COURT FILE NO. 1103 14112

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

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

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

APPLICANT **ROLAND TWINN, EVERETT JUSTIN TWIN, MARGARET WARD, TRACEY SCARLETT and DAVID MAJESKI, as Trustees for the 1985 Trust**

RESPONDENTS **THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE and CATHERINE TWINN**

DOCUMENT **WRITTEN BRIEF OF THE RESPONDENT, CATHERINE TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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PART 1 INTRODUCTION

1. In August 2016, the parties to this litigation approved a consent order that was endorsed by the Honourable Justice Thomas on August 24, 2016 (the "**Consent Order**")[1]. The Consent Order was entered on notice to and with the involvement of the following non-parties that were represented at the application on August 25, 2016 when the Consent Order was entered[2]:

   a) The Sawridge First Nation

   b) Minister of Aboriginal Affairs and Northern Development, Government of Canada

   c) Shelby Twinn, Patrick Twinn and Deborah Serafinchon

2. Catherine Twinn's understanding of the effect of the Consent Order is it ratified the transfer of assets from the Sawridge Band Trust dated April 15, 1982 (the "**1982 Trust**") to the Sawridge Band Intervivos Settlement dated April 15, 1985 (the "**1985 Trust**") and confirmed that the assets were held subject to the terms of the 1985 Trust deed.

3. Catherine Twinn understood the reason the trustees of the 1985 Trust (the "**Trustees**") sought the Consent Order was to formally confirm that the 1985 Trust was the only trust with which to deal, as the fact the assets had transferred in 1985 was not contentious and the assets have been under the management of the 1985 Trustees for over 30 years.[3]

4. Ms. Twinn believes all involved parties and non-parties, including the SFN, shared this understanding based on the communication exchanged prior to the entry of the Consent Order.[4]

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[1] Consent Order [**TAB A**]

[2] Transcript of Proceedings on August 24, 2016 [**TAB B**]

[3] Affidavit of Paul Bujold, filed September 13, 2011 at paras. 24-28.

[4] Questioning of Darcy Twin, held October 18, 2019, Exhibit "E", "F" and "G" [**TAB C**]

5. On April 25, 2019 this Honourable Court sought submissions on the terms of the Consent Order and what impact the Consent Order had on the trust terms upon which the subject assets were being held.

6. At the September 4, 2019 case management meeting, the Court sought to have the issues to be addressed on November 27, 2019 defined with precision and clarified those issues to be a determination of the "meaning and consequences" that flow from the Consent Order, "specifically with respect to whether or not after the transfer of assets to the 1985 Trust, those assets are being held subject to the terms of the 1985 Trust, or whether they are being held subject to the terms of the 1982 Trust"[5] (the "**Issues for November 27, 2019**").

7. The Trustees volunteered to bring an application to procedurally formalize the Issues for November 27, 2019[6]. This application was filed on September 13, 2019 (the "**Application**"). The Application seeks the advice and direction of the Court on the Issues for November 27, 2019, but also seeks advice and direction on additional matters raised by the Trustees[7].

8. The submissions filed by the Trustees in relation to the Application are scant and essentially rely on their August 2016 submissions to the Court in support of the Consent Order. The Trustees submissions do not:

   a) Provide a position on the meaning and effect of the Consent Order;

   b) Provide relevant law on the proper interpretation of the Consent Order; or

   c) Advocacy on whether the Consent Order confirms the transferred assets are subject to the terms of the 1985 Trust. Notably, if this finding is made by the Court, it would render all further inquiry into the propriety of the transfer moot as

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[5] Transcript of Proceedings on September 4, 2019 at page 22 [**TAB D**]

[6] Transcript of Proceedings on September 4, 2019 at page 22 [**TAB D**]

[7] Application filed by Trustees on September 13, 2019 [**TAB E**]

the Consent Order was not appealed and no application has been made to overturn it.

9. Ms. Twinn's submissions in relation to the Application will focus on supplementing these striking gaps left by the Trustees and to advocate for the interests of the existing beneficiaries of the 1985 Trust. More particularly, the conclusion Ms. Twinn will ask the Court to draw is that the meaning and effect of the Consent Order is that the transferred assets are held subject to the terms of the 1985 Trust deed. In the alternative, if this position is not accepted, Ms. Twinn will provide the Court with her submissions on process for the future adjudication of the transfer issue, including addressing the evidentiary record that will need to be established for that application.

PART 2 RELEVANT FACTS AND EVIDENCE

Historical Background

10. Chief Walter Patrick Twinn was the Chief of the Sawridge First Nation ("**SFN**") from 1966 until his death in 1997.[8]

11. On April 15, 1982, Chief Twinn settled a trust for the benefit of "all members, present and future" of the SFN, with the exception of "illegitimate children of Indian women". This trust was called the Sawridge Band Trust (defined as the 1982 Trust in these submissions). The trustees of the 1982 Trust were intended to be the Chief and Council of the SFN.[9] The 1982 Trust deed was subsequently amended to provide for staggered terms for the trustees.[10]

12. At the time the 1982 Trust was settled, membership in the SFN was determined by the qualification provisions of the *Indian Act*, R.S.C. 1970, c. I-6 ("*Indian Act*") which were administered by the Department of Indian Affairs and Northern Development, later known as Aboriginal Affairs and Northern Development Canada. At the time,

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[8] Affidavit of Paul Bujold, filed September 13, 2011 at para 6.

[9] 1982 Trust Deed found at Exhibit A to the Affidavit of Paul Bujold, filed September 13, 2011. [**TAB F**]

[10] Affidavit of Paul Bujold, filed September 13, 2011 at para 11 and Exhibit C.

registration for Indian status and membership in a particular first nation were one and the same.

13. In 1985 meaningful changes were being introduced by Parliament to the *Indian Act*. On April 17, 1985, the provisions of Bill C-31, An Act to amend the Indian Act, 33-34 Eliz II c.27 ("Bill C-31"), came into force.[11] The Bill C-31 amendments, amongst other matters, affected who would qualify for Indian status, membership in a band and the band membership process generally. A major change was that the First Nation could elect to administer their own band membership list rather than the list being managed by the Department of Indian Affairs and Northern Development. Following the Bill C-31 amendments, the Sawridge First Nation elected to take control of its band list and introduced its own membership code that allows it to determine who can become a member of the SFN based on their own rules as set out in the membership code.[12]

14. The membership code provides a high degree of discretion to the SFN in determining who will (and won't) become a member of the SFN. The only individuals who have a right to be placed on their membership list are natural children of parents whose names are both entered on the SFN's membership list.[13]

15. The SFN's membership practices have a history of controversy, including, most notably, the long running and unsuccessful constitutional challenge by the SFN to deny membership status to those directed onto its membership list by the coming into force of Bill C-31.[14] Shelby Twinn in her intervenor application spoke to her personal experience with the membership process, the significant delays and perceived bias, and her conclusion, based on personal experience, that the process is corrupt.[15]

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[11] *Indian Act,* RSC 1970, c. I-6, as amended by SC 1985, c. 27, s. 23(1). [**TAB G**]

[12] Questioning on Affidavit of Paul Bujold sworn February 27, 2017 and held on March 7-10, 2017 at Exhibit 7 (the "**Membership Code**")[**TAB H**]

[13] Membership Code at para. 3(b) [**TAB H**]

[14] Leave to appeal to Supreme Court of Canada denied December 10, 2009

[15] Transcript of Proceedings on October 30, 2019 at page 9 [**TAB I**]

16. Bill C-31 was in large part a response to the introduction of the Canadian Charter of Rights and Freedoms and was intended, amongst other matters, to correct certain provisions of the *Indian Act* that were found to be discriminatory and inconsistent with the Charter. As a result of this, certain individuals who were previously disqualified from status, were directed to be reinstated to membership in their respective First Nation.[16]

17. A significant consequence of the Bill C-31 changes was that while an individual could qualify for Indian status they may not necessarily become a member of a particular First Nation, thus leaving the individual without membership in any First Nation.

18. As of August 12, 2016, there were approximately 493 persons associated with the SFN at the Department of Indian Affairs and Northern Development, but at present only 45 persons are on the SFN membership list that is maintained by the SFN.[17]

19. The SFN was concerned about the impact Bill C-31 would have on their First Nation, particularly in regard to the anticipated influx of additional members to their membership list. Consequently, the decision was made to settle a new trust for the purpose of preserving assets for SFN members as they had previously been established at the time the 1982 Trust was settled (i.e. utilizing the provisions of the *Indian Act*).[18]

20. On April 15, 1985, Chief Twinn settled the 1985 Trust for the benefit of its beneficiaries. The beneficiaries are defined at paragraph 2(a) of the Deed, as:

> "all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not

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[16] Affidavit of Paul Bujold, filed September 13, 2011 at para 13-15.

[17] Affidavit of Claudette Young, sworn August 12, 2016, filed August 12, 2016 at Exhibit B [**TAB J**]; Affidavit of Darcy Twin, filed September 26, 2019 at para. 2.

[18] Excerpt from the Written Submissions of the Sawridge First Nation, filed March 8, 2012, para. 8 [**TAB K**]

> such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of this execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purpose of this Settlement"

21. The 1985 Trust was settled with $100.00.[19]

22. A significant difference between the 1982 and 1985 Trusts, is rather than the Chief and Council of the SFN comprising the trustee group, the 1985 Trust provided for a group of five trustees, at least two of which must be beneficiaries of the 1985 Trust.

23. As a result of the changes arising from Bill C-31 and as previously detailed, it is possible for an individual to qualify as a beneficiary of the 1985 Trust, but not be a member of the SFN. Intervenor, Shelby Twinn, is an example of such an individual.

Transfer of Assets

24. Immediately following the settlement of the 1985 Trust, it is understood that the trustees of the 1982 Trust transferred all of the assets of the 1982 Trust to the 1985 Trust. In addition, it has been suggested that the SFN or individuals holding property in trust for the SFN and its members, transferred additional property into the 1985 Trust. [20]

25. On April 15, 1985, the persons qualifying as beneficiaries of the 1985 Trust were identical to those of the 1982 Trust. These persons were easily identifiable as they were the persons listed on the band list maintained by the Department of Indian Affairs and Northern Development.

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[19] 1985 Trust page 11, Schedule. [**TAB L**]

[20] Affidavit of Paul Bujold, filed September 13, 2011 at para 22.

26. Relevant documentation pertaining to the transfer of assets is as follows:

a) **Resolution of the trustees of the 1982 Trust dated April 15, 1982**[21] – pertinent sections are:

A. Preamble: Reference is made to the impending changes arising from Bill C-31 and the ability of the trustees "to pay or apply all or so much of the net income of the Trust Fund and all or so much of the capital of the Trust Fund" as they determine to the beneficiaries.

B. Preamble: For the purpose of "precluding future uncertainty as to the identity of the beneficiaries of the Trust" the trustees were desirous of resettling the assets of the 1982 Trust so that the trust funds could only be used for the benefit of persons who would qualify for membership in the SFN as such process existed at the time the 1982 Trust was settled.

C. Paragraph 1 – It was resolved to transfer all of the assets of the 1982 Trust to the 1985 Trust.

D. Acceptance by 1985 Trust Trustees – The Trustees of the 1985 Trust accepted the transfer of all of the assets and that they would hold those assets on the terms set out in the 1985 Trust.

b) **Sawridge Band Resolution dated April 15, 1985**[22] ratifying and approving the transfer of assets from the 1982 Trust to the 1985 Trust at a duly convened and constituted meeting of the Sawridge Indian Band at the Band Office in Slave Lake. The Resolution is signed by various SFN members.

c) **Declaration of Trust dated April 16, 1985 between the trustees of the 1982 and 1985 Trusts**[23], declaring that the Trustees of the 1985 Trust will hold the following assets in trust under the terms of the 1985 Trust:

A. 46 Class "A" Common shares in Sawridge Holdings Ltd.

B. 100 Class "A" Common shares in Sawridge Energy Ltd.

27. The transfer of assets from the 1982 to the 1985 Trust occurred with the benefit of sophisticated legal and accounting advisors, including Maurice Cullity (subsequently Justice Cullity of the Ontario Superior Court of Justice) and Ron Ewoniak of Deloitte.[24]

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[21] Affidavit of Paul Bujold, filed September 13, 2011 at para 19 and Exhibit H. [**TAB M**]

[22] Affidavit of Paul Bujold, filed September 13, 2011 at para 20 and Exhibit I. [**TAB N**]

[23] Affidavit of Paul Bujold, filed September 13, 2011 at para 21 and Exhibit J. [**TAB O**]

28. On August 15, 1986, Chief Twinn settled an additional and separate trust (the "**1986 Trust**") for the benefit of:[25]

> "all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada".

29. Effectively, the 1985 Trust provided for all persons who would qualify for SFN membership pre *Bill C-31* amendments and the 1986 Trust provides for persons who qualify for SFN membership post *Bill C-31* amendments. The 1985 and 1986 Trusts collectively, provide beneficial status to a broad range of individuals associated with the SFN and thus entitle a broader Sawridge community, both members and non-members, to benefits.

Involvement of the Crown in the 1985 Trust

30. By way of letter dated December 23, 1993, an office of the Crown sought to inquire about the "trusts" created by the SFN as they believed these trusts held funds previously derived from band capital and revenue monies previously released by the Minister of the Department of Indian Affairs and Northern Development.[26]

31. Over the course of 1993/1994 the SFN took the position with the Crown that the Crown was not "entitled to demand details of expenditures made by the band in the past or with respect to the assets that it now holds." This position is documented in a letter by their counsel, Maurice Cullity, dated October 20, 1994.[27]

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[24] Affidavit of Paul Bujold, filed September 13, 2011 at para 23

[25] 1986 Trust [**TAB P**]

[26] Affidavit of Darcy Twinn, filed September 26, 2019 at para. 8 and Exhibit C.

[27] Supplemental Affidavit of Records of Sawridge Trustees, filed April 30, 2018, Documents #SAW001879, #SAW001881, #SAW001885, #SAW001886, #SAW001892 and #SAW001893 [**TAB Q**]

32. The position taken by Mr. Cullity on behalf of the SFN was subsequently affirmed by the Supreme Court of Canada in *Ermineskin Indian Band and Nation v. Canada* which held: "Once a transfer is effected, the Crown's fiduciary obligation with regard to the funds in question must cease, as it no longer has control over the funds and is not responsible for their management." [28]

33. The Crown did not take any action in regards to the 1985 Trust and further, did not oppose the Consent Order.[29]

PART 3 ISSUES

34. The issues raised in the Application are as follows:

a) Determination of the meaning and effect of the Consent Order;

b) Determination of the sufficiency of service of the Consent Order;

c) The ability of the Trustees to transfer the 1985 Trust assets to the 1986 Trust.

PART 4 ARGUMENT

A. *Determination of the meaning and effect of the Consent Order*

35. The Consent Order is an unchallenged and unappealed order of this Honourable Court and thus there is no jurisdiction on this application to disturb its directions.

36. The issue on this application is interpretive, namely, does the Consent Order have the effect of confirming that the subject assets are held pursuant to the terms of the 1985 Trust Deed.

37. Orders of this Honourable Court are not to be interpreted in a vacuum. The correct approach is to examine:

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[28] *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 [Tab 4, Brief of the Sawrdige First Nation, filed September 26, 2019]

[29] Questioning of Darcy Twin, held October 18, 2019, p. 30, 1.1-14 [Appendix O, Responding Brief of the OPGT, filed October 25, 2019]

a) The pleadings of the action in which the order is made;

b) The language of the order itself;

c) The circumstances in which the order was granted, so far as these circumstances were before the Court and patent to the parties;

d) Evidence before the Court when making the Order;

e) Reasons for making the order as given by the Court in its judgment.[30]

38. The interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.[31] Even if a judgment is not ambiguous, it is nevertheless proper (if not essential) in construing it to have regard to the factual context in which the judgment was given and that this context includes the pleadings, the reasons for the judgment and the course of evidence at the trial.[32]

39. This litigation was commenced by way of an Order of Justice D.R.G. Thomas issued August 31, 2011 (the "**August 2011 Order**")[33]. The August 2011 Order directed the Trustees of the 1985 Trust to bring an application for advice and direction for the purpose of:

a) Seeking direction with respect to the definition of "Beneficiaries" contained in the 1985 Trust, and, if necessary, to vary the 1985 Trust to clarify the definition of "Beneficiaries"; and

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

40. In furtherance of the August 2011 Order, the Consent Order arose from an application filed by the Trustees on August 11, 2016 seeking advice and direction on the matter of the transfer of assets to the 1985 Trust (the "**Transfer Application**"). The Transfer

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[30] *Campbell v. Campbell*, 2016 SKCA 39 at paras. 15 – 18 [**TAB R**]; *Manseau & Perron Inc. v. ThyssenKrupp Industrial Solutions (Canada) Inc.*, 2018 ABQB 949 at 31 [**TAB S**].

[31] *Sans Souci Limited v VRL Services Limited*, [2012] UKPC 6 at para. 13 [**TAB T**]

[32] *Re: Sharpe*, [1992] FCA 616 at pg 12. [**TAB U**]

[33] Order of Justice D.R.G. Thomas, August 31, 2011

Application referenced a broad base of evidence on which the Trustees were relying for the Order, including all affidavits of Paul Bujold, along with all questioning transcripts arising from those affidavits and associated undertakings.[34]

41. Mr. Bujold makes very clear in his Affidavit filed September 13, 2011 that the trustees are seeking a declaration of the Court that "the asset transfer was proper and that the assets in the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust."[35]

42. The correspondence between the parties that led to the endorsement of the Consent Oder is demonstrative that they understood this to be the resolution the Consent Order was to effect and were reliant on the evidence from Mr. Bujold in this regard.[36] In fact, in correspondence dated July 6, 2016 from the SFN to the OPGT, the SFN urged the OPGT to consent to the order sought by the Trustees in relation to the transfer of assets as they believed it to be "reasonable" and would resolve "any possible concerns with respect to the approval of the transfer of the assets from the 1982 Trust to the 1985 Trust".

43. This common understanding was logical as the subject assets had been managed by the Trustees of the 1985 Trust for over thirty years and it was clear that legal title to the assets had transferred.

44. The Trustees filed written submissions in support of the Consent Order on August 17, 2016 for the purpose of providing the Court with the factual and legal basis for granting the Consent Order. These submissions were considered by the Court. The Trustees advised in their submissions that:

> "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

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[34] Application of the Trustees, filed August 11, 2016 [**TAB V**]

[35] Affidavit of Paul Bujold, filed September 13, 2011 at para. 25.

[36] Questioning of Darcy Twin, held October 18, 2019, Exhibit "E", "F" and "G" [**TAB C**]

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."[37]

45. In oral submissions to the Court, counsel for the Trustees stated that:

"Sir, you'll recall that in this application, there were basically two issues. One was the beneficiary designation and the second was to confirm that the transfer of assets from the 1982 Trust to the 1985 Trust were – was appropriate, and that we've put that issue behind us. And through the work of counsel we've been able to reach agreement on the issue of the transfer of assets. I believe, Sir, you received a brief from us and a copy of the consent order."[38]

46. In response, the Court stated:

"I did. And thank you very much for the brief, because it makes it pretty clear – well, what the basis for it is, and I'm certainly satisfied that the consent order is appropriate and properly based in law."[39]

47. Turning to the Consent Order[40] itself, pertinent passages are as follows:

a) Preamble: AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust;

b) Paragraph 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*. **[emphasis mine]**

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[37]Written Submissions of the Trustees, filed August 17, 2016 at para 31.

[38] Transcript of Proceedings on August 24, 2016 at page 3 [**TAB B**]

[39] Transcript of Proceedings on August 24, 2016 at page 3 [**TAB B**]

[40] Consent Order [**TAB A**]

48. It is submitted that the interpretive exercise on this application is to determine the scope of the "transfer" being approved in the Consent Order. More particularly, does the transfer refer to legal ownership only OR legal and beneficial ownership.

49. What is clear from a review of the record is the Court believed the Consent Order was intended to finalize the advice and direction sought in relation to the transfer of assets.

50. The evidence and written submissions before the Court on the application were clear that the substantive relief being sought by the Trustees was confirmation that that assets transferred to the 1985 Trust were being held in trust for the benefit of the beneficiaries of the 1985 Trust and that the term "transfer" was to connote legal and beneficial ownership.

51. It is informative that in granting the Consent Order, the Court noted in the preamble that the assets from the 1982 Trust were transferred *into* the 1985 Trust. (emphasis mine)

52. In the relief granted, the Court approved the "transfer" of assets between the 1982 and 1985 Trusts. It is submitted that the word "transfer" must be construed in reference to the preamble which states it was a transfer "into the 1985 Trust".

53. It is a fundamental principle of every developed legal system that one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside.[41] The Trustees of the 1985 Trust, in that legal function, exist only to serve the beneficiaries of the 1985 Trust in accordance with the terms of the 1985 Trust Deed – they do not exist to serve the beneficiaries of the 1982 Trust. As such, if assets are placed "into" the 1985 Trust, the assets can only be lawfully administered according to the terms of the 1985 Trust Deed.

54. The meaning of the "transfer" is further informed by the Resolution of the Trustees of the 1982 Trust dated April 15, 1982 ("**Transfer Resolution**") and which was in evidence

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[41] Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) **at 930-931. [TAB W]**

before the Court on the application. In the Transfer Resolution, the Trustees of the 1985 Trust accept the transfer and agree to deal with the assets for the benefit of the beneficiaries of the 1985 Trust.[42]

55. In light of the foregoing contextual analysis, it is submitted that the proper interpretation of the meaning and effect of the Consent Order is it confirms the assets transferred from the 1982 Trust to the 1985 Trust and are being held in trust pursuant to the terms of the 1985 Trust deed because:

a) The evidence in support of the application states that this is the relief being sought by the Trustees and the Transfer Resolution evidences that the transfer was to convey both legal and beneficial ownership. This evidence would inform both the parties and the Court's understanding of the meaning and effect of the wording of the Consent Order and in particular the scope of the "transfer" being approved;

b) The written submissions filed in support of the Consent Order state the purpose of the Consent Order is to "protect the assets of the 1985 Trust for the benefit of the beneficiaries" and that unravelling this transfer would have deleterious effect on the trust property. This is supportive that the meaning and effect of the Consent Order is to ensure the subject assets do not revert to the 1982 Trust;

c) In oral submissions the Court was made aware that the Consent Order had the effect of resolving the issue pertaining to the transferred assets. It would be inconsistent with this position to interpret the Consent Order as leaving open the issue of which trust terms govern;

d) If the Consent Order was interpreted as only confirming that the 1985 Trustees are holding legal title to the subject assets, this would have the effect of placing the Trustees in direct breach of fundamental principles of our legal system.

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[42] Affidavit of Paul Bujold, filed September 13, 2011 at para 19 and Exhibit H. [**TAB M**]

C. Sufficiency of Service

56. The August 2011 Order sets out procedural terms for the service of further documents arising in this action.

57. The Trustees confirm that they complied with the terms of service set out in the August 2011 Order in regards to the Transfer Application. As such, proper service of the Application was effected.

58. The Consent Order was granted on notice to and with the participation of the SFN, who in their written submissions in support of their intervenor application confirmed that SFN "through its duly elected Chief and Council represents the members of Sawridge."[43] As such, the members of SFN who may be affected by the Consent Order, had the benefit of representation in relation to the Consent Order.

59. Further and of significance, the Consent Order is unchallenged. The Trustees were not requested by the Court to raise this issue. By independently raising the sufficiency of service, it gives the appearance that the Trustees are attempting to undermine the validity of the Consent Order.

60. It is respectfully requested that the Court decline to provide advice and direction on this matter.

D. Ability to Transfer 1985 Trust assets to the 1986 Trust

61. It is further noted that the Court did not seek an application from the Trustees on this matter and the Trustees have of their own accord brought this issue before the Court.

62. The Trustees have not laid any legal foundation for this request and simply rely on their submissions in support of the transfer of assets from the 1982 Trust to the 1985 Trust. In

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[43] Written submissions of SFN, filed September 26, 2019 at para. 42.

addition, the Trustees have not provided any particulars on how they would propose to structure the transaction.

63. A significant distinction between the transfer from the 1982 Trust to the 1985 Trust vs. a transfer from the 1985 Trust to the 1986 Trust is that the beneficiaries in the first example were the same at the time of transfer and the beneficiaries in the second example are different.

64. The foundation of the Trustees submissions in support of the transfer from the 1982 Trust to the 1985 Trust was that the transfer was for the benefit of the same persons.[44]

65. As such, the Trustees have not provided a legal foundation for their request for approval to transfer the 1985 Trust assets to the 1986 Trust and their request for direction should be denied.

D. ***In the alternative – Procedural Considerations***

66. In the event this Court finds that the Consent Order does not resolve which trust terms govern the transferred assets, Ms. Twinn notes the following:

a) A further hearing in this regard will be required, which will raise issues of mixed fact and law.

b) The evidentiary record is incomplete and the factual circumstances surrounding the transfer of assets requires further exploration, particularly in light of the new submissions put forward by the SFN in their recent intervenor application. More particularly:

A. The SFN has lead evidence in their intervenor application that the transferred assets are derived from the capital and revenue accounts maintained by the Crown for the SFN and, if so, this would have an impact

[44] Brief of the Trustees filed August 17, 2016 at para. 20.

on the asset transfer. Ms. Twinn has reason to believe that the source of funding for the transferred assets may not be the capital and revenue accounts. The SFN has not provided any accounting records that would support their assertion. Ms. Twinn would seek production of records that trace the source of funding.

B. Maurice Cullity is alive and believed to be able to give evidence on the factual circumstances surrounding the transfer of assets in 1985. The Trustees have taken the position that any information Mr. Cullity may have is subject to solicitor/client privilege. An application will be required to determine if privilege exists and if so, the extent and whether the information and files of Mr. Cullity are producible and/or compellable. There is case law for the proposition that solicitor/client privilege does not exist between trustees and beneficiaries.[45]

c) If the subject assets were found to be governed by the 1982 Trust terms, there is uncertainty relating to the proper interpretation of the beneficiary definition contained in the 1982 Trust Deed. More particularly, at the time the 1982 Trust Deed was settled, the settlor would have understood that members of the SFN were determined in a particular way, namely in accordance with the 1970 *Indian Act*. As such, the proper interpretation of the beneficiary definition in the 1982 Trust, may also be to utilize the 1970 *Indian Act* provisions. This issue is supported by the Resolution of the trustees of the 1982 Trust dated April 15, 1982 that cites the purpose of the transfer of assets to the 1985 Trust was to preclude "future uncertainty as to the identity of the beneficiaries of the Trust". An application to resolve this uncertainty will likely be required so that the beneficiaries can be properly ascertained.

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[45] *O'Rourke v. Darbishire*, [1920] All ER Rep1, 57 SLR 730 at 740. [**TAB X**]

PART 5 REMEDY SOUGHT

67. Catherine Twinn respectfully requests an Order:

a) Confirming that the meaning and effect of the Consent Order is to confirm that the subject assets are held subject to the terms of the 1985 Trust Deed;

b) Declining to provide advice and direction on service and further transfer of assets;

c) Heightened costs of this application in light of the Trustees failure to meaningfully defend the interests of the 1985 Trust beneficiaries on these matters and leaving this burden to others.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 15th day of November, 2019.

McLennan Ross LLP

Per: _____

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

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

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

DATE ON WHICH ORDER WAS PRONOUNCED: August 24, 2016

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, AB

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

CONSENT ORDER

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

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

IT IS HEREBY ORDERED THAT:

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

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

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

CONSENTED TO BY:

Dentons Canada LLP

Doris Bonora
Counsel for Sawridge Trustees

Reynolds Mirth Richards & Farmer LLP

Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP

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

Hutchison Law

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

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

IT IS HEREBY ORDERED THAT:

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

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

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

CONSENTED TO BY:

Dentons Canada LLP

Doris Bonora
Counsel for Sawridge Trustees

Reynolds Mirth Richards & Farmer LLP

Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP

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

Hutchison Law

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

TAB B

Action No.: 1103 14112
E-File No.: EVQ16SAWRIDGEBAND3
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

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")

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

Applicants

P R O C E E D I N G S

Edmonton, Alberta
August 24, 2016

Transcript Management Services, Edmonton
1000, 10123 99th Street
Edmonton, Alberta T5J-3H1
Phone: (780) 427-6181 Fax: (780) 422-2826

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C. Osuladini	For Catherine Twinn
L. Maj	For the Minister of Aboriginal Affairs and Northern Development
J.L. Hutchison	For the Public Trustee of Alberta
D.C. Bonora	For Sawridge Trustees
A. Loparco	For Sawridge Trustees
N.L. Golding, Q.C.	For Patrick Twinn, et al
E.H. Molstad, Q.C.	For Sawridge First Nation
G. Joshee-Arnal	For Sawridge First Nation
S.A. Wanke	For Morris Stoney, et al
C. Wilde	Court Clerk

Discussions

THE COURT: Good morning.

Are you going to do the introductions?

MR. MOLSTAD: I have been assigned that task, Sir.

THE COURT: All right.

MR. MOLSTAD: We have, representing the Sawridge Trustees, Ms. Bonora and Ms. Loparco.

We have representing the Public Trustee, Ms. Hutchison. Mr. Meehan is not with us today.

We have representing Catherine Twinn, Ms. Platten, and Ms. Osualdini.

We have myself, Sir, and Mr. Joshee-Arnal representing the Sawridge First Nation.

We have representing Mr. Morris Stoney, et al, Ms. Wanke.

And we have representing Patrick Twinn, et al, Ms. Golding.

We also have in attendance from the Minister of Aboriginal Affairs and Northern Development, Ms. Maj from the Department of Justice.

We -- as you can see from the agenda that was sent to you yesterday, the first item on the agenda is the Rule 5.13 application --

THE COURT: Yes.

MR. MOLSTAD: -- on membership and costs. And I'd like to guess that the matters after that are not going to take too long, but that is a guess in terms of the other matters (INDISCERNIBLE).

THE COURT: Yeah, I saw that revised agenda this morning. Thanks for sending it in. But I think what I'm going to do is I'm going to reorder it, because it looks to me from the revised agenda, the only matter that may take some time is actually your application.

MR. MOLSTAD: That may be the case.

THE COURT: So let's see if we can move some of the counsel along here.

MR. MOLSTAD: Well, I'm -- we're all in your hands, Sir, so. . .

THE COURT: All right.

MR. MOLSTAD: What order are you proposing in.

THE COURT: Oh, I'm proposing just normal chambers process; that is the consent order first, get it resolved and dealt with. That would be --

MR. MOLSTAD: Number 4?

THE COURT: Number 4, the consent order. And then we'll deal with these adjournment requests and --

MR. MOLSTAD: All right. Before I sit down, before we start the

Rule 5.13 application, I've had some discussion with my friend and I have a few preliminary comments before we start that.

THE COURT: All right.

MR. MOLSTAD: Okay? Thank you, Sir.

THE COURT: Certainly. And I think I will -- that's useful, because I think I've reviewed that material and I can narrow it down fairly quickly.

MR. MOLSTAD: Thank you.

THE COURT CLERK: Sorry, Sir, what was your name?

THE COURT: Mr. Molstad, Q.C.

MR. MOLSTAD: Sorry.

Submissions by Ms. Bonora

MS. BONORA: Sir, you'll recall that in this application, there were basically two issues. One was the beneficiary designation and the second was to confirm that the transfer of assets from the 1982 Trust to the 1985 Trust were -- was appropriate, and that we've put that issue behind us. And through the work of counsel, we've been able to reach agreement on the issue of the transfer of assets.

I believe, Sir, you received a brief from us and a copy of the consent order.

THE COURT: I did. And thank you very much for the brief, because it makes it pretty clear --

MS. BONORA: Yeah. So --

THE COURT: -- well, what the basis for it is, and I'm certainly satisfied that the consent order is appropriate and properly based in law.

MS. BONORA: Sir, I will not take any more time then. If you've read the brief, I really have nothing else to add to the submissions that we've made. And so, therefore, I think my friends would like to make a few comments, and I'll just respond to those if there's anything else, unless you have any questions for me.

THE COURT: All right. I wonder if, counsel, if you wouldn't mind just mentioning your name before you speak just so the clerk can keep track of who's speaking?

MS. BONORA: Doris Bonora of Dentons just spoke. Thank you, Sir.

THE COURT: Thanks, Ms. Bonora.

Submissions by Ms. Hutchison

MS. HUTCHISON: Good morning, My Lord. Janet Hutchison for the Public Trustee of Alberta.

Very brief comments, My Lord, simply to give the Court some idea of why the OPTT, and I believe Ms. Platten will speak to trustee Twinn, why we weren't able to arrive at a joint brief, as well as a consent order. And it was simply a matter, My Lord, of some of the wording around the facts and the evidence and what evidence was actually available, as well as the final paragraph of the brief. Counsel just really weren't able to quite agree how to characterize some of the issues around accounting.

The -- the Public Trustee would just like it noted on record that its position on the consent order is that when it -- there is this reference to accounting in the preamble in paragraph 2, that includes an individual accounting, as well as a passing of accounts. And, of course, My Lord, for future reference, the passing of accounts for the five trusts would occur logically within this proceeding, after beneficiary identification is dealt with.

But that's all we have to say, My Lord.

THE COURT: All right. Thank you. Ms. Platten?

Submissions by Ms. Platten

MS. PLATTEN: Sir, I think those are also our submissions, and so we don't really anything further to say.

THE COURT CLERK: Sorry, your name, for the record?

MS. PLATTEN: Sorry, Karen Platten for Catherine Twinn.

Submissions by Ms. Golding

MS. GOLDING: Sir, Nancy Golding from Borden Ladner Gervais in Calgary, and I am new to these -- this matter, acting on behalf of several of the individual beneficiaries.

I just wanted to comment that my client wasn't involved in this order, and so we don't intend to make any comment on it. However, we do want it noted that our understanding is the order is without prejudice to the rights of our client to request an accounting as it relates to the 1982 and 1985 Trusts, and for any relief that might come from that.

Thank you, Sir.

THE COURT: Thank you. Ms. Bonora, any --

MS. BONORA: Just one --

THE COURT: Look, I --

MS. BONORA: -- comment, Sir.

MS. MAJ: Sorry, sorry.

MS. BONORA: Oh, my -- my apologies.

THE COURT: You -- you can say something, but if --

MS. MAJ: That's all right. It's hard -- it's hard to see me in the back.

THE COURT: Quite frankly, you are not a party at --

Submissions by Ms. Maj

MS. MAJ: I was simply going to actually echo Ms. Platten's comments, My Lord.

THE COURT: Yeah. Well, okay. Well, just echo it and let's get on with it.

Ms. Bonora?

Submissions by Ms. Bonora

MS. BONORA: Just one comment. Ms. Hutchison said that the consent order was based on the accounting naturally occurring in this proceeding, and that was not discussed until yesterday morning. So I don't think it is the basis for the consent order, and that is a very live issue in terms of how the accounting will proceed. So I -- we just need to -- I'm not sure that you will be hearing that accounting. That is an issue that you'll hear about later in terms of how that's going to happen, so. . .

THE COURT: All right. Mr. Molstad, you don't have anything to say?

MR. MOLSTAD: I don't have anything to say. My name is Mr. Molstad.

Order (Consent Order)

THE COURT: All right. The consent order being sent to me with the brief, as I -- just so it's clear on the record, I did review that brief and it was very helpful to me in terms of providing a legal basis for the consent order. Plus, the Summary of Facts helped put me in the picture again.

So the consent order is granted, and there it is.

MS. BONORA: Thank you, Sir.

THE COURT: Madam Clerk, if you wouldn't mind handing that to Ms. Bonora.

Submissions by Ms. Bonora (Distribution Proposal Adjournment)

MS. BONORA: Sir, perhaps I'll speak to the adjournment in respect of the distribution proposal next.

THE COURT: All right. Sure.

MS. BONORA: Sir, the -- you'll recall in your December 17th, 2015, decision, you asked the Trustees to present a distribution proposal and to have it approved by the Court, and so we, in fact, submitted the distribution proposal to the Court. We then filed a brief in respect of approving that distribution proposal, and briefs have been filed by the Office of the Public Guardian and Trustee, and by Catherine

TAB C

Exhibit E

EXHIBIT: 5
QUESTIONING OF: Paul Bujold
Date: July 27, 2016
Allison Hawkins, CSR(A)

Doris M. McKenna

From: Bonora, Doris <doris.bonora@dentons.com>
Sent: Friday, May 13, 2016 4:57 PM
To: 'Janet Hutchison' (jhutchison@jlhlaw.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

Doris C.E. Bonora
Partner

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

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

大成 Salans FMC SNR Denton McKenna Long

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.

大成 DENTONS

Doris Bonora

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

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

大成 Salans FMC SNR Denton McKenna Long
dentons.com

Exhibit F for ID

June 22, 2016

File No.: 551860-1

SENT VIA E-MAIL: jhutchison@jlhlaw.ca

Hutchison Law
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park AB T8H 2A3

Attention: Janet L. Hutchison

Dear Madam:

RE: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust)
QB Action No. 1103 14112
Offer of settlement on the Transfer issue
With Prejudice

We are writing to make a formal offer of settlement to the OPGT in respect of the issue of the transfer of assets from the 1982 trust to the 1985 trust. We believe that this issue is simple. This issue involves simply normalizing the transfer of assets from one trust to the other trust. It does not involve an accounting of the assets in either trust or an accounting of the assets that transferred. The accounting is not an issue that the trustees have raised in this application. The trustees understand that the beneficiaries are free to bring an application for an accounting in respect of the transfer of assets and an accounting of the assets in the 1985 trust. The trustees are stating on a with prejudice basis that an order of the court to approve the transfer of assets from one trust to the other trust will not be raised be raised to argue that any subsequent accounting application brought by any beneficiary is *res judicata*. Of course, the transfer issue itself that is addressed in the Consent Order will be *res judicata*.

Thus, we offer to settle the transfer issue by entering into the attached consent order. We believe the order sets out exactly what we have stated above and believe it protects the ability of any beneficiary to bring an accounting application.

The offer to settle by entering into the consent order is open for acceptance until July 15, 2016. In the event that the offer is not accepted, then the offer will be made known to the court from the perspective of an answer to the request for documents in the OPGT Rule 5.13 application on the transfer issue. The offer will also be made known to the court in support of an application for costs in the event that the OPGT is not successful in its Rule 5.13 application given that the clarification in the attached consent order should assist the OPGT to determine that it need not proceed with its extensive Rule 5.13 application on the transfer issue.

