COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE *TRUSTEE ACT*, RSA 2000, c T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**REPLY BRIEF OF SAWRIDGE FIRST NATION ON THE ASSET TRANSFER ISSUE**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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Self-Represented Party, Intervenor on Asset Transfer Issue

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I. Introduction

1. On November 15, 2019, the Sawridge First Nation ("Sawridge") filed its written submissions (the "Sawridge Brief") setting out its position that this Honourable Court should direct that the assets situated in the Sawridge Band Inter Vivos Settlement (the "1985 Trust") remain Sawridge Band Trust (the "1982 Trust") property and should be held in the 1985 Trust on the terms of the 1982 Trust.

2. The Office of the Public Guardian and Trustee ("OPGT") filed its written submissions on November 15, 2019 (the "OPGT Brief"), and it takes the position that the Consent Order of the Honourable Mr. Justice Thomas granted on August 24, 2016 (the "Consent Order") established that the 1985 Trust assets are held on the terms of the 1985 Trust.

3. Catherine Twinn filed her written submissions on November 15, 2019 (the "Catherine Twinn Brief"), and her position is that the Consent Order ratified the transfer of assets from the 1982 Trust to the 1985 Trust.

4. Shelby Twinn filed her written submissions on November 15, 2019 (the "Shelby Twinn Brief"), and her position is that the assets are held in the 1985 Trust for the benefit of the 1985 Trust beneficiaries.

5. The 1985 Trustees filed their written submissions on November 1, 2019 (the "1985 Trustees Brief"). The 1985 Trustees relied upon the Brief of the Trustees for approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust, dated and filed August 17, 2016. The 1985 Trustees state that, as fiduciaries of the 1986 Trust, they cannot advocate that the 1982 Trust applies to the assets.[1] They admit that the litigation in respect of the discriminatory nature of the 1985 Trust would be at an end if the definition of beneficiary contained in the 1982 Trust applies to the assets.[2] The 1985 Trustees also take the position that a transfer from the 1985 Trust to The Sawridge Band Trust (the "1986 Trust") would be valid.

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[1] 1985 Trustees Brief at para 4
[2] 1985 Trustees Brief at para 4

6. These submissions are filed as a reply to the OPGT Brief, the Catherine Twinn Brief, and the Shelby Twinn Brief.

II. Sawridge Was Not a Party to the Consent Order

7. Catherine Twinn states that Sawridge was involved in the Consent Order.[3] Similarly, Shelby Twinn asserts that Sawridge approved the Consent Order.[4] Both briefs make reference to Sawridge's presence in the Court on August 24, 2016. Both of these assertions mischaracterize the purpose of Sawridge's presence in the court on August 24, 2016 and Sawridge's involvement in drafting, preparing, and agreeing to the Consent Order.

8. Sawridge never provided its consent to the Consent Order. Sawridge is not a party to the Consent Order.

9. Sawridge was present in court on August 24, 2016 to respond to far-reaching applications for productions brought by the OPGT. On February 1, 2016 the OPGT filed two applications naming Sawridge as respondent (the "OPGT Applications"). The OPGT Applications sought production of Sawridge Band Council resolutions, minutes, and all other documents from the 1970s related to the acquisition and transfers of property which later formed the corpus of the 1982 Trust, including financial statements and documents related to specific transactions;[5] and it sought production of all Sawridge documents which may assist in identifying current and possible minors who are children of Sawridge members.[6]

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[3] Catherine Twinn Brief at paragraph 1
[4] Shebly Twinn Brief at paragraph 3
[5] Rule 5.13 Application by the OPGT for Document Production re Assets, filed Feb 1, 2016 **[TAB A]**
[6] Rule 5.13 Application by the OPGT for Document Production re Minors, filed Feb 1, 2016 **[TAB B]**

10. Sawridge opposed the OPGT Applications for the reasons outlined in its Brief filed March 15, 2016.[7] The OPGT Applications were scheduled to be heard on August 24, 2016, the same day that the Consent Order was presented to Thomas J for his approval.

11. Sawridge's suggestion that the OPGT agree to the Consent Order was a position of compromise in the face of the over-reaching applications for production.[8] This suggestion does not mean that Sawridge was a party to the Consent Order or that Sawridge played any role in drafting the Consent Order.

12. The June 22, 2016 "With Prejudice" offer made by the 1985 Trustees,[9] which circulated the draft consent order, contained no discussion of the legal basis for the order and made no reference to case law or to Section 42 of the *Trustee Act*.[10]

13. Furthermore, at the questioning on affidavit of Paul Bujold, held on July 27, 2016, counsel for Sawridge confirmed that Sawridge had no control over the consent order.[11]

14. On August 24, 2016, Sawridge made no submissions regarding the Consent Order.

15. No party or non-party to this action has produced any evidence showing that Sawridge was involved in the drafting or preparation of the Consent Order.

III. The Alleged Overlapping 1982 and 1985 Trust Beneficiaries are Irrelevant

16. The OPGT and Catherine Twinn assert that on April 15, 1985, the day the 1985 Trust was settled, the beneficiaries of both the 1982 Trust and 1985 Trust were the same, such that the transfer based on *Pilkington* was proper.[12]

17. Sawridge contends that the two day alleged overlap of beneficiaries between April 15, 1985 and April 17, 1985 is irrelevant, because the purpose of the purported transfer was

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[7] Sawridge First Nation Brief on OPGT Rule 5.13 Applications for Production. The Brief, without tabbed materials, is reproduced at **[TAB C]**

[8] Letter of Ed Molstad to Parties, dated July 6, 2016, Tab C to the Catherine Twinn Brief.

[9] Catherine Twinn Brief, Tab C.

[10] RSA 2000 c T-8, being Tab 10 to Sawridge's Brief. Section 42 has not been amended since prior to 1982.

[11] Questioning on Affidavit of Paul Bujold, July 27, 2016, at page 6:19-24, Tab G to the OPGT Brief.

[12] Catherine Twinn Brief at paras 25 and 63, OPGT Brief at paras 22 and 94.

clearly to deprive individuals who would become Sawridge members under Bill C-31 from becoming beneficiaries, as the 1982 Trust Deed required.

18. Furthermore, the position taken by Ms. Twinn and by the OPGT creates uncertainty as to who qualifies as a beneficiary under the 1985 Trust, creating an issue of certainty of object. This issue will be discussed later in this Reply.

19. The fact that the beneficiaries of the 1982 Trust and the 1985 Trust allegedly overlapped for two days is irrelevant because the 1982 Trustees did not have the power to change the definition of a beneficiary. The issue is not whether the beneficiaries had to be the same individuals, but whether the 1982 Trustees had the discretion to encroach on 1982 Trust property and resettle the 1982 Trust property into a trust with a different definition of beneficiary.

20. Trustees have an obligation to act fairly between beneficiaries in the exercise of their powers.[13] The duty of even-handedness requires that where there are two or more classes of beneficiaries, each class receives exactly what the terms of the documentation confer.[14]

21. No authority exists to establish that trustees can use a discretion to redefine a trust's beneficiaries without the consent of beneficiaries who will be excluded. The beneficiaries under a resettled trust need not be defined in the same manner as in the original trust provided that either the beneficiaries consent (as did the nephew in *Pilkington*[15]) or that the original trust deed allow the trustee to exclude a beneficiary (as in *Edell*[16]).

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[13] *Hunter Estate v Houlton* 1992 CarswellOnt 537, 7 OR (3d) 372 [*Hunter Estate*], Tab 7 of the Sawridge brief
[14] *Burke v Hudson's Bay Co* 2010 SCC 34 at 85 [*Burke*]. **[TAB 1].**
[15] *Pilkington v Inland Revenue Commissioners* (1962), [1964] AC 612 (Eng HL) [*Pilkington*], Tab A03 of the Brief of the Sawridge Trustees on the Application on Transfer Issue as Directed by the Court Returnable November 27, 2019.
[16] *Edell v Sitzer*, 2001 CarswellOnt 020, 55 OR (3d) 198 (ON SC), Tab 8 of the Sawridge Brief

22. In *Bruderheim Community Church v Board of Elders*,[17] this Honourable Court construed a trust which defined its beneficiaries as a "static entity"[18] of persons. Almost all members of a local congregation (the "Congregation") of a global church (the "Moravian Church") elected to dissociate themselves from the Moravian church following a doctrinal dispute.[19] Although the individuals who composed that static entity changed over the trust's roughly 120 year existence, the static entity remained well defined and ascertainable.[20] The trust property in that case involved land and a church building (the "Church Property"). The Church Property was held on trust by the Moravian Church "for the purposes of the Congregation of the Moravian Church at Bruderheim and be devoted to public purposes only" (the "Trust Conditions").[21] The individuals who had quit membership in the Congregation incorporated a new church[22] (the "New Church") and applied for an injunction declaring that they continued to hold beneficial ownership the Church Property.[23] The New Church was opposed by the Moravian Church which argued that the Moravian Church held the Church Property on trust for the "Congregation of the Moravian Church at Bruderheim" to the extent that such an entity existed.[24]

23. The New Church argued that it, or its members, were the beneficiaries under the Trust Conditions. The New Church argued that its members were the same individuals who had worshiped at the Church Property for generations.[25] This Court summarized the Applicants' argument as being that "after making major investments in the church and

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[17] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 [*Bruderheim*] **[TAB 2]**
[18] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 78 [*Bruderheim*] **[TAB 2]**
[19] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 44 [*Bruderheim*] **[TAB 2]**
[20] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 78 [*Bruderheim*] **[TAB 2]**
[21] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 19 [*Bruderheim*] **[TAB 2]**
[22] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 51 [*Bruderheim*] **[TAB 2]**
[23] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 53 [*Bruderheim*] **[TAB 2].** The New Church also applied for a declaration that the Global Church be found in breach of trust and replaced as trustee by the New Church.
[24] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 56 [*Bruderheim*] **[TAB 2].** The respondent had originally argued that the respondent had validly dissolved the congregation, resulting in beneficial ownership of the Church Property reverting to the global church. The respondent abandoned this position in oral argument.
[25] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 99 [*Bruderheim*] **[TAB 2]**

worshipping at the church for more than 120 years, it is simply unfair to exclude them from what they consider to be their own church."[26]

24. Almost every member of the Congregation departed for the New Church.[27] The members of the New Church were effectively the same individuals as the Congregation. The New Church argued that this meant that the New Church met the definition of "Congregation of the Moravian Church at Bruderheim", and that the Church Property was therefore held on trust for the New Church.

25. This court rejected that reasoning, holding that the wording of the Trust Conditions indicates that the Church Property is held on trust for a congregation of members of the Moravian Church located at Bruderheim, rather than for the former members of the Congregation.[28] Only members of the Moravian Church could be beneficiaries.[29]

26. *Bruderheim* shows that a trust settled for the object of benefiting an ascertainable static entity is constrained by the four corners of its deed to benefit that object and no other individuals. *Bruderheim* shows that the beneficiaries of a resettled trust must be defined in the same manner as in the original trust. The fact that the individuals (as members of the New Church) in *Bruderheim* had previously been beneficiaries was irrelevant as they had ceased to meet the definition of beneficiary.[30]

27. Similarly, the fact that there was an alleged two day overlap of beneficiaries between the 1982 Trust and the 1985 Trust was irrelevant. The relevant question is whether beneficiaries are defined in the same manner in both trusts.

28. No specific power is given to the 1982 Trustees to disentitle beneficiaries. *Fox* shows that in the absence of a specific power the duty to treat beneficiaries equally requires that no beneficiary be excluded.

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[26] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 100 [*Bruderheim*] **[TAB 2]**
[27] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraphs 44, 54 [*Bruderheim*] **[TAB 2]**
[28] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 125 [*Bruderheim*] **[TAB 2]**
[29] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 126 [*Bruderheim*] **[TAB 2]**
[30] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 126 [*Bruderheim*] **[TAB 2]**

IV. The Transfer Improperly Allowed the Trustees to Broaden their Discretion

29. Similarly, the transfer improperly allowed the Trustees to broaden the discretion over which they held the trust assets.

30. Paragraph 6 of the 1982 Trust Deed states:

> The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for the beneficiaries set out above; and the Trustees may make such payments at such tine, and from time to time, and in such manner as the Trustees in their uncontrolled discretion deem appropriate.[31]

31. This contrasts with the discretion to apply capital contained in the 1985 Trust deed, also at paragraph 6 of that deed:

> The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.[32]

32. The relatively broader discretion contained within the 1985 Trust Deed was likely an intentional addition meant to aid the eventual transfer of the 1985 Trust assets into the contemplated 1986 Trust.

33. Section 42 of the *Trustee Act*[33] ("Section 42") requires that any variation to a trust, including to a trustee's powers, be either authorized within the trust deed itself or else

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[31] Exhibit A to the Affidavit of Paul Bujold, Sworn September 12, 2011, filed September 13, 2011, Tab A to the OPGT Brief.

[32] Exhibit G to the Affidavit of Paul Bujold, Sworn September 12, 2011, filed September 13, 2011, Tab G to Sawridge's Book of Documents filed November 15, 2019 .

[33] RSA 2000 c T-8, being Tab 10 to Sawridge's Brief. Section 42 has not been amended since prior to 1982.

be approved by the Court. Trustees cannot convey a title better than the trustees possess unless the recipient is a *bona fide* purchaser for value without notice.[34]

34. Nothing in the 1982 Trust Deed suggests that the 1982 Trustees had the authority to vary their own power. The fact that the 1982 Trustees obtained a court order under Section 42 in 1983 to allow staggered trustee terms[35] indicates that the 1982 Trustees were aware of the relatively constrained discretion available to modify aspects of the 1982 Trust.

35. As discussed in the Sawridge Brief, the Consent Order does not meet the requirements of Section 42. In particular, the Consent Order does not approve of the enlargement of the powers.

36. In the absence of trust terms reserving to the trustees the right to vary their own power, or a court order, the expansion of the Trustees' discretion which was achieved by the transfer is contrary to the concept of a trust.[36]

V. The 1982 Trust Remains in Existence

37. The OPGT Brief misstates the current status of the 1982 Trust. At paragraphs 45, 49, 72 and elsewhere the OPGT Brief, relying on the evidence of Paul Bujold, asserts that the 1982 Trust no longer exists.[37] With respect, this is an incorrect characterization of the 1982 Trust and of the Consent Order.

38. The 1982 Trust has never been revoked or dissolved by either a court order or by an act of the 1982 Trustees. Nothing in the Consent Order makes reference to dissolution of the 1982 Trust.

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[34] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paragraph 90 **[TAB 2]**.
[35] Exhibit C to the Affidavit of Paul Bujold, Sworn September 12, 2011, filed September 13, 2011, Tab C to Sawridge's Book of Documents filed November 15, 2019 .
[36] Donovan Waters, Mark Gillen & Lionel Smith, eds, *Waters' Law of Trusts in Canada* 4th Edition (Toronto: Carswell, 2012) at 1358 [*Waters*], Tab 9 of the Sawridge Brief.
[37] OPGT Brief, citing the Questioning on Affidavit of Paul Bujold, July 27, 2016, at page 27:1-27, reproduced at Tab G of the OPGT Brief.

39. Trustees cannot convey property unless authorized by the trust deed, statute, or court order. If the 1982 Trustees were not properly authorized to transfer the trust assets to the 1985 Trust then their fiduciary obligations remain live.

VI. Catherine Twinn's Brief Mischaracterizes the Consent order

40. At paragraph 2 of her brief, Catherine Twinn states that the Consent Order "confirmed that the assets were held subject to the terms of the 1985 Trust deed." This is a mischaracterization of the Consent Order. Nothing in the Consent Order states that the assets are held subject to the terms of the 1985 Trust. The terms on which the 1982 Trust assets are held is a live issue before this Honourable Court.

VII. Catherine Twinn and the OPGT Incorrectly Characterize the Pre-Bill C-31 Indian Act

41. Catherine Twinn's assertion at paragraph 12 of her brief that registration for Indian status and membership in a particular first nation were one and the same is an incorrect characterization of the pre- Bill C-31 statutory regime. The Catherine Twinn Brief makes a similar error at paragraph 17 when it states that "a...consequence of the Bill C-31 changes was that while an individual could qualify for Indian status they may not necessarily become a member of a particular First Nation." Prior to Bill C-31 a status Indian could be registered as a member of a particular band or as an Indian on the General List.

42. Under the *Indian Act* RSC 1970, c I-6[38], (the "1970 Act") a person could be registered as an Indian on the General List while not a member of any band. Section 6 of the 1970 Act allowed for Indians who were not members of any band to be entered into the "General List".[39]

43. Subsection 9(1) of the 1970 Act allowed a band council or any ten electors to protest the addition of any person to that Band's list to the Registrar.[40] Subsection 9(2) of the 1970

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[38] *Indian Act* RSC 1970, c I-6 [*1970* Act] **[TAB 3]**
[39] *Indian Act* RSC 1970, c I-6 s6 **[TAB 3]**
[40] *Indian Act* RSC 1970, c I-6 s9(1) **[TAB 3]**

Act required the Registrar to investigate whether the impugned person should have been added to the Band List, and subsection 9(3) of the 1970 Act allowed a band council to refer the matter to a district or county court for judicial review of the Registrar's decision on the standard of correctness. [41]

44. Subsection 13(a) required a band council to consent to the addition of a person who was registered on the General List to be added to the Band List. [42]

45. Therefore, in accordance with the legislation, a person could be registered as a Status Indian without being a member of a Band. Further, contrary to the assertions in Catherine Twinn's brief, bands had control over the addition of members to their band list. Registration as a Status Indian was not synonymous with band membership.

46. The 1982 Trust was clearly settled on the basis that only members of the Sawridge First Nation Band List would be 1982 Trust beneficiaries. Paragraph 6 of the 1982 Trust Deed states that only present and future "Members" of the Sawridge First Nation are beneficiaries.

VIII. Catherine Twinn and the OPGT Interpret the Beneficiaries of the 1985 Trust in a Manner that Defeats the Certainty of Object

47. Catherine Twinn's assertion at paragraph 18 of her brief that there were approximately 493 persons associated with Sawridge as of August 12, 2016 is irrelevant to a determination of the meaning of the 1985 transfer.

48. Catherine Twinn's interpretation of the beneficiary definition contained in paragraph 2(a) of the 1985 Trust Deed defeats certainty of object.

49. Catherine Twinn's assertion that the 1985 and 1986 Trusts collectively provide beneficial status to a "broader Sawridge community" mischaracterizes the purposes and the beneficiaries of both trusts. The 1985 Trust purports to be limited to persons who

[41] *Indian Act* RSC 1970, c I-6 ss9(2)-9(4) **[TAB 3]**
[42] *Indian Act* RSC 1970, c I-6 s13(a) **[TAB 3]**

would qualify for membership in Sawridge under the 1970 Act. The 1985 Trust definition of beneficiary necessarily includes a Band Council's right to consent to any addition to its Band List, pursuant to section 13(a) of the 1970 Act.

50. The OPGT takes a similarly vague approach to the definition of beneficiaries under the 1985 Trust.

IX. A Transfer from the 1985 Trust to the 1986 Trust would be Valid

51. In the alternative, if the 1982 Trustees did have the power to transfer assets into the 1985 Trust, then there is no barrier to the 1985 Trustees transferring the corpus of the 1985 Trust into The Sawridge Band Trust (the "1986 Trust").

52. As detailed above, the 1985 Trust Deed allows the Trustees to apply the entire corpus of the trust to one individual if the Trustees so desire. The 1985 Trust Deed is more akin to the deed described in *Edell*, where an encroachment of the entire corpus in favour of one beneficiary and to the detriment of the others was permitted.

53. The 1985 Trust Deed would allow for a transfer of the 1985 Trust assets into the 1986 Trust provided that every beneficiary of the 1986 Trust is also a beneficiary under the 1985 Trust.

54. Catherine Twinn suggests, at paragraph 66 c) of her brief, that there is uncertainty relating to the definition of a beneficiary under the 1982 Trust Deed. Sawridge contends that there is no uncertainty under the 1982 Trust Deed definition. The beneficiaries are the members of Sawridge.

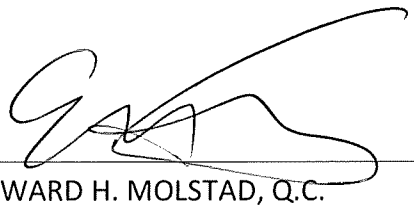
X. Response to Shelby Twinn Brief

55. Shelby Twinn's brief consists largely of conjecture or of an attempt to introduce evidence which is irrelevant to this application. The brief makes no legal arguments which are able to assist the court in arriving at a determination of the meaning of the Consent Order.

56. Furthermore, the Catherine Twinn brief, at paragraph 15, improperly relies on Shelby Twinn's oral submissions as evidence concerning allegations as to the Sawridge membership application process. Oral submissions given at hearings is not evidence. There should be no reliance on oral submissions that are not given as evidence which can be cross-examined.

XI. ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of November, 2019.

PARLEE McLAWS LLP



EDWARD H. MOLSTAD, Q.C.
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Sawridge First Nation

XII. TABLE OF AUTHORITIES RELIED UPON (ATTACHED TO REPLY BRIEF)

TAB	AUTHORITY
1.	*Burke v Hudson's Bay Co* 2010 SCC 34
2.	*Bruderheim Community Church v Board of Elders*, 2018 ABQB 90
3.	*Indian Act* RSC 1970, c I-6

XIII. TABLE OF DOCUMENTS (ATTACHED TO BRIEF)

TAB	DOCUMENT
A.	Rule 5.13 Application by the OPGT for Document Production re Assets, filed Feb 1, 2016
B.	Rule 5.13 Application by the OPGT for Document Production re Minors, filed Feb 1, 2016
C.	Sawridge First Nation Brief on OPGT Rule 5.13 Applications for Production

TAB 1

Peter Christopher Burke, Richard Fallis and A. Douglas Ross, personally and in a representative capacity *Appellants*

v.

Governor and Company of Adventurers of England Trading into Hudson's Bay and Investors Group Trust Company Ltd. *Respondents*

Peter Christopher Burke, Richard Fallis et A. Douglas Ross, agissant en leur qualité personnelle et en leur qualité de représentants *Appelants*

c.

Gouverneur et Compagnie des aventuriers d'Angleterre faisant le commerce dans la Baie d'Hudson et la Compagnie de Fiducie du Groupe Investors Ltée *Intimés*

INDEXED AS: BURKE *v.* HUDSON'S BAY CO.

2010 SCC 34

File No.: 32789.

2010: May 18; 2010: October 7.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

RÉPERTORIÉ : BURKE *c.* CIE DE LA BAIE D'HUDSON

2010 CSC 34

N° du greffe : 32789.

2010 : 18 mai; 2010 : 7 octobre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Pension plans — Surplus — Ongoing defined benefit pension plan — Sale of division of company resulting in employees being transferred to new company — Transferred employees removed from former employer's pension plan and incorporated into new pension plan — At time of transfer, former employer's pension plan had significant projected surplus — Former employer transferred enough pension funds to cover transferred employees defined benefits but no surplus funds transferred — Whether there was an obligation on former employer to transfer a pro rata portion of surplus on sale — Whether former employer's obligations to transferred employees were satisfied by assuring their defined benefits — Pension Benefits Act, 1987, S.O. 1987, c. 35.

Pensions — Pension plans — Expenses — Whether pension plan documentation allowed employer to charge plan administration expenses to fund.

In 1961, the Hudson's Bay Company ("HBC") provided a contributory, defined benefits pension plan for

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Pensions — Régimes de retraite — Excédent — Régime de retraite à prestations déterminées qui continue d'exister — La vente d'une division de la société ayant donné lieu à la mutation d'employés à une autre société — Les employés mutés ont été dissociés du régime de retraite de leur ancien employeur et ont intégré un nouveau régime — Lors du transfert, le régime de l'ancien employeur affichait un excédent projeté important — L'ancien employeur a transféré suffisamment d'éléments d'actif de la caisse de retraite pour financer les prestations déterminées des employés mutés, mais a conservé l'excédent — L'ancien employeur était-il tenu de transférer une portion de l'excédent, déterminée au prorata, lors de la vente? — L'ancien employeur a-t-il honoré ses obligations envers les employés mutés en garantissant leur régime à prestations déterminées? — Pension Benefits Act, 1987, S.O. 1987, ch. 35.

Pensions — Régimes de retraite — Frais — Les documents relatifs au régime de retraite autorisaient-ils l'employeur à imputer les frais d'administration du régime à la caisse de retraite?

En 1961, la Compagnie de la Baie d'Hudson (« HBC ») offrait à ses employés un régime de retraite contributif

its employees. Under this defined benefit pension plan members of the plan were guaranteed a specified benefit upon retirement. For the first twenty years of existence, the plan was in deficit and HBC made additional payments to keep the plan solvent. In 1982, the plan generated its first actuarial surplus and HBC began paying plan administration expenses out of the fund.

In 1987, HBC sold its Northern Stores Division to the North West Company ("NWC") and approximately 1,200 employees were transferred from HBC to NWC. The companies entered into an agreement to protect the pensions of the transferred employees. The agreement provided that NWC would establish a new pension plan and would provide the transferred employees with benefits at least equal to those provided under the HBC plan. HBC agreed to transfer assets sufficient to cover the defined benefits of the transferred employees. At the time of the transfer, HBC's pension plan had an actuarial surplus of about $94 million. The companies discussed whether a portion of the actuarial surplus should be transferred; however, HBC suggested that transferring part of the surplus would increase the purchase price and the matter went no further.

The transferred employees allege that HBC, as plan administrator, breached its fiduciary duty to treat all pension plan members with an even hand. They argue that HBC was required to transfer a portion of the actuarial surplus to the successor plan and that HBC improperly charged pension plan administration expenses to the pension fund for approximately six years prior to their transfer. The trial judge found in favour of HBC on the issue of administration expenses, but held that the surplus was subject to trust principles, and that the transferred employees, as beneficiaries of the trust, had an equitable interest in the actuarial surplus. The disparate treatment of the beneficiaries was found to be a breach of an equitable trust which required the transfer of a portion of the actuarial surplus to remedy the breach. HBC appealed the issue of surplus and the transferred employees cross-appealed on the issue of administration expenses. The Court of Appeal allowed the appeal and dismissed the cross-appeal.

Held: The appeal should be dismissed.

