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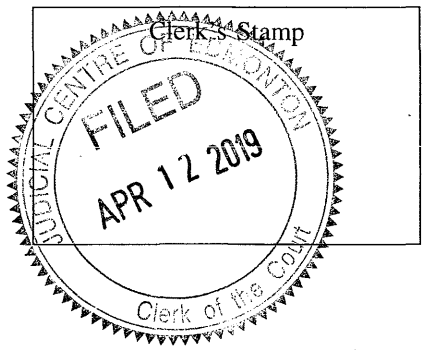

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, C. T-8, AS AMENDED, and

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

APPLICANT	**ROLAND TWINN, EVERETT JUSTIN TWIN, MARGARET WARD, TRACEY SCARLETT and DAVID MAJESKI, as Trustees for the 1985 Trust**
RESPONDENTS	**THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE and CATHERINE TWINN**
DOCUMENT	**WRITTEN BRIEF OF THE RESPONDENT, CATHERINE TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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PART 1 INTRODUCTION

1. Catherine Twinn is a former trustee of both the Sawridge Band Inter Vivos Settlement, settled on April 15, 1985 (the "**1985 Trust**") and the Sawridge Trust, settled on August 15, 1986 (the "**1986 Trust**"). Both Trusts were created by her late husband, Chief Walter Patrick Twinn (the "**Settlor**"), of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation (the "**First Nation**"). The 1985 Trust and 1986 Trust are collectively referred to as the "**Trusts**". The current trustees of the 1985 Trust and the applicants in this litigation are referred to as the "**Trustees**".

2. Ms. Twinn was one of the original trustees of the 1986 Trust. She had a long tenure as a trustee of both Trusts with over 30 years of service[1]. Ms. Twinn is a current beneficiary of the 1985 Trust under the existing definition and a beneficiary of the 1986 Trust.

3. As a trustee, Ms. Twinn obtained independent legal counsel regarding positions the Trustees were taking to amend the beneficiary definition of the 1985 Trust and began actively participating in this litigation as a dissenting trustee in 2015.

4. Ms. Twinn was of the view that her fiduciary duty to the beneficiaries of the 1985 Trust demanded she act as a minority trustee. This was due to the manner in which the majority of the Trustees were propagating and conducting this litigation, which she believed was contrary to her obligations and was not in the best interests of the 1985 Trust beneficiaries.

5. Ms. Twinn ultimately agreed to step down as a trustee of the Trusts in 2018, but with the agreement that she would retain her party status in this litigation and be able to participate as though she were a trustee. This was documented by way of Order issued in this litigation on March 15, 2018.[2]

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[1] Affidavit of Catherine Twinn sworn September 23, 2015, and filed September 30, 2015 ("**Twinn 2015 Affidavit**"), at para 2 [**TAB 1**]

[2] Order of Justice Thomas issued March 15, 2018 [**TAB 2**]

6. Ms. Twinn has expressed to the Court her grave concerns that the majority of Trustees have conducted this litigation with a view to further the political objectives of the First Nation. This concern is understandable as the current Chief of the First Nation, Roland Twinn, is one of the five Trustees of the Trusts and over the course of this litigation numerous other members of the First Nation Band Council have sat as Trustees.[3]

7. The Trustees have made it clear that the objective of this litigation is to achieve a result. Namely, to change the beneficiaries of the 1985 Trust from the existing class to only those persons who are on the band membership list maintained by the First Nation. The Trustees understand that their relief will result in "winners" and "losers" and that various beneficiaries would lose their current beneficiary status if the Trustees are successful in achieving their litigation goal[4]. This goal would result in a major benefit to the First Nation as it would effectively be able to control and limit who is and isn't a beneficiary and it would have the power to revoke beneficiary status through revocation of membership in the First Nation, a process that is at the discretion of the First Nation.

8. As such, the Court must review the submissions of the Trustees on this application with the understanding that they are a positional litigant and not a neutral party.

9. Since Ms. Twinn began participating in this litigation as a minority trustee in 2015, she has raised concern that the Court may not have jurisdiction to grant the relief the Trustees are seeking, namely changing the existing beneficiary class without current beneficiary approval.

10. On an appeal heard before the Court of Appeal in 2017, a direction was issued to have this very crucial jurisdictional question determined in advance of trial.[5]

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[3] Twinn 2015 Affidavit, at paras. 9 and 10 [**TAB 1**]

[4] Examination of Paul Bujold on Affidavit of Paul Bujold filed February 15, 2017 and undertakings, conducted March 7-10, 2017 and June 20, 2017 ("**2017 Bujold Transcript**"), Page 367, Lines 18-22 and Page 366, Lines 14-15 [**TAB 3**]

[5] *Twinn v Twinn*, 2017 ABCA 419 at para. 22 [**TAB 4**]

11. In their submissions filed March 29, 2019 ("**Trustee Submissions**"), the Trustees acknowledge that to grant the relief they are seeking, namely variation of the beneficiary class of the 1985 Trust, would require the creation of new legal principles by this Court or at the very least, an extension of current principles.

12. Despite this concern pertaining to jurisdiction being laid before the Trustees many years ago, this fundamental question is only now being asked by the Trustees to this Court. If this Court finds that it does not have jurisdiction to amend or vary the existing beneficiary definition in the absence of beneficiary consent, it would effectively end this litigation.

13. For clarity, the issues before the Court on this application are theoretical, in that the Court is only being asked to confirm what jurisdiction it theoretically has available to amend the 1985 Trust and in what circumstances it would be able to exercise that jurisdiction.

14. On this application, it is not before the Court to determine any form of final relief, including whether the beneficiary definition in fact offends public policy. While the Trustees argue in their submissions that the current beneficiary definition of the 1985 Trust offends public policy, this issue forms final relief and must be dealt with by the ultimate trier of fact. If this matter proceeds to trial there will be evidence advanced contrary to the Trustees' position. Prior to scheduling this application, the Trustees agreed that the "jurisdiction order will not direct final relief in respect of the declaration of public policy", and it was upon this basis that the Office of the Public Guardian and Trustee and Ms. Twinn agreed to the form of Order scheduling this application and setting out the issues to be determined.[6]

15. In their submissions, the Trustees do not provide a fulsome overview of the current state of the law in Alberta as it pertains to trust variation and amendment. Trust law is well established and it is Ms. Twinn's position that the relief the Trustees are seeking is contrary to the principles of trust law.

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[6] Email correspondence between parties over December 14-16, 2018 [**TAB 5**]

16. The purpose of these submissions is primarily to provide the Court with an overview of the currently recognized principles on trust variation, along with observation and comment on the position advocated for by the Trustees, with the objective of ensuring that the Court has a full understanding of the issues at stake and factual matrix prior to making a decision as to whether it will create new law and thus revolutionize and potentially overturn trust principles stemming back hundreds of years.

PART 2 RELEVANT FACTS AND EVIDENCE

The 1985 and 1986 Trusts

17. The 1985 Trust was settled by Chief Walter Twinn of the First Nation on April 15, 1985 for the benefit of its beneficiaries. The beneficiaries are defined at paragraph 2(a) of the deed, as:[7]

> "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 this 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 purpose of this Settlement"

18. The 1985 and the 1986 Trusts were drafted and settled, with the benefit of legal counsel with expertise in trust law, Maurice Cullity of Davies, Ward, Beck and Vineberg LLP.

[7] Trustee Submissions, Tab 6 at para. 2(a).

As this Court is likely aware, Mr. Cullity went on to become a Justice of the Ontario Superior Court.

19. On April 17, 1985, two days after the 1985 Trust was settled, there were meaningful changes made to the *Indian Act*, R.S.C. 1970, c. I-6 as a result of *Bill C-31, An Act to amend the Indian Act*, 33-34 Eliz II c.27 ("*Bill C-31*"). The Settlor obviously created the 1985 Trust purposefully to address this change. The *Bill C-31* amendments, amongst other matters, affected who would qualify for membership in a band and the band membership process generally. A major change was that a first nation could elect to administer, in accordance with the law, their own band membership list rather than the list being administered by the Department of Indian Affairs and Northern Development (now known as Aboriginal Affairs and Northern Development Canada) ("**DIAND**"), as had previously been the practice. Following the *Bill C-31* amendments, the First Nation elected to take control of its band list and continues to do so at present.

20. On August 15, 1986, Chief Walter Twinn settled an additional and separate trust, the 1986 Trust, for the benefit of[8]:

> "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".

21. It is notable that this definition refers to those who "qualify" as members under "membership rules" and "customary laws" of the First Nation, rather than those who are members. As demonstrated in their submissions, the Trustees have treated this definition as only including those persons who are on the membership list maintained by the First Nation as opposed to those who would qualify. Judicial advice has never been sought by the Trustees on the appropriateness of this interpretation.

22. Pursuant to the instructions of the Settlor, Mr. Cullity drafted the Trusts. Effectively, the 1985 Trust provided for all persons who would qualify for First Nation band membership

[8] Trustee Submissions, Tab 8 at Exhibit K, para. 2(a).

pre *Bill C-31* amendments and the 1986 Trust provides for all First Nation band members post *Bill C-31* amendments.

23. As of January 23, 2015, there were approximately 478 persons associated with the First Nation at DIAND, but only 44 persons are on the First Nation membership list.[9]

24. The Sawridge community is comprised of three family groups, the Twin(n)s, the Potskins and the Wards. The majority of the current members of the First Nation are Twin(n)s.[10]

25. The 2011 Action was commenced by way of Order of Justice D.R. Thomas issued August 31, 2011 (the "**August 2011 Order**"). The August 2011 Order directed the Trustees of the 1985 Trust to bring an application for advice and direction for the purpose of:

    a) Seeking 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"; and

    b) Seeking direction with respect to the transfer of assets to the 1985 Trust.[11]

26. The Trustees did not file a constating application in this litigation until January 2018.[12]

27. An Affidavit filed by the Trustees on September 13, 2011 in support of the relief sought in the 2011 Action was deposed by Mr. Bujold and stated that the Trustees were seeking that the definition of "beneficiary" in the 1985 Trust be amended such that it is consistent with the definition of "beneficiary" in the 1986 Trust. In other words, change the definition of beneficiaries in the 1985 Trust to members of the First Nation.[13] This

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[9] Affidavit of Catherine Twinn sworn December 15, 2015, and filed December 16, 2015, para 12 [**TAB 6**]

[10] Twinn 2015 Affidavit at para 5 [**TAB 1**].

[11] Order of Justice Thomas issued August 31, 2011 [**TAB 7**]

[12] Trustee Submissions, Tab 1

[13] Affidavit of Paul Bujold sworn and filed February 15, 2017, at Exhibit A, para. 33 [**TAB 8**]

request for variation is proposed despite this being contrary to the intention of the Settlor when establishing the 1985 and 1986 Trusts.

28. While the Trustees allege that the Settlor intended to merge the two Trusts, the fact is he didn't. The Settlor died in 1997, many years after the introduction of the *Bill-C31* legislative amendments.[14]

29. The Trustees have not properly identified the current beneficiaries of the 1985 Trust or taken any steps to formally resolve any lack of clarity around the qualification of any particular beneficiary. Various beneficiaries of the 1985 Trust are not currently members of the First Nation (example Shelby Twinn). The 1985 Trust has never made distributions to beneficiaries. The Trustees take the position that they are not obliged to identify and pay benefits until this litigation is concluded.[15]

30. In October 2018, the Trustees sent a letter via regular mail to various persons they had identified as "potential beneficiaries" and a different letter via regular mail to "persons of interest" for the purported purpose of determining whether unanimous beneficiary approval could be gathered to amend the beneficiary definition of the 1985 Trust (the "**Mailout**"). This process was undertaken by the Trustees despite concerns raised by Ms. Twinn and the OPGT in its timing and form.[16]

31. Only eight votes were received in response to the Mailout, two of those votes were from Chief Roland Twinn and his spouse, who notably voted for different beneficiary definitions.[17]

PART 3 ISSUES

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[14] Twinn 2015 Affidavit, at para 4 [**TAB 1**].

[15] Examination of Paul Bujold on Affidavit of Paul Bujold filed January 10, 2019 ("**2019 Bujold Affidavit**"), conducted February 11, 2019 ("**2019 Bujold Transcript**"), page 50 lines 10-27, &-page 51 lines 1-15 [**TAB 9**]

[16] 2019 Bujold Transcript, at Exhibits For Identification B-D [**TAB 9**]

[17] 2019 Bujold Affidavit, Trustees Submissions Tab 10 at Exhibit C.

32. Ms. Twinn concurs with the statement of issues set out in the Trustee Submissions. Ms. Twinn also takes no position, at present, in regards to issue (e), namely the effect of the *Minor's Property Act* on this application.

33. Ms. Twinn concurs with the conclusion in the Trustees' Submissions with respect to issue (d), namely whether the 1985 Trust Deed permits amendment of the beneficiary definition. Ms. Twinn will not provide further submissions on this point as it is clear that the 1985 Trust deed itself ("**Deed**") specifically prohibits amendment to the beneficiary definition, which further evidences the Settlor's intention that the beneficiary definition should not be disturbed.

PART 4 ARGUMENT

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

34. The scope of the Court's jurisdiction to amend a trust, first must begin with an analysis of whether the trust is "private" or "public". These are two recognized categories of trusts in Canada. Under each category there are many subsets (i.e. testamentary, *inter vivos* etc.).

35. A private trust is created for a class of individuals or named individuals, specified by the settlor. When the objects of a trust are specific and ascertainable persons, for example to X for life, remainder to his first son at 21, the trust is said to be a private trust. A trust is still private when it is in favour of a class of persons.[18]

36. A public trust is created for the benefit of the public at large, or a significantly sizable section of the public. The underlying theme is that the trust is really for the public benefit

[18] *Waters' Law of Trusts in Canada, Fourth Edition by Donovan WM Waters, Mark R. Gillen & Lionel D. Smith* (Toronto: Carswell, 2012) ("**Waters on Trusts**") pages 28-29 [**TAB 10**]

rather than a class or group of persons who have a common nexus.[19] For example, a trust created for the poor of Toronto.

37. In Canada, a public trust must be a charitable trust.[20]

38. In order to be a charitable trust there are three requisite elements, namely, the purpose is included within the law's description of charity, its purpose must be wholly and exclusively charitable and it is for the benefit of the public.[21]

39. In Canada, there are four recognized heads of charity. Namely:

a) Relief of Poverty

b) Advancement of Education

c) Advancement of Religion

d) Miscellaneous activities beneficial to the community[22]

40. The 1985 Trust is a fully discretionary trust, in that the Trustees can distribute income and/or capital to any or all of the beneficiaries, including to the exclusion of any particular beneficiary. Further, such distribution can be for any purpose the trustees deem appropriate.

41. More particularly, paragraph 6 of the Deed provides the following direction in regards to how the 1985 Trust fund is to be distributed:[23]

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

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[19] Waters on Trusts, at pages 28-29 [**TAB 10**]

[20] Waters on Trusts, at pages 28-29 Footnotes 47 and 48 [**TAB 10**]; *Re; Killam Estate* (1999), 38 ETR (2d) 50 at para. 62 [**TAB 17**]

[21] *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1990 CarswellOnt 486 at para. 86 [**TAB 11**]

[22] Waters on Trusts, at pages 721-722 [**TAB 10**]

[23] Trustee Submissions, Tab 6 at para. 6.

> such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate".

42. As such, there is clearly no obligation in the Deed to use the 1985 Trust fund for charitable purposes. Under the terms of the 1985 Trust, it is possible for the Trustees to exercise their discretion for obviously non-charitable purposes such as payment for luxury items or other gratuitous amounts. It is notable that the Trustees have exercised their discretion in relation to the 1986 Trust for matters that are non-charitable such as a one-time good faith cash disbursement of $2,500.00. [24]

43. Ms. Twinn submits that the 1985 Trust is a private trust for the following reasons:

a) It is a trust created for an ascertainable class of individuals and not the public at large.

b) All of the beneficiaries of the 1985 Trust have a common nexus to the Settlor and to each other in light of their familial relationships and common heritage. It is notable that many persons who are blood relations of the Settlor are not presently members of the First Nation, such as Shelby Twinn, the Settlor's granddaughter. It is foreseeable that persons such as Shelby Twinn may never be members of the First Nation, as the First Nation's membership rules grant it largely unfettered discretion to deny membership in the First Nation for any reason, irrespective of an individual's lineage, save for a "natural child" of parents, both of whom are registered on the band list[25];

c) The 1985 Trust is not charitable. It is not charitable because the purpose for which it was established, namely to benefit a particular class of individuals is not charitable, nor is the manner in which the Trustees are directed to distribute its assets.

44. In the Trustee Submissions they concede that the 1985 Trust is not charitable, but argue that an entirely new category of trust should be created. The Trustees advocate to this

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[24] Trustee Submissions, Tab 9 at page 3.

[25] Trustee Submissions, Tab 9 at para. 3.

Court to use the terms "community trust" or "quasi public trust". The argument distilled is essentially that new category(ies) of trusts should be created by this Court and the Court should recognize a remedial function over these new trust classifications. Such remedial function would include provision for judicial variance of the trust deed. More particularly, the Trustees argue that this remedial function should extend to being able to vary the core purpose for which the trust was established, such as varying the beneficiary class.

45. Ms. Twinn notes that these proposed legal principles have no precedent in any Commonwealth jurisdiction to the knowledge of Ms. Twinn, including under the doctrines applicable to public trusts. The Trustees have also not identified such authority.

46. It is notable that for a period immediately prior to the commencement of this litigation, the Trustees had retained Dr. Donovan Waters Q.C. to advise them on the specific issues that were ultimately raised in this litigation. Dr. Waters is a well recognized expert in trust law and author of "The Law of Trusts in Canada". Dr. Waters has been utilized as an expert witness in prior proceedings where novel questions of trust law were at issue and historical context to the body of trust law was of assistance to the Court.[26] Despite having the expertise of Dr. Waters' available, the Trustees did not produce a report from Dr. Waters that is supportive of their request for the creation of new law. As a long serving trustee, Ms. Twinn is not aware of Dr. Waters providing such endorsement.

47. Ms. Twinn notes that the decision primarily referred to by the Trustees in support of their jurisdiction argument, *Canada Trust Co. v. Ontario (Human Rights Commission)*, pertains to a trust established for the purposes of providing educational scholarships – thus a public (charitable) trust This decision did not create any new categories of trusts. Further, this decision reinforces that the variance power of the Court in relation to public trusts requires the Court to maintain the settlor's charitable intent and thus not vary the purpose of the trust. [27]

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[26] *Re; Killam Estate* (1999), 38 ETR (2d) 50 at paras. 56-62 [**TAB 17**]

[27] *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1990 CarswellOnt 486 at paras. 43 and 45 [**TAB 11**]

48. If the Court is inclined to create new law, an examination of the existing variance powers pertaining to private and public trusts should first be considered as the creation of a new category may not be helpful given the state of existing law. Ms. Twinn submits that the Court has considered its powers to vary trusts over the centuries and has developed appropriate principles.

(a) Variation of Private Trusts

49. There are presently four processes recognized by Alberta law that can be utilized to vary a private trust, namely:

a) Variation pursuant to the terms of the trust deed;

b) Variation pursuant to the *Trustee Act*;

c) Variation pursuant to inherent jurisdiction;

d) Failure of the trust.

A. Variation pursuant to the terms of the trust deed

50. If a trust deed provides a variation procedure, then such procedure can be utilized. As set out in the Trustee Submissions, this is not possible in these circumstances as the Deed expressly prohibits amendment to the beneficiary definition. This is a clear indication by the Settlor that he did not wish the Definition interfered with.

B. Variation pursuant to the Trustee Act

51. As documented in the Trustee Submissions, s. 42 of the *Trustee Act* provides a process for judicial amendments, including to beneficiary definition. Section 42 requires the unanimous approval of all adult beneficiaries who are capable of consenting. The Court is able to consent on behalf of minors, the incapacitated or persons who after reasonable inquiry cannot be located.[28]

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[28] *Trustee Act*, Trustee Submissions Tab 4

52. In invoking the provisions of the *Trustee Act*, the legislature provided the Court with a narrow role in deciding whether to approve a trust variation. The legislature specifically did not grant the Court authority to approve such arrangement on behalf of a non-consenting adult beneficiary with capacity. This is presumably an intentional policy decision of the legislature as trust legislation across the country provides Courts with varying degrees of authority to amend trusts.

53. Inherent jurisdiction has been defined by the Supreme Court of Canada as a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so. These powers are derived not from any statute or rule of law, but from the very nature of the court as a superior court of law to enable the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.[29]

54. The general principle derived from ss. 8 and 13(2) of the *Judicature Act* as to when inherent jurisdiction may be utilized, is whether a court, after having considered all the circumstances, is satisfied that a remedy will do justice between the parties.[30]

55. Within the ambit of doing justice between the parties, different considerations underlie a court's exercise of equitable discretion according to the nature of the remedy sought. However, when an applicant seeks a remedy, a court must first determine the entire extent of the parties' legal rights, which in turn informs the court's decision on whether to grant an equitable remedy.[31]

56. This "test" is informed by legislative schemes across the country that confer statutory authority on provincial superior courts and case law that interprets this legislation.[32]

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[29] *R v Caron*, 2011 SCC 5 at para. 24 [**TAB 12**]

[30] *RP v RV*, 2012 ABQB 353 at para. 21 [**TAB 13**]

[31] *Ibid* at para 22.

[32] *Ibid* at para 25.

57. It is imperative that when exercising inherent jurisdiction, the effect is not to override rules that have been created by legislation.

58. Ms. Twinn submits that it is not open to this Court to use its inherent jurisdiction to create a new ability for a Court to vary a beneficiary definition contained in a private trust as to do so would be to circumvent section 42 of the *Trustee Act* which has defined the Court's role in relation to variation of private trusts. If changes to this process are to occur, they need to originate from amendments to the *Trustee Act*.

C. Variation pursuant to inherent jurisdiction – Chapman v. Chapman

59. The inherent jurisdiction of the Court is based on the principle of aiding the preservation of the settlor's trust and supporting the administration of its terms by the trustees. It is fundamental that the Court will not write the trust for the settlor, either in whole or in substantial part.[33]

60. The Court sees its role as support, not a creator. Because the Court is essentially supporting the settlor's instrument, it follows that it will not vary the beneficial interests set up by the trusts. [34]

61. In a celebrated passage in *Walker v. Duncombe*, heard in 1901, Farwell J. said "I decline to accept any suggestion that the Court has an inherent jurisdiction to alter a man's will because he thinks it beneficial. It seems to me that is quite impossible."[35]

62. In 1954, the House of Lords in *Chapman v. Chapman* listed certain circumstances in which inherent jurisdiction exists[36]:

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[33] Waters on Trusts, at page 1363 [**TAB 10**]

[34] Waters on Trusts, at page 1363-4 [**TAB 10**]

[35] *Walker v. Duncombe* [1901], 1 CH. 879 at 885. [**TAB 14**]

[36] *Chapman v. Chapman* [1954], A.C. 429 [**TAB 15**]

a) A compromise power, enabling trustees to dispose of specific property if to do so would be in the interests of a minor

b) A salvage or emergency jurisdiction, which could empower trustees to enter into a transaction or corporate reorganization where the trust document does not provide adequate powers;

c) For the maintenance of a minor, even though no such provision is made in the trust;

d) A compromise jurisdiction, allowing the Court to approve arrangements on behalf of non *sui juris* beneficiaries. (No longer relevant in light of provisions in *Trustee Act*)

63. These instances have been accepted into Canadian jurisprudence.[37]

64. Notably, the emergency or salvage jurisdiction requires the existence of a situation where it is essential for the trustees to act for the good of the trust and where the settlor had not provided for the circumstance because he clearly did not foresee it.[38] This is not consistent with the facts in this litigation as the Settlor was well aware of the impending changes to the *Indian Act* arising from *Bill C-31* and intentionally settled the 1985 Trust, and subsequently the 1986 Trust, in light of those changes.

65. It is submitted that none of these categories are applicable to the issues raised in this litigation and that none of these categories would allow the Court to change the beneficiaries of a trust as they are designed to address administrative matters.

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[37] Waters on Trusts, at pages 1363 - 1369 [**TAB 10**]

[38] Waters on Trusts, at page 1365 [**TAB 10**]

D. Failure of the Trust

66. It is open to a Court to examine whether a trust violates principles of public policy. It is generally accepted that for a Court to intervene on the basis of public policy is a serious step and should only be invoked in clear cases in which the harm to the public is substantially incontestable.[39]

67. It is open to a Court to void a condition, covenant or the trust itself to correct a public policy offence.[40]

68. The provision of the 1985 Trust that is at issue is the beneficiary Definition itself and the very group of people for which it was established. Thus, if the Definition is found to violate public policy, which Ms. Twinn submits it does not, it is open to the Court to void the 1985 Trust.[41]

69. While the Trustees argue that the legal authority pertaining to conditional gifts is relevant, Ms. Twinn submits it is not.

70. Firstly, the law of conditions should be considered. Conditions are either precedent or subsequent. A condition precedent must be fulfilled before a gift takes effect. For example, $5,000 to George upon him attaining the age of 25 years provided that he is a baptized member of the Episcopal Church at that time. The intention of the settlor is that his condition must be satisfied before George can take the $5,000. Moreover, the condition precedent must be satisfied at the moment when the gift would otherwise take effect. In our example, it is not open to George to be baptized into the Episcopal Church at the age of 30, and the claim the gift. A condition is subsequent when it operates so as to bring to a close a gift which has already taken effect. In technical language, the

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[39] Waters on Trusts, at page 317 [**TAB 10**] *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1990 CarswellOnt 486 at para. 34 [**TAB 11**]

[40] Waters on Trusts, at page 318 [**TAB 10**]

[41] *McCorkill v. Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased*, 2014 NBQB 148 at para. 90 [**TAB 16**]

condition when fulfilled divests a gift which has already vested in possession. For example: "I give and devise my house to Thomas, but if he shall ever use any part of the house for commercial purposes, then the house is to go to Harry". In short, a condition precedent is a qualification that the donee must meet; the condition subsequent is a forfeiture.[42]

71. The existing Definition does not contain "conditions". It defines beneficiaries as those persons who would have qualified as First Nation members under the statutory regime in place on the date of settlement of the 1985 Trust. The Definition does not provide that the beneficiaries of the 1985 Trust are the First Nation members *so long as* or *provided that* they qualify under the 1982 *Indian Act* provision.

72. This position is supported by the fact that not all of the current beneficiaries of the 1985 Trust are members of the First Nation, Shelby Twinn is an example. As such, it is clear that the 1985 Trust was not intended to be settled for the future members of the First Nation, although it was certainly possible that some beneficiaries may be members.

73. This is consistent with the factual matrix in which the 1985 Trust was established. The Settlor was aware that the First Nation was about to assume control of its membership list, that the *Bill C-31* legislative changes were impending and that the persons who may be on the First Nation's controlled membership list in the future, may not be the same persons who would have qualified under the 1982 *Indian Act* provisions. Further the assets that were utilized to settle the 1985 Trust represented wealth of the First Nation prior to *Bill C-31* amendments.

74. The Settlor went on to settle the 1986 Trust which was intended to provide for all members of the First Nation, post *Bill C-31* and would include all members of the First Nation that were not captured under the 1985 Trust. The 1986 Trust was established so that the future wealth of the First Nation could be held in trust for its members.[43]

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[42] Waters on Trusts, at pages 329 - 330 [**TAB 10**]

[43] Trustee Submissions at para. 11.

75. In sum, the 1985 and 1986 Trust were intended to provide for two distinct pools of beneficiaries, were not conditional in nature and were structured in accordance with the intentions of the Settlor who had the benefit of experienced counsel.

(b) Variation of Public Trusts

76. As stated earlier in these submissions, in order to qualify as a "public trust", the trust must be charitable. The 1985 Trust is not a charitable trust.

77. The Court has the following powers to address a problematic charitable trust:

a) Variation pursuant to administrative scheme;

b) Variation pursuant to the doctrine of *Cy-pres.*

A. Administrative Scheme

78. Once a trust is established as charitable, it cannot fail for uncertainty. The Court has an inherent jurisdiction to compose a scheme, whereby any uncertainty is removed and the gift remains operative. [44]

79. Administrative schemes can be used to clarify the charitable purpose, to deal with excess income, to deal with racially discriminating conditions barring certain persons from qualifying for the benefit from the trust, and to vary trustees' power of investment.[45]

80. The Court will exercise the administrative power where adherence to the administrative terms of a trust would disrupt the specific purpose of the charitable trust. The purpose of the amendment must be in the best interests of the beneficiaries and for the better administration of the Trust.[46]

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[44] Waters on Trusts, at pages 807 [**TAB 10**]

[45] Waters on Trusts, at pages [**TAB 10**]

[46] *Re; Killam Estate* (1999), 38 ETR (2d) 50 at para.81 [**TAB 17**]

81. Through an administrative scheme, the Court can clarify or vary terms of the trust, which includes both adding and deleting words.[47]

B. Cy-pres

82. *Cy-pres* is a short form of the old Norman French phrase "cy-pres comme possible" which means "as near as possible". It describes the inherent power that the court has, where it has become impossible or impractical to apply funds so dedicated to a charitable object or objects, to find objects "as near as possible" to the originally named ones.

83. It is essential to demonstrate charitable intent in order to invoke the doctrine of *cy-pres* because, as Dr. Water's explains, the term should be "better described as a requirement of a paramount or overriding intention to give for the charitable purpose of which the particular object set out by the trust or absolute gift is merely one mode of furtherance."[48]

84. *Cy-pres* should never depart from the settlor's true intention. If the Court must decide that the settlor would not have established the trust if it could not be carried out in the specific way set out, then there is no general charitable intention and the trust fails. If, on the other hand, the discriminatory provisions can be said to be the "machinery" of the trust, separable from the general intention, then the Court may apply *cy-pres*.[49]

85. Absent a charitable intent, a Court must conclude that the settlor wished to further the particular object only, and if that was not possible, wished the trust property to revert to them.[50]

86. While the Trustees' implicitly argue that the doctrine of *cy-pres* should be extended so as to apply to the 1985 Trust, an admittedly non charitable trust, this would not be

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[47] *Re; Killam Estate* (1999), 38 ETR (2d) 50 at paras. 83-4 [**TAB 17**]

[48] Waters on Trusts, at pages 824 - 826 [**TAB 10**]

[49] *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1990 CarswellOnt 486 at paras. 108 and 109 [**TAB 11**]

[50] Waters on Trusts, at pages 825 [**TAB 10**]

appropriate based on the very foundations of the doctrine. Namely, the 1985 Trust was established for a particular pool of beneficiaries, the effect of changing that pool of beneficiaries, as suggested by the Trustees or any change for that matter, would disregard the Settlor's intent as to why the 1985 Trust was settled. The doctrine of *cy-pres* cannot be invoked in order to change the purpose for which a trust was settled.

87. To effect the variation the Trustees are seeking, would require this Court to re-write the doctrine of *cy-pres* such that the Court has the inherent jurisdiction to vary the purpose of a trust, or alternatively, to create an entirely new doctrine that is presently unknown to law in the Commonwealth and would be contrary to well established principles.

88. Ms. Twinn submits that this is not an appropriate direction for the Court to take as it interferes with a settlor's autonomy to settle funds for their desired purpose. Respecting a settlor's autonomy is a well-recognized legal principle.[51]

B. *General Comments and Observations*

89. Despite acting as fiduciaries to the current beneficiaries to the 1985 Trust, the Trustee Submissions take positions that are adverse to the beneficiaries interests. This has compelled Ms. Twinn to make independent submissions consistent with the fiduciary obligations due to the existing beneficiary class. More particularly:

a) It is a fundamental duty of a trustee to determine and ascertain the members of a class of beneficiaries and then to make reasonable efforts to identify and locate the members of that class.[52] The Trustees have admittedly failed to do this and take the position that there are not any beneficiaries until the Court resolves this litigation. They take this position, in part, because the reason "we're going through such a convoluted process to try and identify the beneficiaries of the '85 trust" is to avoid giving those beneficiaries any ground or leverage on which to

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[51] *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1990 CarswellOnt 486 at para. 37 [**TAB 11**]

[52] *Barry v. Garden River Band of Ojibway Nation No 14*, 1997 CarswellOnt 1812 (CA), at para 40 [**TAB 18**]

assert that they are entitled to membership in the First Nation.[53] The trustees have "always been concerned that if someone was declared to be a beneficiary of the 1985 Trust that they would use this as a justification for admission to membership in the First Nation[54]". Exacerbating the situation is the Trustees attempt to use this failure as a basis upon which to vary the 1985 Trust and thus expose the current beneficiaries to disentitlement or at the very least a change in the quality of their beneficial interest[55]. Specifically, they failed to take formal steps to determine Justin Twin's status as beneficiary, and other person's status generally, and use this lack of certainty as a basis to suggest s. 42 of the *Trustee Act* is an unworkable solution;

b) The Trustees argue that the 1985 Trust violates public policy, which is contrary to the interests of the current beneficiaries and the intentions of the Settlor, and is a determination for the Court, not the Trustees. Further this position ignores the fact that the Settlor settled both 1985 Trust and the 1986 Trust, which when viewed together, capture a broad beneficiary pool, including the *Bill C-31* women;

c) They argue that the current members of the First Nation could benefit from an interest in the 1985 Trust, which disregards the needs of the existing beneficiary class to whom they owe a duty of the highest order;

d) They actively argue that if the Court has jurisdiction to amend a trust that offends public policy, they should only delete words, rather than have the power to add them. The implicit effect of this argument is to ensure that the only new definition possible is the one the Trustees want. If words could be added, then the existing beneficiary class could be protected. Given that the Trustees are arguing

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[53] 2017 Bujold Transcript, Page 295-296, Lines 4-4 and Page 363-367, Lines 7-1 [**TAB 3**]

[54] 2017 Bujold Transcript, Page 295-296, Lines 4-4 [**TAB 3**]

[55] While certain current beneficiaries of the 1985 Trust are also members of the First Nation, their membership in the First Nation is subject to revocation by the First Nation, thus changing their current beneficiary status from irrevocable to revocable.

for the creation of an entirely new legal approach to trust variation, and if the Court is inclined to create new law, there is no reason it would need to be restricted to the deletion of words. Further, the preceding amending schemes for public trusts do not prohibit the addition of words;

e) The Trustees suggest the 1985 Trust might fail for not meeting the three certainties. This is premised on the Trustees' argument that the current beneficiaries cannot be ascertained. Once again, this argument is utilizing the Trustees' failure to take proper steps to ascertain beneficiaries as a basis to advocate for the relief they are seeking in the litigation. It is notable that:

A. This argument is baseless as certainty of objects is determined at the time of settlement in the context of an *inter vivos* trust[56]. The beneficiaries of the 1985 Trust were obvious on the date of settlement as they were one and the same as those individuals on the First Nation membership list maintained by DIAND;

B. It is well recognized law that simply because ascertaining the individuals that form a class of beneficiary is difficult, does not mean that they are uncertain[57]. DIAND utilized the 1982 *Indian Act* rules for many years to determine first nation membership and continue to do so in their modernized form, so clearly these rules are capable of application, the Trustees simply need to take appropriate steps to do so;

C. Prior to the commencement of this litigation, Dr. Donovan Waters was assisting the Trustees with these issues. As part of the process, Dr. Waters believed that the 1985 Trust beneficiaries were capable of ascertainment

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[56] *Oosterhoff on Trusts, Eight Edition by A.H. Oosterhoff, Robert Chambers & Mitchell McInnes* (Toronto: Carswell, 2014) page 218-9 [**TAB 19**]

[57] *Oosterhoff on Trusts, Eight Edition by A.H. Oosterhoff, Robert Chambers & Mitchell McInnes* (Toronto: Carswell, 2014) page 217 [**TAB 19**]

and provided the Trustees an option of utilizing a tribunal to determine status[58].

f) The commencement of this litigation was premised on the Trustees firstly seeking to determine whether the definition is in fact problematic and obtaining Court direction in this regard[59]. As demonstrated by the Trustee Submissions, they have not taken a neutral role in this regard, but have rather already decided the 1985 Trust offends public policy and are seeking to persuade the Court to agree with them;

g) This position becomes even more concerning in light of the recent decision of the 2019 Ontario Superior Court pertaining to the Ginoogaming First Nation trust[60]. In this decision the relevant beneficiary definition relied on a historical version of the *Indian Act*, that was later found to not be Charter compliant and was amended by Parliament. The Court found that this definition did not offend public policy and that persons who later became band members as a result of the legislative amendments did not qualify as beneficiaries. This is factually quite similar to the matters at issue in this litigation and arguably puts an end to the public policy concern pertaining to the 1985 Trust. In the Trustee Submissions, rather than utilizing this decision to protect the current beneficiary class, the Trustees make every attempt to differentiate the decision and interpret its findings to be consistent, or at least not at odds, with their litigation objective, namely to change the beneficiaries of the 1985 Trust to the members of the First Nation. It is notable that the trustees in the Ginoogaming First Nation decision properly took a neutral role on the application, as opposed to advocating for an outcome which is the approach taken by these Trustees;

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[58] Affidavit of Catherine Twinn sworn May 10, 2017, and filed May 11, 2017 ("**2017 Twinn Affidavit**"), at para 53 and Exhibit H [**TAB 20**]

[59] *Supra*, [**TAB 7**]

[60] Trustee Submissions Tab 28.

h) The Trustees invite the Court to believe that the First Nation's membership system is a preferable system to the manner in which beneficiaries are presently ascertained under the existing Definition[61]. This is despite the Trustees being well aware of the serious concerns that have been raised, and continue to be raised and recognized by the Federal Court of Canada in regards to the application of the First Nation's membership rules. Given that the Trustees have raised this argument, the Court should be aware of the following history:

A. 2010/2011 – Trustees retain legal counsel, including Dr. Donovan Waters Q.C., for the purpose of addressing the issue of beneficiary ascertainment. Dr. Waters provides various opinions and comments to the Trustees, which include the following:

i. Concerns were expressed by several Trustees to Dr. Waters regarding the membership process of the First Nation, with particular focus on the long delays of the First Nation in making decisions on membership[62].

ii. Dr. Waters advised the Trustees that aspects of the current membership rules of the First Nation are likely discriminatory and not Charter compliant and thus would not withstand scrutiny[63].

iii. Dr. Waters found the First Nation's membership process to be deficient in that the decision making criteria for membership was too subjective and the delays in processing applications were inappropriate[64].

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[61] Trustee Submissions para. 41.

[62] 2017 Twinn Affidavit at Exhibit H [**TAB 20**] 2017 Bujold Transcript, Page 509, Lines 12-18, Page 320, Lines 2-10, Page 328-329, Lines 12-9 [**TAB 3**]

[63] 2017 Twinn Affidavit at Exhibit H [**TAB 20**]

[64] 2017 Twinn Affidavit at para 10 and Exhibit G [**TAB 20**]

B. December 21, 2010 – The Trustees resolve to adopt certain recommendations of Dr. Waters in regards to the Trusts, which included initiating this litigation, with the following parameters:

i. To proactively work with the First Nation membership committee and the Chief and Council to expedite recommendations to the Legislative Assembly so that applications can be determined within 6 month from the date received; and

ii. To work with the Chief and Council to develop proposed amendments to the Sawridge Citizenship Code including outlining legal standards that the decision-making process must meet[65].

C. June 21, 2011 - In furtherance to the decision of the Trustees to work with the First Nation to resolve its membership issues, Paul Bujold writes to the First Nation. The First Nation does not respond[66].

D. The trustees take no further steps to follow up with the First Nation. The trustees admittedly are aware that their concerns with the First Nation's membership process have not been rectified.[67]

E. In 2017, the Federal Court issues a decision pertaining to the First Nation in which Justice Russell makes the following critical remarks about the First Nation's membership system[68]:

i. "While I think that current membership practices at SFN could give rise to corrupt electoral practices (which I will address later), I don't think the CEO can be faulted for taking the position that he cannot

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[65] 2017 Twinn Affidavit at Exhibit H [**TAB 20**]

[66] 2017 Twinn Affidavit at para. 13 and Exhibit J [**TAB 20**] 2017 Bujold Transcript, Page 320-321, Lines 23-6 [**TAB 3**]

[67] 2017 Bujold Transcript, Page 321, Lines 21-26 [**TAB 3**]

[68] *Twinn v. Sawridge First Nation*, 2017 FC 407 at paras. 80, 86 and 131 **[TAB 21]**

be expected to resolve such broad and complex issues of membership in his electoral role";

ii. "This is not to say, of course, that SFN's position on membership is legal, or that it is not simply defiant of what the Courts have ruled on the issue of membership";

iii. "As the jurisprudence shows, there is significant concern and confusion regarding membership and, thus, voting entitlement at SFN. As Justice Zinn pointed out, this application raises "serious matters that will affect the electoral process undertaken in 2015 and future elections." These are serious, public issues that affect all members of SFN and I do not think that individual members should be discouraged from coming before the Court on those occasions when their concerns have some justification. SFN is unique in being such a small and self-contained First Nation. It has also faced numerous disputes on the membership issue. Membership is a requirement which is tightly controlled and the process for granting and withholding membership is opaque and secretive. Hence, there is scope for abuse and the lack of transparency is bound to give rise to future disputes. This application is a function of the system in place at SFN. Although I cannot find for the Applicants on the facts of this case, it seems to me that this application is, to some extent at least, a response to a public need at SFN that will persist until membership issues are resolved."

i) The Trustees invite the Court to find that s. 42 of the *Trustee Act* is irrelevant to these proceedings unless and until someone, presumably other than the Trustees, takes the initiative to obtain 100% *sui juris* beneficiary approval. With respect, the utterly deficient and confusing Mailout cannot form a basis to suggest agreement is impossible or impractical. The Trustees admit that they did not hold beneficiary consultations or provide access to legal advice so that the

beneficiaries could consider the proposed amendments.[69] Despite Mr. Bujold's evidence in questioning that you would need to be "thick" not to understand the process being proposed,[70] the Mailout and its associated process was not in a form a lay person could easily understand, especially a lay person who may lack education. Changing the Definition is a significant ask of the current beneficiaries, and true effort would need to be expended to attempt to build consensus amongst the group before it could be fairly concluded that consensus is not likely. This did not happen here.

C. *Conclusion*

90. In conclusion, Ms. Twinn notes that despite the Minister of Aboriginal Affairs and Northern Development Canada being served with notice of this application, the Minister or the Attorney General have not come forward to suggest the 1985 Trust offends public policy, despite matters pertaining to indigenous persons falling within the federal sphere of powers.[71]

91. Ms. Twinn submits that, aside from the provisions of the *Trustee Act*, the Court has no jurisdiction with which to amend the beneficiary definition of the 1985 Trust as requested, or at all. Further, there is no basis upon which this Court needs to contort itself to upset hundreds of years of trust law in order to create new legal principles or worse, circumvent the clear direction of the legislature in the *Trustee Act* as it relates to how trust variation is to occur.

92. The implications of an alternative outcome are significant, as essentially, this would empower any trustee group to seek to vary a core purpose of a private trust, despite this purpose being the underlying reason they were empowered to act and allow the intentions

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[69] 2019 Bujold Transcript, page 43-4 lines 23-7 and page 62-65 lines 4-1 [**TAB 9**]

[70] 2019 Bujold Transcript, page 30-32 lines 21-16 [**TAB 9**]

[71] *McCorkill v. Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased*, 2014 NBQB 148 at para. 81-2 [**TAB 16**]

of a settlor to be disregarded. Ms. Twinn respectfully submits that this is not the direction this Court should take.

PART 5 REMEDY SOUGHT

93. Catherine Twinn respectfully requests an Order:

a) Declaring that the 1985 is a private trust for non-charitable purposes;

b) Declaring that the Court has no jurisdiction to amend or vary the Definition of the 1985 Trust, except as provided for in the *Trustee Act*;

c) Costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 12th day of April, 2019.

McLennan Ross LLP

Per: _____

David R. Risling and Crista C. Osualdini
Solicitors for Catherine Twinn

TABLE OF AUTHORITIES

Tab 1

Form 49
Alberta Rules of Court
Rule 13.19

Clerk's Stamp: JUDICIAL CENTRE OF EDMONTON FILED SEP 30 2015 Clerk of the Court

COURT FILE NO. 1103 14112

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT, APRIL 15, 1985 (the "1985 Trust") and THE SAWRIDGE TRUST, AUGUST 15, 1986 (the "1986 Trust")

APPLICANT CATHERINE TWINN, as Trustee for the 1985 Trust and the 1986 Trust

RESPONDENTS ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN and MARGARET WARD as Trustees for the 1985 Trust and the 1986 Trust

DOCUMENT **AFFIDAVIT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No.: 281946

AFFIDAVIT OF CATHERINE TWINN

SWORN ON THE 23rd DAY OF SEPTEMBER, 2015

I, Catherine Twinn, of the Sawridge Indian Reserve 150 G and the City of Edmonton, in the Province of Alberta, SWEAR AND SAY THAT:

1. I am a trustee of the Sawridge Band Inter Vivos Settlement, April 15, 1985 (the "1985 Trust") and the Sawridge Trust, August 15, 1986 (the "1986 Trust") (collectively referred to as the "Trusts"), and, as such, have a personal knowledge of the matters hereinafter deposed to, save where stated to be based upon information and belief.

2. I was appointed as trustee of the 1985 Trust on December 18, 1986 and of the 1986 Trust on August 15, 1986. I have continuously maintained my position as a trustee since these appointments.

3. It is my understanding that the Trusts will have a collective asset value of approximately $213 million dollars by 2015.

BACKGROUND

4. My late husband was Walter Patrick Twinn. He passed away on October 30, 1997. My husband was the Chief of the Sawridge Indian Band (the "Band") from 1966 until his death.

5. The Band is comprised of three family groups, the Twin(n)s, the Potskins and the Wards. The majority of the Band membership of approximately 44 members is comprised of the Twin(n) family. Only 3 of the 44 Band members are minor children.

6. The trustees of the Trusts have taken the position that membership in the Band, as determined by Band Council, is definitive of beneficiary status under the 1986 Trust. There has not been an independent legal determination of the beneficiaries of the 1985 Trust or a process put into place to make this determination.

7. Paul Bujold has been the Administrator of the Trusts since September 9, 2009. This is a salaried position that is contracted for by the Trusts. Mr. Bujold is not a trustee of the Trusts and has no voting power. His position is at the discretion of the trustees.

8. Brian Heidecker has been the Chair of the Trusts since May 10, 2010 (the "Chair"). This is also a position that receives financial compensation. Mr. Heidecker is not a trustee of the Trusts and has no voting power. His position is at the discretion of the trustees.

9. The current trustees of the Trusts are:

   (a) Myself;

   (b) Bertha L'Hirondelle (also a paid elected elder of the Band);

   (c) Roland C. Twinn (also the elected Chief of the Band);

   (d) E. Justin Twin (also an elected Band Councillor), appointed January 21, 2014; and

   (e) Peggy Ward, appointed August 12, 2014.

10. As 3 out of the 5 trustees are also elected officials of the Band, these individuals are duly responsible for administering and managing the Trusts, but also have the ability to determine or influence Band membership and thus who is a beneficiary under the 1986 Trust.

HISTORY OF TRUSTS

11. Prior to the subject Trusts, various assets of the Band were held under prior trust deeds starting in 1982. Prior to 1982, the assets of the Band were held in a bare trust by the Band Council for the benefit of the Band.

12. As my late husband was the Chief of the Band in the 1980s, he was the settlor of the Trusts.

13. It is my understanding that under prior trust deeds, elected officials of the Band were automatically designated as Trustees. The terms of the subject Trusts were a marked departure from this practice, as they do not provide for the automatic appointment of elected officials as trustees of the Trusts. The deeds of settlement for each of the subject Trusts provide that a maximum of two of the trustees may be non-beneficiaries of the Trusts and a minimum of three trustees must qualify as beneficiaries under each Trust.

14. My late husband and I had many conversations regarding this change in practice. My late husband expressed concerns about having trustees of the Trusts who were also elected officials of the Band and was attempting to move away from such a practice.

Recent Appointments to Trusts

Justin Everret Twin-McCoy ("Justin")

15. In or around January 8, 2014, I was notified by Mr. Bujold that Walter Felix Twin intended to resign as a trustee of the Trusts.

16. At the next trustee meeting on January 21, 2014, six motions were presented, without prior notice to me, that accepted Walter Felix Twin's resignation and appointed Justin Everret Twin-McCoy in his place and sought to make a transfer of the Trusts' assets to the new trustees. These motions were approved by Bertha Twin-L'Hirondelle, Clara Twin-Midbo and Roland Twinn. I did not consent to this appointment and instead raised questions, including the need for a proper succession planning process and whether Justin was a beneficiary under the 1985 Trust, which was a requirement as Walter Felix Twin was a beneficiary trustee.

17. Bertha Twin-L'Hirondelle and Clara Twin-Midbo were Roland Twinn and Justin's aunts. I am Chief Roland Twinn's step mother and Justin's aunt. Bertha and Clara do not qualify as beneficiaries under the 1985 Trust. Under the 1985 Trust, Band membership is not synonymous with beneficiary status as it is under the 1986 Trust.

18. While the deeds of the Trusts do not require unanimous approval, to my knowledge, in all past trustee votes to appoint a successor trustee, it was a practice and policy that the decision be unanimous. Attached as **Exhibit "A"** to my Affidavit is a draft document tendered by the Chair at the September 17, 2013 trustee meeting that speaks to this issue at paragraph 7(b)(ii)(2) wherein it states "Gives each Trustee a veto regarding Trustee succession" (the "September Chair Agenda").

19. At the time of and following Justin's appointment, I raised concerns with the other trustees, the Chair and Mr. Bujold regarding whether Justin was an eligible beneficiary under the 1985 Trust. Approximately two months after Justin's appointment, I received a letter from Mike McKinney dated March 5, 2014 that stated that Justin qualified as a beneficiary under the 1985 Trust. Mike McKinney is a lawyer employed in house by the Sawridge First Nation. His employment is determined by the Chief and Council of which, Roland Twinn is the Chief and Justin is a Council member. Roland Twinn and Justin constitute a majority of the three person Band Council.

20. I relayed my concerns to the Chair that it was essential that an independent legal opinion was obtained. I proceeded to obtain the opinion of Larry Gilbert, who is a lawyer and was the former Registrar of Indian Status and Band membership for Indian and Northern Affairs Canada. The opinion of Mr. Gilbert dated July 2, 2014 concluded that Justin did not qualify as a beneficiary under the 1985 Trust, despite Justin being a Band member. Attached as **Exhibit "B"** to my Affidavit is a copy of Mr. Gilbert's opinion.

21. To date, from my perspective, the issue of whether Justin is a beneficiary under the 1985 Trust has not been resolved and his appointment to replace Walter Felix Twin is a violation of the terms of the 1985 Trust deed.

Clara Midbo ("Clara")

22. On July 13, 2014, Clara Midbo passed away from cancer. I was not aware that she was terminally ill and no prior disclosure or discussion on this matter had occurred at any trustee meetings I was present at, including the June 10, 2014 meeting where trustee succession was an agenda item.

23. As a result of her death, Mr. Bujold called an emergency trustee meeting for August 12, 2014 for the stated purpose of appointing a replacement trustee for Clara.

24. On August 6, 2014, I emailed Mr. Bujold, the Chair and the three other trustees, asking who was being proposed as a replacement trustee. I did not receive a response.

25. On August 12, 2014, I proposed that an independent outside professional trustee be appointed to fill the vacancy. This proposal was met with criticism by Justin and Roland Twinn. Roland Twinn stated that the Trusts' beneficiaries were unhappy with having outside directors for the corporations held by the Trusts and the sale of the Slave Lake hotel and further, the beneficiaries would not be supportive of having independent professional individuals appointed as trustees for the Trusts. This concerns me because a trustee ought not to fetter their discretion.

26. By way of background, in 2003 the control of the Sawridge Group of Companies was transferred to outside management from Band Council management because the Sawridge Group of Companies were in financial distress. Since the Sawridge Group of Companies were transferred to the control of outside management (2003) and directors (2006), they have financially recovered and avoided bankruptcy.

27. Despite my objections and proposal that an independent professional trustee be appointed who met a skills matrix I tabled, Peggy Ward, a Band member and a beneficiary of the 1985 Trust, was appointed by the other trustees as Clara's successor.

28. At the time of Peggy Ward's appointment, I was not aware of her past business, board, investment, financial and trust experience and what skill set and qualities she would bring as a trustee of the Trusts. I am deeply troubled with how and the circumstances in which this appointment was conducted, that an individual would be elected as a trustee of the Trusts without a resume being presented in support of her nomination, without regard to the need for independent, professional, expertise to modernize the Trusts and without due regard to other highly qualified and independent candidates whose resumes were tabled.

Interaction between Political Interests and Trust Management

29. For some time, I have been very concerned that the elected Band Council members and elders, who are also trustees of the Trusts, are allowing their political and/or personal agenda to influence their decision making as trustees. My concern is that elected Band Council members, with elected elder support, are approving Band members who are then beneficiaries of the 1986 Trust. This process does not appear to be fair, timely, unbiased or transparent, in addition, I am concerned that it is not Charter compliant. When my concerns are expressed to the other trustees, the Chair and Mr. Bujold, I am either ignored or met with varying degrees of ridicule, denial, reprisal and/or contempt. The following are various examples of why I am concerned:

    (a) Ascertaining the Trusts beneficiaries in a fair, timely and unbiased process has been an ongoing issue and subject to an interlocutory decision by Justice D. Thomas on June 12, 2012. Attached as **Exhibit "C"** to my Affidavit is a copy of Justice Thomas' decision. I have observed examples of where family members of the elected Band Council, including

Chief Roland Twinn, were quickly added to the Band membership list, while membership applications of non-Twin(n) family members have remained unprocessed or denied.

(b) It concerns me that individuals who are responsible for managing, growing and distributing the Trusts' wealth, are demonstrating bias in their capacity as members of Council in determining who is entitled to the Trusts' wealth. One particularly disturbing example of this behavior was when Chief Roland Twinn and Bertha Twin-L'Hirondelle voted against Alfred Potskin's membership application at a membership committee meeting after Chief Roland Twinn's sister, Arlene Twinn, told a story wherein a Potskin woman had allegedly been rude to their mother many years ago. Arlene Twinn finished the story with the statement "this is payback time". Immediately thereafter, Chief Roland Twinn and Bertha Twin-L'Hirondelle voted to not recommend Alfred Potskin's membership application. This recommendation and the application, then goes to Chief and Council who make the decision. As of August 10, 2014, Albert Potskin's name is not on the Band list. I note that Chief Roland Twinn is placed in the dual role of recommending and deciding upon membership applications. I was present during this event. I also note that with the exception of only a few individuals, only the children of former and currently elected Band officials have been granted Band membership by Chief and Council, while other children have been discounted and/or discouraged from applying.

(c) There have been instances where a ruling on Band membership has not been made in a timely manner, including one applicant who waited 28 years for a decision.

(d) I have concluded that, based on information received from persons who may be entitled to beneficiary status under 1985 Trust rules, they will not be granted that beneficiary status as the trustees have never gone through a process of independently determining who qualifies as beneficiaries. Thus the eligible pool of candidates to be trustees who qualify as beneficiaries of both Trusts is greatly limited as a direct result of the decisions made by those trustees who are also elected officials of the Band and decide and restrict Band membership.

(e) At the August 12, 2014 and September 14, 2014 trustee meetings, Chief Roland Twinn stated "we don't know who they are". This statement referred to the beneficiaries of the 1985 Trust. I advised him that those who qualify under the 1985 Trust rules can be ascertained, but the trustees have repeatedly failed to provide an independent process for such. The separate issue of whether those rules are valid is before Justice Thomas. This is just one example of the trustees refusal to make meaningful attempts to even discuss how to determine the proper beneficiaries of the 1985 Trust. At present, despite my insistence, the beneficiaries of the 1985 Trust have not been properly ascertained. The September Chair Agenda is a further example of how these issues have been tabled at trustee meetings for years however, despite the passage of time, no resolution to these issues has been reached. A further example of the trustees unwillingness to address these issues is shown in a January 19, 2009 letter to David Ward, Q.C. of Davies Ward Phillips & Vineberg LLP which is attached as **Exhibit "D"** to my Affidavit and was copied to the other trustees. In this correspondence, I raise the issue of trustee composition. Robert Roth from Fraser Milner Casgrain (as it was then known) had been retained to develop and deliver a process however Chief Roland Twinn failed to engage and the process terminated.

(f) It has been made clear to me by the Chair, Mr. Bujold and the trustees who are also elected Band officials, that how membership is determined is not the concern of the trustees. I see two very separate issues that this statement raises, authority to determine membership and the trustee's confidence in the determination of the beneficiaries of the 1986 Trust.

(g) As a trustee I have expressed concern about the Band membership lists, as this list determines the 1986 Trust beneficiaries, to date, this difficult issue has not been properly discussed and resolved by the trustees.

(h) Benefits from the Trusts have only been extended to the 1986 Trust beneficiaries, which group, at present, only amounts to 44 individuals. This has been to the detriment of the 1985 Trust beneficiaries who can be ascertained under the 1985 Trust rules and who the settlor expressly intended to include and benefit. I believe that the 1985 Trust beneficiaries is much larger than the Band membership group who comprise the 1986 Trust beneficiaries.

(i) Chief Roland Twinn and Band Council are the directors of Sawridge Resource Development. The Band is the shareholder and presumably, it is the Chief and Council who appoint directors. Chief Roland Twinn is also the CEO. As a result, Chief Roland Twinn directly controls the employment and monetary income of Band members employed by Sawridge Resource Development because he has the power to terminate or otherwise control their employment. As a result, he influences Band membership, employment and beneficiary status, amongst other things.

(j) I am afraid that if I speak out at trustee meetings, that I will be faced with reprisal from or because of Chief Roland Twinn. I base this concern on the fact that Chief Roland Twinn has threatened to take my home on the Band reserve from me, without compensation, which could further result in my Band membership being revoked by the Chief and Council as a non-resident member. This is only one example of the many reprisals I have experienced from Chief Roland Twinn.

(k) Despite my objections, a majority of the trustees authorized payment of the Band's legal fees in relation to the Band's participation in the matter before Justice Thomas regarding Band membership, despite the fact that such a payment is not allowed pursuant to the deeds of settlement.

(l) I am concerned that the former counsel for the Band, Marco Poretti, is now acting as counsel for the Trusts at his new law firm, Reynolds Mirth Richards & Farmer.

(m) It took years from 2003 when the Band Council's management contract was terminated to transfer and gather records relating to the Trusts' assets from Band Council (which was previously responsible for the management of the Trusts' assets). While efforts were still being made to obtain these records, Chief Roland Twinn and Bertha L'Hirondelle advised at a trustee meeting that some records had been burned.

(n) Many of the trustees who were or are elected officials of the Band supported adding the Band as a beneficiary of the Trusts and developing "an innovative approach that will enable the construction of a new office and community center complex on the Sawridge First Nation". The September Chair Agenda attached as **Exhibit "A"** documents this request for a community center. I did not support this initiative for a number of reasons, including, the fact that a majority of the beneficiaries of the Trusts do not live on the

Sawridge reserve and this may not be the best use of Trust funds to benefit the beneficiaries. I am concerned that the community center initiative is an example of the elected officials political agendas interfering with their decision making as a trustee.

30. On or about January 12, 2009, the trustees of the Trusts executed a Code of Conduct for Trustees ("Code"). Attached as **Exhibit "E"** is a copy of the executed Code. I am concerned that the instances of conflict and breach of duty that are described in my Affidavit, violate the Code.

ROLE OF BAND COUNCIL

31. The elected members of Band Council and the Chief have a myriad of duties, powers and responsibilities. They deal with a wide range of issues that include political, social, legal, financial, economic, governmental, and personal issues relating to band members. Resources, including their allocation, are a challenge, along with overcoming many complex challenges and historical legacies.

32. First Nations groups are unique in the sense that members of each Nation are related to each other and have long histories as clans and families. As a result of these long histories, conflict amongst members often results.

33. Given the often competing interests already facing elected members of Council and the Chief, I am concerned that it is an inherent conflict of interest for elected members of Band Council or the Chief to also hold the office of a trustee of the Trusts. As members of Council, individuals are called to act in the best interest in the community, while as trustees, individuals are called to act in the best interests of the beneficiaries of the Trusts – these two interests have the potential to conflict. In addition, given that the elected officials have the ability to seriously impact an individual's livelihood, reputation, residency, membership and security in the reserve community and beyond, it makes it difficult for non-elected official trustees to take positions that are contrary to the majority, even if the trustee believes that taking the position is in the best interests of the beneficiaries. This is especially so when one of the elected officials is the Chief of the Band.

34. The enmeshment of elected officials of the Band acting as trustees of the Trusts creates the opportunity for and causes me to be fearful of reprisal if I question how beneficiaries are being determined or why persons who appear qualified and entitled are being excluded as beneficiaries. I have found it very stressful to voice concerns about my lack of confidence in the systems ascertaining beneficiary status. The trustees who are elected officials of the Band have an undue influence at the trustee table both by the fact they are a majority of the trustees and control decision making and also because of the deference shown to them by others and the difficulty in separating political interests from trustee decision making. Undue influence and conflict of interest are compelling reasons to employ the separation rule that elected Band officials and their employees and agents cannot be trustees. I find it hard as a non-elected trustee to cast a vote against the Chief and other elected Band officials who are trustees for fear of political, legal, financial and other repercussions. While all trustees should be considered equal, the Chief remains the Chief and in most cases is the primary influencer of decisions at trustee meetings.

35. It is my understanding and I do verily believe that many other First Nations in Alberta and Canada structure their trusts, or are in the process or restructuring their trusts, so that elected officials and their employees and agents, cannot sit as trustees or if so, are ex officio or a minority. Examples of this include:

(a) Samson Cree Nation;

(b) Ermineskin First Nation;

(c) Onion Lake Cree Nation;

(d) Stoney Nakoda;

(e) Mikisew Cree Nation; and

(f) Saddle Lake Cree Nation.

36. I swear this as evidence for the Court and for no improper purpose.

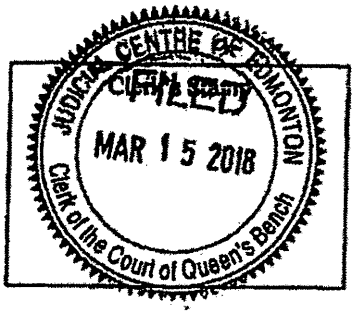
SWORN BEFORE ME at the
City of Edmonton,
In the Province of Alberta
the 23rd day of September, 2015

A Commissioner for Oaths in and
for the Province of Alberta

Catherine Twinn

Tab 2

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, 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 Trust")

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

for Clerk of the Court

APPLICANTS	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, CLARA MIDBO AND CATHERINE TWINN, as Trustee for the 1985 Trust (the "Sawridge Trustees")
DOCUMENT	CONSENT ORDER

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLENNAN ROSS LLP #600 McLennan Ross Bldg. 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Crista Osualdini Telephone: (780) 482-9200 Fax: (780) 482-9100 Email: cosualdini@mross.com File No.: 144194

DATE ON WHICH ORDER WAS PRONOUNCED:	March 15, 2018
NAME OF JUSTICE WHO MADE THIS ORDER:	JUSTICE D. THOMAS
LOCATION OF HEARING:	EDMONTON, ALBERTA

UPON THE APPLICATION of Catherine Twinn, AND UPON being advised that Catherine Twinn has elected to resign as a trustee of the 1985 Trust upon the satisfaction of certain terms and conditions, yet to be satisfied; AND UPON noting the consent of the Sawridge Trustees; AND UPON BEING ADVISED that the Office of the Public Trustee takes no position in respect of this Order:

IT IS HEREBY ORDERED AND DIRECTED THAT:

1. Catherine Twinn will continue as a party in the 1103-14112 Action (the "Action"), despite any resignation of Catherine Twinn as a trustee of the 1985 Trust. Ms. Twinn may participate in the

Action in the same manner as though she were a trustee of the 1985 Trust, despite any resignation by Ms. Twinn as a trustee of the 1985 Trust.

2. Despite any resignation by Catherine Twinn as a trustee of the 1985 Trust, Ms. Twinn may participate, as though she were a trustee of the 1985 Trust, in any action or proceeding, which may be brought in any forum or court, including any level of court or jurisdiction, that arises from or is related in any way to the issues raised in the Action, which shall include the following matters:

    a. Any matters, including the basis for the claim and remedy sought, that are set out in the application filed by the Sawridge Trustees in the within Action on January 9, 2018; and

    b. Any application or claim filed by the Sawridge First Nation in which the relief sought may result in the invalidation or dissolution of the 1985 Trust.

3. For greater certainty, the phrase "same manner as though she were a Trustee" in paragraph 1 above and the phrase "as though she were a Trustee" in paragraph 2 above, shall be interpreted to mean:

    a. Catherine Twinn will not bind the 1985 Trust nor will she speak for nor represent the views of the Trustees of the 1985 Trust;

    b. Catherine Twinn agrees that she will not be entitled to indemnification or reimbursement of any kind (other than Schedule C, taxable party and party court costs and disbursements, if awarded) from the 1985 Trust nor any of the Trustees of the 1985 Trust;

    c. Roland Twinn, Everett Justin Twin, Bertha L'Hirondelle and Margaret Ward (either personally or as trustees) agree that they will not be entitled to indemnification or reimbursement of any kind (other than Schedule C, taxable party and party court costs and disbursements, if awarded) from Catherine Twinn; and

    d. Catherine Twinn agrees she cannot exercise any of the rights of an actual Trustee of the 1985 Trust vis-à-vis the 1985 Trust in the same manner or as though she were an actual Trustee of the 1985 Trust.