We note that the Sawridge Trustees are the applicants in this application. To that end, it is up to the applicants to define the issue they wish to have addressed and the relief that they seek. No accounting relief is being sought, no relief is being sought to prevent a beneficiary from seeking an accounting. We have provided that clarification orally, in writing and now in the form of a consent order and formal with prejudice offer.

We are seeking to keep the costs in control. We make this offer in the hopes that the OPGT will respond positively to say that the transfer of assets from one trust to the other does not prejudice or in any way harm the minor beneficiaries provided their rights are protected to seek a future accounting.

The 1985 trust has been operating since 1985 with assets transferred to it from the 1982 trust. The problem for the trustees is really a dearth of information and documentation in respect of the trust to trust transfer. We simply wish to have the court agree that the transfer is approved and the 1985 trust is the entity with which to deal.

We do not see this as complex. We hope the OPGT can see that dealing with this issue poses no risk to the minor beneficiaries.

We believe this offer is in keeping with the direction of the Court to the parties to focus and to proceed expeditiously with the litigation.

This offer is open for acceptance until July 15, 2016.

Yours truly,
Dentons Canada LLP

Doris Bonora

DCEB/clg
Enclosure

cc K. Platten, Q.C., Crista Osualdini McLennan Ross (Catherine Twinn) (via email)

cc Marco Poretti, Reynolds, Mirth, Richards & Farmer LLP (via email)

cc E. Molstad, Q.C., Parlee McLaws LLP (via email)

cc Paul Bujold (via email)

cc Brian Heidecker (via email)

Clerk's Stamp:

COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, 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	Doris C.E. Bonora Dentons Canada LLP 2900 Manulife Place 10180 – 101 Street Edmonton, Alberta T5J 3V5 Ph. (780) 423-7188 Fx. (780) 423-7276 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

ORDER

UPON HEARING representations from counsel for the Sawridge Trustees, Catherine Twinn as a Trustee of the 1985 Sawridge Trust, and the Office of Public Guardian and Trustee of Alberta;:

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.

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

APPROVED AS TO FORM AND CONTENT BY:

Dentons Canada LLP

Doris Bonora
Counsel for Sawridge Trustees

Reynolds Mirth Richards & Farmer LLP

Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP

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

Hutchison Law

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

PARLEE McLAWS LLP
BARRISTERS & SOLICITORS | PATENT & TRADEMARK AGENTS

July 6, 2016

Exhibit G
for ID

EDWARD H. MOLSTAD, Q.C.
DIRECT DIAL: 780.423.8506
DIRECT FAX: 780.423.2870
EMAIL: emolstad@parlee.com
OUR FILE #: 64203-7/EHM

Hutchison Law
190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, Alberta T8H 2A3

Via email only

Attention: Ms. Janet Hutchison

Dear Madam:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust)
QB Action No. 1103 14112
With Prejudice Offer of Settlement of Transfer Issue

We confirm that we received a copy of the with prejudice offers to settle made by the Sawridge Trustees to the Public Trustee and to Catherine Twinn in the letter from Dentons Canada LLP, dated June 22nd, 2016.

It is the position of the Sawridge First Nation that this settlement offer is reasonable and resolves any possible concerns with respect to the approval of the transfer of the assets from the 1982 Trust to the 1985 Trust.

As previously noted, the Sawridge First Nation will be claiming costs payable by the Public Trustee on the basis that these costs not be paid from the Sawridge Trust. In the event that the Sawridge Trustee's offer regarding the transfer of assets is not accepted by the Public Trustee, the Sawridge First Nation will be submitting to the Court as part of its response to the Public Trustee's Rule 5.13 application regarding the transfer of assets that the Court take the Public Trustee's response to the offer into consideration in relation to Sawridge First Nation's application for costs.

Yours truly,

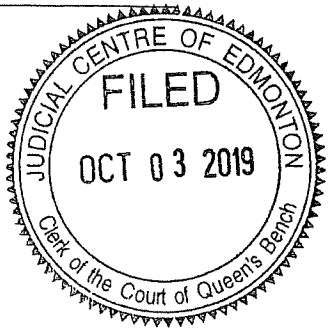
PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
EHM/tlk

Cc: Reynolds Mirth Richards & Farmer LLP – Attn: Mr. Marco Poretti
Cc: Dentons LLP – Attn: Ms Doris Bonora
Cc: Bryan & Company – Attn: Ms Nancy Cumming, Q.C.
Cc: McLennan Ross LLP – Attn: Ms Karen Platten, Q.C.
Cc: McLennan Ross LLP – Attn: Ms Crista Osualdini
Cc: Supreme Advocacy LLP - Mr. Eugene Meehan, Q.C.
(ALL VIA EMAIL ONLY)

TAB D

Action No.: 1103-14112
E-File No.: EVQ19TWINNR
Appeal No.: _____



IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF 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")

ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESCKI, as Trustees for the 1985 Sawridge Trust

Applicants

PROCEEDINGS

Edmonton, Alberta
September 4, 2019

Transcript Management Services
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

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M.S. Sestito	For R. Twinn, M. Ward, B. L'Hirondelle, E. Twinn and D. Majeski
C. Osualdini	For Catherine Twinn
D.D. Risling	For Catherine Twinn
J.L. Hutchison	For the Office of the Public Trustee
R.J. Faulds, Q.C.	For the Office of the Public Trustee
E.H. Molstad, Esq.	For the Sawridge First Nation
E. Sopko	For the Sawridge First Nation
M. O'Sullivan	Court Clerk

Discussion

THE COURT CLERK: Order in court. All rise.

THE COURT: Good morning. Please be seated.

MS. BONORA: Good morning.

MS. OSUALDINI: Good morning, My Lord.

MR. FAULDS: Good morning, My Lord.

THE COURT: Good morning.

Submissions by Ms. Bonora

MS. BONORA: Thank you, My Lord, for seeing us today and making the time for us. I'll just do some introductions.

Doris Bonora and Michael Sestito of Dentons on behalf of the Sawridge Trustees. John Faulds and Janet Hutchison are representing the Office of the Public Trustee and

THE COURT: -- on the issue.

MR. MOLSTAD: We'll file the motion, the affidavit and the briefs --

THE COURT: Okay.

MR. MOLSTAD: -- on the 27th.

THE COURT: Good. And then say a week later any of the parties can let me know whether or not you need an oral hearing on that, and if you need an oral hearing, we'll deal one -- deal with it in mid-October some time. It's -- it will be a short hearing, I'm thinking. So you can contact my assistant and say you need a time at 8:45 one morning, knowing that I will be gone by 10. So the 15th or 16th or 17th or 18th of October, if need be, but if you all agree that we can deal with it in writing, I'll just give you a response. Okay?

MR. FAULDS: That would certainly be agreeable.

THE COURT: Good. So that the second major issue that we've got to deal with today is defining with precision what it is we're going to do on November 27th, and really there are two options. One is whether we're going to deal with a whole suite of issues relating to the jurisdictional question, or whether we're going to target this one issue. Those are -- those are the two options.

So the first option is to deal with it narrowly. The question that would be put, presumably someone would file a motion, and I don't know, the Trustees perhaps would file a motion to have the issue of the meaning and consequences that flow from Justice Thomas' order of August 24th, 2016, specifically with respect to whether or not after the transfer of assets to the 1985 Trust, those assets are being held subject to the terms of the 1985 Trust, or whether they're being held subject to the terms of the 1982 Trust.

MS. BONORA: Sir, we'll take that on to file a motion in respect of those questions to be answered.

THE COURT: So that's the first option. The second option is we try to deal with that, as well as everything else that we had originally planned to deal with, and then if -- now, I can tell you this before you make submissions on that. If you were to phone down today to book a time, January and February and March, the calender hasn't been set for that, so you could jump the cue by booking a date in January. So you could -- you -- we could deal with a narrow issue on November 27th, and you could come

TAB E

Form 27
Rule 6.3

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	**APPLICATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2500 Stantec Tower 10230 – 103 Avenue Edmonton, AB T5J 0K4 Attention: Doris C.E. Bonora and Michael S Sestito Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
SEP 13 2019
Clerk of the Court

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:	**Wednesday, November 27, 2019**
Time:	**10:00 a.m.**
Where:	**Law Courts, 1A Sir Winston Churchill Square, Edmonton, Alberta T5J 0R2**
Before Whom:	**The Honourable Mr. Justice J.T. Henderson**

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

Remedy claimed or sought:

1. Determination and direction of the affect of the consent order made by Mr. Justice D.R.G. Thomas pronounced on August 24, 2016 (the "**2016 Order**") respecting the transfer of assets from the Sawridge Band Trust dated April 15, 1982 (the "**1982 Trust**") to the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "**1985 Trust**"), more particularly described below.

2. Determination of the sufficiency of service of the 2016 Order.

3. Alternatively, the determination of the ability to perform a subsequent trust to trust transfer, similar to what was approved by the 2016 Order.

Grounds for making this application:

4. In 1982, the Sawridge Band decided to establish a formal trust in respect of property 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.

5. On April 15, 1985, the trustees of the 1982 Trust resolved to transfer the assets of the 1982 Trust to the 1985 Trust (the **"1985 Transfer"**).

6. In 2016, the Sawridge Trustees, the Office of the Public Guardian and Trustee and Catherine Twinn (collectively, the "**Parties**") agreed to the terms of the 2016 Consent Order respecting the 1985 Transfer.

7. On April 25, 2019, the Parties appeared before His Lordship Mr. Justice Henderson who advised of some concerns with respect to the 1985 Transfer, the consequences of the 2016 Order and the service of the 2016 Order.

8. On September 4, 2019, His Lordship Mr. Justice Henderson invited a party to draft and file an application to determine: "what flows from the 2016 Order, and whether, as a result of that order, the Trust assets are held subject to the terms of the 1985 Trust, whether the beneficiaries as described in the 1985 Trust are actually the beneficiaries of these Trust assets, and whether that took away the Trust obligation that existed in the 1982 Trust." (Transcript of Proceedings – September 4, 2019 26:3-8).

9. His Lordship also commented: "If it was as easy to change the terms of the Trust as to go ahead and do what was done between 1985 [sic] and 1985, why don't you just go ahead and do that very same thing again and see how far it gets you." (Transcript of Proceedings – September 4, 2019 13:13-15)

10. The Sawridge Trustees have volunteered to file the within application, consistent with The Court's invitation.

Material or evidence to be relied on:

11. Affidavits previously filed in this action;
12. Questionings filed in this action;
13. Undertakings filed in this action;
14. Affidavits of records and supplemental affidavits of records in this action;
15. Such further material as counsel may further advise and this Honourable Court may permit.

Applicable rules:

16. *Alberta Rules of Court,* Alta Reg 124/2010, Rules 4.11, 4.14, 6.3,
17. Such further and other rules as counsel may advise and this Honourable Court may permit.

Applicable Acts, regulations and Orders:

18. *Trustee Act,* RSA 2000, c T-8, as amended;
19. Various procedural orders made in the within action;
20. Such further and other acts, regulations, and orders as counsel may advise and this Honourable Court may permit.

Any irregularity complained of or objection relied on:

21. None.

How the application is proposed to be heard or considered:

22. In person before the Case Management Justice.

WARNING

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

TAB F

This is Exhibit " A " referred to in the Affidavit of
Paul Bujold
Sworn before me this 12 day
of September A.D., 2012
A. Magnan
A ~~Notary Public~~, A Commissioner for Oaths
in and for the Province of Alberta
Catherine A. Magnan
My Commission Expires
January 29, 2013

DECLARATION OF TRUST

SAWRIDGE BAND TRUST

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

BETWEEN:

CHIEF WALTER PATRICK TWINN
of the Sawridge Indian Band
No. 19, Slave Lake, Alberta

(hereinafter called the "Settlor")

of the First Part

AND:

CHIEF WALTER PATRICK TWINN,
WALTER FELIX TWINN and GEORGE TWINN
Chief and Councillors of the
Sawridge Indian Band No. 150 A S R respectively

(hereinafter collectively called the "Trustees")

of the Second Part

AND WITNESSES THAT:

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

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

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

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

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

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

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

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

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

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

6. The Trustees shall hold the Trust Fund for the benefit of all members, present and future, of the Band; provided, however, that at the end of twenty one (21) years after the death of the last decendant now living of the original signators of Treaty Number 8 who at the date hereof are registered Indians, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among all members of the Band then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and

their status may not have been protested under Section 12(2) thereunder; and provided further that the Trustees shall exclude any member of the Band who transfers to another Indian Band, or has become enfranchised (within the meaning of these terms in the Indian Act).

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

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investment authorized for Trustees' investments by The Trustees' Act, being Chapter 373 of the Revised Statutes of Alberta 1970, as amended from time to time, but the Trustees are not restricted to such Trustee investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act or the Quebec Savings Bank Act applies.

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

and to discharge their obligations thereunder other than acts done or omitted to be done by them in bad faith or in gross negligence, including, without limiting the generality of the foregoing, the power

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

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

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

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

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

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

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

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

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

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

SIGNED, SEALED AND DELIVERED
In the Presence of:

Heather Lyle
NAME
1100 One Thornton Court
ADDRESS

A. Settlor: Walter Paul

Heather Lyle
NAME
1100 One Thornton Court
ADDRESS

B. Trustees: 1. Walter Paul

NAME Heather Ayers

ADDRESS 1100 One Thornton Court

NAME Heather Ayers

ADDRESS 1100 One Thornton Court

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

2. [signature]

3. Walter F Ayers

4. _____

5. _____

6. _____

7. _____

8. _____

TAB G

CHAPTER 27

An Act to amend the Indian Act

[Assented to 28th June, 1985]

R.S., c. I-6; c. 10 (2nd Supp.); 1974-75-76, c. 48; 1978-79, c. 11; 1980-81-82-83, cc. 47, 110; 1984, c. 4

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. (1) The definitions "child", "elector" and "Registrar" in subsection 2(1) of the *Indian Act* are repealed and the following substituted therefor in alphabetical order within the subsection:

"child" «enfant»

"child" includes a child born in or out of wedlock, a legally adopted child and a child adopted in accordance with Indian custom;

"elector" «électeur»

"elector" means a person who

(*a*) is registered on a Band List,

(*b*) is of the full age of eighteen years, and

(*c*) is not disqualified from voting at band elections;

"Registrar" «registraire»

"Registrar" means the officer in the Department who is in charge of the Indian Register and the Band Lists maintained in the Department;"

(2) Subsection 2(1) of the said Act is further amended by adding thereto, in alphabetical order within the subsection, the following definitions:

"Band List" «liste...»

"Band List" means a list of persons that is maintained under section 8 by a band or in the Department;

CHAPITRE 27

Loi modifiant la Loi sur les Indiens

[Sanctionnée le 28 juin 1985]

S.R., c. I-6; ch. 10 (2e suppl.); 1974-75-76, ch. 48; 1978-79, ch. 11; 1980-81-82-83, ch. 47, 110; 1984, ch. 4

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, décrète :

1. (1) Les définitions de «électeur», «enfant» et «registraire», au paragraphe 2(1) de la *Loi sur les Indiens*, sont abrogées et respectivement remplacées par ce qui suit :

«électeur» "elector"

«électeur» signifie une personne qui

a) est inscrite sur une liste de bande,

b) a dix-huit ans révolus, et

c) n'a pas perdu son droit de vote aux élections de la bande;

«enfant» "child"

«enfant» comprend un enfant né du mariage ou hors mariage, un enfant légalement adopté, ainsi qu'un enfant adopté selon la coutume indienne;

«registraire» "Registrar"

«registraire» désigne le fonctionnaire du ministère responsable du registre des Indiens et des listes de bande tenus au ministère;

(2) Le paragraphe 2(1) de la même loi est modifié par insertion, suivant l'ordre alphabétique, de ce qui suit :

«liste de bande» "Band List"

«liste de bande» signifie une liste de personnes tenue en vertu de l'article 8 par une bande ou au ministère;

«registre des Indiens» "Indian Register"

«registre des Indiens» signifie le registre de personnes tenu en vertu de l'article 5;

"Indian Register" *registre...*

"Indian Register" means the register of persons that is maintained under section 5;"

2. Section 4 of the said Act is amended by striking out subsection (2) and substituting the following therefor:

Act may be declared inapplicable

"(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 5 to 14.3 or sections 37 to 41, shall not apply to

(*a*) any Indians or any group or band of Indians, or

(*b*) any reserve or any surrendered lands or any part thereof,

and may by proclamation revoke any such declaration.

Authority confirmed for certain cases

(2.1) For greater certainty, and without restricting the generality of subsection (2), the Governor in Council shall be deemed to have had the authority to make any declaration under subsection (2) that he has made in respect of section 11, 12 or 14, or any provision thereof, as each section or provision read immediately prior to April 17, 1985."

3. The said Act is further amended by adding thereto, immediately after section 4 thereof, the following section:

Application of certain provisions to all band members

"4.1 A reference to an Indian in the definitions "band", "Indian moneys" and "mentally incompetent Indian" in section 2 or a reference to an Indian in subsection 4(2) or (3), subsection 18(2), section 20, sections 22 to 25, subsection 31(1) or (3), subsection 35(4), section 51, section 52, subsection 58(3), subsection 61(1), section 63, section 65, subsection 66(2), subsection 70(1) or (4), section 71, paragraph 73(*g*) or (*h*), subsection 74(4), section 84, paragraph 87(*a*), section 88, subsection 89(1) or paragraph 107(*b*) shall be deemed to include a reference to any person who is entitled to have his name entered in a Band List and whose name has been entered therein."

2. L'article 4 de la même loi est modifié par retranchement du paragraphe (2) et son remplacement par ce qui suit :

Pouvoir de déclarer la loi inapplicable

«(2) Le gouverneur en conseil peut, par proclamation, déclarer que la présente loi, ou toute partie de celle-ci, sauf les articles 5 à 14.3 et 37 à 41, ne s'applique pas

a) à des Indiens ou à un groupe ou une bande d'Indiens, ou

b) à une réserve ou à des terres cédées, ou à une partie y afférente,

et peut par proclamation révoquer toute semblable déclaration.

Confirmation de la validité de certaines déclarations

(2.1) Sans qu'en soit limitée la portée générale du paragraphe (2), il demeure entendu que le gouverneur en conseil est réputé avoir eu le pouvoir de faire en vertu du paragraphe (2) toute déclaration qu'il a faite à l'égard des articles 11, 12 ou 14 ou d'une de leurs dispositions, dans leur version précédant immédiatement le 17 avril 1985.»

3. La même loi est modifiée par insertion, après l'article 4, de ce qui suit :

Application de certaines dispositions à tous les membres d'une bande

«4.1 La mention d'un Indien dans les définitions de «bande», «deniers des Indiens» ou «Indien mentalement incapable» à l'article 2 et cette mention aux paragraphes 4(2) ou (3), au paragraphe 18(2), à l'article 20, aux articles 22 à 25, aux paragraphes 31(1) ou (3), au paragraphe 35(4), à l'article 51, à l'article 52, au paragraphe 58(3), au paragraphe 61(1), à l'article 63, à l'article 65, au paragraphe 66(2), aux paragraphes 70(1) ou (4), à l'article 71, aux alinéas 73*g*) ou *h*), au paragraphe 74(4), à l'article 84, à l'alinéa 87*a*), à l'article 88, au paragraphe 89(1) ou à l'alinéa 107*b*) sont réputées comprendre la mention de toute personne qui a droit à ce que son nom soit consigné dans une liste de bande et dont le nom y a effectivement été consigné.»

1974-75-76, c. 48, s. 25; 1978-79, c. 11, s. 10

4. Sections 5 to 14 of the said Act are repealed and the following substituted therefor:

"Indian Register

Indian Register

5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.

Existing Indian Register

(2) The names in the Indian Register immediately prior to April 17, 1985 shall constitute the Indian Register on April 17, 1985.

Deletions and additions

(3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.

Date of change

(4) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

Application for registration

(5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.

Persons entitled to be registered

6. (1) Subject to section 7, a person is entitled to be registered if

(*a*) that person was registered or entitled to be registered immediately prior to April 17, 1985;

(*b*) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

(*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act

4. Les articles 5 à 14 de la même loi sont abrogés et remplacés par ce qui suit :

1974-75-76, ch. 48, art. 25; 1978-79, ch. 11, art. 10

«*Registre des Indiens*

Tenue du registre

5. (1) Est tenu au ministère un registre des Indiens où est consigné le nom de chaque personne ayant droit d'être inscrite comme Indien en vertu de la présente loi.

Registre des Indiens existant

(2) Les noms figurant au registre des Indiens immédiatement avant le 17 avril 1985 constituent le registre des Indiens au 17 avril 1985.

Additions et retranchements

(3) Le registraire peut ajouter au registre des Indiens, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans ce registre.

Date du changement

(4) Le registre des Indiens indique la date où chaque nom y a été ajouté ou en a été retranché.

Demande

(5) Il n'est pas requis que le nom d'une personne qui a droit d'être inscrite soit consigné dans le registre des Indiens, à moins qu'une demande à cette effet soit présentée au registraire.

Personnes ayant droit à l'inscription

6. (1) Sous réserve de l'article 7, une personne a droit d'être inscrite si elle remplit une des conditions suivantes :

a) elle était inscrite ou avait droit de l'être immédiatement avant le 17 avril 1985;

b) elle est membre d'un groupe de personnes déclaré par le gouverneur en conseil après le 16 avril 1985 être une bande pour l'application de la présente loi;

c) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)*a*)(iv), de l'alinéa 12(1)*b*) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)*a*)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version précédant immédiatement

relating to the same subject-matter as any of those provisions;

(*d*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(*e*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(*f*) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

Idem

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

Deeming provision

(3) For the purposes of paragraph (1)(*f*) and subsection (2),

(*a*) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(*a*); and

le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

d) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande en vertu du sous-alinéa 12(1)*a*)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(1), dans leur version précédant immédiatement le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

e) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande :

(i) soit en vertu de l'article 13, dans sa version précédant immédiatement le 4 septembre 1951, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article,

(ii) soit en vertu de l'article 111, dans sa version précédant immédiatement le 1er juillet 1920, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article;

f) ses parents ont tous deux droit d'être inscrits en vertu du présent article ou, s'ils sont décédés, avaient ce droit à la date de leur décès.

Idem

(2) Sous réserve de l'article 7, une personne a droit d'être inscrite si l'un de ses parents a droit d'être inscrit en vertu du paragraphe (1) ou, s'il est décédé, avait ce droit à la date de son décès.

Présomption

(3) Pour l'application de l'alinéa (1)*f*) et du paragraphe (2) :

a) la personne qui est décédée avant le 17 avril 1985 mais qui avait droit d'être inscrite à la date de son décès est réputée avoir droit d'être inscrite en vertu de l'alinéa (1)*a*);

b) la personne visée aux alinéas (1)*c*), *d*) ou *e*) qui est décédée avant le 17 avril

(*b*) a person described in paragraph (1)(*c*), (*d*) or (*e*) who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that paragraph.

1985 est réputée avoir droit d'être inscrite en vertu de ces alinéas.

Persons not entitled to be registered

7. (1) The following persons are not entitled to be registered:

(*a*) a person who was registered under paragraph 11(1)(*f*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and whose name was subsequently omitted or deleted from the Indian Register under this Act; or

(*b*) a person who is the child of a person who was registered or entitled to be registered under paragraph 11(1)(*f*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and is also the child of a person who is not entitled to be registered.

Personnes n'ayant pas droit à l'inscription

7. (1) Les personnes suivantes n'ont pas droit d'être inscrites :

a) celles qui étaient inscrites en vertu de l'alinéa 11(1)*f*), dans sa version précédant immédiatement le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et dont le nom a ultérieurement été omis ou retranché du registre des Indiens en vertu de la présente loi;

b) celles qui sont les enfants d'une personne qui était inscrite ou avait droit de l'être en vertu de l'alinéa 11(1)*f*), dans sa version précédant immédiatement le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et qui sont également les enfants d'une personne qui n'a pas droit d'être inscrite.

Exception

(2) Paragraph (1)(*a*) does not apply in respect of a female person who was, at any time prior to being registered under paragraph 11(1)(*f*), entitled to be registered under any other provision of this Act.

Exception

(2) L'alinéa (1)*a*) ne s'applique pas à une personne de sexe féminin qui, avant qu'elle ne soit inscrite en vertu de l'alinéa 11(1)*f*), avait droit d'être inscrite en vertu de toute autre disposition de la présente loi.

Idem

(3) Paragraph (1)(*b*) does not apply in respect of the child of a female person who was, at any time prior to being registered under paragraph 11(1)(*f*), entitled to be registered under any other provision of this Act.

Idem

(3) L'alinéa (1)*b*) ne s'applique pas à l'enfant d'une personne de sexe féminin qui, avant qu'elle ne soit inscrite en vertu de l'alinéa 11(1)*f*), avait droit d'être inscrite en vertu de toute autre disposition de la présente loi.

Band Lists

Listes de bande

Band Lists

8. There shall be maintained in accordance with this Act for each band a Band List in which shall be entered the name of every person who is a member of that band.

Tenue de la liste

8. Est tenue conformément à la présente loi la liste de chaque bande où est consigné le nom de chaque personne qui en est membre.

Band Lists maintained in Department

9. (1) Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

Liste de bande tenue au ministère

9. (1) Jusqu'à ce que la bande assume la responsabilité de sa liste, celle-ci est tenue au ministère par le registraire.

Existing Band Lists

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

(2) Les noms figurant à une liste d'une bande immédiatement avant le 17 avril 1985 constituent la liste de cette bande au 17 avril 1985.

Listes de bande existantes

Deletions and additions

(3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

(3) Le registraire peut ajouter à une liste de bande tenue au ministère, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

Additions et retranchements

Date of change

(4) A Band List maintained in the Department shall indicate the date on which each name was added thereto or deleted therefrom.

(4) La liste de bande tenue au ministère indique la date où chaque nom y a été ajouté ou en a été retranché.

Date du changement

Application for entry

(5) The name of a person who is entitled to have his name entered in a Band List maintained in the Department is not required to be entered therein unless an application for entry therein is made to the Registrar.

(5) Il n'est pas requis que le nom d'une personne qui a droit à ce que celui-ci soit consigné dans une liste de bande tenue au ministère y soit consigné à moins qu'une demande à cet effet soit présentée au registraire.

Demande

Band control of membership

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

10. (1) La bande peut décider de l'appartenance à ses effectifs si elle en fixe les règles par écrit conformément au présent article et si, après qu'elle a donné un avis convenable de son intention de décider de cette appartenance, elle y est autorisée par la majorité de ses électeurs.

Pouvoir de décision

Membership rules

(2) A band may, pursuant to the consent of a majority of the electors of the band,

(*a*) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and

(*b*) provide for a mechanism for reviewing decisions on membership.

(2) La bande peut, avec l'autorisation de la majorité de ses électeurs :

a) après avoir donné un avis convenable de son intention de ce faire, fixer les règles d'appartenance à ses effectifs;

b) prévoir une procédure de révision des décisions portant sur l'appartenance à ses effectifs.

Règles d'appartenance

Exception relating to consent

(3) Where the council of a band makes a by-law under paragraph 81(1)(*p.4*) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

(3) Lorsque le conseil d'une bande établit un statut administratif en vertu de l'alinéa 81(1)*p.4*) mettant en vigueur le présent paragraphe à l'égard d'une bande, l'autorisation requise en vertu des paragraphes (1) et (2) doit être donnée par la majorité des membres de la bande qui ont dix-huit ans révolus.

Statut administratif sur l'autorisation requise

Acquired rights

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his

(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce

Droits acquis

name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

que son nom soit consigné dans la liste de bande immédiatement avant la fixation des règles du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.

Idem

(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(*c*) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

(5) Il demeure entendu que le paragraphe (4) s'applique à la personne qui avait droit à ce que son nom soit consigné dans la liste de bande en vertu de l'alinéa 11(1)*c*) immédiatement avant que celle-ci n'assume la responsabilité de la tenue de sa liste si elle ne cesse pas ultérieurement d'avoir droit à ce que son nom y soit consigné.

Idem

Notice to the Minister

(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.

(6) Une fois remplies les conditions du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le Ministre du fait que celle-ci décide désormais de l'appartenance à ses effectifs et lui transmet le texte des règles d'appartenance.

Avis au Ministre

Notice to band and copy of Band List

(7) On receipt of a notice from the council of a band under subsection (6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith

(*a*) give notice to the band that it has control of its own membership; and

(*b*) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

(7) Sur réception de l'avis du conseil de bande prévu au paragraphe (6), le Ministre, sans délai, s'il constate que les conditions prévues au paragraphe (1) sont remplies :

a) avise la bande qu'elle décide désormais de l'appartenance à ses effectifs;

b) ordonne au registraire de transmettre à la bande une copie de la liste de bande tenue au ministère.

Transmission de la liste

Effective date of band's membership rules

(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.

(8) Lorsque la bande décide de l'appartenance à ses effectifs en vertu du présent article, les règles d'appartenance fixées par celle-ci entrent en vigueur à compter de la date où l'avis au Ministre a été donné en vertu du paragraphe (6); les additions ou retranchements de la liste de la bande effectués par le registraire après cette date ne sont valides que s'ils ont été effectués conformément aux règles d'appartenance fixées par la bande.

Date d'entrée en vigueur des règles d'appartenance

Band to maintain Band List

(9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph (7)(*b*), and, subject to section

(9) À compter de la réception de l'avis prévu à l'alinéa (7)*b*), la bande est responsable de la tenue de sa liste. Sous réserve de l'article 13.2, le ministère, à compter de

Transfert de responsabilité

13.2, the Department shall have no further responsibility with respect to that Band List from that date.

13.2, le Ministère est dégagé de toute responsabilité à l'égard de cette liste.

Deletions and additions

(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.

(10) La bande peut ajouter à la liste de bande tenue par elle, ou en retrancher, le nom de la personne qui, aux termes des règles d'appartenance de la bande, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans la liste.

Additions et retranchements

Date of change

(11) A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom.

(11) La liste de bande tenue par celle-ci indique la date où chaque nom y a été ajouté ou en a été retranché.

Date du changement

Membership rules for Departmental Band List

11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

(*a*) the name of that person was entered in the Band List for that band, or that person was entitled to have his name entered in the Band List for that band, immediately prior to April 17, 1985;

(*b*) that person is entitled to be registered under paragraph 6(1)(*b*) as a member of that band;

(*c*) that person is entitled to be registered under paragraph 6(1)(*c*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(*d*) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(*f*) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.

11. (1) À compter du 17 avril 1985, une personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour cette dernière au ministère si elle remplit une des conditions suivantes :

a) son nom a été consigné dans cette liste, ou elle avait droit à ce qu'il le soit immédiatement avant le 17 avril 1985;

b) elle a droit d'être inscrite en vertu de l'alinéa 6(1)*b*) comme membre de cette bande;

c) elle a droit d'être inscrite en vertu de l'alinéa 6(1)*c*) et a cessé d'être un membre de cette bande en raison des circonstances prévues à cet alinéa;

d) elle est née après le 16 avril 1985 et a droit d'être inscrite en vertu de l'alinéa 6(1)*f*) et ses parents ont tous deux droit à ce que leur nom soit consigné dans la liste de bande ou, s'ils sont décédés, avaient ce droit à la date de leur décès.

Règles d'appartenance pour une liste tenue au ministère

Additional membership rules for Departmental Band List

(2) Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(2) À compter du jour qui suit de deux ans le jour où la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, a reçu la sanction royale ou de la date antérieure choisie en vertu de l'article 13.1, lorsque la bande n'a pas la responsabilité de la tenue de sa liste prévue à la présente loi, une personne a droit à ce que son nom soit consigné dans la liste de bande tenue au ministère pour cette dernière :

Règles d'appartenance supplémentaires pour les listes tenues au ministère

(*a*) if that person is entitled to be registered under paragraph 6(1)(*d*) or (*e*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(*b*) if that person is entitled to be registered under paragraph 6(1)(*f*) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

Deeming provision

(3) For the purposes of paragraph (1)(*d*) and subsection (2), a person whose name was omitted or deleted from the Indian Register or a band list in the circumstances set out in paragraph 6(1)(*c*), (*d*) or (*e*) who was no longer living on the first day on which he would otherwise be entitled to have his name entered in the Band List of the band of which he ceased to be a member shall be deemed to be entitled to have his name so entered.

Where band amalgamates or is divided

(4) Where a band amalgamates with another band or is divided so as to constitute new bands, any person who would otherwise have been entitled to have his name entered in the Band List of that band under this section is entitled to have his name entered in the Band List of the amalgamated band or the new band to which he has the closest family ties, as the case may be.

Entitlement with consent of band

12. Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, any person who

(*a*) is entitled to be registered under section 6, but is not entitled to have his name entered in the Band List maintained in the Department under section 11, or

(*b*) is a member of another band,

is entitled to have his name entered in the Band List maintained in the Department

a) soit si elle a droit d'être inscrite en vertu des alinéas 6(1)*d*) ou *e*) et qu'elle a cessé d'être un membre de la bande en raison des circonstances prévues à l'un de ces alinéas;

b) soit si elle a droit d'être inscrite en vertu de l'alinéa 6(1)*f*) ou du paragraphe 6(2) et qu'un de ses parents visés à l'une de ces dispositions a droit à ce que son nom soit consigné dans la liste de bande ou, s'il est décédé, avait ce droit à la date de son décès.

Présomption

(3) Pour l'application de l'alinéa (1)*d*) et du paragraphe (2), la personne dont le nom a été omis ou retranché du registre des Indiens ou d'une liste de bande dans les circonstances prévues aux alinéas 6(1)*c*), *d*) ou *e*) et qui est décédée avant le premier jour où elle aurait acquis le droit à ce que son nom soit consigné dans la liste de bande dont elle a cessé d'être membre est réputée avoir droit à ce que son nom y soit consigné.

Fusion ou division de bandes

(4) Lorsqu'une bande fusionne avec une autre ou qu'elle est divisée pour former de nouvelles bandes, toute personne qui aurait par ailleurs eu droit à ce que son nom soit consigné dans la liste de la bande en vertu du présent article a droit à ce que son nom soit consigné dans la liste de la bande issue de la fusion ou de celle de la nouvelle bande à l'égard de laquelle ses liens familiaux sont les plus étroits.

Inscription sujette au consentement du conseil

12. À compter du jour qui suit de deux ans le jour où la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, a reçu la sanction royale ou de la date antérieure choisie en vertu de l'article 13.1, la personne qui,

a) soit a droit d'être inscrite en vertu de l'article 6 sans avoir droit à ce que son nom soit consigné dans une liste de bande tenue au ministère en vertu de l'article 11,

b) soit est membre d'une autre bande,

a droit à ce que son nom soit consigné dans la liste d'une bande tenue au ministère

for a band if the council of the admitting band consents.

Limitation to one Band List

13. Notwithstanding sections 11 and 12, no person is entitled to have his name entered at the same time in more than one Band List maintained in the Department.

Decision to leave Band List control with Department

13.1 (1) A band may, at any time prior to the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, decide to leave the control of its Band List with the Department if a majority of the electors of the band gives its consent to that decision.

Notice to the Minister

(2) Where a band decides to leave the control of its Band List with the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect.

Subsequent band control of membership

(3) Notwithstanding a decision under subsection (1), a band may, at any time after that decision is taken, assume control of its Band List under section 10.

Return of control to Department

13.2 (1) A band may, at any time after assuming control of its Band List under section 10, decide to return control of the Band List to the Department if a majority of the electors of the band gives its consent to that decision.

Notice to the Minister and copy of membership rules

(2) Where a band decides to return control of its Band List to the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect and shall provide the Minister with a copy of the Band List and a copy of all the membership rules that were established by the band under subsection 10(2) while the band maintained its own Band List.

Transfer of responsibility to Department

(3) Where a notice is given under subsection (2) in respect of a Band List, the maintenance of that Band List shall be the responsibility of the Department from the date on which the notice is received and from that time the Band List shall be maintained in accordance with the membership rules set out in section 11.

pour cette dernière si le conseil de la bande qui l'admet en son sein y consent.

Nom consigné dans une seule liste

13. Par dérogation aux articles 11 et 12, nul n'a droit à ce que son nom soit consigné en même temps dans plus d'une liste de bande tenue au ministère.

Première décision

13.1 (1) Une bande peut, avant le jour qui suit de deux ans le jour où la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, a reçu la sanction royale, décider de laisser la responsabilité de la tenue de sa liste au ministère à condition d'y être autorisée par la majorité de ses électeurs.

Avis au Ministre

(2) Si la bande décide de laisser la responsabilité de la tenue de sa liste au ministère en vertu du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le Ministre de la décision.

Seconde décision

(3) Malgré la décision visée au paragraphe (1), la bande peut, en tout temps après cette décision, assumer la responsabilité de la tenue de sa liste en vertu de l'article 10.

Transfert de responsabilité au ministère

13.2 (1) La bande peut, en tout temps après avoir assumé la responsabilité de la tenue de sa liste en vertu de l'article 10, décider d'en remettre la responsabilité au ministère à condition d'y être autorisée par la majorité de ses électeurs.

Avis au Ministre et texte des règles

(2) Lorsque la bande décide de remettre la responsabilité de la tenue de sa liste au ministère en vertu du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le Ministre de la décision et lui transmet une copie de la liste et le texte des règles d'appartenance fixées par la bande conformément au paragraphe 10(2) pendant qu'elle assumait la responsabilité de la tenue de sa liste.

Transfert de responsabilité au ministère

(3) Lorsqu'est donné l'avis prévu au paragraphe (2) à l'égard d'une liste de bande, la tenue de cette dernière devient la responsabilité du ministère à compter de la date de réception de l'avis. Elle est tenue, à compter de cette date, conformément aux règles d'appartenance prévues à l'article 11.

Entitlement retained

13.3 A person is entitled to have his name entered in a Band List maintained in the Department pursuant to section 13.2 if that person was entitled to have his name entered, and his name was entered, in the Band List immediately before a copy of it was provided to the Minister under subsection 13.2(2), whether or not that person is also entitled to have his name entered in the Band List under section 11.

Maintien du droit d'être consigné dans la liste

13.3 Une personne a droit à ce que son nom soit consigné dans une liste de bande tenue par le ministère en vertu de l'article 13.2 si elle avait droit à ce que son nom soit consigné dans cette liste, et qu'il y a effectivement été consigné, immédiatement avant qu'une copie en soit transmise au Ministre en vertu du paragraphe 13.2(2), que cette personne ait ou non droit à ce que son nom soit consigné dans cette liste en vertu de l'article 11.

Notice of Band Lists

Affichage des listes de bande

Copy of Band List provided to band council

14. (1) Within one month after the day an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, the Registrar shall provide the council of each band with a copy of the Band List for the band as it stood immediately prior to that day.