An employer is obligated to pay for administration expenses when such an obligation is imposed by statute or common law. In this case, there were no statutory or common law obligations on HBC to pay administration

à prestations déterminées. Par ce régime de retraite à prestations déterminées, les participants étaient assurés d'obtenir une prestation fixe à la retraite. Au cours de ses vingt premières années d'existence, le régime accusait un déficit et HBC a versé des cotisations supplémentaires afin d'en assurer la solvabilité. En 1982, le régime a affiché son premier excédent actuariel et HBC a commencé à imputer à la caisse les frais d'administration du régime.

En 1987, HBC a vendu sa division des Magasins du Nord à la Compagnie du Nord-Ouest (« CNO ») et environ 1 200 employés de HBC ont été mutés à CNO. Les sociétés ont conclu une entente visant à protéger le régime de retraite des employés mutés. Cette entente prévoyait la constitution, par CNO, d'un nouveau régime de retraite qui offrirait aux employés mutés des prestations au moins égales à celles prévues par le régime HBC. HBC a consenti à transférer des éléments d'actif suffisants pour assurer les prestations déterminées des employés mutés. Au moment du transfert, le régime de retraite de HBC affichait un excédent actuariel d'environ 94 millions de dollars. Les sociétés ont discuté de la possibilité de transférer une partie de cet excédent, mais HBC a laissé entendre qu'une telle transaction ferait augmenter le prix d'achat et la question n'a plus été débattue.

Les employés mutés soutiennent que HBC, à titre d'administratrice du régime, a manqué à son devoir fiducial d'accorder un traitement égalitaire à tous les participants au régime de retraite. Selon eux, HBC était tenue au transfert d'une portion de l'excédent actuariel au régime subséquent et elle a imputé à tort les frais d'administration du régime à la caisse de retraite pendant une période d'environ six ans précédant le transfert. Le juge du procès a donné gain de cause à HBC sur la question des frais d'administration, mais il a conclu que l'excédent du régime était assujetti aux principes de la fiducie et que les employés mutés, en tant que bénéficiaires de la fiducie, avaient un intérêt en equity dans l'excédent actuariel. Il était d'avis que le traitement différent accordé aux bénéficiaires contrevenait à une fiducie régie par l'equity et que, pour y remédier, une partie de l'excédent actuariel devait être transférée. HBC a interjeté appel à l'égard de la question de l'excédent, et les employés mutés ont formé un appel incident sur la question des frais d'administration. La Cour d'appel a accueilli l'appel et a rejeté l'appel incident.

Arrêt : Le pourvoi est rejeté.

L'employeur est obligé d'acquitter les frais d'un régime de retraite si une telle obligation est imposée par une source de nature législative ou jurisprudentielle. En l'espèce, aucune loi ni règle de common law n'imposait

expenses. The original trust agreement as well as the plan text do not expressly address plan administrative expenses. Subsequent trust agreements included a provision which expressly allowed HBC to charge plan administration expenses to the fund. The new trust agreements merely confirmed what was already implicitly provided for in the original trust agreement. HBC was therefore permitted to charge plan administration expenses to the pension fund.

The issue as to whether HBC was required to transfer a portion of the actuarial surplus when it sold its Northern Stores Division to NWC raises a novel question in pension law as the sale occurred in the context of an ongoing pension plan, rather than a terminated or wound-up plan. In all cases the interests in the surplus of a pension plan have to be determined according to the words of the relevant documents and applicable contract and trust principles and statutory provisions. Each situation must be evaluated on a case-by-case basis.

Here, subject to the text of the plan, the terms of the trust agreement, and relevant statutes, HBC, as plan administrator, had wide discretion with respect to the pension plan, which it could exercise unilaterally and which could affect the interests of the employees and to which exercise of discretion the employees were vulnerable. Therefore, a fiduciary relationship existed between HBC as administrator and the employees/beneficiaries under the pension plan.

Pensions legislation is not a complete code but rather it establishes minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of those entitled to receive them under private pension plans. Here, HBC complied with the 1987 *Pension Benefits Act* when it transferred the pension assets to NWC. The terms of the relevant plan and trust documentation may impose a higher standard. Thus, HBC's compliance with the 1987 *Pension Benefits Act* is not a complete answer to the transferred employees' claim. It is necessary to examine the common law and equitable principles that govern interpretation of the plan and trust documentation.

In a defined benefit pension governed by trust principles, as in this case, legal ownership of the defined benefits lies with the trustee. The funds needed to pay the employees' defined benefits are held in trust on their behalf. As beneficiaries, the employees have

à HBC l'obligation de payer ces frais. La convention de fiducie originale, ainsi que le texte du régime, ne traitent pas expressément des frais d'administration du régime. Les conventions de fiducie subséquentes autorisaient expressément HBC à imputer à la caisse les frais d'administration du régime. Les nouvelles conventions de fiducie n'ont fait que confirmer expressément ce que prévoyait implicitement la convention originale. Par conséquent, HBC pouvait imputer les frais d'administration du régime à la caisse de retraite.

La question de savoir si HBC était tenue de transférer une portion de l'excédent actuariel lorsqu'elle a vendu sa division des Magasins du Nord à CNO soulève une question nouvelle intéressant le droit applicable aux régimes de retraite, car le régime de retraite a continué d'exister après la vente; il n'y a pas été mis fin et il n'a pas été liquidé. Dans toutes les affaires, le droit à l'excédent d'un régime de retraite doit être déterminé en fonction du libellé des documents pertinents, des principes du droit des contrats et du droit des fiducies et des textes législatifs applicables. Chaque situation appelle un examen au cas par cas.

En l'espèce, sous réserve du texte du régime, de la convention de fiducie et des lois applicables, HBC, en qualité d'administratrice du régime, avait à l'égard du régime de retraite un vaste pouvoir discrétionnaire, qu'elle pouvait exercer unilatéralement de manière à avoir un effet sur les intérêts des employés et auquel ces derniers étaient vulnérables. Par conséquent, un lien fiducial unissait HBC, en tant qu'administratrice du régime, à ses employés, en tant que bénéficiaires du régime de retraite.

La loi sur les régimes de retraite n'est pas un code exhaustif; elle établit des normes minimales et une supervision réglementaire afin de protéger et de garantir les prestations et les droits des personnes qui y ont droit en vertu des régimes de retraite complémentaires. En l'espèce, HBC a respecté les dispositions de la *Pension Benefits Act* de 1987 lors du transfert des éléments d'actif de la caisse de retraite à CNO. Les documents constituant le régime et la fiducie peuvent imposer une norme supérieure. Par conséquent, le respect des dispositions de la *Pension Benefits Act* de 1987 par HBC ne suffit pas à réfuter l'argument des employés mutés. Il est nécessaire d'analyser les principes de common law et d'equity régissant l'interprétation des documents relatifs au régime et à la fiducie.

Dans le cadre d'un régime de retraite à prestations déterminées régi par les principes de la fiducie, comme en l'espèce, le fiduciaire détient le titre en common law sur les prestations déterminées. Les fonds nécessaires au versement des prestations déterminées aux employés

an equitable interest in the funds needed to cover their defined benefits. A review of the original and subsequent pension plan documentation indicates that the only employee benefits that are provided for under the terms of the plan are the employees' defined retirement benefits. Additionally, the pension plan documents (the pension plan text and trust agreement), having regard to the operative language of the plan as a whole, do not contain any of the language that would typically give employees an entitlement to surplus. Based on the provisions of the pension plan documentation, it cannot be said that the transferred employees had an equitable interest in the surplus on termination, and therefore no floating equity in the actuarial surplus during continuation of the plan.

The fact that HBC may have voluntarily chosen to increase pension benefits out of surplus funds or otherwise, does not change the nature of the employees' interest in the pension fund or extend fiduciary obligations to voluntary actions of the employer. Moreover, employees have no right to compel surplus funding to provide a cushion against insolvency. As a defined benefit plan, HBC's duty was to ensure that funds at all times meet the fixed benefits promised by the employer. The right of the employees is that their defined benefits be adequately funded, not that an actuarial surplus be funded. Just because HBC had fiduciary duties as plan administrator does not obligate it under any purported duty of evenhandedness to confer benefits upon one class of employees to which they have no right under the plan. Neither the retained nor the transferred employees had an equitable interest in the plan surplus. Thus, there was no duty of evenhandedness applicable to the surplus.

Finally, a beneficiary of a trust has the right to compel its due administration even if it does not have an equitable interest in all of the assets of the trust. In this case, because the transferred employees had an equitable interest in their defined benefits, they have the right to compel the due administration of the trust and to ensure that the employer, trustee and plan administrator are complying with their legal obligations in the pension plan documents. The circumstances of this case do not suggest that the actuarial surplus was abused by HBC or used for an improper purpose.

sont détenus en fiducie au profit de ces derniers. En leur qualité de bénéficiaires, les employés ont un intérêt en equity dans ces fonds. Un examen des documents initiaux et subséquents relatifs au régime de retraite indique que les prestations déterminées de retraite sont les seules prestations auxquelles les employés ont droit aux termes du régime. En outre, les documents relatifs au régime de retraite (le texte du régime et la convention de fiducie), eu égard aux termes performatifs du régime dans son ensemble, ne contiennent aucune des formules qui confèrent normalement aux employés un droit à l'excédent. Vu les dispositions des documents relatifs au régime de retraite, on ne saurait dire que les employés mutés avaient un intérêt en equity sur l'excédent à la cessation du régime, et donc aucun droit flottant en equity dans l'excédent actuariel pendant l'existence du plan.

Le fait que HBC ait librement décidé d'augmenter les prestations de retraite au moyen notamment d'une réaffectation de l'excédent ne change rien à la nature de l'intérêt que détiennent les employés dans la caisse de retraite ni n'a pour effet d'étendre les obligations fiduciales de l'employeur à ses actes gratuits. En outre, les employés n'ont pas le droit d'exiger que l'excédent actuariel soit utilisé pour parer au risque d'insolvabilité. Dans le cadre d'un régime à prestations déterminées, le devoir de HBC consistait à faire en sorte que les fonds soient en tout temps suffisants pour assurer le versement des prestations déterminées qu'il a promises. Le droit des employés se rapporte à la capitalisation suffisante de leurs prestations déterminées et non d'un excédent actuariel. Le fait que HBC avait des obligations fiduciales, en qualité d'administratrice du régime, ne la contraint pas, en raison d'un quelconque devoir de traitement égalitaire, à reconnaître à un groupe d'employés des avantages que le régime ne leur confère pas. Ni les employés mutés ni ceux qui sont demeurés en poste chez HBC ne possédaient d'intérêt en equity dans l'excédent. Partant, aucun devoir de traitement égalitaire ne s'appliquait à l'égard de l'excédent.

Enfin, le bénéficiaire d'une fiducie est en droit d'en exiger la bonne administration, et ce, même s'il ne possède pas d'intérêt en equity dans tous les éléments d'actif de la fiducie. En l'espèce, comme les employés mutés possédaient un intérêt en equity dans les prestations déterminées, ils avaient le droit d'exiger la bonne administration de la fiducie et de s'assurer que l'employeur, le fiduciaire et l'administrateur du plan s'acquittent des obligations juridiques prévues dans les documents relatifs au régime. Les circonstances de l'espèce ne laissent pas croire que HBC a utilisé l'excédent actuariel d'une façon ou à une fin irrégulière.

What occurred between HBC and NWC was a legitimate commercial transaction. HBC and NWC negotiated over the purchase price of the assets, including the pension plan. HBC was agreeable to transferring a portion of the surplus so long as NWC was willing to pay for the benefit of acquiring a plan in surplus. NWC was not willing to pay. Both companies complied with the legislative requirements, lending further support to the legitimacy of the transaction. In executing the transfer, HBC was entitled to rely on the terms of the plan. Under the plan documentation, the employees' rights and interests were limited to their defined benefits. HBC's legal obligations with respect to its employees, including the fiduciary duties that it owed to the transferred employees, were satisfied in this case by protecting their defined benefits. Based on the plan documentation, HBC did not have a fiduciary obligation to transfer a portion of the actuarial surplus.

Cases Cited

Applied: *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; **distinguished:** *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973; **referred to:** *North West Co. v. Hudson's Bay Co.*, [1991] O.J. No. 2449 (QL); *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; *Burke v. Hudson's Bay Co.*, 2008 ONCA 690, 241 O.A.C. 245.

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HBC et CNO ont conclu une opération commerciale légitime. HBC et CNO ont négocié le prix d'achat des éléments d'actif, y compris le régime de retraite. HBC était disposée à transférer une portion de l'excédent si CNO acceptait de payer davantage pour acquérir un régime excédentaire, ce que cette dernière n'était pas disposée à faire. L'opération est d'autant plus légitime que les deux sociétés se sont conformées aux prescriptions de la loi. Lorsqu'elle a conclu le transfert, HBC pouvait se fonder sur les dispositions du régime. Aux termes des documents relatifs à ce dernier, les droits et les intérêts des employés se limitaient à leurs prestations déterminées. En l'espèce, HBC a honoré ses obligations juridiques envers ses employés, et notamment ses devoirs fiduciaux envers les employés mutés, en protégeant leurs prestations déterminées. Selon les documents relatifs au régime, HBC n'avait aucune obligation fiduciale de transférer quelque portion que ce soit de l'excédent actuariel.

Jurisprudence

Arrêt appliqué : *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678; **distinction d'avec l'arrêt :** *Buschau c. Rogers Communications Inc.*, 2006 CSC 28, [2006] 1 R.C.S. 973; **arrêts mentionnés :** *North West Co. c. Hudson's Bay Co.*, [1991] O.J. No. 2449 (QL); *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Frame c. Smith*, [1987] 2 R.C.S. 99; *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; *Burke c. Hudson's Bay Co.*, 2008 ONCA 690, 241 O.A.C. 245.

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Loi modifiant la Loi sur les régimes de retraite, L.O. 2010, ch. 9, art. 68.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Weiler and Gillese JJ.A.), 2008 ONCA 394, 236 O.A.C. 140, 67 C.C.P.B. 1, 40 E.T.R. (3d) 157, [2008] O.J. No. 1945 (QL), 2008 CarswellOnt 2801, reversing in part a decision of Campbell J. (2005), 51 C.C.P.B. 66, 25 E.T.R. (3d) 161, 2005 CanLII 47086, [2005] O.J. No. 5434 (QL), 2005 CarswellOnt 7334. Appeal dismissed.

David C. Moore and *Kenneth G. G. Jones*, for the appellants.

J. Brett Ledger, *Christopher P. Naudie* and *Craig T. Lockwood*, for the respondents.

The judgment of the Court was delivered by

ROTHSTEIN J. —

I. Introduction

[1] This appeal arises out of the sale of a division of the Hudson's Bay Company ("HBC") to the North West Company ("NWC"). The employees of the division were retained, but transferred to NWC in the sale, and their pensions were assured. The transferred employees were removed from the HBC pension plan and incorporated into a new successor plan. At the time of the transfer, the HBC plan had a projected surplus. HBC transferred enough of the pension fund to cover the transferred employees' defined benefits but did not transfer any of the surplus funds.

[2] The transferred employees allege that the employer breached its fiduciary duty to treat all pension plan members with an even hand. They argue that HBC was required to transfer a portion of the projected surplus to the successor plan. They argue that the result was uneven treatment: the remaining HBC employees benefited from a plan in surplus but the transferred employees did not. As a subsidiary issue, the transferred employees also argue that HBC improperly charged pension plan administration expenses to the pension

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Weiler et Gillese), 2008 ONCA 394, 236 O.A.C. 140, 67 C.C.P.B. 1, 40 E.T.R. (3d) 157, [2008] O.J. No. 1945 (QL), 2008 CarswellOnt 2801, qui a infirmé en partie une décision du juge Campbell (2005), 51 C.C.P.B. 66, 25 E.T.R. (3d) 161, 2005 CanLII 47086, [2005] O.J. No. 5434 (QL), 2005 CarswellOnt 7334. Pourvoi rejeté.

David C. Moore et *Kenneth G. G. Jones*, pour les appelants.

J. Brett Ledger, *Christopher P. Naudie* et *Craig T. Lockwood*, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE ROTHSTEIN —

I. Introduction

[1] Le pourvoi découle de la vente d'une division de la Compagnie de la Baie d'Hudson (« HBC ») à la Compagnie du Nord-Ouest (« CNO »). Au moment de la vente, les employés de la division n'ont pas été mis à pied; ils ont été mutés à CNO, et leur régime de retraite a été garanti. Les employés mutés ont été dissociés du régime de retraite de HBC et ont intégré un régime subséquent, créé à ce moment. Lors du transfert, le régime de HBC affichait un excédent projeté. HBC a transféré suffisamment d'éléments d'actif de la caisse de retraite pour financer les prestations déterminées des employés mutés, mais a conservé l'excédent.

[2] Les employés mutés soutiennent que l'employeur a manqué à son devoir fiducial d'accorder un traitement égalitaire à tous les participants au régime de retraite. Selon eux, HBC était tenue au transfert d'une portion de l'excédent projeté au régime subséquent et son défaut d'y procéder a donné lieu à un traitement inégal : les employés demeurés en poste chez HBC ont bénéficié d'un régime excédentaire, contrairement aux employés mutés. Subsidiairement, les employés mutés font valoir que HBC a imputé à tort les frais

fund for approximately six years prior to their transfer.

[3] In the reasons that follow, I conclude that the transferred employees' claims fail on both grounds. I conclude that the pension plan documentation allowed HBC to charge plan administration expenses to the fund. I also conclude that there was no obligation on HBC to transfer a pro rata portion of the surplus on the sale. HBC's obligations to the transferred employees were satisfied by assuring their defined benefits.

[4] At the outset, it might be useful to set out the pension terminology relevant to the facts of this case. HBC provided a defined benefit pension plan to its employees. This means that the members of the plan were guaranteed a specified benefit upon retirement. A defined benefit plan stands in contrast to a defined contribution plan, where retirement benefits are based on contributions and the earnings on the contributions set out in the pension plan. Under either type of plan, contributions may be made by both the employer and employees or just the employer. In order to fund the defined benefits in this case, both HBC and the employees made contributions to the pension plan. For employees who obtained five years seniority, pension plan participation was a mandatory condition of employment at HBC. Employees were required to contribute to their pensions. The basic employee contribution requirement was set at 5% of annual earnings. HBC contributed any additional amount needed to ensure coverage of the employees' defined benefits. HBC's contribution was based on the assessment of an actuary. The actuary's calculations rested on certain assumptions — inflation rates, investment returns, and future employees, amongst other things. This is an exercise in estimation that frequently results in deviation between the actuary's assessment and the real state of the pension fund.

[5] An ongoing pension fund may be said to have an actuarial surplus when the actuary's prediction is that the fund has more assets than liabilities (i.e. the

d'administration du régime à la caisse de retraite pendant une période d'environ six ans précédant le transfert.

[3] Dans les motifs qui suivent, je rejette les deux moyens d'appel soulevés par les employés mutés. Je conclus que les documents relatifs au régime de retraite autorisaient HBC à prélever les frais d'administration du régime sur la caisse de retraite. Je conclus également que HBC n'était pas tenue de transférer une portion de l'excédent, déterminée au prorata, lors de la vente. Elle a honoré ses obligations envers les employés mutés en garantissant leur régime à prestations déterminées.

[4] Pour commencer, il serait utile d'exposer la terminologie pertinente des régimes de retraite eu égard aux faits de l'espèce. HBC offrait à ses employés un régime de retraite à prestations déterminées. Ainsi, elle garantissait aux participants une prestation fixe à la retraite. Cette formule se distingue du régime à cotisations déterminées, où les prestations de retraite sont fonction des cotisations, établies par le régime, et des revenus générés par celles-ci. Dans l'un et l'autre cas, les cotisations peuvent être versées par l'employeur et l'employé, ou par l'employeur seul. En l'espèce, à la fois HBC et les employés cotisaient au régime. La participation au régime de retraite était une condition impérative d'emploi à HBC après une période d'emploi de cinq ans. Les employés étaient tenus d'y cotiser. La cotisation de base d'un employé correspondait à 5 p. 100 de son revenu annuel. HBC versait le reste de la somme requise pour financer les prestations déterminées des employés. Le montant des cotisations de HBC était fixé par un actuaire dont les calculs s'appuyaient sur certaines hypothèses — taux d'inflation, rendement du capital investi, employés à venir, etc. Un tel exercice d'estimation se traduit fréquemment par des écarts entre l'évaluation de l'actuaire et l'état réel de la caisse de retraite.

[5] On peut dire d'une caisse de retraite qu'elle enregistre un excédent actuariel lorsque l'actuaire conclut que l'actif du régime est supérieur à son

defined benefits). Where the prediction is that the liabilities are greater than the assets, the fund is said to be in deficit. Because of the nature of the actuarial predictions, it is sometimes said that an actuarial surplus or deficit only exists on paper. If the pension plan is terminated, or wound-up, the assets and liabilities can be tallied and whether a fund is *actually* in deficit or surplus can be determined. Therefore, it is sometimes said that an actual surplus only crystallizes on plan termination.

[6] The employer's and employees' respective rights and obligations with respect to the defined benefits, contributions and surplus are set out in the pension plan documentation. In the present case there are two types of pension plan documents: the pension plan text and the fund management agreement (also referred to as the trust agreement). Gillese J.A. succinctly described the role of each document in her reasons (2008 ONCA 394, 236 O.A.C. 140, at paras. 35-36). To paraphrase her reasons, the pension plan text is a contract between the employer and the employee. The plan text sets out the administration of the pension plan and addresses matters such as funding obligations of the employer and employees, defined benefits and the method by which the plan will be administered. The plan text is not a stand-alone document, however, as it is not a tool for accumulating funds. Therefore, a second document is required. In this case, there is a trust agreement between HBC and the trustees of the pension fund. This document established and requires the maintenance of the HBC pension trust fund. Certain provisions of the pension text and the trust agreement will be reviewed in more detail in the analysis that follows below.

II. Facts

[7] HBC provided a pension plan for its employees ("the plan"). It is a contributory, defined benefits pension plan.

[8] The plan was established in 1961. For the first twenty years of existence, the plan was in deficit — the fund did not contain enough assets to cover the defined benefits of the employees. HBC made

passif (c.-à-d. les prestations déterminées). Par contre, s'il conclut que le passif est supérieur à l'actif, la caisse est tenue pour déficitaire. À cause de la nature des avis actuariels, on dit parfois que l'excédent ou le déficit actuariel n'existe qu'en théorie. S'il est mis fin au régime de retraite, ou si le régime est liquidé, on peut comptabiliser l'actif et le passif et déterminer si la caisse est *réellement* déficitaire ou excédentaire. C'est pourquoi on dit parfois que l'excédent réel d'un régime ne se cristallise qu'à la date à laquelle on met fin au régime.

[6] Les droits et les obligations respectifs de l'employeur et des employés au regard des prestations déterminées, des cotisations et de l'excédent sont définis dans les documents relatifs au régime de retraite. En l'espèce, le régime est constitué par deux types de documents : le texte du régime et la convention de gestion de la caisse (aussi appelée la convention de fiducie). Dans ses motifs, la juge Gillese a décrit brièvement le rôle de chaque document (2008 ONCA 394, 236 O.A.C. 140, par. 35-36). Pour paraphraser ses propos, le texte du régime est un contrat entre l'employeur et l'employé. Il explique le fonctionnement du régime et traite de questions telles que l'obligation de cotiser de l'employeur et des employés, les prestations déterminées et le mode d'administration du régime. Or, il n'est pas un document autonome puisqu'il ne prévoit pas l'accumulation des fonds, d'où la nécessité d'un deuxième document qui, en l'espèce, consiste en une convention de fiducie entre HBC et les fiduciaires de la caisse de retraite. Ce document a constitué en fiducie la caisse de retraite de HBC et en prévoit la continuation. J'examinerai en détail certaines dispositions du texte du régime et de la convention de fiducie dans l'analyse qui suit.

II. Les faits

[7] HBC offrait à ses employés un régime de retraite contributif à prestations déterminées (« le régime »).

[8] Le régime a été constitué en 1961. Au cours de ses vingt premières années d'existence, il accusait un déficit — l'actif de la caisse ne suffisait pas à couvrir les prestations déterminées des employés.

additional payments to keep the plan solvent. In 1982, the plan generated its first actuarial surplus. In response to the surplus, HBC began taking contribution holidays — meaning that it did not have to continue contributing to cover the defined benefits. The actuarial surplus also allowed HBC to pay for plan administration expenses out of the fund without affecting the defined benefits. In 1986, HBC attempted to withdraw $35 million of the estimated $76 million surplus in the fund. It abandoned this process, at least in part, because of the employees' adverse reaction.

Afin d'assurer la solvabilité du régime, HBC a versé des cotisations supplémentaires. En 1982, le régime a affiché son premier excédent actuariel, ce qui a incité HBC à s'accorder des périodes d'exonération de cotisations, son apport n'étant plus nécessaire pour couvrir le montant des prestations déterminées. L'excédent actuariel lui permettait également de payer les frais d'administration du régime à même la caisse sans entamer les fonds réservés aux prestations déterminées. En 1986, HBC a voulu retirer 35 millions de dollars de l'excédent de la caisse estimé à 76 millions de dollars. Elle a abandonné l'idée, entre autres, en raison de la réaction négative des employés.

[9] Although the original 1961 plan documentation provided that HBC's contributions were "entirely voluntary" and that payment of defined benefits under the plan were not guaranteed, the documentation also states that HBC intended to contribute the amounts deemed necessary on the basis of actuarial computations to provide the retirement benefits under the plan (art. 4 and 11.01). As indicated, HBC did make the payments that were required to fund the defined benefits under the plan when it was in deficit.

[9] Même si les documents initiaux relatifs au régime, qui datent de 1961, précisaient à propos des cotisations de HBC qu'elles seraient [TRADUCTION] « tout à fait volontaires » et que le versement des prestations déterminées par le régime n'était pas assuré, ils prévoyaient également que HBC entendait cotiser les fonds jugés nécessaires, suivant des calculs actuariels, au versement des prestations de retraite prévues au régime (art. 4 et 11.01). Comme il est indiqué précédemment, HBC a cotisé des sommes suffisantes pour financer le régime de prestations déterminées quand ce dernier était déficitaire.

[10] In 1965, *The Pension Benefits Act, 1965*, S.O. 1965, c. 96, came into force which required employers to pre-fund their defined benefit pension plans to maintain prescribed solvency levels (A. N. Kaplan, *Pension Law* (2006), at p. 43). In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35 ("*1987 PBA*") (the Act in force at the time relevant to this appeal), s. 56(1) provided:

> A pension plan is not eligible for registration unless it provides for funding sufficient to provide the pension benefits, ancillary benefits and other benefits under the pension plan in accordance with this Act and the regulations.