4. There shall be no costs payable in relation to this Order.

Justice of the Court of Queen's Bench of Alberta

Thomas J

CONSENTED TO:

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

BRYAN & COMPANY LLP

K.B. Haluschak
Counsel for Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret Ward

MCLENNAN ROSS LLP

David Risling and Crista Osualdini
Counsel for Catherine Twinn

Tab 3

PAUL BUJOLD - March 7, 8, 9, 10, 2017
Questioned by Ms. Osualdini

COPY

COURT FILE NUMBERS:	1103 14112 and 1403 04885
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 IN THE MATTER OF THE SAWRIDGE TRUST CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19, AUGUST 15, 1986 (the "1986 Trust")
APPLICANT:	CATHERINE TWINN, as Trustee for the 1985 Trust and the 1986 Trust
RESPONDENTS:	ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND MARGARET WARD, as Trustees for the 1985 Trust and the 1986 Trust

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Questioning on Affidavits of **PAUL BUJOLD**, sworn the 15th day of February 2017 C.E., held at the offices of McLennan Ross LLP, Edmonton, Alberta, on the 7th, 8th, 9th, and 10th days of March 2017 C.E.

2011? Like, that was the information being presented to them?

A. That's right. That's right.

Q. Okay. And at the September 2013 meeting, the reason there was a concern about settling with the Office of the Public Trustee is because the trustees did not want Band membership investigated?

A. No. The -- the position of the trustees all along has been -- and this supports the -- the position of the First Nation as well, is that the trustees didn't want persons who were declared beneficiary of the 1985 trust to use that in any way as a justification for their being admitted into membership in the Sawridge First Nation.

10:56

And there was concern on the part of the trustees that that's what would happen, that if someone were declared a beneficiaries of a trust that arose from the Sawridge First Nation and which clearly says is for the members of the Sawridge First Nation, that someone would, by extension, use that as an argument -- a legal argument to say, "Well, if I'm a beneficiary, then I should be admissible into membership."

10:56

And so the trustees took the position that they would not grandfather anyone, and that's partly why we're going through such a convoluted process to try and identify the beneficiaries of the '85 trust is

that it -- the initial statement of that definition is that it's for the members of the Sawridge First Nation. And then there's a subclause that says, "As defined by --"

Q. But you would agree with me, though, that in the June 2012 Justice Thomas decision, that the trustees understood that there was a direction to the Office of the Public Trustee to investigate Band membership --

10:57 **A. There was.**

Q. -- process?

A. Sorry.

Q. Band membership process?

A. Yes, there was.

Q. And you would agree with me that many trustees expressed concern about that?

A. Many. All of them, actually.

Q. And that Chief Roland Twinn expressed concern that he didn't want the Band membership process

10:57 investigated?

A. I don't think anyone saw it -- I mean, the -- certainly the discussions that we had with legal counsel at the time were that that should not be an issue that's being raised in the determination of beneficiaries to the 1985 trust. The adequacy or inadequacy of the Sawridge membership process should not be the question; the question should be who are

A. Yes.
Q. So at this meeting, concerns about the Band membership process were raised and discussed?
A. Yes.
Q. Timeliness of processing of applications was one of them?
A. Yes.
Q. And concerns about the nature of the Band membership code was also discussed?
11:37 A. Yes.
Q. And in Point 3 of the resolution which speaks to amending the Sawridge Citizenship Code, I understand that to be the membership code that we've spoken about today?
A. Membership rules, yes.
Q. Yes, membership rules. And that was entered as an exhibit?
A. That's right.
Q. Okay. Those rules have never been changed since --
A. Well --
Q. -- since the date of this meeting?
A. No.
Q. No. And what steps have the trustees taken since the December 2010 meeting to cause applications submitted to the Sawridge First Nation to be processed within six months from the date received?
A. As I indicated, the -- following this -- this

meeting, a letter was sent from the trustees to the Sawridge First Nation with all of the information that Donovan Waters presented, including the opinion -- the information in his opinion.

Q. Okay.

A. And -- and we never received a response.

Q. And as of today, do you know if membership applications are being processed within six months?

A. I -- I don't know. I -- no, I don't know.

11:39 Q. Would the information that you have been presented with as trusts' administrator lead you to believe that they're not?

A. Just to correct the -- my previous statement, in my undertakings to the Office of the Public Trustee, the -- one of the things that the Public Trustee requested was a list of all of the applications that had been processed for the last 30 years and the timelines on those for consideration and approval, and the trustees did receive a copy of that through

11:39 my undertakings.

Q. Okay. And based on that information you received, would you agree with me that applications are not being processed within six months?

A. I don't know that all of -- no, I can't -- I can't say that all of them are being dealt with within six months, no.

Q. And was that information on the processing times of

2010.

Q. MS OSUALDINI: And it was Chief Roland Twinn who took the position that a tribunal to determine Band membership would not be appropriate?

A. To determine Band membership?

Q. M-hm.

A. Yes.

Q. He was against the tribunal?

A. Yes. He wasn't against the tribunal for determining beneficiaries; he was determined -- against the tribunal for determining Band membership only.

11:52

Q. And I'm showing you a copy of an email dated December 23rd, 2010, that appears to be from Donovan Waters to yourself, Mr. Heidecker, and Catherine Twinn, Clara Midbo, and Chief Roland Twinn.

I'll just give you a second to read it.

A. Okay.

Q. Okay. So this email would have shortly followed the December 2010 trustee meeting?

11:53

A. Yes.

Q. Okay. And in this email, Donovan states: [as read]

"For there's several purposes both Band and trustees need to know who are the Band members and to know also there is in place an overhauled process for the future appointment of

Band members."

A. Yes.

Q. Was there a discussion at the December 2010 trustee meeting about overhauling process for the future appointment of Band members?

A. There was a discussion, and there was -- as I said, there was a letter that went from the trustees to the Sawridge Council about that and how it could be done.

11:54 Q. But was there more than that? Were the trustees advised that there would be -- were the trustees provided with information that the Band membership process would be overhauled?

A. No.

Q. So is the information from Donovan Waters not what was discussed at the trustee meeting?

A. What he's saying is this -- the trustees need to know who the Band members are and to know who the -- that there is also -- there is in place an

11:54 overhauled process. So I -- you know, that doesn't mean that they know that there -- that process because we received no response from the First Nation.

Q. And no steps were taken to follow up with the First Nation?

A. That's not true.

Q. Okay.

beneficiaries who are, you know -- who would fall under the rules of the *1970s Indian Act*, and the third list are the spouses of either people who are already on the list or some of the potential people.

Q. Okay.

A. Potential adults.

Q. Okay. So you created those lists by going back to the database and dividing people into those categories?

09:18 A. Right. So because there was a different -- there was a different strategy proposed for each of those lists, it's not a separate list; it's actually a continuous list. But the trustees considered the list in three separate -- for three separate proposals.

Q. Okay. What was the strategy on each of those lists?

A. Well, the original strategy was just to present the minors as -- as a possibility for grandfathering to the Office of the Public Trustee since they're only

09:19 concerned with minors. That was it.

Q. Okay. And did you think that was in the best interests of the 1985 beneficiaries? Because you would be excluding the adults from that grandfathering.

A. Yeah. That's true. I don't know if I can ascertain if it's in the best interests of the beneficiaries or not. I don't -- I don't know.

Q. So that strategy was developed without considering whether it was in the best interests of the beneficiaries?
A. No. It was -- it -- that was part of the consideration, but it was also developed, you know, according to the wishes of the -- that the trustees had expressed in the -- in the past.

And that was that -- you know, that we -- that we not -- that if we're going to grandfather anyone, and this includes the children, that we not create a situation where those persons would use that as a -- as a point of leverage to become members of the Sawridge First Nation. You know, they -- they can and should apply. They've all been told that.

Q. And why would that be of concern to the trustees?
A. Well, the -- the trustees wanted to keep the -- I'm blanking out. I'm sorry. I just --
Q. Well, I put it to you that the reason --
A. Yeah.
Q. -- it was a concern to the trustees is because the Chief of the Sawridge First Nation is one of the trustees.
A. No, that's not the case at all.
Q. But you can't tell me why, then, it was a concern for the trustees --
A. Oh, it's not that I can't tell you why. It's just that my mind went off somewhere else. Sorry.

MS. OSUALDINI: Off the record.
[DISCUSSION OFF THE RECORD]
Q. MS OSUALDINI: So my question was why was it of concern to the trustees whether individuals could use the definition in the 1985 trust to leverage an application to become a Sawridge First Nation member?
MS. CUMMING: Oh, it wasn't -- no, he didn't say it was to leverage for an application.
MS. OSUALDINI: I think that's the word --
MS. CUMMING: It was used as leverage to argue that they were members of the SFN.
MS. OSUALDINI: Okay.
A. Yeah.
MS. OSUALDINI: Okay. Sorry.
MS. CUMMING: -- and wouldn't have to apply for membership. It would be a shortcut.
Q. MS OSUALDINI: Oh, okay. So why was that of concern to the trustees?
09:22 A. Well, the trustees early on decided that they didn't want anyone using their beneficial status in the '85 trust as a way of gaining or using that as a legal argument to obtain membership in the Sawridge First Nation, that they should be required to go through the same process as everyone else.
And so, you know, basically we followed that -- we've been following that policy all along. We try

not to create a situation where we're jeopardizing the inherent right of the Sawridge First Nation to decide its own membership. And, you know, we're trying to support them. I mean, we're -- we're a related agency, and so we -- we're -- we're trying to work with them.

In terms of the -- you know, so any -- any proposal to grandfather, there was a concern early on that grandfathering would give persons that -- 09:23 that notion that maybe if they were grandfathered, there was some reason for them being grandfathered. It was explained to the trustees also very early on that whenever you amend or change a definition of beneficiaries in a trust, that there are always winners and losers.

And so some persons may, indeed, be affected negatively by a change in definition of the -- of the trust. And that is sort of expected trust practice as far as we were informed, that -- that 09:24 persons could -- there -- you know, there are always winners and losers.

We wanted especially, though, not to -- not to negatively affect children, if we could possibly -- you know, if we could possibly manage to find some way to positively respond to -- to children, that that would be important, especially if they were members of -- or, I mean, especially if their

parents were already members of the First Nation.

Q. What about future generations of children that will be excluded?

A. Well, a trust can't -- a trust can address only -- you know, Donovan Waters explained this to us also very early on, that a trust can certainly speak to future generations, but in terms of the designation of beneficiaries, that you can't tie a trust to -- you know, to creating some interest for someone who doesn't exist.

09:25

Q. But you would agree with me, though, that if the existing 1985 beneficiary definition was maintained, that future children will be affected if it's changed to Sawridge First Nation membership?

A. Yes. Oh, of course.

Q. Yeah.

A. Yes. Yes.

Q. So have the trustees just accepted that, as part of any definition change, there's going to be collateral damage, and that's just the way it is?

09:25

A. Yeah. Even if we leave it the way it is currently defined, there will be collateral damage. So --

Q. How will there be collateral damage?

A. Well, all of the persons -- or all of the persons who were women who married out and their descendants are not admissible under the 1985 trust according to the current definition.

A. Among them, whether or not membership was part of that process.
Q. Okay. But you would agree that Catherine Twinn has been -- has been very vocal about her concerns with membership issues with the Sawridge First Nation?
A. Lately, yes.
Q. When did those start?
A. It started with her 20 -- or her 1403 action.
Q. Okay. So it started prior to the filing of this
09:37 application, which was June 12th, 2015?
A. Actually, it would have been immediately prior, yes.
Q. Okay. So prior to this, she was vocal that she had concerns?
A. Well, I mean, all of the trustees had expressed, you know, that they would like to see certain things improved, yes.
Q. Including Chief Roland Twinn?
A. Yes.
Q. And, sorry, just to back up. In some of your
09:38 earlier evidence, you spoke about if an issue arose that you felt you needed direction from the trustees on, you would arrange a conference call to obtain direction?
A. Yes.
Q. Has such a conference call ever occurred?
A. On this application?
Q. On any application.

Tab 4

2017 ABCA 419
Alberta Court of Appeal

Twinn v. Twinn

2017 CarswellAlta 2650, 2017 ABCA 419, [2018] A.W.L.D. 638, [2018] A.W.L.D. 647, 287 A.C.W.S. (3d) 454

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)

Marina Paperny J.A., Barbara Lea Veldhuis J.A., Sheilah Martin J.A.

Heard: November 1, 2017
Judgment: December 12, 2017
Docket: Edmonton Appeal 1703-0193-AC

Proceedings: reversing in part *1985 Sawridge Trust v. Alberta (Public Trustee)* (2017), 2017 CarswellAlta 1193, 2017 ABQB 377, D.R.G. Thomas J. (Alta. Q.B.)

Counsel: N.L. Golding, Q.C., for Appellants
D.C. Bonora, A. Loparco, for Respondents, Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Trust
J.L. Hutchison, for Respondent, The Office of the Public Guardian and Trustee
D.D. Risling, for Respondent, Catherine Twinn

Subject: Civil Practice and Procedure

APPEAL by applicants, from order reported at *1985 Sawridge Trust v. Alberta (Public Trustee)* (2017), 2017 ABQB 377, 2017 CarswellAlta 1193 (Alta. Q.B.) dismissing application to be added to litigation as full parties and ordering applicants to pay solicitor and client costs.

Per curiam:

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 (Alta. Q.B.) (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 Band v. R.*, 2009 FCA 123, 391 N.R. 375 (F.C.A.), leave denied [2009] S.C.C.A. No. 248 (S.C.C.); *Sawridge Band v. Poitras*, 2012 FCA 47, 428 N.R. 282 (F.C.A.); *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.).

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 (Alta. Q.B.) (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 (S.C.C.) at para 2, [2014] 1 S.C.R. 87 (S.C.C.), 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 (Alta. C.A.) at para 3, [2017] A.J. No. 276 (Alta. C.A.); *Sturgeon Lake Indian Band v. Alberta*, 2015 ABCA 253 (Alta. C.A.) at para 8, (2015), 606 A.R. 291 (Alta. C.A.); *Lameman v. Alberta*, 2013 ABCA 148 (Alta. C.A.) at para 13, (2013), 553 A.R. 44 (Alta. C.A.).

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 (S.C.C.) at para 27, [2013] 2 S.C.R. 125 (S.C.C.):

> 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 Law Firm*, 2010 ABCA 67 (Alta. C.A.) at para 13, (2010), 487 A.R. 111 (Alta. C.A.).

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. L.R. (3d) 325 (Alta. Q.B.) 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.* (1955), [1956] 1 Q.B. 357 (Eng. Q.B.) 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 (Alta. Q.B.) at para 8, (2010), 25 Alta. L.R. (5th) 70 (Alta. Q.B.); *Luft v. Taylor, Zinkhofer & Conway*, 2017 ABCA 228 (Alta. C.A.) at para 77, (2017), 53 Alta. L.R. (6th) 44 (Alta. C.A.).

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 (Alta. Q.B.) at para 25; *Brown v. Silvera* at paras 29-35; aff'd 2011 ABCA 109 (Alta. C.A.). 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 *Luft* 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 allowed only as to scale of costs.

End of Document

Tab 5

Marco Marrelli

From: Marco Marrelli
Sent: Thursday, April 11, 2019 4:19 PM
To: Marco Marrelli
Subject: FW: Jurisdiction Order

From: Crista Osualdini
Sent: Thursday, April 11, 2019 4:15 PM
To: Marco Marrelli <mmarrelli@mross.com>
Subject: FW: Jurisdiction Order

From: Bonora, Doris [mailto:doris.bonora@dentons.com]
Sent: Sunday, December 16, 2018 5:40 PM
To: Janet Hutchison <jhutchison@jlhlaw.ca>; Crista Osualdini <cosualdini@mross.com>
Cc: England, Mandy <mandy.england@dentons.com>
Subject: Re: Jurisdiction Order

I am responding to the issue raised by Crista on the jurisdiction order

We believe we are on the same page

We agree that the jurisdiction order will not direct final relief in respect of the declaration of public policy. We agree that it will not seek directed relief in respect of the actual amendment to the trust. We however cannot not agree that there will not be findings of fact as even the existence of the trust is a finding of fact. The existence of a definition and an amendment clause in the trust are findings of fact. The vote that took place will be put before the court as an event that occurred and is therefore factual. There must be some findings of fact for the judge to make a determination on the law. That is the very nature of an application.

Please advise if this is acceptable

Doris

DENTONS

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Salans FMC SNR Denton

On Dec 14, 2018, at 2:04 PM, Janet Hutchison <JHutchison@jlhlaw.ca> wrote:

> That was also my understanding Crista. The order asks the Court to deal with an "academic" question of jurisdiction based almost solely on law, not fact....and so no findings specific to the final relief.

Janet L. Hutchison

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

Hutchison Law Holiday Closure Information

Our offices will be closed from Noon on December 21, 2018 to January 2, 2019, inclusive, reopening on January 3, 2019. Please hold all courier deliveries until January 3, 2019.

We wish you and yours a Happy Holiday season!

From: Crista Osualdini <cosualdini@mross.com>
Sent: Friday, December 14, 2018 1:31 PM
To: doris.bonora@dentons.com; Janet Hutchison <JHutchison@jlhlaw.ca>; England, Mandy <mandy.england@dentons.com>
Cc: Karen Platten <kplatten@mross.com>; David Risling <drisling@mross.com>
Subject: Jurisdiction Order

Counsel,

Please find attached the Jurisdiction Order, consented to by our office. This consent is provided on the understanding that the direction sought in this Order will only provide confirmation of the existing jurisdiction of the Court and will not seek findings of fact or any directed relief in relation to the 1985 Trust. More particularly, that the Order will not seek a determination of whether the trust in fact offends public policy to the extent that remedy is required.

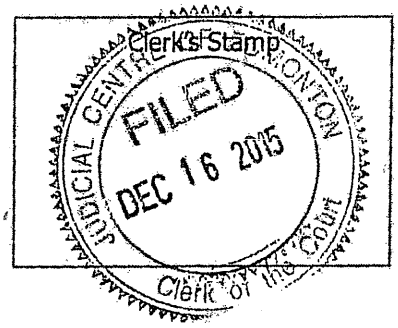
If my understanding is incorrect, please immediately advise.

Crista

Crista Osualdini | Partner | direct 780.482.9239 | toll free 1.800.567.9200 | fax 780.733.9723
McLennan Ross LLP | www.mross.com | BIOGRAPHY | Member of Meritas
600 McLennan Ross Building, 12220 Stony Plain Road, Edmonton, AB T5N 3Y4

Tab 6

Form 49
Alberta Rules of Court
Rule 13.19



COURT FILE NO. 1103 14112 and 1403 04885

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

IN THE MATTER OF THE SAWRIDGE TRUST CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19, AUGUST 15, 1986 (the "1986 Trust")

APPLICANT CATHERINE TWINN, as Trustee for the 1985 Trust and the 1986 Trust

RESPONDENTS ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND MARGARET WARD, as Trustees for the 1985 Trust and the 1986 Trust

DOCUMENT **AFFIDAVIT OF CATHERINE TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLENNAN ROSS LLP #600 West Chambers 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Karen A. Platten, Q.C. Telephone: (780) 482-9200 Fax: (780) 482-9102 Email: kplatten@mross.com File No.: 144194

AFFIDAVIT OF CATHERINE TWINN

SWORN ON THE 15 DAY OF DECEMBER, 2015

I, Catherine Twinn, of the Sawridge Indian Reserve 150 G and the City of Edmonton, in the Province of Alberta, SWEAR AND SAY THAT:

1. I am a trustee of the Sawridge Band Inter Vivos Settlement, April 15, 1985 (the "1985 Trust") and the Sawridge Trust, August 15, 1986 (the "1986 Trust") (collectively referred to as the

"Trusts"), and, as such, have a personal knowledge of the matters hereinafter deposed to, save where stated to be based upon information and belief.

2. I was appointed as trustee of the 1985 Trust on December 18, 1986 and of the 1986 Trust on August 15, 1986. I have continuously maintained my position as a trustee since these appointments.

CONFLICT – COURT OF QUEEN'S BENCH ACTION NO. 1103 14112 (the "2011 Action")

3. Dentons LLP ("Dentons") and Reynolds Mirth Richards & Farmer LLP ("RMRF") presently represent the collective group of the trustees of the 1985 Trust in the 2011 Action. As such, I am one of their clients.

4. I have had longstanding concerns with the administration of the Trusts. These concerns generally arise from what I perceive to be a conflict of interest between the duties of the trustees of the Trusts and other various roles, powers, duties and relationships they hold within the Sawridge First Nation (the "Band"), which includes elected and appointed positions. One of my earliest concerns in relation to the 1985 Trust was that appropriate steps were not being taken to ascertain the beneficiaries of that trust. I had a similar concern in regards to the 1986 Trust, more particularly that the beneficiary list was not complete because persons who should qualify for Band membership, including those who are entitled, were not being fairly admitted into membership by the Band due to political and/or personal motivations. I recommended to the other trustees that we should use a tribunal to make decisions on beneficiary status for both Trusts, however, this recommendation, after a retired Justice was engaged, was rejected as the other trustees wanted to defer to the Band to make these decisions. As time has gone on, my concerns have only grown.

5. Historically many of the 5 trustee positions for the Trusts were held by elected officials of the Band. Presently, the Chief of the Band, Roland Twinn is a trustee of both Trusts. My concerns in this regard are set out in more particular detail in my Affidavit filed on September 3, 2015 in Court of Queen's Bench Action No. 1403 04885 (the "2014 Action"), and which Affidavit was subsequently filed in the 2011 Action on September 30, 2015. Since this particular Affidavit was prepared, I remain of the view that it is imperative that the Trusts have independent representation at the trustee level so that the management of the Trusts assets is not affected by improper motivations.

6. My particular concerns with the 2011 Action increased in 2012 after the June 12, 2012 decision of Justice Thomas in the 2011 Action (the "Decision"). To summarize some of the Decision, Justice Thomas appointed the Office of the Public Trustee of Alberta ("OPT") as litigation representative for impacted minor children, directing the OPT to ascertain how the proposed changes to the beneficiary designation would affect minors. This included all potential minor beneficiaries. The proposed new beneficiary definition was that a beneficiary would include only Band members. Given that beneficiary status, under the proposed variation, would solely be tied to Band membership, the OPT's mandate flowing from the Decision directed the OPT to examine and enable an evaluation of the Band membership rules and process and whether such are fair, reasonable, timely, unbiased, due process and Charter compliant. Justice Thomas also identified a structural conflict that existed in the trustee group by the fact that some of the trustees were or are in elected Band positions.

7. At the August 2012 trustee meeting, I provided a written recommendation to the trustees to address and cure the structural conflict identified by Justice Thomas in the Decision because it was my opinion that it was in the best interests of the beneficiaries that this conflict not exist. I proposed that all trustees resign, myself included, a proper process for our replacement be put in

place and an undertaking to the OPT to work honestly and collaboratively to thoroughly examine the Band system for ascertaining beneficiaries and implementing remedies. I believed this would be appropriate and minimize legal costs to the Trusts. The other trustees rejected my recommendation and in my view, increased their hostility towards me.

8. Given the increasingly divergent views between myself and the other trustees and my belief that the other trustees were not meeting their fiduciary duties to the beneficiaries of the Trusts, I requested, in September 2012, that the Trusts reimburse me for access to independent legal advice so that I could obtain counsel on my role and duties as a trustee. My request was denied by the other trustees.

9. I tried again in February 2013 to obtain trustee approval for independent legal advice for myself. I did this by proposing a resolution at a trustee meeting that would enable me or any other trustee access to legal advice. None of the other trustees would second my motion.

10. I tried again in September 2013 to have my concerns addressed. Once again, I raised my concerns with Brian Heidecker, the Chair of the Trusts. The concerns relayed to Mr. Heidecker, in general, were:

    (a) the membership process and rules used by the Band were deeply flawed and did not meet legal principles of fairness and due process and it did not seem that improvements would be made;

    (b) the beneficiaries of the 1985 Trust had not been properly ascertained;

    (c) the other trustees were rejecting all of my suggestions on how to ascertain the beneficiaries of the 1985 Trust without providing any alternative suggestions.

11. The day after my meeting with Brian Heidecker, he and Paul Bujold (Trusts Administrator) hurriedly brought forward a proposal to the Trustees asking for authority to negotiate with the OPT to grandfather certain 1985 Trust beneficiaries regardless of whether they became Band members in exchange for the proposed variation to Band membership and thereby end the examination of Band membership by the OPT. A number of lists of beneficiaries they could choose to "grandfather" were produced by Mr. Heidecker and Mr. Bujold and these lists did not appear to have been created using proper methods to ascertain the actual beneficiaries of the 1985 Trust. Then and subsequently, I requested disclosure from Mr. Heidecker and Mr. Bujold on how these lists were created and such disclosure was refused. Given their refusal to disclose how the lists were compiled, I became very concerned that their proposal was undermining the Decision, improperly excluding 1985 Trust beneficiaries and a means to support the political and personal agenda of those in control of the Band and Trusts. I am concerned that those in control of the Band wish to vary the beneficiary designation in the 1985 Trust to Band membership so that they can control who the beneficiaries of the 1985 Trust are.

12. Following this proposal by Mr. Heidecker and Mr. Bujold and the subsequent refusals to disclose the basis for it, it became clear to me that my concerns regarding the structural conflict identified by Justice Thomas would not be addressed internally by the other trustees and that proper ascertainment and inclusion of all the 1985 Trust beneficiaries would not occur. While the other trustees were in favour of Mr. Heidecker and Mr. Bujold's proposal, it was my belief that this course of action did not comply with our fiduciary obligations as trustees. This belief was largely formed because of my concern that this proposal was an attempt by the other trustees to avoid having the Band membership process scrutinized. Additionally, I believe that the trustees need to have a process in place to ascertain beneficiaries of the 1985 Trust which is clear and which the trustees understand and approve. I was very concerned about the Band membership

process, for many reasons, not the least of which included the fact that the Band only has 44 members, while, Aboriginal Affairs and Northern Development Canada had significantly more people registered as affiliated with the Band (as at January 23, 2015 the number was 478 persons).

13. As a result of these concerns, and given that Dentons and RMRF were receiving instructions based on the consensus of the entire group of trustees, as communicated by Mr. Heidecker and Mr. Bujold, and failing to address my concerns in a manner that was satisfactory to me, I retained independent legal counsel, McLennan Ross LLP ("MR"), in the fall of 2013 to assist me with my concerns as a trustee of the Trusts and to counsel me on my fiduciary obligations as a trustee of the Trusts.

Dentons and RMRF

14. Given the divergent views between myself and the other trustees, the representation of the collective group by Dentons and RMRF in the 2011 Action is problematic.

15. The inherent difficulty in Dentons and RMRF's representation of me in the 2011 Action became clear in 2014 when on April 1, 2014, Dentons and RMRF, at the instruction of the trustees of the Trusts, as they purportedly existed at that date and with the exception of myself, filed an application against myself in the 2014 Action which related to the transfer of assets of the Trusts from the prevailing trustees of the Trusts to the new trustees of the Trusts. This application occurred in response to the appointment of Everett Justin Twin as a replacement trustee to Walter Felix Twin. I was shocked that my apparent legal counsel would file an application seeking relief against their own client.

16. In response to this application relating to the appointment of Everett Twin, MR attempted to negotiate a binding issue resolution process with Dentons that would resolve the application and allow for a procedure, overseen by Justice Thomas, to resolve all of the outstanding concerns I had with the operation of the Trusts, including the appointment of Justin Twin. Ultimately, Dentons rejected this proposal and would not engage further in negotiations. Attached as **Exhibit "A"** is the MR letter dated May 8, 2014 to Justice Thomas and as **Exhibit "B"** a copy of the May 8, 2014 Issue Resolution Agreement MR provided to Dentons and as **Exhibit "C"** a copy of a Dentons letter sent to Justice Thomas July 1, 2014 and as **Exhibit "D"** a copy of a July 14, 2014 letter sent by MR to Justice Thomas and as **Exhibit "E"** a copy of Dentons July 21, 2014 letter to Justice Thomas.

17. This application was heard before Justice Neilson on May 16, 2014. At the application, Justice Neilson ordered that my right to bring an application on the eligibility of Everett Justin Twin to sit as a trustee of the 1985 Trust was reserved. My objection to this application was based, amongst other matters, on my concern that Everett Justin Twin did not qualify to sit as a trustee of the 1985 Trust, the process used to create his alleged appointment as a trustee and that he was an elected official of the Band. Attached as **Exhibits "F" and "G"** to my Affidavit, respectively are a copy of the April 1, 2014 application and the Order issued by Justice Neilson on May 16, 2014.

18. Following the May 16, 2014 application, further instances arose that demonstrated to me that Dentons and RMRF were advocating for the majority of the trustees and that the interests I sought to address were not being represented, namely my concerns regarding the interests of the impacted beneficiaries and potential beneficiaries. For instance, I requested from Ms. Bonora at Dentons information as to when and where cross examinations on Affidavits were occurring in the 2011 Action. I did not receive Dentons response until after one of the examinations occurred and the response advised that direction only comes through Mr. Heidecker or Mr. Bujold and that

it was Dentons understanding that Mr. Heidecker of Mr. Bujold would have provided me the information I sought. Attached as **Exhibit "H"** is a copy of Dentons email dated May 28, 2014. Another incident arose in August 2014 when another replacement trustee needed to be appointed to replace a trustee (Clara Midbo) who died suddenly and unexpectedly. My concerns and recommendations relating to that appointment, which were similar to the appointment of Justin Twin, were not advocated by, or to my knowledge, even considered by Dentons or RMRF who had no discussions with me.

19. On or about June 12, 2015, the OPT filed an application in the 2011 Application. The application of the OPT, amongst other matters, sought document production from the Band and trustees as per their mandate stemming from the Decision of Justice Thomas. This application was returnable on June 30, 2015.

20. The difficulty in Dentons and RMRF's representation of me, in my capacity as a trustee, in the 2011 Action reached a breaking point when in anticipation of the OPT's production application and without my consent, Dentons and RMRF filed an application on June 12, 2015. This application, amongst other matters, sought to approve a settlement offer allegedly proposed by the trustees of the 1985 Trust in order to resolve, in full, the 2011 Action (the "Settlement Offer"). The Settlement Offer sought to grandfather certain alleged minor beneficiaries of the 1985 Trust and vary the 1985 Trust's definition of "beneficiary" to include only Band members. Interestingly, the effect of the Settlement Offer, if approved, would avoid Band membership being scrutinized by the OPT. The Settlement Offer was later withdrawn by Dentons after the June 30, 2015 application was case managed and set for hearing on September 2 and 3, 2015 along with the application filed by the OPT in relation to document production.

21. Given my serious concerns with the actions taken by the other trustees in relation to the Settlement Offer and other matters, my counsel, MR, prepared written submissions and appeared at the June 30, 2015 application on my behalf. While MR's appearance on June 30, 2015, was the first time they appeared on the record in relation to the 2011 Action, MR has been advising me in relation to the 2011 Action since the fall of 2013. MR has also been advising me in relation to the 2014 Action since the inception of that action.

22. At the June 30, 2015 application, the conflict in Dentons and RMRFs representation of the collective group of trustees was acknowledged by the Court. The Court directed Dentons to bring an application by July 15, 2015 in order to address the conflict issue. Dentons did file this application in the 2011 Action, but it has not been heard by the Court. To my knowledge, Dentons has not taken any further steps in order to resolve this issue.

23. The OPT's application for document production was adjourned to September 2 and 3rd, 2015. Dentons and RMRF filed a Brief on behalf of the trustees of the 1985 Trust for use at the September 2 and 3rd, 2015 application. The Brief filed by Dentons and RMRF argued that the Band should not be required to produce the records sought by the OPT. As a trustee, I am firmly of the view that the trustees should not be taking an opposing position to the OPT in regards to this issue because, given the potentially *significant* variation in beneficiary designation being sought by the trustees, a full understanding of the potential impact of that change is required in order to discharge our fiduciary duties. I consider this matter especially concerning because many of the potential beneficiaries of the 1985 Trust are vulnerable and marginalized persons that do not have the ability to participate in these legal proceedings and ensure that their views are heard.

24. Once again, given my concerns with the position being advanced by Dentons and RMRF on behalf of the trustees of the 1985 Trust, my counsel, MR, attended the September 2 and 3rd, 2015 application to make submissions on my behalf as a trustee of the 1985 Trust and to ensure

that the Court was aware of my concerns, namely that the other trustees should not be opposing this relief and that it is demonstrative of the inherent conflict between the multiple roles played by those persons that are both trustees and Band officials (or were Band officials).

25. At present, while my positions are not advocated by Dentons and RMRF because they accept the instructions of the majority of the trustees and communicate through Mr. Heidecker and Mr. Bujold, I technically remain their client. This is of serious concern to me.

Costs

26. As of December 3, 2015, I have incurred legal expenses in excess of $170,000.00 with MR in relation to the 2011 and 2014 Actions. Given that these Actions are so intricately related, involving the same persons, factual matrix and similar issues, it is difficult to determine with any precision which Action the costs incurred by me with MR relate to.

27. I have also incurred other legal expenses such as obtaining an opinion from Larry Gilbert, former Acting Registrar in Ottawa of Indian Status and Band Membership, Indian and Northern Affairs Canada on whether Justin Twin qualified as a beneficiary of the 1985 Trust. Larry Gilbert was responsible for deciding Indian status and where the Department controlled the Band List, band membership. He also was responsible for investigating and deciding protests under the Indian Act. In 1996, his text "Entitlement to Indian Status and Membership Codes in Canada" was published by Carswell with an expected second edition once the Supreme Court of Canada decides the Harry Daniels case regarding Metis and non-status Indians. Although Larry Gilbert was implementing the Indian Act (Bill C-31) he also had to interpret and apply the Indian Act as it read prior to Bill C-31, that is, the 1951 Indian Act because the ancestors of each applicant under Bill C-31 might still have to meet the requirements of the 1951 Act. This choice of competent counsel for an opinion on the eligibility of Justin (McCoy) Twin was provided by MR to Dentons and RMRF, but not acted upon. To date, I have not been reimbursed for this legal expense.

28. In the 2011 Action, the following law firms have made oral or written submissions before the Court or, alternatively, have been present at applications in the 2011 Action. All of these law firms have had fees reimbursed from the Trusts' assets.

Law Firm - Clients

Dentons – Trustees of the 1985 Trust

RMRF – Trustees of the 1985 Trust

Bryan & Company LLP – All trustees of the 1985 Trust with the exception of Catherine Twinn

Parlee McLaws LLP – the Band

Bennett Jones LLP – Brian Heidecker, Chair of the Board of the trustees of the 1985 Trust

29. In the 2014 Action, Dentons, RMRF and Bryan & Company have all made oral or written submissions before the Court and have all been paid in full from the Trusts' assets.

30. From February 2010 to August 10, 2015, the Trusts have paid law firms in excess of $1.8 million dollars, mostly in relation to the 2011 Action with some costs in the 2014 Action.

31. At this point, I have been required to self-fund my representation in the 2011 Action and the

2014 Action, while the other trustees have authorized payments of legal fees for Dentons (including firms advising Dentons for the purpose of providing supporting opinions such as Horne Couper), RMRF, Bryan & Company LLP, Parlee McLaws LLP and Bennett Jones LLP. The other trustees have also had the benefit of the representation of at least 3 law firms (Dentons, RMRF and Bryan & Company) with senior counsel involved at all firms. In comparison with the legal expense incurred by the other trustees, the amount of my legal expenses is quite modest and I have only had the benefit of one law firm representing my position and counselling me on my duties as a trustee in relation to the 2011 and 2014 Actions.

32. Attached as **Exhibits "I"** and **"J"** to my Affidavit are copies of the 1985 and 1986 Trust Deeds, respectively. Both trust deeds specifically authorize the reasonable reimbursement of costs incurred by a trustee incurred in the administration of the Trust.

33. I am very concerned that the legal fees of the other trustees, the Band and Mr. Heidecker have all been paid from the Trusts and I have been required to self-fund. It is especially concerning to me that, despite my objections, the Band's fees have been paid from the Trusts given that such a payment is not authorized pursuant to the deeds of settlement and the Band is taking a position that, in my view, is contrary to the beneficiaries' best interest in the 2011 Action.

34. I have submitted a formal request to the other trustees for payment of my legal invoices and to date, have not received any payment, not even partial payment. Attached as **Exhibit "K"** is a copy of a letter dated July 7, 2015 from MR to Dentons formally requesting payment of my legal fees that were incurred in my role as a trustee of the Trusts.

35. I swear this as evidence for the Court and for no improper purpose.

SWORN BEFORE ME at the
City of Edmonton,
in the Province of Alberta
the 15 day of December, 2015

Crista C. Osualdini
A Commissioner for Oaths in and
for the Province of Alberta

Crista C. Osualdini
Barrister & Solicitor

Catherine Twinn
CATHERINE TWINN

Tab 7

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

Date on which Order Pronounced: August 31, 2011

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

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

Application

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

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

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

Notice

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

    a. The Sawridge First Nation;

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

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

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

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

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

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

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

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

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

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

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

Dates and Timelines for Advice and Direction Application

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

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

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

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

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

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

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

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

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

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

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

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

Further Notice and Service Provisions

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

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

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

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

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

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

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

    a. Legal counsel for the Applicants;

    b. Legal counsel for any individual Trustee;

    c. Legal counsel for any Beneficiaries and Potential Beneficiaries;

    d. The Sawridge First Nation;

    e. The Public Trustee; and

f. The Minister.

Variation or Amendment of this Order

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

Justice of the Court of Queen's Bench in Alberta

809772;August 31, 2011

Tab 8

This is Exhibit " A " referred to in the
Affidavit of
Paul Bujold
Sworn before me this 15th day
of February A.D. 2017

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

KURTIS P. LETWIN
Student-at-Law

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

AFFIDAVIT OF PAUL BUJOLD

Sworn on September 12, 2011

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

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

Trust") and the Sawridge Band Trust created in 1986 (hereinafter referred to as the "1986 Trust"), and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. I make this affidavit in support of an application for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust.

Issues for this Application

3. At present, there are five trustees of the 1985 Trust: Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland C. Twinn and Walter Felix Twin (hereinafter referred to as the "Trustees").

4. The Trustees would like to make distributions for the benefit of the beneficiaries of the 1985 Trust. However, concerns have been raised by the Trustees:

   a. Regarding the definition of "Beneficiaries" contained in the 1985 Trust.

   b. Regarding the transfer of assets into the 1985 Trust.

5. Accordingly, the Trustees seek the opinion, advice and direction of the Court in regard to these matters.

Background

6. In 1966, Chief Walter Patrick Twinn (hereinafter referred to as "Chief Walter Twinn") became the Chief of the Sawridge Band No. 454, now known as Sawridge First Nation (hereinafter referred to as the "Sawridge First Nation" or the "Nation"), and remained the Chief until his death on October 30, 1997.

7. I am advised by Ronald Ewoniak, CA, retired engagement partner on behalf of Deloitte & Touche LLP to the Sawridge Trusts, Companies and First Nation, and do verily believe, that Chief Walter Twinn believed that the lives of the members of the Sawridge First Nation could be improved by creating businesses that gave rise to employment opportunities. Chief Walter Twinn believed that investing a portion of the oil and gas royalties received by the Nation would stimulate economic development and create an avenue for self-sufficiency, self-assurance, confidence and financial independence for the members of the Nation.

8. I am advised by Ronald Ewoniak, CA, and do verily believe, that in the early 1970s the Sawridge First Nation began investing some of its oil and gas royalties in land, hotels and other business assets. At the time, it was unclear whether the Nation had statutory ownership powers, and accordingly assets acquired by the Nation were registered to the names of individuals who would hold the property in trust. By 1982, Chief Walter Twinn, George Twin, Walter Felix Twin, Samuel Gilbert Twin and David Fennell held a number of assets in trust for the Sawridge First Nation.

Creation of the 1982 Trust

9. I am advised by Ronald Ewoniak, CA, and do verily believe, that in 1982 the Sawridge First Nation decided to establish a formal trust in respect of the property then held in trust by individuals on behalf of the present and future members of the Nation. The establishment of the formal trust would enable the Nation to provide long-term benefits to the members and their descendents. On April 15, 1982, a declaration of trust establishing the Sawridge Band Trust (hereinafter referred to as the "1982 Trust") was executed. Attached as **Exhibit "A"** to my Affidavit is a copy of the 1982 Trust.

10. In June, 1982, at a meeting of the trustees and the settlor of the 1982 Trust, it was resolved that the necessary documentation be prepared to transfer all property held by Chief Walter Twinn, George Vital Twin and Walter Felix Twin, in trust for the present

and future members of the Nation, to the 1982 Trust. Attached as **Exhibit "B"** to my Affidavit is a copy of the resolution passed at the said meeting dated June, 1982.

11. The 1982 Trust was varied by a Court Order entered on June 17, 2003, whereby paragraph 5 of the 1982 Trust was amended to provide for staggered terms for the trustees. Attached as **Exhibit "C"** to my Affidavit is a copy of the Court Order entered on June 17, 2003 varying the 1982 Trust.

12. On December 19, 1983, a number of properties and shares in various companies which had been held by Chief Walter Twinn, Walter Felix Twin, Samuel Gilbert Twin and David Fennell in trust for the present and future members of the Nation were transferred into the 1982 Trust. Attached as **Exhibit "D"** to my Affidavit is an agreement dated December 19, 1983, transferring certain assets into the 1982 Trust. Attached as **Exhibit "E"** to my Affidavit is a transfer agreement dated December 19, 1983 transferring certain assets from the 1982 Trust to Sawridge Holdings Ltd.

Changes in Legislation – The *Charter of Rights and Freedoms* and *Bill C-31*

13. On April 17, 1982, the *Constitution Act, 1982*, which included the *Canadian Charter of Rights and Freedoms* (hereinafter referred to as the "*Charter*"), came into force. Section 15 of the *Charter* did not have effect, however, until April 17, 1985, to enable provincial and federal legislation to be brought into compliance with it.

14. After the *Charter* came into force, the federal government began the process of amending the *Indian Act*, R.S.C. 1970, c. I-6 (hereinafter referred to as the "1970 *Indian Act*"). Following the federal election in 1984, the government introduced *Bill C-31*, a copy of which is attached as **Exhibit "F"** to my Affidavit. *Bill C-31* was introduced to address concerns that certain provisions of the 1970 *Indian Act* relating to membership were discriminatory.

15. It was expected that *Bill C-31* would result in an increase in the number of individuals included on the membership list of the Sawridge First Nation. This led the Nation to settle a new trust, the 1985 Trust, within which assets would be preserved for the Band members as defined by the legislation prior to *Bill C-31*.

Creation of the 1985 Trust

16. Attached as **Exhibit "G"** to my Affidavit is a copy of the 1985 Trust dated April 15, 1985.

17. The 1985 Trust provides that the "Beneficiaries" are:

> "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."

18. The 1985 Trust effectively "froze" the definition of beneficiaries according to the legislation as it existed prior to *Bill C-31*.

19. Attached as **Exhibit "H"** to my Affidavit is a copy of a Resolution of Trustees dated April 15, 1985, whereby the trustees of the 1982 Trust resolved to transfer all of the assets of the 1982 Trust to the 1985 Trust.

20. On April 15, 1985, the Sawridge First Nation approved and ratified the transfer of the assets from the 1982 Trust to the 1985 Trust. Attached as **Exhibit "I"** to my Affidavit is a Sawridge Band Resolution dated April 15, 1985 to this effect.

21. On April 16, 1985 the trustees of the 1982 Trust and the trustees of the 1985 Trust declared:

a. that the trustees of the 1985 Trust would hold and continue to hold legal title to the assets described in Schedule "A" of that Declaration; and

b. that the trustees of the 1985 Trust had assigned and released to them any and all interest in the Promissory Notes attached as Schedule "B" of that Declaration.

Attached as **Exhibit "J"** to this my Affidavit is the Declaration of Trust made April 16, 1985.

22. Based upon my review of the exhibits attached to this my affidavit and upon the knowledge I have acquired as Chief Executive Officer of the Sawridge Trusts, I believe that all of the property from the 1982 Trust was transferred to the 1985 Trust. Further, there was additional property transferred into the 1985 Trust by the Sawridge First Nation or individuals holding property in trust for the Nation and its members.

23. The transfers were carried out by the trustees of the 1982 Trust under the guidance of accountants and lawyers. The Trustees have been unable to locate all of the necessary documentation in relation to the transfer of the assets from the 1982 Trust to the 1985 Trust or in relation to the transfer of assets from individuals or the Nation to the 1985 Trust.

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

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

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

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

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

Creation of the 1986 Trust

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

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

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

Identification of Beneficiaries Under the 1985 Trust and the 1986 Trust

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

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

Current Status

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

the types of payments the Trustees should consider making from the trusts. Attached hereto as **Exhibit "L"** is a summary chart of recommendations taken from the said report.

35. Having undertaken the consultation process, the Trustees have a desire to confer more direct benefits on the beneficiaries of the Sawridge Trusts. The Trustees require clarification and amendment of the 1985 Trust such that the definition of "Beneficiaries" in the 1985 Trust is varied to make it consistent with the definition of "Beneficiaries" in the 1986 Trust. In this way the members of the Nation are the beneficiaries of both the 1985 Trust and the1986 Trust and the assets that once belonged to the Nation can be distributed through the trusts to the members of the Nation.

how/how payments be made has discrimination contained

SWORN before me at Edmonton
in the Province of Alberta,
on the 12 day of September, 2011.

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

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

Paul Bujold

809051_2;September 12, 2011

A

Tab 9

COURT FILE NO: 1103 14112

COURT: QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

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

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

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

---

QUESTIONING ON AFFIDAVIT

OF

PAUL BUJOLD
SWORN JANUARY 9, 2019

Ms. D. Bonora — For the Applicants

Ms. J. Hutchison — For the Public Trustee

Ms. C. Osualdini — For Catherine Twinn

Susan Stelter — Court Reporter

Edmonton, Alberta

11 February, 2019

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

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

know of, no.
Q Okay. So then by January of 2017 all of the possible names were identified to the Trustees?
A Barring someone else falling out of the sky, yes.
Q But as far as --
A As far as we know, no.
Q No additional names have come forward since January of 2017?
A No.
Q You also mentioned that there is three different lists floating around, I think floating around was your words, about possible beneficiaries or persons of interest. Do you recall that?
A Yes.
Q What steps have the Trustees taken to resolve that confusion around these various lists?
A They have had settlement meetings with the parties.
Q Okay.
A That is basically it. I mean they have gone through the list themselves. They have presented their views on the various persons on the various lists to the parties, and it hasn't been resolved.
Q Okay. So beyond settlement meetings among the parties in this litigation have the Trustees attempted to obtain judicial direction?
A No.
Q Mr. Bujold, do the Trustees have a position on who the

current beneficiaries of the 1985 Trust are under the existing definition?

A To the extent to which they can identify those persons I suppose they would have some estimate of who would qualify.

Q Okay. I'm taking from your answer that you are not certain if the Trustees have a position?

A Well, they don't. They don't have a position, because their position is until there is a valid definition there can't be a valid list.

Q Okay. So the Trustees are taking the position that until the court makes a determination in this litigation they have no obligation to identify the current beneficiaries?

A That is correct.

Q Just give me a moment. I'm trying to not be repetitive in questions.

A Okay.

Q Mr. Bujold, you spoke about the Trust receiving a large number of applications probably about 2009 in response to an advertisement put out by the Trustees?

A It would have been in 2010, '11. Not '9.

Q Okay. Do you recall if Angie Ward was one of the individuals that sent in an application?

A I don't off the top of my head.

Q Because the reason that I ask is in Exhibit B to your Affidavit individual Number 72 on that list is Angie

efforts to follow up with these individuals to see if they received their mail?

A No.

Q I guess to short-circuit this is it fair to say you made no efforts to follow up with these individuals?

A No.

Q Sorry, is that not a fair statement or you agree with me?

A No, it is a fair statement, yes.

Q Okay. And you would agree with me that the Trustees didn't provide any paid access to legal advice for these individuals?

A That is correct.

Q I understand that over October 13th and 14th the Trustees held an annual general meeting for the 1986 Trust beneficiaries?

MS. BONORA: We are not answering questions about the '86 Trust. It is irrelevant to this action.

MS. OSUALDINI: It is relevant in the sense that input is being sought from the 1985 beneficiaries around the same time. So I want to confirm that that in fact happened?

MS. BONORA: We are not answering questions about the '86 Trust.

MS. OSUALDINI: Okay.

Q MS. OSUALDINI: But you would agree with me the Trustees made no efforts to have a general meeting for

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.

Q Are you aware of any discussions with the Trustees about the implications of the split vote on the two definitions?
A A split vote in which way?
Q Well, the Trustees proposed two different definitions or possible definitions?
A Right.
Q So was there any discussion amongst the Trustees about the implication if the vote was split between the two definitions in any sort of proportion?
A No, Section 42 of the Trustee Act doesn't provide for a split definition, it provides for a 100 percent definition.
Q So the Trustees knew that if 100 percent approval wasn't obtained on any particular definition that it wasn't going ahead?
A That is right.
Q And are you aware that Haitina Twinn is Chief Roland Twinn's wife?
A I am.
Q Are you aware that both Chief Roland Twinn and Haitina Twinn voted?
A Yes.
Q And you are aware that their votes were different?
A Yes.
Q Are you aware of any discussion of the Trustees about the difference in their voting?

A No.
MS. OSUALDINI: Can I take about five minutes right now.
(Questioning adjourned.)
(Questioning resumed.)
Q MS. OSUALDINI: Thank you, Mr. Bujold. We just took a short break. You acknowledge that you are still under oath?
A I do.
Q Just one point I wanted to clarify with you. I believe your evidence to me about the mailing list that is identified at Exhibit B of your Affidavit, is that all of the persons who are currently minors or were minors at the inception of the 1103 litigation, all of their letters were sent to the office of the OPGT; is that correct?
A That is correct.
Q Okay. It is my understanding, Mr. Bujold, that you were looking for mailing addresses for some of the individuals who were minors at the outset that are now adults, such as Kaitlin Twinn?
A Shelby.
Q No, Kaitlin.
A I wasn't looking for Kaitlin, I was looking for Shelby's address.
Q Do you want to --
A Just --

EXHIBITS

UNDERTAKINGS

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

Chantelle Monson

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

Janet and Crista

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

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

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

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

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

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

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

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

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

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

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

Please let us know if you have any questions.

Doris

DENTONS Doris C.E. Bonora
Partner

D +1 780 423 7188
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Bio | Website

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

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

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

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

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

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

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

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

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

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

Yours truly,

Janet L. Hutchison

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

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

Chantelle Monson

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

Crista

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

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

Doris

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

Doris,

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

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

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

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

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

Crista

Crista Osualdini | Partner | direct 780.482.9239 | toll free 1.800.567.9200 | fax 780.733.9723
McLennan Ross LLP | www.mross.com | BIOGRAPHY | Member of Meritas
600 McLennan Ross Building, 12220 Stony Plain Road, Edmonton, AB T5N 3Y4

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

Janet and Crista

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

Please provide us the definition that you wish to send out

Crista,

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

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

May we please have your definition by Wednesday

Doris

DENTONS

Doris C.E. Bonora
Partner

D +1 780 423 7188
doris.bonora@dentons.com
Bio | Website

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

Salans FMC SNR Denton

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

Chantelle Monson

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

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

Doris

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

DENTONS
Doris C.E. Bonora
Partner

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

> Doris,
>
> Thank you for providing this confirmation, including confirmation that the OPGT has the ability to vote on behalf of the persons it represents for a s. 42 definition amendment.
>
> We had a few additional questions
>
> 1. To whom is this mail out being sent? Who are the trustees deeming to be "identified potential beneficiaries". Can we please be provided with the mailing list.
> 2. What steps are the trustees' employing to ensure the accuracy of the mailing list, both in terms of who is included and their mailing information.

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

Thank you and we look forward to your response.

Crista Osualdini | Partner | direct 780.482.9239 | toll free 1.800.567.9200 | fax 780.733.9723
McLennan Ross LLP | www.mross.com | BIOGRAPHY | Member of Meritas
600 McLennan Ross Building, 12220 Stony Plain Road, Edmonton, AB T5N 3Y4

<image6d2eb1.JPG>

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

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

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

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

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

Please let us know if you have any questions.

Doris

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Doris C.E. Bonora
Partner

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

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

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

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

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

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

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

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

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

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

Yours truly,

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Tab 10

III. COMPLETELY AND INCOMPLETELY CONSTITUTED TRUSTS

Executed and executory trusts are completely constituted when the intention to create a trust is ascertained, the trust property is clearly defined and in the trustees' hands, and the trust "objects"[43] are clear. A trust is incompletely constituted on the other hand when every trust element is clear and precise but the settlor has not transferred the property to the trustees. If neither the trustees nor the trust beneficiaries are able to compel the settlor or his representatives to transfer the property, the trust must fail since there is nothing for its terms to operate upon. A trust which is completely constituted not only has clarity and precision of language, property and objects, but the property is vested in the trustees, and the trust is therefore operative.[44]

IV. LAWFUL AND UNLAWFUL TRUSTS

Any transaction or act which contravenes public policy, the common law or statute of the realm, is unlawful. The same principle applies to trusts. A trust is unlawful if its object is some such end as the encouragement of immoral behaviour which is contrary to public policy, if its terms contravene a common law rule, such as the rule against perpetuities,[45] or if it violates a statute, such as a *Fraudulent Conveyances Act* or the *Bankruptcy and Insolvency Act*.[46] If a trust is unlawful, it is void either *in toto* or as to that part which is contrary to law: for example, its entire object is the funding of a terrorist organization, or out of a number of successive interests there may be one limitation contravening the perpetuity rule.

V. PRIVATE AND PUBLIC TRUSTS

When the objects of a trust are specific and ascertainable persons, for example, to X for life, "remainder to his first son at 21", the trust is said to be a private trust. A trust is still private when it is in favour of a class, such as "the children of A at 21 equally and absolutely". The connection or nexus here is with a specific person, A. But settlors often wish to benefit persons at large, or persons living within a defined area, being motivated by a desire to achieve some benefit to that section of the public.

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[43] I.e., the beneficiaries of the trust, or the purpose or purposes to be carried out by the trustees. Clarity of objects will exist if, though clarity is lacking in detail, the trust fund is dedicated to exclusively charitable purposes.

[44] A trust is *created* or *set-up*, a verb often used in speech, when there is an intention to create a trust, certainty of property, certainty of objects and the property is vested in the trustees. An incompletely constituted trust, when the settlor cannot be compelled to transfer the property to the intended trustees, is therefore created only at the moment when the gift is completed (assuming an intention to make an immediate gift), that is, when the property is effectively transferred to the trustees. See further chapter 6, Part I, and *Scott and Ascher*, §§5.2.1 and 5.2.2.

[45] *Infra*, chapter 8, Part IV B.

[46] *Infra*, chapter 8, Part III.

silent, however, the courts over the years have evolved heads or principles of public policy and, whatever may be their present-day attitudes towards recognizing new heads of public policy, acting with those principles in mind they have declared void a wide range of conditions, covenants, and trust objects.

In the sensitive and difficult field of public policy, however, it should not be forgotten what a straitjacket the courts have felt obliged to impose upon themselves. As Rowell C.J.O. concluded in *Re Millar*:[3] "It is clear that no evidence can be received as to what is public policy or the effect of the bequest in question. It is a question of law to be determined by the Court." Though the courts are sensitive to changing *mores* and values in society, it is probable that they continue to regard precedent as laying down the heads of public policy. How far then may the courts consider a change in public opinion as entitling them to depart from precedent? And how far may they develop new heads of public policy which go beyond, or are distinct from any reported precedent? There are both conservative and more radical views on these questions, questions which have been thrown into relief by the quickened pace of social and economic change during recent and present times.

Fortunately, perhaps, that change has brought with it another development, and that is the markedly increased activity of legislatures throughout the common law world, in passing social policy legislation in response to the pronounced concerns of contemporary public opinion. With gathering pressure over the years, many societies sought reform of family law, particularly as to the property relations of husband and wife, both within and upon the termination of marriage.

Egalitarianism has also resulted in a public desire to see the dignity of the individual reflected in the removal of all traces of differing status between persons. The stigma of lunacy, for instance, has given way to a public regard for the needs of the less fortunate who are mentally ill, and illegitimacy, which society for centuries shunned as the outcome of immoral conduct, is now increasingly seen from the child's position. Persons are to be treated equally, regardless of the parental relationship that gives rise to birth. Also regard for human rights has cast a more pervasive disapproval upon those who seek to impose personal prejudices, not only as to the circumstances of birth, but as to race, religion or colour upon the lives of others.

Canadian jurisdictions have registered all these concerns. Since the mid-1960s law reform bodies and legislatures across the country have been actively involved in the discussion and enactment of reform legislation, and there is little doubt that the thrust of social policy reform is now widely seen, and widely accepted, as the responsibility of Parliament and the provincial and territorial legislatures. Less and less do many see the reflection of public policy as a task of the courts.[4] Others have

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[3] [1937] O.R. 382, [1937] 3 D.L.R. 234 (Ont. C.A.), affirmed (1937), [1938] S.C.R. 1, [1938] 1 D.L.R. 65 (S.C.C.) at 401 [O.R.].

[4] E.g., see the opinion of Wilson J. in *Belanger v. Pester* (1979), 6 E.T.R. 21, (sub nom. *Re Horinek Estate*) 108 D.L.R. (3d) 84 (Man. Q.B.) at 32 [E.T.R.]. Duff C.J.C. in *Re Millar* (1937), [1938] S.C.R. 1, [1938] 1 D.L.R. 65 (S.C.C.) at 5-6 [S.C.R.] took a cautious approach to invoking public policy and this approach has been referred to with approval in numerous subsequent cases. See, e.g., *St-Hilaire v. Canada (Attorney General)*, [2001] 4 F.C. 289, 204 D.L.R. (4th) 103 (Fed. C.A.), leave to appeal refused (2001), 285 N.R. 392 (note) (S.C.C.); *65302 British Columbia Ltd. v. R.*, (sub nom. *65302 British Columbia Ltd. v. Canada*) [1999] 3 S.C.R. 804 (S.C.C.) at 838-41 (*per* Iacobucci J.); *Stewart*

Such a trust is known as a public or charitable trust. The essence of a public trust is that the trust objects, or those who will benefit from the trust, are the public at large or a significantly sizeable section of the public. Questions often arise as to whether the beneficiaries of a particular would-be charitable trust have a common nexus or relationship with an individual, or whether the trust is really for the public benefit as a public or charitable trust.[47]

A charitable trust may be for a class of the public, such as the poor of Toronto or immigrant visible minority women in Vancouver; on the other hand it may have as its object the carrying out of a purpose. The settlor may transfer funds to trustees "for the building of a recreation hall for the Boy Scouts of Windsor," or "for the advancement of education in Canadian schools." Such is a charitable purpose trust. A settlor may also wish to promote a purpose which is not charitable, for example, the erection by a municipality of a suitable memorial to his parents; this would be a non-charitable purpose trust.[48]

VI. STATUTORY TRUSTS

Trusts created by statute, both federal and provincial, are, of course, familiar in Canada. One of the most familiar of these trusts is that which gives the Crown, either federally or provincially, the consequent status of a secured creditor in the bankruptcy of a person who is under the statutory duty to remit to the Crown moneys collected from third parties. Such moneys may represent, for instance, deductions by the employer from an employee's salary or wages as the employee's statutorily required contribution to the Canada Pension Plan, payments under the federal employment insurance scheme, or for income taxes.[49] Moneys are due to the Crown by right of a province, for example, when the vendor of goods or services, as he is required to do, collects for the Crown a tax on the sale. Statute has also enabled the Crown, in some

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[47] But not everything that is for the benefit of the public is necessarily charitable, and if the trust object is not charitable then it will not be a public trust. The word "charitable" is, in fact, dominant; the usual reference is to "a charitable (or public) trust". An example: a bequest for the education of the Canadian public in the principles and policies of the Liberal Party is not within the legal definition of charity. Therefore, such a bequest does not create a valid "charitable (or public) trust".

[48] Not being charitable, the trust is not public either. There are two elements in a charitable trust: (a) the purpose is included within the law's description of charity, and (b) it is for the benefit of the public.

[49] See, e.g., *KRA Restaurants Ltd. v. Toronto Dominion Bank* (1977), 25 N.S.R. (2d) 605, 74 D.L.R. (3d) 272 (N.S. T.D.); *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182, 108 D.L.R. (3d) 257 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.* (1997), 143 D.L.R. (4th) 385 (S.C.C.); and *Ministre du Revenu national c. Caisse Populaire du bon Conseil*, 2009 CarswellNat 1569, [2009] 2 S.C.R. 94, (sub nom. *Caisse populaire Desjardins de l'Est de Drummond v. R.*) 2009 D.T.C. 5106, [2009] 4 C.T.C. 330, 309 D.L.R. (4th) 323 (S.C.C.). In terms of the effect of these trusts, H. MacDonald J. in *Canada (Attorney General) v. Thorne Riddell Inc.*, [1982] 6 W.W.R. 572, 140 D.L.R. (3d) 740 (Alta. Q.B.) at 575[W.W.R.], expressed the view that it did not matter whether they are categorized as "statutory trusts", "express trusts" or "constructive trusts." The effect is the same.

It is also against society's interests that persons should act fraudulently. A party to a transaction or disposition may, of course, act fraudulently when he is in the act of setting it up. No society could tolerate this kind of abuse of its technical rules, and any activity which is vitiated by fraud will of course be binding on the innocent party only if he wishes to overlook the fraud when it comes to light. Though the technical rules have been satisfied, the object of the transaction or disposition may be to defraud third parties. This cannot be in society's interest. A disposition which is designed, for example, to cheat the taxing authorities or to prevent property falling into the hands of duly entitled creditors would be subject to the rules protecting society's overall interests. It is against a common law rule to defraud the federal or provincial tax gathering authorities, and legislative enactments originating in the Elizabethan period render a transaction of disposition capable of being set aside if its object is to defraud creditors or claimants in bankruptcy.

Finally, there are rules of law affecting dispositions[1] of property. These rules reflect values which are thought to rank high in society's interest, and no disposition of property may contravene them. For example, it is thought that it is in society's interests that no property ought to be kept out of free circulation by the device of giving limited interests to successive generations. Society is prepared to allow an owner to provide for those persons or purposes that he considers merit his largesse, and in so doing to employ the device of successive interests, but it limits him from imposing his control over the property for too long a period from the moment that his alienation takes effect.

We will now turn to examine these rules, in particular as they affect the law of trusts.

II. TRUSTS CONTRARY TO PUBLIC POLICY

A. Public Policy and the Courts

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.[2] In areas where the legislature has been

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[1] See further, *infra*, Part IV.

[2] These first two sentences on declaring a disposition of property void on the ground that it contravenes public policy were quoted with approval by Robins J.A. in *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1990 CarswellOnt 486, 74 O.R. (2d) 481, 69 D.L.R. (4th) 321 (Ont. C.A.) at para. 36; and in *University of Victoria Foundation v. British Columbia (Attorney General)*, 2000 CarswellBC 529, (sub nom. *University of Victoria v. British Columbia (Ministry of the Attorney General)*) 185 D.L.R. (4th) 182 (B.C. S.C. [In Chambers]) at para. 20.

interests of public policy[51] they will not enforce conditions which interfere with husband and wife relations, or meddle in the discharge of parental duties.[52] There is also precedent laying down that conditions whose object or effect is to create racial discrimination are against public policy. However, the common law has not regarded restraint upon freedom of religion as being contrary to public policy, though if the condition also involves interference with husband and wife relations,[53] or with the discharge of parental duties,[54] it will contravene that policy.

(b) Conditions Precedent and Subsequent

What effect has the unenforceability of the condition upon the gift? The first thing to notice is that a condition which contravenes public policy is not only unenforceable, it is void. The effect of the voidity depends upon the type of condition in question. Conditions are either precedent or subsequent.[55] A condition is precedent when it must be fulfilled before the gift takes effect. For example: "I leave $5,000 to George on his attaining 25 years, provided he is a baptised member of the Episcopal Church at that time." The intention of the testator is that this condition must be satisfied before George can take the $5,000. Moreover, the condition precedent must be satisfied at the moment when the gift would otherwise take effect. In our example, it is not open to George to be baptised into the Episcopal Church at the age of 30, and then claim the gift.[56] A condition is subsequent when it operates so as to bring to a close a gift which has already taken effect. In technical language, the condition when fulfilled divests a gift which has already vested in possession.[57] For example: "I give and devise my house to Thomas, but if he shall ever use any part of the house for commercial purposes, then the house is to go to Harry."[58] In short, a condition

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[51] Testamentary freedom of disposition has itself been described as a principle emanating from public policy: *Blathwayt v. Cawley* (1975), [1976] A.C. 397, [1975] 3 All E.R. 625 (U.K. H.L.), an opinion expressly or impliedly supported by each of the five Law Lords. *Blathwayt v. Cowley* had been referred to in Canada for this point – see, e.g., *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1990 CarswellOnt 486, 69 D.L.R. (4th) 321, 38 E.T.R. 1 (Ont. C.A.); and *University of Victoria Foundation v. British Columbia (Attorney General)*, 2000 CarswellBC 529, 73 B.C.L.R. (3d) 375, (sub nom. *University of Victoria v. British Columbia (Ministry of the Attorney General)*) 185 D.L.R. (4th) 182 (B.C. S.C. [In Chambers]). *Infra*, Part II C 5 a.

