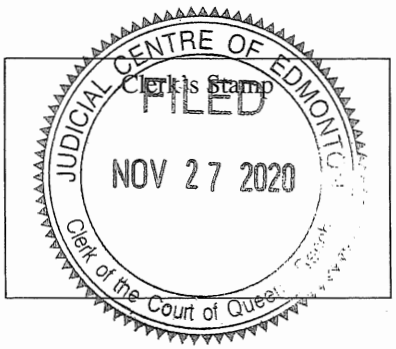

COURT FILE NO. 1103 14112

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

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

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

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

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

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

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Suite 600
McLennan Ross Building
12220 Stony Plain Road
Edmonton, AB T5N 3Y4

Lawyer: David Risling and Crista Osualdini
Telephone: (780) 482-9200
Fax: (780) 482-9100
Email: cosualdini@mross.com
File No.: 144194

PART 1 INTRODUCTION

1. These submissions are filed to supplement Ms. Twinn's written submissions filed on November 15, 2019 and further to the directions provided by your Lordship at the November 22, 2019 case management meeting.

2. More particularly, the Court advised the parties that as part of adjudicating the Application and thus interpreting the Consent Order, the Court would need to determine for whose benefit the 1985 Trust assets were held immediately prior to the issuance of the Consent Order and on what legal basis they are being held.[1] The Court suggested, as an example, that the 1985 Trustees could be holding the assets in a constructive trust for the benefit of the 1982 Trust beneficiaries.[2]

3. Respectfully, Ms. Twinn disagrees that such a legal determination is required or appropriate in order to interpret the meaning and effect of the Consent Order.

4. The well-established legal test for interpretation of orders of this Honourable Court requires an analysis of the record before the Court at the time the order was granted.[3] For your Lordship to make further rulings in order to interpret the Consent Order, would be creating a record that was not before Justice Thomas at the time the Consent Order was granted and would, respectfully, constitute an error in law.

5. Further, if the Court finds that the Consent Order does not confirm beneficial ownership of the 1985 Trust assets, then the final relief being sought by the

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[1] Transcript November 22, 2019 Page 8, lines 34-40 [**TAB A**]

[2] Transcript Sept 4, 2019 Page 13, lines 13-23 [**TAB B**]

[3] *Campbell v. Campbell*, 2016 SKCA 39 at paras. 15 – 18 [**TAB R** of November 15, 2019 submissions]; *Manseau & Perron Inc. v. ThyssenKrupp Industrial Solutions (Canada) Inc.*, 2018 ABQB 949 at 31 [**TAB S** of November 15, 2019 submissions].

Trustees remains at large and is properly before the final trier of fact and is outside the jurisdiction of case management.[4]

6. Even at trial, the jurisdiction of this Court is limited to "...all remedies whatsoever to which any of the *parties to the proceeding* may appear to be entitled in respect of any and every legal or equitable claim *properly brought forward by them in the proceeding...*" [*Emphasis mine*].[5]

7. No party in this matter has brought proceedings on behalf of the 1982 Trust beneficiaries or to otherwise strip the 1985 Trust of its assets.

8. Respectfully, your Lordship does not have jurisdiction to issue a remedial order for the benefit of the 1982 Trust on the Application. To do so, would be placing the Court outside its adjudication role and statutory authority.

9. Ms. Twinn objects to final relief being granted in case management. These submissions are filed in response to the Court's direction, but under protest and without prejudice to Ms. Twinn's position that the inquiries directed by the Court, respectfully, are not germane to the interpretation of the Consent Order and that final relief and relief not being sought by the parties cannot be granted in case management.

PART 2 RELEVANT FACTS AND EVIDENCE

Historical Background

Transfer from Bare Trusts to 1982 Trust

10. Prior to the settlement of the 1982 Trust, like other First Nations, it was unclear whether the SFN had statutory ownership powers. As a consequence, assets

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[4] Alberta Rules of Court, Rule 4.14 [**TAB C**]

[5] *Judicature Act*, RSA 2000, c J-2 s. 8 [**TAB D**]

acquired by the SFN were registered in the names of individuals who would hold property in trust.[6]

11. By 1982, Chief Walter Twinn, Walter Felix Twin, Samuel Gilbert Twin and David Fennel (collectively the "**Bare Trustees**") held a number of assets in trust.[7] The terms upon which these individuals were holding assets was not documented in writing at the time of acquisition, or at least same has not been produced in these proceedings. While trust terms are often in writing, there is not a legal requirement for them to be.

12. The 1982 Trust was settled on April 15, 1982. The Chief and Council of the SFN were to act as the trustees.[8]

13. In 1983 the Bare Trustees transferred certain trust property they were holding to the 1982 Trust pursuant to the terms of a transfer agreement dated December 19, 1983.[9] These assets included real estate and shares in various corporate holdings that are part of what is known as the Sawridge Group of Companies.

14. The assets transferred in 1983 were subsequently reorganized by the 1982 Trustees and in their reorganized form ultimately became part of the transfer of assets from the 1982 Trust to the 1985 Trust.[10]

Assignment of Debenture

15. In addition to the assets transferred by the 1982 Trust to the 1985 Trust, there is evidence that a $12,000,000.00 debenture was transferred by the SFN to the

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

[7] Affidavit of Records of the Sawridge Trustees, SAW000073-000088 [**TAB E**]

[8] 1982 Trust Deed at paragraph 5 [**TAB F**]

[9] Affidavit of Records of the Sawridge Trustees, SAW000073-000088 [**TAB E**]

[10] Affidavit of Records of the Sawridge Trustees, SAW000089-000096 and Affidavit of Records of the Sawridge Trustees, SAW000123-000134 [**TAB E**]

1985 Trust on or about April 15, 1985. This transfer is evidenced by the following:

a) Demand debenture in the amount of $12,000,000.00 issued January 21, 1985 by Walter P. Twinn as Trustee for the Sawridge Indian Band to Sawridge Enterprises Ltd.[11] (the "**Debenture**");

b) Assignment of Debenture by Walter P. Twinn as Trustee of the Sawridge Indian Band to Trustees of the 1985 Trust dated April 15, 1985[12]; and

c) Band Council Resolution dated April 15, 1985 authorizing assignment of Debenture[13];

16. The funds secured by the Debenture were never part of the 1982 Trust as they represent an underlying loan between the SFN and Sawridge Enterprises Ltd.

17. In May 2010, various individuals who had historical knowledge of the 1985 Trust, gathered together with a Court Reporter to record and preserve that knowledge base. A transcript of this information was created.[14] One of those individuals was Mike McKinney, Executive Director of the Sawridge Group of Companies. During the interview, Mr. McKinney advised that the Debenture had been assigned to the 1985 Trust.[15]

18. While the 1985 Trustees historically acknowledged that the Debenture formed part of the 1985 Trust property, they have recently changed their position on this

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[11] Affidavit of Records of the Sawridge Trustees, SAW000495-000521 [**TAB E**]

[12] Affidavit of Records of the Sawridge Trustees, SAW000537-000539 [**TAB E**]

[13] Affidavit of Records of the Sawridge Trustees, SAW001895 [**TAB E**]

[14] Interrogatory Responses of Catherine Twinn to Undertaking Responses to March 12, 2020 Questioning, Interrogatory 4 TWN007950-56 [**TAB G**]

[15] Undertaking 18 to Questioning of Catherine Twinn on March 12, 2020 ("**Historical Transcript**") at page 79-80 [**TAB H**].

matter. The basis for the revised position is, in part, based on an inquiry in or around 2012 with John MacNutt, CEO of Sawridge Group of Companies, wherein Mr. Bujold asked him "...if I should be considering this [the Debenture] as part of the assets of the Trust in the holding company". Mr. MacNutt advised that he had as little knowledge as Mr. Bujold and had no additional records that confirmed the status of the Debenture. Mr. MacNutt concluded based on the paucity of records that the Debenture had "no effect". [16]

19. If in fact the Debenture was transferred to the 1985 Trust and remains outstanding or in a re-organized form, then the 1985 Trust would continue to have assets irrespective of any determination relating to the assets transferred by the 1982 Trust.

20. The recent decision by the Trustees to deny that the Debenture forms part of the assets of the 1985 Trust is concerning to Ms. Twinn. There is an evidentiary basis to support that the Debenture was in fact transferred to the 1985 Trust.

Source of Funds for Assets

21. On this Application, the SFN has alleged that the source of funding for the assets transferred to the 1985 Trusts was the capital and revenue accounts maintained by the Government of Canada for the SFN. The SFN has not submitted any documentary or accounting records that would factually demonstrate the source of funding.

22. Evidence has been put forward by Catherine Twinn supporting that some of the source funding arose from debt financing and not the capital and revenue accounts, including:

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[16] Questioning Transcript of Paul Bujold February 26, 2020 and March 2, 2020 ("**Bujold Transcript**") at pages 42-50 [**TAB I**]

a) Historical summary of 1985 Trust maintained by 1985 Trustees which references use of bank financing by the Sawridge Group of Companies[17];

b) Film "Honour of All" – Documentary of life of Chief Walter Twinn, Ron Ewoniak speaks to the use of third party funding to build the Slave Lake Hotel, including grants from the Department of Regional Economic Expansion[18];

c) Recent conversation between Catherine Twinn and Mr. Ewoniak that confirms information in "Honour of All" film pertaining to source of funds for Slave Lake Hotel[19]; and

d) Historical Transcript:

A. Mr. MacNutt advised financing came from Scotiabank for Fort McMurray Hotel[20]; and

B. Mr. McKinney advised the trust started with very little. "In the very beginning, when they built the hotel in Slave Lake, they had very little money. They had debts. When they built Jasper, same thing. It was all by debt."[21]

23. There is evidence that when the SFN accessed its capital and revenue accounts, it would loan that money to the Sawridge Group of Companies and when repayment came due, that money would be gifted to the Trusts. The SFN ensured that after 1985 no further funds went into the 1985 Trust, but rather the

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[17] Second Supplemental Affidavit of Records of Catherine Twinn, sworn December 18, 2019 at TWN007907 to TWN007910 [**TAB J**]

[18] Second Supplemental Affidavit of Records of Catherine Twinn, sworn December 18, 2019 at TWN007946, Transcript of the relevant section of the film has been appended for convenience and brevity [**TAB J**]

[19] Affidavit of Catherine Twinn, filed January 28, 2020 at para. 5(f)-(g).

[20] Historical Transcript at page 88 [**TAB H**]

[21] Historical Transcript at page 95 [**TAB H**]

1986 Trust, in light of Bill C-31 and the associated changes. Thus, the assets of the 1985 Trust are comprised of wealth arising on or before April 15, 1985 and the associated growth thereof.[22]

Enfranchisement Payments

24. Prior to the introduction of Bill C-31, enfranchisement was the process that resulted in a person no longer being considered an Indian under federal legislation. Enfranchisement could be voluntary or involuntary. An example of involuntary enfranchisements are the "Bill C-31 women" who have been referred to many times in these proceedings and are indigenous women who married non indigenous men.

25. Financial compensation was provided to enfranchised individuals, including the Bill C-31 women. The financial compensation would typically be a percentage (per-capita) payment of what their band would have received from the government. From 1951 to 1985 a Treaty Indian who enfranchised would receive an amount equal to twenty years of treaty payments.[23]

26. Prior to the introduction of Bill C-31, the SFN had experienced a high rate of enfranchisement, arising from both voluntary and involuntary enfranchisement. There is an example in or around this time of one family unit receiving a per capita payment of $1.2 million dollars. In the early 1980s it was not unusual for a SFN per capita distribution to amount to $300,000 to $400,000 a person. The per capita payments were made from the SFN's capital and revenue accounts.[24]

27. The effect of Bill C-31 is the Bill C-31 women who had lost their status had an absolute right to be re-instated into membership. This reinstatement is despite

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[22] Historical Transcript at page 26-32 [**TAB H**]

[23] Government of Canada www.rcaanc-cirnac.gc.ca/eng/1540403281222/1568898803889#_Enfranchisement under heading "Enfranchisement" [**TAB K**]

[24] Questioning Transcript of Catherine Twinn March 12, 2020 ("**Twinn Transcript**") at pages 21-25 [**TAB L**]

the fact that these women would have already received their per-capita payment and the members of the SFN who did not enfranchise would have not received a similar payment.

28. Ms. Twinn recalls that one of the purposes of the 1985 Trust was to compensate for this inequity between SFN members that arose as a result of the reinstatement of the Bill C-31 women. In other words, those SFN members that received a per capita payment and those who did not. Mr. Ewoniak also has this recollection. [25]

Distributions from 1985 Trust

29. The Trustees and the SFN have asserted that there have not been any distributions of the assets held in the 1985 Trust to beneficiaries.[26] Respectfully, this is factually untrue.

30. Since its settlement in 1985, there have been various distributions of trust property to the 1985 Trust beneficiaries as part of a tax planning strategy. For instance, in 2004 $146,215.00 was distributed to Walter Felix Twinn.[27]

31. In the Historical Transcript, Mr. McKinney and Mr. Ewoniak confirmed this practice by the 1985 Trust and that it was done to shelter income from taxation. It was thought that quite substantial distributions had occurred, likely in the millions of dollars.[28]

PART 3 ISSUES

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[25] Twinn Transcript at page 31-32, lines 24-17 [**TAB L**]; Affidavit of Catherine Twinn, filed January 28, 2020 at para. 5(l).

[26] Written submissions of the SFN, filed November 15, 2019 at para. 35.

[27] Second Supplemental Affidavit of Records of Catherine Twinn, sworn December 18, 2019 at TWN007907, TWN007944-45 [**TAB J**]; Affidavit of Catherine Twinn, filed January 28, 2020 at para. 5(q).

[28] Historical Transcript at page 30-32 [**TAB H**]

32. The following will address the Court's request for submissions on for whose benefit the 1985 Trust assets were held immediately prior to the issuance of the Consent Order and on what legal basis they were being held. These submissions will address the following topics:

a) **Factual and Legal History of the 1985 Trust – Foundational Principles**

A. Settlement of the 1985 Trust;

B. Transfer of Assets in 1985 from the 1982 Trust;

C. Existence of the 1982 Trust

b) **For Whose Benefit Were the Assets Held Immediately Prior to the Consent Order Being Granted?**

A. General;

B. Did the 1982 Trustees Act Within the Scope of their Authority?

c) **Considerations in the Event the Transfer is Found to be Improper**

A. Limitation Periods;

B. Remedies for Breach of Trust;

C. Application for Advice and Direction;

D. Findings of Constructive or Resulting Trust

PART 4 ARGUMENT

A. *Factual and Legal History of the 1985 Trust – Foundational Principles*

(a) *Settlement of the 1985 Trust*

33. The SFN has argued that the 1982 and 1985 Trusts are one and the same and what occurred in April 1985 was simply a name change. This argument is premised on a note to the 1986 unaudited Financial Statements for the 1985 Trust.

34. Respectfully, the SFN is attempting to seize upon an obvious error in the financial statements as the factual circumstances do not support such a finding, nor does the law.

35. It is basic trust law that in order to establish a valid trust, there must be three certainties, one of which is certainty of subject matter. This means that it must be possible to clearly identify the property which is to be subject to the trust.[29]

36. The 1985 Trust Deed states that it was settled with $100.00. Thus, this is the property that creates the subject matter of the 1985 Trust *ab initio*. Evidence of the settlement funds ($100.00) is before the Court in these proceedings.[30]

37. This means that the 1985 Trust exists independently of the 1982 Trust as the 1985 Trust was settled with $100.00.

38. The assets of the 1982 Trust were transferred following settlement of the 1985 Trust and are after acquired property of the 1985 Trust.