[10] En 1965, la *Pension Benefits Act, 1965*, S.O. 1965, ch. 96, a exigé des employeurs la capitalisation anticipée de leurs régimes de retraite à prestations déterminées afin d'en assurer le degré de solvabilité prescrit (A. N. Kaplan, *Pension Law* (2006), p. 43). Le paragraphe 56(1) de la *Pension Benefits Act, 1987*, S.O. 1987, ch. 35 (« PBA de 1987 »), en vigueur à l'époque visée par le litige, dispose :

> [TRADUCTION] Un régime de retraite n'est pas admissible à l'enregistrement s'il ne prévoit pas de financement suffisant pour assurer les prestations de retraite, les prestations accessoires et les autres prestations aux termes du régime de retraite, conformément à la présente loi et aux règlements.

[11] In the 1985 plan that was amended and restated on January 1, 1985, art. 4.04 provided that HBC was obligated to make contributions sufficient

[11] Dans le texte du régime modifié en date du 1er janvier 1985, l'art. 4.04 prévoyait l'obligation pour HBC de cotiser des fonds suffisants pour financer

to cover the defined benefits under the plan. Article 4.04 provided in part:

> The company shall from time to time, but not less frequently than annually, contribute such amounts to the Plan as are necessary, in the opinion of the Actuary, to provide the pension benefits accruing to Members during the current year and to amortize any initial unfunded liability or experience deficiency in accordance with the requirements of the Act, after taking into account the assets in the Trust Fund, the earnings thereon, the required contributions of Members during the year and all other relevant factors.

[12] Therefore, notwithstanding the apparent voluntary nature of HBC's contributions at the outset in 1961, HBC did make all contributions necessary to fund the defined benefits under the plan. In any event, HBC, pursuant to art. 4.04, expressly undertook and was required to satisfy the defined benefits prescribed under the plan.

[13] In 1987, HBC sold its Northern Stores Division to NWC. NWC agreed to retain the Northern Stores employees. This resulted in approximately 1,200 employees being transferred from HBC to NWC. As part of the sale, HBC and NWC entered into an agreement to protect the pensions of the transferred employees. The agreement provided that NWC would establish a new pension plan and would provide the transferred employees with benefits "at least equal to those presently provided under [the HBC plan]". HBC agreed to transfer assets sufficient to cover the defined benefits of the transferred employees. The actuarial report showed that HBC had to transfer approximately $12.6 million to cover the defined pension benefits of the transferred employees.

[14] At the time of the transfer, the HBC plan had a significant actuarial surplus estimated to be about $94 million. HBC and NWC discussed whether a portion of the actuarial surplus should be transferred. However, HBC suggested that transferring part of the surplus would increase the purchase price and the matter went no further.

[15] NWC contested the transferred amount on the basis that it did not sufficiently account for early

les prestations déterminées prévues au régime. Suit un extrait de l'art. 4.04 :

> [TRADUCTION] Au moins une fois l'an, la société cotise au régime la somme nécessaire, selon l'actuaire, pour verser aux participants les prestations de retraite accumulées pendant l'année en cours et pour amortir tout déficit actuariel ou perte actuarielle conformément aux prescriptions de la loi, compte tenu des facteurs pertinents, notamment l'actif du fonds en fiducie, ses revenus et les cotisations que sont tenus de verser les participants au cours de l'année.

[12] Ainsi, en dépit du caractère apparemment volontaire de ses cotisations à l'époque de la constitution du régime, en 1961, HBC a versé tous les fonds nécessaires pour financer le régime de prestations déterminées. Du reste, à l'art. 4.04, HBC s'était engagée expressément à financer les prestations déterminées prévues au régime, et elle y était tenue.

[13] En 1987, HBC a vendu sa division des Magasins du Nord à CNO, qui a convenu de garder à son service les employés des Magasins du Nord. Environ 1 200 employés de HBC ont donc été mutés à CNO. Dans le cadre de la vente, HBC et CNO ont conclu une entente visant à protéger le régime de retraite des employés mutés. Cette entente prévoyait la constitution, par CNO, d'un nouveau régime de retraite qui offrirait aux employés mutés des prestations [TRADUCTION] « au moins égales à celles prévues par [le régime HBC] ». HBC a consenti à transférer des éléments d'actif suffisants pour assurer les prestations déterminées des employés mutés, soit environ 12,6 millions de dollars, selon le rapport de l'actuaire.

[14] Au moment du transfert, le régime de HBC affichait un excédent actuariel important estimé à quelque 94 millions de dollars. HBC et CNO ont discuté de la possibilité de transférer une partie de cet excédent, mais HBC a laissé entendre qu'une telle transaction ferait augmenter le prix d'achat et la question n'a plus été débattue.

[15] CNO a contesté la somme transférée, faisant valoir qu'elle ne suffirait pas au versement des

retirement benefits. The matter was heard before the Superintendent of the Pension Commission of Ontario. The Superintendent agreed with NWC and found that the transferred amount did not account for early retirement benefits. However, the Superintendent found that he did not have the jurisdiction to order a transfer of further funds to cover the shortfall. NWC brought an application in court to determine its rights under the agreement. Gotlib J. of the Ontario Court of Justice agreed with NWC and ordered the transfer of an additional $1.27 million to cover early retirement benefits (*North West Co. v. Hudson's Bay Co.*, [1991] O.J. No. 2449 (QL)).

[16] The issue of transferring the actuarial surplus was presented to the Superintendent. He held that he did not have the jurisdiction to determine issues of surplus entitlement.

III. Lower Court Decisions

A. *Ontario Superior Court of Justice (2005), 51 C.C.P.B. 66*

[17] Peter Burke, Richard Fallis and A. Douglas Ross were Northern Stores employees who were transferred to NWC. They were appointed representatives of all the pension plan beneficiaries who were transferred to NWC. In their personal and representative capacity they claimed to be entitled to a portion of the actuarial surplus that existed in the HBC pension at the time of the transfer. They also sought to recover plan administration expenses that HBC charged to the fund, as well as the actuarial surplus funds that HBC used to take contribution holidays.

[18] Campbell J. heard the transferred employees' claims at the Ontario Superior Court of Justice. He concluded that the surplus was subject to trust principles, and that the transferred employees, as beneficiaries of the trust, had an equitable interest in the actuarial surplus. Campbell J. reasoned that the remaining employees stood to benefit from a greater pool of assets, because the entire actuarial surplus remained with HBC. Conversely, the transferred

prestations de retraite anticipée. L'affaire a été soumise au surintendant de la Commission des régimes de retraite de l'Ontario, qui a donné raison à CNO. Cependant, à son avis, il n'avait pas compétence pour ordonner le transfert de fonds supplémentaires pour combler la différence. CNO s'est alors adressée au tribunal afin que soient déterminés les droits que lui conférait l'entente. Le juge Gotlib de la Cour de justice de l'Ontario a souscrit à la thèse de CNO et a ordonné le transfert d'une somme additionnelle de 1,27 million de dollars qui servirait au versement des prestations de retraite anticipée (*North West Co. c. Hudson's Bay Co.*, [1991] O.J. No. 2449 (QL)).

[16] La question du transfert de l'excédent actuariel a été soumise au surintendant, qui s'est dit incompétent pour trancher les questions relatives au droit à l'excédent.

III. Décisions des juridictions inférieures

A. *Cour supérieure de justice de l'Ontario (2005), 51 C.C.P.B. 66*

[17] Peter Burke, Richard Fallis et A. Douglas Ross font partie des employés des Magasins du Nord qui ont été mutés à CNO. Ils ont été désignés à titre de représentants de l'ensemble des bénéficiaires du régime de retraite mutés à CNO. En leur qualité personnelle et en leur qualité de représentants, ils ont prétendu avoir droit à une partie de l'excédent actuariel qu'affichait le régime de HBC au moment du transfert. Ils ont également demandé le remboursement des frais d'administration du régime prélevés sur la caisse par HBC, de même que des fonds provenant de l'excédent actuariel dont cette dernière s'était servie pour s'accorder des périodes d'exonération de cotisations.

[18] Le juge Campbell de la Cour supérieure de justice de l'Ontario a instruit les demandes présentées par les employés mutés. Il a conclu que l'excédent du régime était assujetti aux principes de la fiducie et que les employés mutés, en tant que bénéficiaires de la fiducie, avaient un intérêt en equity dans l'excédent actuariel. Le juge Campbell a estimé que les employés demeurés en poste chez HBC auraient la chance de bénéficier d'une caisse

employees were deprived of the actuarial surplus that would have provided greater security for the payment and potential improvement of their benefits. The trial judge concluded that the disparate treatment of the beneficiaries was a breach of an equitable trust which required the transfer of a portion of the actuarial surplus to remedy the breach. The details of the remedy would be determined after further submissions from the parties.

[19] Campbell J. found in favour of HBC on the issue of expenses and concluded, based on contract principles, that HBC was entitled to charge plan administration expenses to the pension fund. Campbell J. also concluded that HBC was permitted to take contribution holidays. His conclusion on the latter issue was not appealed.

B. *Ontario Court of Appeal, 2008 ONCA 394, 236 O.A.C. 140*

[20] HBC appealed the issue of surplus to the Court of Appeal and the transferred employees cross-appealed on the issue of expenses. Gillese J.A., for a unanimous court, allowed the appeal and dismissed the cross-appeal.

[21] On the issue of surplus, Gillese J.A. determined that the matter could only be resolved by first determining whether the transferred employees had any entitlement to the actuarial surplus at the time of the transfer. If they did not, then HBC could not have had any obligation to transfer a portion of the actuarial surplus. Surplus entitlement is a matter of construction. Gillese J.A. analysed the language of the plan documentation and found that the documents did not contain any of the language that courts have found to establish employee entitlement to surplus. On the basis of several provisions in the plan text, Gillese J.A. found that the employees were entitled to only the defined benefits provided by the terms of the plan.

mieux garnie, parce que HBC avait conservé la totalité de l'excédent actuariel, tandis que les employés mutés se voyaient privés de ces fonds qui auraient mieux garanti leurs prestations et qui étaient susceptibles de les bonifier. Le juge du procès a conclu que le traitement différent accordé aux bénéficiaires contrevenait à une fiducie régie par l'equity et que, pour y remédier, une partie de l'excédent actuariel devait être transférée. Les détails de cette mesure de réparation seraient déterminés une fois que les parties auraient présenté leurs observations à cet égard.

[19] Le juge Campbell a donné gain de cause à HBC sur la question des frais d'administration et, se fondant sur les principes du droit des contrats, a conclu que HBC pouvait imputer les frais d'administration du régime à la caisse de retraite. Le juge Campbell a également conclu que HBC était autorisée à s'exonérer du versement des cotisations. Il n'a pas été interjeté appel de sa conclusion sur cette dernière question.

B. *Cour d'appel de l'Ontario, 2008 ONCA 394, 236 O.A.C. 140*

[20] HBC s'est pourvue devant la Cour d'appel sur la question de l'excédent, et les employés mutés ont formé un appel incident sur la question des frais d'administration. Dans une décision unanime, la juge Gillese a accueilli l'appel et a rejeté l'appel incident.

[21] Au sujet de l'excédent, la juge Gillese a conclu qu'elle ne pouvait trancher cette question qu'après avoir déterminé si les employés mutés avaient un droit quelconque à l'excédent actuariel au moment du transfert. Dans la négative, HBC ne pouvait avoir eu l'obligation d'en transférer une portion. Le droit à l'excédent est une affaire d'interprétation. Après avoir analysé le libellé des documents relatifs au régime, la juge Gillese était d'avis qu'ils ne contenaient aucune des formules reconnues par les tribunaux comme conférant un droit à l'excédent aux employés. Se fondant sur plusieurs dispositions du texte du régime, la juge Gillese a conclu que les employés n'avaient droit qu'aux prestations déterminées que leur accordait le régime.

[22] Gillese J.A. agreed with the trial judge that a fundamental principle of trust law is that the beneficiaries are to be treated with impartiality and an even hand. However, she noted, this principle is subject to the terms of the trust instrument. Gillese J.A. found that the plan documentation displaced the duty of even-handedness with respect to the actuarial surplus. Because the employees were only entitled to the defined benefits at the time of the transfer, the duty of even-handedness only required ensuring that the defined benefits were protected. In her opinion, the considerable discretion afforded to the employer on the use of actuarial surplus supported her conclusion.

[23] Based on the text of the plan documentation, Gillese J.A. found that HBC was entitled to charge plan administration expenses to the fund. Silence does not create a positive obligation on the employer to pay expenses. The plan text was silent on plan administration expenses; therefore, HBC was not obliged to pay out of its own pocket. Subsequent amendments to the documentation made this explicit, stating that administration costs could be paid out of the pension fund.

[24] Mr. Burke et al. ("Burke") appeal the decision on both issues.

IV. Issues

[25] I will deal with the issues in the reverse order of the Court of Appeal. First, did HBC properly pay the plan administration expenses from the pension fund? Second, was HBC obligated to transfer a portion of the actuarial surplus in the sale of Northern Stores?

V. Analysis

[26] Both issues in this appeal concern HBC's obligations with respect to surplus in the pension plan. Pension surpluses raise contentious issues that this Court has considered previously: *Schmidt*

[22] La juge Gillese a souscrit à la conclusion du juge du procès qu'un principe fondamental du droit des fiducies exige que les bénéficiaires soient traités de manière impartiale et égalitaire. Toutefois, a-t-elle fait remarquer, ce principe est assujetti à la convention de fiducie. Selon elle, les documents relatifs au régime supplantent le devoir de traitement égalitaire relativement à l'excédent actuariel. Comme les employés n'avaient droit qu'aux prestations déterminées au moment du transfert, le devoir de traitement égalitaire se limitait à la protection de ces prestations. À son avis, l'important pouvoir discrétionnaire conféré à l'employeur quant à l'utilisation de l'excédent actuariel étayait sa conclusion.

[23] Se fondant sur le libellé des documents relatifs au régime, la juge Gillese a conclu que HBC pouvait imputer les frais d'administration du régime à la caisse. L'absence d'une disposition sur le paiement des frais n'impose pas à l'employeur l'obligation positive de les acquitter. Le texte du régime ne prévoyait rien à l'égard des frais d'administration du régime; en conséquence, HBC n'était pas tenue de les payer de sa poche. Des modifications subséquentes aux documents ont clarifié la question, en permettant expressément le paiement des frais d'administration à même la caisse de retraite.

[24] M. Burke et les autres appelants (« le groupe de M. Burke ») ont interjeté appel du jugement rendu sur les deux questions.

IV. Questions en litige

[25] J'analyserai les questions dans l'ordre inverse de celui adopté par la Cour d'appel. Premièrement, HBC a-t-elle agi à bon droit en payant les frais d'administration du régime à même la caisse de retraite? Deuxièmement, HBC était-elle tenue de transférer une portion de l'excédent actuariel dans le cadre de la vente des Magasins du Nord?

V. Analyse

[26] Les deux questions dont notre Cour est saisie en l'espèce portent sur les obligations de HBC à l'égard de l'excédent accumulé par le régime de retraite. L'excédent d'une caisse de retraite soulève

v. Air Products Canada Ltd., [1994] 2 S.C.R. 611; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678. In all these cases the interests in the surplus of the pension plan have been determined according to the words of the relevant documents and applicable contract and trust principles and statutory provisions.

A. *Plan Administration Expenses*

[27] In 1982, when the pension fund had its first actuarial surplus, HBC began paying plan administration expenses out of the fund. Burke alleges that HBC improperly charged these expenses to the fund and that HBC, itself, should have paid the expenses. They seek to reclaim the funds used to pay expenses from 1982 until they were transferred to NWC in 1987.

[28] This Court recently addressed the issue of plan administration expenses in *Kerry*. While this Court's reasons in *Kerry* were released after the Court of Appeal's decision in the present appeal, my view is that the issue was correctly decided by Gillese J.A. I will briefly address why HBC properly paid the expenses from the fund in accordance with the principles in *Kerry*, but the Court of Appeal's decision correctly analyses this issue in more detail.

[29] In *Kerry*, this Court determined that absent a statutory or common law authority creating an obligation on the employer to pay for expenses, such an obligation must arise from the text and the context of the pension plan documents (para. 40). There was no statutory obligation on HBC to pay expenses. Accordingly, Burke argues that the obligation on HBC derives from the plan documents and the common law. This argument was rejected at the Court of Appeal, and for the following reasons I would also reject this argument.

des questions litigieuses sur lesquelles notre Cour a déjà été appelée à se pencher : *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152; *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678. Dans toutes ces affaires, le droit à l'excédent a été déterminé en fonction du libellé des documents pertinents, des principes du droit des contrats et du droit des fiducies et des textes législatifs applicables.

A. *Frais d'administration du régime*

[27] En 1982, année où le régime a affiché son premier excédent actuariel, HBC a commencé à payer à même la caisse les frais d'administration du régime. Le groupe de M. Burke prétend que HBC a irrégulièrement imputé ces frais à la caisse et qu'elle aurait dû les acquitter elle-même. Il sollicite le remboursement des fonds ayant servi au paiement de ces frais, de 1982 jusqu'à sa mutation à CNO, en 1987.

[28] Notre Cour a récemment traité de la question des frais d'administration d'un régime dans l'arrêt *Kerry*. Certes, nos motifs ont été publiés après l'arrêt de la Cour d'appel en l'espèce, mais j'estime que la juge Gillese a correctement tranché la question. Je traiterai brièvement des raisons pour lesquelles, selon les principes établis dans *Kerry*, HBC a agi à bon droit en payant ces frais à même la caisse, mais je rappelle que la Cour d'appel analyse correctement cette question plus en détail dans sa décision.

[29] Dans l'arrêt *Kerry*, la Cour a statué qu'en l'absence d'une source de nature législative ou jurisprudentielle qui obligerait l'employeur à acquitter les frais d'un régime de retraite, une telle obligation devrait découler du texte et du contexte des documents relatifs au régime (par. 40). Aucune loi n'imposait à HBC l'obligation de payer ces frais. Par conséquent, le groupe de M. Burke soutient que cette obligation découle des documents relatifs au régime et de la jurisprudence. Cet argument a été rejeté par la Cour d'appel et je suis d'avis de faire de même pour les motifs qui suivent.

[30] Burke argues that art. 21 of the original 1961 trust agreement imposes an obligation on the employer to pay plan administration expenses. The article provides:

21. COMPENSATION OF TRUSTEE

The Trustee shall be entitled to such compensation as may from time to time be mutually agreed in writing with the Company. Such compensation and all other disbursements made and expenses incurred in the management of the Fund shall be paid by the Company.

Burke puts particular emphasis on the last sentence of the provision and argues that "all other disbursements made and expenses incurred in the management of the Fund" is an ambiguous phrase and could include not only trustee expenses, but also additional plan administration expenses.

[31] In light of this broad wording, Burke argues that the ambiguity should be resolved having regard to the statements made in booklets distributed to the employees by HBC for the purpose of explaining their pension benefits. The HBC pension booklets for 1961, 1975 and 1980 stated that the entire cost of administering the plan will be borne or paid by the Company. Therefore, Burke argues that the combined effect of art. 21 and these booklets is that HBC improperly charged the plan administration expenses to the fund.

[32] I cannot accept this argument. In my opinion, art. 21 is not broad nor ambiguous. Article 21 deals with expenses incurred by the trustee "in the management of the Fund" and does not address plan administration expenses. The plan text, which deals with the administration of the plan, is silent on plan administration expenses. This Court reached the same conclusion in *Kerry*, where a similar article was found to impose an obligation on the employer to pay only for trustee expenses and not plan administration expenses. In my opinion, art. 21 is not ambiguous, as Burke suggests. The article

[30] Le groupe de M. Burke prétend que l'art. 21 de la convention de fiducie originale, qui date de 1961, impose à l'employeur l'obligation de payer les frais d'administration du régime. L'article est ainsi rédigé :

[TRADUCTION]

21. RÉMUNÉRATION DU FIDUCIAIRE

Le fiduciaire aura droit à la rémunération dont il aura convenu par écrit avec la société. Cette rémunération, ainsi que tous les autres débours et frais engagés dans le cadre de la gestion de la caisse, seront acquittés par la société.

Le groupe de M. Burke, insistant sur la dernière phrase de la disposition, fait valoir que la proposition [TRADUCTION] « tous les autres débours et frais engagés dans le cadre de la gestion de la caisse » est ambigüe et qu'elle pourrait viser non seulement les dépenses du fiduciaire, mais également les autres frais d'administration du régime.

[31] Invoquant le caractère général du libellé, le groupe de M. Burke prétend que l'ambiguïté devrait être résolue à la lumière des affirmations qui figurent dans les brochures distribuées par HBC à ses employés pour leur expliquer leur régime de retraite. Les brochures de 1961, 1975 et 1980 affirment que la totalité des frais relatifs à l'administration du régime seront assumés ou payés par la société. Partant, le groupe de M. Burke soutient que, compte tenu de l'art. 21 et des brochures, interprétés ensemble, HBC a agi irrégulièrement en prélevant sur la caisse les frais d'administration du régime.

[32] Je ne puis retenir cet argument. À mon avis, l'art. 21 n'est ni général ni ambigu. L'article 21 traite des dépenses engagées par le fiduciaire « dans le cadre de la gestion de la caisse » et non des frais d'administration du régime. Le texte du régime, qui porte sur l'administration de ce dernier, est muet sur la question des frais d'administration. La Cour est arrivée à la même conclusion dans l'arrêt *Kerry*, où elle a jugé qu'une disposition semblable imposait à l'employeur l'obligation de ne payer que les dépenses du fiduciaire, et non les frais d'administration du régime. Selon moi, l'art. 21 n'est pas

clearly outlines HBC's obligation with respect to trustee expenses and nothing else.

[33] In 1971, HBC entered into a new trust agreement. This new trust agreement included a provision which expressly allowed HBC to charge plan administration expenses to the fund. Again, in 1984, HBC entered into a new trust agreement. The 1984 trust agreement also expressly allowed HBC to charge plan administration expenses to the fund. Since the new trust agreements merely confirmed expressly what was already implicitly provided for in the original trust agreement, there is no need to discuss whether the new versions were valid as they introduce no new obligations or rights with respect to plan administration expenses.

[34] What, then, is the effect of the HBC pension booklets that stated that HBC would bear the entire cost of administering the pension plan? In light of my conclusion that art. 21 was unambiguous, it is not necessary to look to the booklets as an interpretative aid. Burke did not advance the argument in this Court that the statement in the booklets was a binding promise and created an estoppel.

[35] I would dismiss this ground of the appeal.

B. *Transfer of Surplus*

[36] The primary issue on this appeal is whether HBC was required to transfer a portion of the actuarial surplus when it sold Northern Stores to NWC in 1987. This is a novel question in pension law. The novelty arises from the fact that the sale occurred in the context of an ongoing pension plan, rather than a terminated or wound-up plan.

[37] Burke argues that, because the transfer occurred in the context of an ongoing plan, plan administration principles should govern the transfer. He says that he has an equitable interest in the

ambigu, comme le prétend le groupe de M. Burke. Cette disposition décrit clairement l'obligation de HBC à l'égard des dépenses engagées par le fiduciaire, et rien d'autre.

[33] En 1971, HBC a conclu une nouvelle convention de fiducie, laquelle autorisait expressément HBC à imputer à la caisse les frais d'administration du régime. En 1984, HBC a conclu une autre convention de fiducie, qui comportait elle aussi une disposition expresse à cet effet. Puisque les nouvelles conventions de fiducie n'ont fait que confirmer expressément ce que prévoyait implicitement la convention originale et n'ont pas créé de nouvelles obligations ni de nouveaux droits à l'égard des frais d'administration du régime, il n'y a pas lieu de se pencher sur leur validité.

[34] Quel est donc l'effet des brochures sur le régime de retraite de HBC qui affirmaient que cette dernière supporterait la totalité des frais relatifs à l'administration du régime? Vu ma conclusion que l'art. 21 n'est pas ambigu, il n'est pas nécessaire de recourir aux brochures comme outil d'interprétation. Le groupe de M. Burke n'a pas prétendu devant la Cour que l'affirmation figurant dans les brochures était une promesse exécutoire et qu'elle emportait la préclusion.

[35] Je suis d'avis de rejeter ce moyen d'appel.

B. *Transfert de l'excédent*

[36] La principale question en litige dans le présent pourvoi est de savoir si HBC était tenue de transférer une portion de l'excédent actuariel lorsqu'elle a vendu ses Magasins du Nord à CNO en 1987. Il s'agit d'une question nouvelle intéressant le droit applicable aux régimes de retraite. Sa nouveauté tient au fait que le régime de retraite a continué d'exister après la vente; il n'y a pas été mis fin et il n'a pas été liquidé.

[37] Le groupe de M. Burke soutient que le transfert, survenu dans le contexte du prolongement du régime, était assujetti aux principes applicables à l'administration du régime. Il affirme avoir un droit

total assets of the fund and therefore he can bring a claim against HBC for breach of fiduciary duty and compel due administration of the fund. He says HBC, as a fiduciary, had the obligation to treat the beneficiaries of the fund with an even hand and that in not transferring a portion of the surplus in the fund for the benefit of the transferred employees, HBC breached its fiduciary duty of even-handedness.

[38] I will first address the question of whether HBC is a fiduciary in the circumstances of this case. Second, I will address the role of the *1987 PBA* in the transfer of assets to NWC. I will then turn to Burke's argument that he has an equitable interest in the total assets of the fund. After that, I deal with the even-handedness argument and finally the obligations of HBC in the due administration of the pension fund.

(1) HBC as Fiduciary

[39] In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 408, La Forest J. endorsed the indicia that help recognize a fiduciary relationship set forth by Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 136:

(1) [S]cope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power.

La Forest J. wrote that "Wilson J.'s mode of analysis has been followed as a 'rough and ready guide' in identifying new categories of fiduciary relationships" (see also D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 42).

[40] At para. 55 of her reasons, Gillese J.A. found that HBC, as pension plan administrator, was a fiduciary. Article 11.01 of the 1985 restatement of the pension plan designates HBC as the

en equity dans l'actif total de la caisse et pouvoir, en conséquence, intenter une action contre HBC pour violation de son devoir fiducial et exiger la bonne administration de la caisse. Selon lui, HBC était tenue, en sa qualité de fiduciale, d'accorder un traitement égalitaire aux bénéficiaires de la caisse et elle aurait manqué à ce devoir fiducial par son défaut de transférer une portion de l'excédent au profit des employés mutés.