Copie de la liste de bande transmise au conseil de bande

14. (1) Au plus tard un mois après la date où la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, a reçu la sanction royale, le registraire transmet au conseil de chaque bande une copie de la liste de la bande dans son état précédant immédiatement cette date.

List of additions and deletions

(2) Where a Band List is maintained by the Department, the Registrar shall, at least once every two months after a copy of the Band List is provided to the council of a band under subsection (1), provide the council of the band with a list of the additions to or deletions from the Band List not included in a list previously provided under this subsection.

Listes des additions et des retranchements

(2) Si la liste de bande est tenue au ministère, le registraire, au moins une fois tous les deux mois après la transmission prévue au paragraphe (1) d'une copie de la liste au conseil de la bande, transmet à ce dernier une liste des additions à la liste et des retranchements de celle-ci non compris dans une liste antérieure transmise en vertu du présent paragraphe.

Lists to be posted

(3) The council of each band shall, forthwith on receiving a copy of the Band List under subsection (1), or a list of additions to and deletions from its Band List under subsection (2), post the copy or the list, as the case may be, in a conspicuous place on the reserve of the band.

Affichage de la liste

(3) Le conseil de chaque bande, dès qu'il reçoit copie de la liste de bande prévue au paragraphe (1) ou la liste des additions et des retranchements prévue au paragraphe (2), affiche la copie ou la liste, selon le cas, en un lieu bien en évidence dans la réserve de la bande.

Inquiries

Demandes

Inquiries relating to Indian Register or Band Lists

14.1 The Registrar shall, on inquiry from any person who believes that he or any person he represents is entitled to have his name included in the Indian Register or a Band List maintained in the Department, indicate to the person making the inquiry whether or not that name is included therein.

Demandes relatives au registre des Indiens ou aux listes de bande

14.1 Le registraire, à la demande de toute personne qui croit qu'elle-même ou que la personne qu'elle représente a droit à l'inclusion de son nom dans le registre des Indiens ou une liste de bande tenue au ministère, indique sans délai à l'auteur de la demande si ce nom y est inclus ou non.

Protests

Protestations

Protests

14.2 (1) A protest may be made in respect of the inclusion or addition of the name of a person in, or the omission or deletion of the name of a person from, the Indian Register, or a Band List maintained in the Department, within three years after the inclusion or addition, or omission or deletion, as the case may be, by notice in writing to the Registrar, containing a brief statement of the grounds therefor.

Protestations

14.2 (1) Une protestation peut être formulée, par avis écrit au registraire renfermant un bref exposé des motifs invoqués, contre l'inclusion ou l'addition du nom d'une personne dans le registre des Indiens ou une liste de bande tenue au ministère ou contre l'omission ou le retranchement de son nom de ce registre ou d'une telle liste dans les trois ans suivant soit l'inclusion ou l'addition, soit l'omission ou le retranchement.

Protest in respect of Band List

(2) A protest may be made under this section in respect of the Band List of a band by the council of the band, any member of the band or the person in respect of whose name the protest is made or his representative.

Protestation relative à la liste de bande

(2) Une protestation peut être formulée en vertu du présent article à l'égard d'une liste de bande par le conseil de cette bande, un membre de celle-ci ou la personne dont le nom fait l'objet de la protestation ou son représentant.

Protest in respect of Indian Register

(3) A protest may be made under this section in respect of the Indian Register by the person in respect of whose name the protest is made or his representative.

Protestation relative au registre des Indiens

(3) Une protestation peut être formulée en vertu du présent article à l'égard du registre des Indiens par la personne dont le nom fait l'objet de la protestation ou son représentant.

Onus of proof

(4) The onus of establishing the grounds of a protest under this section lies on the person making the protest.

Charge de la preuve

(4) La personne qui formule la protestation prévue au présent article a la charge d'en prouver le bien-fondé.

Registrar to cause investigation

(5) Where a protest is made to the Registrar under this section, he shall cause an investigation to be made into the matter and render a decision.

Le registraire fait tenir une enquête

(5) Lorsqu'une protestation lui est adressée en vertu du présent article, le registraire fait tenir une enquête sur la question et rend une décision.

Evidence

(6) For the purposes of this section, the Registrar may receive such evidence on oath, on affidavit or in any other manner, whether or not admissible in a court of law, as in his discretion he sees fit or deems just.

Preuve

(6) Pour l'application du présent article, le registraire peut recevoir toute preuve présentée sous serment, sous déclaration sous serment ou autrement, si celui-ci, à son appréciation, l'estime indiquée ou équitable, que cette preuve soit ou non admissible devant les tribunaux.

Decision final

(7) Subject to section 14.3, the decision of the Registrar under subsection (5) is final and conclusive.

Décision finale

(7) Sous réserve de l'article 14.3 la décision du registraire visée au paragraphe (5) est finale et péremptoire.

Appeal

14.3 (1) Within six months after the Registrar renders a decision on a protest under section 14.2,

(*a*) in the case of a protest in respect of the Band List of a band, the council of the band, the person by whom the protest was made, or the person in respect

Appel

14.3 (1) Dans les six mois suivant la date de la décision du registraire sur une protestation prévue à l'article 14.2 :

a) soit, s'il s'agit d'une protestation formulée à l'égard d'une liste de bande, le conseil de la bande, la personne qui a formulé la protestation ou la personne

of whose name the protest was made or his representative, or

(*b*) in the case of a protest in respect of the Indian Register, the person in respect of whose name the protest was made or his representative,

may, by notice in writing, appeal the decision to a court referred to in subsection (5).

dont le nom fait l'objet de la protestation ou son représentant,

b) soit, s'il s'agit d'une protestation formulée à l'égard du registre des Indiens, la personne dont le nom a fait l'objet de la protestation ou son représentant,

peuvent, par avis écrit, interjeter appel de la décision à la cour visée au paragraphe (5).

Copy of notice of appeal to the Registrar

(2) Where an appeal is taken under this section, the person who takes the appeal shall forthwith provide the Registrar with a copy of the notice of appeal.

(2) Lorsqu'il est interjeté appel en vertu du présent article, l'appelant transmet sans délai au registraire une copie de l'avis d'appel.

Copie de l'avis d'appel au registraire

Material to be filed with the court by Registrar

(3) On receipt of a copy of a notice of appeal under subsection (2), the Registrar shall forthwith file with the court a copy of the decision being appealed together with all documentary evidence considered in arriving at that decision and any recording or transcript of any oral proceedings related thereto that were held before the Registrar.

(3) Sur réception de la copie de l'avis d'appel prévu au paragraphe (2), le registraire dépose sans délai à la cour une copie de la décision en appel, toute la preuve documentaire prise en compte pour la décision, ainsi que l'enregistrement ou la transcription des débats devant le registraire.

Documents à déposer à la cour par le registraire

Decision

(4) The court may, after hearing an appeal under this section,

(*a*) affirm, vary or reverse the decision of the Registrar; or

(*b*) refer the subject-matter of the appeal back to the Registrar for reconsideration or further investigation.

(4) La cour peut, à l'issue de l'audition de l'appel prévu au présent article :

a) soit confirmer, modifier ou renverser la décision du registraire;

b) soit renvoyer la question en appel au registraire pour réexamen ou nouvelle enquête.

Décision

Court

(5) An appeal may be heard under this section

(*a*) in the Province of Prince Edward Island, the Yukon Territory or the Northwest Territories, before the Supreme Court;

(*b*) in the Province of New Brunswick, Manitoba, Saskatchewan or Alberta, before the Court of Queen's Bench;

(*c*) in the Province of Quebec, before the Superior Court for the district in which the band is situated or in which the person who made the protest resides, or for such other district as the Minister may designate; or

(*d*) in any other province, before the county or district court of the county or district in which the band is situated or in which the person who made the pro-

(5) L'appel prévu au présent article peut être entendu :

a) dans la province de l'Île-du-Prince-Édouard, le territoire du Yukon et les territoires du Nord-Ouest, par la Cour suprême;

b) dans la province du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou d'Alberta, par la Cour du Banc de la Reine;

c) dans la province de Québec, par la Cour supérieure du district où la bande est située ou dans lequel réside la personne qui a formulé la protestation, ou de tel autre district désigné par le Ministre;

d) dans les autres provinces, par un juge de la cour de comté ou de district du comté ou du district où la bande est

Cour

test resides, or of such other county or district as the Minister may designate."

5. Subsections 15(1) to (4) of the said Act are repealed and the following substituted therefor:

"*Payments in Respect of Persons Ceasing to be Band Members*"

6. (1) Subsection 16(1) of the said Act is repealed.

(2) Subsection 16(3) of the said Act is repealed.

7. (1) Subsection 17(1) of the said Act is repealed and the following substituted therefor:

"*New Bands*

Minister may constitute new bands

17. (1) The Minister may, whenever he considers it desirable,

(*a*) amalgamate bands that, by a vote of a majority of their electors, request to be amalgamated; and

(*b*) constitute new bands and establish Band Lists with respect thereto from existing Band Lists, or from the Indian Register, if requested to do so by persons proposing to form the new bands."

(2) Subsection 17(3) of the said Act is repealed and the following substituted therefor:

No protest

"(3) No protest may be made under section 14.2 in respect of the deletion from or the addition to a Band List consequent on the exercise by the Minister of any of his powers under subsection (1)."

8. The said Act is further amended by adding thereto, immediately after section 18 thereof, the following section:

Children of band members

"18.1 A member of a band who resides on the reserve of the band may reside there with his dependent children or any children of whom he has custody."

située ou dans lequel réside la personne qui a formulé la protestation, ou de tel autre comté ou district désigné par le Ministre.»

5. Les paragraphes 15(1) à (4) de la même loi sont abrogés et remplacés par ce qui suit :

«*Paiements aux personnes qui cessent d'être membres d'une bande*»

6. (1) Le paragraphe 16(1) de la même loi est abrogé.

(2) Le paragraphe 16(3) de la même loi est abrogé.

7. (1) Le paragraphe 17(1) de la même loi est abrogé et remplacé par ce qui suit :

«*Nouvelles bandes*

Constitution de nouvelles bandes par le Ministre

17. (1) Le Ministre peut, lorsqu'il l'estime à propos :

a) fusionner les bandes qui, par un vote majoritaire de leurs électeurs, demandent la fusion;

b) constituer de nouvelles bandes et établir à leur égard des listes de bande à partir des listes de bande existantes, ou du registre des Indiens, s'il lui en est fait la demande par des personnes proposant la constitution de nouvelles bandes.»

(2) Le paragraphe 17(3) de la même loi est abrogé et remplacé par ce qui suit :

Aucune protestation

«(3) Aucune protestation ne peut être formulée en vertu de l'article 14.2 à l'égard d'un retranchement d'une liste de bande ou d'une addition à celle-ci qui découle de l'exercice par le Ministre de l'un de ses pouvoirs prévus au paragraphe (1).»

8. La même loi est modifiée par insertion, après l'article 18, de ce qui suit :

Enfants des membres d'une bande

«18.1 Le membre d'une bande qui réside sur la réserve de cette dernière peut y résider avec ses enfants à charge ou tout enfant dont il a la garde.»

9. (1) Subsections 48(13) and (14) of the said Act are repealed.

(2) Subsection 48(16) of the said Act is repealed and the following substituted therefor:

Definition of "child"

"(16) In this section, "child" includes a child born in or out of wedlock, a legally adopted child and a child adopted in accordance with Indian custom."

10. (1) Section 64 of the said Act is renumbered as subsection 64(1).

(2) Section 64 of the said Act is further amended by adding thereto the following subsection:

Expenditure of capital moneys in accordance with by-laws

"(2) The Minister may make expenditures out of the capital moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(*p.3*) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the capital moneys."

11. The said Act is further amended by adding thereto, immediately after section 64 thereof, the following section:

Limitation in respect of paragraphs 6(1)(c), (d) and (e)

"64.1 (1) A person who has received an amount that exceeds one thousand dollars under paragraph 15(1)(*a*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, by reason of ceasing to be a member of a band in the circumstances set out in paragraph 6(1)(*c*), (*d*) or (*e*) is not entitled to receive an amount under paragraph 64(1)(*a*) until such time as the aggregate of all amounts that he would, but for this subsection, have received under paragraph 64(1)(*a*) is equal to the amount by which the amount that he received under paragraph 15(1)(*a*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that

9. (1) Les paragraphes 48(13) et (14) de la même loi sont abrogés.

(2) Le paragraphe 48(16) de la même loi est abrogé et remplacé par ce qui suit :

Définition d'«enfant»

«(16) Au présent article, «enfant» comprend un enfant né du mariage ou hors mariage, un enfant légalement adopté et un enfant adopté conformément aux coutumes indiennes.»

10. (1) Le numéro d'article 64 de la même loi est remplacé par le numéro de paragraphe 64(1).

(2) L'article 64 de la même loi est modifié par adjonction de ce qui suit :

Dépenses sur les deniers au compte de capital

«(2) Le Ministre peut effectuer des dépenses sur les deniers au compte de capital d'une bande conformément aux statuts administratifs établis en vertu de l'alinéa 81(1)*p.3*) en vue de faire des paiements à toute personne dont le nom a été retranché de la liste de la bande pour un montant n'excédant pas une part per capita des deniers au compte de capital.»

11. La même loi est modifiée par insertion, après l'article 64, de ce qui suit :

Réserve relative aux alinéas 6(1)c), d) ou e)

«64.1 (1) Une personne qui a reçu un montant supérieur à mille dollars en vertu de l'alinéa 15(1)*a*), dans sa version précédant immédiatement le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, du fait qu'elle a cessé d'être membre d'une bande dans les circonstances prévues aux alinéas 6(1)*c*), *d*) ou *e*) n'a pas droit de recevoir de montant en vertu de l'alinéa 64(1)*a*) jusqu'à ce que le total de tous les montants qu'elle aurait reçus en vertu de l'alinéa 64(1)*a*), n'eût été le présent paragraphe, égale la part du montant qu'elle a reçu en vertu de l'alinéa 15(1)*a*), dans sa version précédant immédiatement le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que

paragraph, exceeds one thousand dollars, together with any interest thereon.

Additional limitation

(2) Where the council of a band makes a by-law under paragraph 81(1)(*p.4*) bringing this subsection into effect, a person who has received an amount that exceeds one thousand dollars under paragraph 15(1)(*a*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, by reason of ceasing to be a member of the band in the circumstances set out in paragraph 6(1)(*c*), (*d*) or (*e*) is not entitled to receive any benefit afforded to members of the band as individuals as a result of the expenditure of Indian moneys under paragraphs 64(1)(*b*) to (*k*), subsection 66(1) or subsection 69(1) until the amount by which the amount so received exceeds one thousand dollars, together with any interest thereon, has been repaid to the band.

Regulations

(3) The Governor in Council may make regulations prescribing the manner of determining interest for the purpose of subsections (1) and (2)."

12. Section 66 of the said Act is amended by adding thereto, immediately after subsection (2) thereof, the following subsection:

Idem

"(2.1) The Minister may make expenditures out of the revenue moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(*p.3*) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the revenue moneys."

13. Section 68 of the said Act is repealed and the following substituted therefor:

Maintenance of dependants

"68. Where the Minister is satisfied that an Indian

(*a*) has deserted his spouse or family without sufficient cause,

(*b*) has conducted himself in such a manner as to justify the refusal of his spouse or family to live with him, or

celui de ce paragraphe, en excédant de mille dollars, y compris les intérêts.

Réserve additionnelle

(2) Lorsque le conseil d'une bande établit des statuts administratifs en vertu de l'alinéa 81(1)*p.4*) mettant en vigueur le présent paragraphe, la personne qui a reçu un montant supérieur à mille dollars en vertu de l'alinéa 15(1)*a*) dans sa version précédant immédiatement le 17 avril 1985, ou en vertu de toute autre disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, parce qu'elle a cessé d'être membre de la bande dans les circonstances prévues aux alinéas 6(1)*c*); *d*) ou *e*) n'a droit de recevoir aucun des avantages offerts aux membres de la bande à titre individuel résultant de la dépense de deniers des Indiens au titre des alinéas 64(1)*b*) à *k*), du paragraphe 66(1) ou du paragraphe 69(1) jusqu'à ce que l'excédent du montant ainsi reçu sur mille dollars, y compris l'intérêt sur celui-ci, ait été remboursé à la bande.

Règlements

(3) Le gouverneur en conseil peut prendre des règlements prévoyant la façon de déterminer les intérêts pour l'application des paragraphes (1) et (2).»

12. L'article 66 de la même loi est modifié par adjonction, après le paragraphe (2), de ce qui suit :

Idem

«(2.1) Le Ministre peut effectuer des dépenses sur les derniers de revenu de la bande conformément aux statuts administratifs visés à l'alinéa 81(1)*p.3*) en vue d'effectuer des paiements à une personne dont le nom a été retranché de la liste de bande jusqu'à concurrence d'un montant n'excédant pas une part *per capita* des fonds de revenu.»

13. L'article 68 de la même loi est abrogé et remplacé par ce qui suit :

Entretien des personnes à charge

«68. Lorsque le Ministre est convaincu qu'un Indien :

a) a abandonné son conjoint ou sa famille sans raison suffisante,

b) s'est conduit de façon à justifier le refus de son conjoint ou de sa famille de vivre avec lui, ou

(*c*) has been separated by imprisonment from his spouse and family,

the Minister may order that payments of any annuity or interest money to which that Indian is entitled shall be applied to the support of the spouse or family or both the spouse and family of that Indian."

14. Subsections 77(1) and (2) of the said Act are repealed and the following substituted therefor:

Eligibility of voters for chief

"77. (1) A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors.

Councillor

(2) A member of a band who is of the full age of eighteen years and is ordinarily resident in a section that has been established for voting purposes is qualified to vote for a person nominated to be councillor to represent that section."

15. Section 81 of the said Act is amended by adding thereto, immediately after paragraph (*p*) thereof, the following paragraphs:

"(*p*.1) the residence of band members and other persons on the reserve;

(*p*.2) to provide for the rights of spouses and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

(*p*.3) to authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the Band List of the band;

(*p*.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;"

15.1 (1) Paragraph 81(*r*) of the said Act is repealed and the following substituted therefor:

c) a été séparé de son conjoint et de sa famille par emprisonnement,

il peut ordonner que les paiements de rentes ou d'intérêts auxquels cet Indien a droit soient appliqués au soutien du conjoint ou de la famille ou du conjoint et de la famille de ce dernier.»

14. Les paragraphes 77(1) et (2) de la même loi sont abrogés et remplacés par ce qui suit :

Qualités exigées des électeurs au poste de chef

«77. (1) Un membre d'une bande, qui a dix-huit ans révolus et réside ordinairement dans la réserve, a qualité pour voter en faveur d'une personne présentée comme candidat au poste de chef de la bande et, lorsque la réserve, aux fins d'élection, ne comprend qu'une section, pour voter en faveur de personnes présentées aux postes de conseillers.

Conseiller

(2) Un membre d'une bande, qui a dix-huit ans révolus et réside ordinairement dans une section établie aux fins de votation, a qualité pour voter en faveur d'une personne présentée au poste de conseiller pour représenter cette section.»

15. L'article 81 de la même loi est modifié par insertion, après l'alinéa *p*), de ce qui suit :

«*p*.1) la résidence des membres de la bande ou des autres personnes sur la réserve;

p.2) l'adoption de mesures relatives aux droits des conjoints ou des enfants qui résident avec des membres de la bande dans une réserve pour toute matière au sujet de laquelle le conseil peut établir des statuts administratifs à l'égard des membres de la bande;

p.3) l'autorisation du Ministre à effectuer des paiements sur des deniers au compte de capital ou des deniers de revenu aux personnes dont les noms ont été retranchés de la liste de la bande;

p.4) la mise en vigueur des paragraphes 10(3) ou 64.1(2) à l'égard de la bande;»

15.1 (1) L'alinéa 81*r*) de la même loi est abrogé et remplacé par ce qui suit :

"(*r*) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section."

«*r*) l'imposition, sur déclaration sommaire de culpabilité, d'une amende n'excédant pas mille dollars ou d'un emprisonnement d'au plus trente jours, ou de l'amende et de l'emprisonnement à la fois, pour violation d'un statut administratif établi aux termes du présent article.»

(2) Section 81 of the said Act is renumbered as subsection 81(1).

(2) L'article 81 de la même loi devient le paragraphe 81(1).

(3) Section 81 of the said Act is further amended by adding thereto the following subsections:

(3) L'article 81 de la même loi est modifié par adjonction de ce qui suit :

Power to restrain by order where conviction entered

"(2) Where any by-law of a band is contravened and a conviction entered, in addition to any other remedy and to any penalty imposed by the by-law, the court in which the conviction has been entered, and any court of competent jurisdiction thereafter, may make an order prohibiting the continuation or repetition of the offence by the person convicted.

Pouvoir de prendre une ordonnance

«(2) Lorsqu'un statut administratif d'une bande est violé et qu'une déclaration de culpabilité est prononcée, en plus de tout autre remède et de toute pénalité imposée par le statut administratif, le tribunal dans lequel a été prononcée la déclaration de culpabilité, et tout tribunal compétent par la suite, peut rendre une ordonnance interdisant la continuation ou la répétition de l'infraction par la personne déclarée coupable.

Power to restrain by court action

(3) Where any by-law of a band passed is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by court action at the instance of the band council."

Pouvoir d'intenter une action en justice

(3) Lorsqu'un statut administratif d'une bande est violé, en plus de tout autre remède et de toute pénalité imposée par le statut administratif, cette violation peut être refrénée par une action en justice à la demande du conseil de bande.»

16. The said Act is further amended by adding thereto, immediately after section 85 thereof, the following section:

16. La même loi est modifiée par insertion, après l'article 85, de ce qui suit :

By-laws relating to intoxicants

"85.1 (1) Subject to subsection (2), the council of a band may make by-laws

(*a*) prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve of the band;

(*b*) prohibiting any person from being intoxicated on the reserve;

(*c*) prohibiting any person from having intoxicants in his possession on the reserve; and

(*d*) providing for exceptions to any of the prohibitions established pursuant to paragraph (*b*) or (*c*).

Statuts administratifs sur les spiritueux

«85.1 (1) Sous réserve du paragraphe (2), le conseil d'une bande peut établir des statuts administratifs :

a) interdisant de vendre, de faire le troc, de fournir ou de fabriquer des spiritueux sur la réserve de la bande;

b) interdisant à toute personne d'être en état d'ivresse sur la réserve;

c) interdisant à toute personne d'avoir en sa possession des spiritueux sur la réserve;

d) prévoyant des exceptions aux interdictions établies en vertu des alinéas *b*) ou *c*).

Consent of electors

(2) A by-law may not be made under this section unless it is first assented to by a majority of the electors of the band who voted at a special meeting of the band called by the council of the band for the purpose of considering the by-law.

Copies of by-laws to be sent to Minister

(3) A copy of every by-law made under this section shall be sent by mail to the Minister by the chief or a member of the council of the band within four days after it is made.

Offence

(4) Every person who contravenes a by-law made under this section is guilty of an offence and is liable on summary conviction

(*a*) in the case of a by-law made under paragraph (1)(*a*), to a fine of not more than one thousand dollars or to imprisonment for a term not exceeding six months or to both; and

(*b*) in the case of a by-law made under paragraph (1)(*b*) or (*c*), to a fine of not more than one hundred dollars or to imprisonment for a term not exceeding three months or to both.

Contentement des électeurs

(2) Les statuts administratifs prévus au présent article ne peuvent être établis qu'avec le consentement préalable de la majorité des électeurs de la bande ayant voté à l'assemblée spéciale de la bande convoquée par le conseil de cette dernière pour l'étude de ces statuts.

Copie des statuts administratifs au Ministre

(3) Le chef ou un membre du conseil de la bande doit envoyer par courrier au Ministre une copie de chaque statut administratif prévu au présent article dans les quatre jours suivant son établissement.

Infraction

(4) Toute personne qui enfreint un statut administratif établi en vertu du présent article commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire :

a) dans le cas d'un statut administratif établi en vertu de l'alinéa (1)*a*), une amende maximale de mille dollars et un emprisonnement maximal de six mois, ou une de ces peines;

b) dans le cas d'un statut administratif établi en vertu des alinéas (1)*b*) ou *c*), une amende maximale de cent dollars et un emprisonnement maximal de trois mois, ou l'une de ces peines.»

17. Sections 94 to 100 of the said Act are repealed and the following substituted therefor:

17. Les articles 94 à 100 de la même loi sont abrogés et remplacés par ce qui suit :

"OFFENCES"

«PEINES»

18. Subsection 103(1) of the said Act is repealed and the following substituted therefor:

18. Le paragraphe 103(1) de la même loi est abrogé et remplacé par ce qui suit :

Seizure of goods

"103. (1) Whenever a peace officer, a superintendent or a person authorized by the Minister believes on reasonable grounds that an offence against section 33, 85.1, 90 or 93 has been committed, he may seize all goods and chattels by means of or in relation to which he believes on reasonable grounds the offence was committed."

Saisie des marchandises

«103. (1) Chaque fois qu'un agent de la paix, un surintendant ou une autre personne autorisée par le Ministre a des motifs raisonnables de croire qu'une infraction aux articles 33, 85.1, 90 ou 93 a été commise, il peut saisir toutes les marchandises et tous les biens meubles au moyen ou à l'égard desquels il a des motifs raisonnables de croire que l'infraction a été commise.»

19. Sections 109 to 113 of the said Act are repealed.

19. Les articles 109 à 113 de la même loi sont abrogés.

20. (1) All that portion of subsection 119(2) of the said Act preceding paragraph (*a*) thereof is repealed and the following substituted therefor:

Powers

"(2) Without restricting the generality of subsection (1), a truant officer may, subject to subsection (2.1),"

(2) Section 119 of the said Act is further amended by adding thereto, immediately after subsection (2) thereof, the following subsections:

Warrant required to enter dwelling-house

"(2.1) Where any place referred to in paragraph (2)(*a*) is a dwelling-house, a truant officer may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant issued under subsection (2.2).

Authority to issue warrant

(2.2) Where on *ex-parte* application a justice of the peace is satisfied by information on oath

(*a*) that the conditions for entry described in paragraph (2)(*a*) exist in relation to a dwelling-house,

(*b*) that entry to the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and

(*c*) that entry to the dwelling-house has been refused or that there are reasonable grounds for believing that entry thereto will be refused,

he may issue a warrant under his hand authorizing the truant officer named therein to enter that dwelling-house subject to such conditions as may be specified in the warrant.

Use of force

(2.3) In executing a warrant issued under subsection (2.2), the truant officer named therein shall not use force unless he is accompanied by a peace officer and the use of force has been specifically authorized in the warrant."

Saving from liability

21. For greater certainty, no claim lies against Her Majesty in right of Canada, the Minister, any band, council of a band or member of a band or any other person or body in relation to the omission or deletion of

20. (1) Le passage du paragraphe 119(2) de la même loi qui précède l'alinéa *a*) est abrogé et remplacé par ce qui suit :

Pouvoirs

«(2) Sans qu'en soit restreinte la portée générale du paragraphe (1), un agent de surveillance peut, sous réserve du paragraphe (2.1) :»

(2) L'article 119 de la même loi est modifié par insertion, après le paragraphe (2), de ce qui suit :

Mandat : maison d'habitation

«(2.1) Lorsque l'endroit visé à l'alinéa (2)*a*) est une maison d'habitation, l'agent de surveillance ne peut y pénétrer sans l'autorisation de l'occupant qu'en vertu du mandat prévu au paragraphe (2.2).

Pouvoir de délivrer un mandat

(2.2) Sur demande *ex parte*, le juge de paix peut délivrer sous son seing un mandat autorisant l'agent de surveillance qui y est nommé, sous réserve des conditions éventuellement fixées dans le mandat, à pénétrer dans une maison d'habitation s'il est convaincu, d'après une dénonciation sous serment, de ce qui suit :

a) les circonstances prévues à l'alinéa (2)*a*) dans lesquelles un agent peut y pénétrer existent;

b) il est nécessaire d'y pénétrer pour l'application de la présente loi;

c) un refus d'y pénétrer a été opposé ou il y a des motifs raisonnables de croire qu'un tel refus sera opposé.

Usage de la force

(2.3) L'agent de surveillance nommé dans le mandat prévu au paragraphe (2.2) ne peut recourir à la force dans l'exécution du mandat que si celui-ci en autorise expressément l'usage et que si lui-même est accompagné d'un agent de la paix.»

Aucune réclamation

21. Il demeure entendu qu'il ne peut être présenté aucune réclamation contre Sa Majesté du chef du Canada, le Ministre, une bande, un conseil de bande, un membre d'une bande ou autre personne ou organisme

the name of a person from the Indian Register in the circumstances set out in paragraph 6(1)(*c*), (*d*) or (*e*) of the *Indian Act*.

Report of Minister to Parliament

22. (1) The Minister shall cause to be laid before each House of Parliament, not later than two years after this Act is assented to, a report on the implementation of the amendments to the *Indian Act*, as enacted by this Act, which report shall include detailed information on

(*a*) the number of people who have been registered under section 6 of the *Indian Act*, and the number entered on each Band List under subsection 11(1) of that Act, since April 17, 1985;

(*b*) the names and number of bands that have assumed control of their own membership under section 10 of the *Indian Act*; and

(*c*) the impact of the amendments on the lands and resources of Indian bands.

Review by Parliamentary committee

(2) Such committees of Parliament as may be designated or established for the purposes of this subsection shall, forthwith after the report of the Minister is tabled under subsection (1), review that report and may, in the course of that review, undertake a review of any provision of the *Indian Act* enacted by this Act.

Commencement

23. (1) Subject to subsection (2), this Act shall come into force or be deemed to have come into force on April 17, 1985.

Idem

(2) Sections 17 and 18 shall come into force six months after this Act is assented to.

relativement à l'omission ou au retranchement du nom d'une personne du registre des Indiens dans les circonstances prévues aux alinéas 6(1)*c*), *d*) ou *e*) de la *Loi sur les Indiens*.

Rapport du Ministre au Parlement

22. (1) Au plus tard deux ans après la sanction royale de la présente loi, le Ministre fait déposer devant chaque chambre du Parlement un rapport sur l'application des modifications de la *Loi sur les Indiens* prévues dans la présente loi. Le rapport contient des renseignements détaillés sur :

a) le nombre de personnes inscrites en vertu de l'article 6 de la *Loi sur les Indiens* et le nombre de personnes dont le nom a été consigné dans une liste de bande en vertu du paragraphe 11(1) de cette loi, depuis le 17 avril 1985;

b) les noms et le nombre des bandes qui décident de l'appartenance à leurs effectifs en vertu de l'article 10 de la *Loi sur les Indiens*;

c) l'effet des modifications sur les terres et les ressources des bandes d'Indiens.

Examen par un comité parlementaire

(2) Le Comité du Parlement que ce dernier peut désigner ou établir pour l'application du présent paragraphe doit examiner sans délai après son dépôt par le Ministre le rapport visé au paragraphe (1). Le comité peut, dans le cadre de cet examen, procéder à la révision de toute disposition de la *Loi sur les Indiens* prévue à la présente loi.

Entrée en vigueur

23. (1) Sous réserve du paragraphe (2), la présente loi entre en vigueur ou est réputée être entrée en vigueur le 17 avril 1985.

Idem

(2) Les articles 17 et 18 entrent en vigueur six mois après que la présente loi a reçu la sanction royale.

QUEEN'S PRINTER FOR CANADA © IMPRIMEUR DE LA REINE POUR LE CANADA
OTTAWA, 1993

TAB H

Exhibit 1
Date: March 9, 2017
Witness: PAUL BUSOLO
Katie McLeod, Court Reporter KM

SAWRIDGE MEMBERSHIP RULES

1. These Rules shall come into force on the day on which the Band gives notice to the Minister pursuant to subsection 10(6) of the Act. **[PASSED JULY 4, 1985]**

2. On and after the day these Rules come into force the Band List of the Band shall be maintained by the Band under the direction and supervision of the Band Council and only those persons whose names are included therein, or who have rights to have their names entered therein, pursuant to these rules shall be members of the Band. **[PASSED JULY 4, 1985]**

3. Each of the following persons shall have a right to have his or her name entered in the Band List; **[PASSED JULY 4, 1985]**

(a) any person who, but for the establishment of these rules, would be entitled pursuant to subsection 11(1) of the Act to have his or her name entered in the Band List required to be maintained in the Department and who, at any time after these rules come into force, either

(i) is lawfully resident on the reserve; or

(ii) has applied for membership in the band and, in the judgment of the Band Council, has a significant commitment to, and knowledge of, the history, customs, traditions, culture and communal life of the Band and a character and lifestyle that would not cause his or her admission to membership in the Band to be detrimental to the future welfare or advancement of the Band;

(b) a natural child of parents both of whose names are entered on the Band List;

(c) with the consent of the Band Council, any person who

(i) has applied for membership in the Band;

(ii) is entitled to be registered in the Indian Register pursuant to the Act;

(iii) is the spouse of a member of the Band, and

(iv) is not a member of another band;

(d) with the consent of the Band Council, any person who

(i) has applied for membership in the Band,

(ii) was born after the date these rules come into force, and

(iii) is the natural child of a member of the Band, and

(e) any member of another band admitted into membership of the Band with the consent of the council of both bands and who thereupon ceases to be a member of the other band.

4. For the purpose of section 3(a)(i) and section 6 the question whether a person is lawfully resident on the reserve shall be determined exclusively by reference to by-laws made by the Band Council pursuant to section 81 of the Act except that, at any time when there are no such applicable by-laws in force, no person shall be considered to be lawfully resident on the reserve for the purpose of section 3(a)(i) and section 6 unless the residence of such person on the reserve has been approved or ratified by a resolution of the Band Council that is expressed to be made for the purpose of these Rules. **[PASSED JULY 4, 1985]**

5. In considering an application under section 3, the Band Council shall not refuse to enter the name of the applicant in the Band List by reason only of a situation that existed or an action that was taken before these Rules came into force. **[PASSED JULY 4, 1985]**

6. The Band Council may at any time delete from the Band List the name of any person who has applied to the Band Council to have his or her name deleted from the Band List or the name of any person who is not then lawfully resident on the reserve and who, in the judgment of the Band Council, either does not have a significant commitment to the history, customs, traditions, culture and communal life of the Band or has a character or lifestyle that would cause his or her continued membership in the Band to be seriously detrimental to the future welfare or advancement of the Band; provided that, before a decision to delete the name of any person from the Band List is made under this section, otherwise than pursuant to an application by such person, the Band Council shall give fifteen days notice to such person who shall then be entitled to make representation to the Band Council in writing, in person or through an agent or counsel within such period of fifteen days. **[PASSED JULY 4, 1985]**

7. Where the name of a person is deleted from the Band List pursuant to section 6, the names of his or her minor children may, in the discretion of the Band Council, also be deleted from the Band List. **[PASSED JULY 4, 1985]**

8. Notwithstanding section 6 the Band Council shall delete from the Band List the name of any person who has been admitted into membership of another band with the consent of both the Band council and the admitting band. **[PASSED JULY 4, 1985]**

9. Except as otherwise expressly provided in these Rules, no application shall be required before the Band Council may enter in the Band List the name of any person who has a right to have his or her name entered in the Band List pursuant to these Rules. **[PASSED JULY 5, 1985]**

10. Where, pursuant to section 3 of these Rules, an application is required before a person has a right to have his or her name entered in the Band List, such application may be made in such manner and form as the Band Council may determine from time to time and, for greater certainty, the Band Council may permit applications to be made

under section 3(d) by a parent or guardian of a natural child referred to therein who is an infant at the time the application is made. **[PASSED JULY 5, 1985]**

11. The Band Council may consider and deal with applications made pursuant to section 3 of these Rules according to such procedure and at such time or times as it shall determine in its discretion and, without detracting from the generality of the foregoing, the Band Council may conduct such interviews, require such evidence and may deal with any two or more of such applications separately or together as it shall determine in its discretion. **[PASSED JULY 5, 1985]**

12. Any person whose application for membership in the Band pursuant to section 3 of these Rules has been denied, or whose name has been deleted from the Band List pursuant to section 6, by the Band Council may appeal such decision to the electors of the Band by delivering notice in writing to the Band Council at the office of the Band within 15 days after communication to him or her of the decision of the Band Council. **[PASSED JULY 5, 1985]**

13. Within 60 days after receipt of a notice of appeal pursuant to section 12 of these Rules the Band Council shall convene a meeting of the electors of the Band for the purpose of disposing of the appeal and the applicant shall be entitled to be present at such meeting and make representations thereto in person or through an agent or counsel. **[PASSED JULY 5, 1985]**

14. Each discretionary power conferred upon the Band Council under these rules shall be exercised by the Band Council in good faith, without discrimination on the basis of sex and in accordance with its judgment of the best interests and welfare of the Band. **[PASSED JULY 5, 1985]**

15. No person shall have a right to have his or her name entered in the Band List except as provided in section 3 of these Rules **[PASSED JULY 5, 1985]** and, for greater certainty, no person shall be entitled to have his or her name included in the Band List unless that person has, at some time after July 4, 1985, had a right to have his or her name entered in the Band List pursuant to these Rules. **[PASSED JUNE 24, 1987]**

16. In the event that any of the foregoing provisions of these Rules is held by a court of competent jurisdiction to be invalid in whole or in part on the ground that it is not within the power of the Band to exclude any particular person or persons from membership in the Band, these Rules shall be construed and shall have effect as if they contained a specific provision conferring upon each such person a right to have his or her name entered in the Band List, but for greater certainty, no other person shall have a right to have his or her name entered or included in the Band List by virtue of the provisions of this Section and, in particular, no person referred to in Subsection 11(2) of the Act shall be entitled to membership in the Band otherwise than pursuant to Section 3 of these Rules. **[PASSED JUNE 24, 1987]**

17. In the event that any provision, or part of any provision, of these Rules is held to be invalid or of no binding force or effect by any court of competent jurisdiction, these Rules shall be construed and applied as if such provision or part thereof did not apply to or in the circumstances giving rise to such invalidity and the effect of the remaining provisions, or parts thereof, of these Rules shall not be affected thereby. **[PASSED JUNE 24, 1987]**

TAB I

Action No.: 1103-14112
E-File No.: EVQ19SAWRIDGE
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF 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 VIROS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO, 19, now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")

ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for the 1985 Trust ("Sawridge Trustees")

Applicants

PROCEEDINGS

Edmonton, Alberta
October 30, 2019

Transcript Management Services
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

TABLE OF CONTENTS

Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

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October 30, 2019	Afternoon Session
The Honourable Mr. Justice Henderson	Court of Queen's Bench of Alberta
M. Sestito	For R. Twinn, M. Ward, B. L'Hirondelle, E. Twinn, and D. Majeski
K. Martin	For R. Twinn, M. Ward, B. L'Hirondelle, E. Twinn, and D. Majeski
E. Molstad, Q.C.	For Sawridge First Nation
E. Sopko	For Sawridge First Nation
P. Faulds, Q.C.	For the Office of the Public Trustee
J. Hutchison	For the Office of the Public Trustee
C. Osualdini	For C. Twinn
D. Risling	For C. Twinn
(No Counsel)	For S. Twinn
R. Lee	Court Clerk

THE COURT CLERK: Order in court, all rise.

