



Clerk's stamp:

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

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

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

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

DOCUMENT **BRIEF OF THE SAWRIDGE TRUSTEES**
**APPLICATION ON TRANSFER ISSUE AS DIRECTED BY
THE COURT RETURNABLE NOVEMBER 27, 2019**

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Counsel for Catherine Twinn

1. On April 25, 2019, this Honourable Court identified concerns regarding the transfer (the "**Transfer**") of assets (the "**Assets**") from the 1982 Sawridge Trust ("**1982 Trust**") to the 1985 Sawridge Trust ("**1985 Trust**"). Specifically, this Honourable Court has questioned
 - (a) the meaning and consequences that flow from the August 24, 2016 order of the Honourable Justice DRG Thomas (the "**Consent Order**") approving the Transfer *nunc pro tunc*; and
 - (b) specifically whether the Assets are being held subject to the terms and conditions of the 1985 Trust or those of the 1982 Trust.
2. By request, the Trustees of the 1985 Trust ("**Trustees**") provided this Honourable Court with a copy of the Brief of the Trustees for Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust filed August 17, 2016¹ and supporting documents previously provided to Justice Thomas in advance of granting the Consent Order.
3. At this time, the Trustees are not aware of the definitive position of the Sawridge First Nation or other parties to these proceedings and so reserve a right of reply. Subject to this right of reply, the Trustees have nothing material to add to the previously filed Brief.
4. This Honourable Court has suggested that if the Assets are subject to the 1982 Trust, the issue of the discriminatory definition of beneficiary in the 1985 Trust ("**1985 Definition**") is, at least in part, remedied. While the imposition of the 1982 Trust terms may be such a remedy, given their obligations as established in the 1985 Trust deed, the Trustees as fiduciaries of the 1985 Trust cannot advocate that the 1982 Trust applies to the Assets. The Trustees do, however, admit that if the definition of beneficiary contained in the 1982 Trust applies to the Assets, the litigation in respect of the discriminatory nature of the 1985 Trust would be at an end but as set out below one issue remains.
5. Should this Honourable Court make a determination that the Assets, while situated in the 1985 Trust, are subject to the terms of the 1982 Trust, the Trustees seek advice and direction with respect to whether grandfathering of the 1985 Trust beneficiaries who are not members of the Sawridge First Nation could be accomplished and if so, the appropriate method and procedure for the same.
6. The Trustees submit that if the trust to trust transfer from the 1982 Trust to the 1985 Trust is possible and permissible then the Trustees are at liberty to transfer the assets of the 1985 Trust to the Sawridge Band Trust created in 1986. This solution also cures the discrimination in the 1985 Trust. There is evidence of intention from the Chief that the trusts of 1985 and 1986 would be combined.²
7. Another issue raised by the Court is the issue of service of the application for the consent order for the transfer. The Trustees drafted an application for the transfer issue and such application was posted on the website which was created for the purpose of service of all filed documents in

¹ Brief of the Trustees for Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust dated August 17, 2016 and filed August 17, 2016 [TAB A]

² Testimony of Chief Walter Twinn – Federal Court of Canada Court File No. T-66-86, October 29, 1993 Volume 25 [TAB B]

this action.³ No other special service was created with the exception of serving the application on the known parties (OPGT and Catherine Twinn) and on counsel for Shelby Twinn, Patrick Twinn and Deborah Serafinchon and Sawridge First Nation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st DAY OF NOVEMBER, 2019.

Dentons Canada LLP

PER: _____

DORIS BONORA
MICHAEL SESTITO
Solicitors for the Sawridge Trustees

³ Procedural Order of Justice D.R.G. Thomas rendered August 31, 2011 and filed September 6, 2011 and Application for Advice and Direction in Respect of the Transfer of Assets filed by the Sawridge Trustees on August 11, 2016 [TAB C]

LIST OF EVIDENCE

TAB NO.	DESCRIPTION
TAB A	Brief of the Trustees for Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust dated August 17, 2016 and filed August 17, 2016
TAB B	Testimony of Chief Walter Twinn – Federal Court of Canada Court File No. T-66-86, October 29, 1993 Volume 25
TAB C	Procedural Order of Justice D.R.G. Thomas rendered August 31, 2011 and filed September 6, 2011; and Application for Advice and Direction in Respect of the Transfer of Assets filed by the Sawridge Trustees on August 11, 2016

Tab A



Clerk's stamp:

COURT FILE NUMBER

1103 14112

COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

EDMONTON

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

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

APPLICANTS

ROLAND TWINN,
WALTER FELIX TWIN,
BERTHA L'HIRONDELLE, and
CLARA MIDBO,
CATHERINE TWINN, as trustees for the 1985
Sawridge Trust

DOCUMENT

**BRIEF OF THE TRUSTEES FOR
APPROVAL OF THE TRANSFER OF
ASSETS FROM THE 1982 TRUST TO
THE 1985 TRUST**

ADDRESS FOR SERVICE AND
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Counsel for Catherine Twinn as a Trustee of the
1985 Sawridge Trust

TABLE OF CONTENTS

INTRODUCTION2

PART I – STATEMENT OF FACTS.....2

PART II - ISSUES.....5

PART III - SUBMISSIONS5

PART IV – REMEDY SOUGHT7

LIST OF AUTHORITIES AND ATTACHMENTS8

INTRODUCTION

1. This Brief is filed in support of an application concerning the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "1985 Trust") brought by the trustees of the 1985 Trust (the "Trustees"). The Trustees seek the approval of the Court of the transfer of assets which occurred in 1985, from the Sawridge Band Trust ("1982 Trust") into the 1985 Trust, *nunc pro tunc*.
2. This application is being made with consent. Attached at **Tab 1** is a Consent Order provided for approval of the Court. The within material is filed to provide the Court with the factual background to consider the proposed Consent Order.
3. This Consent order is not to be deemed to be an accounting of the assets transferred into the 1982 Trust or the 1985 Trust. The Trustees have agreed a beneficiary may seek an accounting in relation to the 1982 Trust or the 1985 Trust.
4. OPGT agreed to withdraw its Rule 5.13 Asset transfer application against Sawridge First Nation once the terms of the Order were agreed to on July 27, 2016 (Questioning of Paul Bujold July 27, 2016 page 7-8 compressed transcript **Tab 4**).

PART I – STATEMENT OF FACTS

5. The history of the 1982 Trust and the information available related to the transfer of assets into the 1985 Trust is the subject of affidavits sworn by Paul Bujold, Chief Executive Officer of the Sawridge Trusts, and on which affidavits he has been questioned. The factual background obtained from this evidence includes:
 - (a) In 1982, the Sawridge Band ("Band") decided to establish a formal trust in respect of property then held in trust by individuals on behalf of the present and future members of the Sawridge Band. On April 15, 1982, a declaration of trust establishing the 1982 Trust was executed. (Affidavit of Paul Bujold September 12, 2011 paragraph 9 and 10) On April 15, 1985, a Resolution of trustees was made whereby the trustees of the 1982 Trust resolved to transfer the assets of the 1982 Trust to the 1985 Trust. (Affidavit of Paul Bujold September 12, 2011 Paragraph 19, 20 and 21)

- (b) On April 16, 1985, the Trustees of the 1982 Trust and the Trustees of the 1985 Trust declared that the Trustees of the 1985 Trust would hold and continue to hold legal title to the assets which had been held in the 1982 Trust. (Affidavit of Paul Bujold September 12, 2011 paragraph 21)
6. Mr. Bujold attests that through his review of all of the documents in the possession of or acquired by the Trustees, and through his discussion with many individuals involved with the trusts, he believes that all of the assets held in the 1982 Trust were transferred to the 1985 Trust. He testified that it makes sense that all of the assets were transferred to the 1985 Trust because the trust was designed to protect the assets of the 1982 Trust for the members of SFN as they existed in 1985 before the passage of Bill C-31. It would not make sense that any assets would not be transferred to the 1985 Trust given the protectionist goal of the trust. (Affidavit of Paul Bujold September 12, 2011 paragraph 22; Questioning of Paul Bujold July 27, 2016 page 17-24 compressed transcript; Questioning of Paul Bujold May , 2014 pages 45-59)
7. The transfers were carried out by the Trustees of the 1982 Trust under the guidance of lawyers and accountants. (Affidavit of Paul Bujold September 12, 2011 paragraph 22 -24; Questioning of Paul Bujold July 27, 2016 page 26 compressed transcript)
8. The Trustees have been able to locate very little documentation in relation to the transfer of the assets from the 1982 Trust to the 1985 Trust. The fact that very little information is available is the main reason for the Trustee's application. (Affidavit of Paul Bujold September 12, 2011 paragraph 24; Questioning of Paul Bujold July 27, 2016 page 18-19 and page 27 compressed transcript; Questioning of Paul Bujold May 2014 page 68)
9. Mr. Bujold has been cross-examined on the affidavits sworn and has provided undertakings in response to questions arising from the transfer of assets from the 1982 Trust to the 1985 Trust.
10. At the Questioning on Affidavit of Paul Bujold held on May 27 and 28, 2014, counsel for the Public Trustee had the opportunity to examine Mr. Bujold on the basis for his belief that all of the assets of the 1982 Trust were transferred to the 1985 Trust. Questioning on this issue continued from page 33 to 74. This issue was also the subject of Undertakings 12 through 18, all of which were answered by Mr. Bujold. Ultimately however, the conclusion reached was that there is very little information and that the relevant parties who were involved such as the accountants and lawyers no longer had any records. Mr. Bujold was also questioned by Mr. Molstad on July 27, 2016 on this issue. (Questioning of Paul Bujold July 27, 2016 compressed transcript pages 22-27, 32-33, 35-37)
11. From the questioning and undertakings, the following factual background has been identified:

- (a) The Trustees contacted individuals who were still alive who would have had knowledge of the financial dealings of the trusts in the relevant time period to attempt to obtain and review any relevant documentation relating to the transfer of assets that remained available. (Undertakings 12-19, 49 and 50 from Questioning of Paul Bujold May 27 and 28, 2014)
 - (b) All relevant documentation in the Trustees' possession or obtained through enquiries have been disclosed to all parties and have been reviewed by all counsel.
 - (c) All of the assets that were held in trust in the 1982 Trust in 1985 were transferred into the 1985 Trust. Thus it appears it was a trust to trust transfer.
 - (d) There are no documents that Mr. Bujold reviewed nor any one he spoke to that led him to believe that there is any asset of the 1982 Trust that was not transferred into the 1985 Trust. Mr. Bujold was also questioned by Mr. Molstad on July 27, 2016 on this issue. (Questioning of Paul Bujold July 27, 2016 compressed transcript pages 22-27, 32-33, 35-37)
12. The Trustees have reviewed the limited documentation available obtained through their search efforts and agreed to make requests for additional documentation. Based on what has become available through the searches and after review of the limited documents available, and based on interviews conducted with the individuals involved with the trusts in 1985, it is understood that assets from the 1982 Trust transferred directly to the 1985 Trust. Mr. Bujold was also questioned by Mr. Molstad on July 27, 2016 on this issue. (Questioning of Paul Bujold July 27, 2016 compressed transcript pages 22-27, 32-33, 35-37)

Paragraphs 1-12 above rely on the following:

- Affidavit of Paul Bujold September 12, 2011 paragraphs 9 -28, Exhibits A-E, G-J
- Transcripts of Paul Bujold May 27-28, 2014, pages 33-45, 56-58, 64-73, 180-183
- Undertakings of Paul Bujold 12, 13,14, 15, 16, 17, 18, 49, 50
- Transcripts of Paul Bujold July 27, 2016 pages 18 -29, 31-33, 35-37,
- Transcript of Paul Bujold July 27, 2016

13. The OPGT and Catherine Twinn asked for a clarification of the transfer issue to ensure that an accounting was not being requested and that an accounting could be requested in the future. The clarification provided on May 13, 2016 is attached hereto at **Tab 2**. (Clarification was entered as Exhibit 5 in Questioning of Paul Bujold July 27, 2016; Questioning of Paul Bujold July 27, 2016 page 28-29 compressed transcript)
14. Once the parties were ad idem that the transfer relief sought did not limit a beneficiary's right to an accounting, the OPGT and Catherine Twinn were able to agree to the form of Order attached.

PART II - ISSUES

15. Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust.
16. Confirmation that the approval will not have an impact on the ability of beneficiaries to seek an accounting from the 1985 Trustees, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 Trust.

PART III - SUBMISSIONS

17. The Trustees have advised all parties that the approval of the transfer of assets from the 1982 Trust to the 1985 Trust is sought for certainty and to protect the assets of the 1985 Trust for the benefit of the beneficiaries. To unravel the assets of the 1985 Trust after 30 years would create undue costs and would have the potential impact of destroying the trust. Assets would have to be sold to pay the costs and to pay the taxes associated with the reversal of the transfer of assets. (Affidavit of Paul Bujold September 11, 2011 paragraph 28 and Questioning of Paul Bujold July 27, 2016 page 27-28 compressed version)
18. While there are limitations in the documents available, the Trustees have advised all parties they have exhausted all reasonable options to obtain documentation regarding the transfer of assets from the 1982 Trust to the 1985 Trust and have provided the limited documents the Trustees have located to the parties. There is evidence that the 1985 Trust was created to preserve the assets of the 1982 Trust for the members of the Sawridge First Nation for the members that existed in 1985 before Bill C-31 was enacted. The 1985 Trust was not a beneficiary of the 1982 Trust and thus should not have been able to receive assets directly. There are many methods by which a trust can transfer assets to another trust through a series of transactions. Given the high level of advice that the Trustees received, it is believed that the transaction was carried out

properly. Based on the searches conducted, there is simply no record of the necessary transactions.

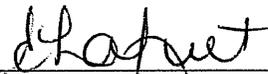
19. The Trustees, OPGT and Catherine Twinn have had appropriate opportunity to consider the documentation available and to seek any further documentation they may have found informative. Based on the clarifications provided by the Trustees, including the assurances that the relief sought in this application in no way seeks an accounting of the assets of the 1985 Trust or the 1982 Trust, the OPGT and Catherine Twinn have consented to this application and do not seek additional evidence or information about the transfer of assets that were in the 1982 Trust at the time of their transfer into the 1985 Trust or about how the transfers from the 1982 Trust to the 1985 Trust were documented.
20. In *Pilkington v. Inland Revenue Commissioners* HL 8 Oct 1962 **Tab 3**, the House of Lords approved as appropriate a transfer of part of one trust to another trust for the benefit of one beneficiary. On the basis of this case and what has become known as the Pilkington principle, a trust to trust transfer can be appropriate where it is for the benefit of the beneficiary. At page 17 of the *Pilkington* case the Court effectively says that if the transfer could have been done from one trust to another trust through a series of transactions then it cannot be held to be inappropriate where the same result is achieved directly. Admittedly, *Pilkington* dealt with a payment for the benefit of one beneficiary to a trust for the benefit of that beneficiary and in the Sawridge trusts, the transfer was of the whole trust fund of one trust to another trust. However, it is submitted that the same principle is applicable as the transfer from the 1982 Trust to the 1985 Trust was for the benefit of the same beneficiaries and preserved their interest in the trust assets. In addition, it is submitted that the Sawridge trust to trust transfer could have been achieved through a series of transactions and as *Pilkington* says, the transfer should not be held as inappropriate just because it was done directly instead of indirectly if this was the case with the transfer to the 1985 Trust. It is submitted that it is in the best interests of the beneficiaries of the 1985 Trust that the transfer of assets be approved, *nunc pro tunc*.
21. The Trustees, the Office of the Public Guardian and Trustee and Catherine Twinn consent to an Order of this Court approving the transfer of assets from the 1982 Trust to the 1985 Trust, *nunc pro tunc*. The proposed Consent Order makes it clear that the approval of transfer of assets shall not operate as an accounting of the assets of the 1982 Trust and that the Order approving the transfer may not be relied upon by the Trustees in a future application to prevent a beneficiary from seeking an accounting of the 1985 Trust, including an accounting to determine the assets that were transferred from the 1982 Trust.

PART IV – REMEDY SOUGHT

22. The Trustees respectfully submit the attached Consent Order for approval by the Court.

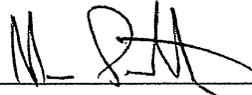
ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF AUGUST, 2016.

DENTONS CANADA LLP

PER:  _____

 Doris Bonora
Solicitors for the Trustees

REYNOLDS MIRTH RICHARDS & FARMER LLP

PER:  _____

Marco S. Poretti
Solicitors for the Trustees

LIST OF AUTHORITIES AND ATTACHMENTS

	Page
TAB 1 Proposed Consent Order	2
TAB 2 Clarification of the transfer issue	5
TAB 3 <i>Pilkington v. Inland Revenue Commissioners HL 8 Oct 1962</i>	6
Tab 4 Questioning of Paul Bujold July 27, 2016 page 7-8 compressed transcript.....	2

Tab A 01

Clerk's Stamp:

COURT FILE NUMBER 1103 14112
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c
T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER
VIVOS SETTLEMENT CREATED BY CHIEF WALTER
PATRICK TWINN, OF THE SAWRIDGE INDIAN
BAND, NO. 19 now known as SAWRIDGE FIRST
NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS ROLAND TWINN, CATHERINE TWINN, WALTER
FELIX TWIN, BERTHA L'HIRONDELLE and CLARA
MIDBO, as Trustees for the 1985 Sawridge Trust (the
"Sawridge Trustees")

DOCUMENT CONSENT ORDER

ADDRESS FOR SERVICE
AND CONTACT
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Fx. (780) 423-7276	File No. 108511-MSP
File No.: 551860-1	

DATE ON WHICH ORDER WAS PRONOUNCED: _____, 2016

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, AB

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

CONSENT ORDER

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

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

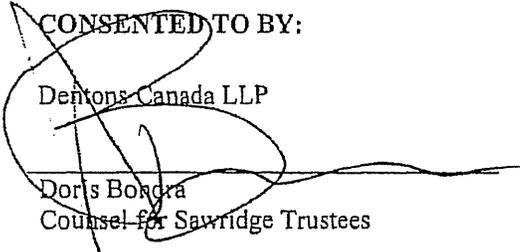
IT IS HEREBY ORDERED THAT:

1. The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.
2. Without limiting the generality of the foregoing, the Trustees' application and this Consent Order cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 Trust.

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

CONSENTED TO BY:

Dentons Canada LLP


Doris Bosdra
Counsel for Sawridge Trustees

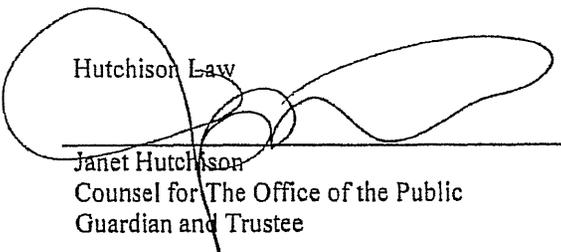
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Karen Platten, Q.C.
Counsel for Catherine Twinn as a Trustee
of the 1985 Sawridge Trust

Hutchison Law


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

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

IT IS HEREBY ORDERED THAT:

1. The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.
2. Without limiting the generality of the foregoing, the Trustees' application and this Consent Order cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 Trust.

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

~~CONSENTED TO BY:~~

~~Deftons Canada LLP~~

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Reynolds Mirth Richards & Farmer LLP

Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP

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

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Counsel for The Office of the Public
Guardian and Trustee

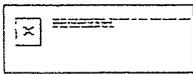
Tab A 02

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Sent: Friday, May 13, 2016 4:57 PM
To: 'Janet Hutchison' (jhutchison@jhlhlaw.ca); Karen Platten; Crista Osualdini; Edward H. Molstad; Marco S. Poretti; Gabriel Joshee-Arnal
Cc: Brian Heidecker; 'Paul@sawridgetrusts.ca'
Subject: Clarification of the transfer issue
Attachments: 21595350_1.docx

We are attaching a draft of the clarification of the transfer issue for your review and comments. This is intended to try and resolve this issue. If the clarification is acceptable we could draft a consent order to deal with this issue. We understood that Catherine Twinn and the OPGT had concerns that the transfer issue involved an accounting and we have attempted to make this clear. We would be pleased to hear your comments so that we can perhaps move ahead to resolve this single matter.

Doris



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Clarification of the transfer issue

The Sawridge Trustees seek to have the Court approve the transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") nunc pro tunc.

The approval of the transfer by the Court shall not be deemed to be an accounting of the assets of the 1982 trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 trust that existed upon settlement of the trust in 1985. The sole issue before the Court is to approve the transfer of assets from the 1982 trust to the 1985 trust such that there shall not be a challenge to the transfer from one trust to the other which occurred in 1985.

Tab A 03



***612 Pilkington and Another Appellants; v. Inland Revenue Commissioners and Others Respondents.**

 [Image 1 within document in PDF format.](#)

House of Lords
8 October 1962

[1962] 3 W.L.R. 1051

[1964] A.C. 612

Lord Reid , Viscount Radcliffe , Lord Jenkins , Lord Hodson and Lord Devlin .
1962 July 9, 10, 11; Oct. 8.

Analysis

[On Appeal from In Re Pilkington's Will Trusts.]

Trusts—Power of advancement—Exercise of power—Statutory power—Fund held on trust for beneficiary for life and after his death for such of his children or remoter issue as he should appoint—Settlement for the benefit of infant child of beneficiary—Advancement of moiety of infant's expectant share on trusts of new settlement Avoidance of death duties —Whether advancement for benefit of object of power—Whether rule against perpetuities infringed— *613 Whether valid exercise of power of advancement— Trustee Act, 1925 (15 Geo. 5. c. 19)

Perpetuity Rule—Power of advancement—Power used for resettlement—Application of perpetuity rule.

Power of Appointment—Power of advancement—Distinction—Perpetuity rule.

By his will dated December 14, 1934, a testator directed his trustees to hold the income of his residuary estate upon protective trusts in equal shares for all his nephews and nieces living at his death with a provision that their consent to any exercise of any applicable power of advancement should not cause a forfeiture of their interests; and after the death of a nephew or niece to hold the capital and income of such beneficiary's share for his or her children or remoter issue as he or she should appoint and in default of appointment for his or her children at 21. The will contained no provision replacing or excluding the power of advancement contained in section 32 of the Trustee Act, 1925 . ¹ The testator died on February 8, 1935. One of his nephews was married and had three infant children. The second child, a daughter, was born on December 29, 1936, and the trustees, for the purpose of avoiding death duties, desired to exercise the statutory power of advancement in her favour by applying up to one moiety of her expectant share in the testator's trust fund by adding it to a fund, which it was proposed should be subject to the trusts of a new settlement, under which the income of the fund was to be applied for her maintenance until she attained 21, and from then and until she attained 30 was to be paid to her, when the capital was to be held on trust for her absolutely. If she should die under that age the trust fund was to be held upon trust for her children who should attain the age of 21 years and, subject as aforesaid, upon trust for the nephew's other children.