39. The terms of the 1985 Trust deed permit the 1985 Trustees to, in their discretion, accept further receipt of property from any person or persons. It was based on this discretionary power that the Trustees were able to receive the transfer from the 1982 Trust.[31]

40. The 1985 Trust Deed provides that the Trustees are only able to receive property for the purposes set out in the 1985 Trust Deed.[32]

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[29] Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 5.III [Waters] [**TAB M**]

[30] Affidavit of Records of the Sawridge Trustees, SAW000532 [**TAB E**]

[31] 1985 Trust Deed at para. 3 [**TAB N**]

[32] 1985 Trust Deed at para. 3 [**TAB N**]

41. In sum, there is no doubt that the 1982 Trust and the 1985 Trust are distinct and separate trusts and the SFN's position in this regard is not accurate.

(b) *Transfer of Assets in 1985*

42. The SFN has also argued that what occurred in 1985 surrounding the transfer of assets was a variation or resettlement of the 1982 Trust and thus required unanimous beneficiary consent and Court approval as per section 42 of the *Trustee Act*.

43. It is respectfully submitted that the submissions of the SFN and their application of case law often misapplies or intermingles the trust principles of variation and advancement. The distinction between these principles is important as the function of the Court in relation to each is fundamentally different and the legal consequences that flow from each are different as well.

44. A variation of a trust means that the terms of the trust are being amended, likewise, the term "resettlement" refers to a variation of a trust that has the effect of fundamentally amending the terms of the trust deed.[33] A variation or resettlement that occurs as an exercise within the scope of a trustee's power is not subject to the mandatory Court approval provisions found in section 42 of the *Trustee Act*.[34]

45. The power of advancement describes the payment to a beneficiary of part of the capital of a gift before the time has come at which the capital falls into the beneficiary's hands.[35]

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[33] *John Risley Family Trust 2009 (Re)*, 2017 NSSC 318 at para. 11 **[TAB O]**

[34] A.H. Oosterhoff, *Oosterhoff on Trusts*, 9th ed (Toronto: Carswell, 2019) at 329-330 **[TAB P]** and *Trustee Act*, RSA 2000, c T-8, s. 42(2) **[TAB Q]**

[35] Waters, *supra* note 29 at 21.III **[TAB M]**

46. When exercising a power of advancement contained in a trust instrument, absent express terms, prior beneficiary or Court approval is not required, although a trustee has the option of seeking advice and direction on the lawfulness of same if there is any concern.

47. The 1982 Trust Deed, at paragraph 6, contains a power of advancement[36]:

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

48. It is notable that this power of advancement is highly discretionary, permits complete capital distributions and does not mandate that beneficial distributions be made personally to a beneficiary, but rather in any manner as the 1982 Trustees deem appropriate.

49. Ms. Twinn submits that the transfer by the 1982 Trustees was based on an exercise of the power of advancement granted to them in the 1982 Trust deed. This understanding is confirmed by the preamble of the resolution of the 1982 Trustees which authorized the transfer and confirmed the 1982 Trustees' authority to make income and capital distributions to beneficiaries as they so determined.[37]

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[36] 1982 Trust Deed, at paragraph 6 [**TAB F**]

[37] Affidavit of Paul Bujold, filed September 13, 2011 at para 19 and Exhibit H. [TAB M to November 15, 2019 submissions]

50. Respectfully, it is submitted that the validity of the transfer is solely a question of whether the power of advancement was exercised appropriately and within the scope of authority granted to the 1982 Trustees. The law pertaining to Court approval of trust variation or resettlement under the *Trustee Act* is not relevant.

(c) *Existence of the 1982 Trust*

51. There appears to be no dispute amongst the parties that the 1982 Trust transferred the entirety of its property to the 1985 Trust.

52. The consequence of transferring the entirety of its property is that the 1982 Trust ceased to exist. This is because it lost the required certainty of subject matter as it no longer had clearly ascertainable property that was subject to its terms.

53. This legal conclusion is factually consistent with how the interested individuals and entities treated the 1982 Trust thereafter and how their professional advisors understood the status of the 1982 Trust.[38]

54. It is submitted that the 1982 Trust ceased to exist on April 15, 1985.

B. ***For Whose Benefit Were the Assets Held Immediately Prior to the Consent Order Being Granted?***

(a) *General*

55. Ms. Twinn submits that the answer to this question is the beneficiaries of the 1985 Trust.

56. There is no question that this was the intention of all parties involved at the time of transfer, including the intentions of the SFN. This intention could not have been made any more clear in the documents effecting the transfer. See paragraph 26 of Ms. Twinn's November 15, 2019 submissions for particularization of the transactional documents and their statements regarding intention.

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[38] Affidavit of Catherine Twinn, filed January 28, 2020 at para. 5(n).

57. This understanding was shared by a key professional advisor at the time, Mr. Ron Ewoniak of Deloitte, who recently spoke with Ms. Twinn about his recollection of these events.[39]

58. The terms of the 1985 Trust Deed only authorize the 1985 Trustees to receive property if it is held under the terms of the 1985 Trust. They are not authorized to hold property for any other purpose.[40]

59. No party or intervenor in these proceedings has raised a legal argument that challenges this position.

60. It appears that the underlying question the Court is asking is whether the transfer of assets in 1985 to the benefit of the 1985 beneficiaries was lawful and, if not, can it be remedied in these proceedings. The remainder of these submissions will address these matters.

(b) *Did the 1982 Trustees Act Within the Scope of their Authority*

Legal Principles

61. The 1982 Trustees effected a complete income and capital distribution for the benefit of the beneficiaries of the 1982 Trust, who existed as at that date, by transferring the trust property to the 1985 Trust utilizing the power of advancement contained in the 1982 Trust Deed.

62. The issue raised by this Court is whether that transfer was within the scope of their authority. Ms. Twinn submits that the answer is "yes".

63. *Pilkington v. Inland Revenue Commissioners*[41] is the foundational decision that considers the scope of the power of advancement and whether it can be used to

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[39] Affidavit of Catherine Twinn, filed January 28, 2020 at para. 5(p).

[40] 1985 Trust Deed at para. 3 [**TAB N**]

settle a new trust. While the *Pilkington* decision specifically considers the statutory power of advancement found in the 1925 British *Trustee Act*, the findings of the Court are applicable to the subject transfer.

64. The facts in *Pilkington* are straightforward:

a) A testator died directing that the residue of his estate be equally divided and held in trust for the benefit of his nephews and nieces.

b) Upon the death of a niece or nephew, any amount remaining in their trust would be divided amongst their children and held in trust until age 21 unless a power of appointment was exercised naming further beneficiaries.

c) The Will did not contemplate a power of advancement and thus statutory provisions on same were applied.

d) A nephew of the deceased wished to have a portion of his trust used to settle a new trust in favour of his minor daughter, Miss Penelope, a contingent beneficiary, to which she would not be entitled to the capital of same until age 30 (as opposed to age 21 which was currently provided for in the terms of the Will). If Miss Penelope died prior to reaching age 30, the remainder of her trust would be divided amongst her children. Under the terms of the existing trust, Miss Penelope's future children did not have an interest.

e) The nephew had three infant children at the time the transaction was proposed. The effect of transferring funds to a separate trust for Miss Penelope had the potential to provide her with an advantage over her siblings if their father (the nephew) had any further children.

f) The Trustees were seeking Court approval of the proposed arrangement for the benefit of Miss Penelope.

65. While it is true that in *Pilkington* the nephew consented to the use of the trust property to settle another trust, the House of Lords expressly rejected the idea

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[41] *Pilkington v. Inland Revenue Commissioners*, [1964] A.C. 612 (UKHL) [*Pilkington*] [**TAB R**]

that beneficiary consent was required in order to exercise the power of advancement.[42]

66. Contrary to the November 15, 2019 written submissions of the SFN, paragraphs 61-62, the House of Lords in *Pilkington* did not find a statutory or common law requirement for beneficiary consent prior to the exercise of a power of advancement.

67. In fact, the House of Lords expressly stated that:

> "It is not as if anyone were contending for a principle that a power of advancement cannot be exercised "over the head" of a beneficiary, that is, unless he actually asks for the money to be raised and consents to its application. From some points of view that might be a satisfactory limitation, and no doubt it is the way in which an advancement takes place in the great majority of cases. But, if application and consent were necessary requisites of advancement, that would cut out the possibility of making any advancement for the benefit of a person under age, at any rate without the institution of court proceedings and formal representation of the infant: and it would mean, moreover, that the trustees of an adult could not in any Circumstances insist on raising money to pay his debts, however much the operation might be to his benefit, unless he agreed to that course."[43]

68. This reasoning from 1964 holds true today and there remains good reason to give latitude to a trustee to make advances they deem appropriate and without prior approval as the settlor entrusted them to make these decisions.

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[42] *Ibid* at page 12 [**TAB R**]

[43] *Ibid* at pages 16-17 [**TAB R**]

69. The SFN submissions on this point are a misapplication of *Pilkington* and appear to confuse legal principles associated with advances to remaindermen during the lifetime of a prior life-tenant. A life interest is not created in the 1982 Trust and this concept is inapplicable to the current circumstances.

70. In *Pilkington*, a good deal of the argument against the arrangement was directed at whether the power of advancement could be utilized to settle a new trust for the benefit of the contingent beneficiary, Miss Penelope, and whether the power of advancement could be utilized to benefit persons who presently did not have an interest in the trust (i.e. Miss Penelope's unborn children).

71. The House of Lords was not troubled by Miss Penelope's future children gaining an interest under the arrangement, as this would constitute a benefit for Miss Penelope. Thus it was held that so long as it constituted a benefit for a current beneficiary, the expansion of benefits to presently uninterested persons was not problematic[44].

72. The November 15, 2019 written submissions of the SFN, paragraph 69, argue that *Pilkington* and *Hunter*[45] stand for the proposition that "resettlement must be effected for the same beneficiaries identified in the original trust". This argument misstates the findings in *Pilkington* and was not at issue in *Hunter*.

73. Rather, *Pilkington* stands for the proposition that a transfer of trust property to a new trust, even a trust that includes new beneficiaries, is permissible so long as same is permissible under the scope of authority granted by the relevant power of advancement and is for the benefit of a current beneficiary, with a residual power by the Court to correct any exercise that can be shown to be merely wanton or capricious and not attributable to a genuine discretion[46].

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[44] *Pilkington*, *supra* note 41 at page 16 [**TAB R**]

[45] *Hunter Estate v. Holton*, 1992 CarswellOnt 537 (ONSC) ["*Hunter*"] [**TAB S**]

[46] *Pilkington*, *supra* note 41 at page 18 [**TAB R**]

74. When a Court should interfere with an exercise of trustee discretion was considered by the Ontario Court (General Division) in *Hunter*, which cites with approval the proposition from *Re Hastings-Bass*, that a Court may not interfere with a trustee's good faith exercise of a discretionary power, unless: "(1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account."[47]

75. In their submissions, the SFN does not argue that it acted in bad faith when authorizing the transfer (the SFN Chief and Council were the 1982 Trustees), but rather focuses their argument on whether the transfer was within the 1982 Trustees' scope of authority. As such, it appears all parties, including the SFN, are *ad idem* that the transfer was undertaken in good faith.

76. In light of this position, the findings of the Ontario Court of Appeal in *Fox*[48] are generally inapplicable to this application as they considered whether a trustee acted with *mala fides* (bad faith) and the interpretation of a power of advancement which was substantially different than the power of advancement contained in the 1982 Trust Deed. The power of advancement in the 1982 Trust Deed specifically authorizes a complete capital distribution to the beneficiaries, at any given time, while in *Fox* the relevant power of advancement did not.

77. The SFN references the 2018 decision of the Alberta Court of Queen's Bench in *Bruderheim Community Church v. Board of Elders*. It is submitted that this case is wholly inapplicable to the current circumstances as a transfer of the trust

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[47] *Hunter, supra* note 46 at para. 19 [**TAB S**]

[48] *Fox v. Fox Estate*, 1996 CarswellOnt 317 (ONCA) ["*Fox*"] [TAB 7 of Written Submissions filed by SFN on November 15, 2019]

property was never at issue in *Bruderheim* and the decision solely pertained to an interpretation of the beneficiary definition contained in the original deed.

Analysis

78. The power of advancement found in the 1982 Trust Deed is very broad. Similarly, the power of advancement in *Pilkington* was very broad. Thus the findings of the Court in *Pilkington* are highly relevant and persuasive on this Application.

79. The terms of the 1982 Trust Deed contemplate that the trustees could, at any time, pay any or all of the trust fund if they deemed same to be appropriate to the beneficiaries. The effect of such a distribution would be to potentially dilute the interest of future persons who would qualify as a beneficiary.

80. This interpretation is logical because to interpret otherwise would mean the 1982 Trust could never make a distribution of income or capital until the ultimate winding up date, which was defined as the end of 21 years after the death of the last descendant now living of the original signators of Treaty Number 8 who at the date hereof are registered Indians, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among all members of the Band then living (the "**Distribution Date**").[49]

81. In other words, the Distribution Date is a very distant date in the future and the distribution at that time would only be for those persons who are then alive.

82. The SFN implicitly argues in Part 4 of its November 20, 2019 written brief that the 1982 Trust Deed did not confer the ability to make distributions to any particular beneficiary to the exclusion of others, including future beneficiaries. For the foregoing reasons, this interpretation is illogical and would have been

[49] 1982 Trust Deed at paragraph 6 [**TAB F**]

alien to Chief Twinn, the settlor. To accept this interpretation would mean that Chief Twinn intended the 1982 Trust to make its assets unavailable for beneficiary use for decades to come and to only benefit those persons who are alive at the Distribution Date. This is nonsensical.

83. Until the Distribution Date, no individual beneficiary had a right to demand any portion of the trust fund and could possibly receive nothing from the trust fund. The power of advancement contained in the 1982 Trust Deed provided the 1982 Trustees with the flexibility to make discretionary distributions prior to the Distribution Date.

84. Further, the 1982 Trustees could make the distribution in such a manner as they deemed appropriate. As such, the settlor clearly contemplated distributions that were not simply "cash in hand" to a beneficiary. It is submitted that this provision makes beneficial distributions to a new trust possible.

85. The beneficiaries of the 1982 Trust were identical to those of the 1985 Trust as of the date of transfer on April 15, 1985. This is because the 1985 Trust defined beneficiaries utilizing the statutory reference in the 1970 *Indian Act* that had, up to that time, been the basis upon which membership in the SFN was determined for the purposes of the 1982 Trust.

86. As such, every person who qualified as a beneficiary on April 15, 1985 received an interest in the 1985 Trust that was essentially identical to the one they held in the 1982 Trust.

87. The fact that some future members of the SFN would not necessarily be able to participate in the 1985 Trust is not unlike the circumstances in *Pilkington*. More particularly, the arrangement proposed in *Pilkington* was only for the benefit of Miss Penelope. If Miss Penelope's father had further children, this arrangement would have had the effect of diluting their interest in the current trust.

> been more particularly raised in connection with motions which turn out to involve a conflict as to ownership of the assets. The courts refuse to give such assistance when there is essentially a conflict between interested parties, and this is not merely because the court has not the necessary evidence before it, but because it is felt that a 'fight', whether or not it is patent, is not a matter of management or administration."[67]

124. The authoritative text, Widdifield on Executors and Trustees, also takes this view. The learned author cites the foundational decision in *Lorenz's Settlement* for the position that a court's jurisdiction on advice and direction is confined to:

> ...advising "a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties *inter se* ...Judges generally now consider that it ought not to be done."[68]

125. It is respectfully submitted that this Court does not have the authority on an application for advice and direction to impose either remedial or declaratory relief that has the effect of resolving conflicting interests between the 1982 and 1985 Trust beneficiaries (assuming such conflict even exists given that no one has initiated litigation on behalf of the 1982 beneficiaries).