[52] It is probable that conditions restraining would-be donees or legatees from marriage belong to a bygone era, while interference in the relations of persons in common law marriage or same-sex marriage is today contrary to public policy.

[53] See *Church Property of Diocese of Newcastle (Trustees of) v. Ebbeck* (1960), 104 C.L.R. 394 (Australia H.C.), a powerfully argued decision of the High Court of Australia. *Infra*, Part II C 5 c.

[54] *Re Sandbrook*, [1912] 2 Ch. 471 (Eng. Ch. Div.); *Re Borwick*, [1933] Ch. 657 (Eng. Ch. Div.). The notion is that the parent may be deflected from making the best decision when a condition as to religious belief is imposed on the infant or minor. The validity of this public policy principle was challenged in *Blathwayt v. Cawley*, *supra*, note 57. See further, *infra*, Part II C 5 c.

[55] As to the requirement of certainty in a condition, see, *infra*, Part II C 1 e.

[56] For an example from the authorities, see *Phinney v. Moore* (1957), 8 D.L.R. (2d) 541 (N.S. S.C.).

[57] It may also divest a gift which has vested in interest, though not in possession. E.g., *Clarke v. Darraugh* (1884), 5 O.R. 140, and *Re Thorne* (1922), 22 O.W.N. 28. Divestment presupposes, of course, the exercise of the power of re-entry.

[58] For another example, see *Re McBain* (1915), 8 O.W.N. 330.

precedent is a qualification that the donee must meet; the condition subsequent is a forfeiture.

(c) Effect of a Void Condition Precedent vs. a Void Condition Subsequent

The common law rule was that, if a condition precedent is void, the entire gift fails, because the condition can never occur which will allow the gift to commence or take effect. If a condition subsequent is void, the common law rule strikes out the condition, and therefore the gift continues whether or not the circumstances described in the condition do in fact occur. The common law rule as to the effect of conditions was partly set aside, however, when in the eighteenth and nineteenth centuries the English Courts of Chancery took over the rule of the ecclesiastical courts. The latter courts formerly had jurisdiction over personal property, and their rule was that, if the condition precedent was void for *malum in se*, the entire gift failed, thus agreeing with the common law result, but that, if the condition precedent was void for *malum prohibitum*, the void condition was struck out and the gift took effect as if there had been no such condition. Since the time of the adoption of the ecclesiastical rule into the common law, however, the judges have never liked the illogical distinctions of the outcome. Why should some conditions precedent bring down with them the intended gift, while others are struck out leaving the intended gift to take effect free of the condition?

Not only is there the unjustifiable distinction between gifts of real property and gifts of personal property, but the distinction between *malum in se* and *malum prohibitum* has never been precisely clarified. Based as the latter distinction is upon moral values, it is possible even that it defies such clarification. Broadly, it seems to distinguish the fundamental wrong which would be condemned in any society from the wrong of which the law disapproves, but which in moral terms is of minor significance. In *Quinn v. Eastern Trust Co.*,[59] for example, the Prince Edward Island Appeal Court held a condition void where the testator made a gift to his housekeeper "if she is still living away from [J.M.] her husband." Campbell C.J. construed this as a condition precedent, and held that it was *malum prohibitum*.

(d) Condition vs. Determinable Interest

Whether a condition is precedent or subsequent is a question of intent, to be discovered by construction of the language employed in the instrument. Very fine niceties of language will lead to different constructions, as the cases show,[60] and this is consequently an area of the law which can provide a good deal of practical difficulty. It has first to be discovered whether the testator's language should be construed as importing words of limitation in his gift. In such a situation, though the testator may apparently have used the language of condition, he is in fact describing the quantum of the gift or, in other words, how long the gift should last. For example,

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[59] (1963), 48 M.P.R. 134, 39 D.L.R. (2d) 743 (P.E.I. S.C. [In Banco]).

[60] See, e.g., the *Quinn* judgments, *ibid.*

IV. LEGAL MEANING OF CHARITY

There is no legal definition of charity. Common law societies have long relied upon a judicial understanding as to which activities merit the description of charitable.[286] Consequently, one can describe the attributes and the scope of charity; one cannot define it.

The essential attribute of a charitable activity is that it seeks the welfare of the public; it is not concerned with the conferment of private advantage. However, the law also looks for a certain generic character in charitable activity, and to explain this one has to go back through the centuries. As the impact of the Reformation was absorbed in sixteenth century England, and secular activities for the community welfare grew, it became clear that piety no longer described the scope of charitable purposes as it had done in the days of the European-wide faith. Some enumeration was needed of the activities which were thought to further the public good. As events turned out this was provided, no doubt without any such legislative intent, by the preamble to the *Statute of Charitable Uses* in 1601. In those few lines were listed by Parliament, for the purposes of the Act, those activities which the legislature felt to constitute the scope of what is charitable, and for over three and a half centuries that preamble has been the judicial lodestar as to what sort of activities (or trust purposes) fall within the common understanding. The described activities of that preamble have for many years been outdated, but the courts – left alone to develop the concept of charity – have constantly analogized contemporary activities with the activities of the preamble, and thus kept the law abreast of changing institutions and values in society. Finally in 1891 in *Pemsel v. Special Commissioners of Income Tax*,[287] Lord Macnaghten sought to sum up and categorize the diverse activities which had come to be recognized as charitable. He found they fell into four groups: the relief of poverty, the advancement of education, the advancement of religion, and miscellaneous activities beneficial to the community.[288] In addition, of course,

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[286] Only relatively recently have statutory provisions defining "charitable purposes" begun to appear and these are based on the historical judicial understanding and, subject to amendments of these definitions, further expansion of these statutory definitions will depend on judicial interpretation. See, e.g., the English *Charities Act*, 2006, c. 50, s. 2; and the *Charities Accounting Act*, R.S.O. 1990, c. C.10, s. 7.

[287] [1891] A.C. 531 (U.K. H.L.).

[288] This four-part categorization of "charitable purposes" is the basis of the otherwise extended list of purposes in subsection 2(2) of the English *Charities Act*, 2006, c. 50. Paragraphs (a), (b) and (c) of subsection 2(2) refer to the first three heads of "relief of poverty," "advancement of education," and "advancement of religion." Paragraphs (d) through (f), (i) and (k) of that subsection refer to matters that have been held to be charitable purposes under the fourth head of "other purposes beneficial to the community." Paragraph (m) in conjunction with subsection 2(4) provides guidance for development of the meaning of "charitable purpose" through judicial interpretation adopting approaches for which there was existing judicial authority. In subsection 1(3) it is provided that a reference to the *Charitable Uses Act*, 1601, or the preamble to that Act, shall be construed as a reference to s. 2 of the Act. See further on the *Charities Act*, *infra*, notes 340, 359, 526, 644, 841, 894, and 903.

For a paper on the Broadbent proposals ("Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector", 1999) in Canada and the background to the Charities Bill in England, see Donovan Waters, "What *is* Charity All About?", Second National Symposium

every such activity had to be concerned with the benefit of the public, or some significantly large section of the public.

These, then, are the two attributes that are required of each charitable activity today; it must fall within one of Lord Macnaghten's heads of charity, and be concerned with the public benefit.

A. Subject-Matter and Public Benefit

1. The Relief of Poverty

(a) Nature of Poverty

"The relief of aged, impotent, and poor people" is one of the charitable objects set out in the preamble to the *Statute of Elizabeth*, 1601, and since that time there has never been any doubt in the courts that such activity lies at the heart of charity. Over the years, however, this activity has crystallized into the relief of poverty, and it therefore became an independent head of charity in Lord Macnaghten's four-part classification of charity in *Pemsel v. Special Commissioners of Income Tax*.[289] Indeed, the relief of poverty was the first head. In Canada most common law provinces continue to work directly with the language of the Elizabethan preamble, as do the English courts themselves.[290] However, as Williams C.J.Q.B. observed in *Re Angell Estate*,[291] the Macnaghten classification is itself a rationalization of the Elizabethan preamble and the authorities which have applied the language of the preamble, and consequently the principles applied, are the same throughout common law Canada.

What is poverty? There are two problems here. First, what forms of want are comprised within the relief of poverty as a head of charity, and, secondly, whether poverty refers only to those persons without any other means of support. The interrelationship between these two issues can be both subtle and difficult. An excellent

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on Charity Law, C.B.A., Toronto, April 14, 2004. No signs are evident that an agreed statutory definition or even description of charity is likely to appear in the foreseeable future in common law Canada.

The *Pemsel* case also underlines the necessity that an object that is charitable also be for the benefit of the public at large or a sufficient section of the public. See the CRA paper describing, and seeking viewpoints from Canadians concerning, public benefit: "Charities 2004/09/30 – Consultation on the Proposed Guidelines for Registering a Charity: Meeting the Public Benefit Test". *Supra*, note 191, for the CRA website. See also the English *Charities Act*, 2006, c. 50, s. 3 ("The 'public benefit' test") and s. 4 ("Guidance as to operation of public benefit requirement").

289 *Ibid.*

290 Under the *Mortmain and Charitable Uses Act*, R.S.O. 1980, c. 297, legislation in force in Ontario since the nineteenth century, the Macnaghten classification was employed for the purposes of the Act. However, the whole Act is now repealed: S.O. 1982, c. 12.

291 (1955), 16 W.W.R. 342, 63 Man. R. 401 (Man. Q.B.). See also, *infra*, note 940.

latures and not only must there be considerable doubt as to how a court of a reform jurisdiction would approach the question, but questions remain in suggesting what "specific" non-charitable purposes the section will be held to include.[784] It is obviously unsatisfactory if the section does indeed draw a distinction between a specific non-charitable purpose containing charitable elements on the one hand, and charitable and specific non-charitable purposes linked by a conjunctive or disjunctive on the other hand. Too much uncertainty surrounds the operation of the section; its random effect upon imperfect trust provisions more than suggests the need for a policy. Legislation in this area is certainly needed.

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.[785] This was, and remains in jurisdictions where

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[784] In *Wood v. R.*, *supra*, note 771, the testator's trust was in favour of the "religious, literary and educational" purposes among a particular institution's objects. These purposes were held not to be "specific," in the sense that they were not *certain.* It could not be said, given such undefinable terms, which, if any, of the objects satisfied the test. However, though the *Perpetuities Act* did not save the trust, the institution was concerned *inter alia* with the advancement of education. The trust fund was therefore permitted to be expended on that charitable object. With that sole purpose the trust was valid as a charitable trust.

[785] In *Mills v. Farmer* (1815), 19 Ves. 483, 34 E.R. 595 at 485-86 [Ves.], Lord Eldon remarked:

> I consider it now established, that although the mode, in which a legacy is to take effect, is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote, that charity is the legatee, the Court does not hold, that the mode is of the substance of the legacy; but will effectuate the gift to charity, as the substance; providing a mode for that legatee to take, which is not provided for any other legatee.

This passage was cited by MacDonald J. in *Re Young Women's Christian Assn. Extension Campaign Fund*, [1934] 3 W.W.R. 49 (Sask. K.B.). As to the source and nature of the court's jurisdiction, see *Re Conroy Estate*, [1973] 4 W.W.R. 537, 35 D.L.R. (3d) 752 (B.C. S.C.). See also the discussion of alternative schemes in Rachael P. Mulheron, *The Modern Cy-près Doctrine* (London; U.C.L. Press, 2006), at pp. 26-30.

In *Lee v. North Vancouver School District No. 44*, 2011 CarswellBC 344, 67 E.T.R. (3d) 274 (B.C. S.C. [In Chambers]), although he considered whether an administrative scheme could be provided under the inherent jurisdiction, Davies J. was of the view that subss. 3(3) and 3(4) of the *Charitable Purposes Trust Preservation Act*, S.B.C. 2004, c. 59, give the court the authority to make an order for the administration of the trust so long as the trust is a charitable purpose trust, and the property held on trust meets the definition of "discrete purpose charitable property" under s. 1 of the Act. The Act requires a separate holding and administration of this "discrete . . . property" from the other property of the trustee held in title, and a sole dedication of that property to advance the specified charitable purpose to the exclusion of any usage to satisfy another trust's purpose. The court may order that this property be used to further any purpose consistent with the "discrete" charitable

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.[786] 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.[787]

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.[788] 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[789] 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

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purpose. Effectively, this legislation renders statutory the case law as it was understood to be, prior to *Re Christian Brothers of Ireland in Canada*, 2000 CarswellOnt 1143, 47 O.R. (3d) 674, 184 D.L.R. (4th) 445 (Ont. C.A.), leave to appeal refused 2000 CarswellOnt 4333, 2000 CarswellOnt 4334 (S.C.C.), reconsideration refused 2002 CarswellOnt 1770, 2002 CarswellOnt 1771 (S.C.C.) (see, *infra*, Part VIII of this chapter), both as to the dedication of distinct property to a separate trust purpose or purposes, and as to the availability of a *cy-près* order.

[786] *Re Dominion Students' Hall Trust* (1946), [1947] Ch. 183 (Eng. Ch. Div.). See *Tudor on Charities*, 5th ed. (London: Sweet & Maxwell, 1929) at chapter 5 'The Jurisdiction of the Court' (174-193), for a discussion of the inherent scheme-making power. The "administrative" scheme is a description adopted in the twentieth century; prior to that, and even today, what the court would approve was largely undefined, and not categorized. The courts attempted to save public trusts wherever that was reasonably possible.

In 1960 in England, legislation effectively replaced the inherent administrative scheme jurisdiction.

[787] *Re Stillman Estate* (2003), 5 E.T.R. (3d) 260 (Ont. S.C.J.) *per* Cullity. J., who characterized the nature of this power as concerned with "administrative machinery" (at 273).

[788] See *Tudor on Charities*, *supra*, note 786, at 334-38.

[789] This term is used here to include all associations, whether incorporated or unincorporated. The rules governing gifts on trust for purposes or institutions are for all practical purposes the same as those applied to absolute gifts for charitable institutions.

once would have had, they cannot be interfered with.[868] That is to say, impossibility and impracticability have been kept within narrow limits, a restriction which has had particular significance in the handling of *cy-près* applications on the basis of supervening impossibility and impracticability.[869]

Initial impossibility or impracticability of the object is assessed at the time when the instrument of gift takes effect.[870] In the case of an *inter vivos* gift this means the date of the deed or other instrument; in the case of a will, the date of the testator's death. This is the date on which the gift vests, unless the gift is contingent on some future event. An immediate gift for charity will obviously be assessed as at this time, because it vests both in interest and in possession when the instrument of gift takes effect. Even if the gift does not vest in possession upon the instrument taking effect, it is as of that date that the assessment takes place.[871] This is an important rule because most of these problems of impossibility and impracticability occur in wills, and very often the gift to charity takes the form of a remainder interest after a life interest, which, in many cases, is in the testator's widow. The widow may survive for many years after her husband's death, but, if it is found on the widow's death that events, as they then are, have overtaken the charitable gift or that it is in some other way impossible or impracticable at that time to carry out the trust object, the court will nevertheless require impossibility or impracticability to be established as of the date of the husband's death before approving a *cy-près* scheme. Therefore, as an initial impossibility or impracticability, a general charitable intent will have to be established as if the charitable gift had taken immediate effect upon the testator's death. The same rule appears to apply even if the vested remainder to charity is defeasible on some later event, for instance, the birth of children to a life tenant.[872] It follows that the power in the trustees merely to draw on capital in favour of the life tenant will not change the timing of assessment.

There is little but doctrinal logic to commend this timing in the case of charitable gifts other than those which are immediate.[873] Not only may the courts be prepared

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[868] This was also the view expressed in *Re Connolly Estate*, 2006 CarswellPEI 69, 262 Nfld. & P.E.I.R. 51, 31 E.T.R. (3d) 81 (P.E.I. T.D.) where it was said that there was no need to employ *cy-près* since there were still persons who would qualify to receive benefits from the trust.

[869] On the legislative response in England see *Tudor on Charities*, 9th ed. (London: Sweet & Maxwell, 1995) at para. 11-046 (see also the cases cited in *Tudor on Charities*, 6th ed., *supra*, note 867, at 243, for the position prior to the legislation). The *Charities Act*, 1960, has been somewhat amended by the *Charities Act*, 2006, s. 15, but not so as to affect the comment in the text above. No statutory change to the *cy-près* doctrine has been made in Canada, except possibly for a limited change in Nova Scotia which in any event has no effect on the point now under examination. For the Nova Scotia legislation, see, *infra*, text accompanying notes 922-926. For a recommended court power to vary charitable trusts, see British Columbia Law Institute, "A Modern Trustee Act for British Columbia" BCLI Report No. 33, October 2004. The power is contained in s. 65 of the proposed Act. For the meaning of supervening impossibility, see, *infra*, Part VI B 4.

[870] See *Tudor on Charities*, *supra*, note 867, at para. 11-003.

[871] *Re Tacon*, [1958] Ch. 447, [1958] 1 All E.R. 163 (Eng. C.A.).

[872] *Ibid.*

[873] The doctrinal logic is that this is the moment for determining whether a testamentary gift, including a would-be charitable gift, is valid; the question is whether it lapses and the property reverts to the estate, or it is a valid and effective gift. Whether a gift is non-charitable or charitable, and immediate or in remainder (or reversion), it must satisfy the test of validity at the time of the instrument taking

to take a different view in relation to contingent remainder interests,[874] but the testator himself, if he has the prescience, may make provision for a possible impossibility or impracticability of his charitable object at the time when the gift falls into possession.[875] In this way he will avoid the assessment of the validity of his object in terms of how things were on the date of his death, rather than when the prior interests fall in. However doctrinally sound it may be to treat remainder and reversionary interests in this way, it involves the difficult distinction between initial and supervening impossibility. The closer it is examined, the more elusive it becomes. And there is something comic about a court which is working out what it will say about a present breakdown in terms of what it might have said about an unknown future had it been asked many years before. If concessions are to be made to charity in order to encourage philanthropy, this matter calls for legislative attention.[876]

The second requirement, namely, a general charitable intent might be better described as a requirement of a paramount or overriding intention to give for the charitable purpose of which the particular object set out by the trust or absolute gift is merely one mode of furtherance.[877] Where the court can construe no such general intent, no *cy-près* scheme can be approved; it must be concluded in those circumstances that the testator wished to further the particular object only, and, if that was not possible, wished the trust property to fall back into his estate. There are many examples in the reports of such failures, and they normally involve a gift to a particular institution, such as a particular congregational[878] or Presbyterian[879] church,

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effect. Supervening impossibility or impracticability can only occur to charitable gifts which have been dedicated to charity and taken effect, i.e., are already vested in interest and in possession.

[874] Evershed M.R. in *Re Tacon*, *supra*, note 871, at 454: "Different considerations may, to some extent at any rate, be applicable to the case of a strictly contingent gift." If this is so, and assessment at the later date is preferred, the gift must avoid the nice distinctions of *Browne v. Moody*, [1936] A.C. 635, [1936] 4 D.L.R. 1 (Ontario P.C.), which would construe it as vested as of the testator's death, but defeasible.

[875] He may give his trustees power to confer with named institutions and otherwise exercise their own judgment, and make a suitable alternative appointment or terms of appointment.

[876] Why not regard *charitable* gifts in remainder absolute or reversion as exclusively dedicated to charity? The Charities Bill (Eng.), *supra*, note 276, provides (s. 15(3)(b)) that the court shall consider "the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes", thus eliminating the problem.

[877] E.g., *Halifax School for the Blind v. Nova Scotia (Attorney General)*, [1935] 2 D.L.R. 347 (N.S. T.D.): public appeal for children blinded as a result of an explosion in 1917 in Halifax harbour; "although the immediate incentive to the raising of the fund" was "a permanent building for blind children". This was only a particular purpose, but it was part of a wider purpose to aid blind children. *Cy-près* approved providing clothing for needy blind children attending the School.

The B.C.L.I. Report No. 33, *supra*, note 869, recommends that the need for general charitable intent be abolished. If the donor (including the testator) intends the gift to charity to be for the expressed purpose (or institution) only, the instrument of gift must provide a gift over in the event that the purpose (or institution) fails.

[878] *United Church of Canada v. Murphy*, [1931] 1 D.L.R. 452 (N.S. S.C.).

[879] *Re Patriquin*, [1930] S.C.R. 344, [1930] 3 D.L.R. 241 (S.C.C.). See also *Cox v. Nova Scotia (Public Trustee)* (1983), 56 N.S.R. (2d) 657, 117 A.P.R. 657 (N.S. T.D.) at 662-64 [N.S.R.] (an incorporated, but defunct "Halifax Church of God").

an old people's home,[880] an orphanage,[881] or a named charitable foundation.[882] sort of purposes that may fail are perhaps instanced by a bequest for the buildi a parsonage for a particular Baptist church,[883] a bequest for the payment of h particular church's debt,[884] or a bequest for a Roman Catholic orphanage in H Kong or Vietnam for the benefit of Eurasian children where no such orphan existed.[885] In *Re Young Women's Christian Assn. Extension Campaign Fund* public appeal had been launched for the purpose of erecting a new building an thus increasing accommodation for the members of the Regina Y.W.C.A. After funds were assembled, it became clear that the accommodation was not needed and the association argued that by means of a *cy-près* scheme it be permitted to the funds to discharge its operating deficit. Consent was not given because the publ were construed to have given funds for the particular purpose, and, even if th were a more general intent, it could not be held to embrace something as differe as the discharge of an operating deficit.

In the *Young Women's Christian Assn.* case, it should be noted, the failure w initial because no part of the fund was expended. In the case of public appeals the is an important distinction to be drawn between initial impossibility when no part the fund can be expended, and subsequent impossibility when a surplus remain after the appeal object has been achieved.

Cy-près may also be available when a charitable gift is to take effect after period of accumulation of income, and the *Accumulations Act*[888] prevents furth accumulation before the intended period ends, thus creating an issue as to th destination of income arising after the close of the permitted period. The donor, who is likely in Canada to be a testator, may have required a fund to be built up by way

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[880] *Re Ogilvy Estate*, *supra*, note 855; *Re Fitzgibbon Estate* (1922), 51 O.L.R. 500, 69 D.L.R. 524 (Ont. H.C.).

[881] *Re Schjaastad Estate* (1919), [1920] 1 W.W.R. 327, 50 D.L.R. 445 (Sask. C.A.); *Re Fisher Estate*, [1959] O.W.N. 46 (Ont. H.C.).

[882] *Montreal Trust Co. v. Matthews*, 99 D.L.R. (3d) 65, [1979] 3 W.W.R. 621 (B.C. S.C.): a private foundation under the terms of the *Income Tax Act*, and also as a registrant under the provincial *Societies Act*, may not accept gifts from an outside source; the foundation therefore disclaimed.

[883] *Re McMillan*, *supra*, note 863.

[884] *Re Harding* (1904), 4 O.W.R. 316 (Ont. H.C.).

[885] *Re Charlesworth Estate* (1996), 12 E.T.R. (2d) 257 (Man. Q.B.), additional reasons at (1996), 1996 CarswellMan 371 (Man. Q.B.) (testatrix did not have a general charitable intent). See also *Eberwein Estate v. Saleem*, 2012 BCSC 250, 2012 CarswellBC 502 (B.C. S.C.) in which no general charitable intent was found where the gift was to a particular charity that operated a cat shelter, but the charity had ceased to exist prior to the testator's death.

[886] [1934] 3 W.W.R. 49 (Sask. K.B.).

[887] The funds collected were considered inadequate for the building planned, and, then, during the Depression, the number of girls in residence dropped dramatically.

[888] The *Accumulations Act*, 1800 (Eng.) applies in Nova Scotia, New Brunswick, Newfoundland, the Yukon and the Northwest Territories. Ontario makes separate statutory provision for accumulation periods: *Accumulations Act*, R.S.O. 1990, c. A.5; and Prince Edward Island makes another type of provision in the *Perpetuities Act*, R.S.P.E.I. 1988, c. P-3, s.1. Accumulation of income is no longer subject to any permitted period in Alberta (R.S.A. 2000, c. P-5, s. 24) or in British Columbia (R.S.B.C. 1996, c. 358, s. 25), except for vesting requirements; Manitoba and Saskatchewan have also abolished accumulation provisions. See further on this subject, chapter 8, Part IV B, text accompanying notes 299-306.

difference of approach in the American state jurisdictions, where such variation of trusts legislation has nowhere been adopted, is equally dramatic. Had the circumstances which prevailed in England between 1945 and 1958 also prevailed in jurisdictions like New York State, it would have been intriguing to witness the outcome. As it was, the situation never arose; statutory adoption of the prudent man rule in the majority of American jurisdictions had given adequate investment powers to all trustees, and a more consistent and logical pattern of taxes sent estate planning off in different directions.

II. THE INHERENT JURISDICTION OF THE COURT[22]

Today the inherent jurisdiction of the court will rarely need to be invoked in Canada, with the possible exception of Newfoundland and Labrador.[23] The object of the variation of trusts legislation was to bypass it with an adequate statutory jurisdiction, and the legislation has done so. Nevertheless, the attitude of the courts to what they were asked to authorize or approve prior to the legislation may still afford some guide as to what the courts will consider proper for them to approve under their discretionary variation of trusts powers. And, of course, there is still one province where it may be necessary to invoke it.

The inherent jurisdiction of the court is based on the principle of aiding the preservation of the settlor's trust and supporting the administration of its terms by the trustees. It is fundamental that the court will not write the trust for the settlor or testator, either in whole or in substantial part; the court sees its role as support, not a creator. Where, for instance, it enables the trustees to take part in a company reorganization, trading in existing shares and receiving a new issue in return, the court sees itself as implementing the settlor's basic purpose.[24] His trust purpose has been overtaken by an event which he probably had not foreseen, and without the

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[22] This section of the text leaves aside the scheme-making power which, as a matter of inherent jurisdiction, the court has over charitable trusts: *supra*, chapter 14, Part VI. This still has great significance: see *Re Killam Estate* (1999), 185 N.S.R. (2d) 201, 38 E.T.R. (2d) 50 (N.S. S.C. [In Chambers]), where it was held that total return investing could be approved under the administrative scheme-making inherent jurisdiction, and *Re Stillman Estate* (2003), 5 E.T.R. (3d) 260 (Ont. S.C.J.), where the court preferred for this purpose to invoke the *cy-près* scheme-making jurisdiction. Only in Alberta and Manitoba does the variation of trusts legislation apply to charitable trusts. See e.g., *University of Alberta v. R.* (1979), 11 Alta. L.R. (2d) 26 (Alta. Q.B.); *Knox United Church v. Royal Trust Corp. of Canada* (1996), 110 Man. R. (2d) 81, 12 E.T.R. (2d) 40 (Man. C.A.). The British Columbia Law Institute, Report No. 25, *Variation and Termination of Trusts* (2003), makes a similar recommendation for this province. See now British Columbia Law Institute, "A Modern Trustee Act for British Columbia", Report No. 33 (s. 55(3)(e) of the draft Act). For a full and detailed analysis of the inherent jurisdiction, the pre-1958 legislation, and the variation of trusts legislation, see A.J. McClean, "Variation of Trusts in England and Canada" (1965) 43 Can. Bar Rev. 181.

[23] In Australia, the states of New South Wales and Tasmania also lack variation legislation. For an analysis of how problems can be solved in this context, see P.M. Wood, "Variation of Trusts in New South Wales" (1990) 13 U.N.S.W.L.J. 359.

[24] See, e.g., *Re New*, [1901] 2 Ch. 534 (Eng. C.A.).

emergency support of the court it will go badly awry. The practical difficulty for the adviser of the trustee is to find the line between not writing a trust for the settlor, and coming to the relief in a so-called emergency situation when an event has occurred for which the settlor has not provided. Because the court is essentially supporting the settlor's instrument, it follows that it will not vary the beneficial interests set up by the trust. In a celebrated passage in *Walker v. Duncombe*, heard in 1901, Farwell J. said,[25] "I decline to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible." Nevertheless, prior to 1954[26] it was again difficult to distinguish between the alteration of an instrument, and a compromise settlement of beneficial interests. Indeed, a number of considerations led to the case of *Chapman v. Chapman*.[27] There was the uncertainty as to the limits of jurisdiction, the inevitable difference between courts as to how far the courts should go, the fact that many decisions were heard in the judges' chambers and not reported, and the obvious willingness of judges sitting in chambers to do what they could to assist trustees and the beneficiaries who were really in trouble. In that case the House decided that the court had no inherent jurisdiction to alter the beneficial interests set up by a trust, unless the case falls into one of four exceptions.

The first is the jurisdiction of the court to change the nature of an infant's interest under a trust. This involves approval of the sale of personalty, sometimes but rarely of realty, when that would be for the benefit of the infant. However, this is really a change only in the nature of the infant's property.[28]

The second is the power of the court to allow trustees to enter into some business transaction which is not authorized by the settlement. This is an example of the so-called salvage and emergency jurisdiction. Under this power the court has authorized trustees to take part in a company reorganization. It is essentially a means of preserving the trust and the trust property, and is an aspect of administration not concerned with the beneficial interests of beneficiaries.

The third is the power of the court to direct maintenance for an infant out of income which is required by the instrument to be accumulated. The court may exercise this power, as we have seen,[29] not only where the infant has a vested and absolute interest in the accumulations, but where his interest, though vested, is defeasible upon the occurrence of a possible future event, or is actually contingent. In a sense this *is* a jurisdiction to alter the beneficial interests of the trust, since property is taken from the person who would have taken under the gift over on the occurrence of the defeasance or the non-occurrence of the contingency, and given to the infant. However, the courts again regard themselves as doing what the settlor would surely have done himself had he been in the court's position.

The fourth exception is the compromise jurisdiction. The court has power to consent on behalf of infants and unborn beneficiaries to a compromise settlement of

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[25] [1901] 1 Ch. 879 (Eng. Ch. Div.) at 885.
[26] *Chapman v. Chapman*, *supra*, note 18.
[27] *Supra*, note 18.
[28] Sometimes described as the conversion power.
[29] See, *supra*, chapter 21, Part II A.

a dispute or doubt over the quantum of beneficial interests. It was under this head that, prior to 1954, the judges were consenting to compromises resulting in a rearrangement of beneficial interests, the principal object of which was to reduce the burden of likely estate duties. However, the House held that there must be a genuine dispute or doubt before this jurisdiction can be exercised; there is no genuine dispute or doubt, if it would merely be to the advantage of the beneficiaries that clearly-set-out beneficial interests are to be varied for some reason extraneous to the instrument.

A. Salvage and Emergency Jurisdiction

Canadian courts have followed English precedents to the letter in determining the limits of the inherent jurisdiction. The leading case on the emergency jurisdiction in Canada, *Tornroos v. Crocker*,[30] demonstrates this well. The shares in a company were owned by three persons, A, B and C, and the articles of association required any shareholder desiring to sell his shares to offer them first to his co-shareholders. A in his will appointed B his executor and trustee, the co-trustee being A's widow and the trust beneficiaries the widow and children of A. After A's death, C died, and C's widow duly offered C's shares to the trustees, and to B in his personal capacity as a shareholder. The shares were not authorized investments, and A's will restricted the trustees to such investments. Since the trust could not purchase the shares, B regarded the trust as having no interest, and, acting in his personal capacity, bought the shares for himself. He was now the major shareholder, and the trust was in a minority position. The liability of B on the basis of having acted when there was a conflict between his interest and his duty was made to turn on whether there was, in fact, a conflict.[31] Since the trustees could not purchase the C shares, ought they to have asked the court for the power to do so? And, if they had asked the court, would the emergency or salvage jurisdiction have been exercised in their favour?[32]

The Supreme Court decided that it could not have been exercised in their favour. The English authorities made it clear that the emergency jurisdiction requires the existence of a situation where it is essential that the trustees act for the good of the trust, and where the settlor has not provided for the circumstance which has arisen because he clearly did not foresee it. *Re New*,[33] where the Court of Appeal had agreed to empower the trustees to take advantage of a company reconstruction scheme, was indeed "the high-water mark"[34] of what the courts could do under this jurisdiction. In the instant case the Supreme Court could neither accept that it was essential or necessary for the good of the trust that the trust acquire C's shares, nor that A had

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[30] [1957] S.C.R. 151, 7 D.L.R. (2d) 104 (S.C.C.).

[31] Unlike the exact situation in *Keech v. Sandford* (1726), 2 Eq. Cas. Abr. 741, 25 E.R. 223 (Eng. Ch.), B had a right in his own personal capacity, unconnected with the trust, to be made an offer of the shares.

[32] "Salvage" is principally employed in relation to buildings which are decaying, and where the use of capital money is desired for the purpose of basic repairs, rebuilding, and sometimes erection of new buildings.

[33] *Supra*, note 24.

[34] A comment of Cozens-Hardy L.J. in *Re Tollemache*, [1903] 1 Ch. 955 (Eng. C.A.) at 956.

not foreseen that the trust shareholding might become a minority interest. He was content to rely upon his co-shareholders to do what was also in the interests of the trust.

The benefit of all the trust beneficiaries is not therefore the criterion, though it is an obvious requirement. In *Re Blivass*,[35] the testator had left $1200 *per annum* to his widow, which the trustees were free to replace with an annuity if they wished to make an early distribution of the remainder of the estate. Hogg J. was asked to approve the commutation of the instalments for a lump sum. This came to a lesser sum than the cost of an annuity, and the widow consented to it; the estate could be earlier distributed, and there would be more to distribute. The learned judge refused. The emergency jurisdiction was concerned with the trust property and such matters as its sale. That did not apply here; this was an application for the alteration of beneficial interests.[36]

Both these applications could have been approved under the variation of trusts legislation.[37] The only requirement under this legislation is that the court be satisfied the arrangement is truly for the benefit of the incapacitated or unborn beneficiaries, and that it otherwise appears to be an arrangement which the court ought to approve. This latter element has led the courts to ask for evidence of the settlor's intentions, but that is a factor which has nowhere near the weight it has under the inherent jurisdiction. Were *Tornroos v. Crocker* to be heard today, the appellant would surely be expected to have applied to the court for the exercise of its new statutory jurisdiction, and the empowerment of the trustees to purchase the shares, before he exercised his personal rights as a shareholder.

B. Maintenance Jurisdiction

The courts have been willing in dire situations to permit the use of capital for the maintenance of infants,[38] but the jurisdiction in question here is the use of income that is directed to be accumulated. As we have said, this jurisdiction does indeed involve the invasion of the quantum of several beneficial interests, in so far as payments may be made for persons whose interest in the accumulated income is

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[35] [1944] O.W.N. 497 (Ont. H.C.). This case also makes it clear that notice of the application must have been served on all interested parties. In this case it had not been.

[36] In *Sullivan v. MacDonald* (1961), 46 M.P.R. 296 (N.B. S.C.), the trustees held a house which was on leased land; the lease was expiring and the freeholder would not renew. The trustees wanted to be authorized to purchase or lease a lot to which they might move the house, which could then be rented. The alternative was to demolish it and sell the material for a nominal sum. It was decided there was no salvage jurisdiction because the proposal involved the creation of an asset not authorized by law as a trustee investment, to which the trustees were restricted.

[37] In *Shoal Lake Indian Bank No. 40 v. Royal Trust Corp. of Canada*, 91 Man. R. (2d) 287, [1994] 3 W.W.R. 410 (Man. Q.B.), Schulman J. held (at para. 15) that the variation legislation effectively overtakes the inherent emergency jurisdiction.

[38] *Hanbury and Martin* at 628. In *D (A Child) v. O*, [2004] 3 All E.R. 780, 7 I.T.E.L.R. 63, Lloyd J. stated (at paras. 12-13) that he could have used the inherent jurisdiction to allow a minor access to capital for the costs of education. He stated, however, that it was more appropriate to proceed under the variation legislation.

defeasible or contingent. Nor is the jurisdiction restricted to the maintenance of infants. It applies to any person whose interest has not vested in possession, whether it is already vested in interest or is contingent. In *Re Wright*,[39] maintenance was increased for beneficiaries whose interests were not to vest in possession until the attainment of twenty-five years of age, and older beneficiaries were not given maintenance simply because, on the facts, they could not show need.

The criterion of desperate want is rarely invoked; what must be shown is a need comparable with the degree of provision and comfort that a person with a future property expectation ought to enjoy in the light of the size of that future acquisition. This was the basis on which the beneficiaries in *Re Wright* qualified. In *Re McCallum*,[40] the beneficiary, whose interest vested at thirty years of age, was married with a child, and wished to resume his university degree course. Maintenance was given at $2500 per year with leave to return for more should it be shown that was reasonably required.

C. Compromise Jurisdiction

The rearrangement of trusts, which the House of Lords refused to accept as coming within the court's inherent jurisdiction to agree to compromise, can take many forms. The beneficial interests of one trust may differ substantially from those of another trust, and the taxing statutes are constantly being changed. The facts in *Chapman v. Chapman*[41] itself present a typical example. Grandparents had created two *inter vivos* trusts in favour of the children of their son, Robert. The funds were to be divided equally, if there proved to be more than one child, between those children who attained twenty-one or died under that age leaving issue. However, until the youngest child attained twenty-five the trustees were to apply at their discretion such part of the income as was needed for the maintenance of all the children. Only when the youngest attained twenty-five would the capital and the accumulated surplus income be divided between them. The difficulty was created by the estate duty legislation. In order to meet the requirements of the perpetuity rule, the trust instruments provided that the common maintenance clause should have effect until the youngest child attained twenty-five if that event should occur within twenty-one years of the making of the trusts, or, given that the event had not happened when the survivor of the grandparents (the settlors) died, if the event should occur within twenty-one years of the surviving grandparent's death. By introducing in this way the date of the settlor's deaths, estate duty became leviable upon the entire trust funds on the deaths of the surviving grandparent. The survivor's death was the signal for the commencement of a period of years after which the grandchildren's interests would vest, and that death therefore gave rise to a "passing" of property from the deceased to the grandchildren.

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[39] (1954), [1954] O.R. 755, [1955] 1 D.L.R. 213 (Ont. H.C.).
[40] [1956] O.W.N. 321, 2 D.L.R. (2d) 618 (Ont. H.C.).
[41] *Supra*, note 18.

Another trust was set up by the grandparents, this time in favour of the family of Nicholas, a second son, and the tax flaw in this case was that, on failure of the objects of that trust, the fund was to pass to the trustees for Robert's children, to be held on the terms of that trust.

It was a simple proposal that was put to the court. A new trust instrument would be drawn in favour of Robert's children omitting the common maintenance clause, and the trustees of the existing trusts would be required to convey the trust funds to the new trustees. The trust funds for Nicholas and his family were, on the failure of those objects, to pass to the new trustees on the new trust for Robert's children. It was this total proposal that the House ruled to be outside the jurisdiction of the court. No approval was possible.[42]

In *Re Southam Trust*,[43] however, Judson J. was able to find an element in such a proposal which brought it within the inherent jurisdiction. The life tenant had a power of appointment by deed or will among his children and grandchildren. In default of appointment the capital was to be divided among the children, grandchildren taking the place of deceased children. The proposal involved the distribution of capital among the life tenant, the children, and grandchildren who were adult, infants, or as yet unborn. Since the life tenant had it in his power to appoint exclusively to his children who were living and adult, and thus cut out the grandchildren altogether, Judson J. thought he could approve a proposal which gave grandchildren a benefit they might otherwise not have.

One would have to say with respect that it is impossible to reconcile this decision with *Chapman v. Chapman*. On the other hand, it is precisely within the jurisdiction conferred by the variation of trusts legislation, and there have been many reported cases involving the approval of similar arrangements.

D. Release of Capital Not Needed to Secure Annuities

Although it was not mentioned in *Chapman v. Chapman*, there is another established head of the inherent jurisdiction. When annuities are charged upon capital, the party entitled to the capital upon the death of the last annuitant may demand that so much of the capital as is not needed to secure the payment of the annuities be paid to him immediately.[44] This is unlike the maintenance jurisdiction in that the

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[42] After the passing of the *Variation of Trusts Act*, 1958, one of the first arrangements put to the court was this proposal, when it was duly approved: *Re Chapman's Settlement Trusts (No. 2)*, [1959] 1 W.L.R. 372, [1959] 2 All E.R. 47n.

[43] (1954), [1954] O.W.N. 923, [1955] 1 D.L.R. 438 (Ont. H.C.).

[44] *Harbin v. Masterman*, [1896] 1 Ch. 351 (Eng. C.A.), applied in *Allen v. Montreal Trust Co.* (1977), [1978] 1 W.W.R. 462, 82 D.L.R. (3d) 311 (Sask. C.A.), and *Re Phillips Estate* (1995), 140 N.S.R. (2d) 213, 7 E.T.R. (2d) 50 (N.S. S.C.). The decision in *Harbin* was based on an established practice of releasing capital from an estate when there was more than enough to secure any annuities (*Slannin v. Style* (1734), 3 P. Wms. 334, 24 E.R. 1089); *Harbin* extended it to trusts, where the annuitant is not just a creditor of the estate but a trust beneficiary. In *Allen v. Montreal Trust Co.* the court, following *Harbin*, set aside sufficient capital to meet the annuity, and released the balance of the capital to the capital beneficiaries. Both cases were cited and applied in *Re Phillips*. *Cf. Re Doyle* (1976), 11 Nfld. & P.E.I.R. 83 (Nfld. T.D.). In England, *Harbin* was confirmed in *Re Coller's Deed*

court acts on the basis that the testator's intended scheme of beneficial interests will be preserved; the order accelerates the remainderman's interest in possession without encroaching on the annuitant's income or security. It is closer to the jurisdiction under the variation legislation, with the important difference that the excess capital can be released even against the wishes of a fully capacitated annuitant;[45] under the variation legislation, all capacitated beneficiaries must generally consent.[46] For the same reason, it is difficult to understand this jurisdiction as an application of *Saunders v. Vautier;*[47] the annuitant whose annuity is charged on the corpus does have an interest in the whole corpus, and so his consent is needed in order for *Saunders* to apply.[48] It is best understood on the basis that the annuitant's interest in the whole corpus is only by way of security. So long as the security is adequate, there is no right to anything more.[49]

III. STATUTORY POWERS OF THE COURT TO VARY TRUSTS OTHER THAN UNDER THE VARIATION OF TRUSTS LEGISLATION

A. Enlarging the Management or Administrative Powers of Trustees

Alberta, Manitoba, New Brunswick, Nova Scotia, the Northwest Territories, Nunavut and the Yukon have each adopted this power from the *Trustee Act*, 1925,

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Trusts (1937), (sub nom. *Re Coller*) [1939] Ch. 277, [1937] 3 All E.R. 292 (Eng. C.A.) at 284 [Ch.], at 296 [All E.R.], which in turn was cited with approval in *Re Earl of Berkeley*, [1968] Ch. 744, [1968] 3 All E.R. 364 (Eng. Ch. Div.) at 779 [Ch.], at 382 [All E.R.]. See further, *supra*, chapter 19, Part III C 3, and chapter 23, note 102 and accompanying text.

[45] This was established in *Harbin v. Masterman* (*ibid.*), on the basis that the annuitant's objection was genuine, at least at first instance. It was discovered, through the intervention of the judges of the Court of Appeal themselves, that her appeal to that court was not genuine. Rather her solicitor had promoted further litigation, and the solicitor was required to pay all of the costs of the appeal personally.

[46] For discussion of whether recent cases cast doubt on this, see *infra*, Part IV C 4.

[47] (1841), Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.). See, *supra*, chapter 23, Part II.

[48] This was recognized in *Allen v. Montreal Trust Co.*, *supra*, note 44, referring to *Re Coller's Deed Trusts*, *supra*, note 44. In *Re Doyle*, *supra*, note 44, a variation like this was approved in reliance on *Saunders*, but one annuitant was incompetent and so not able to consent. One possible reconciliation between *Saunders* (*ibid.*) and *Harbin* (*supra*, note 44) is by reference to the principle in *Re Marshell*, [1914] 1 Ch. 192 (Eng. C.A.), under which a trust fund can be divided and *Saunders* applied only to part of it; see *supra*, chapter 23, note 11.

[49] The principle might be useful in understanding some aspects of pension trusts. The beneficiary of a defined benefit pension scheme, like an annuitant, is entitled to certain payments, and to that extent his interest in the whole fund is really by way of security for those payments. Thus when there is an actuarial surplus, the employer may be allowed to suspend contributions, without the consent of the beneficiaries: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631 (S.C.C.).

Tab 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Spence v. BMO Trust Co. | 2016 ONCA 196, 2016 CarswellOnt 3345, 346 O.A.C. 108, [2016] O.J. No. 1162, 395 D.L.R. (4th) 297, 14 E.T.R. (4th) 31, 263 A.C.W.S. (3d) 550, 129 O.R. (3d) 561 | (Ont. C.A., Mar 8, 2016)

1990 CarswellOnt 486
Ontario Supreme Court, Court of Appeal

Canada Trust Co. v. Ontario (Human Rights Commission)

1990 CarswellOnt 486, [1990] O.J. No. 615, 12 C.H.R.R. D/184, 20 A.C.W.S. (3d) 736, 37 O.A.C. 191, 38 E.T.R. 1, 69 D.L.R. (4th) 321, 74 O.R. (2d) 481

RE LEONARD FOUNDATION TRUST; CANADA TRUST CO. v. ONTARIO HUMAN RIGHTS COMMISSION; ROYAL ONTARIO MUSEUM et al. (intervenors)

Robins and Tarnopolsky JJ.A. and Osler J. (ad hoc)

Heard: September 7 and 8, 1989
Judgment: April 24, 1990
Docket: Doc. Nos. CA586/87 and CA622/87

Counsel: *Janet E. Minor*, for appellant Ontario Human Rights Commission.
Alan P. Shanoff and *Francy Kussner*, for intervenor-appellant Royal Ontario Museum.
H. Donald Guthrie, Q.C., and *John W.R. Day*, for respondent Canada Trust Co.
William L.N. Somerville, Q.C., *Lindsay A. Histrop*, for intervenor Class of Persons Eligible to Receive Scholarships from the Leonard Foundation.
Stan J. Sokol, for intervenor Public Trustee.

Subject: Estates and Trusts; Constitutional

Annotation

While public policy considerations surrounding the Leonard Foundation Trust are clearly important and will likely attract a good deal of academic comment, this annotation deals only with the application of the cy-près doctrine to the trust. It is concerned with the circumstances and conditions under which a court may apply trust funds cy-près when a well-established charitable purpose subsequently becomes impracticable.

The ability of the Court to apply trust funds cy-près is a part of the Court's inherent scheme-making power. Although many have attempted to define the concept, it seems to have been difficult to articulate a clear definition. In England, the Nathan Committee, (1952, Cmd 8710) reporting on the law and practice relating to charitable trusts, loosely defined it as "a device for keeping in existence a gift to charity so that it may continue as a public benefit from generation to generation." (LA. Sheridan and V.T.H. Delaney, *The Cy-près Doctrine*, 1985 at 2).

An important feature of the charitable trust is its dedication to a purpose for the public benefit. This aspect of the charitable trust has allowed the relaxation of many of the strict rules generally applicable to trusts. Most notable is the preferential treatment of the charitable trust under the rule against perpetuities. Nonetheless, the perpetual nature of charitable trusts creates difficulties that are unique to it:

Its continued existence is almost certain to produce a state of affairs in which its social utility will become impaired if not destroyed. A direction by a testator that his bounty is to be applied along narrow or eccentric lines, coupled with the

passage of time, may mean that the purpose for which it was given has disappeared. Far from conferring a benefit upon the community, the continued performance of the trust may be positively detrimental to the commonweal.

[Sheridan and Delaney, supra, at 2.]

Such was the case with the Leonard Foundation Trust. This trust, which, in 1923, was clearly implemented with an element of public benefit in mind, later came to undermine the public quest for equality. The question then arose whether the funds could be applied cy-près.

The cy-près doctrine may only be applied to charitable trusts. It is not available to save a private trust that has been incompletely or improperly created. How the doctrine will be applied in any given case will depend upon whether the impossibility or impracticability of carrying out the charitable purpose is initial or supervening. Initial impossibility or impracticability arises where a donor makes a grant of property on trust for charity which cannot ever take effect in the precise terms specified. The rule in such a case is that the property will be applied cy-près only if the donor can be shown to have had a general charitable intention. If no general charitable intention can be shown, the property will return to the donor on a resulting trust. According to Buckley L.J. in *Re Lysaght*, [1966] 1 Ch. 141, [1965] 2 AU .E.R. 288, at 202 [Ch.], a general charitable intention:

may be said to be a paramount intention on the part of a donor to effect some charitable purpose which the court can find a method of putting into operation, notwithstanding that it is impracticable to give effect to some direction by the donor which is not an essential part of his true intention — not, that is to say, part of his paramount intention.

While it is necessary to demonstrate a general charitable intention on the part of the donor where there is an initial impossibility, this is not necessary where the object of the trust is possible at the date of the gift but subsequently becomes impossible. All that is necessary in such a case is that the donor has made an exclusive dedication of the property to charity. (See D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 611-632.)

In order for a gift to be exclusively for charity, there must be no gift over of any kind. In the case of the Leonard Foundation Trust, it was found by McKeown J. and affirmed by the Court of Appeal, that this was a charitable trust. No provisions were made for a gift over. It is worth noting that the Royal Ontario Museum ("R.O.M.") in this case was not claiming on the basis that it was entitled to a gift over in the event of a failure of the trust purpose. It claimed instead that, as the trust was contrary to public policy, it should fail completely. In such a case, the R.O.M. argued, the trust fund would fall into the Leonard estate to be distributed to the residual beneficiaries, of which the R.O.M. was one.

Unfortunately for the R.O.M., however, once a trust has become vested in charity, it can never return upon a resulting trust to the donor or the donor's estate. (Waters, supra; see also S. G. Maurice & D. B. Parker, eds. *Tudor on Charities*, 7th ed. (1984)). Where the trust purpose fails at some point after the property has vested, the property will pass to the Crown as parens patriae, the ultimate protector of charities. (*Moggeridge v. Thackwell* (1803), 7 Ves. 36, 32 E.R. 15). The Crown will then submit to the court's cy-près jurisdiction, and the trust will be applied to another similar or related charitable purpose.

An analysis of the Leonard Foundation Trust on the basis of a very technical application of the cy-près doctrine would in all certainty lead to the same result as that reached by the Ontario Court of Appeal, but it would arrive at the conclusion by a different route. The appropriate question to ask, it is submitted, is not whether Colonel Leonard had a general charitable intent at the time he created the Leonard Scholarships but rather whether, in making his gift, he dedicated it exclusively to charity? The answer to this latter question, it is submitted, is that the property was dedicated to the purpose of charity alone, there being no gift over. It is this answer which triggers the application of the cy-près doctrine.

Although the doctrine, when considered in the abstract, makes a clear distinction between the need for a general charitable intention in the cases of initial impossibility and for an exclusive dedication to charity in the case of supervening impossibility, the distinction is not always so easily made in actual application of the doctrine to a particular case. It is very common to discover judicial searches for general charitable intent in cases of supervening impossibility, when in

fact the question should have been, "Did the donor give the property to charity exclusively?" *Tudor on Charities*, supra. Although these two queries will often lead to the same result and may appear to be synonymous, they are not. As stated by the learned authors of *Tudor on Charities* (supra, at 268):

an intention to make an out-and-out gift may be some evidence and, in some cases, conclusive evidence of a general charitable intention; but it is submitted that the judges who have treated a mere intention to make an out-and-out gift as automatically conclusive evidence of a general charitable intention have failed to recognize and give effect to the established distinction between the two intentions.

The test contained in the phrase "general charitable intention" is a stricter test and more difficult to meet than the standard implied by the concept of "exclusive dedication to charity". Thus, it is possible that the misapplication of the general charitable intention test in a case where exclusive dedication to charity would suffice could result in the failure of a trust that ought to have been applied cy-près. The case of *Wokingham Fire Brigade Trusts*, [1951] Ch. 373 is a good example. Sixty-six years after a public appeal was made for funds to establish a voluntary fire brigade, the National Fire Service took over the operation of the brigade. After the takeover, the trustees were left with a sum of money, and they applied to the Court for directions for the use of the funds. Danckwerts J. found that the original subscribers had donated their money with the specific intention of establishing a fire brigade and that they did not therefore have a general charitable intention. However, Danckwerts J. also concluded that the subscribers had intended to part with all of their interest in their money when they made their donations and that they had thus made an exclusive dedication to charity. He ordered that the money should be applied cy-près by means of a scheme. If, in his analysis, Danckwerts J. had stopped after concluding that the subscribers did not have any general charitable intention, the trust would have failed. It was the exclusive dedication to charity that allowed the funds to be applied cy-près.

Professor Waters has often bemoaned the confusion in the application of the doctrine. In a comment on the case of *Re Hunter; Genn v. Attorney General (British Columbia)*, [1973] 3 W.W.R. 197, 34 D.L.R. (3d) 602 (B.C. S.C.), Waters stated that:

It was irrelevant that [the testatrix] had ... no general charitable intent. The property now passed to the Crown, and a *cy-près* scheme could be put forward by the Crown from or approval. By the exclusive dedication to charity, [her] next-of-kind had been excluded forever.

However, this was not the result to which MacIntyre J. came.

. . . . .

Left to one's own devices, one is compelled to conclude that *Re Hunter* was wrongly decided.

(D. W. M. Waters, "Comment on *Re Hunter*" (1974) 52 Can. Bar Rev. 598).

In his treatise, *Law of Trusts in Canada*, Professor Waters elaborates on the confusion in Canadian courts applying the *cy-près* doctrine:

A fault with the decision, however, is that it insists on a general charitable intention in the donor before there can be a *cy-près* application, though the problem in hand is one of *supervening* impossibility or impracticability. This idea can be found repeated in a number of earlier and later Canadian cases, and it has support in earlier English authority. In *Re McDougall*, however, Kelly J. would have none of this, and his view has been supported by later English authority. It is to be hoped that Kelly J.'s view prevails in the higher Canadian Courts, because if the doctrine of exclusive dedication to charity means anything, and the Crown is prepared to waive any rights it has to the property already vested in a trust whose objects subsequently can no longer be pursued, the presence or absence of a general charitable intent in the testator or the *inter vivos* settlor is irrelevant.

[Waters, supra, at 629.]

Although it may not be doctrinally correct to look for general charitable intent in the case of supervening impossibility, as a practical matter the attempt to discover a means of applying the trust cy-près may demand an equivalent inquiry. In order to discover another purpose that is as near as possible to the original intent of the donor, it may be necessary to inquire what, generally, the donor was attempting to accomplish. Can it really be said that this question is substantially different from the search for a general charitable intent?

In the case of the Leonard Foundation Trust, the quest for the general charitable intent led the Court of Appeal to find that Colonel Leonard had a general intention to promote education and leadership.

This conclusion allowed a *cy-près* application of the trust fund to education generally. If, instead, the Court had asked whether Colonel Leonard had made and exclusive dedication to charity and concluded that he had and that the trust funds should be applied *cy-près*, they would then have had to determine what alternate means would be as near as possible to the donor's original intent. They would, it is submitted, have applied the property in the same way. The fact that both approaches will in most cases lead to the same result perhaps explains why the application of the doctrine is in such a state of confusion. Despite the confusion, in most cases the courts still arrive at the correct result. Occasionally, in cases where the original intention is simply too narrow for any amount of judicial creativity to discover a general charitable intent, and otherwise salvageable trust will fail. This is the problem with the *cy-près* doctrine in Canada.

The confusion in this area has led to calls for legislative reform in both England and the United States. In England, the *Charities Act, 1960* (U.K.) (8 & 9 Eliz. 2, c. 58; see also *Charities Act, 1985* (U.K.), 1985, c. 20 has alleviated some confusion by expressly laying out the circumstances in which funds may be applied *cy-près*. The legislation also declares the duty of trustees to obtain a scheme whenever their trust falls within the requirements of the Act. In the United States, the doctrine is even less clear than it is here. It is not uncommon for well established trusts which have been in existence for decades to fall into the estate of their original donor long after the donor and any residuary beneficiaries have died. The funds are then lost to charity forever.

Hopefully, Canadian courts will be able to avoid the extremes encountered in the United States. In Canada, many of the strict rules applicable to private trusts are waived: as a matter of public policy we wish to encourage and facilitate charitable giving. Yet, when the original charitable purpose fails, by misapplying the *cy-près* doctrine, we allow the demise of the charitable gift. The problem has been addressed by the Law Reform Commission of Ontario (*Report on the Law of Trusts*, 1984; more specifically, the Commission is currently conducting a *Project on the Reform of the Law of Charities*). Perhaps the time is now ripe for a legislative response.

L.A. Turnbull [1]

APPEAL from judgment [reported (1987), 27 E.T.R. 193 (H.C.)] upholding validity of trust instrument.

***Robins J.A. (Osler J.* (ad hoc) concurring):**

1 The principal question in this appeal is whether the terms of a scholarship trust established in 1923 by the late Reuben Wells Leonard are now contrary to public policy. If they are, the question then is whether the cy-près doctrine can be applied to preserve the trust.

2 The appeal is from the order of McKeown J. [reported (1987), 27 E.T.R. 193 (H.C.)] on an application under s. 60 of the *Trustee Act*, R.S.O. 1980, c. 512 and rr. 14.05(2) and (3) of the *Rules of Civil Procedure*, by the Canada Trust Company, as the successor trustee of a scholarship trust known as "The Leonard Foundation", for the advice, opinion and direction of the Court upon certain questions arising in the administration of the trust. The questions put before the Court are as follows:

> 1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation,

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

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

> 21. ... the Trustee has been advised that it is, and has hitherto seen it to be its duty to support, maintain and administer the trusts which were accepted by the original Trustee until such time as a Court of competent jurisdiction determines that the trust is illegal or void. This the Trustee and its predecessor corporations have done for upwards of 63 years since the inception of the trust, without serious difficulty or opposition until the more recent of the events described in paragraphs 14 to 20 hereof.
>
> 22. The inquiries from the press, complaints of universities, schools, Human Rights Commissions and similar agencies, academics, members of the public and certain members of the General Committee, as well as the Complaint referred to in paragraph 17 hereof, the press articles and reports referred to in paragraphs 14 and 18 hereof, the divisive effect of the motion and vote referred to in paragraph 20 hereof, and other similar recent events have, in my view, had an unsettling effect and have interfered with the due administration of the trusts declared by the Indenture and the ability of the Trustee to carry on such administration effectively. They have also impacted and can be expected to continue to impact unfavourably on the efficient administration of the scholarship programme by the General Committee, its Committee on Scholarships and its officials.
>
> 23. Although there has not to date been any serious difficulty experienced by the General Committee in identifying and making awards to students who fulfil the eligibility requirements of the Indenture, there have obviously been great changes in Canadian society and in the British Empire that have occurred in the 63 years since the inception of the Foundation. It may become more difficult than in the past to interpret and apply such eligibility terms as 'British Nationality', 'British Parentage', 'allegiance to any Foreign Government, Prince, Pope or Potentate', 'Christians of the White Race', 'British Subject' and 'of the Christian Religion in its Protestant Form'. The Trustee has received an opinion of its counsel that a charitable trust is exempt from the requirement of certainty of objects and cannot fail for uncertainty so long as there are some eligible persons who are with certainty within the ambit of the qualifications. Nevertheless, in the context of modern Canadian life and society, the increasingly multi-cultural makeup of Canada and the attention which has now been focused on the eligibility requirements of the Indenture, these difficulties may be expected to increase.
>
> 24. The Trustee accordingly believes that it requires the opinion, advice and direction of this Honourable Court as to the essential validity of the Indenture under which it operates, pursuant to the provisions of section 60 of the *Trustee Act* and the Court's inherent jurisdiction to supervise charitable trusts.

The Public Policy Issue

A. Can the Recitals Be Considered in Deciding this Issue?

31 In holding that the provisions of the trust did not violate either the *Human Rights Code, 1981* or public policy, McKeown J. took into account only the operative clauses of the trust document and the second sentence of the fourth recital. In his view, the balance of the recitals were merely expressions of the settlor's motive and, hence, irrelevant to a determination of the issues before him. While he found the motives offensive to today's general community, he concluded

that these recitals could play no part in interpreting the trust document or in resolving the question of whether the trust contravened public policy.

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

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

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

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

B. Does the Trust Violate Public Policy?

36 Viewing this trust document as a whole, does it violate public policy? In answering that question, I am not unmindful of the adage that "public policy is an unruly horse" or of the admonition that public policy " 'should be invoked only in clear cases, in which harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds' ": *Re Millar*, [1938] S.C.R. 1, [1938] 1 D.L.R. 65, at 7 [S.C.R.]. I have regard also to the observation of Professor Waters in his text on the *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), at 240 to the effect that:

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

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

37 The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law: *Blathwayt v. Lord Cawley*, [1976] A.C. 397, [1975] 3 All E.R. 625 (H.L.). That interest must, however, be limited in the case of this trust by public-policy considerations. In my opinion, the trust is couched in terms so at odds with today's social values as to make its continued operation in its present form inimical to the public interest.

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

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

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

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

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

The Cy-Près Issue

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

44 It must not be forgotten that when the trust property initially vested in 1923 the terms of the Indenture would have been held to be certain, valid and not contrary to any public policy which rendered the trust void or illegal or which detracted from the settlor's general intention to devote the property to charitable purposes. However, with changing social attitudes, public policy has changed. The public policy of the 1920s is not the public policy of the 1990s. As a result, it is no longer in the interest of the community to continue the trust on the basis predicated by the settlor. Put another way, while the trust was practicable when it was created, changing times have rendered the ideas promoted by it contrary to public policy, and hence it has become impracticable to carry it on in the manner originally planned by the settlor.

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

46 The observations of Lord Simonds in *National Anti-Vivisection Society v. Inland Revenue Commissioners* (1947), [1948] A.C. 31 (H.L.), are apposite to this case. At 74 he said:

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

[Emphasis added.]

47 Reference might also be made to *Scott on Trusts* [W.F. Fratcher ed.], 4th ed., vol. IVA (Boston: Little, Brown & Co., 1989), where, at 535-536, the following comment appears:

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

ceases to be useful. The founder of a charity should understand therefore that he cannot create a charity that shall be forever exempt from modification.

[Emphasis added.] See, generally, Waters, op. cit, at 611-632; *Power v. Attorney General for Nova Scotia* (1903), 35 S.C.R. 182; *Re Fitzpatrick; Fidelity Trust Co. v. St. Joseph's Vocational School of Winnipeg*, 16 E.T.R. 221, [1984] 3 W.W.R. 429, 6 D.L.R. (4th) 644, 27 Man. R. (2d) 285 (Q.B.); *Re Tacon; Public Trustee v. Tacon*, [1958] Ch. D. 447, [1958] 1 All E.R. 163; and *Re Dominion Students' Hall Trust*, [1947] Ch. 183.

Disposition

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

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

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

51 Q.2 — No.

52 Q.3 — Yes.

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

54 Q.5 and 6 — The application form should be changed in accordance with this decision.

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

***Tarnopolsky J.A.*:**

I. The Judicial History and the Issues

56 This case concerns appeals from the judgment of McKeown J., dated August 10, 1987, upon an application, under s. 60 of the *Trustee Act*, R.S.O. 1980, c. 512 and rr. 14.05(2) and (3) of the *Rules of Civil Procedure*, by The Canada Trust Company, as the successor trustee under an Indenture made on December 28, 1923, between one Reuben Wells Leonard, the settlor, and the Toronto General Trusts Corporation, the Trustee, for advice and direction upon the following questions arising out of the administration of the trust created by the Indenture:

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

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

(ii) other public policy, if any;

have had inherent jurisdiction for centuries and, in particular, with respect to charitable or public trusts. As noted at the beginning of this judgment, the trustee in this case applied to the High Court for advice and direction pursuant to the trust instrument itself as well as s. 60 of the *Trustee Act*.

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

> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

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

84 Finally, I agree with McKeown J. that this is not a case where the fact-finding role of the Commission and a board of inquiry would be required. Even in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1, where some further fact-finding and, particularly, fact-verification might have been useful, Martland J., on behalf of the majority on the Supreme Court of Canada, quoted Lord Goddard in *R. v. Tottenham and District Rent Tribunal; Ex parte Northfield (Highgate) Ltd.* (1956), [1957] 1 Q.B. 103 at 108 to the effect that: "[W]here there is a clear question of law not depending upon particular facts — because there is no fact in dispute in this case — there is no reason why the applicants should not come direct [sic] to this court for prohibition." Similarly, here, I agree with McKeown J. that we are concerned with a question of law; there are no facts in dispute. The trustee is entitled to come to the superior court, pursuant to s. 60 of the *Trustee Act*, to seek advice and direction.