[38] Je trancherai d'abord la question de savoir si HBC est une fiduciale dans le contexte qui nous occupe. J'examinerai ensuite le rôle de la PBA de 1987 dans le transfert des éléments d'actifs à CNO. J'analyserai par la suite la prétention du groupe de M. Burke selon laquelle il aurait un droit en equity dans l'actif total de la caisse. Enfin, je traiterai de l'argument relatif au traitement égalitaire et j'aborderai les obligations de HBC à l'égard de la bonne administration de la caisse de retraite.

(1) HBC agissant à titre fiducial

[39] Dans l'arrêt *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, à la p. 408, le juge La Forest fait siennes les caractéristiques qui aident le tribunal à reconnaître une relation fiduciale énoncées par la juge Wilson dans *Frame c. Smith*, [1987] 2 R.C.S. 99, à la p. 136 :

(1) [U]n certain pouvoir discrétionnaire peut être exercé, (2) ce pouvoir discrétionnaire peut être exercé unilatéralement de manière à avoir un effet sur les intérêts juridiques ou pratiques du bénéficiaire, et (3) une vulnérabilité particulière à l'exercice de ce pouvoir discrétionnaire.

Le juge La Forest a précisé que « la méthode d'analyse du juge Wilson a été suivie en tant que "guide sommaire et existant" pour identifier de nouvelles catégories de rapports [fiduciaux] » (voir aussi D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 42).

[40] Au paragraphe 55 de ses motifs, la juge Gillese a conclu que HBC, en sa qualité d'administratrice du régime, agissait à titre fiducial. L'article 11.01 de la reformulation du régime de

plan administrator with the power to "conclusively decide all matters relating to the administration, interpretation, overall operation and application of the Plan". Article 11.01 provides:

> 11.01 Company Administration
>
> The Plan shall be administered by the Company which shall determine all questions relating to the length of Continuous Service, eligibility, early or postponed retirement, and rates and amounts of Annual Earnings and Average Earnings for the purposes of the Plan and shall conclusively decide all matters relating to the administration, interpretation, overall operation and application of the Plan, consistent, however, with the text of the Plan, the terms of the Trust Agreement, and the Act and the *Income Tax Act* (Canada). [Emphasis added.]

[41] Subject to the text of the plan, the terms of the trust agreement, and relevant statutes, there is no doubt that HBC had wide discretion with respect to the pension plan, which it could exercise unilaterally and which could affect the interests of the employees, and to which exercise of discretion the employees were vulnerable. Therefore, I agree with Gillese J.A. that in these circumstances HBC, as plan administrator, was a fiduciary and that a fiduciary relationship existed between HBC as administrator and the employees/beneficiaries under the pension plan. As Gillese J.A. wrote, at para. 55, "[h]ad there been a legal obligation to transfer part of the surplus at the time of Sale and had it been found that the Bay failed to cause that to occur, the proper nomenclature would have been a finding that the Bay was in breach of its fiduciary obligations to the Transferred Employees." The question is whether there was such a legal obligation.

(2) The *Pension Benefits Act, 1987*

[42] HBC argues that s. 81 of the *1987 PBA* is a specialized regime for transferring pension assets

retraite de 1985 désigne HBC à titre d'administratrice du régime et lui confère le pouvoir de régler [TRADUCTION] « définitivement toutes les questions relatives à l'administration, à l'interprétation, au fonctionnement général et à l'application du régime ». L'article 11.01 est ainsi libellé :

[TRADUCTION]

> 11.01 Administration par la société
>
> Le régime est administré par la société, qui tranche toutes les questions relatives à la durée du service ininterrompu, à l'admissibilité, à la retraite anticipée ou différée, ainsi qu'aux taux et aux montants de revenu annuel et de revenu moyen pour l'application du régime et règle définitivement toutes les questions relatives à l'administration, à l'interprétation, au fonctionnement général et à l'application du régime, en conformité toutefois avec le texte du régime, avec la convention de fiducie et avec la Loi et la *Loi de l'impôt sur le revenu* (Canada). [Je souligne.]

[41] Sous réserve du texte du régime, de la convention de fiducie et des lois applicables, il ne fait aucun doute que HBC avait, à l'égard du régime de retraite, un vaste pouvoir discrétionnaire, qu'elle pouvait exercer unilatéralement de manière à avoir un effet sur les intérêts des employés, et que les employés étaient vulnérables à l'exercice de ce pouvoir. Par conséquent, je conviens avec la juge Gillese qu'en l'espèce, HBC, en qualité d'administratrice du régime, agissait à titre fiducial et qu'un lien fiducial unissait HBC, en tant qu'administratrice du régime, à ses employés, en tant que bénéficiaires du régime de retraite. Comme l'écrivait la juge Gillese au par. 55 : [TRADUCTION] « S'il avait existé une obligation juridique de transférer une portion de l'excédent lors de la vente, et s'il avait été déterminé que La Baie avait omis de faire en sorte que le transfert soit effectué, il aurait fallu dire, en conclusion, que La Baie avait manqué à ses obligations fiduciales envers les employés mutés. » Il s'agit de déterminer si une telle obligation lui incombait effectivement en droit.

(2) La *Pension Benefits Act, 1987*

[42] HBC prétend que l'art. 81 de la PBA de 1987 constitue un régime spécialisé, régissant le

and that it was simply required to comply with this regime, which it did. It says this situation is like that in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973, where this Court found that the general trust rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.), which allows beneficiaries to collapse a trust in certain circumstances, was displaced by legislative provisions.

[43] The transfer of pension assets to NWC was subject to the *1987 PBA* (decision of the Superintendent of the Pension Commission of Ontario, April 30, 1990, Reference C-8389). I note that this statute has been subsequently amended, with the most recent revision receiving Royal Assent as of May 2010. I would also note that the issue of surplus transfer when there is a transfer of pension assets is dealt with under the yet to be proclaimed s. 80(13) of the amended statute (S.O. 2010, c. 9, s. 68). Section 81 of the *1987 PBA* deems the transfer of pension assets in this case to be a continuation of the HBC plan, and it ensures the protection of the employees' defined benefits already accrued, as well as any other benefits provided under the plan. This section provides:

81.—(1) Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer's business or all or part of the assets of the employer's business, a member of the pension plan who, in conjunction with the sale, assignment or disposition becomes an employee of the successor employer and becomes a member of a pension plan provided by the successor employer,

(a) continues to be entitled to the benefits provided under the employer's pension plan in respect of employment in Ontario or a designated province to the effective date of the sale, assignment or disposition without further accrual;

(b) is entitled to credit in the pension plan of the successor employer for the period of

transfert de l'actif d'un régime de retraite et qu'il suffisait qu'elle s'y conforme, ce qu'elle a fait. À son avis, la présente situation est semblable à celle qui était examinée dans l'arrêt *Buschau c. Rogers Communications Inc.*, 2006 CSC 28, [2006] 1 R.C.S. 973, où la Cour a statué que les dispositions législatives supplantent la règle de *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.), en matière de fiducie, selon laquelle les bénéficiaires peuvent mettre fin à une fiducie dans certaines circonstances.

[43] Le transfert à CNO de l'actif du régime de retraite était assujetti à la PBA de 1987 (décision du 30 avril 1990 du surintendant de la Commission des régimes de retraite de l'Ontario, n° de dossier C-8389). Je signale que cette loi a été modifiée depuis. La dernière modification a reçu la sanction royale en mai 2010. Je tiens également à signaler que la question du transfert de l'excédent dans le cadre du transfert d'éléments d'actif d'une caisse de retraite est traitée dans le par. 80(13), non encore promulgué, de la loi modifiée (L.R.O. 2010, ch. 9, art. 68). Suivant l'art. 81 de la PBA de 1987, qui protège les prestations déterminées accumulées ainsi que tous les autres avantages accordés aux employés par les régimes, le transfert de l'actif de la caisse en l'espèce est réputé prolonger le régime de HBC. Cet article est ainsi libellé :

[TRADUCTION]

81.—(1) Si un employeur qui cotise à un régime de retraite vend ou cède la totalité ou une partie de ses affaires ou de l'actif de ses affaires, ou l'aliène autrement, un participant au régime de retraite qui, à la suite de la vente, de la cession ou de l'aliénation, devient un employé de l'employeur subséquent et un participant au régime de retraite offert par l'employeur subséquent :

a) continue d'avoir droit aux prestations prévues aux termes du régime de retraite de l'employeur à l'égard de l'emploi en Ontario ou dans une province désignée jusqu'à la date de prise d'effet de la vente, de la cession ou de l'aliénation sans accumulation supplémentaire;

b) a droit au crédit dans le régime de retraite de l'employeur subséquent pour la période

membership in the employer's pension plan, for the purpose of determining eligibility for membership in or entitlement to benefits under the pension plan of the successor employer; and

(c) is entitled to credit in the employer's pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer's pension plan.

(2) Clause (1) (a) does not apply if the successor employer assumes responsibility for the accrued pension benefits of the employer's pension plan and the pension plan of the successor employer shall be deemed to be a continuation of the employer's plan with respect to any benefits or assets transferred.

(3) Where a transaction described in subsection (1) takes place, the employment of the employee shall be deemed, for the purposes of this Act, not to be terminated by reason of the transaction.

(4) Where a transaction described in subsection (1) occurs and the successor employer assumes responsibility in whole or in part for the pension benefits provided under the employer's pension plan, no transfer of assets shall be made from the employer's pension fund to the pension fund of the plan provided by the successor employer without the prior consent of the Superintendent or contrary to the prescribed terms and conditions.

(5) The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the employer's pension plan or that does not meet the prescribed requirements and qualifications.

[44] I am not persuaded that s. 81 resolves the issue. Nor do I see this as analogous to the situation in *Buschau*.

[45] Pensions legislation is not a complete code (*Buschau*, at para. 35). As this Court said in *Monsanto* (speaking of the *Pension Benefits Act*, R.S.O. 1990, c. P.8), the *PBA*'s "purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans" (para. 38 (emphasis added)).

d'affiliation au régime de retraite de l'employeur, afin de déterminer l'admissibilité à l'affiliation au régime de retraite de l'employeur subséquent ou le droit aux prestations aux termes de ce régime;

c) a droit au crédit dans le régime de retraite de l'employeur pour la période d'emploi chez l'employeur subséquent afin de déterminer le droit aux prestations aux termes du régime de retraite de l'employeur.

(2) L'alinéa (1) a) ne s'applique pas si l'employeur subséquent assume la responsabilité des prestations de retraite accumulées dans le régime de retraite de l'employeur. Le régime de retraite de l'employeur subséquent est réputé être un prolongement du régime de l'employeur à l'égard des prestations ou de l'actif transférés.

(3) Si une opération décrite au paragraphe (1) a lieu, l'emploi de l'employé est réputé, pour l'application de la présente loi, ne pas avoir pris fin en raison de l'opération.

(4) Si l'opération décrite au paragraphe (1) a lieu et que l'employeur subséquent assume la responsabilité totale ou partielle des prestations de retraite prévues aux termes du régime de retraite de l'employeur, aucun transfert de l'actif n'est fait de la caisse de retraite de l'employeur à celle du régime de retraite offert par l'employeur subséquent sans le consentement préalable du surintendant ou à l'encontre des conditions prescrites.

(5) Le surintendant refuse de consentir à un transfert d'actif qui ne protège pas les prestations de retraite et les autres prestations des participants et des anciens participants au régime de retraite de l'employeur ou qui ne répond pas aux exigences et aux conditions requises qui sont prescrites.

[44] Je ne suis pas convaincu que l'art. 81 tranche la question, ni que la présente situation est analogue à celle en cause dans *Buschau*.

[45] La loi sur les régimes de retraite n'est pas un code exhaustif (*Buschau*, par. 35). Ainsi que l'a affirmé la Cour dans *Monsanto* (au sujet de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8), la loi « vise à établir des normes minimales et une supervision réglementaire afin de protéger et de garantir les prestations et les droits des participants, des anciens participants et des autres personnes qui ont droit à des prestations en vertu des

In my opinion, s. 81(5) does exactly that — establishes a minimum standard for the transfer of pension assets. The terms of the relevant plan and trust documentation may impose a higher standard.

[46] In this way it would not be inconsistent with the legislative scheme for the plan and trust documentation to require a higher standard than that set out in s. 81. By contrast, in *Buschau*, the application of the trust rule in *Saunders* would have allowed the employees to circumvent the statutory procedure and defeat the objective of the legislative scheme (para. 28). These concerns do not arise in the present case. Requiring an employer to transfer additional funds on a sale would not interfere with the procedure set out in s. 81, and would not impede the objective of protecting employees' pension benefits in the context of a sale. Thus, I cannot agree with HBC that compliance with the *1987 PBA* is a complete answer to Burke's claim.

[47] It is therefore necessary to turn to the common law and equitable principles that govern the interpretation of the plan and trust documentation.

(3) Common Law and Equitable Principles

[48] Where a pension plan is created in the form of a trust, trust principles will apply. If there is no express or implied declaration of trust, then the pension plan will be governed by the terms of the plan (*Schmidt*, at p. 639).

[49] The parties agree that the pension fund is held in trust and that it must be administered according to trust principles. Based on the text of the plan documentation, the trust extends to the total assets in the fund (art. 1, 1961 trust agreement).

[50] The trust instrument in this case incorporates the terms of the pension plan (art. 2, 1961

régimes de retraite complémentaires » (par. 38 (je souligne)). À mon avis, c'est exactement l'effet du par. 81(5) : il établit des normes minimales pour le transfert de l'actif d'un régime de retraite. Les documents constituant le régime et la fiducie peuvent imposer une norme supérieure.

[46] Ainsi, l'imposition par les documents constituant le régime et la fiducie d'une norme plus élevée que celle prévue à l'art. 81 ne serait pas contraire au régime législatif. À l'opposé, dans *Buschau*, l'application de la règle de *Saunders* en matière de fiducie aurait permis aux employés de se soustraire aux modalités prévues par la loi, ce qui allait à l'encontre de l'objectif du régime législatif (par. 28). De telles considérations ne sont pas présentes en l'espèce. Obliger l'employeur à transférer des fonds additionnels dans le cadre d'une vente ne menace pas les modalités prévues à l'art. 81 et ne nuirait pas à l'objectif de protéger les prestations de retraite des employés dans le contexte d'une vente. Par conséquent, je ne puis admettre la thèse de HBC selon laquelle le respect des dispositions de la PBA de 1987 suffit à réfuter l'argument du groupe de M. Burke.

[47] Par conséquent, il est nécessaire d'analyser les principes de common law et d'equity régissant l'interprétation des documents relatifs au régime et à la fiducie.

(3) Principes de common law et d'equity

[48] Lorsqu'un régime de retraite est constitué en fiducie, les principes de la fiducie s'y appliquent. En l'absence d'une déclaration expresse ou implicite de fiducie, le régime de retraite est régi par les dispositions du régime (*Schmidt*, p. 639).

[49] Les parties reconnaissent que la caisse de retraite est détenue en fiducie et qu'elle doit être administrée conformément aux principes de la fiducie. Aux termes des documents relatifs au régime, la fiducie porte sur tous les éléments d'actif de la caisse (article premier, convention de fiducie de 1961).

[50] En l'espèce, la convention de fiducie incorpore par renvoi les dispositions du régime (art. 2,

trust agreement). Thus, both documents are relevant in determining the rights and obligations of the employees and employer under the plan.

(a) *Equitable Interest*

[51] Burke relies on the statement in *Schmidt* that employees have an equitable interest in pension plan surplus prior to termination. He argues that "the absence of a specific legal interest in surplus . . . does not mean that no rights or obligations exist in relation to plan surplus while a pension plan is ongoing" (A.F., at para. 67 (emphasis omitted)). He argues that his equitable interest in the total assets of the fund gives him the ability to bring his claim against his employer for breach of fiduciary duty of even-handedness in its dealings (or lack thereof) with the actuarial surplus.

[52] Burke relies on the following passage in *Schmidt*:

> While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus. [Emphasis added; pp. 654-55.]

[53] In my view, it is necessary to first determine what is meant by the use of the phrase "equitable interest" in *Schmidt* and, second, to examine how this concept fits within the terms of this specific plan.

[54] Equitable interest typically means "an actual right of property, such as an interest under a trust" (J. McGhee, ed., *Snell's Equity* (31st ed. 2005),

convention de fiducie de 1961). Ainsi, ces deux documents sont pertinents dans l'analyse des droits et obligations des employés et de l'employeur en vertu du régime.

a) *Intérêt en equity*

[51] Le groupe de M. Burke invoque un passage de l'arrêt *Schmidt* selon lequel les employés ont un droit en equity sur l'excédent avant la cessation du régime. Selon lui, [TRADUCTION] « il ne faut pas déduire de l'inexistence d'un intérêt précis en common law dans l'excédent [. . .] l'inexistence de tout droit et de toute obligation relativement à l'excédent pendant l'existence du régime » (m.a., par. 67 (soulignement omis)). Il prétend que son intérêt en equity dans l'actif total de la caisse l'habilite à intenter une action contre son employeur pour violation de son devoir fiducial de traitement égalitaire dans l'utilisation qu'il fait — ou ne fait pas — de l'excédent actuariel.

[52] Le groupe de M. Burke invoque l'extrait suivant tiré de l'arrêt *Schmidt* :

> Pendant l'existence d'un régime sous forme de fiducie, le surplus est un surplus actuariel. Ni l'employeur ni les employés n'ont de droit précis sur cette somme puisqu'elle n'existe que théoriquement, même si les employés bénéficiaires ont, en *equity*, un droit sur tous les éléments d'actif de la caisse pendant qu'elle existe. À la cessation du régime, le surplus actuariel devient un surplus réel et est dévolu aux employés bénéficiaires. La distinction entre le surplus réel et le surplus actuariel signifie qu'il n'y a pas d'incompatibilité entre le droit de l'employeur à des périodes d'exonération de cotisations et le fait qu'il n'a pas le droit de récupérer le surplus accumulé à la cessation du régime. Le premier repose sur un surplus actuariel et le second, sur un surplus réel. [Je souligne; p. 654-655.]

[53] À mon avis, il faut commencer par définir ce qu'on entend par un « intérêt en equity », ou par le terme « droit en equity » employé dans l'arrêt *Schmidt*, pour ensuite déterminer comment s'applique ce concept dans le cadre du régime qui nous intéresse.

[54] Un intérêt en equity est généralement [TRADUCTION] « un véritable droit de propriété, tel l'intérêt détenu en vertu d'une fiducie » (J. McGhee,

at para. 2-05). The holder of an equitable interest owns that property in equity (S. J. Hepburn, *Principles of Equity and Trusts* (4th ed. 2009), at p. 63). According to *Snell's Equity* an equitable interest is distinct from mere equities, floating equities and equitable remedies, though the term "equity" is often used to refer to any or all of these more specific concepts (para. 2-01).

[55] The phrase "equitable interest" was only used once by Cory J. in the course of his judgment in *Schmidt*. The question, then, is in what sense did he use this phrase? In my view, the following observations can be made.

[56] First, it is clear that in a defined benefit pension governed by trust principles, employees have an equitable interest in their defined benefits. As in the case of a classic trust, legal ownership of the defined benefits lies with the trustee. The funds needed to pay the employees' defined benefits are held in trust on their behalf. As beneficiaries, the employees have an equitable interest in the funds needed to cover their defined benefits.

[57] Second, and importantly, when Cory J. referred to the employees' equitable interest in the total assets of the fund, he was writing on the premise that the employees were entitled to the actual surplus on termination. This is clear from the language that follows his use of "equitable interest", which I repeat:

> Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. [Emphasis added.]

If the employees are entitled to actual surplus on termination then they do have an equitable interest in that surplus, and, when added to their defined

dir., *Snell's Equity* (31e éd. 2005), par. 2-05). Le détenteur d'un intérêt en equity dans un bien en est le propriétaire en equity (S. J. Hepburn, *Principles of Equity and Trusts* (4e éd. 2009), p. 63). Suivant *Snell's Equity*, un intérêt en equity se distingue des simples droits en equity, des droits flottants en equity et des recours d'equity, même si le terme « *equity* », en anglais, sert souvent à désigner ces notions spécifiques individuellement ou collectivement (par. 2-01).

[55] Dans ses motifs dans l'affaire *Schmidt*, le juge Cory ne mentionne qu'une seule fois le « droit en equity » des employés. La question qui se pose alors est de savoir ce qu'il entendait par là. On peut à bon droit, selon moi, faire les observations suivantes.

[56] Tout d'abord, dans le cadre d'un régime de retraite à prestations déterminées régi par les principes de la fiducie, les employés ont à l'évidence un intérêt en equity dans les prestations déterminées. Comme dans le cas d'une fiducie classique, le fiduciaire détient le titre en common law sur les prestations déterminées. Les fonds nécessaires au versement des prestations déterminées aux employés sont détenus en fiducie au profit de ces derniers. En leur qualité de bénéficiaires, les employés ont un intérêt en equity dans ces fonds.

[57] Ensuite, fait important, lorsque le juge Cory mentionne que les employés ont un droit, en equity, sur tous les éléments d'actif de la caisse, il part du postulat que les employés ont droit à l'excédent réel à la cessation du régime. C'est ce qui ressort clairement de la phrase qui suit celle où il parle du droit en equity des employés et que je répète :

> Ni l'employeur ni les employés n'ont de droit précis sur cette somme puisqu'elle n'existe que théoriquement, même si les employés bénéficiaires ont, en *equity*, un droit sur tous les éléments d'actif de la caisse pendant qu'elle existe. À la cessation du régime, le surplus actuariel devient un surplus réel et est dévolu aux employés bénéficiaires. [Je souligne.]

Si les employés ont droit à l'excédent réel à la cessation du régime, ils ont un intérêt en equity dans cet excédent. Or, le total de cet excédent et de leurs

benefits, this constitutes the total assets of the fund. Thus, I would agree with Cory J. that, where employees are entitled to actual surplus on termination, they have an equitable interest in the total assets of the fund.

[58] Cory J. did not elaborate on the significance, or content, of that equitable interest in the surplus while the plan is ongoing. However, it seems to me that it might be somewhat analogous to a floating equity. A floating equity attaches to, for example, the residue in a will. The residuary beneficiary does not immediately obtain an equitable interest in the residue of the estate, because the assets may be needed to pay debts. Even in the case of a solvent estate, it is still unclear what property constitutes residue until the administration of the estate is complete. The residuary beneficiary is therefore said to have a "'floating equity', which may or may not crystallise". A floating equity "protects the beneficiaries, not by giving them equitable interests, but by ensuring the due administration of assets by the personal representatives" (*Snell's Equity*, at para. 2-06).

[59] It appears to me that entitlement to surplus on termination is analogous to the entitlement of a residuary beneficiary. The vesting of actual surplus in the employees is contingent on (a) the plan terminating, (b) there being an actual surplus once the liabilities are satisfied and (c) the employees surviving the date of the termination of the trust.

[60] Do the transferred employees in this case have a floating equity in the total assets of the HBC pension fund during its subsistence? In my view, they do not. As I will explain, the plan text limits their interest to their defined benefits and, unlike the circumstances in *Schmidt*, they are not entitled to surplus on termination.

(b) *The Employees' Rights and Interests Under the Plan*

[61] The original pension plan text provides that the employees' rights and interests under the plan

prestations déterminées correspond à l'actif total de la caisse. Par conséquent, je partage l'avis du juge Cory selon lequel les employés qui ont droit à l'excédent réel à la fin du régime ont un intérêt en equity sur tous les éléments d'actif de la caisse.

[58] Le juge Cory n'a précisé ni la portée ni la teneur de ce droit en equity sur l'excédent d'un régime qui existe toujours. Or, une analogie avec un droit flottant en equity me semble possible. Un droit flottant en equity se rattache, par exemple, au reliquat d'une succession testamentaire. Le bénéficiaire du reliquat n'obtient pas immédiatement un intérêt en equity dans le reliquat de la succession, dont les éléments d'actif risquent d'être affectés en totalité au paiement des dettes. Même lorsque la succession est solvable, on ne peut déterminer les biens qui constitueront le reliquat qu'au terme de l'administration successorale. On dit donc du bénéficiaire du reliquat qu'il possède un [TRADUCTION] « "droit flottant en equity", qui se cristallisera ou non plus tard ». Un droit flottant en equity « protège les bénéficiaires, non pas en leur conférant un intérêt en equity, mais en assurant la bonne administration des éléments d'actif par les représentants successoraux » (*Snell's Equity*, par. 2-06).

[59] Selon moi, le droit des employés à l'excédent à la cessation du régime s'apparente à celui du bénéficiaire du reliquat. L'excédent réel ne leur est dévolu qu'à la réalisation des trois conditions suivantes : il est mis fin au régime, un excédent réel subsiste après la liquidation du passif et les employés survivent à la fin de la fiducie.

[60] En l'espèce, les employés mutés possèdent-ils un droit flottant en equity dans tous les éléments d'actif de la caisse de retraite de HBC pendant son existence? Je ne le crois pas. Comme je l'expliquerai, aux termes du texte du régime, leur intérêt se limite aux prestations déterminées, et ils n'ont pas droit à l'excédent lorsqu'il est mis fin au régime, comme c'était le cas dans l'affaire *Schmidt*.

b) *Les droits et intérêts conférés aux employés par le régime*

[61] Le texte initial du régime de retraite prévoit que les employés bénéficient uniquement des droits

are limited only to that which is expressly and specifically provided for in the plan.

11.03 *Rights in the Trust Fund:* . . . No Member or person entitled to benefits under the Plan has any right or interest in the Trust Fund except as expressly provided in the Plan; . . .

. . .

14.01 . . . There shall be no right to any benefit under this Plan except to the extent such right is specifically provided under the terms of the Plan and there are funds available therefor in the hands of the Trustee.

[62] A review of the original and subsequent pension plan documentation indicates that the only employee benefits that are provided for under the terms of the plan are the employees' defined retirement benefits.

[63] Under the original pension plan provisions in this case, the employees' entitlements in the event of plan termination were expressly limited to their defined retirement benefits:

12.024 *Apportionment of Balance of the Trust Fund to be Proportional:* Any apportionment within each group, in the order stated, shall be proportionate to but not in excess of the actuarially determined present values at the date of the termination of the Plan of their respective retirement benefits and accrued retirement benefits. [Emphasis added.]

