Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "**1985 Trust**")
APPLICANT	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust (the "**1985 Trustees**");
DOCUMENT	**REPLY BRIEF OF THE SAWRIDGE TRUSTEES** **ASSET TRANSFER APPLICATION RETURNABLE NOVEMBER 27, 2019**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora / Michael S. Sestito Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

Clerk's stamp:

COURT FILE NUMBER	1103 14112
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JUDICIAL CENTRE	EDMONTON
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APPLICANT	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust (the "**1985 Trustees**");
DOCUMENT	**REPLY BRIEF OF THE SAWRIDGE TRUSTEES** **ASSET TRANSFER APPLICATION RETURNABLE NOVEMBER 27, 2019**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora / Michael S. Sestito Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

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Self-Represented Party

TABLE OF CONTENTS

A. Introduction:

1. The 1985 Trust is discriminatory. This point is not open for debate.[1] The definition of "beneficiary" is anchored on the sexist, antiquated and unconstitutional language of the pre- *Canadian Charter of Rights and Freedoms* [*Charter*], *Indian Act*. The discrimination is not incidental to determining beneficiary status – it is central and it is mandatory.

2. The 1985 Trustees cannot distribute pursuant to a discriminatory trust. That is the entire reason for this litigation. After nearly a decade of court applications and allegations of malfeasance, we may be close to finding a solution in this application ("**Application**").

3. The 1985 Trustees have prepared this submission in part to respond to the submissions of the Office of the Public Trustee and Guardian (the "**OPGT**"), the Sawridge First Nation (the "**SFN**"), Catherine Twinn and Shelby Twinn. Additionally, we, make these submissions to assist the Court in contextualizing this Application – curing discrimination in order to lift the complete stalemate of providing for a vulnerable population.

4. The Court will hear much about the equities involved in this lawsuit – those individuals who would not qualify for Beneficiary status but for the discriminatory definition, the constitutionally enshrined deference owed to the sovereignty of a First Nation, the rights of women to choose their partners regardless of race, and the stigmatization of "illegitimate" children. There is no perfect solution and in any litigation involving discrimination, there will always be parties who benefit from that discrimination. The question is how can we cure the discrimination, which our federal government and the *Charter* say is clearly wrong, and yet still provide for as many people as possible.

B. General Reply:

The 1985 Beneficiary Definition

5. The definition of "beneficiary" ("**1985 Beneficiary**") in the 1985 Trust deed is discriminatory. Simply put, in order to be a 1985 Beneficiary, one must be a "member" of the "Sawridge Indian Band" pursuant to the provisions of the *Indian Act* that existed prior to Bill C-31. Bill C-31 sought to ensure that the *Indian Act* reflected the changes brought upon by the *Charter* – it sought to

[1] The fact of the discrimination was acknowledged by the parties and the Court (Consent Order granted by the Honourable Justice DRG Thomas January 19, 2018 at para 1 **[TAB 1]**).

"remedy historic discrimination against Indian women and other Indians previously excluded from status under the *Indian Act* and band membership."[2]

6. In general reply to the submissions of the other parties, the 1985 Trustees wish to draw to the Court's attention some of the practical realities of how this definition actually works in practice:

   (a) A woman will lose her beneficiary status if she chooses to marry someone who is from a different race, but a man is free to marry whomever he chooses without it altering his beneficiary status and his spouse becomes a 1985 Beneficiary. Thus a young women will be a Beneficiary until she marries.

   (b) An "illegitimate" female child born to a male member of the SFN cannot be a 1985 Beneficiary[3] but, if the parents subsequently marry, the child's "legitimate" siblings born in wedlock will be 1985 Beneficiaries;

   (c) Women whose rights were restored under Bill C-31 and who Canada sought and obtained an injunction requiring the SFN to recognize and act on their entitlement to membership are not Beneficiaries.[4] At Sawridge, the Bill C-31 women are still stigmatized because they are still reminded that while they were beneficiaries under the 1982 Sawridge Trust ("**1982 Trust**"), they are not 1985 Beneficiaries.

7. As the OPGT points out there are children who are currently 1985 Beneficiaries, who are not members of the SFN, but if the definition changes, could eliminate any rights they have under the 1985 Trust. However, there are also children who are not 1985 Beneficiaries who can never be beneficiaries because the definition does not permit application to become a member.[5]

8. It will be difficult to find a solution that will include everyone and cure the discrimination.

Intention

9. Much has been written in the reply briefs, about the intention of the parties both in 1985 and in 2016. This misconstrues the question before the Court.

10. The intention of the parties in 1985 when the transfer of assets from the 1982 Trust to the 1985 Trust (the "**Transfer**") occurred is irrelevant. The question before the Court is the legal effect of

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[2] *Sawridge Band v Canada,* 2004 FCA 16, [2004] FCJ No 77 [*Hugessen Appeal*] at para 55 **[Responding Brief of the OPGT filed November 15, 2019 ("OPGT Brief") TAB 10]**; This is also thoroughly canvassed by the OPGT in their brief at paras 4 to 6 and 14 to 16.

[3] This is illustrated in the case of Aspen Twinn. Aspen is the daughter of Patrick Twinn, who is the son of Child Walter Twinn and Catherine Twinn. Aspen's parents were not married at the time of her birth. They married very shortly after her birth. Under the current definition, Aspen cannot qualify as a Beneficiary. Aspen is represented in this litigation by the OPGT.

[4] As outlined in the OPGT Brief at paragraph 27, Canada sought and obtained an injunction requiring the SFN to recognize these women in *Sawridge Band v Canada,* 2003 FCT 347, [2003] FCJ No 723 [*Hugessen Decision*], upheld on appeal **[OPGT Brief TAB 10]**.

[5] As outlined above, Aspen Twinn, who is represented by the OPGT, is one such example.

the Transfer itself. The ultimate interpretive issue is whether, in law, the Transfer was appropriate. Is it, as the Court queried and as the SFN argued, that the 1985 Trust holds its assets on the terms of the 1982 Trust and thus for a class of beneficiaries as defined in the 1982 Trust. Or is it, as others argue, that the Transfer successfully removed assets from the beneficiaries of the 1982 Trust (specifically excluding, *inter alia*, the women who regained membership under Bill C-31) for the benefit of the 1985 Beneficiaries.

11. The intention of the parties in 2016, with respect to the negotiation of the consent order granted by the Honourable Justice DRG Thomas August 24, 2016 (the "**2016 Consent Order**"), is also irrelevant. Clearly the parties to the 2016 Consent Order would not have negotiated the 2016 Consent Order if they did not believe that it approved the Transfer. Certainly, that was the intention of the 1985 Trustees, as outlined in their written brief and in multiple instances thoroughly canvassed by the parties. Indeed, as the court in *Yu v Jordan* succinctly put it:

> "...the interpretation of a court order is not governed by the subjective views [or intentions] 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" [emphasis added].[6]

12. Accordingly, there is no need for previous legal advisors, such as Mr. Cullity, to provide evidence as their evidence would be limited to describing, through hearsay, intention. Furthermore, Mr. Cullity's evidence would be completely covered by solicitor-client privilege, which primarily involved the SFN as the client. We understand that the SFN is not in a position to waive privilege. To the extent that any privilege attaches to the 1985 Trustees, they have also said they would not waive privilege. In her brief, Catherine Twinn suggests that solicitor-client privilege does not exist between trustees and beneficiaries and cites a 1920 English case for that proposition. The law has evolved since 1920 and this is not consistent with the modern approach in trust law.[7]

13. Furthermore, much has been written about the previous evidence before the Court regarding the deleterious effects of moving the assets back to the 1982 Trust. Again, this consideration is irrelevant. There is no suggestion before this Court that the assets are not currently held by the 1985 Trust. There is no suggestion that the assets are moving "back" to the 1982 Trust. The Court was clear that the Transfer occurred and the issue is only what terms apply.

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[6] *Yu v Jordan,* 2012 BCCA 367, [2012] BCJ No 1863 at para 53 **[OPGT Brief Tab 10]**.

[7] The 1985 Trustees will provide further argument on this point should it become necessary at the appropriate time.

1982 Trust Terms and Transfer from 1985 to 1986

14. Both the OPGT and Catherine Twinn have argued that there is no legal basis to support a transfer from the 1985 Trust to the 1986 Sawridge Trust (the "**1986 Trust**"). They argue that the facts and circumstances are entirely different. The OPGT argues that for a trust to trust transfer to occur, the transfer must have the same individual beneficiaries and the transfer must be for their benefit. The OPGT goes further and states: "At the time of the 1985 Asset Transfer, the 1982 and 1985 Trusts' beneficiaries were the same group of individuals. As a result, the assets could be transferred from one trust to the other trust without affecting their beneficial interests. The transfer was also in their interests given its intention to protect the assets for them." Nevertheless, the 1985 Trustees note that the OPGT in oral argument have said that there may be 76 people who are not members of the SFN who may be Beneficiaries of the 1985 Trust, thus the Transfer has not achieved the result of protecting assets for the 1982 Trust beneficiaries.[8]

15. Further along in their brief, the OPGT cites the case of *Pilkington v Inland Revenue Commissioners* [*Pilkington*], which was cited by the 1985 Trustees in their brief supporting the Transfer.[9] The SFN distinguishes *Pilkington* in their brief along with other lines of authority.

16. In light of the submissions of the OPGT and the SFN on this point, the 1985 Trustees provide the following responses.

17. Generally speaking, there are two types of beneficiaries in trust law – individual beneficiaries and a class of beneficiaries. Each trust deed in this litigation was prepared for the benefit of a class of beneficiaries. This is similar to the concept of a "class gift", which is defined as "a number of persons who are united or connected by some common tie, and you can see that the testator was looking to the body as a whole rather than to members constituting the body as individuals..."[10] Another analogy is the concept of a "static entity" as described by Your Lordship in *Bruderheim Community Church v Board of Elders*.[11]

18. The 1985 Trustees previously presented the Court with *Pilkington* as that was the only apparent authority under which the Transfer occurred, while cautioning on the differences in the fact pattern between *Pilkington* and the situation of the Transfer.[12] At its heart, *Pilkington* stands for

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[8] OPGT Brief at para 94.

[9] Brief of the Sawridge Trustees filed November 1, 2019 ("1985 Trustees Brief") TAB A *Brief of the Trustees for Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust* ("TAB A") at para 20.

[10] *Allan Estate, Re*, 1994 CanLII 9204, 1994 CarswellAlta 680 (ABQB) at para 17 **[TAB 2]**.

[11] 2018 ABQB 90 at paras 76-78 **[TAB 3]**.

[12] 1985 Trustees Brief TAB A at para 20.

the principle that a party can accomplish in one transaction directly what it could accomplish in multiple transactions indirectly.[13] This is the true characterization of the "Pilkington principle."

19. While due to some clever timing those individuals who comprised the class of beneficiaries as between the 1982 Trust and the 1985 Trust were identical at a moment in time, the 1985 Trustees point out that the appropriate analysis is to focus on the class. In each case, the similarity was the definition of beneficiaries which was "members of the [Sawridge] First Nation". The focus was not on the individuals. On April 15, 1985 the Transfer occurred, but 2 days later as of April 17, 1985 the Bill C-31 regime would have applied.[14] *Pilkington* would permit the Transfer because the Transfer involved the same "class" i.e. members of the SFN. The transfer can occur again (i.e. 1985 Trust to 1986 Trust) because we are dealing with the same class, it is not about the individuals. If this is not the case, then neither transfer could work.

20. In this case, the change in the definition lead to the dramatic exclusion of some and an increase of 1985 Beneficiaries who are not members of the SFN. It is difficult to reconcile this with the OPGT's statement that the Transfer would not alter the beneficial interests of the 1982 Trust beneficiaries, as it would have diluted the assets amongst a larger pool of beneficiaries than would have otherwise existed and as a class it left a group behind. It is odd that the 1982 Trust trustees at the time thought it necessary to go to court to achieve a variation of the 1982 Trust to change the terms of service of trustees but believed that a change to one of the three certainties of a trust could be done with a resolution. It is also odd that they made the change to avoid an increase in members and yet achieved the opposite. For those reasons, it is possible they expected the 1982 Trust terms in respect of the beneficiary definition to be consistent in terms of the people who would benefit – that being members of the SFN.

21. What we are left with are two eventualities. Firstly, if the OPGT's argument is to be accepted, then the Pilkington principle allows the 1985 Trustees to transfer the assets of the 1985 Trust without court order to another trust notwithstanding the individuals are different. The only true similarity was that the definition was for a similar class of individuals – members of the SFN. The change in 1985 was to redirect how one defines members – knowing full well (and the evidence is uncontested on this point) that the definition would be changing dramatically two days after the creation of the 1985 Trust. The fact that at the point in time the definition would result in the same individuals benefitting is irrelevant. Therefore, applying the same logic to any other point in time, if the previous Transfer was legitimate then a subsequent transfer ought also to be legitimate so long as the receiving trust deals with a similar class (members of the SFN). This would be consistent with the evidence of the former Chief's intention to transfer the assets into

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[13] *Pilkington v Inland Revenue Commissioners,* [1964] AC 612 (1962) at 17 **[Sawridge Trustees Brief TAB 3]**.

[14] *Hugessen Decision,* at para 25 **[OPGT Brief TAB 10]**.

the 1986 Trust.[15] Therefore, the assets subject to the 1985 Trust deed should be able to be transferred to terms of the 1986 Trust deed, with its identical beneficiary definition as found in the 1982 Trust deed.

22. On the other hand, if it is impermissible to transfer the assets of the 1985 Trust to the 1986 Trust because the beneficiary definition is different, then the same must have been true in 1985. If this is the case, then the SFN's argument must be accepted.

23. In simple terms, if the 1982 Trust beneficiary definition is the same as the 1986 Trust beneficiary definition, and the 1982 Trust assets could be transferred into the 1985 Trust, then it stands to reason that the same logic would permit the 1985 Trust assets to be transferred to the 1986 Trust. Either *Pilkington* permits both transfers or neither.

Collateral Attacks on the 1985 Trustees

24. It has been well established that this litigation ought to be structured in a non-adversarial manner. Notwithstanding this direction, some of the parties have continued to malign the reputation, impugn the motives and question the efficacy of the 1985 Trustees. This is inappropriate and unproductive. We do not propose to deal with these allegations as we do not think it productive and thus will only say that we deny the allegations and if the Court wishes further submissions, we will provide them. Further, by way of general reply, both Shelby and Catherine Twinn suggest that the 1985 Trustees have gone beyond the scope of what the Court invited them to explore in the instant Application. In fact, the 1985 Trustees prepared the Application document making specific reference to the comments of the Court on which the Application document was prepared.[16]

25. Catherine Twinn has asked the Court for costs. We do not agree that costs awards are appropriate for a completely voluntary participant, but if such costs are to be entertained, we would ask for an opportunity to make further submissions.