(2) Is the Trust Void in Whole or in Part Either for Uncertainty or Because it Violates Public Policy

85 We are concerned here with a charitable trust. In order to be considered charitable, a trust must have been established for one of the following four purposes: relief of poverty, advancement of education, advancement of religion or other purposes beneficial to the community as a whole as enunciated by the courts. (For the original summary and categorization of these see *Income Tax Commissioners v. Pemsel*, [1891] A.C. 531. For their Ontario application see *Charities Accounting Act*, R.S.O. 1980, c. 65 and *Re Levy* (1989), 68 O.R. (2d) 385, 33 E.T.R. 1, 58 D.L.R. (4th) 375, 33 O.A.C. 99 (C.A.). Also see, generally, D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), c. 14.

86 The general rule is that in order to achieve charitable status, a trust must satisfy three conditions. It must have as its object one of the four purposes stated above; its purpose must be wholly and exclusively charitable, and it must promote a public benefit (*Ministry of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.); *McGovern v. Attorney General*, [1982] 1 Ch. 321, [1981] 3 All E.R. 493, at 331 [Ch.] and *Re Levy*, supra. To satisfy the public benefit requirement, the trust must be beneficial and not harmful to the public and its benefits must be available to a sufficient cross-section of the public (*Halsbury's Laws of England*, (4th ed., 1989) vol. 5, para. 505, p. 309; *Gilmour v. Coats*, [1949] A.C. 426, [1949] 1 All E.R. 848 (H.L.) at 855 [All E.R.] and Waters, supra, c. 14, pp. 460-504). If there is a personal nexus between each of the beneficiaries and the settlor, the trust will fail for lack of public benefit (*Oppenheim v. Tobacco Securities Trust Co.*, [1951] A.C. 297, [1951] 1 All E.R. 31 (H.L.) at 309 [A.C.]).

87 In the case at Bar, all of these tests are met. The trust is dedicated to the advancement of education and it is wholly charitable. Education is clearly a benefit to the public. Because the class was not ascertainable by the settlor, there was

no personal nexus between him and the beneficiaries. The benefit, although not available to everyone, is available to a sufficiently wide cross-section of the public.

88 Next, it is necessary to consider whether the trust could be invalid because of uncertainty. It is important to note that in analyzing the validity of the trust on this basis, the Court may refer only to the operative words, unless they are ambiguous, in which case it can refer to the recitals. Regular rules of statutory construction apply (*Re Moon; Ex parte Dawes* (1886), 17 Q.B.D. 275, 34 W.R. 753 (C.A.)). Since recitals are descriptions of motive and are normally irrelevant to determining validity, McKeown J. held that they were irrelevant and inoperative. However, it could be argued that many sections of the Indenture refer to the recitals and thereby incorporate them. In fact, McKeown J. noted eight references, after the recitals, to the definition of the class of beneficiaries but then went on to state [at 214-215]:

> At no time throughout the operative clauses does Colonel Leonard refer back to the three opening recitals; thus his beliefs as stated therein are not incorporated into the operative words and play no part in the interpretation of this instrument.

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

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

90 This definition of the class of beneficiaries is a condition precedent. A condition precedent is one in which no gift is intended until the condition is fulfilled. A condition subsequent differs in that non-compliance with the condition will put an end to an already existing gift. A condition precedent will not be void for uncertainty if it is possible to say with certainty that any proposed beneficiary is or is not a member of the class (*Jones v. T. Eaton Co.*, [1973] S.C.R. 635, 35 D.L.R. (3d) 97, at 650-651 [S.C.R.] and *McPhail v. Doulton*, [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.) at 456 [A.C.]). It is enough that some claimants can satisfy the condition (*Re Selby's Will Trusts; Donn v. Selby*, [1966] 1 W.L.R. 43, [1965] 3 All E.R. 386 (Ch.D.)). The condition will not fail for uncertainty unless it is clearly impossible for anyone to qualify (*Re Allen; Faith v. Allen*, [1953] Ch. 810, [1953] 2 All E.R. 898 (C.A.), subsequent proceedings [1954] Ch. 259, [1954] 1 All E.R. 526). It is well established that a charitable trust should not fail for uncertainty (see *Re Gott*, [1944] Ch. 193, [1944] 1 All E.R. 293). Historically, courts have been reluctant to strike down such gifts if it can be avoided. If a condition is uncertain, the court can consider it inoperative, but rarely will a trust fail because of uncertainty if the condition is a condition precedent.

91 In this case, there has been no difficulty over some 6 decades in ascertaining whether students qualify. The clause referred to above is sufficiently certain, except possibly for the "allegiance" exclusion. In my view, however, the clause as a whole meets the requirements established for a condition precedent, and the provisions containing the conditions are sufficiently certain. If I am wrong, however, I would find only the clause referring to "allegiance" to be uncertain and I would hold that it is severable from the other restrictions as to class.

92 Turning now to the public-policy issue, it must first be acknowledged that there has been no finding by a Canadian or a British court that at common law a charitable trust established to offer scholarships or other benefits to a restricted class is void as against public policy because it is discriminatory. In some cases, British courts have chosen to delete offensive clauses as "uncertain", as in *Re Lysaght; Hill v. Royal College of Surgeons of England*, [1966] Ch. 191, [1965] 2 All E.R. 888; *Clayton v. Ramsden*, [1943] A.C. 320, [1943] 1 All E.R. 16 (H.L.) and *Re Tarnopolsk; Barclay's Bank Ltd. v. Hyer*, [1958] 1 W.L.R. 1157, [1958] 3 All E.R. 479 or "impracticable" as in *Re Dominion Students' Hall Trust*, [1947] Ch. 183. In the latter case, the Court found a general charitable intention and then applied the trust property cy-près.

The attitude of British courts, however, is probably best summed up in the words of Buckley L.J. in *Re Lysaght*, supra, at 206, quoted by McKeown J. at 220:

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

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

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

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

95 Subsequently, in *Bhadauria*, supra, at 715 [D.L.R.], in concluding that the common law had evolved to the point of recognizing a new tort of discrimination, Wilson J.A. referred to the preamble to the *Ontario Human Rights Code*, R.S.O. 1970, c. 318, the first two paragraphs of which then provided:

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

She then observed: "I regard the preamble to the Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights." That the *Human Rights Code* recognizes public policy in Ontario was acknowledged a few years later by the Supreme Court of Canada in *Ontario Human Rights Commission v. Borough of Etobicoke* (1982), 3 C.H.R.R. D/781, 82 C.L.L.C. 17,005, 132 D.L.R. (3d) 14, 40 N.R. 159, at 23-24 [D.L.R.].

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

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

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

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

98 It is relevant in this case to refer as well to the "Ontario Policy on Race Relations" (Race Relations Directorate, Ministry of Citizenship) as well as the Premier's statement in the Legislature concerning the policy (*Hansard Official Report of Debates of Legislative Assembly of Ontario*, 2nd Session, 33rd Parliament, Wednesday, May 28, 1986, pp. 937-941). The Policy on Race Relations states:

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

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

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

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

> The accepted rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in *Insurance Corp. of B.C. v. Heerspink et al.* ... [1982] 2 S.C.R. 145 at pp. 157-158 ...), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional, but certainly more than ordinary — and it is for the courts to seek out its purpose and give it effect.

100 In addition, equality rights "without discrimination" are now enshrined in the *Constitution Act, 1982* [*Canadian Charter of Rights and Freedoms*] in s. 15; the equal rights of men and women are reinforced in s. 28, and the protection and enhancement of our multicultural heritage is provided for in s. 27.

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

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

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

104 It will be necessary in each case to undertake an equality analysis like that adopted by the Human Rights Commission when approaching ss. 1 and 13 of the *Human Rights Code, 1981*, and that adopted by the courts when approaching s. 15(2) of the *Charter*. Those charitable trusts aimed at the amelioration of inequality and whose restrictions can be justified on that basis under s. 13 of the *Human Rights Code* or s. 15(2) of the *Charter* would not likely be found void because they promote rather than impede the public policy of equality. In such an analysis, attention will have to be paid to the social and historical context of the group concerned (see *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, [1989] 2 W.W.R. 289, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1, 91 N.R. 255, at 152-153 [S.C.R.] per Wilson J. and 175 per McIntyre J.) as well as the effect of the restrictions on racial, religious or gender equality, to name but a few examples.

105 Not all restrictions will violate public policy, just as not all legislative distinctions constitute discrimination contrary to s. 15 of the *Charter* (*Andrews*, supra, at 168-169 per McIntyre J.). In the Indenture in this case, for example, there is nothing contrary to public policy as expressed in the preferences for children of "clergymen", "school teachers", etc. It would be hard to imagine in the foreseeable future that a charitable trust established to promote the education of women, aboriginal peoples, the physically or mentally handicapped, or other historically disadvantaged groups would be void as against public policy. Clearly, public trusts restricted to those in financial need would be permissible. Given the history and importance of bilingualism and multiculturalism in this country, restrictions on the basis of language would probably not be void as against public policy, subject, of course, to an analysis of the context, purpose and effect of the restriction.

106 In this case, the Court must, as it does in so many areas of law, engage in a balancing process. Important as it is to permit individuals to dispose of their property as they see fit, it cannot be an absolute right. The law imposes restrictions

on freedom of both contract and testamentary disposition. Under the *Conveyancing and Law of Property Act*, s. 22, for instance, covenants that purport to restrict sale, ownership, occupation or use of land because of, inter alia, race, creed or colour are void. Under the *Human Rights Code*, discriminatory contracts relating to leasing of accommodation are prohibited. With respect to testamentary dispositions, as mentioned earlier, one cannot establish a charitable trust unless it is for an exclusively charitable purpose (see Waters, supra, at 601-603 and 626; and *Ministry of Health v. Simpson*, supra). Similarly, public trusts which discriminate on the basis of distinctions that are contrary to public policy must now be void.

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

(3) Is There a General Charitable Intention So that The Court Can Apply the Trust Cy-près?

108 One of the great advantages of a charitable trust is that if it fails for some reason, it can be applied cy-près. However, in order to apply the trust property cy-près, the Court must find that the settlor had a general charitable intention. If the mode of application is such an essential part of the gift that the Court cannot distinguish any general purpose of charity but is obliged to say that the prescribed mode of doing the charitable act is the only one the testator intended, it cannot apply the trust cy-près (see *Re Wilson; Twentyman v. Simpson*, [1913] 1 Ch. 314 [1911-13] All E.R. Rep. 1101; *Re Lysaght*, supra, at 203 and *Halsbury's Laws of England*, (4th ed., 1989), vol. 5, Charities, para. 696). Cy-près should never depart from the testator's true intention. This must be discerned from reading the trust instrument as a whole. The Court may have regard to the recitals in order to determine the "substantial, overriding, true or paramount intention."

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

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

110 The question in this case is, then, whether the testator's paramount intention was to provide scholarships for education or whether he intended to provide it for specific kinds of students and would not have created it otherwise. To preserve the trust, this Court must find that the settlor's general intention was to educate young people for the benefit of the Empire (now the Commonwealth and this country) and that the discriminatory provisions are merely the machinery designed to effect that intention. Was it his intention to educate particular kinds of people because only they could be entrusted with the future of the country? Was it his overriding purpose to select students of the right breeding and prepare them for leadership? If so, then his intention was specific and the trust must fail.

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

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

> It is not necessary to go to the length of saying that the original scheme is absolutely impracticable. Were that so, it would not be possible to establish in the present case that the charity could not be carried on at all if it continued to be so limited as to exclude coloured members of the Empire.
>
> I have, however, to consider the primary intention of the charity. At the time when it came into being, the objects of promoting community of citizenship, culture and tradition among all members of the British Commonwealth of Nations might best have been attained by confining the hall to members of the Empire of European origin. But times have changed, particularly as a result of the war; and it is said that to retain the condition, so far from furthering the charity's main object, might defeat it and would be liable to antagonize those students, both white and coloured, whose support and goodwill it is the purpose of the charity to sustain.

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

IV. The Disposition

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

114 Q.1 (i) — Yes, but not just as confined by the *Human Rights Code*.

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

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

117 (iv) — No.

118 Q.2 — No.

119 Q.3 — Yes.

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

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

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

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

Appeal allowed.

Footnotes

1 L.A. Turnbull, lecturer, Osgoode Hall Law School.

End of Document

Tab 12

Most Negative Treatment: Check subsequent history and related treatments.

2011 SCC 5
Supreme Court of Canada

R. c. Caron

2011 CarswellAlta 81, 2011 CarswellAlta 82, 2011 SCC 5, [2011] 1 S.C.R. 78, [2011] 4 W.W.R. 1, [2011] S.C.J. No. 5, 14 Admin. L.R. (5th) 30, 264 C.C.C. (3d) 320, 329 D.L.R. (4th) 50, 37 Alta. L.R. (5th) 19, 411 N.R. 89, 499 A.R. 309, 514 W.A.C. 309, 93 W.C.B. (2d) 265, 97 C.P.C. (6th) 205, J.E. 2011-232

Her Majesty The Queen in Right of the Province of Alberta (Appellant) and Gilles Caron (Respondent) and Commissioner of Official Languages for Canada, Canadian Civil Liberties Association, Council of Canadians with Disabilities, Charter Committee on Poverty Issues, Poverty and Human Rights Centre, Women's Legal Education and Action Fund, Association canadienne-française de l'Alberta and David Asper Centre for Constitutional Rights (Interveners)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: April 13, 2010
Judgment: February 4, 2011
Docket: 33092

Proceedings: affirming *R. c. Caron* (2009), 1 Alta. L.R. (5th) 199, [2009] 6 W.W.R. 438, (sub nom. *R. v. Caron*) 446 A.R. 362, (sub nom. *R. v. Caron*) 442 W.A.C. 362, 71 C.P.C. (6th) 319, 2009 CarswellAlta 94, 2009 CarswellAlta 95, 2009 ABCA 34, (sub nom. *R. v. Caron*) 241 C.C.C. (3d) 296 (Alta. C.A.); affirming *R. c. Caron* (2007), 84 Alta. L.R. (4th) 146, 2007 CarswellAlta 1413, 2007 CarswellAlta 1414, 2007 ABQB 632, [2008] 3 W.W.R. 628, (sub nom. *R. v. Caron*) 424 A.R. 377 (Alta. Q.B.)

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Benjamin L. Berger for Intervener, Canadian Civil Liberties Association
Gwen Brodsky (written), Melina Buckley (written) for Interveners, Council of Canadians with Disabilities, Charter Committee on Poverty Issues, Poverty and Human Rights Centre, Women's Legal Education and Action Fund
Michel Doucet, Q.C. (written), Mark Power (written), François Larocque (written) for Intervener, Association canadienne-française de l'Alberta
Cheryl Milne (written), Lorne Sossin (written) for Intervener, David Asper Centre for Constitutional Rights

Subject: Public; Civil Practice and Procedure; Constitutional; Criminal

APPEAL of judgment reported at *R. c. Caron* (2009), 1 Alta. L.R. (5th) 199, [2009] 6 W.W.R. 438, (sub nom. *R. v. Caron*) 446 A.R. 362, (sub nom. *R. v. Caron*) 442 W.A.C. 362, 71 C.P.C. (6th) 319, 2009 CarswellAlta 94, 2009 CarswellAlta 95, 2009 ABCA 34, (sub nom. *R. v. Caron*) 241 C.C.C. (3d) 296 (Alta. C.A.).

POURVOI d'un jugement publié à *R. c. Caron* (2009), 1 Alta. L.R. (5th) 199, [2009] 6 W.W.R. 438, (sub nom. *R. v. Caron*) 446 A.R. 362, (sub nom. *R. v. Caron*) 442 W.A.C. 362, 71 C.P.C. (6th) 319, 2009 CarswellAlta 94, 2009 CarswellAlta 95, 2009 ABCA 34, (sub nom. *R. v. Caron*) 241 C.C.C. (3d) 296 (Alta. C.A.).

***Binnie J.*:**

1 This appeal raises anew the difficult issue of whether and to what extent the courts can (or should) order funding by the state of what may broadly be described as public interest litigation. The novel twist in this case is that an interim costs order was made by the Alberta Court of Queen's Bench — a *superior* court — in favour of an accused defending a regulatory prosecution in the *provincial* court of Alberta. The appellant Crown says that the superior court had no jurisdiction to make such an interim costs order and that even if it did have such jurisdiction the interim costs order was improper in any event.

2 The context in which this appeal arises is as follows.

3 In the course of a routine prosecution for a minor traffic offence — a wrongful left turn — the accused, Mr. Caron, claimed the proceedings were a nullity because the court documents were uniquely in English. He insisted that he has the right to use French in "proceedings before the courts" of Alberta as guaranteed in 1886 by the *North-West Territories Act*, R.S.C. 1886, c. 50, and the *Royal Proclamation of 1869*. His position is that French language rights may not now be abrogated by the province, and that the Alberta *Languages Act*, R.S.A. 2000, c. L-6, which purported to do so, is therefore unconstitutional.

4 The only issue before our Court at this time is two orders for interim costs made by the Court of Queen's Bench. Mr. Caron's application came late in his trial before the provincial court when, after about 18 months of on-again-off-again hearings, the Crown filed in reply what Mr. Caron's counsel described as a mountain of historical evidence. Mr. Caron — having run out of money — established to the satisfaction of the provincial court that he was unable to finance the rebuttal evidence necessary to complete the trial unless he were provided with interim costs. The provincial court made such an order. The Alberta Court of Queen's Bench, setting aside the provincial court order as being made without jurisdiction, nevertheless held that it could (and did) make the interim costs orders itself. It is the validity of the Queen's Bench orders for interim funding of the provincial court defence that is now before us.

5 The Crown takes the view that even though the Alberta Court of Queen's Bench identified what it regarded as an unacceptable outcome facing the provincial court in a constitutional challenge of great public significance, the *superior* court was powerless to intervene with a funding order to keep the *provincial* court proceedings on the rails. I agree that such orders must be highly exceptional and made only where the absence of public funding would work a serious injustice to the *public* interest, but I disagree with the Crown's argument that faced with this exceptional situation the Court of Queen's Bench was powerless to invoke its inherent jurisdiction to right the injustice perceived by the courts below. As to whether that discretionary jurisdiction ought to have been exercised in favour of Mr. Caron on the facts of this case, I defer to the affirmative answer given by the Alberta Court of Queen's Bench and upheld by a unanimous Court of Appeal (2009 ABCA 34, 1 Alta. L.R. (5th) 199 (Alta. C.A.)). Those courts have primary responsibility for the administration of justice in the province and, in my view, made no legal error in the exercise of their jurisdiction. I would dismiss the appeal.

I. Overview

6 As a general rule, of course, it is for Parliament and the provincial legislatures to determine if and how public monies will be used to fund litigation against the Crown, but it has sometimes fallen to the courts to make such determinations. To promote trial fairness in criminal prosecutions, for instance, the courts have in narrow circumstances been prepared to order a stay of proceedings unless the Crown funded an accused in whole or in part: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Rain* (1998), 223 A.R. 359 (Alta. C.A.). In the civil context, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.), extended the class of civil cases for which public funding on an interim basis could be ordered to include "special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate" (para. 36). *Okanagan* was based on the strong public interest in obtaining a ruling on a legal issue of exceptional importance that not only transcended the interest of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice. In *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.) ("*Little Sisters (No. 2)*"), the majority affirmed that

> the injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. This means that a litigant whose case, however compelling it may be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test. [para. 39]

Neither *Okanagan* nor *Little Sisters (No. 2)* concerned an interim funding order made in respect of matters proceeding in a lower court. Nevertheless, the Alberta courts were faced here with a constitutional challenge of great importance.

7 At issue was (and is) a fundamental aspect of the rule of law in Alberta. While the Crown argues that French language rights in that province were settled by this Court in *R. v. Mercure*, [1988] 1 S.C.R. 234 (S.C.C.), and *Paquette v. Canada*, [1990] 2 S.C.R. 1103 (S.C.C.), Mr. Caron was able to distinguish these cases to the satisfaction of the Alberta provincial court (see *R. c. Caron*, 2008 ABPC 232, 95 Alta. L.R. (4th) 307 (Alta. Prov. Ct.)). That decision on the merits was reversed by the Alberta Court of Queen's Bench in *R. c. Caron*, 2009 ABQB 745, 23 Alta. L.R. (5th) 321 (Alta. Q.B.), but even in upholding the Crown's position the Queen's Bench declared that "the Supreme Court's decision in *R. v. Mercure* does not answer the issue raised at trial and in this appeal" (para. 143). Mr. Caron's application for leave to appeal on the merits was granted in part by the Alberta Court of Appeal (2010 ABCA 343 (Alta. C.A.)).

8 As stated, the Alberta *Languages Act* enacted following this Court's decision in *Mercure* purports to abolish minority French language rights in the province. The impact of Mr. Caron's challenge, if ultimately successful, could be widespread and severe and include, according to Mr. Caron, the requirement for Alberta to re-enact most if not all of its laws in both French and English. The case, in short, has the potential (if successful) to become an Alberta replay of the *Reference re Language Rights*, [1992] 1 S.C.R. 212 (S.C.C.). This is what makes the case "sufficiently special" in terms of *Okanagan*/*Little Sisters (No. 2)*.

9 The courts in Alberta saw sufficient merit in Mr. Caron's legal argument to necessitate its resolution in the broader public interest. This was an outcome beyond the financial capacity of Mr. Caron and the Alberta courts were not willing to allow the issue to go unresolved for want of a champion with "deep pockets". The exercise of the superior court's inherent jurisdiction to fashion an exceptional remedy to meet highly unusual circumstances must be seen in that light.

II. Facts

10 On December 4, 2003, Mr. Caron was charged with the regulatory offence of failure to make a left turn safely. If convicted, he faced a fine of $100. Five days later he gave notice to the provincial court that his defence would consist of a constitutional languages challenge. Indeed, Mr. Caron did not contest the facts of the offence and advised the Crown that he would be presenting evidence only on the languages question. In taking this position he followed in the well-trodden path of other minority language advocates including Georges Forest's English-only parking ticket in *Forest v. Manitoba (Attorney General)*, [1979] 2 S.C.R. 1032 (S.C.C.); the unilingual traffic summons of Roger Bilodeau in Manitoba (*Bilodeau v. Manitoba (Attorney General)*, [1986] 1 S.C.R. 449 (S.C.C.)) and Duncan Cross MacDonald in Quebec (*MacDonald v. Montreal (City)*, [1986] 1 S.C.R. 460 (S.C.C.)); the English-only trial of André Mercure in *Mercure* and the unilingual provision of police services available to Marie-Claire Paulin in *Société des Acadiens & Acadiennes du Nouveau-Brunswick c. R.*, 2008 SCC 15, [2008] 1 S.C.R. 383 (S.C.C.). See also *Alberta v. Lefebvre* (1993), 135 A.R. 338 (Alta. C.A.), leave to appeal refused, [1993] 3 S.C.R. vii (note) (S.C.C.), and *R. c. Rémillard*, 2009 MBCA 112, 249 C.C.C. (3d) 44 (Man. C.A.).

11 Mr. Caron took the necessary steps to ensure payment of his costs for what his lawyers (unrealistically, it might be said) indicated could be a two- to five-day affair. These steps included mobilizing his own limited funds, seeking funding from the Alberta francophone association (Association canadienne-française de l'Alberta) (although the Association refused to fund his case, he obtained two loans of $15,000 each from its supporters), and securing some additional donations and $70,000 from the federal Court Challenges Program (paid in increments as the trial lengthened from month to month). He also solicited support over the Internet. Legal Aid was not available.

12 Following presentation of the defence evidence in March 2006, the Crown requested an adjournment in order to prepare reply evidence from expert witnesses. Given the continuing length of the trial, Mr. Caron made a further request of the Court Challenges Program for additional funding, but the Program was abolished by the federal government on September 25, 2006, before additional funding could be considered. Subsequent requests for reconsideration by Legal Aid were also unsuccessful.

13 The trial resumed in October 2006 to hear the Crown's expert evidence. The scale of the battle of the experts became clear, and Mr. Caron's finances left the defence unable to proceed further. The provincial court judge had denied an *Okanagan* order (2006 ABPC 278, 416 A.R. 63 (Alta. Prov. Ct.), at para. 164), but later ordered the Crown to pay the fees of Mr. Caron's lawyer and his experts' fees from and after that date pursuant to s. 24(1) of the *Charter*. Subsequently, the Court of Queen's Bench quashed the trial judge's s. 24(1) order. However, the merits of the *Okanagan* application were not further dealt with on appeal because, in the view of the Queen's Bench judge, "the learned provincial court judge did not have jurisdiction to award *Okanagan* interim costs in any event" (*R. c. Caron*, 2007 ABQB 262, 75 Alta. L.R. (4th) 287 (Alta. Q.B.), at para. 131). No appeal was taken from the decision to quash (which is therefore not before us) because on May 16, 2007, the superior court itself rendered an interim order that the expert fees be paid for the continuation of the trial anticipated to take place from May 22 to June 15, 2007. On October 19, 2007, it rendered an additional order requiring the Crown to pay Mr. Caron's costs for the surrebuttal component of the trial (2007 ABQB 632, 84 Alta. L.R. (4th) 146 (Alta. Q.B.), *per* Ouellette J.).

14 The Crown requested an adjournment, to a date after completion of the trial to argue the question of defence counsel's fees, on the agreed term that such delay would not prejudice the defence application.

15 The trial ended on June 15, 2007. The historical record was substantial. It included 12 witnesses, eight of whom were experts, 9,164 pages of transcripts and 93 exhibits (2008 ABPC 232 (Alta. Prov. Ct.), at paras. 14 and 16). As stated, the provincial court was persuaded by this record to declare the English-only prosecution a nullity.

16 The Crown now seeks to have set aside the interim funding orders made on May 16 and October 19, 2007. It also seeks an order requiring Mr. Caron to repay about $120,000 provided thereunder as fees and disbursements for lawyers and experts, presumably long since disbursed to the intended recipients.

III. Issues

17

1. Does the Court of Queen's Bench have inherent jurisdiction to grant an interim remedy in litigation taking place in the provincial court?

2. If so, were the criteria for an interim costs order met in this case?

IV. Analysis

18 The parties fundamentally disagree about what is at stake in this case. The Crown characterizes the dispute as a traffic offence which has a constitutional element, as have many criminal and quasi-criminal cases. In Mr. Caron's view the traffic offence is irrelevant except as a backdrop to his constitutional challenge. As such, he says, the ordinary rules governing costs in traffic court are irrelevant to the outcome of the appeal. The courts in Alberta essentially agreed with Mr. Caron on this point and I believe they were correct in that approach.

19 This being said, the history of this litigation — with its numerous adjournments, mutual recriminations about "trial by ambush" and periodic trips to the appellate courts — demonstrates once again that a prosecution in a provincial court does not generally provide, from a procedural point of view, an efficient institutional forum to resolve this sort of major constitutional litigation: *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220 (S.C.C.), at paras. 142-44. There is no mutuality between the prosecution and the defence in the discovery of documents or pre-trial disclosure. The procedural

powers of the provincial court are limited (although, as stated in para. 13, above, the quashing of the provincial court order for costs for want of jurisdiction was not appealed and we therefore refrain from expressing any opinion on its validity). Nevertheless, Mr. Caron's having announced his intention to use the prosecution as a springboard to launch his constitutional challenge to the validity of the Alberta *Languages Act*, the Crown persisted in the provincial court rather than seeking to have the constitutional question (as opposed to the minor driving infraction) brought before the superior court.

20 The Crown agrees that if the language issue had been litigated in the superior court (perhaps as a direct challenge to the Alberta *Languages Act*), that court would have had jurisdiction in relation to a case pending before it to make a costs order in the terms now complained of.

21 The provincial court was confronted with a potential failure of justice once the unexpected length of the trial had exhausted Mr. Caron's financial resources. By that time, substantial trial time and costs had already been expended, including the substantial public monies provided under the Court Challenges Program. In mid-trial the provincial court, so to speak, had a tiger by the tail. The Crown insisted on pursuing the prosecution in provincial court; Mr. Caron insisted on his French language defence. Neither side expressed any interest in a stay of proceedings.

22 The courts in Alberta were clearly concerned lest the Crown achieve, by pressing on with the prosecution in the provincial court, an unfair advantage ("lopsided", Ritter J.A. called it) over the accused in the creation of the crucial factual record on which an important constitutional issue would be determined. A lopsided trial would not have put the languages issue to rest. Mr. Caron's challenge was considered by the courts below to have merit and in their view it was in the interest of all Albertans that the challenge be properly dealt with.

23 I should make it clear that the present decision does not constitute a general invitation for applications to fund the defence of ordinary criminal cases where constitutional (including *Charter*) issues happen to be raised. In those cases the gravamen is truly the criminal offence. Here the traffic court context is simply background to the constitutional fight. A more appropriate analogy, as will be discussed, is the *Okanagan*/*Little Sisters (No. 2)* paradigm for public interest funding in a civil case.

A. Does the Inherent Jurisdiction of the Alberta Court of Queen's Bench Extend to Making the Interim Costs Order in Respect of Proceedings in the Provincial Court?

24 The inherent jurisdiction of the provincial superior courts, is broadly defined as "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28). In equally broad language Lamer C.J., citing the Jacob analysis with approval (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.), at paras. 29-30), referred to "those powers which are essential to the administration of justice and the maintenance of the rule of law", at para. 38. See also *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 18 *per* Rothstein J., relying on the Jacob analysis, and *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 (S.C.C.), at paras. 29-32.

25 One of the earliest manifestations of the superior court's inherent jurisdiction was the appointment of counsel to represent impecunious litigants *in forma pauperis* (W. S. Holdsworth, *A History of English Law*, vol. IV (3rd ed. 1945), at p. 538, and G. O. Morgan and H. Davey, *A Treatise on Costs in Chancery* (1865), at p. 268).

26 The Crown argues that whatever may be a superior court's inherent jurisdiction in relation to matters pending before it, such jurisdiction cannot extend to an order of interim funding of a litigant in a matter pending in the provincial court. However, as Jacob points out, superior courts *do* possess inherent jurisdiction "to render assistance to inferior courts to enable them to administer justice fully and effectively" (p. 48). For example, superior courts have long intervened in

respect of contempt not committed "in the face of" the inferior court because "the inferior courts have not the power to protect themselves" (p. 48). See, e.g., *R. v. Peel Regional Police Service* (2000), 149 C.C.C. (3d) 356 (Ont. S.C.J.), and *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.). In the same vein, Mr. Keith Mason, Q.C., a former President of the New South Wales Court of Appeal, has written in an article titled "*The Inherent Jurisdiction of the Court*" (1983), 57 *Aust. Law J.* 449, that

> [i]t is not surprising that a general concern with the "due administration of justice" has been invoked to justify the Supreme Court creating or enforcing procedural rights applicable to other courts and tribunals. Such helpful intervention has been offered where the other body has been considered powerless to act or where undue expense or delay might be caused if parties were forced to resort to it.
>
> . . . . .
>
> Many of the more recent developments of administrative law can be related to the assumption by superior courts of a general inherent jurisdiction to use their process in aid of the proper administration of justice.
>
> [Emphasis added; p. 456.]

The Mason article was also cited with approval by Lamer C.J. in *MacMillan Bloedel* (para. 33).

27 Canadian courts have, from time to time, exercised their inherent jurisdiction to render assistance to inferior courts as circumstances required. Novelty has not been treated as a barrier to necessary action. In the *Peel Regional Police* case, the superior court cited the Regional Police Service and the Police Services Board for contempt based on repeated delays in transferring prisoners to court rooms for hearings. This caused days of court time to be lost and inconvenienced lawyers, witnesses, and members of the public (paras. 20-28). The delays were said to undermine the rule of law. Citing *MacMillan Bloedel*, the court explained the basis for its action:

> This court acted in order to terminate the systemic delays in the timely delivery of prisoners to courtrooms throughout the Peel Courthouse. The court was desirous of averting a multiplicity of coercive proceedings. As well, the superior court was conscious of its duty to assist provincially created courts to restore the paramountcy of the rule of law....
>
> [Emphasis added; para. 68.]

28 In *United Nurses of Alberta*, this Court upheld a criminal contempt order made by the superior court against a union that defied a ruling issued by the province's Labour Relations Board. The superior court relied on its inherent jurisdiction to come to the aid of the tribunal.

29 While contempt proceedings are the best known form of "assistance to inferior courts", the inherent jurisdiction of the superior court is not so limited. Other examples include "the issue of a subpoena to attend and give evidence; and to exercise general superintendence over the proceedings of inferior courts, *e.g.*, to admit to bail" (Jacob, at pp. 48-49). In summary, Jacob states, "The inherent jurisdiction of the court may be invoked *in an apparently inexhaustible variety of circumstances* and may be exercised in different ways" (p. 23 (emphasis added)). I agree with this analysis. A "categories" approach is not appropriate.

30 Of course the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution. In the case of inferior tribunals, the superior court may render "assistance" (not meddle), but only in circumstances where the inferior tribunals are powerless to act and it is essential to avoid an injustice that action be taken. This requirement is consistent with the "sufficiently special" circumstances required for interim costs orders by *Little Sisters (No. 2)*, at para. 37, as will be discussed.

31 Accordingly, I would not accept the argument that the apparent novelty of the interim costs order in this case is, on account of its novelty, beyond the inherent jurisdiction of the Court of Queen's Bench.

32 The Crown argues that even if the making of such an interim costs order could *in theory* fall within the inherent jurisdiction of the superior court, such jurisdiction has been taken away by statutory costs provisions. In this respect the Crown relies on the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34, and the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 809 and 840, which provides for example $4 a day for witnesses. The Crown argues that while not expressly limited, the inherent jurisdiction of the Court of Queen's Bench is *implicitly* ousted by these enactments. However on this point, as well, the Jacob analysis is helpful:

> ... the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.
>
> [Emphasis added; p. 24.]

I agree with Jacob on this point as well.

33 The Crown's premise here and elsewhere in its argument is that this case is an ordinary "garden variety" regulatory proceeding of the sort to which these provincial court costs provisions were intended to apply, a premise which I cannot accept. The provincial court was confronted with language rights litigation of major significance that after months of trial had reached the point of collapse. The intervention of the superior court was not a matter of routine. It was part of a salvage operation to avoid months of effort, costs and judicial resources from being thrown away.

34 The Crown also relies on various statutes dealing with costs in matters pending before the Court of Queen's Bench itself, including the *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 21, the *Judicature Act*, R.S.A. 2000, c. J-2, s. 8, and the *Alberta Rules of Court*, Alta. Reg. 390/68, rr. 600 and 601. Certainly these enactments authorize the award of costs in various circumstances, but words of authorization in this connection should not be read as words limiting the court's inherent jurisdiction to do what is essential "to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (Jacob, at p. 28). It would be contrary to all authority to draw a negative inference against the inherent jurisdiction of the superior court based on "implication" and conjecture about legislative intent: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 (S.C.C.).

35 I am satisfied that the supervisory jurisdiction of the superior courts over the provincial courts in Alberta includes the power to order interim funding before an inferior tribunal where it is "*essential* to the administration of justice and the maintenance of the rule of law" (*MacMillan Bloedel*, at para. 38 (emphasis added)). It remains to determine, of course, the conditions under which such jurisdiction should be exercised in the present case. In my view, the *Okanagan*/*Little Sisters (No. 2)* criteria are helpful to this delineation.

B. Criteria for the Grant of a Public Interest Funding Order

36 Although Mr. Caron seeks what he calls an *Okanagan* order, the Crown points out that there are many distinctions between that case and the one before us. *Okanagan* was a civil case. The fight here arose in the context of a quasi-criminal proceeding and, generally speaking, as the Crown emphasizes, the costs regimes in civil and criminal cases are very different. Secondly, *Okanagan* did not involve the exercise of the court's inherent jurisdiction, but addressed the equitable exercise of a statutory costs authority. Thirdly, the original *Okanagan* order was made in relation to proceedings before the court that ordered the funding, namely the superior court of British Columbia. It dealt with an award of advance costs to a plaintiff, not an accused. The same distinctions apply to *Little Sisters (No. 2)*.

37 The Crown argues that the courts cannot create an alternative legal aid scheme by judicial fiat. Nor, says the Crown, can the courts judicially reinstate the Court Challenges Program. These points are valid so far as they go, but in my opinion they do not control the outcome of the appeal.

38 Clearly, this case is not *Okanagan* where the Court viewed the funding issue from the perspective of a proposed civil trial not yet commenced. We are presented with the issue of public interest funding in a different context. Nevertheless,

Okanagan/*Little Sisters (No. 2)* provide important guidance to the general paradigm of public interest funding. In those cases, as earlier emphasized in the discussion of inherent jurisdiction, the fundamental purpose (and limit) on judicial intervention is to do only what is essential to avoid an injustice.

39 The *Okanagan* criteria governing the discretionary award of interim (or "advanced") costs are three in number, as formulated by LeBel J., at para. 40:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Even where these criteria are met there is no "right" to a funding order. As stated by Bastarache and LeBel JJ. for the majority in *Little Sisters (No. 2)*:

> In analysing these requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts.
>
> [Emphasis added; para. 37.]

While these criteria were formulated in the very different circumstances of *Okanagan* and *Little Sisters (No. 2)*, in my opinion they apply as well to help determine whether the costs intervention of the Court of Queen's Bench was essential to enable the provincial court to "administer justice fully and effectively", and may therefore be said to fall within the superior court's inherent jurisdiction.

C. Application of the Public Funding Criteria to the Present Case

40 The courts below addressed each of the above criteria.

(1) Impecunious Litigant

41 As to Mr. Caron's financial circumstances, the superior court judge concluded that, while he was willing to expend (and had expended) his own and borrowed money (as well as funding from the Court Challenges Program) to the limit, Mr. Caron's resources had been exhausted by the time the applications for the orders in issue were made. He could not finance the last leg of his protracted trial. The Crown argues that Mr. Caron ought to have pursued a more aggressive fundraising campaign, particularly within Alberta's francophone community. The Queen's Bench judge, on the contrary, was impressed with the "responsible manner" in which Mr. Caron had pulled together finances for the anticipated length of trial and its unexpected continuances. However, as the scope of the expert evidence continued to expand, it was not "realistically possible" for him to launch a formal fundraising campaign given the trial schedule and its demands (2007 ABQB 632 (Alta. Q.B.), at para. 30). The Queen's Bench judge declared himself "satisfied that Mr. Caron has no realistic means of paying the fees resulting from this litigation, and that all other possibilities for funding have been canvassed, but in vain" (para. 31). The Crown's objection on this point was not accepted in the courts below and those courts made no palpable error in reaching the conclusion they did.

(2) Prima Facie Meritorious Case

42 The order for interim costs in this case did not prejudge the outcome. Mr. Caron, however, persuaded the Alberta courts that his challenge differs from *Mercure*, *Paquette*, and *Lefebvre*. In *Mercure*, it will be recalled, minority language rights on the prairies were addressed in terms of the *North-West Territories Act, 1875*, S.C. 1875 c. 49. The key provision, which is essentially the same as s. 133 of the *Constitution Act, 1867*, was reproduced in the 1886 consolidation as s. 110 (am. S.C. 1891, c. 22, s. 18):

> **110.** Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such Assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and publishing same; and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant Governor in conformity with the law, and thereafter shall have full force and effect.

Mercure itself held that in Saskatchewan this provision was subject to repeal by virtue both of ss. 14 and 16(1) of the *Saskatchewan Act* and s. 45 of the *Constitution Act, 1982* (p. 271).

43 Mr. Caron's contention is that the *Mercure* case did not consider much of the relevant historical evidence including, in particular, the *Royal Proclamation* of December 6, 1869, annexing to Canada what was then the North-West Territories, whose effect was characterized by the provincial court judge as follows:

> [TRANSLATION] I therefore believe that the proclamation had to be constitutional to appease the Métis by giving them greater certainty. A political guarantee can be cancelled more easily than a constitutional guarantee.... In my opinion, in light of the historical context, the proclamation is a constitutional document. This means that "all your civil ... rights" mentioned in the proclamation are protected by the Constitution. As I held above, relying on the historical evidence, the expression "civil rights" was broad enough to include language rights, which means that the same protection applies to language rights.
>
> (2008 ABPC 232, at para. 561)

Whether or not this view of the 1869 Proclamation survives final appellate consideration is not, of course, the issue. All the courts below recognized that there was *prima facie* merit to Mr. Caron's claim (*R. c. Caron*, 2006 ABPC 278, 416 A.R. 63 (Alta. Prov. Ct.), at para. 149; 2007 ABQB 632 (Alta. Q.B.), at paras. 32-36 and 40; 2009 ABCA 34 (Alta. C.A.), at paras. 58-61). It would, in the words of *Okanagan*, be contrary to the interest of justice if the proper resolution of this case on the merits was forfeited just because Mr. Caron — the putative standard bearer for Franco-Albertans in this matter — lacked the financial means to complete what he started.

(3) Public Importance

44 The public importance aspect of the *Okanagan* test has three elements, namely that "[t]he issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases" (para. 40). Not every constitutional case meets these criteria, as it could not be said in each and every case that it is "sufficiently special that it would be contrary to the interests of justice to deny the advanced costs application" (*Little Sisters (No. 2)*, para. 37). What is "sufficiently special" about this case is that it constitutes an attack of *prima facie* merit (as that term is used in *Okanagan*) on the validity of the entire corpus of Alberta's unilingual statute books. The impact on Alberta legislation, if Mr. Caron were to succeed, could be extremely serious and the resulting problems ought, if it becomes necessary to do so, to be addressed as quickly as possible. A lopsided contest in which the challenger, by reason of impecuniosity, had to abandon his defence in the midstream of the trial would not lay the issue to rest. The result of Mr. Caron's collapse at the final stage of the trial would simply be that the costs and judicial resources already expended on resolving this issue by the public, as well as by Mr. Caron, would be thrown away.

45 The injury created by continuing uncertainty about French language rights in Alberta transcends Mr. Caron's particular situation and risks injury to the broader Alberta public interest. The Alberta courts have taken the view that the status and effect of the 1869 Proclamation was not fully dealt with in the previous litigation. It is in the public interest that it be dealt with now. This makes the case "sufficiently special" under the *Okanagan/Little Sisters (No. 2)* criteria, in my opinion.

D. The Exercise of the Superior Court's Inherent Jurisdiction

46 The proper perspective from which this case is to be viewed (and was viewed by the Court of Queen's Bench) is that of the provincial court judge who was on the last lap of a complex trial, with substantial costs incurred already, and months of court time under his belt, facing the prospect that all of this cost and effort would be wasted — despite its constitutional significance — because of Mr. Caron's impecuniosity. I believe that in these very unusual circumstances it was open to the Queen's Bench judge to determine, in the exercise of his discretion, whether or not to come to the assistance of the provincial court with the interim costs order, and that such an order was, in the words of *MacMillan Bloedel*, "essential to the administration of justice and the maintenance of the rule of law" (para. 38). Although he did not use these words, they describe in my opinion the tenor of his judgment.

47 Such funding orders, if made, "should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards" (*Okanagan*, at para. 41). In the present case, the judges were working within the confines of a trial in progress. Nevertheless, the order of Ouellette J. in the Court of Queen's Bench did put a cap on allowable hours for the expert witnesses, and disallowed a payment of $3,504.60 for a "temporary assistant". It seems that Judge Wenden in the provincial court was working with invoices not in the record before us. In his October 18, 2006 order (A.R., vol. 1, at pp. 2-13), Wenden Prov. Ct. J. clearly refused to make an *ex ante* blank cheque. On August 2, 2006, he ordered the Crown to pay Mr. Caron's already incurred (and therefore quantified) legal fees. All in all, I accept the conclusion of the Court of Appeal that the financial controls in place were adequate and met the *Okanagan* standard.

V. Conclusion

48 In my view, the Alberta Court of Queen's Bench possessed the inherent jurisdiction to make the funding order that it did in respect of proceedings in the provincial court. There was no error of principle in taking into consideration the *Okanagan/Little Sisters (No. 2)* criteria in the exercise of that inherent jurisdiction. On the merits, I defer to what seems to me to be the reasonable exercise of the discretion by the Queen's Bench judge. I would therefore affirm the decision of the Alberta Court of Appeal and dismiss the appeal.

49 Although costs are not generally available in quasi-criminal proceedings (absent special circumstances such as Crown misconduct of which there is none here), this case is more in the nature of regular constitutional litigation conducted (as discussed) by an impecunious plaintiff for the benefit of the Franco-Albertan community generally. In these unusual circumstances, Mr. Caron should have his costs on a party and party basis in this Court.

***Abella J.*:**

50 I agree with Binnie J. that the unique circumstances of this case appropriately attract the award of interim public interest funding based on the principles developed by this Court in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.), and *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.). I am concerned, however, that the reasons may be seen to unduly expand the scope of the common law authority of a superior court in the exercise of its inherent jurisdiction.

51 In particular, it is important that these reasons not be seen to encourage the undue expansion of a superior court's inherent jurisdiction into matters this Court has increasingly come to see as part of a statutory court's implied authority to do what is necessary, in the fulfilment of its mandate, to administer justice fully and effectively. (See *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 51; *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (S.C.C.), at paras. 70 and 71 ("*Dunedin*"); *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 19; *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722 (S.C.C.). See also *Interprovincial Pipe Line Ltd. v. Canada (National Energy Board)* (1977), [1978] 1 F.C. 601 (Fed. C.A.); *New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13 (Fed. C.A.); *Canadian Broadcasting League v. Canadian Radio-Television & Telecommunications Commission* (1982), [1983] 1 F.C. 182 (Fed. C.A.), aff'd [1985] 1 S.C.R. 174 (S.C.C.); *Dow Chemical Canada Inc. v. Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641 (Ont. Div. Ct.), aff'd (1983), 42 O.R. (2d) 731 (Ont. C.A.); *Children's Aid Society of Huron (County) v. P. (C.)* [2002 CarswellOnt 162 (Ont. S.C.J.)], 2002 CanLII 45644; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 (S.C.C.); R.W. Macaulay and J. L. H. Sprague, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), vol. 3, at p. 29-1; Ruth Sullivan, *Sullivan on the Construction of Statutes* (2008), at pp. 290-91).

52 The superior court's inherent jurisdiction, it seems to me, should not be seen as a broad plenary power to "assist", but should be interpreted consistently with this Court's evolving jurisprudence about the role, authority and mandate of statutory courts and tribunals. This includes an awareness of the need to avoid bifurcated proceedings in all but exceptional cases. (See *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54, [2003] 2 S.C.R. 504 (S.C.C.), at para. 29; and, *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.), at para. 79.) The fundamental purpose of such intervention by the superior court must be limited, as Binnie J. points out, to "what is essential to avoid an injustice" (para. 38). For the first time, that inherent jurisdiction was, interpreted in this case to include the ability to make an interim costs award in a proceeding before a statutory court or tribunal.

53 It is worth remembering, as Binnie J. acknowledged, that this exercise of inherent jurisdiction was based on the premise that the provincial court lacked the jurisdiction to make the order. Regrettably that piece in the jurisdictional puzzle is not, strictly speaking, before us. Mr. Caron had made an unsuccessful application for *Okanagan* funding directly to the provincial court. The court concluded that while the *Okanagan* criteria were met, *Okanagan* costs could not be ordered by the provincial court. That decision was essentially undisturbed by the Court of Queen's Bench (2007), 75 Alta. L.R. (4th) 287 (Alta. Q.B.), *per* Marceau J. and was not appealed by Mr. Caron. He chose instead to seek his funding by way of a new claim to the Queen's Bench, seeking the exercise of its inherent jurisdiction as a superior court to make the order. As a result, the question of whether a statutory court or tribunal has jurisdiction to order *Okanagan* costs will have to be determined in a future case.

54 That leaves us in the problematic position of having to decide Mr. Caron's ability to obtain funding and continue with this litigation *as if* no other jurisdictional course were available to him. I therefore simply raise a cautionary note: this Court's evolutionary acknowledgment of the independence, integrity and expertise of statutory courts and tribunals may well be inconsistent with an approach that has the effect of expanding the reach of a superior court's common law inherent jurisdiction into matters of which a statutory court or tribunal is seized. When considering the proper limits of a superior court's inherent jurisdiction, any such inquiry should reconcile the common law scope of inherent jurisdiction *with* the implied legislative mandate of a statutory court or tribunal, to control its own process to the extent necessary to prevent an injustice and accomplish its statutory objectives. (See *Cunningham*, at para. 19; *ATCO*, at para. 51; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), at para. 37; *R. v. Jewitt*, [1985] 2 S.C.R. 128 (S.C.C.); and, *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 35.) The inability to order funding in the very limited circumstances contemplated by *Okanagan* and *Little Sisters* could well frustrate the ability of the provincial courts and tribunals to continue to hear potentially meritorious cases of public importance. As McLachlin C.J. observed in *Dunedin*, costs awards are significant remedial tools and "integrally connected to the court's control of its trial process" (para. 81).

55 With the above caution in mind, therefore, in the exceptional circumstances of this case I agree with Binnie J. that the award of *Okanagan* costs should be upheld and the appeal dismissed.

Appeal dismissed.

Pourvoi rejeté.

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Tab 13

2012 ABQB 353
Alberta Court of Queen's Bench

P. (R.) v. V. (R.)

2012 CarswellAlta 920, 2012 ABQB 353, [2012] A.W.L.D. 3488, [2012] A.W.L.D. 3539, [2012] W.D.F.L. 3739, 217 A.C.W.S. (3d) 644, 541 A.R. 207, 70 Alta. L.R. (5th) 173

R.P., Applicant (Defendant) and R.V., Respondent (Plaintiff)

E.A. Hughes J.

Heard: June 2, 24, 2011; July 12, 2011; October 27, 2011
Judgment: May 25, 2012
Docket: Calgary FL01-08934

Counsel: Bernadette L. Labrie for Applicant / Defendant
Mr. V., Respondent / Plaintiff for himself
D.K. Colborne for Child, M.

Subject: Family; Civil Practice and Procedure

APPLICATION by mother for restraining order against father.

***E.A. Hughes J.*:**

Introduction

1 R. P. (Ms. P.), the Applicant, sought a Restraining Order Without Notice in a Family Law Situation on behalf of M.V. (M.), her son, against his father, R.V. (Mr. V.). An interim restraining order was granted on March 23, 2011 and was extended on a number of subsequent court dates. On May 11, a one day *viva voce* hearing was set for June 3, 2011 for the contested application for a permanent restraining order.

2 Prior to the hearing date, counsel was appointed by the Court to represent the interests of the child M..

3 On June 3, the hearing commenced and continued on June 24, July 12 and October 27 with the interim restraining order being extended on each date.

4 I find the applicant Ms. P. has established the necessity of a restraining order on behalf of M..

Background

5 Ms. P. and Mr. V. are the parents of M., a 13 year old boy born in 1998. Some background respecting the family relationship is necessary.

6 Ms. P., who was born and raised in the Philippines, met Mr. V. in 1990. Mr. V., a professional engineer who is now retired, was educated in England before coming to Canada. Mr. V., who is 66 years old, appears to be much older than Ms. P..

7 Mr. V. is a much physically larger individual than Ms. P.. Indeed Mr. V. would be a physically imposing individual to any person of Ms. P's height and build.

8 The parties eventually lived together in an adult interdependent relationship but separated July 30, 2002 when Ms. P. and M. left the family home in the early morning hours while Mr. V. slept. Ms. P. had received counselling from the Sheriff King Centre prior to her deciding to leave. Ms. P. testified that from approximately 1994 and on, Mr. V. was controlling of her, verbally abusive and occasionally physically abusive. Mr. V. in his evidence acknowledged "yelling and scolding" Ms. P. during their relationship but denied physically assaulting Ms. P..

9 After Ms. P. left the home, an action was commenced in this Court respecting parenting of M.. Between 2002 - 2003 the court proceedings appear to have been acrimonious but, in June, 2003 an agreement was reached between the parties and confirmed in May 2004, that Ms. P. and Mr. V. would share parenting of M.. As time progressed, M. was parented for a number of months at a time by one of his parents, and then the other. This was the state of affairs in 2010.

10 That year, Ms. P. was in the Philippines at the beginning of the year and M. was parented by his father from January, 2010 to June 21, 2010. On June 21, M. went to live with his mother at her home after she returned to Canada. M. remained at his mother's home until January 11, 2011 when he returned to his father's home for approximately a month before returning again to his mother's home on February 17, 2011.

11 During the time period June 21, 2010 to January, 2011 M. is alleged to have told his mother, that Mr. V. caned him and threatened to cane him. These same allegations and others were made by M. to his mother and his mother's husband after February 17, 2011. All the allegations give rise to this application.

Restraining Orders at Common Law

12 In the case at bar Ms. P. seeks a permanent restraining order against Mr. V.. By way of clarity, when I use the term "permanent" I am referring to an order granted after the parties' legal rights have been fully determined by a court. In this Court, it is not uncommon to see permanent restraining orders granted for a one year time period.

13 As Ms. P. seeks a common law restraining order rather than a Queen's Bench protection order pursuant to the *Protection Against Family Violence Act*, R.S.A. 2000, c. P-27, s. 4 (*PAFVA*), I will first set out the Court's authority to grant the relief requested, and then discuss the test an applicant must satisfy before the Court will grant a restraining order.

Source of Authority

14 A restraining order in the family law context is a form of injunction. See Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf edition, 2012, (Toronto, Ontario: Canada Law Book) at 5-26.

15 I.C.F. Spry in *Equitable Remedies*, 6th ed. (Agincourt, Ontario: Carswell, 2001) at 322 writes: "An injunction is an order, historically of an equitable nature, restraining the person to whom it is directed from performing a specified act..." Sharpe observes at 1-1 that "...the heart of the injunctive process is the prohibition, permanently or temporarily, of the wrongful conduct or conduct which would interfere with the rights of another."

16 The common law jurisdiction to grant a restraining order flows from the inherent jurisdiction of provincial superior courts to hear any matter properly coming before it, in combination with the general power of those courts to grant injunctive relief as an equitable remedy.

17 In *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.) at para. 24, the Supreme Court of Canada quoted with approval I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, in describing inherent jurisdiction as:

> "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so" ... These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior

> court of law" ... to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner". [citations omitted]

18 In *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.), at 499, the Supreme Court held that the authority to grant an injunction is based upon this inherent jurisdiction:

> The governing principle on this issue is ... the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the court over interlocutory matters: *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, a p. 727.

19 While the above quotation expressly refers to interlocutory relief, the scope of inherent jurisdiction is broader than that. The discretionary power to grant all manner of injunctions is an equitable remedy that dates back to English law: Spry at 323 and 328-329.

20 This Court's inherent jurisdiction and authority to grant equitable relief has been codified in the Alberta *Judicature Act*, R.S.A. 2000, c. J-2, ss. 8 and 13(2). See *Goebel v. Edmonton (City)*, 2004 ABCA 86, 346 A.R. 275 (Alta. C.A.) at para. 9; *Alberta Soccer Assn. v. Charpentier*, 2011 ABQB 3 (Alta. Q.B.) at para. 9; *Bank of Montreal v. Valerio*, 2009 ABQB 578, 480 A.R. 393 (Alta. Q.B.) at para. 30; *Sweiss v. Alberta Health Services*, 2009 ABQB 691, 483 A.R. 340 (Alta. Q.B.) at para. 33; *Yaghi v. WMS Gaming Inc.*, 2003 ABQB 680 (Alta. Q.B.) at para. 21, (2003), [2004] 2 W.W.R. 657 (Alta. Q.B.); *Switzer v. Gruenewald* (1997), 207 A.R. 391 (Alta. Q.B.) at para. 8. See also *Caron*, *supra*, at para. 34. Notably, s. 13(2) specifically refers to injunctive powers in language that virtually repeats the equivalent provision in England's original *Supreme Court of Judicature Act*, 1873 (UK), 36 & 37 Vict., c. 66, s. 25(8).

The Test

21 The next question is what test must an applicant satisfy before a court should exercise its discretion to grant a restraining order? The general principle derived from ss. 8 and 13(2) of the *Judicature Act* is whether a court, after having considered all the circumstances, is satisfied that granting an injunction will do justice between the parties. However, little else has been written on the issue.

22 Within the ambit of doing justice between the parties, different considerations underlie a court's exercise of equitable discretion according to the nature of the remedy sought. For example, in the case of interlocutory stay or an interim injunction application, the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at 334, will ordinarily apply. However, where as here an applicant seeks a permanent injunction, a court must first determine the entire extent of the parties' legal rights, which in turn informs the court's decision on whether to grant an equitable remedy.

23 In *Qureshi v. Gooch*, 2005 BCSC 1584 (B.C. S.C.) at paras. 28-29, the British Columbia Supreme Court set out a series of factors relevant to issuing a permanent injunction in the context of breach of contract. While the case at bar implicates a different legal right, i.e. the Applicant's freedom to remain unfettered by harassing, intimidating, threatening, or violent conduct, I accept the general principles in *Qureshi*:

> 28 The issuance of a permanent injunction is a discretionary order. In determining whether it is appropriate to grant a permanent injunction the court looks at the nature of the rights that the injunction is sought to protect and the surrounding circumstances, and attempts to balance the equities between the parties: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.).
>
> 29 In determining whether it is appropriate to order a permanent injunction courts have considered a number of factors including:

1. whether an enforceable right and a threat/violation of that right exists: *Delta Hotels Ltd. v. Okabe Canada Investments Co.* (1991), 81 Alta. L.R. (2d) 338 (Alta. Q.B.), var'd on other grounds (1992), 3 Alta. L.R. (3d) 85 (Alta. C.A.);

2. whether the applicant will suffer demonstrable harm: *Steeves Dairy Ltd. v. Twin City Co-operative Milk Producers Assn.* (1925), [1926] 1 W.W.R. 25 (B.C. S.C.);

3. the hardship that would be caused to the defendant if a permanent injunction was granted compared to the hardship that would be caused to a plaintiff if he/she had to resort only to an award of damages: *Cadbury*;

4. the conduct of the parties; and

5. the effectiveness of an injunction.

24 In my opinion, within the context of a no-contact restraining order these factors lead to a more specific standard: has the applicant established that the respondent poses a legitimate risk of harm to the applicant, a person under the applicant's care or the applicant's property as a result of the respondent's harassing, intimidating, molesting, threatening or violent behaviour?

25 This "test" is informed by legislative schemes across the country that confer statutory authority on provincial superior courts to issue no-contact restraining orders, and case law that interprets this legislation.

26 For example, the *Protection Against Family Violence Act*, confers wide authority on the Court of Queen's Bench to enjoin a person from conducting themself in any way that interferes with the applicant's right to live free from the respondent's harassing, intimidating, or violent behaviour. The statutory test is for the Court to determine whether "the claimant has been the subject of family violence". At s. 1(1)(e) the definition of "family violence" is defined as:

(e) "Family Violence" includes

(i) any intentional or reckless act or omission that causes injury or property damage and that intimidates or harms a family member,

(ii) any act or threatened act that intimidates a family member by creating a reasonable fear of property damage or injury to a family member,

(iii) forced confinement,

(iv) sexual abuse, and

(v) stalking,

. . .

27 Similar legislation, conferring similar authority to protect victims of domestic violence, exists in other provincial jurisdictions. See the *Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, ss. 2(d) and 7; *Domestic Violence and Stalking Act*, S.M. 1998, c. 41, C.C.S.M., c. D93, ss. 2 and 12(1); and *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, ss. 2, 6 and 7.

28 In Ontario, statutory authority for granting restraining orders is found in the *Family Law Act*, R.S.O. 1990, c. F. 3, s. 46(1) and the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 35(1). In *Fuda v. Fuda*, 2011 ONSC 154 (Ont. S.C.J.) at paras. 31-32, the Ontario Superior Court of Justice interpreted the statutory test for issuing restraining orders under both enactments:

31 The test for whether a restraining order should be granted is, under both s. 46(1) of *The Family Law Act* and s. 35(1) of *The Children's Law Reform Act* is whether the moving party "has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody." This test was considered in *Khara v. McManus*, 2007 CarswellOnt 3159 (Ont. C.J.) which was a trial of an application for a restraining order. Justice P.W. Dunn stated, at para. 33 as follows:

> When a court grants a restraining order in an applicant's favour, the respondent is restrained from molesting, harassing or annoying the applicant. It is not necessary for a respondent to have actually committed an act, gesture or words of harassment, to justify a restraining order. It is enough if an applicant has a legitimate fear of such acts being committed. An applicant does not have to have an overwhelming fear that could be understood by almost everyone; the standard for granting an order is not that elevated. However, an applicant's fear of harassment must not be entirely subjective, comprehended only by the applicant. A restraining order cannot be issued to forestall every perceived fear of insult or possible harm, without compelling facts. There can be fears of a personal or subjective nature, but they must be related to a respondent's actions or words. A court must be able to connect or associate a respondent's actions or words with an applicant's fears.

32 In other words, where an Applicant has a "legitimate fear" for his or her safety, even where that is somewhat subjective, a restraining order should go where there are compelling facts leading to that fear.

29 I accept this interpretation and adopt it within the context of no-contact restraining orders issued under the common law. However, I emphasize the applicant's fear, while subjectively held, must also be objectively reasonable. This requirement imports a necessary check and balance into the overall assessment in order to curtail abuse of the Court's equitable powers and prevent ill-intentioned applicants from pursuing ulterior motives.

30 There is both judicial and statutory support for incorporating this objective element. In *Fuda*, the Ontario Supreme Court of Justice referred with approval to the trial judgment in *Khara v. McManus* [2007 CarswellOnt 3159 (Ont. C.J.)] where Justice Dunn implied the objective element when he wrote "[the applicant's fear need not] be understood by almost everyone; the standard for granting an order is not that elevated. However, an applicant's fear of harassment must not be entirely subjective, comprehended only by the applicant".

31 Moreover, in Alberta, in *A. (N.D.) v. A. (K.B.)*, 2009 ABQB 26, 467 A.R. 120 (Alta. Q.B.) at para. 40, this Court rejected an application for a Queen's Bench Protection Order pursuant to s. 4 of the *PAFVA* precisely because the applicant's fears were not objectively reasonable. That decision gave effect to the requirement for reasonableness that is expressly written into the definition of "family violence", pursuant to *PAFVA*, s. 1(1)(e)(ii) which includes:

> any act or threatened act that intimidates a family member by creating a *reasonable* fear of property damage or injury to a family member,
>
> [emphasis added]

32 The final point to note is the test to grant a restraining order under the common law is broader in reach than the enactments referred to above. Those statutory laws generally target violence amongst persons within familial relations. In contrast, the common law casts a wider net to protect any person or their property suffering from, or at risk of, harassing, intimidating, molesting, threatening or violent behaviour. Where, for example, a victim suffers violence in circumstances where the victim is the boyfriend or girlfriend of the aggressor, the victim is not able to seek protection under the *PAFVA* on account of the familial scope of Alberta's Act. This is exactly the type of circumstance where the broad reach of the common law can, and does, step in with a form of remedy available to the victim.

33 In summary, subject to the wide discretion of the Court to grant equitable remedies based on all the circumstances, the general rule this Court should follow before granting a restraining order under the common law is whether the applicant has sufficiently demonstrated a reasonably held and legitimate fear for his or her safety, the safety of any

other person under his or her care or the safety of his or her property as a result of the respondent's harassing, intimidating, molesting, threatening or violent behaviour. If so, the Court should grant the injunctive relief barring any other circumstances that might militate against doing so, such as facts that implicate one or more other equitable considerations, such as clean hands, excessive hardship, misrepresentation, laches, etc.

The Allegations

34 Ms. P. testified M. told her about Mr. V. caning M. and threatening to cane M.. In particular, Ms. P. testified:

> Q When you came back from the Philippines when?
>
> A Yes, in June 21st, 2010, he started to open up some of his fears about how his father treat — was treating him. And I ask him what was that. And he said, I don't — I — I'm afraid to go back to my dad because he was caning me. And I said, Caning you for what reason? And he says, Because he would give me difficult questions apart from my homework, and if I don't answer the difficult question, he would cane me. But at the time he didn't tell me the details how he was caning him, but then he expressed that he told — that [Mr. V.] told him he will cane him, scrape to the bone when — to discipline him, or when he leaves the — the keys of the house or when he doesn't study.

35 Ms. P. raised the issue with Mr. V. in an email she sent to him dated June 30, 2010. Her email reads as follows:

> Hi [Mr. V.],
>
> Just want to know when exactly do you plan to be back. I got his report card. He got an award on the 1st term and has good grades. But dropped his grades on 2nd and 3rd. Most of it were some assignments or works had to be done through internet, which you don't have at home. It is very important now to students to have access in the internet to do their work. You should understand that this is now a new generation. Going to the library on occasional basis does not help M. much to accomplish his works. You have to understand the flow of teaching these days, otherwise he will be out of place and be left behind in school assignments. DO NOT YELL OR GET MAD OR SPANK OR CANE HIM! It won't help the morale of your child. You will plant a nervous breakdown on his studies. You can't always dictate how you want M. to study. He needs some balance to make him to have healthy mind. He is trying his best to study with you. He is already a big boy to be canned!!! He is very very afraid of this !!! I hate this threat you put to his head that you will cane him scrape to his bone!!! How does that help to motivate your son to study!!!

36 On July 7, 2010 Mr. V. replied:

> Terrible e-mail Not true. He did very well in Science. I take him to the library almost everyday and he goes on the internet all the time. Unfortunately he may be playing the games. I regularly ask him if he has any assignments he says no. You have been talking to that stupid [K.G.] [sic] Thank god she is no longer his teacher. Please stop this fighting you are making M. miserable. I am sending him a copy of everything to him.