[64] At the oral hearing of this appeal, counsel for Burke argued that art. 12.024 had to be interpreted in light of art. 12.022 and 12.023, which are other provisions dealing with plan termination. Counsel submitted that the operation of these provisions required that there had to be at least some employee entitlement to surplus on plan termination (transcript, at pp. 11-19). It was argued that art. 12 required a two-stage distribution to employees on plan termination: first, a distribution

et intérêts qui leur sont accordés expressément par le régime.

[TRADUCTION]

11.03 *Droits sur la caisse de retraite :* [. . .] Les participants et personnes ayant droit à des prestations en vertu du régime n'ont aucun autre droit ni intérêt sur la caisse de retraite que ceux qui leur sont conférés expressément par le régime; . . .

. . .

14.01 . . . Le régime n'accorde aucun droit à quelque avantage ou prestation que ce soit, à moins que ses dispositions le prévoient expressément et que le fiduciaire dispose de fonds à cette fin.

[62] Un examen des documents initiaux et subséquents relatifs au régime de retraite indique que les prestations déterminées de retraite sont les seules prestations auxquelles les employés ont droit aux termes du régime.

[63] Selon les dispositions initiales du régime de retraite, les droits des employés dans le cas où il serait mis fin au régime se limitaient expressément à leurs prestations déterminées de retraite :

[TRADUCTION]

12.024 *Répartition proportionnelle du solde de la caisse de retraite :* Toute répartition au sein de chacun des groupes, dans l'ordre prévu, sera proportionnelle, mais non supérieure, à la valeur actuarielle de leurs prestations de retraite respectives et prestations de retraite accumulées à la date où il est mis fin au régime. [Je souligne.]

[64] À l'audition du pourvoi, l'avocat du groupe de M. Burke a fait valoir que l'art. 12.024 devait être interprété à la lumière des art. 12.022 et 12.023, qui traitent aussi de la cessation du régime. Selon l'avocat, l'application de ces dispositions exigeait que les employés aient à tout le moins un droit quelconque à l'excédent lorsqu'il serait mis fin au régime (transcription, p. 11-19). On a fait valoir que la distribution aux employés prévue à l'art. 12 comportait deux étapes : premièrement, la distribution des

of contributions plus credited interest (under art. 12.022); and second, a distribution of defined retirement benefits (under art. 12.023). The limitation in art. 12.024, it was argued, only applied to the second distribution, which meant that "in order to fully satisfy both of these two distributions, arithmetically, there would have to be a surplus on hand to enable that to be done on plan termination" (transcript, at p. 13).

[65] HBC argued that art. 12 operated on termination to provide members with their contributions (and credited interest), and then to "top up" that amount to provide the defined retirement benefits (transcript, at p. 37). Counsel argued that the limitation in art. 12.024 applied to apportionment upon plan termination, and therefore applied with respect to both art. 12.022 and 12.023. Interpreting art. 12.024 in this manner would limit the employees' entitlement on termination solely to their defined retirement benefits (transcript, at pp. 37-39).

[66] Articles 12.022 and 12.023, as set out in the original pension plan, are as follows:

12.022 *Allocation of the Trust Fund:* The Retirement Board shall then allocate to each Member, Retired Member (including Joint Annuitants and Beneficiaries, if any) and Terminated Members (including Beneficiaries, if any) a benefit, payable monthly, of an amount actuarially equivalent to (or, in lieu of such benefit, if so determined by the Retirement Board with respect to any or all such Members, Retired Members and Terminated Members, a lump sum payment equal to) the total of his own contributions plus Credited Interest to the date the Plan is terminated, less any retirement benefits, or returns of his own contributions and Credited Interest in accordance with the Plan, theretofore received by him. If the Trust Fund is insufficient for this purpose, it shall be allocated to each Member, Retired Member ([including] Joint Annuitants and Beneficiaries, if any) and Terminated Members (including Beneficiaries, if any) in the proportion that the amount of his contributions plus Credited

cotisations majorées de l'intérêt crédité (selon l'art. 12.022); deuxièmement, la distribution des prestations déterminées de retraite (selon l'art. 12.023). On a aussi soutenu que la limite prévue à l'art. 12.024 ne s'appliquait qu'à la deuxième étape, ce qui signifie que [TRADUCTION] « ces deux distributions ne pourront se faire intégralement, sur le plan arithmétique, que s'il existe un excédent suffisant au moment où il est mis fin au régime » (transcription, p. 13).

[65] HBC a fait valoir que l'art. 12 s'appliquait à la cessation du régime de façon que les participants recouvrent leurs cotisations (majorées de l'intérêt crédité) et reçoivent ensuite le montant additionnel nécessaire pour toucher leurs prestations déterminées de retraite (transcription, p. 37). Ses avocats ont soutenu que la limite prévue à l'art. 12.024 visait la répartition effectuée à la cessation du régime et qu'elle s'appliquait donc à la fois à l'art. 12.022 et à l'art. 12.023. Cette interprétation de l'art. 12.024 limiterait expressément les droits des employés lors de la cessation du régime à leurs prestations déterminées (transcription, p. 37-39).

[66] Voici les art. 12.022 et 12.023 du régime de retraite initial :

[TRADUCTION]

12.022 *Répartition de la caisse de retraite :* Le Comité de la caisse de retraite verse ensuite à tous les participants, participants retraités (y compris leurs corentiers et bénéficiaires, le cas échéant) et participants sortis (y compris leurs bénéficiaires, le cas échéant) une prestation mensuelle dont le montant équivaut, sur le plan actuariel, (ou, au lieu d'une telle prestation, si le Comité de la caisse de retraite en décide ainsi à l'endroit d'une partie ou de l'ensemble des participants, participants retraités et participants sortis, un paiement forfaitaire équivalent) au total de leurs cotisations majorées de l'intérêt crédité à la date où il est mis fin au régime, moins les prestations de retraite qui leur ont été versées ou les cotisations majorées de l'intérêt crédité qui leur ont été remboursées conformément au régime. Si la caisse de retraite est insuffisante pour ce faire, elle est répartie entre tous les participants, participants retraités ([y compris] leurs corentiers et bénéficiaires, le cas échéant) et participants sortis (y compris leurs

Interest to the date the Plan is terminated, less any retirement benefits, or returns of his own contributions plus Credited Interest in accordance with the Plan, theretofore received by him, bears to the total of such amounts with respect to all such Members, Retired Members and Terminated Members.

12.023 *Application of Balance of the Trust Fund:* If any balance of the Trust Fund shall remain, it shall then be applied in the following manner:

First, for the benefit of Retired Members and such of the Terminated Members who have reached their Normal Retirement Date and are entitled to retirement benefits under Article 6 of the Plan, in each case upon the basis of their retirement benefits; and

Second, as to any balance remaining, for the benefit of all Members and such of the Terminated Members who are entitled to retirement benefits under Article 6 of the Plan but who have not yet reached their Normal Retirement Date, in each case upon the basis of their accrued retirement benefits at the date of such termination of contributions.

[67] I do not agree with counsel for Burke that art. 12 requires two distributions and operates to provide employees with an entitlement to a portion of the surplus on plan termination.

[68] When art. 12.022, 12.023 and 12.024 are examined, there is nothing in the wording used that indicates there are two separate distributions. Article 12.022 discusses the allocation of the trust fund between three groups of members: members, retired members and terminated members. Under art. 12.022, each of the members is allocated a sum that represents contributions plus credited interest less any retirement benefits already received. The opening words of art. 12.023 are, "[i]f any balance of the Trust Fund shall remain". It therefore deals with the application of the funds remaining after the initial allocation under art. 12.022. Article 12.023 acts to "top up" the amounts allocated to the three groups under art. 12.022 to a maximum of their defined benefits. It is not a separate distribution.

bénéficiaires, le cas échéant) selon la proportion que représente le montant de leurs cotisations majorées de l'intérêt crédité à la date où il est mis fin au régime, moins les prestations de retraite qui leur ont été versées ou les cotisations majorées de l'intérêt crédité qui leur ont été remboursées conformément au régime, par rapport au total de ces montants à l'égard de tous les participants, participants retraités et participants sortis.

12.023 *Attribution du solde de la caisse de retraite :* S'il reste un solde dans la caisse de retraite, il est attribué comme suit : Tout d'abord aux participants retraités et aux participants sortis qui sont arrivés à leur date normale de retraite et qui ont droit à des prestations de retraite selon l'article 6 du régime, dans tous les cas en fonction de leurs prestations de retraite respectives; ensuite, s'il reste toujours un solde, à tous les participants et aux participants sortis qui ont droit à des prestations de retraite selon l'article 6 du régime, mais qui ne sont pas encore arrivés à leur date normale de retraite, dans tous les cas en fonction de leurs prestations de retraite accumulées à la date où ils ont cessé de verser leurs cotisations.

[67] Je ne partage pas l'avis de l'avocat du groupe de M. Burke que l'art. 12 exige une distribution en deux étapes et s'applique de façon à conférer aux employés un droit sur une partie de l'excédent lorsqu'il est mis fin au régime.

[68] Lorsqu'on examine les art. 12.022, 12.023 et 12.024, on constate que les termes employés dans ceux-ci n'indiquent aucunement qu'il existe deux distributions distinctes. L'article 12.022 parle de la répartition de la caisse de retraite entre trois groupes de participants : les participants, les participants retraités et les participants sortis. Selon l'art. 12.022, tous les participants reçoivent une somme correspondant aux cotisations majorées de l'intérêt crédité, moins les prestations de retraite déjà versées. L'article 12.023 commence par les mots suivants : [TRADUCTION] « [s]'il reste un solde dans la caisse de retraite ». Il traite donc de l'attribution des fonds qui restent après la répartition faite au départ conformément à l'art. 12.022. L'article 12.023 a pour effet de compléter les sommes réparties entre

Article 12.024 then operates in conjunction with art. 12.022 and 12.023, and deals with the apportionment of funds within the three groups of members. Article 12.024 expressly limits the apportionment within each of the three groups to the defined retirement benefits. Therefore, under art. 12, there is only one distribution of funds, which is expressly limited to the defined retirement benefits.

[69] Additionally, the pension plan documents (the pension plan text and trust agreement) do not contain any of the language that would typically give employees an entitlement to surplus. Except for the 1984 trust agreement, none of the pension plan documents include the "exclusive benefit" or "non-diversion" language which was found to result in an employee entitlement to surplus in *Schmidt* (p. 659). (Below, I will discuss why the inclusion of this language in the 1984 trust agreement also does not provide the employees with such an entitlement to the surplus.) Instead of using the language in *Schmidt*, the pension plan text indicates that the trust fund was held exclusively for the purposes of the *plan* and that no part could be diverted except for the purposes of the *plan* (e.g. art. 11.02 of the 1961 plan text).

[70] At the oral hearing, counsel for Burke argued that the purpose of the plan was to exclusively benefit employees, and that such a purpose could be inferred from the preamble to the trust agreement text (transcript, at pp. 8-10). If that purpose could be inferred, it was argued, an employee entitlement to the surplus existed in a similar manner to the employee entitlement to surplus that existed in one of the pension plans in *Schmidt*.

[71] The preamble provided in part:

WHEREAS the Company has established a Pension Plan (hereinafter referred to as "the Plan") for the

les trois groupes en application de l'art. 12.022 jusqu'à concurrence de leurs prestations déterminées. Il ne s'agit pas d'une distribution distincte. L'article 12.024 s'applique ensuite en combinaison avec les art. 12.022 et 12.023, et porte sur la répartition des fonds au sein des trois groupes de participants. L'article 12.024 limite expressément la répartition au sein des trois groupes aux prestations déterminées de retraite. Par conséquent, l'art. 12 ne prévoit qu'une seule distribution des fonds, expressément limitée aux prestations déterminées.

[69] En outre, les documents relatifs au régime de retraite (le texte du régime et la convention de fiducie) ne contiennent aucune des formules qui confèrent normalement aux employés un droit à l'excédent. Exception faite de la convention de fiducie de 1984, aucun des documents relatifs au régime de retraite ne contient de disposition relative au « bénéfice exclusif » ou à « l'interdiction d'utiliser à d'autres fins », comme celles qui, a-t-on conclu dans *Schmidt* (p. 659), conféraient à un employé un droit à l'excédent. (J'expliquerai ci-dessous pourquoi l'insertion de ces formules dans la convention de fiducie de 1984 ne confère pas non plus aux employés un tel droit à l'excédent.) Au lieu de reprendre les formules employées dans l'affaire *Schmidt*, le texte du régime de retraite indique que la caisse de retraite devait servir exclusivement aux fins du *régime* et qu'aucune partie de la caisse ne pouvait être utilisée à d'autres fins que celles du *régime* (p. ex., l'art. 11.02 du texte du régime de retraite de 1961).

[70] À l'audience, l'avocat du groupe de M. Burke a fait valoir que le régime avait été créé exclusivement au bénéfice des employés, et que cette fin pouvait être inférée du préambule de la convention de fiducie (transcription, p. 8-10). On soutient que, s'il est possible d'inférer cette fin, un employé avait droit à l'excédent, tout comme l'employé avait droit à l'excédent de l'un des régimes de retraite dans *Schmidt*.

[71] Le préambule disait notamment ce qui suit :

[TRADUCTION]

ATTENDU que la Société a constitué un régime de retraite (ci-après appelé « le régime ») au bénéfice

benefit of employees engaged in its Canadian business . . . .

It is obvious that the plan was established for the benefit of employees. But the wording says nothing about the specific entitlements of the employees under the plan. Nothing about those entitlements can be inferred from the words of the preamble. To determine those entitlements it is necessary to have regard to the operative language of the plan as a whole.

[72] I agree with Gillese J.A. (at para. 44 of her reasons) that, when read as a whole, the plan provisions indicate that the purpose of the plan is to provide employees with their defined retirement benefits. In *Schmidt*, in addition to the preamble, the operative language of the pension plan documents, including that the trust fund was for the "exclusive benefit" of employees, "non-diversion" language, and other provisions re-allocating the contributions of certain employees who left the plan, allowed the inference to be drawn that the employees were entitled to actual surplus on termination (see *Schmidt*, at pp. 658-59). The operative language of the HBC plan is to the contrary.

[73] Article 12.024 in the original plan expressly limited the entitlement of the employees on termination of the plan to their defined benefits. The provisions dealing with plan termination were amended by HBC in 1980 with the addition of art. 12.025 and restated in 1985 with art. 14.05, which expressly referred to surplus, specifically providing that HBC was entitled to the surplus on termination:

12.025 Refund of Surplus to Company:

If any balance of the Trust Fund shall remain after the satisfaction of all obligations of the plan in accordance with the provisions of this article 12, such balance shall be paid to the Company.

14.05 Excess Assets

If after provision for the satisfaction of all liabilities under the Plan has been made, there should

des employés travaillant pour son entreprise canadienne . . .

De toute évidence, le régime a été constitué au bénéfice des employés. Cependant, les termes employés ne disent rien des droits précis que le régime confère aux employés. Aucune inférence ne peut être tirée du texte du préambule quant à ces droits. Pour déterminer en quoi ils consistent, il faut tenir compte des termes performatifs du régime dans son ensemble.

[72] Je suis d'accord avec la juge Gillese (par. 44 de ses motifs) que, lues dans leur ensemble, les dispositions du régime indiquent qu'il a pour objet d'accorder aux employés leurs prestations déterminées de retraite. Dans *Schmidt*, outre le préambule, les termes performatifs des documents relatifs au régime de retraite, notamment l'affectation de la caisse de retraite au « bénéfice exclusif » des employés, « l'interdiction [de l']utiliser à d'autres fins » et d'autres dispositions réattribuant les cotisations de certains employés qui ont cessé de cotiser au régime, permettent de conclure que les employés avaient droit à l'excédent existant lorsqu'il a été mis fin au régime (voir *Schmidt*, p. 658-659). Les termes performatifs du régime de HBC ont l'effet contraire.

[73] L'article 12.024 du régime initial limitait expressément les droits des employés lors de la cessation du régime à leurs prestations déterminées. En 1980, HBC a modifié les dispositions traitant de la cessation du régime en ajoutant l'art. 12.025, reformulé en 1985 à l'art. 14.05, pour traiter expressément de l'excédent et préciser que HBC y avait droit à la cessation du régime :

[TRADUCTION]

12.025 Remboursement de l'excédent à la société :

S'il reste un solde quelconque dans la caisse de retraite après la liquidation complète du passif du régime en conformité avec les dispositions du présent article 12, ce solde est versé à la société.

14.05 Excédent

S'il reste un excédent dans la caisse de retraite après la liquidation complète du passif

remain assets in the Trust Fund, such assets shall revert to the Company or be used as the Company may direct, subject to the provisions of the Act and the rules and regulations of the Department of National Revenue as amended from time to time.

[74] With respect to the 1984 trust agreement, I am in agreement with the analysis of Gillese J.A. (at paras. 49 to 53 of her decision) that the inclusion of "exclusive benefit" and "non-diversion" language in that trust agreement does not give the employees an entitlement to surplus. Burke argued that art. 2(d) and 11(ii) of the 1984 trust agreement confirm that employees have an entitlement to surplus. I agree with Gillese J.A.'s reasons for rejecting this argument. The 1984 trust agreement has to be read consistently with the then existing provisions of the pension plan, including art. 12.025. To read art. 2(d) and 11(ii) in the manner suggested by Burke would result in an inconsistency with art. 12.025 of the pension plan, which expressly confers the surplus on termination on HBC.

[75] Article 2(d) deals with expenses incurred for the sale and purchase of investments, taxes and other expenses and costs of administering the funds by the Trustee. It provides in part:

The Trustee is hereby authorized to pay out of each of the appropriate Funds:

(i) all brokerage fees, transfer taxes . . .

(ii) all property, income and other taxes . . .

(iii) amounts on account of income tax . . .

(iv) all other expenses and costs of administering the Funds . . . .

ALWAYS PROVIDED that no part of the funds may be used for, or diverted to any purposes other than those connected with the exclusive benefit of members of the respective Plans and their beneficiaries.

conformément au régime, cet excédent est versé à la société ou est utilisé au gré de celle-ci, sous réserve de la Loi ainsi que des règles et règlements du ministère du Revenu national et de leurs modifications.

[74] Quant à la convention de fiducie de 1984, je souscris à l'analyse de la juge Gillese (par. 49 à 53 de sa décision) selon laquelle l'insertion de dispositions relatives au « bénéfice exclusif » et à « l'interdiction d'utiliser à d'autres fins » dans cette convention de fiducie ne confère pas aux employés un droit sur l'excédent. Le groupe de M. Burke a fait valoir que l'al. 2d) et le sous-al. 11(ii) de la convention de fiducie de 1984 confirment que les employés ont droit à l'excédent. Je suis d'accord sur les motifs pour lesquels la juge Gillese a rejeté cet argument. Il faut interpréter la convention de fiducie de 1984 conformément aux dispositions du régime de retraite en vigueur à cette époque, et notamment à l'art. 12.025. Si l'on donnait à l'al. 2d) et au sous-al. 11(ii) l'interprétation proposée par le groupe de M. Burke, ces dispositions seraient incompatibles avec l'art. 12.025 du régime de retraite, qui prévoit expressément le versement de l'excédent à HBC à la cessation du régime.

[75] L'alinéa 2d) porte sur les dépenses engagées pour la vente et l'achat de placements, les taxes et les autres frais d'administration des fonds par le fiduciaire. Cet alinéa prévoit notamment ce qui suit :

[TRADUCTION] La présente autorise le fiduciaire à payer toutes les dépenses suivantes à même les fonds appropriés :

(i) les frais de courtage, les droits de mutation . . .

(ii) l'impôt foncier, l'impôt sur le revenu et les autres taxes . . .

(iii) les sommes à verser au titre de l'impôt sur le revenu . . .

(iv) les autres frais d'administration du fonds . . .

TOUJOURS À LA CONDITION qu'aucune partie des fonds ne peut être utilisée à d'autres fins que celles liées au bénéfice exclusif des participants aux régimes respectifs et de leurs bénéficiaires.

[76] It is in the context of authorized expenses that no part of the funds may be used for or diverted to any purpose other than those associated with the exclusive benefit of members. Having regard to the context, it is clear that these words do not afford a new entitlement to surplus which had not previously existed and which is expressly addressed in art. 12.025.

[77] Article 11(ii) provides in part:

> The Bay . . . shall have the right at any time . . . to change or modify by amendment any of the provisions of, and to terminate, this Agreement . . . provided that
>
> . . .
>
> (ii) such change, modification or termination shall not authorize or permit or result in any part of the corpus or income of the Funds being used for or diverted to purposes other than for the benefit exclusively of members of the Plans . . . .

[78] Article 11(ii) is addressed to changes. In other words, the "benefit exclusively of members" language must be read in the context of what the employees were entitled to before any change. The entitlements before any change were the defined benefits. No change may result in the funds being used other than for those defined benefits, except as specified. The provision does not confer on employees a new and additional entitlement they did not previously have.

[79] Additionally, the pension plan documents have made the pension plan text the dominant document over the trust agreement. For example, art. 23 of the 1961 trust agreement provided that it could be amended but that "[n]o such amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than those specified in the Plan" and art. 11.03 of the 1961 pension plan provided that "[n]o Member . . . has any right or interest in the Trust Fund except

[76] C'est dans le contexte des dépenses autorisées qu'aucune partie des fonds ne peut être utilisée à d'autres fins que celles liées au bénéfice exclusif des participants. Compte tenu du contexte, les dispositions ci-dessus ne confèrent manifestement pas un droit à l'excédent qui n'existait pas auparavant et dont le sort est fixé expressément à l'art. 12.025.

[77] L'alinéa 11(ii) prévoit notamment ce qui suit :

[TRADUCTION]

> La Baie [. . .] peu[t] à son gré [. . .] remplacer ou modifier toute disposition de la présente convention et résilier la présente convention [. . .] pourvu que
>
> . . .
>
> (ii) ce remplacement, cette modification ou cette résiliation n'autorise, ne rende possible ni n'entraîne l'usage d'une quelconque partie du capital ou des revenus de la caisse à d'autres fins qu'au bénéfice exclusif des participants aux régimes . . .

[78] Le sous-alinéa 11(ii) porte sur les modifications. Autrement dit, il faut interpréter l'expression « au bénéfice exclusif des participants » en tenant compte des avantages auxquels les employés avaient droit avant toute modification à la convention. Le droit dont ils bénéficiaient avant toute modification était le droit aux prestations déterminées. Sauf disposition contraire, aucune modification ne peut entraîner l'utilisation des fonds à une autre fin qu'aux fins des prestations déterminées. Cette disposition ne confère pas aux employés un droit supplémentaire qu'ils n'avaient pas auparavant.

[79] De plus, les documents relatifs au régime de retraite ont fait en sorte que le texte du régime l'emporte sur la convention de fiducie. Par exemple, l'art. 23 de la convention de fiducie de 1961 prévoyait que celle-ci pouvait être modifiée, mais que [TRADUCTION] « cette modification ne peut autoriser ni rendre possible l'utilisation d'une partie de la caisse à d'autres fins que celles prévues au régime » et, selon l'art. 11.03 du régime de retraite de 1961, [TRADUCTION] « [l]es participants [. . .] n'ont aucun

as expressly provided in the Plan". The pension plan text and the trust agreement have to be read together, so if art. 2(d) and 11(ii) of the 1984 trust agreement were interpreted in the manner suggested by Burke, there would be a conflict with art. 12.025 of the pension plan text. However, even if one were to conclude that art. 2(d) and 11(ii) should be interpreted in a manner that creates such a conflict, which I do not, the conflict would be resolved in favour of art. 12.025, as the pension plan is the dominant document.

[80] Thus, the pension plan documents in this case use language different than that found in *Schmidt*. The documents do not contain language that would give the employees an entitlement to the surplus.

[81] Burke relies on *Schmidt* to argue that employee entitlement to surplus may only be restricted if the language of the documentation is "explicit", which he argues is not the case here. As HBC has pointed out, "explicit" does not prescribe a word formula. HBC's entitlement to surplus must be clear. In my opinion, it is. As Gillese J.A. noted at para. 8 of her reasons, and as the foregoing analysis demonstrates, the documentation in this case limited the employees' entitlement to their defined benefits provided for in the plan.

[82] Based on the provisions of the pension plan documentation, it cannot be said that the transferred employees had an equitable interest in the surplus on termination.

(c) *Fiduciary Duty of Even-Handedness*

[83] Burke says that HBC undertook to improve pension benefits from time to time. He argues that the transferred employees' interest in the actuarial surplus stems from the lost possibility of future improvements to their defined benefits as such improvements might be received by the employees

autre droit ni intérêt sur la caisse de retraite que ceux qui leur sont conférés expressément par le régime ». Il faut interpréter conjointement le texte du régime de retraite et la convention de fiducie. Ainsi, si l'al. 2d) et le sous-al. 11(ii) de la convention de fiducie de 1984 recevaient l'interprétation proposée par le groupe de M. Burke, ils entreraient en conflit avec l'art. 12.025 du texte du régime. Toutefois, même si l'on statuait, contrairement à ce que je conclus, qu'il faut attribuer à l'al. 2d) et au sous-al. 11(ii) une interprétation qui occasionne un tel conflit, celui-ci serait résolu en faveur de l'art. 12.025, car le régime de retraite a préséance.

[80] Par conséquent, le libellé des documents relatifs au régime de retraite en l'espèce diffère de celui en cause dans l'affaire *Schmidt*. Les présents documents ne contiennent pas de disposition dont les termes confèreraient aux employés un droit sur l'excédent.

[81] Le groupe de M. Burke se fonde sur *Schmidt* pour soutenir que le droit de l'employé à l'excédent ne peut être restreint que si le libellé des documents l'indique « explicitement », ce qui, prétend-il, n'est pas le cas ici. Comme l'a souligné HBC, il n'est pas impératif d'utiliser une formule précise pour l'indiquer « explicitement ». Le droit de HBC à l'excédent doit être clair. À mon avis, il l'est. Comme la juge Gillese l'a souligné au par. 8 de ses motifs, et comme le démontre l'analyse qui précède, les documents en l'espèce limitaient les droits des employés aux prestations déterminées que leur accordait le régime.