THE COURT: Good afternoon. Please be seated.

MR. FAULDS: Good afternoon.

MS. HUTCHISON: Good afternoon.

MS. OSUALDINI: Good afternoon.

MR. MOLSTAD: Good afternoon.

THE COURT: Okay. Mr. Molstad?

MR. MOLSTAD: Yes. Would you like me to introduce the participants here today, Sir?

THE COURT: Why don't you do that if for no other reason than the record.

MS. TWINN: I guess I'll just introduce myself so you can understand who I am to this. My name is Shelby Twinn. I am the daughter of current Band member Paul Twinn and the granddaughter of the late Chief Walter Twinn. I'm going to also start off with just asking you to bear with me. I'm a little intimidated by this setting.

THE COURT: Oh, sure, but don't be intimidated. Just -- just relax and just -- you just carry on --

MS. TWINN: Okay.

THE COURT: -- and we'll -- we'll give you what time you need, so...

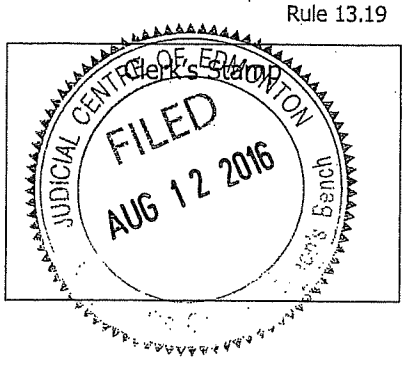
MS. TWINN: All right. So I guess I am here because I do need to speak up for myself. And I know it is -- I'm not the only one in my situation because the Trustees of the 1985 Trust have not been and are not now protecting my interest as a beneficiary of the 1985 Trust. And they've been proceeding with the end goal of limiting the beneficiaries to the members of the Sawridge First Nation with little or no grandfathering of the current beneficiaries, and that the Sawridge First Nation is here to say that the 1985 Trust -- well, the assets do not belong to the 1985 beneficiaries, that it is only for the 45 Sawridge First Nation Band members which are already benefits from the 1986 Trust, while the 1985 beneficiaries have been denied benefits and not for lack of trying.

And as stated before, the Sawridge First Nation and the Trustees want to limit the current beneficiaries to the current members Sawridge First Nation, subjecting the disentitled beneficiaries to the Sawridge First Nation's abusive and painful membership application system that, in my belief, is corrupt, biased, and unfair. So on October 25th this past, an hour -- hours before APTN Investigates ran a documentary on the Sawridge First Nation membership system, I did receive an e-mail from Mike McKiddie (phonetic) that I do believe -- in regards to my membership application that I had submitted at the end of April of last year, 2018. And I do believe that this e-mail proves that they are not going to let in the people, the disentitled beneficiaries, and that it's not a viable option over our 1985 beneficiary status. I have copies of that e-mail if anybody or you wanted a copy. I brought copies.

And also that I have spoken to other non Band member beneficiaries that I would like to also say that if granted intervenor status, I would be willing to share it with those other people.

TAB J

Form 49
Alberta Rules of Court
Rule 13.19



COURT FILE NO. 1103 14112

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

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

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

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

DOCUMENT **AFFIDAVIT OF CLAUDETTE YOUNG**

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

AFFIDAVIT OF CLAUDETTE YOUNG

SWORN ON THE 12 DAY OF AUGUST, 2016

I, Claudette Young, of the City of Edmonton, in the Province of Alberta, SWEAR AND SAY THAT:

1. I am a legal assistant at the law firm McLennan Ross LLP, counsel for the trustee Catherine Twinn, and therefore have personal knowledge of the matters hereinafter deposed to except where based on information and belief, in which case I believe the same to be true.

2. Attached as **Exhibit "A"** to my Affidavit is a printout from the Aboriginal Affairs and Northern Development Canada website, accessed on August 12, 2016, pertaining to the population of the Sawridge First Nation.

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

SWORN BEFORE ME at the)
City of Edmonton,)
in the Province of Alberta)
the 12 day of August, 2016)
)
)
)
)
A Commissioner for Oaths in and)
for the Province of Alberta

JOEL H. FRANZ
Barrister and Solicitor

Claudette Young

Registered Population

Official Name **Sawridge First Nation**
Number **454**

Registered Population as of July, 2016

Residency	# of People
Registered Males On Own Reserve	23
Registered Females On Own Reserve	19
Registered Males On Other Reserves	2
Registered Females On Other Reserves	4
Registered Males On Own Crown Land	0
Registered Females On Own Crown Land	0
Registered Males On Other Band Crown Land	0
Registered Females On Other Band Crown Land	0
Registered Males On No Band Crown Land	1
Registered Females On No Band Crown Land	0
Registered Males Off Reserve	225
egistered Females Off Reserve	219
Total Registered Population	**493**

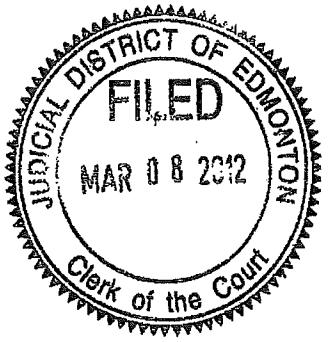
Date Modified:2015-01-23

This is Exhibit " A " referred to in the Affidavit of
Claudette Young
Sworn before me this 12 day
of August A.D., 2016

A Commissioner for Oaths in and for the Province of Alberta

JOEL H. FRANZ
Barrister and Solicitor

TAB K

Clerk's stamp:	
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**WRITTEN BRIEF OF THE SAWRIDGE FIRST NATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Parlee McLaws LLP #1500, 10180-101 Street Edmonton, Alberta T5J 4K1 Attention: Edward H. Molstad Telephone: (780) 423-8506 Fax: (780) 423-2870 File No: 64203-7/EHM

Chamberlain Hutchison
#155, 10403 – 122 Street
Edmonton, AB T5N 4C1

Attention: Janet L. Hutchison
Solicitors for the Public Trustee of Alberta

Department of Justice
300, 10423 – 101 Street
Edmonton, AB T5H 0E7

Attention: Jim Kindrake
Solicitors for the Minister of Aboriginal Affairs and Northern Development (Canada)

Davis LLP
#1201, 10060 Jasper Avenue
Edmonton, AB T5J 4E5

Attention: Priscilla Kennedy
Solicitors for June Kolosky and Aline Huzar

Reynolds, Mirth, Richards & Farmer LLP
3200 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3W8

Attention: Marco Poretti
Solicitors for the Trustees for the 1985 Sawridge Trust

TABLE OF CONTENTS

INTRODUCTION

1. This application originates from proceedings seeking advice and direction of the court in respect to certain trust matters.

2. The Sawridge Indian Band, No. 19, now known as the Sawridge First Nation is a First Nation located in northern Alberta (the "Sawridge First Nation"). In the 1980's, three trusts were created for the benefit of the members of the Sawridge First Nation that are relevant in this matter (the "1982 Trust" the "1985 Trust" and the "1986 Trust").

3. By Order of Justice Thomas dated August 31, 2011, (the "Procedural Order") the trustees of the 1985 Trust (the "Sawridge Trustees") were directed to bring an application (the "Advice and Direction Application") to determine the following issues:

    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.

    Order of Justice D.R.G. Thomas, dated August 31, 2011, paragraph 1.

4. This application is brought by the Office of the Public Trustee ("Public Trustee") and is in respect to three issues:

    a. The appointment of the Public Trustee as litigation representative of minors who may be interested in the within proceedings;
    b. The payment of advance costs on a solicitor and his own client basis with exemption from liability for costs as conditions of any such appointment; and
    c. The relevance of intervening in the membership application process of the Sawridge First Nation and questioning on "membership" issues in these proceedings.

5. The Sawridge First Nation's submissions are in response to the Public Trustee's submissions on the relevance of the Sawridge First Nation's membership application process and criteria to the Advice and Direction Application. In particular, the Sawridge

First Nation makes submissions in response to the Public Trustee seeking direction that it may question witnesses on: i) the number of pending membership applications; ii) the details of membership criteria and who makes membership decisions; and iii) the steps taken to identify and fully ascertain the members of the class of beneficiaries.

PART I – STATEMENT OF FACTS

6. On April 15, 1982, Walter Patrick Twinn, former Chief of Sawridge First Nation, executed a Deed of Settlement establishing the 1982 Trust. The purpose of the 1982 Trust was to provide long-term benefits to members of the Sawridge First Nation and their descendants.

> Affidavit of Paul Bujold, dated August 30, 2011, paragraph 3.
> Affidavit of Paul Bujold, dated September 12, 2011, paragraph 9.

7. On April 17, 1982, the *Constitution Act, 1982*, along with the *Canadian Charter of Rights and Freedoms* (the "*Charter*") came into force. Section 15 of the *Charter*, the provisions dealing with equality, did not come into force until April 17, 1985 so that legislation could be adapted to comply with the new equality requirements.

> Affidavit of Paul Bujold, dated September 12, 2011, paragraph 13.

8. Following the passage of the *Charter*, the *Indian Act*, R.S.C. 1970, c. I-6 (the "*Pre-Charter Indian Act*") was amended by *Bill C-31*. The amendments in *Bill C-31* allowed for persons who had lost their Indian status to regain that status. With the passage of *Bill C-31*, the Sawridge First Nation believed there would be a substantial influx of new members into the Sawridge First Nation. Accordingly, the 1985 Trust was settled on April 15, 1985 for the purpose of preserving the assets of the Sawridge First Nation for the benefit of members as defined under the *Pre-Charter Indian Act*.

> Affidavit of Paul Bujold, dated September 12, 2011, paragraphs 14-15.
> Affidavit of Paul Bujold, dated August 30, 2011, paragraph 4.

9. The Sawridge Trustees are considering making distributions from the 1985 Trust at some date in the future. The Sawridge Trustees are concerned that the definition of

"Beneficiary" under the 1985 Trust could be discriminatory since the definition refers to provisions in the *Pre-Charter Indian Act*. Accordingly, the Sawridge Trustees are seeking an order under the Advice and Direction Application to resolve the issue of potential discrimination in the definition of "Beneficiary" of the 1985 Trust.

Affidavit of Paul Bujold, dated September 12, 2011, paragraphs 32-33.
Affidavit of Paul Bujold, dated August 30, 2011, paragraph 6.

10. The Sawridge Trustees have taken steps to notify potential beneficiaries of the 1985 Trust. These steps are detailed in the Affidavit of Paul Bujold, dated August 30, 2011, and include:
    a. A series of newspaper advertisements in Alberta, Saskatchewan, Manitoba and British Columbia for the purpose of collecting names of potential beneficiaries;
    b. Correspondence with a number of potential beneficiaries; and
    c. Creating a website to provide notice to beneficiaries and potential beneficiaries.

    Affidavit of Paul Bujold, dated August 30, 2011, paragraphs 7-9, 11, 13.

11. Due to the steps outlined above, the Sawridge Trustees have made a list of 194 beneficiaries and potential beneficiaries, with contact information of 190 of those persons.

    Affidavit of Paul Bujold, dated August 30, 2011, paragraph 11.

PART II – ISSUES

12. The Sawridge First Nation submissions relate to the following issues:

    a. Is the Sawridge First Nation membership processing and criteria relevant to the Advice and Direction Application?

    b. Is the Advice and Direction Application the proper forum for the membership issues raised by the Public Trustee to be addressed?

    c. Is there a conflict of interest in the dual roles of acting as a trustee of the 1985 Trust and determining membership applications of the Sawridge First Nation?

TAB L

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

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

A. Magnan

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

Catherine A. Magnan
My Commission Expires
January 29, 2012

SAWRIDGE BAND INTER VIVOS SETTLEMENT

DECLARATION OF TRUST

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

B E T W E E N :

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

OF THE FIRST PART,

- and -

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

OF THE SECOND PART.

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

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

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

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

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

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

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

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

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

(b) "Trust Fund" shall mean:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

A. Settlor [illegible]

B. Trustees:

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

1. [illegible]

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

2. [illegible]

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

3. [illegible]

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

TAB M

This is Exhibit " H " referred to in the Affidavit of Paul Bujold Sworn before me this 12 day of September A.D., 20 11

A. Magnan
~~A Notary Public~~, A Commissioner for Oaths in and for the Province of Alberta
Catherine A. Magnan
My Commission Expires January 29, 20 12

SAWRIDGE BAND TRUST

RESOLUTION OF TRUSTEES

WHEREAS the undersigned are the Trustees of an inter vivos settlement (the "Sawridge Band Trust") made the 15th day of April, 1982 between Chief Walter Patrick Twinn, as Settlor, and Chief Walter Patrick G. Twinn, Walter Felix Twin and George V. Twin, as Trustees;

AND WHEREAS the beneficiaries of the Sawridge Band Trust are the members, present and future, of the Sawridge Indian Band (the "Band"), a band for the purposes of the Indian Act R.S.C., Chapter 149;

AND WHEREAS amendments introduced into the House of Commons on the 28th day of February, 1985 may, if enacted, extend membership in the Band to certain classes of persons who did not qualify for such membership on the 15th day of April, 1982;

AND WHEREAS pursuant to paragraph 6 of the instrument (the "Trust Instrument") establishing the Trust the undersigned have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for the beneficiaries of the Trust;

AND WHEREAS for the purpose of precluding future uncertainty as to the identity of the beneficiaries of the Trust the Trustees desire to exercise the said power by resettling the assets of the Trust for the benefit of only those persons (the "Beneficiaries") who qualify, or would in the future qualify, for membership in the Band under the provisions of the Act in force on the 15th day of April, 1982;

AND WHEREAS by deed executed the 15th day of ~~March~~ APR 2, 1985 between Chief Walter Patrick Twinn, as Settlor, and the undersigned as Trustees, an inter vivos settlement (the "Sawridge Band Inter Vivos Settlement") has been constituted for the benefit of the Beneficiaries;

NOW THEREFORE BE IT RESOLVED THAT

1. the power conferred upon the undersigned in their capacities as Trustees of the Trust pursuant to paragraph 6 of the Trust Instrument be and the same is hereby exercised by transferring all of the assets of the Trust to the

undersigned in their capacities as Trustees of the Sawridge Band Inter Vivos Settlement; and

2. Chief Walter Patrick Twinn is hereby authorized to execute all share transfer forms and other instruments in writing and to do all other acts and things necessary or expedient for the purpose of completing the transfer of the said assets of the Trust to the Sawridge Band Inter Vivos Settlement in accordance with all applicable legal formalities and other legal requirements.

DATED the 15th day of ~~March~~ April, 1985.

Chief Walter Patrick Twinn

Samuel G. Twin

George V. Twin

ACCEPTANCE BY TRUSTEES

The undersigned in their capacities as Trustees of the Sawridge Band Inter Vivos Settlement hereby declare that they accept the transfer of all of the assets of the Trust and that they will hold the said assets and deal with the same hereafter for the benefit of the Beneficiaries in all respects in accordance with the terms and provisions of the Sawridge Band Inter Vivos Settlement.

DATED the 15th day of ~~March~~ April, 1985.

Chief Walter Patrick Twinn

Samuel G. Twin

George V. Twin

TAB N

21902 Trust Docs

SAWRIDGE BAND RESOLUTION

WHEREAS the Trustees of a certain trust dated the 15th day of April, 1982, have authorized the transfer of the trust assets to the Trustees of the attached trust dated the 15th day of April, A.D., 1985.

AND WHEREAS the assets have actually been transferred this 15th day of April, A.D. 1985.

THEREFORE BE IT RESOLVED at this duly convened and constituted meeting of the Sawridge Indian Band at the Band Office in Slave Lake, Alberta, this 15th day of April, A.D. 1985, that the said transfer be and the same is hereby approved and ratified.

WITNESS

As to all signatures

Bruce E Thom

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

Paul Bujold

Sworn before me this 12 day

of September A.D., 2011

A. Magnan

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

Catherine A. Magnan
My Commission Expires
January 29, 2012

Walter F Twin

Debbie L. Twin

Catherine Twin

TAB O

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

This is Exhibit "J" referred to in the Affidavit of Paul Bujold
Sworn before me this 12 day of September A.D., 2011
A. Magnan
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
Catherine A. Magnan
My Commission Expires January 29, 2012

BETWEEN:

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

OF THE FIRST PART

AND:

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

OF THE SECOND PART

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

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

NOW THEREFORE this Deed witnesseth as follows:

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

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

WITNESS:

OLD TRUSTEES

NEW TRUSTEES

SCHEDULE "A"

SAWRIDGE HOLDINGS LTD. --- SHARES	
WALTER PATRICK TWINN	30 CLASS "A" COMMON
GEORGE TWIN	4 CLASS "A" COMMON
SAM TWIN	12 CLASS "A" COMMON

SAWRIDGE ENERGY LTD. ---- SHARES	
WALTER PATRICK TWINN	100 CLASS "A" COMMON

SCHEDULE 'B'

PROMISSORY NOTE

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

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

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

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

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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

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

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SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of SIXTY THOUSAND ($60,000.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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

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

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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

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

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of TWENTY THOUSAND, ONE HUNDRED AND EIGHTY FOUR ($20,184.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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

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

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

SAWRIDGE HOLDINGS LTD.

Per: [signature]

Per: [signature]

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of TWENTY THOUSAND, ONE HUNDRED AND EIGHTY ONE ($20,181.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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

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

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

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

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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

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

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

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

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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

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

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

DATED at the City of Edmonton, in the Province of Alberta, this 1 day of [illegible], A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

TAB P

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

Sworn before me this 12 day of September A.D., 20 17

A. Magnan

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

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

THE SAWRIDGE TRUST

DECLARATION OF TRUST

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

BETWEEN:

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

OF THE FIRST PART,

- and -

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

OF THE SECOND PART,

WHEREAS the Settlor desires to create an inter vivos trust for the benefit of the members of the Sawridge Indian Band, a band within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, and for that purpose has transferred to the Trustees the property described in the Schedule attached hereto;

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

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

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

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

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

(b) "Trust Fund" shall mean:

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

(B) any further, substituted or additional property, including any property, beneficial interests or rights referred to in paragraph 3 of this Deed and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Deed;

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

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

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

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

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

5. The Trustees who are the original signatories hereto, shall in their discretion and at such time as they determine, appoint additional Trustees to act hereunder. Any Trustee may at any time resign from the office of Trustee of this Trust on giving not less than thirty (30) days notice addressed to the

other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee and the power of appointing additional Trustees to increase the number of Trustees to any number allowed by law shall be vested in the continuing Trustees or Trustee of this Trust and such power shall be exercised so that at all times (except for the period pending any such appointment) there shall be a minimum of Three (3) Trustees of this Trust and a maximum of Seven (7) Trustees of this Trust and no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there are more than Two (2) Trustees who are not then Beneficiaries.

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

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

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for trustees' investments by the Trustee's Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Saving Bank Act applies.

8. The Trustees are authorized and empowered to do all acts that are not prohibited under any applicable laws of Canada or of any other jurisdiction and that are necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Trust for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner or to any extent detracted from the generality of the foregoing, the power

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

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

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

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

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

11. The provision of this Deed may be amended from time to time by a resolution of the Trustees that received the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years and, for greater certainty, any such amendment may provide for a commingling of the assets, and a consolidation of the administration, of this Trust with the assets and administration of any other trust established for the benefit of all or any of the Beneficiaries.

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

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

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

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

16. This Deed and the Trust created hereunder shall be governed by, and shall be construed in accordance with, the laws of the Province of Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

A. Settlor
CHIEF WALTER P. TWINN

B. Trustees:

1. CHIEF WALTER P. TWINN

2. CATHERINE TWINN

3. GEORGE TWIN

SCHEDULE

One Hundred Dollars ($100.00) in Canadian Currency.

TAB Q

Department of Justice Canada / Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

NOV 9 3 29 PM '94

November 9, 1994

VIA FAX NUMBER (416) 863-0871

Mr. Maurice C. Cullity, Q.C.
Davies, Ward & Beck
P.O. Box 63, Suite 1400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Sawridge Indian Band Expenditures pursuant to Sections 64 and 66 of the *Indian Act*

Dear Mr. Cullity:

We are in receipt of your letter of October 24th, 1994.

Although we note the concern expressed in your letter regarding the inclusion on the list of amounts for recurring and other expenditures which would not involve the acquisition of specific assets, we should remember that the suggestion for the production of such a statement originated from your letter of April 19, 1994.

We and our client, the Department of Indian Affairs and Northern Development, are concerned regarding the delay in resolving this matter.

In an attempt to accelerate the resolution of the current situation, we are prepared to limit the scope of the statement to be provided by your client's auditors. Accordingly, we hereby request confirmation by way of statement from Sawridge's accountants that all funds that were released for the acquisition of capital assets were in fact used for that specific purpose, and further confirmation that those assets are held in trust, or have been converted into other assets which are held in trust, for the members of the Band. In other words, at this time we do not seek confirmation regarding amounts released for purposes other than the acquisition of capital assets.

.../2

Canada

We would appreciate receiving confirmation of this proposal at your earliest convenience.

Yours very truly,

M. C. McIntosh

Margaret McIntosh
Counsel

DAVIES, WARD & BECK

BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

VIA TELECOPIER

October 20, 1994

Ms. Margaret McIntosh
Counsel, Legal Services
Indian Affairs and Northern Development
Room 1018
Les Terrasses de la Chaudière
10 Wellington Street
Hull, Quebec
K1A 0H4

Dear Ms. McIntosh:

Sawridge

Further to our recent discussions, I am writing to confirm that I do not believe that the list of expenditures provided with your letter of October 5, 1994 is helpful for the purposes we have discussed. Many of the amounts referred to on the list relate to recurring expenditures, such as legal and other professional fees, and some are as small as $500. They extend back over a period of 20 years and to ask for a statement from the auditors that all were properly expended on the particular purposes referred to in the BCRs would be prohibitively expensive even if, after such a period, it were possible to deal with them.

In my discussion with Mr. Gregor MacIntosh on April 7, 1994, I was told that the Department's concern was to ensure that all funds distributed to the Band pursuant to section 64 or section 69 were either held in trust, or could be traced into assets held in trust, for members of the Band. I suggested that the auditors might be asked to certify that all funds distributed to the band by the Minister pursuant to section 64 or section 69 of the *Indian Act* for the acquisition of specific assets, or property or investments into which those funds have been converted, are now held in trusts for members of the band. In my letter of April 19 to Mr. Van Iterson, I referred too generally to funds distributed to the band for specific purposes pursuant to those sections of the *Indian Act*. A large number of the amounts on the list you have provided refer to section 66 of the Act but, more importantly, many of them were amounts for recurring and other expenditures that would not involve the acquisition of assets and could not be expected to end up in trusts or otherwise in property of the Band.

DAVIES, WARD & BECK

In order to try to resolve this matter without further delay and expense, I wonder whether it would be an acceptable solution to ask the auditors to confine their attention to amounts on your list of $500,000 or more that were advanced for the purpose of acquiring specific assets. If this is not satisfactory from the viewpoint of the Department, perhaps you would suggest another alternative.

As I have indicated to you on a number of occasions, we do not agree that the Department is entitled to demand details of expenditures made by the band in the past or with respect to the assets that it now holds. At the same time, in the interests of avoiding the litigation that will be inevitable if your client intends to make unreasonable demands, I have attempted to find a solution that will satisfy the Department without involving the Band in unnecessary expense. I still wish to do this if it is possible.

Yours very truly,

Maurice C. Cullity

MCC/dp

cc: M. McKinney, Esq.

Department of Justice Canada
Ministère de la Justice Canada

Ottawa, Canada
K1A 0H8

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Quebec
K1A 0H4

August 29, 1994

Mr. Maurice C. Cullity, Q.C.
Davies, Ward Beck
P.O. Box 63, Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Subject: Sawridge Trusts

Dear Mr. Cullity:

Further to our telephone conversation of August 9, 1994, we continue to anticipate a statement from the auditors of the Sawridge Indian Band to the effect that funds released to the Band pursuant to sections 64 and 69 of the *Indian Act* are being held in trust for the members of the Band, and that any funds were used for the purposes for which they were authorized by the Minister of Indian Affairs and Northern Development.

My client is anxious to have this matter settled as expeditiously as possible. Accordingly, I respectfully request some written indication of when this information will be available.

Thank you for your consideration of this matter.

Margaret McIntosh
Counsel

Canada

Sawridge

March 21, 1994

Davies Ward & Beck
Barristers & Solicitors
Box 63, 44th Floor
1 Canadian Place
Toronto, Ontario
M5X 1B1

ATTENTION: M. Cullity

Dear Sir:

RE: Sawridge Trusts

Further to our recent telephone conversation, we wish to confirm that the Department was aware of the existence of Trusts for the benefit of Sawridge Band Members for quite some time. This knowledge can be attributed to the Department from several sources including:

1. Annual Audits
2. Capital Project Funds Requests
3. Self-Government Negotiations
4. Early Trust discussions

1. Annual Audits

The annual audit reports show an amount each year as "*Distributions to Band Members*". In the March 31, 1984 statement Note #16 reads:

> *16. Distributions to Band Members*
>
> *On December 17, 1983 the Members of the Band transferred certain assets with a carrying value of $17,951,590 to "The Sawridge Band Trust", a trust formed for the benefit of the members of the Sawridge Indian Band".*

HEAD OFFICE: BOX 326, SLAVE LAKE, ALBERTA, T0G 2A0 • TEL: (403) 849-4311 • FAX: (403) 849-3446
BRANCH OFFICE: #766, 10201 JASPER AVENUE, EDMONTON, ALBERTA, T5J 3N7 • TEL: (403) 421-4845 • FAX: (403) 428-7022

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

FIRD TRUSTS

MAR 30 1994

RECEIVED
APR - 8 1994
Sawridge

Mr. Maurice C. Cullity
Davies, Ward & Beck
Barristers & Solicitors
P.O. Box 63, Suite 4400
1 First Canadian Place
TORONTO ON M5X 1B1

Dear Mr. Cullity:

Thank you for your letter of March 16, 1994 concerning the existence of trusts that were apparently established on behalf of members of the Sawridge Band. I appreciate your willingness to meet to discuss this matter.

A meeting is desirable because of the Minister's statutory responsibilities for ensuring that moneys released to the band, pursuant to sections 61 to 69 of the *Indian Act*, are used for the benefit of the band and its members.

It may be that a relatively small amount of infomation on the above trusts, the existence of which was unknown to the Minister, will provide sufficient assurances that the above concerns have been met. We may also be assured that the assets are being held in those trusts for the benefit of all band members, including those who may be entitled to membership, as will be determined by the current related litigation.

To make the necessary arrangements for the meeting, would you please contact my office at (819) 953-5577.

Yours sincerely,

Original by/par
W. VAN ITERSON

W. (Bill) Van Iterson
A/Assistant Deputy Minister
Lands and Trust Services

c.c.: Chief Walter Twinn
Gregor MacIntosh
Ken Kirby
Chris McNaught

Canada

ORIGINAL in Capital/Red file 93-94

DAVIES, WARD & BECK

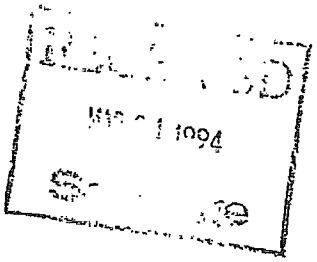
BARRISTERS & SOLICITORS

COPY

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

March 16, 1994



W. Van Iterson, Esq.
A/Assistant Deputy Minister
Lands and Trust Services
Indian and Northern Affairs Canada
Ottawa, Ontario
K1A 0H4

Dear Sir:

Sawridge Indian Band

I refer to the letters of May 7, 1994 and December 23, 1993 addressed to Chief Walter Twinn. 8th March

For some years we have been retained to advise the Band with respect to, among other matters, any trusts established for its members. Accordingly, I have been instructed to respond to any questions you may have in connection with such trusts to the extent that you are entitled to receive answers.

You will understand that the Band, like any other community, organization or entity engaged in business and other activities for the benefit of its members is reluctant to release financial information relating to such activities to anyone other than such members unless it determines that this is in its best interests or is required by law. For this reason, although I have no objection to meeting with individuals from your department, it would be helpful if you would indicate in advance why you believe such a meeting to be desirable and the grounds, if any, on which you believe you are entitled to receive information about the trusts referred to in the letter from Ms. Porteous.

It would be appreciated if you would address your reply and any further correspondence or questions on this matter to this office.

Yours very truly,

Maurice C. Cullity

MCC/dp

cc: Chief Walter Twinn

bcc: M. Henderson

TAB R

Court of Appeal for Saskatchewan

Docket: CACV2663

Citation: *Campbell v Campbell*, 2016 SKCA 39

Date: 2016-03-22

Between:

Shaun Norman Campbell

Appellant
(Petitioner)

And

Kristin Ann Campbell

Respondent
(Respondent)

Before:	Ottenbreit, Herauf and Whitmore JJ.A.
Disposition:	Appeal Allowed
Written reasons by:	The Honourable Mr. Justice Ottenbreit
In concurrence:	The Honourable Mr. Justice Herauf
	The Honourable Mr. Justice Whitmore

On Appeal From:	DIV 540 of 2011, Saskatoon
Heard:	September 24, 2015
Counsel:	Sherry L. Fitzsimmons for the Appellant
	Tiffany M. Paulsen, Q.C., for the Respondent

Ottenbreit J.A.

I. Introduction

[1] Shaun Norman Campbell (the father) appeals a Court of Queen's Bench Chambers decision dated December 17, 2014, dismissing an application to vary parenting arrangements set forth in a consent divorce judgment dated January 5, 2012. For the reasons hereinafter set forth, the appeal is allowed.

II. Facts and Background

[2] The father and Kristin Ann Campbell (the mother) were separated in September 2009 and divorced in February 2012. They have twin daughters, Hailey and Hanna, now aged 12. The mother and the father entered into an interspousal agreement (interspousal agreement) in relation to custody, parenting time, child support and other issues in 2011 when the twins were approximately seven years old.

[3] The terms of the interspousal agreement with respect to parenting arrangements were incorporated into a consent divorce judgment, child support and parenting order (order). Pursuant to the order, the primary residence for the children was with the mother. The father had specified parenting time. The order also incorporated the following provision (review clause) from the parties' interspousal agreement:

> 2(d) This parenting plan shall be open for review in the event of a material change in circumstances affecting the children or in the event that the current parenting arrangement is no longer meeting the children's needs. In that event, either party may trigger a review. The review shall proceed to mediation initially with the party who triggered the review to be solely responsible for the costs associated with same;

[4] In December 2013, the father applied to vary the terms of the order. He wanted to increase his parenting time within a four-week rotation from 9 days to 12½ days including two full weekends, have less exchanges of the twins between the parties, and avoid early morning exchanges. He also wanted equal sharing of summer holidays. In January 2014, in accordance with the terms of the review clause, the mother and father were directed to attend four sessions of high-conflict mediation prior to either

party being permitted to return the application to the Chambers list. No agreement was reached at the mediation and, as a result, the application was eventually heard by the Chambers judge.

[5] Between them, the parties filed at least six affidavits before the Chambers judge. The affidavits were voluminous and detailed and, as one might expect, represented the factual thrust and parry of conflicting interpretations of what transpired between the parties and the twins since separation, and the circumstances of the lives of the parties and the twins as at the date of application. The affidavits of the father focussed on facts tending to establish that a variation was necessary and the affidavits of the mother focussed on facts tending to show the contrary. The father's affidavits outlined changes in his personal life: he had married, had a new home, benefited from two incomes and had greater assistance with child care. For the purposes of this decision, the facts need not be set out in detail although I will refer to certain of the facts with respect to the arguments of the parties.

III. Decision of the Chambers Judge

[6] The Chambers judge referred to s. 17(5) of the *Divorce Act*, RSC 1985, c 3 (2d Supp) [*Act*], which governs variation of parenting orders. He also referred to the jurisprudence governing variation and the two-stage test as reflected in *Gordon v Goertz*, [1996] 2 SCR 27 [*Gordon*], and *Gray v Wiegers*, 2008 SKCA 7, [2008] 4 WWR 225 [*Gray*]. He observed that a parent seeking to vary a custody order must pass the first stage and meet a high threshold, *i.e.*, demonstration of a material change that will adversely affect the needs of the child. The Chambers judge also enunciated some of the principles governing variation applications: a material change must be to the child's circumstances, not merely to the circumstances of the party, and passage of time is itself not a material change.

[7] After analyzing the review clause, the Chambers judge determined initially that its wording did not provide an additional basis to vary the parenting arrangement apart from the material change criteria required under s. 17(5) of the *Act* and *Gordon*. He questioned if it could be interpreted to provide an additional basis to vary the parenting arrangement and whether it could be given effect given what he perceived to be the mandatory direction of s. 17(5). He did not elaborate or provide any analysis on that last point.

[8] Nevertheless, he stated he would proceed as if the review clause did create a second distinct and permissible test to vary the parenting arrangement. He concluded as follows:

[12] If it creates a different test, as I interpret the words used, the conflicting evidence does not satisfy me that the current parenting arrangement is no longer meeting the children's needs. Their needs are being met. This language does not specify that their needs must be met to the highest potential level or some other standard. It simply requires their needs to be met.

[13] Based upon the conflicting evidence before me I am not able to find a material, pivotal or fundamental change that will adversely affect the needs of the children. Their needs now are essentially the same needs they had when the judgment issued. What has changed is the petitioner's circumstances, not the needs of the children. The fact of the petitioner remarrying and obtaining housing that is better able to accommodate more parenting of the children was entirely predictable at the time of the agreement between the parties and at the time of the consent judgment, as was the certainty that the children would grow older. The petitioner has not discharged the onus on him to demonstrate a material change that adversely affects the needs of the children. I do not get beyond the first stage of the two-stage inquiry.

He dismissed the father's application to vary.

IV. Issues

[9] The father raises issues which can conveniently be restated as follows:

A. Did the Chambers Judge err by determining that the review clause did not contain a second and permissible test for review and variation of the parenting arrangements absent a material change in circumstances?

B. Did the Chambers Judge err in his application of the review clause to the evidence before him?

C. Did the Chambers Judge err by deciding the matter in Chambers rather than directing the matter to a Pre-Trial Conference?

D. Did the Chambers Judge err by accepting a Brief of Law on behalf of the Respondent but refusing leave to counsel for the Appellant to file materials in response?

E. Did the Chambers Judge err by awarding costs in favour of the Respondent?

V. Analysis

A. Did the Chambers Judge err by determining that the review clause did not contain a second and permissible test for review and variation of the parenting arrangements absent a material change in circumstances?

[10] The father contends the Chambers judge erred by ultimately not construing the review clause as containing a provision for variation independent of the material change criteria. He submits that the parties to the interspousal agreement and order agreed to two distinct bases for changing the parenting arrangements which were reflected in the review clause and that the second part of the review clause is independent of whether there is a material change of circumstances. He submits he need only show "the current parenting arrangement is no longer meeting the children's needs" to justify a variation. The father argues that the review clause is like a contract and that meaning must be given to it as a bargain to review parenting without the constraints of the material change test under s. 17(5) of the *Act*.

[11] The mother argues that the Chambers judge correctly interpreted the review clause and his decision must, on the basis of a stringent standard of review, be accorded the highest deference. The mother makes little argument on what the words of the clause mean, but instead refers to the judge's reliance on s. 17(5) of the *Act* and its application to the clause and the high threshold which someone applying for a variation must meet.

[12] This high threshold was set forth in *Gray* at paras 13 and 14, where this Court, following *Gordon*, held that a variation under s. 17(5) of the *Act* requires a two-stage inquiry:

> (i) the reviewing judge must first determine if there has been a material change in the condition, means, needs or other circumstances of the children adversely affecting them, and
>
> (ii) if the applicant has demonstrated such material change, the court must decide whether such change is in the best interests of the children.

In other words, if the threshold of a material change has been crossed only then should the judge consider the best interests of the children with reference to that change.

[13] With this in mind, I turn to the analysis of the review clause.

[14] As a preliminary matter, let me deal with the father's argument that the review clause must be construed similar to a clause in a contract. The review clause is not a contract and resort to contractual interpretation and principles is misplaced. Once the review clause was incorporated into the judgment it became part of a court order and principles regarding interpretation of court orders apply.

[15] These principles have been set forth in a number of cases. In *Sutherland v Reeves*, 2014 BCCA 222, 61 BCLR (5th) 308, Bauman C.J.B.C. stated:

> [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):
>
> > [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.
> >
> > [Emphasis added.]
>
> As a result, in addition to examining the language of the Order, it is necessary to review the pleadings and surrounding circumstances. It would be an error to have regard to those factors but to then interpret a generic Model Order instead of the specific order Mr. Justice Willcock made in response to the pleadings and the surrounding circumstances before him.

[16] In *Sans Souci Limited v VRL Services Limited*, [2012] UKPC 6, Lord Sumption reached the same conclusion:

> [13] ... The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.

[17] In *Re: Sharpe*, [1992] FCA 616 (Aust), the Court stated:

> [20] ... even if a judgment is not ambiguous, it is nevertheless proper (if not essential) in construing it to have regard to the factual context in which the judgment was given and that this context includes the pleadings, the reasons for the judgment and the course of evidence at the trial.

[18] With this jurisprudence in mind, I will examine the language of the order, the pleadings and the circumstances in which the order was made. I turn, first, to the language of the review clause. A plain reading of the review clause and the presence of the word "or" in the second line of the clause shows that the clause is disjunctive and, on its face, contains two possibilities for review of the parenting arrangement: (a) a material change in circumstances affecting the children, or (b) the current parenting arrangement is no longer meeting the children's needs. The second part of the review clause would be unnecessary if the clause as a whole only purported to address variation where there is a material change in circumstances. I say this because the words "material change in circumstances" found in the first part of the clause are well known and usually connote the two-stage test for variation set forth in *Gordon* and the principles surrounding its application. The additional language of the second part of the review clause would be unnecessary or redundant if the clause as a whole only purported to refer to the test in *Gordon*. The structure and language of the review clause therefore suggests that it allows a second avenue of review apart from a variation application based on material change.