37 In order to put Mr. V.'s response in context, it is necessary to include an email chain between the parties approximately three months earlier. The email chain began with Ms. P. receiving an email from K.G., M.'s teacher, and the same K.G. referred to above. The email dated March 25, 2010 read:

> [Ms. P.] — it is SO unfortunate that M. has to be without you - he truly misses you - I cannot believe that you are now thinking of coming home in June or July - that will be almost a year since you left - I feel so badly for him - it is too bad that your work is not here in Calgary with him - I understand the job situation there is unstable and I sure you want to be here with your son, as well.
>
> M. is not on holidays - he is in school - he will go on Spring holidays starting this Friday the 26th until the 7th of April.

At school, he is O.K. - I think that is an unhappy lad - he does not seem to do too much outside of school - he has not computer at home to access e mail, complete work at home or connect to our school D2L homework sites. I only wish that he would gain some friendships at school, but going home for lunch each day, does not allow him to be with his classmates for social or fun times. I have not met your former husband, he has not come into the school at all. I did ask M. to talk to his dad about a new pair of shoes, as the ones he was wearing were falling apart. He did a new pair, exactly like the other ones - he likes them. He also told me that his dad cut his hair, he does not like it much, it is growing our now.

Hopefully you can return to Canada sooner than you think and spend some much needed quality time with M.

Take care,

38 Ms. P. forwarded the email to Mr. V. and said: Hi [Mr. V.] I'm just forwarding you this message from M.'s teacher.

39 Mr. V. responded as follows on March 29, 2010:

M. is very happy, I spend a lot of time with him, we are very close. Don't listen to that stupid idiot [K.G.]. She is Jewish and wants to stir the shit and make us fight she probably gets commission from Jewish family lawyer for client referrals. I am very suspicious of her intentions because it is highly irregular for a school teacher to gets involved in a student's family affairs. [K.G.] has done very little for M.'s ability to read and comprehend. Frankly I am not surprised because in her e-mail she demonstrates poor command of the English language, particularly for a teacher designated to teach English to her students. M. is excelling in Maths and is above average in Science. While I was teaching him science, I observed that he had difficulty in reading and comprehension; therefore I am now concentrating in teaching him to read and write. He has been improving, but this should have been [K.G.]'s job, instead she engages in a student's private home life. I did not approve of her field trip to see a puppet show about "the tooth fairy" organized by [K.G.] for $15. M. is matured and does not even believe in Santa Claus. I treat him with respect and encourage him to make his own decisions regarding his hairstyle and the shoes, which he wishes to wear. He has 6 pairs of shoes and I will not interfere in his choice of shoes or clothing he wishes to wear.

40 After Mr. V.'s July 7 response to Ms. P., M.'s report of caning and threats of caning were not discussed again between his parents.

41 At the end of January, M.J.W.O. [Mr. O.], the husband of Ms. P. returned to Calgary from the Philippines. In mid-February, M. returned to Ms. P.'s home because Mr. V. had to travel to B.C. for a court case there.

42 M. spoke again to his mother on his return to her home about the caning, threats of caning, as well as told her about other conduct of his father's. She testified:

Q MS. LABRIE: What — what did your son tell you?

A Okay. My son told me that he doesn't want to be caned, that he is afraid of caning him again. And he said that — and we ask him, How was he caning you? And then so he said he would ask him to go to his bedroom and face the mirror and cane him.

Q What would he cane him with?

A When we asked M., he said it's a stick, stick that he uses in the plants. And then so my — I —

Q I — so he would have to stand in front of the mirror while he was —

A Face the mirror —

Q — caning? A — and bend.

Q Yes.

A But not looking at — but not looking himself in the mirror. So when he demonstrated, he was bending, heads down but in front of the mirror.

Q Were all of his clothes on when he was caned?

A Clothes were on, yes.

43 Mr. O. testified:

Q Could you please tell the Court what those disclosures were.

A Certainly. M. was very upset about a couple of things that had been going on between him and his father. And M. related to me that his father — to his — me and [Ms. P.] that his father had hit him after he had been studying and gotten questions wrong. We asked him, what do you mean hitting you? And he started to explain that it was regular practice that he would be given tough math questions or other questions in other subjects, and if he got them wrong, then [Mr. V.] would proceed to take M. to his bedroom, put him in front of the mirror, bend M. over and hit him with some sort of a cane or stick.

There was an incident as well on that exact day M. related to us whereby he was younger at the time, and [Mr. V.] had asked him to get out and check out the space between the back of the truck and another vehicle while was backing into a parking stall. M. wasn't accurate in his measurements, and at — I don't know if the vehicle — he never was clarified that the vehicle actually impacted the other vehicle, I don't know. But when he returned to the vehicle, M. told me and [Ms. P.] that his father hit him in the face and made him bleed.

As well, he related to us a couple days after that as we were talking about things that his father made him shower with him. And he was so incredibly scared to tell us that, that it was so embarrassing for him. I — I felt sorry for M. I felt sorry for him the whole time, but that was especially concerning just considering about pain in — in the way he said it. He said, You — you don't think I'm weird if you tell me this — if I tell you this, it's just that my father makes me shower with him. And — and he was very ashamed of that.

He also — M. also recalled the times that he saw [Mr. V.] hit [Ms. P.] back in the day, and he related those events as well.

Q Now, did he — did he tell you what [Mr. V.] used to hit him with?

A Yes. He said a cane. When we tried to get the accurate description of the cane, and it turned out to be a — what was it, M.'s words exactly, a stick that you would use for holding up a plant. He reckoned that it was about, I don't know, half an inch in diameter and fairly long, maybe 3 or 4 feet long.

Q And was M. — did he mention whether or note he was clothed while this was happening?

A Certainly he had his clothes on. I asked him, Did he take your pants off? No, he did not.

Q And did he give you any indication of how often this would happen?

A He said it was quite frequent. He — he can't remember any exact times, but he said it was more than a few times per day if they were on a study session.

44 M. told his mother and Mr. O. most of this conduct took place between October, 2009 and June, 2010 when his father, while assisting M. with his schoolwork, would ask questions M. could not answer. However, Mr. V. did not cane M. during the period January 21-February 17, 2011.

45 M. also told them of other conduct that included Mr. V. forcing M. to travel to Vancouver without allowing him to urinate, refusing to allow M. to contact his mother by phone, and repeatedly and publicly accusing M. of being racially impure in that he is half Filipino and half Iranian; M. also told them about a Taser his father owned.

46 Ms. P testified that when she asked M. why he had not told her these things before he told her he didn't want to tell her because he was afraid that she would then tell his father and because of the joint custody status, his father would come to learn of M.'s concerns.

47 On February 28, 2011 Ms. P. sent the below email to Mr. V.. Ms. P. testified that prior to Mr. V. leaving for B.C. on February 17, she had phoned Mr. V. several times to try to discuss the three points in her e-mail but Mr. V. hung up on her or told her not to disturb him.

> [Mr. V.],
>
> Since I have to be the adult here, here is my phone number 403-[...]. I am tired of your hanging up the phone when (sic) on me like a little girl, so don't call me unless you are prepared to discuss things like a man. I only want to know three things from you anyways so you can just email me them and then so I don't have to listen to your emotionally abusive words.
>
> 1. when are you coming back.
>
> 2. what is your contact number for emergencies.
>
> 3. where are we meeting when you come back as a formal meeting to discuss M.'s future.
>
> I am tired of letting you take too much control of my life and from this point forward, I am using the law and your own stupidity against you. You assume I have no capacity to do anything and that your physical and emotional abuse you use on me and M. has made us afraid of you. That was true for many years but now that I see the true effect you have on my life and the way people should really treat me and my son with respect and love I know better. I am removing your horribly controlling behaviour from my life, once and for all.
>
> The agreement is old, every lawyer I have had it in front of laughs at it and says they have never seen anything this silly or one sided.
>
> I want to change it.
>
> M. wants to change it.
>
> If you do not grant us the opportunity to sit down and change the agreement outside of court ... you have forced me to do it inside of court then.
>
> I don't want to spend that kind of money but if you force me to ... I will have no choice.
>
> For the sake of your son please consider this carefully.

48 Mr. V. called Ms. P. on March 4, 2011 about the email. Ms. P. spoke to Mr. V. about varying the consent order and obtaining his permission for M. to travel with her. It appears nothing was resolved during the conversation.

49 After this, Ms. P. went to both Child Welfare and the police seeking information on how to resolve the matter and protect M.. Both agencies advised her to make an application for a restraining order.

50 Mr. V. testified and denied ever caning M. and that he did not believe in caning. When asked whether he had ever threatened to cane M., Mr. V. testified:

Q Let's get to the point right now. Did you ever threaten to cane M.?

A I — I can't recall that. I — I — I have yelled at him. I have called him an idiot, and I have called him — that his actions are stupid on occasions. And — but these are — these are — these are words that have been described in the Oxford Dictionary. Stupidity, the — the Oxford Dictionary definition is un — unintelligent or unthoughtful behaviour. So I know it has different connotations in North America, but that's the meaning of the word. And so it's not out of place for me to have said that.

51 Shortly after this answer Mr. V. testified:

Applicant's statement on oath that I threatened to cane him to the bone is untrue. I am not familiar with such an expression. I have never used such a threat.

52 Mr. V. admitted on more than one occasion he had yelled at M. when assisting M. with his homework. For example, Mr. V. testified in direct:

A Well, the most important issue here, My Lady, is that M. was a very fine boy, but he did not take to his studies voluntarily. He till to this day will not open his books and study on his own. He needed to be motivated, induced and occasionally forced to do so. And when I say "forced," I don't mean by beating. It was a combination of yelling, you know, saying that I'm going to cut off his television time and DVD time, I'm not going to take him swimming, and stuff like that, you know. So those where my disciplinary actions. It came with a very loud voice on occasions. And the — when — when he — when he made stupid mistakes, I told him that they were stupid. And you know, I — I — I admit to that. But I did not beat him. I may have paced up and down the corridor, yelling on top of my voice.

I sat down with him patiently and explained to him that, Look, once you fall behind in the class, you know, it's going to be very difficult for you, you're not going to enjoy school, you are going to fall further and further behind, and you will eventually drop out of school, and — and life will be very tough for you in later years when — when — when — when, you know — and I gave him lots and lots of examples. And I used this therapy all the time where we would see an unfortunate individual, and I said, Look this is what happens when you drop out of school, you know, and stuff like that.

But it was a combination of motivation, inducement, yelling, disciplinary action, and — and — and, you know, the — the important point that I want to make to this Court is that every child is different. There are some children which will run to their books. There are others which will maybe run on some days and avoid his books on the other days, and there are some that will avoid them all the time. M. unfortunately fell in the last category. He would not voluntarily study or do his homework till I — I — I coaxed him, you know, sat down with him, we would work together. I'd do my work, and he would do his work, you know. Well, that — that was a strong mote (sic) — inducement for him. I would take him to the library for the primary reason that I would show him other children of his age. And I said, Look, all these guys are studying. And that would motivate him. But on his own, he would not be motivated.

This was — this is the peculiarity of — of individual child characteristics. The psychologists will say that. But in essence it took a lot of hard work and discipline and disciplinary action and perhaps yelling to get M. who is at the bottom at the class in Grade 5 to within the first five students in his class. In fact, he had the highest marks in mathematics and science, and he was given an awards — certificates of award for — for two of the subjects. And he was also given a third certificate to show the greatest improvement.

53 Mr. V. also denied not stopping on trips to Vancouver for M. to urinate, denied not allowing M. to telephone his mother and denied owning a Taser.

54 Lastly, Mr. V. denied the allegation he forced M. to shower daily with him and explained the showering this way:

> ... Applicant's allegations that I forced M. to shower daily with me is untrue. During the period January 10th 2 — 2011, to February 17th, 2011, we both showered at the rec centre with dozens of other males when we frequently went swimming. Okay? When — I — I — I don't — I don't think we ever showered in that period at home. We have showered at — at other times going back a year ago or so, whatever, you know, and I admitted to that in my affidavit.
>
> M. is reluctant to shower on his own. I — I — and I haven't figured out exactly why that is the reason. It may very well be that he's fearful of getting soap in his eyes, something he complains bitterly about when it does occur. So I have induced him to shower at the same time with me. Apart from casually observing that he cleanse himself, it also makes more efficient use of the hot water because, you know, while he's scrubbing his face, you know, and — and body, I'm — I'm showering and — and vice versa. I — I say on — on oath that I had never touched his private parts, his rectum area or his genitals after the age of 4. At best I would assist him to wash his back or his face because he was reluctant to the soap getting in his eyes.
>
> So — but I have two bathrooms in my house, and M. has always been free to shower in either bathroom at any time. He simply does not do so. ...

55 Mr. V. called two additional witnesses in his case, both of whom testified to their observations of Mr. V.'s parenting of M.. Both spoke of Mr. V.'s parenting in a positive light, albeit their opportunity to observe Mr. V.'s parenting was in a public venue, once per week.

Positions of the Parties

56 Counsel for Ms. P. and counsel for M. submitted the evidence of Ms. P. and Mr. O. should be accepted by the Court and this evidence clearly establishes that M. fears his father because of the past caning and threats of caning, and other related conduct. Accordingly, a permanent restraining order should be issued.

57 Mr. V., both during his testimony and his submissions, stated the allegations are untruthful. He submits they have been fabricated by Ms. P. in an attempt to alienate his son from him and is an attempt by Ms. P. to vary the shared parenting order. He stated he is a caring father who has always had M.'s best interests at heart.

Analysis

58 In assessing the evidence of the Applicant's case, I am cognizant of the frailties of hearsay evidence. I am also cognizant of Mr. V.'s submission that this application for a restraining order is a "back door" means of varying the parties' shared parenting order.

59 I begin my assessment of Ms. P.'s evidence with her email to Mr. V. dated June 30, 2010. The contents of the email are consistent with M. telling his mother about his father caning him and threatening to cane him while studying. The email was sent approximately eight and one-half months prior to Ms. P.'s swearing her affidavit in support of the restraining order.

60 To find this application is a means of varying the shared parenting order would mean Ms. P. planned a sham application some eight and one-half to nine months prior to her bringing it, by sending the email of June 30, 2010 to Mr. V.. I do not accept that Ms. P. orchestrated the matter in this way.

61 I also take into account the evidence of Ms. P. and Mr. O. that M. does not want to have anything to do with his father. Judges in family matters routinely observe children moving from one parent's home to the other to avoid the parent who is the strict disciplinarian of the two parents. In this case it is clear that Mr. V. is the strict parent, at least when it involves education. However, we do not see those same children then wanting to have nothing to do with the strict parent as is the case here.

62 The evidence before me from all of the witnesses called establishes M. is an intelligent, caring, sensitive, polite and kind individual. M.'s statement of wanting nothing more to do with his father, even though his mother and Mr. O. encourage him to have a safe relationship with his father, is evidence I find to be confirmatory of the allegations.

63 I also observe in assessing the evidence of the Applicant's case that Mr. V. did own a Taser like instrument in his home at the time Ms. P. made her application. I also observe Mr. V. testified he and M. showered together, albeit he testified it was because M. was reluctant to shower on his own.

64 Mr. V.'s evidence troubles me in several areas. For example, when asked about the allegation whether he had ever threatened to cane M., he testified "I can't recall."

65 Mr. V. held himself out as an individual who is very tolerant of different religions and race in relation to the allegation of accusing M. of being racially impure. However, it is evident from his cross-examination with respect to his March email respecting M.'s teacher, that he is not as tolerant as he held himself out to be.

66 It was apparent to me from Mr. V.'s evidence that he considers himself to be superior to Ms. P..

67 When I consider:

i. Mr. V.'s past remarks respecting K.G.;

ii. his superior attitude vis á vis Ms. P.; and

iii. he never denied accusing M. of being racially impure, he only claimed that he did not damage M.'s self worth;

I find Mr. V. did accuse M. of being racially impure.

68 I also found Mr. V.'s explanation of why he and M. showered together, especially the part with respect to this being a more efficient use of water, as an unbelievable explanation. Thus, I do not believe Mr. V. when he testified he did not force M. to shower with him.

69 These issues and others with Mr. V.'s evidence lead me to reject Mr. V.'s evidence when it conflicts with that of Ms. P. and Mr. O..

70 There is no doubt in my mind that Mr. V. loves his son and wishes him to succeed academically. I find that Mr. V.'s method of discipline when he assisted M. in his studies included scolding, yelling and withholding privileges, but also included caning and threats of caning. These latter actions meet the test for the granting of a restraining order and I grant a permanent restraining order on the same terms as the interim restraining order.

71 I am of the view, like M.'s mother and Mr. O., that it is in M.'s best interests to have a healthy relationship with both his parents. Therefore, taking into account the length of time Mr. V. has been bound by the interim restraining orders, the permanent restraining order will end July 31, 2012.

72 However, in light of Mr. V. caning and threatening to cane M., I am staying the shared parenting provision of the May 2004 Order until further order of the Court. To my mind, if Mr. V. wishes to rebuild his relationship with M., it must be in an environment where M. feels safe. At present, residing in his father's home is not a safe environment.

Application granted.

End of Document

Tab 14

has been used only occasionally and by a few persons, and only to such an extent and in such a manner as was inevitable by reason of the absence of any fence or other obstacle. Such user is too indefinite to form the foundation of a public right, or to establish a dedication as part of the highway. I may add that, even if the public have rights over the margin, but not beyond, the acts of the defendants cannot be justified. I must therefore make a declaration and grant an injunction in terms of paragraphs 1 and 3 of the claim, and the defendants must pay the costs of the action.

Solicitors: *Patersons, Snow, Bloxam & Kinder; Prior, Church & Adams.*

D. P.

In re WALKER. WALKER *v.* DUNCOMBE.

[1901 W. 222.]

Settled Estates—Infant Tenant in Tail—Maintenance—Direction to accumulate Surplus Income—Allowance for Up-keep of Family Mansion—Subscriptions to Local Charities.

A testator devised real estates upon trusts under which, in the events which happened, A. became infant tenant in tail in possession. The will directed that during the minority of any person for the time being tenant in tail in possession the trustees should apply 500*l.* per annum out of the income for the maintenance and education of the minor, and should accumulate the surplus income for the benefit of the minor on attaining twenty-one. The testator also bequeathed nearly half a million in money to be invested in real estate to be held upon the same trusts as the devised estates. The net income of the settled property exceeded 14,000*l.* per annum.

The Court sanctioned a scheme for allowing 4000*l.* per annum out of the income for the up-keep of the family mansion and the maintenance there of the infant tenant in tail in a manner befitting the social position he would occupy in life. This allowance included 100*l.* per annum for subscriptions to local charities.

THIS was an application to obtain the sanction of the Court to a scheme prepared by the trustees of a settlement for the maintenance of an infant, who was tenant in tail in possession of the settled estates, under these circumstances.

FARWELL J. 1901 WALKER, *In re.* WALKER *v.* DUNCOMBE.

Sir James Walker, Bart., late of Sand Hutton, in the county of York, by his will dated September 5, 1882, devised real estates of great value in the county of York and elsewhere (comprising 9698 acres) to the use of three persons, upon trust that they, or other the trustees or trustee for the time being of his will, should as soon as conveniently might be after his death settle and assure the said real estates to the uses upon and for the trusts, powers, and provisions thereinafter declared concerning the same, that was to say, to the use of his eldest son James Robert Walker for life without impeachment of waste, and after his decease to the use of James Heron Walker (the first son of the said James Robert Walker) for life without impeachment of waste, and after the decease of the said James Heron Walker to the use of the first and every other son of the said James Heron Walker severally and successively in tail male, with divers remainders over. And the testator (amongst other things) directed that the said settlement should contain provisions enabling the trustees or trustee for the time being thereof, during the minority of every person for the time being entitled thereunder, either as tenant for life or in tail by purchase to the possession of the said real estates, to manage the same and to receive the rents and profits thereof, and to make any new or additional buildings, fences, plantations, or other improvements thereon as the same trustees or trustee should think proper and most advantageous for the same estates and the persons interested therein, and to apply for such purposes accordingly any part of the rents and profits of the same hereditaments; and also provisions that the said trustees or trustee for the time being should out of the rents and profits of the same estates raise and levy, during the minority of any tenant for life or in tail by purchase in possession as aforesaid, such yearly or other sum for the maintenance, education, or benefit of such minor as his guardian or guardians should in writing direct (not exceeding in the whole, until such minor should attain the age of eighteen years, the sum of 500*l.* in any one year, and for the residue of such minority the sum of 600*l.* in any one year), and should pay the same yearly, or other sum or sums of money, to such guardian or guardians, to

be applied to the last-mentioned purposes, either immediately by them or at their election, to be paid to any person or persons to be appointed by them to receive and apply the same to those purposes; and also that the said trustees or trustee for the time being should, during the minority of any tenant for life or in tail by purchase in possession as aforesaid, invest and accumulate on such securities as were thereinafter authorized the surplus of the yearly rents and profits of the settled estates for the benefit of such tenant for life, or in tail as aforesaid, if he should attain full age, but if he should die under age, then should hold all investments and accumulations of surplus rent during his minority upon the trusts therein directed to be declared concerning the moneys to arise from any sale or exchange of the said settled estates under the said settlement; and the testator directed that the said settlement should contain usual powers of leasing for twenty-one years, and of sale and exchange, and that the money to arise from any sale and exchange should be invested in the purchase of other hereditaments to be settled to the same uses and trusts as in the settlement to be contained. And the testator expressed his desire that the said James Robert Walker should make Sand Hutton his chief residence.

By a codicil to his said will the said testator bequeathed a sum of 340,000*l.* and the residue (about 100,000*l.*) of his personal estate to the trustees of his will, upon trust to invest the same and the interest thereof upon the same trusts and purposes as in the will declared concerning the moneys to arise under the powers of sale and exchange to be contained in the settlement.

The said testator died on October 8, 1883, and the settlement of the devised real estates directed by his said will was carried into effect by a deed dated August 19, 1884.

Sir James Robert Walker, the first tenant for life under the will and deed of settlement, died on June 12, 1899, and was succeeded as tenant for life by his son, Sir James Heron Walker, who died on November 25, 1900, leaving a widow, Dame Violet Maud Cecil Walker, and five infant children, the eldest of whom, Sir R. J. M. Walker (who was born in March,

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1890), then became tenant in tail in possession under the will and deed of settlement of the real estates and settled funds.

This was an originating summons by the infant tenant in tail, suing by his next friend, for an order—(1.) That the defendant trustees might be authorized to permit Sand Hutton Hall, together with the outbuildings, gardens, and pleasure grounds, to be used and occupied during the minority of the plaintiff as the residence of the plaintiff and of Dame Violet Maud Cecil Walker, the mother and one of the guardians of the person of the plaintiff. (2.) That the defendant trustees might be authorized during the minority of the plaintiff, out of the rents, profits, and income of the estate of which the plaintiff under the said will and settlement is tenant in tail in possession, to keep Sand Hutton Hall and the outbuildings thereof, including the greenhouses and all other garden buildings, erections, and walls, in repair, so far as regards roofs, main walls, and timber and external repairs, and to pay 4000*l.* per annum (free of income tax) for the maintenance and education of the plaintiff as from January 1, 1901, to the said Dame Violet Maud Cecil Walker, one of the guardians of the person of the plaintiff.

It appeared from the evidence that Sand Hutton Hall was the principal mansion-house on the estates, and had been occupied and maintained by Sir James Walker, Sir James Robert Walker, and Sir James Heron Walker as the family seat. It was rebuilt some years ago by Sir James Robert Walker at a cost of 20,000*l.* It comprised, with the outbuildings, gardens, and pleasure grounds, some seventeen acres, and required about 600*l.* per annum to maintain it in proper order. The rents and profits and income of the settled estates and settled funds amounted to some 24,000*l.* per annum, and, after providing for all annuities, jointures, and other charges and outgoings, the net income of which the infant plaintiff was tenant in tail in possession exceeded 14,000*l.* per annum. It was most desirable in the interest, and it would be greatly for the benefit, of the infant plaintiff that he should be brought up as far as possible at Sand Hutton Hall, and that Sand Hutton Hall should continue to be maintained and kept up as the

principal mansion-house of the estate, where the plaintiff could reside as his permanent home with his mother and her other children. With this object the trustees had prepared the following scheme for 4000*l.* per annum to be paid to the guardians of the plaintiff, as an allowance for his maintenance and education:—

	£	*s.*	*d.*
Internal repairs of Sand Hutton Hall and the outbuildings attached thereto . .	200	0	0
Maintenance of gardens and pleasure grounds of Sand Hutton Hall	600	0	0
To be paid to Dame V. M. C. Walker for the maintenance of the plaintiff . .	2700	0	0
Tutors, clothing, pocket-money, travelling and incidental expenses of plaintiff . .	400	0	0
Subscriptions to local charities . . .	100	0	0
	£4000	0	0

Sand Hutton Hall could be maintained by Dame V. M. C. Walker if the foregoing allowance were authorized by the Court; but otherwise the house would have to be let, if a tenant could be found, and the plaintiff would have to be brought up and maintained elsewhere. Dame V. M. C. Walker had a separate annual income of her own of about 2500*l.*, and would also receive the income (about 1000*l.*) of the portions of her younger children for their maintenance, but she could not properly maintain the plaintiff at Sand Hutton Hall and educate him on a smaller allowance than that above stated.

Butcher, K.C., and *T. L. Wilkinson*, for the infant plaintiff. It is considered by the members of the family to be for the plaintiff's benefit that he should be allowed to live at Sand Hutton Hall to become acquainted with and known to his tenantry, and be identified with all the old associations that count for so much in such a family. But 500*l.* per annum is wholly inadequate for the purpose. It is submitted that the case falls

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within the principle of *Griggs* v. *Gibson* (1); *Havelock* v. *Havelock* (2); *In re Collins* (3); *Bennett* v. *Wyndham* (4); *Revel* v. *Watkinson* (5); *Greenwell* v. *Greenwell* (6); *Barnes* v. *Ross.* (7) The guardians approve of the scheme. Under the circumstances the allowance of 100*l.* per annum for subscriptions to local charities is reasonable. Sect. 43 of the Conveyancing and Law of Property Act, 1881, also seems applicable to the case.

T. B. Napier, for the defendant trustees.

Davenport, for the infant remaindermen. It is not to the benefit of the infant remaindermen to contest this application. A liberal allowance for keeping up Sand Hutton Hall as the family residence is desirable; but the question is whether the Court can do it in the face of the express direction in the will to accumulate the surplus income.

FARWELL J. The testator, Sir James Walker, who died in 1883, was the great-grandfather of the present plaintiff, who is infant tenant in tail in possession under the limitations contained in the will. This is an application asking that the trustees may be permitted to expend some 4000*l.* a year in keeping up Sand Hutton Hall, the principal mansion-house on the property, and in paying the mother of the infant plaintiff a sum of money to enable an establishment to be kept up at Sand Hutton Hall where the infant tenant in tail, who is now ten years old, and his three brothers may reside. The estate is a very large one: about 12,000*l.* a year in land, and some half a million in personalty, which is given by a codicil to be invested in the purchase of land to be settled to uses similar to those devised by the will. I should have mentioned that the will directs a settlement to be made, but inasmuch as it sets out very fully the provisions which are to be contained in the settlement, and the settlement which has been made is practically a copy of the provisions in the will, I will deal only

(1) (1866) 14 W. R. 538.
(2) (1881) 17 Ch. D. 807.
(3) (1886) 32 Ch. D. 229.
(4) (1857) 23 Beav. 521.
(5) (1748) 1 Ves. Sen. 93.
(6) (1800) 5 Ves. 194.
(7) [1896] A. C. 625.

with the words contained in the will. [His Lordship then read the trustees' powers of management, and the maintenance and accumulation clauses above stated, and continued :—]

It is obvious that 500*l.* a year is wholly inadequate to keep up Sand Hutton Hall. There is a general power of leasing in the will which does not exclude the mansion-house, but there is an expression of desire that the son would reside at Sand Hutton Hall, which is some evidence to shew that the testator regarded Sand Hutton as the family mansion-house. The question that I have to consider is whether I can on the true construction of this will authorize the trustees to make any expenditure larger than the sum mentioned in the will. I decline to accept any suggestion that the Court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible. But in considering what is the true construction of the will, it is open to the Court to ascertain if there be a paramount intention expressed in the will, and if so, to consider whether particular directions are properly to be read as subordinate to such paramount intention, or are to be treated as independent positive provisions. This is, in my opinion, the basis of the cases before Lord Hardwicke and Pearson J. *Revel* v. *Watkinson* (1) was a very strong case. Lord Hardwicke there had a tenant for life and a remainderman. There were charges upon the estates the interest on which more than absorbed the whole of the income of the property, and, in the absence of any express direction in the will, the tenant for life was bound to keep down the interest on the charges. But Lord Hardwicke held that there was in that case a paramount intention that the tenant for life should not starve, and he accordingly directed a reasonable sum to be paid for the maintenance of the tenant for life out of the income. That was extended by Pearson J., in the case of *In re Collins* (2), to the education and bringing up of an infant in a way suitable to the position which he was likely to fill in the world afterwards, on the ground that where a testator settles his property on persons in succession, but postpones the enjoyment of the estate and provides for infants being maintained,

(1) 1 Ves. Sen. 93. (2) 32 Ch. D. 229.

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he does not, by mentioning a sum for maintenance and directing an accumulation of the rest without negative words, necessarily forbid the expenditure of a larger sum, if it be proved to be necessary for the maintenance of the estate and the bringing up of the infants in a manner suitable to the position which he has pointed out for them by his will. There are in fact two intentions running side by side in this will. One is that the infant is to inherit the full enjoyment at twenty-one of that which is now subject to the management clauses. The other is that he shall have an allowance of 500*l.* a year during minority. I think I do no violence to the words of this will when I regard the 500*l.* a year as the sort of allowance which a parent in the position of the testator would make to a son who is under age, either allowing it to him personally or regarding it as the amount which would be necessary to pay his school bills and clothing and so on, while the parent himself provides a home and keeps up the family estate and the family mansion at which the boy lives with his father. The direction as to management in this will to my mind points to the same state of things. The testator certainly did not contemplate that Sand Hutton Hall should be shut up; and although the power of leasing is wide enough to include the letting of Sand Hutton in case it became necessary, I think the testator had no contemplation of the possibility of letting, nor would it be desirable or convenient that the house should be let as a furnished house unless it was unavoidable. I find in this will a paramount intention that the estate should be kept up, but no express provision made with respect to the mansion-house: I find an allowance of 500*l.* a year for the maintenance, education, or benefit of the infant tenant in tail: and I find no negative words forbidding the trustees to exercise their discretionary power of managing the estate by keeping up the family mansion-house as a home for the benefit of the infant tenant in tail and his family. I therefore hold that on the true construction of this will I can accede to the suggestion which is made to me. The case of *Griggs* v. *Gibson* (1), before Lord Hatherley, is strongly in favour of the conclusion at

(1) 14 W. R. 538.

which I have arrived. No question is here raised by Mr. Davenport that the amount is more than sufficient, and it seems to me to be a very fair and proper amount. And as regards one item—the subscriptions to charities—to which my attention has been specially called, although I am not aware of any reported case, it is within my own recollection that in many cases of large estates judges have allowed a sum to be expended for charities on the footing, amongst other things, that it is within the principle that the son is to be brought up and the property maintained in the mode usual amongst gentlemen holding the position to which the son is born, keeping up the reputation of the family and estate, and this involves the payment of subscriptions to local charities. Therefore I will make the order as asked.

Solicitors for all parties : *Long & Gardiner.*

H. L. F.

In re GREENWOOD. SUTCLIFFE *v.* GLEDHILL.

[1901 G. 11.]

Will—Forfeiture Clause—Gift of Income to A. for Life or until Alienation—Garnishee Order—Rules of Supreme Court, 1883, *Order* XLV., *r.* 2.

By will personalty was bequeathed in trust to pay the income to A. for life "or until he attempts to alien, charge or anticipate the same . . . . or until any other event happens whereby, if the same were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof," and then over. A judgment creditor of A. served the trustees, who had accrued income in their hands, with a garnishee order :—

Held, that the garnishee order did not operate as a forfeiture of A.'s life interest.

Bates v. *Bates*, W. N. (1884) 129, dissented from.

Sutton, Carden & Co. v. *Goodrich*, (1899) 80 L. T. 765, followed.

MARY GREENWOOD, widow, by her will dated November 4, 1891, after appointing the plaintiffs to be the executors and trustees thereof, devised and bequeathed to the plaintiffs all her real and personal estate upon trusts for sale and conversion,

Tab 15

Lord
Chancellor
Lord
Oakscy
Lord

Morton of
Henryton
Lord

Asquith of
Bishop-
stone
Lord
Cohen

HOUSE OF LORDS

CHAPMAN AND OTHERS

v.

CHAPMAN AND OTHERS

25th March 1954.

Lord Chancellor

MY LORDS,

This appeal raises questions of considerable importance and for that reason, though I have had the privilege of reading the Opinion which my noble and learned friend. Lord Morton of Henryton, is about to deliver and agree with it in its reasoning and conclusions. I think it desirable to make same observations upon the main argument of the Appellants. By way of preliminary explanation, it is only necessary to say that your Lordships are invited to hold that a Judge of the Chancery Division of the High Court of Justice has an inherent jurisdiction in the execution of the trusts of a settlement to sanction on behalf of infant beneficiaries and unborn persons a rearrangement of the trusts of that settlement for no other purpose than to secure an adventitious benefit which may be and, in the present case, is, that estate duty, payable in a certain event as things now stand, will, in consequence of the rearrangement, not be payable in respect of the

trust funds.

This argument, which found favour with Lord Justice Denning, is based, as I understand it, on two separate lines of thought which are for this purpose blended. On the one hand it is said that the Chancellor, the Court of Chancery and the Chancery Division of the High Court of Justice, exercising in turn on behalf of the Sovereign as *parens patriae* a peculiar jurisdiction over infants, had and has power to dispose of an infant's property in any manner beneficial to him in which he, if of full age. could have disposed of it ; and, on the other hand, it is said that the same Court whose duty it has been for some centuries to execute and administer trusts has jurisdiction to remodel those trusts by agreeing on behalf of infants and unborn persons to any rearrangement which it deems to be advantageous to them.

These two lines are happily united in the proposition of the learned Lord Justice which I quote—

> " He " [that is Lord Hardwicke] " proceeded on the broad principle
> " that the Court had power to deal with the property and interests of
> " infants and other persons under disability in a manner not authorised
> " by the trust, whenever the Court was satisfied that what was proposed
> " was most advantageous for them provided, of course, chat everyone of
> " full age agreed to it. I hope to show that this is the true principle
> " to-day."

It was natural that die learned Lord Justice should, upon the basis of an unlimited inherent jurisdiction, proceed to the conclusion that, whenever the Court had in the past asserted a want of jurisdiction, it had of its own motion placed limitations on its own jurisdiction and, giving as examples of this abnegation its declared inability to remove a married woman's restraint on anticipation, to permit a sale of heirlooms or to sanction an unauthorised transaction for the sake of expediency, should observe that in all these cases the intervention of the legislature to vest these powers in the Court must not be read as delimiting the jurisdiction of the Court, but rather as removing limitations which the Court had imposed on itself. These statutory provisions he says " show that the Judges of the late nineteenth century made a " mistake in tieing their own hands in these matters. We ought not to " make the same mistake to-day."

My Lords. I am unable to accept as accurate this view of the origin, development and scope of the jurisdiction of the Court of Chancery. I

do not propose to embark on the arduous task of tracing to its sources this peculiar jurisdiction. Many volumes have been devoted to it, and I have refreshed my memory by reference to some of them. Nowhere can I find any statement which would support the broad proposition for which the Appellants contend. Moreover, the Law Reports contain many cases in which the scope of the jurisdiction has been discussed, everyone of them a work of supererogation if its scope was unlimited.

In my opinion, the true view that emerges from a consideration of this jurisdiction through the centuries is not that at some unknown date it appeared full-fledged and that from time to time timid Judges have pulled out some of its feathers, but rather that it has been a creature of gradual growth, though with many setbacks, and that the range of its authority can only be determined by seeing what jurisdiction the great equity Judges of the past assumed and how they justified that assumption. It is, in effect, in this way that the majority of the Court of Appeal in the present case have approached the problem and, in my opinion, it is the right way. It may well be that the result is not logical and it may be asked why, if the jurisdiction of the Court extended to this thing, it did not extend to that also. But. my Lords, that question is as vain in the sphere of jurisdiction as it is in the sphere of substantive law. We are as little justified in saying that a Court has a certain jurisdiction, merely because we think it ought to have it, as we should be in declaring that the substantive law is something different from what it has always been declared to be, merely because we think it ought to be so. It is even possible that we are not wiser than our ancestors. It is for the Legislature, which does not rest under that disability, to determine whether there should be a change in the law and what that change should be.

My Lords, I have indicated what is, in my view, the proper approach to the problem and do not propose to traverse the ground which has been so ably covered by the majority of the Court of Appeal and will be explored again by my noble and learned friends. The major proposition I state in the words of one of the great masters of equity. " I decline," said Sir George Farwell, " to accept any suggestion that the Court has an inherent jurisdiction " to alter a man's will because it thinks it beneficial. It seems to me that " is quite impossible." It should then be asked what are the exceptions to this rule. They seem to me to be reasonably clearly defined. There is no doubt that the Chancellor (whether by virtue of the paternal power or in the execution of a trust, it matters not) had and exercised the jurisdiction to change the nature of an infant's property from real to personal estate and *vice versa,* though this jurisdiction was generally so exercised as to preserve rights of testamentary disposition and of succession. Equally, there is no doubt that from an early date the Court assumed the power, sometimes for that purpose ignoring the direction of a settlor, to provide maintenance for an infant, and, rarely, for an adult, beneficiary. So, too, the Court had power in the administration of trust property to direct that by way of salvage some transaction unauthorised by the trust instrument should be carried out. Nothing is more significant than the repeated assertions by the Court that mere expediency was not enough to found the jurisdiction.

Lastly, and I can find no other than these four categories, the Court had power to sanction a compromise by an infant in a suit to which that infant was a party by next friend or guardian *ad litem*. This jurisdiction, it may be noted, is exercisable alike in the Queen's Bench Division and the Chancery Division and whether or not the Court is in course of executing a trust.

This brings me to the question which alone presents any difficulty in this case. It is whether this fourth category, which I may call the compromise category, should be extended to cover cases in which there is no real dispute as to rights and, therefore, no compromise, but it is sought by way of bargain between the beneficiaries to rearrange the beneficial interests under the trust instrument and to bind infants and unborn persons to the bargain by order of the Court.

My Lords, I find myself faced at once with a difficulty which I do not see my way to overcome. For though I am not as a rule impressed by

an argument about the difficulty of drawing the line since I remember the answer of a great Judge that, though he knew not when day ended and night began, he knew that midday was day and midnight was night, yet in the present case it appears to me chat to accept this extension in any degree is to concede exactly what has been denied. It is the function of the Court to execute a trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt and, if they do wrong, to penalise them. It is not the function of the Court to alter a trust because alteration is thought to be advantageous to an infant beneficiary. It was, I thought, significant that learned counsel was driven to the admission that since the benefit of the infant was the test, the Court had the power, though in its discretion it might not use it, to override the wishes of a living and expostulating settlor, if it assumed to know better than he what was beneficial for the infant. This would appear to me a strange way for a court of conscience to execute a trust. If then the Court has not, as I hold it has not, power to alter or rearrange the trusts of a trust instrument, except within the limits which I have defined, I am unable to see how that jurisdiction can be conferred by pleading that the alteration is but a little one.

It remains to say a few words on the authorities. Counsel have not cited, and I have not found, any case before the twentieth century in which the Court has given to the term "compromise" a meaning which it does not legitimately bear and sanctioned an alteration of trusts where no dispute existed. Two cases were brought to your Lordships' notice which occurred in the early years of this century. One of them, *re Wells,* a decision of Farwell, J., does not, I think, upon examination support the extension of the jurisdiction. I will not anticipate what my noble and learned friend has to say about it. I cannot think that it weighs heavily in the scales against the emphatic views elsewhere expressed by the same learned Judge. The other case, *re Trenchard,* a decision of Buckley, J., is more difficult to explain. I should myself regard it as an isolated case in which the Court went further than it had hitherto done in giving to the word " compromise " an unnatural meaning and to itself a jurisdiction never before exercised. After these two cases, there appears to have been no case in which the limits of the jurisdiction have been discussed until the present case and two others with it, which are not the subject of appeal, came before the Court. But it seems that Judges of the Chancery Division have in recent years entertained jurisdiction to make orders in Chambers sanctioning on behalf of infant beneficiaries bargains or arrangements which involved the alteration of trusts but did not arise out of any dispute as to rights which it was expedient to compromise; just such orders, in fact, as that which is under consideration today. In the reported cases, *re Duke of Leeds* in 1947 and *re Lucas* in the same year, there is a clear indication of its being done and learned counsel assured us that it was done. But neither in these cases nor in other unreported cases in which a similar course was adopted. does there appear to have been any argument. It is, moreover, clear from the orders made by Harman, J., in the present case and by Roxburgh, J., in the related cases of *re Downshire* and *re Blackwell,* that there was in the year 1952 no generally accepted doctrine on the question. Nor, though

I am told that I myself made such an order when I was a Judge of the High Court, would I assent of my own recollection to the view that this jurisdiction was at any time during my life at the Bar or on the Bench generally regarded as belonging to the Court. But this sort of recollection is necessarily fallible, and I would rather say that there is nothing in the reported cases of the last fifty years to show that there is now vested in the Court a jurisdiction which it had formerly disclaimed.

This appeal must accordingly, in my view, be dismissed. Your Lordships will think it proper that the costs of the Appellants and Respondents should be paid out of the trust funds.

I cannot, my Lords, conclude without expressing to Mr. Buckley the gratitude of the House for the very able argument which as *amicus curioe* he addressed to us.

Lord Oaksey

MY LORDS,

My experience in the exercise of its jurisdiction by the Court of Chancery in the administration of trusts is so limited that I am not prepared to differ from the Opinion about to be expressed by my noble and learned friend, Lord Morton of Henryton.

I must confess, however, that I only agree with the greatest hesitation.

The general rule is said to be that the Court must see that the trusts are executed, but it is conceded that the Court has no power to insist upon the execution of the trusts if the cancellation of the settlement is desired by all the parties if they are *sui juris* and the property can then be resettled upon altered trusts. Yet where infants are concerned the Court cannot, it appears, sanction any alteration of the trusts under the general rule although the interests of the infants appear to demand the alteration.

Lord Morton of Henryton

MY LORDS,

The case which is the subject of the present appeal is one of three cases which came before Judges of the Chancery Division at the end of July in the year 1952. The other two are *re* Downshire's *Settled Estates* [1952] 2 A.E.R. 603 and *re Blackwells Settlement* [1952] 2 A.E.R. 647. These three cases differed to some extent in their facts, but in each of them the Court was asked to alter the trusts of a settlement, and in each of them the reason for the application was the same. The trustees and the adult beneficiaries realised that if the trusts of the settlement remained unaltered, the burden of taxation would be very heavy, whereas if the trusts were altered in certain respects that burden would or might be greatly reduced. They therefore applied to the Court for an order sanctioning a scheme carrying out these alterations, on the ground that the adult parties approved the scheme and that it was for the benefit of the infant beneficiaries and of any after-born beneficiaries.

The present case, *Re Chapman,* came before Harman, J. in Chambers on the 28th July, 1952, and he dismissed the application. The learned Judge did not deliver a formal judgment, but it is agreed that he took the view that he had no jurisdiction to make the order which was sought.

On the same day Roxburgh. J. had to consider the case of *re Downshire.* In that case the Court was asked to sanction the scheme either under its general jurisdiction or under section 64 (1) of the Settled Land Act, 1925. Argument was heard in Chambers, but judgment was delivered in open Court on 30th July. The learned Judge reviewed certain authorities and concluded as follows: —

" I hold that the transactions involved in this scheme amount in

" substance to a re-writing of the trusts, or a substantial part thereof,
" or to directions to administer the trust property on the footing that
" new trusts have been declared and old trusts have been struck out
" or varied, and the admitted purpose of the scheme is not to solve any
" administrative problem but to rearrange beneficial interests to greater
" advantage. Such proposals fall, in my judgment, outside the scope of
" the Court's ' extraordinary ' jurisdiction."

He held also that the proposals were outside the ambit of section 64 of the Settled Land Act, 1925, and section 57 of the Trustee Act, 1925.

Next day Roxburgh, J. gave judgment in open Court in *re Blackwell,* which had also been argued in Chambers. In that case the settlement was of personalty, and the general jurisdiction and section 57 of the Trustee Act, 1925, were relied upon. The learned Judge said: "This scheme, in my
" judgment, proposes a much less drastic re-settlement than the scheme in
" *re Downshire* but my conclusions are the same."

The Applicants appealed in all three cases, and as in none of the cases was there any person or class of persons concerned to argue against the Applicants' contentions, the Court of Appeal thought it proper to suggest that counsel should be instructed on behalf of the Attorney-General to assist the Court as *amicus curiae.* Mr. Buckley appeared in response to that suggestion, both in the Court of Appeal and in this House, and has rendered very valuable assistance.

The Court of Appeal allowed the appeals in *re Downshire* and *re Blackwell* but by a majority (the Master of the Rolls and Romer, L.J.) they dismissed the appeal in *re Chapman.* Denning, L.J. would have allowed the appeal in all three cases. The present appeal relates only to the case of *re Chapman,* but I have found it convenient to state the history of all three cases, for reasons which will appear later.

The application now before your Lordships' House relates to three separate settlements. The first of these settlements is dated the 15th March, 1944, and is hereafter referred to as " the 1944 Settlement". The settlors were Col. Robert Chapman and his wife (now Sir Robert and Lady Chapman). Clauses 2, 3 and 4 of the 1944 Settlement are as follows: -

" 2. The trustees shall stand possessed of the trust premises (subject " to clauses 3 and 4 following) for all or any the child or children of " the settlors' son Robert Macgowan Chapman who shall attain the " age of twenty-one years or die under that age leaving issue and if more " than one in equal shares as tenants in common."

" 3. Provided always that until the youngest child of the said Robert " Macgowan Chapman shall have attained the age of twenty-five years " if that event shall happen within twenty-one years from the date hereof " or until the expiration of twenty-one years from the death of the " survivor of the settlors if the youngest surviving child of the said " Robert Macgowan Chapman shall not then have attained the age of " twenty-five years the trustees shall retain the trust premises and shall " apply such part as they in their discretion shall think fit of the income " thereof for or towards the common maintenance education or other " benefits of the children of the said Robert Macgowan Chapman for the " time being living whether minors or adults or for or towards the " maintenance education or other benefit of any one or more of them " to the exclusion of the other or others and shall (subject as hereinafter " mentioned) accumulate the surplus of such income until the time for " distribution by investing the same and the resulting income thereof in " any investments hereby authorised in augmentation of the capital of " the trust premises to be held upon the same trusts as the original " trust premises but so that the trustees may apply the accumulations of " any preceding year or years in or towards the maintenance education " or benefit of all or any of the said children in the same manner as " such accumulations might have been applied had they been income " arising from the original trust funds in the then current year. Provided " always that after each child of the said Robert Macgowan Chapman " has attained his or her majority the surplus income of his share in the " trust premises not expended by virtue of the foregoing powers of this

" clause shall not be accumulated but shall be paid to such child."

" 4. Provided also that the trustees may at any time with the consent
" in writing of the Settlors raise any part or parts not exceeding in the
" whole one half of the then expectant or presumptive or vested share
" of any child whether minor or adult of the said Robert Macgowan
" Chapman in the trust premises under the trust hereinbefore contained
" and pay or apply the same to him or her or for his or her advance-
" ment or otherwise for his or her exclusive benefit in such manner
" as the trustees shall think fit and as to the part or parts so raised
" the maintenance and other trusts of the last preceding clause shall
" cease to be applicable and no interest on any such advance shall be
" charged to any child so advanced in the accounts of die trust."

The remaining clauses of the Settlement were administrative and are not relevant for the purposes of this appeal

By the second settlement, dated the 8th February, 1950, and hereafter referred to as " the 1950 Settlement", Lady Chapman settled certain further funds on substantially the same trusts for the benefit of Mr. Robert Macgowan Chapman's children as those declared by the 1944 Settlement. In particular the provisions for common maintenance and accumulation contained in clause 3 of the 1944 Settlement were repeated by clause 4 of the 1950 Settlement save that the reference in the former clause to the expiration of 21 years from the death of the survivor of the settlors was altered in the latter clause to the expiration of 21 years from the death of Lady Chapman.

By the third settlement, dated the 10th February, 1950 (hereafter referred to as " the Nicholas Settlement " and made upon the marriage of Henry James Nicholas Chapman with Anne Barbara Croft), Lady Chapman settled certain funds upon trusts for the benefit of the children of that marriage and of the husband and the wife or (if none of such children attained a vested interest) then upon similar trusts for the benefit of the children of Nicholas by any subsequent marriage, and of Nicholas and any subsequent wife, and it was provided (clause 4) that in the event of the determination or failure of such trusts the trustees should pay over the trust funds (subject as therein mentioned) to the trustees of the 1950 Settlement to be held by them upon the trusts of that Settlement.

Mr. Robert Macgowan Chapman (who is the son of Sir Robert and Lady Chapman) has been married once, namely, to his present wife, Barbara May Chapman, and there have been three children of the marriage, namely, the Defendants David Robert Macgowan Chapman, who was born on the 16th December, 1941, Peter Stuart Chapman, who was born on the 24th August, 1944, and Elizabeth Mary Chapman, who was born on the 11th May, 1946. There has been no issue as yet of the marriage between Mr. Henry James Nicholas Chapman (who is also a son of Sir Robert and Lady Chapman) and his wife Anne Barbara.

As at the 24th March, 1952. the estimated values of the funds comprised in the three Settlements were respectively as follows:—The 1944 Settlement £43.000, of which £27.700 was settled by Sir Robert, and £15,600 by Lady Chapman; the 1950 Settlement £14,700; and the Nicholas Settlement £19.600. By reason of the discretionary trusts for the common maintenance of Mr. Robert Macgowan Chapman's children contained respectively in clause 3 of the 1944 Settlement and clause 4 of the 1950 Settlement the trustees of those Settlements were advised that, except in certain unlikely events, a claim for estate duty would arise in respect of the funds comprised in the former Settlement on the death of the survivor of Sir Robert (now aged 72) and Lady Chapman (now aged 65) and in respect of the funds comprised in the latter Settlement upon the death of Lady Chapman. Further, the Trustees of the Nicholas Settlement were advised that if the substitutive limitation contained in that Settlement, and before referred to, is valid and should become effective, a claim for estate duty will arise in respect of their funds by reason of that limitation. If the present rates of estate duty remain unchanged it is estimated that nearly £30,000 will be exigible for duty in respect of the three trust funds whether Sir Robert survives or predeceases Lady Chapman.

In these circumstances a scheme of arrangement was prepared the object of which was to avoid the expected claims for duty on the deaths of Sir Robert and Lady Chapman. This object could only be achieved by freeing the 1944 and 1950 Settlement Funds from the provisions for common maintenance contained in clauses 3 and 4 of those Settlements respectively. It was accordingly proposed that the trustees of those Settlements should, with the sanction of the Court, advance their respective funds to the trustees of a new Settlement which was to be entered into containing similar trusts, but omitting those provisions; and that the trustees of the Nicholas Settlement should, on the failure of the trusts therein contained for the benefit of Nicholas Chapman and his present and any future wife and issue similarly transfer their fund to the trustees of the proposed new Settlement to be held upon the trusts thereof.

To the above statement of the facts (which is taken in substance from the majority judgment in the Court of Appeal) I would add that in this House

counsel asked for an order in somewhat different terms, the effect being that the trusts declared by clause 3 of the 1944 Settlement and clause 4 of the 1950 Settlement should no longer have any operation.

My Lords, the first question which arises is solely one of jurisdiction. and may be stated thus—Had Harman, J. jurisdiction to destroy the trusts contained in clause 3 of the 1944 settlement and the similar trusts created by clause 4 of the 1950 settlement, if he came to the conclusion that the elimination of these trusts would result in benefit to the infant beneficiaries and to any after-born beneficiaries? For the sake of brevity I shall address my observations only to the case of the 1944 Settlement, since precisely similar considerations will apply to the 1950 Settlement.

It is common ground that the discretionary trusts contained in clause 3 of the 1944 Settlement are in no way objectionable in themselves, but I shall assume, for the purposes of this judgment, that their elimination would be beneficial to all parties concerned, by reason of the relevant taxing provisions.

Mr. Neville Gray for the Appellant trustees and Mr. Russell for the Respondents, three of whom are infants, invite your Lordships to answer the question already posed in the affirmative. Mr. Buckley, as *amicus curiae* has put forward, for the assistance of this House, certain reasons why it should be answered in the negative. Mr. Gray first contended that the Court of Chancery, and its successor the Chancery Division of the High Court of Justice, has had for many years an inherent jurisdiction to make such an order as is sought in the present case. The same argument was advanced in the Court of Appeal and was stated in the majority judgment as follows :-

> " It was the argument of the learned Counsel for all the Appellants
> " (founded on Lord Chancellor Jeffreys' case, Earl *of Winchelsea* v.
> " *Norcliffe,* 1 Vernon, page 435, and other early cases, including *Pierson*
> " v. *Shore,* 1 Atkyn. page 480, before Lord Chancellor Hardwicke and
> " *Inwood* v. *Twyne,* Ambler, page 417. before Lord Chancellor
> " Northington), that the jurisdiction of the Court to modify or vary trusts
> " and to direct the trustees accordingly was unlimited provided (1) that
> " all persons interested who were *sui juris* assented and (2) that it was
> " clearly shown to be for the advantage or convenience of all persons
> " interested who were not *sui juris* including persons unborn or not
> " presently ascertainable: in other words, that the Court has unlimited
> " jurisdiction in relation to the property of infants, including the bene-
> " ficial interests of infants and unborn *cestuisque* trust under a settlement,
> " and will exercise that jurisdiction so as to secure any benefit or advan-
> " tage for the infants or unborn persons which they could have
> " themselves secured had they been in *esse* and *sui juris,* even to the
> " extent of sanctioning a departure from the beneficial trusts of the trust
> " instrument from which the interests in question are derived."

The majority rejected this argument, but Denning, L.J. accepted it. My Lords, on this point I find myself in complete agreement with the majority. They expressed their conclusion in the following language, which I would desire to adopt as my own: -

" In our judgment, such a broad and general jurisdiction is
" inconsistent with the two decisions of this Court in 1901 and 1903.
" never so far as we are aware subsequently qualified or criticised,
" namely. *Re New* ([1901] 2 Chancery, page 534) and Re *Tollemache*
" (| 1903] 1 Chancery, page 457) . . . The general rule ... is that the
" Court will give effect, as it requires the trustees themselves to do,
" to the intentions of a settlor as expressed in .the trust instrument
" and has not arrogated to itself any overriding power to disregard or
" re-write the trusts (See, for example, *D'Eyncourt* v. *Gregory,* 3
" Chancery Division, page 635; *Johnstone* v. *Baber,* 8 Beavan, page
" 233). There have been cases in which the Court has made Orders
" which did undoubtedly result in a departure from the trusts declared
" by the settlor; in our opinion, however, these cases did not establish
" new rules but only exceptions to the general rule."

Mr. Gray contended that the cases which the Court of Appeal regarded as exceptions were really examples of the unlimited jurisdiction which he sought to establish. I call it " unlimited jurisdiction ", because Mr. Gray set no limit to it, provided only that the two elements already mentioned are present. It is necessary, therefore, to examine these so-called examples in some detail. Mr. Gray grouped them under four heads—

1. Cases in which the Court has effected changes in the nature of an infant's property, e.g. by directing investment of his personalty in the purchase of freeholds:
2. Cases in which the Court has allowed the trustees of settled property to enter into some business transaction which was not authorised by the settlement:
3. Cases in which the Court has allowed maintenance out of income which the settlor or testator directed to be accumulated:
4. Cases in which the Court has approved a compromise on behalf of infants and possible after-born beneficiaries.

As to head (a). In my view these cases in no way assist the argument now under consideration. It is self-evident that a change in the nature of property to which an infant is absolutely entitled causes no change in the infant's beneficial interest, and it is noteworthy that even in such cases the Court usually so framed its order that the infant's right to make a will during infancy in the case of personalty, and the rights of his heir to take the realty if the infant died under the age of 21, were carefully safeguarded. Some earlier instances of this exercise of the Court's paternal jurisdiction are *Earl of Winchelsea* v. *Norcliffe* (1686) *supra, Pierson v. Shore* (1739) *supra. Bridges* v. *Bridges* (1752) footnote in 12 A.C. at p. 693, *Inwood v. Twyne* (1762) *supra, Ashburton* v. *Ashburton* (1801) 6 Vesey, 6.

Even this limited jurisdiction was recognised as being of an exceptional nature in *Re Jackson* (1882) 21 Ch. D. 786; see also *Glover v. Barlow* reported in a footnote to that case.

A similar jurisdiction was exercised in the case of lunatics.

As to head (b). The leading case under this head is *Re New* [1901] 2 Ch. 534. In that case the Court of Appeal authorised the trustees of three separate trust instruments to concur in a shareholders' scheme for the reconstruction of a prosperous limited company, shares in which, settled by the settlor or testator in each case, had become vested in the trustees, it being proposed that all the shareholders in the existing company should exchange their shares, all of which were fully paid, for more realisable shares (fully paid) and debentures in the proposed new or reconstructed company. The evidence showed that the scheme would be greatly to the advantage of all parties interested under the several trusts, including infants and unborn persons. In one of the three cases the trustees had power, under the trust instrument, to invest in shares or debentures of such a company as the proposed new company. In the two other cases, as the trustees had no such power, the Court put them on an undertaking to apply for leave to retain the shares and debentures they would obtain under the scheme, if they desired to retain them beyond one year from the time the

reconstruction should be carried into effect.

Romer L.J. in delivering the judgment of the Court said: " As a rule,
" the Court has no jurisdiction to give, and will not give, its sanction to the
" performance by trustees of acts with reference to the trust estate which are
" not, on the face of the instrument creating the trust, authorised by its
" terms. The cases of *In re Crawshay.* decided by North J., and *In re*
" *Morrison,* decided by Buckley J., are instances where the Court was asked
" to sanction steps to be taken by trustees which it thought unjustifiable, and
" which it declared it had no jurisdiction to authorise. But in the manage-
" ment of a trust estate, and especially where that estate consists of a business
" or shares in a mercantile company, it not infrequently happens that some
" peculiar state of circumstances arises for which provision is not expressly
" made by the trust instrument, and which renders it most desirable, and it
" may be even essential, for the benefit of the estate and in the interest of all

" the *cestuis que* trust, that certain acts should be done by the trustees which " in ordinary circumstances they would have no power to do. In a case of " this kind, which may reasonably be supposed to be one not foreseen or " anticipated by the author of the trust, where the trustees are embarrassed " by the emergency that has arisen and the duty cast upon them to do " what is best for the estate, and the consent of all the beneficiaries cannot be " obtained by reason of some of them not being *sui juris* or in existence, " then it may be right for the Court, and the Court in a proper case would " have jurisdiction, to sanction on behalf of all concerned such acts on behalf " of the trustees as we have above referred to. By way merely of illustration, " we may take the case where a testator has declared that some property " of his shall be sold at a particular time after his death, and then, owing to " unforeseen change cf circumstances since the testator's death, when the time " for sale arrives it is found that to sell at that precise time would be ruinous "Do the estate, and that it is necessary or right to postpone the sale for a " short time in order to effect a proper sale: in such a case the Court would " have jurisdiction to authorize, and would authorize, the trustees to postpone " the sale for a reasonable time.

" It is a matter of common knowledge that the jurisdiction we have been " referring to, which is only part of the general administrative jurisdiction of " the Court, has been constantly exercised, chiefly at chambers. Of course, " the jurisdiction is one to be exercised with great caution, and the Court will " take care not to strain its powers. It is impossible, and no attempt ought " to be made, to state or define all the circumstances under which, or the " extent to which, the Court will exercise the jurisdiction ; but it need scarcely " be said that the Court will not be justified in sanctioning every act desired " by trustees and beneficiaries merely because it may appear beneficial to the " estate ; and certainly the Court will not be disposed to sanction transactions " of a speculative or risky character. But each case brought before the Court " must be considered and dealt with according to its special circumstances."

My Lords, surely the passage just quoted tells strongly against the argument now under consideration. The opening sentence states the general rule in the plainest terms and clearly recognises that even the limited and exceptional jurisdiction to sanction transactions in the nature of " salvage" of the trust property must be exercised with great caution. The Court was, of course, only dealing with a proposed investment to be made by trustees, and the beneficial trusts were in no way altered ; but surely if the Court had had the wide general power to alter trusts, for which counsel contend, the whole trend of the judgment would have been different.

Two years later Kekewich, J. and the Court of Appeal had to consider the case of *Re Tollemache* [1903] 1 Ch. 457. In that case the trustees sought power to acquire a mortgage of the interests of the tenant for life. This transaction was not within the investments authorised by the settlement, but it was pointed out that it would increase the income of the tenant for life and would not injure the remaindermen. Kekewich, J. refused the application and carefully analysed the relevant authorities as to jurisdiction, including *Re New.* At p. 462, after citing certain cases, he observed : " The above are " illustrations of the exercise by the Court, justified by the practical necessity

" of the case, of jurisdiction going beyond the mere administration of trusts
" according to the terms of the instruments creating them. Others might be
" given : the applications or rather the circumstances inducing them exhibiting
" large varieties, but those mentioned suffice to explain the scope of the
" practice of the Court. There might be added illustrations of the refusal of
" the Court to exercise this extraordinary jurisdiction, but there is no occasion.
" All the cases of refusal may be grouped under one of two classes. Either,
" notwithstanding the advantage actual and prospective of what is proposed
" to be done, there is no urgency for it, and the existing state of things may
" without great mischief be allowed to remain, or the terms on which the
" advantage can be gained are such that the Court would by accepting them
" create a new trust in lieu of that which it is administering."

The judgments of the Court of Appeal are in [1903] 1 Ch. 956. They are as follows: —

" Lord Justice Vaughan Williams: It is admitted that the Applicant " cannot succeed unless she can bring herself within *In re New.* Putting " that case shortly, it is this—that a case may arise in which, in the course " of the administration of an estate, such an emergency may occur that " it must be dealt with at once; but it cannot be said that there is any " such emergency here. The appeal must, therefore, be dismissed, and " with costs. Lord Justice Romer: I agree. *In re New* shews how far " the Court will go, and beyond what point it will not go. Lord " Justice Cozens-Hardy: I agree. I will only add that, in my opinion, " In *re New* constitutes the high-water mark of the exercise by the Court " of its extraordinary jurisdiction in relation to trusts."

To quote again the majority judgment in the present case:

" These Judgments are, in our view, consistent and only consistent " with the conclusion we have expressed above, and are irreconcilable " with the broad general proposition for which Counsel for the Appel- " lants have contended. It is to be noted that Lord Justice Romer, who " had delivered the Judgment in *Re New,* was a member of the Court " in *Re Tollemache.* And if, in view of the arguments now ,put forward, " the present members of the Court of Appeal wish that he had more " precisely stated the limits of the jurisdiction which he plainly had " in mind, he indicated no dissent from or qualification of the other " Judgments of the Court or the Judgment of Mr. Justice Kekewich."

My Lords, in my view the cases just mentioned, exemplifying the exceptional jurisdiction which is exercised for the sake of " salvage " of the trust property, far from supporting the existence of a general jurisdiction in the Court to alter trusts, go far to negative it.

As to head (c). It is said, and said truly, that in some cases under this head the Court's order resulted in an alteration of beneficial interests, since income was applied in maintaining beneficiaries, notwithstanding that the testator or settlor had directed that it should be accumulated or applied in reduction of incumbrances. Some instances are *Revel* v. *Watkinson* (1748) 1 Vesey Senior. 93, *Cavendish* v. *Mercer* (1776) 5 Vesey. 195, footnote, *Greenwell v. Greenwell* (1800) 5 Vesey, 194. *Emit* v. *Barlow* (1807) 14 Vesey, 202. *Haley* v. *Bannister,* 4 Maddocks 279. *Havelock* v. *Havelock* (1881) 17 Ch. D. 807. This jurisdiction is too well established to be doubted to-day. It was explained as follows by Pearson, J. in *Re Collins* 32 Ch. D. 232: " The " ground of the decision " —that is, the decision in *Havelock—"* I take to be, " that where a testator has made a provision for a family, using that word in " the ordinary sense in which we take the word, that is the children of a " particular *stirps* in succession or otherwise, but has postponed the enjoy- " ment, either for a particular purpose or generally for the increase of the " estate, it is assumed that he did not intend that these children should " be left unprovided for, or in a state of such moderate means that they " should not be educated properly for the position and fortune which he " designs them to have, and the Court has accordingly found from the earliest " time that where an heir-at-law is unprovided for, maintenance ought to be

" provided for him."