[82] Vu les dispositions des documents relatifs au régime de retraite, on ne saurait dire que les employés mutés avaient un intérêt en equity sur l'excédent à la cessation du régime.

c) *Devoir fiducial de traitement égalitaire*

[83] Aux dires du groupe de M. Burke, HBC s'était engagée à bonifier les prestations de retraite de temps à autre. Il prétend que l'intérêt dans l'excédent actuariel revendiqué par les employés mutés découle de la perte de cette possibilité d'amélioration de leur régime à prestations déterminées,

retained by HBC. Therefore, HBC breached its fiduciary duty of even-handedness by treating retained and transferred employees differently. I cannot agree. For the reasons I have given, employees, either retained or transferred, have no equitable interest in the surplus. The fact that an employer may voluntarily choose to increase pension benefits out of surplus funds or otherwise, does not change the nature of the employees' interest in the pension fund or extend fiduciary obligations to voluntary actions of the employer. The employees' equitable interest is limited to their defined benefits.

[84] At the oral hearing, counsel for Burke also argued that failing to transfer part of the surplus deprived the transferred employees of any protection against solvency swings that would be available to retained employees and that HBC was again in breach of its fiduciary duty of even-handedness (transcript, at p. 23). Although in practice actuarial surplus may provide a cushion against insolvency, employees have no right to compel surplus funding to provide this extra protection (*Kerry*, at para. 113). In the absence of such a right, no fiduciary obligation of even-handedness applies. As the plan was a defined benefit plan, HBC assumed the risk of ensuring that sufficient assets existed to fund the liabilities (i.e. defined benefits) of the pension. The employer's duty is to ensure that funds at all times meet the fixed benefits promised by the employer. Unlike defined contribution pension plans in which the employee bears the risk of fluctuations in capital markets, the risk of unfunded liabilities falls on HBC, as it is obligated under its defined benefit plan to provide the employees with their defined benefits. The right of the employees is that their defined benefits be adequately funded, not that an actuarial surplus be funded.

amélioration dont les autres employés de HBC sont susceptibles de bénéficier. Par conséquent, HBC aurait manqué à son devoir fiducial de traitement égalitaire en agissant différemment à l'égard des deux groupes d'employés. Je ne suis pas de cet avis. Pour les motifs que j'ai déjà exposés, ni les employés mutés ni ceux qui sont demeurés en poste chez HBC ne possèdent d'intérêt en equity dans l'excédent. Le fait que l'employeur soit libre de décider d'augmenter ou non les prestations de retraite au moyen notamment d'une réaffectation de l'excédent ne change rien à la nature de l'intérêt que détiennent les employés dans la caisse de retraite ni n'a pour effet d'étendre les obligations fiduciales de l'employeur à ses actes gratuits. L'intérêt en equity des employés ne vise que leurs prestations déterminées.

[84] À l'audience, l'avocat du groupe de M. Burke a également fait valoir que le défaut de HBC de transférer une partie de l'excédent a privé les employés mutés de la protection contre les fluctuations de solvabilité de leur caisse dont les autres employés bénéficient toujours et constitue un autre manquement de la part de HBC à son devoir fiducial de traitement égalitaire (transcription, p. 23). Même si, dans la pratique, l'excédent actuariel peut servir à parer au risque d'insolvabilité, les employés n'ont pas le droit d'exiger qu'il soit utilisé pour leur assurer cette protection supplémentaire (*Kerry*, par. 113). Sans un tel droit, il n'existe pas d'obligation fiduciale de traitement égalitaire. Comme il s'agit d'un régime à prestations déterminées, HBC assumait le risque inhérent à l'obligation que l'actif soit suffisant pour couvrir le passif de la caisse, c'est-à-dire les prestations déterminées. Le devoir de l'employeur consiste à faire en sorte que les fonds soient en tout temps suffisants pour assurer le versement des prestations déterminées qu'il a promises. Au contraire d'un régime de retraite à cotisations déterminées, dans le cadre duquel les employés assument le risque de fluctuations dans les marchés financiers, en l'espèce, le risque d'un déficit actuariel pèse sur HBC, puisqu'elle est tenue, par les modalités de son régime de retraite, de verser des prestations déterminées à ses employés. Le droit des employés se rapporte à la capitalisation suffisante de leurs prestations déterminées et non d'un excédent actuariel.

[85] The duty of even-handedness must be anchored in the terms of the pension plan documentation. It does not operate in a vacuum. The duty of even-handedness requires that where there are two or more classes of beneficiaries, each class receives exactly what the terms of the documentation confer (*Waters'*, at p. 966). In its role as pension plan administrator, HBC was a fiduciary and had fiduciary obligations. However, just because HBC has fiduciary duties as plan administrator does not obligate it under any purported duty of even-handedness to confer benefits upon one class of employees to which they have no right under the plan. It was the obligation of HBC to carry out the terms of the pension plan documents and to ensure that in the administration of the plan they do not give an advantage or impose a burden when that advantage or burden is not found in the terms of the plan documents (*Waters'*, at pp. 966-67). Neither the retained nor the transferred employees had an equitable interest in the plan surplus. Accordingly, there is no duty of even-handedness applicable to the surplus.

(d) *Due Administration of the Fund*

[86] Burke argues that it is their equitable interest in the total assets of the pension fund that allows them to compel due administration of the pension fund which they say would require transfer of a portion of the actuarial surplus. I agree that Burke has a right to compel the due administration of the pension trust fund, but not because they have an equitable interest in the surplus.

[87] A beneficiary of a trust has the right to compel its due administration even if he does not have an equitable interest in all the assets of the trust. In this case, because Burke has an equitable interest in their defined benefits, they have the right to compel the due administration of the trust and to ensure that the employer, trustee and plan administrator are complying with their legal obligations in the pension plan documents (see *Snell's Equity*, at para. 27-24; *Waters'*, at pp. 1203-4).

[85] Le devoir de traitement égalitaire doit reposer sur le libellé des documents relatifs au régime de retraite; il n'existe pas dans l'absolu. Dans les situations mettant en cause au moins deux groupes de bénéficiaires, ce devoir exige que chaque groupe reçoive exactement les avantages conférés par les documents (*Waters'*, p. 966). En tant qu'administratrice du régime, HBC agissait à titre fiducial, ce qui lui imposait des obligations fiduciales. Toutefois, ses obligations fiduciales ne la contraignaient pas, en raison d'un quelconque devoir de traitement égalitaire, à reconnaître à un groupe d'employés des avantages que le régime ne leur confère pas. HBC était tenue de donner effet aux documents relatifs au régime de retraite et de veiller, en administrant le régime, à ce qu'aucun avantage ne soit attribué ni fardeau imposé qui ne soit pas prévu dans ces documents (*Waters'*, p. 966-967). Ni les employés mutés ni les autres n'avaient d'intérêt en equity dans l'excédent. Partant, aucun devoir de traitement égalitaire ne s'applique à l'affectation de l'excédent.

d) *Bonne administration de la caisse*

[86] Le groupe de M. Burke prétend que son intérêt en equity dans l'actif total de la caisse de retraite l'habilite à en exiger la bonne administration, ce qui nécessite, selon lui, le transfert d'une portion de l'excédent actuariel. Certes, le groupe de M. Burke a le droit d'exiger la bonne administration de la caisse de retraite, mais ce droit ne tient pas au fait qu'il aurait un intérêt en equity dans l'excédent.

[87] Le bénéficiaire d'une fiducie est en droit d'en exiger la bonne administration, et ce, même s'il ne possède pas d'intérêt en equity dans tous les éléments d'actif de la fiducie. En l'espèce, comme le groupe de M. Burke possède un intérêt en equity dans les prestations déterminées, il a le droit d'exiger la bonne administration de la fiducie et de s'assurer que l'employeur, le fiduciaire et l'administrateur du plan s'acquittent des obligations juridiques prévues dans les documents relatifs au régime (voir *Snell's Equity*, par. 27-24; *Waters'*, p. 1203-1204).

[88] Thus, the employer does not have free rein in its use of the actuarial surplus. The obligations of the employer are governed by the terms of the pension plan. Thus, an employer is only permitted to use actuarial surplus in a way that is consistent with the plan documentation.

[89] It is the trustee's obligation to ensure that funds held in trust are distributed in a manner that is consistent with the terms of the trust. In the present case, this obligation on the trustee was made express in the original trust agreement:

> The Retirement Board may from time to time require the Trustee to make payments out of the Fund to an insurer and to such persons, beneficiaries, personal representatives in such amounts, for such purposes and in such manner as the Retirement Board may from time to time in writing direct; provided that no payments shall be made out of the Fund until the Retirement Board shall have certified to the Trustee in writing that such payments are in accordance with the terms and conditions of the Plan. [Emphasis added.]

The trustee's role is to ensure that the funds are distributed in accordance with the plan and that any actuarial surplus is not abused by the employer and used for an improper purpose.

[90] While the record before this Court is sparse on the details of the communications between HBC and the trustees of its pension fund, I find it difficult to see how the circumstances of this case could suggest an improper purpose on the part of HBC.

[91] What occurred between HBC and NWC was a legitimate commercial transaction. HBC and NWC negotiated over the purchase price of the assets, including the pension plan. HBC was agreeable to transferring a portion of the surplus so long as NWC was willing to pay for the benefit of acquiring a plan in surplus. NWC was not willing to pay. Both companies complied with the legislative requirements, lending further support to the legitimacy of the transaction.

[92] In executing the transfer, HBC was entitled to rely on the terms of the plan. Under the plan

[88] C'est donc dire que l'employeur ne peut pas user de l'excédent actuariel à son gré. Ses obligations sont régies par les dispositions du régime de retraite. Par conséquent, il ne peut utiliser cet excédent que pour des fins compatibles avec celles prévues dans les documents relatifs au régime.

[89] Il incombe au fiduciaire de veiller à ce que les fonds détenus en fiducie soient distribués conformément aux conditions de la fiducie. En l'espèce, cette obligation du fiduciaire était prévue expressément en ces termes dans la convention de fiducie originale :

> [TRADUCTION] Le Comité de retraite peut ordonner par écrit au fiduciaire de verser un montant déterminé, par prélèvement sur la caisse, à un assureur et aux personnes, bénéficiaires et représentants successoraux désignés, aux fins et de la manière précisées dans ses instructions, à la condition qu'aucun versement ne soit effectué sans que le Comité de retraite ait au préalable attesté par écrit au fiduciaire que ce versement est conforme aux dispositions du régime. [Je souligne.]

Le fiduciaire a pour rôle de veiller à ce que les fonds soient distribués conformément au régime et à ce que l'employeur n'utilise pas un excédent actuariel d'une façon ou à une fin irrégulière.

[90] Certes, le dossier qui a été présenté à la Cour était avare de détails sur les communications entre HBC et les fiduciaires de la caisse de retraite, mais je vois mal en quoi les circonstances pourraient laisser croire que HBC aurait utilisé les fonds à des fins inappropriées en l'espèce.

[91] HBC et CNO ont conclu une opération commerciale légitime. HBC et CNO ont négocié le prix d'achat des éléments d'actif, y compris le régime de retraite. HBC était disposée à transférer une portion de l'excédent si CNO acceptait de payer davantage pour acquérir un régime excédentaire, ce que cette dernière n'était pas disposée à faire. L'opération est en outre d'autant plus légitime que les deux sociétés se sont conformées aux prescriptions de la loi.

[92] Lorsqu'elle a conclu le transfert, HBC pouvait se fonder sur les dispositions du régime. Aux

documentation, the employees' rights and interests were limited to their defined benefits. The plan documentation permitted HBC to take contribution holidays and charge administrative expenses to the plan. Moreover, if an individual employee had left HBC, either voluntarily or by reason of discharge, that individual employee would not be entitled to any portion of the actuarial surplus under the terms of the plan.

[93] HBC's legal obligations with respect to its employees, including the fiduciary duties that it owed to the transferred employees, were satisfied in this case by protecting their defined benefits. Based on the plan documentation, HBC did not have a fiduciary obligation to transfer a portion of the actuarial surplus.

VI. Conclusion

[94] I would dismiss the appeal on the issue of plan administration expenses. The HBC pension plan did not impose an obligation on HBC to pay plan administration expenses. HBC was permitted to charge plan administration expenses to the pension fund. The issue of whether HBC was permitted to take contribution holidays was not appealed. However, the language in the pension plan documents indicates that the employer's contributions were determined by an actuary. Therefore, the trial judge was correct in concluding that HBC was permitted to take contribution holidays.

[95] I would also dismiss the appeal on the issue of the transfer of the surplus. Gillese J.A. correctly found that the transferred employees did not have an equitable interest in the surplus of the pension fund. Their only interest was in their defined benefits. As the defined benefits were protected in the transfer, HBC did not breach any fiduciary obligation that it owed.

[96] I should emphasize that this decision depends upon the text and context of the pension plan documentation that was before this Court. An analysis of that documentation leads to the finding

termes des documents relatifs à ce dernier, les droits et les intérêts des employés se limitaient à leurs prestations déterminées. Ces documents habilitaient HBC à s'accorder des périodes d'exonération de cotisations et à imputer les frais d'administration à la caisse. De plus, selon les dispositions du régime, l'employé qui quittait HBC, de son gré ou par suite d'un congédiement, n'avait droit à aucune portion de l'excédent actuariel.

[93] En l'espèce, HBC a honoré ses obligations juridiques envers ses employés, et notamment ses devoirs fiduciaux envers les employés mutés, en protégeant leurs prestations déterminées. Selon les documents relatifs au régime, HBC n'avait aucune obligation fiduciale de transférer quelque portion que ce soit de l'excédent actuariel.

VI. Conclusion

[94] Je suis d'avis de rejeter le pourvoi en ce qui concerne la question des frais d'administration du régime. Le régime de retraite de HBC n'obligeait pas cette dernière à en assumer les frais d'administration. HBC pouvait imputer les frais d'administration du régime à la caisse de retraite. La question de savoir si HBC pouvait s'accorder des périodes d'exonération de cotisations n'était pas portée en appel. Toutefois, aux termes des documents relatifs au régime, les cotisations de l'employeur étaient déterminées par un actuaire. Par conséquent, j'estime juste la conclusion du juge du procès que HBC était autorisée à s'accorder de telles périodes.

[95] Je suis également d'avis de rejeter le pourvoi en ce qui concerne la question du transfert de l'excédent. La juge Gillese a conclu, à bon droit, que les employés mutés ne possédaient aucun intérêt en equity dans l'excédent de la caisse de retraite. Ils avaient seulement un intérêt dans leurs prestations déterminées. Comme ces dernières ont été protégées dans le cadre du transfert, HBC n'a manqué à aucune obligation fiduciale lui incombant.

[96] Je tiens à souligner que la présente décision découle du libellé et du contexte des documents relatifs au régime de retraite soumis à la Cour. L'analyse de ces documents mène à la conclusion

that the employees are not entitled to any portion of the surplus on their transfer to NWC. This decision does not purport to deal with other situations involving actuarial surplus and plan transfer. Each situation must be evaluated on a case-by-case basis. Specifically, the resolution of the issue of surplus transfer when the pension plan documents indicate that employees are entitled to surplus on plan termination is best left to another case where that issue arises.

[97] The Court of Appeal's ruling on costs was not challenged in this Court. Gillese J.A. found that for this case it was appropriate for costs to be paid out of the pension trust fund because this case dealt with issues surrounding the due administration of the pension trust fund and was for the benefit of all the beneficiaries (*Burke v. Hudson's Bay Co.*, 2008 ONCA 690, 241 O.A.C. 245). The parties submit that this is an appropriate case for costs in this Court to be paid to both parties on a full-indemnity basis out of the trust fund. Therefore, in accordance with the terminology used in this Court, I order costs on a solicitor-and-client basis in this Court, including costs of the leave application, to be paid to both parties out of the trust fund.

Appeal dismissed with costs.

Solicitors for the appellants: Bellmore & Moore, Toronto.

Solicitors for the respondents: Osler, Hoskin & Harcourt, Toronto.

que les employés n'avaient droit à aucune part de l'excédent au moment de leur mutation à CNO. La présente décision ne prétend pas répondre à d'autres situations mettant en cause un excédent actuariel et le transfert d'un régime. Chaque situation appelle un examen au cas par cas. Tout particulièrement, il est préférable de laisser irrésolue la question du transfert de l'excédent d'un régime dont les documents accordent aux employés un droit à l'excédent à la cessation du régime pour la trancher lorsqu'elle sera éventuellement soulevée dans un autre pourvoi.

[97] Il n'était pas interjeté appel, devant la Cour, de la décision de la Cour d'appel quant aux dépens. La juge Gillese était d'avis qu'il convenait dans ce cas de prélever les dépens sur la caisse de retraite parce que le litige portait sur des questions intéressant la bonne administration de la caisse de retraite détenue en fiducie et que leur règlement allait profiter à tous les bénéficiaires (*Burke c. Hudson's Bay Co.*, 2008 ONCA 690, 241 O.A.C. 245). Les parties font valoir qu'il conviendrait, en l'espèce, que la Cour accorde les dépens devant la Cour sur la base d'une indemnisation totale aux deux parties et ordonne qu'ils soient prélevés sur la caisse de retraite. Pour reprendre la formule usuelle, par conséquent, j'accorde les dépens devant la Cour aux deux parties sur la base procureur-client, y compris les dépens relatifs à la demande d'autorisation d'appel, et ordonne qu'ils soient prélevés sur la caisse de retraite.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Bellmore & Moore, Toronto.

Procureurs des intimés : Osler, Hoskin & Harcourt, Toronto.

TAB 2

Court of Queen's Bench of Alberta

Citation: Bruderheim Community Church v. Board of Elders, 2018 ABQB 90

Date: 20180209
Docket: 1703 10116
Registry: Edmonton

Between:

Bruderheim Community Church and Bruderheim Moravian Church

Applicants

- and -

Board of Elders of the Canadian District of the Moravian Church In America

Respondent

Reasons for Decision of the Honourable Mr. Justice John T. Henderson

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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] AJ No 548, appeal dismissed 2017 ABCA 343. 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 ½ 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] AJ No 1088 at para 26; ***Irving Oil Ltd v Ashar***, 2016 ABCA 15 at paras 17-8, 609 AR 388; ***1711811 Ontario Ltd v Buckley Insurance Brokers Ltd***, 2014 ONCA 125, [2014] OJ No 697 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] AJ No 972 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] AJ No 1127, 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(JR) v Glendinning***, [2000] OJ No 2695 at para 10, 191 DLR (4th) 750 (SCJ). 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 WLR 425, [1911] BCJ No 112 (CA), 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 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: ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 at para 83, [2010] 3 SCR 379.

[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 ***Incorporated Synod of the Diocese of Huron v Delicata***, 2013 ONCA 540, 117 OR (3d) 1, leave denied [2013] SCCA No 439, 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 SCR 294, [1885] SCJ No 40 and ***Weatherby v Weatherby*** (1927), 53 NBR 403, 1927 CarswellNB 20.

[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": ***Income Tax Special Purposes Commissioners v Pemsel***, [1891] AC 531 at 582 (HL). 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 Coats***, [1949] AC 426 (HL). 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***, [1962] SCR 170 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 WWR 14, [1984] AJ No 2561 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] OJ No 4866, 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 BCLR (5th) 209, leave denied [2011] SCCA No 26, 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 OR (3d) 304, [1991] OJ No 234 (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 4th, 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.

Heard on the 16th day of January, 2018.
Dated at the City of Edmonton, Alberta this 9th day of February, 2018.

John T. Henderson
J.C.Q.B.A.

Appearances:

R. O. Langley
for the Applicants

J. B. Laycraft, Q.C.
G. J. Ludwig Q.C. and
R. E. Harrison
for the Respondent

TAB 3

CHAPTER I-6

An Act respecting Indians

SHORT TITLE

Short title

1. This Act may be cited as the *Indian Act*. R.S., c. 149, s. 1.

INTERPRETATION

Definitions

2. (1) In this Act

"band" «*bande*»

"band" means a body of Indians

(*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951,

(*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

(*c*) declared by the Governor in Council to be a band for the purposes of this Act;

"child" «*enfant*»

"child" includes a legally adopted Indian child;

"council of the band" «*conseil...*»

"council of the band" means

(*a*) in the case of a band to which section 74 applies, the council established pursuant to that section,

(*b*) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

"Department" «*Ministère*»

"Department" means the Department of Indian Affairs and Northern Development;

"elector" «*électeur*»

"elector" means a person who

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

(*b*) is of the full age of twenty-one years, and

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

CHAPITRE I-6

Loi concernant les Indiens

TITRE ABRÉGÉ

Titre abrégé

1. La présente loi peut être citée sous le titre: *Loi sur les Indiens*. S.R., c. 149, art. 1.

INTERPRÉTATION

Définitions

2. (1) Dans la présente loi

«bande» "*band*"

«bande» signifie un groupe d'Indiens,

a) à l'usage et au profit communs desquels, des terres, dont le titre juridique est attribué à Sa Majesté, ont été mises de côté avant ou après le 4 septembre 1951,

b) à l'usage et au profit communs desquels, Sa Majesté détient des sommes d'argent, ou

c) que le gouverneur en conseil a déclaré être une bande aux fins de la présente loi;

«biens» "*estate*"

«biens» comprend les biens réels et personnels et tout intérêt dans un terrain;

«conseil de la bande» "*council...*"

«conseil de la bande» signifie

a) dans le cas d'une bande à laquelle s'applique l'article 74, le conseil établi conformément audit article;

b) dans le cas d'une bande à laquelle l'article 74 n'est pas applicable, le conseil choisi selon la coutume de la bande ou, en l'absence d'un conseil, le chef de la bande choisi selon la coutume de la bande;

«deniers des Indiens» "*Indian moneys*"

«deniers des Indiens» signifie toutes les sommes d'argent perçues, reçues ou détenues par Sa Majesté à l'usage et au profit des Indiens ou des bandes;

«électeur» "*elector*"

«électeur» signifie une personne qui

a) est inscrite sur une liste de bande,

b) a vingt et un ans révolus, et

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

"estate" «*biens*»
"estate" includes real and personal property and any interest in land;

"Indian" «*Indien*»
"Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

"Indian moneys" «*deniers...*»
"Indian moneys" means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands;

"intoxicant" «*spiritueux*»
"intoxicant" includes alcohol, alcoholic, spirituous, vinous, fermented malt or other intoxicating liquor or combination of liquors and mixed liquor a part of which is spirituous, vinous, fermented or otherwise intoxicating and all drinks or drinkable liquids and all preparations or mixtures capable of human consumption that are intoxicating;

"member of a band" «*membre...*»
"member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

"mentally incompetent Indian" «*Indien mentalement incapable*»
"mentally incompetent Indian" means an Indian who, pursuant to the laws of the province in which he resides, has been found to be mentally defective or incompetent for the purposes of any laws of that province providing for the administration of estates of mentally defective or incompetent persons;

"Minister" «*Ministre*»
"Minister" means the Minister of Indian Affairs and Northern Development;

"registered" «*inscrit*»
"registered" means registered as an Indian in the Indian Register;

"Registrar" «*registraire*»
"Registrar" means the officer of the Department who is in charge of the Indian Register;

"reserve" «*réserve*»
"reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band;

"superintendent" «*surintendant*»
"superintendent" includes a commissioner, regional supervisor, Indian superintendent, assistant Indian superintendent and any other person declared by the Minister to be a superintendent for the purposes of this Act, and with reference to a band or a reserve, means the superintendent for that band or reserve;

"surrendered lands" «*terres...*»
"surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit

«enfant» "*child*"
«enfant» comprend un enfant indien légalement adopté;

«Indien» "*Indian*"
«Indien» signifie une personne qui, conformément à la présente loi, est inscrite à titre d'Indien ou a droit de l'être;

«Indien mentalement incapable» "*mentally...*"
«Indien mentalement incapable» signifie un Indien qui, conformément aux lois de la province où il réside, a été déclaré mentalement déficient ou incapable, aux fins de toute loi de cette province régissant l'administration des biens de personnes mentalement déficientes ou incapables;

«inscrit» "*registered*"
«inscrit» signifie inscrit comme Indien dans le registre des Indiens;

«membre d'une bande» "*member...*"
«membre d'une bande» signifie une personne dont le nom apparaît sur une liste de bande ou qui a droit à ce que son nom y figure;

«ministère» "*Department*"
«ministère» signifie le ministère des Affaires indiennes et du Nord canadien;

«Ministre» "*Minister*"
«Ministre» désigne le ministre des Affaires indiennes et du Nord canadien;

«registraire» "*Registrar*"
«registraire» désigne le fonctionnaire du ministère qui est préposé au registre des Indiens;

«réserve» "*reserve*"
«réserve» signifie une parcelle de terrain dont le titre juridique est attribué à Sa Majesté et qu'Elle a mise de côté à l'usage et au profit d'une bande;

«spiritueux» "*intoxicant*"
«spiritueux» comprend l'alcool, une liqueur ou une combinaison de liqueurs alcooliques, spiritueuses, vineuses, à base de malt fermenté ou autrement enivrantes et une liqueur mélangée dont une partie est spiritueuse, vineuse, fermentée ou autrement enivrante, et tous les breuvages ou boissons et tous les mélanges ou préparations susceptibles de consommation par l'homme, qui sont enivrants;

«surintendant» "*superintendent*"
«surintendant» comprend un commissaire, un surveillant régional, un surintendant des Indiens, un surintendant adjoint des Indiens et toute autre personne que le Ministre a déclarée un surintendant aux fins de la présente loi, et, relativement à une bande ou une réserve, signifie le surintendant de cette bande ou réserve;

«terres cédées» "*surrendered...*"
«terres cédées» signifie une réserve ou partie d'une réserve, ou tout intérêt y afférent, dont le titre juridique demeure attribué à Sa Majesté et que la bande à l'usage et au profit de laquelle il avait été mis de côté a abandonné ou cédé.

it was set apart.

"Band"

(2) The expression "band" with reference to a reserve or surrendered lands means the band for whose use and benefit the reserve or the surrendered lands were set apart.

«Bande»

(2) L'expression «bande», en ce qui concerne une réserve ou des terres cédées, signifie la bande à l'usage et au profit de laquelle la réserve ou les terres cédées ont été mises de côté.

Exercise of powers conferred on band or council

(3) Unless the context otherwise requires or this Act otherwise provides

(*a*) a power conferred upon a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band, and

(*b*) a power conferred upon the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened. R.S., c. 149, s. 2; 1966-67, c. 25, s. 40.

Exercice des pouvoirs conférés à une bande ou un conseil

(3) Sauf si le contexte s'y oppose ou si la présente loi dispose autrement,

a) un pouvoir conféré à une bande est censé ne pas être exercé, à moins de l'être en vertu du consentement donné par une majorité des électeurs de la bande, et

b) un pouvoir conféré au conseil d'une bande est censé ne pas être exercé à moins de l'être en vertu du consentement donné par une majorité des conseillers de la bande présents à une réunion du conseil dûment convoquée. S.R., c. 149, art. 2; 1966-67, c. 25, art. 40.