126. Finally, the fact that the 1985 Trustees waited over 25 years to seek advice and direction is in and of itself problematic as limitation issues are clearly engaged. At present, this transfer occurred 35 years ago. To upset this transaction at this point in time, would create significant uncertainty for every trust, individual and corporation and the various transactions each has historically engaged in.

127. It is submitted that, in addition to the foregoing reasons, the Court should decline to grant further advice and direction on this matter given the significant issues the delay in seeking same has created.

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[67] *Ibid* at para. 53 [**TAB X**]

[68] Widdifield, *Executors and Trustees*, 6th ed (Toronto: Thomson Rheuters, 2016) at 12.3.7; citing *Lorenz's Settlement, Re*, (1861) 1 Dr. & Sm. 401 (Eng. V.-C.). [**TAB Y**]

128. The Consent Order confirmed the *status quo* that has existed since 1985 and this Court should not consider interrupting this state of affairs on an application for advice and direction.

(d) *Findings of Constructive or Resulting Trust*

129. In the event the Court is prepared to grant remedial relief on this application for advice and direction, despite the foregoing submissions, the following are relevant considerations.

130. The Court has suggested the assets transferred to the 1985 Trust might be subject to a resulting or constructive trust in favour of the beneficiaries of the 1982 Trust. The following legal principles bear consideration in this regard:

A. ***Resulting Trust***

131. Broadly speaking, a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party is under an obligation to return it to the original title owner, or to the person who paid the purchase money for it. [69]

132. While constructive trusts have nothing to do with intention, express or implied, resulting trusts can be explained either on the basis of intention or imposition of law.[70]

133. No Court has ever suggested that it has discretion as to whether a resulting trust arises or not.[71] A resulting trust either exists or it does not.

134. Resulting trusts fall into two groups – "presumed resulting trusts" or "automatic resulting trusts".[72]

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[69] Waters, *supra* note 29 at 10.I **[TAB M]**

[70] *Ibid* at 10.I **[TAB M]**

[71] *Ibid* at 10.I **[TAB M]**

[72] *Ibid* at 397 **[TAB M]**

135. A presumed resulting trust arises based on an analysis of intention. What did the transferor intend when he transferred property to another? Did the transferor intend for the recipient to hold the property in trust?[73]

136. In these circumstances, there is no need to debate the intentions of the 1982 Trustees. Their intentions were clearly stated, with the benefit of sophisticated legal advice, in the declaration of trust and resolutions in support of the asset transfer. These documents made perfectly clear that the intention was to transfer the assets for the 1985 Trustees to "hold those assets on the terms set out in the 1985 Trust"[74].

137. This intention is supported by the conduct of all involved persons and entities, including the SFN, from that point forward.

138. An automatic resulting trust arises when a settlor fails to dispose of the entirety of the beneficial interest in property and the remaining beneficial interest which is left undisposed reverts back to the settlor. This concept is wholly inapplicable in these circumstances.[75]

139. In sum, there is no factual basis upon which to find a resulting trust as the intentions of the 1982 Trustees were clearly to deliver beneficial ownership to the beneficiaries of the 1985 Trust.

B. Constructive Trust

140. A constructive trust comes into existence regardless of any party's intent, when the law imposes upon a party an obligation to hold specific property for the benefit of another.[76]

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[73] *Ibid* at 397 **[TAB M]**

[74] Affidavit of Paul Bujold, filed September 13, 2011 at para 19 and Exhibit H.

[75] Waters, *supra* note 29 at 397-398 **[TAB M]**

[76] *Ibid* at 11.I **[TAB M]**

88. Ms. Twinn submits that based on the authority in *Pilkington*, which has been accepted by Canadian courts, including in *Hunter*, the arrangement by the 1982 Trustees was permissible under the power of advancement given to them by the settlor, who notably was also one of the 1982 Trustees, and did not require prior Court approval.

89. It appears the objections of the SFN to the transfer are more strenuously focused on the second part of the test set out in *Re Hastings-Bass*, namely whether the SFN, whose Chief and Council were the 1982 Trustees, took into account considerations they should not have when exercising their discretion – or more particularly, the impending changes to membership caused by Bill C-31.

90. When analyzing this portion of the test, the Court in *Hunter* considered whether the purpose for which the discretion was exercised was to accomplish a purpose quite alien from the intention of the settlor[50].

91. The current circumstances are unique in that the settlor, Chief Twinn, was also one of the 1982 Trustees. As such, he clearly approved of the transfer and did not find the purposes of the 1985 Trust to be "alien" to him.

92. That said, even in the absence of Chief Twinn being the architect of the transfer, it is submitted that the manner in which the 1982 Trustees exercised their discretion actually maintained the purpose of the 1982 Trust as Chief Twinn would have understood it when he settled the 1982 Trust and prevented it from becoming alien to him.

93. More particularly, at the time Chief Twinn settled the 1982 Trust, he would have understood membership in the SFN to have been determined based on the statutory requirements of the 1970 *Indian Act*. The changes being proposed by

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[50] *Hunter*, *supra* note 46 at para. 19-20 [**TAB S**]

Bill C-31 turned the manner in which membership was established on its head and into a form that bore little resemblance to the prior process.

94. Notably, the 1970 *Indian Act* determined membership based on ancestral and familial relationships and was administered by the Crown. The current membership process at Sawridge that was enabled by Bill C-31 does not mandate membership based on these relationships, as is demonstrated by the fact that Shelby Twinn has not acquired membership despite being Chief Twinn's biological granddaughter nor has Deborah Serafinchon, the biological daughter of Chief Walter Twinn and half sister to the current Chief Roland Twinn. As a result of Bill C-31, membership in the SFN has largely become a purely discretionary decision of Chief and Council.

95. Ms. Twinn submits that to distribute the assets of the 1982 Trust to a new trust that determined beneficial entitlement on identical terms to which beneficiary entitlement would have been determined at the time of settlement of the 1982 Trust, persevered and honoured the intention of Chief Twinn when he settled the 1982 Trust.

96. At the time the transfer occurred, the 1982 Trustees were aware that a new trust was being established to hold (and grow) the wealth of the SFN that arose from April 15, 1985 forward and would be for the benefit of current and future members of the SFN as determined based on the new Bill C-31 requirements.[51] This trust was in fact established on August 15, 1986 and has been referred to in these proceedings as the 1986 Trust.[52]

97. As such, it is submitted that the 1982 Trustees made appropriate considerations when exercising their power of advancement and the subject transfer was within the 1982 Trustees' scope of authority. This is particularly so, in light of the fact

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[51] Affidavit of Paul Bujold, filed September 13, 2011 at para. 30-31.

[52] Affidavit of Paul Bujold, filed September 6, 2011 at Exhibit C.

that the future wealth of the SFN post April 15, 1985 was going to be held in a separate trust for the benefit of those who qualified for membership in the SFN post Bill C-31 amendments. In addition, the transfer balanced the inequity between those enfranchised SFN members who would be reinstated into membership without being required to return their per-capita payment and those who had not enfranchised and thus had not received a per-capita payment.[53]

C. *Considerations in the event the transfer is found to be improper*

(a) *Limitation Periods*

98. To challenge the validity of the transfer at this juncture, effectively 35 years later, would run afoul of the *Limitations Act*, 2000 c. L.-12 ("*Limitations Act*").

99. The underlying purpose of the *Limitations Act* is to provide certainty.

100. The *Limitations Act* provides that a defendant is entitled to immunity from liability in respect of a claim 10 years after the claim arose.[54]

101. A "claim" is defined as a matter giving rise to a civil proceeding in which a claimant seeks a remedial order.[55]

102. A claim based on a breach of a duty arises when the conduct, act or omission occurs.[56]

103. Given that the impugned conduct occurred in 1985, this conduct is well beyond the ultimate limitation period provided for in the *Limitations Act*.

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[53] Twinn Transcript at page 31-32, lines 24-17 [**TAB K**].

[54] *Limitations Act*, 2000 c. L.-12, para. 3(1)(b) [**TAB T**]

[55] *Ibid,* para. 1(a) [**TAB T**]

[56] *Ibid*, para. 3(3)(b) [**TAB T**]

104. In addition, the advice and direction being sought by the 1985 Trustees, namely confirmation 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" was sought on notice to interested parties, including the SFN, in 2011. To date, litigation seeking remedial relief in relation to the Transfer has not been initiated by anyone, albeit, the SFN recently elected to use its role as an intervenor to seek remedial relief.

105. The doctrines of acquiescence and laches are engaged. The subject transfer was open and notorious since 1985.

106. In the 1982 decision of the Alberta Court of Queen's Bench, Justice Stratton cited with approval the following quotes from learned authorities in regard to the doctrines of laches and acquiescence:

> "No legal system could allow a person who has a legal claim to do nothing over a long period of time to assert it, and then to bring his action because it pleases him at that moment to do so. A would-be defendant is reasonably entitled to ask that action shall be brought when the evidence, particularly in his own favour, is still available and at least relatively fresh.
>
> The gist of this equitable doctrine is that a plaintiff will be barred unless he has been reasonably diligent in seeking relief from the court, and this principle is broadly applied by the courts in the light of the type of relief sought and the circumstances."[57]

107. It is respectfully submitted that the time for challenging the transfer has long since passed and immunity from liability is available.

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[57] *Lawrence v. Lindsey*, [1982] A.J. No. 33 (ABQB) at paras 48-50 [**TAB U**]

(b) *Remedies for Breach of Trust*

108. In the event the 1982 Trustees acted outside their scope of authority and thus breached their fiduciary duty to the 1982 beneficiaries, the prime remedy of the beneficiaries is as against the 1982 Trustees or, in this case, the SFN as it was the Chief and Council acting as the 1982 Trustees.[58]

109. A claim by a beneficiary against a trustee for breach of trust is an *in personam* remedy.[59]

110. Given that a finding of breach of trust would expose the SFN to liability for same, their submissions that seek to push all liability onto the beneficiaries of the 1985 Trust must be considered in this light.

111. Given the *in personam* liability of the SFN that would arise from a finding that they breached their fiduciary duty, which based on the submissions of the SFN they have effectively admitted liability for, it is submitted that it would be more appropriate to allow the beneficiaries of the 1982 Trust to first pursue recovery against the SFN prior to being entitled to seek a proprietary remedy against the 1985 Trust and its beneficiaries.

(c) *Application for Advice and Direction*

112. Section 43(1) of the *Trustee Act* permits trustees to seek "the opinion, advice or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property".[60]

113. The 1985 Trustees invoked this provision in 2011 when they sought advice and direction in regards to the transfer of assets to the 1985 Trust.

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[58] Waters, *supra* note 29 at page 1334 **[TAB M]**

[59] Waters, *supra* note 29 at page 1334 **[TAB M]**

[60] *Trustee Act*, RSA 2000, c T-8 **[TAB Q]**

b) Expending funds from the corpus of the 1985 Trust assets for purposes related to the 1985 Trust, including this litigation and hiring staff (e.g. Mr. Bujold) to administer the 1985 Trust; and

c) Distributing the 1985 Trust property to its beneficiaries.

119. The authority of the 1985 Trustees to accept the transfer is clearly authorized by the 1985 Trust Deed.[64]

120. It is respectfully submitted, that in these proceedings, the Court has no jurisdiction to substitute its discretion in the place and stead of discretionary decisions already made by the Trustees of the 1985 Trust.

121. Further, an application for advice and direction is not a procedure to be utilized to affect the rights of parties to property.[65]

122. Justice Dorgan of the British Columbia Court of Queen's Bench dealt with a request for advice and direction over the management or administration of trust property, and the use of estate funds, in a situation where there was a conflict between the interested parties. She found that the directions sought did not fall within the scope of authority granted by the equivalent provisions in the British Columbia *Trustee Act*. She held that these legislative provisions were intended to allow the Court to help trustees administer the trust by giving advice, not in respect of conflicting parties, but advice regarding the obligations of a trustee.[66]

123. In reaching this finding, Justice Dorgan relied on the following passage from Dr. Waters' authoritative text:

> "management or administration as a limitation upon the *Trustee Act* power of the court to give its opinion, advice, or direction has

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[64] 1985 Trust Deed at para. 3 **[TAB N]**

[65] *Tomlinson Estate (Re)*, 2016 BCSC 1223 at para. 51 ["*Tomlinson*] **[TAB X]**

[66] *Ibid* at para. 54 **[TAB X]**

141. The concept of the constructive trust has a long history dating back to 17th century England and arose in the Courts of Equity. The Courts of Equity would "construe" a position to be that of a trustee and thus impose a constructive trust.[77]

142. In modern Canadian law, the concept has evolved to provide redress for not only fraudulent, but also unconscionable or inequitable conduct. The 1980 decision of the Supreme Court of Canada in *Pettkus v. Becker*[78] is the seminal decision that expanded the use of the constructive trust in Canadian law to act as a remedy to unjust enrichment.

143. In 1993 the Supreme Court of Canada provided further direction on the use of the constructive trust in *Peter v. Beblow*.[79]

144. Justice McLachlin stated that a constructive trust is a proprietary remedy. In order for the remedy to arise the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution. In order for a constructive trust to be found, monetary compensation must be demonstrated to be inadequate.[80]

145. Thus, a constructive trust in Canadian law is a proprietary remedy meant to rectify unconscionable circumstances where monetary awards would be inappropriate.

146. In the event the Transfer was found to be improper and not statute barred, the liability of not only the 1985 Trust, but also the SFN whose Chief and Council acted as the trustees of the 1982 Trust, would need to be considered and

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[77] *Ibid* at 11.I [**TAB M**]

[78] *Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 SCR 834 [**TAB Z**]

[79] *Peter v. Beblow*, 1993 CanLII 126 (SCC), [1993] 1 SCR 980 [**TAB AA**]

[80] *Ibid* at para 25-6 [**TAB AA**]

apportioned. In addition, the Court would need to consider for whom the 1982 Trustees held the trust property as they also received the property as a transfer from the Bare Trustees. The circumstances surrounding the transfer from the Bare Trustees to the 1982 Trust have not been meaningfully canvassed in these proceedings.

147. At this juncture, a determination of the availability of proprietary relief would be premature. The adequacy of monetary relief remains at large and the 1982 Trust beneficiaries have not established a direct link to their contribution to the funds transferred to the 1985 Trust as such funds originated in the trusts held by the Bare Trustees.

148. In addition, it is arguable that all affected beneficiaries have not been provided with proper notice that relief in favour of the 1982 Trust beneficiaries is being proposed by the Court. The current method of service via the Sawridge Trusts website may now be inadequate given the change in scope initiated by the Court.

149. As this is an application for advice and direction, wherein no party is seeking damages or relief against the 1985 Trust, with respect, this Honourable Court does not have the requisite jurisdiction to impose a proprietary remedy against the 1985 Trust or a remedy to which a beneficiary of the 1982 Trust would otherwise be entitled to seek. To impose such relief would be outside the jurisdiction of this Court as granted under the *Judicature Act*.

150. The concerns canvassed in these submissions were initially identified by your Lordship in your April 25, 2019 correspondence to counsel. As contemplated in that correspondence, a simple explanation does exist. That explanation is, respectfully, that these queries are outside of your Lordship's jurisdiction on an application for advice and direction and need not be addressed in these proceedings.

PART 5 REMEDY SOUGHT

151. Catherine Twinn reiterates the relief sought in her November 15, 2019 submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 27th day of November, 2020.