A somewhat similar explanation was given by Farwell, J. in *Re Walker* [1901] 1 Oh. 879 at 885. It is clear that neither of these learned judges regarded the maintenance cases as affording any evidence that the Court had an inherent jurisdiction to alter beneficial trusts in any way it pleased. To my mind they must be regarded as an exception, and I think the only real exception, to the general rule, as stated by Romer, LJ. in *Re New* in the words already quoted and by Harwell, J. in *Re Walker supra* when he said: " I decline to accept any suggestion that the Court has an inherent jurisdic- " tion to alter a man's Will because it thinks it beneficial. It seems to me " that is quite impossible."

Striking instances of cases which negative the existence of the alleged unlimited jurisdiction are *Re Crawshay* (1888) 60 L.T. 357, *Re Morrison* (Buckley, J.) [1901] 1 Ch. 701, and *Re Montagu* (CA.) [1897] 2 Ch. 8. In the

first of these cases North, J. said " I should not be administering the trusts " created by the testator if I consented to this scheme. I should be altering " his trusts and substituting something quite outside the will. On the " assumption that the scheme would be beneficial to the estate, I cannot " decide that I have jurisdiction to alter it." In the last-mentioned case the Court of Appeal held that it had no jurisdiction to allow the trustees of a settlement to raise money by mortgage of the settled estate and to apply it in pulling down and rebuilding some of the houses on the property. Lindley, L.J. said: " We none of us see our way to hold that there is " jurisdiction to make an order in this case. It is very desirable that " the Court should have jurisdiction to deal with such a case ; but Par- " liament has never gone so far as to give it that jurisdiction. No doubt " it would be a judicious thing to do what is wanted in this case, and if " the persons interested were all ascertained and of age, "they would probably " concur, and then it might be done; but they are not all ascertained nor of " full age ; and unless the Court can authorise the trustees to do it, it cannot " be done."

Lopes, L.J. said: " I have no doubt that what is proposed is beneficial, " and would increase both the income and the capital value of the property. " The question is whether the Court has jurisdiction to sanction it. There " is no provision in the settlement which would authorise the works in ques- " tion, nor do they fall within any of the improvements sanctioned by the " Settled Land Acts. It is urged that the Court, having control over trust " property, can sanction them, as it would be vastly for the benefit of the " persons interested that it should do so. That is not enough. If the build- " ings were falling down it would be a case of actual salvage and would stand " differently. Even in cases of repairs the Court has been very careful in the " exercise of its jurisdiction. In the case of *In re Jackson,* Kay. J., in " dealing with a case of repairs, said: ' I think that this jurisdiction should be " ' jealously exercised, and only in cases which amount to actual salvage.' " The present cannot be said to be a case of actual salvage, and the learned " judge was right in refusing to exercise a jurisdiction which he in fact did " not possess."

As to head (d). There are, of course, many cases to be found in the reports in which the Court of Chancery, and its successor the Chancery Division, have approved compromises of disputed rights on behalf of infants interested under a will or settlement and on behalf also of possible after-born beneficiaries. In my opinion these cases in no way support the existence of the " unlimited jurisdiction " for which Mr. Gray contends. Where rights are in dispute, and the Court approves a compromise, it is not altering the trusts, for the trusts are, *ex hypothesi,* still in doubt and unascertained.

For these reasons, I would reject Mr. Gray's contention that the Court has the unlimited jurisdiction already described. It now becomes necessary to examine a further argument, of far-reaching importance, which was fully developed by Mr. Russell. This argument may be summarised as follows:-

> " Let it be assumed, for the purposes of this argument, that the Court " of Appeal rightly rejected our submission as to the general jurisdiction

" of the Court of Chancery, and its successor the Chancery Division.
" to modify or vary trusts. Even on that assumption the present
" scheme can be sanctioned as being a ' compromise'. There
" is no doubt that in cases where the respective rights of persons
" interested under a will or settlement were in dispute, the Court of
" Chancery down to 1873, and the Chancery Division since the passing
" of the Judicature Act, has had jurisdiction to approve a compromise
" on behalf of infants and unborn persons. There has never been any
" logical reason why this jurisdiction should not extend to alterations
" of beneficial interests under a trust, if such alterations are desired by
" the adult beneficiaries and are for the benefit of infants and any after-
" born beneficiaries, and it has been so extended on various occasions
" during the last fifty years. Arrangements of this kind may not be
" compromises in the strict sense, if no rights are in dispute, but they
" are compromises ' in the broader sense of the word '—to quote the

" majority judgment in the Court of Appeal. The majority had no
" good reason for rejecting the arrangement in *Re Chapman* if they
" had jurisdiction to sanction the arrangements in *Re Downshire* and *Re*
" *Blackwell.* No one of them is a compromise of disputed rights ; each
" one results in an alteration or rearrangement of beneficial interests
" under a settlement, and each one is made for the same reason—the
" desire to reduce or avoid taxation."

As this argument is based partly on the reasoning of the Master of the Rolls and Romer, L.J. in their joint judgment, and partly upon the fact that the Court of Appeal was unanimous in sanctioning the schemes put forward in *Downshire* and *Blackwell.* it is necessary to set out in some detail the course taken in the joint judgment. After rejecting the argument as to the " unlimited jurisdiction ", and referring to the maintenance cases as an exception to the rule that the Court cannot alter or vary trusts, the joint judgment proceeded as follows: —

" It must also now be taken, in our judgment (at any rate since the
" decision of *Re Trenchant* fifty years ago, [1902], 1 Ch. 378) that the
" Court has a further power and jurisdiction ... to approve, on behalf
" of persons interested under the trust who are under a disability (particu-
" larly infants) and persons who may hereafter become interested,
" compromises proposed by or between persons beneficially interested
" under the trust who are *sui juris,* and to direct and protect trustees
" accordingly ; and the word ' compromise' should not be narrowly
" construed so as to be confined to ' compromises' of disputed rights."

It is to be noted that it is not stated at this point how far the word " compromise " is to extend.

The Master of the Rolls and Romer. L.J. went on to consider *Re Trenchard* and *Re Wells* [1903] 1 Ch. 848. I shall consider these cases later. They then turned to a consideration of section 57 of the Trustee Act. 1925. They thought that that section afforded the Appellants no assistance, and in this House counsel have stated that they could not contend that that section had any application to the present case. After making some observations on section 64 of the Settled Land Act, 1925, the majority then considered the case of *Re Downshire* and said: " In our judgment the present scheme does
" fall fairly within the ambit of the Court's jurisdiction to approve com-
" promises (used in the broad sense of the word) which is illustrated in Mr.
" Justice Buckley's decision in *Re Trenchard."* Later they observed:
"... we think that . . . the proposals may fairly and properly be regarded
" as constituting a compromise in the broader sense of the word in which
" it was used in *Re Trenchard."* They then turned to the case now under appeal, and expressed their views in language which must be quoted in full.

" The only possible way, therefore, as it seems to us, that the scheme could
" be brought within the inherent jurisdiction of the Court is by showing that
" it involves a compromise or composition of beneficial interests to which the
" principle exemplified in *In Re Trenchard* can properly be applied. We
" are unable, however, to see how any such compromise or composition
" arises. Certainly there is no question of compromise in the strict sense,

" for none of the relevant beneficial interests gives rise to any question of
" construction or is otherwise in dispute. It is suggested, however, that some-
" thing in the nature of a composition of the rights of Mr. Macgowan
" Chapman's children is to be found in the elimination, during the lifetime
" of the settlors,"—(the last six words should, I think, read "during the
" period stated in the settlements ")—" of the expectation that each may
" have of receiving more or less than the others and in substituting equal
" rights among the class, as between themselves, in its place. We think that
" there are two objections to the acceptance of this view. First, although it
" is true that the scheme if sanctioned would have the result described we
" cannot regard that result as constituting a composition of rights in any real
" sense at all. It is nothing more than a rearrangement of beneficial interests
" which, to the extent that it might prove to be of advantage to some members
" of the class, would correspondingly operate to the prejudice of others. It
" cannot, therefore, be compared to a proposal under which, for example, the

" contingent interests of all of the members of a class in a fund are converted
" into vested interests in a smaller fund, for in such a case the proposal, if
" beneficial to one member of the class, would of necessity be beneficial to
" them all. Secondly, it is impossible to say, on the facts of the case, that
" the rights and interests of the children under the existing discretionary trusts
" are prejudicial to them and should therefore be eliminated. Both of the
" Settlements were executed within the last 10 years and the trusts in question
" were presumably inserted therein because the settlors thought that their
" introduction would be of advantage to the children; they may well have
" thought, for example, that some of the children might need more for
" maintenance than others and accordingly they empowered the trustees to
" provide for this if occasion should require. Nothing has since transpired
" to show that their views upon this matter were wrong. All that has
" transpired is that the manner in which the discretionary trusts were framed
" may attract an unexpected claim for death duties. The object of the
" scheme, accordingly, is not to compound the interests which the children
" have under the discretionary trust but to avoid the claim for duties; and
" such avoidance does not, and cannot, be regarded as a composition of rights
" for the purpose of the second exception to the rule. Moreover, although,
" as we have previously said, the fact that a scheme will result in the saving
" of death duties or income tax is, in itself, no ground for its rejection, the
" acceptance of the scheme now under consideration might well be followed
" by the presentation of further proposals of a similar character whenever it
" should be considered desirable in the future to avoid or mitigate the effect
" of such changes as may occur hereafter in the existing fiscal legislation. We
" would point out, therefore, that it is no part of the functions of Her
" Majesty's Courts to recast settlements from time to time merely with a
" view to tax avoidance even if they had the power to do so which, in our
" opinion, they have not.

" It follows from what we have said that the scheme proposed is in truth
" what it appears on its face to be. namely, the destruction of trusts expressly
" declared, and that inasmuch as it cannot be brought within the first
" exception to the general rule and cannot, under the guise of a composition,
" invoke the second exception, the rule applies ; and the Court accordingly
" has no jurisdiction to authorise the trustees to carry it into effect. This
" appeal, in our judgment, must therefore fail."

To complete the picture, I add that the majority allowed the appeal in *Re Blackwell,* saying: " In our judgment, therefore, the scheme is of a
" nature which it is competent for the Court to sanction in exercise of its
" jurisdiction to approve compromises in the wide sense of that word which
" we have already indicated."

My Lords, I have set out this lengthy survey of the majority judgment because I could devise no other satisfactory way of approaching the argument addressed to your Lordships by Mr. Russell, which I have already summarised.

This argument brings one face to face with the vitally important question --is it possible to draw a line at some point between the Court's undoubted jurisdiction to sanction a compromise of disputed rights, and the alleged unlimited jurisdiction to alter beneficial interests to any extent, provided that

every person interested who is *sui juris* assents and the change is shown to be for the benefit of infants and after-born beneficiaries? I confess that I have found it impossible to draw such a line. As I have said, the Court's jurisdiction to sanction a compromise in the true sense, when the beneficial interests are in dispute, is not a jurisdiction to alter these interests, for they are still unascertained. If, however, there is no doubt as to the beneficial interests, the Court is, to my mind, exceeding its jurisdiction if it sanctions a scheme for their alteration, whether the scheme is called a " compromise "in the broader sense " or an " arrangement " or is given any other name. Mr. Russell in the course of his argument suggested that the step from the former to the latter class of case was a short one. My Lords, it may be a short step, but it is a step into a field of extremely wide extent. In my view that field was not open to the Court at the beginning of the present century and is not open now. I think that Farwell, J. (as he then was) was right when in 1901 he used the words already quoted—" I decline to accept any

" suggestion that the Court has an inherent jurisdiction to alter a man's will " because it thinks it beneficial. It seems to me that is quite impossible ". *(Re Walker* [1901] 1 Ch. 879 at p. 885.) If these words are true in the case of a will, they are equally true in the case of a settlement, and in 1952 Roxburgh and Harman, J.J., in effect, adopted the words of Farwell. J. and applied them to the present day. I think these two learned Judges were right.

It follows that, in my view, the majority of the Court of Appeal were right in dismissing this appeal, but their decisions in *Re Downshire* and *Re Blackwell* went too far. The facts in these two cases are fully set out in the majority judgment and need not be repeated here. Suffice it to say that the scheme in each case involved extensive alterations of the beneficial trusts declared in settlements dated respectively 1915 and 1933. in order to reduce taxation, including in each case the release of part of the settled property from a protected life interest. In neither case was there any appeal, but I have found it necessary to express my view upon them because counsel have cited these cases as authorities, and have submitted (rightly, as I think) that the present case cannot be distinguished from them.

I must, however, examine the cases which were said to establish the jurisdiction to sanction the scheme now before your Lordships.

The first such case is *Re Trenchard* [1902] 1 Ch. 378, and the facts must be stated somewhat fully, in view of the argument which has been based on this case. A testator who died in 1899 by clause 3 of his will gave to his wife " the use of my residence Woodville aforesaid so long as she shall " desire to make it her permanent place of residence and shall remain my " widow, my estate to pay all rates, taxes and outgoings in respect thereof, " and to keep the house and grounds in tenantable repair ". The testator gave his residuary real and personal estate to his trustees upon the usual trusts for sale and conversion and payment of debts and legacies and directed them to stand possessed of his residuary trust monies and the income thereof upon certain trusts for his children and remoter issue. He directed his trustees to postpone the sale of his Honor Oak estate (which included Woodville House) until after the death or marriage again of his wife and he empowered them from time to time as they should think fit to develop the same estate, and for that purpose to use such part of his estate as they deemed advisable.

The widow took possession of Woodville and resided there, but rinding that it was a larger house than she required and that there were difficulties connected with the management, repairs, outgoings and development of the property, she asked the trustees to come to an arrangement with her. Questions arose, and on a summons taken out by the trustees, Byrne, J. made an order declaring that the widow had the powers of a tenant for life under the Settled Land Acts and that she would not forfeit the benefits conferred upon her by the directions in the will by selling or leasing the house under those powers. All the persons interested desired that the estate, which was freehold, should be developed for building purposes, but this could not be done so long as the widow remained in occupation of Woodville,

and would be prevented if she sold Woodville in exercise of her powers as tenant for life under the Settled Land Acts. The widow estimated her interest in the rental value of Woodville, together with the rates, taxes and outgoings, at £350 a year and offered to release her claims under clause 3 of the will to the trustees in return for a fixed payment of £320 a year.

A summons was taken out to decide whether the trustees had power, with the sanction of the Court, to enter into an arrangement by way of compromise for the payment to her of a fixed annual sum in satisfaction of her claims under clause 3 of the will, and if so, that an agreement to pay her a fixed sum of £275 per annum during widowhood by way of compromise of the whole of her claims under clause 3 of the will might be approved by the Court. There were infants interested in residue and they appeared by counsel, who expressed the view that the compromise was beneficial to them. Buckley, J. (as he then was) approved the arrangement, saying: " It

" seems to me that this is a fair compromise for all parties, and I declare " that it is within the power of the trustees to enter into it, and I sanction it " accordingly ".

My Lords, this decision appears to me to be no more than the sanctioning by the Court of a purchase by the trustees of the widow's rights. It may be that Buckley, J. stretched the jurisdiction to approve a compromise beyond its proper limits; but I cannot regard him as claiming a new and extensive jurisdiction, the existence whereof had so recently been denied by judges of the Chancery Division and by the Court of Appeal.

The next case relied upon was *Re Wells* [1903] 1 Ch. 848. The facts of this case are very fully stated in the majority judgment of the Court of Appeal and need not be repeated here. I entirely accept the observations in the majority judgment on that case—" There was no rearrangement or " altering of any trusts. All persons interested under the trusts of the " testator's will, according to its terms, were *sui juris* and capable of determin- " ing the trusts. The difficulty arose solely from the fact that derivative " settlements had been made by the persons contingently entitled to the " corpus of the estate. No alteration was required of any of the trusts of " these settlements. What was proposed was that the trustees of the deriva- " tive settlements should receive a present and certain subject matter instead " of their previously existing contingent rights ". In my view, *Re Wells* affords no support to the argument now under consideration. It was decided by Farwell, J. (as he then was) and I feel sure he did not think that in sanctioning the arrangement there proposed he was in any way departing from the views, already quoted, which he had expressed so forcibly in *Re Walker.*

So far as reported cases are concerned, there is a long gap between *Re Wells* and *Re Duke of Leeds* [1947] 1 Ch. 525. Counsel assured us, however, that, during the intervening 44 years, orders had been made from time to time in Chambers which were similar in their effect to the orders asked for in the present case, in *Re Downshire,* and in *Re Blackwell.*

My Lords, this may well have been so, but, accepting counsel's statement. I would make the following observations. First, when judges are exercising an undoubted jurisdiction in Chambers, the manner in which they exercise it may form a useful precedent; but no judge can acquire a jurisdiction which he does not possess merely by making orders which extend beyond that jurisdiction. Secondly, it is impossible to found any proposition upon an unreported case without being aware of all the facts, the precise nature of the order made, and the arguments advanced at the hearing. It may well be that the question of jurisdiction was never brought to the minds of the judges who dealt with these matters in Chambers. I would add this—according to my recollection, which may be at fault, it was thought at one time by judges sitting in Chambers that the decision in *Re New, supra,* extended by section 57 of the Trustee Act, 1925, justified the making of many orders which were later considered to have been made in excess of jurisdiction. I agree with the comments upon *Re New* and upon section 57 which are contained in the majority judgment in the present case, and it is conceded by counsel that neither that decision nor the section can possibly

justify the application now before your Lordships.

I now come to the case of *Re Duke of Leeds* already mentioned. In that case freehold estates comprising a number of coal mines in Yorkshire and the North Midlands had been settled by the will of a testator who died in 1927. By the Coal Act, 1938, these mines were compulsorily acquired by the National Coal Commission, the vesting date being 1st July, 1942, and the compensation therefor was duly assessed by the National Valuation Boards of each area and paid to the trustees of the will. Questions arose as to how the compensation monies should be dealt with as between the persons entitled in succession under the will, and the matter came before Jenkins. J. (as he then was). The learned Judge decided all these questions and said, at page 556 *fin:* "In view of the unanimity of all parties in supporting the " plaintiff's contention I suggested the possibility of authorising the proposed " commutation by way of compromise, if it could truly be shown to be for

" the benefit of all infant or unborn or unascertained persons interested or " possibly interested under the settlement. It appeared, however, that this " suggestion was not acceptable, and I was asked to decide the point one way " or the other as a matter of construction of the Coal Act, 1938, and in " particular paragraph 21 (2). This I have accordingly done. My decision " against the plaintiff's contention as a matter of legal right does not, of " course, rule out the possibility of giving effect to it as a compromise or " arrangement if shown to the satisfaction of the Court to fulfill the condition " mentioned above."

Mr. Wolfe informs us that in fact a compromise was subsequently approved by Jenkins, J. under which, I understand, a certain lump sum was paid to the tenant for life out of the compensation monies and the balance was to be invested as capital and held on the trusts of the will. He also informed us that compromises of a similar nature were sanctioned by the Court in *Re Lucas* which immediately follows *Re Duke of Leeds* in [1947] 1 Ch.

My Lords, I should have been glad if I could have found it possible to draw some sound distinction between the two cases just mentioned and *Downshire* and *Blackwell* on the one hand, and the present application on the other. The majority in the Court of Appeal, as I understand their judgment, drew a line between schemes which involved " a compromise or " composition of beneficial interests", such as the schemes in *Downshire* and *Blackwell,* and schemes such as the *Chapman* scheme, where no such compromise or composition was involved. If such a line could be drawn, no doubt the schemes in *Duke of Leeds* and *Lucas* would fall on the right side of it. I do not, however, feel able to draw this line. I agree that there is a distinction in fact between the *Chapman* scheme and the schemes in *Downshire* and *Blackwell,* and this is clearly pointed out in the majority judgment. Further, I think it might be possible to find some distinction in fact between *Downshire* and *Blackwell* on the one hand and *Duke of Leeds* and *Lucas* on the other. Yet all the five cases do involve an alteration in the ascertained and undisputed beneficial interests under a settlement.

For the reasons which I have set out, I fear at too great length, I am of opinion that the Court has only claimed jurisdiction to make such an alteration in the maintenance cases already mentioned, and has frequently denied that it has such a jurisdiction in any other case. In saying this I am not overlooking the " salvage " cases, but they relate to administrative acts by trustees and not to alteration of beneficial interests.

I agree with the majority of the Court of Appeal in their rejection of the present application, and I cannot accept Mr. Russell's argument based on the other cases which he has cited.

My Lords, it will already be apparent why I cannot agree with the conclusions of Denning, L.J. in his dissenting judgment, but I feel bound to comment upon two passages in that judgment. Denning, L.J. quotes the following passage from the judgment of Turner, L.J. in *Brooke* v. *Mostyn* (1864, 2 DeG. J. & S. 373 at p. 415):-

> " That this Court has power to compromise the rights and claims of " infants and persons under disabilities, when those rights and claims are " merely equitable, has not been and cannot be disputed. It is a power

" which has continually been exercised by the Court, and results almost
" necessarily from the jurisdiction which the Court exercises over
" trustees. In the exercise of that jurisdiction the Court may in general
" order the trustees to deal with the trust property in whatever mode
" it may consider to be for the benefit of *cestuisque* trust who are
" infants or under disabilities. ... I have thought it right to make these
" observations, because I consider it of great importance that no doubt
" should be cast upon the power of the Court. . . . The rights of infants
" and incapacitated persons must in many cases be sacrificed if the
" power be not maintained."

It is to be noted that *Brooke* v. *Mostyn* was a case of a true compromise of disputed rights, and the only question for decision was whether such a compromise could be set aside. In my view the observations just quoted, though one sentence is couched in very general terms, must be read as relating only to cases of true compromise where, to quote the first sentence.

the Court is compromising "the rights and claims of infants and persons " under disabilities." Denning, L.J., goes on to say: " This jurisdiction " is not confined to cases where there is a dispute about the extent of the " beneficial interests, nor to cases of emergency or necessity, but extends " wherever there is a bargain about the beneficial interests which is for " the benefit of the infants or unborn persons." In support of this observation he cites *Re Trenchard, Re Wells,* and the argument of Lord Parker, as junior counsel, in *Re New.* But, as I have already said, I cannot regard these cases as supporting the proposition.

Later, Denning, L.J., said: "The proposed scheme for the Chapman " Settlement is more troublesome. We are told that the lawyer who drew " up the Deed made a mistake. He did not have in mind the statutory " definition about property passing ' on the death ' for the purpose of death " duties: and he included a discretionary trust for common maintenance " when he ought to have omitted it. He ought to have left the children " to receive maintenance equally instead of giving the trustees a discretion " to grant more to one than the others. It is a small mistake but it means " a difference of £30,000 in death duties. The mistake cannot be remedied " under the strict doctrine of rectification because it is not a mistake in " expressing the settlor's intentions but only a mistake as to the legal con- " sequences. Nevertheless I do not myself see why the mistake should " not be corrected by the settlors themselves." In regard to this passage I would say first, that counsel for all parties are agreed that the wishes of the grandparents as settlors are entirely irrelevant on the question of jurisdiction. By settling the property on certain trusts they have put it out of their power to alter these trusts, however much they may wish to do so. Secondly, it is not contended by counsel that there was any mistake, in the true sense of the word, in the present case. The trusts contained in the settlement are exactly the trusts upon which the settlors intended the settled property to be held. The present application arises only by reason of the fact that it was afterwards realised that these trusts, although perfectly proper and sensible in themselves, would or might have unfortunate results as regards death duties. Lastly, the question is not whether the Court ought to have jurisdiction to alter the trusts in this case, but whether in fact it has that jurisdiction.

I would add, in amplification of remarks by the Master of the Rolls and Romer. L.J. already quoted, that if the court had power to approve, and did approve, schemes such as the present scheme, the way would be open for a most undignified game of chess between the Chancery Division and the Legislature. The alteration of one settlement for the purpose of avoiding taxation already imposed might well be followed by scores of successful applications for a similar purpose by beneficiaries under other settlements. The Legislature might then counter this move by imposing fresh taxation upon the settlements as thus altered. The beneficiaries would then troop back to the Chancery Division and say, " Please alter the trusts again. " You have the power, the adults desire it, and it is for the benefit of the " infants to avoid this fresh taxation. The Legislature may not move again." So the game might go on, if the judges of the Chancery Division had the power which the Appellants claim for them, and if they thought it right

to make the first move.

I would dismiss the appeal.

Lord Asquith of Bishopstone

MY LORDS,

In this appeal Counsel for the Appellants began by taking his stand on an ambitious general principle of law: namely, that there resided in the Court of Chancery an inherent jurisdiction to vary the trusts of a settlement or a will, in every case in which two conditions were satisfied, viz.:

1. that all adults interested in the trust dispositions consented, and
2. that the variation was plainly for the benefit of all interested parties other than adults, viz. infants and unborn persons.

Speaking with much less familiarity with these matters than most of my noble friends, I cannot but think this principle is too broadly stated, and respectfully agree with the conclusions and reasoning of my noble and learned friends, the Lord Chancellor and Lord Morton of Henryton.

In practice, Courts of Chancery have asserted this jurisdiction mainly, if indeed not solely, in three classes of cases:

1. Where the trust dispositions have provided for accumulations of income in favour of an infant during his minority without providing for his maintenance during that period: but this provision would be stultified if the infant were not maintained while the income was accumulating. The Court has in such cases refrained from enforcing the letter of the trusts, and by authorising maintenance has saved the infant from starving while the harvest designed for him was in the course of ripening.
2. Where some event or development unforeseen, perhaps unforeseeable, and anyhow unprovided against by the settlor or testator, threatened to make shipwreck of his intentions: and it was imperative that something should be saved from the impending wreck. These are often referred to as the "salvage" cases: and many of the " main- " tenance " cases which I have classified separately could properly be subsumed under this wider class.
3. Where there has been a *compromise* of rights (under the Settlement or Will) which are the subject of doubt or dispute. It is then often to the interest of all interested parties, adult or infant or unborn, to have certainty substituted for doubt, even if the supersession of a dubious right by an undoubted one may be doing beneficent violence to the terms of the trust: though it is perhaps inappropriate to speak of violence to terms to which different persons attribute a different meaning. Whether there is jurisdiction to do the same in reference to rights which are *not* in dispute is a point which lies near the centre of the present appeal, and to which I will revert.

Leaving this last point for the time being aside, I would venture to record my view that the inherent jurisdiction of the Court of Chancery in this sphere is limited to these three classes of cases: " maintenance " cases. " salvage " cases, and " compromise " cases: and that the Court's exercise of jurisdiction in these three spheres is limited to those spheres and is not simply the exercise in particular circumstances of the far wider jurisdiction claimed for the Court by Counsel for the Appellants of a jurisdiction limited only by two conditions:

(a) consent of interested adults ;

(b) benefit to interested non-adults.

If that wider principle had been valid., a formidable volume of judicial learning and forensic argument directed to the question whether the facts of a case bring it within the three privileged compartments must have been expended in vain. Why this expenditure of time and erudition if the alleged broad principle was always there, offering a short cut? Nor, speaking more generally, does English jurisprudence start from a broad principle and decide

cases in accordance with its logical implications. It starts with a clean slate, scored over, in course of time, with *ad hoc* decisions. General rules are arrived at inductively, from the collation and comparison of these decisions: they do not pre-exist them.

Now it is argued that even if this be so, yet the third category or compartment creating jurisdiction—" compromise " —includes rearrangements of property rights or interests even where these are not in dispute. And certain cases—*In re Trenchard* ([1902] 1 Ch. 378), *In re Wells* ([1903] 1 Ch. 848), two cases under the Coal Mines Act *(Re Duke of Leeds* [1947] 1 Ch. 525, and *Re Lucas* reported immediately after it) and the cases of *Downshire* and *Blackwell,* decided simultaneously with the present case (though in a different sense by the Court of Appeal) are prayed in aid as supporting this extension of the jurisdiction from cases of " compromise *stricto sensu* " to " quasi-" compromise ". And it is further argued that if these cases or some of

them attract the jurisdiction, then so does the present case. As to this latter point, though I can see differences, I cannot see any material distinction between the *Downshire* and *Blackwell* cases and the present case.

But it will be observed (1) that until the 20th century the category "com- " promise " had been construed as strictly confined to cases of disputed rights; (2) that in practice, once it is construed as including what I have termed " quasi-compromise ", there is it would seem no logical stopping point short of the broad and loose principle which was contended for by the Appellants and which, for reasons given above, seems to me untenable. None of the decisions since 1900, relied on by the Appellants, are binding on your Lordships' House. Some of them can, I think, be distinguished on the lines indicated by my noble and learned friend Lord Morton of Henryton. For instance, the case of *In re Wells,* in my view, is a very special one and does not on a true view support the Appellants' proposition. Subject to these considerations I would reassert the rule that a compromise in this connexion means a compromise in the strict sense and that the attempted creation of a category of quasi-compromise is invalid.

As to the effect more specifically of a decision in this sense on *In re Trenchard (supra). In re Wells (supra)* the two cases decided under the Coal Mines Act and the cases of *Downshire* and *Blackwell,* I have had the advantage of reading in advance the opinion just delivered by my noble and learned friend. Lord Morton of Henryton, and would respectfully adopt his observations. I am of opinion that the appeal should be dismissed.

Lord Cohen

MY LORDS,

I have had the advantage of reading in print the Opinion delivered by my noble and learned friend, Lord Morton of Henryton. I agree with him in rejecting the main argument advanced by Mr. Gray for the Appellants. Like him. I accept the reasons given by the majority of the Court of Appeal for rejecting that argument. In my opinion, the cases relied on by Mr. Gray are not examples of the unlimited jurisdiction for which he contends, but illustrate exceptions from the general principle that the Court will give effect, as it requires the trustees themselves to do, to the intentions of the settlor or testator as expressed in the trust instrument.

In considering those cases I will adopt the grouping made by Mr. Gray and already stated by the noble and learned Lord. I agree with his comments on the first three groups, with the reservation that I do not think that the maintenance cases are the only real exception to the rule that the Court will not alter beneficial trusts. My reasons for this reservation will appear from the observations I have to make on the scope of the exception which the Chancery Courts have adopted as regards the sanctioning of compromises on behalf of infants and possible after-born beneficiaries.

My Lords, like the majority of the Court of Appeal I think that this juris-

diction is not limited to compromises of disputed rights but extends to compromises in the wider meaning of that word, and had it not been that some of your Lordships take a different view, I should have been content to express my agreement with the reasoning of the Master of the Rolls and Romer, L.J. on this point.

Lord Morton of Henryton sums up the arguments advanced against their conclusion somewhat as follows :-

> I. The Court's sanction of a compromise in the true sense, when the beneficial interests are in dispute, is not the exercise of a jurisdiction to alter those interests, for they are still unascertained.
>
> II. Re *Trenchard* ([1902]) 1 Ch. 378. which is the foundation of the majority judgment of the Court of Appeal on this point, is not a case of compromise in the broad sense but is " no more than the sanctioning " by the Court of a purchase by the trustees of the widow's rights."

III. It is impossible to draw *a* line at which the jurisdiction to sanction a compromise in the broad sense ends or, put otherwise, it is impossible to draw a line at some point between the Court's undoubted jurisdiction to sanction a compromise of disputed rights and alleged unlimited jurisdiction to alter beneficial rights to any extent provided that every person who is *sui juris* consents and the change is shown to be for the benefit of infants and after-born beneficiaries.

My Lords, I am not satisfied that the Court, in sanctioning a compromise in the strict sense, is not exercising a jurisdiction to alter beneficial rights. It is true that in such a case the right has not been defined, but the right of the beneficiary is a right to that to which, upon its true construction, the will or settlement entitles him. The very essence of a compromise is that it may give each party something other than that which the will or settlement would, on its true construction, confer on him.

Nor am I able to accept the view that *Re Trenchard (supra)* involved nothing more than the purchase by the trustees of the widow's interest. Under clause 3 of the testator's will she was entitled only *(a)* to the use of the testator's residence so long as she desired to make it her permanent place of residence and remained the testator's widow, and *(b)* during that time to have the house and grounds kept up at the expense of the estate. If she ceased to reside, she would forfeit those benefits, the value of the tenantable repair provision being estimated at £350 a year. Under the arrangement sanctioned by the Court she got £275 per annum, determinable only on remarriage not by non-residence in the house. The arrangement, therefore, in my opinion, clearly involved an alteration of the quality of the beneficial interest of the widow. So far as the residuary legatees were concerned, the primary effect was to alter the quantum of what they would receive, but I am unable to see that it can properly be said that the only purpose and effect of the transaction was a purchase of the widow's interest. The summons asked a question as to compromise (see p. 380). Buckley. J. (at p. 385) himself described the proposal as a fair compromise for all parties. He was not using the term " compromise " in the strict sense for the legal rights had already been decided. He was, I think, sanctioning a re-arrangement of rights as between tenant for life and remaindermen which could not be carried out without the sanction of the Court because infants were interested. The question of jurisdiction was argued but Buckley. J. seems to have felt no doubt as to his jurisdiction. In cases of this kind the Court is always under the disadvantage that as most of such cases are heard in Chambers there are few reported precedents. There may well have been earlier unreported cases in which the Chancery Courts had exercised their jurisdiction over trustees in a similar way. Be that as it may the decision in *Re Trenchard (supra)* has stood unquestioned for 50 years and I see no reason why your Lordships should now overrule it.

I turn, therefore, to the third argument. My Lords, a distinguished member of this House once said, in another connection, that while he might have difficulty in drawing a line, he had never had any difficulty in deciding on which side of it a particular case fell. I think that a comparison of the facts

in *Re Downshire* and *Re Blackwell* on the one hand, and the facts in *Re Chapman* which is now before your Lordships, illustrate where the line might be drawn.

In *Re Downshire* and *Re Blackwell* as in *Re Trenchard* and. I think, also in Re *Duke of Leeds* ([1947]) 1 Ch. 525, and Re *Lucas* (which immediately follows that case) the Court was dealing with compromises in the broad sense between tenants for life on the one hand and remaindermen on the other hand ; they were not varying the rights *inter se* of parties whom the testator had placed on an equality. In *Re Chapman,* on the other hand, there was no question of compromise between tenants for life and remaindermen ; the Court was being asked to vary the rights *inter se* of a class which the Testator had directed should be treated in a particular way. As the majority of the Court of Appeal said in the present case, what is proposed is not " a composition of rights in any real sense at all. It is nothing more than

" a re-arrangement of beneficial interests which, to the extent that it might
" prove to be of advantage to some members of the class, would correspond-
" ingly operate to the prejudice of others."

My Lords, I have, I hope, said enough to show why I think that the Court of Appeal were right in allowing the appeals in *Re Downshire* and *Re Blackwell* and in dismissing the appeal in *Re Chapman,* and why, though for different reasons, I agree that the appeal to your Lordships' House should be dismissed.

I cannot sit down without expressing my doubt whether there is any foundation for the suggestion made by Denning, L.J. that the effect of your Lordships' decision may be that schemes sanctioned in the past could be ignored by the Revenue and by all persons not *sui juris.* The High Court is a superior Court and the control of trustees is a matter within its jurisdiction. It would take a good deal of argument to satisfy me that its orders were a nullity and that trustees were not fully protected by orders made by that Court in the exercise of that trust jurisdiction even though your Lordships may, in a later case, have said that the jurisdiction had been wrongly exercised.

Tab 16

2014 NBBR 148, 2014 NBQB 148
New Brunswick Court of Queen's Bench

McCorkill v. McCorkill Estate

2014 CarswellNB 425, 2014 CarswellNB 426, 2014 NBBR 148, 2014 NBQB 148, 1104
A.P.R. 21, 1 E.T.R. (4th) 41, 243 A.C.W.S. (3d) 774, 377 D.L.R. (4th) 537, 424 N.B.R. (2d) 21

Isabelle Rose McCorkill, Applicant and Fred Gene Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased, Respondent and The Province of New Brunswick as represented by the Attorney General, The Center for Israel and Jewish Affairs, League for Human Rights of B'Nai Brith Canada, and The Canadian Association for Free Expression, Interveners

William T. Grant J.

Heard: January 27-28, 2014
Judgment: June 5, 2014
Docket: S/M/49/13

Counsel: Marc-Antoine Chiasson, for Applicant
John D. Hughes, for Respondent
Richard A. Williams, for Intervener, Province of New Brunswick as represented by the Attorney-General
Danys R.X. Delaquis, for Intervener, Centre for Israel and Jewish Affairs
Catherine A. Fawcett, for Intervener, League for Human Rights of B'Nai Brith Canada
Andy Lodge, for Intervener, Canadian Association for Free Expression

Subject: Civil Practice and Procedure; Constitutional; Estates and Trusts; Employment

APPLICATION by sister of testator for declaration that bequest was void as illegal and/or contrary to public policy.

William T. Grant J.:

1 Harry Robert McCorkill died on February 20, 2004 having first made his last will and testament dated April 19, 2000. He named William Luther Pierce of Post Office Box 70, Hillsboro, West Virginia as his sole executor and the respondent, Fred Gene Streed ("Streed"), of the same address as his alternate executor. Mr. Pierce predeceased Mr. McCorkill so Streed became the executor and trustee.

2 In the dispositive clause of his will he transferred all of his property to his trustee in trust to pay all his debts and taxes and to "...pay or transfer the residue of my estate... to the NATIONAL ALLIANCE, a Virginia corporation, with principal offices at Post Office Box 70, Hillsboro, West Virginia 24946, United States of America", the same address he used for both his executor and his alternate executor.

3 On November 30, 2010, Streed applied for Letters Probate of the McCorkill Will showing a probate value of approximately $128,500 Canadian and $90,000 US, all of which was personal property. On May 6, 2013, Letters Probate were issued to Streed.

4 Mr. McCorkill was never married and had no children. He had two siblings, a brother and a sister, both of whom survived him though he was not close to them.

5 On July 18, 2013 his sister, Isabelle Rose McCorkill, filed an application with this court which was amended on August 29, 2013. In her amended application, Ms. McCorkill requests, *inter alia*, an order:

> a. Declaring that the bequest provided at paragraph 3(b) of the Last Will and Testament of Harry Robert McCorkill (a.k.a. McCorkell) void as it is a bequest that is illegal and/or contrary to public policy;

6 On July 22, 2013, Ms. McCorkill was granted an *ex parte* injunction enjoining Streed as executor of the estate from paying, transferring or dispersing any portion of the estate and ordering that all the assets of the estate remain in the province of New Brunswick until further order of the Court.

7 On July 31, 2013, after a hearing with notice to the respondent, that order was continued pending the disposition of this application on its merits.

8 On August 19, 2013, the Province of New Brunswick ("the Province"), The Centre for Israel and Jewish Affairs ("the CIJA") and The League for Human Rights of B'Nai Brith Canada ("B'Nai Brith") were given leave to intervene in this application.

9 On September 3, 2013, the Canadian Association for Free Expression ("CAFE") was also added as an intervenor.

Applicant's Grounds

10 In her amended Notice of Application, Ms. McCorkill sets out the following as the grounds of her application:

> g. The payment or transfer of the residue of the estate to the National Alliance is against public policy and in contradiction with Canada's own laws, undertakings and commitments in that:
>
> > i. The National Alliance is a long-standing neo- Nazi group in the United States that has also been active in Canada. Through its hate propaganda, the National Alliance promotes a political program parallel to that of the original World War II-era National Socialist Party of Germany (the Nazis) including genocide, ethnic cleansing, and the use of hate motivated violence and terror to achieve its aims.
> >
> > ii. The National Alliance has a long history of inspiring and carrying out hate motivated violence and terror through its members and supporters in order to achieve its stated political aims;
> >
> > iii. The *Criminal Code* of Canada specifically prohibits hate propaganda in Canada and make criminal offences of advocating genocide and publicly inciting hatred;
> >
> > iv. Canada has been a signatory and party to the *International Convention on the Elimination of All Forms of Racial Discrimination* ("Convention") since 1970. Parties to the Convention shall condemn all hate propaganda and declare as offences hate propaganda, membership in racial supremacist groups and the provision of any assistance to racist activities, including the financing thereof;
> >
> > v. Canada has also signed on, and committed to, other international declarations and covenants which specifically protect individuals against any discrimination, advocacy of national, racial or religious hatred and incitement to discrimination and violence; ...

Issues

11 This application raises the following issues:

Analysis and Decision

72 While the jurisprudence on voiding bequests on the grounds of public policy tends to deal with conditions attached to specific bequests, in my opinion the facts of this case are so strong that they render this case indistinguishable from those.

73 Unlike most beneficiaries, the National Alliance has foundational documents which state its purposes. Moreover, those purposes have been expanded upon, explained and disseminated in various forms of media by the NA since its inception. They consistently show that the National Alliance stands for principles and policies, as well as the means to implement them, that are both illegal and contrary to public policy in Canada. If the organization has changed in these respects since its inception then it was incumbent upon the respondent, particularly through the evidence of Erich Gliebe, the current President of the National Alliance, to demonstrate that in this application. It has not done so.

74 The facts of this case can be distinguished from most other cases because in most cases, a beneficiary of an estate does not "stand for" something identifiable. They don't have foundational documents. A drug dealer does not "stand for" dealing drugs. He or she may have a criminal record of doing that but that does not mean that that is what they stand for. Their crimes are not the purpose for which they exist, their *raison d'être*.

75 Unlike in the *Jake Estate* case, *supra.*, where there was no finding by the court that the State of Israel's *raison d'être* was contrary to public policy in Canada, in this case it is abundantly clear that what the National Alliance stands for and has stood for since its inception, its *raison d'être*, is contrary to public policy in Canada. In fact, as mentioned earlier, what it stands for, anti-semitism, eugenics, discrimination, racism and white supremacy, violates numerous statutes and conventions that have been passed by Parliament and the Legislatures and endorsed by the Government of Canada, including the *Criminal Code*.

76 The evidence before the court convinces me that in the case of the NA the purpose for which it exists is to promote white supremacy through the dissemination of propaganda which incites hatred of various identifiable groups which they deem to be non-white and therefore unworthy. Those purposes and the means they advocate to achieve them are criminal in Canada and that is what makes this bequest repugnant.

77 It is also what makes this situation comparable, in my view, to a gift to a trustee for a purpose that is contrary to public policy. The law of wills is concerned with the intent of the testator and from the very fact that Mr. McCorkill left his entire estate to the NA I infer that he intended it to be used for their clearly stated, illegal purposes. For me to find that such a gift was valid would require that I ignore an overwhelming body of evidence. The Court of Appeal has made the point on more than one occasion that trial judges must not "check their common sense at the court room door". Allowing this bequest to stand because it doesn't repeat those stated purposes but bestows the bequest on the organization whose very existence is dedicated to achieving them would be doing just that, in my view.

78 Moreover, while the bequest doesn't advocate violence, it would unavoidably lead to violence because the NA, in its communications, both advocates violence and supports its use by others of like mind such as skinheads. It attempts, in some of its writings, to profess zero tolerance for violence or illegal activity but its writings and publications consistently expose those disclaimers as disingenuous.

79 In its foundational documents, and more recently in Mr. Gliebe's affidavit opposing this application which he swore on July 26, 2013, the NA attempts to project an image of itself as a cultural organization promoting traditional European culture and heritage to young people through music and festivals. These feeble protestations only call to mind the attempts by the Nazis in Hitler's Germany to mask their true intentions through organizations like the Hitler Youth. History tells us that behind the mask lurked some of the worst evil ever visited on the human race.

80 Mr. Gliebe also protests that the NA's records show that the Oklahoma bomber, Timothy McVeigh, and others identified by the SPLC as having been inspired by the writings of the NA were never members of the NA. In my view

the fact that there is credible evidence before the court of any connection, no matter how small, between the NA and the evil visited on society by people such as McVeigh and Joseph Paul Franklin only underlines what Cory, J.A. (as he then was) called "... the destructive effects of the promotion of hatred." and "... the catastrophic results of expressions which promote hatred.": see paragraph 53, *supra.*

81 CAFE further submits that decisions such as this dealing with public policy should be left to Parliament and the Legislatures and that the courts should not interfere. (See also para. 59, *supra.*) That submission ignores the fact that Parliament has spoken loudly and clearly on this very subject in s. 319(2) of the *Criminal Code* as well as the fact that the *New Brunswick Legislature* has enacted the *Human Rights Act*, R.S.N.B. 1973 c. H-11, the preamble to which states, in part:

> Whereas recognition of the fundamental principle that all persons are equal in dignity and human rights without regard to race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition or political belief or activity is a governing principle sanctioned by the laws of New Brunswick; ...

82 That submission also might have carried more weight if, in this case, the Attorney General had not intervened. However, the Attorney General has intervened and clearly stated the position of the government that this bequest is in violation of the public policy of this province and should be voided. It would not be practical for legislatures to pass legislation dealing with individual wills. An intervention such as this by the Attorney General is the only practical way for a government to deal with a particular case in order to ensure that the principles set out in legislation such as the *Human Rights Act*, *supra.*, are upheld. That intervention sends a strong message about the effect of this bequest on the public policy of this province.

83 CAFE also submits that since Mr. McCorkill was legally permitted to donate money to the NA during his lifetime there is no compelling legal argument for prohibiting him from doing so on his death. I don't accept the premise of that submission. He may have been able to donate to the NA during his lifetime but I absolutely reject the submission that it was legal for him to assist an organization in the dissemination of hate propaganda. As mentioned earlier the NA's activities offend section 319(2) of the *Criminal Code* and, as a contributor, he would have been a party to that offence.

84 Moreover, even if the bequest were not illegal but violated public policy for other reasons, the court could still void it. In *Egerton v. Earl of Brownlow* (1853), 10 E.R. 359 (U.K. H.L.) the Lord Chief Baron discussed this in the following passage at p. 417:

> ... The owner of an estate may himself do many things which he could not (by a condition) compel his successor to do. One example is sufficient. He may leave his land uncultivated, but he cannot by a condition compel his successor to do so. The law does not interfere with the owner and compel him to cultivate his land (though it be for the public good that land should be cultivated) so far the law respects ownership; but when, by a condition, he attempts to compel his successor to do what is against the public good, the law steps in and pronounces the condition void, ...

85 Thus, in this case if the right of free speech in Canada were unfettered by the *Criminal Code* and Mr. McCorkill could have legally donated to the NA while he was living, this court would still have the authority, on making a finding that the bequest violates public policy, to step in and declare it void. See also *Fox v. Fox Estate* [1996 CarswellOnt 317 (Ont. C.A.)] 1996 CanLii 779 at p. 11.

86 Mr. Streed also submits that there is no evidence before the court that the NA will use the bequest for any purposes that violate public policy such as inciting hatred against Jewish people and other identifiable minorities. The answer to that submission is found in the foundational documents of the NA which demonstrate that it is dedicated to precisely that and related purposes as the means of achieving white supremacy, white living space and its other racist goals. The fact that it may use some of the bequest to pay someone to clean its office premises or to fund a cultural festival does not mean that the bequest is used for other purposes. All of its activities are clearly focused on achieving its core purposes

and thus any money it spends, from whatever source or for any activity, contributes, either directly or indirectly, to achieving those purposes.

87 Finally, CAFE and the respondent submit that if the Court intervenes and voids the bequest because of the nature of the beneficiary then the floodgates will be open and estate litigation will flourish where bequests are left to persons who are not of stellar character. In my view, there is little risk of that. Each case must be dealt with on its own merits and I have little doubt that the expense of litigation will discourage frivolous applications. It is difficult to imagine too many applications that would be based on such a strong factual background as this one. On the contrary, in my view, if the court allowed this bequest to stand it would increase the risk of opening the door to bequests to other criminal organizations.

88 Moreover, the jurisprudence concerning cases that are contrary to public policy goes back 200 years in the English common law tradition and more than a century in Canada alone. Despite that long history, it can hardly be said that there has been a deluge of cases where the courts have intervened in an estate or trust or even a contract on the grounds of public policy.

89 I therefore find that while the voiding of a bequest based on the character of the beneficiary is, and will continue to be, an unusual remedy, where, as here, the beneficiary's *raison d'être* is contrary to public policy, it is the appropriate remedy.

Disposition

90 In summary, I find that the purposes of the National Alliance and the activities and communications which it undertakes to promote its purposes are both illegal in Canada and contrary to the public policy of both Canada and New Brunswick. Consequently, I declare the residual bequest to it in the will of Harry Robert McCorkill to be void.

91 I further declare that as a result of this finding, there is an intestacy with respect to the residue of the estate of Harry Robert McCorkill and that the residue shall be divided amongst the next of kin of the said Harry Robert McCorkill in accordance with the *Devolution of Estates Act*, R.S.N.B. 1973 c.D-9, as amended.

92 With respect to the administration of the estate, Ms. McCorkill requests that I direct Mr. Streed to turn the assets of the estate over to her lawyer in trust and order Mr. Streed to pass his accounts within 30 days. However, I have not, by this decision, removed Mr. Streed as executor or otherwise invalidated the will nor has Ms. McCorkill provided any grounds for removing Mr. Streed as executor. That would require a separate application under the Probate Rules.

93 With respect to Mr. Streed's accounts, if he wishes to have them passed for whatever reason, including if he wishes to resign as executor, then he can renew the application he previously made for that purpose to the Probate Court.

94 Ms. McCorkill also requests, and I hereby make, an order permanently enjoining any individual associated with the estate from distributing, paying or transferring the residue of the estate or any part thereof to the National Alliance without further order of either this Court or the Probate Court.

Costs

95 Ms. McCorkill is entitled to her costs on a solicitor and client basis from the estate. Mr. Streed is also entitled to his costs from the estate on a solicitor and client basis. While he has not been successful, he did not write the will. Mr. McCorkill did and Mr. Streed had a duty to propound it as the surviving executor.

96 The province has not requested costs and CAFE has been unsuccessful in its intervention. While the submissions of CIJA and B'nai Brith have both been helpful, their own purposes were also served by intervening so I will award them each a lump sum of $3,000.00 including disbursements to be paid out of the estate.

Application granted.

End of Document

TAB 17

1999 CarswellNS 456
Nova Scotia Supreme Court [In Chambers]

Killam Estate, Re

1999 CarswellNS 456, 185 N.S.R. (2d) 201, 38 E.T.R. (2d) 50, 575 A.P.R. 201, 97 A.C.W.S. (3d) 1287

In the Matter of the Estate of Dorothy J. Killam, Late of Halifax, in The County of Halifax, Province of Nova Scotia, Deceased

John H. Matthews, George T. H. Cooper, W. Robert Wyman and M. Ann McCaig, Trustees of and Under the Last Will and Testament of the Late Dorothy J. Killam, Applicant and Dalhousie University, Royal Institution for the Advancement of Learning (McGill University), University of Alberta, The University of Calgary, The University of British Columbia and The Canada Council for the Arts, Respondents and The Attorney-General of Nova Scotia, Intervenor

Kennedy C.J.S.C.

Judgment: October 12, 1999*
Docket: Doc. S.C. 14903

Counsel: *Peter Bryson* and *George T.H. Cooper, Q.C.*, for Applicants, Killam Trusts.
Timothy Matthews, Q.C., for Respondents, The Killam Institutions.
John W. Traves and *Pauline Doucet*, for Intervenor, A.G.N.S.

***Kennedy C.J.S.C.*:**

1 By this application, the Trustees of the Estate of Dorothy J. Killam seek this Court's approval to the implementation of an agreement (*attached as a Schedule*) reached between the Trustees and certain beneficiaries of the estate, referred to collectively as the "Killam Institutions".

2 I gave an oral decision approving the application dated October 12, 1999. At that time I indicated that written reasons would follow.

3 The "Killam Institutions" are Dalhousie University, the Royal Institution for the Advancement of Learning (McGill University), the University of Alberta, the University of Calgary, the University of British Columbia and the Canada Council for the Arts. They are represented before this Court and all are supportive of the application.

4 Dorothy J. Killam died on July 27, 1965. By her last Will, dated May 22, 1965, she established four categories of trusts for the benefit of the institutions, specifically the Killam Memorial Chairs Fund (The "Chairs Fund"), the Killam Memorial Salary Funds (The "Salary Funds"), the Izaak Walton Killam Memorial Funds for advanced studies (The "Scholarship Funds"), and the Killam General Endowment Funds (The "Endowment Funds").

5 In addition, during her lifetime, Mrs. Killam made anonymous gifts to Dalhousie University and the Canada Council for the Arts (The "Anonymous Donor Fund Trust"). The Will Trusts and the Anonymous Donors Fund Trusts, are hereafter referred to collectively as "The Killam Trusts".

6 As a result of Mrs. Killam's philanthropy, the six beneficiaries together, now have under management, approximately $360 million in market value.

7 I am satisfied that Nova Scotia is the appropriate jurisdiction in which to bring this application. The first clause of her Will sets out that Mrs. Killam is "a Canadian citizen, domiciled and resident in the City of Halifax, in the Province of Nova Scotia."

8 Upon her death her Will was probated in the Court of Probate for the County of Halifax.

9 Since that time, the Trustees have on a regular basis, presented their accounts to the Supreme Court of Nova Scotia for review and approval. There is no issue as to the geographic jurisdiction of this Court.

The Problem and the Proposed Solution

10 The Will, and the Anonymous Donor Fund documents are specific as to the purposes of "The Killam Trusts", and make clear that it is the "income only" derived therefrom that is to be distributed to accomplish those purposes.

11 The following language is used in the Will.

12 As to the Chairs Fund: In Clause 'Sixth', subparagraphs 10(a) and (b) of her Will, Mrs. Killam gifted the sum of $2 million each to Dalhousie University and the University of Alberta, using the following language:

> ...Two Million Dollars ($2,000,000.00) in trust to be set aside and preserved by Dalhousie [and $2 million to the University of Alberta] in a special fund separate and apart from any other of its assets or funds, the income only thereof to be exclusively used to establish at least two Chairs at Dalhousie [and the University of Alberta] in post-graduate work in the scientific and/or engineering fields as determined by its Board ... subject to the approval of my Trustees ... The salary ... shall be such as to attract men of the highest distinction.

13 As to the Salary Funds: In Clause 'Seventh' of her Will, Mrs. Killam set aside monies for Dalhousie University, the University of Alberta and the University of British Columbia, to pay salaries to the permanent teaching staff of each institution. It says in part:

> ...[the foregoing sums] to be set aside and preserved by each University in a special fund ... separate and apart from any other of its assets or funds, the income only thereof to be used exclusively at the discretion of the Board ... of each University and with the approval of my Trustees to pay salaries of its permanent teaching staff ... The assets comprising the Killam Memorial Salary Funds shall be held, managed and from time to time invested and reinvested as directed by the respective Boards ... subject always to the approval of my Trustees.

14 As to the Killam Scholarship Funds: Under Clause 'Eighth' of her Will, Mrs. Killam established certain scholarships and her purposes in doing so are expressed at some length. Sub-clause (3) provides:

> My purpose in establishing the Killam Trusts is to help in the building of Canada's future by encouraging advanced study. Thereby I hope in some measure to increase the scientific and scholastic attainments of Canadians, to develop and expand the work of Canadian universities, and to promote sympathetic understanding between Canadians and the peoples of other countries. Accordingly, the net income from each Killam Trust shall be used to provide fellowships and other grants ... for advanced study or research at universities, hospitals, research or scientific institutes, ...

15 Sub-clause (4), provides:

> It is my desire that those selected to receive Scholarships shall be likely to contribute to the advancement of learning or to win distinction in a profession and it is my hope that insofar as possible Scholarships will be granted for work either leading or subsequent to a doctorate or for work of similar standing.

16 Sub-clause (6) provides:

The amount of each individual Scholarship shall be at the direction of the body awarding the same and shall be sufficient to enable the scholar to live simply but comfortably.

17 I am satisfied that the magnitude of the gifts, together with the provisions for preserving capital and spending income, make clear that Mrs. Killam's intention was that these trusts would continue in perpetuity.

18 Under the instruments establishing the "Killam Trusts", the Trustees retain certain powers with respect to the investment by the Killam Institutions of certain of the trusts. The extent of those powers vary from trust to trust and in some cases the powers are not explicitly set out.

19 In accordance with Mrs. Killam's expressed intent, the Trustees have authorized the expenditure of "income only" (interest, dividends, rents, royalties and the like) and prevented the expenditure, by the Killam Institutions, of capital gains.

20 Because the trusts are perpetual, the Trustees and the Killam Institutions consider it important to insure that approximately the same levels of benefits on a post-inflationary basis, are provided to generation-after-generation of recipients, believing this to be Mrs. Killam's charitable intention. To accomplish this, the Killam Institutions had in recent years, with the approval of the Killam Trustees, adopted the "total return" concept of investing, which seeks to maximize the total of capital gains plus income of trust funds over the long term, so that more funds will be available for annual spending over an extended period, than would be the case if the goal were to maximize income in the restricted sense, (ie. excluding capital gains).

21 Also, with the approval of the Killam Institutions, the Trustees have over the past ten years or so, decided on a spending level of approximately 5% of the "market value" of the funds available, which they consider to be a prudent and appropriate figure.

22 This objective has thought, in recent years, been thwarted, because the income has amounted to less than 5% of the market value, so that in the current investment climate, expenditures cannot be maintained at this level, so long as the "total return" concept of investing is retained and such spending is limited to "income" in the restricted sense.

23 The Trustees retained Price Waterhouse, Coopers, Chartered Accountants to complete a historical analysis of some of the Killam Trust Funds held by the six Killam Institutions covering the eight year period from 1989 to 1997.

24 The report of the accountants has been produced in evidence at this hearing. It confirms and explains the "income" problem. In summary, this report states:

> During the 1989-1997 period, the Killam institutions experienced dramatic increases in the value of their investment portfolios as a result of rising markets and a shift of funds to equity investments and away from debt instruments. Income during this same period declined and failed to keep up with inflation.

25 It has been submitted before me therefore, that if the Killam Institutions are to maintain a 5% spending level, the alternatives would be to spend realized capital gains as a supplement to "income" in the restrictive sense, or to cease to invest in accordance with the "total return" model, and instead invest for maximum income and thereby it is argued, favour today's generation of scholars at the expense of tomorrow's.

26 On the other hand, if the "total return" model is retained, and "income only" distributed, resulting in spending levels forced below 5%, the Trustees believe that the present generation of scholars would suffer in comparison to those generations to come.

27 Both the Trustees and the Institutions want to continue to use the "total return" model of investing and yet maintain the 5% spending level.

28 It is clear that, they cannot continue to do both if they are restricted to the spending of "income only".

29 Thus, "the agreement", by which the Trustees and the Killam Institution would approve the distribution of part of the realized capital gains to supplement the income.

30 The Trustees and Institutions now ask this Court to accept that the "total return" model of investing and the 5% spending level, are both proper and appropriate policies to adopt and exercise in the management of these trusts and to further accept that "the agreement" is the reasonable and proper solution to this dilemma.

31 In support of their submissions, they have engaged acknowledged experts who have written reports specific to this problem and its proposed solution.

32 The reports of these experts are central to the submissions of the applicants.

33 "The agreement" is endorsed by Dr. J. Peter Williamson. He is a Canadian who has spent his professional life teaching and writing in the United States. For thirty-one of those years he was a professor at the prestigious School of Business Administration at Dartmouth College in New Hampshire.

34 His particular area of expertise has been the management of educational endowment funds.

35 He is the author of "Funds for the Future: College Endowment Management for the 1990's" (1993, The Common Fund Press). This Court acknowledges his expertise in this area.

36 Firstly, Dr. Williamson advocates and endorses the Trustees and Institutions' decision to use the "total return" policy of investment.

37 At p. 4 of the report to the Trustees he states:

> Those who administer educational endowment funds have come to realize that it is the combination of income and appreciation, not either one alone, that should be the focus of investment policy. Investment policy should be aimed at obtaining the best overall rate of return (income plus appreciation) consistent with an acceptable level of risk. This is the essence of the total return concept.

38 He points out that investment for short term income in the highest yielding securities "offers no protection from the future effects of inflation".

39 At p. 4:

> ....the purchasing power of that apparently high income will inevitably erode over the years and come to support far less activity than the donor is likely to have intended or anticipated.

40 Secondly, as to spending, Dr. Williamson says that the results of his analysis at p. 7:

> ...support a 5% spending level as appropriate in generally maintaining growth in spending (and in principal value) that keeps pace with inflation, as well as achieving an appropriate combination of investment risk and return.

41 Having endorsed the Killam Trustees and the Killam Institutions policy of investing for "total return" and supporting their 5% spending level as reasonable and prudent, Dr. Williamson says "the agreement" "...sets out a procedure offering a very sensible solution" to the dilemma of "income" not supporting "spending".

42 He advocates the use of capital gains to enable spending beyond income, which is the essence of "the agreement".

43 Dr. Williamson makes reference to the United States experience in response to the problem of restricted "income only" endowments.

44 He points out why the American educational institutions faced this problem and devised a solution many years ago and yet the Canadian institutions are just now confronting the dilemma.

45 At p. 7 of this report:

> I believe the explanation lies in the fact that almost all institutions of higher learning in Canada are taxpayer supported, and have not been nearly as dependent on their endowments as are the major private institutions in the United States. Thirty years ago these U. S. institutions, some meeting 20% or more of their budget needs from endowment spending, simply had to find a way to deal with the 'restricted income only' problem.

46 In the United States the solution has years ago been endorsed and enabled by legislation. Again at p. 7 of his report, Dr. Williamson states:

> A more satisfactory solution in the U. S. has been the **Uniform Management of Institutional Funds Act** approved by the Conference of Commissioners on Uniform State Laws in 1972. This legislative solution ... authorizes the use of a prudent portion of capital gains to augment spending beyond income, where the donor has limited spending to 'income' but has not explicitly prohibited this augmentation.

47 He says "the agreement" accomplishes essentially the same thing for the Killam Trusts.

48 At p. 9:

> The Agreement, in my judgment, solves a serious problem faced by the Killam Trustees and the institutions benefiting from the Will of Mrs. Killam. It is well designed to enhance the overall investment performance of the Trusts and at the same time to match growth in capital value and in distributions to the probable rate of inflation, thus furthering the apparent object of Mrs. Killam's philanthropy.
>
> It appears to me that the Agreement reflects the thought-process set out in the **Uniform Act** as representing the standard of prudence required of trustees, a statute reflecting years of careful deliberation and empirical testing in the United States. I understand the spending rate the Trustees and the Beneficiary Institutions have in mind is 5% of a three year average, although this is not spelled out in the Agreement and can be changed if conditions require a change. In all my experience and on the basis of current conditions I believe this to be a prudent spending rate. The fact that the Agreement may be terminated on a year's notice either by the Trustees or by any Killam Institution adds another safety element.

49 After having listened to argument and read the affidavits in support, which include the Price Waterhouse and Williamson reports, I am convinced that what the Trustees and Institutions seek to do by "the agreement" is reasonable, justified in accordance with the purposes of the trusts, and to the benefit of the ultimate beneficiaries.

As to the Use of This Court's Inherent Jurisdiction

50 While the objects of "the agreement" may be worthy, there remains the question of how it can be implemented in this Country, in this Province, a jurisdiction that does not have legislation of the nature of the *Uniform Management of Institutional Funds Act* in the United States.

51 In the United Kingdom and other Commonwealth countries as well, legislation has been passed that addresses the need to confer updated administrative power upon Trustees when necessary to further the "spirit of the gift", in the words of the *Charities Act*, 1960 (England).

52 In Canada, unlike the United States and other major jurisdictions in the Commonwealth, the provinces have not reduced to statute form the various court powers and procedures for dealing with charities.

53 The applicants submit though, that this Court can accomplish here what the legislation has accomplished in the United States and the Commonwealth. They argue that I can and should exercise my inherent jurisdiction with respect to the administration of these charitable trusts and authorize the changes sought by the Trustees.

54 The applicants submit that it is well established that the courts have inherent jurisdiction to approve arrangements whereby the administrative provisions of charitable trusts, which are perpetual in nature, are adapted to suit changing circumstances, so as to accomplish the donor's charitable intent more effectively as economic times change.

55 They argue that the Court in so doing, is not limited by conditions placed on the mode of operation of the trust, even if the variation sought appears to contradict directly the intention of the testator or settlor.

56 Another expert retained by the Trustees to address the issues specific to this application, is Dr. Donovan W. M. Waters, Q.C.

57 He is a barrister practicing in Vancouver and professor *Emeritus* of the University of Victoria. He is the author of "The Law of Trusts in Canada" and has been awarded the degree of Doctor of Civil Law by Oxford University in recognition of his contribution to Canadian trust law. This Court acknowledges his expertise in the area of trusts.

58 Dr. Waters speaks particularly to this Court's inherent jurisdiction at p. 3 of the report:

> The jurisdiction assumed by the one-time Court of Chancery to sustain and further charitable trusts was implicitly taken over by the High Court of England after the fusion by the **Judicature Act**, 1873, of the Royal Courts, and that same assumption (or inherent) jurisdiction passed to the courts of the colonies overseas. It remained when the colonies of the Empire became the Dominions of the Commonwealth and, finally, totally independent nations. The inherent jurisdiction therefore vests in the Supreme Court of Nova Scotia.

59 Dr. Waters points out the different approach that courts of equity have historically taken to charitable trusts as opposed to private trusts.

60 Whereas a private trust will fail if the object or objects are equivocal so that the court cannot determine the implemental intent of the trust creator, charitable trusts will commonly survive as long as the creator makes clear that the objects are to be exclusively charitable. If the trust is charitable, courts have been prepared to order the making of a 'scheme' carrying out the apparent intent of the would be charitable trust creator. The 'scheme' supplies the missing details as to the purpose or purposes the trustees are to pursue.