On a summons to determine whether the trustees might lawfully so exercise the power of advancement:-

Held:

(1) that there was nothing in the language of section 32 of the Trustee Act, 1925, which in terms or by implication restricted the width of the manner or purpose of advancement. In particular, if the whole provision made for the object of the power was for his or her benefit, it was no objection to the exercise of the power that (as might happen here) other persons benefited incidentally as a result of the exercise, nor was it bad merely because moneys were to be tied up in a proposed settlement. Accordingly, there was no maintainable reason for introducing into the statutory power of *614 advancement a qualification that would exclude its exercise in the manner proposed by the trustees (post, pp. 636, 640). *Lowther v. Bentinck* (1874) L.R. 19 Eq. 166; *In re Joicey* [1915] 2 Ch. 115, C.A.; *In re Halsted's Will Trusts* [1937] 2 All E.R. 570; *In re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332; and *In re Collard's Will Trusts* [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 considered.

(2) But that the exercise of the statutory power of advancement which took the form of a settlement was a special power akin to a special power of appointment and, as such, must be exercised within the period permitted by the rule against remoteness, and its exercise must, for the purpose of the rule, be written into the instrument creating, the power, and that since the new settlement was only effected lay the operation of a fiduciary power which itself "belonged" to the old settlement, the trusts of the settlement proposed by the trustees must be treated as if they had been made by the testator's will, ailed so treated they infringed the rule (post, pp. 641-642).

Decision of the Court of Appeal [1961] Ch. 466; [1961] 2 W.L.R. 776; [1961] 2 All E.R. 330, C.A. reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Upjohn and Pearson L.JJ. ²).

This was an appeal from an order of the Court of Appeal dated March 24, 1961, discharging (save so far as it related to costs) an order of the Chancery Division of the High Court of Justice (Danckwerts J.) dated May 14, 1959. The said orders were made in a cause or matter commenced by originating summons wherein the respondents, Guy Reginald Pilkington, Leonard Norman Winder, David Frost Pilkington and Clifford Pearson, trustees of the will of William Norman Pilkington, were the plaintiffs; and the appellants, Richard Godfrey Pilkington and Penelope Margaret Pilkington, were originally the only defendants, the respondents the Commissioners of Inland Revenue being added as defendants by order of the Court of Appeal dated July 18, 1960.

The question at issue in this appeal was whether the trustees could lawfully exercise the powers conferred on them by the will of William Norman Pilkington (hereinafter called "the testator") and section 32 of the Trustee Act, 1925, by making part of the expectant interest of the appellant Penelope Margaret Pilkington in the testator's residuary trust fund subject to the trusts, powers and provisions of a new settlement to be executed by the respondent, Guy Reginald Pilkington.

By his will dated December 14, 1934, the testator, William *615 Norman Pilkington, directed his trustees to invest his residuary estate and to hold the fund upon trust in equal shares for all his nephews and nieces, therein defined as "the beneficiaries," being children of his brothers Lionel Edward Pilkington, Charles Raymond Pilkington and Guy Reginald Pilkington, living at his death who should attain the age of 21 years or being female marry under that age. The share of each beneficiary was, so far as is here material, settled upon express protective trusts for the benefit of the beneficiary during his or her life, with a provision that his or her consent to any exercise of any applicable power of advancement should not cause a forfeiture of the interest. After the death of a beneficiary the capital and future income of the share of such beneficiary was to be held in trust for the children or remoter issue of such beneficiary as he should appoint with a trust in default of appointment for the beneficiary's children on attaining the age of 21 years or marriage. If the trusts

of the share of a beneficiary should fail then it was to accrue to the other shares in the trust fund. The will contained no provision replacing or excluding the power of advancement conferred upon trustees by section 32 of the Trustee Act, 1925. The testator died on February 8, 1935, and his will was duly proved by his executors.

The first appellant, Richard Godfrey Pilkington, a son of Guy Reginald Pilkington, was married with three children. His father, who was also a trustee of the will, was desirous of making a settlement in favour of the second appellant, Penelope Margaret Pilkington, the second child of Richard Godfrey Pilkington, who was born on December 29, 1956, and he proposed to his co-trustees that he should execute a settlement for the benefit of Penelope and that the trustees of the will should then exercise the power given by section 32 of the Trustee Act, 1925, by applying part of Penelope's expectant share in the testator's trust fund by adding it to the fund subject to the trusts of the proposed new settlement. Accordingly he paid £10 in cash to the trustees of the proposed settlement under which the trustees were directed to hold this sum, together with any further moneys (the intended total sum being £7,600) which were to be paid to them upon the following trusts: Until Penelope attained 21 years, or died under that age, the trustees were to have power at their discretion to apply the whole or any part of the income of the trust fund for the maintenance, education or benefit of Penelope as they thought fit and were to accumulate the residue of income as an addition to the capital of the trust fund, with power to apply all or part of the accumulations as if they were income of the current year; if she *616 should attain 21 years then until she attained 30 years, or died under that age, the trustees were to pay the income of the trust fund to her. The capital of the fund to be held upon trust for her upon attaining 30 years absolutely; if Penelope died under the age of 30 leaving children or a child living at her death the trustees were to hold the fund and the income thereof in trust for all or any her children or child who should attain the age of 21 years, if more than one in equal shares, and in such event the trusts applicable until Penelope attained 21 were to apply to the children and the income of their expectant shares of the fund. Subject to these provisions the trustees were to hold the fund in trust for all or any the children or child of Richard Godfrey Pilkington (other than Penelope) who being male attained 21 years or being female attained that age or married if more than one in equal shares. In the event of the failure of the trusts the fund was to be held upon the trusts of the will of the testator applicable to the share of Richard Godfrey Pilkington as though he had died without being married. The power of advancement contained in section 32 of the Trustee Act, 1925, was expressly made applicable.

The trustees of the will took out a summons to determine whether they could lawfully exercise the powers conferred upon them by section 32 of the Trustee Act, 1925, in relation to Penelope's expectant interest in the testator's trust fund by applying (with the consent of Richard Godfrey Pilkington) up to one moiety of the capital of such interest so as to make it subject to the new proposed settlement, or whether such an application of the capital would be improper and unauthorised because: (a) Penelope's interest under the proposed settlement would vest at a date later than the date on which she attained a vested interest in her expectant share under the will of the testator; or (b) the trusts of the new settlement, if contained in the will of the testator, would be void for perpetuity.

Danckwerts J. held that the power of advancement might be legitimately exercised by paying some part of the capital of Penelope's share (not exceeding one moiety) to the trustees of the proposed settlement and so as to make it subject to the trusts, powers and provisions of such settlement and, since the power of advancement took the property advanced out of the original settlement, the relevant period for the purposes of the rule against perpetuities was to be determined by reference to the proposed settlement and the power could accordingly be exercised in the manner proposed.

On July 18, 1960, the Court of Appeal, on the motion of the *617 respondent trustees, ordered that the Commissioners of Inland Revenue might be added as parties and further that (notwithstanding that the time for appealing had expired) the trustees or the commissioners might be at liberty to appeal from the order of Danckwerts J.

The Commissioners of Inland Revenue appealed. The grounds of their appeal were that the order was wrong in law:

(1) Because the proposed transaction was nothing less than a resettlement of the capital over which it extended upon trusts and with and subject to powers and discretions not contained in or contemplated by the testator's will and not authorised by the power of advancement contained in section 32 and because it was irrelevant that the trustees thought that it was for the benefit of Penelope that it should be so resettled.

(2) Because to resettle any part of the capital of the share of a beneficiary was not within the meaning of the phrase "to pay or apply any capital money" subject to a trust.

(3) Because upon the true construction of the section the power of advancement thereby conferred upon trustees to pay or apply any capital money subject to a trust for the advancement or benefit of any person entitled to the capital of the trust property or of any share therein did not extend to enable such trustees to deprive such person of the interest in property conferred upon him by the trust instrument or to declare new or other trusts affecting such capital or share or to do any act or thing in relation to the trust property which would operate to deprive such person of such interest or to subject such capital or share to such new or other trusts.

(4) Because the power of advancement might only be exercised to accelerate and, if necessary, enlarge the interest of the person sought to be advanced and not to postpone or reduce it.

(5) Because the effect of the proposed transaction would be to deprive Penelope of her existing contingent interest in the capital sought to be subjected to the trusts of the proposed new settlement and to subject such capital to trusts which differed from those declared by the will and to postpone and reduce Penelope's interest in such capital.

(6) Because *In re Fox*³ and *In re Joicey*⁴ are authority for the proposition that a power of advancement did not enable the trustees to alter the devaluation of the estate or to destroy the contingent interest of the person sought to be advanced.

*618

(7) Because the authorities upon which Danckwerts J. relied, properly understood, did not decide the contrary or, if they did, were wrongly decided.

(8) Because, if contrary to the contention of the Commissioners of Inland Revenue the said power of advancement extended to enable the trustees to subject the capital to new or other trusts, and thereby to postpone or reduce the interest of Penelope, the validity or otherwise of any such new or other trusts in relation to the rule against perpetuities fell to be tested by considering whether they would have been within the rule if they had been declared by the testator's will.

(9) Because the trusts in favour of Penelope and her children declared by the proposed new settlement would have been void for remoteness if contained in the testator's will.

(10) Because the subjection of any part of the capital of the expectant share of Penelope to the trusts, powers and provisions of the proposed new settlement would be an unlawful delegation of the trusts, powers and provisions of the will.

(11) Because under the trusts of the proposed new settlement persons who were not objects of the power of advancement (and in particular Penelope's children) were beneficiaries, and the proposed transaction was accordingly a transaction in excess of the said power.

The Court of Appeal allowed the appeal.

Sir Milner Holland Q.C. and *Eric Griffith* for the appellants. The trustees of the testator's will take the view that it is for the benefit of Penelope that part of her contingent reversionary interest in the testator's residuary trust fund should be raised now and made subject to the trusts, powers and provisions of a new settlement to be executed by the respondent Guy Reginald Pilkington. This raises the questions (1) whether the trustees have power to do this under section 32 of the Trustee Act, 1925, if in their absolute discretion they consider that it is for the benefit of the infant Penelope. (2) The subsidiary question whether the terms of the proposed settlement would infringe the rule against remoteness of vesting.

(1) There is no express reference in the will to a power of advancement, and, accordingly, the trustees have the powers of advancement conferred on them by section 32 of the Trustee Act, 1925. It is not disputed that the trustees' proposed exercise of the power is bona fide. The proposed exercise of the *619 power can only be ineffective in law if in any circumstances it cannot be for Penelope's benefit. The only view to the contrary which would appear to have cogency is that held by the Court of Appeal, namely, that the proposed exercise is not within the purview of section 32 at all.

Attention is drawn to the very wide language of section 32. The words are "advancement or benefit." The words "or benefit" are not a mere trifling addition but cover any application of money for the benefit of the object of the power which may not be advancement as such. In *Roper-Curzon v. Roper-Curzon* ⁵ it was held that even a bare power of advancement justified the payment of money into the trusts of a post-nuptial settlement of the person for whose benefit the power was exercised. As to "benefit": see *Lowther v. Bentinck* ⁶ and *In re Kershaw's Trusts*. ⁷ "Benefit" is not to be construed in this context ejusdem generis with "advancement" but is a word of very wide import: see *In re Halsted's Will Trusts*, ⁸ where Farwell J. adopted the observations of Jessel M.R. in *Lowther v. Bentinck* ⁹ and held that a power to benefit A included power to benefit other persons for whom A was under some obligation.

In the Court of Appeal ¹⁰ it was pointed out that in *Roper-Curzon* ¹¹ and *Halsted* ¹² the power was exercised for the benefit of an adult beneficiary. It is to be observed (a) that in both cases the payments were in fact made to the trustees of a new settlement; (b) if it is not within a power of this kind to pay money to the trusts of an existing settlement it could not be a proper exercise of the power to pay it to an adult to apply it to the trusts of a new settlement, for that would amount to a fraud on the power.

In *In re Roper's Settlement Trusts* ¹³ Harman J. considered that it had been rightly conceded in argument that it was a proper exercise of the power of advancement there for the trustees of the original settlement to hand money to the

trustees of a new settlement provided that they were satisfied after a proper consideration of all the circumstances that such exercise was for the benefit of the objects of the power.

As to the judgment of Lord Evershed M.R., ¹⁴ it is conceded *620 that if the trustees are concerned only with the advancement in life of a beneficiary then any advancement must relate to the personal circumstances or personal needs of that beneficiary, but under section 32 one is considering not only the payment of money for advancement but also the application of capital moneys "subject to a trust, for the advancement or benefit,... of any person entitled to the capital of the trust property." These words cannot be confined here to the personal needs of Penelope. Further, it is not disputed that the trustees must consider the circumstances at the time they exercise the power, but the exercise of the power conferred by section 32 cannot be limited to those circumstances which the situation of the object of the power demand to be done.

As to the ambit of a power of advancement "for benefit and advancement": see *In re Brittlebank* ¹⁵ which shows that the effect of the insertion of the word "benefit" is to enlarge the power and give it a wider extension than "advancement" alone would give, and that in the absence of mala fides on the part of the trustees, once they have reached the conclusion that a given exercise of the power is for the benefit of the object of the power the court will not interfere with the exercise of it.

The fact that the Court of Appeal have held that the power of advancement contemplated in section 32 is one to be exercised in special circumstances, for example, setting up the object of the power in a profession, or making some provision on marriage, is inconsistent with the view that the avoidance of death duties justifies trustees in exercising this power, for that is not a special circumstance but an ever present situation; nevertheless, the court approved *In re Collard's Will Trusts* ¹⁶ where the sole purpose for exercising the power was to avoid death duties.

The Court of Appeal placed reliance on *In re Joicey*, ¹⁷ but the power in question there was an arbitrary power and not a power of advancement under which the trustees have to consider whether in the circumstances its proposed exercise is for the benefit of the beneficiary.

A limitation on the scope of this power cannot properly be derived from the cross-heading "Maintenance, Advancement and Protective Trusts" which precedes section 31 of the Trustee Act, 1925. It by no means follows that because an advancement *621 requires special circumstances therefore the object of the power can only receive a benefit under section 32 in special circumstances. Further, where trustees have exercised the power bona fide it is not within the province of the court to overrule them.

(2) If the rule against perpetuities as contended for by the Crown is applicable then the relevant date for the purposes of the rule is the death of the testator in 1938. It is submitted, however, that the exercise by the trustees of the power of advancement takes the sum in question out of the will entirely. Accordingly, it is irrelevant to consider whether interests created by Guy Reginald Pilkington's settlement vest within 21 years after lives in being under interests created by the will of the testator. For the purposes of the rule, therefore, the relevant interests are those contained in the proposed settlement. If this view be wrong it is surprising that it was not adverted to in *Roper-Curzon v. Roper-Curzon* ¹⁸ since it follows from the Crown's contention that what the court authorised there plainly offended the rule.

In *re Gosset's Settlement*, ¹⁹ *Lawrie v. Buncos* ²⁰ and *In re Fox* ²¹ show that once trustees decide to exercise a power of advancement the sum advanced is taken right out of the settlement for all purposes and thus any trust created in respect of such sum is not read back into the original instrument.

Upjohn L.J. ²² described the power here as a special power, but there is no such interest known to the law as a *special* power of *advancement*. The addition of the word "special" adds nothing to the concept of a power of advancement. Those authorities, therefore, such as *In re Fane*, ²³ which lay down that for the purposes of the rule against perpetuities all limitations made in pursuance of a special power shall be such only as would have been valid if inserted in the original will or settlement, are inapplicable.

[Reference was also made to Morris and Leach, *The Rule Against Perpetuities*, 1st. ed., p. 50 and to *In re Legh's Settlement Trusts*. ²⁴]

B. L. Bathurst Q.C. (Viscount Bledisloe) and *James Cunliffe* for the trustees. The argument on behalf of the appellants is *622 adopted. For the following reasons the trustees consider that their proposed exercise of the power of advancement conferred on them by section 32 of the Trustee Act, 1925, is a proper exercise thereof: (i) Penelope's advanced share could not thereafter be divested by the subsequent exercise of her father's special power of appointment over his share of the trust fund. (ii) If her father survived the advance for more than two years, estate duty would be reduced and after five years no estate duty would be payable in respect of it on his death. (iii) The income from the advanced share would be used wholly for Penelope's maintenance, or, accumulated. (iv) That income would be (a) free from surtax and (b) qualify for personal allowances for Penelope. (v) On attaining 21, Penelope would be absolutely entitled to the income. (vi) Penelope's children would be provided for if she died between the ages of 21 and 30. (vii) Penelope obtains the capital on attaining 30. (viii) Penelope would be protected from extravagance on attaining 21.

The Court of Appeal have held in allowing the Crown's appeal (1) that the proposed settlement is nothing more than a resettlement; (2) that an advancement must relate to some special circumstance arising.

As to (1), advancements by way of settlement have a long history: see *Roper-Curzon v. Roper-Curzon*. ²⁵ If an advancement by way of a settlement of this kind can be said in certain circumstances to be a benefit for an adult it would be very surprising if such a benefit were to be denied to an infant.

As to (2), whether there must exist a particular need, the language of section 32 could hardly be wider, and it has nowhere been suggested that there is anything improper in what the trustees propose to do. *In re Moxon's Will Trusts* ²⁶ is an example of the court refusing to interfere with a bona fide and reasonable exercise by trustees of a discretion vested in them.

As regards the perpetuity question, the short answer is that when a power of advancement is exercised the fund advanced is taken right out of the original settlement: see *per Danckwerts J.*, ²⁷ To call this a special power is meaningless. The word "special" in relation to powers has always been linked with powers of appointment and it is only in relation to a limited or special power of appointment that the power must be read back for this purpose *623 into the original will

or settlement. Thus, in relation to a power of advancement once the fund is taken out there is no vested interest left under the original settlement.

Peter Foster Q.C. and E. B. Stamp for the Commissioners of Inland Revenue. Reliance is placed on the following propositions: (1) The statutory power contained in section 32 of the Trustee Act, 1925, can only be used to enlarge or accelerate the beneficiary's interest and not to postpone or reduce it. (2) The proposed exercise of the power in this case will offend the rule delegates non potest delegare. That doctrine applies to all powers and applies to section 32. (3) The proposed exercise of the power is void as being an excessive execution since non-objects are included. (4) The proposed exercise is nothing less than a resettlement and cannot come within section 32 however wide a meaning is given to the words "pay or apply." (5) The proposed exercise of the power will offend the rule against perpetuities in any event.

1. The position under the will is that Penelope has a vested interest at 21 or earlier marriage. Under the proposed settlement she is given a contingent interest until she attains 30. The effect of the exercise of the power is not to advance her interest but to postpone its vesting from 21 to 30. This power does not enable trustees to alter the devaluation of or destroy the contingent interest of the beneficiary advanced. There must be an out and out payment and there cannot be a settlement without the advancee so asks and it is then the advancee who is the settler. The power of advancement given by section 32 follows the old form of advancement used by convincers and is similar to that to be found in the precedent books for many years before 1925. Reliance is placed on the definition of advancement propounded by Cotton L.J. in *In re Aldridge* ²⁸ : "it is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy, before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled."

If a power of advancement were as wide as has been contended for by the appellants *In re Morris's Settlement Trusts* ²⁹ would have been decided differently. "A power of advancement is a purely ancillary power, enabling the trustees to anticipate by means of an advance under it the date of actual enjoyment *624 by a beneficiary selected by the appoint or of the interest appointed to him or her, and it can only affect the destination of the fund indirectly in the event of the person advanced failing to attain a vested interest": *per Jenkins L.J.* ³⁰

The purpose of exercising a power of advancement is to accelerate the vesting in interest of capital and not to postpone such vesting. The power of advancement contained in section 32 is a very limited power in that it is limited to the payment of an application of capital and capital moneys to a person interested in capital and to no one else. It is emphasised that although the language of section 32 may appear quite wide the nature of the power is such as to accelerate and not to vary, reduce or postpone the nature of the interest. Ex hypothesi it does not enable a resettlement which alters, varies and postpones the interest in question.

The House is invited to consider the cross-heading which precedes section 31 as an aid to the construction of section 32: Qualter, Hall & Co. v. Board of Trade. ³¹ It is "Maintenance, Advancement and Protective Trust." There are only three sections under this heading. Section 32 is the second of them and therefore it must refer to advancement. Powers of advancement are used to advance capital to a particular person for a particular purpose, for example, the purchase of a commission. The word "benefit" extends the purposes for which the payment may be made, such as, for example, the payment of debts. "Apply" is limited to the expending of money on behalf of the beneficiary for his benefit in contradistinction to a payment to the beneficiary direct. "Benefit" is anything which accrues to the beneficiary as a result of the immediate spending of money by the trustees. "Apply" in the context of section 31 (1) and (2) and section

33 (1) (ii) clearly means "expend" and it is plain that an application of income under section 31 (1) cannot be by way of a resettlement for section 31 as a whole is concerned with maintenance during the beneficiary's minority.

The power of advancement conferred by section 32 admits of a payment but not of a settlement. The cases show that the power of advancement has never been exercised so as to enable *the trustees* to resettle the sum advanced; it is the person *625 advanced who effects the settlement: *In re Gosset's Settlement* ³²; *Roper-Curzon v. Roper-Curzon* ³³; *In re Halsted's Will Trusts*. ³⁴ Ex concessis this cannot be done by an infant.

The following authorities show very clearly what has hitherto been considered to be the true nature of a power of advancement: *In re Joicey* ³⁵ shows that an advancement is an acceleration of the beneficiary's interest. If the appellants' contention be correct then that case should have been decided differently, as also should *In re Mewburn's Settlement*, ³⁶ for there the power of advancement contained in the power of appointment would have been a delegation of the power and the exercise of the power of appointment would have been bad as an excessive execution. Similar observations apply to *In re May's Settlement*. ³⁷

The rule of construction is that the words of section 32 are to be assumed to bear their technical meaning as hitherto understood by convancers and are not to be given a wider meaning: see *Craies on Statute Law*, 5th ed., p. 158; *Mason v. Bolton's Library Ltd.*, *per* Farwell L.J. ³⁸

2. Delegates non potest delegare. The proposed exercise of the power offends this rule. In the resettlement there is a power of advancement. This amounts to a pure delegation. If the proposed settlement is made the power contained in the will by virtue of section 32 Will be exercised by another set of trustees, that is, those of the settlement and that plainly infringes the rule.