ADMINISTRATION

ADMINISTRATION

Minister to administer Act

3. (1) This Act shall be administered by the Minister of Indian Affairs and Northern Development, who shall be the superintendent general of Indian affairs.

Le Ministre est chargé de l'application de la loi

3. (1) Le ministre des Affaires indiennes et du Nord canadien, qui doit être surintendant général des affaires indiennes, est chargé de l'application de la présente loi.

Authority of Deputy Minister and chief officer

(2) The Minister may authorize the Deputy Minister of Indian Affairs and Northern Development or the chief officer in charge of the branch of the Department relating to Indian affairs to perform and exercise any of the duties, powers and functions that may be or are required to be performed or exercised by the Minister under this Act or any other Act of the Parliament of Canada relating to Indian affairs. R.S., c. 149, s. 3; 1966-67, c. 25, s. 40.

Autorité du sous-ministre et du fonctionnaire en chef

(2) Le Ministre peut autoriser le sous-ministre des Affaires indiennes et du Nord canadien ou le fonctionnaire en chef de la division du ministère relative aux affaires indiennes à accomplir et exercer tout devoir, pouvoir et fonction que peut ou doit accomplir ou exercer le Ministre aux termes de la présente loi ou de toute autre loi du Parlement du Canada concernant les affaires indiennes. S.R., c. 149, art. 3; 1966-67, c. 25, art. 40.

APPLICATION OF ACT

APPLICATION DE LA LOI

Application of Act

4. (1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Eskimos.

Application de la loi

4. (1) La mention d'un Indien, dans la présente loi, ne comprend pas une personne de la race d'aborigènes communément appelés Esquimaux.

Act may be declared inapplicable

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

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

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

On peut déclarer la loi inapplicable

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

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

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

and may by proclamation revoke any such declaration.

Certain sections inapplicable to Indians living off reserves

(3) Sections 114 to 123 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province. R.S., c. 149, s. 4; 1956, c. 40, s. 1.

et peut par proclamation révoquer toute semblable déclaration.

Certains articles ne s'appliquent pas aux Indiens vivant hors des réserves

(3) Les articles 114 à 123 et, sauf si le Ministre en ordonne autrement, les articles 42 à 52 ne s'appliquent à aucun Indien, ni à l'égard d'aucun Indien, ne résidant pas ordinairement dans une réserve ou sur des terres qui appartiennent à Sa Majesté du chef du Canada ou d'une province. S.R., c. 149, art. 4; 1956, c. 40, art. 1.

DEFINITION AND REGISTRATION OF INDIANS

DÉFINITION ET ENREGISTREMENT DES INDIENS

Indian Register

5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian. R.S., c. 149, s. 5.

Registre des Indiens

5. Est maintenu au ministère un registre des Indiens, lequel consiste dans des listes de bande et des listes générales et où doit être consigné le nom de chaque personne ayant droit d'être inscrite comme Indien. S.R., c. 149, art. 5.

Band Lists and General Lists

6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List. R.S., c. 149, s. 6.

Listes de bande et listes générales

6. Le nom de chaque personne qui est membre d'une bande et a droit d'être inscrite doit être consigné sur la liste de bande pour la bande en question, et le nom de chaque personne qui n'est pas membre d'une bande et a droit d'être inscrite doit apparaître sur une liste générale. S.R., c. 149, art. 6.

Deletions and additions

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

Additions et retranchements

7. (1) Le registraire peut en tout temps ajouter à une liste de bande ou à une liste générale, ou en retrancher, le nom de toute personne qui, d'après la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

Date of change

(2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom. R.S., c. 149, s. 7.

Date du changement

(2) Le registre des Indiens doit indiquer la date où chaque nom y a été ajouté ou en a été retranché. S.R., c. 149, art. 7.

Existing lists to constitute Register

8. The band lists in existence in the Department on the 4th day of September 1951 shall constitute the Indian Register, and the applicable lists shall be posted in a conspicuous place in the superintendent's office that serves the band or persons to whom the List relates and in all other places where band notices are ordinarily displayed. R.S., c. 149, s. 8.

Les listes existantes constituent le registre

8. Les listes de bande dressées au ministère le 4 septembre 1951 constituent le registre des Indiens et les listes applicables doivent être affichées à un endroit bien en vue dans le bureau du surintendant qui dessert la bande ou les personnes visées par la liste et dans tous les autres endroits où les avis concernant la bande sont ordinairement affichés. S.R., c. 149, art. 8.

Deletions and additions may be protested

9. (1) Within six months after a list has been posted in accordance with section 8 or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section 7

Les retranchements et les additions peuvent être l'objet d'une protestation

9. (1) Dans les six mois de l'affichage d'une liste conformément à l'article 8 ou dans les trois mois de l'addition du nom d'une personne à une liste de bande ou à une liste générale, ou de son retranchement d'une telle liste, en vertu de l'article 7,

(*a*) in the case of a Band List, the council of the band, any ten electors of the band, or any three electors if there are less than ten electors in the band,

(*b*) in the case of a posted portion of a General List, any adult person whose name appears on that posted portion, and

(*c*) the person whose name was included in or omitted from the List referred to in section 8, or whose name was added to or deleted from a Band List or a General List,

may, by notice in writing to the Registrar, containing a brief statement of the grounds therefor, protest the inclusion, omission, addition, or deletion, as the case may be, of the name of that person, and the onus of establishing those grounds lies on the person making the protest.

a) dans le cas d'une liste de bande, le conseil de la bande, dix électeurs de la bande ou trois électeurs, s'il y en a moins de dix,

b) dans le cas d'une portion affichée d'une liste générale, tout adulte dont le nom figure sur cette portion affichée, et

c) la personne dont le nom a été inclus dans la liste mentionnée à l'article 8, ou y a été omis, ou dont le nom a été ajouté à une liste de bande ou une liste générale, ou en a été retranché,

peuvent, par avis écrit au registraire, renfermant un bref exposé des motifs invoqués à cette fin, protester contre l'inclusion, l'omission, l'addition ou le retranchement, selon le cas, du nom de cette personne, et il incombe à la personne qui formule la protestation d'établir ces motifs.

Registrar to cause investigation

(2) Where a protest is made to the Registrar under this section he shall cause an investigation to be made into the matter and shall render a decision, and subject to a reference under subsection (3), the decision of the Registrar is final and conclusive.

Le registraire fait tenir une enquête

(2) Lorsqu'une protestation est adressée au registraire, en vertu du présent article, il doit faire tenir une enquête sur la question et rendre une décision qui, sous réserve d'un renvoi prévu au paragraphe (3), est définitive et péremptoire.

Reference to judge

(3) Within three months from the date of a decision of the Registrar under this section

(*a*) the council of the band affected by the Registrar's decision, or

(*b*) the person by or in respect of whom the protest was made,

may, by notice in writing, request the Registrar to refer the decision to a judge for review, and thereupon the Registrar shall refer the decision, together with all material considered by the Registrar in making his decision, to the judge of the county or district court of the county or district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other county or district as the Minister may designate, or in the Province of Quebec, to the judge of the Superior Court for the district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other district as the Minister may designate.

Renvoi devant un juge

(3) Dans les trois mois de la date d'une décision du registraire aux termes du présent article,

a) le conseil de la bande que vise la décision du registraire, ou

b) la personne qui a fait la protestation ou à l'égard de qui elle a eu lieu,

peut, moyennant un avis par écrit, demander au registraire de soumettre la décision à un juge, pour revision, et dès lors le registraire doit déférer la décision, avec tous les éléments que le registraire a examinés en rendant sa décision, au juge de la cour de comté ou district du comté ou district où la bande est située ou dans lequel réside la personne à l'égard de qui la protestation a été faite, ou de tel autre comté ou district que le Ministre peut désigner, ou, dans la province de Québec, au juge de la cour supérieure du district où la bande est située ou dans lequel réside la personne à l'égard de qui la protestation a été faite, ou de tel autre district que le Ministre peut désigner.

Inquiry and decision

(4) The judge of the county, district or Superior Court, as the case may be, shall inquire into the correctness of the Registrar's decision, and for such purposes may exercise

Enquête et décision

(4) Le juge de la cour de comté, de la cour de district ou de la cour supérieure, selon le cas, doit enquêter sur la justesse de la décision du registraire, et, à ces fins, peut exercer tous

all the powers of a commissioner under Part I of the *Inquiries Act*; the judge shall decide whether the person in respect of whom the protest was made is, in accordance with this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and the decision of the judge is final and conclusive.

les pouvoirs d'un commissaire en vertu de la Partie I de la *Loi sur les enquêtes*. Le juge doit décider si la personne qui a fait l'objet de la protestation a ou n'a pas droit, selon le cas, d'après la présente loi, à l'inscription de son nom au registre des Indiens, et la décision du juge est définitive et péremptoire.

One reference only

(5) Not more than one reference of a Registrar's decision in respect of a protest may be made to a judge under this section.

(5) La décision du registraire à l'égard d'une protestation ne peut être renvoyée qu'une seule fois devant un juge aux termes du présent article. Un seul renvoi

Burden of proof

(6) Where a decision of the Registrar has been referred to a judge for review under this section, the burden of establishing that the decision of the Registrar is erroneous is on the person who requested that the decision be so referred. R.S., c. 149, s. 9; 1956, c. 40, s. 2.

(6) Lorsque la décision du registraire a été renvoyée devant un juge, pour revision, aux termes du présent article, il incombe à la personne qui a demandé ce renvoi d'établir que la décision du registraire est erronée. S.R., c. 149, art. 9; 1956, c. 40, art. 2. Fardeau de la preuve

Wife and minor children

10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be. R.S., c. 149, s. 10.

10. Lorsque le nom d'une personne du sexe masculin est inclus dans une liste de bande ou une liste générale, ou y est ajouté ou omis, ou en est retranché, les noms de son épouse et de ses enfants mineurs doivent également être inclus, ajoutés, omis ou retranchés, selon le cas. S.R., c. 149, art. 10. L'épouse et les enfants mineurs

Persons entitled to be registered

11. (1) Subject to section 12, a person is entitled to be registered if that person

(*a*) on the 26th day of May 1874 was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

(*b*) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

(*c*) is a male person who is a direct descendant in the male line of a male

11. (1) Sous réserve de l'article 12, une personne a droit d'être inscrite si Personnes ayant droit à l'inscription

a) elle était, le 26 mai 1874, aux fins de la loi alors intitulée: *Acte pourvoyant à l'organisation du Département du Secrétaire d'État du Canada, ainsi qu'à l'administration des Terres des Sauvages et de l'Ordonnance*, chapitre 42 des Statuts du Canada de 1868, modifiée par l'article 6 du chapitre 6 des Statuts du Canada de 1869 et par l'article 8 du chapitre 21 des Statuts du Canada de 1874, considérée comme ayant droit à la détention, l'usage ou la jouissance des terres et autres biens immobiliers appartenant aux tribus, bandes ou groupes d'Indiens au Canada, ou affectés à leur usage;

b) elle est membre d'une bande

(i) à l'usage et au profit communs de laquelle des terres ont été mises de côté ou, depuis le 26 mai 1874, ont fait l'objet d'un traité les mettant de côté, ou

(ii) que le gouverneur en conseil a déclarée une bande aux fins de la présente loi;

c) elle est du sexe masculin et descendante directe, dans la ligne masculine, d'une personne du sexe masculin décrite à l'alinéa

person described in paragraph (*a*) or (*b*);

(*d*) is the legitimate child of

(i) a male person described in paragraph (*a*) or (*b*), or

(ii) a person described in paragraph (*c*);

(*e*) is the illegitimate child of a female person described in paragraph (*a*), (*b*) or (*d*); or

(*f*) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (*a*), (*b*), (*c*), (*d*) or (*e*).

Exception

(2) Paragraph (1)(*e*) applies only to persons born after the 13th day of August 1956. R.S., c. 149, s. 11; 1956, c. 40, s. 3.

Persons not entitled to be registered

12. (1) The following persons are not entitled to be registered, namely,

(*a*) a person who

(i) has received or has been allotted half-breed lands or money scrip,

(ii) is a descendant of a person described in subparagraph (i),

(iii) is enfranchised, or

(iv) is a person born of a marriage entered into after the 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(*a*),(*b*) or (*d*) or entitled to be registered by virtue of paragraph 11(1)(*e*),

unless, being a woman, that person is the wife or widow of a person described in section 11, and

(*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

Protest re illegitimate child

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(*e*) may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

Certificate

(3) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

Exception

(4) Subparagraphs (1)(*a*)(i) and (ii) do not apply to a person who

a) ou *b*);

d) elle est l'enfant légitime

(i) d'une personne du sexe masculin décrite à l'alinéa *a*) ou *b*), ou

(ii) d'une personne décrite à l'alinéa *c*);

e) elle est l'enfant illégitime d'une personne du sexe féminin décrite à l'alinéa *a*), *b*) ou *d*); ou

f) elle est l'épouse ou la veuve d'une personne ayant le droit d'être inscrite aux termes de l'alinéa *a*), *b*), *c*), *d*) ou *e*).

Exception

(2) L'alinéa (1)*e*) s'applique seulement aux personnes nées après le 13 août 1956. S.R., c. 149, art. 11; 1956, c. 40, art. 3.

Personnes n'ayant pas droit à l'inscription

12. (1) Les personnes suivantes n'ont pas le droit d'être inscrites, savoir:

a) une personne qui

(i) a reçu, ou à qui il a été attribué, des terres ou certificats d'argent de métis,

(ii) est un descendant d'une personne décrite au sous-alinéa (i),

(iii) est émancipée, ou

(iv) est née d'un mariage contracté après le 4 septembre 1951 et a atteint l'âge de vingt et un ans, dont la mère et la grand-mère paternelle ne sont pas des personnes décrites à l'alinéa 11(1)*a*),*b*) ou *d*) ou admises à être inscrites en vertu de l'alinéa 11(1)*e*),

sauf si, étant une femme, cette personne est l'épouse ou la veuve de quelqu'un décrit à l'article 11, et

b) une femme qui a épousé un non-Indien, sauf si cette femme devient subséquemment l'épouse ou la veuve d'une personne décrite à l'article 11.

Protestation au sujet d'un enfant illégitime

(2) L'addition, à une liste de bande, du nom d'un enfant illégitime décrit à l'alinéa 11(1)*e*) peut faire l'objet d'une protestation en tout temps dans les douze mois de l'addition et si, à la suite de la protestation, il est décidé que le père de l'enfant n'était pas un Indien, l'enfant n'a pas le droit d'être inscrit selon cet alinéa.

Certificat

(3) Le Ministre peut délivrer à tout Indien auquel la présente loi cesse de s'appliquer, un certificat dans ce sens.

Exception

(4) Les sous-alinéas (1)*a*)(i) et (ii) ne s'appliquent pas à une personne qui,

(*a*) pursuant to this Act is registered as an Indian on the 13th day of August 1958, or

(*b*) is a descendant of a person described in paragraph (*a*) of this subsection.

Idem

(5) Subsection (2) applies only to persons born after the 13th day of August 1956. R.S., c. 149, s. 12; 1956, c. 40, ss. 3, 4; 1958, c. 19, s. 1.

Admission to band and transfer

13. Subject to the approval of the Minister and, if the Minister so directs, to the consent of the admitting band,

(*a*) a person whose name appears on a General List may be admitted into membership of a band with the consent of the council of the band, and

(*b*) a member of a band may be admitted into membership of another band with the consent of the council of the latter band. 1956, c. 40, s. 5.

Woman marrying outside band

14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, but if she marries a member of another band, she thereupon becomes a member of the band of which her husband is a member. R.S., c. 149, s. 14.

Payments to persons ceasing to be members

15. (1) Subject to subsection (2), an Indian who becomes enfranchised or who otherwise ceases to be a member of a band is entitled to receive from Her Majesty

(*a*) one per capita share of the capital and revenue moneys held by Her Majesty on behalf of the band, and

(*b*) an amount equal to the amount that in the opinion of the Minister he would have received during the next succeeding twenty years under any treaty then in existence between the band and Her Majesty if he had continued to be a member of the band.

Payments not to be made in certain cases

(2) A person is not entitled to receive any amount under subsection (1)

(*a*) if his name was removed from the Indian register pursuant to a protest made under section 9, or

(*b*) if he is not entitled to be a member of a band by reason of the application of paragraph 11(1)(*e*) or subparagraph 12(1)(*a*)(iv).

Payments to minors

(3) Where by virtue of this section moneys

a) en conformité de la présente loi, est inscrite à titre d'Indien le 13 août 1958, ou

b) est un descendant d'une personne désignée à l'alinéa *a*) du présent paragraphe.

Idem

(5) Le paragraphe (2) s'applique seulement aux personnes nées après le 13 août 1956. S.R., c. 149, art. 12; 1956, c. 40, art. 3, 4; 1958, c. 19, art. 1.

Admission au sein d'une bande et transfert d'un membre

13. Sous réserve de l'approbation du Ministre et, si ce dernier l'ordonne, sous réserve du consentement de la bande qui accorde l'admission,

a) une personne dont le nom apparaît sur une liste générale peut être admise au sein d'une bande avec le consentement du conseil de la bande, et

b) un membre d'une bande peut être admis parmi les membres d'une autre bande avec le consentement du conseil de celle-ci. 1956, c. 40, art. 5.

Femme qui épouse un homme n'étant pas de la bande

14. Une femme qui est membre d'une bande cesse d'en faire partie si elle épouse une personne qui n'en est pas membre, mais si elle épouse un membre d'une autre bande, elle entre dès lors dans la bande à laquelle appartient son mari. S.R., c. 149, art. 14.

Paiements aux personnes qui cessent d'être membres

15. (1) Sous réserve du paragraphe (2), un Indien qui devient émancipé ou qui, d'autre manière, cesse d'être membre d'une bande a droit de recevoir de Sa Majesté

a) une part *per capita* des fonds de capital et de revenu détenus par Sa Majesté au nom de la bande, et

b) un montant égal à la somme que, de l'avis du Ministre, il aurait reçue durant les vingt années suivantes aux termes de tout traité alors en vigueur entre la bande et Sa Majesté s'il était demeuré membre de la bande.

Certains cas où les paiements ne sont pas versés

(2) Une personne n'a pas droit de recevoir un montant quelconque sous le régime du paragraphe (1)

a) si son nom a été rayé du registre des Indiens à la suite d'une protestation faite en vertu de l'article 9, ou

b) si elle n'a pas droit d'être membre d'une bande en raison de l'application de l'alinéa 11(1)*e*) ou du sous-alinéa 12(1)*a*)(iv).

Paiements aux mineurs

(3) Lorsqu'en vertu du présent article, des

are payable to a person who is under the age of twenty-one, the Minister may

(*a*) pay the moneys to the parent, guardian or other person having the custody of that person or to the public trustee, public administrator or other like official for the province in which that person resides, or

(*b*) cause payment of the moneys to be withheld until that person reaches the age of twenty-one.

deniers sont payables à une personne de moins de vingt et un ans, le Ministre peut

a) payer les deniers au père ou à la mère, au tuteur ou à l'autre personne ayant la garde de cette personne, ou au curateur public ou administrateur public ou autre semblable fonctionnaire de la province où réside ladite personne, ou

b) faire suspendre le paiement des deniers jusqu'à ce que la personne ait atteint l'âge de vingt et un ans.

Compensation for permanent improvements

(4) Where the name of a person is removed from the Indian Register and he is not entitled to any payment under subsection (1), the Minister shall, if he considers it equitable to do so, authorize payment, out of moneys appropriated by Parliament, of such compensation as the Minister may determine for any permanent improvements made by that person on lands in a reserve.

(4) Lorsque le nom d'une personne est rayé du registre des Indiens et que celle-ci n'a droit à aucun paiement aux termes du paragraphe (1), le Ministre, s'il l'estime équitable, doit autoriser le paiement, à même les deniers votés par le Parlement, de l'indemnité qu'il fixe pour toute amélioration permanente faite par cette personne sur des terres d'une réserve.

Indemnité relative aux améliorations permanentes

Commutation of payments under former Act

(5) Where, prior to the 4th day of September 1951, any woman became entitled, under section 14 of the *Indian Act*, chapter 98 of the Revised Statutes of Canada, 1927, or any prior provisions to the like effect, to share in the distribution of annuities, interest moneys or rents, the Minister may, in lieu thereof, pay to such woman out of the moneys of the band an amount equal to ten times the average annual amounts of such payments made to her during the ten years last preceding or, if they were paid for less than ten years, during the years they were paid. R.S., c. 149, s. 15; 1956, c. 40, s. 6.

(5) Lorsque, avant le 4 septembre 1951, une femme est devenue admissible, selon l'article 14 de la *Loi des Indiens*, chapitre 98 des Statuts revisés du Canada de 1927, ou selon quelque disposition antérieure ayant le même effet, à participer à la distribution d'annuités, intérêts ou rentes, le Ministre peut, en remplacement des susdits, payer à cette femme, sur les deniers de la bande, un montant égal à dix fois les montants annuels moyens de ces paiements à elle effectués au cours des dix années précédentes ou, s'ils l'ont été pendant moins de dix ans, au cours des années pendant lesquelles ils ont été faits. S.R., c. 149, art. 15; 1956, c. 40, art. 6.

Commutation de paiements prévus par une loi antérieure

Transfer of funds

16. (1) Section 15 does not apply to a person who ceases to be a member of one band by reason of his becoming a member of another band, but, subject to subsection (3), there shall be transferred to the credit of the latter band the amount to which that person would, but for this section, have been entitled under section 15.

16. (1) L'article 15 ne s'applique pas à une personne qui cesse d'appartenir à une bande du fait qu'elle devient membre d'une autre bande, mais, sous réserve du paragraphe (3), le montant auquel cette personne aurait eu droit en vertu de l'article 15, sans le présent article, doit être transféré au crédit de la bande en dernier lieu mentionnée.

Transfert de fonds

Transferred member's interest

(2) A person who ceases to be a member of one band by reason of his becoming a member of another band is not entitled to any interest in the lands or moneys held by Her Majesty on behalf of the former band, but he is entitled to the same interest in common in lands and moneys held by Her Majesty on behalf of the latter band as other members of that band.

(2) Une personne qui cesse de faire partie d'une bande du fait qu'elle est devenue membre d'une autre bande n'a droit à aucun intérêt dans les terres ou deniers détenus par Sa Majesté au nom de la bande en premier lieu mentionnée, mais elle a droit au même intérêt en commun, dans les terres et les deniers détenus par Sa Majesté au nom de la bande en deuxième lieu mentionnée, que les

L'intérêt d'un membre transféré

Transfer of woman by marriage

(3) Where a woman who is a member of one band becomes a member of another band by reason of marriage, and the per capita share of the capital and revenue moneys held by Her Majesty on behalf of the first-mentioned band is greater than the per capita share of such moneys so held for the second-mentioned band, there shall be transferred to the credit of the second-mentioned band an amount equal to the per capita share held for that band, and the remainder of the money to which the woman would, but for this section, have been entitled under section 15 shall be paid to her in such manner and at such times as the Minister may determine. R.S., c. 149, s. 16.

Minister may constitute new bands

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

(*a*) constitute new bands and establish Band Lists with respect thereto from existing Band Lists or General Lists, or both,

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

(*c*) where a band has applied for enfranchisement, remove any name from the Band List and add it to the General List.

Division of reserves and funds

(2) Where pursuant to subsection (1) a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Minister determines shall be held for the use and benefit of the new band.

No protest

(3) No protest may be made under section 9 in respect of the deletion from or addition to a list consequent upon the exercise by the Minister of any of his powers under subsection (1). R.S., c. 149, s. 17; 1956, c. 40, s. 7.

RESERVES

Reserves to be held for use and benefit of Indians

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any

autres membres de cette dernière.

Quand une femme change de bande du fait de son mariage

(3) Lorsqu'une femme qui fait partie d'une bande devient membre d'une autre bande du fait de son mariage et que la part *per capita* des fonds de capital et de revenu détenus par Sa Majesté au nom de la bande en premier lieu mentionnée, est plus élevée que la part *per capita* des fonds ainsi détenus pour la bande en deuxième lieu mentionnée, il doit être transféré au crédit de la bande en deuxième lieu mentionnée un montant égal à la part *per capita* détenue pour cette bande, et le solde des deniers auxquels cette femme aurait eu droit aux termes de l'article 15, sans le présent article, doit lui être versé de la manière et aux époques que le Ministre détermine. S.R., c. 149, art. 16.

Le Ministre peut constituer de nouvelles bandes

17. (1) Le Ministre peut, chaque fois qu'il l'estime opportun,

a) constituer de nouvelles bandes et établir à leur égard des listes de bande en se servant des listes de bande ou des listes générales existantes, ou des deux à la fois,

b) fusionner des bandes qui, par un vote majoritaire de leurs électeurs, demandent la fusion, et

c) lorsqu'une bande a demandé l'émancipation, retrancher tout nom de la liste de bande et l'ajouter à la liste générale.

Division des réserves et des fonds

(2) Si, conformément au paragraphe (1), une nouvelle bande a été constituée à même une bande existante ou quelque partie de cette dernière, on doit détenir à l'usage et au profit de la nouvelle bande telle fraction des terres de réserve et des fonds de la bande existante que le Ministre détermine.

Aucune protestation

(3) Aucune protestation ne peut être faite selon l'article 9 à l'égard du retranchement d'une liste ou de l'addition à une liste par suite de l'exercice, par le Ministre, de l'un quelconque de ses pouvoirs prévus au paragraphe (1). S.R., c. 149, art. 17; 1956, c. 40, art. 7.

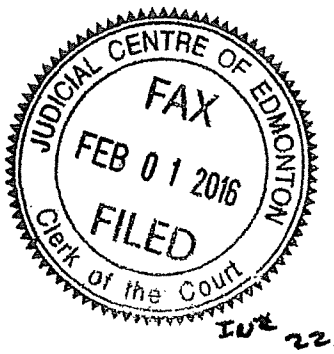
RÉSERVES

Les réserves sont détenues à l'usage et au profit des Indiens

18. (1) Sauf les dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; et, sauf la présente loi et les stipulations de tout traité ou cession, le gouverneur en conseil peut

TAB A

Clerk's Stamp:



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COURT FILE NUMBER: 1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE EDMONTON

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

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

ENTERED by LP

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

APPLICANT in this Application OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA

RESPONDENT in this Application THE SAWRIDGE FIRST NATION

DOCUMENT **APPLICATION BY THE OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA FOR PRODUCTION UNDER RULE 5.13.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

HUTCHISON LAW
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, AB T8A 3X1

Attention: **Janet L. Hutchison**
Telephone: (780) 417-7871
Fax: (780) 417-7872
Email: jhutchison@jlhlaw.ca
File: 51433 JLH

NOTICE TO THE RESPONDENT, SAWRIDGE FIRST NATION

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

You have the right to state your side of this matter before the Justice.