61 At, p. 2 of his report:

> This scheme-making power of the courts was (and is) also employed where there has been a breakdown in the administrative terms of the charitable trust, or the administrative terms in being are inadequate for contemporary needs. But perhaps the best known aspect of the scheme-making power is the *cy-pres* jurisdiction. This is the authority assumed by Chancery to order a 'scheme' when it has become impossible or impracticable for the trustee or trustees to carry out the objects (or purposes) of a charitable trust as they are set out by the creator of the trust. Provided there exists a general intent of the settlor or testator to further charitable ends, the court in these circumstances will order a scheme applying the trust fund to purposes that are as close as possible (*cy-pres*) to the original purposes.

62 At p. 5:

> ...charitable trusts have received very much more assistance from the courts than private trusts, and to make this possible, the courts historically have assumed a jurisdiction in favour of furthering the validity and efficacy of charitable trusts that is considerably broader than any jurisdiction extended to private trusts.

The Scope of the Inherent Jurisdiction

63 The 'scheme-making' power that this Court is asked to exercise in this matter is concerned with the administration and machinery, of a charitable trust. The issue herein is not the clarification of the purposes of the trusts.

64 Specifically, the question here is whether the inherent jurisdiction used by courts to enable administrative scheme-making, is broad enough to permit this Court to authorize a plan as created by "the agreement".

65 Dr. Waters concedes that there is no precedent of which he is aware, in Canada, or any Commonwealth country, where a court has used its inherent jurisdiction to approve a scheme permitting a distribution, of both income and capital growth, in place of "income only", when the testator has restricted the distribution to "income".

66 He says though, that he believes the authorization for such a "scheme" lies within the jurisdiction of this Court.

67 He points out that there is some judicial guidance than can be found in the decisions. At p. 8 of his report:

The investment power of certain charitable trusts was considered in *Re University of London Charitable Trusts* (1963), [1964] Ch. 282 (Eng. Ch.). The trial judge was Wilberforce J., as he then was. The first part of the summons concerned the inherent jurisdiction, and the second part the **Charities Act**, 1960, statutory jurisdiction. We can be concerned here only with the first part of the summons.

In 1959, prior to the **Charities Act** of 1960 and under the inherent jurisdiction, Wynn-Parry J. had approved a scheme whereby the investment portfolios of a number of University of London trusts would be consolidated as a common investment fund. For a stated percentage of the fund the scheme also authorized investments that were beyond the then legal list, contained in the **Trustee Act**, 1925. In other words, exercising the inherent jurisdiction, the Court widened the investment power for the common fund.

In 1963 Wilberforce J. said he had "no difficulty with the head of relief" (p. 284), and went on to say that, despite the passage in the meantime of the **Trustee Investments Act**, 1961, in the special circumstances he would order that new trusts arising since the previous scheme was made should also have the benefit of that common pool and the wider range of investments.

He put it this way:

> The special circumstance is quite obvious. It is that unless the extension [of investment power] were made, the benefit of the combined investment pool, arising from the saving of administrative expenses and convenience of administration and, indeed, the practicability of dividing up the combined pool into parts, would be frustrated. Therefore, I find no difficulty in authorizing [under the inherent jurisdiction] the extension which would be involved in bringing new trusts into the existing combined pool. (at p. 285)

As to the scope or width of the inherent administrative scheme-making jurisdiction, more light is cast on this by the decision in *J.W. Laing Trust Stewards' Co. Ltd. v. Attorney-General* (1983), [1984] Ch. 143 (Eng. C.A.), a decision of a well-known Chancery judge, Peter Gibson J. The settlor of a charitable trust for certain religious purposes had provided in the trust instrument that the entire fund was to be distributed within 10 years of his death. The fund grew substantially in value during the settlor's lifetime, and to distribute the whole capital within the 10 years would have meant the inundation of recipients with money for a short while and then a total discontinuance of support. The practice had been to supply those recipients with a steady annual income from income funds.

But was the inherent jurisdiction that was invoked here capable of authorizing a scheme which would discharge the 10 year termination provision, allowing the trust to distribute income to the chosen recipients — as before — but indefinitely? Or did any such scheme also straddle changing purposes and involve the *cy-pres* jurisdiction, now rendered statutory under the **Charities Act**, 1960?

I should add that in England the Attorney General is not called upon as *amicus curiae* to present argument against a scheme. As representative of the Crown in its *parens patriae* role the Attorney has the right to appear, and will raise issues if he thinks the applicant has not adequately addressed them. He will also make objections if in his considered opinion the scheme as presented to the court ought not to be approved. In my experience the Attorney's involvement in this jurisdiction is always a benign one.

In the case under consideration both the Trustees and the Attorney-General supported the discharge of the time limitation; the dispute was over whether it had to be done, as the Attorney argued, under the statute as opposed to the inherent jurisdiction.

Counsel for the Trustees and the Attorney were both senior Chancery lawyers, one the present author of a leading work on the law of charity in England. Counsel for the Trustees pleaded that the inherent administrative scheme jurisdiction is about "machinery" and enables the court "to make schemes where the machinery requires overhaul" (at p. 145). Counsel for the Attorney conceded that it is an "unlimited jurisdiction to regulate the administration of a charity" (at p. 146). Referring to precedent, counsel submitted that "the court rectifies the donor's machinery if necessary" (ibid.).

Peter Gibson J. agreed with these submissions made to him on the scope of the administrative scheme jurisdiction, and he held that the scheme sought fell within that jurisdiction. He said (at p. 153) that, in exercising the discretion involved in the inherent jurisdiction and so "considering whether it is expedient to regulate the administration of the charity", the Court should take into account all the circumstances of the charity.

'Expedient', I would add, has been held to be a word of the widest import. This was the view of Dixon J., an eminent Australian High Court judge, in *Riddle v. Riddle* (1952), 85 C.L.R. 202 (Australia H.C.), at p. 214. In a case involving beneficiaries and the request for a broader investment power, he said that "expediency means expediency in the interests of the beneficiaries", and the issue is whether "the interests of the beneficiaries will be seriously threatened" if the broader power is not permitted to the trustees.

That the trust instrument requires distribution within a certain period of time, Peter Gibson J. said, is not a purpose of the trust. Administration is something which goes "to the mechanics of how the property devoted to charity is to be distributed" (at p. 153) (emphasis added).

I emphasize the above remark of the Court because in my view it confirms that both investment authority and manner of distribution lie within the width of the unlimited inherent administrative scheme of jurisdiction. I would suggest on the authorities that the Killam case concerns merely the way in which funds flow to the existing purposes.

In my opinion the Killam Trusts raise a clear instance where the administrative scheme-making jurisdiction is being invoked. The charity is seeking the ability to apply in each year a percentage of income and capital gain arising as total investment return, and to do so in favour of the objects of endowment trusts. The circumstances I have in mind are those where the creator of the trust refers to 'income' distribution or has left 'income' distribution as an implied provision. Such a settlor or testator has not realised in his or her time in history (these are often instruments drawn long ago) that such a provision will severely limit the power of the trustee to make the trust work productively in bringing about the purposes chosen by the settlor or testator. In other words, achieving the objects of the trust is "seriously threatened".

68 Dr. Waters suggests that in the circumstances that it is reasonable and logical that the Trustees bring such an application as this, and the fact that the "institutions" are joining in the application and supporting the proposals, he says, is significant.

69 He submits in conclusion, that the Nova Scotia Supreme Court does possess the inherent jurisdiction to order and approve a scheme to improve the administrative machinery of a trust.

70 He says that English and Commonwealth Courts have for centuries (at p. 11):

> ...assumed an extensive jurisdiction in order to approve schemes facilitating efficacy and upgrading of charitable trusts. The unlimited jurisdiction has been noted in particular with administrative scheme-making.

71 And, while conceding that there is no precedent where a court has used its inherent jurisdiction to do just as the applicants request, he believes that the approval of such a scheme does lie within the inherent jurisdiction of this Court.

72 He suggests that Mrs. Killam's intention was, that these trusts should support her declared purposes "at a level of funding which she during her lifetime would have been advised was possible", through the distribution of income only.

73 At p. 11:

> The court when ordering schemes have always been concerned with furthering the founder's intentions. In the case of the Killam Trusts the terms of the proposed would-be scheme that have been shown to me meet this intention, and they do so in the spirit in which historically schemes have done so.

74 I had asked counsel what they thought Mrs. Killam would do if faced with the contemporary investment climate, and the response was that Mrs. Killam was known to seek the best professional advice and commonly accept it.

75 The Trustees have done that. The Trustees, having obtained the best advice available and with the full cooperation of the distinguished institutions that benefit from the Killam Trusts, are asking this Court to allow what appears to be a sensible response to a problem that should be addressed.

76 The Attorney-General of Nova Scotia was represented at this application in its *parens patriae* capacity.

77 It urged the court to exercise caution in the use of its jurisdiction, but did not question the reasonableness of the applicants' proposal or object to the application.

78 I am satisfied that I do have the inherent jurisdiction to alter the administration, "the machinery" of these charitable trusts, and that it is so extensive as to allow the specific changes that "the agreement" accomplishes.

79 I conclude that the use of this Court's inherent jurisdiction to allow the distribution of both income and capital growth is a progression that comes rationally and naturally from the use of jurisdiction by the English and Commonwealth Courts.

80 Having concluded that both the method of investment and the distribution level sought to be maintained by the applicants are reasonable and prudent, I conclude that this Court should use its inherent jurisdiction to approve and enable "the agreement" to be accomplished.

81 Although the result will be contrary to the expressed, unequivocal direction of Mrs. Killam to distribute "income only", I am influenced by the cases cited, such as: *J. W. Laing Trust Stewards' Co. Ltd. v. Attorney-General* (1983), [1984] Ch. 143 (Eng. C.A.), *Re Dominion Students' Hall Trust*, [1947] Ch. 183 (Eng. Ch. Div.) and *Lysaght v. Royal College of Surgeons* (1965), [1966] Ch. D. 191 (Eng. Ch. Div.)in which the courts have varied trusts and thereby contradicted the original intentions of the makers when they determined that the alterations were in the best interests of the beneficiaries and for the better administration of the trust.

82 I am convinced that the variations accomplished by "the agreement" are in accord with the "spirit of the gift".

83 The Trustee, George Cooper, Q.C. has suggested in his affidavit filed on this application, that "on a fair reading of the Will as a whole, the underlying charitable intentions of Mrs. Killam call for a continuing stream of income in perpetuity, protected against inflation, for the purpose of funding the Killam Scholarships, Salaries and Chairs, and the other activities permitted under the Will;" and I would add the Anonymous Donor Funds.

84 I am convinced that this assessment is correct and I am authorizing the implementation of "the agreement" so that the machinery of the trusts can be modernized and updated to allow for Mrs. Killam's intentions and purposes to continue to be accomplished.

85 The application is granted.

Schedule A

THIS AGREEMENT dated as of the 8th day of January, 1999.

BETWEEN:

THE TRUSTEES OF THE ESTATE OF THE LATE

DOROTHY J. KILLAM (the "Killam Trustee")

OF THE ONE PART

-and -

DALHOUSIE UNIVERSITY, ROYAL INSTITUTION FOR

THE ADVANCEMENT OF LEARNING (McGILL

UNIVERSITY), UNIVERSITY OF ALBERTA, THE

UNIVERSITY OF CALGARY, THE UNIVERSITY OF

BRITISH COLUMBIA and THE CANADA COUNCIL FOR

THE ARTS (each sometimes hereinafter referred to as a "Killam

Institution" and, collectively, the "Killam Institutions")

OF THE OTHER PART

WHEREAS:

A. Dorothy J. Killam, late of Halifax, Nova Scotia, died on or about July 27, 1965, having executed her Last Will and Testament (the "Killam Will") under which the Killam Trustees are the trustees in office at present and the Killam Institutions are beneficiaries under certain trusts therein established (the "Killam Will Trusts");

B. In addition to the gifts under the Killam Will, Mrs. Killam during her lifetime gave certain gifts anonymously to Dalhousie University and to The Canada Council for the Arts, which gifts are now designated as the "Anonymous Donor's Fund" by the Canada Council and the "Killam Memorial Research and Scholarship Fund" by Dalhousie (collectively, the "Anonymous Donor's Fund Trusts", and which, together with the Killam Will Trusts, are hereinafter collectively referred to as the "Killam Trusts");

C. Pursuant to the provisions of each of the Killam Will Trusts and the Anonymous Donor's Fund Trusts, the Killam Institutions are restricted to the expenditure of the "income" therefrom;

D. The Killam Institutions have questions whether "income" includes, or should include, realized capital gains;

E. Since Mrs. Killam's death, the principles of portfolio investment by Institutions such as the Killam Institutions have changed, in that investment in accordance with the "total return" concept of investing has now become generally accepted as the most effective model of investing in terms of increasing the capital value of the portfolio over time. One implication of this model is that realized capital gains will be available for spending (as a supplement to interest, dividends and other income) in order to maintain spending levels that represent an appropriate percentage payout of the funds constituting the Killam Trusts;

F. The Killam Institutions have presented to the Killam Trustees the proposition that, while other investment models would permit the maintenance of appropriate spending levels without the expenditure of realized capital gains, this would be at the cost of restricting the long-term capital growth of the Killam Trusts (and consequently the long-term annual returns therefrom). In addition, a strategy which emphasizes the maximization of income may involve risks of liquidity, term and quality. Accordingly, in the view of the Killam Institutions it would be preferable, in the interest of long term capital growth of the Killam Trusts (and consequently the long-term enhancement of the annual returns therefrom) for the Killam Institutions to invest in accordance with the "total return" model of investing, notwithstanding that such model carries with it the implication that realized capital gains will be available for spending by the Killam Institutions as a supplement to interest, dividends and other forms of income;

G. As a consequence of the foregoing considerations, the Killam Trustees are of the opinion that their duty to encourage and approve the investment model most likely to secure the sustained growth of the Killam Trusts may be in conflict with the position, heretofore taken by the Trustees, that expenditures from the Killam Trusts should be confined to "income" in the restricted sense of interest, dividends and the like, but excluding realized capital gains;

H. Clause EIGHTH(3) of Mrs. Killam's Will provides in part as follows:

"My purpose in establishing the Killam Trusts is to help in the building of Canada's future by encouraging advanced study. Thereby I hope in some measure to increase the scientific and scholastic attainments of Canadians, to develop and expand the work of Canadian universities, and to promote sympathetic understanding between Canadians and the peoples of other countries."

The Killam Trustees are satisfied that Mrs. Killam's ultimate intentions, as they are to be gathered from the overall scheme of her Will in establishing the Killam Will Trusts and the Anonymous Donor's Fund Trusts, and as exemplified by the above passage from Clause EIGHTH(3) of her Will, would be more effectively fulfilled by resolving such conflict in favour of the view that "income" should include realized capital gains provided that such an approach is adopted as part of a plan for the utilization by the Killam Institutions of the "total return" concept of investing and the concomitant spending of realized capital gains, as a supplement to interest, dividends and other forms of income, and as an integral element of spending guidelines set so as to ensure that the aforementioned spending levels are implemented and maintained;

I. The Killam Trustees have accordingly accepted the proposition of the Killam Institutions as stated in Recital F, in exchange for which the Killam Institutions have agreed with the Killam Trustees to maintain annual spending levels that will ensure the sustained growth of the Killam Trusts over the long term;

NOW THEREFORE THIS AGREEMENT WITNESSES:

1. Subject to the provisions of Section 2, so long as the Trustees remain satisfied that the "total return" concept of investment management, carrying with it the concomitant expenditure of realized capital gains, is the investment model

likely to secure the sustained long-term growth of the Killam Trusts, the Trustees may authorize the expenditure of realized capital gains as a supplement to interest, dividends and other forms of income from the Killam Trusts.

2. During the period or periods when the Trustees have given the authorization referred to in Section I, each of the Killam Institutions and the Killam Trustees will mutually agree upon spending levels designed to ensure that over time the capital values after inflation of the Killam Trusts are where possible enhanced, and at least maintained.

3. Either the Trustees or any Killam Institution may at any time terminate this Agreement, as it applies to any one or more Killam Trusts by any one or more Killam Institutions, upon one year's written notice.

4. In the event of a termination pursuant to Section 3 of this Agreement in relation to one or more Killam Trusts held by any one or more Killam Institutions, this Agreement shall continue to apply in relation to all other Killam Trusts held by Killam Institutions.

5. This Agreement shall become effective on the date when it is approved by Order of the Supreme Court of Nova Scotia, and shall apply to the fiscal year of the Killam Institutions in which this Agreement was executed and to future fiscal years until terminated as herein provided.

IN WITNESS WHEREOF the parties hereto have executed this Agreement as of the day and year first above written.

TRUSTEES OF THE ESTATES OF THE LATE DOROTHY J. KILLAM

[Signature]

[Signature]

[Signature]

[Signature]

DALHOUSIE UNIVERSITY

Per: [Signature]

Per: [Signature]

Application granted.

Footnotes

* A corrigendum issued by the court on July 11, 2000 has been incorporated herein.

TAB 18

1997 CarswellOnt 1812
Ontario Court of Appeal

Barry v. Garden River Ojibway Nation No. 14

1997 CarswellOnt 1812, [1997] 4 C.N.L.R. 28, [1997] O.J. No. 2109, 100 O.A.C. 201, 147 D.L.R. (4th) 615, 33 O.R. (3d) 782, 71 A.C.W.S. (3d) 800

Caroline Barry, Patricia Lariviere, Arlene Barry, Valerie Boissoneau, Rita Tice and Carolyn Musgrove each suing on behalf of herself and on behalf of all the women reinstated to and entitled to be reinstated to membership in the Garden River Ojibway Nation #14 [also known as the Garden River Band of Ojibways]; and, Natalie Barry, a minor, and Christian Barry, a minor, and Kari Barry, a minor, by their litigation guardian, Caroline Barry; Lee Ann Barry, a minor, and Charla Barry, a minor, by their litigation guardian, Arlene Barry; Daniel Tice, a minor, and Deanna Tice, a minor, by their litigation guardian, Rita Tice; Kelly Musgrove, a minor, Melanie Musgrove, a minor, and Stacey Musgrove, a minor, by their litigation guardian, Carolyn Musgrove, each minor plaintiff suing on behalf of himself or herself and on behalf of all the other children and lawful wards of all the women reinstated to and entitled to be reinstated to membership in the said Band, Plaintiffs, Appellants and The Chief and Council of The Garden River Band of Ojibways [also known as the Garden River Ojibway Nation #14] including, before the election of 14 October 1988, Ron Boissoneau (Chief), Morley Pine, Ronald Thibault, Daniel L. Pine, Darrell Boissoneau, Willard Pine, Chris Belleau, Arnold Solomon and Terry J. Belleau, Councillors, and, after the said election, Dennis Jones (Chief), Morley Pine, Ronald Thibault, Willard Pine, Chris Belleau, Arnold Solomon, Terry J. Belleau, Muriel Lesage, Gordon Boissoneau and Ted Nolan, Councillors, Defendants, Respondents

Finlayson, Charron and Rosenberg JJ.A.

Heard: April 17, 1997
Judgment: May 27, 1997
Docket: CA C14296

Counsel: *Michael F. W. Bennett*, for the appellants.
Robert MacRae, for the respondents.

Subject: Public

APPEAL from dismissal of action for payment of per capita share in distribution of native claim fund.

***Per curiam*:**

1 The adult appellants are female members of the Garden River First Nation of Ojibways who were reinstated to Indian status and to membership in the Garden River Band of Ojibways ("Band") on or before December 17, 1987 as

a result of amendments, introduced in Bill C-31, *infra*, to the *Indian Act*, R.S.C. 1970, c. I-6, as amended. The minor appellants are their children. The respondents are the Chief and Council of the Band at the material times.

2 The appellants appeal from the judgment of the Honourable Mr. Justice Noble of the Ontario Court of Justice (General Division), wherein the action of the appellants for an equal *per capita* distributive share of land claim settlement moneys was dismissed. When the moneys were distributed to the members of the Garden River Band, the adult appellants' shares were reduced by amounts of Band moneys that they had previously received when they were deemed to have left the Band and became "enfranchised" by reason of marriage to a man who was not a status Indian. The appellant children were denied shares on the ground that they were not members of the Band at the date of distribution.

The proceedings

3 This is an action for an accounting and payment to the appellants of their *per capita* distributive share in what they maintain is a trust fund received by the Garden River Band in settlement of an outstanding claim of the Band against the Government of Canada. The adult appellants claimed a distributive share for themselves and on behalf of all other women reinstated to membership in the Band. The minor appellants claimed a distributive share for themselves and on behalf of all other children of reinstated women who are or shall be known to the respondents. They also sought:

> (a) A temporary injunction restraining the Chief and Council, from time to time, of the Band from distributing or disposing of any part of or of the whole of the balance of the funds from the Squirrel Island Settlement Trust monies remaining in its account until the trial of this action and, in the event there is an insufficient balance of such funds to satisfy the claims of the plaintiffs, then an order that the defendants account to the plaintiffs and trace the said funds.
>
> (b) A declaration that the defendants' failure to distribute the plaintiffs' share of the said Band's Squirrel Island Settlement Trust monies is contrary to s.15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").
>
> (c) A claim for pre-judgment and post-judgment interest and costs on a solicitor client basis.

4 On the face of it, this would appear to be a straightforward case involving the *per capita* distribution of a finite sum of money. Unfortunately, at the Band Council stage, the distribution of these moneys was caught up in a larger and more contentious issue relating to the reinstatement of these adult appellants and their children to the Garden River Band as a result of the passage by the Parliament of Canada of certain amendments to the *Indian Act*, those amendments being commonly referred to as Bill C-31. We propose to deal with the factual aspects of the Settlement Agreement separate from our analysis of the effect, if any, of Bill C-31 on the contemplated distribution.

Facts

(1) The Squirrel Island Land Claim

5 The Band had an outstanding claim against the Government of Canada that related to the sale of land on Squirrel Island in the middle of the St. Mary's River. The Band contended that Squirrel Island was part of the Band Reservation set aside by the Robinson Huron Treaty of 1850. The moneys in issue are part of the Garden River Land Settlement Agreement ("Settlement Agreement") dated March 30, 1987, wherein the Crown, as represented by the Minister of Indian Affairs and Northern Development, agreed with the Chief and Council of the Band to pay in settlement of the claim the sum of $2,530,000.000 made up as follows:

> (a) the offsetting of $154,600.00 as full payment for advances and loans provided by the Crown for researching, preparing and negotiating the agreement;
>
> (b) $1,036,250.00 to be paid into an interest bearing trust account, to be held by the Band in trust exclusively for the repurchase of Squirrel Island;
>
> (c) $1,339,150.00 to be paid into the Band's revenue account, an account set up under the provisions of the *Indian Act*.

6 Section 69.(1) of the *Indian Act* provides:

> The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke such order.

7 The *Indian Bands Revenue Moneys Regulations*, C.R.C. 1978, c. 953, as amended, names the Garden River Band of Indians as a Band. As we read the Regulation, this Band may, subject to the Regulations, control, manage and expend in whole or part its revenue moneys. The Regulations relate to the establishment of a bank account, the selection of signing officers, the appointment of auditors and the publication of an annual auditor's report.

8 At trial, a councillor of the Band testified that the Band Council considered it necessary to consult the Band members and obtain a consensus regarding disposition of the settlement funds in the Revenue Account. Accordingly, a questionnaire was circulated to individual members, asking whether it was agreed "to divide equally amongst the members of the Garden River Band the one million dollars from the trust account [sic]". The questionnaire further asked whether, if the member agreed with the distribution, the distributive share of an enfranchised person now reinstated pursuant to Bill C-31 should be reduced by the aggregate amount of Band moneys paid out to the person when he or she left the Band. The tabulated results of the questionnaire demonstrated that almost everyone who completed a questionnaire was in favour of the distribution. By a small majority, members were also in favour of making deductions from the shares of the enfranchised women in the amount that they had received upon leaving the Band. It is interesting to note that, at a later date, the Chief and Council agreed that no deductions would be made from any members who owed debts to the Band for other reasons, such as water use charges.

9 Accordingly, on September 28, 1987, the Band Council passed a Band Council Resolution ("BCR") which stated:

> As we the Garden River Band operate under section 69 of the Indian Act, do hereby request that the sum of one million dollars from our Revenue Account be made available and payable to the Garden River Band. These monies are required for per capita distribution to the Garden River Band Members.
>
> 1. The Garden River Band will arrange for an audit report to be completed by June 30, 1988. Our auditor is Dunwoody and Company.
>
> 2. The Band will submit expenditure reports.
>
> 3. The Band will use the funds provided for distribution only.
>
> 4. The Band will maintain financial records in accordance with generally accepted accounting principles and practices.

10 It would appear from the above that the sum of $1,000,000.00, being part of the $1,339,150.00 paid under the Settlement Agreement, is not strictly a trust fund because it was to be paid into the Revenue Account of the Band where it could be used for the purposes of the Band generally, subject only to the Regulations which set out accountability requirements. There was no requirement in the Settlement Agreement that the fund was to be distributed to the members of the Band and certainly there was no requirement that it be distributed by a certain date. At some later time, the Band decided on December 17 and 18, 1987 as the dates for the *per capita* distribution. There was no clear evidence presented at trial explaining why these dates were selected. Accordingly, while the funds were not the subject matter of a trust when they were delivered to the Band Council, when the Band Council resolved to make a *per capita* distribution, and to set aside $1,000,000.00 for that purpose, in our view a trust was created. The Band Council was then under a duty to ensure that the distribution was carried out in accordance with trust principles.

(2) Band Membership and the Bill C-31 issue

11 Prior to April 1985, pursuant to s. 5 of the *Indian Act*, the Department of Indian Affairs and Northern Development ("Department") was responsible for maintaining a list, known as the Indian Register, of all aboriginals with Indian status. The Department also maintained the lists of all the Indians who were members of the individual bands ("Band Lists") and did so on the basis of the names in the Indian Register. At that time, subject to s. 12(1)(b) of the *Indian Act*, an aboriginal woman with Indian status was no longer entitled to be included in the Indian Register if she married a man who was not a status Indian. As a consequence of losing her eligibility to be registered, she not only lost her status as an Indian under the *Indian Act*, she lost her eligibility to remain on the Band List of the Band in which she had previously enjoyed membership and with it her status as a member of the Band. As a further consequence, children of such a union were also deprived of the opportunity of achieving status as an Indian, both on the Register maintained by the Department and as a member in the Indian Band. This process leading to a lack of status was known as enfranchisement because when it was first enacted in 1869, the woman became eligible to vote in Canadian elections, a right she had not previously held as a status Indian under the *Indian Act*.

12 On the other hand, if a man with Indian status married a non-status woman, he did not lose his status but rather his wife gained his status. With the advent of the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms* ("*Charter*"), this obvious inequality could no longer be tolerated. Parliament passed Bill C-31, *An Act to Amend the Indian Act*, R.S.C. 1985, c. 32 (1st Supp.). It received Royal Assent on June 28, 1985 but was made effective retroactively to April 17, 1985. It removed the discriminatory provisions and permitted the re-registration of enfranchised Indian women and their children. It also permitted each band to assume control over its membership list. Thus, the Department continued to register aboriginals who had status or who were reinstated to status, but once a band gained control of its membership list, the Department relinquished responsibility for that list to the Band. Two separate lists, one maintained by the Department and one maintained by the band, would come into existence.

13 In order to assume control of its membership list, a Band was required to create a code setting out the rules by which membership was to be determined, and submit it for approval to the Department before June 28, 1987. These provisions are found in s. 10 of Bill C-31, as follows:

> 10.(1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.
>
> (2) A band may, pursuant to the consent of a majority of the electors of the band,
>
> (a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and
>
> (b) provide for a mechanism for reviewing decisions on membership.
>
> (3) Where the council of a band makes a by-law under paragraph 81 (p.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

14 To bring this section into effect, it is necessary to invoke s. 81(1)(p.4) of the *Indian Act* which states:

> 81.(1) The council of a band may make by-laws not inconsistent with this Act or with any regulations made by the Governor in Council or the Minister, for any or all of the following purposes, namely:
>
> (p.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

15 On June 19, 1987, the Garden River Band complied with the procedural requirements of s.10 and submitted its membership rules, called Citizenship Registry Regulations, to the Minister. They were accepted by the Minister by letter dated September 25, 1987 and the membership rules were effective retroactively to June 25, 1987. Part IX provided:

Non-Discrimination

This Code shall be administered and all powers, duties and functions hereunder shall be exercised or performed without discrimination based on sex, affiliation to First Nations or Indian Bands, creeds or religion.

16 The Garden River Band membership rules created four categories of members: Original Members, Restored Members, Accepted Members and Members by Birth. " Original Members" were those who were entitled to be entered on the band list immediately prior to April 17, 1985 and also any child born after April 17, 1985, if the child's natural parents were both original members. The " Restored Members" category applied to those persons, including the adult appellants, who were entitled to rejoin the band pursuant to Bill C-31. The "Accepted Members" category encompassed all members who had applied for membership and whose applications had been accepted and confirmed. The children of reinstated women, including the appellant children, would belong in this category. The final category was created to provide greater certainty for children born after April 17, 1985 and whose natural parents are or were both members of the Garden River Band at the time of the child's birth. At the time that the Band was drafting the membership rules, the Department was having difficulty managing a large, unexpected backlog of applications for reinstatement to Indian status. The Department was also waiting for the bands to complete the process of assuming control over their membership. As a result, births after April 17, 1985 were not being registered by the Department, with the exception of those children born to parents who were both original members. This time was referred to as an abeyance period. There was concern that a child might be denied membership in the Band, and so this section provided for automatic membership for the child.

17 If a person had only one parent who was a member of the Band, that person was required to apply for membership, and thus would become an Accepted Member. The rules further provided for the application process. This is the route by which the appellant children could obtain Band membership. It should be noted that after the rules became effective on June 25, 1987, application for membership was necessary whether the parent-member was the father or the mother of the child. It should be further noted that the application process required the person to first obtain Indian status with the Department prior to applying for membership in the Band. Due to the Department backlog, this requirement created problems in some cases.

18 It was the testimony of the adult appellants that although they frequently and regularly inquired at Band Council meetings regarding the membership application process for their children, the Chief and Councillors did not provide satisfactory answers. The reinstated women were reassured that there was no deadline for applications. Minutes of the Band Council Meeting of February 8, 1988 indicate that application forms were still not available at that time, long after the date of distribution of the settlement moneys. At the time of the distribution, the appellant children were not members of the Band, although in most cases, they had achieved Indian status by directly applying to the Department.

(3) Enfranchisement payments

19 Bill C-31 also dealt with payments that had been made to enfranchised women or other aboriginal persons who became enfranchised or otherwise ceased to be a member of a band. On leaving, these persons were entitled to receive one *per capita* share of money held in the band's capital fund, one *per capita* share of money held in the revenue fund, and if they were in a treaty area, 20 years treaty annuity. Each of the adult appellants had received an aggregate sum of less than one thousand dollars at the time she lost status. A band was allowed a strictly limited right of recovery of these sums by s.64.1(2) of the *Indian Act*. The provision permits recovery of money paid out on enfranchisement in excess of one thousand dollars. Section 64.1 of the *Indian Act* was never resorted to by the Garden River Band. Even if the Band had invoked s.64.1, it would have had no application in this case, because individually each adult appellant received an enfranchisement payment that was less than $1,000.

(4) The distribution procedure

20 As noted above, on September 28, 1987, the Band passed a resolution to make a *per capita* distribution of $1,000,000.00 from the revenue account to all members of the Band. The minutes of a special meeting of the Band

Council held on December 3, 1987, indicate that it was agreed to make the disbursements two weeks later on December 17 and 18, 1987. These minutes further note that it was decided to give each member the sum of $1,000.00 and that no deductions would be made from the shares of members with outstanding debts to the Band. There is no indication in the minutes of the reason for choosing this date for distribution.

21 One week before the dates set for distribution, on December 11, 1987, the Band Council held a "Working Meeting". Several issues related to the disbursement of the funds were discussed. Decisions were finalized regarding the distribution procedure. It is recorded in the minutes that the reinstated women who had applied for reinstatement before June 15, 1987 would qualify for a share, but that a reduction would be applied in the amount of money received at the time of enfranchisement, rounded off to the nearest $100.00.

22 Another issue raised was the question of entitlement of certain children to a share in the settlement funds. There was no provision in the *Indian Act* as amended by Bill C-31, or in the Band's own membership rules, which automatically bestowed membership to children born after April 17, 1985 to parents, only one of whom was a member of the Band. Due to the Department's abeyance period for registering births, these children were in an uncertain situation. The minutes note:

> *STATUS CHILDREN* - Children birn [sic] to one parent original band members born after April 17, 1985 and before June 15, 1987, should they get a share? Noted that all birth registrations were suspended for band membership during that time, except where two parents were band members. Noted that membership code came into effect June 15, 1987.
>
> Decision was made to make Status children Garden River Band members under both of the following categories:
>
> 1 - Born between April 17, 1985 and December 16, 1987.
>
> 2 - Born to one parent original Garden River Band member.

23 All in agreement.

24 At trial, considerable time was spent in interpreting this decision. It was established by witnesses for both sides that it should be read conjunctively, such that a person was required to satisfy both conditions in order to achieve membership in the Band. Therefore, any child born after the effective date of Bill C-31, who had at least one parent who was a member in the Garden River Band, would be entitled to membership in the Band without having to fulfil the procedural requirements set out in the Band's recently enacted membership rules.

25 The decision was implemented by passing Band Council Resolution number 90, dated December 11, 1987, listing forty-nine individuals by name who met both of these requirements, and admitting them to Band membership. People on the list had either a mother or a father who was a member of the Garden River Band. This decision remedied the problem created by the delays in the membership process which existed because the Department had suspended the registration of births and because the Band had not yet instituted its application process. At trial, it was established that persons who obtained membership as a result of this resolution were allowed to collect full shares of the settlement money on December 17 and 18, 1987.

26 The December 11, 1987 decision did not address the concerns of the appellants regarding the position of their children, who were all born before April 17, 1985. These children were still required to complete the application process set out in the membership rules. Thus, the discrimination which Bill C-31 attempted to remedy was perpetuated. Children born *before* April 17, 1985 to a father with Indian status who had married a non-status woman could become members of the Band, since both parents were entitled to Indian status and Band membership according to the *Indian Act* prior to the Bill C-31 amendments. Children born *before* April 17, 1985 to unmarried mothers who were Band members could obtain membership, since their mothers never lost status or membership. Children born *after* April 17, 1985 to fathers or to mothers whose spouses were without status, gained membership as a result of the December 11, 1987

resolution. However, the children of the reinstated women continued to be denied membership. In effect, this denial was based on their mothers' lost status. A woman's loss of status due to marriage of a non-status man had been recognized and rejected as discriminatory action by Parliament. Thus, the denial of membership to the appellant children, while granting membership to other children in a similar position, was a breach of the non-discriminatory clause in the Band's membership rules.

27 This issue of discrimination directed towards children of enfranchised woman was finally eliminated on February 13, 1989. A Band Council Resolution passed on that date reflects the following decision:

> THAT *ALL* Children of restored and original Band Members who have attained Indian Band status designated as First Generation be accepted by the Garden River Band with no exceptions or reservations to any individual.

28 The rapidity of the meetings and decision-making must be noted. The Settlement Agreement was made on March 30, 1987. The dates for distribution of the funds were accepted on December 3rd, of that year, the procedures were discussed one week later on December 11th, and the actual disbursements were made on December 17th and 18th. It is also noted that during the same time period, Band members continued to raise concerns regarding who would share and to what extent, as evidenced by the minutes of the meeting and the testimony at trial.

The trial judge's disposition

29 The trial judge determined this case based upon his analysis of what he regarded as the two issues before the court. The first issue was whether the first generation children of women formerly deprived of Indian status, and to whom Indian status has now been restored by Bill C-31, were entitled to membership in the Band as of the date for distribution of the $1,000,000 from the Settlement Agreement. The second issue was whether it was appropriate to deduct from Indian women re-admitted under Bill C-31 those amounts which had been advanced to them individually by the Government of Canada when their Indian status, and therefore Band membership, had been lost.

30 The trial judge found that on the date of distribution, the appellant children could not claim membership based on any of the enumerated classes found within the Band's membership rules. He stated that he was unable to find that " in its application of its Citizenship Regulations or in the distribution of the Squirrel Island Settlement Trust Money, that the band acting through its Council, did so contrary to law". He also found:

> There was nothing sinister or deliberate in the sense of lacking fairness or was there anything legally improper in the decision to make distribution on December 17 and 18, 1987 to those persons who were, at that time, recorded in the records of the Garden River Band of Ojibways as members in the Band.

Therefore, he held that the appellant children were not entitled to a share.

31 Regarding the second issue, he stated:

> In my opinion, what the Band Council did was fair and equitable and restored the financial interests of the restored C-31 Indian women to equal that of their Indian sisters who had not been deprived of their status and who had not received earlier distribution.

Having decided both issues in the negative, the trial judge dismissed the action.

Analysis

32 In our opinion, the essential error of the trial judge was in not recognizing that the Band in this case was attempting to deal with two unrelated matters at the same time. In the result, he dealt with the two issues in the manner in which they were presented to him and later to this court. They are:

> (1) should the appellant children have received a full share as members of the Band?

(2) were the deductions from the adult appellants appropriate?

With respect, we are of the view that the trial judge erred in his conclusions on both issues.

33 The Band Council Resolution stated that $1,000,000.00 of the settlement moneys was required for *per capita* distribution to the Garden River Band members. *Black's Law Dictionary* (6th ed.) at p. 1136, provides the following definition of *per capita*:

> By the heads or polls; according to the number of individuals; share and share alike. This term, derived from the civil law, is much used in the law of descent and distribution, and denotes that method of dividing an intestate estate by which an equal share is given to each of a number of persons, all of whom stand in equal degree to the decedent, without reference to their stocks or the right of representation.

Webster's Ninth New Collegiate Dictionary, at p. 872 defines *per capita* as meaning "equally to each individual".

34 In order to comply with its own Resolution to make a *per capita* distribution to band members, the Band Council would have to give an equal share to all band members. In effect, it constituted itself a trustee for this purpose. The Band itself appears to have recognized this, given the language of its questionnaire relating to distribution. The trial judge also appears to have proceeded on the basis that from at least the date of the resolution to make a *per capita* distribution, the Band Council was dealing with trust moneys. As D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (1984) explains at p. 111, "whether a trust has been created is simply a matter of construction". In our view, the proper construction of the September 28, 1987 Band Council Resolution is that an express trust was created with the Garden River Band as both settlor and trustee of the $1,000,000.00, being the moneys necessary to make a *per capita* distribution, and the Garden River Band Members as beneficiaries.

35 One of the primary duties of a trustee is to treat all beneficiaries impartially: *Benoit v. Tisdale* (1925), 28 O.W.N. 477 (Ont. H.C.) (Weekly Court); *McClintock, Re* (1976), 70 D.L.R. (3d) 175 (Ont. Div. Ct.) at 180. Waters, *Law of Trusts in Canada, supra*, describes this duty as follows at p. 787:

> It is a primary duty upon trustees that in all their dealings with trust affairs they act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust confer upon him and otherwise receives no advantage and suffers no burden which other beneficiaries do not share. In this way the trustees act impartially; they hold an even hand. The settlor or testator may choose to give disproportionate interests to various beneficiaries, and he very often does so in practice, but that is his privilege. *It is still the duty of the trustees to carry out the terms of the trust as they find them, and to ensure that in the administration of the trust they do not give advantage or impose burden when that advantage or burden is not to be found in the terms of the trust.* [emphasis added].

36 The duty to act impartially would require the trustee to treat equally all members of a class of beneficiaries. We think this basic principle is dispositive of the appeal as it relates to the adult appellants. Once the decision was made by the Band Council that there should be a *per capita* distribution of the sum in issue, then it is apparent that the Band Council had an obligation to treat all members of the Band equally. There could be no suggestion of set off with respect to so-called Band indebtedness unless all Band indebtedness was subject to the set off. The evidence at trial established that a decision was made to deduct sums only from the appellant women. Members of the Band who owed sums for such items as water use charges were able to collect full shares. The reinstated women were entitled to be treated equally to all other beneficiaries. Since all other beneficiaries received full shares, the Band should have advanced full shares to the adult appellants.

37 In any event, such a set off could not be employed to recover from formerly enfranchised women sums relating to re-instatement under Bill C-31. There was a special provision in Bill C-31 relating to that and it is reproduced in s.64.1(2) of the *Indian Act*. This provision limits recovery to sums paid in excess of one thousand dollars. The appellant

women had all received sums less than this amount. The trial judge erred in permitting this deduction from the *per capita* distributive share of each of the adult appellants.

38 The minor appellants, being the first generation children of formerly enfranchised women present a different problem, but it is a problem that disappears when one ignores the self-imposed time limit for the distribution. When the Band Council Resolution in question was passed, it is common ground that the identity of all the first generation children were known. The only live issue for a time was whether a distinction would be drawn between children born after April 17, 1985 with only one parent who was a Band member and children born before April 17, 1985 with similar parentage. The latter group was comprised of the minor appellants whose applications for membership in the Band were being held in abeyance because of matters over which they had no control. Leaving apart the highly valid point that such a distinction could not be made between the two classes of children without violence to the self-imposed non-discrimination provisions of the Band's membership rules, the Band Council knew that these children would ultimately become members, as in fact they did, but well after the date for distribution. The cut off date, being highly arbitrary, could not have the effect of eliminating these children from participation in the *per capita* distribution. Alternatively, if the deadline was of some significance to the Band Council, it would have been a simple thing to have made the distribution to the members whose credentials were certain, after withholding for the time being an amount sufficient to cover the interests of those minor appellants whose applications had not yet been accepted.

39 However, on the evidence, the date for distribution was not chosen for any particular reason. Despite notice of concerns regarding individual entitlement to participate in the distribution of the moneys, the Chief and Council appeared determined to distribute the entire $1,000,000.00 at one time. In fairness to the Band Council, last minute attempts were made to remedy entitlement problems. The December 11th resolution addressed the question of entitlement for some individuals. At trial, witnesses testified that even on the date of distribution, children were brought to the Band Office, produced birth documentation, were accepted as members, and were given their shares. It is also noted that on October 13, 1988, many months after the self-imposed deadline, a Band Council Resolution similar to the December 11, 1987 resolution was passed. As a result, seven more children were entered onto the membership list and advanced shares in the settlement funds.

40 In setting the arbitrary deadline, the Band compromised its ability to fulfil its duties with respect to the distribution of funds. The Band placed itself in the position of having to disburse the funds before it could, as trustee, definitively ascertain the identity of all beneficiaries. This was not only a breach of the Band's duty to act impartially, but it was a breach of its specific duty to determine and ascertain the class that was to benefit from the distribution and to identify and locate the members of that class.

41 It is basic to all trust concepts that for a trust to come into existence, it must have three essential characteristics. Before a trustee can begin the administration of a trust, he or she must be satisfied that the trust satisfies the following three requirements: a) certainty of intention; b) certainty of subject-matter; and, c) certainty of objects.

42 It is the third requirement which is relevant to the discussion of the entitlement of the minor appellants. The need for certainty of objects means that a fixed trust will fail unless it is possible to say whether any person is a member of the class and unless all the possible members of the class are known or ascertainable: Waters, *Law of Trusts in Canada, supra* at p. 80. In determining whether the trust satisfies the requirement of certainty of objects, the trustee will effectively be determining what classes are entitled to benefit from the trust fund. This is because the question whether it is possible to say that any person is a member of the class and the question whether all possible members of the class are known or ascertainable assumes that the class has been determined. In the case under appeal, there is no issue that the object of the distribution was the membership of the Band; the question that arose was whether the Band could pick the date that it did to ascertain the membership of the Band.

43 We think that it could not. A trustee's first duty is to follow implicitly the terms of the trust instrument: *Merrill Petroleums Ltd. v. Seaboard Oil Co.* (1957), 22 W.W.R. 529 (Alta. T.D.) at 557; affirmed (1958), 25 W.W.R. 236 (Alta. C.A.), noted in Waters, *Law of Trusts in Canada, supra* at 695. As a logical extension of this duty, we think that before

a distribution is made, a trustee has a duty to make reasonable efforts to identify and locate the members of a class of beneficiaries. If a trust dictates that the trustee should distribute trust funds to a certain class of beneficiaries, the trustee can only comply with this requirement by first identifying and determining the members of the class.

44 The case of *Atlantic Trust Co. v. McGrath* (1969), 8 D.L.R. (3d) 225 (N.S. C.A.) stands for the proposition that an administrator of an estate has a duty to make reasonable inquiries as to the existence of beneficiaries of the estate. In that case, the administrator had the final accounts passed and the estate distributed after sending out the usual notices for persons having claims against the estate. After the distribution had been completed, the widow of a son of the deceased came forward claiming that she had been excluded from the distribution. At the time of the distribution, the administrator did not know about the deceased's son but he did have reasonable grounds for believing that such a son existed and was last thought to be in the north-eastern United States. Notwithstanding such reasonable grounds, he made no effort to locate the son. The trial judge held that the administrator had a duty to make inquiries as to the existence of the son (quoted at p. 228):

> ... I am of the opinion from all the evidence on the point that Howard McGrath [the administrator] had reasonable grounds for supposing there might well be a son of Harvey McGrath's [the deceased] residing somewhere in the eastern American States. He should have advertised at least in Massachusetts for the next of kin.

The Nova Scotia Court of Appeal agreed that a duty to make such inquiries existed (at p. 238):

> Here the evidence which I have mentioned and which was accepted by the trial Judge indicates a very definite warning that further inquiries and investigations should have been made.

See also: M.V. Ellis, *Fiduciary Duties in Canada*, (1993), at 4.6.

45 Accordingly, there was an affirmative and readily performable duty on the Band Council to ascertain and identify the membership of the Band. That duty came into existence on September 28, 1987 when the decision was made to make a *per capita* distribution. That Band Council Resolution did not fix a date for distribution or set special guidelines for those entitled to a distributive share: it referred only to "Garden River Band Members". Its only time limit on that date was that it would produce an audited report by June 30, 1988. During that period, the Band Council was made aware of the inability of some children who were clearly eligible for Band membership to complete their applications for membership within the time frame set by the Band Council.

46 The trial judge was in error in determining this issue in favour of the Band Council by holding that there was nothing sinister or deliberately unfair in the decision to fix the date for distribution for December 17th and 18th of 1987. That is not the test in scrutinizing the performance of a trustee. The issue of whether a trustee can set an arbitrary time limit for identifying and locating the members of the class is to be resolved by a standard of care analysis. In other words, would a trustee be reasonably fulfilling his or her duty to identify and locate the members of the beneficiary class if he or she operated on a self-imposed deadline?

47 In *Learoyd v. Whiteley* (1887), 12 App. Cas. 727 (U.K. H.L.), Lord Watson set out the standard of care expected of a trustee in carrying out his or her duties. He stated at p. 733 that

> the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own affairs.

Waters defined the standard as follows at p. 750, *supra*:

> the trustee must show ordinary care, skill, and prudence, he must act as the prudent man of discretion and intelligence would act in his own affairs.

In *Fales v. Canada Permanent Trust Co.* (1976), [1977] 2 S.C.R. 302 (S.C.C.) at 318, Dickson J. stated that the trustee must show "vigilance, prudence and sagacity".

48 In our opinion, the Band Council did not show ordinary care, skill and prudence in carrying out its duties as trustee with respect to the minor appellants and the class they represent.

Disposition

49 We are of the opinion that this case can be decided on the basis of well recognized principles relating to the fiduciary obligations of any person who undertakes to make a *per capita* distribution of a fund of money entrusted to that persons' care. Accordingly, we find it unnecessary to address the appellants' submissions regarding s. 15 of the *Charter of Rights and Freedoms*.

50 For the reasons given, we are allowing the appeal and setting aside the judgment below. The appellants and all those they represent are entitled to a declaration that they are each entitled to the payment of an equal distributive share of the $1,000,000 fund from the Settlement Agreement without deduction of any kind. They are also entitled to pre-judgment interest from the distribution date until the date of the trial judgment below and post-judgment interest thereafter until payment. In order to give effect to this declaration, the matter is remitted to the trial judge or a judge of concurrent jurisdiction for an accounting and judgment with respect to the individual appellants and members of the class they represent.

51 Since the appellants are beneficiaries of a trust who were obliged to sue their trustees, they should receive costs on a solicitor and client basis here and below.

Appeal allowed.

End of Document

TAB 19

date. The application of that rule obviously requires ascertainment of the beneficiaries.

4.3.3(b) *Persons and Purposes*

As previously noted, it is necessary to distinguish between trusts for persons and trusts for purposes. The former category includes both natural and legal persons — *i.e.* human beings and corporations. The rules regarding certainty of objects are the same in either event. The rules governing purpose trusts are examined in Chapters 7 and 8. One comment nevertheless is warranted at this point. A personal trust sometimes looks like a purpose trust if the quantum of the beneficiary's interest is defined by some purpose. A trust involving the disposition of "such amounts as my trustee determines is appropriate for the purpose of educating my daughter" is not, despite use of the word "purpose," a purpose trust. The settlor's aim is not to advance education generally, but rather to benefit his daughter personally. The reference to "purpose" merely provides a means of ascertaining the amount to which the daughter is entitled.

4.3.3(c) *Tests of Certainty of Objects*

The precise requirements for certainty of objects depend upon the nature of the trust. A personal express trust may be either *fixed* or *discretionary*. A fixed trust is one in which the beneficiaries and their shares are fully determined by the settlor. A discretionary trust is one in which the settlor directs the trustee to exercise a choice as to the beneficiaries or their shares or both. Because the trustee *must* exercise that choice, the disposition is a trust, rather than a power. The trust is discretionary, rather than fixed, however, because the trustee is required, for example, to distribute $5000 "to either A or B," or to distribute to A "such amount as is thought appropriate."

Re Gulbenkian's Settlement,[127] which appeared in the preceding chapter, contains *dicta* to the effect that the objects of both fixed trusts and discretionary trusts require "class ascertainability." In fact, as the extracts in this section explain, that test properly applies to fixed trusts only. Discretionary trusts, like powers, are governed instead by the test of "individual ascertainability."

4.3.3(d) *Evidentiary and Conceptual Certainty*

Whichever test applies, it generally is said that equity requires *conceptual*, rather than *evidentiary*, certainty of objects. The criteria for admission into the class of beneficiaries must be clear, even if the actual identification of those beneficiaries requires considerable effort. Evidentiary difficulties can be worked out, by a judge if necessary, as they arise.[128] Indeed, as Wynn-Parry J. said in *Re*

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127 [1970] A.C. 508 (H.L.).

128 *Re Baden's Trusts Deeds (No. 2)* (1972), [1973] Ch. 9 (C.A.) at 19 ("the court is never defeated by evidential uncertainty").

Eden,[129] "it may well be that a large part, even the whole of the funds available, would be consumed in the inquiry. To say the least of it, that would be very unfortunate, but it cannot of itself constitute any reason why such an inquiry, whether by the trustees or by the court, should not be undertaken."

4.3.3(e) *Saving Potentially Uncertain Objects*

As previously explained, the courts often exercise considerable flexibility in overcoming potential problems regarding certainty of subject matter. Though perhaps less pronounced, the same sometimes is true with respect to certainty of objects. Once again, for example, the "armchair rule" allows the settlor's words to be interpreted in context. A trust for one's "good friends" *prima facie* is invalid for uncertainty of objects. The category of "good friends" is hopelessly open-ended. The disposition nevertheless may be saved by evidence proving that the settlor invariably used the operative phrase in reference to certain individuals.

Seemingly uncertain objects also may be saved if the settlor entrusted some person (usually the trustee) to resolve such difficulties. There is some debate, however, as to the scope of that proposition. It occasionally is said that while a third party may be allowed to determine *factual* issues, *conceptual* uncertainties are not amenable to the same approach.[130] In a case of factual difficulty, the settlor provides a conceptually clear test and the third party merely bears responsibility for determining whether the criteria are met. In a case of conceptual difficulty, in contrast, the settlor has not established a clear standard. And since the trust derives from the settlor's intention, it is not appropriate to allow a third party to supply the criteria for membership in the class of beneficiaries. *Re Tuck's Settlement Trusts*[131] provides an illustration. A trust purportedly was created for benefit of a man as long as he was "of the Jewish faith" and married to an "approved wife." The settlor further directed that, in the event of factual dispute or doubt, "the decision of the Chief Rabbi in London . . . shall be conclusive."[132] Although the operative terms were held to be sufficiently certain by themselves, the Court of Appeal favourably entertained the possibility that the Chief Rabbi, acting "in the business in which he is expert," otherwise could have been of assistance.

4.3.3(f) *Timing Issues*

It generally is said that the test for certainty of objects must be satisfied at the time that the trust is created. The test therefore applies immediately in the context of an *inter vivos* trust and at the moment of death in the context of a testamentary trust. Significantly, however, the test does not necessarily require the actual identification of the beneficiaries at the outset. In some situations, it is

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129 [1957] 2 All E.R. 430 (Ch.) at 435.

130 G. Thomas & A. Hudson, *The Law of Trusts* (Oxford, Oxford University Press, 2004) at 120-123.

131 [1978] Ch. 49 (C.A.).

132 *Ibid.*, at 49-50.

enough that the beneficiaries and shares will be identifiable at the moment of distribution. Without that flexibility, the courts would be required to strike down a large number of trusts that commonly are used in practice. It is possible, for example, to create a trust that consists of a life interest for A, followed by a remainder interest for A's heir at the time of A's death. Although the trust arises immediately, A's heir will not be known for some time. Similarly, it is possible to create a trust subject to a condition precedent, so that the identity of the beneficiaries (if any arise) will be known only if and when the condition is met.

4.3.3(g) *Consequences of Uncertainty*

If the objects are not sufficiently certainty, the attempted trust will fail. Following the general rule, any property that has been given to the "trustee" presumptively will return to the settlor by way of resulting trust.

Further Reading

J.W. Harris, "Trust, Power and Duty" (1971), 87 L.Q.R. 31.

J. Hopkins, "Certain Uncertainties of Trusts and Powers," [1971] C.L.J. 68.

Y.F.R. Grbich, "Certainty of Objects: The Rule That Never Was" (1973), 5 N.Z.U.L. Rev. 348.

G.E. Palmer, "Private Trusts for Indefinite Beneficiaries" (1972), 71 Mich L. Rev. 359.

L. McKay, "Re Baden and the Criterion of Validity" (1974), 7 V.U.W.L. Rev. 258.

M.C. Cullity, "Fiduciary Powers" (1976), 54 Can. Bar Rev. 229.

R. Burgess, "The Certainty Problem" (1979), 30 N.I.L.Q. 24.

C.T. Emery, "The Most Hallowed Principle — Certainty of Beneficiaries of Trusts and Powers of Appointment" (1982) 98 L.Q.R. 551.

4.3.3(h) *Test for Certainty of Objects of a Fixed Trust: Class Ascertainability*

A fixed trust triggers the *class ascertainability* test. It must be possible to draw a complete list of the beneficiaries.

Class ascertainability is required by the very nature of a fixed trust. The trustee has no discretion as to recipients or shares; the property must be distributed as directed by the settlor. Consequently, for example, a fixed trust that calls for $100,000 to be distributed "to the members of my family in equal shares" requires a precise determination as to the number of recipients. Since the test is conceptual, rather than evidentiary, the trustee need not necessarily locate each member of the family. At a minimum, however, the trustee must know the number of beneficiaries in order to determine the size of each share. (If some family members are known to be alive, but cannot be located, the relevant share can be held in trust pending their appearance.)

Given the nature of the test, it is impossible, in normal circumstances, to have a fixed trust "for equal distribution among my friends." The problem is not merely that the concept of "friends" is vague, so as to make it difficult, at least at the margins, to know whether the test is satisfied. The more fundamental problem is

TAB 20

Form 49
Alberta Rules of Court
Rule 13.19

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
MAY 11 2017
Clerk of the Court of Queen's Bench

COURT FILE NO.	1103 14112 and 1403 04885
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

IN THE MATTER OF THE SAWRIDGE TRUST CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19, AUGUST 15, 1986 (the "1986 Trust")

APPLICANT	CATHERINE TWINN, as Trustee for the 1985 Trust and the 1986 Trust
RESPONDENTS	ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND MARGARET WARD, as Trustees for the 1985 Trust and the 1986 Trust
DOCUMENT	**AFFIDAVIT OF CATHERINE TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLENNAN ROSS LLP #600 West Chambers 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Karen A. Platten, Q.C. Telephone: (780) 482-9200 Fax: (780) 482-9102 Email: kplatten@mross.com File No.: 144194

AFFIDAVIT OF CATHERINE TWINN

SWORN ON THE 10 DAY OF MAY, 2017

I, Catherine Twinn, of the Sawridge Indian Reserve 150 G and the City of Edmonton, in the Province of Alberta, SWEAR AND SAY THAT:

1. I am a trustee of the Sawridge Band Inter Vivos Settlement, April 15, 1985 (the "1985 Trust") and the Sawridge Trust, August 15, 1986 (the "1986 Trust") (collectively referred to as the

"Trusts"), and, as such, have a personal knowledge of the matters hereinafter deposed to, save where stated to be based upon information and belief.

2. I have reviewed the affidavit of Paul Bujold ("Paul"), identical copies of which were filed in Court of Queen' Bench Action No. 1103 14112 ("2011 Action") and Action No. 1403 04885 ("2014 Action") and both copies were sworn on February 15, 2017 (the or his "Affidavit"). I wish to provide my reply to his Affidavit and evidence given during the course of this application for indemnification, including his questioning on his Affidavit that occurred over March 7-10, 2017.

2011 Action

3. Prior to the 2011 Action being initiated, there were concerns discussed at trustee meetings surrounding the membership process of the Sawridge First Nation ("SFN") and ensuring proper beneficiary ascertainment. In furtherance of those concerns, legal advice was sought from Dr. Donovan Waters, Q.C. as to the duties and responsibilities of the trustees in relation to the SFN membership process and beneficiary ascertainment.

4. At my urging, initially the trustees had decided to explore utilizing a tribunal that would have the requisite expertise in order to ascertain who was a beneficiary of the 1985 Trust. Information about the tribunal and the process was publically communicated and persons who thought they might be a beneficiary of the 1985 Trust were asked to send in application forms to the trustees. Examples of this communication to potential beneficiaries are found in newsletters prepared by Mr. Bujold on behalf of the trustees and which are attached as **Exhibit "A"** to my Affidavit. In response to these requests, well over a hundred applications were received from potential 1985 Trust beneficiaries. To date, no meaningful process has been initiated by the trustees to process these applications and form a position on the applicant's entitlement as a 1985 Trust beneficiary, despite my many requests that this be done.

5. Beginning in 2000, a number of lists of possible beneficiaries of the 1985 and 1986 Trusts were produced by Mike McKinney and later by Paul Bujold; a summary of the various lists that are known to me is attached as **Exhibit "B"** to my Affidavit. There has been very limited discussion, tolerance for or explanation as to the process of ascertaining the individuals on the list or the criteria for adding, removing or not including individuals from the lists. An example of a person missing from the lists created is Michelle Ward, daughter of Georgina Ward. Attached to my Affidavit as **Exhibit "C"** is a copy of the May 21, 1985 decision from the Court of Queen's Bench upholding the Registrar's decision to add Michelle Ward to the SFN List of members and as **Exhibit "D"** the Band List from the Registrar under cover letter dated July 22, 1985 enclosing a copy of the Band List as of June 27, 1985 which includes the name of Michelle Danielle Ward. At some point after the SFN assumed control of the Band List in 1985, Michelle Ward's name was removed from the list. The evidence given by Paul Bujold that Michelle Ward was not on the Band List at the time it was turned over by the Federal Government is inaccurate. Please see page 3 of the Band List as shown in Exhibit "D". Section 10(11) of the Indian Act requires the date of her removal to appear on the membership list – this has not been complied with by the SFN. I believe that Michelle Ward is a beneficiary of both the 1985 Trust and the 1986 Trust. There are other persons who are entitled to be on the Band List whose names do not appear. These include Anna McDonald, William McDonald, Deborah Serafinchon and Cameron Shirt.

6. In addition to concerns about ascertainment of 1985 Trust beneficiaries, there were also concerns raised pertaining to proper ascertainment of 1986 Trust beneficiaries and whether the membership list produced by the SFN could be fully relied upon as a comprehensive list of the 1986 Trust beneficiaries. Dr. Waters acknowledged that there were concerns with the SFN membership process and rules and that the trustees needed to work with the SFN in order to address these matters.

7. I had also recommended to the trustees that the 1986 Trust also utilize a tribunal to ascertain beneficiaries of the 1986 Trust and, amongst other matters, to ensure that customary law was being applied in the determination of those who were entitled to be SFN members, as the 1986 Trust Deed requires, which was confirmed by legal advice from David Ward and communicated to Paul Bujold on December 4, 2009. The communication from David Ward is attached as **Exhibit "E"** to my Affidavit.

8. Subsequently, it came to the trustees attention that Chief Roland Twinn, acting in his capacity as Chief of the SFN, took exception with a tribunal being utilized and expressed that he viewed this as usurping the authority of the SFN to control its membership.

9. Dr. Waters advised the trustees that they had an interest in ensuring proper beneficiary ascertainment of both the 1985 and 1986 Trust and that there were concerns with the validity/operation of the existing SFN Membership process and its rules. The trustees were advised at the December 21, 2010 trustee meeting that an option available to the trustees was to work with the SFN to correct membership issues as "the quality of the Band membership Code process is crucial for the proper operating of the 1986 Trust." Attached as **Exhibit "F"** to my Affidavit is an email dated January 26, 2011 from Dr. Waters to Mr. Bujold stating the same.

10. Particular issues raised by Dr. Waters in terms of the SFN membership process were:

    (a) it should be criteria based as the current criteria was too subjective; and

    (b) timeliness in processing applications.

    Attached as **Exhibit "G"** to my Affidavit is an email dated December 23, 2010 from Dr. Waters to Mr. Bujold, the trustees and Brian Heidecker stating the same.

11. At the December 21 2010 trustee meeting, Dr. Waters provided the trustees with various options to address ascertainment of beneficiaries of the Trusts. One of those options involved varying the definition of beneficiaries under the 1985 Trust to be consistent with membership in the SFN. The trustees, including myself, approved proceeding with this option on the following basis, which is reflected in the meeting minutes as a resolution put forward by myself and seconded by Chief Roland Twinn:

    (a) To proactively work with the Sawridge Membership Committee and the Chief and Council to expedite recommendations to the Legislative Assembly so that applications can be determined within 6 months from date received; and

    (b) To work with the Chief and Council to develop proposed amendments to the Sawridge Citizenship Code including outlining legal standards that the decision-making process must meet.

    Attached as **Exhibit "H"** to my Affidavit is a copy of the December 21, 2010 meeting minutes.

Given Chief Roland Twinn's support of the resolution, I believed that the SFN was also going to work with the trustees to achieve these objectives. Chief Roland Twinn did not advise any of the trustees at this meeting that the SFN would not support these objectives I believed that this was a significant step to allow for fair and equal treatment of those individuals applying for membership in the SFN and as a result, receiving beneficiary status in the 1986 Trust and eventually in the 1985 Trust. Unfortunately, as time went on, I came to understand that these commitments were not going to be kept and they were likely only made to induce my support to

vary the definition of beneficiary in the 1985 Trust to membership in the SFN.

12. Mr. Bujold gave evidence at his questioning that his Affidavit sworn on August 30, 2011 and filed in the 2011 Action on September 6, 2011 would have been reviewed with the trustees by their legal team prior to it being sworn by Mr. Bujold. This is not true. I never saw this Affidavit until after it had been sworn. As a result, I did not have a chance to address any inaccuracies.

13. At the June 21, 2011 Trustee meeting the proposed Affidavit of Mr. Bujold was not final or available to the trustees. Brian Heidecker had a flip chart with 5 scenarios/possible results. Attached as **Exhibit "I"** to my Affidavit are photos of these flip charts with the 5 scenarios. I supported #4, predicated on reform of the SFN membership rules as set out in Paragraph 9 of my Affidavit as evidenced by the June 21, 2011 letter from Paul Bujold to the SFN to ensure that administrative law and Charter requirements were met to allow for fair and equal treatment for those individuals applying to become members. The June 21, 2011 letter of Paul Bujold is attached as **Exhibit "J"** of my Affidavit (the highlighting on this copy is mine). This letter raises concerns with the SFN's membership code and requests that the code be corrected to answer these concerns.

14. At the June 21, 2011 Trustee meeting, I was assured that:

    (a) all beneficiaries and potential beneficiaries would be properly notified and fully informed so they understand the application with stringent diligence in this regard;

    (b) Such persons participation in the 2011 Action would not be objected to;

    (c) Upon filing the 2011 Action, the trustees would reach out to beneficiaries and potential beneficiaries in an open and transparent engagement process;

    (d) The 1985 Trust would avoid adversarial litigation.

15. It was my understanding that when the trustees initiated the 2011 Action in August 2011 that, amongst other matters, the trustees would be working with the SFN to address and correct membership concerns and that the first task in the 2011 Action would be to obtain Court direction on whether the existing definition of "beneficiary" in the 1985 Trust was enforceable. It was on this basis that I voted in favour of proceeding with the 2011 Action at the December 21, 2010 trustee meeting. At this point in time, I genuinely believed (perhaps naively) that the SFN was going to work with the trustees to correct its membership process.