MCLENNAN ROSS LLP

Per: _____

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

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

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

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

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

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

Applicants

PROCEEDINGS

Edmonton, Alberta
November 22, 2019

Transcript Management Services
Suite 1901-N, 601-5th Street SW
Calgary, Alberta, T2P 5P7

Phone: (403) 297-7392
Email: TMS.Calgary@csadm.just.gov.ab.ca

THE COURT: The order is there. What does it mean? What is the effect of it? Are the assets being held for the 1985 beneficiaries or for the 1982 beneficiaries or for something else or is it uncertain? And what's the theoretical basis? If -- what's the theoretical basis in trust law that gets us to wherever we get to? What was the theoretical basis that existed before, the moment before the order was granted? What's the theoretical basis after the order is granted? But once I give that interpretation subject to whatever is said the Court of Appeal, that is looking awfully close to a remedy. And I think

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

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

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

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

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

Applicants

PROCEEDINGS

Edmonton, Alberta
September 4, 2019

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

If it was as easy to change the terms of the Trust as to go ahead and do what was done between 1985 and 1985, why don't you just go ahead and do that very same thing again and see how far it gets you. I -- it's -- it strikes me as being a pivotal issue, and we need get that sorted out. Is -- does the -- does the 2016 Order mean that the monies or the assets are transferred from 1982 to 1985 and that those assets are then to be administered under the terms of the 1985 Trust for the benefit of those beneficiaries as described in the 1985, or are the 1985 Trustees holding the assets in some form, and I use the term loosely, so I -- without meaning to ascribe any legal definition to it, are they holding it by way of constructive trust for the beneficiaries as defined in the 1982 Trust? It may be -- it may be that it's completely clear. Mr. Faulds seems to indicate that it is, and he could well be right, but as I look at it superficially, I don't see it, but I intend to look at it in great detail.

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 4 — Managing Litigation
Division 2 — Court Assistance in Managing Litigation

Alta. Reg. 124/2010, s. 4.14

s 4.14 Authority of case management judge

Currency

4.14Authority of case management judge

4.14(1) A case management judge, or if the circumstances require, any other judge, may

(a) order that steps be taken by the parties to identify, simplify or clarify the real issues in dispute,

(b) establish, substitute or amend a complex case litigation plan and order the parties to comply with it,

(c) make an order to facilitate an application, proceeding, questioning or pre-trial proceeding,

(d) make an order to promote the fair and efficient resolution of the action by trial,

(e) facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through negotiation or a dispute resolution process other than trial,

(f) make any procedural order that the judge considers necessary, or

(g) as a case management judge, exercise the powers that a trial judge has by adjudicating any issues that can be decided before commencement of the trial, including those related to

(i) the admissibility of evidence,

(ii) expert witnesses,

(iii) admissions, and

(iv) adverse inferences.

4.14(2) Unless the Chief Justice or the case management judge otherwise directs, or these rules otherwise provide, the case management judge must hear every application filed with respect to the action for which the case management judge is appointed.

4.14(3) A decision that results from the exercise of the power referred to in subrule (1)(g) is binding on the parties for the remainder of the trial, even if the judge who hears the evidence on the merits is not the same as the case management judge, unless the court is satisfied that it would not be in the interests of justice because, among other considerations, fresh evidence has been adduced.

Amendment History
Alta. Reg. 85/2016, s. 1(2)

Currency

Alberta Current to Gazette Vol. 116:18 (September 30, 2020)

Concordance References

Rules Concordance 44, Documents

Rules Concordance 55, Case management

Rules Concordance 160, Streamlined procedure for actions under $ amount

End of Document

Alberta Statutes
Judicature Act
Part 1 — Jurisdiction of the Court (ss. 2-9)

R.S.A. 2000, c. J-2, s. 8

s 8. General jurisdiction

Currency

8.General jurisdiction

The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

Currency

Alberta Current to Gazette Vol. 116:18 (September 30, 2020)

End of Document

THIS AGREEMENT made with effect from the 19th day of December A.D. 1983.

This is Exhibit "D" referred to in the Affidavit of Paul Bujold

Sworn before me this 12 day of September A.D., 20 11

A. Magnan

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

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

BETWEEN:

WALTER PATRICK TWINN, WALTER FELIX TWINN, SAM TWINN, and DAVID A. FENNELL (each being Trustees of certain properties for the Sawridge Indian Band, herein referred to as the "Old Trustees")

OF THE FIRST PART

and:

WALTER PATRICK TWINN, SAM TWINN and GEORGE TWINN (together being the current Trustees of the Sawridge Band Trust, herein referred to as the "New Trustees")

OF THE SECOND PART

WHEREAS:

1. Each of the Old Trustees individually or together with one or more or the other Old Trustees holds one or more of those certain properties listed in Appendix A attached hereto in trust for the present and future members of the Sawridge Indian Band;

2. The Sawridge Band Trust has been established to provide a more formal vehicle to hold property for the benefit of present and future members of the Sawridge Indian Band; and

.../2

3. It is desirable to consolidate all of the properties under the Sawridge Band Trust, by having the Old Trustees transfer the said properties listed in Appendix A to the New Trustees.

NOW THEREFORE, THIS AGREEMENT WITNESS AS FOLLOWS:

1. Each of the Old Trustees hereby transfers all of his legal interest in each of the properties listed in Appendix A attached hereto to the New Trustees as joint tenants, to be held by the New Trustees on the terms and conditions set out in the Sawridge Band Trust, and as part of the said Trust.

2. The Old Trustees agree to convey their said legal interests in the properties referred to above in the New Trustees, or to their order, forthwith upon being directed to do so by the New Trustees, and in the meantime hold their interests in the said properties as agents of the New Trustees and subject to the direction of the New Trustees.

3. The New Trustees hereby undertake to indemnify and save harmless each and every one of the Old Trustees with respect to any claim or action arising after the date of this Agreement with respect to the said properties herein transferred to the New Trustees.

IN WITNESS WHEREOF each of the parties hereto has signed on the respective dates indicated below:

Witness

Walter Patrick Twinn

Dec 19/83
Date

Witness

Walter Felix Twinn

Dec 19/83
Date

.../3

Witness

Sam Twinn

Dec 19/83

Date

Witness

David A. Fennell

Dec 19/83

Date

Witness

Walter Patrick Twinn

Dec 19/83

Date

Witness

Sam Twinn

Dec 19/83

Date

Witness

George Twinn

Dec 19/83

Date

SCHEDULE "A"

Description	Adjusted Cost Base	Consideration
A. The Zeidler Property All that portion of the Northeast quarter of Section 36, Township 72, Range 6. West of the 5th Meridian which lies between the North limit of the Road as shown on Road Plan 946 E.O. and the Southwest limit of the right-of-way of the Edmonton Dunevegan and British Columbia Railway on shown on Railway Plan 4961 B. O. containing 28.1 Hectare (69.40 acres) more or less excepting thereout: (a) 22.6 Hectares (55.73 acres) more or less described in Certificate of Title No. 227-V-136; (b) 0.158 Hectares (1.28 acres) more or less as shown on Road Plan 469 L.Z.	$100,000.00	Primissory Note in the amourt of $100,000.00 1 Common share in Sawridge Holdings Ltd.
B. The Planer Mill Plan 2580 T.R., Lot Four (4), containing 7.60 Hectares (18.79 acres) more or less (P.T. SECS. 29 and 30-72-4-W5TH, Mitsue Lake Industrial Park) excepting thereout all mines and minerals.	Land S 64,633.00 Equipment $135,687.00	Promissory Note in the amount of $200,320.00 1 Common Share in Sawridge Holdings L

Description	Adjusted Cost Base	Consideration
C. Mitsue Property		
Plan 2580 T.R. Lot Eight (8) containing 6.54 Hectares more or less (part of Sections 29 and 30-72-4-W5TH, Mitsue Lake Industrial Park) excepting thereout all mines and minerals and the right to work the same.	Land $ 55,616.00 Building $364,325.00	Promissory Note in the amount of $419,941.00 1 Common Share in Sawridge Holdings Lt
D. The Residences		
Lot 3, Block 7, Plan 1915 H.W. (305-1st St. N.E.)	Land $ 24,602.00 House $ 30,463.00	Promissory Note in the amount of $40,000.00 1 Common Share in Sawridge Holdings Lt
Lot 18, Block 35, Plan 5928 R.S. (301-7th St. S.E.)	$ 20,184.00	Promissory Note in the amount of $4,620.00 Mortgage assumed $15,564 1 Common Share in Sawridge Holdings Lt
Lot 17, Block 35, Plan 5928 R.S. (303-7th St. S.E.)	$ 20,181.00	Promissory Note in the amount of $4,564.00 Mortgage assumed $15,617.00 1 Common Share in Sawridge Holdings Lt

Description	~~Consideration~~
E. Shares in Companies	
1. Sawridge Holdings Ltd.	
Walter Patrick Twinn - 20 Class "A" common	
George Twinn - 2 Class "A" common	
Walter Felix Twinn - 10 Class "A" common	
2. Sawridge Enterprises Ltd.	
Walter P. Twinn - 1 share	1 commmon share in Sawridge Holdings Ltd.
G. Twinn - 1 share	1 common share in Sawridge Holdings Ltd.
George Twinn - 1 share	1 common share in Sawridge Holdings Ltd.
3. Sawridge Development Co. (1977) Ltd.	
Walter P. Twinn - 8 common	1 common share in Sawridge Holdings Ltd.
Sam Twinn - 1 common	1 common share in Sawridge Holdings Ltd.
Walter Felix Twinn - 1 common	1 common share in Sawridge Holdings Ltd.

	Description	Adjusted Cost Base	Consideration
	Sawridge Hotels Ltd.		
	Walter P. Twinn, 1059	$8,138.00	Promissory Note from Sawridge Holdings Ltd. $8,138.00 1 Common Share in Sawridge Holdings Ltd.
	David A. Fennell, 1	$ 1.00	1 Common Share in Sawridge Holdings Ltd.
5.	Slave Lake Developments Ltd.		
	Band holds 22,000 shares	$ 44,000	Promissory Note from Sawridge Holdings Ltd. in the amount of $44,000 1 common share in Sawridge Holdings Ltd.
	Walter Twinn holds 250 shares	$ 250.	1 common shares in Sawridge Holdings Ltd.

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of TWO HUNDRED AND NINETY-THREE THOUSAND, ONE HUNDRED AND SEVENTY-EIGHT ($293,178.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

Interest to be determined at a rate per annum equal to Three (3%) Percent in excess of the prime commercial lending rate published and charged by The Bank of Nova Scotia (a Chartered Bank of Canada with Corporate Head Offices in the City of Toronto, in the Province of Ontario) on a substantial Canadian Dollar loans to its prime risk commercial customers (hereinafter referred to at "prime rate"), until all amounts secured hereunder are paid. It being further understood and agreed that if and whenever the prime rate is a variable rate published and charged by the Bank of Nova Scotia from time to time. It being further understood and agreed that if and whenever the prime rate is varied by The Bank of Nova Scotia the interest rate hereunder shall also be varied, so that at all times the interest rate hereunder, computed on the daily minimum balance, shall be the percentage stipulated for the periods aforesaid plus the prime rate then in effect (hereinafter referred to as the "current mortgage rate"). The Mortgagor, by these presents, hereby waives dispute of and contest with the prime rate, and of the effective date of any change thereto, whether or not the Mortgagor shall have received notice in respect of any change. It being provided and agreed that interest at the current mortgage rate then in effect from time to time on the principal sum, or on such part thereof as has been from time to time advanced and is then outstanding, computed from (and including) the date the principal sum or any such part is advanced.

WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 14th day of [illegible], A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: [signature]

Per: [signature]

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 19th day of December, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of SIXTY THOUSAND ($60,000.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 19th day of [illegible], A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: [signature]

Per: [signature]

PROMISSORY NOTE

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WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 19th day of December, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of TWENTY THOUSAND, ONE HUNDRED AND EIGHTY FOUR ($20,184.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 19th day of December, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 19th day of December, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of EIGHT THOUSAND, ONE HUNDRED AND THIRTY EIGHT ($8,138.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 19th day of September, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: Walter Twinn

Per: [signature]

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of FORTY FOUR THOUSAND, ($44,000.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 16th day of November, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of TWO HUNDRED FIFTY ONE THOUSAND THREE HUNDRED ($251,300.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 19th day of [illegible], A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: [signature]

Per: [signature]

THIS AGREEMENT made with effect from the 1st day of December A.D. 1983.

This is Exhibit "E" referred to in the Affidavit of Paul Buiold Sworn before me this 12 day of September A.D., 2011
A Magnan
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
Catherine A. Magnan
My Commission Expires January 25, 2012

TRANSFER AGREEMENT

BETWEEN:

WALTER PATRICK TWINN, SAM TWINN, and GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, herein referred to as the "New Trustees")

OF THE FIRST PART

and:

SAWRIDGE HOLDINGS LTD. (a federally incorporated Company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, Province of Alberta, hereinafter referred to as the "Purchaser")

OF THE SECOND PART

WHEREAS:

1. The New Trustees are the legal owners of certain assets (herein referred to as the "property") described in Schedule "A" annexed to this Agreement, and hold the property in trust for the members of the Sawridge Indian Band.

2. The New Trustees have agreed to transfer to the Purchaser all of their right, title and interest in and to the property and the Purchaser has agreed to purchase the property upon and subject to the terms set forth herein,

.../2

3. The New Trustees and the Purchaser have agreed to file jointly an Election under subsection 85(1) of the Federal Income Tax Act in respect of the property and the amount to be elected in respect of the property as set forth in Schedule "A" to this Agreement, the said Election and amounts having been made and agreed to only for tax purposes of the parties hereto;

NOW THEREFORE THIS AGREEMENT WITNESSES THAT:

1. For good and valuable consideration as more particularly set forth in Schedule "A" hereto, now paid by the Purchaser to the New Trustees (the receipt and sufficiency of which is hereby acknowledged) and being fair market value of the property described and referred to in the said Schedule "A", the New Trustees hereby grant, bargain, sell, assign, transfer, convey and set over unto the Purchaser, its successors and assigns, the property owned by the New Trustees as described and referred to in Schedule "A" hereto annexed.

2. The purchase price for the property shall be paid as follows:

(a) by promissory note or notes drawn by the Purchaser in favour of the New Trustees equal in value to the aggregate of the adjusted cost bases to the New Trustees of all items of the said property;

(b) by the issuing by the Purchaser to the New Trustees of one or more Common Shares of the Purchaser.

.../3

3. The new Trustees hereby covenant, promise and agree with the purchaser that the New Trustees are or are entitled to be now rightfully possessed of and entitled to the property hereby sold, assigned and transferred to the purchaser, and that the New Trustees have covenant good right, title and authority to sell, assign and transfer the same unto the Purchaser, its successors and assigns, according to the true intent and meaning of these presents; and the Purchaser shall immediately after the execution and delivery hereof have possession and may from time to time and at all times hereafter peaceably and quietly have, hold, possess and enjoy the same and every part thereof to and for its own use and benefit without any manner of hindrance, interruption, molestation, claim or demand whatsoever of, from or by the New Trustees or any person whomsoever; and the Purchaser shall have good and marketable title thereto, free and clear and absolutely released and discharged from and against all former and other bargains, sales, gifts, grants, mortgages, pledges, security interests, adverse claims, liens, charges and encumbrances of any nature or kind whatever (except as specifically agreed to between the parties).