Every settlement confers powers of management, the proposed settlement, however, includes the wide power of investment allowed by the *Trustee Investments Act, 1961*, whilst the testator's will contains a much more restricted power of investment, the power of advancement is therefore being used to widen the powers of investment and that plainly offends the rule against delegation. It is pertinent to observe, moreover, that it would be strange to find in a power of advancement power to delegate powers of management to other persons. further, under this power of advancement it would be possible for Penelope to circumvent the prohibition against a Roman Catholic taking a benefit under the will and that would appear also to be a very strange result to flow from a power of advancement.

3. The proposed exercise of the power will bring in non-objects, *626 for under the will Penelope's children are only objects under the power of appointment and have no interest until that power is exercised in their favour, but under the proposed settlement her children take vested interests at 21 in the event of Penelope dying before the age of 30. The proposed exercise of the power of advancement is therefore void as being an excessive execution of the power.

4. However wide a meaning be given to the language of section 32 it cannot embrace a resettlement. A resettlement cannot come within the words "pay or apply." This argument depends on the width to be given to the word "apply." In *In re Peel* ³⁹ it was held that under a trust to apply an annuity for the maintenance, education, or benefit of an infant,

the trustees had no power to accumulate any part of the income for the benefit of the infant until he should attain 21. In other words, the trustees could not retain the income but must apply it, that is, expend it. The "application" in the present case is not an expending of the capital moneys in question but is a retention of it in the proposed settlement. [Reference was made to In re Vestey's Settlement.⁴⁰]

5. The proposed exercise of the power plainly offends the rule against perpetuities. The object of the power being an infant the trustees can only justify the making of a settlement provided it is within the powers conferred on them by section 32. That cannot be a general power but it is a special power and as such it must be read back into the testator's will: In re Churston Settled Estates.⁴¹

In conclusion, it is submitted that In re Ropner's Settlement Trusts⁴² was wrongly decided. [Reference was also made to Lowther v. Bentinck⁴³ ; In re Kershaw's Trusts.⁴⁴]

E. B. Stamp following. The House may derive some assistance by considering what is the result sought to be achieved by the trustees and the nature of the legal steps or process by which it is proposed to achieve it. The intended result is to force the property over which the power of advancement extends from the trusts of the testator's will and subject it to the trusts of a new settlement. There is no difficulty under *627 section 32 of the Trustee Act, 1925 in freeing the property by paying or applying it for the benefit of Penelope, but there is nothing in section 32 which enables trustees to subject property to the trusts of another settlement.

Leaving on one side section 32, it is submitted that (1) If trustees of a settlement transfer the money or interests which they hold thereunder to trustees of another settlement the effect of that transfer on the beneficial interests is nil. The only effect of such a transfer is simply to make the new trustees hold the property on the trusts of the old settlement. The transferors could only interfere with the beneficial interests if they were empowered so to do by the beneficiaries or if the old settlement contained a power to create new trusts. (2) To describe trustees as settling or resettling trust property is a misnomer. The only persons who can settle or resettle the trust property are the beneficiaries, the persons entitled to it. Trustees can therefore only settle or resettle by authority of the beneficiaries.

The question is, by what process in the present case is it proposed that the property over which the power of advancement extends is to be made subject to the trusts of the new settlement? If the trustees were the beneficial owners of the trust property they could transfer it directly to the trustees of the new settlement to hold it on the trusts of that settlement. The only other way whereby the trustees could achieve that object would be if the testator's will contained a power to create new or other trusts in respect of the property over which the power of advancement extends. This is in effect what the trustees wish to do but they have no power to do so.

It is necessary to ascertain whether the proposed transaction is effected by one or two steps. The power in so far as it enables trustees to terminate a settlement made in favour of a beneficiary can be done over the head of the beneficiary, but trustees have no power to *resettle* property over the head of the beneficiary.

The argument for the appellants inevitably depends on construing the power of advancement as a power of appointing new or other trusts. But nothing resembling such a power is to be found in section 32. Indeed, in the view of the

Variation of Trusts Act, 1958, it would be most extraordinary if in 1962 it were to be found that the Trustee Act, 1925, contained a power enabling trustees to appoint new or other trusts. [Reference was made to Wolstenholme and Cherry's Conveyancing Statutes, 12th ed.. Vol. 2, p. 1320, side note "Maintenance."] Under the *628 power of advancement trustees can make an infant owner of trust property but they cannot set up new trusts in favour of a person absolutely apart from the infant beneficiary.

Sir Milner Holland Q.C. in reply. What the trustees propose to do was not challenged on the ground that it is not for Penelope's benefit but on the ground that some limitation must be placed on the ambit of section 32. But where is that limitation to be found, for what is proposed is plainly an application of capital moneys. In *In re Halsted's Will Trusts* ⁴⁵ Farwell J. expressly decided that half the trust fund could be raised and settled for the benefit of the plaintiff, his wife and children. If it be said that there is no trace in the reports of an application of this kind for the benefit of an infant it is to be remembered that the reason for such an application is of recent origin. *In re Ropner's Settlement Trusts* ⁴⁶ supports the appellants' contention. As to *In re Aldridge*, ⁴⁷ it is to be observed that the infants whom it was proposed to advance never had an interest in capital under the trusts of the will.

As regards perpetuity, the present question is not covered by authority. If this is a proper exercise of the power of advancement, the fund advanced is taken right out of the trusts and the trusts of the proposed settlement have not to be read back into the will. This is a power given by statute and not by the testator's will.

Their Lordships took time for consideration.

1962. October 8.

LORD REID.

My Lords, I have had the advantage of reading the speech about to be delivered by my noble and learned friend Viscount Radcliffe. I entirely agree with what he says about the application of the rule against perpetuities; but I am only reluctantly persuaded by his reasoning to agree that section 32 of the Trustee Act, 1925, can be applied to the present case. I do not think that it is disputed that the main purpose of the appellants' scheme and its main benefit to the infant Penelope is avoidance of death duties and surtax. This is to be achieved by taking funds out of the testator's estate and resettling them on Penelope and any family she may have by means of a new trust with trust purposes different from those provided by the testator. *629 It may be that one is driven step by step to hold that the power conferred by section 32 to "pay or apply any capital money subject to a trust, for the advancement or benefit ... of any person entitled to the capital of the trust property or of any share thereof whether absolutely or contingently ..." must be interpreted as including power to resettle such money on an infant in such a way as will probably confer considerable financial benefit on her many years hence if she survives. But that certainly seems to me far removed from the apparent purpose of the section and considerably beyond anything which it has hitherto been held to cover.

Nevertheless I am compelled to recognise that there is no logical stopping place short of that result. You cannot say that financial benefit from avoidance of taxation is not a benefit within the meaning of the section. Nor can you say that the section only authorises payments for some particular or immediate purpose or that the benefit must be immediate and

certain and not future or problematical. and again you cannot say that the beneficiary must consent to the course which the trustees have decided is for his benefit for that would rule out all payments where the beneficiary is under age.

I have more difficulty about the resettlement. My difficulty does not arise from the rule delegates non potest delegare for if the section authorises the creation of a new trust it must do so by writing into the testator's will authority to his trustees to do this: and new trust purposes almost inevitably mean that in certain events certain persons will take benefit who were not beneficiaries under the testator's will. But I think that the cases show that it is too late now to say that this power can never authorise trustees to convey funds to new trustees to hold for new trust purposes: to say that might endanger past transactions done on the faith of these authorities.

If that be so, then I must hold that, if trustees genuinely and reasonably believe that it is for the benefit of a beneficiary contingently entitled to a share of capital to resettle a sum not exceeding half of his prospective share, they are empowered to do so in ways which do not infringe the rule against perpetuities. To draw a line between one class of case and another would be legislating and not proceeding on an interpretation of the existing statutory power.

I realise that this case opens a wide door and that many other trustees may seek to take advantage of it. But if it is thought that the power which Parliament has conferred is likely to be used *630 in ways of which Parliament does not approve then it is for Parliament to devise appropriate restrictions of the power.

I agree that this appeal must be allowed.

LORD HODSON.

My Lords, the opinion which I am about to read is that of my noble and learned friend Viscount Radcliffe who is unable to be present today.

VISCOUNT RADCLIFFE.

My Lords, this is a difficult case, and at first impression I would not have expected to find it so hard to return a certain answer to a question concerned with the time-honoured and much used power of advancement, long inserted in settlements of personality and now applied to all such settlements made since 1925 by virtue of section 32 of the Trustee Act of that year.

Fortunately, the facts themselves are of contrasting simplicity. Here we have one of the two appellants, Miss Penelope Pilkington, spinster and an infant still only of some 5½ years of age, who belongs evidently to a family of some substance and is entitled to a contingent reversionary interest in a trust fund set up by the will of her father's uncle, William Norman Pilkington. Her father, Richard Godfrey Pilkington, the other appellant, is entitled during his life to the income of a share of that trust fund (the share is said to be worth some £90,000) and after his death, subject to the possible exercise of certain powers to which I will refer in a moment, his share is to be held in trust for his children attaining 21 or, if female, marrying under that age and, if more than one, in equal shares. The father is, I believe, now about 43 years of

age and is married, and Miss Penelope has at present a small sister and a small brother, both presumptively entitled to a portion of his share when it falls into possession and, of course, other children may come into existence to add to the number of possible inheritors.

It is obvious, I think, that as things stand today and are likely to stand for some time to come, Miss Penelope is very far from having any certain or assured rights to any part of this trust fund. If she were to die under 21 unmarried she would take nothing, except in the contingency of her father having previously exercised his special power of appointment in her favour. On the other hand, since this power of appointment extends to all the children or issue of his marriage, an exercise of it by him at any time might exclude her from any interest in his share of the fund or alternatively might reduce her interest to any extent. *631 Powers of appointment apart, her presumptive one-third of his share is variable according to the number of her brothers and sisters, existing or born hereafter, who may ultimately become entitled to divide her father's share with her. There is a separate contingency that this share may never descend to his children at all, because under a special clause of the testator's will (clause 13 (J)) his trustees have power to revoke the trusts affecting the share and transfer it outright to the father for his own absolute use. This would cut out Miss Penelope altogether. Her title to any capital in the trust fund is therefore both contingent and diffusible. So far as concerns rights to derive any income from it, nothing can come to her so long as her father is alive (unless he forfeits his interest and so brings into operation a discretionary trust, under which she might receive some payments) and even after his death her right to income may be further deferred if he appoints a life interest, as he has power to do, to a surviving wife.

Now what the trustees of the testator's will, the second respondents, are proposing to do, if they lawfully can, is to take a sum of about £7,600 or investments of equivalent value out of Miss Penelope's expectant share (I do not think that it can make any difference whether they actually realise the sum or merely appropriate existing investments) and set it apart for her upon the trusts of a new settlement for her benefit which is to be brought into existence for the purpose by her great-uncle, the respondent Guy Reginald Pilkington. The first trustees of this proposed new settlement are intended to be the same persons as the will trustees, but again I do not think that anything turns on this, nor has anyone suggested that it does. What matters is that there are new trusts, not that there are old trustees.

The trusts of the new settlement can be sufficiently stated as follows. Until Miss Penelope is 21, the trustees are to apply the income of her trust fund for her maintenance, education or benefit and to accumulate any unexpended balance. When she attains 21, the income is to be held on protective trusts for her until she is 30, and if she attains 30 the capital and income are to be hers absolutely. If she dies before that age leaving children surviving her, those children take her share: but if she does not leave any such children, her share is to go over to such of her brothers and sisters as attain 21 or being female marry, with an ultimate gift over back to the testator's residuary trust fund. Under this new settlement, therefore, Miss Penelope could not take a capital share unless and until she attained the age of 30.

*632

The trustees are satisfied that if money were thus raised out of her expectant share and settled on these trusts its disposition would be for her benefit. They are able to analyse under various heads the ways in which her situation in life would be improved by having part of her prospective share withdrawn from the shadow of the contingencies or defeasances that might defeat it and secured as provision for herself and, it may be, her children. When one compares her situation under the proposed arrangement with her existing situation it is very natural to conclude that the give and take results to her advantage: but, apart from the actual variation of interests, the trustees have also to take into account the incidence of death duties, a very present matter of consideration for all who have interests in settled property. If she must wait to come into her share until it passes on her father's death, it will be reduced by the payment of duty on its capital value and, under our eccentric system of determining the rate on separate funds by aggregating the values of all properties passing on death in any form, that rate may well be a heavy one. On the other hand, if this settlement is made,

her fund will, it is thought, become free from duty on her father's death if he survives the making by five years. There are, too, more sophisticated calculations, derived from tax experts, which show that the net income resulting from the investments that are to form her fund will be considerably larger if it accrues to her trustees on her behalf than if it came to her father and he had to maintain her.

I am not sure how much independent weight I should give to the last consideration, but that does not matter, because the fact is that from beginning to end of these proceedings it has not been in dispute that the proposed arrangement can properly be described as being for the benefit of Miss Penelope or, more accurately, since the trustees have not surrendered their discretion to the court but merely wish to know whether they have power to exercise it in the way outlined, that it is open to them honestly to entertain this view. What she herself thinks about it all is, of course, at present unascertainable, since she has other concerns with which to occupy herself, but it is at any rate permissible to expect that, when she brings her mind to bear on these matters in more mature years, she will regard the provision now being planned for her and her possible offspring as having been on the whole to her advantage and will be grateful for the forethought that has established her so early in life as a lady of independent means.

*633

Why, then, would it not be lawful for the trustees to exercise their statutory power of advancement in the manner proposed? Danckwerts J., who heard their originating summons in the High Court, seems to have felt no doubt that they had the necessary authority. The first respondents, the Commissioners of Inland Revenue, refused however to accept that his conclusion was correct and, with their consent, they were made parties to the proceedings for the purposes of an appeal. The Court of Appeal unanimously upheld their objection and reversed the order of Danckwerts J. I must notice later the reason for the Court of Appeal's decision: but it does not, I think, coincide with the general position adopted by the commissioners on the legal question, nor was any active attempt made to support it in argument before this House.

The commissioners' main propositions (there is a subsidiary point about the application of the rule against perpetuities which I will deal with later) centre round the construction which, they say, must be given to the words of section 32 of the Trustee Act, 1925. In fact, to me it seems that their several propositions are little more than different ways of illustrating the inherent limitation which they find in or extract from the words of the section. It is necessary, therefore, to begin by saying something about the form and nature of what is known as the power of advancement.

No one doubts that such a power was frequently conferred upon trustees under settlements of personality and that its general purpose was to enable them in a proper case to anticipate the vesting in possession of an intended beneficiary's contingent or reversionary interest by raising money on account of his interest and paying or applying it immediately for his benefit. By so doing they released it from the trusts of the settlement and accelerated the enjoyment of his interest (though normally only with the consent of a prior tenant for life); and, where the contingency upon which the vesting of the beneficiary's title depended failed to mature or there was a later diffuseness or, in some cases, a great shrinkage in the value of the remaining trust funds, the trusts as declared by the settlement were materially varied through the operation of the power of advancement. This possibility was recognised and accepted as an incidental risk attendant upon the exercise of such a power, whose presence was felt on the whole to be advantageous in a system in which the possession of property interests was often deferred long beyond adult years.

*634

No one disputes either that, when section 32 was framed and inserted in the Trustee Act of 1925 as a general enabling provision applying to trusts coming into existence after that date, it was expressed in terms that corresponded closely with the previous common form recommended in books of convincing precedents and adopted in practice. I do not see

any particular importance in this circumstance apart from the fact that it makes it the more natural to refer to what had been said in earlier reported decisions that bear upon the meaning and range of a power of advancement.

The word "advancement" itself meant in this context the establishment in life of the beneficiary who was the object of the power or at any rate some step that would contribute to the furtherance of his establishment. Thus it was found in such phrases as "preferment or advancement" (*Lowther v. Bentinck* ⁴⁸ , "business, profession, or employment or ... advancement or preferment in the world" (*Roper-Curzon v. Roper-Curzon* ⁴⁹ and "placing out or advancement in life" (*In re Breeds' Will* ⁵⁰ . Typical instances of expenditure for such purposes under the social conditions of the nineteenth century were an apprenticeship or the purchase of a commission in the army or of an interest in business. In the case of a girl there could be advancement on marriage (*Lloyd v. Cocker* ⁵¹ . Advancement had, however, to some extent a limited range of meaning, since it was thought to convey the idea of some step in life of permanent significance, and accordingly, to prevent uncertainties about the permitted range of objects for which moneys could be raised and made available, such words as "or otherwise for his or her benefit" were often added to the word "advancement." It was always recognised that these added words were "large words" (see *Jessel M.R. in In re Breeds' Will* ⁵² and indeed in another case (*Lowther v. Bentinck* ⁵³ the same judge spoke of preferment and advancement as being "both large words" but of "benefit" as being the "largest of all." So, too, *Kay J. in In re Brittlebank* ⁵⁴ . Recent judges have spoken in the same terms - see *Farwell J. in In re Halsted's Will Trusts* ⁵⁵ and *Danckwerts J. in In re Moxon's Will Trusts* ⁵⁶ . This wide construction of the range of the power, which evidently did not stand upon niceties of distinction provided that the proposed application could fairly be regarded as for the benefit *635 of the beneficiary who was the object of the power, must have been carried into the statutory power created by section 32, since it adopts without qualification the accustomed wording "for the advancement or benefit in such manner as they may in their absolute discretion think fit."

So much for "advancement," which I now use for brevity to cover the combined phrase "advancement or benefit." It means any use of the money which will improve the material situation of the beneficiary. It is important, however, not to confuse the idea of "advancement" with the idea of advancing the money out of the beneficiary's expectant interest. The two things have only a casual connection with each other. The one refers to the operation of finding money by way of anticipation of an interest not yet absolutely vested in possession or, if so vested, belonging to an infant: the other refers to the status of the beneficiary and the improvement of his situation. The power to carry out the operation of anticipating an interest is not conferred by the word "advancement" but by those other words of the section which expressly authorise the payment or application of capital money for the benefit of a person entitled "whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion," etc.

I think, with all respect to the commissioners, a good deal of their argument is infected with some of this confusion. To say, for instance, that there cannot be a valid exercise of a power of advancement that results in a deferment of the vesting of the beneficiary's absolute title (*Miss Penelope*, it will be remembered, is to take at 30 under the proposed settlement instead of at 21 under the will) is in my opinion to play upon words. The element of anticipation consists in the raising of money for her now before she has any right to receive anything under the existing trusts: the advancement consists in the application of that money to form a trust fund, the provisions of which are thought to be for her benefit. I have not forgotten, of course, the references to powers of advancement which are found in such cases as *In re Joicey* ⁵⁷ *In re May's Settlement* ⁵⁸ and *In re Mewburn's Settlement* ⁵⁹ to which our attention was called, or the answer supplied *636 by *Cotton L.J. in In re Aldridge* ⁶⁰ to his own question "What is advancement?"; but I think that it will be apparent from what I have already said that the description that he gives (it cannot be a definition) is confined entirely to the

aspect of anticipation or acceleration which renders the money available and not to any description or limitation of the purposes for which it can then be applied.

I have not been able to find in the words of section 32, to which I have now referred, anything which in terms or by implication restricts the width of the manner or purpose of advancement. It is true that, if this settlement is made, Miss Penelope's children, who are not objects of the power, are given a possible interest in the event of her dying under 30 leaving surviving issue. But if the disposition itself, by which I mean the whole provision made, is for her benefit, it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise. Thus a man's creditors may in certain cases get the most immediate advantage from an advancement made for the purpose of paying them off, as in *Lowther v. Bentinck* ⁶¹; and a power to raise money for the advancement of a wife may cover a payment made direct to her husband in order to set him up in business (*In re Kershaw's Trusts* ⁶²), The exercise will not be bad therefore on this ground.

Nor in my opinion will it be bad merely because the moneys are to be tied up in the proposed settlement. If it could be said that the payment or application permitted by section 32 cannot take the form of a settlement in any form but must somehow pass direct into or through the hands of the object of the power, I could appreciate the principle upon which the commissioners' objection was founded. But can that principle be asserted? Anyone can see, I think, that there can be circumstances in which, while it is very desirable that some money should be raised at once for the benefit of an owner of an expectant or contingent interest, it would be very undesirable that the money should not be secured to him under some arrangement that will prevent him having the absolute disposition of it. I find it very difficult to think that there is something at the back of section 32 which makes such an advancement impossible. Certainly neither **637 Danckwerts J.* nor the members of the Court of Appeal in this case took that view. Both Lord Evershed M.R. and Upjohn L.J. ⁶³ explicitly accept the possibility of a settlement being made in exercise of a power of advancement. Farwell J. authorised one in *In re Halsted's Will Trusts*, ⁶⁴ a case in which the trustees had left their discretion to the court. The trustees should raise the money and "have" it "settled," he said. So too, Harman J. in *In re Ropner's Settlement Trusts* ⁶⁵ authorised the settlement of an advance provided for an infant, saying that the child could not "consent or request the trustees to make the advance, but the transfer of a part of his contingent share to the trustees of a settlement for him must advance his interest and thus be for his benefit ..." All this must be wrong in principle if a power of advancement cannot cover an application of the moneys by way of settlement.

The truth is, I think, that the propriety of requiring a Settlement of moneys found for advancement was recognised as long ago as 1871 in *Roper-Curzon v. Roper-Curzon* ⁶⁶ and, so far as I know, it has not been impugned since. Lord Romilly M.R.'s decision passed into the textbooks and it must have formed the basis of a good deal of subsequent practice. True enough, as counsel for the commissioners has reminded us, the beneficiary in that case was an adult who was offering to execute the post-nuptial settlement required: but I find it impossible to read Lord Romilly's words as amounting to anything less than a decision that he would permit an advancement under the power only on the terms that the money was to be secured by settlement. That was what the case was about. If, then, it is a proper exercise of a power of advancement for trustees to stipulate that the money shall be settled, I cannot see any difference between having it settled that way and having it settled by themselves paying it to trustees of a settlement which is in the desired form.

It is not as if anyone were contending for a principle that a power of advancement cannot be exercised "over the head" of a beneficiary, that is, unless he actually asks for the money to be raised and consents to its application. From some points of view that might be a satisfactory limitation, and no doubt it is the way in which an advancement takes place in the great majority of cases. But, if application and consent were necessary requisites of advancement, that would cut out the

possibility of making *638 any advancement for the benefit of a person under age, at any rate without the institution of court proceedings and formal representation of the infant: and it would mean, moreover, that the trustees of an adult could not in any Circumstances insist on raising money to pay his debts, however much the operation might be to his benefit, unless he agreed to that course. Counsel for the commissioners did not contend before us that the power of advancement was inherently limited in this way: and I do not think that such a limitation would accord with the general understanding. Indeed its "paternal" nature is well shown by the fact that it is often treated as being peculiarly for the assistance of an infant.