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

Date: To be set by the Case Management Justice, but in any event prior to April 30, 2016 as directed in the Reasons for Judgment dated December 17, 2015

Time: To be set by the Case Management Justice

Where: Law Courts Building
1A Sir Winston Churchill Square,
Edmonton, Alberta T5J 3Y2

Before: Justice D.R.G. Thomas in Chambers

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

Remedy claimed or sought includes:

1. The OPGT requests the Sawridge First Nation ("SFN") provide it with the following types of documents, the OPGT believes may be relevant and material to the issue of which assets, were to be, and were settled in the 1985 Trust:

   a.) Band Council meeting minutes, Band Council Resolutions, or documents presented to or before, or approved by, Band Council in the 1970's, including records of transfers or any transfer documents, when land, hotel and other business assets acquired by the SFN were registered in Chief Walter Twinn's, George Twin's, Walter Felix Twin's, Samuel Gilbert Twin's, and David Fennel's names to hold in trust for the members of SFN, which assets were to be transferred to the 1982 Trust and ultimately into the 1985 Trust. [Source: Affidavit of Paul Bujold, filed September 13, 2011, para. 8];

   b.) Band Council meeting minutes, Band Council Resolutions or documents presented to or before, or approved by, Band Council in the June 1982 meeting held at the Sawridge Band Office to address the transfer of all property held by Chief Walter Twinn, George Twin, Walter Felix Twin, Samuel Gilbert Twin and David Fennel in trust for the present and future members of the 1982 Trust, which assets were ultimately to be transferred into the 1985 Trust, that contain any information about the assets held by the individuals and/or the transfer to the Trust, , including records of transfers or any transfer documents. [Source- Affidavit of Paul Bujold, filed September 13, 2011, para. 10 and Exhibit B]

c.) Band Council meeting minutes or documents presented to or before, or approved by, Band Council, including records of transfers or any transfer documents, at its April 15, 1985 Band Council meeting that would provide any greater detail or information regarding the transfer of assets from the 1982 Trust to the 1985 Trust, beyond that contained in the Band Council Resolution. [Source: Affidavit of Paul Bujold, filed September 13, 2011, Exhibit H]

d.) Any documents SFN has in its possession or control, including records of transfers or any transfer documents, that would assist in identifying the specific additional assets that Mr. Bujold believes were later transferred from SFN or individuals holding the property in trust for SFN members and the dates and manner of transfer. [Source: Affidavit of Paul Bujold, filed September 13, 2011, para. 22]

e.) Copies of SFN financial statements prepared prior to June 1, 1984 that would provide details of the assets which composed the transferred assets with a carrying value of $17, 951, 590.00 as referred to in Note 16 to the June 1, 1984 Financial Statements provided at Undertaking #16 of Paul Bujold's Answers to Undertakings;

f.) Further to item (e) above, any Band Council meeting minutes, Band Council resolutions or documents presented to or before, or approved by, Band Council, or minutes of meetings of Band members, including records of transfers or any transfer documents, or other documentation regarding the December 17, 1983 transfer of assets to the 1982 Trust, and ultimately 1985 Trust;

g.) Any documentation that would assist in understanding if the 1985 Contribution from Beneficiaries related to any of the assets that were being held by individuals in trust for the SFN members and that were later settled in the Trust. [Source- Sawridge Trust Financial statements dated December 31, 1986 (produced as part of Paul Bujold's Answers to Undertakings, UT #16) which refers in Note 7 to a 1985 "contribution from beneficiaries"]

h.) Copies of the series of demand promissory notes held in trust by Walter Twinn for the SFN band members, as referred to in the January 21, 1985 Demand Debenture, which was later transferred to the Trust, as well as any Band Council meeting minutes or documents presented to or before, or approved by, Band Council relating to the promissory notes or the 1985 Demand Debenture. [Source: Paul Bujold Answers to Undertakings, UT #16]

i.) Band Council meeting minutes, Band Council resolutions, or documents presented to or before, or approved by, Band Council, including records of transfers or any transfer documents, in relation to the transfers of $3,706,060.00 and $17,951,590.00 to the Trust in 1985 and 1984 respectively, that would identify that specific assets that comprised the transfers, if not already produced in response to the above requests;

j.) Any documentation in the SFN's possession and control that would assist in determining what assets were intended to be included in the Trust Settlement, the 1982 Trust, or the Declaration of Trust, or any documentation that would confirm the specific transfers from the 1982 Trust to the 1985 Trust. [Source – Paul Bujold Answer to Undertaking #18, Response from Justice Canada suggesting SFN would be the party that would best be able to locate the documents requested.]

2. The OPGT bases its request, including its assessment of whether SFN may have control of the requested records and their relevance and materiality, on the information available in the proceeding as of today's date. It must be noted that the OPGT has not had the benefit of questioning the Trustee's affiant, Paul Bujold, on the documents produced regarding assets, on his answers to undertakings or on his Affidavit of Records, dated November 2, 2015, as of the date of filing.

Grounds for making this application:

1. This application is made under direction of the Court as set out in the December 17, 2015 Reasons for Judgment. The Public Guardian and Trustee is filing its application under revised terms from the December 17, 2015 judgment, which is under appeal.

2. The Public Guardian and Trustee is also filing this application despite the fact that the Parties have also provided the Court with a signed consent order for an extension of time, to file the within application.

3. The OPGT reserves the right to file an amended application once its Questioning of Paul Bujold on asset documentation has actually been held and upon the result of Appeals 1603-0029AC and 1603-0026AC.

Material or evidence to be relied upon:

1. All relevant materials filed to date in Court of Queen's Bench Action 1103 14112, including all transcripts, affidavits, excerpts of evidence and answers to undertakings;

2. Such further and other materials as Counsel may advise and this Honourable Court may allow.

Applicable rules:

1. *Alberta Rules of Court*, Alta Reg 124/2010, *Rule* 5.13;

2. Such further and other rules as Counsel may advise.

Applicable Acts and regulation:

1. *Public Trustee Act*, SA 2004, c P-44.1
2. Such further and other Acts and regulation as Counsel may advise.

Any irregularity complained of or objection relied on:

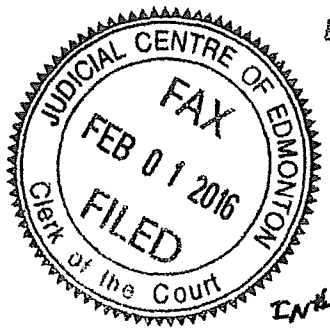
How the application is proposed to be heard or considered:

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

WARNING

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

TAB B



ENTERED by MP

IN # 2222

Clerk's Stamp:

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

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

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

APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
APPLICANT in this Application	OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA
RESPONDENT in this Application	THE SAWRIDGE FIRST NATION
DOCUMENT	**APPLICATION BY THE OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA FOR PRODUCTION UNDER RULE 5.13.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

HUTCHISON LAW
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, AB T8A 3X1

Attention: **Janet L. Hutchison**
Telephone: (780) 417-7871
Fax: (780) 417-7872
Email: jhutchison@jlhlaw.ca
File: 51433 JLH

NOTICE TO THE RESPONDENT, SAWRIDGE FIRST NATION

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

You have the right to state your side of this matter before the Justice.

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

Date: To be set by the Case Management Justice, but in any event prior to April 30, 2016 as directed in the Reasons for Judgment dated December 17, 2015

Time: To be set by the Case Management Justice

Where: Law Courts Building
1A Sir Winston Churchill Square,
Edmonton, Alberta T5J 3Y2

Before: Justice D.R.G. Thomas in Chambers

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

Remedy claimed or sought includes:

1. In accordance with para. 61 of Justice Thomas' December 17, 2015 judgment, all documents in the possession of Sawridge First Nation that may assist in identifying current and possible minors who are children of members of the Sawridge First Nation. Information already provided by Paul Bujold on or about May 27, 2014 in response to Undertaking 31 excluded.

2. The OPGT bases its request, including its assessment of whether SFN may have control of the requested records and their relevance and materiality, on the information available in the proceeding as of today's date. It must be noted that the OPGT has not had the benefit of questioning the Trustee's witnesses, or of having leave to make additional production requests, in relation to the SFN's response dated January 18, 2016.

Grounds for making this application:

1. This application is made under direction of the Court as set out in the December 17, 2015 Reasons for Judgment. The Public Guardian and Trustee is filing its application under revised terms from the December 17, 2015 judgment, which is under appeal.

2. The Public Guardian and Trustee is also filing this application despite the fact that the Parties have also provided the Court with a signed consent order for an extension of time, to file the within application.

3. The OPGT reserves the right to file an amended application once further Questioning occurs and upon the result of Appeals 1603-0029AC and 1603-0026AC.

Material or evidence to be relied upon:

1. All relevant materials filed to date in Court of Queen's Bench Action 1103 14112, including all transcripts, affidavits, excerpts of evidence and answers to undertakings;

2. Such further and other materials as Counsel may advise and this Honourable Court may allow.

Applicable rules:

1. *Alberta Rules of Court*, Alta Reg 124/2010, *Rule* 5.13;

2. Such further and other rules as Counsel may advise.

Applicable Acts and regulation:

1. *Public Trustee Act*, SA 2004, c P-44.1

2. Such further and other Acts and regulation as Counsel may advise.

Any irregularity complained of or objection relied on:

N/A

How the application is proposed to be heard or considered:

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

WARNING

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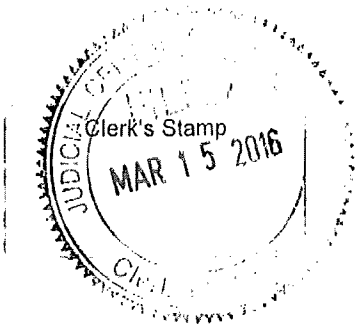
TAB C



COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**BRIEF OF THE SAWRIDGE FIRST NATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1500 Manulife Place 10180 – 101 Street Edmonton, AB T5J 4K1 **Attention**: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 **File Number**: 64203-7/EHM

TABLE OF CONTENTS

I. INTRODUCTION

1. Further to Justice D.R.G. Thomas' reasons for judgment dated December 17, 2015,[1] the Sawridge First Nation ("Sawridge") was served with two applications by the Public Trustee of Alberta (the "Public Trustee") on January 29, 2016. In both of its applications, the Public Trustee is seeking orders to compel Sawridge to provide certain records pursuant to Rule 5.13 of the *Rules of Court*. One of the Public Trustee's applications concerns records related to the identification of the pool of potential beneficiaries for the 1985 Sawridge Trust (the "Beneficiary Application"). The other application concerns records related to the settlement of the assets in the 1985 Sawridge Trust (the "Settlement Application").

2. It is Sawridge's position that the Public Trustee should not be entitled to all of the records that it is seeking as part of its two applications. With regards to the Beneficiary Application, the Public Trustee has been provided with information that would allow it to identify the number and identity of the minors who it represents and who it may represent. Furthermore, the Public Trustee has failed to specify what records it is requesting from Sawridge as part of this application.

3. Insofar as the Settlement Application, a number of the Public Trustee's requests for records are irrelevant, as they do not concern the settlement of the assets into the 1985 Sawridge Trust; rather, a number of those requests are focused on quantifying the assets in the 1985 Sawridge Trust, and on attempting to determine how certain assets were disposed of well before the trust's inception. Those requests, it is submitted, are irrelevant to what Justice Thomas described as "potential irregularities" related to the settlement of the assets in the 1985 Sawridge Trust.

II. BENEFICIARY APPLICATION

A. *BACKGROUND*

4. In his reasons for judgment, Justice Thomas directed Sawridge to provide the Public Trustee with information that would allow the Public Trustee to identify the following:

---

[1] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 [***"Sawridge #2"***]. **[Tab B1]**

1. The names of individuals who have:

    a) made applications to join Sawridge which are pending; and

    b) had applications to join Sawridge rejected and are subject to challenge; and

2. The contact information for those individuals where available.[2]

5. Pursuant to that direction, Sawridge sent a letter to the Public Trustee on January 18, 2016, which included all of the above-listed information. As part of that letter, Sawridge provided a table containing a list of all of the adult individuals who had applied to join Sawridge, but whose applications were still pending with their contact information. Sawridge also provided a list of all of the adult parents, with contact information, who had made applications for membership for their minor children. Additionally, Sawridge confirmed that there were no membership appeal decisions outstanding, and that there were no membership decisions that were subject to challenge in accordance with the relevant limitations period under the Sawridge Constitution and its laws. A copy of that letter has been included as **Tab C1** of these submissions. The attached copy of the letter does not contain the tables referred to above, as those tables contain private and confidential information.

6. On January 29, 2016, the Public Trustee served Sawridge with the Beneficiary Application. According to the Public Trustee's application, it is seeking the following records from Sawridge:

> In accordance with para. 61 of Justice Thomas' December 17, 2015 judgment, all documents in the possession of Sawridge First Nation that may assist in identifying current and possible minors who are children of members of the Sawridge First Nation. Information already provided by Paul Bujold on or about May 27, 2014 in response to Undertaking 31 excluded.

7. The undertaking response referred to in the above paragraph was included in the Public Trustee's document titled, "excerpts from pleadings, transcripts, exhibits and answers to undertakings," which was filed on June 12, 2015, at pp. 153-155. That undertaking response is a

[2] *Ibid*, at para 57.

two-page table that outlines all of the minors who are currently members of Sawridge, and indicates whether those minors are currently beneficiaries of the 1985 Sawridge Trust.

B. *SUBMISSIONS*

8. As noted above, the production of records by a non-party to an action is governed by Rule 5.13 of the *Rules of Court*. That rule creates a narrow exception to the general rule that parties are typically only allowed disclosure from other parties to an action. It states as follows:

> 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.[3]

9. Case law is clear that Rule 5.13 is not intended to give a party to an action the right to obtain document discovery from a third party. Rule 5.13 exists to allow parties access to clearly specified records held by a third party; it cannot be relied upon by parties to engage in a fishing expedition, or to compel a third party to disclose records that they may have.[4]

10. The party seeking the records from a third party has the burden of establishing that the Court should order the production of those records.[5]

11. In light of the specific nature of the request under Rule 5.13, the applicant party must clearly identify the records being sought from the third party, and must establish that the third party has said records in its possession. The moving party must accordingly describe the records being sought with a level of precision, and must provide evidence establishing that the

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[3] *Rules of Court*, at 5.13. [**Tab A1**]
[4] *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, (1988) 63 Alta LR (2d) 189 (QB) [***"Ed Miller"***], at para 13 [**Tab B2**]; see also *Trimay Wear Plate v Way*, 2008 ABQB 601 [***"Trimay"***], at paras 13 and 18. [**Tab B3**]
[5] *Metropolitan Trust Co. of Canada v. Peters*, 1996 CarswellAlta 274 (CA), at para 4. [**Tab B4**]

third party has those records.[6] Failing to adequately describe a record is fatal to an application under Rule 5.13.[7] In addition, if a description is worded in a manner that looks to compel discovery from a party, then that application will be denied.[8]

12. In *Trimay Wear Plate v Way*, for example, Justice Graesser held that the defendants were not entitled to certain records sought from a third party under the previous version of Rule 5.13 (Rule 209), because of a lack of specificity in their request. The defendants' requests in that action were drafted in the following manner:

> (a) documents surrounding 735458's [the Third Party] ownership of Trimay [the Plaintiff], which they say are relevant to whether any proprietary processes or technology exist;
>
> (b) documents concerning 735458's and Alberta Industrial's business dealings with Trimay, which they say are relevant to Trimay's costs and are thus relevant to Trimay's damage claim;
>
> (c) documents concerning Alberta Industrial's business dealings with Trimay which they say relate to the former the Defendants' allegations about mismanagement of Trimay and are thus relevant to damages; and
>
> (d) documents of both 735458 and Alberta Industrial relating to the former senior manager, which they say go to Trimay's damage claim.[9]

13. Justice Graesser held that the defendants' requests were not worded with sufficient specificity to determine if the third party had any relevant or material records. As such, the application was (with the exception of two requests specific documents) dismissed.[10]

14. In his reasons for judgment, Justice Thomas identified three categories of minors who were potential recipients of a distribution of the 1985 Sawridge Trust:

(a) Minors who are children of members of Sawridge;

(b) Children of adults who have unresolved applications to join Sawridge; and

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[6] *Ed Miller*, supra note 4, at paras 13-17. **[Tab B2]**
[7] *Esso Resources Canada Limited v Lloyd's Underwriters & Companies*, 1990 ABCA 144, at paras 12 and 13. **[Tab B5]**
[8] *Gainers Inc. v Pocklington Holdings Inc.*, 1995 CarswellAlta 200 (CA), at para 16. **[Tab B6]**
[9] *Trimay*, supra note 4, at para 12. **[Tab B3]**
[10] *Ibid*, at para 24. **[Tab B3]**

(c) Children of adults who have applied for membership in Sawridge, but have had their application rejected and are challenging that rejection by appeal or judicial review.[11]

15. Sawridge, in its letter of January 18, 2016, provided the Public Trustee with all of the information that would allow it to identify the minors in the last two of the categories listed above. Insofar as the second category, Sawridge provided a list of the adults who had pending applications to Sawridge, as well as a list of adults who had made applications for membership on behalf of their minor children. With regards to the third category, Sawridge confirmed that no appeals had been commenced or could be commenced in relation to any membership applications. As such, and given that information concerning the minors who are currently members of Sawridge was already provided to the Public Trustee as part of Mr. Bujold's undertaking responses, it is Sawridge's position that the Public Trustee does not require any further documents related to same.

16. Furthermore, even if additional records were necessary to identify the minor beneficiaries that the Public Trustee is representing, the Public Trustee's request under Rule 5.13 fails to articulate what documents it is seeking with any level of precision. As noted in the above-cited cases, an applicant is required to provide a precise description of what records it is seeking from a third party under Rule 5.13. Rather than specifying what documents it is seeking, the Public Trustee has simply requested all documents that "may" assist in identifying the minor beneficiaries. That request, it is submitted, is far too broadly worded to be permitted under Rule 5.13.

17. Another issue raised by the manner in which the Public Trustee has framed its request for records is that Sawridge is unable to determine if any of the records that are being sought are producible, or if Sawridge would oppose their production. Some of the records being requested by the Public Trustee may contain confidential information regarding applicants for membership or regarding Sawridge itself. Given that the Public Trustee has not specified which documents it is seeking, Sawridge is unable to say if any records containing confidential

[11] *Sawridge #2*, supra note 1, at para 56. **[Tab B1]**

information are being sought, and is accordingly unable to know whether it needs to raise an objection related to same.

18. The issue of identifying what is being sought by the Public Trustee is rendered even more difficult by the fact that the Public Trustee has indicated in its application that it is relying on, "all relevant materials filed to date" in this action. As a non-party, Sawridge has not necessarily been privy to all of the filings in this action. Importantly, the Public Trustee has failed to provide any indication of what evidence it will rely on, and is instead suggesting that Sawridge should comb through the tomes of records that have been filed in order to guess what the Public Trustee deems is a "relevant document" for the purpose of this application. This failure to specify what evidence is being relied upon runs contrary to the principle of precisely framing a request under Rule 5.13.

III. SETTLEMENT APPLICATION

A. *BACKGROUND*

19. The first Order pronounced in this action is dated August 31, 2011. That Order was pronounced by Justice Thomas, and outlines the scope of the application being made by the 1985 Sawridge Trust's trustees for advice and direction.[12] That Order notes at paragraph 1(b) that one of the purposes of this action is to seek direction, "with respect to the transfer of assets to the 1985 Sawridge Trust."

20. In the Affidavit of Mr. Bujold filed by the trustees of the 1985 Sawridge Trust in support of their application for advice and direction, Mr. Bujold noted the following regarding the advice and direction being sought:

> 25. The Trustees seek the Court's direction to declare that the asset transfer was proper and that the assets in the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust.[13]

21. In his reasons for judgment, Justice Thomas indicated that certain questions had been raised regarding the settlement of the assets in the 1985 Sawridge Trust. Accordingly, he

[12] Order of Justice D.R.G. Thomas, dated August 31, 2011. **[Tab C2]**
[13] Affidavit of Paul Bujold, sworn September 12, 2011, at para 25. **[Tab C3]**

ordered that the Public Trustee could serve Sawridge with an application under Rule 5.13 concerning the assets settled in the 1985 Sawridge Trust. [14]

22. On January 29, 2016, the Public Trustee served Sawridge with the Settlement Application. In that application, the Public Trustee indicated that it was seeking ten different categories of records from Sawridge. Those various categories are outlined at paragraph 1 of the Settlement Application.

B. *SUBMISSIONS*

23. Case law is clear that the Public Trustee must demonstrate that the records that it is seeking from Sawridge are relevant and material to the issues in dispute in this action. The *Rules of Court* affirm that a party is only required to disclose records that are relevant and material. Relevance and materiality are generally defined by the parties' pleadings:

> 5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings. [*Emphasis Added*][15]

24. In addition to reviewing the parties' pleadings, a Court must, when determining whether a record is producible, review a moving party's reason for seeking a record from another party. In *Weatherill (Estate of) v Weatherill*, one of the leading cases concerning applications for document production, Justice Slatter affirmed that a document's relevance is determined based on the issues in a given action, and that said issues are defined (per the *Rules of Court*) based on the parties' pleadings.[16] With regards to materiality, Justice Slatter noted that a document will be material to an action if that document would help determine one of the issues that arises in the

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[14] *Sawridge #2*, supra note 1, at paras 45-47. **[Tab B1]**
[15] *Rules of Court*, at R.5.2. **[Tab A2]**
[16] *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69, at paras 16. **[Tab B7]**

parties' pleadings. He also affirms that a Court must review a party's line of argument in order to determine whether a document is needed to prove a fact related to one of the issues.[17]

25. A party looking to obtain a record from another party, as with most applications, has the burden of proving that said record is relevant and material.[18] If a moving party fails to meet its burden of proving that a record should be produced, then a Court must dismiss that party's application for disclosure.[19]

26. From the outset of this action, the issue regarding the settlement of the assets in the 1985 Sawridge Trust has not concerned the quantification of those assets. At no time has an application been brought for an accounting of those assets; nor has any tracing-type application been brought in relation to the assets.

27. Rather, and as indicated in the first Order pronounced by Justice Thomas and in Mr. Bujold's Affidavit, the issue regarding the settlement of the assets concerns the actual transfer of those assets to the 1985 Sawridge Trust. That transfer, as was noted in Mr. Bujold's Affidavit, occurred in April of 1985. Accordingly, it is Sawridge's position that the only documents related to the assets in the 1985 Sawridge Trust that are relevant and material to this action are those that concern the actual transfer of the assets into that trust.

28. Based on its position regarding the Public Trustee's requests for records, Sawridge provided the Public Trustee with a response to its request in paragraph 1(c). That response was provided via letter on March 11, 2016. A copy of that letter has been included at **Tab C4** of these submissions. Sawridge indicated that it did not have any other records concerning the subject matter of that request.

29. A number of the Public Trustee's requests for records concern matters that predate the transfer of the assets to the 1985 Sawridge Trust. Specifically, certain requests concern records related to assets held by certain individuals in the 1970s (paragraph 1(a)), to the settlement of certain assets in the 1982 Sawridge Trust (paragraphs 1(b) and 1(j)), and to other

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[17] *Ibid*, at paras 16-17. [**Tab B7**]
[18] *Re/Max Real Estate (Edmonton) Ltd v Border Credit Union Ltd*, (1988), 60 Alta LR (2d) 356 (Master Funduk), at paras 20-21. [**Tab B8**]
[19] *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2, at paras 21 and 42 – 44. [**Tab B9**]

matters that predate April of 1985 (paragraphs 1(e), 1(f), and 1(h)). These records are neither relevant nor material to the issue that is the subject of this action, being the actual transfer of the assets to the 1985 Sawridge Trust.

30. Similarly, a number of the other requests concern the identification of the assets located in the 1985 Sawridge Trust. The requests for records concerning transfers that occurred into the trust following its settlement in April of 1985 (paragraph 1(d)) and concerning certain matters in the 1985 Sawridge Trust's financial statements (paragraph 1(g)) are again irrelevant and not material to the issue of the transfer of the assets into the 1985 Sawridge Trust. As eluded to above, the Trustees of the 1985 Sawridge Trust are not seeking an accounting of the trust's assets, or any similar remedy.

31. With regards to paragraph 1(i) of the Public Trustee's application, Sawridge again takes the position that the records being sought regarding the transfers of funds that purportedly occurred in 1984 and 1985 are irrelevant to this action. Additionally, no evidence has been provided to support this request by the Public Trustee. An applicant under Rule 5.13 has the burden of proving that a third party possesses a record. As no evidence has been referred to by the Public Trustee in relation to this request, it is Sawridge's position that the Public Trustee's request under paragraph 1(i) should be dismissed.

32. Sawridge also takes the position that the Public Trustee's request under paragraph 1(j) is irrelevant to the issue of the transfer into the 1985 Sawridge Trust. The Public Trustee has requested records that concern the assets that certain individuals intended to be included in the 1982 Sawridge Trust. The question of intent in these circumstances is irrelevant to the actual transfer that took place.

33. In conclusion, Sawridge's position is that the Public Trustee's requests in the Settlement Application run contrary to Justice Thomas' attempt to refocus the role of the Public Trustee in this action. Justice Thomas was clear in his reasons for judgment that an application under Rule 5.13 was, "not intended to facilitate a 'fishing trip'."[20] The Public Trustee has ignored Justice Thomas' finding in this regard, and has attempted to request a number of records that are not clearly identified and that are irrelevant and immaterial to this action.

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[20] *Sawridge #2*, supra note 1, at para 16. **[Tab B1]**

IV. RELIEF REQUESTED

34. For the above reasons, the respondent Sawridge prays that the contested portions of the Public Trustee's applications for disclosure be dismissed, with costs payable by the Public Trustee on the basis that these costs shall not be paid by the Sawridge Trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of March, 2016.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Solicitors for the Sawridge First Nation

LIST OF AUTHORITIES

A. LEGISLATION AND RULES

B. CASE LAW

C. PRIOR ORDERS