4. For the purposes hereof:

(i) "fair market value" of the property:

(a) shall mean the fair market value thereof on the effective date of this Agreement;

(b) subject to (c) below, the fair market value of the property which is being mutually agreed upon by the New Trustees and the Purchaser is listed and as described in Schedule A attached hereto;

(b) in the event that the Minister of National Revenue or any other competent authority at any time finally determines that the fair market value of the property referred to in (a) above differs from the mutually agreed upon value in (b) above, the fair market value of the property shall for all purposes of this Agreement be deemed always to have been equal to the value finally determined by the said Minister or other competent authority.

.../4

(ii) "tax cost" of the property shall mean the cost amount of the property for income tax purposes, as of the effective date of this Agreement.

(iii) The "purchase price" for the property shall be the fair market value thereof as determined under (i) above.

5. The New Trustees and the Purchaser shall jointly complete and file Form T2057 (Election on Disposition of Property to a Canadian Corporatin, herein referred to as "Election") required under subsection 85(1) of The Federal Income Tax Act in respect of the property with the Edmonton district offices of Revenue Canada - Taxation on or before such dates as may be required by the said Income Tax Act.

6. The Purchaser shall, upon execution of this Agreement, cause to be issued and allotted to the New Trustees the shares set out in Schedule A hereto.

7. The New Trustees covenant and agree with the Purchaser, its successor and assigns, that they will from time to time and at all times hereafter, upon every reasonable request of the Purchaser, its successors and assigns, make, do and execute or cause and procure to be made, done and executed all such further acts, deeds or assurances as may be reasonably required by the Purchaser, its successors and assigns, for more effectually and completely vesting in the Purchaser, its successors and assigns, the property hereby sold, assigned and transfered in accordance with the terms hereof, and the Purchaser makes the same undertaking in favour of the New Trustees.

.../5

IN WITNESS WHEREOF this Agreement has been executed on the dates indicated by the New Trustees and the Purchaser effective as of the date first above written.

Dec 19/83
Date

Walter Patrick Twinn

J D Cavanaugh
Witness

Dec 19/83
Date

Sam Twinn

J D Cavanaugh
Witness

Dec 19/83
Date

George Twinn

J D Cavanaugh
Witness

Dec. 19/83
Date

Sawridge Holdings Ltd.

Witness (c/s)

APPENDIX "A"

THIS is Appendix "A" to an Agreement made with effect from the 14 day of December, A.D. 1983.

BETWEEN:

WALTER PATRICK TWINN, WALTER FELIX TWINN, SAM TWINN, and DAVID A. FENNELL (the "Old Trustees")

and:

WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (the "New Trustees")

The properties referred to in that Agreement are:

	Description	Old Trustee(s)
A.	The Zeidler Property	
	All that portion of the Northeast quarter of Section 36, Township 72, Range 6, West of the 5th Meridian which lies between the North limit of the Road as shown on Road Plan 946 E.O. and the Southwest limit of the right-of-way of the Edmonton Dunevegan and British Columbia Railway as shown on Railway Plan 4961 B.O. containing 28.1 Hectares (69.40 acres) more or less	Walter P. Twinn
	excepting thereout:	
	(a) 22.6 Hectares (55.73 acres) more or less described in Certificate of Title No. 227-V-136;	
	(b) 0.158 Hectares (1.28 acres) more or less as shown on Road Plan 469 L.Z.	

.../7

	Description	Old Trustee(s)
B.	The Planer Mill Plan 2580 T.R., Lot Four (4), containing 7.60 Hectares (18.79 acres) more or less, (P.T. SECS. 29 and 30-72-4-W5TH, Mitsu Lake Industrial Park) excepting thereout all mines and minerals.	Walter P. Twinn
C.	Mitsue Property Plan 2580 T.R. Lot Eight (8) containing 6.54 Hectares more or less (part of Sections 29 and 30-72-4-W5TH, Mitsu Lake Industrial Park) excepting thereout all mines and minerals and the right to work the same.	
D.	The Residences Lot 3, Block 7, Plan 1915 H.W. (305-1st St. N.E.) Lot 18, Block 35, Plan 5928 R.S. (301-7th St. S.E.) Lot 17, Block 35, Plan 5928 R.S. (303-7th St. S.E.)	Walter P. Twinn
E.	Shares in Companies	

1. Sawridge Holdings Ltd.

   Walter Patrick Twinn -
   20 Class "A" common

   George Twinn -
   2 Class "A" common

   Walter Felix Twinn -
   10 Class "A" common

Description	Trustee(s)

2. Sawridge Enterprises Ltd.

Walter P. Twinn -
1 share

Samuel G. Twinn -
1 share

George Twinn -
1 share

3. Sawridge Development Co. (1977) Ltd.

Walter P. Twinn -
8 common

Sam Twinn -
1 common

Walter Felix Twinn -
1 common

4. Sawridge Hotels Ltd.

Walter P. Twinn, 1059

David A. Fennell, 1

5. Slave Lake Developments Ltd.

Band holds 22,000 shares

Walter Twinn holds 250 shares

DECLARATION OF TRUST MADE THIS 16TH DAY OF APRIL, 1985.

This is Exhibit "J" referred to in the Affidavit of Paul Bujold
Sworn before me this 12 day of September A.D., 2011
A. Magnan
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
Catherine A. Magnan
My Commission Expires January 29, 2012

BETWEEN:

WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWIN
(hereinafter referred to collectively as the "Old Trustees")

OF THE FIRST PART

AND:

WALTER PATRICK TWINN, SAM TWIN AND GEORGE TWIN
(hereinafter referred to collectively as the "New Trustees")
OF THE SAWRIDGE INTER VIVOS SETTLEMENT

OF THE SECOND PART

WHEREAS the "Old Trustees" of the Sawridge Band Trust (hereinafter referred to as the "trust") hold legal title to the assets described in Schedule "A" and settlor Walter P. Twinn by Deed in writing dated the 15th day of April, 1985 created the Sawridge Inter Vivos Settlement (hereinafter referred to as the "settlement").

AND WHEREAS the settlement was ratified and approved at a general meeting of the Sawridge Indian Band held in the Band Office at Slave Lake, Alberta on April 15th, A.D. 1985.

NOW THEREFORE this Deed witnesseth as follows:

The undersigned hereby declare that as new trustees they now hold and will continue to hold legal title to the assets described in Schedule "A" for the benefit of the settlement, in accordance with the terms thereof.

Further, each old trustee does hereby assign and release to the new trustees any and all interest in one or more of the promissory notes attached hereto as Schedule "B".

WITNESS:

OLD TRUSTEES

NEW TRUSTEES

SCHEDULE "A"

SAWBIDGE HOLDINGS LTD. --- SHARES	
WALTER PATRICK TWINN	30 CLASS "A" COMMON
GEORGE TWIN	4 CLASS "A" COMMON
SAM TWIN	12 CLASS "A" COMMON

SAWRIDGE ENERGY LTD. --- SHARES	
WALTER PATRICK TWINN	100 CLASS "A" COMMON

SCHEDULE 'B'

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of TWO HUNDRED AND NINETY-THREE THOUSAND, ONE HUNDRED AND SEVENTY-EIGHT ($293,178.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

Interest to be determined at a rate per annum equal to Three (3%) Percent in excess of the prime commercial lending rate published and charged by The Bank of Nova Scotia (a Chartered Bank of Canada with Corporate Head Offices in the City of Toronto, in the Province of Ontario) on a substantial Canadian Dollar loans to its prime risk commercial customers (hereinafter referred to at "prime rate"), until all amounts secured hereunder are paid. It being further understood and agreed that if and whenever the prime rate is a variable rate published and charged by the Bank of Nova Scotia from time to time. It being further understood and agreed that if and whenever the prime rate is varied by The Bank of Nova Scotia the interest rate hereunder shall also be varied, so that at all times the interest rate hereunder, computed on the daily minimum balance, shall be the percentage stipulated for the periods aforesaid plus the prime rate then in effect (hereinafter referred to as the "current mortgage rate"). The Mortgagor, by these presents, hereby waives disputs of and contest with the prime rate, and of the effective date of any change thereto, whether or not the Mortgagor shall have received notice in respect of any change. It being provided and agreed that interest at the current mortgage rate then in effect from time to time on the principal sum, or on such part thereof as has been from time to time advanced and is then outstanding, computed from (and including) the date the principal sum or any such part is advanced.

WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 19th day of December, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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Per: _____

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PROMISSORY NOTE

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DATED at the City of Edmonton, in the Province of Alberta, this 19 day of December, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: [signature]

Per: [signature]

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Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of TWO HUNDRED FIFTY ONE THOUSAND THREE HUNDRED ($251,300.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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DATED at the City of Edmonton, in the Province of Alberta, this 1[illegible] day of [illegible], A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: [signature]

Per: [signature]

29/1-97182/5-121284spm

SAWRIDGE ENTERPRISES LTD

(Incorporated under the laws of the Province of Alberta)

DEMAND DEBENTURE - $12,000,000.00

WHEREAS:

A. WALTER P. TWINN (herein called the "Holder") as Trustee for the SAWRIDGE INDIAN BAND a band of Indians maintaining a reserve at or near the Town of Slave Lake in the Province of Alberta, has advanced to SAWRIDGE ENTERPRISES LTD. formerly known as Sawridge Native Enterprises Ltd; (herein called the "Company") the sum (herein called the "Present Indebtedness") of TEN MILLION EIGHT HUNDRED SEVENTY THOUSAND ($10,870,000.00) DOLLARS as evidenced by a series of demand promissory notes, which demand promissory notes were to be further collaterally secured by way of a debenture.

B. The Company has requested an additional sum of money (herein called the "Additional Indebtedness") in the amount of ONE MILLION ONE HUNDRED THIRTY THOUSAND ($1,130,000.00) DOLLARS.

C. WHEREAS the Holder has agreed to advance the Additional Indebtedness only if the Company grants a debenture to the Holder in the principal amount of TWELVE MILLION ($12,000,000.00) DOLLARS (herein called the "Principal Sum"), such debenture to secure the Present Indebtedness and to secure the Additional Indebtedness of the Company to the Holder.

FOR VALUE RECEIVED, the receipt and sufficiency of which is hereby acknowledged, the Company hereby covenants and agrees with the Holder as follows:

(a) The Company acknowledges itself indebted to and promises to pay to the Holder on demand, or on such earlier date as the indebtedness hereby secured becomes payable in accordance with

the terms of this debenture or by operation of law, at his office located at the Sawridge Indian Reserve, Slave Lake, Alberta or at such other address as the Company may receive written notice of from the Holder from time to time, the Principal Sum together with interest thereon or on so much thereafter as shall from time to time remain unpaid at the rate specified in clause 1(b), such interest being payable before and after demand, default and judgment. Interest at the rate specified shall accrue from and after June 1, 1984, being the interest adjustment date, and shall be calculated half-yearly not in advance on the 1st day of June and on the 1st day of December, in each and every year during which this debenture remains undischarged by the Holder (the first of which calculations and compounding shall be made on the first of such dates next following the interest adjustment date); and

(b) Interest shall accrue at the rate per annum equal to Three (3%) per cent in excess of the 'Prime Rate" as herein defined. The "Prime Rate" means the prime commercial lending rate published and charged by The Bank of Nova Scotia (a chartered bank of Canada with corporate head offices in the City of Halifax, in the Province of Nova Scotia) on substantial Canadian Dollar loans to its prime risk commercial customers. It is understood and agreed that the Prime Rate is a variable rate published and charged by the Bank of Nova Scotia from time to time and that if and whenever the Prime Rate is varied by The Bank of Nova Scotia the interest rate hereunder shall also be varied, so that at all times the interest rate hereunder, computed on the daily minimum balance, shall be the Prime Rate then in effect plus Three (3%) per annum. The Company by these presents, hereby waives dispute of and contest with the Prime Rate, and of the effective date of any change thereto, whether or not the Company shall have received notice in respect of any change. It being provided and agreed that interest at the Prime Rate in effect from time to time on the Principal Sum, or on such part thereof as has been

from time to time advanced and is then outstanding is computed from (and including) the date the Principal Sum or any part thereof is advanced.

2. The amount of the Principal Sum already advanced under and secured by this debenture is the Present Indebtedness and the rate of interest chargeable thereon is the Prime Rate plus Three (3%) per centum per annum calculated half yearly and not in advance. The amount of Principal Sum which remains to be advanced under and secured by this debenture is the Additional Indebtedness and the rate of interest chargeable thereon is the Prime Rate plus Three (3%) per centum per annum calculated half-yearly and not in advance.

3. As security for the due payment of the Principal Sum and interest and all other debts, liabilities and indebtedness of the Company to the Holder, whether such indebtedness arises under this debenture or not, from time to time owing on the security of these presents and for the due performance of the obligations of the Company herein contained:

(a) The Company hereby mortgages by way of a fixed and specific mortgage and charge to and in favour of the Holder all its estate and interest in fee simple in possession of those parcels of land (herein called the "Lands") situate in the Town of Slave Lake, in the Province of Alberta, more particularly described in the First Schedule hereto and including all buildings, improvements, plant, erections, fixtures and fixed equipment of the Company now or at any time hereafter placed thereon and any and all rights, interests, licenses, franchises and privileges appertaining thereto or connected therewith, and any replacement property subject however to such encumbrances, liens and interests as are described in the first schedule hereto as "Permitted Encumbrances";

(b) The Company hereby mortgages by way of a fixed and specific mortgage and charge to and in favour of the Holder its leasehold estate in possession and interest in that parcel of land (herein called the "Leased Lands") situate in the Town of Jasper, in the Province of Alberta, more particularly described in the Second Schedule hereto, and including all buildings, improvements, plant, erections, fixtures and fixed equipment of the Company now or at any time hereafter placed thereon and any and all rights, interests licenses, franchises and privileges appertaining thereto or connected therewith, and any replacement property subject however to such encumbrances, liens and interests as are described in the second schedule hereto as "Permitted Encumbrances"; and

(c) The Corporation hereby grants, assigns, transfers sets over, mortgages, pledges, charges, confirms and encumbers, as and by way of a floating charge, to and in favour of the Holder, all its undertaking and all its property and assets, real and personal, movable and immovable, of whatsoever nature and wheresoever situate, both present and future, including, without in any way limiting the generality of the foregoing, its present and future goodwill, trademarks, inventions, processes, patents and patent rights, franchises, benefits, immunities, materials, supplies, inventories, furniture, equipment, revenues, incomes, contracts, leases, licences, credits, book debts, accounts receivable, negotiable and non-negotiable instruments, judgments, choses in actions, stocks, shares, securities, including without limiting the generality of the foregoing its uncalled capital and all other property and things of value tangible or intangible, legal or equitable, including without limitation all interests of the Company under any conditional sales, mortgage or lease agreements subject however to such encumbrances, liens and interests as are described in the third

schedule hereto as "Permitted Encumbrances"; Provided that the floating charge created in this clause 3(c) shall not in any way hinder or prevent the Company (until the security hereby constituted shall have become enforceable) from leasing, mortgaging, pledging, selling, alienating, assigning, giving security to its bankers under The Bank Act or otherwise charging, disposing of or dealing with that portion of the Mortgaged Property that is subject to the floating charge in the ordinary course of its business and for the purpose of carrying on the same and without limitation shall not hinder or prevent the Company from borrowing from bankers or others upon the security of the Company's accounts or bills receivable or mercantile documents or any other property, such sums of money as the Company may from time to time deem necessary in the ordinary course of the Company's business and for the purpose of carrying on the same.

(d) It is acknowledged that the property charged by clauses 3(a), 3(b), and 3(c) is herein collectively called the "Mortgaged Property".