The commissioners' objections seem to be concentrated upon such propositions as that the proposed transaction is "nothing less than a resettlement" and that a power of advancement cannot be used so as to alter or vary the trusts created by the settlement from which it is derived. Such a transaction, they say, amounts to using the power of advancement as a way of appointing or declaring new trusts different from those of the settlement. The reason why I do not find that these propositions have any compulsive effect upon my mind is that they seem to me merely vivid ways of describing the substantial effect of that which is proposed to be done and they do not in themselves amount to convincing arguments against doing it. Of course, whenever money is raised for advancement on terms that it is to be settled on the beneficiary, the money only passes from one settlement to be caught up in the other. It is therefore the same thing as a resettlement. But, unless one is to say that such moneys can never be applied by way of settlement, an argument which, as I have shown, has few supporters and is contrary to authority, it merely describes the inevitable effect of such an advancement to say that it is nothing less than a resettlement. Similarly, if it is part of the trusts and powers created by one settlement that the trustees of it should have power to raise money and make it available for a beneficiary upon new trusts approved by them, then they are in substance given power to free the money from one trust and to subject it to another. So be it: but, unless they cannot require a settlement of it at all, the transaction they carry out is the same thing in effect as an appointment of new trusts.

In the same way I am unconvinced by the argument that the trustees would be improperly delegating their trust by allowing the money raised to pass over to new trustees under a settlement *639 conferring new powers on the latter. In fact I think that the whole issue of delegation is here beside the mark. The law is not that trustees cannot delegate: it is that trustees cannot delegate unless they have authority to do so. If the power of advancement which they possess is so read as to allow them to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises. If, on the other hand, their power of advancement is read so as to exclude settled advances, *cadit quaestio*.

I ought to note for the record (1) that the transaction envisaged does not actually involve the raising of money, since the trustees propose to appropriate a block of shares in the family's private limited company as the trust investment, and (2) there will not be any actual transfer, since the trustees of the proposed settlement and the will trustees are the same persons. As I have already said, I do not attach any importance to these factors nor, I think, do the commissioners. To transfer or appropriate outright is only to do by short cut what could be done in a more roundabout way by selling the shares to a consenting party, paying the money over to the new settlement with appropriate instructions and arranging for it to be used in buying back the shares as the trust investment. It cannot make any difference to follow the course taken in *In re Collard's Will Trusts* ⁶⁷ and deal with the property direct. On the other point, so long as there are separate trusts, the property effectually passes out of the old settlement into the new one, and it is of no relevance that, at any rate for the time being, the persons administering the new trust are the same individuals.

I have not yet referred to the ground which was taken by the Court of Appeal as their reason for saying that the proposed settlement was not permissible. To put it shortly, they held that the statutory power of advancement could not be

exercised unless the benefit to be conferred has "personal to the person concerned, in the sense of being related to his or her own real or personal needs." ⁶⁸ Or, to use other words of the learned Master of the Rolls, ⁶⁹ the exercise of the power "must be an exercise done to meet the circumstances as they present themselves in regard to a person within the scope of the section, whose circumstances *640 call for that to be done which the trustees think fit to do." Upjohn L.J. ⁷⁰ expressed himself in virtually the same terms.

My Lords, I differ with reluctance from the views of judges so learned and experienced in matters of this sort: but I do not find it possible to import such restrictions into the words of the statutory power which itself does not contain them. First, the suggested qualification, that the considerations or circumstances must be "personal" to the beneficiary, seems to me uncontrollably vague as a guide to general administration. What distinguishes a personal need from any other need to which the trustees in their discretion think it right to attend in the beneficiary's interest? And, if the advantage of preserving the funds of a beneficiary from the incidence of death duty is not an advantage personal to that beneficiary, I do not see what is. Death duty is a present risk that attaches to the settled property in which Miss Penelope has her expectant interest, and even accepting the validity of the supposed limitation, I would not have supposed that there was anything either impersonal or unduly remote in the advantage to be conferred upon her of some exemption from that risk. I do not think, therefore, that I can support the interpretation of the power of advancement that has commended itself to the Court of Appeal, and, with great respect, I think that the judgments really amount to little more than a decision that in the opinion of the members of that court this was not a case in which there was any occasion to exercise the power. That would be a proper answer from a court to which trustees had referred their discretion with a request for its directions; but it does not really solve any question where, as here, they retain their discretion and merely ask whether it is impossible for them to exercise it.

To conclude, therefore, on this issue, I am of opinion that there is no maintainable reason for introducing into the statutory power of advancement a qualification that would exclude the exercise in the case now before us. It would not be candid to omit to say that, though I think that that is what the law requires, I am uneasy at some of the possible applications of this liberty, when advancements are made for the purposes of settlement or on terms that there is to be a settlement. It is quite true, as the *641 commissioners have pointed out, that you might have really extravagant cases of resettlements being forced on beneficiaries in the name of advancement, even a few months before an absolute vesting in possession would have destroyed the power. I have tried to give due weight to such possibilities, but when all is said I do not think that they ought to compel us to introduce a limitation of which no one, with all respect, can produce a satisfactory definition. First, I do not believe that it is wise to try to cut down an admittedly wide and discretionary power, enacted for general use, through fear of its being abused in certain hypothetical instances. and moreover, as regards this fear, I think that it must be remembered that we are speaking of a power intended to be in the hands of trustees chosen by a settler because of his confidence in their discretion and good sense and subject to the external check that no exercise can take place without the consent of a prior life-tenant; and that there does remain at all times a residual power in the court to restrain or correct any purported exercise than can be shown to be merely wanton or capricious and not to be attributable to a genuine discretion. I think, therefore, that, although extravagant possibilities exist, they may be more menacing in argument than in real life.

The other issue on which this case depends, that relating to the application of the rule against perpetuities, does not seem to me to present much difficulty. It is not in dispute that, if the limitations of the proposed settlement are to be treated as if they had been made by the testator's will and as coming into operation at the date of his death, there are trusts in it which would be void ab initio as violating the perpetuity rule. They postpone final vesting by too long a date. It is also a familiar rule of law in this field that, whereas appointments made under a general power of appointment conferred by will or deed are read as taking effect from the date of the exercise of the power, trusts declared by a special power of appointment, the distinguishing feature of which is that it can allocate property among a limited class of persons only,

are treated as coming into operation at the date of the instrument that creates the power. The question therefore resolves itself into asking whether the exercise of a power of advancement which takes the form of a settlement should be looked upon as more closely analogous to a general or to a special power of appointment.

On this issue I am in full agreement with the views of Upjohn *642 L.J. in the Court of Appeal.⁷¹ Indeed, much of the reasoning that has led me to my conclusion on the first issue that I have been considering leads me to think that for this purpose there is an effective analogy between powers of advancement and special powers of appointment. When one asks what person can be regarded as the settler of Miss Penelope's proposed settlement, I do not see how it is possible to say that she is herself or that the trustees are. She is the passive recipient of the benefit extracted for her from the original trusts; the trustees are merely exercising a fiduciary power in arranging for the desired limitations. It is not their property that constitutes the funds of Miss Penelope's settlement; it is the property subjected to trusts by the will of the testator and passed over into the new settlement through the instrumentality of a power which by statute is made appendant to those trusts. I do not think, therefore, that it is important to this issue that money raised under a power of advancement passes entirely out of the reach of the existing trusts and makes, as it were, a new start under fresh limitations, the kind of thing that happened under the old form of family resettlement when the tenant in tail in remainder barred the entail with the consent of the protector of the settlement. I think that the important point for the purpose of the rule against perpetuities is that the new settlement is only effected by the operation of a fiduciary power which itself "belongs" to the old settlement.

In the conclusion, therefore, there are legal objections to the proposed settlement which the trustees have placed before the court. Again I agree with Upjohn L.J. that these objections go to the root of what is proposed and I do not think that it would be satisfactory that the court should try to frame a qualified answer to the question that they have propounded, which would express the general view that the power to advance by way of a settlement of this sort does exist and the special view that the power to make this particular settlement does not. Nor I think, is such a course desired either by the appellants or the trustees. They will, I hope, know where they stand for the future, and so will the commissioners, and that is enough.

LORD HODSON.

My Lords, my noble and learned friends who are also unable to be present today, Lord Jenkins and Lord *643 Devlin, are in full agreement with the opinion which I have just read and I am also in the same agreement.

Representation

Solicitors: Alsop, Stevens, Beck & Co. ; Solicitor of Inland Revenue .

Order of the Court of Appeal in part complained of discharged except as to costs. Declared that the application of the capital proposed by the respondents, the trustees of the will of William Norman Pilkington, deceased, would be improper and unauthorised because the trusts of the new settlement if contained in the said will would be void for perpetuity. Further ordered that the respondents the Commissioners of Inland Revenue do pay, or cause to be paid, to the appellants the costs incurred by them in respect of the said appeal to this House, such costs to be taxed as between solicitor and client. Further ordered that the costs incurred by the respondents [the trustees of the will] in respect of the said appeal to this House be paid out of the estate of the said testator William Norman Pilkington, deceased, such costs to be taxed as between solicitor and client. (J. A. G.)

Footnotes

- 1 Trustee Act, 1925, s. 32: "(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property ... Provided that - (a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property ..."
- 2 [1961] Ch. 466; [1961] 2 W.L.R. 776; [1961] 2 All E.R. 330, C.A.
- 3 [1904] 1 Ch. 480.
- 4 [1915] 2 Ch. 115, C.A.
- 5 (1871) L.R. 11 Eq. 452.
- 6 (1874) L.R. 19 Eq. 166.
- 7 (1868) L.R. 6 Eq. 322.
- 8 [1937] 2 All E.R. 570.
- 9 L.R. 19 Eq. 166.
- 10 [1961] Ch. 466, 486.
- 11 L.R. 11 Eq. 452.
- 12 [1937] 2 All E.R. 570.
- 13 [1956] 1 W.L.R. 902, 904, 905; [1956] 3 All E.R. 332.
- 14 [1961] Ch. 466, 480, 481, 484.
- 15 (1881) 30 W.R. 99.
- 16 [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821.
- 17 [1915] 2 Ch. 115, C.A.
- 18 L.R. 11 Eq. 452.
- 19 (1854) 19 Beav. 529, 534, 535.
- 20 (1858) 4 K. & J. 142.
- 21 [1904] 1 Ch. 480.
- 22 [1961] Ch. 466, 488, 489.
- 23 [1913] 1 Ch. 404, 413; 29 T.L.R. 306, C.A.
- 24 [1938] Ch. 39; 53 T.L.R. 1036; [1937] 3 All E.R. 823, C.A.
- 25 L.R. 11 Eq. 452.
- 26 [1958] 1 W.L.R. 165; [1958] 1 All E.R. 386.
- 27 [1959] Ch. 699, 705, 706.
- 28 (1886) 55 L.T. 554, 556, C.A.
- 29 [1951] 2 All E.R. 528, C.A.
- 30 [1951] 2 All E.R. 528, 532.
- 31 [1962] Ch. 273, 275, 287; [1961] 3 W.L.R. 825; [1961] 3 All E.R. 389, C.A.
- 32 19 Beav. 529, 535, 536.
- 33 11 Eq. 452.
- 34 [1937] 2 All E.R. 570.
- 35 [1915] 2 Ch. 115, 120, C.A.
- 36 [1934] Ch. 112.
- 37 [1926] Ch. 136.
- 38 [1913] 1 K.B. 83, 90, C.A.
- 39 [1936] Ch. 161.
- 40 [1951] Ch. 209; [1950] 2 All E.R. 891, C.A.
- 41 [1954] Ch. 334, 340, 341; [1954] 2 W.L.R. 386; [1954] 1 All E.R. 725.
- 42 [1956] 1 W.L.R. 902.
- 43 L.R. 19 Eq. 166.
- 44 L.R. 6 Eq. 322.
- 45 [1937] 2 All E.R. 570, 572.
- 46 [1956] 1 W.L.R. 902.
- 47 55 L.T. 554.
- 48 (1874) L.R. 19 Eq. 166.
- 49 (1871) L.R. 11 Eq. 452.
- 50 (1875) 1 Ch.D. 226.

- 51 (1860) 27 Beav. 645 .
52 1 Ch.D. 226 , 228.
53 L.R. 19 Eq. 166 , 169.
54 (1881) 30 W.R. 99 , 100.
55 [1937] 2 All E.R. 570 , 671.
56 [1958] 1 W.L.R. 165, 168; [1958] 1 All E.R. 386 .
57 [1915] 2 Ch. 115, C.A.
58 [1926] Ch. 136 .
59 [1934] Ch. 112 .
60 (1886) 55 L.T. 554, 556, C.A. : "It is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy, before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled."

61 L.R. 19 Eq. 166 .
62 (1868) L.R. 6 Eq. 322 .
63 [1961] Ch. 466 , 481, 486.
64 [1937] 2 All E.R. 570 , 572.
65 [1956] 1 W.L.R. 902 , 906.
66 L.R. 11 Eq. 452 .
67 [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 .
68 [1961] Ch 466 , 481.
69 Ibid. 484.
70 [1961] Ch 466 , 487.
71 [1961] Ch. 466 . 488 et seq.

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[1964] A.C. 612

End of Document

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Tab A 04

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

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

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

APPLICANT in this Application: OFFICE OF THE PUBLIC TRUSTEE OF
ALBERTA

RESPONDENT in this Application: THE SAWRIDGE FIRST NATION

QUESTIONING ON AFFIDAVIT

OF

PAUL BUJOLD

E. H. Molstad, Q.C. For Sawridge First Nation
D. C. E. Bonora, Ms. For Sawridge Trustees
J. L. Hutchison, Ms. For Office of the Public
Trustee of Alberta
Allison Hawkins, CSR(A) Court Reporter

Edmonton, Alberta
July 27, 2016

INDEX OF UNDERTAKINGS

(Undertakings are provided for your assistance. Counsel's records may differ. Please check to ensure that all undertakings have been listed according to your records.)

NO. DESCRIPTION PAGE

1 Advise what the value of the Trust was 39
in 2015, as well as the value of the
Trust today.

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COURT: COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE: EDMONTON
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Sawridge Trust
APPLICANT in this OFFICE OF THE PUBLIC TRUSTEE OF
Application: ALBERTA
RESPONDENT in this THE SAWRIDGE FIRST NATION
Application:

QUESTIONING ON AFFIDAVIT
OF
PAUL BUJOLD

E. H. Molstad, Q.C. For Sawridge First Nation
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INDEX

QUESTIONING OF PAUL BUJOLD PAGE

Questioned by Mr. E. H. Molstad 5
Questioned by Ms. D. C. E. Bonora: 78

INDEX OF EXHIBITS

NO. DESCRIPTION PAGE

1 Letter dated June 17th, 2016, from 11
Hutchison Law
2 Letter from Parlee McLaws addressed to 12
Ms. Hutchison setting out the schedule
agreed to between the Office of the
Public Trustee and Sawridge First Nation
3 Email from Hutchison Law dated July 7th, 13
2016, with a letter attached to it
4 Letter without enclosures from Parlee 14
McLaws to Hutchison Law, Ms. Hutchison,
on behalf of the Public Trustee
5 Email from Ms. Bonora attaching a draft 28
of the clarification on the transfer
issued for review and comments
6 Letter from Mr. Poretti to Ms. Hutchison 29
and McLennan Ross dated July 26, 2016,
enclosing a proposed consent order
7 Order of Mr. Justice Thomas, signed by 73
all counsel in the proceedings
8 Copy of letter sent to the Public 77
Trustee dated July 27, 2016

1 PAUL BUJOLD, SWORN AT 9:37 A.M.,
 2 QUESTIONED BY MR E. H. MOLSTAD:
 3 Q MR. MOLSTAD: So I -- first of all, I
 4 thought I'd just explain why we're here. The --
 5 Mr. Bujold, the questioning today is in relation to
 6 your affidavits and the evidence that the Public
 7 Trustee has tendered and purports to rely upon in
 8 their applications, pursuant to rule 5.13,
 9 compelling the Sawridge First Nation to produce
 10 documents, and Sawridge First Nation is named as a
 11 respondent in these two applications, and I, of
 12 course, represent Sawridge First Nation.
 13 MR. MOLSTAD: And I understand,
 14 Ms. Hutchison, that you want to make a statement
 15 for the record?
 16 MS. HUTCHISON: Yes. Thank you very much,
 17 Mr. Molstad. Just wanted to make note of the fact
 18 that as of this morning, there has been an
 19 agreement on the trustees' clarification on assets
 20 consent order, and in light of that consent order
 21 being finalized, and -- and assuming, I should say,
 22 that it is finalized, the Public Trustee's
 23 instructions are to withdraw their rule 5.13
 24 application on assets, so that will change the
 25 scope of the 5.13 applications before the Court.
 26 And, Mr. Molstad, the other --
 27 the other point we just wanted to put on the

1 record, we're not entirely clear about what the
 2 proposed scope of the questioning is today. Rather
 3 than waste anyone's time and resources on multiple
 4 objections or interruptions, we're -- we're going
 5 to attend and listen, and we'll review the
 6 transcript after the fact. Please don't take our
 7 silence as an acceptance that the evidence is
 8 relevant or even admissible, but we'll address
 9 those issues to the Court, as opposed to raising
 10 individual objections to the questions.
 11 MR. MOLSTAD: That's fine. Likewise, the
 12 evidence that you have tendered is, in our
 13 respectful submission, in many respects,
 14 inadmissible, but unfortunately, from our
 15 perspective, much of it is incorrect, and so we
 16 will have to put questions to this witness to
 17 correct that evidence, but I understand your
 18 position.
 19 In terms of the comments you
 20 made about the consent order, as I understand it,
 21 and I want to be clear, I understood you to say
 22 that assuming the consent order is agreed to and
 23 ultimately filed, which Sawridge First Nation has
 24 no control over, you will then withdraw your
 25 application; is that correct?
 26 MS. HUTCHISON: Mr. Molstad, to be clear, my
 27 understanding is that we haven't secured consent

1 from Trustee Twinn at this point in time. So if it
 2 were a situation where the consent order could not
 3 go forward because of Trustee Twinn's lack of
 4 consent, it could affect what the OPGT does with
 5 the 5.13 assets application. Although, frankly, I
 6 would hope that the other parties would proceed to
 7 present that order to the Court and ask it for
 8 endorsement, in which case the OPGT would still be
 9 withdrawing its 5.13 application. I'm hopeful that
 10 with or without Trustee Twinn's consent, that order
 11 that everyone's worked quite hard to prepare, would
 12 be presented to the Court. So as long as there's
 13 no issue that the consent order on asset
 14 clarification is presented to the Court on August
 15 21st -- or 24th for approval, the assets
 16 application -- the 5.13 assets application will be
 17 withdrawn.
 18 I -- and perhaps we can ask --
 19 I realize we're all dealing with this sort of on
 20 short notice this morning. Ms. Bonora, would you
 21 agree that we would present that order to the Court
 22 regardless of Trustee Twinn's consent?
 23 MS. BONORA: Yes. I -- we're very happy to
 24 have your consent, and -- on that order, and we
 25 would be prepared to go ahead and join forces to
 26 say that should go ahead, even if Catherine Twinn
 27 objected, we'd leave her to make her objections, if

1 she decided to do that.
 2 MS. HUTCHISON: Okay. So, Mr. Molstad, on
 3 that basis, we are withdrawing our 5.13 assets
 4 application. Everyone in this room is agreed on
 5 the assets clarification.
 6 MR. MOLSTAD: So --
 7 MS. HUTCHISON: And I will -- I will confirm
 8 that in a letter to counsel and the Court once I'm
 9 not sitting at this boardroom table.
 10 MR. MOLSTAD: Yeah. And -- and when you say
 11 you're withdrawing the 5.13 application, in
 12 relation to the asset transfer?
 13 MS. HUTCHISON: To the asset transfer.
 14 MR. MOLSTAD: Yeah.
 15 MS. HUTCHISON: And as you're aware, the
 16 5.13 application on membership is going forward on
 17 the basis outlined in our correspondence to you,
 18 essentially, a reporting to the Court.
 19 MR. MOLSTAD: Yeah, we'll deal with that.
 20 MS. HUTCHISON: And I will now be quiet,
 21 Mr. Molstad.
 22 MR. MOLSTAD: Okay.
 23 MS. HUTCHISON: This is your transcript, so...
 24 MR. MOLSTAD: All right.
 25 Q MR. MOLSTAD: All right. Mr. Bujold, my
 26 questioning of you today, I will refer to the 1982
 27 Sawridge First Nation Trust as the 1982 Trust, and

1 You'll understand what I'm referring to?
 2 A Yes, I will.
 3 Q And I'll refer to the 1985 Sawridge First Nation
 4 Trust as the 1985 Trust, and you'll understand what
 5 I'm referring to?
 6 A Yes, I will.
 7 Q And I will refer to the 1986 Sawridge First Nation
 8 Trust as the 1986 Trust --
 9 A Okay.
 10 Q -- and you'll understand what I'm referring to?
 11 A I will.
 12 Q And in terms of the trustees of the 1985 Trust and
 13 the 1986 Trust, I will refer to them as the
 14 Sawridge trustees, and that -- you'll understand
 15 what I'm referring to?
 16 A I will.
 17 Q And today we're going to ask you questions in
 18 relation to two affidavits and also evidence that's
 19 been tendered by the Public Trustee. The
 20 affidavits that we're going to be asking questions
 21 in relation to are your affidavit that was sworn on
 22 August 30th, 2011, and filed September 6th, 2011.
 23 Do you have that in front of you?
 24 A Yes, I do.
 25 MR. MOLSTAD: Excuse me just for one moment,
 26 please.
 27 MS. BONORA: Yeah.