26. Shelby Twinn has not asked for costs. However, she has asked that the Court declare that the 1985 Trustees failed to meaningfully defend the interests of the 1985 Beneficiaries.[17] This requested relief is inappropriate for this Application. No such application was made and this relief should be denied.

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[15] Affidavit of Darcy Twinn sworn, filed September 26, 2019 at para 7(e), Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3948-3949 **[Book of Documents of Sawridge First Nation ("BOD") Tabs L and N]**.

[16] Application of the Sawridge Trustees filed September 13, 2019 and returnable November 27, 2019 at paras 8, 9.

[17] Written Brief of the Intervenor Shelby Twinn filed November 15, 2019 at para 22(c).

Collateral Attacks on Membership

27. Catherine and Shelby Twinn also spent a great deal of time attacking the membership process of the SFN. Both go as far as describing the SFN process as corrupt.[18] Again, this is an inappropriate line of attack. Catherine and Shelby Twinn's quarrel is ostensibly with SFN and their membership process. As has been outlined before, in *Sawridge #3*[19] the Court specifically held that it would not entertain arguments on membership in the SFN and made a specific direction that the parties "shall not engage in collateral attacks on membership process of SFN" and yet such arguments continue with increased vigor and increasingly inflammatory language.

Assets within the 1985 Trusts

28. Both Catherine Twinn and the OPGT question whether substantially all of the assets that were transferred to the 1985 Trust were in fact assets of the 1982 Trust. The understanding of the 1985 Trustees is consistent with the understanding of the SFN as outlined at paragraph 106 of the SFN's brief.

C. Options Before the Court

29. In light of the parties' submissions, the 1985 Trustees need to clarify their understanding of the potential consequences of the 2016 Consent Order, including the possibility of a subsequent transfer from the 1985 Trust to the 1986 Trust. The 1985 Trustees understood the Court had accepted that the 2016 Consent Order meant that the assets had *in fact* transferred to the 1985 Trust. This means that, at a minimum, the 1985 Trustees received legal title to the assets in question. The issue is the effect of the Transfer itself – that is, under what terms do the 1985 Trustees hold the assets and for the benefit of whom.

30. In this regard, and after reviewing the submissions of the other parties, there appear to be three eventualities before the Court as a result of this application:

(a) the 1982 Trust terms govern the 1985 Trust assets;

(b) the 1985 Trust terms govern the 1985 Trust assets, but a subsequent transfer to the 1986 Trust is permissible; or

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[18] Written Brief of the Respondent Catherine Twinn filed November 15, 2019 ("Catherine Twinn Brief") at para 15; Transcript of Proceedings – October 30, 2019 9:28-28 **[Catherine Twinn Brief TAB I]**.

[19] *1985 Sawridge Trust (Trustees of) v Alberta (Public Trustee),* 2015 ABQB 799 [*Sawridge #3*] at paras 32-35 and 69 **[TAB 4]**.

(c) the 1985 Trust terms govern the 1985 Trust assets and a subsequent transfer to the 1986 Trust is not permissible.

31. In the eventuality that the 1982 Trust terms govern the 1985 Trust assets, then the 1985 Trustees will accept that the definition of beneficiary means the members of the SFN. The 1985 Trustees propose a grandfathering application take place to address the rights of people who meet the definition of Beneficiary under the 1985 Trust deed but are not members of the SFN. This is consistent with the previous proposals made by the 1985 Trustees.

32. Regardless of the outcome of the grandfathering process, the 1982 Trust terms cure the discrimination and the within litigation would be at an end. While the parties may attempt to complicate this issue, the 1985 Trustees, as applicants, would be satisfied with the advice and direction of the Court.

33. Should this Court find that the 1985 Trust terms govern the 1985 Trust assets, but that the 1985 Trustees can transfer the 1985 Trust assets to the 1986 Trust, then the 1985 Trustees would likely proceed with that transfer but would again need to address the notion of grandfathering those beneficiaries of the 1985 Trust who are not members of the SFN. That said, subject to the grandfathering discussions, this litigation would be at an end and the 1985 Trustees would be satisfied with their ability to exercise their discretion to transfer the assets and thus cure the discrimination.

34. Should this Court find that the 1985 Trust terms govern the 1985 Trust assets and that a subsequent transfer to the 1986 Trust is not possible, then the litigation would continue. The next step would be to continue on with the jurisdictional application, the material for which has already been filed and served.

D. Conclusion

35. The time has come in this litigation for a pragmatic solution. It appears to the 1985 Trustees that the Court has been presented with two viable pragmatic options – that the 1982 Trust terms apply or a subsequent transfer to the 1986 Trust is possible. The 1985 Trustees would supplement either approach with an application on the grandfathering of those beneficiaries of the 1985 Trust who are not members of the SFN. It is hoped that the parties could come to an agreement on the issue of grandfathering but, if not, then the Court could have a limited role to play in that regard.

36. This protracted litigation has continually searched for a pragmatic solution that would cure discrimination and at the same time permit the discretionary distribution of assets to those in need. Until this happens, the assets of the 1985 Trust will continue to be held without the ability to benefit any person in need and will continue to be spent on litigation costs instead of funding those in need.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th OF November, 2019.

DENTONS CANADA LLP

PER: _____

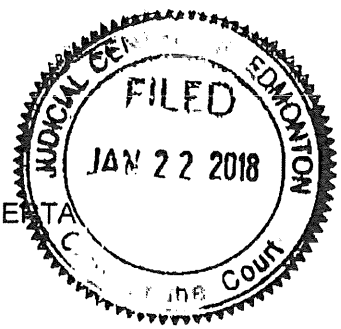
DORIS BONORA
MICHAEL SESTITO
Solicitors for the 1985 Sawridge Trustees

LIST OF AUTHORITIES

TAB	DESCRIPTION
1.	Consent Order granted by the Honourable Justice DRG Thomas January 19, 2018
2.	*Allan Estate, Re*, 1994 CanLII 9204, 1994 CarswellAlta 680 (ABQB)
3.	*Bruderheim Community Church* v *Board of Elders,* 2018 ABQB 90, 2018 Carswell Alta 213
4.	*1985 Sawridge Trust (Trustees of) v Alberta (Public Trustee),* 2015 ABQB 799 [*Sawridge #3*]

Tab 1

Clerk's stamp:



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

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

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

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

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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

JUSTICE: D.R.G. THOMAS
DATE: JAN 19, 2018
LOCATION: EDMONTON

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

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

for Clerk of the Court

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

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

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

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

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

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

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

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

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

IT IS HEREBY ORDERED AND DECLARED;

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

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

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

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

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

The Honourable D. R. G. Thomas

CONSENTED TO BY:

MCLENNAN ROSS LLP

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

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

SCHEDULE "A"

Clerk's stamp:

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

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

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

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

Tab 2

1994 CarswellAlta 680
Alta. Surr. Ct.

Allan Estate, Re

1994 CarswellAlta 680, [1994] A.W.L.D. 946, [1994] A.J. No. 795, 161 A.R. 292, 50 A.C.W.S. (3d) 1355

In the Matter of the Estate of Ethel Marguerite Allan, late of the City of Calgary, in the Province of Alberta, retired Executive Secretary, Deceased.

Mason Surr. Ct. J.

Judgment: October 20, 1994
Docket: Doc. 80590

Counsel: *Ms. Anne L. Kirker*, for the Estate.
L.N. Boddy, Esq., Q.C., for Individual Residual Beneficiaries.
John C. Armstrong, Esq., Q.C., for Pentecostal Tabernacle Church of Calgary.

Subject: Estates and Trusts

Headnote

Estates --- Construction of wills — Testator's intentions given effect

Interpretation of residual provisions of will — Whether or not class gift intended.

In her will, the testatrix dealt with the residue of her estate in two paragraphs. The first paragraph provided that the residue was to be divided into two equal shares and that the first equal share was to be transferred to various relatives who were listed, in the proportions stipulated, if they were to survive her. There was no gift-over to any one of the listed relatives should they predecease her, except for the gift to her brother and his wife. The second paragraph directed the payment of the remaining residue of her estate to a church for its own use absolutely. Three of the relatives listed in the first paragraph predeceased the testatrix. There was a dispute as to whether their share was to be divided proportionately among the remaining living relatives on the list as a class, or whether it fell into the remaining residue which was bequeathed to the church. Executor of the will brought a motion for the interpretation of the will and for advice on how the residue of the estate should be distributed. Held, the actual or subjective intention of the testatrix was that the remaining residue bequeathed to the church was to comprise not only the second equal share but also the share of any specified beneficiary who did not survive her. There was no indication that she had contemplated a class gift to the relatives listed in the first paragraph because each beneficiary was separately named and provided for rather than being considered a member of a whole group connected by some common tie. The fact that the testatrix had provided for one gift-over demonstrated that she had contemplated survivorship at the time she executed the will, but not for the whole group as a class. It was also significant that the will transferred the "remaining residue" to the church as opposed to the second "equal share".

Estates --- Legacies and devises — Class gifts — What constituting

Estates --- Legacies and devises — Residuary gifts — Form of residuary gift — Intention of testator

Estates --- Construction of wills — Testator's intentions given effect

Interpretation of residual provisions of will -- Whether or not class gift intended.

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Estates --- Legacies and devises — Class gifts — What constituting

Estates --- Legacies and devises — Residuary gifts — Form of residuary gift — Intention of testator

Wills — Residuary gifts.

In her will, the deceased directed that the residue of her estate be divided into two equal portions. One half of it was to be divided between seven named family members "if he or she survives me", and the remaining residue was bequeathed to a named church "for its own use absolutely". Three of the named beneficiaries predeceased the deceased, leaving no issue. The executor of the estate applied for advice and direction as to the interpretation of the residuary clause. *Held*, shares of deceased beneficiaries forming part of remaining residue bequeathed to church. In interpreting the provisions of the will, it was the court's duty to determine the subjective intention of the deceased from the ordinary meaning of the words used by her in her will. If that was not possible, then the court would be required to determine the disposition intended by the deceased by the language used and the meaning that language had for her, by placing itself in her position bearing in mind the facts and circumstances known to her at the time she made the will, then interpreting the meaning in that context. In disposing of the residue of her estate, the deceased divided it into two equal shares in order to facilitate the division of one part of the residue to specifically named beneficiaries in specific proportions, provided the particular beneficiary survived her. Survivorship between the named beneficiaries was addressed only in the case of her brother and his wife. It was not directed in any other case, even though two of the named beneficiaries were the sons of another of the named beneficiaries, who had predeceased the deceased. That part of the residuary clause did not in any way contemplate entitlement to a greater share of the estate by any named beneficiary than the portion specified. The second residuary provision, transferring the remaining residue to the church "for its own use absolutely", without referring to the "other share" of the two equal shares of residue contemplated that the remaining residue would comprise not only that other share but the share of a named beneficiary who did not survive the deceased. In determining whether a testator has intended a class gift, a court must consider whether there is a common tie between members of the group; whether the words used illustrated an intention on the part of the testator to deal with the members as a group, regardless of whether or not some or all of them are named; and whether the words or context illustrated an intention that, if one of the members were to predecease the testator, the surviving members should take his or her share. Other than the fact that all of the named beneficiaries were family members, the wording of the residuary clause yielded no indication that the deceased contemplated a class gift to her family members, but rather that each family member designated by name should be given a specific percentage of the residue providing that beneficiary survived her. That wording was a clear indication that the deceased contemplated and addressed the issue of survivorship at the time she made her will. Moreover, the subjective intention of the deceased was clear, from the ordinary meaning of the words used. The deceased intended to leave the remaining residue to the church, subject to the named beneficiaries who survived her taking their share. That was the reason for the wording of the second part of the clause, which negated any possibility of an intestacy for a failed bequest.

***Honourable Mr. Justice D.B. Mason* reasons for judgment:**

1 By Originating Notice of Motion, William P. Davis, the surviving Executor of the Estate of the late Ethel Marguerite Allan, seeks advice and directions as to how the residue of the said Estate should be distributed. All the interested and affected beneficiaries agree that the issue to be determined is which of two possible interpretations should be given to the residual provisions of her Last Will and Testament. The two possible interpretations are stated as:

(a) The "Individual Residual Beneficiary" interpretation;

(b) The "Pentecostal Tabernacle of Calgary" interpretation.

2 The residual provisions of the Last Will and Testament of Ethel Allan, made approximately one year after the death of her husband on the 23rd of September, 1975, provide as follows:

> 4 (d) To divide the residue of my estate into two (2) equal shares and to pay or transfer one of such equal shares to the following persons in the following proportions if he or she survives me:
>
> (i) Fourth-tenths (4/10) to my sister MRS. VICTORIA MAY TOMLINSON.
>
> (ii) Two-tenths (2/10) to my brother and his wife MR. LEONARD and MRS. ESTELLA GUEST or the survivor of them.
>
> (iii) One-tenth (1/10) to my nephew JAMES O. TOMLINSON.

(iv) One-tenth (1/10) to my nephew DAVID TOMLINSON.

(v) One-tenth (1/10) to my nephews daughter CINDY PAT TOMLINSON.

(vi) One-tenth (1/10) to my nephews daughter GILL KAREN TOMLINSON.

(e) To pay or transfer the remaining residue of my estate to the Pentecostal Tabernacle of Calgary, for its own use absolutely.

3 At the time she made the Will, Mrs. Allan, a widow had no children. Her only living relatives when she made her Will were the persons named in Clause 4(d). Her sister, Victoria May Tomlinson, predeceased her on November 11, 1990. Her brother, Leonard Guest, and her sister-in-law, Estella Guest. predeceased her on November 15, 1984 and June 17, 1991 respectively, without issue.

4 Ethel Marguerite Allan died on the 26th April, 1993 leaving an estate valued at approximately $5.5million.

5 The issue is whether the bequests to Victoria May Tomlinson and to Leonard and Estella Guest should be divided proportionately among the remaining relatives listed in that paragraph (the "Individual Residual Beneficiary" interpretation) or whether those bequests should be included as part of the bequest of "the remaining residue" to the Church pursuant to Clause 4(e) of her Will ("the Pentecostal Tabernacle of Calgary" interpretation.