[19] The second analytical factor, the pleadings leading up to the issuance of the judgment, provides no assistance to the interpretation of the review clause. The review clause was part of a consent order and there were no pleadings touching on the issue of interpretation of the clause. There are no reasons for judgment which might inform the interpretation of the review clause. There was no evidence tendered in court prior to the issuance of the order which might help inform an interpretation of it.

[20] In this Court, the parties argue that they filed affidavit material before the Chambers judge which spoke to each of their intentions with respect to the review clause prior to the order being issued and to the issue of how the review clause might be interpreted. The affidavits show the father did not want to be in a position where, when making an application to change parenting, he would be required to show that the threshold for variation had been crossed. He resisted incorporation of the parenting provisions including the review clause. The mother wanted finality to the parenting arrangements. A long process of negotiations ensued. It would appear that the parties never did agree on the interpretation of the review clause. Nevertheless, the father eventually agreed to the incorporation of

the parenting provisions, including the review clause, into the judgment. Evidence of the parties' intention is therefore of no assistance. However, on the basis of the jurisprudence mentioned earlier, the interpretation of the order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made.

[21] In this case, the meaning of the review clause must be found within the wording and structure of the clause itself. On that basis, it is my view the review clause purports to create a second avenue of variation apart from one based on material change and the test in *Gordon*.

[22] The Chambers judge doubted whether s. 17(5) of the *Act* permitted the review clause to set up an independent avenue for review despite its wording. The father argues that s. 17(5) of the *Act* does not preclude a second avenue for review and cites the cases of *Kemery v Kemery*, 2012 SKCA 130, 405 Sask R 231, and *Balzer v Balzer*, 2003 CarswellOnt 6398 (WL) (Sup Ct). However, a review of these cases shows that neither of them stand for that proposition.

[23] Although there is no case directly on point, there is some jurisprudence which indirectly suggests that the *Act* is not an impediment to such a clause. In *Sather v McCallum*, 2006 ABCA 290, 32 RFL (6th) 233, the parties had by agreement inserted a clause into a custody order to review the issue of parenting after mediation. There was no reference in the clause to a necessary change in circumstances. There was no dispute on appeal that the clause did not require the parties to show a material change. The Court agreed with the parties' positions and stated:

> [7] We agree with the parties that para. 3 of the divorce judgment allowed for court review of the residential issue, and we are satisfied that para. 3 contemplated a review and not a variation requiring a change of circumstance. It follows that the chambers judge erred in deciding the issue solely on the basis of no change of circumstance. The effect of our decision, however, is to leave open the question of the children's residence.

[24] In *Sappier v Francis*, 2004 NBCA 70, 8 RFL (6th) 218, a custody and access order provided for a court-ordered review six months after it had been made. When the matter came to a Chambers judge for review, he dismissed the matter because there had been no change in circumstances. On appeal, the NBCA stated:

> [9] I agree with the submission of Ms. Francis that the original order provided for an automatic review hearing to take place within six months of the date of the first

> decision. The review therefore had to be conducted keeping in mind the best interests of the children. The reviewing judge erred in a number of ways. There was no onus on either party to prove a change in circumstances as a threshold to having the decision reviewed. ... Thirdly and most importantly, in deciding any question with respect to custody, the analytical framework to be used is the enumerated criteria found in the Act's definition of "best interests of the child." ...

[25] These two cases show that court orders can either on the agreement of the parties or at the behest of the court contain variation provisions which do not require a material change in circumstances.

[26] The fact that a clause providing an alternative basis for variation is not barred by the policy under s. 17(5) is supported by the reality that courts generally encourage parties to settle their differences where possible: *O'Reilly's Irish Bar Inc. v 10385 Nfld. Ltd.*, 2006 NLCA 26, 255 Nfld & PEIR 292. This policy is reflected in s. 9(2) of the *Act* which imposes on the parties' counsel a duty to encourage settlement. This section reflects Parliament's intention to promote negotiated settlement of matters corollary to a divorce: *Miglin v Miglin*, 2003 SCC 24 at para 54, [2003] 1 SCR 303. In the context of parenting issues, this general policy is, of course, always subject to the best interests of the child.

[27] In my view, it is open to parties to incorporate into parenting provisions in a court order an avenue of review or variation that does not require that a material change in circumstances be shown. The terms of s. 17(5) of the *Act* do not preclude a court sanctioning such an alternative basis for variation of a parenting order.

[28] Given all the foregoing, the proper interpretation of the review clause is that it creates a second avenue for review and avoids the necessity of proving a material change in circumstances before the judge is able to move on to determine the best interests of the child. It is less stringent than the material change test.

[29] I turn now to the Chambers judge's treatment of the review clause. Despite his express statement that he would proceed as if the review clause created a different test apart from material change, he did not actually proceed on this basis. He treated the application as if material change was necessary. I will explain.

[30] First, in dismissing the father's application, the Chambers judge stated he was unable to find "a material, pivotal or fundamental change that will adversely affect the needs of the children". This is the

language of the material change test. Second, his references to what was predictable at the time of the consent judgment and the certainty at the date of the order that the children would grow older all point to the question of whether there has been a material change. Third, the Chambers judge appears to have measured the need to change the parenting against a test of whether any changes *adversely* affect the children's needs. This again reflects the *Gordon* test and the language of "material change". If the second part of the review clause creates a different test than material change then it must allow for the potential that the change, although not adverse, is better overall for the children. Fourth, in relation to the onus on the father, the Chambers judge stated that the father has failed to demonstrate a material change. Last, the Chambers judge stated he does not get beyond the first stage of the two-stage inquiry. This is a reference to the material change test enunciated in *Gordon*.

[31] In my view, the Chambers judge failed to approach the review clause as if there was a test for variation which was different than the material change test.

[32] As a final matter, the father also argues that the Chambers judge was wrong in making a determination that he bore the onus of proof under the second part of the review clause. In this respect, I agree with the Chambers judge. The party relying on the second part of the review clause has the onus of proving that the current parenting arrangement is no longer meeting the needs of the children.

B. Did the Chambers Judge err in his application of the review clause to the evidence before him?

[33] The father accepts that the first part of the review clause sets forth the material change test for variation. He argues that the evidence shows that there is a material change which can trigger a variation. He argues that the Chambers judge never did go on to do an assessment of the best interests of the children whether a review is triggered by the first or second part of the review clause. The mother argues that the Chambers judge did not err in law or make a material error in the application of the facts. She contends that the Chambers judge's decision must, on the basis of the standard of review, be accorded deference.

[34] Given my earlier comments regarding a "different test" as set out in the review clause, it is not necessary for me to determine whether the Chambers judge erred in determining that the father had not discharged his onus of meeting the material change test. I do accept, however, that the Chambers judge did not undertake a sufficient analysis of what was in the best interests of the twins.

[35] The Chambers judge concluded the children's needs were sufficiently met by way of the existing parenting arrangement. The Chambers judge took a narrow view of the words "no longer meeting the children's needs" stating that the language itself does not specify that the needs must be met to the highest potential level or some other standard. The impression left by the Chambers judge in respect of his description of the "needs" of the twins suggests that as long as the children's bare minimum needs are met, there will be no variation. This is an error.

[36] The inquiry that the Chambers judge should have made in this case is whether the parenting arrangement was no longer meeting the children's needs in the context of their best interests. The inquiry regarding best interests must be contextually sensitive and individualized (*Gordon*). Assessment of a child's needs is the foundation of the best interests inquiry. In keeping with the court's *parens patriae* obligations, that assessment must not be restricted to only basic needs or result in conclusions that the manner in which the child's needs are being met is "good enough". Both these approaches are inimical to a broad and sensitive approach to the best interests inquiry. What was required in this case was that the judge assess the children's needs on the basis that any variation order to be made optimizes within reason the fulfillment of those needs based on the evidence before the judge. In short, the interpretation of the needs of the children by the Chambers judge was too narrow.

[37] These errors caused the Chambers judge to fail to determine whether the evidence as a whole allowed for a better fulfillment of the children's needs. An assessment of the needs of the children in accordance with the review clause is required. This is best accomplished by moving this matter forward to a pre-trial conference and, failing agreement, a trial.

[38] In view of my determination on this issue, I need not address the remaining issues raised by the father.

VI. Conclusion

[39] For the reasons set forth above, the appeal is allowed. The decision is set aside. This matter will proceed to a pre-trial conference. If the issues concerning the children are not resolved at the pre-trial conference, there shall be a trial of those issues. The father shall have his costs of this appeal.

"Ottenbreit J.A."

Ottenbreit J.A.

I concur.

"Herauf J.A."

Herauf J.A.

I concur.

"Ottenbreit J.A."

for Whitmore J.A.

TAB S

Court of Queen's Bench of Alberta

Citation: Manseau & Perron Inc v ThyssenKrupp Industrial Solutions (Canada) Inc, 2018 ABQB 949

Date: 20181121
Docket: 1501 02878
Registry: Calgary

Between:

Manseau & Perron Inc.

Appellant/Respondent

- and -

ThyssenKrupp Industrial Solutions (Canada) Inc., formerly known as Krupp Canada Inc.

Respondent/Applicant

- and -

FTI Consulting Canada Inc., In Its Capacity As Court-Appointed Receiver of Pacer Promec Energy Corporation and Pacer Promec Energy Construction Corporation

Appellant/Respondent

Reasons for Judgment of the Honourable Mr. Justice C. Scott Brooker

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Introduction

[1] This is an appeal of an Order made by Master Robertson, Q.C. on October 6th, 2015 (the "Robertson Order") declaring that a builder's lien filed by Manseau & Perron Inc. (hereinafter referred to simply as the "Appellant" or "M&P") ceased to exist pursuant to the terms of an Order of Master Hanebury, Q.C. granted and filed March 17th, 2015 (the "Hanebury Order"). The Roberson Order also permitted the Respondent ThyssenKrupp (hereinafter "TKIS") to reduce the amount of its lien bond by $595,944.85 being the face amount of the appellant's lien.

Facts

[2] Pacer Promec Energy Corporation ("PPEC") was a construction company. It engaged in two oil sands projects. One was for Canadian Natural Resources (the "CNRL project"), the other for Imperial Oil (the "Krupp project"). The general contractor for both projects was TKIS. The appellant was a subcontractor to PPEC with respect to both the CNRL and the Krupp projects. RNS Scaffolding Inc. ("RNS") was a subcontractor of PPEC only with respect to the Krupp project.

[3] M&P, RNS and PPEC all registered liens with respect to the Krupp project. The PPEC lien was registered for $41,184,135. The RNS lien was registered for $1,204,768.27. The M&P lien was registered on November 12, 2014 for $595,944.85.

[4] On March 10, 2015 PPEC was placed into receivership pursuant to an order made by Hawco J. (the "Hawco Order") under the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "*BIA*").

[5] The Hawco Order had the standard stay provision which reads, in part:

> 8. No Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court, providing, however, that nothing in this Order shall (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 8;...

[6] RNS and M&P, as subcontractors of PPEC, were given notice of the receivership as was TKIS as PPEC had claimed it was owed $41,184,135 by TKIS for work performed on the Krupp project.

[7] On March 17, 2015 TKIS applied for an order under s.48 of the *Builders' Lien Act* ("*BLA*"), R.S.A. 2000, c. B-7 permitting it to pay monies in court in order to discharge the liens of RNS, M&P and PPEC. The application was granted and the resulting order made whereby, *inter alia,* upon TKIS depositing with the court security for the liens registered and costs, in the total amount of $43,584,848.12 the PPEC lien, the RNS lien and the M&P lien would be discharged. Paragraph 10 of that order sets out the issues to be tried or determined, including the validity of each lien and the amount of money each claimant is entitled to receive. Paragraph11 of this Order provides:

> 11. The Respondents shall each file a Statement of Claim in relation to their respective Liens within 180 days of the registration of each of their respective Liens, failing which the Liens for which no Statement of Claim has been filed shall cease to exist without further Order of this Honourable Court.

[8] M&P as well as the receiver for PPEC were represented by counsel at TKIS's application on March 17th. Counsel provided Master Hanebury with a copy of the Hawco Order and there was a brief reference in the oral argument before her as to the stay provisions in the Hawco Order. There was a discussion and submissions by counsel on the amount of security that TKIS should post for the liens themselves, the amount of security for costs that should be posted and the potential for TKIS to apply for the discharge of other liens that might be filed in the future. Those discussions resulted in the Master making a number of handwritten alterations to the form of the order that TKIS had apparently brought to the application.

[9] There was no discussion about paragraph 11 of the Hanebury Order requiring the lien claimants to file statements of claim within 180 days of their lien's registration.

[10] The Hanebury Order, in its recitations, notes the consent of the various parties to the order.

[11] The Hanebury Order was not appealed.

[12] M&P did not file a statement of claim with respect to its lien filed against the Krupp project.

[13] M&P did file a statement of claim to perfect its lien filed against the CNRL project wherein M&P named as one of the defendants, PPEC. That statement of claim was filed March 31, 2015 after PPEC had been placed into receivership under the Hawco Order.

[14] On May 7, 2015 Mr. Justice B. Nixon issued an order, filed May 11, 2015 ("the Nixon Order") in the PPEC receivership. That order, inter alia, provided a procedure for lien management and was made under the *BIA*.

[15] On August 21, 2015 TKIS filed an application against M&P seeking a declaration that M&P's lien against the Krupp project has ceased to exist pursuant to the Hanebury order and requesting that TKIS be permitted to reduce the amount of its lien bond by the face amount of the M&P lien.

[16] The matter came before Master Robertson in morning chambers. He requested written briefs and set the matter over to an afternoon hearing. As there was no transcript of the March 17th application, he listened to the audio recording of the March 17th application. On October 6th, 2015 he gave his decision allowing TKIS's application. The resulting order was filed on October 7th, 2015 and M&P filed its appeal of the Robertson Order on October 16, 2015.

Issue

[17] The issue on this appeal is whether Master Robertson erred in declaring that M&P's lien had ceased to exist by virtue of the fact that M&P had failed to file a statement of claim as required under the Hanebury Order.

Positions of the Parties

Appellant's Position

[18] The Appellant takes the position that there are really three issues in this appeal. The first is the proper test to apply when interpreting court orders. In that regard, its position is, citing para 31 of ***Sutherland v Reeves***, 2014 BCCA 222 ("Sutherland") that "...the correct approach to interpreting the provisions of a Court Order is to examine the pleadings, the language of the Order itself, and the circumstances in which the Order was granted".

[19] The second issue which the Appellant raises is: Has the M&P lien ceased to exist by operation of para 11 of the Hanebury Order or has the requirement to file a statement of claim been vitiated by the claims procedure established by the Nixon Order? In discussing that question, the Appellant considers the impact of s.22 of the *BLA* on that analysis as well as the impact of s.49 (3) of the *BLA*. It also questions whether there is any equitable or statutory reason why M&P should be required to file a statement of claim in respect of the M&P lien.

[20] The Appellant argues that the Nixon Order establishes a process to determine the quantum of RNS and M&P's claims against PPEC, that by virtue of the decision in ***Iona Contractors Ltd. v Guarantee Company of North America***, 2015 ABCA 240 any money which PPEC ultimately receives from TKIS as a result of the TKIS litigation will be the subject of a statutory trust under s.22 of the *BLA* in favour of M&P and RNS and consequently there is no need to resort to litigation to prove quantum and indeed to do so would be a collateral attack on, and violation of, the Nixon Order.

[21] The Appellant also argues that s.49 (3) of the *BLA* would require it to name PPEC, the contractor, as a defendant in its statement of claim under the *BLA* and that to do so would place M&P in direct conflict with the provisions of the Nixon Order and that requiring M&P to file a statement of claim against PPEC would be a collateral attack on the Receivership process. Further, the Appellant argues that s.8 of the Hawco Order prohibits the commencement of any proceeding against PPEC or the "Property", that none of the exceptions to the staying provision of the Hawco Order apply to an action in respect of the M&P lien, that Master Hanebury did not have the jurisdiction to make her Order, and that the Nixon Order specifically stayed all requirements for lienholders to file statements of claim.

[22] As a further argument against being required to file a statement of claim the Appellant contends that given the claims procedure established by the Nixon Order, "there is no equitable or statutory reason why M&P or RNS should be required to file a statements of claim in respect to its their liens against the Krupp project. Doing so would create a sub-class of creditors who would have to engage in duplicative proceedings".

[23] The third issue raised by the Appellant, in the alternative, is that if this court finds that M&P was required to have filed its statement of claim in respect of its lien within 180 days, then it should be permitted to now file it and re-instate its lien. It relies on ***TRG Development Corp. v Kee Installations Ltd.***, 2015 ABCA 187. It argues that no party has suffered any prejudice as a consequence of M&P not having filed a statement of claim. The only party who would be prejudiced would be M&P in that it would be required to engage in "duplicative and unnecessary proceedings" by filing a statement of claim in these circumstances.

TKIS's Position

[24] TKIS's position is that the Hanebury Order is a correct and valid order. The Appellant was present in court when the order was made. Its counsel had input into that order and could have objected to it if it had concerns. It did not and cannot now claim that that order is invalid. Further, despite the stay created by the receivership proceedings, paragraph 8 of the Hawco Order contemplated and permitted the bringing of a claim that might become barred by statute or otherwise. TKIS points to the fact that M&P filed a statement of claim for its lien arising out of the CNRL project, naming PPEC as a defendant and that that statement of claim was filed March 31, 2015 three weeks after the Hawco Order was made. TKIS points out that if M&P or indeed any other party to the Hanebury Order, "wanted to avail itself to the security posted by TKIS pursuant to the Discharge Order [the "Hanebury Order"], perfecting its respective builders' lien within the time period clearly stipulated in the Discharge Order was a prerequisite".

[25] TKIS argues that the Nixon Order has no application in this case because M&P's lien did not come within the definitions of liens as set out in that order. The M&P lien was never referred to in the "Receiver's Letter" as therein defined. The M&P lien had already been discharged by the Hanebury Order by the time the Nixon Order was made. Consequently, the M&P lien does not fall under the dispensing of actions provisions of paragraph 22 of the Nixon Order.

[26] TKIS rejects the Appellant's argument that requiring M&P to file its statement of claim to perfect its lien is a collateral attack on the receivership process. Rather, TKIS says, its application for the Hanebury Order was "outside of the parameters of the receivership process, it was a parallel process".

[27] Finally, TKIS submits that it has done nothing to waive M&P's requirement to file a statement of claim under the terms of the Hanebury Order. It points out that it is TKIS who was obliged to pay the lien bond into court to stand as security for M&P's lien. It asserts that it would suffer prejudice if the Appellant was permitted to file its statement of claim now.

Receiver for PPEC's Position

[28] The Receiver submits that the issue on appeal is narrow: whether M&P lost its builder's lien as a result of its failure to file a statement of claim as required under the Hanebury Order. It says that many of the submissions made by the Appellant touch on issues that are irrelevant to the narrow issue on this appeal.

[29] The Receiver argues that, contrary to the Appellant's various assertions in its brief, PPEC is not a "contractor" as that term is defined under the *BLA*. Consequently, PPEC is not required to be named as a defendant under s. 49 of the *BLA*. Furthermore, the issue of entitlement to funds that might be obtained by PPEC from the Krupp claim, including any possible claim under s. 22 of the *BLA* was not an issue before Master Robertson and therefore is not a proper subject of this appeal. Moreover, there is no evidence before the court as to whether a certificate of substantial performance was issued and therefore it is not possible to determine if s.22 is even applicable. To quote from the Receiver's brief: "Ultimately, the determination of M&P's rights as against PPEC is not before this Honourable Court and will be resolved in the Claims Procedure Order [the "Nixon Order"] granted in the receivership proceedings of PPEC. In that regard, the Receiver notes that the Robertson Order states that M&P can advance its claim under s.22 of the *BLA*, if it has one, and that it can continue to advance its claim within the receivership proceedings.

[30] In summary "...it is the Receiver's position that the issue before the Court in the September 3 Application, and this Appeal, is narrow and concerns only whether M&P's builder's lien expired. Any issues relating to M&P's other claims against PPEC are irrelevant."

Analysis

[31] I agree that the correct approach in interpreting the provisions of a court order are as set out in the ***Sutherland*** case which in turn quoted and relied upon that court's decision in ***Yu v Jordan***, 2012 BCCA 367 where Smith J.A. said:

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

[32] However, the facts and circumstances in ***Sutherland*** are quite different than those here. In ***Sutherland*** the court was interpreting the meaning of a phrase in the court order to determine if an action brought personally against a partner in a limited partnership was one "in respect of" the limited partnership and thus subject to the stay provision which had been granted in a receivership order.

[33] The Hanebury Order is not one which has a phrase or word that requires interpretation. On the contrary, it is quite clear. Paragraph 11 of it is clear and unambiguous. In essence, what the Appellant is saying is that it should not have been made --- that the Master had no jurisdiction to make it in face of the Hawco Order.

[34] Of course, as noted previously, the Appellant did not object at the time the Hanebury Order was made even though it was aware of the Hawco Order. And, as noted earlier, not only did M&P not appeal the Hanebury Order or its paragraph 11, it actually filed a statement of claim against PPEC in relation to its lien in the CNRL project, despite the Hawco Order stay provision.

[35] The Hanebury Order was made in an application arising out of the *BLA*. That application was brought by TKIS, the contractor, under the provisions of the *BLA*, to permit it to put up security in the form of a bond, to replace the security represented by the property against which the liens had been filed. Under the *BLA*, a lienholder is obliged to perfect its lien by filing a statement of claim within 180 days of registering its lien. That is what para 11 of the Hanebury Order requires.

[36] The Appellant contends that the requirement for it to file a statement of claim was vitiated by the claims procedure established by the Nixon Order and refers to s.22 and s.49 (3) of the *BLA* to support its position. As well, it argues that the stay put into place by the Hawco Order in relation to proceedings involving PPEC's receivership, prevented it from filing a statement of claim as required by para 11 of the Hanebury Order.

[37] There are a number of problems with the Appellant's position.

[38] First, with respect to the stay contained in the Hawco Order, it must be remembered that the Hanebury Order was issued in an application brought by TKIS under the provisions of s.48 of the *BLA* to permit it to discharge the liens registered against the lands involved in the Krupp project upon it paying into court sufficient security. The application was outside of any receivership proceedings relating to M&P. The Hanebury Order permitted TKIS to discharge the PPEC, RNS and M&P liens then registered against the Krupp property upon depositing security with the court in the amount of $43,584,848.12. Paragraph 10 of that order set out the issues to be tried or determined including the validity of each lien and the amount of money each of the Respondents (lienholders) is entitled to receive. Paragraph 11 directs each Respondent to file a statement of claim within 180 days of the registration of their lien.

[39] I do not accept the Appellant's argument that the Hawco Order prevented it from complying with para 11 of the Hanebury Order and issuing its statement of claim as required by it.

[40] Para 8 of the Hawco Order reads, in part:

> No proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court...provided, however, that nothing in this Oder shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 8;...

[41] This language is broad enough to permit M&P to file a statement of claim to protect its lien which would otherwise become barred under para 11 of the Hanebury Order which itself was made pursuant to the *BLA* and which Order was arrived at by agreement and consent of the parties to it, including M&P. Moreover, if there is any doubt about that, M&P could have either sought leave of the court to file its statement of claim or it could have sought the Receivers consent to do so, all as is provided for under the terms of para 8 of the Hawco Order. It did neither.

[42] Furthermore, it would appear from M&P's own actions that it did not regard the Hawco Order as preventing it from filing a statement of claim against PPEC as it filed one in the CNRL matter on March 31, 2015. As noted by TKIS in para 27 of its argument: "The CNRL Statement of Claim was filed in the face of the provision of the First Receivership Order [the Hawco Order] that Manseau is now attempting to rely upon."

[43] Finally, as the Court of Appeal noted in ***Iona Contractors Ltd. v Guarantee Company of North America***, 2015 ABCA 240, provisions of the *BLA* can apply in certain circumstances even in the face of insolvency proceedings under the *BIA*. At para 23 the Court noted:

> It is obvious that the Builders Lien Act could have an effect on the entitlement to payments on bankruptcy. A subcontractor which has a valid lien, or another valid claim under the Builders' Lien Act, might become entitled to payments to which it would not be entitled as a mere unsecured creditor. No one has suggested that these provision, relating as they do to property and civil rights in the province, necessarily offend the bankruptcy distribution regime.

[44] Accordingly, I find that the Hawco Order did not prevent the Appellant from filing its statement of claim to perfect its lien as required under para 11 of the Hanebury Order.

[45] As to the Appellant's argument relating to the trust provisions under s.22 of the *BLA* and the duplicative nature of proceeding with a statement of claim under the Hanebury Order, it appears to be based on M&P's and RNS' lien claims falling under the claims procedures established by the Nixon Order. At para 43 of its written argument the Appellant states:

> 43. Because of the operation of s.22 of the *BLA,* the resolution of the PPEC/ Krupp litigation is required in order for RNS and M&P to know whether they even need to advance a *BLA* claim against Imperial Oil. The Court could not have intended to compel RNS and M&P to participate in duplicative and overlapping proceedings – especially given that it is highly likely that such proceedings are completely unnecessary given the s.22 trust provision of the *BLA*.

[46] There are number of problems with the Appellant's position.

[47] First, the Nixon Order deals specifically with lien management commencing at para 13 of the Order. Para 17 states:

> 17. Upon being presented with evidence of deposit of the Aggregate Security with the Clerk of the Court and the Receiver's Letter, the Registrar of the Land Titles Office is hereby directed to forthwith discharge the Liens registered by the Lienholders as listed in the Receiver's Letter, together with any related Certificates of Lis Pendens, from the Real Property Interests listed in the Receiver's Letter notwithstanding the requirements of s.191 of the *Land Titles Act* (Alberta).

[48] Paragraph 13 of the Nixon Order defines the "Receiver's Letter" to mean "...a letter issued by the Receiver pursuant to this Order listing the Liens to be discharged and the Real Property Interests from which the liens are to be discharged".

[49] Para 22 of the Nixon Order further provides:

> 22. Pursuant to section 44 of the *BLA*, upon the posting of the Aggregate Security with the Clerk of the Court, the requirement of a Lienholder whose Lien has been discharged by operation of this Order to (i) register the certificate of lis penned, and (ii) commence action to realize on the Lienholder's Lien, are hereby dispensed with [emphasis added].

[50] The letter from the Receiver's solicitors, Dentons, dated September 2, 2015 confirmed that the Receiver did not post any security in respect of the M&P builders lien and that there was no Receiver's Letter issued with respect to the M&P lien.

[51] It is clear, therefore, that the M&P lien falls outside the provisions of the Nixon Order and was not discharged pursuant to it. Further, the provisions of para 22 of the Nixon Order do not dispense with the necessity of M&P filing a statement of claim to prove its lien since by its terms para 22 only applies to a lien that has been discharged by "operation of this Order". Thus lien claims falling under the provisions of the Nixon Order are separate and distinct from the lien claims dealt with and discharged by the Hanebury Order. The processes are not duplicative. They are separate and distinct processes.

[52] I do not agree with the Appellant's argument that because of the trust created by sec.22 of the *BLA*, the PPEC/ Krupp litigation must be resolved in order to avoid likely unnecessary proceedings with the RNS and M&P litigation mandated by the Hanebury Order.

[53] Section 22 of the *BLA* states:

> 22(1) Where
>
> (a) a certificate of substantial performance is issued, and
>
> (b) a payment is made by the owner after a certificate of substantial performance is issued
>
> the person who received the payment, to the extent that the person owes money to persons who provided work or furnished materials for the work or materials in respect of which the certificate was issued, holds that money in trust for the benefit or those persons
>
> (2) When a person other than a person who received the payment referred to in subsection (1)
>
> (a) is entitled to the money held in trust under this section, and
>
> (b) receives payment pursuant to that trust,
>
> the person, to the extent that the person owes money to other persons who provided work or furnished materials for the work or materials in respect of which the payment referred to in clause (b) was made, holds that money in trust for the benefit of those other persons.
>
> (3) A person is subject to the obligations of a trust established under this section is released from any obligations of the trust when that person pays the money to
>
> (a) the person for whom that person holds the money in trust, or
>
> (b) another person for the purposes of having it paid to the person for whom the money is held in trust.

[54] As counsel for the Receiver correctly points out in his written argument "There is no evidence before this Court that a certificate of substantial performance was issued and, thus, this Court cannot determine if section 22 is engaged, let alone any impact it might have".

[55] A further problem with the Appellant's position regarding the s.22 trust is illustrated in para 38 of its written argument. There it state:

> 38. As a result of s. 22 of the *BLA*...the first $1,800,713.12 recovered by PPEC from Krupp, or any lesser amount as determined by the claims officer, will be split rateably between M&P and RNS in satisfaction or their respective claims against the Krupp project.

[56] According to that argument, a claims officer, not a court, decides and there is a potential for a rateable distribution. Further, M&P and RNS's claims become caught up in PPEC's insolvency proceedings, even considering the "carve-out" of the Krupp matters under the Nixon Order.

[57] The process put in place under the Hanebury Order is separate from and independent of, the insolvency proceedings of PPEC. The Hanebury Order arose from TKIS's application to discharge certain liens, including M&P's, from Imperial Oil's property. RNS and M&P had filed liens in their own right. These liens were discharged by the Hanebury Order upon TKIS paying security into court. The lien holders were obliged to file their statement of claims and prove their

liens pursuant to para 11 of that Order. Those proceedings were outside and independent of the insolvency proceedings of PPEC under the Hawco and Nixon Orders. M&P and RNS are, under the Hanebury Order, to have their claims adjudicated by the court – not a "claims officer". They were secured for the full amount of their claims and costs by the security posted by TKIS.

[58] Furthermore, the Robertson Order did not purport to deal with or affect any rights that M&P might have under s.22 of the *BLA*. Para 4 of his order states: "Nothing in this Order affects any rights that Manseau may have pursuant to Section 22 of the Builders' Lien Act..."

[59] The Appellant also raises s. 49(3) of the *BLA*. It argues, *inter alia*, that PPEC is the contractor for the Krupp project and that M&P is a subcontractor and therefore any statement of claim it issued pursuant to para 11 of the Hanebury Order would require it to name PPEC as a party defendant and that would be in direct conflict to the Nixon Order as well as the stay provisions of the Hawco Order. Thus, it argues, the Hanebury Order is a collateral attack on the Hawco and Nixon Orders and that the Master did not have the jurisdiction to make such an order.

[60] I do not accept that argument.

[61] Section 49(3) of the *BLA* provides:

> (3) When the party issuing the statement of claim is not the contractor, the statement of claim shall name as defendants.
>
> (a) the owner
>
> (b) the contractor, and
>
> (c) the holder of any proof registered encumbrance against whom relief is sought.

[62] In the first place, I have dealt earlier in these reasons with the jurisdiction of the Master to make the Hanebury Order and specifically para 11 thereof. The Master had jurisdiction to make that order. Further, it was not a collateral attack on the Hawco Order. Nor was it a collateral attack on the Nixon Order. Indeed, I do not understand how the Hanebury Order, made about 7 weeks before the making of the Nixon Order, could ever be considered a collateral attack on it.

[63] Secondly, the Receiver, in his written argument, notes that PPEC is not a "contractor" as defined in the *BLA* and therefore, there would be no need for M&P to name PPEC as a defendant in its statement of claim.

[64] While that may be the case, it is not necessary to finally determine that since, as I have previously noted, it was always possible under the terms of para 8 of the Hawco Order, for M&P to sue to protect a claim that might otherwise become barred. In that regard, para 11 of the Hanebury Order was made pursuant to the provisions of the *BLA*. And, it was also possible under that same paragraph to seek leave of the court or permission of the Receiver to sue PPEC. The Appellant never sought such leave or permission.

[65] The Appellant asks if there is any equitable or statutory reason why it should be required to file a statement of claim in respect of its lien. It argues that there is not. However, its argument is based on its position that the Nixon Order established a claims procedure which applies to the RNS and M&P liens. I have held that it does not. The Hanebury Order was a valid order made pursuant to the *BLA*. The Appellant had input into it. It did not object to it. It did not appeal it. It

did not comply with the provisions of para 11 of it. What it seeks to do by attempting to justify its failure to file a statement of claim is a collateral attack on the Hanebury Order.

[66] Therefore, for all of the foregoing reasons, I find that the decision of Master Robertson declaring the M&P lien to have ceased to exist by virtue of its failure to file a statement of claim as required in para 11 of the Hanebury Order, was correct. I agree that M&P's lien has therefore ceased to exist.

[67] The Appellant seeks, in the alternative, permission to now file a statement of claim and an order re-instating its lien. It relies on the decision of ***TRG Development Corp. v Kee Installations***, 2015 ABCA 187 ("TRG Development Corp."). In that case the court reinstated a lien which had been cancelled by the Registrar of Land Titles for as a consequence of the lienholder failing to file a Certificate of Lis Pendens as required by s. 43 of the *BLA*. The facts in ***TRG Developments Corp.*** are quite different from those at bar. Nevertheless, the Appellant contends at para 70 of its written argument that the logic behind the Court of Appeal's reasoning that: ..."where an owner has notice of a lien, and where no prejudice will result from a failure to comply with a timeline, and where parallel proceedings are in place, the Court will apply equitable principles of waiver and estoppel to preserve lien rights" applies to this application.

[68] I do not agree.

[69] Firstly, in the case at bar, we are dealing with the specific requirement of a valid court order, that a statement of claim be issued within a specific time frame. This is not, as in ***TRG Developments Corp.***, a matter of waiving a notice requirement when everyone concerned already had notice.

[70] Secondly, unlike the situation in ***TRG Developments Corp.*** TKIS has done nothing to suggest it has in any way waived the requirement that M&P file its statement of claim pursuant to para 11 of the Hanebury Order.

[71] Thirdly, unlike the situation in ***TRG Developments Corp.,*** here there would be prejudice if the court were to permit the statement of claim to be filed now and the lien re-instated. It is TKIS who applied to place the security for the liens into court. When the Robertson Order was granted declaring M&P's lien had ceased to exist, TKIS was allowed to reduce the lien bond by the amount of the M&P lien. That would reduce the amount of the premium TKIS was obliged to pay. To re-instate the M&P lien and issuance of its statement of claim would result in increased premium costs as well as litigation costs with respect to the new statement of claim.

[72] Fourthly, although there are parallel proceedings, they are not the same as indicated earlier in these Reasons. Under the Nixon Order, claims are to be determined by a claims officer as part of the claims assessment proceedings in the insolvency, albeit relating specifically to the Krupp project carve-out. Under a statement of claim, there would be an adjudication by the court.

[73] Finally, the Appellant is asking the court to use its equitable jurisdiction to grant its request to file a statement of claim and restore its lien. Assuming (without deciding) that I have the jurisdiction to do so, that requires the court to use its discretion judicially and to look at the conduct of the party seeking equity. I find it would not be equitable in the circumstances of this case to grant the relief sought. Quite aside from the issues of prejudice and lack of waiver, here the Appellant knew of the requirement to file its statement of claim within the time limit. It was involved in the proceeding which granted that Order. It at no time objected to para 11 of the

Order. It did not appeal that Order. It did nothing to attempt to comply with para 11 of the Order. Rather, after TKIS applied for the declaration that M&P's lien ceased by operation of the Hanebury Order, it proceeded to essentially make a collateral attack on the Hanebury Order by challenging the Master's jurisdiction to make it. Given all of the circumstances, I do not think it equitable to grant the Appellant's request to be permitted to file a statement of claim now and reinstate its lien.

Conclusion

[74] For all of the above reasons, I conclude that Master Robertson was correct and that the appeal of his Order should be dismissed with Costs.

Dated at the City of Calgary, Alberta this 21st day of November, 2018.

C. Scott Brooker
J.C.Q.B.A.

Appearances:

Scott Chimuk
for the Appellant

Shaun W. Hohman
for the Respondent

David LeGeyt and John Regush
for the Third Party

TAB T

[2012] UKPC 6
Privy Council Appeal No 0088 of 2010

JUDGMENT

SANS SOUCI LIMITED
(Appellant)
v
VRL SERVICES LIMITED
(Respondent)

From the Court of Appeal of Jamaica

before

Lord Hope
Lord Clarke
Lord Sumption
Lord Reed
Lady Paton

JUDGMENT DELIVERED BY
LORD SUMPTION
ON

7 March 2012

Heard on 1 February 2012

Appellant
Vincent Nelson QC
Gavin Goffe

(Instructed by Myers, Fletcher & Gordon)

Respondent
Richard Mahfood QC
Javan Herberg QC
Dr Lloyd Barnett
Weiden Daley

(Instructed by Charles Russell LLP)

LORD SUMPTION:

1. The Board has before it an appeal and a cross-appeal arising out of arbitration proceedings in Jamaica. The appeal is concerned with the scope of an order made by the Court of Appeal of Jamaica remitting the award to the arbitrators. The cross-appeal raises two discrete questions on costs.

The facts

2. The Appellant company was the proprietor of the Sans Souci Hotel at White River, St. Mary. The Respondent entered into a contract dated 12 October 1993 to manage the hotel. It is convenient to refer to the parties as "the Proprietor" and "the Manager" respectively. The agreement was for a period of just over ten years to 31 March 2004, plus a further ten years at the Manager's option. At the relevant time, the option had been exercised, and the agreement was therefore due to expire in 2014. For present purposes, the provisions which matter are clauses 4(A) and 13-16. By clause 4(A) the Manager was entitled to an annual management fee based on the gross revenue and gross operating profit of the hotel business. Clause 14 conferred on either party a right of termination in certain events, including force majeure. By clause 15, the agreement would also terminate if the Proprietor sold the hotel during its term, but before doing this he was required to offer it to the Manager. Clause 13 provided for disputes to be referred to arbitration before two arbitrators and an umpire in accordance with the laws of Jamaica.

3. In March 2003, the Proprietor purported to terminate the agreement under clause 14 on the ground of force majeure. This provoked a dispute which was referred to arbitration. It was common ground throughout the arbitration proceedings that the agreement was at an end. The issues were defined in general terms in Terms of Reference prepared by the arbitrators at the outset of their proceedings. Paraphrasing this document, they were (i) whether the termination of the agreement had come about by the lawful exercise of the Proprietor's right of termination or by their unlawful repudiation; and (ii) if the latter, what damages were recoverable by the Manager in consequence.