1 MR. MOLSTAD: Okay.
 2 Q MR. MOLSTAD: And this affidavit that was
 3 sworn on August 30th, 2011, was sworn by you, sir;
 4 is that correct?
 5 A That's -- that's right, sir.
 6 COURT REPORTER: Sorry?
 7 A That's right, yes.
 8 Q MR. MOLSTAD: And the other affidavit that I
 9 will question on is the affidavit sworn on
 10 September 12th, 2011, filed September 13th, 2011,
 11 and this affidavit you have before you, and it was
 12 sworn by you?
 13 A I do, yes.
 14 Q Yeah. Now, your counsel has provided you with
 15 copies of the correspondence in relation to these
 16 proceedings, as I understand it --
 17 A Yes.
 18 Q -- that have been exchanged between counsel?
 19 A Yes.
 20 Q And -- now, I'm showing you -- I'm showing you a
 21 letter dated June 17th, 2016, from Hutchison Law
 22 addressed to four counsel in relation to these
 23 proceedings. You received a copy of this?
 24 A I did.
 25 MR. MOLSTAD: We would ask that this be
 26 marked as an exhibit, please.
 27

1 EXHIBIT 1:
 2 Letter dated June 17th, 2016, from
 3 Hutchison Law
 4 Q MR. MOLSTAD: So if you could just take a
 5 look at Exhibit 1. Do you have Exhibit 1 in front
 6 of you, sir?
 7 A I do.
 8 Q On page 2 of this letter, you'll see at the top of
 9 the page, Ms. Hutchison indicates that in relation
 10 to the 5.13 application regarding the membership,
 11 the -- the OPGT, which refers to the Public
 12 Trustee, will be filing a brief written submission
 13 on that application and then goes on to say that
 14 the OPGT, which is the Public Trustee, will not be
 15 seeking to file affidavit evidence in relation to
 16 that application and anticipates its submissions
 17 will be relatively brief, similar in length to the
 18 Sawridge First Nation's submissions.
 19 That's the position that was
 20 communicated both to yourself and the Sawridge
 21 First Nation at that time; is that correct?
 22 A That's correct.
 23 Q And if you look at the bottom of the second page of
 24 Exhibit 1, they -- you'll see in the third-last
 25 paragraph, they summarize what they intend to do in
 26 relation to the 5.13 assets application, and in the
 27 last paragraph, they indicate that the Public

1 Trustee will not be filing affidavit evidence in
 2 support of this submission. And, also, they
 3 indicate that they will not be seeking to conclude
 4 Paul Bujold's questioning prior to the August 24th,
 5 2016, hearing, and go on to explain why they take
 6 that position.
 7 This also was a position that
 8 was put to both the Sawridge trustees and Sawridge
 9 First Nation; correct?
 10 A That's correct, yes.
 11 Q Now, the next document I want to take -- take you
 12 to is -- is an email to your counsel, which I'm
 13 showing you now, sir. It's this one. Sorry. And
 14 it's a -- it attaches a letter from Parlee McLaws
 15 addressed to Ms. Hutchison setting out the schedule
 16 agreed to between the Office of the Public Trustee
 17 and Sawridge First Nation. You received a copy of
 18 this, sir, did you?
 19 A I did.
 20 MR. MOLSTAD: I'd like to mark that as the
 21 next exhibit.
 22 EXHIBIT 2:
 23 Letter from Parlee McLaws addressed to
 24 Ms. Hutchison setting out the schedule
 25 agreed to between the Office of the
 26 Public Trustee and Sawridge First Nation
 27 Q MR. MOLSTAD: The next document is an email,

13

1 sorry, which I'm showing you, which is from
 2 Ms. Hutchison's office dated July 7th, 2016, and a
 3 letter attached to it. You received a copy of this
 4 through your counsel; is that correct?

5 A I did.

6 MR. MOLSTAD: Can we mark that as the next
 7 exhibit, please?

8 EXHIBIT 3:
 9 Email from Hutchison Law dated July 7th,
 10 2016, with a letter attached to it

11 Q MR. MOLSTAD: Now, Exhibit 3, which is the
 12 email and the letter, includes a description of the
 13 evidence that the Public Trustee will rely upon in
 14 relation to the 5.13 membership application and the
 15 5.13 assets application; is that correct?

16 A Yes, it does.

17 Q And part of this evidence is in relation to both
 18 applications, answers to undertakings of yourself,
 19 and, specifically, some are certain undertakings.
 20 Do you see that?

21 A Yes.

22 Q And as I understand it, the Public Trustee has not
 23 questioned you at this point in time in relation to
 24 any of these undertakings that you've provided; is
 25 that correct?

26 A That's correct.

27 Q Now, the next document is a letter without the

14

1 enclosures, it should be now, from our offices to
 2 Hutchison Law, Ms. Hutchison, on behalf of the
 3 Public Trustee. It does not have the enclosures in
 4 it. This letter was received -- a copy of it
 5 received by you through your counsel; is that
 6 correct?

7 A That's correct.

8 MR. MOLSTAD: Can we mark that as the next
 9 exhibit, please? Thank you.

10 EXHIBIT 4:
 11 Letter without enclosures from Parlee
 12 McLaws to Hutchison Law, Ms. Hutchison,
 13 on behalf of the Public Trustee

14 Q MR. MOLSTAD: The -- the next document is
 15 a -- an email, but it unfortunately attaches what I
 16 consider to be confidential information, and I'm
 17 just going to ask you some questions about it,
 18 rather than mark it, because of that, Mr. Bujold.
 19 It's an email from Ms. Bonora to Janet Hutchison,
 20 counsel for the Public Trustee, and -- and it
 21 encloses the list -- an updated list of the minors,
 22 and what it provided the Public Trustee with at
 23 that time was a list of the minors with the changes
 24 since 2011, and that would have been as at
 25 April 5th, 2016; correct?

26 A That's correct.

27 Q And it is also noted that eight of the minors

15

1 listed had become adults, and -- and of the eight
 2 that are listed, two would become adults that year;
 3 correct?

4 A That's correct.

5 Q It also indicated there were five new minors;
 6 correct?

7 A That's correct.

8 Q And you indicate in this email that you are only
 9 providing this list to you and Mr. Molstad, as the
 10 minors' personal information is provided, and thus
 11 it's not appropriate to share with all the parties;
 12 correct?

13 A That's correct, yes.

14 Q You state in this email as well that it -- it's
 15 your experience with the Public Trustee that the
 16 Public Trustee will not continue to act for a minor
 17 once they become an adult, and you state that you
 18 assume that that is true in your case, especially
 19 given the December 17th, 2016, directions. And you
 20 ask that the Public Trustee confirm that it will
 21 only be representing the minors on the list in
 22 accordance with that decision and not representing
 23 the adults. That's what you've asked her to
 24 advise; correct?

25 A That's right.

26 Q Did you receive a response to that?

27 A Not that I know of.

16

1 Q Okay. I'll just get that back, then, from you.
 2 I'm not going to -- or you can keep that. It's
 3 your document.

4 So I want to take you now to
 5 the affidavit that was sworn by yourself
 6 August 30th, 2011, and filed September 6, 2011. Do
 7 you have that in front of you?

8 A I do.

9 Q I'd like to direct your attention to paragraphs 10,
 10 11, and 12 of this affidavit, where you describe a
 11 considerable amount of information in relation to
 12 beneficiaries and potential beneficiaries. Do you
 13 see that?

14 A I do.

15 Q Now, did you -- I understand you requested the
 16 assistance from the Sawridge First Nation in
 17 compiling these lists?

18 A I did.

19 Q And can you also confirm that the Sawridge First
 20 Nation cooperated with you fully and provided you
 21 with the information --

22 A It did.

23 Q -- you'd requested?

24 A It did, yes.

25 Q Other than with respect to legislation regarding
 26 protection and privacy, did the Sawridge First
 27 Nation ever refuse to provide you with any

<p style="text-align: center;">17</p> <p>1 information requested?</p> <p>2 A No, they didn't.</p> <p>3 Q Okay. I'll just now turn you to the next</p> <p>4 affidavit, the affidavit of yourself sworn</p> <p>5 September 12th, 2011, and filed September 13th,</p> <p>6 2011. Do you have that in front of you?</p> <p>7 A I do.</p> <p>8 Q In paragraph 1, you state that you're the chief</p> <p>9 executive officer of the Sawridge Trust. You're</p> <p>10 speaking of the 1985 Trust and the 1986 Trust; is</p> <p>11 that correct?</p> <p>12 A That's correct.</p> <p>13 Q And when did you first become chief executive</p> <p>14 officer?</p> <p>15 A In September 2009.</p> <p>16 Q Okay. And in paragraph 3, it -- it states who the</p> <p>17 trustees were of the '85 Trust at that time.</p> <p>18 Who -- who are the trustees of the '85 -- 1985</p> <p>19 Trust today?</p> <p>20 A Bertha L'Hirondelle, Catherine Twinn, Roland Twinn,</p> <p>21 Justin Twin, and Margaret Ward.</p> <p>22 Q Okay. And is Margaret Ward sometimes referred to</p> <p>23 as Peggy Ward?</p> <p>24 A She is.</p> <p>25 Q And in paragraph 4 and 5 of your affidavit, it's</p> <p>26 indicated that the trustees would like to make</p> <p>27 distributions in relation -- or from the 1985 Trust</p>	<p style="text-align: center;">19</p> <p>1 of the documents and all of the information with</p> <p>2 respect to the transfer of the assets from the 1982</p> <p>3 Trust to the 1985 Trust, and that -- in other</p> <p>4 words, you've exhausted your efforts in that</p> <p>5 respect?</p> <p>6 A That's correct.</p> <p>7 Q And all of the documents that you've gathered</p> <p>8 demonstrate that all of the assets of the 1982</p> <p>9 Trust were transferred to the 1985 Trust, and</p> <p>10 that's why you seek the Court's order approving</p> <p>11 that transfer?</p> <p>12 A That's correct.</p> <p>13 Q In paragraph 9 of your affidavit, you make</p> <p>14 reference to Ronald Ewaniuk, CA. Do you know when</p> <p>15 Mr. Ewaniuk first became involved with the 1985</p> <p>16 Trust and the 1986 Trust?</p> <p>17 A I am not sure exactly of the date. I -- I could</p> <p>18 research the documents that I've got to see if I</p> <p>19 can find that.</p> <p>20 Q Yeah. Was it -- you know, he was involved for</p> <p>21 quite some time, though, wasn't he?</p> <p>22 A Yes, he was. He was involved in different</p> <p>23 capacities, so in the early days, he was involved</p> <p>24 as a partner -- as a senior partner of Deloitte --</p> <p>25 Okay.</p> <p>26 A -- Touche.</p> <p>27 Q Yeah.</p>
<p style="text-align: center;">18</p> <p>1 for the benefit of beneficiaries, and concerns have</p> <p>2 been raised on these two matters: One, regarding</p> <p>3 the definition of beneficiaries contained in the</p> <p>4 1985 Trust; and, secondly, the transfer of assets</p> <p>5 into the 1985 Trust.</p> <p>6 And as I understand it, the</p> <p>7 Sawridge trustees are seeking to expand the</p> <p>8 definition of beneficiaries of the 1985 Trust to</p> <p>9 include all members of the Sawridge First Nation?</p> <p>10 A That's correct.</p> <p>11 Q And -- and the purpose of that objective on the</p> <p>12 part of the Sawridge trustees is to eliminate</p> <p>13 discrimination?</p> <p>14 A That's correct.</p> <p>15 Q And, in fact, based upon the definition of the</p> <p>16 beneficiaries of the 1985 Trust, persons who were</p> <p>17 declared by the Court to be members pursuant to</p> <p>18 formally Bill C-31, have been excluded as</p> <p>19 beneficiaries of the 1985 Trust?</p> <p>20 A That's correct because they're women who were</p> <p>21 enfranchised --</p> <p>22 Q Right.</p> <p>23 A -- through marriage.</p> <p>24 Q And in terms of the investigation that you've done</p> <p>25 in reviewing the records and gathering the</p> <p>26 documents that you've gathered, I understand that</p> <p>27 you have satisfied yourself that you have seen all</p>	<p style="text-align: center;">20</p> <p>1 A And later, he was involved as a -- as a consultant.</p> <p>2 Q And when you contacted him and made an effort to</p> <p>3 get what information he had, would it be correct to</p> <p>4 state that it was his information that all of the</p> <p>5 assets of the -- in the 1982 Trust were transferred</p> <p>6 to the 1985 Trust?</p> <p>7 A Yes.</p> <p>8 Q And that was the information of the Sawridge First</p> <p>9 Nation that was provided to you?</p> <p>10 A That's right.</p> <p>11 Q Paragraph 10 of your affidavit sworn</p> <p>12 September 12th, 2011, refers to Exhibit B, and if</p> <p>13 you just go to Exhibit B in the affidavit.</p> <p>14 MS. HUTCHISON: Sorry, Mr. Molstad. Exhibit B</p> <p>15 or D?</p> <p>16 MR. MOLSTAD: B. B as in Bob. Yeah.</p> <p>17 MS. HUTCHISON: Thank you.</p> <p>18 Q MR. MOLSTAD: And you found Exhibit B there?</p> <p>19 A Yes, I did.</p> <p>20 Q The -- you'll see that in -- that this is a -- a</p> <p>21 record of the meeting of the trustees and settlers</p> <p>22 of the Sawridge Band Trust, and that -- in</p> <p>23 paragraph 3, it -- it's -- they include a -- a</p> <p>24 resolution that the Sawridge trustees then</p> <p>25 instructed the solicitors to prepare the necessary</p> <p>26 documentation to transfer all property presently</p> <p>27 held by themselves to the Trust and to present the</p>

<p style="text-align: center;">21</p> <p>1 documentation for review and approval. I just want</p> <p>2 to point out that it does describe all property,</p> <p>3 and from your investigation, is it your information</p> <p>4 that that happened?</p> <p>5 A Yes, it is.</p> <p>6 Q Do you have any information to suggest it did not</p> <p>7 happen?</p> <p>8 A None at all.</p> <p>9 Q Yeah. Paragraph 11 and 12 of your affidavit refers</p> <p>10 to Exhibit D, and I'd like to take you to Exhibit D</p> <p>11 of your affidavit. Are you there?</p> <p>12 A I am.</p> <p>13 Q Yeah. The second page of Exhibit D -- and this is</p> <p>14 a -- an agreement between the trustees of the</p> <p>15 old -- or I assume this is the '82 Trust. Is that</p> <p>16 your information, in the 1985 Trust?</p> <p>17 A It is, yes.</p> <p>18 Q Yeah. And on page 2, it -- it describes that each</p> <p>19 of the old trustees hereby transfers all of his</p> <p>20 legal interest in each of the properties listed in</p> <p>21 Appendix A attached hereto to the new trustees as</p> <p>22 joint tenants to be held by the new trustees on the</p> <p>23 terms and conditions set out in the Sawridge Band</p> <p>24 Trust and is part of the said Trust.</p> <p>25 Is it your information that</p> <p>26 that, in fact, happened?</p> <p>27 A Yes, it is.</p>	<p style="text-align: center;">23</p> <p>1 testified, happened? That event took place?</p> <p>2 A Yes, it did.</p> <p>3 Q And what we know, at this time, was that the</p> <p>4 purpose of the 1985 Trust, when it was structured,</p> <p>5 was to protect the assets of that Trust from those</p> <p>6 persons who might be forced upon the Sawridge First</p> <p>7 Nation as members under what was then Bill C-31?</p> <p>8 A That's correct.</p> <p>9 Q And -- and having reviewed all of the records that</p> <p>10 you've been able to gather, do you have any</p> <p>11 information that the resolution, Exhibit H, was not</p> <p>12 carried out?</p> <p>13 A None.</p> <p>14 Q Okay.</p> <p>15 A None whatsoever.</p> <p>16 Q Would you agree with me that based upon the purpose</p> <p>17 of the transfer of the assets from the 1982 Trust</p> <p>18 to the 1985 Trust, there would be no reason for the</p> <p>19 Sawridge trustees, the Sawridge First Nation, or</p> <p>20 chief and council to withhold the transfer of any</p> <p>21 assets?</p> <p>22 A Not that I could think of.</p> <p>23 Q They were trying to protect these assets, so their</p> <p>24 objective was to transfer the assets?</p> <p>25 A We had a telephone conversation with Morris</p> <p>26 Cullity, who was the -- the solicitor working with</p> <p>27 them at the time on the transfer and on the</p>
<p style="text-align: center;">22</p> <p>1 Q Now, in paragraph 13 to 15 of your affidavit, this</p> <p>2 refers to the legislation that we know previously</p> <p>3 referred to as Bill C-31, and you're, I assume,</p> <p>4 familiar with the fact that the Sawridge First</p> <p>5 Nation challenged the constitutionality of the</p> <p>6 legislation in litigation where they asserted a</p> <p>7 right that they, as a First Nation, had the right</p> <p>8 to determine their membership?</p> <p>9 A Yes, I am aware of that.</p> <p>10 Q And it was during that challenge that the women</p> <p>11 that include, for example, Ms. Poytras were ordered</p> <p>12 to be added as members of the Sawridge First</p> <p>13 Nation, and as a result of the way in which the</p> <p>14 1985 Trust was structured, she did not become a</p> <p>15 beneficiary when the Court declared her to be a</p> <p>16 member of the Sawridge First Nation?</p> <p>17 A No.</p> <p>18 Q Is that correct?</p> <p>19 A That's correct.</p> <p>20 Q Yeah. So if I go to paragraph 19, it refers to</p> <p>21 Exhibit H. Can I just get you to look at that?</p> <p>22 Now, this is a -- a --</p> <p>23 Exhibit H is the resolution of the trustees, again,</p> <p>24 transferring all of the assets of the 1982 Trust to</p> <p>25 the 1985 Trust. Do you agree with that?</p> <p>26 A Yes, I do.</p> <p>27 Q And -- and that -- that, as you've already</p>	<p style="text-align: center;">24</p> <p>1 structure of the '85 Trust.</p> <p>2 Q M-hm.</p> <p>3 A His -- in -- in his view, the intent of the 1985</p> <p>4 Trust was simply to protect the assets, pending the</p> <p>5 completion of the constitutional challenge. Once</p> <p>6 that was complete, the intent was to merge the two</p> <p>7 Trusts back to -- using the 1986 Trust definition,</p> <p>8 to go back to that and merge the two Trusts.</p> <p>9 Q But -- but in terms of the 1985 Trust, in -- in --</p> <p>10 in those circumstances, both the Sawridge First</p> <p>11 Nation and the trustees would be motivated to</p> <p>12 ensure that all assets were transferred?</p> <p>13 A That's right. Absolutely.</p> <p>14 Q The reason is to fulfill the purpose at that time?</p> <p>15 A That's right. And to protect those assets.</p> <p>16 Q Yeah.</p> <p>17 A Yes.</p> <p>18 Q If you look at -- at paragraphs 9 to 28 of this</p> <p>19 affidavit -- and I don't want you to rush through</p> <p>20 it. Just take a look at them because a lot of this</p> <p>21 information was information that you obtained from</p> <p>22 the Sawridge First Nation; is that correct?</p> <p>23 A That's correct, yes.</p> <p>24 Q And I think you've confirmed that Sawridge First</p> <p>25 Nation was cooperative, and they were cooperative</p> <p>26 in providing this information as well?</p> <p>27 A They were, yes.</p>

1 Q In paragraph 20 of the affidavit sworn
2 September 12th, 2011, it refers to Exhibit I, and
3 can I just take you to that exhibit?
4 A Okay.
5 Q This is a document entitled "Sawridge Band
6 Resolution" and has a number of signatures which
7 appear to be, obviously, signatures of persons in
8 addition to the chief and council of the Sawridge
9 First Nation. Would you agree with that?
10 A Yes, I would.
11 Q And this recites, in the first paragraph, that the
12 trustees of the 1982 Trust have authorized a
13 transfer of the Trust assets to the trustees of
14 what is, essentially, the 1985 Trust; is that
15 correct?
16 A That's correct.
17 Q And the second paragraph recites that these assets
18 have actually been transferred, and that's a
19 reference to the assets of the 1982 Trust having
20 been already transferred to the 1985 Trust; is that
21 correct?
22 A That's correct.
23 Q And it would appear that the Sawridge First Nation,
24 in the last paragraph of this document, is, for
25 whatever reason, approving and ratifying this
26 transfer?
27 A That's correct.

1 Q Okay. Paragraph 23 and 24 of your affidavit. You
2 indicate that the transfer was carried out under
3 the guidance of accountants and lawyers, and based
4 upon your review and a review of all of the
5 information that you gathered, would you agree that
6 it supports the proposition that all property in
7 the 1982 Trust was transferred to the 1985 Trust?
8 A Yes, I do.
9 Q I -- I want to confirm what the Sawridge trustees
10 are not seeking in relation to their efforts to
11 normalize the 1985 Trust and be in a position to
12 provide benefits to beneficiaries, and can you just
13 confirm that the Sawridge trustees do not seek any
14 declaration or remedy in relation to the assets
15 before 1985?
16 A That's correct.
17 Q And the Sawridge trustees do not seek any
18 declaration or remedy in relation to the assets
19 held in the 1982 Trust?
20 A That's correct.
21 Q And the Sawridge trustees do not seek any
22 declaration or remedy in relation to an accounting
23 of the assets in the 1982 Trust?
24 A That's correct.
25 Q And the Sawridge trustees do not seek any
26 declaration or remedy in relation to an accounting
27 of the assets in the 1985 Trust?