6 Counsel for the surviving family beneficiaries argued that both Clauses 4(d) and (e) were residue clauses. Clause 4(d) was designed, he said, to leave one-half the residue to her family members as a class and the other one-half the residue to the Pentecostal Tabernacle under clause 4(e). This interpretation, he argued, was evidenced by four aspects of the wording used by the testatrix in Clause 4(d):

1. The opening words divide the residue into two equal shares which means the first share bequeathed to the family is equal to the second share bequested to the Church.

2. That the direction "to pay or transfer one such equal share to the following persons" are words of gift vesting the one share in those family members named therein.

3. That the phrase "in the following proportions if he or she survives me" defines only the portions not the vesting of the share of the residue in the family members. The earlier words quoted are the words that vest the share.

4. That the use of the phrase "the remaining residue" in Clause 4(e) does not refer to the whole of the residue but to the residue remaining after payment of the first equal share to the family.

7 The submission of Counsel for the family beneficiaries must rest on an interpretation that the Will devises the property to them as a class even though each is designated by name; and assigned a specific percentage without specific words addressing a gift over; except in the case of her brother, Leonard, and his wife, Estella, her sister-in-law, to whom she is related only by marriage.

8 Counsel for the Church proposed that given their ordinary meaning the proper interpretation of the residue provisions provide that in the event that a named beneficiary predeceases the testatrix, the amount so bequeathed reverts to the Church. He argued any other interpretation would defeat the wording of Clause 4(e).

9 The language in this second clause dealing with the residue, he submitted, was broader and more inclusive than the language in Clause 4(d). In his written submission, Counsel for the Church put the proposition this way:

The Will provides for the residue to be divided into two equal shares with one share directed to pass to specific persons in specific proportions. The wording of the Will does not include a gift-over to any one of the listed individuals, nor does it specify that if any of the individuals predecease the testatrix the other individuals listed in clause 4(d) would receive that individual's share proportionately. Of significance is the fact that paragraph 4(e) of the Will bequeaths to the Pentecostal

Tabernacle of Calgary, not the remaining *equal* share of residue by 'the remaining residue of her estate' which, when giving the words their ordinary meaning, is broad enough to encompass those residual gifts in paragraph 4(d) which fail due to those residual beneficiaries predeceasing the testatrix.

THE LAW

10 Both Counsel agreed than in interpreting the provisions of a Will, the duty of the Court is to determine the subjective intention of the testatrix from the ordinary meaning of the words used by her in the Will. If the Court cannot, then the Court must determine the disposition intended by the testatrix from the language used and the meaning that language had for her, by placing itself in her position bearing in mind the facts and circumstances known to her at the time she made the Will and then interpret the meaning in that context.

11 In *Re Coughlin*, 12 E.T.R. 59, Rutherford, J. set out the approach the Court must utilize in interpreting a Will in the following manner:

> The starting point, and in a sense the sole duty of the Court in construing the wording of a will, is to determine the subjective intention of the testator:
>
> > If the Court is able to deduce the testator's intention from the will, that will prevail. If the court cannot deduce his intention - and only if it cannot - it adopts the so-called 'rules of construction'. These are not in any sense rules of law which are binding on the testator; they are more rules of convenience applied by the court, more often than not in order to give some, rather than no, meaning to the will. (Mellows, *The Law of Succession* (3rd ed., 1977), at p. 148.)
> >
> > In construing a will, the aim of the Court of construction should be to determine the precise disposition of the property intended by the testator. The Court should attempt to ascertain, if possible, the testator's actual or subjective intent as opposed to an objective intent presumed by law. (Feeney, *The Canadian Law of Wills: Construction* (1978), at p. 1)
>
> It is precisely because it is the subjective intent which is to be determined from the instrument that the citation of past cases is so often said to be of little value in will construction cases.
>
> . . . . .
>
> In construing a will, furthermore, 'the Court has the right to ascertain all the facts which were known to the testator at the time when he made the will, and thus to place itself in the testator's position at that time' (Mellows, supra, at p. 167).

12 What is meant by "surrounding circumstances" is further elucidated upon by Rutherford, J. by quoting from Bayda, J.A. (as he then was) in the case of *Haidl et al. v. Sacher et al.* (1979), 106 D.L.R. (3d) 360 at 363:

> . . . surrounding circumstances' as used in these reasons refers only to indirect extrinsic evidence. It has no reference whatever to direct extrinsic evidence. It has no reference whatever to direct extrinsic evidence of intent, the admission of which is governed by a different set of conditions. The former consists of such circumstances as the character and occupation of the testator, the amount, extent and condition of his property; the number, identity, and general relationship to the testator of the immediate family and other relatives; the persons who comprised his circle of friends, and any other natural objects of his bounty. (see Feeney, *The Canadian Law of Wills: Construction* (1978), p. 17). An example of the latter is the instructions which the testator gave to his solicitor for the preparation of the will (as one finds, for instance, in *Reishiska v. Cody* (1967), 62 W.W.R. 581).
>
> These authorities make it clear that I must construe each portion of the will in light of the whole and in light of the circumstances in which Mrs. Hopkins found herself at the time she made the will.

13 It is upon this approach as sanctioned by the text writers, Mellows and Feeney, that I have reached my interpretation of the Last Will and Testament of Mrs. Allan.

14 It is not necessary, in my opinion, to resort to any of the" so-called 'rules of construction'" to deduce the intentions of Ethel Marguerite Allan with reference to the disposition of the residue of her estate. In disposing of the residue of her estate,

Mrs. Allan divided the residue into two equal shares in order to facilitate the division of one part of the residue to specifically named beneficiaries in specific proportions, provided the particular beneficiary survived her. Survivorship between the named beneficiaries is addressed but only contemplated in the case of her brother and his wife. It is not directed in any other case even though her nephews are the sons of Victoria May Tomlinson, the sister who predeceased her. Clause 4(d) does not in any way contemplate any greater share of her estate for a named beneficiary other than the specified proportion in each case.

15 The provision in 4(e) to transfer "the remaining residue of my estate to the Pentecostal Tabernacle of Calgary, *for its own use absolutely*", without referring to the "other share" of the two equal shares of residue contemplates that the remaining residue would comprise not only that other share but the share of a specified beneficiary who did not survive her.

16 The wording of the residue clauses yields no indication that Mrs. Allan contemplated a class gift to her family members. She designated each beneficiary by name and gave each a specific percentage of the residue providing that beneficiary survived her.

17 A class gift was defined years ago in *Kingsbury v. Walter*, [1901] A.C. 187. I quote particularly the judgment of Lord MacNaghten at p. 191, where he states:

> . . . I cannot help thinking that judges have at times concerned themselves more about the definition of 'a class,' about what is or what is not a 'class,' than about the language of the testator actually before them.
>
> In my opinion the principle is clear enough. When there is a gift to a number of persons who are united or connected by some common tie, and you can see that the testator was looking to the body as a whole rather than to the members constituting the body as individuals, and so you can see that he intended that if one or more of that body died in his life-time the survivors should take the gift between them, there is nothing to prevent your giving effect to the wishes of the testator.

18 From my reading of this and the other authorities cited to me, the determination of whether or not there has been a class gift intended by a testator (rix), the Court should have regard to the following:

> (a) Is there a common tie between the members of the group; that is, are they so described or is it clear that there is a recognized relationship having regard to the whole of the Will?
>
> (b) Do the words used illustrate an intention on the part of the testatrix to deal with the members as a group, regardless of whether or not some or all are named, again having regard to the provisions of the Will as a whole and to the particular provisions being addressed?
>
> (c) Do the words or context including surrounding circumstances illustrate an intention that if one of the members were to predecease the testator (rix), the surviving members should take his or her share?

19 As previously stated, only the fact that the named beneficiaries are family members (except for the sister-in-law) is there a common tie; each beneficiary is separately named and provided for in a separate and distinct fashion; there is no gift over of any specific bequest, except for the joint bequest between the deceased's brother and her sister-in-law. That, in itself, is an indication that survivorship was contemplated and addressed by Mrs. Allan at the time that she made her Will.

20 Even were I to consider the indirect extrinsic evidence adduced in these proceedings, my opinion as to the intention of the testatrix would not change. In this case, the subjective intention of the testatrix is clear, from the ordinary meaning of her words. She leaves whatever remaining residue to the Church, subject to the named beneficiaries who survive her taking their share. That, to me, is precisely the reason for the wording of Clause 4(e) which negates any possibility of an intestacy for any failed specific bequest.

21 Therefore, it is the ruling of this Court that the proper interpretation is the "Pentecostal Tabernacle of Calgary" interpretation as set out in Schedule B of the Originating Notice of Motion in these proceedings.

COSTS

Tab 3

2018 ABQB 90
Alberta Court of Queen's Bench

Bruderheim Community Church v. Board of Elders

2018 CarswellAlta 213, 2018 ABQB 90, [2018] 5 W.W.R. 332, [2018] A.W.L.D. 1746, [2018] A.W.L.D. 1747, [2018] A.W.L.D. 1778, [2018] A.W.L.D. 1780, [2018] A.W.L.D. 1782, [2018] A.J. No. 157, 15 C.P.C. (8th) 135, 290 A.C.W.S. (3d) 462, 66 Alta. L.R. (6th) 168

Bruderheim Community Church and Bruderheim Moravian Church (Applicants) and Board of Elders of the Canadian District of the Moravian Church In America (Respondent)

John T. Henderson J.

Heard: January 16, 2018
Judgment: February 9, 2018
Docket: Edmonton 1703-10116

Counsel: R.O. Langley, for Applicants
J.B. Laycraft, Q.C., G.J. Ludwig Q.C., R.E. Harrison, for Respondent

Subject: Churches and Religious Institutions; Civil Practice and Procedure; Estates and Trusts; Property

Headnote

Religious institutions --- Property rights of religious institutions — Miscellaneous

Grant of Land granted church lands to three individuals to hold in trust for purposes of congregation of M Church at B town — Respondent board of elders of religious denomination (BECD) later obtained legal title to church lands, which were occupied by applicant BM church — BM church left religious denomination M Church and incorporated applicant BC church as successor — BECD gave church notice to vacate property — BM and BC churches brought application for permanent injunction to prevent BECD from interfering with their continued use of church lands on ground that they were beneficiaries of trust as congregation of M church at B town — Application dismissed — Since transfer of church lands from original owners to BECD, BECD had held church lands in trust for congregation of M Church at B town — M Church's Book of Order contained reversionary clause that provided that all congregation property would vest in M Church where congregation severed its connection with M Church, which was enforceable as against members of BM church, although church lands were never asset of BM church — Words in trust declaration were M Church at B town, not BM church, so settlor intended lands to be used for purposes of local congregation in B town, in connection with worldwide religious organization, M Church — In order to be beneficiaries of trust, members of local congregation in B town must also be members of M Church — Members of BM church were at one point members of M Church but they no longer were because they voted to dissociate from M Church — BC church was non-denominational congregation that never had any relationship with M Church — Permanent injunction was not appropriate because BM and BC churches did not establish that they were beneficiaries of trust.

Remedies --- Injunctions — Procedure on application — Parties — Miscellaneous

Standing — Applicant BM church occupied buildings on land legally owned by respondent board of elders of religious denomination (BECD) — Church left religious denomination and incorporated applicant BC church as successor — BECD gave church notice to vacate property — BM and BC churches brought application for permanent injunction to prevent BECD from interfering with their continued use and enjoyment of church lands — Application dismissed — BM church was not proper party, but BC church had standing to bring application — BM church was not corporation, but was registered as "charitable organization", which was defined as including unincorporated organizations — BM church, as unincorporated association, was not legal entity which could sue or be sued, and was not capable of holding title to property — BC church was incorporated and was legal entity capable of commencing legal proceedings.

Estates and trusts --- Trusts — Express trust — Creation — Three certainties — Miscellaneous

Grant of Land provided for grant of church lands to three individuals to have and to hold lands in trust for purposes of congregation of M Church at B town — Respondent board of elders of religious denomination (BECD) later obtained legal title to church lands, which were occupied by applicant BM church — BM church left religious denomination M Church and incorporated applicant BC church as successor — BECD gave church notice to vacate property — BM and BC churches brought application for permanent injunction to prevent BECD from interfering with their continued use of church lands on ground that they were beneficiaries of trust as congregation of M church at B town — Application dismissed — Valid trust was created because three certainties were met, but BM and BC churches were not beneficiaries of trust — Grant of Land contained express trust language imposing imperative obligation on named trustees to hold property for benefit of congregation, which satisfied requirement for certainty of intention — Grant of Land expressly identified legal description of lands which were subject of grant, which satisfied requirement for certainty of subject matter — Grant of Land described beneficiaries as members of congregation of M Church at B town, which was static entity even if specific members changed — Grant of Land represented valid declaration of charitable purpose trust — Church lands were conveyed so that congregation would have place to build church for worship, which satisfied requirement for advancement of religion — Trust was public in nature as it benefited community at large by providing place for congregation to worship and engage in beneficial activities.

Estates and trusts --- Trusts — Express trust — Interpretation

Grant of Land granted church lands to three individuals to hold lands in trust for purposes of congregation of M Church at B town — Respondent board of elders of religious denomination (BECD) later obtained legal title to church lands, which were occupied by applicant BM church — BM church left religious denomination M Church and incorporated applicant BC church as successor — BECD gave church notice to vacate property — BM and BC churches brought application for permanent injunction to prevent BECD from interfering with their continued use of church lands on ground that they were beneficiaries of trust — Application dismissed — Since transfer of church lands from original owners to BECD, BECD had held church lands in trust for congregation of M Church at B town — Even though certificate of title did not refer to trust, original owners held property as trustees and could not convey to BECD any better title than they possessed — Words in trust declaration were M Church at B town, not BM church, so settlor intended lands to be used for purposes of local congregation in B town, in connection with specific religious organization, M Church — Reference to M Church in Grant of Land was to worldwide M Church organization with congregation in B town, and not to BM church — In order to be beneficiaries of trust, members of local congregation in B town must also be members of M Church — Members of BM church who voted to dissociate from M Church demonstrated clear choice to no longer be associated with M Church so they are not beneficiaries of trust — BC church was non-denominational congregation that never had any relationship with M Church, so it was not beneficiary of trust.