4. Before the arbitrators, the Manager claimed damages under three heads. The main claim was for the gross management fees which would have accrued from the termination of the agreement until 2014, discounted for early receipt. This was disputed mainly on the ground that the correct measure of damages was the Manager's loss of profit, and that in arriving at the loss of profit it was necessary to deduct from the gross fees the so-called "unrecoverable expenses". These were expenses which, according to the Proprietor, the Manager would have incurred in performing its

functions and could not have recovered under the terms of the agreement. The main issue about them was whether they were really unrecoverable. Second, there was a claim for the value of the Manager's right of first refusal on the sale of the hotel, if it should be held that the hotel would have been sold before the natural expiry of the agreement. This head of claim appears to have been introduced in case the Proprietor should contend that the hotel would have been sold and the payment of management fees thereby brought to an end before 2014. In the event, however, the Proprietor did not say this. Its case was that there was no evidence of any intention to sell and no reason to suppose that if there was a sale the Manager would emerge as the buyer. At some stage, the Manager appears to have conceded this, and the point fell away. Finally, the Manager claimed certain expenditure said to have been wasted as a result of the termination. This head was, in the event, unchallenged.

5. The arbitrators issued their award on 16 July 2004. They held that the Proprietor had repudiated the agreement, and awarded damages of US$6,034,793. A small proportion of this sum represented the wasted expenditure. The rest was the present value of management fees accruing between the termination of the contract and 2014, on assumptions about the gross revenue and operating profit during that period which were derived from expert evidence given at the hearing. The tribunal made no deduction from the projected management fees for "unrecoverable expenses". Apart from referring briefly to this issue as arising from a "set-off" claimed by the Proprietor, they said nothing about it at all.

6. After receiving the award, the Proprietor applied to the Court under Section 11 of the Arbitration Act to set it aside or remit it to the arbitrators. One of the grounds of the application was the arbitrators had not dealt with the "unrecoverable expenses". A number of other grounds were also put forward, but they failed and are not part of this appeal. It is unnecessary to say anything about them.

7. The Judge, Harris J, dismissed the Proprietor's application in its entirety. The Proprietor appealed, and the Court of Appeal gave judgment on 12 December 2008. On most points, they agreed with the Judge. However, they allowed the appeal on the ground based on the "unrecoverable expenses". They held that by characterising the Manager's case about these expenses as being based on set-off, the arbitrators had misunderstood it. As a result, they had failed to make the appropriate findings about the expenses, or to take them into account in the assessment of damages, or to explain why they had not done so. They remitted the award to the arbitrators in the following terms:

> "The appeal against the award of damages is allowed and the matter is remitted to the Arbitrators to determine the issue of damages only."

This order was perfected on 2 January 2009.

8. When the matter came back before the tribunal, the Proprietor sought to raise two points on damages in addition to the question of "unrecoverable expenses", and to lead fresh evidence in support of them. The first was that the Proprietor had in fact sold the hotel on 10 September 2005. This was presumably the prelude to an argument that management fees could not in any event have been earned beyond that date. The second additional point was that economic problems adversely affecting the Jamaican tourist industry after the termination of the agreement would have reduced the management fees below the level which the tribunal, in their award, had derived from the expert evidence. The tribunal refused to entertain either point. In a preliminary ruling on 20 February 2009, they ruled that the award had been remitted to them for the limited purpose of dealing with the "unrecoverable expenses" to be deducted from the future management fees. They were not therefore entitled to reassess the value of the management fees themselves.

9. The Proprietor responded with fresh court proceedings to challenge the arbitrators' preliminary ruling. Their case was that the Court of Appeal had remitted the question of damages generally, and that all points relevant to damages were therefore in principle open before the arbitrators. This was rejected in the Supreme Court and again in the Court of Appeal. The issue now comes before the Board some seven years after the date of the original award.

The appeal: the scope of the remission

10. Section 11 of the Arbitration Act empowers the Court to "remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire." This statutory power has its origin in section 8 of the English Common Law Procedure Act 1854. It exists in order to enable the tribunal, which would otherwise have been *functus officio* from the publication of its award, to address issues which were part of the submission to arbitration but were not resolved, or not properly resolved, in the award. Leaving aside the perhaps anomalous category of cases in which an award has been remitted on the ground that fresh evidence has become available since it was made, the essential condition for the exercise of the power is that something has gone wrong with the proceedings before the arbitrators. Some error, oversight, misunderstanding or misconduct must have occurred which resulted in the tribunal failing to complete its task and justifies reopening what would otherwise be a conclusive resolution of the dispute.

11. It is apparent from the reasons given by the Court of Appeal in December 2008 that, in ordering a remission, they were concerned only with the way in which the arbitrators had dealt with, or failed to deal with, the "unrecoverable expenses".

Harrison P., delivering the leading judgment, identified the error or oversight which justified the remission at paragraph 69:

> "Whether or not expenses incurred by the Respondent were in fact 'unrecoverable', as claimed by the appellant in its Points of Defence, or reimbursable as contended by the Respondents, should have been determined by the arbitrators. The arbitrators were required to demonstrate in their award that they accepted that the expenses were 'unrecoverable', or alternatively payable by the Appellant. At its lowest, the arbitrators should have demonstrated that they considered the issue of 'unrecoverable expenses' as contended for by the Appellant."

No other matter is identified by the Court of Appeal as warranting a remission. Indeed, no other criticism was made of the way in which the arbitrators had dealt with damages.

12. The Proprietor's response is simple, perhaps too simple. It is that the scope of the remission is determined by the Court of Appeal's order. The order allowed "the appeal against the award of damages", and remitted the award to the arbitrators to determine "the issue of damages". In the absence of any words of limitation, it is said that this unambiguously means the entire issue as to damages as formulated in the arbitrators' Terms of Reference. In the absence of any ambiguity in the language of the order, it should not be construed by reference to the limited reasons given for making it.

13. In the opinion of the Board, this approach to the construction of a judicial order is mistaken. It is of course correct that the scope of a remission depends on the construction of the order to remit. But implicit in the Proprietor's argument is the suggestion that the process of construing the order is to be carried out in two discrete stages, the first of which is concerned only with the meaning of the words, and the second with the resolution of any "ambiguities" which may emerge from the first. The Court's reasons, so it is said, are relevant only at the second stage, and then only if an "ambiguity" has been found. The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.

14. It is generally unhelpful to look for an "ambiguity", if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity.

15. As with any judicial order which seeks to encapsulate in the terse language of a forensic draftsman the outcome of what may be a complex discussion, the meaning of the order of the Court of Appeal in this case is open to question if one does not know the background. The order refers generally to "the issue of damages" because if the arbitrators were to decide that there were "unrecoverable expenses", they would not simply deduct them from the amount which they had awarded. They would have to deduct them from the undiscounted gross management fees, and then discount the net figure for early receipt. But the reference in the order to "the issue of damages", although necessary, begged the question "Which issue of damages?" The order does not itself answer it. Only extrinsic evidence can do that. The Proprietor accepts this. Mr Nelson's case was that it is admissible to consult the arbitrators' Terms of Reference to identify "the issue of damages" to which the order referred. But it appears to the Board that this concession, which was clearly rightly made, exposed the illogicality of the Proprietor's case. If it is admissible to construe an order of remission by reference to the issues in the arbitration, it cannot rationally be held inadmissible to construe it by reference to the issues which the remitting court regarded as calling for reconsideration by the arbitrators. As Rix J pointed out in his valuable judgment in *Glencore International A.G. v. Beogradska Plovidba (The "AVALA")* [1996] 2 Lloyd's Rep. 311, 316:

> "When... a Court remits an award to an arbitrator, it is not remitting a whole dispute, unless upon the terms of the order it expressly does so. It generally remits something narrower, and where it does so against the background of an arbitration which has already been defined by pleadings and argument before an arbitrator, it is some one or more of the issues as so defined within the scope of the reference that in general must be considered to be the subject matter of the remission."

16. Of course, it does not follow from the fact that a judgment is admissible to construe an order, that it will necessarily be of much assistance. There is a world of difference between using a Court's reasons to interpret the language of its order, and using it to contradict that language. The point may be illustrated by the decision of the Court of Appeal in England in *Gordon v. Gonda* [1955] 1 WLR 885, where an attempt was made to contradict what the Court regarded as the inescapable meaning of an order, by arguing that the circumstances described in the judgment could not have justified an order which meant what it clearly said. Therefore, it was said, the judge must have meant something else. The answer to this was that any inconsistency between the circumstances of the case or the reasoning of the Court and the resultant

order was properly a matter for appeal. A very similar argument was rejected by the Board for the same reason in *Winston Gibson v Public Service Commission* [2011] UKPC 24. Decisions such as these (and there are others) are not authority for the proposition that a Court's reasons are inadmissible to construe its order. They only show that the answer depends on the construction of the order and that the reasons given in the Judgment may or may not make any difference to that.

17. These considerations apply generally to the construction of judicial orders. But there are particular reasons for giving effect to them in the context of the judicial supervision of arbitration proceedings. An arbitration award is prima facie conclusive. The Court has only limited powers of intervention. It exercises them on well-established grounds such as (to take the case arising here) the arbitrators' failure to deal with some matter falling within the submission. The reopening by the arbitrators of findings which there were no grounds for remitting and which they had already conclusively decided would therefore have been contrary to the scheme of the Arbitration Act. The terms of the order may of course in some cases be such that it must be concluded that the Court did exceed the proper limits of its functions. But it should not readily be assumed to have done so, especially when its reasons show that it has not.

18. The arbitrators were right to reject the Proprietor's attempt to introduce new challenges to the assessment of the gross future management fees in February 2009, and the Courts below were right to endorse their decision.

The cross-appeal: Costs of the Proprietor's application to set aside or remit

19. This point may be shortly dealt with, for it turns entirely on the facts.

20. The Court of Appeal reserved judgment for nineteen months on the Proprietor's application to set aside or remit the award. They then handed it down on one day's notice on 12 December 2008, the last day of term. No advance copy of the judgment was available before it was handed down. Counsel who had been engaged for the Manager on the application were unable to attend, and it was necessary to send junior counsel to take the judgment who knew little or nothing about the case. The judgment as handed down dealt with the costs of the application by ordering that half of the Proprietor's costs should be paid by the Manager. But no argument about costs was either invited or heard.

21. Once the Manager's advisers had studied the judgment, they decided to ask for a more favourable order as to costs than the Court had proposed. They wrote to the Registrar of the Court of Appeal on 7 January 2009 asking to be heard. Unfortunately, unknown to the Manager or its representatives, the order had in the mean time been perfected on 2 January 2009. On 20 January 2009, the Manager formally applied for a

more favourable order. On the following day the Registrar wrote in answer to the Manager's letter of 7 January to convey the view of Panton P., the President of the Court of Appeal, that the Court of Appeal was *functus officio* and that in any event the order for costs was right. Panton P. had not been a member of the court that decided the Proprietor's application. Nor, judging by the Registrar's letter, had he consulted those who had been. He also appears to have been unaware of the Manager's formal application of 20 January. The Manager's application on costs was ultimately heard on 9 March 2009 by a division of the Court of Appeal presided over by Panton J himself. On 2 July 2009, they gave Judgment rejecting it. Their reason, in summary, was that that there had been no miscarriage of justice, essentially because "there was ample opportunity for Counsel for the Applicant to make an application to be heard on the issue of costs before the order was perfected": Panton P. at [32]; cf. Cooke at [49]. By leave of the Board, the Manager now cross-appeals against that decision.

22. It is the duty of a Court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard. The Court of Appeal included an order for costs in their Judgment of 12 December 2008 without hearing either party upon it. The Practice Direction in Jamaica assumes that submissions on costs, if any, will be made before the Court rises after giving Judgment, a course which it would have been impossible for the Manager's representatives to follow in this case because they had had no advance notice of the contents of the judgment and only one day's notice of the fact that it was to be delivered. This procedure may nevertheless be perfectly acceptable, provided that the order included in the Judgment is provisional, and that parties are given a reasonable opportunity to address the Court on costs later.

23. The importance of finality in litigation has been emphasised by generations of common lawyers. Ultimately there must come an end to the parties' opportunities for reopening matters procedural or substantive which have been judicially decided. This principle is, however, founded on an assumption that they were decided in accordance with the rules of natural justice. Notwithstanding the importance of finality, the rule of practice is that until either (i) a reasonable time has elapsed, or (ii) the order has been perfected, a party who has not been heard on costs or other matters arising out of a judgment, is entitled as of right to be heard. Thereafter, the Court still has an inherent jurisdiction to hear him, but the test is more exacting. The order will be varied only in exceptional circumstances, when the party can demonstrate that the form of the order can be attributed to a miscarriage of justice: *Taylor v. Lawrence* [2002] EWCA Civ. 10, [2003] QB 528 at [55]. The Board would endorse the test which was formulated in *Re Uddin* [2005] I WLR 2398, at [4], and applied by the Court of Appeal in this case, that there must be "special circumstances where the process itself has been corrupted." This is not the occasion for extended review of the circumstances which will satisfy this test, but the Board has no doubt that one of the circumstances which will satisfy it is that the party desiring to be heard did not have a reasonable opportunity to be heard at an earlier stage when the test would have been less formidable.

24. The Board cannot avoid a strong sense of discomfort about the rather peremptory procedure which was adopted in this case. However, the Manager was ultimately heard on costs, and it seems to the Board that when the Court of Appeal came to rule upon it they applied the correct test. The decisive factor was the Court's finding that in the three week period between the delivery of judgment on 12 December 2008 and the perfection of the order on 2 January 2009, the Manager had had a reasonable opportunity to apply to be heard. The Board has been invited to reject this finding. But they are satisfied that it would not be appropriate for them to do so. The Court of Appeal was familiar with the practicalities of litigation in its jurisdiction. It was in a much better position than the Board is to assess what opportunities there were for the Manager to make its application in that period. There are no grounds on which its finding can properly be disturbed.

The cross-appeal: the costs of the guarantee

25. There is brief coda to the cross-appeal. It arises from the fact that in 2005 the Supreme Court stayed enforcement of the award on terms that the Proprietor should pay it in full against a guarantee for its repayment so far as the subsequent proceedings should go the Proprietor's way. The Manager had to pay the substantial charges for setting up the guarantee and maintaining it in force, which it now wishes to claim as part of the costs of the proceedings. However, no application to this effect was made to the Court of Appeal when the Manager sought to vary the order for costs made on 12 December 2008. And if it had been, it would inevitably have met the same fate as the Manager's principal application on costs. Since the premise of this particular argument is that the Manager succeeds in its application to reopen the Court of Appeal's order for costs, the point does not arise.

Conclusion

26. The Board will humbly advise her Majesty that the appeal and the cross-appeal should both be dismissed. The parties will have twenty-eight days in which to lodge written submissions about the order to be made for the costs of the proceedings before the Board.

TAB U

GEN DISTRICT

JUDGMENT No. 1011 / 1992

C A T C H W O R D S

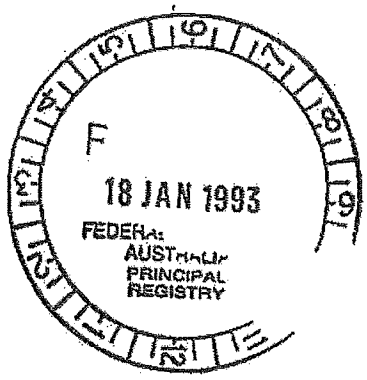
JUDGMENTS AND ORDERS - order made for the taking of an account - directions subsequently given as to the transactions in respect of which account to be taken - accounting party seeking to dispute his liability to account - basis on which an account can be ordered under Order 39 of the Federal Court Rules - construction of order (by reference to reasons for judgment and evidence led at trial) to determine whether in relation to each transaction the subject of the directions there had been a determination of liability to account - certain directions set aside pursuant to Order 35 rule 7(2)(c).

Federal Court Rules O. 35 r. 7 and O. 39 rr. 1, 3 and 10

Australian Energy Limited v. Lennard Oil N.L. (No. 2) [1988] 2 Qd. R. 230
Kwikspan Purlin System Pty Ltd v. Federal Commissioner of Taxation 86 A.T.C. 4602
Lang v. Simon (1952) 53 S.R.(N.S.W.) 508
R. D. Werner & Co. Inc. v. Bailey Aluminium Products Pty Ltd (1988) 80 A.L.R. 134
Rapid Metal Developments (Australia) Pty Ltd v. Rosato [1971] Qd.R. 82
Sharpe v. Goodhew (1990) 33 I.R. 238

CYRIL SHARPE & ORS. v. KENNETH GOODHEW & ORS.
No. QI 6 of 1989

DRUMMOND J.
BRISBANE
11 DECEMBER 1992



IN THE FEDERAL COURT OF AUSTRALIA)
QUEENSLAND DISTRICT REGISTRY)
INDUSTRIAL DIVISION)

No. QI 6 of 1989

BETWEEN: CYRIL SHARPE, ARTHUR SMITH, JOHN BURTON AND PATRICK KEANE

Applicants

AND: KENNETH GOODHEW

First Respondent

AND: BARRY DAY AND IAN BARTON

Second Respondent

AND: RALPH ROOTS, BARRY GLOVER AND GRAHAM SMITH

Third Respondent

AND: STAN HARDWICK, LES SUMMERS AND P.K. BRADY

Fourth Respondent

AND: HUGHCOMBE PTY. LIMITED

Fifth Respondent

AND: MICHAEL SLADE

Sixth Respondent

AND: FEDERATED ENGINE DRIVERS AND FIREMENS ASSOCIATION OF AUSTRALASIA, QUEENSLAND BRANCH UNION OF EMPLOYEES JACK KEVIN CAMBOURNE AND VIC FITZGERALD

Respondents by Cross-Claim

MINUTES OF ORDERS

JUDGE MAKING ORDER: Drummond J
DATE OF ORDER: 11 December, 1992
WHERE MADE: Brisbane

THE COURT ORDERS THAT:

1. The order made by Pincus J on 25 November, 1991 that the first respondent file and serve an account and

verifying affidavit regarding the following transactions be set aside:

	FUNDS DESCRIPTION	AMOUNT
(a)	J. Ware Metway account no. 168167285-6 cash withdrawal 24/10/85	$500.00
(b)	J. Ware Metway account no. 340105802-6 cash withdrawal 20/03/86	$478.73
(c)	J. Ware Metway account no. 340105802-6 transfer to K.W. Wilson Metway no. 168171364-7 on 19/03/86	$15,534.69

2. The Registrar is to proceed to take the accounts directed with respect to the following transactions only:

	FUNDS DESCRIPTION	AMOUNT
(a)	N. Jackwitz Westpac account no. 510443, various cash cheque withdrawals from 11/03/88 to 03/07/89	$51,264.50
(b)	N. Jackwitz Westpac account no. 510443, various cash cheque withdrawals from 11/03/88 to 03/07/89	$7,050.00
(c)	N. Jackwitz Westpac account no. 510443, various handybank withdrawals from 11/03/88 to 03/07/89	$2,900.00
(d)	Suncorp undisclosed FEDFA account no. 20511118609, cash withdrawals between 19/08/85 and 26/02/86	$13,200.00
(e)	Suncorp undisclosed FEDFA account no. 20511118609, cash withdrawals between 18/06/87 to 24/06/87	$3,800.00
(f)	Transfer to K.W. Wilson (Goodhew account) on 23/07/87	$8,000.00

(g)	Bass and Wilson account Metway no. 168171348-6 transfer to K.W. Wilson Metway account 168171364-7 on 12/01/87	$2,302.40
(h)	K.W. Wilson Metway account no. 346286499-5, cash withdrawals between 25/03/88 and 08/04/88	$8,000.00
(i)	K.W. Wilson Metway account no. 346286499-5 transfer to K.W. Wilson Metway account no. 168171364-7 on 26/07/88	$500.00

3. It being conceded by counsel on behalf of the Federated Engine Drivers and Firemens Association of Australasia ("FEDFA") that the accounts are to be taken on the basis that there was in existence at all relevant times a governing body of FEDFA with authority to bind FEDFA to the application of its funds by the first respondent, the Registrar is to take the accounts on the following bases:

(a) that it is not open to the first respondent to dispute that he is liable to account to FEDFA in respect of each of the transactions the subject of the directions referred to in paragraph 2;

(b) that the Registrar shall have regard to any evidence that either party may adduce relevant to the question whether the governing body of FEDFA for the time being was aware, either prior to or after the event, of the particular application that was made of the funds of FEDFA which are the subject of the directions referred to in paragraph 2 and whether any such application of funds was expressly or impliedly authorised or acquiesced in or ratified by that governing body.

4. The taking of the accounts is to proceed before the Registrar on a date to be fixed by him after completion of the following steps:

(a) the first respondent is to file and serve affidavits of all persons upon whose evidence he intends to rely therein by Friday, 29 January, 1993;

(b) FEDFA is to file and serve affidavits of all additional persons upon whose evidence

it intends to rely therein by Friday, 12 February, 1993;

(c) if either party intends to call a witness who is not prepared to provide an affidavit, that party, by the time already limited by this order, shall serve on the other party a statement summarising the evidence that party expects to elicit from that witness.

5. There is to be no order as to costs in relation to the proceedings of 23 November, 1992 and so much of today's proceedings as relate to those proceedings.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)
QUEENSLAND DISTRICT REGISTRY)
INDUSTRIAL DIVISION)

No. QI 6 of 1989

BETWEEN: CYRIL SHARPE, ARTHUR SMITH, JOHN BURTON AND PATRICK KEANE

Applicants

AND: KENNETH GOODHEW

First Respondent

AND: BARRY DAY AND IAN BARTON

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AND: RALPH ROOTS, BARRY GLOVER AND GRAHAM SMITH

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Respondents by Cross-Claim

Coram: Drummond J
Date: 11 December, 1992
Place: Brisbane

REASONS FOR JUDGMENT

This matter came before me by way of a request by the District Registrar for further directions as to the manner

of taking an account. The account in question is that which Pincus J in his judgment of 1 June, 1990 ordered be taken by the District Registrar of what sum (if any) was due by the first respondent in the action, Mr. Goodhew, to the respondent by cross-claim, Federated Engine Drivers and Firemens Association of Australasia Queensland Branch, Union of Employees ("FEDFA"). The judgment is reported as Sharpe v Goodhew (1990) 33 I.R. 238. His Honour adjourned for further consideration the question of the directions that should be given as to the mode of taking this account. On 25 November, 1991, Pincus J gave directions which included a requirement that Mr. Goodhew file and serve an account and verifying affidavit regarding particular cash withdrawals from, and other transactions on, certain bank accounts.

In compliance with these directions, a large volume of material has now been filed by Mr. Goodhew and FEDFA and both parties have informed the Registrar that they intend to call a number of witnesses to give oral evidence. It is because of the nature and complexity of the issues which the parties intend to raise on the taking of the account that the District Registrar has sought directions from the Court.

The chief question for my determination is whether, in view of Pincus' J order of 1 June, 1990, it is still open to Mr. Goodhew to assert (as he has) that, with respect to a number of the transactions the subject of the directions of 25 November, 1991, he is under no liability to account to FEDFA.

By way of example, some of the directions related to three groups of withdrawals from a Westpac account no. 510443 in the name of "N. Jackwitz". Mr. Goodhew deals with the "Jackwitz" account in paragraphs 4 to 18 of his affidavit filed in compliance with these directions. In essence, he alleges that another union official, Gannon, using the name of a deceased union member, Jackwitz, set up a contract in Jackwitz's name for the cleaning of certain union premises and that Mr. Goodhew suspects that Gannon used the account set up in Jackwitz's name to siphon union funds into it for his own benefit. FEDFA has filed an affidavit by Mr. Procopis, a financial analyst with the Cooke Royal Commission, who says that he discovered that various persons connected with the union had set up a number of accounts in false names into which union funds were moved, thereby removing control of those funds from the union to the signatories of the various false name accounts; while most of these funds were either transferred back to disclosed union bank accounts or used for union purposes, some of these funds were used for personal purposes or were otherwise unaccounted for. The "Jackwitz" Westpac account was one of this last-mentioned class of funds. Most of the deposits into the "Jackwitz" account coincide with withdrawals from union accounts. However, Mr. Procopis has turned up little evidence as to the destination of funds withdrawn from the "Jackwitz" account, including the three amounts the subject of the directions. He does not say that Mr. Goodhew was a signatory to the "Jackwitz" account. Mr. Channell, the solicitor for FEDFA, in his affidavit filed 19

February, 1992, describes approaches he has made to obtain affidavits from the various people to whom Mr. Goodhew refers in his own affidavit. Mr. Channell, however, did not approach Gannon for the reason that "he is currently awaiting trial for misappropriating FEDFA money".

The taking of an account is only appropriate once it has been established that the parties involved are in an accounting relationship with each other, that is, only once it has been established that one party is liable to pay to the other anything that is found, on the taking of the account, to be due to that other: Rapid Metal Developments (Australia) Pty. Ltd. v Rosato [1971] Qd.R. 82 at 88-90; Rockhampton Permanent Building Society v Petersen [1986] 1 Qd.R. 128 at 130 and Lang v Simon (1952) 53 S.R. (N.S.W.) 508 at 514. Rules such as Order 39, rules 1 and 3 of the Federal Court Rules do not create a new cause of action or a new equity, nor do they confer a general right to an account in substitution for the trial of issues; these rules do not authorise the sending of the whole case to the Registrar, they only authorise the directing of such accounts as are subsidiary to determining the rights of the parties, thus emphasising that the main issue in suit cannot be disposed of by ordering the taking of an account: Rapid Metal Developments (Australia) Pty. Ltd. v Rosato at pages 88 and 89.

Pincus' J judgment of 1 June, 1990 in which he ordered that an account be taken, must be held to be a

determination binding on Mr. Goodhew that he was liable to account to FEDFA with respect to certain transactions: "A decree for an account is not, as appears to have been assumed, a mere direction to inquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights, only leaving it to be inquired into, how much is due to him from the party accounting ... We cannot make a decree, ordering them to account, without first determining that they are liable to pay if anything be found due." Lang v Simon at pages 513-4, citing from the judgment of Dr. Lushington in the Privy Council decision in Baboo Janokey Doss v Bindabun Doss (1843) 3 Moo. Ind. App. 175.

The present difficulty arises because Pincus J deliberately did not set out in his judgment his reasons for holding that Mr. Goodhew was in an accounting relationship to FEDFA with respect to any particular transaction, including any of the transactions the subject of his directions of 25 November, 1991. The reason for his Honour's reticence was, plainly enough, his concern that if he were to make express findings on the allegations of misconduct made against Mr. Goodhew in the proceedings before him, that might prejudice the conduct of the criminal proceedings foreshadowed against Mr. Goodhew.

The issues in the action covered a much wider field than Mr. Goodhew's liability to account to FEDFA. But as to

the issues raised by FEDFA's cross-claim concerning Mr. Goodhew's financial wrongdoing, Pincus J, at page 239 of his judgment, said:

> "The origin of this problem (at least in part) may have been an attempt by some officials of the Queensland branch to conceal assets, in order to keep them beyond the reach of legislation passed or contemplated by the Queensland Government. As it was, I suppose, an inherent risk of that concealment, it appears that some succumbed to the temptation to take advantage of the opportunities afforded by the resultant irregularities in the company's administration, in order to improve their own financial positions. It is not possible for me to reach a conclusion as to the final financial outcome of any misfeasance which occurred. It is however necessary, in order completely to dispose of the issues, to determine whether any sum is due by Mr. Goodhew as a result of the dealings just alluded to."

His Honour did not explain further the grounds for making the order for the taking of an account other than to say (at page 254), when dealing with the issue concerning ownership of the branch's property:

> "As will appear, I do not propose in these reasons the grant of any specific relief with respect to property, except ordering the taking of an account against Mr. Goodhew. All other questions concerning relief as to property will be adjourned for further consideration."

and (at page 259):

> "A barrister appointed by the State Government, shortly after these proceedings began, to investigate amongst other matters overlapping those with which I am concerned has recently, I am informed, made his report. It seems evident that

> the investigations of fact underlying the report were much more comprehensive, as to certain financial questions, than those the results of which were presented to me. It appears that the report recommends certain prosecutions. In these circumstances, there is risk that material which might be published in these reasons concerning Mr. Goodhew could be relevant in any prosecution which might be brought against him. There is plainly evidence suggesting the necessity of a careful scrutiny of financial dealings involving the branch and Mr. Goodhew, but it seems undesirable, in the circumstances, to publish at this stage my views concerning the evidence against Mr. Goodhew relating to financial matters.
>
> It was admitted that accounting matters need to be investigated, and the only question raised is as to how that should be done. Counsel for FEDFA, who appeared before me in an interlocutory hearing in these proceedings recently, suggested that it would not be appropriate to appoint the Registrar to take an account, since questions of credit and the like arise.
>
> Despite that submission, I propose that the District Registrar shall be appointed to take an account, as O 39, r 9 contemplates may be done."

There are some passages in his Honour's reasons in reliance upon which it was submitted on behalf of Mr. Goodhew that his Honour should not be regarded as having made any finding to the effect that Mr. Goodhew was liable to account to FEDFA in respect of any particular transaction. I have already referred to the passage at page 259. To this can be added what his Honour said at pages 259 and 260, concerning the proposals by FEDFA for an investigation in a form other than the taking of an account and what his Honour had to say about FEDFA's application to join parties additional to Mr. Goodhew, including various of Mr. Goodhew's relatives and the person Gannon I have already referred to, against whom FEDFA made allegations that they had misappropriated moneys

belonging to it. However, I think the explanation for what his Honour said there was his concern not to make any findings which might prejudice the criminal proceedings foreshadowed against Mr. Goodhew in respect of his dealing with union funds, the very matter that was before his Honour.

The argument advanced on behalf of Mr. Goodhew really proceeded on the basis that the directions of 25 November, 1991 were in large part wrongly given because they could only properly be given if it was first established that Mr. Goodhew was an accounting party in respect of the transactions the subject of the directions; it was said that the evidence did not justify such a conclusion.

But Mr. Goodhew has not appealed against the judgment of 1 June, 1990. Nor has he appealed against the order of 25 November, 1991 on the ground that it gives directions for the taking of an account with respect to transactions that are not within the scope of the judgment of 1 June, 1990 that he account to FEDFA.

In seeking an answer to the question whether Mr. Goodhew can dispute his liability to account in respect of any of the transactions the subject of the directions, I think I must proceed on the basis that the judgment of 1 June, 1990 is a binding determination that Mr. Goodhew is liable to account to FEDFA in respect of certain transactions that are not, however, identified in the formal judgment. It is by the

process of construing that judgment that these transactions are to be identified.

The directions of 25 November, 1991 are necessarily interlocutory in view of Order 39, rule 10(1), (3) and (4). If these directions can be seen to go beyond the judgment of June 1990 in that they require Mr. Goodhew to file an account of particular transactions in relation to which he has not been found by that judgment, properly construed, to be liable to account to FEDFA, then I think I should exercise the power conferred by Order 35, rule 7(2)(c) to set aside any such direction, even though the order containing the directions has been perfected: for the reasons already given, a direction with respect to the manner of taking an account can properly be given only where there has already been a finding that the person to whom the direction is addressed is liable to account in respect of the matter in question to another.

The circumstances in which the directions of 25 November, 1991 were made were the subject of discussion before me. The material to which I was referred showed that Mr. Goodhew was given notice after the judgment of June 1990, but well prior to the hearing on 25 November, 1991, that FEDFA would seek the directions in fact given that day; it also appears from what took place at that hearing that Mr. Goodhew agreed to the making of directions in the terms in which Pincus J gave them on 25 November, 1991. However, the directions are not themselves expressed in the formal order to

be by consent and Mr. Goodhew's concurrence can only be gathered from a reference to the transcript. A perusal of the material before the Court on 25 November, 1991 shows quite clearly that Mr. Goodhew's consent was accompanied by a reservation of the entitlement he believed he had to dispute that he was liable to account in relation to certain of those transactions. I do not therefore think that FEDFA can gather any support for the proposition that Mr. Goodhew cannot, in complying with the directions given on 25 November, 1991, dispute his obligation to account on the ground that he consented to those directions being given. In any event, the power contained in Order 35, rule 7(2)(c) can be exercised even if the interlocutory order in question is a consent order: R.D. Werner & Co. Inc. v Bailey Aluminium Products Pty. Ltd. (1988) 80 A.L.R. 134.

Since I am of the view that the answer to the present problem depends upon the proper construction of the judgment of 1 June, 1990, it becomes necessary to identify the range of material to which regard can be had in interpreting that judgment.

In Australian Energy Limited v Lennard Oil N.L. (No. 2) [1988] 2 Qd.R. 230, Andrews CJ (Kelly SPJ agreeing) rejected an argument that a declaration should be granted as to the proper construction of a declaration made in an earlier action between the parties only if the latter was ambiguous. He said, at page 232:

> "I would further hold that it is necessary in order fully to understand the effect of the declaration to examine the reasons expressed by McPherson J in coming to his decision and the extrinsic evidence and surrounding circumstances relied upon by him. This is not so much to construe the words of the declaration as to understand it in its place in the context of the matter and thus give it its true construction."

In granting Australian Energy Limited the declaration as to the proper construction of the original order which it sought, His Honour had regard to both the reasons of the judge who made the original declaration and to the evidence before that judge, which took the form of admitted facts. In Gordon v Gonda [1955] 1 W.L.R. 885, Evershed M.R., with Hodson L.J. agreeing, appears to have taken much the same approach as the majority in the Australian Energy Limited case in construing the judgment there in issue.

In Kwikspan Purlin System Pty. Ltd. v F.C. of T. 86 A.T.C. 4602, Macrossan J had to decide whether an earlier order allowing a taxpayer's appeal and remitting the case to the Commissioner of Taxation for re-assessment resolved the question whether the Commissioner was precluded from disallowing a particular deduction claimed by the taxpayer on the re-assessment. He took the view that the matter was governed by the proper interpretation of the earlier order. In determining this, his Honour declined to limit his considerations to the words of the order, which were argued to be sufficient in themselves to justify the Commissioner's amended assessment disallowing the particular deduction, and

had regard to the reasons given for the making of the earlier order and to the notice of objection that led to the appeal in which that order was made, as aids to the construction of that order. His conclusion was that the taxpayer's entitlement to the deduction was fairly involved in, and so decided by, the appeal. The problem here is very similar to that which confronted Macrossan J.

In my view, these three cases are authority for the propositions that even if a judgment is not ambiguous, it is nevertheless proper (if not essential) in construing it to have regard to the factual context in which the judgment was given and that this context includes the pleadings, the reasons for the judgment and the course of evidence at the trial.

I turn now to this question of construction of the judgment of 1 June, 1990. I have already referred to what appears in the reasons relevant to this question: that material throws little light on the present problem. Nor do the pleadings illuminate the matter. It is thus by reference to the evidence that this question must be resolved.

As to the direction given on 25 November, 1991 that Mr. Goodhew file an account and verifying affidavit regarding the three groups of transactions on the "Jackwitz" account, evidence was called at the trial by the applicants that linked Mr. Goodhew with the "Jackwitz" account. A handwriting

witness gave evidence that a withdrawal form in respect of the withdrawal of $24,000.00 from a Union Metway account upon which form the name "N. Jackwitz" was written was in Mr. Goodhew's handwriting and that $24,000.00 was deposited into the "Jackwitz" account on the same day as this withdrawal was made. There is also evidence in the applicants' case that at a number of Union committee meetings in mid-1989, Mr. Goodhew declined to answer questions concerning the "Jackwitz" account or to respond to accusations by the man Gannon that Mr. Goodhew was connected with the "Jackwitz" account in a number of respects, that he had arranged "withdrawals" (that is, more than one) from a Union account and the transfer of the money withdrawn into the "Jackwitz" account. Mr. Goodhew declined to give evidence at the trial.

It is submitted that I should not treat this failure to give evidence as an admission by conduct by Mr. Goodhew of the various allegations I have summarised and the correctness of the other evidence I have referred to which connected him with the "Jackwitz" account because that failure could be explained by the fact that Mr. Goodhew was then "in considerable jeopardy with respect to criminal charges". It was also submitted that there was no evidence at the trial that Mr. Goodhew was involved in the withdrawal of any money from the "Jackwitz" account. It was submitted that all the evidence at the trial justified was an inquiry as to whether Mr. Goodhew was liable to account to FEDFA in respect of funds

deposited into and withdrawn from the "Jackwitz" account, but that it could not justify a finding in that regard.

Notwithstanding the submissions advanced on behalf of Mr. Goodhew, it is I think clear that an issue litigated at the trial was the transfer of money from Union accounts into the "Jackwitz" account and Mr. Goodhew's connection with and control of that particular account. I think a reading of the judgment against the relevant surrounding circumstances in which it was given shows that the investigation as to whether Mr. Goodhew was liable to account to FEDFA in respect of the "Jackwitz" account was conducted at the trial and determined adversely to Mr. Goodhew by his Honour's judgment of 1 June, 1990. The subsidiary directions his Honour gave on 25 November, 1991 pursuant no doubt to Order 39, rule 3, cannot therefore be understood as impermissibly leaving it to the District Registrar to determine that main issue: it had already been determined by the judgment. All the Registrar was required to do by the directions of 25 November, 1991 was to conduct such an investigation as would enable him to quantify the amount, if any, of Mr. Goodhew's liability to FEDFA in respect of the "Jackwitz" account transactions, which liability had been established by the judgment of 1 June, 1990.

As to the directions of 25 November, 1991 concerning the Suncorp account number 20511118609, while this account was opened in FEDFA's name, the evidence showed that Mr. Goodhew

was the sole signatory and there was evidence that he had instructed Union clerical staff not to disclose the existence of this account to the Union auditors. It is conceded that the evidence before Pincus J was sufficient to entitle him to find that Mr. Goodhew had withdrawn funds from this account and was liable to account to FEDFA in respect of any apparent deficiency. However, it was submitted that, because the evidence showed that Mr. Goodhew had supplied an explanation for the disbursement of the first sum the subject of the directions concerning this account which the auditors did not at the time challenge, his Honour could not find that Mr. Goodhew's explanation in respect of that sum was untrue.

Be that as it may, this is not an appeal from the judgment of 1 June, 1990 and it is quite clear, having regard to the circumstances in which judgment was given on 1 June and which I have summarised, that the judgment must be understood as establishing Mr. Goodhew's liability to account to FEDFA in respect of deposits to and withdrawals from this particular Suncorp account. All the relevant directions require of the Registrar is for him to conduct such an investigation as is necessary to establish the quantum, if any, of Mr. Goodhew's liability in that regard.