1 A That's correct.
2 Q And the Sawridge trustees do not seek any
3 declaration or remedy in relation to assets prior
4 to the 1982 Trust?
5 A That's correct.
6 Q And this order being sought by the Sawridge
7 trustees does not prevent a beneficiary from
8 seeking an accounting of the 1985 Trust?
9 A That's correct.
10 Q Do you have any information that there are any
11 other relevant documents that relate to the
12 transfer of assets from the '82 Trust to the 1985
13 Trust that have not been produced?
14 A I -- no. I think the search was exhaustive.
15 Q Yeah. In paragraph 28 of your affidavit, you state
16 that: (As read)
17 To unravel the assets of the 1985
18 Trust after 26 years would create
19 enormous costs and will likely
20 destroy the Trust.
21 Could you just give a brief explanation of what you
22 mean there?
23 A Well, if -- if the 1985 Trust were to fail, all the
24 assets -- because the 1982 Trust no longer exists,
25 all the -- all the assets would either have to be
26 sold and -- and they're -- the results then
27 distributed among the beneficiaries, but we'd first

1 have to identify the beneficiaries. Or the Court
2 could order a return of those assets to the 1982
3 Trust, and so it would essentially destroy the 1985
4 Trust.
5 Q And the cost of that happening, would it be to the
6 detriment of the beneficiaries?
7 A Oh, it would be enormous detriment to the
8 beneficiaries because of all of the costs for
9 assessment, for sale, for transfer would all be
10 taken out of the Trust, and it would, in essence,
11 destroy the -- not only the assets of the 1985
12 Trust, but the assets of the 1986 Trust, since the
13 two are intertwined.
14 Q Yeah. I have another document I want to put to
15 you. It's a -- an email from your counsel,
16 Ms. Bonora, to other counsel, which attaches a
17 draft of the clarification on the transfer issued
18 for review and comments and proposes that if this
19 clarification is acceptable, a consent order could
20 be drafted. You received a copy of this, did you?
21 A I did.
22 MR. MOLSTAD: I wonder if that could be
23 marked as an exhibit, please.
24 EXHIBIT 5:
25 Email from Ms. Bonora attaching a draft
26 of the clarification on the transfer
27 issued for review and comments

29

1 Q MR. MOLSTAD: And there's another document I
 2 want to put to you. It's a letter from
 3 Ms. Hutchison to counsel -- I'm sorry. It's from
 4 Mr. Poretti to Ms. Hutchison and McLennan Ross
 5 dated July 26, 2016, enclosing a proposed consent
 6 order. You received a copy of this?
 7 A I did.
 8 MR. MOLSTAD: I'd like to mark this as an
 9 exhibit, please.
 10 EXHIBIT 6:
 11 Letter from Mr. Poretti to Ms. Hutchison
 12 and McLennan Ross dated July 26, 2016,
 13 enclosing a proposed consent order
 14 Q MR. MOLSTAD: Now, I want to turn now to
 15 you -- the questioning on affidavit of yourself.
 16 Do you have a copy of that transcript with you?
 17 A I do.
 18 Q This is a transcript of the questioning on your
 19 affidavits that was conducted on the 27th and 28th
 20 of May 2014, which we're advised will be relied
 21 upon by the Public Trustee in relation to these
 22 applications, and I have a few questions about your
 23 evidence in this transcript.
 24 If you go to page 9 of the
 25 transcript -- and I think that we talked already
 26 about who the trustees are. How many of the five
 27 trustees are members of chief and council of the

30

1 Sawridge First Nation?
 2 A One.
 3 Q And who is that?
 4 A Roland Twinn.
 5 Q And Ms. Catherine Twinn is also a trustee of the
 6 Sawridge Trust; is that correct?
 7 A That's correct.
 8 Q And in terms of Ms. Catherine Twinn's roles with
 9 the First Nation, she was part of the Sawridge
 10 First Nation membership committee for many years?
 11 A That's right.
 12 Q Ms. Catherine Twinn was also one of the legal
 13 counsel who acted for the Sawridge First Nation in
 14 the lawsuit where the Sawridge First Nation was
 15 challenging the constitutionality of Bill C-31?
 16 A That's correct.
 17 Q And -- and do you know if Ms. Catherine Twinn also
 18 participated in preparing the Sawridge First Nation
 19 membership code?
 20 A As far as I know, she did, yes.
 21 Q Yeah. And Ms. Catherine Twinn is an elector of the
 22 Sawridge First Nation?
 23 A That's right.
 24 Q And Ms. Catherine Twinn is also a beneficiary of
 25 both the 1985 Trust and the 1986 Trust?
 26 A Yes, so far as we're able to determine on the 1985
 27 Trust.

31

1 Q Okay. And since these trusts were first
 2 established, both the 1985 Trust and the 1986
 3 Trust, the trustees have included members from the
 4 same family and also members from chief and
 5 council; correct?
 6 A That's correct.
 7 Q And do you know who the members of chief and
 8 council are today?
 9 A Yes.
 10 Q And who are they?
 11 A Chief Roland Twinn, Councillor Tracey
 12 Poitras-Collins, and councillor -- who's the third
 13 one?
 14 Q Is it Darcy Twin?
 15 A Yes, Darcy. Sorry. My mind was blanking.
 16 Q Yeah. And when you say Councillor Tracey, it's
 17 Councillor Tracey Poitras-Collins, is it?
 18 A Poitras-Collins, yes.
 19 Q Yeah. And in relation to your efforts to have
 20 these trusts normalized, the Sawridge First Nation
 21 provided you with much of their records, including
 22 their code of conduct, their constitution, their
 23 Governance Act, and other documentation, whenever
 24 requested?
 25 A That's correct.
 26 Q And we've asked you about the documents, but do you
 27 believe that after all of your efforts to gather

32

1 documents and to speak to people who have
 2 involvement in -- historically and to make written
 3 inquiries of those persons, that you have all of
 4 the information that still exists in relation to
 5 the transfer of the assets from the 1982 Trust to
 6 the 1985 Trust?
 7 A Yes, I think I do.
 8 Q If I can -- I'll get you to go to page 45 of the
 9 transcript. I'm just going to read to you part of
 10 this transcript, beginning at line 19: (As read)
 11 Q Do you have any information to
 12 indicate that the assets that
 13 individuals were holding between
 14 the early 1970s and 1982, that
 15 some of those assets were not
 16 ultimately transferred into the
 17 1982 Trust?
 18 A From the records that we have
 19 got, my understanding is that all
 20 of the assets that were held by
 21 individuals for the 1982 Trust
 22 eventually ended up in the 1982
 23 Trust, and those assets were then
 24 transferred in full to the 1985
 25 Trust.
 26 That is your information today; correct?
 27 A It is.

1 Q And at page 63 of the transcript of your
2 evidence -- and this is when you were being
3 questioned by Ms. Hutchison in relation to your
4 affidavits, page 63, lines 15 to 22: (As read)
5 Q So going back, Mr. Bujold, to
6 paragraph 7, 8, 9, and 10 of your
7 September 12th, 2011, affidavit,
8 what I am sort of focusing on
9 there is that if I understand
10 what you are saying, your belief
11 is that -- and I apologize. I am
12 actually looking at paragraph 22.
13 So you indicate that your belief
14 is that all of the assets from
15 the 1982 Trust were actually
16 transferred over to the 1985
17 Trust?
18 A Yes.
19 That is and continues to be your belief today?
20 A It is.
21 Q At page 103 and 104 -- actually, I take that back.
22 Let me just ask you: As I understand it, that in
23 relation to the 1985 Trust definition of
24 beneficiaries, if it is not changed, if it
25 continues to be in accordance with that trustee, it
26 will create certain problems for the trustees, as I
27 understand it; is that correct?

1 A That's correct.
2 Q And some of those problems include the fact that
3 it -- it discriminates against women who married
4 non-First Nation men and discriminates against
5 their children?
6 A Yes, it does.
7 Q And do you recall some of the other problems that
8 will be created by that?
9 A Well, it discriminates, also, against anyone who's
10 enfranchised, although that clause no longer exists
11 in the *Indian Act*.
12 Q Yeah.
13 A It -- it discriminates against anyone who's
14 illegitimate, and that's all I can think of at the
15 moment.
16 Q Okay. The -- if you go to page 127 of your
17 transcript of questioning by Ms. Hutchison, at line
18 6 to 27, if you just take a quick look at that, as
19 I understand it, that Sawridge First Nation
20 provided the Sawridge trustees with information
21 about the number of applications for membership and
22 this was passed on to the Public Trustee; correct?
23 A That's correct, yes.
24 Q And I'm referring to page 147, lines 4 to 13 of
25 your transcript, and just want to confirm that
26 Sawridge First Nation provided to the Sawridge
27 trustees their membership application form, a flow

1 chart for the membership application process,
2 Sawridge First Nation membership rules, and all of
3 this information was passed on by the Sawridge
4 trustees to the Public Trustee?
5 A That's correct.
6 Q At page 150 of the transcript, as I understand it,
7 the -- Sawridge First Nation provided the Sawridge
8 trustees with letters of acceptance and rejection
9 in relation to membership applications, and these
10 were provided by the Sawridge trustees to the
11 Public Trustee?
12 A That's correct.
13 Q And if you go to page 180 of the transcript, you'll
14 see there there's an undertaking listed as
15 undertaking number 49, at the bottom of the page?
16 A Yes.
17 Q It says: (As read)
18 Inquire of Catherine Twinn her
19 recollection of what was discussed
20 at the April 15th, 1985, meeting
21 that the Sawridge Band resolution
22 presented at Exhibit I of
23 Mr. Bujold's September 12, 2011,
24 affidavit dealt with. Specifically,
25 does she recall if there was any
26 discussion or documentation
27 presented in relation to the

1 transfer of assets from the 1982
2 Trust to the 1985 Trust. Also,
3 inquire if Ms. Twinn has any
4 documentation of that particular
5 meeting.
6 And that undertaking was followed through, and
7 you -- Sawridge trustees requested that
8 Ms. Catherine Twinn advise you of her response, and
9 as I understand it, Ms. Catherine Twinn's response
10 to that was that she had no memory of the meeting
11 and no documents in her possession?
12 A That's correct.
13 Q If I could get you to turn over to page 181 of the
14 transcript of your questioning on your affidavit,
15 beginning at line 13, and I'm just going to read to
16 you some of this evidence: (As read)
17 Q MS. HUTCHISON: Mr. Bujold,
18 just looking at Exhibit A of your
19 August 30th, 2011, affidavit, so
20 that is the 1982 Declaration of
21 Trust, and I am looking at
22 paragraph 10 of that instrument.
23 A Which one?
24 Q Paragraph 10, on page 5.
25 So I just want to be
26 clear in some of the discussions
27 that we have had around the

37

1 transfer of assets from the --
 2 from the '82 Trust to the '85
 3 Trust. I take it that you have,
 4 at this point, made every inquiry
 5 that you have been able to to try
 6 and locate any documentation that
 7 would have been kept pursuant to
 8 this paragraph?
 9 A Yes.
 10 Q You have. Okay. And you have
 11 provided us with copies of
 12 anything that in any way relates
 13 to -- or you will be by way of
 14 undertaking -- anything that
 15 relates to the transfer of the
 16 assets in the 1982 Trust to the
 17 1985 Trust?
 18 A Yes.
 19 And that information is accurate today, is it?
 20 A Yes, it is.
 21 Q Okay. I'm finished with that transcript.
 22 Now, the affidavit of
 23 Ms. Catherine Twinn sworn September 23rd, 2015, and
 24 filed September 30th, 2015, has been served on the
 25 Sawridge First Nation in support of the Public
 26 Trustee's applications. And have you read this
 27 affidavit?

38

1 A Yes, I have.
 2 Q Okay. And -- and I think we've already confirmed
 3 that this is the same Ms. Catherine Twinn that
 4 acted for the Sawridge First Nation as one of their
 5 legal counsel when the Sawridge First Nation
 6 challenged the constitutionality of the legislation
 7 formally referred to as Bill C-31?
 8 A That's correct.
 9 Q And in paragraph 3 of Ms. Twinn's affidavit, she
 10 states that the Trust will have a collective asset
 11 value of approximately 213 million by 2015. It --
 12 was that the value in 2015?
 13 A Not that I know of. I have no idea where she got
 14 that number.
 15 Q What was the value in 2015?
 16 A I'd have to get that information for you, but it
 17 was closer to 120 million, combined.
 18 Q A hundred and...
 19 A Hundred and twenty.
 20 Q Million, combined. Yeah.
 21 A And that's not accurate. I'd -- I'd need to -- if
 22 you want accurate figures, I'd need to get that.
 23 Q Yeah. Perhaps if you don't mind, you could
 24 undertake to --
 25 A I can get that.
 26 Q -- tell us what the value is --
 27 A Yes.

39

1 Q -- in --
 2 A Do you want it -- do you want the values as of
 3 2015?
 4 Q And the value today too.
 5 A Okay.
 6 MR. HEIDECKER: So December 31st, 2015, and
 7 today?
 8 Q MR. MOLSTAD: Is that a hard task --
 9 A No. No.
 10 Q -- or is that -- no? Okay.
 11 MR. HEIDECKER: Just for clarification.
 12 MR. MOLSTAD: Yeah. Yeah.
 13 UNDERTAKING NO. 1:
 14 Advise what the value of the Trust was in
 15 2015, as well as the value of the Trust
 16 today.
 17 Q MR. MOLSTAD: In paragraph 5 of Ms. Twinn's
 18 affidavit, she refers to family groups as being
 19 part of the First Nation. Obviously Sawridge First
 20 Nation is a relatively small First Nation. Do you
 21 know -- well, first of all, does Sawridge First
 22 Nation provide you information about who are
 23 members of their First Nation in order to
 24 administrate the Trust?
 25 A Yes, they do.
 26 Q Yeah. And do you know how many members of the
 27 Sawridge First Nation today are minors?

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1 A One.
 2 Q And paragraph 6 of this affidavit sets out that --
 3 that the trustees have taken the position that
 4 membership in the Band is definitive of the
 5 beneficiary status. Would it be more accurate to
 6 state that the position of the Sawridge trustee is
 7 based upon the declaration of the Trust?
 8 A Yes, it is. Yes.
 9 Q And you, I assume, as trustees, have received
 10 advice through experts that the definition of the
 11 beneficiaries under the 1985 Trust is
 12 discriminatory; is that correct?
 13 A Yes. From multiple sources.
 14 Q Yeah. And would you agree that there is no process
 15 that is necessary to determine the 1985
 16 beneficiaries if the definition is changed to
 17 members?
 18 A Until we know what the definition is that the court
 19 will approve, there's no way of defining who the --
 20 the beneficiaries are.
 21 Q Right. But if the Court doesn't change the
 22 definition of beneficiaries, you have what it is.
 23 A Then we'll have to use the provisions of the 1970s
 24 Indian Act.
 25 Q Right. In paragraph 9 of Ms. Twinn's affidavit,
 26 she speaks about who the current trustees were when
 27 she swore this affidavit September 23rd, 2015, but

<p style="text-align: center;">41</p> <p>1 even at that time, as I understand it, Mr. Justin 2 Twin had ceased to be an elected official or 3 councillor on February 20th, 2015; is that correct? 4 A That's correct. 5 Q And Ms. Bertha L'Hirondelle ceased to be an elected 6 elder on February 20th, 2015? 7 A That's correct. 8 Q In paragraph 10 of Ms. Twinn's affidavit, the 9 reference to determine the age of the membership, I 10 assume that you were aware that for many years 11 there was a -- a process for application for 12 membership that went to a membership committee 13 first? 14 A Yes, I am. 15 Q And after the membership committee, it then went to 16 chief and council? 17 A That's right. 18 Q And after chief and council, if anyone was 19 dissatisfied, they could lodge an appeal to the 20 Sawridge First Nation electors? 21 A That's correct. 22 Q Yeah. And this membership committee, I think, was 23 disbanded last year? 24 A Yes, as far as I know. 25 Q And now it just goes to chief and council? 26 A That's right. 27 Q But Catherine -- Ms. Catherine Twinn served on this</p>	<p style="text-align: center;">43</p> <p>1 she talks about what happened at the next meeting, 2 there was, in fact, at that meeting, discussion 3 about appointment of Justin Twin as a trustee; is 4 that correct? 5 A That's correct. 6 Q And the motions that were actually presented were 7 drafted, in fact, at the meeting that took place; 8 is that correct? 9 A That's correct. 10 Q And as I understand it, there was some urgency in 11 terms of the appointment of a trustee as a result 12 of a -- a transaction involving one of the 13 corporations, and this was explained to the 14 trustees? 15 A It was. There was also another complication, and 16 that is that we have to have five trustees at all 17 times in order to carry out business. 18 Q Okay. And -- and the succession plan that is 19 referred to in paragraph 16 had never been agreed 20 to by the trustees; is that correct? 21 A That's correct. 22 Q And with respect to and prior to the appointment of 23 Justin Twin as one of the trustees, it's my 24 understanding that you obtained information to show 25 that Justin Twin was a beneficiary of the 1985 26 Trust? 27 A That's correct.</p>
<p style="text-align: center;">42</p> <p>1 membership committee during all the years that it 2 existed? 3 A That's right. 4 Q And is it true the trustees, in their role as 5 trustees, do not participate, in any way, in 6 applications for membership in the Sawridge First 7 Nation? 8 A Not as trustees, no. 9 Q And in relation to paragraph 14 of Ms. Twinn's 10 affidavit, she refers to what may be the intent. 11 Are you able to confirm that the -- Chief Walter P. 12 Twinn continued in a practice, up until the time of 13 his death, where he involved elected officials as 14 trustees? 15 A Yes. There were elected officials on -- as 16 trustees up to his -- his passing in 17 October 1997 -- 18 Q Right. 19 A -- and there continued to be after his passing. 20 Q Right. In paragraph 15 of Ms. Twinn's affidavit, 21 she mentions about Walter Felix Twin and his 22 resignation. Would it be fair to say that the 23 trustees expected that to happen because Mr. Walter 24 Felix Twin was having some health problems? 25 A Yes. He'd had major surgery in -- in November, 26 December of the previous year. 27 Q And in paragraph 16 of Ms. Twinn's affidavit, where</p>	<p style="text-align: center;">44</p> <p>1 Q And the -- 2 MS. HUTCHISON: Mr. Molstad -- 3 MR. MOLSTAD: Yeah? 4 MS. HUTCHISON: -- I know I said I was going 5 to be quiet. I'm just struggling with how this is 6 relevant to the 5.13 application, or is there -- is 7 there another -- is it the position of the Sawridge 8 First Nation that this questioning can be used for 9 another purpose? 10 MR. MOLSTAD: Well, you've put the evidence 11 in. You tell me how it's relevant. 12 MS. HUTCHISON: I'll -- I'll reserve my 13 objections -- 14 MR. MOLSTAD: Yeah. 15 MS. HUTCHISON: -- for -- for the Court, then. 16 Thank you, Mr. Molstad. 17 MR. MOLSTAD: This is the evidence that 18 you've tendered, and we're questioning the witness 19 about the evidence, and our objective is -- is to 20 ensure that the evidence before the Court is 21 factual. 22 Q MR. MOLSTAD: And as I understand it, at -- 23 at this time, when Justin Twin was appointed, it 24 necessitated a court application? 25 A That's correct. 26 Q And what was that application in relation to? 27 A It was to transfer the assets from the old group of</p>

<p style="text-align: center;">45</p> <p>1 trustees to the new group of trustees.</p> <p>2 Q And why was it necessary to go to court?</p> <p>3 A Because Catherine Twinn refused to sign either the</p> <p>4 appointment -- or the resolution appointing Justin</p> <p>5 Twin as a trustee or the transfer of assets from</p> <p>6 the old group of trustees to the new group of</p> <p>7 trustees.</p> <p>8 Q And were the Sawridge trustees successful in</p> <p>9 obtaining an order of the court?</p> <p>10 A Yes. The Court ordered that we proceed under my</p> <p>11 direction, as the Trust administrator, without</p> <p>12 Catherine's consent --</p> <p>13 Q And --</p> <p>14 A -- and that the transfer be effected that way.</p> <p>15 Q And the transfer was effected that way?</p> <p>16 A That's right.</p> <p>17 Q And was that order appealed?</p> <p>18 A No. There was no appeal.</p> <p>19 Q Paragraph 18 of Ms. Twinn's affidavit. She</p> <p>20 attaches Exhibit A to her affidavit as a document</p> <p>21 tendered, and I just want to confirm that</p> <p>22 Exhibit A, although presented, was never approved</p> <p>23 or adopted by the Sawridge trustees in relation to</p> <p>24 either the 1985 Trust or the 1986 Trust?</p> <p>25 A No. It was a brainstorming planning document. It</p> <p>26 was never a policy document.</p> <p>27 Q Yeah. And is it true that there were no written</p>	<p style="text-align: center;">47</p> <p>1 the Trust deeds were inaccurate.</p> <p>2 Q Okay. Thank you. Paragraph 19 of Ms. Twinn's</p> <p>3 affidavit. She indicates she raised concerns with</p> <p>4 the other trustees, and with yourself, whether</p> <p>5 Justin was an eligible beneficiary under the 1985</p> <p>6 Trust. And as I understand it, the Sawridge</p> <p>7 trustees saw it and received a legal opinion on</p> <p>8 Justin Twin's membership status?</p> <p>9 A That's correct.</p> <p>10 Q And that was from Mr. McKinney, in-house legal</p> <p>11 counsel for Sawridge First Nation?</p> <p>12 A That's right.</p> <p>13 Q And he concluded that Mr. Justin Twin was a member?</p> <p>14 A That's right.</p> <p>15 Q And I also understand that the Sawridge trustees</p> <p>16 also received that confirmation, either directly</p> <p>17 from INAC or through the Sawridge First Nation from</p> <p>18 INAC, confirming in writing that Justin Twin was a</p> <p>19 member of Sawridge First Nation?</p> <p>20 A Yes, that's right.</p> <p>21 Q And I just want to confirm that Sawridge First</p> <p>22 Nation -- to your knowledge, chief and council did</p> <p>23 not conduct a vote with respect to whether Justin</p> <p>24 Twin was a member of Sawridge First Nation?</p> <p>25 A No, they didn't.</p> <p>26 Q And do you have knowledge of any person having been</p> <p>27 removed as a member of the Sawridge First Nation</p>
<p style="text-align: center;">46</p> <p>1 policies with respect to unanimous approval?</p> <p>2 A There were and are no written policies regarding</p> <p>3 unanimous approval.</p> <p>4 Q And was -- and that's both in relation to the 1985</p> <p>5 Trust and the 1986 Trust?</p> <p>6 A That's correct.</p> <p>7 Q And is it also true that there was no unwritten</p> <p>8 policy requiring unanimous approval?</p> <p>9 A Not as far as I know.</p> <p>10 Q Yeah. And is it fair to say that the Trust deeds</p> <p>11 govern the conduct?</p> <p>12 A They always have, and we continue to follow that --</p> <p>13 Q Yeah.</p> <p>14 A -- that the Trust deeds are the governing</p> <p>15 documents.</p> <p>16 Q In paragraph 19 of Ms. Twinn's affidavit, you'll</p> <p>17 see that she refers to raising issues about whether</p> <p>18 Justin Twin was an eligible beneficiary --</p> <p>19 A Can I just go back to 18 for a second?</p> <p>20 Q Yeah.</p> <p>21 A In the memo both for the appointment of Justin Twin</p> <p>22 and -- and later for the appointment of -- of Peggy</p> <p>23 Ward, I -- I sent the trustees the quotes right out</p> <p>24 of the Trust deed regarding the process for</p> <p>25 appointing, that it had to be by a majority</p> <p>26 decision, that it was -- and it -- there was no</p> <p>27 contesting at the meeting that -- you know, that</p>	<p style="text-align: center;">48</p> <p>1 once they have achieved membership?</p> <p>2 A I've never heard of it.</p> <p>3 Q Paragraph 20 of Ms. Twinn's affidavit. You know,</p> <p>4 first of all, the Sawridge trustees relied on the</p> <p>5 legal counsel for the Sawridge First Nation and</p> <p>6 INAC regarding Justin Twin's membership status;</p> <p>7 correct?</p> <p>8 A That's correct.</p> <p>9 Q And the 1985 Trust and the 1986 Trust did not</p> <p>10 retain Mr. Gilbert to do an opinion?</p> <p>11 A No, they did not.</p> <p>12 Q No. And if you look at Mr. Gilbert's opinion,</p> <p>13 which is attached as Exhibit B to Ms. Twinn's</p> <p>14 affidavit, there are just a couple points I want to</p> <p>15 take you to there. On page 4 of Mr. Gilbert's</p> <p>16 opinion, the last three lines, Mr. Gilbert</p> <p>17 states -- and I'll read the last full paragraph</p> <p>18 there. He says: (As read)</p> <p>19 These questions arise because</p> <p>20 recently Justin McCoy Twin was made</p> <p>21 a beneficiary and appointed as a</p> <p>22 trustee of that Trust by chief and</p> <p>23 council of the Sawridge Indian Band.</p> <p>24 Well, first of all, that's not true, is it?</p> <p>25 A No. Trustees can only be appointed by trustees.</p> <p>26 Q Right. And, also, if you go over to page 6 of this</p> <p>27 document -- oh, sorry, I guess it's page 5 -- the</p>

1 bottom of page 5. They quote paragraph 6. Is that
 2 paragraph 6 of the '82 -- 1982 Trust?
 3 A No. 1982.
 4 Q I -- that's what it's referred to.
 5 A Oh, okay.
 6 Q And what he says in terms of dealing with intention
 7 is an interesting comment because he says that --
 8 on page 6, in the first full paragraph there: (As
 9 read)
 10 by virtue of paragraph 6 of the
 11 Declaration of Trust, Sawridge Band
 12 Trust dated April 15th, 1982, I
 13 believe it was the intention of the
 14 settler of the 1985 Trust to exclude
 15 illegitimate children from being
 16 beneficiaries of the Trust.
 17 And if you look up above there, you see that the
 18 trustees: (As read)
 19 Shall be specifically entitled not
 20 to grant any benefit during the
 21 duration of the Trust or at the end
 22 thereof to any illegitimate children
 23 of Indian women, even though that
 24 child or those children may be
 25 registered under the *Indian Act*, and
 26 their status may not have been
 27 protested under section 12(2)

1 thereunder.
 2 I put it to you that that does not mean that they
 3 are not -- or that they are excluding illegitimate
 4 children. It gives a discretion.
 5 A Yes. This -- this paragraph is included in both
 6 the 1982 Trust --
 7 Q And --
 8 A -- the documents, and the 1985 Trust documents.
 9 Q Okay.
 10 A And -- and it doesn't -- it doesn't insist that
 11 they exclude. It just says that they can if they
 12 want.
 13 Q Right. And in terms of the make-up of the trustees
 14 of the 1985 Trust and the 1986 Trust, as a result
 15 of the appointment of Margaret Ward as a trustee,
 16 it doesn't matter if Justin Twin is a beneficiary
 17 or not, does it?
 18 A No, it doesn't.
 19 Q Now, paragraph 22 of Ms. Twinn's affidavit. The --
 20 I understand that you -- you and -- were not aware
 21 that Clara Midbo was terminally ill and, to your
 22 knowledge, the other trustees were not aware of
 23 this?
 24 A No. She was very ill, but we didn't --
 25 Q Yeah.
 26 A -- we didn't realize it was terminal.
 27 Q She was at the June 2014 trustees meeting?