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Permanent injunctions — Threshold test — Violation of right

Grant of Land provided for grant of church lands to three individuals to have and to hold lands in trust for purposes of congregation of M Church at B town — Respondent board of elders of religious denomination (BECD) later obtained legal title to church lands, which were occupied by applicant BM church — BM church left religious denomination M Church and incorporated applicant BC church as successor — BECD gave church notice to vacate property — BM and BC churches brought application for permanent injunction to prevent BECD from interfering with their continued use of church lands on ground that they were beneficiaries of trust as congregation of M church at B town — Application dismissed — Permanent injunction was not appropriate — Before permanent injunction could be granted, BM and BC churches must establish that they had interest in church lands — BM and BC churches did not establish that they were beneficiaries of trust to church lands — Members of BM church who had chosen to become disassociated from M Church were no longer beneficiaries of trust — Members of BC church never had any relationship with M Church — BC church did not represent any person in B town who continued to be members of congregation of M Church.

APPLICATION by churches for permanent injunction to prevent board of elders from interfering with their continued use and enjoyment of church lands.

***John T. Henderson J.*:**

I. INTRODUCTION

1 This case highlights some of the consequences that can arise when a local church congregation elects to disassociate from the main church.

2 In May 2016, a local congregation decided to disassociate from the Moravian Church in America. After some failed discussions, the Respondent took steps to attempt to gain control over the assets of the local church.

3 On May 31, 2017, the Court granted an interim injunction prohibiting the Respondent from requiring the Applicants to vacate lands in the Town of Bruderheim, Alberta, on which the church building is situated ("Church Lands"): *Bruderheim Community Church v. Moravian Church in America (Canadian District)*, 2017 ABQB 355, [2017] A.J. No. 548 (Alta. Q.B.), appeal dismissed 2017 ABCA 343 (Alta. C.A.). The injunction was granted on terms that would allow worshipers who had not joined the Bruderheim Community Church ("Community Church") to continue to hold regular services in the church buildings.

4 The Applicants now apply for a permanent injunction and other ancillary relief to prevent the Respondent from interfering with the Applicants' continued use and enjoyment of the Church Lands. They claim that they are, or that they represent, the "Congregation of the Moravian Church at Bruderheim" and that the Respondent holds the Church Lands in trust for them.

5 The Respondent seeks dismissal of the application, arguing that the Applicants have no beneficial interest in the Church Lands.

II. PARTIES

A. Applicants

6 The Applicant, Community Church, was incorporated on April 4, 2017 under the *Religious Societies Land Act*, RSA 2000, c R-15. The Declaration of Incorporation discloses that it is a "Non-Denominational" congregation and that those people entitled to vote on church business are "all active members of the church".

7 The other Applicant, Bruderheim Moravian Church, is an unincorporated association. For more than 120 years, members of the Bruderheim Moravian Church have celebrated their faith at a church located on the Church Lands.

8 Bruderheim Moravian Church has been registered with the Canada Revenue Agency as a registered charity since January 1, 1967. The Registered Charity Information Return for the year ending December 13, 2015 discloses that its activities include regular Sunday School, adult/children, regular worship services, junior/senior high youth programs, youth ministry focusing on community outreach, community family events, support of missionary requests, Operation Christmas Child, and a Breakfast Program in a local school.

B. Respondent

9 The Respondent, the Board of Elders of the Canadian District of the Moravian Church in America ("Board of Elders"), was incorporated in 1909 by a statute of Canada. It has been extra- provincially registered in Alberta as a non-profit corporation since 1953.

10 The Board of Elders is associated with the *Unatis Fratrum*, which is the formal name for the worldwide Moravian Church ("Moravian Church"). The Moravian Church operates through twenty-four geographical divisions which are referred to as "provinces", one of which is the Moravian Church, Northern Province (the "Northern Province"). The Northern Province is a body corporate located in Bethlehem, Pennsylvania and consists of approximately 90 congregations, eight of which are in Canada, seven of those being in Alberta.

11 The Northern Province's constitutional document, the Book of Order, provides for the governance of the Moravian Church within the Northern Province. In accordance with the Book of Order, the Northern Province is governed by the Provincial Elders Conference ("Provincial Conference"), an unincorporated association which is responsible for administering the 90

congregations. The Board of Elders assists the Provincial Conference with the administration of the eight congregations in Canada.

III. BACKGROUND

A. Moravians' Arrival in Bruderheim

12 The Bruderheim community north-east of Edmonton was first settled by a small group of German-speaking immigrants from Volhynia, Russia in 1894. Andreas Lilge was one of the first settlers to arrive in the Bruderheim area and was at least partially responsible for organizing the arrival of others as a result of his efforts in negotiating with the Dominion government for homestead sites near Bruderheim.

B. Contact with the Moravian Church

13 By October 1894, Lilge began communications with the Moravian Church with a view to developing an association with it. While the Moravian Church was not initially prepared to designate Bruderheim as a "Home Mission Congregation", it did make arrangements to send some text books and catechisms to be used by the settlers.

14 On May 6, 1895, a group of men and women signed a charter membership roll which established a congregation known as the "Bruderheim Moravian Church". Lilge was an organizer of the congregation and, at least initially, began holding church services in his own home. Despite its name, the congregation did not have any formal relationship with the Moravian Church at that time.

15 During 1895, Lilge continued to communicate with the Moravian Church regarding the potential for an affiliation. Ultimately, on December 17, 1895, a formal relationship came into existence when the Provincial Conference resolved that they had "undertaken" the congregation at Bruderheim.

16 By February 1896, a Pastor had been assigned to the Bruderheim Moravian Church. The pastor also provided services to the Buderfeld Moravian Church south of Edmonton (now the Millwoods Community Church).

C. Acquisition of Land to Build a Church

17 In February 1896, active steps were taken by the Bruderheim Moravian Church to acquire land for church purposes. By letter dated February 14, 1896 to the Canadian Pacific Railway ("CPR"), Lilge requested that the railway provide the grant of the land.

18 On March 11, 1896, the Canadian Land Commissioner wrote to the Bruderheim Moravian Church to advise that the land request would be granted through a process by which the CPR would re-convey a 40 acre parcel of land in Bruderheim to the Dominion of Canada, which would in turn provide a grant of the land for the purpose of a church.

19 On April 14, 1897, a Grant of Land was given under the "Great Seal of Canada" and it was recorded in the Department of the Interior by the Registrar of Dominion Lands Patents on April 22, 1897. The lands described in the 1897 Grant of Land were the "fifty-fifth township in the Twentieth range west of the fourth meridian in the Provisional District of Alberta, in the North West Territories in Our Dominion of Canada and being composed of Legal Subdivision thirteen of Section thirty-three of the said township containing . . . 40 acres more or less" (the "Original Church Lands"). The 1897 Grant of Land was made to:

> . . . Wilhelm Lilge, Frank Heffner and Gustav Werner, their successors and assigns forever, in trust, for the purposes of the Congregation of the Moravian Church at Bruderheim aforesaid and to be devoted to public purposes within the meaning of Clause thirty one of [*The Dominion Lands Act*].
>
> (emphasis added)

20 The current Director of Land Titles and Surveys North has sworn an affidavit which explains that this notation on the 1897 Grant of Land is referred to as a "Habendum Clause" which is defined as "the part of a deed that defines the extent of interest being granted and any condition affecting the grant".

21 A church building was constructed on the Original Church Lands in 1896 or 1897. The Minutes of the Provincial Conference in 1896 disclose a commitment to provide "hardware, glass and other material needed for the buildings" at the expense of the Provincial Conference. $300 was dedicated for this purpose. Over the years, additional improvements have been made to the lands and a cemetery was developed. There is no evidence that the Provincial Conference contributed to the cost of any improvements subsequent to the original construction. However, the local congregation has made substantial contributions to the upkeep and development of the Original Church Lands. The total amount of this investment over the years is estimated at $2 million.

D. Title to the Church Lands

22 The first Certificate of Title for the Original Church Lands was issued out of the North Alberta Land Registration District on May 20, 1907. It certified that "Wilhelm Lilge, Frank Heffner, and Gustav Werner, all of Bruderheim . . . Trustees of the Moravian Congregation of Bruderheim ... [are] now the owner[s] of an estate in fee simple". The Habendum Clause from the 1897 Grant of Land was incorporated into the Certificate of Title.

23 On May 19, 1909, the Parliament of Canada incorporated the Board of Elders by way of *An Act to incorporate the Board of Elders of the Canadian District of the Moravian Church in America*, 8-9 Edward VII, c 112. The preamble to the legislation records that the Petitioners were members of the Moravian Church in America who had been carrying on various church activities in Canada and that "in the course of their work some of them have acquired land which they desire to transfer to the corporation hereby created".

24 The legislation specifically permitted the Board of Elders to own land and other property for the purposes of the work of the Board of Elders or the Moravian Church in America. It also contemplated that the Board of Elders could hold some of the lands in trust:

> 8. In so far as authorization by the Parliament of Canada is necessary, any person or corporation in whose name any property, real or personal, is held, in trust or otherwise, for the uses and purposes aforesaid, or any such person or corporation to whom any such property devolves, may, subject always to the terms and conditions of any trust relating to such property, transfer such property or any part thereof to the Board [of Elders] to be held in such trust, if any.
>
> (emphasis added)

25 At a meeting of the council of the Bruderheim Moravian Church held on August 23, 1909, it was reported that the District board (the Board of Elders) had been incorporated. A resolution of the Bruderheim Moravian Church was unanimously adopted to:

> . . . transfe[r] the church property to the District board, which is now incorporated, which was unanimously adopted by those present. Bro. Hoyler should make out the necessary papers. At the same time Bro. Hoyler promised to have a security paper made out for the congregation that especially the southern 40 acres are only held in trust for the congregation. These were the case in other congregations, too. This action saves the congregation the cost for being incorporated itself. And as a corporation the District board can deal better with the C.N.R.

26 Approximately three years later, in October 1912, the transfer of the Original Church Lands to the Board of Elders was effected by Instrument Number 7840AM. The current Director of Land Titles North, Curtis Woollard, has certified that this document has been lost and therefore there is no evidence regarding any conditions which may have been imposed in relation to the transfer.

27 A new Certificate of Title was issued in relation to the Original Church Lands on October 18, 1912. It certified that the Board of Elders were "the owner of an estate in fee simple". This Certificate of Title, as originally issued, did not make any reference to the Habendum Clause.

28 The Certificate of Title in the name of the Board of Elders remained unchanged for approximately 10 years until March 26, 1922, when the Registrar of the North Alberta Land Registration District corrected the title to include the following clause:

> subject to the condition that the same shall be held in trust for the congregation of the Moravian Church at Bruderheim and be devoted to public purposes only.
>
> (emphasis added)

29 Thus the Habendum Clause was added in the corrected title. It is identical in its terms to the clause described in the 1897 Grant of Land.

30 Title to the Original Church Lands remained unchanged until 1950 when portions of the Original Church Lands were sold. The minutes of the Bruderheim Moravian Church council meeting of June 16, 1947 record a discussion about seeking tenders for the sale of 20 acres.

31 A Bruderheim Moravian Church council, at a meeting held in September 1950, again considered the sale of a portion of the Original Church Lands. The minutes read in part:

> There was an open discussion regarding the sale of the church land, namely the offer that we had received from Western Leesholds [sic] which was $4500 for all western frontage.
>
> There was a motion made by Ted Sampert and G.L. Schultz that we accept the offer from Western Lesseholds [sic] of $4500 for either ten or twelve acres or $^{1}/_{2}$ of the 27 acre plot less frontage of between 100 and 200 feet for reserve for a cemetary [sic] and less 33 feet frontage for a road allowance. Carried unanimously.
>
> The board was given authority to act for the sale of the church land in the best interests of the church upon motion made by Wm Sampert and Clarence Frauenfeld. Carried
>
> On a motion by GL Schultz and WM Arndt it was decided to get clearance on our title of all church land, from the gov't, except that which is to stay for the immediate church grounds.
>
> (emphasis added)

32 By October 1950, the Bruderheim Moravian Church had retained lawyers to seek amendments to the Habendum Clause, presumably to facilitate a sale of a portion of the Original Church Lands. On October 11, 1950, the Government of the Province of Alberta through the Deputy Minister, Department of Lands and Forests, for a fee of $96, granted a Partial Release which purported to modify the trust conditions described in the Habendum Clause. The Partial Release expressly declares that the Habendum Clause was amended in relation to all of the Original Church Lands, except the northwest corner of the lands measuring 600 feet by 600 feet, or approximately 8.26 acres. The amendment provided that, with respect to the remaining 31.74 acres, the "trust condition requiring the said portion to be used for public purposes and for no other purpose . . . shall from henceforth cease and determine".

33 While there is no direct evidence on this point, it is apparent that 13.21 acres of the Original Church Lands were sold sometime after September 1950 and two small parcels (0.83 acres and 0.1 acres) were expropriated for road allowances. This is consistent with the minutes from the September 1950 Bruderheim Moravian Church council meeting.

34 There is no evidence before the Court as to the consideration received from the sale of the 13.21 acres. Nor is there any evidence as to who ultimately received the consideration for the sale of the land or the use to which the sale proceeds were put.

35 The post 1950 Certificates of Title regarding the Church Lands which are in evidence show that the lands consist of a total of 25.86 acres.

36 The Certificate of Title was renewed on February 7, 1977. It certifies that the Board of Elders is the owner of an interest in fee simple of the Church Lands. The certificate also records a partial discharge of the Habendum Clause.

37 On March 15, 1990, the Province of Alberta, Consumer and Corporate Affairs directed that a habendum clause be added to the Certificate of Title to disclose that Church Lands had been designated for cemetery purposes only and that in accordance with the *Cemeteries Act*, title should not be altered in any way without prior approval from the Director, Licensing of Trades and Business (the "Cemetery Habendum Clause").

38 On January 29, 1991, the Certificate of Title was cancelled and a new one was issued when the Land Titles office converted from a paper based system to a computer based system. Both that new Certificate of Title and the current Certificate of Title certify that the Board of Elders is the registered owner in fee simple of the Church Lands subject only to the Cemetery Habendum Clause. The current Certificate of Title does not refer to any portion of the Church Lands being held in trust for the congregation.

39 The current Director of Land Titles and Surveys North has sworn in an affidavit that his review of the files does not disclose any reason or instrument which would explain why the Habendum Clause with respect to the trust was removed from title.

E. Dispute between Bruderheim Moravian Church and the Northern Province

40 Tensions had been developing for many years between the Bruderheim Moravian Church and the Provincial Conference focusing mainly on the inability of the Provincial Conference to provide the local congregation with pastoral care as well as some differences in scriptural interpretation and doctrine.