As to the two withdrawals from the two "J. Ware" Metway accounts the subject of other directions, there is evidence from Union clerical officers that they were aware of the existence of a Metway account in the name of "J. Ware",

having seen at the Union offices a passbook on that account; there was also evidence that at a Union committee meeting in mid-1989, Mr. Goodhew said "the Union, through the auditor, is well aware of it and knows that FEDFA money went into the James Ware account because of the SEQEB dispute." There was hearsay evidence, admitted without objection, that this "J. Ware" account was "looked after" by Mr. Goodhew. There are, however, two different Metway accounts in the name of "J. Ware" referred to in the directions. The auditors' letter to the Committee of Management of the Union dated 21 August, 1989 which was in evidence does not (despite submissions made to the contrary) refer to either of the two Metway accounts the subject of Pincus' J directions. While the judgment, read against the relevant surrounding circumstances, can be seen to involve a determination that Mr. Goodhew was liable to account to FEDFA in respect of a withdrawal from the particular "J. Ware" account referred to in the evidence, it is not possible to identify which of the two accounts it is that answers this description. I will therefore order that the directions given on 25 November, 1991 with respect to these two transactions be set aside.

As to the direction concerning the "transfer to K.W. Wilson (Goodhew account)", the only evidence given at the trial to which I have been referred in which mention was made of this particular account was evidence from the Union auditors that Mr. Goodhew had in effect told them that he opened this account in the name of "K.W. Wilson", that he used

it to protect his own personal assets and that no Union funds ever passed through this account. Even if it is assumed that his Honour rejected this statement by Mr. Goodhew, there is no basis upon which the judgment of 1 June, 1990 can be construed as establishing Mr. Goodhew's liability to account to FEDFA in respect of the transfer of $8,000.00 to this account. I will order that this direction be set aside.

As to the direction concerning the "Bass and Wilson" account, in exhibit 5 (which was a copy of a paragraph from one of Mr. Goodhew's affidavits, tendered on behalf of the applicants at the trial, in which Mr. Goodhew identified what he described as "the various undisclosed accounts operated by the State Union"), there was included an account with Metropolitan Permanent in the name of "Bass and Wilson"; this is the same account described in the Union auditors' letter of 21 August, 1989 to which I have already referred as the "Metway account - Bass and Wilson". In exhibit 5, Mr. Goodhew identified the two signatories to this "Bass and Wilson" account as Gannon, under the name of "Bass", and himself, under the name of "Wilson"; he also there stated that $25,000.00 was withdrawn from this account in 1986 and used to purchase a bond with Occidental Life Insurance in the names of "Maskey" and "Kelso". He identifies "Maskey" as an alias of Gannon and "Kelso" as an alias for himself. He repeated this information to the auditors, according to their letter of 21 August, 1989. The evidence before Pincus J was sufficient to show that Mr. Goodhew was involved in the operation of this

account as one of two signatories to it, it being an account in which Union funds were concealed. There is also the evidence, already referred to, that Mr. Goodhew told the Union auditors that the particular "K.W. Wilson" account into which the transfer of the $2,302.40 here in question was made and in respect of which the direction requires Mr. Goodhew to account to the Union was an account opened by Mr. Goodhew for his own personal purposes. The judgment should therefore be construed as involving a determination that Mr. Goodhew is an accounting party vis-a-vis FEDFA in respect of operations on the "Bass and Wilson" account. There is no reason to interfere with the direction given with respect to the one transfer in question from this account.

As to the direction given with respect to the transfer from a nominated "J. Ware" Metway account to a "K.W. Wilson" account of $15,534.69, the evidence goes no further than showing that while there were two accounts in the name "J. Ware" with Metway, Union funds were deposited to only one of those accounts, but that account is not identified. I do not think the judgment of 1 June, 1990 can be construed as involving a determination that Mr. Goodhew is liable to account to FEDFA in respect of this transaction. I will order that this direction be set aside.

As to the withdrawals from the "K.W. Wilson" account number 346286499-5, it is not disputed that this particular account is the Metway account number 6286499/5 referred to on

page 5 of the letter from the Union's auditors of 21 August, 1989. There was evidence at the trial that Mr. Goodhew admitted to the auditors that he established this particular account, upon which he was the sole signatory, as "a transfer account for Union business". Mr. Goodhew told the auditors that withdrawals totalling $6,500.00 from this account between 25 March, 1988 and 26 July, 1988 were used for a Union purpose. There is also evidence that Union funds were deposited into this account and that Mr. Goodhew made various withdrawals from it for various Union purposes. There was no other evidence concerning this matter. However, I think the judgment of 1 June, 1990, construed against the background of this evidentiary material, involves a determination that Mr. Goodhew was an accounting party vis-a-vis FEDFA in respect of all withdrawals from this account. There is no ground for interfering with this direction (otherwise than to check whether the reference to $8,000.00 in the direction is in error for $6,000.00).

As to the direction with respect to the transfer from this "K.W. Wilson" Metway account to another "K.W. Wilson" Metway account of $500.00, the same comments as apply to the previous direction are applicable here, with the addition of the fact that the "K.W. Wilson" account into which the $500.00 is said to have been paid was admitted by Mr. Goodhew to be one which he set up for his own private use.

I should also mention that it was submitted on behalf of Mr. Goodhew that his Honour's directions, insofar as they required the Registrar to determine substantive issues, were void as running "foul of the requirement that the judicial power of the Commonwealth is to be exercised by the Federal Court". Counsel for Mr. Goodhew disclaimed any challenge to the validity of Order 39 on the ground that the order purported to confer judicial power on the Registrar, a disclaimer fully justified in view of the provisions of Order 39, rule 10: cf. the differing views of Mason CJ and Deane J, on the one hand, and of Brennan J, on the other, in Harris v Caladine (1991) 172 C.L.R. 84 at 95 and 110-111. No issue arises to which s. 78B of the Judiciary Act 1903 (Cth) would apply: it is not suggested that Order 39 is beyond power, all that is challenged is an order of the Federal Court which was said to go beyond what Order 39 permits by delegating to the Registrar power to determine substantive issues. No question of constitutional invalidity arises in relation to a judgment.

EX TEMPORE REASONS FOR JUDGMENT - 11 DECEMBER, 1992

One of the directions given by Pincus J on 25 November, 1991 was that Mr. Goodhew file and serve an account and verifying affidavit regarding a particular item described as "transfer to K.W. Wilson (Goodhew account) on 23 July, 1987" in an amount of $8,000.00. In the reasons which I have just published, I dealt with this particular matter and concluded that, having regard to the evidence which was before

his Honour, the judgment of June 1990 could not be regarded as establishing that Mr. Goodhew was liable to account in respect of that particular transaction.

However, in the course of those reasons, I explained why I thought the judgment of June 1990 should be regarded as settling Mr. Goodhew's liability to account to FEDFA in respect of all deposits into and withdrawals from the Suncorp undisclosed FEDFA account no. 20511118609. I have now been referred to the evidence of Mr. Procopis, which was first put before me on behalf of FEDFA on 23 November last, in which he said that on 23 July, 1987 a sum of $8,000.00 was withdrawn from this particular Suncorp account and deposited to the "K.W. Wilson" account.

It is clear that it is this particular transaction that was intended to be the subject of the direction given on 25 November, 1991. What the direction plainly was concerned with was that Mr. Goodhew should account to FEDFA in respect of the source of the $8,000.00 which was transferred to the "K.W. Wilson" account on the day in question. For the reasons earlier given, I think that the issue of Mr. Goodhew's liability to account to FEDFA in respect of this particular Suncorp account was settled by the judgment of June 1990 and that FEDFA has at all relevant times clearly been seeking an account from Mr. Goodhew in respect of the source of this particular sum of $8,000.00. It is therefore appropriate that I should not make the order foreshadowed by my published

reasons setting aside the direction of 25 November, 1991 in respect of this transaction. In view of what Mr. Goodhew has already said about this transaction in his affidavit filed 9 December, 1991, I will not give a direction that Mr. Goodhew file a further affidavit dealing specifically with this transaction.

Given that I regard the judgment of 1 June, 1990 as settling the question of Mr. Goodhew's liability to account to FEDFA in respect of a range of transactions, it is, in theory at least, open to FEDFA to make applications to the Court for directions that Mr. Goodhew account in respect of any particular transactions that FEDFA may now want to pursue, so long as they are transactions in relation to which the judgment settles Mr. Goodhew's liability to account to the union. I say FEDFA can do that in theory, but it seems to me that save in wholly exceptional circumstances the union has had its opportunity, when it sought directions from Pincus J on 25 November, 1991, to ask for directions requiring Mr. Goodhew to account in respect of any particular transaction that it is interested in pursuing and it should not be allowed to keep the matter open indefinitely.

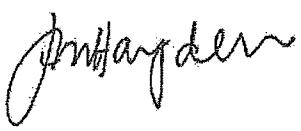
So far as concerns the costs of the proceedings on 23 November, 1992 and the costs incurred today in relation to those same proceedings, they involve a discrete dispute in the litigation: Mr. Goodhew sought to terminate a potential liability to pay the sum of $113,530.32, the subject of the 25

November, 1991 directions, by arguing that the directions should not be further enforced. He failed very largely on that, although he did achieve a modest measure of success. The cause, however, of that particular dispute seems to me to fairly arise from the confused form in which the directions were proposed by FEDFA to Pincus J on 25 November.

I am aware that Mr. Goodhew then agreed with the making of the directions in that form, but I think it is clear enough that it was FEDFA that had the carriage of formulating the directions and, as I have said, it chose to formulate them in a way which was confusing and, indeed, unjustifiable in a number of respects.

I therefore think that the proper order to make is that there be no order as to costs in relation to the proceedings of 23 November last and so much of the proceedings of today as relate to those proceedings.

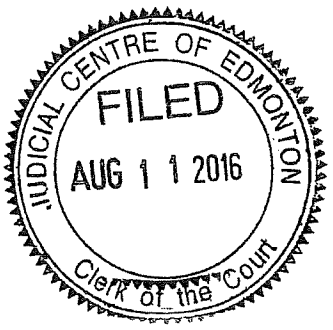
I certify that this and the preceding twenty two pages is a true copy of the *reasons for judgment herein of the* Honourable Mr. Justice Drummond.

Associate: 

Date: 11 December, 1992

Counsel for the First Respondent	:	J. A. Jerrard
Solicitors for the First Respondent:		Masinello & Associates
Counsel for Respondents by cross-claim	:	L. Boccabella
Solicitors for Respondents by cross-claim	:	Peter Channell & Associates
Date of Hearing	:	23 November 1992

TAB V



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 INFORMATION OF PARTY FILING THIS DOCUMENT:

DENTONS CANADA LLP
2900, 10180 - 101 Street
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Attention : Doris Bonora

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

DATE ON WHICH ORDER WAS PRONOUNCED: _____, 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

TAB W

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

By

Editor-in-Chief

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an overall prudent strategy should cover the case.[83] In New Brunswick the thinking may be that the old rule of equity, which exempted the trustee from liability if he prudently selected and monitored the agent, will apply unless excluded by the legislation.

Subsection (4) is strangely worded, since it refers to a duty to "the trust" and it is elementary that the trust is not a legal person which holds rights. In the normal course, the agent would owe a duty to the trustee, under their agreement, and the trustee holds that duty (and any claims arising out of its breach) on trust. It would be unusual, perhaps unprincipled, to give a right of action directly to the beneficiaries, which they could exercise against the agent, without the involvement of the trustee. The agent, after all, might not even know of the trust, and might wish to rely on terms of the contract made with the trustee. Some Canadian provinces (Alberta, Saskatchewan and Ontario) removed this language in enacting the model Act.[84]

E. Conclusion

In Canada, therefore, all the common law jurisdictions have modified, in at least some way, the old rules of equity as to the use of agents, and the trustee's responsibility for an agent's acts. The prudent investor jurisdictions have gone the furthest, as regards the core trustee function of selecting investments. Nevertheless, there remains the innate responsibility of the trustee as a trustee. Despite the legislation, there are tasks which the trustee must perform personally.

II. CONFLICT OF INTEREST AND DUTY

A. Introduction

It is a fundamental principle of every developed legal system that one who undertakes a task on behalf of another must act exclusively for the benefit of the

---

[83] R.S.O. 1990, c. T.23, s. 28: "A trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances." The main aim of this is to make clear that under modern portfolio theory, it is impermissible for a beneficiary to complain about one single investment choice; prudence must be assessed by looking at the whole portfolio. But it also exonerates in the case of prudent employment of an agent; s. 27.1(2) stipulates that an agent may only be employed pursuant to a written strategy that complies with s. 28.

[84] The Saskatchewan legislation (S.S. 2009, c. T-23.01, s. 28(4)) states that the agent's duty of care is owed to "the trustee and the beneficiaries"; this also arguably creates a direct right of action by the beneficiaries against the agent. Ontario (R.S.O. 1990, c. T.23, s. 27.1(3)) and Alberta (R.S.A. 2000, c. T-8, s. 5(5)) instead provide that the beneficiary may proceed directly against the agent on the failure of the trustee to pursue the claim within a reasonable time (see *infra*, chapter 24). This could, in any event, have been done through the procedural mechanism of joining the recalcitrant trustee as a defendant, although that procedure is based on the traditional idea that the beneficiaries only enforce whatever rights are held by the trustee.

other, putting his own interests completely aside. In the common law system this duty may be enforceable by way of an action by the principal upon the contract of agency, but the modes in which the rule can be breached are myriad, many of them in situations other than contract and therefore beyond the control of the law of contract. It was, in part, to meet such situations that Equity fashioned the rule that no one may allow his duty to conflict with his interest.[85] Stated in this way, Equity has been able, since the sixteenth century, to provide a remedy for a whole range of cases where the person with a task to perform has used the opportunity to benefit himself.[86]

In this section on the "Conflict of Interest and Duty", therefore, we shall be concerned with express trustees, and with all those others whom the courts have held to be fiduciaries and consequently bound by a duty of loyalty. The duty of loyalty requires the avoidance of situations where that duty conflicts with the self-interest of the fiduciary; indeed it prohibits conflicts of a fiduciary duty to one person with the same duty owed to another.[87] Contracts made when the fiduciary is in such a conflict are voidable at the instance of the person to whom the duty is owed.[88] And if a profit was acquired, it must be disgorged. Both the express trustee and the fiduciary who is not an express trustee have an obligation to account, the express trustee to the trust beneficiaries, and the fiduciary to the person or persons on behalf of whom he is acting.[89] The express trustee will be compelled to hand over improper gains to the beneficiaries in an ordinary action brought by them for breach of trust. The fiduciary is so compelled by an order of the court requiring him to account for his profits,[90] or possibly declaring him to be a constructive trustee of the improper

---

[85] Equity had exclusive jurisdiction over trusts and the administration of estates, and the principle had primary importance there. It was extended into relationships which have a common law foundation in contract, such as agency and partnership.

[86] For the same principle in the law of Quebec, see *Mongeau v. Mongeau* (1971), [1973] S.C.R. 529 (S.C.C.); *Banque de Montréal v. Ng*, [1989] 2 S.C.R. 429 (S.C.C.) at 436.

[87] This case is rarer but equity's standards are equally high. See *Raso v. Dionigi* (1993), 12 O.R. (3d) 580, 100 D.L.R. (4th) 459 (Ont. C.A.). Although the case is discussed in terms of "conflict of interest", it seems that it is a possible conflict of duty which underlies *MacDonald Estate v. Martin*, (sub nom. *Martin v. Gray*) [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249 (S.C.C.). If a firm of lawyers acting for one side of a dispute is joined by a lawyer who had acted for the other side in the same dispute, the firm may be disqualified. The firm, as a whole, now has duties to both sides in that dispute.

[88] This is the consequence of any exercise of a fiduciary's powers in breach of the duty of loyalty. If a third party in good faith has transacted with the fiduciary, the principal may not be allowed to rescind: *Logicrose Ltd. v. Southend United Football Club*, [1988] 1 W.L.R. 1256; *Criterion Properties plc v. Stratford UK Properties LLC*, [2004] UKHL 28 (U.K. H.L.) (C.A.). Other remedies against the breaching fiduciary would not be affected.

[89] The rule, however, is not ordinarily penal. If a partner takes a secret profit, his obligation to account nonetheless allows him to keep his share of the gain: *Olson v. Gullo* (1994), 17 O.R. (3d) 790, 113 D.L.R. (4th) 42 (Ont. C.A.), leave to appeal to S.C.C. refused (1994), [1994] S.C.C.A. No. 248, 4 E.T.R. (2d) 280 (note) (S.C.C.). Even a trustee who breaches his duty of loyalty may be entitled to compensation: *Simone v. Cheifetz* (2000), 36 E.T.R. (2d) 297 (Ont. C.A.). As to whether punitive damages may be awarded in an appropriate case, see chapter 25, Part II C.

[90] *Warman International Ltd. v. Dwyer* (1995), 182 C.L.R. 544 (Australia H.C.); *Rochwerg v. Truster* (2002), 58 O.R. (3d) 687 (Ont. C.A.), additional reasons at (2002), 212 D.L.R. (4th) 498 (Ont. C.A.).

TAB XYZ

it is part of the ordinary business or practice of a bank to collect cheques for their customers. If therefore a standard is sought, it must be the standard to be derived from the ordinary practice of bankers, not individuals. Their Lordships think therefore that the evidence of bank officials in *Kendall's* case as to the practice of banks was rightly tendered and received, as indeed the Court in that case decided.

Coming now to the reasons alleged for holding the learned trial judge to have been wrong in holding no negligence proved, they really amount to this, that the bank ought not to have collected a cheque for a customer who was of such recent introduction and about whom they knew nothing. There was, however, nothing suspicious about the way the account was opened. A customer, however genuine and respectable, could hardly, assuming him to start with a deposit of £20 in cash, have opened it in any other way. Was then the fact that a cheque was paid into that account for collection two days after the account was opened a circumstance of an unusual character calculated to arouse suspicion and provoke inquiry? For if it was laid down that no cheque should be collected without a thorough inquiry as to the history of the cheque it would render banking business as ordinarily carried on impossible; customers would often be left for long periods without available money. Now if the cheque here had been for some unusually large sum, perhaps suspicion might have been aroused. This is really a question of degree, and their Lordships cannot say that the trial judge was wrong in thinking that £743 was not a sum of such magnitude as to create the duty of inquiry.

If the cheque had been in different form things might well have been otherwise. Their Lordships cannot help remarking that to a certain extent the appellants have themselves to thank for what has happened, owing to the terms of their instructions. If they had insisted that in the case of payments made at the office, as they did insist in the case of drafts sent by post, the cheques should be made payable to the Commissioners of Taxation, then there would have been something on the face of the cheque to arouse inquiry. The fact that the cheque was to bearer distinguishes this case from the case of *Permewan*. In that case, in the case of thirty-six cheques, the cheques were drawn in favour of the Commissioners, or had such markings on them as showed that they were drawn for the purpose of paying duties. This was held, their Lordships think rightly, to be a circumstance which ought to have put the bank on inquiry when such cheques were presented by a private individual. Their Lordships do not think it necessary to consider and decide as to whether the majority or minority were right as to the other twenty-two cheques in that case, the point being whether the markings on those cheques did or did not sound such a note of alarm as ought to have put the bank on their guard. There was here no note of warning of any kind on the cheque, and accordingly the conditions which arose in the *Permewan* case do not apply.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Counsel for the Appellants—Rome, K.C. —Austen-Cartmell. Agents—Light & Fulton, Solicitors.

Counsel for the Respondents — R. A. Wright, K.C.—Jowitt. Agents—Slaughter & May, Solicitors.

HOUSE OF LORDS.

Thursday, February 26, 1920.

(Before Lords Finlay, Sumner, Parmoor, and Wrenbury.)

O'ROURKE *v.* DARBISHIRE AND OTHERS.

(On Appeal from the Court of Appeal in England.)

Agent and Client—Privileged Communication — Solicitor Acting Both as Trustee and Agent of the Trust — Allegation of Fraud—Extent of Privilege.

The fact that the solicitor of a trust is also a trustee does not affect the privilege attaching to confidential communications seeking or giving professional advice. *In re Postlethwaite*, 1887, 35 Ch. D. 722, *considered* and *distinguished.*

Where fraud is claimed to defeat such privilege a *prima facie* case must be established—dicta of Romer, L.-J., and Lord Davey in *Bullivant* v. *Attorney-General for Victoria*, [1900] 2 Q.B. 163, [1901] A.C. 196, *considered.*

The right to refuse production of documents on the ground that they relate solely to the case of the resisting party is not confined to such documents as the resisting party could put in as evidence in support of his own case.

Knight v. *Waterford (Marquess of)*, 1836, 2 Y. & C., Ex. 22; *Hey* v. *De la Hey*, 1886, W.N. 101, *distinguished.*

Bewicke v. *Graham*, 1881, 7 Q.B.D. 400, *approved.*

Appeal—Arbitration—Judicial Reference—Competency of Appeal.

Observations on the competency of appeal against the decision of a judge who, in the course of proceedings before him for discovery, at the request of both parties has looked at certain documents to ascertain whether they should be produced.

Decision of the Court of Appeal, [1919] 1 Ch. 320, *affirmed* (Lord Finlay dissenting with regard to one item).

The *facts* appear from their Lordships' considered judgment, which was delivered as follows:—

Lord Finlay — This case raises some important questions with regard to the right to require production of documents.

The order made by Peterson, J., for production was reserved by the Court of Appeal, from whose judgment the present appeal has been brought.

The writ in the action was issued on the 11th February 1915. The plaintiff's claim is to the estate of the late Sir Joseph Whitworth, who died on the 22nd January 1887, leaving property, real and personal, said to be of the value of £1,000,000 or more. The plaintiff claims as representing the heiress-at-law and one of the two next-of-kin of the testator. The representatives of the executors of Sir Joseph Whitworth are defendants. The defendants Ellen M'Gowan and Elise Jenkins are the executrices of the other next-of-kin of the testator.

The amended statement of claim was delivered on the 12th April 1916, and the defence in June of the same year. The affidavit of documents was filed on the 1st May 1917, and a further affidavit on the 3rd May 1918. In this last affidavit the defendants claimed that they were not bound to produce a number of documents on the ground of professional privilege, and on the further ground that the documents relate solely to the defendants' case and not to the plaintiff's case, and do not in any way tend to support the plaintiff's case or to impeach that of the defendant's.

The statement of claim alleges that the deceased Sir Joseph Whitworth left a will, dated the 3rd December 1884, and four codicils, the effect of which is stated, and that the widow Lady Whitworth, Mr Christie, and Mr Darbishire were the trustees and executors.

By the will and the first three codicils it is alleged that provision was made for educational purposes, and various legacies were given, the fourth codicil being in the following terms (par. 8 of the statement of claim)—"I declare that the gift in my first codicil of all other property if any not effectually disposed of beneficially by my said will or by that codicil to my wife and Richard Copley Christie and Robert Dukinfield Darbishire for their own absolute benefit in equal shares which gift I have augmented by the provisions of my second codicil shall include all the real and personal estate belonging to me and not otherwise disposed of by my will or any codicil thereto. And I accordingly give to them such real and personal estate in equal shares for their own benefit having full confidence that they will respectively desire to carry out my wishes to the utmost of their power but nothing in this codicil or in my will or my first three codicils contained shall be construed so as to impose any trust upon my residuary legatees and devisees or any of them or in any manner to abridge or qualify their absolute ownership or rights. And subject to the provisions herein contained I hereby confirm my said will and first three codicils.

The statement of claim charges in pars. 11 and 12 that the trustees and executors took the residuary estate upon a secret trust which was never defined or was invalid by reason of the Mortmain Acts or otherwise (so that there would be a resulting trust for the heir-at-law and next-of-kin), and further that if the trustees and executors took for their own use and benefit, the dispositions had been obtained by them from the testator by fraud. Particulars were delivered under these two paragraphs stating that the fraud was in devising and carrying out the scheme embodied in the will and codicils whereby the testator was left in the belief that his wishes as to the disposal of the residue of his estate for educational purposes would be carried out by the executors, whereas they intended to appropriate the greater part of the testator's estate for their own use.

The statement of claim further alleges (par. 23) that a deed of release, dated the 31st December 1889, was made between Fanny Uniacke of the first part, Ellen M'Gowan of the second part, the defendant Joseph Whitworth M'Gowan of the third part, and Whitworth's executors of the fourth part. This deed recited that the parties of the first, second, and third parts (the heiress and next-of-kin of the testator) had expressed their intention to take proceedings for the recall of the probate of Sir Joseph Whitworth's will and codicils, and that a compromise had been arranged on the terms that Whitworth's executors were to pay £75,000 to be divided in the proportion specified between Fanny Uniacke and her children and Ellen M'Gowan and Joseph M'Gowan. By this deed the first, second, and third parties released to Whitworth's executors all the real and personal estate of the testator discharged from all claims. The statement of claim alleges that the execution of this release was procured by the fraud of Whitworth's executors in concealing from the other parties to the deed the facts as to the testator's will and codicils, as alleged earlier in the statement of claim, and that the executors appropriated to their own use a considerable part of the testator's estate.

The claim made in the action is that Whitworth's executors should be declared to be trustees for the heir-at-law and next-of-kin of the testator, and that the deed of release should be cancelled or declared not to be binding.

The application for production of documents was heard in the first instance by Petersen, J., and he made the order of the 3rd July 1918 for the production of the documents described in the schedule to that order. The Court of Appeal, consisting of Bankes, Warrington, and Scrutton, L.JJ., reversed this order, holding that the documents in question were covered by professional privilege. On the present appeal it was urged on behalf of the plaintiff—(*a*) That the professional privilege did not exist, the solicitor being himself one of the trustees and executors; (*b*) that the plaintiff had what was called a "proprietary right" as one of the cestui que trust to see all documents relating to the trust; (*c*) that no privilege exists where the communication has been made for the purpose of carrying out a fraud, and that this was the case with regard to the documents in question.

I shall take these points in order—(*a*) Mr Darbishire, one of the three trustees, acted as solicitor for the trust. The privilege is claimed in respect of communications between him as such solicitor and his co-trustees with reference to the trust. Peterson, J., held on the authority of *Postlethwaite's* case (35 Ch. D. 722) that there could be no privilege where the solicitor consulted was himself one of the trustees. In my opinion any such proposition is erroneous in point of law, and I think that no such proposition is involved in the decision of North, J., in that case. Trustees are entitled to consult a solicitor with reference to the affairs of the trust, and the communications between them and their legal adviser are privileged if for the purpose of obtaining legal advice. Why should such communications be less privileged because the solicitor is himself one of the trustees? There is no valid distinction between such communications with the solicitor who is himself a trustee, and such communications with a solicitor who is outside the trust altogether. Of course the privilege is confined to communications genuinely for the purpose of getting legal advice. It would not extend to mere business communications with reference to the trust, not for the purpose of getting legal advice. In the present case the affidavit of the 3rd May 1918 states that the communications were for the purpose of getting legal advice. No sufficient reason has been shown for discrediting this affidavit as untrue or as made under some misconception of fact or law. The statement is not inherently incredible, as was suggested on behalf of the appellant, and I think that the Court of Appeal was right in giving effect to it.

When the decision in *Postlethwaite's* case is examined it will be found that it does not really support the proposition contended for.

The judgment must be read with reference to the facts of the case. The plaintiffs were admittedly cestui que trust of the testator's property. They averred that one of the trustees had himself secretly purchased part of the trust property and made a profit out of it. As cestui que trust they had a right to see all the documents relating to the trust passing between the trustees, and this right could not be got rid of by the employment by the one trustee of the other as his solicitor.

(*b*) It was further urged that the plaintiff, as representing the heir and one of the next-of-kin of the testator, has a right to see any documents relating to the trust as being one of the cestui que trust. I assume that the plaintiff is the representative of the heir and next-of-kin, but it does not follow that he is a cestui que trust. By the will and codicils the property is expressed to be given to the trustees and executors absolutely free from any trust. The plaintiff's case is put in the alternative. The first alternative is that the trustees and executors took the property on the terms of a secret trust, and that as such trust has failed owing to its not having been sufficiently defined or by reason of the statutes of Mortmain, the representatives of the heir and next-of-kin of the testator are entitled to the property as on a resulting trust. Whether there was such a secret trust, which has failed, is a matter in dispute in the action, and at present there is not even a *prima facie* case that the plaintiff is a cestui que trust on this ground. The second alternative put forward by the plaintiff is that the trustees and executors induced the testator to leave the property to them by fraudulently leading him to believe they would apply it for educational purposes in accordance with his wishes, while in fact they from the first intended to appropriate it to themselves as it is alleged they have done. No more serious charge could well be put forward. It cannot be assumed to be true for the purpose of obtaining inspection of documents, and it is putting the case with great moderation to say that the appellant has not made out any *prima facie* case of the truth of these charges. There is a complete absence of evidence to show that the appellant is in a position to claim inspection on this ground, and there is nothing to show that the "proprietary right" on which the appellant relies in fact exists. To establish any such right it would further be necessary for the appellant to get rid of the deed of release of the 21st December 1889. The release was given so long ago as 1889 and the fraud alleged has yet to be proved. There is certainly no *prima facie* case that it can be set aside, and so long as the deed stands the appellant cannot be a cestui que trust.

(*c*) The appellant also relied on the proposition that no privilege comes into existence with regard to communications made in order to get advice for the purpose of carrying out a fraud.

This is clear law, and if such guilty purpose was in the client's mind when he sought the solicitor's advice professional privilege is out of the question. But it is not enough to allege fraud. If the communications to the solicitor were for the purpose of obtaining professional advice, there must be in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some *prima facie* evidence that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. In the present case it seems to me clear that the appellant has not shown such a *prima facie* case as would make it right to treat the claim

of professional privilege as unfounded.

A great many cases were cited to your Lordships on the question of professional privilege, but I do not think it is necessary to go through them. *Bullivant's* case ([1901] A.C. 196) was cited by the respondents. The question there arose not on application for discovery but with regard to a witness who was being examined under a commission from the Courts of New Zealand, and who claimed professional privilege. The House of Lords decided that in the absence of a definite allegation of fraud the privilege prevailed. The question, what more is necessary to get rid of the privilege, was not discussed.

For these reasons I agree with the Court of Appeal in thinking that inspection should in this case be refused on the ground of professional privilege, subject to what I shall say as to item 434 later in the judgment.

The Court of Appeal thought that professional privilege was sufficient to dispose of the case, and gave no judgment on the second ground, which was thus stated in par. 4 of the further affidavit: — "To the best of our knowledge, information, and belief the said documents numbered 434 and 436 and (so far as we object to produce the same) 437 either do not in any way relate to the matters in issue in this action, or in so far as they do relate to the same relate solely to our case and to the case of our said co-defendants and not to the case of the plaintiff, and do not in any way tend to support the plaintiff's case or impeach our own."

This claim was rejected by Peterson, J., on the ground that on perusal by consent of the documents in item 434, for which amongst others this privilege had been claimed, he thought that they might tend to support the plaintiff's case to some extent. He therefore declined to give effect to this claim with respect to any documents, as in his opinion the defendants' affidavit must have been made under a misconception of the law applicable to this head of privilege or a misapprehension of the effect of the documents. I agree with the Court of Appeal in thinking that this mistake as to item 434 was not a sufficient reason for treating this claim as unfounded in all cases. This ground of privilege has been elaborately argued before us, and I propose to state the conclusions at which I have arrived.

The grounds on which privilege under this head was denied were—(1) That such privilege is confined to documents which are admissible in evidence; (2) that it sufficiently appears in this case that the affidavit in which this privilege is claimed is untrustworthy. There is no case confining privilege of this kind to documents which are admissible in evidence, and such a limitation would be inconsistent with the principle on which it rests.

A great many passages were cited from Wigram on Discovery (2nd ed. 1840) in which the documents which are the subject of this privilege are described as "evidences," and it was urged that this showed that the privilege could not be claimed in respect of any document not admissible in evidence. It is, however, a mistake to suppose that "evidences" (an old phrase in English law) necessarily denotes only documents which are admissible in evidence. The principle laid down by Wigram on Discovery (p. 264, par. 346) is that a plaintiff is not entitled to exact from the defendant any discovery exclusively relating to his case or to the evidence by means of which that case is to be established. It is obvious, as Mr Tomlin pointed out in his extremely clear and cogent argument, that to exempt from inspection only documents which are admissible in evidence would leave open to inspection many documents which might reveal what the case of the opponent is and the evidence by means of which it is proposed to establish it.

A party is entitled to get inspection of any documents relating to his own case. He is not entitled to see documents relating exclusively to his opponent's case in order that he may prepare means of meeting it or try to discover flaws in it. The whole of the plaintiff's argument on this head seems to me to rest on a misconception of the meaning of the terms "evidences" as used in this connection. Of course in a very great number of cases the documents which have come into question have been title-deeds or other documents which are admissible in evidence, but there is an entire absence of authority to show that the privilege is confined to such documents, and if it were so confined the value of the privilege would be greatly lessened. The affidavit in the present case is in the form which has been in use for a great many years, and your Lordships are now in effect asked to say that judges, counsel, and solicitors have all failed to appreciate the law on a matter of everyday practice, and that every affidavit which has been made claiming such privilege within the memory of man has been erroneous and insufficient. The proposition put forward on behalf of the appellant on this head seems to me to be entirely novel, erroneous in principle, and destitute of authority.

I think the affidavit in the present case is sufficient, and that if it were necessary to rely on this head of privilege the defendants have properly claimed it.

Some questions of a special nature have arisen with regard to documents under item 434. These documents consist of—(1) A case and opinion of counsel taken on behalf of the testator; (2) a case and opinion of counsel taken by the trustees and executors after the testator's death.

In my opinion the appeal as to these documents should not have been entertained by the Court of Appeal; the decision of Peterson, J., with regard to them was not appealable. The learned Judge was invited by the defendants' counsel to inspect these documents and to say whether they should be produced. He did so and decided that the plaintiff should see them. An order made under the circumstances was in the nature of an award, not a judgment.

The statement of Peterson, J., as to what took place is set out in the appendix. He begins by touching on certain legal con-

siderations, and points out that the plaintiff could not claim to inspect the documents under the second head of item 434. He then says that the plaintiff also rested his claim to inspect on the ground that fraud was charged, and proceeds thus—"Whether this is correct or not I need not consider for the purpose of this part of the case, as in both cases comprised in item 434 counsel for the defendants invited me to peruse the two cases and opinions and say whether in my judgment they ought to be produced. I have done so, and although I do not say that the plaintiff will derive much comfort and support from them, in my opinion he ought to have the opportunity of seeing them."

There are of course many cases in which documents are shown to the judge to give him materials for his judgment and to form an element for his appreciation of the case as a judge. Peterson, J., in the passage which I have quoted above expressly states that he considers it unnecessary to determine a legal point which was raised as he had been invited to say on perusing the documents whether they should be produced. This seems to me to show that he understood that he was invited to decide summarily what should be done as a matter of fairness and not to decide merely on legal considerations. In other words, that he was to arbitrate. His language is quite unequivocal and his decision would be appealable only if it appeared that he had misunderstood the effect of what passed before him.

A reference to the proceedings as set out in the supplemental appendix shows I think that he was quite right.

At the beginning of the discussion as to this item the counsel for the respondents said—"Now so far as item 434 is concerned, although our views are that we have good grounds for resisting the production of those—[those are the two opinions]—we are quite content that your Lordship should see those, and if your Lordship thinks that they ought to be produced, then they shall be produced, so that I need not trouble about the principle concerned there."

This to my mind is a clear statement that the respondents would produce the documents if the learned Judge on seeing them thought they ought to be produced, and on this basis the parties dispensed with discussion of principle. The undertaking that the documents should be produced if the Judge on seeing them thought that they ought to be produced is quite inconsistent with there being any right of appeal from his decision on this point.

Later in the argument respondents' counsel said—"If the views I put before your Lordship are sound, I submit that this application must fail except so far as your Lordship thinks it is proper that they should succeed on those two cases. Perhaps I may hand those up. [*Same handed to his Lordship.*] Those are item 434, and if your Lordship thinks that the notes and memoranda in item 435 are not sufficiently claimed we do not mind their seeing those, but with regard to all the rest I submit that the claim must fail."

Then followed a discussion in which counsel on both sides took part as to whether it was desirable that the Judge should have the drafts as well as the cases themselves, and in answer to an observation from the other side as to the case submitted to Mr Theobald the respondents' counsel said—"My friend must not take it in that way. If it is going to be disputed I submit there is great dispute about the first. I invite your Lordship to look at them. As a matter of fact your Lordship will see that that was a case to advise, amongst others, the executors nominated personally. Even if my friend relies upon *Russell* v. *Jackson* ((1851) 9 Hare 387, 10 Hare 204) that would not necessarily avail him. It would apply to the right which they might have with regard to advice they had taken for themselves personally. I am leaving it in your Lordship's hands. I do not in the least admit that the first case is a clear case."

These passages appear to me to show clearly that the matter was left in his Lordship's hands to determine summarily and not in the ordinary way as a judge, and they are in conformity with the view which he himself took of his functions under the consent of the parties.

At the close of the judgment Peterson, J., went through the documents with counsel, stating that the documents to be produced included both cases in item 434. The defendants' counsel then asked for leave to appeal "in regard to such parts of your decision as are against us," which Peterson, J., granted, nothing being said by anyone as to excepting from the appeal the decision as to item 434. But I do not think that this can alter the effect of what had taken place before the decision. The leave to appeal can operate only on what is appealable. The question is not whether the parties entered into an express agreement that there should be no appeal, but whether they took a course which is inconsistent with the existence of a right to appeal. The fact that general leave to appeal was given may have been due to inadvertence, or to the fact that the parties had not present to their minds at the moment the effect in this respect of the course which had been adopted.

I should add that the perfect good faith of counsel in this matter is beyond question. The only point raised is as to the legal effect on the right to appeal of what passed.

In *Bustros* v. *White* (1876, 1 Q.B.D. 423) Sir George Jessel, M.R., delivering the judgment of the Court of Appeal, said that where to avoid further affidavits the Judge at the desire of both parties has looked into the documents himself and decided whether they should be produced, it is not competent to either party to appeal (p. 427). The view so expressed by an exceptionally strong Court of Appeal, consisting of eight Judges (Jessel, M.R., Kelly, C.B., James, and Mellish, L.JJ., Baggalay, J.A., Lush and Denman, JJ., and Pollock, B.) has never, so far as I am aware, been dissented from and in my opinion it is right. It appears to me to be directly applicable to the facts of the present case in which this course was taken to avoid a legal argument.

I cannot agree with the view expressed by Bankes, L.J., that Peterson, J., was asked to look at the documents merely in order that he might see whether the claim of privilege on the ground that they related only to the defendants' case was justified. Such a view is in conflict with what took place on the argument, and is contradicted by the terms in which Peterson, J., in his judgment gave his view on what had taken place.