1 A That's right.
 2 Q And she passed away the following month?
 3 A That's right.
 4 Q Yeah. And in paragraph 24, Ms. Twinn states that
 5 she emailed you, sir, and the other trustees asking
 6 who was being proposed, and she did not receive a
 7 response. And I understand that you did phone her
 8 and told her what the plan was?
 9 A Yeah. I -- she didn't receive a response to the
 10 email, but I did speak to her on the phone, where
 11 she inquired who was being proposed, and I told her
 12 then that there was no proposals. It would be
 13 discussed at the trustee meeting, like it had been
 14 at the last -- in the last case.
 15 Q Right. So it was to be discussed at the next
 16 trustee meeting?
 17 A That's right.
 18 Q Okay. And you communicated that to Ms. Twinn?
 19 A Yes, I did, verbally.
 20 Q If you go to paragraph 25 of the affidavit of
 21 Ms. Twinn, there was discussion at this trustee
 22 meeting about -- and Ms. Twinn proposed that an
 23 independent outside trustee be appointed; correct?
 24 A That's right.
 25 Q And Chief Roland Twinn basically responded that, in
 26 his view, the beneficiaries would not be open to
 27 outsiders as trustees; is that correct?

1 A That's correct.
 2 Q And at this meeting, the trustees offered to
 3 consider Ms. Catherine Twinn's proposal for an
 4 independent board in October; correct?
 5 A That's correct.
 6 Q And they asked Ms. Catherine Twinn to proceed with
 7 the appointment of a trustee to replace Clara
 8 Midbo, and I understand that Ms. Twinn refused to
 9 do so?
 10 A That's right.
 11 Q And I understand that Ms. Twinn also, again,
 12 refused to sign the transfer of assets?
 13 A Yes, she did.
 14 Q And this, again, required an application to the
 15 Court to deal with the transfer of assets?
 16 A It did.
 17 Q And that application proceeded and what was the
 18 result?
 19 A The result was that the Court ordered Catherine to
 20 sign the transfer documents and the appointment of
 21 the trustee.
 22 Q And was that then -- did that result in the
 23 transfer being signed?
 24 A It did.
 25 Q Was that order appealed?
 26 A No.
 27 Q Paragraph 26 of Ms. Twinn's affidavit, she talks

1 about the Sawridge group of companies and outside
2 management. Can you respond to that? The -- the
3 trustees were the shareholders and directors of the
4 companies; is that correct?
5 A That's right.
6 Q And Mr. Mike McKinney was a director of the
7 companies?
8 A He was at the time, yes.
9 Q And the Band council had no control over the
10 companies?
11 A No, they did not.
12 Q And I believe that Mr. McKinney continues as an
13 executive director and general counsel to these
14 companies?
15 A To -- yes, he does.
16 Q Paragraph 27, the -- I think we dealt with this.
17 Bottom line is that the trustees -- the majority of
18 the trustees -- Sawridge trustees did not agree to
19 delay the appointment of Justin Twin and Margaret
20 Ward; is that correct?
21 A No, they did not.
22 Q And paragraph 28, with respect to Margaret Ward,
23 who is referred to as Peggy Ward in Ms. Twinn's
24 affidavit, as I understand it, the Sawridge
25 trustees had established a process way back in --
26 in 2004 to try to develop candidates who might be
27 able to serve as trustees; is that correct?

1 A That's correct. From 2004 to 2007.
2 Q Yeah. And the four candidates that were considered
3 at that time as potential trustees were Justin
4 Twin, David Midbo, Deanna Morton, and Margaret
5 Ward?
6 A That's correct.
7 Q And -- and I understand that Catherine -- or
8 Ms. Catherine Twinn advised you about Margaret Ward
9 and about how she had done research on indigenous
10 education and written a paper, and that she had a
11 PhD; is that correct?
12 A That's correct. I -- that paper was written
13 specifically at the direction of the trustees --
14 Q Oh.
15 A -- and at the request of the trustees by Margaret,
16 and Catherine Twinn also told me that Margaret Ward
17 had been a trustee in training.
18 Q Okay. So the -- the Sawridge trustees were aware
19 of Margaret Ward's background, and -- in addition
20 to the fact that she was a beneficiary of both the
21 1985 and 1986 Trust?
22 A Absolutely.
23 Q Yeah. Paragraph 29 of Ms. Catherine Twinn's
24 affidavit. Previously and historically,
25 Ms. Catherine Twinn had agreed with appointment of
26 Bertha L'Hirondelle, when she was chief, and Walter
27 Twin, a councillor, and Roland Twinn, a councillor?

1 A That's correct.
2 Q And in terms of the time that Ms. Catherine Twinn
3 was on the membership committee, I think it was
4 from -- actually, I may have misspoke. It was from
5 1985 to March 31st, 2016. Is that your
6 information?
7 A Yes, as far as I understand.
8 Q Yeah. I -- I believe it was March 31st of '16 that
9 the membership committee ceased and applications
10 for membership went to chief and council after
11 that.
12 A Okay.
13 Q Now, in paragraph 29 of Catherine Twinn's
14 affidavit, she does refer to political and personal
15 agendas. The fact of the matter is that there has
16 been, to this date, no distribution from the 1985
17 Trust; correct?
18 A That's correct.
19 Q In paragraph 29, in the first part of this
20 paragraph, Ms. Catherine Twinn states that when her
21 concerns are expressed to the other trustees, the
22 Chair, and Mr. Bujold, she is either ignored or met
23 with varying degrees of ridicule, denial, reprisal,
24 and/or contempt. Would you comment and respond to
25 that allegation?
26 A I -- I don't think that any of the trustees or the
27 chair or myself ignore Catherine, ever, in a

1 meeting. She makes it very difficult to be
2 ignored, and we don't -- certainly don't engage in
3 ridicule, denial, reprisal, or contempt. We
4 certainly may disagree with her ideas, but we try,
5 as much as possible, not to engage in personal
6 attacks.
7 Q Okay. In paragraph 29(a) of this affidavit,
8 mention is made of Chief Roland Twinn's children
9 were quickly added to the Band membership list.
10 It's my understanding that Chief Twinn's children's
11 applications were dealt with, in one case, over a
12 period of time of 557 days and, in another case,
13 266 days, and when they were dealt with, Chief
14 Roland Twinn abstained. Is that consistent with
15 what you know?
16 A Yes, it is.
17 Q And I think we've confirmed that the Sawridge
18 trustees have no role in determination of
19 membership when they are acting as trustees?
20 A None.
21 MR. MOLSTAD: why don't we take -- why don't
22 we take 15 minutes? Okay?
23 MS. BONORA: Yeah. Thank you.
24 (ADJOURNMENT)
25 Q MR. MOLSTAD: If I could continue now the
26 affidavit of Ms. Catherine Twinn in paragraph
27 29(b). In terms of these remarks about Alfred

1 Potskin, it's my understanding that Mr. Alfred
 2 Potskin was enfranchised May 28th, 1952?
 3 A Yes, as far as I know.
 4 Q Okay. And although she makes reference to the
 5 membership committee, I -- I believe the fact is
 6 that it is chief and council that an application
 7 goes to now; correct?
 8 A That's correct.
 9 Q And --
 10 A Even the membership committee simply recommended to
 11 council -- chief and council. It never actually --
 12 Q Never --
 13 A -- made a decision.
 14 Q -- never decided. Right.
 15 And in terms of the 17
 16 children that have been admitted into membership,
 17 are you aware that six of those never had a parent
 18 on council?
 19 A Yes.
 20 Q Okay. 29(c). Do you have any knowledge about what
 21 Ms. Catherine Twinn is speaking of in making this
 22 allegation?
 23 A I think that she is referring to the case of
 24 Elizabeth Poytras, but we -- well, in our
 25 examination of Elizabeth, there were problems with
 26 her filling out the application. It was never
 27 completed.

1 Q But the fact is that Elizabeth Poytras was that --
 2 one of those person who was declared to be a member
 3 by the --
 4 A She was declared in -- yeah, by Justice Hugessen.
 5 Q Right. Paragraph 29(d) of Ms. Catherine Twinn's
 6 affidavit, as I understand it, in response to this,
 7 the Sawridge trustees very specifically sought the
 8 direction of the Court to determine what it should
 9 do; is that correct?
 10 A That's correct.
 11 Q And the trustees never made decisions to restrict
 12 Sawridge First Nation membership; correct?
 13 A No. No, they haven't.
 14 Q Yeah. And at the -- at the -- at the present time,
 15 there's only one elected official who's the
 16 trustee; correct?
 17 A That's correct.
 18 Q And is it fair to say that it is, in fact, useful
 19 to the board of trustees that you've observed them
 20 when they do have an elected official -- an elected
 21 official to come report on the needs of the nation?
 22 A Yes, it's been very useful.
 23 Q Referring to paragraph 29(e) of
 24 Ms. Catherine Twinn's affidavit, since the matter
 25 has been referred to the Court, the statement that
 26 "we don't know who they are" may be, in fact,
 27 correct. Is that fair?

1 A Yes, that is, in fact, correct. Until the Court
 2 advises us who or what the definition will be --
 3 Q Right.
 4 A -- we have no way of choosing.
 5 Q I think you mentioned that as far as you know, the
 6 intention, once the impact of Bill C-31 was
 7 determined, would be to ensure that all members
 8 were beneficiaries of the Trust?
 9 A Well, the 1982 Trust were for the Band members.
 10 1985 Trust, I think, had the same intent. It just
 11 wanted to restrict anyone who could claim
 12 membership --
 13 Q Yeah.
 14 A -- through Bill C-31.
 15 Q Okay. Paragraph 29(f) of Ms. Catherine Twinn's
 16 affidavit. The -- would you agree that the -- that
 17 how membership of -- in Sawridge First Nation is
 18 determined is the responsibility of the Sawridge
 19 First Nation?
 20 A We had a very clear legal opinion provided us -- to
 21 the trustees on that -- on that very point, and it
 22 was very clear that the trustees had no business
 23 interfering in any way with the determination of
 24 membership.
 25 Q Okay. And do you also understand that the Sawridge
 26 First Nation membership code was drafted to
 27 effectively give Sawridge First Nation control over

1 membership and that it wanted that complete
 2 control?
 3 A Yes.
 4 Q 29(g) of Ms. Catherine Twinn's affidavit. And this
 5 issue that she raises having been discussed, it's
 6 my understanding that the Sawridge trustees have
 7 discussed it, and the majority of the Sawridge
 8 trustees have decided that Band membership is the
 9 jurisdiction of the Sawridge First Nation?
 10 A That's correct.
 11 Q And is it also correct that the Sawridge trustees
 12 did, in fact, obtain a legal opinion provided by
 13 Donovan Waters that the trustees had no business
 14 interfering in the membership process?
 15 A That's correct.
 16 Q Exhibit -- or Catherine Twinn's affidavit -- or
 17 Ms. Catherine Twinn's affidavit at paragraph 29(h).
 18 And I just want to confirm that in that there has
 19 been no distribution from the 1985 Trust, one of
 20 the purposes of your -- your application, your
 21 questions that are being put to the Court, is to
 22 allow you to provide benefits from the 1985 Trust
 23 to the beneficiaries?
 24 A That's correct.
 25 Q Paragraph 29(i) of Ms. Catherine Twinn's affidavit.
 26 Do you have any information that Sawridge Resource
 27 Developments [sic] does not operate in accordance

61

1 with the laws and good governance?
 2 A Not that I know of.
 3 Q 29(j) of Ms. Catherine Twinn's affidavit. Have you
 4 ever received any information or seen anything that
 5 suggests that Chief Roland Twinn has threatened to
 6 take Catherine Twinn's home away?
 7 A Certainly not at a trustee meeting. I've never
 8 seen it there.
 9 Q Yeah. And have you spoken to Chief Roland Twinn
 10 about these allegations in 29(j) of Ms. Catherine
 11 Twinn's affidavit?
 12 A He's -- he's had conversations with me about --
 13 about this allegation, but he's indicated he
 14 never --
 15 Q Yeah.
 16 A -- never said that.
 17 Q Did he deny this allegation?
 18 A Yes, he did.
 19 Q Yeah. It -- it says in paragraph 29(j) of
 20 Ms. Catherine Twinn's affidavit that she's afraid
 21 that if she speak out at trustee meetings, she'll
 22 be faced with reprisal from her because of Chief
 23 Roland Twinn.
 24 When you are in attendance at
 25 the Sawridge trustees meetings, does Ms. Catherine
 26 Twinn's behaviour ever demonstrate that she's
 27 afraid to speak out?

62

1 A Quite the contrary. She'll speak out on anything,
 2 any time, and will often oppose Chief Roland
 3 Twinn's proposals and will oppose motions that he
 4 votes on.
 5 Q Yeah. 29 -- at paragraph 29(k) of Ms. Catherine
 6 Twinn's affidavit --
 7 A M-hm.
 8 Q -- it refers to legal fees, and it's my
 9 understanding that the Sawridge trustees, including
 10 Ms. Catherine Twinn, agreed to pay the legal fees
 11 of the Sawridge First Nation when it became clear
 12 that considerable work would have to be done by the
 13 Sawridge First Nation for the Trust to complete
 14 their -- their application in relation to the
 15 transfer of the assets in the definition of
 16 beneficiaries; is that correct?
 17 A That's correct. I would have to get an
 18 undertaking -- or do an undertaking with you to
 19 provide the exact motion to ensure that Catherine
 20 actually voted in favour. It was discussed on a
 21 couple of occasions, and I think in the first
 22 occasion, yes, she was in favour. I think in the
 23 second occasion, she may have objected.
 24 Q Right. Well, the -- the -- the majority of the
 25 trustees --
 26 A But the majority of the trustees certainly --
 27 Q -- were in favour?

63

1 A -- were in favour, yes.
 2 Q Yeah. And in --
 3 MS. BONORA: Mr. Molstad, do you want that
 4 undertaking? You don't want -- you're satisfied
 5 with that answer?
 6 MR. MOLSTAD: Yeah, I am. Yeah.
 7 Q MR. MOLSTAD: Paragraph 29(l) of
 8 Ms. Catherine Twinn's affidavit.
 9 A M-hm. Yes.
 10 Q This concern expressed about Mr. Poretti, it's my
 11 understanding that although Mr. Poretti was one of
 12 the counsel in relation to the Bill C-31
 13 constitutional challenge advanced by the Sawridge
 14 First Nation, the issue of conflicts of interest
 15 were examined when he was first involved in the
 16 Trust application, and no conflict was identified
 17 by the Sawridge trustees at that time; is that
 18 correct?
 19 A That's correct, and he also indicated very clearly
 20 that he wouldn't share any information from that
 21 previous action.
 22 Q Yeah. Paragraph 29(m) of Ms. Catherine Twinn's
 23 affidavit. I understand that you conducted, or
 24 someone on your behalf conducted, an investigation
 25 to determine what, if any, records in the Sawridge
 26 First Nation storage building in Slave Lake were
 27 destroyed, and it was determined that these records

64

1 were bar chits from the liquor services at the
 2 Sawridge Inn Slave Lake from the early days, late
 3 1970s, and that they had no relevance since the
 4 financial information was contained in the company,
 5 financial statements obtained by the Trust. Is
 6 that -- is that true?
 7 A That's correct, and I undertook that investigation
 8 myself.
 9 Q Okay. Paragraph 29(n) of Ms. Catherine Twinn's
 10 affidavit. When she refers to this proposal, it's
 11 my understanding that the proposal for a community
 12 centre was to see if there were other ways that the
 13 Trust could benefit the beneficiaries, and it was,
 14 in fact, recognized that the Trust funds could not
 15 be paid to the First Nation, and one of the
 16 proposals that was put forward was that the company
 17 pay licencing fees to the Sawridge First Nation of
 18 50,000 over ten years for the use of the Sawridge
 19 name and that that money, in turn, could be used by
 20 the Sawridge First Nation to assist in a
 21 building -- a new office building on the Reserve,
 22 but the agreement was never concluded or
 23 implemented; is that correct?
 24 A That's correct.
 25 Q And the fact is that 19 of the 44 beneficiaries of
 26 the Sawridge Trust live away from the Reserve,
 27 while 25 of 44 and their families live on the

1 Reserve or close by?
 2 A That's correct.
 3 Q And that's the beneficiaries of the 1986 Trust?
 4 A That's right.
 5 Q Paragraph 30 of Ms. Catherine Twinn's affidavit
 6 refers to the code of conduct, which is Exhibit E
 7 to her affidavit.
 8 A Yes.
 9 Q If I could just turn -- or have you turn to that
 10 document.
 11 Did Ms. Catherine Twinn draft
 12 this code of conduct?
 13 A She played a large part in drafting it, yes.
 14 Q Yeah. And the trustees, including Ms. Catherine
 15 Twinn, signed this code of conduct, Exhibit E?
 16 A Yes, she did.
 17 Q And in paragraph 6 of this code of conduct, it
 18 deals with confidentiality --
 19 A Yes.
 20 Q -- and an obligation of the trustees to maintain a
 21 confidentiality of the deliberations and other
 22 confidential information. Was an application made
 23 on behalf of Ms. Catherine Twinn to seal this
 24 affidavit?
 25 A Yes, it was. Well, it -- she never actually made
 26 the application. She requested it at -- at a
 27 hearing in front of Justice Thomas, and he said he

1 wouldn't -- that there had to be a whole process
 2 that they had to go through.
 3 Q Right. They would have had to serve notice on --
 4 A On the media.
 5 Q -- the media?
 6 A Yeah.
 7 Q And do you know if that happened?
 8 A No, it didn't.
 9 Q So there's been no application to seal this
 10 affidavit?
 11 A No.
 12 Q If you go to Schedule A of the code of conduct
 13 that's been signed by the Sawridge trustees, it
 14 describes the responsibilities of the trustees, and
 15 under the title "Beneficiaries" -- and describes
 16 who they are. So the trustees, when they sign this
 17 code of conduct, undoubtedly, would have seen
 18 and -- the definition of the beneficiaries, as it's
 19 described in this document?
 20 A Yes.
 21 Q And is this an accurate description of the
 22 beneficiaries?
 23 A Yes, it is.
 24 Q And just for the record, the definition of
 25 beneficiaries in Schedule A of the code of conduct
 26 are described as follows: (As read)
 27 Paragraph 2(a) of the Trust deed

1 applying to the 1985 Trust defines
 2 beneficiaries for the purposes of
 3 that trust as: All persons who at
 4 any particular time qualify as
 5 members of the Sawridge Indian Band,
 6 pursuant to the provisions of the
 7 Indian Act, as those provisions
 8 existed on April 15th, 1982.
 9 Paragraph 2(a) of the Trust
 10 deed applying to the 1986 Trust
 11 defines beneficiaries for the
 12 purposes of that Trust as: All
 13 persons who at any particular time
 14 qualify as members of the Sawridge
 15 Indian Band under the laws of Canada
 16 in force from time to time,
 17 including the membership rules and
 18 customary laws with the Sawridge
 19 Indian Band, as they exist from time
 20 to time, to the extent that such
 21 membership, rules, and customary
 22 laws are incorporated into or
 23 recognized by the laws of Canada.
 24 And that summary is a -- a reasonably accurate
 25 summary of the beneficiaries?
 26 A It is.
 27 Q Okay. Paragraph 33 of the affidavit of