41 In June 2014, the Northern Province held a Synod which adopted a resolution by which "individuals regardless of sexual orientation and whether single, married or in a covenanted relationship" could be ordained and considered clergy in the Northern Province. This resolution was of concern to the members of the Bruderheim Moravian Church who at a meeting held on June 26, 2014 decided that the congregation's payment of "quotas" to the Northern Province would be withheld until such time as the views of the members could be solicited on a range of issues, including the direction that had been taken by the Northern Province and the direction of the local ministry in Bruderheim.

42 By March 2015, the congregation's concerns regarding the disparity between its beliefs and the beliefs of the Northern Province had intensified. As a result, the annual Church Council passed a resolution at a meeting on March 22, 2015 giving the board of the Bruderheim Moravian Church authority to "further expand the pastoral search to include outside denominations that are compatible with the beliefs of our congregation". In approximately May 2015, the Bruderheim Moravian Church hired Wayne Larson as its pastor. Pastor Larson had no prior history with the Moravian Church and, at the time of his hiring, had spent the majority of his ministry life with the Canadian Baptists of Western Canada.

43 At a Bruderheim Moravian Church Special Counsel Meeting held on May 1, 2016, members of the congregation discussed their ongoing concerns regarding the positions taken by the Northern Province. The minutes of the meeting recorded the following:

> For close to two years, we have been separated from the Northern Province financially (in not paying our quotas), as well as mentally and spiritually. We share different beliefs and have varying priorities when it comes to the Bible and its relevance to our spiritual life. Hence, our resolution to seek independence as considered at our annual Church Council in 2015 and reported again at our Annual Church Council, 2016.

44 At the conclusion of the May 1, 2016 meeting, the board of the Bruderheim Moravian Church resolved "to disassociate . . . from the Moravian Church, Northern Province and become . . . an independent congregation". The decision to disassociate from the Northern Province was supported by 49 members of the congregation. Only three members voted against the resolution.

45 In light of the position taken by the congregation, Northern Province called for a further Bruderheim Moravian Church special meeting to be held on June 6, 2016. The meeting was to be held in accordance with the Book of Order. Pursuant to Article 119(i) of the Book of Order, only the Provincial Conference may dissolve a congregation, although a congregation may request its own dissolution.

46 At the June 6, 2016 meeting, the congregation was asked to consider a motion to request that the Provincial Conference dissolve the Bruderheim Moravian Church and that all of its property become vested in the Provincial Conference. The congregation of the Bruderheim Moravian Church voted against this resolution by a vote of 53 to one. The resolution was rejected after it was explained to the congregation that under the Book of Order, property owned by Bruderheim Moravian Church would vest in the Provincial Conference on dissolution.

47 Following the June 6, 2016 meeting, the Bruderheim Moravian Church began to take steps to consider the structure of a new church entity. A draft set of by-laws of the new Community Church were prepared in that regard. The proposed bylaws were discussed at a Special Church council meeting held on January 22, 2017. They made no reference to the Moravian Church, the Northern Province, its governance structure, or the Moravian faith. They included the following:

> B. Purpose and Affiliation
>
> Bruderheim Community Church is a Christian faith community proclaiming Jesus Christ as Saviour and Lord, celebrating life and freedom through worship, fellowship, discipleship and service.
>
> The Church is an independent and self-governing evangelical congregation committed to the authority of the Scriptures as the word of God, and to belief in a personal relationship with Jesus Christ as Saviour and Lord.
>
> C. Organization
>
> For governing the affairs of this church, authority and responsibility shall be vested in the active membership of this congregation. The church shall be congregational in government and democratic in practice. The governing board of the church shall be the Church Board, which is directly responsible to the congregation.
>
> (emphasis added)

48 At the January 22, 2017 meeting, 45 members voted in favour of accepting the proposed bylaws. Four members abstained. None opposed the resolution.

49 The Board of Elders came to the conclusion at its March 6, 2017 meeting that the Bruderheim congregation "had no intention of remaining within the . . . [Moravian Church-Northern Province] or associating with the denomination in any capacity". This prompted the Board of Elders on March 15, 2017 to recommend to the Provincial Conference that it dissolve the Bruderheim Moravian Church, and it purported to do so effective March 16, 2017.

50 On March 22, 2017, the Northern Province advised representatives of the Bruderheim Moravian Church that all real and personal property associated with the Bruderheim church reverted to the Northern Province. The Provincial Conference also demanded that the church property be vacated by May 31, 2017.

51 At a Special Council Meeting of the Bruderheim Moravian Church on April 9, 2017, a motion was passed by a vote of 58 to two to incorporate under the *Religious Societies Land Act*. As a result, the Community Church was incorporated on April 11, 2017.

52 By letter dated May 25, 2017, the president of the Provincial Conference informed readers that "those preparing to start a community church in Bruderheim are celebrating their last Sunday in the building on May 28". She also invited those who "do not wish to join the congregation that is leaving the Moravian Church" to attend a "Moravian worship service"

commencing at 2:00 p.m. on Sunday, June 4 and each Sunday thereafter. Her letter indicated that "Moravian clergy from Edmonton congregations will lead this weekly worship service".

53 The Applicants obtained an interim injunction on May 31, 2017 enjoining the Respondent from interfering with their use and enjoyment of the church property.

54 While the evidence is not entirely clear on this point, a small number of worshipers who do not wish to disassociate from the Moravian Church have continued to attend services in the church building each week. There is no evidence that either of the Applicants is associated with or represents any of these persons.

IV. PARTIES' POSITIONS

55 The foundation of the Applicants' argument is that a trust was created at the time of the original 1897 Grant of Land pursuant to which title was to be held in trust in perpetuity for the congregation. The Applicants argue that on transfer of title to the Respondent, it became the trustee, holding the property for the purposes of the congregation of the Moravian church at Bruderheim. The settlor's intention was to support the congregation at Bruderheim, not an international church. The Applicants submit that the Respondent acted contrary to the interests of the Bruderheim Moravian Church by recommending dissolution, was accordingly in breach of trust, and ought to be replaced as trustee by the Community Church under s. 16 of the *Trustee Act*, c T-8, RSA 2000, or the trust varied to effect the same result under s. 20 of the *Religious Societies Land Act*.

56 The Respondent initially took the position that the Moravian Church had dissolved the Bruderheim Moravian Church and therefore all of the church property had reverted to the Moravian church. However, counsel conceded in argument before me that the Respondent holds the Church Lands in trust for the "Congregation of the Moravian Church at Bruderheim" to the extent that any such entity continues to exist. The Respondent submits that the Bruderheim Moravian Church was a member congregation of the Northern Province, and agreed to be bound by the rules, procedures and constituting documents of the Northern Province. The Book of Order establishes the contractual relationship between the parties and is the only written document to outline that relationship. Under s. 1046 of the Book of Order, Bruderheim Moravian Church's property reverts to the Northern Province on its dissolution. Article VII(5) of Bruderheim Moravian Church's congregation Handbook similarly provides that all of its property reverts to the Provincial Conference of the Northern Province if the congregation disbands or secedes to another denomination. The Respondent submits that the Bruderheim Moravian Church as currently constituted is not the beneficiary of any trust as it is no longer a congregation of the Moravian Church. The Respondent further submits that the Community Church has no standing. It did not exist prior to April 2017, and has no relationship with the Moravian Church.

V. TEST FOR PERMANENT INJUNCTION

57 Permanent injunctions are granted after a final adjudication of rights, whereas interlocutory injunctions are imposed in ongoing cases: see Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (Toronto: Canada Law Book, 2013), at para. 1.40, citing *Liu v. Matrikon Inc.*, 2007 ABCA 310, [2007] A.J. No. 1088 (Alta. C.A.) at para 26; *Irving Oil Ltd. v. Ashar*, 2016 ABCA 15 (Alta. C.A.) at paras 17-8, (2016), 609 A.R. 388 (Alta. C.A.); *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, [2014] O.J. No. 697 (Ont. C.A.) at paras 77-9.

58 In order to obtain a permanent injunction, the Applicants must establish their legal rights, that damages are an inadequate remedy, and that there is no impediment to the Court's discretion to grant an injunction: *1711811 Ontario* at paras 74-80, *Liu v. Hamptons Golf Course Ltd.*, 2017 ABCA 303, [2017] A.J. No. 972 (Alta. C.A.) at para 17.

VI. ISSUES

59 In order to determine whether to grant a permanent injunction in this case, the Court must consider the following issues:

A. Do the Applicants have legal status or standing to seek a permanent injunction?

B. Was a valid trust created at the time of the 1897 Grant of Land?

C. Did the Respondent take title subject to a trust in 1912 and has that trust continued?

D. If there is a trust, who are the current beneficiaries?

1. What is the relevance of the institutional context?

2. What is the "Moravian Church at Bruderheim"?

3. Do the Applicants Represent Members of the Moravian Church?

E. Are the Applicants entitled to a permanent injunction?

VII. DISCUSSION

A. Do the Applicants have legal status or standing to seek a permanent injunction?

60 The Bruderheim Moravian Church is not a corporation under the *Religious Societies Land Act*, the *Societies Act*, RSA 2000, c S-14, or any other act. It is registered as a "charitable organization", defined under the *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 149.1(1) as including unincorporated organizations, such as those organizations established as a trust or under a constitution. It is not a legal entity which can sue or be sued.

61 The status of an unincorporated association is addressed by Eileen Gileese in *The Law of Trusts*, 3rd ed (Toronto: Irwin, 2014) at 77: "As an unincorporated association is not a legal entity it is not capable of holding title to property, nor can it exercise any other legal rights, powers, or duties associated with legal personhood".

62 Donald J Bourgeois, *The Law of Charitable and Not-for-Profit Organizations*, 5th ed (Toronto: LexisNexis 2016) at 23-24 describes in more detail the nature of unincorporated associations and their general inability to sue or be sued:

> An unincorporated association . . . is, essentially, an agreement among a number of persons which articulates their common purpose, establishes an organization to achieve that common purpose and sets out how the organization is to be operated to achieve that purpose. The relationship among the persons is contractual in nature. The courts sometimes refer to these organizations as "voluntary associations." ...
>
> Generally, an unincorporated association is not viewed as being a "person" and will not have the legal capacity to sue or be sued, absent other legal factors. But the law develops in this area. For example, the Ontario Court of Appeal in *Professional Institute of the Public Service Alliance of Canada v. Canada (Attorney General)* concluded that trade unions had a legal status to assert their rights in court, including common law rights, absent clear contrary legislation, in particular where there is sufficient private or special interest in the subject matter, such as federal pension legislation. Organized athletic activity is another area in which the law recognizes that associations may properly be named as a party to an action.

(emphasis added)

63 The development of the law as described by Mr. Bourgeois has not extended to religious organizations. In *Indian Residential Schools, Re*, 2001 ABCA 216, [2001] A.J. No. 1127 (Alta. C.A.), the Court held that the "Roman Catholic Church" is not a legal entity that could sue or be sued.

64 The Applicants argue that the Bruderheim Moravian Church is a "quasi-corporation" and as a result can advance this action. They refer me to *S. (J.R.) v. Glendinning*, [2000] O.J. No. 2695 (Ont. S.C.J.) at para 10, (2000), 191 D.L.R. (4th) 750 (Ont. S.C.J.). What is referred to in that paragraph is the right under the *Ontario Religious Organizations' Lands Act* for trustees to hold legal title to church lands for the benefit of the congregation in a way to permit perpetual succession. *Glendinning* does not suggest that an unincorporated congregation is a quasi-corporation or that, as an unincorporated corporation, a congregation can sue or be sued. The *Glendinning* decision provides no assistance to the Applicants.

65 However, an unincorporated association is not without a remedy to enforce the terms of a charitable trust. The Provincial Attorney General may exercise his or her *parens patriae* jurisdiction and commence the proceedings to enforce a charitable trust. A private litigant can also initiate proceedings in the name of the Attorney General after obtaining the consent of the Attorney General: Robert J Sharpe, *Injunctions and Specific Performance*, loose-leaf (Toronto: Canada Law Book, 2013) at paras 3.40-3.50.

66 In *Fernie District Fire Relief Committee v. Bruce* (1911), 17 W.L.R. 425, [1911] B.C.J. No. 112 (B.C. C.A.), it was held that the Attorney General is the only person who can commence and carry on an action on behalf of an unincorporated public charity.

67 I conclude that Bruderheim Moravian Church is not a legal entity. It has no ability to sue or be sued and is not a proper party to this litigation. Wakeling J.A., dissenting, came to the same conclusion on the appeal of the interim injunction in this matter: 2017 ABCA 343 (Alta. C.A.) at para 41. The majority did not address the issue.

68 The Community Church was incorporated on April 11, 2017. It is therefore a legal entity and is capable of commencing legal proceedings. It claims to represent the beneficiaries of the trust. As a result, I conclude that the Community Church does have standing, at least on this issue.

69 In case I am found to have erred in concluding that the Bruderheim Community Church does not have standing, I will address the substantive issues raised by the parties before me as they relate to both of the Applicants.

B. Was a valid trust created at the time of the 1897 Grant of Land?

70 Creation of an express trust requires the presence of three certainties, namely intention, subject matter, and object: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 83, [2010] 3 S.C.R. 379 (S.C.C.).

71 The 1897 Grant of Land provides for a grant to three named individuals:

> To have and to hold the said lands . . . in trust for the purposes of the Congregation of the Moravian Church at Bruderheim aforesaid and to be devoted to public purposes within the meaning of Clause thirty-one of [*The Dominion Lands Act*].

72 The *Dominion Lands Act*, RSC 1886, c 54, s 31, proclaimed in force on March 1, 1887, provided the authority for the 1897 Grant of Land which contained express trust language imposing an imperative obligation on the named trustees to hold property for the benefit of the congregation. The wording in the 1897 Grant of Land satisfies the requirement for certainty of intention. A mechanism for appointing successor trustees had been established through *An Ordinance Respecting the Holding of Lands in Trust for Religious Societies and Congregations* which had been enacted on November 16, 1886 by the Lieutenant-Governor of the North-West Territories in Council ("Ordinance No. 5").

73 The 1987 Grant of Land also expressly identified the legal description of the lands which are the subject of the grant, thereby satisfying the requirement for certainty of the subject matter.

74 Certainty of objects requires that the persons or the class of persons who are the intended beneficiaries must be sufficiently certain so that the trust can be performed. Certainty of objects is required because the trustee cannot be sure that he is performing properly unless the objects are clearly specified.

75 The language in the 1897 Grant of Land does not specify any particular individuals who are beneficiaries but instead describes the beneficiaries as members of a congregation.