4. Neither the execution nor registration nor acceptance of this debenture, nor the advance of part of the monies secured hereby shall bind the Holder to advance the entire sum or any unadvanced portion thereof, but nevertheless this debenture and the mortgage and charge hereby created shall take effect forthwith upon the execution hereof, whether the monies hereby secured shall be advanced before, after or upon the date of execution of these presents, and if the Principal Sum or any part thereof shall not be advanced at the date hereof, the Holder may advance the same in one or more sums to the Company or to its order at any future date or dates, and the amounts of such advances when so made shall be secured hereby and be repayable with interest as herein provided.

5. This Debenture is issued subject to and with the benefit of the conditions and schedules hereto annexed which are deemed to be part of it.

In witness whereof the Company has executed this debenture by the hands of its duly authorized officers in that behalf and under its corporate seal this 21 day of January, 1985.

SAWRIDGE ENTERPRISES LTD.

Per: _____
President

(corporate seal)

Per: _____
Secretary

CONDITIONS OF DEBENTURE

THE FOLLOWING ARE THE CONDITIONS REFERRED TO IN THE DEBENTURE DATED JANUARY 21, 1985 AND TO WHICH THESE CONDITIONS ARE ATTACHED.

THE COMPANY HEREBY COVENANTS AND AGREES WITH THE HOLDER THAT:

1. This debenture is a single debenture securing the Principal Sum of TWELVE MILLION ($12,000,000.00) DOLLARS, interest and all other sums made payable by this debenture and is a charge upon the Mortgaged Property and the Company is not at liberty to create any mortgage or charge in priority to or pari passu with this debenture, save as specifically provided herein.

2. The Company lawfully owns and is lawfully in possession of the Mortgaged Property; that it has a good right and lawful authority to grant, convey, assign, transfer, hypothecate, mortgage, pledge and/or charge the Mortgaged Property as herein provided; that the Mortgaged Property is free and clear of any deed of trust, mortgage, lien or similar charge or encumbrance except such as are known to and permitted by the Holder and as set out in Schedules 1, 2 and 3 and called the "Permitted Encumbrances"; that on default the Holder shall have quiet possession of the Mortgaged Property, free from all encumbrances save as herein provided; and that it will warrant and defend the title of the Mortgaged Property and every part thereof, whether now owned or hereafter acquired by the Company, against the claims and demands of all persons whomsoever.

3. This debenture is given as additional and collateral security to and not in substitution for a series of 13 promissory notes (the "Notes") given by the Company payable to Holder and dated July 31, 1973, July 31, 1974, July 31, 1975, July 31, 1976, July 31, 1977, November 30, 1977, July 31, 1978, December 31, 1978, December 31, 1979, December 31, 1980, December 31, 1981, December 31, 1982, December 31, 1983 and any renewals, replacements or substitutions thereof. Payments made under the Notes shall be credited against payments due hereunder, and vice versa, and notwithstanding anything contained in the Notes or in any renewals,

hereby secured shall forthwith be due and payable upon any default or breach by the Company of any covenant, agreement or provision of this debenture, the whole of the Principal Sum and interest owing under the Notes or any renewals, replacements or substitutions thereof shall likewise and forthwith shall be due and payable.

4. The Company acknowledges that any monies advanced prior to the execution of this debenture were advanced on the condition that this debenture be granted to the Holder as security for such advance.

5. The Company will duly and punctually pay or cause to be paid to the Holder the Principal Sum together with interest accrued thereon, and in the case of default, compound interest, and any other monies due or payable under the debenture at the date and places and in the manner mentioned herein.

6. The Company will maintain its corporate existence, diligently preserve all its rights, powers, privileges, franchises and good will; carry on and conduct its business in a proper and efficient manner so as to preserve and protect the Mortgaged Property and the earnings, income, rents, issues and profits thereof; duly observe, and perform all valid requirements of any governmental or municipal authority relative to the Mortgaged Property or any part thereof and all covenants, terms and conditions upon or under which the Mortgaged Property is held; and exercise any rights of renewal or extensions of any lease, license, concession, franchise or other right, whenever, in the opinion of the Company, it is advantageous to the Company to do so.

7. The Company will punctually pay and discharge every obligation lawfully incurred by it or imposed upon it or the Mortgaged Property or any part thereof, by virtue of any law, regulation, order, direction or requirement of any competent authority or any contract, agreement, lease, license, concession, franchise or otherwise, the failure to pay or discharge which might result in any lien or charge against the Mortgaged

Property or any part thereof and will exhibit to the Holder when required a certificate of the Company's auditor or other evidence establishing such payment; provided that the Company may, upon furnishing such security, if any, as the Holder may require, refrain from paying and discharging any such obligation so long as it shall in good faith contest its liability therefor.

8. The Company does hereby indemnify and save harmless the Holder from all liability and damages of whatsoever nature which may be incurred or caused in connection with the use and operation of the Mortgaged Property or any part thereof.

9. The Company will fully and effectually maintain and keep maintained the security herein created as a valid and effective security at all times and it will not, save as herein permitted, permit or suffer the registration of any lien, privilege or charge of workmen, builders, contractors, architects or suppliers of materials upon or in respect of the Mortgaged Property or any part thereof which would rank prior to or pari passu with this debenture; provided that the registration of such lien, privilege or charge shall not be deemed to be a breach of this covenant if the Company shall desire to contest the same and shall give security to the satisfaction of the Holder for the due payment or discharge of the amount claimed in respect thereof in case it shall be held to be a valid lien, privilege or charge.

10. The Company will not, without prior written consent of the Holder permit any of its lessees to pay to the Company or to any party whomsoever other than the Holder, in advance of the time specified in any lease (or renewal thereof) of space or premises in the building situate on the Lands or Leased Lands the rentals payable thereunder or permit any such lessee to surrender any lease of such space or premises, or otherwise terminate the term granted by such lease or other renewal thereof, or materially alter or amend or agree to alter or amend any of the provisions of such lease or any renewal thereof.

11. The last day of any term of years or any extended term as the case may be reserved by any lease, verbal or written, or any agreement therefor, now held or hereafter acquired by the Company is excepted out of the Mortgaged Property but the Company shall stand possessed of any such reversion upon trust to assign and dispose thereof as the Holder may direct.

12. (a) The Company will keep proper books of account and make therein true and faithful entries of all dealings and transactions in relation to its business, permit the Holder by its agents, auditors and accountants to examine the books of account, records, reports and other papers of the Company or to conduct an audit of its books and accounts by a qualified accountant selected by the Holder and for such purposes the Company shall make available to such persons all books of record and all vouchers, books, papers and documents which may relate to the Company's business, who may make copies thereof and take extracts therefrom.

(b) The Company will during the continuance of this Debenture and until the same has been discharged by the Holder furnish to the Holder annually within ninety (90) days of the end of each of the Company's fiscal years, balance sheets and statements covering the operations of the Company upon the Lands and the Leased Lands for the preceding year, and in each case with supporting schedules, detailed profit and loss accounts and explanations of all items of an unusual nature, all audited by a chartered accountant or firm of chartered accountants satisfactory to the Holder; and as well copies of every audited financial statement or statements which may be prepared from time to time of the Company's affairs;

(c) The officers or authorized agents of the Holder shall have the right to visit and inspect the Mortgaged Property or any part thereof and discuss the affairs, finances and accounts of the

Company with the officers of the Company, all upon reasonable notice, at reasonable times and as often as the Holder may reasonably require.

13. The Company will pay when and as the same fall due all taxes, rates, assessments, liens, charges, encumbrances or claims which are or may be or become charges or claims against the Mortgaged Property, or which may be validly levied, assessed or imposed upon it or upon the Mortgaged Property; provided that in respect of municipal taxes against the Mortgaged Property or any part thereof upon default of payment by the Company of taxes as aforesaid, then the Holder may pay such taxes and also any liens, charges and encumbrances which may be charged against the Mortgaged Property, but shall not be obligated so to do, and all monies expended by the Holder for any such purposes shall be added to the Principal Sum hereby secured and be repaid by the Company to the Holder forthwith and interest on the unpaid amount shall be at the Prime Rate plus Three (3%) per centum per annum until such sum together with interest is paid calculated from the date of payment by the Holder.

14. All erections, buildings, fences, machinery, plant and improvements, fixed or otherwise, now or hereafter put upon the Lands and Leased Lands including, but without limiting the generality of the foregoing, all furnaces, boilers, plumbing, heating and airconditioning equipment, elevators, light fixtures, storm windows, storm doors and screens and all apparatus and equipment appurtenant thereto, are and will, in addition to any other fixtures thereon, become fixtures and form part of the realty and of the security of this debenture, and the Company will not permit any act of waste thereon.

15. The Company will repair and keep in good order and condition all buildings, erections, machinery and other plant and equipment and appurtenances thereto, the use of which is necessary or advantageous in connection with its business, up to a modern standard of usage and maintain the same consistent with the best practice of other companies working similar undertakings; renew and replace all and any of the same

which may be worn, dilapidated, unserviceable, obsolete, inconvenient or destroyed, or may otherwise require renewal or replacement and at all reasonable times allow the Holder or its representatives access to its premises in order to view the state and condition the same are in, and in the event of any loss or damage thereto or destruction thereof the Holder may give notice to the Company to repair, rebuild, replace or reinstate within a time to be determined by the Holder to be stated in such notice and upon the Company failing to so repair, rebuild, replace or reinstate within such time such failure shall constitute a breach of covenant hereunder.

16. The Company will not remove or destroy the buildings or any machinery, fixtures or improvements thereon now or hereafter in, upon or under the buildings or the Lands and Leased Lands, unless the same be worn out or rendered unfit for use or unless such removal is with a view to immediately replace the same by other property of greater or of at least equal value, unless it shall appear by a certificate of the Company delivered to the Holder and the Holder concurs, that such property is no longer useful in the conduct of the Company's business, and need not be replaced.

17. If the Company shall fail to perform any covenant on its part herein contained the Holder may in its discretion, but shall not be obligated to perform any of the said covenants capable of being performed by it, and if any such covenant requires the payment or expenditure of money it may make such payments or expenditures and all sums so expended or advanced shall be at once repayable by the Company and shall bear interest calculated from the date such sums are expended by the Holder at the Prime Rate plus Three (3%) per annum until paid and shall be secured hereby as is the Principal Sum, but no performance or payment shall be deemed to relieve the Company from any default hereunder.

18. All proper inspectors', lawyers, valuators' and surveyors' fees and expenses for examining the Mortgaged Property and the title thereto and for making or maintaining this debenture and charge upon the Mortgaged Property, together with all sums which the Holder may and does from time

to time advance, expend or incur hereunder for principal, insurance premiums, taxes, rates or in or towards payment of prior liens, charges, encumbrances or claims charged or to be charged against the Lands, Leased Lands or other Mortgaged Property, or in repairing, replacing or reinstating the Mortgaged Property as hereinbefore provided, or in inspecting, leasing, managing or improving the Mortgaged Property or in exercising or enforcing or attempting to enforce or in pursuance of any right, power, remedy or purpose hereunder including legal costs as between solicitor and his own client relative thereto are to be secured hereby and shall be a charge upon the Mortgaged Property together with interest at the Prime Rate plus three (3%) per annum, and all such monies shall be repayable to the Holder on demand.

19. (a) The Company shall at its sole expense forthwith insure and during the continuance of this security keep insured against loss or damage by fire, lightning, explosion, smoke, tornado, cyclone, boiler or such other risks or perils as the Holder may deem expedient or require, with extended coverage and replacement cost endorsements, each and every building now or hereafter erected or placed on the Lands and Leased Lands (and if the property of the Company, the said contents) to their full insurable value, excluding in the case of buildings the cost of excavations and foundations, and in any event to the extent of at least the full insurable value thereof with an insurance company or companies to be approved by the Holder and subject thereto the Company shall duly maintain the amount of insurance thereon that may be required by any co-insurance clause in any such policy.

(b) The Company shall at its sole expense forthwith insure and during the continuance of this security shall maintain public liability insurance policies in an amount which shall be satisfactory to the Holder and shall name the Holder as an insured under those policies.

20. In the event of loss, the Holder at its option and as it in its sole discretion may deem appropriate, may apply the insurance proceeds regressively against the balance outstanding against the Company or release said proceeds to the Company to repair, replace or rebuild, or apply the said proceeds or any part thereof to repair, replace or rebuild or partly one and partly the others, and that nothing done under this paragraph shall operate as payment or novation or in any way affect the security hereof or any other security for the amount hereby secured.

21. The Company shall also insure and keep insured against loss or damage by the same perils in like manner in like companies or by other approved insurers and to their full insurable value all of its property which is of a character usually insured by same or similar locations and carrying on a business similar to that of the Company.

22. The Company shall promptly pay as they become due all premiums and all other sums payable for maintaining all such insurance and will not do or suffer anything whereby such insurance may be vitiated. The loss under such policy or policies of insurance shall, where appropriate, be made payable to the Holder as its interest may appear and subject to a standard mortgage clause. The Company will forthwith deliver to the Holder such policy or policies of insurance or certified copies thereof and the receipts proving payment of the premiums thereto appertaining. Each policy may be kept by the Holder during the currency of this debenture and until the debenture is discharged by the Holder and should an insurer at any time cease to have the approval of the Holder the Company will forthwith effect such new insurance as the Holder may desire. Notwithstanding anything to the contrary herein contained, if the Company does not keep the Mortgaged Property insured as aforesaid, or pay the said premiums, or deliver such receipts and produce to the Holder at least thirty (30) days before the termination of the insurance then existing proof of renewal thereof, then the Holder will be entitled, but not obligated, to insure the Mortgaged Property or any part of them, and all monies expended by it shall be repaid by the Company on demand, and in the meantime the amount of such payments shall be added to the Principal Sum

hereby secured and shall bear interest at the Prime Rate plus three (3%) per cent per annum from the time of such payment and all such payments shall become a part of the Principal Sum secured by this Debenture and shall be a charge upon the Mortgaged Property. All monies received by virtue of any such policy or policies may at the option of the Holder either be forthwith applied in or towards the payment of the Principal Sum. And in case of surplus then it may be paid over in whole or in part to the Company. On the happening of any loss or damage to Mortgaged Property the Company shall forthwith notify the insurer and the Holder and and the Company at its expense shall complete all the necessary proofs of loss and do all necessary acts to enable the Holder to obtain payment of the insurance monies.

23. The Holder may release any part or parts of the Mortgaged Property at its discretion, either with or without any consideration therefor, without being accountable for the value thereof, or any monies except those actually received by it, and without releasing thereby any other part of the Mortgaged Property or any other securities and without releasing the Company from any other covenants herein expressed or implied.

24. That the Company shall when so directed by the Holder execute, acknowledge, issue and deliver unto the Holder by the proper officers of the Company, deeds or indentures supplemental hereto which thereafter shall form part hereof for any one or more of the following purposes:

(a) correcting or amplifying the description of any property specifically mortgaged, pledged or charged or intended so to be;

(b) making any corrections or changes as Counsel advises are required for the purpose of curing or correcting any ambiguity or defective or inconsistent provisions or clerical omission or mistake or manifest error contained herein or in any deed or indenture supplemental or ancillary hereto; and

(c) executing any other documents or performing any other acts which are reasonably required to better secure the Holder under the debenture.