1 Ms. Catherine Twinn. This deals with an allegation
 2 of -- of conflict, which we'll deal with later in
 3 terms of the direction of the Court, but would you
 4 agree that, to date, there has been no conflict in
 5 terms of a conflict of interest when the Sawridge
 6 trustees are addressing issues that they have to
 7 address?
 8 A Other than Catherine Twinn's general allegations,
 9 there have never been any specific --
 10 Q Yeah.
 11 A -- allegations of conflict of interest.
 12 Q And although Ms. Twinn has suggested independent
 13 trustees, that, in fact, would require an amendment
 14 to the Trust, which would require 80 percent of the
 15 beneficiaries to agree to that; is that correct?
 16 A That's correct.
 17 Q And that may be rather difficult in terms of the
 18 1985 Trust, when you don't know who all the
 19 beneficiaries are?
 20 A That's correct.
 21 Q And is it fair to say that the Sawridge trustees --
 22 or the majority of the Sawridge trustees believe
 23 that the beneficiaries do not want the Trust run by
 24 outside trustees that are not part of the
 25 community?
 26 A That's correct.
 27 Q Yeah. And in terms of your observation, have you

1 observed that the trustees, four of them are not
 2 elected to chief or council, are, in any way,
 3 reluctant to take positions that -- when they
 4 attend at meetings?
 5 A No. They're -- they're all very eager to
 6 participate fully in the -- the affairs of the
 7 Trust.
 8 Q Right. Paragraph 34 of Ms. Catherine Twinn's
 9 affidavit. Would you -- you know, I -- I believe
 10 it's alleged that Chief Roland Twinn is a primary
 11 influence of the trustee decisions. Would you
 12 agree that the decisions are made after discussion
 13 and appear to be independent decisions of each
 14 trustee?
 15 A They are. I -- I would disagree that Chief Roland
 16 Twinn is the primary motivator of -- of ideas that
 17 come before the Trust. I think Catherine Twinn
 18 is -- would be the one that brings most of the
 19 ideas.
 20 Q In paragraph 34 of Ms. Catherine Twinn's affidavit,
 21 she indicates that she finds it hard as a
 22 non-elected trustee to cast a vote against the
 23 chief and other elected Band officials who are
 24 trustees for fear of political, legal, financial,
 25 and other repercussions. What is your observation
 26 in relation to that statement?
 27 A As I stated before, I -- Catherine Twinn never --

1 is never reluctant to express her opinion on
 2 anything and is certainly not afraid to cast an
 3 opposing vote or to abstain and to explain why she
 4 is opposing or abstaining. I -- I've never seen
 5 any reluctance at all in Catherine's participation.
 6 Q And in past, is it correct to state that
 7 Ms. Catherine Twinn has voted against positions of
 8 the elected officials?
 9 A On a number of occasions, yes.
 10 Q Yeah. And -- now, the Sawridge First Nation is a
 11 small First Nation relative to other First Nations
 12 in Canada?
 13 A That's correct.
 14 Q And if you removed elected officials from the
 15 ability to serve as Sawridge trustees, would you
 16 lose a number of eligible candidates?
 17 A If you were to remove the 5 people who are elected
 18 out of 44, that would make a significant reduction
 19 in qualified candidates as trustees, yes.
 20 Q Yeah. And, generally, when the trustees make
 21 decisions, those decisions are voted on after there
 22 has been discussion of the issues?
 23 A Considerable discussion, yes, and research, often.
 24 Q Yeah. In paragraph 35 of Ms. Catherine Twinn's
 25 affidavit, she makes mention of some First Nations
 26 who structure their trust different from the
 27 Sawridge First Nation. Would you agree that there

1 are a number of trusts that have been established
 2 by First Nations who -- or that involve their
 3 elected officials as trustees?
 4 A Yes. The -- there's -- there's over 600 First
 5 Nations in Canada, and of these, a number of these
 6 would probably have trusts and a number of those
 7 trusts are -- have Band officials and elected
 8 members as -- as trustees.
 9 Q Yeah. Okay.
 10 MS. HUTCHISON: Are you done with that
 11 affidavit, Mr. Molstad?
 12 MR. MOLSTAD: Yes, I think I'm done with
 13 that affidavit for now.
 14 MS. HUTCHISON: I just would like to note on
 15 the record, we were on that affidavit, by my count,
 16 for over an hour.
 17 Our letter of June 7th, 2016,
 18 made note that we would make limited use of this
 19 affidavit and maybe only refer to paragraph 29, and
 20 that was 18 minutes of the questioning on
 21 paragraph 29. We will be taking the position that
 22 the vast majority of the questions on this
 23 affidavit were completely irrelevant to the 5.13
 24 application. Thank you, Mr. Molstad.
 25 MR. MOLSTAD: The -- the evidence that you
 26 have adduced in support of your application is the
 27 whole of the affidavit.

1 MS. HUTCHISON: I -- I would just refer you to
 2 the letter you've entered as an exhibit.
 3 MR. MOLSTAD: I read your letter, and --
 4 MS. HUTCHISON: Yeah.
 5 MR. MOLSTAD: -- and your letter didn't say
 6 that you would be relying on only that paragraph.
 7 You said you would be relying mainly on that
 8 paragraph, and until you tell me precisely what you
 9 are relying upon, I will continue to ask questions
 10 in terms of the correctness of the evidence that
 11 you're putting forward.
 12 MS. HUTCHISON: The questions, Mr. Molstad,
 13 must remain relevant to the application that is
 14 before the Court, which is a 5.13 application on
 15 membership production.
 16 MR. MOLSTAD: Well, right now we have two
 17 applications before the Court. I understand what
 18 you've told me in terms of the application in terms
 19 of the transfer of assets, but that application has
 20 not yet been resolved, dismissed, and is before the
 21 Court, so...
 22 I understand what your
 23 position is, and, you know, if we want to put our
 24 positions on the record, let me put mine on on
 25 behalf of the Sawridge First Nation, that these
 26 applications pursuant to 5.13 are duplicitous.
 27 They are completely devoid of merit. They are a

1 waste of resources in terms of the Sawridge First
2 Nation, and we, on behalf of the Sawridge First
3 Nation, will be seeking solicitor-client costs
4 against the Public Trustee in relation to these
5 applications on the basis that the Public Trustee
6 is not indemnified from the Sawridge Trust. So --
7 MS. HUTCHISON: Thank you, Mr. Molstad. And
8 I -- I assume that in those submissions, you'll
9 provide the Court with evidence about which of your
10 accounts were paid by the Sawridge Trust?
11 MR. MOLSTAD: No, we won't. I'll just take
12 a moment here.
13 Q MR. MOLSTAD: I'm showing you now an order
14 that's been signed by all of the counsel on these
15 proceedings that flow from the decision of
16 Mr. Justice Thomas, which, unfortunately, has
17 yet -- not yet been signed by the Court. So I'm
18 going to ask that this be marked -- this -- as an
19 exhibit. You've seen this, I assume, sir?
20 A Yes, I have. Yes.
21 MR. MOLSTAD: I'd ask that it be marked as
22 an exhibit.
23 EXHIBIT 7:
24 Order of Mr. Justice Thomas, signed by
25 all counsel in the proceedings
26 Q MR. MOLSTAD: The -- Exhibit 7, which is the
27 order of the Court. Do you have that in front of

1 you, sir?
2 A I do.
3 Q Appreciating that it has not yet been signed by the
4 Court but it has been approved by all counsel,
5 the -- I -- I want to take to you some of the
6 provisions of this and just ultimately ask you a
7 few questions.
8 In paragraph 5 of -- or,
9 sorry, paragraph 3 of this order, it was ordered by
10 the Court that: (As read)
11 The Public Trustee shall not conduct
12 an open-ended inquiry into the
13 membership of the Sawridge First
14 Nation and the historic disputes
15 that relate to that subject.
16 And in paragraph 4, it states that: (As read)
17 The Public Trustee shall not conduct
18 a general inquiry into potential
19 conflicts of interest between
20 Sawridge First Nation, its
21 administration, and the Sawridge
22 trustees.
23 And over on the next page, it states that: (As
24 read)
25 The Sawridge First Nation shall
26 provide the following to the Public
27 Trustee by January 29th, 2016:

1 (a) The names of individuals who
2 have:
3 (i) Made
4 applications to join the Sawridge
5 First Nation which are pending; and
6 (ii) Had the
7 applications to join the Sawridge
8 First Nation rejected and are
9 subject to challenge.
10 (b) The contact information for
11 those individuals were available.
12 And in paragraph 13 it states: (As read)
13 The Public Trustee is instructed
14 that if it requires any additional
15 documents from the Sawridge First
16 Nation to assist it in identifying
17 the current and possible members of
18 category 2, minors who are children
19 of members of the Sawridge First
20 Nation, the Public Trustee shall
21 file a Rule 5.13(1) application by
22 January 29th, 2016.
23 Now, I think we've already marked as an exhibit the
24 letter that was sent to the Public Trustee
25 responding to the direction to the Sawridge First
26 Nation, which was sent out, I believe, on -- on
27 January 18th and has been marked as Exhibit 4 in

1 these proceedings.
2 After that letter was sent,
3 did the Public Trustee, through their counsel,
4 request any additional information from the
5 Sawridge trustees in relation to membership?
6 A No.
7 Q And paragraph 15 also states that: (As read)
8 The Public Trustee shall not engage
9 in collateral attacks on membership
10 processes of the Sawridge First
11 Nation, and the Sawridge trustees
12 shall not engage in collateral
13 attacks on Sawridge First Nation's
14 membership processes.
15 The Sawridge First Nation was not requested by --
16 or, sorry. The -- the Sawridge trustees were not
17 requested by the Public Trustee to provide any
18 information following this letter in January of
19 2016 in relation to the membership process; is that
20 correct?
21 A That's correct.
22 Q Now --
23 MR. MOLSTAD: Off the record.
24 (DISCUSSION OFF THE RECORD)
25 Q MR. MOLSTAD: The -- your counsel has
26 provided you with a -- a copy of their letter to
27 the Public Trustee, which is dated today -- oh,

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1 wait a minute. This is without prejudice.

2 A No. It's with prejudice.

3 MS. BONORA: It -- it's with prejudice.

4 Is -- are you referring --

5 MR. MOLSTAD: Oh, sorry. Yeah, it is

6 with --

7 MS. BONORA: -- to the July 27th --

8 MR. MOLSTAD: Yeah. Yeah. Sorry. Sorry.

9 Q MR. MOLSTAD: Yeah. This is a copy of what

10 your counsel sent to the Public Trustee today; is

11 that correct?

12 A That's correct, yes.

13 MR. MOLSTAD: Could we mark that as the next

14 exhibit, please?

15 EXHIBIT 8:

16 Copy of letter sent to the Public Trustee

17 dated July 27, 2016

18 Q MR. MOLSTAD: So Exhibit 8, which is the

19 letter from Mr. Poretti to the -- counsel for the

20 Public Trustee and to McLennan Ross is the form of

21 the order that the -- I understand, that the Public

22 Trustee has advised you today that they are

23 prepared to agree to; is that correct?

24 A That's correct.

25 Q And we don't know whether Ms. Platten, on --

26 counsel on behalf of Catherine Twinn, will agree to

27 this at this time, do we?

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1 A No, we do not.

2 MR. MOLSTAD: Yeah. Those are the questions

3 that I have in cross-examination.

4 MS. BONORA: I have a couple of questions

5 I'd like to just put on the record for

6 clarification.

7 PAUL BUJOLD, PREVIOUSLY SWORN,

8 QUESTIONED BY MS. D. C. E. BONORA:

9 Q MS. BONORA: Mr. Bujold, the -- you were

10 asked questions about two different orders with

11 respect to the appointment of Justin Twin and

12 Margaret Ward. You were specifically asked whether

13 the order in respect of the appointment of Margaret

14 Ward and the transfer of assets was appealed. Can

15 you tell me whether the order with respect to the

16 appointment of Justin Twin and the transfer of

17 assets was appealed?

18 A No, it was not.

19 Q In respect of the appointment of Justin Twin, can

20 you tell me the order in terms of events, in terms

21 of when Justin Twin was appointed as a trustee and

22 when you received information in respect of his

23 membership status?

24 A Justin Twin was -- I mean, the -- the vote was

25 taken at the January 21st meeting, 2014. Justin

26 signed the documents in February of that year. The

27 letters from Mike McKinney and Indian Affairs were

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1 received subsequent to that.

2 Q Can you just advise and put on the record what was

3 in the package that was sent to the trustees before

4 Margaret Ward -- before the meeting which Margaret

5 Ward was appointed as trustee?

6 A What was included was a notice of meeting, that it

7 was a special meeting, the requirements under the

8 Trust deeds on how trustees can be appointed, and,

9 basically, the date and place of the meeting.

10 Q And --

11 A Oh, and the other thing is that we had -- we had

12 designed resolutions to be passed by the trustees

13 with Justin -- with Justin's appointment -- or

14 prior to Justin's appointment. We had designed two

15 resolutions: one for transferring -- or -- or

16 appointing the trustee and transferring the assets

17 and one for limiting the term of -- of appointment.

18 And so those were presented in draft form.

19 Q I -- I just want to take you back to a letter which

20 was not marked as an exhibit for privacy reasons,

21 which is a letter to -- or an email from Dentons to

22 Hutchison Law dated April 5th, 2016.

23 A Yes.

24 Q And I believe you were asked the question, Was

25 there any information requested with respect to

26 paragraph 13 of the order resulting from the

27 December 17th decision? And I believe your answer

80

1 was, No. And I want you to look at this and advise

2 whether you think that there was, in fact, any

3 information requested and then provided to the

4 Public Trustee's office.

5 A The request was for the list of minors. We updated

6 the minors as of -- as of the date of this email.

7 No other -- no further information was requested,

8 as far as I know.

9 MS. BONORA: Okay. Those are all my

10 questions.

11 MR. MOLSTAD: Okay. Anything else?

12 MS. HUTCHISON: No. Thanks, Ed.

13 MR. MOLSTAD: Okay. Thanks very much.

14 MS. HUTCHISON: Thank you.

15 MR. MOLSTAD: Thank you.

16

17 PROCEEDINGS ADJOURNED 12:04 P.M.

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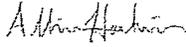
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CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 2nd day of August, 2016.



Allison Hawkins, CSR(A)
Court Reporter



Tab B

03945:01 IN THE FEDERAL COURT OF CANADA

02 TRIAL DIVISION

03 Court File No. T-66-86

04 BETWEEN:

05 WALTER PATRICK TWINN, suing on his own behalf and on
06 behalf of all other members of the Sawridge Band,
07 WAYNE ROAN, suing on his own behalf and on behalf of all
08 other members of the Ermineskin Band, BRUCE STARLIGHT,
09 suing on his own behalf and on behalf of all other
10 members of the Sarcee Band

11 Plaintiffs

12 -and-

13 HER MAJESTY THE QUEEN

14 Defendant

15 -and-

16 NATIVE COUNCIL OF CANADA, NATIVE COUNCIL OF CANADA
17 (ALBERTA), AND NON-STATUS INDIAN ASSOCIATION OF

ALBERTA

18 Interveners

19 P R O C E E D I N G S

20 Held at the Federal Court of Canada

21 Edmonton, Alberta

22 October 29, 1993

23 Volume 25

24 Pages 3945 to 4047

25 Taken Before:

26 The Honourable Mr. Justice F. Muldoon

03946:01 APPEARANCES

02 M. Henderson, Esq. For the Plaintiffs

03 C. M. Twinn, Ms.

04 P. Healey, Esq.

05 D. D. Akman, Esq. For the Defendant

06 E. Meehan, Esq. Intervener for the

07 Native Council of Canada

08 P. J. Faulds, Esq. Intervener for the Native

09 T. K. O'Reilly, Esq. Council of Canada (Alberta)

10 T. P. Glancy, Esq. Intervener for the

11 Non-Status Indian

12 Association of Alberta

13
14 -----

16 June Rossetto Court Registrar

17 M. Andruniak, CSR(A) Court Reporter

18

19 * * * * *

10 I act as agent for Mr. Glancy?
11 THE COURT: Of course. With his consent, of
12 course.
13 MR. MEEHAN: With his consent.
14 MR. FAULDS: And at his request.
15 THE COURT: Mr. Faulds?
16 MR. FAULDS: Thank you, My Lord.
17 MR. TWINN CROSS-EXAMINED FURTHER BY MR. FAULDS:
18 Q Chief Twinn, when we broke at the end of yesterday, you
19 had in front of you two documents. They were
20 Exhibits 92(E), and I believe it was 92(G).
21 THE COURT: G and E?
22 MR. FAULDS: E and G.
23 Q MR. FAULDS: Now, Chief Twinn, just to keep
24 things straight, 92(E), I understand, is -- I'll call it
25 the 1985 trust which did not include the Bill C-31 people
26 as beneficiaries, and 92(G) is the 1986 trust which would
03949:01 include the Bill C-31 people as beneficiaries.
02 What I was asking you about at the
03 end of the day was, as far as you can recall, were these
04 two trusts supposed to exist side by side? Were there
05 supposed to be two trusts?
06 A No. The second trust was made after that, after the '85
07 trust. I think the '86 was made after the '85.
08 Q Was every asset held by the 1985 trust supposed to be
09 placed into the 1986 trust?
10 A Probably everything, unless there was some new company
11 that had been -- between '85 and the '86 was made. I
12 don't know that off the top of my head.
13 Q But the intention was that the 1985 trust no longer be
14 effective and that everything be in the 1986 trust?
15 A That's right.
16 THE COURT: So it's a substitution.
17 THE WITNESS: That's right.
18 Q MR. FAULDS: And it appears that with the
19 exception of the documents that Mr. Henderson pointed
20 out, that is, Document 92(K), which was a trust
21 declaration over Plaza Food Fare Inc., we don't have any
22 records or documents of the assets actually being placed
23 into the 1986 trust. That's correct?
24 A That could be correct.
25 Q But that was the intention?
26 A That's the intention.
03950:01 Q And if we can look at the back page of Exhibit 92(G), the
02 second last page, page 8, that would be your signature as
03 the settlor under A there?

Tab C

	Clerk's stamp:
COURT FILE NUMBER	1103-14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	<p>IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED</p> <p>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")</p>
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	<p>Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8</p> <p>Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB</p>

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.

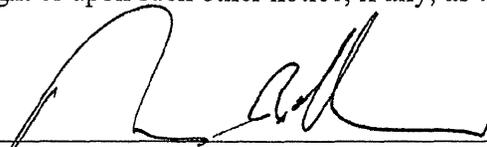
Further Notice and Service Provisions

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

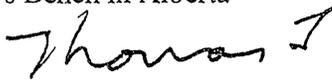
f. The Minister.

Variation or Amendment of this Order

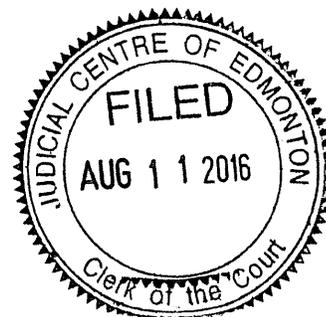
19. Any interested person, including the Applicants, may apply to this Court to vary or amend this Order on not less than 7 days' notice to those persons identified in paragraph 17 of this Order, as well as any other person or persons likely to be affected by the order sought or upon such other notice,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



Justice of the Court of Queen's Bench in Alberta



COURT FILE NUMBER 1103 14112
 COURT Court of Queen's Bench of Alberta
 JUDICIAL CENTRE Edmonton



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

IN THE MATTER OF THE SAWRIDGE BAND
 INTER VIVOS SETTLEMENT
 CREATED BY CHIEF WALTER PATRICK
 TWINN, OF THE SAWRIDGE INDIAN BAND,
 NO. 19 now known as SAWRIDGE FIRST
 NATION ON APRIL 15, 1985
 (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 APPLICATION for Advice and Direction in
 Respect of the transfer of assets

ADDRESS FOR SERVICE AND CONTACT DENTONS CANADA LLP
 2900, 10180 - 101 Street
 INFORMATION OF PARTY Edmonton, Alberta T5J 3V5
 FILING THIS DOCUMENT: T 780 423 7100 F 780 423 7276
 Attention : Doris Bonora

REYNOLDS, MIRTH, RICHARDS & FARMER LLP
 3200 Manulife Place
 10180 - 101 Street
 Edmonton, AB T5J 3W8
 Attention: Marco S. Poretti

Telephone: (780) 497-3325
 Fax: (780) 429-3044
 File No: 108511-001-MSP

NOTICE TO RESPONDENT(S)

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

You have the right to state your side of this matter before the master/judge.

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

Date	Thursday, August 24, 2016
Time	10:00 AM
Where	Law Courts Building 1 Sir Winston Churchill Square Edmonton, AB T5J 3Y2
Before Whom	Justice D.R.G. Thomas

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

1. Applicants

- (a) The Trustees of the 1985 Sawridge Trust

2. Issues to be determined or nature of claims

- (a) Approval of the transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.
- (b) Providing Direction that without limiting the generality of the foregoing, the Trustees' application cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 trust.

3. Grounds for request and relief sought

- (a) Assets were transferred from the 1982 trust to the 1985 trust in 1985;
- (b) There are representations from counsel for the Sawridge Trustees that the Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust;
- (c) The parties to this action have been given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have obtained;

- (d) The Trustees are not seeking an accounting of the assets transferred into the 1982 Trust;
- (e) The Trustees are not seeking an accounting of the assets transferred into the 1985 Trust;
- (f) The Trustees are not seeking an accounting of the assets transferred from the 1982 Trust into the 1985 Trust;
- (g) Little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust.

4. **Documents filed in this application**

- (a) Affidavits of Paul Bujold filed in this action;
- (b) Questioning on the affidavits of Paul Bujold filed in this action;
- (c) Undertakings of Paul Bujold filed in this action;
- (d) Form of Order in respect of this matter attached as Schedule "A" hereto.

5. **Applicable Statutes**

- (a) Trustee Act R.S.A. 2000, c.T-8, s.43, as amended

6. **Any irregularity complained of or objection relied on:**

7. **How the application is proposed to be heard or considered:**

In chambers before Justice D.R.G. Thomas, the case management justice assigned to this file.

WARNING

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

SCHEDULE "A"

Clerk's Stamp:

COURT FILE NUMBER 1103 14112
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c
T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER
VIVOS SETTLEMENT CREATED BY CHIEF WALTER
PATRICK TWINN, OF THE SAWRIDGE INDIAN
BAND, NO. 19 now known as SAWRIDGE FIRST
NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS ROLAND TWINN, CATHERINE TWINN, WALTER
FELIX TWIN, BERTHA L'HIRONDELLE and CLARA
MIDBO, as Trustees for the 1985 Sawridge Trust (the
"Sawridge Trustees")

DOCUMENT

ORDER

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF PARTY
FILING THIS DOCUMENT

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Fx: (780) 429-3044
File No. 108511-MSP

DATE ON WHICH ORDER WAS PRONOUNCED: _____, 2016

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, AB

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

ORDER

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

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

IT IS HEREBY ORDERED THAT:

1. The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.
2. Without limiting the generality of the foregoing, the Trustees' application and this Order cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 trust.

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