76 In *Inc. Synod of the Diocese of Huron v. Delicata*, 2013 ONCA 540, 117 O.R. (3d) 1 (Ont. C.A.), leave denied (2014), [2013] S.C.C.A. No. 439 (S.C.C.), Canon 14 enacted by the Synod provided that legal title to all real property held by any parish within the diocese must be registered in the name of the Synod, which held such property "in trust for the benefit of the Parish or congregation". The trial judge held that the "Parish" for which the property was held in trust is a static entity. Although members might come and go, the parish itself would remain constant and could not sever itself from the Diocese. The Diocese

retained control over church property in perpetuity for the benefit of members of the Diocese. The trial judge found that the *Anglican Church of Canada Act*, SO 1979, c 46 also supported this conclusion, as s. 2(1) requires the consent of the diocesan bishop and the Synod's executive committee to any sale, lease or encumbrance of church land.

77 On appeal, the Court in *Delicata* upheld the trial judge's interpretation of "Parish or congregation" as necessarily denoting a static entity that could not be severed from the Diocese and was not defined by any particular group of members at any particular time. The alternative interpretation of a fluid entity was contrary to the intent that the Diocese was to retain control over all church property for the benefit of its members.

78 The same reasoning applies in this case. By the time of the 1897 Grant of Land, a formal relationship had come into existence as the Provincial Conference had by that time "undertaken" the congregation at Bruderheim. Although the object in 1897 was but a fledgling congregation, it was nevertheless a static entity located in Bruderheim which identified with the Moravian Church. There is no suggestion that there was any uncertainty as to what group constituted that entity from 1895 to 2014. It appears, from the plain wording of the Grant of Land, that the settlor intended the property would be held in trust for the benefit of whatever group of members constituted that entity at any given time.

79 The Applicants argue that the 1897 Grant of Land gives rise to a charitable purpose trust, citing *Nova Scotia (Attorney General) v. Axford* (1885), 13 S.C.R. 294, [1885] S.C.J. No. 40 (S.C.C.) and *Weatherby v. Weatherby* (1927), 53 N.B.R. 403, 1927 CarswellNB 20 (N.B. Ch.).

80 A charitable purpose trust is one which is set up to accomplish public purposes. The paramount obligation of a charitable trust is the fulfilment of a task that the creator of the trust wishes the trustee to perform through the use of the trust property: Eileen Gileese, *The Law of Trusts* 3rd ed (Toronto: Irwin, 2014) at p 61. A charitable trust must: 1) be within at least one of the accepted categories of charity; 2) be sufficiently public in nature; 3) be of benefit to society; 4) be exclusively charitable in purpose; and 5) not be for a political purpose.

81 One of the categories of charity which can give rise to a charitable purpose trust is the "advancement of religion": *Pemsel v. Special Commissioners of Income Tax*, [1891] A.C. 531 (U.K. H.L.) at 582. In Canada, the common law recognizes a gift on trust for the development, building or repair of a church as charitable: Donovan WM Waters et al, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto, Carswell, 2012) at 746-748.

82 The Original Church Lands were conveyed by the Dominion of Canada so that the Bruderheim congregation would have a place to build a church for worship. This satisfies the requirement for "advancement of religion". There is an assumption that such a trust is public in nature because it benefits the community at large or, at least, a significant segment of the community. The public hurdle is met since most religions want as many people as possible to subscribe to their beliefs: Gileese, *The Law of Trusts* at 67. Not all religious activity meets the third requirement of being of benefit to society: *Gilmour v. Coates*, [1949] A.C. 426 (U.K. H.L.). However, in this case the trust was of benefit to the public since it provided lands on which a church congregation could worship and engage in other activities which would be of benefit to the community. Furthermore, the express terms of the 1897 Grant of Land mandated that the lands were to be "devoted to public purposes". As a result, the public benefit requirement is also met. The trust was exclusively charitable because the primary function of the trust was to advance religion, a charitable purpose: Gileese, *The Law of Trusts* at 69. Finally, there is no indication in the 1897 Grant of Land that there was any political purpose associated with the grant or the trust. As a result, this criterion is also met.

83 I conclude that the 1897 Grant of Land represents a valid declaration of a charitable purpose trust. With the conveyance of the trust property to the trustees, the trust became properly constituted. From and after April 1897, the three individual trustees were bound to hold the Original Church Lands in trust for the "Congregation of the Moravian Church at Bruderheim . . . and to be devoted to public purposes".

C. Did the Respondent take title subject to a trust in 1912 and has that trust continued?

84 For the last 105 years, fee simple title to the Church Lands has been registered in the name of the Board of Elders. Various iterations of the congregation have used a portion of the Original Church Lands continuously for church services since 1897.

85 The Applicants argue that when the three individual trustees transferred the Original Church Lands to the Respondents in 1912, the trust survived and from 1912 until the present time the Respondent has held title to the lands in trust for the "Congregation of the Moravian Church at Bruderheim . . . and to be devoted to public purposes".

86 There is no documentation in evidence to explain the terms or the circumstances of the 1912 transfer. The current Director of Land Titles North, Curtis Woollard, has certified that the transfer document has been lost.

87 Ordinance No. 5 permitted trustees to hold church lands in perpetual succession for the benefit of the congregation. The three individuals named in the 1897 Grant of Land became the trustees and they, or their successors, occupied that role until 1912. In 1909, the Board of Elders was incorporated by an Act of Parliament, thereby acquiring legal status to hold the real property in trust. In s. 8 of the 1909 legislation incorporating the Board of Elders, the Parliament of Canada expressly contemplated that the Board of Elders could assume title to church lands to be held " . . . subject always to the terms and conditions of any trust relating to such property".

88 The transfer to the Board of Elders was contemplated by s. 10 of Ordinance No. 5 which formed part of the *Consolidated Ordinances of the North-West Territories*, 1898 and then was incorporated by reference into provincial legislation: *The Congregations Holdings Act of 1907*, SA 1907, c 22. In accordance with s. 10, successor trustees could be appointed by a resolution of the congregation. The unanimous resolution of the Bruderheim Moravian Church Council dated August 23, 1909 specifically authorized the appointment of the District board [the Board of Elders] as the successor trustees.

89 As a result, the legal title was lawfully transferred to the Board of Elders. However, the 1912 Certificate of Title identified the Board of Elders as the registered owner of an estate in fee simple of the Original Church Lands, with no reference to the lands being held in trust for any beneficiaries.

90 The three individual registered owners held the property as trustees and could not convey to the Board of Elders any better title than they possessed unless the Board of Elders was a *bona fide* purchaser for value without notice: *Kaup v. Imperial Oil Ltd.*, [1962] S.C.R. 170 (S.C.C.) at paras 19 and 40. In the present case, there is no evidence that the Board of Elders was a purchaser for value; the Habendum Clause which was on the certificate of title immediately prior to the transfer gave the Board of Elders notice of the trust.

91 Therefore, the Respondent took bare legal title to the Original Church Lands and held the lands in trust for the "Congregation of the Moravian Church at Bruderheim . . . and to be devoted to public purposes".

92 The Respondent has continued to be the registered owner of the lands from 1912 until the present time. At various times through the years, the Habendum Clause describing the trust was on title and at other times it was not on title. The most recent certificate of title does not contain a Habendum Clause in relation to the trust, nor does it make any other reference to the trust. However, as between the Respondent and the beneficiaries of the trust, this is of no significance and does not affect the enforceability of the trust in the circumstances: *Passburg Petroleums Ltd. v. Landstrom Developments Ltd.*, [1984] 4 W.W.R. 14, [1984] A.J. No. 2561 (Alta. C.A.) at paras 16-22.

93 The only significant change to the title after 1912 took place in or about 1950 when representatives of the Province of Alberta purported to modify the terms of the trust with respect to a portion of the Original Church Lands. Ostensibly acting on the application of "Wilhelm Lilge, Franz Heffner and Gustav Werner, Trustees of the Congregation of the Moravian Church at Bruderheim", the Deputy Minister of Lands and Forests purported to release the "trust condition requiring the said portion [31.74 acres of the Original Church Lands] to be used for public purposes".

94 A concern arises because Wilhelm Lilge, Franz Heffner and Gustav Werner had transferred legal title to the Respondent 38 year earlier and there is no indication that any of them were even alive in 1950. More importantly, there is no indication that the Respondent, the actual registered owner and trustee, participated or received any notice of the proposed variation of the trust. Nor is there any indication that anyone applied to the Court to vary the trust.

95 However, there was a unanimous resolution at a meeting of the Council of the congregation in September 1950 that the congregation sell a portion of the Original Church Lands. It was also resolved that the board have authority to act for the sale of the church land in the best interests of the church, and that the congregation would obtain a clearance from the government on the title to all church land except the immediate church grounds.

96 Whether the 1950 variation of the terms of the trust by the beneficiary was effective and what consequences flow from the purported variation was not the subject of argument on this motion. However, even assuming it was effective, it did not purport to release the Respondent from holding the lands in trust for the "Congregation of the Moravian Church at Bruderheim". It only purported to release the obligation to use the lands for public purposes. This could potentially have an impact on whether the trust in relation to the 31.74 acres (and later the 17.6 acres after the sale of 13.21 acres and the expropriation of two small parcels for road allowances) could still be considered a charitable purpose trust given that this portion of the land is now no longer restricted to use for "public purposes".

97 While the Respondent did take a contrary position in this litigation prior to the hearing of the motion, it conceded in argument before me that it holds the Church Lands (25.86 acres) in trust for the "Congregation of the Moravian Church at Bruderheim". As a result, it is not necessary for me to consider the consequences which flowed from the purported 1950 trust variation.

98 I conclude that since the time of the transfer in 1912, the Respondent has held the Church Lands in trust for the Congregation of the Moravian Church at Bruderheim.

D. If there is a trust, who are the current beneficiaries?

99 The Applicants argue that they are, or that they represent the beneficiaries of the trust. The Applicants wish to continue their ministry and worship on the same lands which they and their forbearers have worshiped at for many decades. The unchallenged evidence is that of the approximately 90 to 100 people who identify as members of the Bruderheim Moravian Church, approximately 52% trace their direct ancestry to the women and men listed on the charter membership roll of May 6, 1895.

100 The Bruderheim Moravian Church has made major investments in the development of the Church Lands which it now values at $2 million. The Applicants argue that the success of the local Bruderheim congregation has been as a result of the time and commitment of the members of the congregation. While not stated precisely in these terms, the position of the Applicants is that after making major investments in the church and worshiping at the church for more than 120 years, it is simply unfair to exclude them from what they consider to be their own church with which they have a major spiritual connection. They argue that the Respondent has attempted to interfere with their use and enjoyment of the Church Lands and that they should be entitled to relief.

101 The Respondent argues that the Applicants are not the beneficiaries of the trust and that they do not represent the beneficiaries of the trust. It submits that the trust is subject to the Book of Order, noting that the congregation of the Bruderheim Moravian Church decided on its own to disassociate from the Moravian Church in 2016 and to become an independent congregation. After that time, the congregation were no longer members of the Moravian Church and, as a result, based on the clear words of the trust arising from the 1897 Grant of Land, they are not beneficiaries of the trust.

1. What is the relevance of the Institutional Context?

102 The Book of Order is part of the institutional context of which both the Board of Elders and the Bruderheim Moravian Church are a part, at least until very recently. It is the constitutional document which provides for the governance of the Northern Province. Various editions of the Book of Order have been in place for decades although the name of the document has changed over the years. For example, in 1889 a document entitled a Provincial Digest detailed the results of the general Synod of 1879 which describes some of the governance issues which are identified in the current Book of Order.

103 In *Pankerichan v. Djokic*, 2014 ONCA 709, [2014] O.J. No. 4866 (Ont. C.A.), Lauwers J.A. for the Court observed that a relatively consistent method or pattern has emerged in these types of property disputes, citing *Bentley v. Anglican Synod of the Diocese of New Westminster*, 2010 BCCA 506, 11 B.C.L.R. (5th) 209 (B.C. C.A.), leave denied [2011] S.C.C.A. No. 26 (S.C.C.), and *Delicata*. In both *Bentley* and *Delicata*, a dissident majority of a parish congregation was opposed to the decision of the Anglican Church of Canada to permit the blessing of same-sex partnerships. Both congregations claimed that they were the beneficial owners of the property held in trust for the parish. The Courts in both cases construed the terms of the trust on which the properties were held, taking into account the deeds, the applicable legislation, the canons or church law promulgated by each diocese, and the doctrinal context.

104 Lauwers J.A. noted that this approach was not novel, citing a similar dispute in *United Church of Canada v. Anderson* (1991), 2 O.R. (3d) 304, [1991] O.J. No. 234 (Ont. Gen. Div.), and numerous cases cited by Alvin Esau in "The Judicial Resolution of Church Property Disputes" (2003) 40 Alta L Rev 767, and by Margaret Ogilvie in "Church Property Disputes: Some Organizing Principles" (1992) 42 UTLJ 377.

105 In *Religious Institutions and the Law in Canada* (Toronto: Irwin Law, 2017), Professor Ogilvie notes at 305:

> . . . Religious organizations are treated in law as voluntary associations whose legal basis is the multipartite contractual consent of all members to the doctrine, practices, and discipline of the organization. Thus, as long as members of a religious organization remain as members of it, they are subject to its doctrine, practices and discipline as a matter of consent or contract. When property disputes arise they are equally subject to the doctrine, practices, and discipline in relation to such disputes...

106 She explains at 308-9 that the courts' approach to church property disputes has changed decisively with respect to situations where doctrinal change has occurred. Instead of holding churches to their original, foundational doctrinal positions and awarding property to those persons who subscribe to those positions, the courts now award property to those who have complied with the church's own constitution in relation to changes to doctrine, practice, or discipline and restrict their intervention to ensuring that the constitution at issue has been complied with strictly:

> . . . the appropriate role for a court in relation to church property disputes is to interpret the constitutional documents relevant to the dispute, apply the ordinary principles of construction, and enforce that interpretation without considering or making any direct decision about the underlying doctrinal issue, which is left to the institution to determine in accordance with its own constitutional rules. Thus, courts continue to adopt a modest and restrained approach to theological issues...
>
> . . . Where the trustees in actual possession of the property of a religious institution are part of a dissenting or minority group, they will be treated in law as holding the property in trust for those who represent the "true body" of the institution...