C. IT IS AGREED BETWEEN THE PARTIES HERETO THAT:

25. The whole of the Principal Sum and interest and other monies owing under the debenture hereby secured, shall at the option of the Holder, immediately become due and payable without demand and the security hereby constituted shall become enforceable:

(a) if the Company makes default in the payment of the Principal Sum, interest or other monies hereby secured, or in the observance or performance of any covenant, condition or proviso binding upon the Company by virtue of these presents or makes default under any of the covenants contained in any security collateral, supplemental or separate to this debenture, whether or not the Company is in default hereunder;

(b) if an order is made or an effective resolution passed for the winding up of the Company;

(c) if the Company becomes insolvent or makes an authorized assignment or commits an act of bankruptcy or is subject to the provisions of the Bankruptcy Act or any successor or replacement legislation or any other bankruptcy or insolvency legislation;

(d) if any process of execution is enforced or levied upon the Mortgaged Property or any part thereof and remains unsatisfied for a period of five (5) days as to personal property and three (3) weeks as to real property, provided that such process of execution is not in good faith disputed by the Company and in that event provided further that nonpayment shall not, in the sole discretion of the Holder, jeopardize or impair its interests, and that further the Company shall in that event also

give additional security which in the discretion of the Holder shall or may be sufficient to pay in full the amount claimed under any such execution in the event that it shall be held to be valid;

(e) if a receiver of the Company's undertaking or any part thereof shall be appointed or if the security constituted by any mortgage, bond, trust deed or other debenture or debentures of the Company heretofore or hereafter issued shall become enforceable pursuant to the terms and conditions therein contained;

(f) if the Company shall except as may be specifically allowed herein sell or dispose of or in any way part with possession of the Mortgaged Property, or any substantial portion thereof or make a bulk sale of its assets, or remove or suffer the removal of the furnishings, chattels and equipment forming a part of the Mortgaged Property or any part thereof from the Lands or Leased Lands;

(g) if a charge, or encumbrance created or issued by the Company having the nature of a floating or fixed charge upon the Mortgaged Property shall become enforceable;

(h) if the Company ceases or threatens to cease to carry on its business;

(i) if the Company shall without the consent of the Holder make or attempt to make any alterations in the provisions of its By-Laws or Articles of Incorporation which might in the sole discretion of the Holder detrimentally affect its security;

(j) if the Company shall, without the permission of the Holder, create or propose or attempt to create, any charge or mortgage

ranking or which may be made to rank pari passu with or in priority to the security hereby constituted;

(k) if the Company is in default in respect of any indebtedness to any creditor of the Company; and

(l) in any circumstance in which the Holder, in his sole discretion, deems it necessary to protect his security.

26. All payments made by the Company to the Holder shall be applied to interest then outstanding, and the remainder, if any, against the principal.

27. This debenture shall be assignable by the Holder without notice to the Company. Further the Holder may negotiate the debenture without notice to the Company at any time during the currency of the debenture and until the same has been discharged by the Holder.

28. The Company shall immediately, upon request by the Holder, pledge the debenture to the Holder.

29. Upon the happening of any event upon which the security hereby constituted becomes enforceable as in clause 25 hereof, and in addition to all other rights and remedies to which the Holder is entitled either at law or equity the Holder may, without notice to the Company, enter upon and take possession of the Mortgaged Property or any part thereof, either by itself or its agents and may, in its discretion, whether in or out of possession, and either before or after making any such entry, lease or sell, call in, collect or convert into money the same or any part thereof for such terms, periods and at such rents as the Holder shall think proper. Any such sale or conveyance of all or any part of the Mortgaged Property may be either a sale en bloc or in such parcels and either by public auction or by private contract and with or without any special conditions as to upset price, reserve bid, title or evidence of title or other matter as from time to time the Holder in its discretion thinks fit,

with power to vary or rescind any such contract of sale or buy in at any such auction and resell with or without being answerable for any loss. The Holder may at any sale of the Mortgaged Property or any part thereof, sell for a purchase consideration payable by installments either with or without taking security for the second and subsequent installments and may make and deliver to the purchaser good and sufficient transfers, assurances, and conveyances of such Mortgaged Property and give receipts for the purchase money, and any such sale shall be a perpetual bar both at law and in equity against the Company and all others claiming the Mortgaged Property or any part thereof by, from or under the Company. The Holder may become purchaser at any sale of the Mortgaged Property made pursuant to judicial proceedings. Nothing herein contained shall curtail or limit the remedies of the Holder as permitted by any law or statute to a mortgagee or creditor.

30. After the security hereby constituted shall have become enforceable and the Holder shall have determined to enforce the same, the Holder may without notice to the Company, by writing appoint a receiver or receivers of the Mortgaged Property or any part thereof and may remove any receiver so appointed and appoint another in his stead and the following provisions shall take effect:

(a) such appointment may be made at any time either before or after the Holder shall have entered into or taken possession of the Mortgaged Premises or any part thereof;

(b) any such receiver may be vested with any of the powers and discretions of the Holder;

(c) such receiver may carry on the business of the Company or any part thereof;

(d) such receiver shall have, possess and may exercise all powers vested or herein conferred upon the Holder including its power of sale of the security or part or parts thereof;

(e) such receiver may, with the consent of the Holder borrow money for the purpose of carrying on the business of the Company, or the maintenance of the Mortgaged Premises or any part of parts thereof, or for other purposes approved by the Holder and any amount so borrowed together with interest thereon shall form a charge upon the Mortgaged Property in priority to the security of this debenture;

(f) the Holder may from time to time fix the remuneration of every such receiver and direct the payment thereof out of the Mortgaged Property or the proceeds thereof; and

(g) every such receiver shall, so far as concerns responsibility for his acts, be deemed to be the agent of the Company.

The term "receiver" as used in this debenture includes a receiver and manager.

31. In case the amount realized under any sale of the Mortgaged Property shall be insufficient to pay the whole of the principal, interest, costs, charges and expenses then due, the Company shall and will forthwith pay or cause to be paid unto the Holder any such deficiency.

32. For better securing the punctual payment of the Principal Sum and interest, and other amounts hereby secured the Company hereby attorns and becomes tenant to the Holder in regard to the Lands at a rental equivalent to the amounts hereby secured, and if the whole of the balance of the monies hereby secured shall become immediately due and payable and the security hereby constituted shall become enforceable as hereinbefore provided then such rental shall, if not already payable, be payable immediately thereafter. The legal relationship of landlord and tenant is hereby constituted between the Holder and the Company. The Holder may at any time after default hereunder enter upon the Lands and determine the tenancy hereby created without giving the Company any notice to quit. Neither this clause or anything by virtue thereof or any acts of the

receiver shall render the Holder a mortgagee in possession or accountable for any monies except those actually received.

33. The taking of a judgment or judgments under any of the covenants hereunder or pursuant to any collateral, additional or separate security will not operate as a merger of the said covenants or affect the Holder's right to interest at the rate and upon the terms aforesaid, and compound interest in the manner aforesaid, and the exercise or attempted exercise of one or more of the Holder's rights or remedies will not operate as a waiver of the remainder thereof and any and all of the said rights or remedies may be exercised successively or concurrently.

34. The Company hereby covenants and agrees with the Holder that it will at all times do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered all and every such further acts, deeds, mortgages, transfers and assurances in law as the Holder hereof shall reasonably require for the better assuring, mortgaging, assigning, and confirming unto the Holder the Mortgaged Property hereby mortgaged and charged or intended so to be or which the Company may hereafter become bound to mortgage and charge in favour of the Holder and for the better accomplishing of the intentions of this debenture.

35. In the event of default the Company hereby irrevocably appoints the Holder to be the attorney of the Company in the name and on behalf of the Company to execute and do any and all deeds, transfers, conveyances, assignments, assurances and things which the Company ought to execute and do under the covenants and provisions herein contained, and generally to use the name of the Company in the exercise of any or all of the powers hereby conferred on the Holder.

36. No remedy herein or in any collateral, additional or separate security conferred upon or reserved to the Holder is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or under any security collateral hereto or now existing or hereafter to

regularity of any sale or of any other dealing by the Company or receiver with the Mortgaged Property.

39. Every request, notice, account, bill or other communication provided for in this debenture or arising in connection therewith shall be in writing and shall be mailed or delivered to such parties addressed as follows:

The Company: Sawridge Enterprises Ltd.
P.O. Box 326
Slave Lake, Alberta

The Holder: Sawridge Indian Band
Sawridge Indian Reserve
Slave Lake, Alberta

Any party may change its mailing and/or delivery address or addresses by giving to the other party written notice to that effect. Every notice, request, account or other communication mailed at any Post Office in Canada in prepaid registered post in an envelope addressed to the party or parties to whom the same is directed, shall be deemed to have been given to and received by the addressee on the second business day following mailing as aforesaid.

40. No action or inaction on the part of the Holder shall constitute a waiver of any default under the debenture by the Company unless the holder notifies the Company in writing that the Holder is waiving that particular default.

41. Time shall be of the essence.

42. If any obligation, covenant or agreement in this debenture or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this debenture or the application of such covenant, obligation and agreement to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each covenant, obligation

and agreement shall be separately valid and enforceable to the fullest extent permitted by law.

43. This debenture shall be construed in accordance with and shall be governed by the laws of the Province of Alberta.

44. Words importing the singular number only shall include the plural and vice versa and words importing the masculine gender shall include the feminine and neuter genders and words importing persons shall include companies and trusts as the context may require.

45. This debenture shall enure to the benefit of the Holder and its successors and assigns and shall be binding upon the Company, and its successors and assigns.

IN WITNESS WHEREOF the Company has executed these Conditions under its corporate seal duly attested by the hands of its proper officers in that behalf, this 21 day of January, A.D. 1985.

SAWRIDGE ENTERPRISES LTD.

Per: _____

(corporate seal)

Per: _____

29/1-97182/5.24-270984jb

FIRST SCHEDULE

FIRSTLY: LOT ONE (1)
CONTAINING ONE AND TWELVE HUNDREDTHS (1.12) ACRES
MORE OR LESS
IN BLOCK FIVE-A (5-A)
ON PLAN 3225 T.R.
EXCEPTING THEREOUT:

ACRES	PLAN	NUMBER
0.01	SUBDIVISION	752 0877

(SLAVE LAKE - SE 36-72-6-5)

EXCEPTING THEREOUT ALL MINES AND MINERALS.

Permitted Encumbrances:

1. Mortgage in favour of Her Majesty the Queen in Right of Canada registered as instrument #3673 SS

2. Caveat registered in favour of the Societe Generale (Canada) and registered as instrument #832202427.

SECONDLY: LOT TWO (2)
CONTAINING FOUR AND NINETY SIX HUNDREDTHS (4.96) ACRES
MORE OR LESS
IN BLOCK FIVE-A (5-A)
ON PLAN 3225 T.R.
(SLAVE LAKE - SE 36-72-6-5)

EXCEPTING THEREOUT ALL MINES AND MINERALS.

Permitted Encumbrances:

1. Mortgage in favour of Her Majesty the Queen in Right of Canada registered as instrument #3673 SS

2. Mortgage in favour of Alberta Opportunity Co. registered as instrument #5399 U.B.

3. Postponement registered as instrument #1545 UK and

4. Caveat in favour of Societe Generale (Canada) registered as instrument #832202427.

SECOND SCHEDULE - LEASEHOLD

PLAN 4458 R.S.
THE WHOLE OF PARCEL CG
CONTAINING 1.17 HECTARES, MORE OR LESS
JASPER

Permitted Encumbrances:

1. Mortgage registered as instrument No. 832187939 to Societe Generale (Canada)

2. Caveat in favour of Societe Generale (Canada) registered as instrument No. 832202425

THIRD SCHEDULE

Permitted Encumbrances:

1. a debenture in the principal amount of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS in favour of the Alberta Opportunity Company and registered on the mortgage register at the Corporations Branch on September 19, 1973.

2. a chattel mortgage in favour of the Societe Generale (Canada) and registered at the Central Registry as instrument No. 432294 and in the mortgage register at the Corporations Branch on August 4, 1983 in the principal amount of Eleven Million, Five Hundred Thousand ($11,500,000.00) Dollars; and

3. an assignment of book debts in favour of the Societe Generale (Canada) and registered at the Central Registry as instrument No. 432573.

IDENTIFICATION SHEET

SAWRIDGE BAND INTER VIVOS ~~TRUST~~ SETTLEMENT

NOTE: For Bank Use Only
Tear Off Before
Issuing To Customer

FOR C/A STARTER KIT

CHECK FOR CORRECT ADDRESS

THE BANK OF NOVA SCOTIA
P. O. BOX 728
SLAVE LAKE, ALTA. T0G 2A0

CHECK ACCOUNT NUMBER WITH CONTROL SHEET BEFORE ISSUING TO CUSTOMER

⑈80739⑈00 2⑆ 00618⑈16⑈

1040316 (10/82)

Scotiabank
THE BANK OF NOVA SCOTIA

RECEIPT OF DEPOSIT

ACCOUNT NUMBER	618-16
TRANSIT NUMBER (IF ABB)	
AMOUNT	100,00

TELLER'S STAMP

00739-002

SAW000532

ASSIGNMENT OF DEBENTURE

THIS INDENTURE MADE THIS 15th day of April , A.D. 1985

BETWEEN:

WALTER P. TWINN
as Trustee of the Sawridge Indian Band

(hereinafter called the "Assignor")

OF THE FIRST PART

AND:

WALTER P. TWINN, SAM TWIN, AND GEORGE TWIN
As Trustees for the Sawridge Band Inter Vivos Settlement

(hereinafter called "the Assignees")

OF THE SECOND PART

WHEREAS the Assignor holds a certain debenture made in writing and executed on the 21st day of January, 1985, between Sawridge Enterprises Ltd. and the Sawridge Indian Band through its Chief Walter P. Twinn acting Trustee as holder, in the principal amount of $12,000,000.00.

AND WHEREAS the Assignor has agreed to assign all of its interest in the aforesaid debenture to the Assignees.

AND WHEREAS the Assignees have consented to such assignment.

NOW THEREFORE, in consideration of the sum of $1.00 together with other good and valuable consideration the adequacy and sufficiency whereof is hereby acknowledged, the Parties hereto covenant and agree as follows:

1. The said Assignor does hereby assign all its interest in the said debenture as hereinbefore described to the said Assignees to have and to hold the said interest in the said debenture, unto and to the use of the Assignees, their heirs and assigns forever, subject to the terms, covenants contained in the said debenture.

2. The said Assignor hereby covenants with the said Assignees that there is now due or accruing due and upaid under the said debenture, the sum of $13,157,219.89.

3. The said Assignor covenants that it has done no act or permitted any act to encumber its interest in the said debenture, and it has not done or permitted any act, neither has it been guilty of any ommission or laches whereby the said debenture has become in part or entirely in any way impaired or invalid and has not released, assigned, hypothecated or discharged nor has any covenant, condition, or proviso contained in the said debenture been discharged or waived or any breach or non-performance of any covenant contained in the said debenture been waived or condoned and that the Assignor will, upon the request to do so from the Assignees do, perform, or execute every act necessary to enforce the full performance of the covenants or any other matter contained in the said debenture. For the purposes of enforcing all rights of the Assignor, being the SAWRIDGE INDIAN BAND, in the said debenture, the said Assignor does hereby nominate, constitute and appoint the Assignees its true and lawful attorney, irrevocable and to use the name of the Sawridge Indian Band in securing the enforcement of all such rights contained in the debenture.

NOW WHEREFORE the Assignor and Assignee have hereunto affixed their signatures on the day and month and year first written above.