If the right to inspection of the documents 434 had to be determined by legal considerations applicable in cases where the parties have not consented to cut the knot in the fashion adopted here, I think that as to the documents under head (1) the appellant would succeed, and that he would fail as to those under head (2).

As to (1) the case was submitted to counsel and his opinion taken in the lifetime of the testator. Both the plaintiff and the defendants claim under the testator, the plaintiff as representing their heir and the next-of-kin, the defendants as representing his trustees and executors under his will. The foundation of the law of professional privilege is that it is necessary in order that a person may be able without danger to make full disclosure to his professional advisers. It follows that as between him or his representatives and third persons claiming not under the testator but adversely to him, the privilege exists, but as was pointed out by Turner, V.C., in *Russell* v. *Jackson* (1851, 9 Hare 387 and 10 Hare 207) the reason of the privilege does not exist in the case of competition between persons all claiming under the testator, as the disclosure in the latter case can affect no right or interest of the client. The bill in that case was filed by the next-of-kin against the executors of the deceased, who were also his residuary legatees and alleged that the gift of the property was made upon a secret trust for the foundation of a school and that the defendants were trustees for the heir-at-law and next-of-kin—(See judgment 10 Hare, pp. 207, 208). The solicitor to the testator, who after his death became solicitor to the executors, was examined under commission, and a motion was made to suppress parts of his deposition on the ground of professional confidence. It was held that the communications between the testator and his solicitor might be read, but that the communications between the executors and the solicitor after the death of the testator were privileged. The Vice-Chancellor gives his reasons at length (9 Hare, p. 391-3). Bankes, L.J., in his judgment says—"With reference to the case and opinion in the lifetime of the testator, in my opinion that first case is covered by the conclusion which Peterson, J., arrived at in another part of his judgment, namely, that a person who claims a document under a proprietary right must first of all establish the existence of that right, and that not having been done in this case it appears to me that the plaintiff must fail in his claim with reference to that first case." This rule has no application to the point under discussion. As was explained by Turner, V.C., in the case just cited it is not by "proprietary right" that the privilege is negatived but by the fact that as both claim under the testator the ground of this kind of privilege fails.

The production of the documents under head (1) could not be resisted on the second ground put forward by the defendants—namely, that they relate only to the defendants' case. Peterson, J., himself inspected these documents and came to the conclusion that they related in part to the plaintiff's case.

With regard to head (2) under 434 professional privilege would have prevented any right to inspect. The parties have, however, taken a course which makes it unnecessary to consider these legal questions.

The Court of Appeal reversed the order of Peterson, J., *in toto*. By some inadvertence it was not realised that this order would exempt from inspection in item 435 "memoranda and notes of evidence in actions," and in item 437 "draft and fair copies, bill of costs July 1882 to December 1886, and diaries before the 22nd January 1887," for which protection had not been claimed. These matters should be set right and for the reasons I have given I think that the appeal ought to be allowed under item 434 as regards the cases and opinions both in the lifetime of the testator and after his death; otherwise the appeal should be dismissed.

LORD SUMNER—This appeal has raised three questions which, as they were copiously and earnestly argued and go to the root of long-settled practice, require a reasoned solution, though I do not imagine that the answer to them could ever have been in doubt. These questions are—(1) Does a pleaded charge of fraud strip those against whom it is made of the ordinary right to rely on professional privilege as a ground for resisting production of documents? (2) Is that privilege taken away because the relation of solicitor and client, on which it rests, arises between persons who are trustees and executors, and are in effect parties to the action? (3) Is the claim to refuse production of documents on the ground that they do not support his opponent's case but only his own, a claim which is available solely for such documents as the claimant could give in evidence in support of his own case?

(1) No one doubts that the claim for professional privilege does not apply to documents which have been brought into existence in the course of or in furtherance of a fraud to which both solicitor and client are parties. To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to lay before a solicitor the facts relating to a charge of fraud, actually made or anticipated, and make a clean breast of it with the object of being advised about the best way in which to meet it, is a very different thing from consulting him in order to learn how to plan, execute, or stifle an actual fraud. No one doubts again that you can

neither try out the issue in the action on a mere interlocutory proceeding, nor require the claimant to carry the issue raised to a successful trial before he can obtain production of documents which are only relevant to that issue and only sought for the purpose of proving it. I am, however, sure that it is equally clear in principle that no mere allegation of a fraud, even though made in the most approved form of pleading, will suffice in itself to overcome a claim of professional privilege properly formulated.

North, J., in the first of the grounds of decision in *In re Postlethwaite* (35 Ch. D. 722) seems to have otherwise held. I think that he overlooked the fact that in one of the cases which he relied upon no fraud appeared on the pleadings at all, and that in the other numerous facts had already been admitted or ascertained. So far I think that his decision was wrong.

If the dicta in *Bullivant's* case of Romer, L.J. ([1900] 2 Q.B. at p. 169) and of Lord Davey ([1901] A.C. at p. 203) are to be read as supporting such a view, I think they ought not to be followed. As I read the opinion of Lord Halsbury, he clearly holds that a *prima facie* case must be "made out" without purporting to define in what "mode" this is to be done, and without sanctioning a mere pleaded allegation as sufficient. The right of the one party to have discovery and inspection and the right of the other, within certain areas, to be protected from inspection, are parallel rights; in itself neither is paramount over the other. It is therefore the business of the party claiming production to meet a properly framed claim of professional privilege by showing that the privilege does not attach, because it is being asserted for documents which were brought into existence in furtherance of a fraud, and he can only do this by establishing a *prima facie* case of fraud in fact. Evidence, admission, inference, from circumstances which are common ground, or "what not," as Lord Halsbury says, may serve for this purpose. I do not pretend to define what material may and what may not be used. The imperfections of his pleadings or the dubious character of his procedure in the action may militate against the claimant's case. The fact that a motion to strike out his pleadings has been made and has failed does not establish that he has a sufficient *prima facie* case for this purpose. The stage in this action is only an interlocutory one and the materials must be weighed, such as they are, without the apparatus of a formal trial of an issue. On such materials the court must judge whether the claim of privilege is displaced or not.

This is, as I understand it, the view taken by the Court of Appeal, though expressed in somewhat different language. It is not my business even to form any opinion now as to the plaintiff's prospects at the trial, but I see no ground for thinking that on the material before it the Court of Appeal was not justified in holding that no sufficient foundation had been laid for setting aside the respondents' claim of professional privilege.

(2) The necessity which has sometimes been said to be the foundation for the claim of professional privilege is not the necessity for confiding in the particular solicitor consulted, but the necessity for letting a litigant confide in some solicitor. It is equally obvious that this principle involves allowing the litigant to choose his own solicitor and to consult the person in whom he feels confidence. To limit the persons among whom he can choose might be to deny him a choice. To say that if he chooses to consult a co-executor he does so on the terms that their written communications will be open to his opponent, so penalises that particular choice that in effect it is a prohibition. For reasons stated later I say nothing of the special case when a solicitor and client are executors of a will under which the party claiming production is a beneficiary, but I do not wish to be understood as accepting the appellant's argument, which I think it irrelevant at present to discuss.

(3) No case has been cited which decides that the right to refuse production of relevant documents, on the ground that they only support the possessor's case, is limited to "evidences" of his case in the sense that they are such as could be put in evidence by him and form part of his title. Before the Judicature Acts many cases were decided on claims to refuse production of documents which their possessor might have put in evidence, and none are forthcoming, it seems, in which the documents could not have been so used. The two cases which were said to have decided the point —*Knight* v. *Waterford* (*Marquis of*), 1836, 2 Y. & C., Ex. 22, and *Hey* v. *De la Hey*, 1886, W. N. 101—turn out on examination to be decisions on other grounds. Very little can be inferred from such a condition of the reported authorities. It may be accidental. In any case the point turns on different considerations. The orders and rules made under the statutory authority of the Judicature Acts are the code which is paramount in matters which they regulate. The same word "relate" is used in them in connection with the obligation to make discovery by affidavit and with the right to refuse production on the specified ground in question. In terms neither is limited, and relevancy and that alone is the test. In substance that must be so as to discovery, and no reason has been suggested why it should not equally be so as to privilege from production, and for many years this has been regarded as settled practice. The contrary would work injustice. I think the appellant's contention fails.

As to the questions arising upon item 434 the two cases for the opinion of counsel and the opinions of counsel thereon I am not disposed to allow the appeal. If the documents were submitted to the learned Judge in order that he might decide once for all whether they should be produced or not his decision could not be appealed (*Bustros* v. *White*, 1 Q.B.D. at p. 427), but the reason for this must be that both parties have so intended. The joint request of both parties that the learned Judge should inspect the

documents for himself would in itself raise a presumption that the intention was to submit them for his final decision, but the special language used may negative that. Contrary to the respondents' contention I think in the present case the language used would not in itself negative that presumption, though it is true that after the judgment of Peterson, J., was given counsel for the now respondent said—"Will your Lordship give us leave to appeal in regard to such parts of your decision as are against us?" which included these particular documents, and leave was given, and at the request of the other side was made "mutual." The case, however, goes further. If the learned Judge's decision is unappealable it is because the parties have agreed that it should be so, and here this is in dispute. Mr Tomlin says that whatever words he used this never was his meaning. The agreement whatever it was never was reduced into writing and signed, and in themselves the words are susceptible of more than one interpretation. It has not been contended for the appellant that by accepting Mr Tomlin's language in the wider sense his position has in any way been changed on the faith of the words being so intended and understood, and the question therefore is whether there was any *consensus animorum* between counsel if the decision Mr Tomlin asked for was meant to be appealable, and the decision Mr Hughes assented to take was understood to be unappealable.

This controversy has been raised before the Court of Appeal and in substance decided. Such a case must be exceptional, and I think must be rare and must depend mainly upon the statements of counsel. It is hardly a matter suitable for appeal to your Lordships' House, and I see no sufficient reason for interfering with the determination of it at which the Court of Appeal arrived.

There is a further point as to the opinion of counsel, No 1 of No 434. It was taken in the lifetime of the testator, and though the defendants' first affidavit covers it by the description "Cases and instructions to counsel to advise the executors of Sir Joseph Whitworth as to his will and codicils, and counsel's opinion and notes thereon," their second affidavit showed that it consisted of communications "between the testator and his counsel," and only the second is said to have been between counsel and the executors. The Lords Justices examined the documents in the first item as Peterson, J., had done. They agree with Peterson, J., that they might be used to support the plaintiff's case, and one of the grounds on which protection was claimed fails accordingly, but they go on to say that the claim of professional privilege covers them. This is the claim of the client, and if the testator alone was the client I do not quite see how the defendants could set up professional privilege. It may be, however, that the proposed executors and legatees joined in taking this opinion. I have not seen the papers. Peterson, J., rejected the claim to refuse production, partly on what has been called the "proprietary" ground, partly because he thought that no professional privilege can be claimed between co-executors. He does not negative the possibility that the proposed executors were also Mr Theobald's clients in the matter, and if so, the view of Bankes and Warrington, L.JJ., would be explained. I am not satisfied that your Lordships should interfere. It is a question of particular documents, not of general principle.

The remaining matters relate to the application of well-settled rules to the particular facts of this case in a mere interlocutory proceeding. I agree that the appellant has no claim to see these documents, including the first of the two cases for opinion in No. 434, except under the law relating to discovery, because while the releases obtained by "Whitworth's executors" stand, to say nothing of the fourth codicil, he cannot claim to see them as being his documents in any sense. I am satisfied that if the two letters dated 30th December 1895 and 26th January 1895 have been wrongly appreciated by the respondents in relation to discovery (which I by no means decide) their error has not been such as to cast doubt on their general understanding or observance of their obligations, or to vitiate their claims to withhold disclosure in respect of other documents.

In drawing up the order of the Court of Appeal an error has been made as to which I think the respondents have been to blame, and might well have been made liable in costs to some extent, but as two of your Lordships think differently, as the appellant has already seen some of the documents which the order has erroneously dealt with, and as counsel has undertaken for the production of the others when requested, and as the order being interlocutory is only of importance as affecting production, I acquiesce in their views.

I agree that the appeal should be dismissed with costs.

LORD PARMOOR—Sir Joseph Whitworth died in January 1887, seized or possessed of real or personal estate of great value. The appellant is the legal personal representative of Fanny Uniacke, who was the heiress-at-law and one of the two next-of-kin of the testator. The respondents are the respective legal personal representatives of the executors of Sir Joseph Whitworth. The action related to the estate and testamentary disposition of Sir Joseph Whitworth, and the plaintiff charged that there was either a secret trust or that the executors took the residuary real and personal estate for their own absolute use and benefit, and that the form in which the testamentary disposition was arranged or settled was a mere fraudulent device or scheme for appropriating to the use of the executors a very large portion of the estate of the testator. It is not necessary to determine how far the action is well constituted, so long as the probate of the will and codicils of the testator have not been recalled. The appeal must be determined on the pleadings as they stand. The question is whether an order for production of the documents con-

tained in the second part of the schedule of documents should be made. These documents relate to the matters in question in the action, but their production is refused on the ground that they are privileged either as being documents which consist solely of professional communications of a confidential nature, which for the purpose of obtaining legal advice have passed between the executors and their solicitors, or on the ground that the documents either do not in any way relate to the matters in issue in this action, or in so far as they do relate, relate solely to the case of the defendants and not to the case of the plaintiff, and do not in any way tender a support to the plaintiff's case or impeach that of the defendants. In form this privilege is sufficiently claimed, but it was urged on behalf of the appellants that over a long period of years the meaning of the claim for privilege on the ground that the documents related exclusively to the case of the defendants had been misunderstood, and that the privilege only extended to such documents as might be admissible in evidence to support the defendant's case. The claim for privilege was disputed by the appellant on various grounds, and the question for determination is whether and how far these objections raised on behalf of the appellant can be maintained.

A cestui que trust in an action against his trustees is generally entitled to the production for inspection of all documents relating to the affairs of the trust. It is not material for the present purpose whether this right is to be regarded as a paramount proprietary right in the cestui que trust or as a right to be enforced under the law of discovery, since in both cases an essential preliminary is either the admission or the establishment of the status on which the right is based. I agree in the view expressed by Peterson, J., that the rule as to the right of a cestui que trust to the production of trust documents for inspection does not apply when the question to be tried in the action is whether the plaintiff is a cestui que trust or not. In the present case not only is the status of the appellant as a cestui que trust disputed, but in addition a release was executed, which unless it can be set aside is a bar to his claim. It is not necessary to consider on what grounds the release is attacked, but it is obvious that there may be formidable difficulties in the way of the appellant under this head. The attention of your Lordships is directed to various authorities, but it is sufficient to refer to *Wynne* v. *Humberston*, 1858, 27 Beav. 421, and to *Compton* v. *Earl Grey*, 1826, 1 Y. & J. 154.

The second point raised on behalf of the appellant was based on the proposition that professional privilege does not apply to a case in which a solicitor who is a trustee has acted as professional adviser to himself and his co-trustees, who are co-defendants in the action. It was not contended that this principle would apply where professional advice was taken on a personal matter affecting one of the trustees, but in the present case the affidavit of documents shows that the privilege is claimed in respect of documents which do relate to the trust matters in question. It is notorious that in many cases solicitors are appointed as co-trustees with full power to act as solicitors in their professional capacity in relation to trust matters, and to make in respect thereof ordinary professional charges.

As a matter of principle, it is difficult to understand why confidential communications made to a solicitor in his professional capacity should cease to be privileged because such solicitor has been appointed as a co-trustee by the testator with a power to act as solicitor in the affairs of the trust. There is no less necessity in such a case to protect in the interests of justice such a disclosure of the facts and conditions as is required to obtain professional and confidential advice. To hold otherwise would deprive a lay trustee of a privilege which would attach to communications made to an outside solicitor, with the result that it might be necessary for him to take such advice in preference to that of the solicitor especially cognisant of the trust affairs. It is not a relevant consideration that communications between co-defendants, none of whom are solicitors, are not privileged. In the argument on behalf of the appellant reliance was placed on the case of *In re Postlethwaite*, 35 Ch. D. 722. In this case the plaintiff, who sought the production of documents, was undoubtedly a beneficiary. Further, a charge was made in the statement of claim that the purchase in the name of a third person was a fraudulent device intended to cover up a real purchase by one of the two trustees. As to this it is not necessary to say more since the decision turned on the special circumstances of the case. I agree with Warrington, L.J., that the claim to have the documents produced was placed on the proprietary right of the plaintiff, and not on the ground that the claim of privilege was destroyed owing to the fact that the solicitor consulted was also a co-trustee. If, however, the judgment of North, J., can be extended to cover the claim made by the plaintiff in this case the principle is stated in too wide terms and cannot be maintained.

The third point relied on by the appellant as an answer to the claim of professional privilege is that the present case comes within the principle that such privilege does not attach where a fraud has been concocted between a solicitor and his client, or where advice has been given to a client by a solicitor in order to enable him to carry through a fraudulent transaction. If the present case can be brought within this principle there will be no professional privilege, since it is no part of the professional duty of a solicitor either to take part in the concoction of fraud or to advise his client how to carry through a fraud. Transactions and communications for such purposes cannot be said to pass in professional confidence in the course of professional employment. Such a case must be differentiated from a case in which after the commission of a crime, or in order to meet a charge of fraud made against him in a civil action, a client consults a solicitor

in his professional capacity, employing him to obtain the benefit of his confidential advice and assistance. The appellant does make in his pleadings a charge that a fraud has been concocted between the solicitor and client, and the question which arises is whether such a *prima facie* case of a definite character has in some way been brought to the notice of the Court as to justify the Court in holding that the appellant has the ordinary right of production of documents relating to his case, the defendents in respect of such production not bringing themselves within the protection of professional privilege.

It may be that the allegations in the statement of claim, apart from any other source of information, are sufficiently explicit to negative the claim of professional privilege, but the proposition that the mere pleading of fraud is in itself sufficient necessarily to defeat the claim of professional privilege cannot be maintained. To admit this proposition would be equivalent to saying that the claim to protection for professional privilege—a claim founded in the interest of the proper administration of justice—could be defeated by the skill of a pleader and the use of technical language whenever it was desired to obtain an inspection of documents otherwise privileged in the expectation of the discovery by this means of information to support a charge of fraud. On the other hand in order to obtain the production of documents it is certainly not necessary to prove the existence of fraud, and such an obligation might result in the non-production of documents which in a particular instance might constitute the only evidence on which the plaintiff relied to establish his case.

In the case of *Bullivant* v. *Attorney-General for Victoria* ([1901] A.C. at p. 201) Lord Halsbury in advising the House says — "The line which the Courts have hitherto taken and I hope will preserve is this — that in order to displace the *prima facie* right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation, or affidavit, or what not." This passage relates to the giving of evidence before commissioners, but there is no difference in the principle applicable in such a case and the principle applicable to the production of documents on an interlocutory application. Whether the circumstances brought to the notice of the Court in a particular case are sufficiently explicit to establish a *prima facie* case of definite fraud either by allegation, affidavit, or in some other way, will depend on special facts in each case—*Reg.* v. *Cox and Railton*, 1884, 14 Q.B.D. 153. But something more is required than mere pleading, or than mere surmise or conjecture. If in the present appeal there is disclosed a real *prima facie* case of definite fraud, this must be found in the allegations contained in the pleadings and particulars, seeing that there has been no affidavit and no information from any other source. In the statement of claim fraud is alleged as an alternative to a secret trust, on the ground that the form in which the testamentary disposition of the testator was settled or arranged by Christie and Darbishire was a mere fraudulent device or scheme for appropriating to the use of Whitworth's executors a very large portion of the testator's estate. This allegation is not supported by the statement of any facts which might give positiveness or distinctness to the charge, but rests on nothing more than pleading or mere surmise and conjecture. In my opinion this is insufficient either to support the right of the appellant to inspection or to defeat the claim of the defendant to the protection of professional privilege, and I agree with the decision arrived at by the Court of Appeal under this head. I desire to add that the refusal of the Court to strike out the statement of claim on the application of the defendants does not of itself establish any case of *prima facie* fraud or make the case other than one of mere surmise and conjecture.

The next question for consideration is whether the claim of privilege has been sufficiently made in the statement that the documents relate solely to the case of the defendants and not to the case of the plaintiff, and do not in any way tend to support the plaintiff's case or impeach that of the defendants. It was argued on behalf of the plaintiff that to support the claim for privilege the documents must be such as might be admissible in evidence to support the case of the defendants. I think that this is an impossible contention, and that to assent to it would be to admit a proposition which is not supportable either in principle or by authority. The affidavit for discovery of documents includes all documents in the possession and power of the deponent which relate to the matter in question and clearly is not limited only to such documents as may be admissible in evidence. Such a limitation would destroy in great part the value of discovery; but if documents must be disclosed in the affidavit of documents independently of whether they are admissible in evidence or not, it is difficult to suggest any reason why the claim of privilege against production should not cover the same documents. For instance the copy of a document, although not in itself admissible in evidence, comes within the same category as the original document in so far as concerns the privilege of production, but if there were an obligation to produce, it would give the same information as the document itself, though such a document would itself be protected on the ground that it is admissible in evidence. This novel doctrine assumes that the word "relate" can be read as synonymous to admissible in evidence—an assumption for which there is no warrant.

The attention of your Lordships was called to a number of passages in the works of Hare and Sir J. Wigram. It is not necessary to consider these passages in detail, but I can find none which support the proposition that there is no privilege attaching to documents which relate exclusively to the case of one party to an action, unless such

documents may be admissible in evidence in support of his case. To quote one passage to the contrary from Sir J. Wigram's book, p. 264—"A plaintiff is not entitled to exact from the defendant any discovery exclusively relating to his case, or of the evidence by means of which that case is to be established."

Numerous authorities were quoted to your Lordships in the argument on behalf of the plaintiff, but there is no case which holds that a document not admissible in evidence is outside the claim of privilege although such document relates solely to the opponent's case and not to the case of the party seeking production—*Bewicke* v. *Graham* (7 Q.B.D. 400) is a direct authority that the claim of privilege is sufficiently made in the form similar to that used in the present case. Compare *Budden* v. *Wilkinson*, [1893] 2 Q.B. 432.

The only cases which could present any difficulty are *Knight* v. *Marquis of Waterford*, 2 Y. & C. Ex. 22, and *Hey* v. *De la Hey*, 1886 W.N. 101. I have had the advantage of reading the opinion expressed by Lord Wrenbury on these cases and desire to express my entire concurrence. It was further argued that the affidavit filed on behalf of the defendants was on its face untrustworthy. This argument raises no question of principle, but there appears to be no adequate reason for displacing the oath of Mr Darbishire. The test to be applied is well stated in the case of *Roberts* v. *Oppenheim* (1884, 26 Ch.D. 724) by Cotton, L.J.—"We ought not to speculate in order to get rid of the protection claimed, and we ought to accept the affidavit as conclusive unless the Court can see distinctly that the oath of the party cannot be relied on."

In the course of his exhaustive argument Mr Hughes handed in for the convenience of your Lordships a chart of the documents. Documents 434 (1) if privileged from production are only so privileged as documents which relate entirely to the case of the defendants — Documents 434 (2) may be privileged either under the claim of professional privilege or as documents which relate entirely to the case of the defendants. These documents were inspected by the learned Judge, and it was argued that he acted as arbitrator between the parties with their consent, and that no appeal would lie against the order for production. The matter is not free from doubt, and there was a difference in the understanding of the two counsel both of whom with evident sincerity referred to what passed before the learned Judge at the trial. It is sufficient to say that I am not prepared to differ from the conclusion of the Court of Appeal. The order of the Court of Appeal includes documents, to the production of which the counsel for the defendants agreed in the hearing before Peterson, J., and on which no appeal was opened in the Court of Appeal, and documents for which no privilege was claimed in the affidavit of Mr Darbishire. The order should be that, the respondents undertaking to produce these documents, the appeal should be dismissed with costs.

LORD WRENBURY — As legal personal representative of the heiress-at-law and one of the next-of-kin of the testator the plaintiff claims to be entitled to certain part of the testator's estate. His claim is made not under the will but upon the footing of an intestacy as regards so much of the estate as upon the face of the will was given to the three executors absolutely in equal third shares. If he is right the executors are trustees for him and none the less by reason of the fact that he claims not under a gift contained in the will but by reason of there being, as he says, no effectual beneficial gift there contained. The executors are trustees for whomsoever is beneficially entitled to the testator's property.

If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestui que trust, and the beneficiaries are entitled to see them because they are beneficiaries. The first case in *Talbot* v. *Marshfield* (1865, 2 Dr. & Sm. 549) is an instance.

But this plaintiff cannot as matters stand say that he is a beneficiary. That is the very question to be determined in the litigation. Before he can establish that he is a cestui que trust he has two difficulties to surmount. The one is that he must establish that there is property undisposed of by the will. The will on its face purports to dispose absolutely of the whole. He says there was a secret trust, that this trust failed, and that the funds in the hands of the executors are, as between them and him, bound by a trust which he can enforce, viz., a trust for those who would be entitled if the secret trust failed as he says it did. One question at issue in the action is whether there was any such secret trust or whether the executors are right in saying as they do that the property was given absolutely to them in equal third shares. The other difficulty is that Mrs Uniacke (as whose legal personal representative he sues) executed on the 21st November 1889 a release which laid the above question at rest in a manner fatal to his claim, and unless and until he succeeds in setting that release aside he has no claim to any part of the estate. That release is thirty years old, the parties to it are dead. Evidence has thus been lost, and there is no presumption that it will be, and no *prima facie* case made to lead to the belief that it will be, set aside.

In this state of facts the plaintiff cannot assert a proprietary right to the documents on the footing that they are his, and cannot enforce inspection on that ground. If authority be needed, *Wynne* v. *Humberston* (27 Beav. 421) is clear authority upon the point.

This being so the plaintiff must succeed, if at all, upon the ground that he has a right to discovery of the documents—a right to inspect them nothwithstanding they are not his—because they relate to the matters in question in the action. *Prima facie* he is entitled to inspection on that ground. It is for the defendants to show valid grounds for protecting them from inspection. The grounds upon which they resist inspection have to be considered under three heads.

The first is professional privilege. As to this the plaintiff says—There is no professional privilege, because the solicitor who was consulted was himself one of the trustees. In my opinion this contention cannot be supported. Professional privilege is based upon public policy. It is considered that for purposes of justice a client ought to be in a position to go to his solicitor and be wholly untrammelled in speaking to him without any reserve; that he ought to be in a position to obtain his advice, and that all this should be done under the veil of professional confidence. Lord Brougham in *Greenough* v. *Gaskell* (1833, 1 My. & K. 98) gives the true foundation of the doctrine. I see no ground of principle why this should be affected by the fact that the solicitor is a co-trustee with the client. The appellant says that the solicitor trustee is bound to answer the cestui que trust as to any matter relating to the trust. So he is, unless he is constrained by some superior duty. To say that professional confidence is not a superior duty is to beg the question. If the trustee who is not solicitor is asked the question he is entitled to claim privilege, for otherwise public policy would be defeated in compelling him to answer. His privilege cannot lapse because the solicitor whom he consults owes a duty to another. And if the trustee who is solicitor is asked he is entitled to reply that he is constrained by the privilege of his client which he is not entitled to break. But, says the appellant, the trustee should have gone to some other solicitor. In the present case the testator in fact by his first codicil authorised the trustee-solicitor to act as solicitor to the trust. But I do not rely on this as differentiating the case. There is nothing wrong in employing a co-trustee as solicitor. If privilege would have existed if the solicitor had not been trustee I cannot see anything that will destroy privilege when he is. Other considerations would arise if the case made were that the trustees were conspiring to defraud the trust, for it is no part of a solicitor's duty to advise his client how to commit a fraud. This is a separate ground which I shall deal with presently.

The appellant relies on *In re Postlethwaite*, 35 Ch. D. 722. The case differs from the present in material particulars. The plaintiff there was a cestui que trust; there was no question about that. He had a proprietary right, and had that right to see every document in the trustees' hands which had been obtained by them as trustees. Protection could only be claimed (and it was claimed) on the ground that the documents came into existence on an occasion when the lay trustee was consulting the solicitor trustee not as solicitor to the trust but as his private solicitor. The illustration given by North, J., in *In re Postlethwaite* upon his second ground is far from convincing. Not everything that is said at a professional interview between solicitor and client is privileged any more than the whole of a letter, some part of which contains professional advice and other part bears no such character, is privileged.

In my opinion this plaintiff, who cannot at present affirm that he is, or even say that he has established a *prima facie* case that he is, a cestui que trust, cannot succeed on the ground of proprietary right, and cannot on the mere ground that the solicitor was a co-trustee exclude the privilege if in other respects it is rightly claimed.

The second question for consideration is whether privilege has rightly been claimed by the defendants on the ground that the documents relate solely to the defendants' case and not to the case of the plaintiff, and do not tend to support the plaintiff's case, and do not contain anything impeaching the defendants' case. Upon this the plaintiff has advanced a contention which is startling to me, that privilege under those words can only be claimed for documents which the defendants could put in evidence at the trial. The words are to be understood, he says, as if they ran "relate solely to and could be used by the defendants in support of their case." My first observation upon this is that these are not the words, and it would have been easy to require these words if this were the meaning. The second observation is that this cannot be the meaning of the words, and for this reason. The verb used is "relate." The same word is used in defining the whole class of the documents as to which the affidavit of documents is to be made. They are all the documents which "relate" to the matters in question in the action, whether they be capable of being given in evidence or not. The documents to which the affidavit is to extend is not confined to documents which somebody could use in evidence. The same meaning must be attributed to the word in the language under consideration.

Further, it is obvious that there are many documents which the defendants could not put in evidence which they would be entitled to protect from inspection. The defendant's private diary, which may be most useful to him in enabling him to determine and speak to a relevant date, is a document which he cannot put in evidence, but the plaintiff could not get inspection of it. So if the defendant has made a copy of a deed relating only to his own title, or has made for his own use a translation of a document in Norman French, or has prepared for his own guidance a note or abstract of what he is in a position to say in evidence, he could not put the copy or translation or note in

evidence (unless as regards the copy deed or the translation the original had been lost, and he was entitled to use secondary evidence), but the plaintiff could not obtain discovery of such documents as those so as to acquaint himself with the contents of the deed or the nature of the proposed evidence. Numerous authorities have been cited by the appellant in which the word "evidences" has been used, and in which documents which were "evidences" in the sense that the defendant could use them as evidence have been protected. But no cases have been cited in which an order has been made that documents which were not "evidences" be discovered on the ground that although privilege was appropriately claimed in all other respects the opposite party was entitled on that ground to inspect them, unless it be *Knight* v. *Waterford (Marquess of)* (2 Y. & C. Ex. 22) and *Hey* v. *De la Hey* (1886, W. N. 101). Neither of these cases goes this length. In the former case the map, it was said, "may possibly be evidence of the extent of the manor, and may therefore throw some light on the plaintiff's claims" (*see* 2 Y. & C. Ex., at p. 41). The Court rolls were "a collection of Court rolls which he holds for the benefit of others," and as to the answer and the letters reasons are assigned which support production on grounds of special matters, not grounds of general application. In *Hey* v. *De la Hey* the defendants by their affidavit claimed that the documents "were intended to be or might be used by the defendants in evidence," and the Court ordered production on the ground that they could not be so used. They were letters between co-defendants, and the ground was obviously a good one. The documents were discoverable unless there were some other ground of privilege on which the affidavit and the report are alike silent. To found anything upon a report of this kind in the Weekly Notes is, in my opinion, impossible.

Upon this point *Bewicke* v. *Graham* (7 Q.B.D. 400) is important and establishes, I think, the law as I understand it to be—(see Bray on Discovery, 1885 ed. p. 485).

The defendants' claim of privilege under this second head is, in my opinion, good.

Then the scene changes and the plaintiff says—"Granted all this, it remains that these documents are discoverable because I allege a case of fraud." Here he relies principally upon *Bullivant's* case ([1900] 2 Q.B. 163; 1901 A.C. 194), and in particular upon the words of Romer, L.J., "the claim of privilege is unavailing in cases where fraud or illegality is alleged, and the existence of that fraud or illegality being in issue the documents are relevant to that issue." To cite these words and rely upon them as laying down a general principle apart from the context and the facts with reference to which they were uttered is, of course, quite inadmissible. For instance, if the affidavit showed that the documents related to professional advice sought for and obtained by the party in anticipation of litigation or under the stress of litigation in respect of the alleged fraud, no one could dispute that they were protected. The Lord Justice's words must, of course, be qualified accordingly. Not every document relevant to the issue of fraud, but documents which are not upon some other ground privileged, are exposed to production. For the present purpose it is sufficiently accurate to say that documents relating to the conception and carrying out of the alleged fraud are not, but documents arising in professional confidence as to defence against the alleged fraud are protected.

Further, as regards documents which upon the principle above stated are open to inspection, the plaintiff must in asking for them go at any rate so far as to satisfy the court that his allegations of fraud are not merely the bold assertions of a reckless pleader, but are such as to be regarded seriously as constituting *prima facie* a case of fraud resting on solid grounds. Here again a sentence from Lord Davey's opinion in *Bullivant's* case is to be read carefully and its meaning to be ascertained from the circumstances in which it was uttered. "I do not dissent," he says, "from what was said by Mr Haldane, that it must be assumed for the present purpose that the case stated in the pleadings is true for the purpose of testing the right to production.

In *Bullivant's* case an information had been filed in the Supreme Court of Victoria and a commission had been issued to take the evidence of a witness in this country. Upon this examination he was called upon to produce a certain book. The question in the action was whether the defendant was "evading" a statute. In the Court of Appeal the case was decided upon the footing that the allegations of intent to evade were allegations of fraud. The House of Lords reversed the Court of Appeal on the ground that evasion of a statute is not, in one sense of the word, a fraud and that there was no sufficient allegation of fraud. Upon this state of facts Lord Davey's words obviously fell far short of the meaning that if fraud be alleged the Court must assume that it is true. Lord Halsbury's words are that "before professional confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not." If I may venture to express this in my own words, I should say that to obtain discovery on the ground of fraud the plaintiff must show to the satisfaction of the Court good ground for saying that *prima facie* a state of things exists which, if not displaced at the trial, will support a charge of fraud. This may be done in various ways—admissions on the pleadings of facts which go to show fraud—affidavits in some interlocutory proceedings which go to show fraud — possibly even without admission or affidavit allegations of facts which if not disputed or met by other facts would lead a reasonable person to see at any rate a strong probability that there was fraud, may be taken by the Court to be sufficient. Every case must be decided on its merits—(*Reg* v. *Cox*, 14 Q.B.D. 163). The mere use of the word "fraud" or the prefix of the adverb "fraudulently" from time to time throughout the narrative will not suffice

The Court of Appeal found in the present case no sufficient allegation of a case of fraud. I agree. Par. 11 of the statement of claim "charges" that the testator communicated to his executors a secret trust which was either too indefinite or was invalid by reason of the Mortmain Acts. Suppose he did. Who was defrauded by his doing so? Not the testator, for *ex hypothesi* it was he who made the communication; he was a party to it and intended it. Par. 12 "charges" that the form in which the testamentary dispositions was (*sic*) arranged or settled by two of the executors was a fraudulent device for appropriating to the executors a part of the testator's estate and that the third executor was a party to it. This is a "charge" of the existence of a "scheme," not the allegation of any facts which tend *prima facie* to support a case of fraud. And there is nothing whatever in the way of admission or evidence or circumstances of suspicion to found a probability or a *prima facie* case of fraud. This ground therefore in my judgment fails.

It follows that the appeal wholly fails, subject to something which must be said as to some particular documents. . . .

As regards the documents Nos. 434 (1) and (2), these were inspected by the judge with the consent of the parties. It is a matter of everyday occurrence that to save time and dispute the parties say, "Let the judge see the document," meaning that he is to look at it as further material upon which to base his judicial decision whether it is privileged or not. No one in such a case intends to make the judge an arbitrator, and I am satisfied that the parties in the present case did not so intend. As to the right decision as regards those, the matter stands thus—No. 434 (1) is a case and opinion taken in the testator's lifetime. No. 434 (2) is a case and opinion taken after his death. In my opinion both of these are protected, and the order under appeal is right. No. 434 (2) is protected by professional privilege—No. 434 (1) is not—(*Russell* v. *Jackson*, 9 Hare, 387). No. 434 (1), however, is protected upon the grounds stated by Lord Sumner in his judgment.

The defendants giving an undertaking to produce the documents Nos. 435 (2) and 437 (1), as to which the order under appeal is obviously wrong by a slip, this appeal should in my judgment be dismissed, with costs.

Appeal dismissed.

Counsel for the Appellants — Hughes, K.C. — J. B. Matthews, K.C. — Beddell. Agents—Edmund O'Connor & Company, Solicitors.

Counsel for the Respondents — Tomlin, K.C. — D. Hogg, K.C.—Dighton Pollock. Agents—Pennington & Son, for Tatham, Worthington, & Company, Manchester, Solicitors.

HOUSE OF LORDS.

Friday, March 5, 1920.

(Before the Lord Chancellor (Birkenhead), the Lord Chief Justice (Reading), Lords Haldane, Dunedin, Atkinson, Sumner, Buckmaster, and Phillimore.)

REX *v.* BEARD.

Criminal Law—Murder—Act of Violence Done in Furtherance of Rape—Plea of Drunkenness—Intent.

Homicide by an act of violence done in the course or in the furtherance of a felony involving violence is murder.

Insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged.

Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

Observations on *Rex* v. *Meade*, [1909] 1 K.B. 895.

Their Lordships' judgment was delivered by

LORD CHANCELLOR (BIRKENHEAD) — Arthur Beard was convicted of murder at Chester Assizes and sentenced to death. The Court of Criminal Appeal quashed the conviction and substituted a verdict of manslaughter and a sentence of twenty years' penal servitude. The case is brought to your Lordships' House under section 1, subsection 6, of the Criminal Appeal Act 1907 upon the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional importance. The facts which are relevant may be shortly stated.

About 6 p.m. or a little later on the 25th July 1919 a girl of thirteen years of age was sent by her father to purchase some small articles at a shop. About half-past six she was seen entering the gate which leads into Carfield Mill. The only person then at the mill was the prisoner Beard, who was there in discharge of his duty as night watchman. He proceeded to have carnal knowledge of the girl by force, and when she struggled to escape from him he placed his hand over her mouth, and his thumb on her throat, thereby causing her death by suffocation. There was some but not much evidence that the prisoner was under the influence of intoxicating liquor on the day and at the time in question. This evidence was of a character which is not unusual in crimes of violence, but in view of the legal problems to which this case has given rise it requires examination.