107 The Book of Order contains very specific requirements with respect to "Church Property". In circumstances such as this, where congregations are not incorporated, the Book of Order provides in paragraph 1040 that trustees who have been appointed by the congregation:

> . . . shall have the power to receive, acquire, hold, possess, and enjoy in trust for said congregation and the Moravian Church — Northern Province any bequests, land, tenements, inherited property and to use, administer, and manage the same in the manner provided in this Book of Order and the local bylaws, rules, and regulations of the congregation of or the proper benefit of the Moravian Church. Said trustees and the congregations they represent shall always be under and subject to the rules and regulations and bylaws of the Moravian Church — Northern Province, as contained in the Book of Order and in conformity with current legislation and enactments of the Provincial Synod.
>
> (emphasis added)

108 The Book of Order also contains very specific provisions with respect to Church Property including a provision (clause 1046) which mandates that all congregation property, including real property, vest in the Northern Province where a congregation severs its connection with the Northern Province (the "Reversionary Clause").

109 The Reversionary Clause is not new to the Moravian Church and was a part of the constitutional structure of the Church long before the Bruderheim Moravian Church was formed. In 1888, the Northern Province's Provincial Digest outlined governance and ownership issues. It contemplated that titles to church properties acquired by congregations should be vested in their corporation, in trust for each respective congregation, to become absolute in case of the cessation. The Reversionary Clause is described under the heading "*All Church Property is Trust Property*" which provided in clear terms that if a congregation secedes from the main church or "expressly or virtually throws off its connection", the congregation loses all right to the property of which it has had the management, and the congregation's claim upon the estate held in its name would be null and void.

110 It is apparent that the congregation of the Bruderheim Moravian Church, from the time of its first existence either agreed to, or acquiesced in, having its relationship with the Northern Province governed by the Book of Order. Specifically with respect to the Revisionary Clause, the Minutes of the Provincial Conference from 1895 summarize the communications with the Bruderheim Moravian Church representatives and clearly reflect an expectation on the part of the Moravian Church that, as a condition of an affiliation, the congregation would need to acquire lands on which a church would be constructed and that the lands would be required to be transferred to the Provincial Conference.

111 In more modern times, the Provincial Conference minutes reflect approval of the Bruderheim Moravian Church bylaws in 1994. The Revisionary Clause is on page 7 of that document.

112 More recently, the Bruderheim Movarian Church Unified Board Handbook contains a copy of the "Rules and Regulations of the Bruderheim Moravian Church — Revised: 2004" which provide in part as follows:

> In subscribing to the following rules and Regulations, the congregation holds that it is a member of the Canadian District of the Moravian Church, Northern Province. As such, the Moravian Covenant for Christian Living (formerly known as the Brotherly Agreement), the Book of Order, and other enactments of the Synods of the Moravian Church shall have priority over the functioning of this congregation.
>
> (emphasis added)

113 As late as 2008, the Bruderheim Moravian Church adopted a Unified Board Handbook whereby it affirmed that all of its property and funds would revert to the Provincial Conference of the Moravian Church, Northern Province if it disbanded or seceded.

114 The willingness of the congregation to ascribe to, and comply with, the Book of Order continued even after the dispute had reached a critical point in June 2016. At that time, the congregation of the Bruderheim Moravian Church agreed to proceed with a meeting called by the Northern Province and agreed that the meeting be conducted in accordance with the Book of Order.

115 In all of these circumstances, I conclude that the relationship between the Bruderheim Moravian Church and the Northern Province was governed by the terms of the Book of Order. The Reversionary Clause forms part of the Book of Order and is clear in its terms. I conclude that the Reversionary Clause is enforceable as against the members of the Bruderheim Moravian Church.

116 However, the Reversionary Clause can have application only to the assets of the Bruderheim Moravian Church. The Church Lands are not now and never were an asset of the Bruderheim Moravian Church. Legal title to the lands is with the Board of Elders. The lands are held for the benefit of the "Congregation of the Moravian Church in Bruderheim".

117 As a result, the Board of Elders owes a trust duty to the "Congregation of the Moravian Church in Bruderheim". While the Board of Elders is an arm of the Provincial Conference, it does not owe any trust duty to the Provincial Conference insofar as the Church Lands are concerned. The duty is only to the beneficiaries. Therefore, while the Reversionary Clause is enforceable against the Bruderheim Moravian Church, the Provincial Conference is not able to use the Reversionary Clause to

acquire an absolute interest in the Church Lands unless the terms of the trust are varied to permit this to happen. Furthermore, while the Book of Order governs the relationship between the congregation and the Northern Province, nothing in the Book of Order provides the Northern Province with any authority to unilaterally vary the terms of the trust. A trust can only be varied if approval is first sought and obtained from the Court.

118 It is possible that an attempt may be made at some time in the future to vary the terms of the trust pursuant to which the Church Lands are held. The Board of Elders has not applied to the Court in accordance with s. 42 of the *Trustee Act* to enforce the terms of the Book of Order in order to vary the terms of the trust or to terminate it. Nor has the Board of Elders applied under s. 43 of the *Trustee Act* for advice and directions in relation to the approach to take in dealing with the Church Lands.

119 Whether and in what circumstances the trust may be varied is not before me. While the trust remains in force and unvaried, the Board of Elders must continue to hold the Current Church Lands for the benefit of the Congregation of the Moravian Church at Bruderheim.

2. What is the Congregation of the "Moravian Church at Bruderheim"?

120 The 1897 Grant of Land was for the benefit of the "Congregation of the Moravian Church at Bruderheim". In order to determine the beneficiaries of the original trust, it is first necessary to consider the meaning of these words. More specifically, it is necessary to consider whether the settlor intended these words to mean the "Moravian Church", a worldwide church with a congregation in Bruderheim or, alternatively, the "Brudereheim Moravian Church", the local congregation.

121 The intention of the settlor must be determined based upon the plain and ordinary meaning of the words which were used in the declaration of trust and must be assessed in the context of the circumstances which existed immediately prior to the declaration of the trust.

122 On May 6, 1895, the charter membership roll was signed establishing the "Bruderheim Moravian Church". At that time, the local congregation had no formal ties to the Moravian Church. This was long before the 1897 Grant of Land and also long before the request to the Canadian Pacific Railway for a grant of land in February 1896 and the March 11, 1896 letter from the Canadian Land Commissioner confirming that a 40 acre parcel would be re-conveyed from the railway and then granted for the purpose of a church. Furthermore, the application for the grant of land was made by Lilge who was a member of the Bruderheim Morvarian Church but had no official role with the Morvarian Church or the Provincial Conference. It is therefore at least possible that the settlor intended to refer to the "Bruderheim Moravian Church" in the 1897 Grant of Land.

123 However, the words used in the trust declaration were "Moravian Church at Bruderheim" and not the "Bruderheim Moravian Church". The formal ties between the Bruderheim Moravian Church and the Moravian Church were formally established on December 17, 1895 when the Provincial Conference resolved that they had "undertaken" the congregation of Bruderheim. As a result, there was in existence a congregation of the Moravian Church at Bruderheim at all times after December 1895. This was also well before the 1897 Grant of Land and long before the communications with the Canadian Pacific Railway and the Canadian Land Commissioner in February and March of 1896.

124 The actual letters to the Canadian Pacific Railway and from the Canadian Land Commissioner are not in evidence. Therefore, it is not possible to determine whether the words contained in those communications might provide further insight into what the settlor may have intended in the trust declaration.

125 Based on the totality of the evidence before me I conclude, on the plain meaning of the words in the trust declaration, that the settlor intended the lands to be used for the purposes of a local congregation in Bruderheim. However, it is equally clear that the settlor intended the lands be used in conjunction with a specific religious organization, the Moravian Church. The 1897 Grant of Land specifically capitalized the words "Moravian Church". I conclude based on the totality of the evidence that the reference to the "Moravian Church" in the 1897 Grant of Land must be to the worldwide Moravian Church organization with a congregation in Bruderheim and not to the Bruderheim Moravian Church.

126 As a result, I conclude that in order to be beneficiaries of the trust the members of the local Bruderheim congregation must also be members of the Moravian Church.

3. Do the Applicants Represent Members of the Moravian Church?

a The Bruderheim Moravian Church

127 Members of the congregation of the Bruderheim Moravian Church were also members of the Moravian Church, at least between December 1895 and 2016.

128 However, by May 1, 2016, the majority of the members of the Bruderheim Moravian Church were no longer members of the Moravian Church. I come to this conclusion for the following reasons:

i. On June 26, 2014 the board of the Bruderheim Moravian Church resolved to hold back the payment of "quotas" to the Provincial Conference pending further discussion. This in conflict with the obligations imposed by the Book of Order, Clauses 709 and 710. By February 2017 the arrears stood at approximately $83,000.

ii. On March 22, 2015 the Bruderheim Moravian Church resolved that because of a disparity of beliefs between it and the Northern Province a pastoral search would expand to include outside denominations that were compatible with the beliefs of the local congregation. In approximately May 2015, the Bruderheim Moravian Church hired Wayne Larson as its pastor. Pastor Larson had no prior history with the Moravian Church and had spent the majority of his ministry life with the Canadian Baptists of Western Canada.

iii. On May 1, 2016, because of a "disparity between the teachings and beliefs of our congregation and that of the Moravian Church, Northern Province" the Bruderheim Moravian Church resolved by a vote of 49 to 3 to "disassociate from the Moravian Church, Northern Province and become an independent congregation".

iv. After May 1, 2016, the Bruderheim Moravian Church took steps to arrange for the drafting of by-laws in relation to the creation of a new church to be incorporated under the *Religious Societies Act*, and a new corporation, the Community Church was incorporated on April 11, 2017.

129 As a result, the members of the Bruderheim Moravian Church who now identify with the Community Church have demonstrated by their own actions a clear choice to no longer be associated with the Moravian Church. Having done so they can no longer claim to be members of the Moravian Church.

130 Clause 1019(f) of the Book of Order provides the Provincial Conference with the authority to dissolve congregations which are associated with the Northern Province. By resolution dated March 16, 2017, the Provincial Conference, acting in accordance with this provision, dissolved the Bruderheim Moravian Church. In doing so, the Provincial Conference accepted the decision which had been made by the congregation known as the Bruderheim Moravian Church on May 1, 2016 to disassociate from the Northern Province. In taking this decision, the Provincial Conference was dissolving the relationship between the Moravian Church and the congregation of the Bruderheim Moravian Church. The Bruderheim Moravian Church continues to be an unincorporated association of members of a church organization who are no longer connected in any way to the Moravian Church.

131 The Applicants argue that even though their members may no longer be members of the Moravian Church, they are nevertheless "of Moravian Heritage". They argue that this should satisfy the Moravian requirement in the trust declaration. This argument entirely ignores the plain wording of the trust declaration and the institutional context. The declaration requires that the property be held in trust for the congregation of the Moravian Church. Having Moravian heritage does not make a person a member of the congregation of the Moravian Church. A past membership in the Moravian Church is insufficient to permit a beneficial interest in the trust. All beneficiaries must be current members of the Moravian Church.

b The Bruderheim Community Church

132 The Community Church was incorporated on April 4, 2017 and is self-described as a "Non-Denominational" congregation. In addition to injunctive relief, the Community Church seeks a variation of the trust to permit it to assume the role of trustee and to have the Board of Elders removed as trustee.

133 The Community Church does not now have and has never had any relationship with the Moravian Church. It did not come into existence until after the congregation of the Bruderheim Moravian Church disassociated from the Moravian Church.

134 As a result, the Community Church is not a beneficiary of the trust.

135 On the whole of the evidence before me, I conclude that the members of the Community Church are those members of the Bruderheim Moravian Church who elected to disassociate from the Moravian Church. There is no evidence that the Community Church represents any of the persons in the Bruderheim area who continue to be members of the congregation of the Moravian Church.

136 As a result, the Community Church does not represent any members of the Moravian Church and it would not be appropriate to install the Community Church as a new trustee.

4. Conclusion — Beneficiaries of the Trust

137 The Church Lands are held for the benefit of the "Congregation of the Moravian Church at Bruderheim". Those members of the Bruderheim Moravian Church who have chosen to become disassociated from the Moravian Church are no longer beneficiaries of the trust.

138 It is arguable that after the March 16, 2017 resolution of the Provincial Conference, there was no congregation of the "Moravian Church at Bruderheim". However, by a letter to the congregation dated May 25, 2017, the Provincial Conference advised:

> Others, however, do not wish to join the congregation that is leaving the Moravian Church. Beginning Sunday June 4 th , at 2:00 PM, there will be a light lunch followed by a Moravian worship service in what was formerly known as the Bruderheim Moravian Chruch. Moravian clergy from Edmonton congregations will lead this weekly worship service; they invite all to worship with them and discuss ways to maintain a Moravian presence in Bruderheim.

139 While the evidence is not entirely clear on this point, those services have continued with a small number of worshipers each week. The interim injunction was granted on the condition that any such persons be allowed to continue to conduct a weekly worship service in the church building. As a result, there are likely some persons who continue to be members of the Moravian Church in Bruderheim and who continue to be beneficiaries of the trust. However, there is no evidence that either one of the Applicants represents any of these persons.

140 If there are no persons who fulfill the criteria of being the "Movarian Congregation at Bruderheim", then an application may be necessary to formally vary or terminate the trust under the applicable legislation or alternatively to seek to apply the *cy-pres* doctrine to avoid the failure of the charitable trust. These are issues which are not before me on this motion.

F. Are the Applicants Entitled to a Permanent Injunction?

141 Before a permanent injunction can be granted, the Applicants must establish that they have an interest in the property which is the subject of the litigation. I have concluded that the Applicants have not established that they are the beneficiaries of the trust to the lands and therefore a permanent injunction is not appropriate in this case.

142 The parties did not make any submissions with respect to the other requirements for a permanent injunction, namely that damages are an inadequate remedy and that the balance of convenience favours the granting of the injunction. As a result, I will not address those issues.

VIII. CONCLUSION

143 For the reasons given above, I come to the following conclusions:

1. A charitable trust was created by the 1897 Grant of Land.

2. The beneficiaries of the trust are the "Congregation of the Moravian Church at Bruderheim".

3. When the lands were transferred in 1912, the Board of Elders became the registered owner of the legal title but they took the title subject to the trust. As a result, the Board of Elders holds legal title as trustee for the benefit of the "Congregation of the Moravian Church at Bruderheim".

4. Only those persons who are members of the Moravian Church can be considered to be part of the "Congregation of the Moravian Church at Bruderheim".

5. The congregation of the Bruderheim Movarian Church disassociated itself from the Moravian Church in May 2016, and after that date the members of the congregation were independent from and no longer associated with the Moravian Church.