16. Since December 2010, my concerns regarding fairness and equity have not been addressed which has an obvious impact on my responsibility as a trustee to protect the interests of existing and future legitimate beneficiaries of the Trusts. Most notably, there have been no amendments to the SFN membership code; entitlement to membership in the SFN continues to be highly discretionary and arbitrary. Further, despite a request by the trustees, by the letter dated June 21, 2011, to work with the SFN on addressing concerns, this request has been ignored by the SFN. This is despite the fact that Chief Roland Twinn is both a trustee and the Chief of the SFN. In addition, Mr. Bujold has instructed legal counsel for the trustees to take the position that the definition of "beneficiary" in the 1985 Trust is discriminatory and must be amended – effectively the trustees are trying to jump to a variation of the definition before the Court has considered the enforceability of the definition.

17. If I had known that the SFN membership process was not going to be reformed, I would not have voted in favour of proceeding with the 2011 Action, as it had been presented to me initially. My position has always been that the membership system needs to be reformed to allow fair and

equal treatment to those who are eligible to apply for membership and that we will need to grandfather those beneficiaries of the 1985 Trust who cannot apply for membership.

18. The SFN Membership process is shrouded in secrecy and continues to demonstrate a lack of procedural fairness. Attached as **Exhibit "K"** to my Affidavit is a letter dated February 17, 2016 from Chief Roland Twinn to Gina Donald-Potskin, an applicant for membership in the SFN, that advises that an application was received from Gina on February 27, 2009 and that it took the SFN until December 12, 2012 to advise Gina that they did not believe her application to be complete. The letter also states that current economic conditions are a factor being considered by the SFN to determine membership admission. Attached as **Exhibit "L"** to my Affidavit is the signed statement of Gina's mother, Lilly Potskin, relative to Gina's attempts to apply for membership. Another example is a letter dated December 10, 2013, attached as **Exhibit "M"** to my Affidavit, from Mike McKinney (in house counsel for the SFN and the Companies) to Alfred Potskin that advised that the SFN had elected not to utilize its discretion to admit Mr. Potskin because it did not feel his admission was in the best interests and welfare of the nation. I am aware that Mr. Potskin's family were former members of the SFN. Mr. Potskin's parents enfranchised when he was a minor and it was on this basis that he lost his membership in the SFN many years ago. I am aware that Alfred Potskin applied for membership in 2011 and that it took over two years for him to receive a response. Attached as **Exhibit "N"** to my Affidavit is a sworn statement from Alfred Potskin dated December 26, 2014.

19. In specific response to paragraph 114 of Mr. Bujold's Affidavit he states that Alfred Potskin enfranchised in 1952. While this is true, this was the result of Mr. Potskin's father's application to enfranchise and not a result of a decision by Mr. Potskin as he was a minor at the time. At this time many indigenous persons elected to enfranchise due to fears about their children being forced into residential schools – it was not an easy decision and not necessarily a reflection that the person did not wish to be a member of their nation. In addition, Mr. Bujold incorrectly states that the reason given to Mr. Potskin for his rejection was because of the enfranchisement – this was not even mentioned in the rejection letter provided to Mr. Potskin by the SFN. I am aware that at the time Mr. Potskin received the rejection letter he was sick with cancer. As such, appealing to the electorate was not a matter that he could easily undertake. I urged Chief Roland Twinn an Bertha L'Hirondelle to reconsider and at least interview Alfred before committing to such a position on his membership.

20. Attached as **Exhibit "O"** to my Affidavit are various sworn statements from individuals who have had problems with the SFN membership process. These were previously provided to Mr. Bujold. To suggest or imply that there do not continue to be concerns with SFN membership process is difficult to fathom.

21. In addition, I am aware that in 2016 Chief Roland Twinn's children were added to the membership list of the SFN in a relatively short period of time (within months) as their applications for membership were processed prior to other applications that had been in the queue for longer, some for years.

22. Concerns with the SFN membership process were recently discussed by the Federal Court of Canada in Sam Twinn and Isaac Twinn v. Sawridge First Nation et. al. Attached as **Exhibit "P"** to my Affidavit is a copy of the decision.

<u>My History with the Trusts</u>

23. As set out in my prior Affidavits, I am the longest serving trustee of the Trusts and became a trustee of both Trusts in 1986. In 1986, I was in my 30s, married to Walter Twinn and raising a young family. My involvement and knowledge of the Trusts at that time was extremely limited. I

was never invited to a trustee meeting and the Trusts were dominated by men. I relied heavily on my husband, my time was consumed by domestic obligations and family and community issues – at this time addiction was rampant in the Sawridge community. I did not start becoming very active in the trusts until following my husband's death in 1997.

24. In specific response to paragraph 64(c) of Mr. Bujold's Affidavit, he states that I want a tribunal to identify beneficiaries prior to the Court providing Advice and Direction in the 2011 Action. This is a mischaracterization of my position. The relief the trustees are seeking in the 2011 Action would have the effect of disentitling persons who are currently beneficiaries under the existing definition of "beneficiary" in the 1985 Trust. It is my view that it is critical that the current beneficiaries of the 1985 Trust be identified so that those persons' interests can be properly considered by the Court and by the trustees. A tribunal is but one method of ascertaining a person's beneficiary status. I have offered and actively advocated other suggestions on how beneficiary ascertainment could occur to the other trustees, but have been met with resistance.

25. Paragraph 64(f) and 71 of Mr. Bujold's Affidavit are not entirely accurate in relation to his characterization of the advice the trustees received. The advice the trustees received was that while the SFN was responsible for determining membership in the SFN, the trustees of the Trusts had an interest in ensuring the SFN membership process was operating properly. Further, the trustees were advised by the late David Ward that they "have no power to ignore customary laws in determining the beneficiaries". See **Exhibit "E"** to my Affidavit. This is important because the definition of "beneficiary" in the 1986 Trust Deed refers to customary laws as a basis for determining membership. Despite this advice, the other trustees have taken no steps to address these issues with the SFN and have readily adopted the position that they can accept the membership list of the SFN as a complete statement of who is a beneficiary of the 1986 Trust, without question. This further reinforces my belief that the conflict of interest inherent in Chief Roland Twinn's dual role as trustee and Chief of the SFN is detrimental to the proper functioning of the Trusts.

26. In specific response to paragraph 70 of Mr. Bujold's Affidavit, he criticizes me for not taking steps to fix the SFN membership process. In fact, I did make many attempts while a member of the SFN Membership Committee to make recommendation to fix the process. My recommendations went ignored by Chief and Council. More recently, as a member, I specifically tried to ensure implementation of a review of the laws and membership code, but this was rejected by Chief Roland Twinn. As stated above, I had thought that prior to the 2011 Action being initiated that the trustees were going to work with the SFN to fix the broken membership system. It seems that once the 2011 Action was initiated and it appeared that the 1985 Trust beneficiary definition would eventually be varied to membership in the SFN, the SFN lost all interest in working with the trustees to fix the broken membership system.

Appointment of Justin Twin

27. Following learning of Walter Felix Twinn's resignation, I called him in order to discuss his reasons for resigning. He advised me that he needed to resign because the stress of trying to battle the dysfunction that was occurring at SFN had become too much for him. Attached as **Exhibit "Q"** to my Affidavit is a summary of my January 22, 2014 telephone call with Walter Felix Twinn that was signed by Walter on April 14, 2014 that confirms that this reflects his reasons for resigning as a trustee.

28. In specific response to paragraph 28 of Mr. Bujold's Affidavit, prior to the appointment of Justin Twin as a trustee, the trustees had never been asked to sign a motion that they did not vote in favour of and further had never been asked to sign transfer documents in relation to the assets of the Trusts. This request by Mr. Bujold came as a surprise to me. I felt that I was being

pressured into conceding to Justin Twin's appointment despite concerns I had with his eligibility, qualifications and his familial loyalty to Roland Twinn. In respect to my latter concern, I was aware of Justin's relationship with Roland and anticipated that he may not challenge positions appropriately or simply defer to Roland rather than consider the merits of issues before the trustees or his obligations as a trustee to the beneficiaries. Mr. Bujold states that the trustees had a legal opinion that supported these actions at that time. I was not presented with said legal opinion at that time, and to date, have never received a legal opinion that existed at the date of the January 21, 2014 trustee meeting that stated the same.

29. In response to paragraph 35 of Mr. Bujold's Affidavit, it is not true that I attacked Justin or attacked his membership at the January 21, 2014 meeting. As set out in my prior Affidavits, I was blindsided at the January 21, 2014 meeting by the appointment of Justin Twin. I had not fully considered his appropriateness or qualifications as a trustee of the 1985 Trust in advance. I did not raise concerns about Justin's eligibility as a 1985 beneficiary until after the January 21, 2014 meeting. However, when Justin Twin was being considered for a trustee-in-training program in 2004, which he was ultimately not selected for, I raised concerns at that point with whether he qualified as a 1985 Trust beneficiary. Attached as **Exhibit "R"** to my Affidavit is an email dated April 1, 2004 from myself to Bill Kostenko (a consultant working for the Companies at the time), Clara Midbo and Chief Roland Twinn that identified this concern and suggested that we needed to identify 1985 Trust beneficiaries. My recommendation was ignored.

30. Further, prior to the May 5, 2014 application to compel the transfer of assets to the new Trustee group, I had sent a letter dated March 19, 2014 to Brian Heidecker requesting various information in regards to the transfer of asset issue and ancillary matters. I had asked that the issue of Justin Twin's appointment be separated from the transfer of assets. I did not receive a substantive response to my inquiries. Attached as **Exhibit "S"** to my Affidavit is the letter of March 19, 2014.

31. In specific response to paragraph 32 of Mr. Bujold's Affidavit where he states that a pending commercial transaction had become an emergency which required the transfer of assets to be completed immediately, I have spoken with John MacNutt, CEO of the Companies, who confirmed to me that there was not an emergency from the Companies perspective and that they were proceeding with the commercial transaction irrespective of the transfer of assets as they did not perceive this as a requirement for them to conduct business. This is especially so because a transfer of assets had never been signed in the past.

32. I note that this "urgency" was also deposed to in an Affidavit by Brian Heidecker sworn on May 14, 2014 and filed in the 2014 Action on May 15, 2014, contrary to the information I received from Mr. MacNutt and from past practice in relation to major transactions such as the sale of the Slave Lake Hotel, the purchase of the Edmonton Hotel and the Best Western Plus Sawridge Suites Hotel in Fort McMurray.

33. In specific response to paragraph 51(g) of Mr. Bujold's affidavit, he notes that another Court Application needed to be made respecting the transfer of assets when Dr. Ward became a Trustee. However, at that time, there was no emergency or pending asset crisis or need for trustee consent and therefore no need to make another application to the Court.

My Character

34. I take exception with Mr. Bujold's attempts to undermine my character in his Affidavit.

35. I am a lawyer and have continuously been a member of the Law Society of Alberta since 1980. I take my ethical obligations seriously and apply them to all aspects of my life, including my role as

a trustee.

36. Attached as **Exhibit "T"** to my Affidavits are letters of recommendation from the Honourable Chief Justice Allan H. Wachowich dated March 18, 2009 wherein he recommended that I apply for a judicial appointment to the Alberta Court of Queen's Bench and believed that I would make an excellent judge. There is also a subsequent letter from the Honourable Chief Justice Wachowich dated June 21, 2011 wherein he recommended me for a senior government position. The Honourable Chief Justice Wachowich noted that my "integrity is beyond question" and I possess "a friendly demeanour with those with whom she comes into contact".

37. I have taken my duties, both legal and moral, as a member of the Sawridge community very seriously and have spent countless hours in trying to further the interests of the community. Many persons associated with the Sawridge community are marginalized persons, who suffer from lack of education, trauma based conditions, including addiction, poverty and personal/social issues. To be able to stand up for their rights requires they must first know what their rights are and have the courage and resources to do so. Accessing justice requires money, especially in these circumstances. Some are not well equipped to be able to stand up for their rights and interests.

38. I have worked tirelessly for the Trusts for many years to further the interests of all beneficiaries. For over a decade I worked on beneficiary ascertainment in relation to the 1985 Trust and advocating to the other trustees that the beneficiaries needed to be identified. The benefits program which is now offered by the 1986 Trust is a result of the Four Worlds report which report was brought about through my efforts to retain and support the work of Four Worlds. I also worked tirelessly to assist in saving the Companies from financial ruin. I have dedicated a great deal of my time to discharge my duties as a trustee and the only compensation I have received is the standard meeting compensation to which all trustees are entitled. This is despite the fact that I have spent a disproportionate amount of time working for the Trusts as compared to many of the other trustees.

39. My efforts began as raising issues and seeking to create dialogue with persons who had authority or influence to effect change. Based on my experience, dialogue alone has not been enough. This has led to my involvement in the 2011 and 2014 Actions. My involvement in these Actions was not undertaken lightly and it came based on my emerging conclusion that the only way to address my concerns and discharge my duties as a trustee was through Court process.

40. In specific response to paragraph 131 of Mr. Bujold's affidavit, a "without prejudice" agreement, attached as **Exhibit "U"** to my Affidavit, was signed by all parties at the meeting and thus, anything said at the meeting was "without prejudice", thus allowing the parties to say what they believed needed to be said in order to effect settlement.

41. In summary, I have expended a significant amount of my own funds in order to challenge the positions being taken by the majority of the trustees with respect to:

    (a) Beneficiary definition in the 1985 trust;

    (b) Ascertainment of beneficiaries;

    (c) Trustee obligations;

    (d) Conflicts of interest within the trustee group; and

    (e) Separation of political from economic decision making.

I have done this not to benefit myself, but to discharge my duties as a trustees and to protect those beneficiaries that I believe will be excluded and marginalized as a result of the decisions of the trustees, which I believe are heavily influenced by the SFN and its political objectives. I will receive no personal benefit from the positions I am taking as I am currently a beneficiary of both Trusts and would continue to be even if the definition of "beneficiary" in the 1985 Trust is varied as sought by the majority. Taking these positions has come at a significant personal cost to myself and my family whose future applications for membership in the SFN have likely been jeopardized as a result of me speaking out. In the recent months, I have requested a minor's application form for membership in the SFN for my granddaughter, Aspen Twinn, on two separate occasions from Chief Roland Twinn. He has ignored both of my requests.

42. I have attempted for many years to work with the trustees and the SFN to effect positive change. Despite my efforts, change has not resulted. Attached as **Exhibit "V"** to my Affidavit is summary of telephone call that occurred on December 14, 2009 between David Ward, Tim Youdan, Megan, myself and Mr. Bujold. In this call, Tim Youdan (counsel to the trustees) stated that it was the trustees duty to properly ascertain the beneficiaries of both Trusts. Mr. Bujold acknowledges that I had been trying to obtain trustee cooperation in terms of beneficiary ascertainment, but the trustees "will not listen". This telephone summary was prepared by Mr. Youdan's office and not me.

43. As a trustee I have advocated on several occasions for trustee decisions that were not popular amongst the other trustees, but I believed were solely for the interest of the beneficiaries and critical for the future of the Trusts. In 2003 the Sawridge Group of Companies (the "Companies") (the shares of which are the sole asset of the Trusts) were in financial distress. At the time they were being managed by the SFN under a lucrative contract under which I was later advised by David Ward on December 14, 2009, the "Chief of the Band" and Mike McKinney were paid large sums which should properly be disclosed on a passing of accounts by the Trusts. Mr. Bujold's evidence at questioning that the SFN was simply providing bookkeeping services, is not accurate. As a result of my insistence, management of the Companies was assumed first by an outside management team led by CEO John MacNutt (who I identified and recruited) and then in 2006, by an outside Board of Directors. Many of my efforts to benefit the beneficiaries have come at a great personal cost to me. I faced a great deal of retaliation and hostility for my part in recruiting and implementing outside management and an outside Board of Directors. It is similar to the reaction that I am now experiencing for advocating for independent trustees and as articulated in Mr. Bujold's Affidavit. At the time the outside board was appointed for the Companies, similar arguments were raised that the SFN community did not want "outsiders" managing the Companies. These positions still exist today and are reflected in Mr. Bujold's Affidavit. Following the implementation of the outside CEO and Board, the Companies financially recovered. If it had not been for my insistence and numerous hours expended in implementing this change, the Companies would likely have succumbed to financial pressure and folded.

44. Mr. Bujold gave evidence at his questioning on his Affidavit that I had created tension with the independent Board of Directors of the Companies through my conduct. I deny that this occurred. I enjoy a good working relationship with the Board. Some Directors have indicated their discomfort working with Paul Bujold. The Chair and CEO expressed tension over how Brian Heidecker handled a succession issue wherein an excellent Director, Sid Hanson, was replaced with Mike Percy, Brian Heidecker's connection from the University of Alberta. The Directors are very concerned by the risks to the Companies posed by the other Trustees' management of the 2011 Action in which Paul Bujold and Brian Heidecker are the instructing clients.

45. It is noteworthy that Mr. Bujold does not depose as to the interference of Chief Roland Twinn with the Companies. I am aware that Chief Roland Twinn often interferes with the management of the Companies at an operational level and uses his position as Chief and trustee to create

deference to himself and his immediate family. For example, I am aware that he harassed a former long standing employee of the Companies (Dave Nelson) which ultimately caused Mr. Nelson to quit. Attached as **Exhibit "W"** to my Affidavit is a copy of a letter dated May 1, 2017 from Mr. Nelson that describes his experience with the Companies and Chief Roland Twinn.

Various Matters

46. In specific response to paragraph 84 of Mr. Bujold's Affidavit, this is a mischaracterization of what occurred. As set out in my earlier Affidavit, I proposed a process whereby all trustees would resign and only myself and Clara Midbo would stay on for a short period of time until replacements for all trustees, including myself, could be found. I have never stated that only I am good enough to stay on as a Trustee. Many times Roland Twinn offered to resign if I did, yet when I accepted his offer, he refused. I have offered to step down if Roland Twinn and Bertha L'Hirondelle do likewise. I want a competent Board of Trustees who are truly independent and capable of critical thinking.

47. In regard to paragraph 91 of Mr. Bujold's Affidavit, I also believe that the other trustees have breached the Code in many ways and I have filed complaints against them. Attached as **Exhibit "X"** are copies of my complaints filed thus far by me in the Code of Conduct proceedings. I disagree with Mr. Bujold's characterization of my behavior at trustee meetings, however will admit that I am very frustrated because it appears that my significant concerns pertaining to, amongst other matters, beneficiary ascertainment of both Trusts, go ignored despite the fact that I have been raising these issues for years, as have others, including the Court.

48. In regard to paragraph 117 of Mr. Bujold's Affidavit, the membership committee of the SFN, prior to it being abolished was unorganized and ineffective. I raised many concerns during my time on this committee, but meaningful change was not achieved. Mr. Bujold states that he was advised that I often did not attend meetings and thus affected the ability of the committee to achieve quorum. This was surprising to me as the committee had many members, so repeated failure to reach quorum would indicate a systemic problem. Mr. Bujold acknowledged in questioning that he has no personal knowledge of these matters. What Mr. Bujold's informant failed to state is that meetings of the committee were often called on very short notice to me or no notice at all. I had a busy schedule and required reasonable notice in order to accommodate meetings. If I failed to attend a membership committee meeting, it would usually be because I had very short notice, or no notice. The meetings were not scheduled at regular times despite my request for a schedule. It was concerning to me that reasonable notice and minutes of the meetings were not provided to me. I suspected that this may have been done in order to try and prevent my attendance and keep the discussions at the meetings secret from me.

49. In specific response to paragraph 187 of Mr. Bujold's Affidavit, this is entirely untrue that I have not been working with the trustees and their counsel to try and resolve the 2011 Action. I have been actively engaged in settlement discussions. My primary concern in this litigation is that those persons, and their issue, who would be disentitled as a result of a change in definition to membership in the SFN be identified and grandfathered.

50. In regards to Mr. Bujold's responses to written interrogatories, I have the following comments:

(a) W/I #2 – Mr. Bujold refused to provide an example of a trustee meeting minute wherein Dr. Ward voted against the majority. I am not aware of this ever occurring.

(b) W/I #18 - Mr. Bujold refused to provide an example of where SFN council members have formed a majority vote against the Chief at SFN council meetings. To my knowledge, I

am not aware of this ever occurring during the tenure of Chief Roland Twinn as Chief of the SFN.

(c) W/I #19 – Despite deposing that the other trustees all ask "tough questions" at trustee meetings. Mr. Bujold refused to produce copies of any meeting minutes that disclose such questions being asked. Based upon my experience, Justin Twin and Bertha L'Hirondelle do not actively participate at trustee meetings and defer to Chief Roland Twinn.

51. I disagree with much of what Paul Bujold gave evidence to in terms of the purpose and intention of the settlor for the Trusts, including that my late husband (the settlor) intended to merge the Trusts. I never heard Walter say this. After his death, merger was discussed at various times for tax or operational reasons but never with a view to legally strip beneficiaries and their issue of their status. To the contrary, the advice received in 2004 was that merger was a variation, beneficiary consent would be required to vary the Trust and beneficiaries must be ascertained and they and their issue grandfathered. The Trustees decided to ascertain 1985 Trust beneficiaries in 2004 and again in 2009 but failed to act and follow through.

52. Paul Bujold stated in questioning that persons do not have to be Indians to be SFN band members on the Band List. This is simply false and inconsistent with prior positions taken by the SFN and Paul Bujold himself. It is my understanding that you must be a registered Indian in order to be considered for membership in the SFN.

53. The trustees have recently taken the position that ascertaining 1985 Trust beneficiaries cannot be done – for a variety of reasons including cost, time and uncertainty. I disagree. I am aware of a First Nation Trust in Manitoba where some 300+ beneficiaries were ascertained almost all of them in less than 6 months, at a cost well under $150,000. A consultant and lawyer competent in the Indian Act rules undertook the ascertainment and would recommend to the Board of Trustees whether that person qualified to receive a Trust benefit. The Sawridge Trustees decided to ascertain 1985 Trust beneficiaries in 2004 and 2009, but they failed to act and now have spent more than $4 million of Trust money on an amorphous litigation process which they claim negates them of their obligation to ascertain the 1985 Trust beneficiaries until the outcome of the litigation is known.

54. I swear this as evidence for the Court and for no improper purpose.

SWORN BEFORE ME at the
City of Edmonton,
in the Province of Alberta
the 10th day of ~~December~~ May, 2017

Crista C. Osualdini

A Commissioner for Oaths in and
for the Province of Alberta

Crista C. Osualdini
a Notary Public and Commissioner for Oaths
in and for the Province of Alberta
My Appointment expires at the Pleasure
of the Lieutenant Governor

Catherine Twinn

CATHERINE TWINN

Paul Bujold

From: Donovan Waters [donovan.waters@shaw.ca]
Sent: December-23-10 12:50 AM
To: Brian Heidecker; Catherine Twinn; Clara Midbo; Roland Twinn; Paul Bujold
Subject: Trustees Meeting December 21, 2010

Exhibit: 10
Date: March 9, 2017
Witness: PAUL BUJOLD
Katie McLeod, Court Reporter

Trustees and Guests,

May I be allowed to support our Chairman's closing remarks, and, as counsel to the Trustees, to say how encouraged I was with the conclusion to which the Trustees came on the 'merger' question, and their choice of the option to work with the Band on the 'certainty' question. Co-operation between the Trustees and the Band in my view is indispensable. For their several purposes both Band and Trustees need to know who are the Band members and to know also there is in place an overhauled process for the future appointment of Band members.

The 1985 and 1986 Trusts

For the Trustees' consideration I will now start framing a court application. We need to determine whether the 1985 Trust definition of "beneficiaries" is valid under the relevant legislation and, if so, whether it nevertheless fails for uncertainty or public policy objection. If the court rules in favour of the existing definition, then we would apply the terms of the ruling made by the court, pending further consideration of what other steps, if any, we wish to take. If, as I would think likely, the definition is ruled against on one or more of those grounds, we then consider how the 1986 Trust definition can be adopted for the 1985 Trust, ensuring that all the existing 1985 beneficiaries are grandfathered into the 1986 Trust.

'Certainty' of Trust beneficiaries

The Band is the body with legal authority to decide who shall be Band members, but we will now explore how we have discussions with the Sawridge community, the Chief and Band Council. We need to fashion a criteria-based process, more timely in reaching decisions, whereby Band membership recommendations further to the Code are made to the Band. I look forward to giving any assistance the Trustees are of the opinion I can give. Once we have a discussion formula in place, with which everyone is satisfied, I am certain we will make progress.

Best wishes for the Season to everyone,

Donovan Waters

NB. Walter Felix Twin and Bertha L'Hirondelle : by facsimile

This is Exhibit "6" referred to in the Affidavit of
Catherine Twinn
Sworn before me this 10 day
of May A.D., 20 17

Crista C. Osualdini
a Notary Public and Commissioner for Oaths
in and for the Province of Alberta
My Appointment expires at the Pleasure
of the Lieutenant Governor

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

Email, Donovan Waters to Trustees, Re Trustees Meeting Dec. 21/10
10123

SAWRIDGE TRUSTS

Catherine Twinn
EXHIBIT NO. H
Sept. 9/16
D. WILLIAMS

TRUSTEE MEETING MINUTES

Sawridge Inn, Edmonton South, Edmonton
21 December 2010

Attendees: **Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland Twinn, Walter Felix Twin**

Guests: **Brian Heidecker, Chair, Donovan Waters, Trusts Counsel, Paul Bujold, Trusts Administrator**

Recorder: **Paul Bujold**

1. OPENING AND PRAYER

Brian called the meeting to order at 10:10 AM and opened the meeting with a prayer led by Walter Felix.

2. REVIEW OF AGENDA

Trustees reviewed the agenda for the meeting and added 6.1 Evaluation of Chair's Performance.

2010-073 **Moved by Roland, seconded by Clara that the agenda be accepted as amended.**

Carried unanimously.

3. REVIEW OF MINUTES 17 NOVEMBER 2010

Minutes from the meeting held 18 October were reviewed.

Under 4. Business Arising, after "Roland indicated that the LSLIRC is having discussions about" add: "problems about" before "continuing with the Federal Services Master Agreement." After this statement add: "This may result in a potential impact on demand for Trust programs by beneficiaries."

Under 5.2 add: "Ardell had indicated that" instead of "Brian indicated that".

Under 5.4 change "...the Trust does not have any way to provide health services..." to :the Trust does not have a program to provide health services...".

Under 6.1.2 insert "impact" in front of "analysis".

Under 6.2.1 add the phrase "...based on the advice of David Ward and Tim Youdan." at the end of the introduction.

2010-074 **Moved by Catherine, seconded by Clara that the Minutes of 17 November 2010 be accepted as presented.**

Carried unanimously.

This is Exhibit "H" referred to in the Affidavit of
Catherine Twinn
Sworn before me this 10 day
of May A.D., 2017
Crista C. Osualdini
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

Crista C. Osualdini
a Notary Public and Commissioner for Oaths
in and for the Province of Alberta
My Appointment expires at the Pleasure
of the Lieutenant Governor

4. BENEFICIARIES

4.1 Donovan Waters, Merger of Trusts and Certainty of Beneficiaries

Donovan Waters, Legal Counsel to the Trusts, presented options (attached as part of the Minutes) for review by the Trustees on merging the Trusts and on certainty in determining the beneficiaries. These options were developed by Donovan, in consultation with input from Catherine Twinn, Doris Bonora and Mike McKinney at a meeting held in the Trusts Office 10 November 2010 and were further refined in a conference call meeting on 17 November 2010 between the parties including Roland Twinn as Chief of Sawridge First Nation.

Trustees first reviewed the options presented under ***Merger of Trusts*** Trustees felt that it was not time yet to consider Option 1 merging the two Trusts as other matters had to be dealt with first. Option 3 presented the problem of placing one Trust in a minority shareholder position compared to the other Trust and therefore was not a favourable option to consider.

Option 2 seemed to present the best possible solution at this time although it would require that an application be made to the Court for advice and direction on the beneficiary determination clause in the 1985 Trust.

Under the ***Certainty of Beneficiaries*** options, Option 1 and Option 3 presented significant challenges in that the membership and Band Council of the Sawridge First Nation had the ultimate legal responsibility for determining membership.

Option 2 seemed to present the best solution at this time. Trustees discussed the present difficulties with the Band process of determining membership and the long delays involved in making decisions. After Brian made some observations and suggestions including offers to help on both a technical and process basis, Chief Twinn agreed to encourage the Band, Council and Assembly to work with the Trusts to refine the Band process that would expedite resolving membership applications and questions. This would permit the Trusts to move forward on the question of beneficiary determination. Donovan also offered to assist with advice as a courtesy back to Mike KcKinney for his previous involvement.

2010-075 Moved by Catherine, seconded by Roland that the Trustees resolve:

1. **To adopt Option 2 under the Certainty of Beneficiaries in the Sawridge Trustee Options—Trustee Meeting 21 December 2010 document dated 17 December 2010 prepared by Donovan Waters and attached,**
2. **To proactively work with the Sawridge Membership Committee and the Chief and Council to expedite recommendations to the Legislative Assembly so that applications can be determined within 6 months from the date received,**
3. **To work with Chief and Council to develop proposed amendments to the Sawridge Citizenship Code including outlining legal standards that the decision-making process must meet, and**
4. **To adopt Option 2 under the Merger of Trusts and to apply to the Court for advice and direction as to whether the definition of 'beneficiary' in the 1985 Inter Vivos Settlement is valid.**

Carried, 4 in favour, Walter Felix abstaining.

5. TRUST MATTERS

5.1 Reports

6.1.1 Trust Administrator's Report

Paul reported that most of his time in the last month has been working on determining the beneficiaries and on working out the costs of proposed benefits and savings plans. He has also working on the accounting system to bring matters up to date for the audit and tax preparation.

6.1.2 Trustee Reports

Catherine reported that the third community dialogue of the Economic Development through Reconciliation will take place in Hobbema in January 10 - 11, 2011.

Roland reported that the Regional Council has been given limited options on extending the Master Services Agreement by the Federal Government. The First Nations are not willing to be forced into an agreement that they cannot support. If a new agreement or extension is not signed by 20 January 2011, it is unclear how services will be delivered by the Federal Government.

5.2 Legal

Paul presented information on the three tax lawyers under consideration: Cheryl Gibson, Howard Morry and Chris Anderson. Catherine pointed out that it was important not to sever our long-term relationship with Davies Ward Phillips and Vineberg.

2010-076 Moved by Roland, seconded by Walter that Cheryl Gibson be retained to handle the Trusts' tax matters.

Carried, 4 in favour, Catherine Twinn abstaining.

5.3 Financial

6.5.1 Financial Reports November 2010

Trustees reviewed financial reports for November 2010.

2010-077 Moved by Bertha, seconded by Clara that the November 2010 financial reports be accepted as presented.

Carried unanimously.

5.4 Budget 2011

Trustees reviewed the 2011 Budget Projections, including separate projections for the Phase II benefits. The Phase II benefits will not be implemented until there is more certainty on the identification of beneficiaries.

2010-078 Moved by Clara, seconded by Roland that the 2011 Budget Projections be approved as presented.

Carried unanimously.

6. COMPANY ISSUES

Brian reported that he and Paul had met with Ralph Peterson and John MacNutt on 24 November 2010 to discuss a number of issues of mutual concern.

A new severance package offer has been presented to Sunil Lall's lawyer and a response is being awaited from Sunil.

John stressed that neither he nor anyone from management had worked with Ardell Twinn on his business proposal to the Trusts. In fact, the Companies were awaiting information from Ardell on his proposal to lease space in the Travel Centre but had received nothing yet.

Justin Twin and the Companies are in discussion on a new arrangement since the arrangement for Justin with Fountain Tire did not work out. Indications are that a win-win situation is achievable for all concerned.

The Companies budget is on track to meet or slightly exceed targets. The airport development is going well.

Brian arranged for John MacNutt to meet with the RCMP K Division officials and officials from Alberta Solicitor General about plans to move the RCMP hangar.

Brian is awaiting a proposal from Ron Gilbertson on the Walter Twinn Memorial Foundation. At present, the Companies do not have anything in their budgets for this project.

Also discussed merging the trusts, developing a tax strategy, diversifying investments, the policy on employee/beneficiary access to hotel and restaurant services, featuring the ownership of the Companies by the Trusts, and plans to replace the CFO position with an Analyst and a Controller position.

A joint meeting between the Directors and the Trustees is planned for sometime in late February 2011.

6.1 Review of Chair Performance

Trustees met in camera with Brian Heidecker on the issue of his performance evaluation.

7. NEXT MEETING AND ADJOURNMENT

Action 1012-01 Trustees decided to hold the next meeting of the Trustees on 15 February 2011 in Slave Lake at the Sawridge Inn.

_____

Brian Heidecker, Chair

SAWRIDGE – TRUSTEE OPTIONS – TRUSTEE MEETING 21 DEC. 2010

Revised following lawyers' meeting on Friday, December 17

October meeting (proposals then made)

"Beneficiaries" clause is contrary to 1985 (Bill C-31) Charter philosophy. Contrary to public policy? Recommended merge 1985 Trust with 1986 Trust.

Membership code. S. 3(a) of Band Code cannot be enforced against s. 11(1) 1985 *Indian Act* persons. S. 3 of Band code may discriminate (contrary to Charter) against natural children with only one registered parent, and also adopted children.

December meeting (options before the Trustees)

1. ***Merger of Trusts***

Option 1 Apply to court to terminate the 1985 Trust and transfer the trust fund to the 1986 Trust trustees.

[NB. Merger requires in law that all beneficiaries under the 1985 Trust become beneficiaries of the new (or 1986) Trust. Capacitated and sui juris beneficiaries of the 1985 Trust must approve of the merger themselves. Question: can who are beneficiaries of the 1985 Trust be ascertained for this purpose? The court will only consider the minors' legal position under the proposed merger, and the fact that the minors of the 1985 Trust will become members of a larger beneficiary class under the new (or 1986) Trust.]

Option 2 Leave each of the 1985 and 1986 Trusts in being, and apply to court to determine whether the "beneficiaries" clause of the 1985 Trust is invalidated by the 1985 *Indian Act* or the Charter.

[NB. The argument can be made for the Trustees that the definitional trust clause, though referring to the "Band", should be construed as merely descriptive of the settlor intended class, and that the Charter does not therefore apply. If the court rejects this argument, and decides the clause is invalid, however, possibly on grounds of public policy, the Trustees then decide on a new beneficiary clause for the 1985 Trust to put before the court.]

Option 3 Leave the two Trusts in being. Value the assets of each Trust as of a determined date, and then the Trustees of each trust transfer the assets of that trust to a corporation, which then administers the assets as a whole. Shares would be issued to each Trust in the proportion that the valuation figures bear to each other, e.g., $600,000 as the valuation figure of one trust, and $400,000 of the other, resulting in a shareholding of 6 shares to one and 4 shares to the other out of 10 issued shares.

[NB. This is a useful way in which to secure the common administration of both Trusts assets. However, trust law requires that the assets of distinct trusts be kept separate, unless there is a statutorily-approved pooling arrangement in place. Moreover, as each of the 1985 Trust and the 1986 Trust is in favour of Sawridge Band members at a different time, the beneficiaries of the two Trusts

will be different persons. It cannot therefore be argued that there is a common beneficiary class. If this option is chosen, we shall have to work further on it.]

2. ***Certainty of beneficiaries***

Both Trust instruments say the beneficiaries are those who "qualify as Band members".

Option 1 Apply to court to replace "beneficiaries" clause of 1985 Trust and the 1986 Trust, if there is to be no merger. There will then be no reference to the Band or Band membership. The new description will be the "Sawridge First Nation", or the customary law description of the Sawridge community. A Trustee appointed tribunal will determine which persons meet this description.

Option 2 **The 1985 Trust**–adopt the Band's view as to which persons are Band members under the 1982 Band membership class description.

The 1986 Trust–follow the Band Code and Band decisions as to who are registered members (s. 2 and s. 3(b), (c), (d), and (e) of the Code), and also 'entitled' persons (s. 11(1) of the Act) as yet unregistered, as and when these persons are registered by the Band.

The Trusts and the Band would then be operating with the one Band membership list.

Option 3 **The 1985 Trust**–the Trustees decide by way of a tribunal who are the persons who satisfy the 1982 Band membership class description.

The 1986 Trust–the Trustees follow the Band Code but decide for themselves for Trust purposes by way of a tribunal as to who qualifies under that Code as Trust "beneficiaries".

[NB. It is likely that the Band's ultimate list will largely be the same as the Trustees' list, but the Trustees will require administrative law standards to apply in determining who are "beneficiaries"].

SAWRIDGE TRUSTS

This is Exhibit "J" referred to in the Affidavit of
Catherine Twinn
Sworn before me this 10 day
of May A.D., 20 17
Crista C. Os
A Notary Public, A Commissioner for Oaths
in and for the Province of Alberta

Crista C. Osualdini
a Notary Public and Commissioner for Oaths
in and for the Province of Alberta
My Appointment expires at the Pleasure
of the Lieutenant Governor

21 June 2011

Chief and Council
Membership Committee
Sawridge First Nation
P.O. Box 326
Slave Lake, AB T0G 2A1

Dear Chief, Council and Membership Committee Members,

As you know, after obtaining legal advice the Trustees of the Sawridge Trusts have determined that certainty as to who are the beneficiaries of the Sawridge Trust (1986) can only be achieved by obtaining the current list of members of the First Nation from the Council. This is so because the First Nation list and the Trust beneficiaries are the same persons. For the Sawridge Band Inter Vivos Settlement (1985) the Trustees are currently in the process of asking for the advice and direction of the Court concerning the definition of beneficiaries contained in that Trust.

People who responded to our Notice to Potential Beneficiaries in the newspaper have all now been advised to apply for status under the Indian Act, if they have not already done so, and, since First Nation membership is the only way that anyone can qualify as a beneficiary of the 1986 Trust, to apply for membership in the First Nation. In the course of obtaining advice from various lawyers on the determination of certainty of the beneficiaries for the 1985 Trust, the Trustees have also been advised that the Membership Code and the First Nation's process for reviewing and approving applications for membership in the First Nation may be subject to legal challenges, especially by applicants who have been turned down. That situation could affect both the Sawridge First Nation and the Sawridge Trusts. The Trustees of the Sawridge Trusts are anxious that no legal problems arise as a result of the response to either of these issues, so we are bringing these matters to your attention.

The areas of uncertainty in the Membership Code include the following:

a. Clause 3(a), and possibly Clause 6, appear to challenge the Indian Act, R.S.C. 1985, c. I-5 ss. 10(4) and 10(5). They seem to require that any person who has an absolute right under the Act to Band membership, and who is seeking that membership, must either live on the Reserve or satisfy the Band Council that he/she is a suitable person to be granted membership. The advice that we have received, as to those with absolute rights, points out that these clauses have been held invalid by the Court (*Sawridge Band v. R.* [2003] 3 C.N.L.R. 344 (Fed. T.D.) and affirmed by [2004] 2 C.N.L.R. 316 (F.C.A.).
b. Clause 3(b) states that a natural child both of whose parents are entered on the Band List has a right to be entered, while Clause 3(d)(i) states that a natural child one only of whose parents is a member of the Band, and who is born after 4 July 1985, must apply for membership and have the consent of the Band Council in order to become a member.

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Web: www.sawridgetrusts.ca

c. There is no mention in the Membership Code of adopted children, either legally adopted or traditionally adopted. A legally adopted child, we understand, becomes by statute a child of the adopting person or persons in the fullest sense. The same may be true of traditional adoptions.

d. According to the assessments that the Trustees have been given about our beneficiary and First Nation membership process, there are two concerns regarding that process. The first is that no criteria are established with which the Band Council are required to operate in granting or withholding consent with regard to an application, and the second is that there is no stated right of an applicant to a fair hearing or a review of the decision should there be a question as to the decision itself or the fairness of the process. These matters could lead to both the First Nation and the Trusts being subject to litigation, because of an alleged lack of open, fair-minded and just process. We are concerned that litigation is costly for all parties and can be divisive, causing family and community suffering. The same concerns could be said to exist with respect to the selection process that the Membership Committee follows in considering applications for membership.

   There are itemised considerations as to process that could protect both the First Nation and the Trusts in dealing with membership issues. The Council and Committee review process has to be seen to be fair and even-handed, as well as being so. These are values that have been cherished traditionally both by First Nations and by many societies around the world. These values include:

   i. Having the jurisdiction (or the authority) to deal with the issues at hand
   ii. Acting only within the powers given by that jurisdiction
   iii. Operating openly (that is, having nothing to hide) and objectively (that is, without bias)
   iv. Affording all parties the opportunity to present their arguments, not only in writing but also in person
   v. Exercising discretionary powers fairly and in good faith (that is, honestly meaning and trying to do the best when making discretionary decisions).
   vi. Exercising those powers with due care and attention to the possible negative impact or damage decisions may have on the applicant

We do hope that you are able to address these issues. To our minds implementation of appropriate action by the First Nation will help considerably in preventing anyone from taking either the First Nation or the Trusts to court, or to the Canadian Human Rights Commission. If such claims were numerous, they would also impose considerable financial stress on the First Nation or the Trusts in having to respond in court or before the Commission.

Cordially,
The Sawridge Trustees

Per Paul Bujold,
Trusts Administrator

TAB 21

2017 FC 407, 2017 CF 407
Federal Court

Twinn v. Sawridge First Nation

2017 CarswellNat 1812, 2017 CarswellNat 7400, 2017 FC 407, 2017 CF 407, 282 A.C.W.S. (3d) 676

SAM TWINN AND ISAAC TWINN (Applicants) and SAWRIDGE FIRST NATION, SAWRIDGE FIRST NATION FORMERLY KNOWN AS THE SAWRIDGE INDIAN BAND, ROLAND TWINN, ACTING ON HIS OWN BEHALF AND IN HIS CAPACITY AS CHIEF OF THE SAWRIDGE FIRST NATION AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA (Respondent)

James Russell J.

Heard: March 14, 2017
Judgment: April 26, 2017
Docket: T-1073-15

Counsel: Cameron McCoy, for Applicants
Edward Molstad, for Respondents

Subject: Civil Practice and Procedure; Constitutional; Public

APPLICATION for judicial review of decision dismissing appeal of election.

James Russell J.:

I. INTRODUCTION

1 This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act] for judicial review of connected decisions taken by the Chief Electoral Officer [CEO], made on or about February 17, 2015 [Decisions] related to the 2015 general election [Election] of Sawridge First Nation [SFN].

II. BACKGROUND

2 On December 4, 2014, prior to the Election, the CEO sent a mail-out package to SFN's electors that contained: a cover letter; Notice of Election; Notice of the Date for Nominations; a resident electors sub-list; and a non-resident electors sub-list. The cover letter advised recipients to refer to s 18 of the *Sawridge First Nation Elections Act, Consolidated with Elections Act Amendment Act* [*Elections Act*] for the provisions that governed the process for submitting changes to the sub-lists and corresponding deadline.

3 The CEO received 4 requests to correct the sub-lists and provided notice of the changes to SFN's electors on December 23, 2014. The notice also advised that the deadline for submitting a statutory declaration as to why the changes should not be made was 11 days prior to the January 13, 2015 nomination meeting.

4 On January 13, 2015, Sam and Roland Twinn were nominated for the position of Chief.

5 The Election took place on February 17, 2015 from 10:00AM to 6:00PM. After the polls closed, the CEO publicly opened the 15 sealed mail-in ballots, including those of Walter Felix Twinn (Walter) and Deana Morton.

6 Walter's ballot lacked the initials of the CEO, which is a requirement for validity under the *Elections Act*. Ron Rault [Scrutineer], the scrutineer for Sam Twinn, Tracey Poitras-Collins, and Elizabeth Poitras, suggested that Walter's vote be accepted, or that Walter be permitted to cast an in-person vote since he was present at the polls; however, the CEO rejected both suggestions and determined Walter's vote, along with two others, was invalid.

7 Deana's vote lacked a witness address but was accepted by the CEO.

8 Roland was declared the winner of the Election for Chief by one vote. According to s 72 of the *Elections Act*, a tie would have required a run-off election.

9 The Applicants then proceeded to appeal the Election. On March 2, 2015, they filed a Notice of Appeal with the CEO, which was rejected on March 6, 2015. The Applicants then appealed to the Elders Commission, which did not respond within the required time period. Accordingly, the Applicants appealed to the Special General Assembly [SGA] of the SFN on April 13, 2015. The four grounds of all the appeals were: improper rejection of ballots; non-compliance with election rules; inconsistent administration decisions impacting the popular vote; and non-compliance with the rules regarding the creation and notice of voter lists.

10 On May 30, 2015, the SGA dismissed the Applicants' appeal. The Applicants then commenced this application for judicial review.

III. DECISIONS UNDER REVIEW

11 According to the Applicants, there are three related decisions that constitute the subject of this judicial review:

(1) Rejection of Walter's Vote

12 According to the Scrutineer, the CEO set aside Walter's ballot upon opening Walter's mail-in vote because it had been cut and the CEO's initials removed. The CEO later determined Walter's vote to be invalid, overruling the Scrutineer's suggestion that Walter be permitted to cast a new in-person vote in place of his spoiled ballot.

(2) Conduct of the Election

13 The mail-out packages were dated December 3, 2014 and mailed December 4, 2014, with the Election held on February 17, 2015.

14 Two of the mail-out packages, addressed to Patrick Twinn and Georgina Ward, were not delivered and returned.

15 Following corrections, the CEO sent revised lists of electors. The deadline to correct the new list was January 2, 2015. However, Sam Twinn did not receive the notice until January 6, 2015.

16 On January 12, 2015, the CEO stated in an email to Catherine Twinn, the Membership Registrar, that general membership issues were dealt with by the Membership rather than the CEO. This response was a reply to Catherine's question of whether the CEO had authority to add the names of persons who were entitled to membership to the list of electors, including those whose completed applications had been pending for an unreasonable length of time.

(3) SFN Membership Application Process

17 In the mail-out package of December 4, 2014, Roy Twinn, the son of Roland Twinn, was listed on the non-resident sub-list. There is no documentation indicating when Roy became a member, but Roy was not on the elector lists for the 2011 election, and others have applied for membership and have not yet received a decision.

IV. ISSUES

18 The Applicants submit that the following are at issue:

A. Whether the CEO erred in law, including that going to jurisdiction, both in his initial and appeal decisions, in rejecting an election ballot through misinterpretation and misapplication of statutory provisions, compounded by breach of rules of natural justice and procedural fairness?

B. Whether the Respondents failed in their fiduciary duty to establish and confirm that a proper and complete list of electors was prepared, in disregard of constitutional, statutory, and other legal requirements, compounded by corrupt practices, thereby committing errors going to jurisdiction?

C. Whether the CEO erred in law, including that going to jurisdiction, in failing or declining to make adequate inquiry into the composition of the Electors List, compounded by procedural unfairness and disregard for rules of natural justice?

19 The Respondents submit that the following are at issue:

A. Whether the information and documents in Sam's affidavit, referred to in the Respondent's arguments, are all irrelevant and inadmissible in a judicial review of the CEO's Decisions?

B. Whether the CEO reasonably, indeed correctly, rejected and did not count Walter's mail-in ballot because it did not have "the distinctive mark of the Electoral Officer on the back" as mandated by s 69(1)(b) of the *Elections Act*?

C. Whether the CEO's decision not to give Walter a new, in-person ballot after he had already voted by mail-in ballot and after the polls had closed is neither unfair, discriminatory, nor anti-democratic, but rather a reasonable, indeed correct, interpretation and application of the *Elections Act*?

D. Whether the CEO's decision dismissing the Applicants' March 2, 2015 challenge to the electors sub-lists for non-compliance with statutory procedures and limitation periods is a reasonable, indeed correct, interpretation and application of the *Elections Act*?

E. Whether this judicial review is subject to public policy?

V. STANDARD OF REVIEW

20 The Supreme Court of Canada in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.) [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 (S.C.C.) at para 48.

21 Although the Applicants raise a wide range of issues in this application, the Court concludes that it is only in a position to review a connected series of decisions (and in particular the rejection of Walter's vote) made by the CEO during the 2015 Election and the appeal of those decisions to the CEO. This essentially gives rise to issues of procedural fairness and the CEO's interpretation and application of the governing provisions of the *Elections Act*.

22 Issues of procedural fairness, particularly in regards to the actions of Elections Committees, have been found to be reviewable under a standard of correctness: *Beardy v. Beardy*, 2016 FC 383 (F.C.) at para 45 [*Beardy*].

23 Issues of statutory interpretation and application by the CEO will be reviewed on a standard of reasonableness: *Mercredi v. Mikisew Cree First Nation*, 2015 FC 1374 (F.C.) at para 17.

13. The Appellants also alleged that an Elector's Rights under S.2 (l)(f) and G) of the Constitution were infringed. This was based in part on the Elector's age as an Elder. I would note the Appellants are not Elders themselves.

14. S. 2(2) of the Constitution states "**when a person believes he or she has been treated unfairly, discriminated against or treated in a manner not in accord with accepted standards of administrative fairness**[.]"

15. In these circumstances, the Elector alleged to have had his rights infringed based on age or other grounds has not made a complaint or appeal, but the Appellants. I find the Appellants do not have standing to bring a complaint under S. 2(2) of the Constitution as their Rights and Freedoms were not affected, but those of another Elector.

16. This ground of the appeal is dismissed.

17. The third ground of appeal also deals with complaints based on another Electors alleged infringement of other Rights under Article 2 of the Constitution.

18. Similarly, the Appellants third grounds of Appeal are dismissed for the same reasons as above in paragraph 15.

19. The Appellants in their fourth grounds of Appeal allege non-compliance with the Voters Lists. There is a process including appeals both to the Electoral Officer and the Elders Commission in "Part III, The Electoral List" of the Act. It is both comprehensive and final. This is necessary to allow the Nomination process and the Voting process to proceed.

20. The timelines for appeals within Part III of the Act have expired and are concluded. I find the appeals provision in Section 11(2) of the Constitution under which this appeal has been filed does not allow a second opportunity to revisit expired timelines in the Electoral List process under Part III of the Act. The law in Part III of the Act was followed and concluded.

21. The Appeal is hereby dismissed.

[emphasis in original]

76 The CEO's reasons as set out above are important because they provide the rationale for the decisions he made in the pre-Election period under review and which are referred to by the parties in their submissions.

Membership Issues

77 In their written submissions, the Applicants say that the CEO erred in law — including jurisdiction — in failing or declining to make adequate inquiry into the composition of the Electors List that was used by the CEO to administer the Election. They say this error was further compounded by the CEO's procedural unfairness and disregard for the rules of natural justice in his handling of the appeals.

78 For the obligation to ensure the completeness and integrity of the Electors List, the Applicants rely primarily on s 20(1) of the *Elections Act* which reads as follows:

Correcting the Electors Lists

20. (1) The Electoral Officer shall revise the Electors Lists where it is demonstrated to the Electoral Officer's satisfaction prior to the commencement of the Nomination Meeting that

(a) the name of an Elector has been omitted from the Electors List;

(b) the name or birth date of an elector is incorrectly set out in the Electors List;

(c) the name of a person who is not qualified to vote is included in the Electors List.

[...]

79 The Applicants say that these provisions place the responsibility upon the CEO to go behind the Electors List provided by SFN to ascertain the names of all persons who the Courts have said are rightfully members of SFN, and not just those individuals who SFN has decided to admit to membership in accordance with its own Membership Code. They say the CEO's decision to leave the status of membership to SFN simply compounds the corrupt practices and procedures regarding membership that the Courts have found to prevail at SFN. In other words, the argument is that membership for the purposes of the Electors List is not simply a matter of accepting the list provided by SFN's Membership Registrar; it is a matter of the CEO ascertaining and assembling a full membership list in accordance with the Court's directions on membership entitlement at SFN.

80 While I think that current membership practices at SFN could give rise to corrupt electoral practices (which I will address later), I don't think the CEO can be faulted for taking the position that he cannot be expected to resolve such broad and complex issues of membership in his electoral role. And I think that the governing legislation supports that position.

81 Under the *Elections Act*, the definition of "Electors List" means "the list of Electors prepared pursuant to this Act" and the preparation of the list is governed by Part III of the *Elections Act*.

82 Under Part III, it is the "Membership Registrar" who must "provide the Electoral Officer named by the Council pursuant to the Constitution with an alphabetical list of all members who will be Electors on the day of the Election...." What the CEO can and should do with this list is set out fully in the other provisions of Part III. These provisions deal mainly with corrections, omissions and additions to the Electors List provided by the Membership Registrar. And this must all be done before the nomination meeting because s 18.3 of the *Elections Act* makes it clear that:

> 18.3 After the commencement of the nomination meeting the names which appear on the Electoral List may not be changed and the names which appear on a Sub-List may not be removed from that Sub-List and placed on the other Sub-List.

83 What is more, s 19 of the *Elections Act* provides as follows:

> **No Delay in Nomination Meeting or Election**
>
> 19. Notwithstanding any other section of this Act, no question with respect to the names on the Electoral List or a Sub-List shall cause a delay in the date set for either the Nomination Meeting or the Election or the holding of the Nomination Meeting or the Election.

84 Section 20 of the *Elections Act*, relied upon by the Applicants, allows the CEO to revise the Electors List provided by the Membership Registrar "prior to the nomination meeting" because any application to correct is governed by s 18:

> 18.1 (1) If the Electoral Officer decides that the information provided in the statutory declaration is sufficient evidence, if unrefuted, that the elector's name should be moved from one list to another, the Electoral Officer shall make reasonable efforts to notify all electors that based on the information received, he or she is considering changing the list on which that elector's name appears and offer all electors the opportunity to show cause as to why that elector's name should not be moved from one list to the other.
>
> (2) If any elector wishes to show cause as to why the change should not be made, they may at any time prior to 11 days prior to the date set for the nomination meeting provide the Electoral Officer with a statutory declaration containing evidence and the Electoral Officer shall consider the evidence and make a determination as to which list the elector's name shall appear on and notify all Electors.

(3) The Electoral Officer may ask the Elders Commission any question with regard to a dispute as to whether a correction, omission, or addition should be made with respect to the Electoral Lists, and shall consider the counsel, opinion, or recommendation of the Elders Commission before making a decision.

(4) When considering a request to move an Elector's name from one Sub-List to another Sub-List in a situation where the Elector has more than one Residence, the Electoral Officer and the Elders' Commission may consider the following in relation to each residence:

i. An Elector may have only one Primary Residence at any point in time;

ii. The location around which the Elector's life is focussed;

iii. The location of the Elector's usual place of employment or education;

iv. The location where the Elector spends the most time;

v. The location which the Elector represents to be the Elector's Residence;

vi. Whether people other than the immediate family of the Elector reside in the residence;

vii. Whether other members of the Elector's immediate family reside in the residence;

viii. Whether the residence is owned or rented, and if rented or leased, the duration of the lease (daily, weekly, monthly, or annual) and the term of the lease (whether it is fixed or indefinite);

ix. The Elector's social, religious, business, and financial connections to the location of the residence;

x. The location where the majority of the Elector's clothes and personal belongings are located;

xi. Regularity and length of stays in a Residence; and

xii. The center of the Electors's vital interests; (5) The Electoral Officer shall make a decision with respect to any appeal received no less than 7 days prior to the date set for the nomination meeting.

18.2 If any elector wishes to appeal the decision of the Electoral Officer, the matter shall be referred to the Elders Commission no less than 4 days prior to the date set for the nomination meeting which shall decide whether it wishes to hear the appeal, and if not, the Electoral Officer's decision is final. If the Elders Commission decides to hear the appeal, it shall hear the evidence of the electors who have filed statutory declarations, the elector in question, and the Electoral Officer as to the reasons for his or her decision, and after which, shall decide on which list the name of the Elector in question shall appear. The decision of the Elders Commission must be provided to the Electoral Officer prior to the date set for the nomination meeting.

18.3 After the commencement of the nomination meeting the names which appear on the Electoral List may not be changed and the names which appear on a Sub-List may not be removed from that Sub-List and placed on the other Sub-List.

85 It is questionable whether s 20 gives the CEO any authority to go beyond s 18 but, even if it did, there would have to be a request to amend "prior to the commencement of the Nomination Meeting," which did not occur in this case.

86 It seems clear from Part III that the CEO is neither empowered or obliged to make changes to the Electors List, or to reject or supplement the Electors List provided by the Membership Registrar, without a request from a member that he do so. On the facts before me, no such request was made. I see nothing in the *Elections Act* that would allow the CEO to reject the Electors List provided by the Membership Registrar and, on his own initiative, compile an alternative

Electors List based upon what the Courts have said about entitlement to membership at SFN. It would make no sense for SFN to put in place an *Elections Act* that did not reflect and conform to its own position on membership. This is not to say, of course, that SFN's position on membership is legal, or that it is not simply defiant of what the Courts have ruled on the issue of membership. But I don't think that those Court rulings give the CEO any power to go beyond the present *Elections Act*. And the Court has not been asked to review the legality of the *Elections Act* in this application.

87 This means that I have to reject the Applicants' argument for reviewable error by the CEO for failing or declining to make inquiry into the composition of the Electors List that was provided to him by the Membership Registrar, after his finding that the "timelines for appeals within Part III of the Act have expired and are concluded." There was no requirement for the CEO to implement some kind of general inquiry into the creation of the Voters List.

88 It appears to me that the Applicants accepted this position at the oral hearing before me in Edmonton and agreed, at least, that it would be "impractical" to expect the CEO to deal with membership issues in this broad sense.

Failure of Respondents to Establish and Confirm a Proper and Complete Voters List

89 The Applicants say that the Respondents failed in their fiduciary duty to establish and confirm that a proper and complete Voters List was prepared. They say further that this was done in disregard of constitutional, statutory and other legal requirements, and was compounded by corrupt practices and errors of jurisdiction.

90 In written representations, the Applicants summarize the situation as follows:

> 81. In *Holland v. Saskatchewan*, [2008] SCC 42, the SCC dealt with the situation where a court issues a binding order which is then not complied with. The court ruled that although some aspect of negligence might be a viable action, the traditional and proper remedy is judicial review for invalidity [para 9]. That is precisely what the Applicants seek. So long as the SFN continues to throw down the gauntlet to the courts by refusing to implement the clear language of this Court in *L'Hirondelle*, *supra*, it continues to irretrievably corrupt the election process. So long as entitled persons are not added to the Band list, despite the clear determination of entitlement, the concept of a truly fair election is illusory.
>
> 82. It is made even worse by the queue jumping which has Roland's scions added to the list whilst others must wait for someone to enforce the law. It is possible, as the evidence indicates, for someone to be left hanging for years, in a SFN process that is shrouded in secrecy. The SFN adopts a stance and process that is the polar opposite of the enfranchisement purpose of the *Indian Act* and a truly fair and democratic electoral process.
>
> [footnotes omitted]

91 The Respondents take the position that these issues are beyond the scope of review in this application. They say that this application is not a challenge to any and all of the decisions made by the Chief and Councillors applying SFN's Membership Code, nor is it a challenge to the confidentiality of SFN's membership list under First Nations Law. In other words, the Respondents say that this issue is entirely irrelevant because it was not before the CEO when he made the pre-Election decisions that are the subject of this judicial review application.

92 It seems to me that the Applicants are again attempting to use this judicial review of decisions made by the CEO in the 2015 Election to attack the SFN's Membership Code and the way that membership is dealt with at SFN.

93 Bearing in mind that this application, as confirmed by Justice Zinn, deals with decisions of the CEO during the 2015 Election, I think that Rule 302 excludes this kind of extensive general inquiry into membership issues at SFN. As the Court has made clear on numerous occasions, where review of multiple decisions is sought, Rule 302 requires an application for each decision to be filed, unless the Court orders otherwise, or the applicant can show that the decisions at issue form part of a continuous course of conduct. However, where two or more decisions are made at different times

and involve a different focus, they cannot be said to form part of a continuing course of conduct. See, for example, *Servier Canada Inc. v. Canada (Minister of Health)*, 2007 FC 196 (F.C.).

94 In the present case, I do not think that the Respondents' implementation of a Membership Code and the general process for granting membership at SFN can be said to be part of a continuing course of conduct that includes the decisions made by the CEO at the 2015 Election, except perhaps in one respect. There is an allegation of queue jumping in membership applications that the Applicants say was facilitated by Chief Roland Twinn in the 6 month period prior to the 2015 Election to ensure that his own son was granted membership, while other applicants for membership have been kept waiting for years. The inference is that this was done so that Roland's son could vote for his father in the 2015 Election. In a First Nation such as SFN with a total membership of only 44, of which only 41 are qualified to vote, I can see why this might be a concern. In the notice of appeal dated March 2, 2015, the Applicants stated as a ground under IV. Non Compliance with the Rules Regarding the Creation and Notice of Voter Lists:

> 3. The failure to comply with the creation and notice of Voter's Lists was compounded by a process that unfairly added persons and excluded others. In particular, notwithstanding applications for inclusion which had been outstanding for years, only the son of the successful candidate for Chief was added to the List."

This was not addressed by the CEO in the appeal decision. However, the CEO did reply, in an email to the Membership Registrar regarding the Election and his authority to "add the names of persons entitled to membership to the electoral list including those whose completed applications have been pending for an unreasonable time" that "a general membership issue would be dealt with by Membership." In other words, the CEO felt that he could not deal with this complaint because, as previously mentioned, his authority to deal with membership issues is restricted by ss 18 and 20 of the *Elections Act*. It seems to me that this position is neither unreasonable or incorrect.

Errors by CEO

95 The true focus of this application must be the allegations that the CEO, Mr. Callihoo, erred in law (including jurisdiction) in rejecting Walter's election ballot through misinterpretation and misapplication of the governing statutory provisions, and that this error was compounded by a breach of the rules of natural justice and procedural fairness.

96 It is noteworthy that the error identified is the rejection of "an election ballot," and this would appear to be a reference to the ballot of Walter Felix Twinn.

97 The Applicants explain the problems associated with the rejection of Walter's ballot as follows, and I think it would be helpful to set out the arguments of both sides on this central point in detail:

> 16. Walter Felix Twin ("Walter") is an elderly resident member of the SFN. He asked Sam in 2012 to run for the position of Chief which Sam, in Sept., 2014, decided to do. Walter was about 80 years old, has health issues and may have difficulty reading and comprehending English, Cree being his first language. On election day Sam was present in the polling station before 6 p.m., as were Walter and his wife.
>
> 17. Mail in ballots were mailed to electors. Before the poll opened at 10 a.m.; the CEO showed Sam's Scrutineer, Ron Rault ("Scrutineer") all the Mail In Ballots, 15 in total, all unopened. The 15 mail in ballots showed the name of the elector on the return envelope and these 15 names were recorded. One of these names was life time resident elector Walter. A non-resident elector, Wesley Twinn, completed his mail in ballot and asked the CEO if he could drop it off but was refused. Therefore, on Feb. 12, 2015 he express posted the ballot. However, Wesley was not one of the 15 names recorded at the polling station. Wesley Twin had to vote in person. Some electors arrived with mail in ballots but without Voter Declarations as required but were permitted to vote in person.
>
> 18. After 6 p.m., the CEO opened the 15 mail in ballots, including Walter's, who was still at the polling station. His ballot was set aside as the portion that had the CEO's initials had been cut off to fit the paper into the return envelope. Discussion ensued between the scrutineer, the CEO and his deputy, in the presence of other electors. The

127 In any event, Article II of the *Constitution* requires all appeals to be made in writing and that the "Electoral Officer shall make a decision in respect of any appeal within seven days of receipt." Appeals have to be made within 14 days after the election.

128 For obvious reasons, SFN has decided that any appeals need to be dealt with quickly and in writing. Long, drawn-out appeals can give rise to significant uncertainty and difficult legitimacy issues for which the whole First Nation can suffer.

129 The Court has not been asked to review the Article II appeal process in any general way and, on the facts of this case, it has not been established that the Applicants suffered any procedural unfairness for having to make their appeal in accordance with Article II. Given the issues raised, Article II provided a reasonable process whereby applying the *Elections Act* to undisputed facts, the Applicants were able to state their case. It is true that the Applicants wanted the CEO to take general soundings with regards to membership at SFN, but that was not within the CEO's competence or jurisdiction. The material matters of concern that the CEO could deal with — the handling of Walter's ballot and the Voters List issues — were reasonably and fairly dealt with on the basis of written submissions.

Conclusions

130 The Applicants have not convinced me that a reviewable error has occurred in this application.

Costs

131 The Respondents have asked for their costs in this case, but I feel this is an appropriate case to require that both sides meet their own costs. As the jurisprudence shows, there is significant concern and confusion regarding membership and, thus, voting entitlement at SFN. As Justice Zinn pointed out, this application raises "serious matters that will affect the electoral process undertaken in 2015 and future elections." These are serious, public issues that affect all members of SFN and I do not think that individual members should be discouraged from coming before the Court on those occasions when their concerns have some justification. SFN is unique in being such a small and self-contained First Nation. It has also faced numerous disputes on the membership issue. Membership is a requirement which is tightly controlled and the process for granting and withholding membership is opaque and secretive. Hence, there is scope for abuse and the lack of transparency is bound to give rise to future disputes. This application is a function of the system in place at SFN. Although I cannot find for the Applicants on the facts of this case, it seems to me that this application is, to some extent at least, a response to a public need at SFN that will persist until membership issues are resolved.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. The parties will bear their own costs.

Application dismissed.

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