6. The congregation of what is now the Bruderheim Community Church are not the "Congregation of the Moravian Church at Bruderheim" and as a result the Church Lands are not held by the Board of Elders for their benefit.

7. There is some evidence that there continue to be a limited number of persons in Bruderheim who are members of the Moravian Church. To the extent that there are members of the Moravian Church, they are the current beneficiaries of the trust.

144 I therefore dismiss the application. The interim injunction which was granted on May 31, 2017 is no longer in force.

IX. Costs

145 If the parties cannot agree on costs, they may arrange a time to speak to the issue within 30 days of the date of this decision.

Application dismissed.

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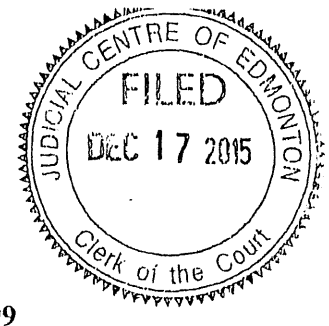
Tab 4



Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

In the Matter of the *Trustees Act*, RSA 2000, c T-8, as amended; and

In the Matter of The Sawridge Band *Inter Vivos* Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Between:

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust

Respondents

- and -

Public Trustee of Alberta

Applicant

Reasons for Judgment (SAWRIDGE #3)
of the
Honourable Mr. Justice D.R.G. Thomas

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I Introduction

[1] This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365 ["***Sawridge #1***"], 543 AR 90 affirmed 2013 ABCA 226, 553 AR 324 ["***Sawridge #2***"]. The terms defined in ***Sawridge #1*** are used in this decision.

II. Background

[2] On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the "Band", "Sawridge Band", or "SFN"], set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the "*Charter*"].

[3] The 1985 Sawridge Trust is administered by the Trustees [the "Sawridge Trustees" or the "Trustees"]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust (the "Trust Amendments") and confirmation of the transfer of assets into that Trust.

[4] One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

[5] Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

> August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

February 14, 2012 - The Public Trustee applied:

1. to be appointed as the litigation representative of minors interested in this proceeding;
2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and
3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.

June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: ***Sawridge #1***, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (***Sawridge #1***, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (***Sawridge #1***, at para 55).

June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (***Sawridge #2***).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;
- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and
- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],
- the Trustees may withdraw their proposed settlement agreement and litigation plan, and

- some document and disclosure related items sought by the Public Trustee were adjourned *sine die*.
  ("September 2/3 Order")

October 5, 2015- I directed the Public Trustee to provide more detailed information in relation to its accounts totalling $205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

[6] Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

[7] This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

[8] ***Sawridge #1*** at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee's involvement in this matter:

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.
>
> [9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.
>
> [10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

[11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

[12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

[9] This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a *Rules* Part V affidavit of records within 60 days of the September 2/3 Order.

[10] The primary remaining issue relates to the disclosure of information in documentary form sought by the Public Trustee from the SFN and there are also a number of additional ancillary issues. The Public Trustee seeks information concerning:

1. membership in the SFN,
2. candidates who have or are seeking membership with the SFN,
3. the processes involved to determine whether individuals may become part of the SFN,
4. records of the application processes and certain associated litigation, and
5 how assets ended up in the 1985 Sawridge Trust.

[11] The SFN resists the application of the Public Trustee, arguing it is not a party to this proceeding and that the Public Trustee's application falls outside the *Rules*. Beyond that, the SFN questions the relevance of the information sought.

V. Submissions and Argument

A. The Public Trustee

[12] The Public Trustee takes the position that it has not been able to complete the responsibilities assigned to it by me in ***Sawridge #1*** because it has not received enough information on potential, incomplete and filed applications to join the SFN. It also needs information on the membership process, including historical membership litigation scenarios, as well as data concerning movement of assets into the 1985 Sawridge Trust.

[13] It also says that, without full information, the Public Trustee cannot discharge its role in representing affected minors.

[14] The Public Trustee's position is that the Sawridge Band is a party to this proceeding, or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information. It says that the Court can add the Sawridge Band as a party. In the alternative, the Public Trustee argues that *Rules* 5.13 and 9.19 provide a basis to order production of all relevant and material records.

B. The SFN

[15] The SFN takes the position that it is not a party to the Trustee's proceedings in this Court and it has been careful not to be added as a party. The SFN and the Sawridge Trustees are distinct and separate entities. It says that since the SFN has not been made a party to this proceeding, the *Rules* Part V procedures to compel documents do not apply to it. This is a stringent test: ***Trimay Wear Plate Ltd. v Way***, 2008 ABQB 601, 456 AR 371; ***Wasylyshen v Canadian Broadcasting Corp.***, [2006] AJ No 1169 (Alta QB).

[16] The only mechanism provided for in the *Rules* to compel a non-party such as the SFN to provide documents is *Rule* 5.13, and its function is to permit access to specific identified items held by the third party. That process is not intended to facilitate a 'fishing expedition' (***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*** (1988), 94 AR 17, 63 Alta LR (2d) 189 (Alta QB)) or compel disclosure (***Gainers Inc. v Pocklington Holdings Inc.*** (1995), 169 AR 288, 30 Alta LR (3d) 273 (Alta CA)). Items sought must be particularized, and this process is not a form of discovery: ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.*** (1989), 98 AR 374, 16 ACWS (3d) 286 (Alta CA).

[17] The SFN notes the information sought is voluminous, confidential and involves third parties. It says that the Public Trustee's application is document discovery camouflaged under a different name. In any case, a document is only producible if it is relevant and material to the arguments pled: *Rule* 5.2; ***Weatherill (Estate) v Weatherill***, 2003 ABQB 69, 337 AR 180.

[18] The SFN takes the position that ***Sawridge #1*** ordered the Public Trustee to investigate two points: 1) identifying the beneficiaries of the 1985 Sawridge Trust; and 2) scrutiny of transfer of assets into the 1985 Sawridge Trust. They say that what the decision in ***Sawridge #1*** did not do was authorize interference or duplication in the SFN's membership process and its results. Much of what the Public Trustee seeks is not relevant to either issue, and so falls outside the scope of what properly may be sought under *Rule* 5.13.

[19] Privacy interests and privacy legislation are also factors: ***Royal Bank of Canada v Trang***, 2014 ONCA 883 at paras 97, 123 OR (3d) 401; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information

unless the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: ***Juman v Doucette; Doucette (Litigation Guardian of) v Wee Watch Day Care Systems***, 2008 SCC 8, [2008] 1 SCR 157. The cost to produce the materials is substantial.

[20] The SFN notes that even though it is a target of the relief sought by the Public Trustee that it was not served with the July 16, 2015 application, and states the Public Trustee should follow the procedure in *Rule* 6.3. The SFN expressed concern that the Public Trustee's application represents an unnecessary and prejudicial investigation which ultimately harms the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust. In ***Sawridge #2*** at para 29, the Court of Appeal had stressed that the order in ***Sawridge #1*** that the Public Trustee's costs be paid on a solicitor and own client basis is not a "blank cheque", but limited to activities that are "fair and reasonable". It asks that the Public Trustee's application be dismissed and that the Public Trustee pay the costs of the SFN in this application, without indemnification from the 1985 Sawridge Trust.

C. The Sawridge Trustees

[21] The Sawridge Trustees offered and I ordered in my September 2/3 Order that within 60 days the Trustees prepare and deliver a *Rule* 5.5-5.9 affidavit of records to assist in moving the process forward. This resolved the immediate question of the Public Trustee's access to documents held by the Trustees.

[22] The Trustees generally support the position taken by the SFN in response to the Public Trustee's application for Band documents. More broadly, the Trustees questioned whether the Public Trustee's developing line of inquiry was necessary. They argued that it appears to target the process by which the SFN evaluates membership applications. That is not the purpose of this proceeding, which is instead directed at re-organizing and distributing the 1985 Sawridge Trust in a manner that is fair and non-discriminatory to members of the SFN.

[23] They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253. Further, the membership criteria used by the SFN operate until they are found to be invalid: ***Huzar v Canada***, [2000] FCJ No 873 at para 5, 258 NR 246. Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

[24] The 1985 Sawridge Trustees reviewed the evidence which the Public Trustee alleges discloses an unfair membership admission process, and submit that the evidence relating to Elizabeth Poitras and other applicants did not indicate a discriminatory process, and in any case was irrelevant to the critical question for the Public Trustee as identified in ***Sawridge #1***, namely that the Public Trustee's participation is to ensure minor children of Band members are treated fairly in the proposed distribution of the assets of the 1985 Sawridge Trust.

[25] Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and

that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

[26] The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

[27] I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: ***Trimay Wear Plate Ltd. v Way***, at para 17.

[28] If I were to compel document production by the Sawridge Band, it would be via *Rule* 5.13:

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.

[29] The modern *Rule* 5.13 uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule* 5.13 has referenced and used approaches developed in the application of that precursor provision: ***Toronto Dominion Bank v Sawchuk***, 2011 ABQB 757, 530 AR 172; ***H.Z. v Unger***, 2013 ABQB 639, 573 AR 391. I agree with this approach and conclude that the principles in the pre-*Rule* 5.13 jurisprudence identified by the SFN apply here: ***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co***; ***Gainers Inc. v Pocklington Holdings Inc.***; ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.***

[30] The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: ***Royal Bank of Canada v Kaddoura***, 2015 ABCA 154 at para 15, 15 Alta LR (6th) 37.

[31] I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

[32] It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee. A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

[33] In ***Sawridge #1*** I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since ***Sawridge #1*** the Federal Court has ruled in ***Stoney v Sawridge First Nation*** on the operation of the SFN's membership process.

[34] Further, in ***Sawridge #1*** I noted at paras 51-52 that in ***783783 Alberta Ltd. v Canada (Attorney General)***, 2010 ABCA 226, 322 DLR (4th) 56, the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in ***Strickland v Canada (Attorney General)***, 2015 SCC 37, the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

[35] The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in ***Stoney v Sawridge First Nation,*** there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

[36] It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

[37] Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;
2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and
3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

4. Supervising the distribution process itself.

[38] The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

[39] I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

[40] The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

[41] I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

[42] On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

[43] The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule* 5.13(1) application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

[44] If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule* 5.13(1) application by the Public Trustee. In the event no *Rule* 5.13(1) application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 – Examining potential irregularities related to the settlement of assets to the Trust

[45] There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

[46] The Public Trustee shall by January 29, 2016 prepare and serve a *Rule* 5.13(1) application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

[47] A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule* 5.13(1) application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

[48] The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of individuals who are minor beneficiaries and potential minor beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and
2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

[49] I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

[50] As Aalto, J. observed in ***Poitras v Twinn***, 2013 FC 910, 438 FTR 264, "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

[51] The Public Trustee has no relevant interest in the children of any parent who has an unresolved application for membership in the Sawridge Band. If that outstanding application results in the applicant being admitted to the SFN then that child will become another minor represented by the Public Trustee.

[52] While the Public Trustee has sought information relating to incomplete applications or other potential SFN candidates, I conclude that an open-ended 'fishing trip' for unidentified hypothetical future SFN members, who may also have children, is outside the scope of the Public Trustee's role in this proceeding. There needs to be minimum threshold proximity between the Public Trustee and any unknown and hypothetical minor beneficiary. As I will stress later, the Public Trustee's activities need to be reasonable and fair, and balance its objectives: cost-effective participation in this process (i.e., not unreasonably draining the Trust) and protecting the interests of minor children of SFN members. Every dollar spent in legal and research costs turning over stones and looking under bushes in an attempt to find an additional, hypothetical minor beneficiary reduces the funds held in trust for the known and existing minor children who are potential beneficiaries of the 1985 Sawridge Trust distribution and the clients of the Public Trustee. Therefore, I will only allow investigation and representation by the Public Trustee of

children of persons who have, at a minimum, completed a Sawridge Band membership application.

[53] The Public Trustee also has a potential interest in a child of a Sawridge Band candidate who has been rejected or is rejected after an unsuccessful application to join the SFN. In these instances the Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection or challenge the rejection through judicial review in the Federal Court. If so, then that child is also a potential candidate for representation by the Public Trustee.

[54] This Court's function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership. I mean by this that if the Public Trustee's inquiries determine that there are one or more outstanding applications for Band membership by a parent of a minor child then that is not a basis for the Public Trustee to intervene in or conduct a collateral attack on the manner in which that application is evaluated, or the result of that process.

[55] I direct that this shall be the full extent of the Public Trustee's participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

[56] In summary, what is pertinent at this point is to identify the potential recipients of a distribution of the 1985 Sawridge Trust, which include the following categories:

1. Adult members of the SFN;
2. Minors who are children of members of the SFN;
3. Adults who have unresolved applications to join the SFN;
4. Children of adults who have unresolved applications to join the SFN;
5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and
6. Children of persons in category 5 above.

[57] The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:
   a) made applications to join the SFN which are pending (category 3); and
   b) had applications to join the SFN rejected and are subject to challenge (category 5); and
2. The contact information for those individuals where available.

[58] As noted, the Public Trustee's function is limited *to representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and

2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

[59] This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);

b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and

c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

[60] These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

[61] My understanding from the affidavit evidence and submissions of the SFN and the 1985 Sawridge Trustees is that the Public Trustee has already received much information about persons on the SFN's membership roll and prospective and rejected candidates. I believe that this will provide all the data that the Public Trustee requires to complete Task 3. Nevertheless, the Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, then it is to file a *Rule* 5.13 application by January 29, 2016. The Sawridge Band and Trustees will then have until March 15, 2016 to make written submissions in response to that application. I will hear any disputed *Rule* 5.13 disclosure application at a case management hearing to be set before April 30, 2016.

Task 4 - General and residual distributions

[62] The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

[63] Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

a) a potential future successful SFN membership applicant and/or child of a successful applicant, or

b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

[64] As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or

2. on a pro rata basis:

a) be distributed to the members of Pool 1, and

b) be reserved in Pool 2 for future potential Pool 2 recipients.

[65] A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

[66] At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

[67] First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

[68] Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

[69] As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

[70] I believe that the instructions given here will refocus the process on Tasks 1 – 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in ***Sawridge #1*** I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in ***Stoney v Sawridge First Nation***. I repeat that

inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

[71] As the Court of Appeal observed in ***Sawridge #2*** at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule* 5.13 applications which may arise from completion of Tasks 1-3.

Heard on the 2nd and 3rd days of September, 2015.
Dated at the City of Edmonton, Alberta this 17th day of December, 2015.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

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for the 1985 Sawridge Trustees / Respondents

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Bertha L'Hoirondelle and Clara Midbo

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