SAWRIDGE INDIAN BAND

Per:

SAWRIDGE BAND INTER VIVOS SETTLEMENT

Per:

Indian and Northern Affairs Canada / Affaires indiennes et du Nord Canada
Indian and Inuit Affairs / Affaires indiennes et inuit

Chronological No. – Numéro consécutif: 454-117-85/86

File Reference – Nº de réf. du dossier:

BAND COUNCIL RESOLUTION
RÉSOLUTION DE CONSEIL DE BANDE

NOTE: The words "From our Band Funds" "Capital" or "Revenue", which ever is the case, must appear in all resolutions requesting expenditures from Band Funds

NOTA: Les mots "des fonds de notre bande "Capital" ou revenu" selon le cas doivent paraître dans toutes les résolutions portant sur des dépenses à même les fonds des bandes

THE COUNCIL OF THE / LE CONSEIL DE LA BANDE INDIENNE: SAWRIDGE BAND

AGENCY / DISTRICT: LESSER SLAVE LAKE

PROVINCE: ALBERTA

PLACE / NOM DE L'ENDROIT: SLAVE LAKE

DATE: 15 (DAY – JOUR) 04 (MONTH – MOIS) AD 19 85 (YEAR – ANNÉE)

Current Capital Balance / Solde de capital $

Committed – Engagé $

Current Revenue balance / Solde de revenu $

Committed – Engagé $

DO HEREBY RESOLVE:
DÉCIDE, PAR LES PRÉSENTES:

WHEREAS Chief Walter P. Twinn holds as trustee for the Sawridge Indian Band a certain debenture dated the 21st day of January, 1985;

AND WHEREAS the aforesaid trust was created to protect the interests of the members of the Sawridge Indian Band;

AND WHEREAS it is deemed expedient and in the interest of the said members to pass this Resolution:

AND UPON IT BEING MOVED by George Twin and seconded by Walter Felix
THEREFORE BE IT UNANIMOUSLY RESOLVED at this duly convened and constituted meeting of the Sawridge Band Council at the Band Office in Slave Lake, Alberta, this 15th day of April, A.D. 1985, that Chief Walter P. Twinn is hereby directed and authorized to transfer the aforesaid debenture to the Trustees of the trust dated the 15th day of April, A.D. 1985, to be held by the said Trustees as an accretion to the assets of the trust and subject in all respects to the terms and provisions thereof.

A quorum for this Band / Pour cette bande le quorum est: consists of / fixé à 2 Council Members / Membres du Conseil

(Chief – Chef) Walter P. Twinn

(Councillor – conseiller) George Twin

(Councillor – conseiller) Walter Felix

(Councillor – conseiller) (Councillor – conseiller) (Councillor – conseiller)

(Councillor – conseiller) (Councillor – conseiller) (Councillor – conseiller)

(Councillor – conseiller) (Councillor – conseiller) (Councillor – conseiller)

FOR DEPARTMENTAL USE ONLY – RÉSERVÉ AU MINISTÈRE

1. Band Fund Code / Code du compte de bande	2. COMPUTER BALANCES – SOLDES D'ORDINATEUR: A. Capital $	B. Revenue – Revenu $	3. Expenditure / Dépense $	4. Authority – Autorité: Indian Act Sec / Art. de la Loi sur les Indiens	5. Source of Funds / Source des fonds: ☐ Capital ☐ Revenue / Revenu

6. Recommended – Recommandable

Date / Recommending Officer – Recommandé par

Approved – Approuvable

Date / Approving Officer – Approuvé par

707

DECLARATION OF TRUST

SAWRIDGE BAND TRUST

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

BETWEEN:

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

(hereinafter called the "Settlor")

of the First Part

AND:

CHIEF WALTER PATRICK TWINN,
WALTER FELIX TWINN and GEORGE TWINN
Chief and Councillors of the
Sawridge Indian Band No. 150 G & H respectively

(hereinafter collectively called the "Trustees")

of the Second Part

AND WITNESSES THAT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SIGNED, SEALED AND DELIVERED
In the Presence of:

Deanna Lyle
NAME

1100 One Thornton Court
ADDRESS

A. Settlor: Walter P. J...

Deanna Lyle
NAME

1100 One Thornton Court
ADDRESS

B. Trustees: 1. Walter P. J...

CTW000159

Page 7

Warren Lyles
NAME
1100 One Thornton Court
ADDRESS
Warren Lyles
NAME
1100 One Thornton Court
ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

2. [signature]

3. Walter F Irwin

4.

5.

6.

7.

8.

Mike Mirasol

From: Paul Bujold <Paul@sawridgetrusts.ca> on behalf of Paul Bujold <Paul@sawridgetrusts.ca> <Paul@sawridgetrusts.ca>
Sent: Friday, April 17, 2020 10:23 AM
To: Catherine Twinn; Doris Bonora; Eileen Key; John MacNutt; Mike McKinney; Ron Ewaniuk
Subject: Questions for Historical Interviews
Attachments: Questions for History Interviews, 100211.docx

Attached is a copy of the initial questions for which we are seeking answers in developing the history of the Sawridge Trusts. Undoubtedly, other questions will arise during the day as you provide your information and interact with the other participants.

We will begin promptly at 10:00 AM on 10 May 2010. The meeting will be held at the Trusts' Offices at 801, 4445 Calgary Trail, Edmonton. Refreshments and lunch will be provided. Please plan to be here until at least 4:00 PM. We will have a court reporter present to record the meeting so that we can develop a complete record for future reference.

I look forward to seeing you there,

Paul Bujold
Trusts Administrator
Sawridge Trusts
Office (780) 988-7723

INTERVIEWS TO DETERMINE THE HISTORY OF THE SAWRIDGE TRUSTS

10 MAY 2010

The intent is these interviews is to develop a history of the Trusts into which the various transactions of record can be placed. We are interested in both the actual historical sequence actions as well as the historical context of these actions—economic conditions at the time, political situations, legal and court precedents, and decision-making processes.

We hope that having everyone together for the interview process will enable the participants will fill-in gaps left by other participants, will be able to clarify points raised by others and will be able to provide an historical perspective not presently available.

In order to try to complete this process in one day, we ask that participants try to keep the exposition and discussion focused. The questions will act as a general outline of what we need to address in this history but are, by no means, the entire scope of the questions that may arise from points raised by the participants.

The Trusts have scanned all documents presently available into an electronic filing system. If you need to refer to a specific document during the process, we will provide access to those documents during the interviews.

GENERAL:

1. Can you each provide a background on the creation of each trust from your perspective?
2. How did the current trusts form from trusts that were already in existence and how were the assets transferred?
3. Did the former trusts terminate?
4. Why were the trusts created? In your estimation, are those reason still valid today?
5. Has the purpose of the trusts changed from their inception?
6. How were the trustees appointed?

TRUST 1985:

7. What do you know of the debentures issued by the trust? How many were there and what was their value and the interest due?
8. Do you know the chronology/history of the cash and other assets that were placed in the trust; what property was first placed in the trust; and who was the owner of that property? (Review each asset and determine how it was settled in the trust and who was the owner of the asset before it was put into the trust.)
9. If initial assets were Band owned, how were they transferred to the Trusts? BCR?
10. What was the value of each asset as it was transferred into the trust?
11. What are the assets currently in the trust?

12. What is the value of the assets currently in the trust?

13. What knowledge do you have about how the interest or other income of the trusts was invested, reinvested and/or distributed? Where there any records of these transactions?

It is not necessarily relevant to review transactions within the trust, e.g., if assets were sold and some other asset purchased but we are interested about claims by beneficiaries or by beneficiaries that may be excluded, that we know where the assets came from and what was the value of the asset when it was transferred to the trust.

TRUST 1986:

14. What do you know of the debentures issued by the trust? How many were there and what was their value and the interest due?

15. Do you know the chronology/history of the cash and other assets that were placed in the trust; what property was first placed in the trust; and who was the owner of that property? (Review each asset and determine how it was settled in the trust and who was the owner of the asset before it was put into the trust.)

16. If initial assets were Band owned, how were they transferred to the Trusts? BCR?

17. What was the value of each asset as it was transferred into the trust?

18. What are the assets currently in the trust?

19. What is the value of the assets currently in the trust?

20. What knowledge do you have about how the interest or other income of the trusts was invested, reinvested and/or distributed? Where there any records of these transactions?

It is not necessarily relevant to review transactions within the trust, e.g., if assets were sold and some other asset purchased but we are interested about claims by beneficiaries or by beneficiaries that may be excluded, that we know where the assets came from and what was the value of the asset when it was transferred to the trust.

DISCUSSION OF MANAGEMENT OF TRUSTS:

21. How were the trusts managed:

    a. Inception in 1985 and 1986 to the passing of Chief Walter P. Twinn in 1997

        i. What role did the trustees play?

        ii. How often did the trustees meet?

iii. How long were the meetings?

iv. What types of decisions were made by the trustees?

v. Were financial advisors consulted regarding investments for the trusts?

vi. Did all trustees have an equal role in managing the trusts during this time?

b. 1997 to 2003 (when management company hired)

i. What role did the trustees play?

ii. How often did the trustees meet?

iii. How long were the meetings?

iv. What types of decisions were made by the trustees?

v. Were financial advisors consulted regarding investments for the trusts?

vi. Did the trusts have an investment policy?

vii. Did all trustees have an equal role in managing the trusts during this time?

c. 2003 to 2006 by management company

i. Who was involved in the management company and what was its responsibility?

ii. What role did the trustee play?

iii. How often did the trustees meet?

iv. How long were the meetings?

v. What types of decisions were made by the trustees?

vi. Were financial advisors consulted regarding investments for the trusts?

vii. Did the trustees have an investment policy?

viii. Did all trustees have an equal role in managing the trusts during this time?

d. 2006 to now by Board of Directors

i. How were the directors chosen and what was their responsibility?

ii. What role did the trustee play?

iii. How often did the trustees meet?

iv. How long were the meetings?

v. What types of decisions were made by the trustees?

vi. Were financial advisors consulted regarding investments for the trusts?

vii. Did the trustees have an investment policy?

viii. Did all trustees have an equal role in managing the trusts during this time?

22. Do you have other information as to how the trust was managed generally from their inception up to now?

ROLE OF TRUSTEES:

23. Can you provide information about the time expended by the trustees: breakdown of time per month, who was involved, tasks that were undertaken.

24. Were there any records kept of the hours?

25. Were the monthly meetings full-day meetings and were they for both trusts?

26. What decisions are made by trustees in terms of actively managing the trust:

    a. From the inception of trusts to the passing of Chief Walter P. Twinn in 1997?

    b. From 1997 to 2003 when the management company was hired?

    c. From 2003 to 2006 while management company managed trusts?

    d. From 2006 to the present while the Board of Directors of Sawridge Group of Companies was managing the assets?

27. What care and management was/is needed for the trusts excluding the running of the actual businesses, i.e., active involvement on a daily basis or occasional involvement. Provide details.

28. What was/is decided at the trustee meetings in all of the time periods? (We are assuming that pre-2006 most of the business decisions were made in the trustee meetings but after 2006 the business decisions are made by the Board of Directors. We need to know the level of involvement of the trustees in these decisions.

29. What fees were paid to the Trustees over the course of the trust and what fees were paid to managers and other consultants in respect of the business affairs of the trust.

BENEFICIARIES AND DISBURSEMENTS:

30. How were beneficiaries identified?

31. What disbursements have been made to the beneficiaries

a. 1985 Trust: how much and when

b. 1986 Trust: how much and when

32. Were any records kept?

PAYMENTS MADE TO CIRCUMVENT TAXES:

33. What knowledge do you have of payments being made to trustees that were then "donated" back to trusts, to circumvent the payment of taxes?

34. What records were kept? For what period of time did this go on?

35. What types of issues were encountered in management of the trust, i.e., complexity of the work involved and whether any difficult or unusual questions were raised?

    a. From the inception of trusts to the passing of Chief Walter P. Twinn in 1997?

    b. From 1997 to 2003 when the management company was hired?

    c. From 2003 to 2006 while management company managed trusts?

    d. From 2006 to the present while the Board of Directors of Sawridge Group of Companies was managing the assets?

36. What tasks were delegated to others, e.g., professionals, and to whom and what amounts were billed to the trusts?

    a. From the inception of trusts to the passing of Chief Walter P. Twinn in 1997?

    b. From 1997 to 2003 when the management company was hired?

    c. From 2003 to 2006 while management company managed trusts?

    d. From 2006 to the present while the Board of Directors of Sawridge Group of Companies was managing the assets?

37. Was there ever any agreement made on how the trustees would be compensated and was it in writing?

38. What was your understanding of how the trustees would be compensated?

39. What trustee fees have been made to each trustee to date? Were any records kept?

40. What expenses were incurred by the trustee and were these reimbursed? Were any records kept?

TAXES:

41. Were tax returns filed to deal with the deemed disposition rule of 21 years?

42. Do the companies file their own tax returns?

43. Do the trusts also file their own tax returns? What income is claimed in the trust?

TERMINATION OF THE TRUST:

44. Do you have any thoughts on how the trusts are to be concluded? Is there any historical information about the reason that the trusts were drafted as they were in respect of the termination? In the trust, how is the last survivor to be determined?

LOCATION OF MEETINGS:

45. Where have the trustee meetings been held? At what point did the meetings stop being held at Sawridge offices?

MCLENNAN ROSS LLP
LEGAL COUNSEL

Our File Reference: 144194

Crista Osualdini
Direct Line: (780) 482-9239
e-mail: cosualdini@mross.com

Danielle Pfeifle, Assistant
Direct Line: (780) 482-9198

Fax: (780) 482-9100
PLEASE REPLY TO EDMONTON OFFICE

March 26, 2020

Via Email (JHutchison@jlhlaw.ca)

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

Attention: Janet Hutchison

Dear Madam:

Re: SAWRIDGE TRUST

Further to Ms. Twinn's questioning on March 12, 2020 by the OPGT and the statements put on the record by counsel to the Sawridge Trustees and the Sawridge First Nation that respectively sought to reserve their client's ability to object to the evidence to be given by Ms. Twinn, we confirm that no objections have been received from either the Sawridge Trustees or the Sawridge First Nation in regards to the undertakings sought by the OPGT. In reliance on the foregoing, please find enclosed Ms. Twinn's responses to undertakings.

1. Advise What Bruce Thom's Official Position Was:

Response: To Ms. Twinn's knowledge his position was Executive Director of Sawridge Administration. Please find enclosed letter dated April 2, 1987 that was marked Exhibit A for Identification to the examination of Elizabeth Poitras on May 29, 2014.

2. Produce any notes kept by Ms. Twinn of SFN members meeting or notices posted relating to community meeting

Response: Ms. Twinn has reviewed her records and is unable to locate same.

3. Produce any records kept by Ms. Twinn relating to information given to SFN members before they were asked to vote on member's resolution

Response: Ms. Twinn has reviewed her records and is unable to locate same.

4. Produce copies of emails with the date and signature block which would indicate Mr. McKinney's title from 1987, 2003, 2009 and 2009 to present:

Response: Please find enclosed TWN000523-4; TWN002894-6; TWIN001566-7 and Exhibit D for Identification to the examination of Elizabeth Poitras on May 29, 2014.

5. Produce business cards or documentation with dates and signature indicating Mr. Thom's title

Response: See response to U/T 1.

6. Advise whether or not SFN's fees for their participation in the lead up to the 2017 asset transfer consent order were paid by the trustees

Response: To our client's understanding such fees were paid. Please see paragraph 36 of Ms. Twinn's written submissions filed in these proceedings on September 1, 2017 for further particulars on these matters.

7. Determine if Ms. Twinn has a copy of the draft letter from R. Ewoniak referred to in Twinn DOC 7825, dated August 9, 1994

Response: Ms. Twinn has reviewed her records and was unable to locate same.

8. Provide an index or listing of the documents in Ms. Twinn's Possession as a trustee between 1982-1987 (Under Advisement)

Response: Refused. Overly broad, lacks relevance.

9. Determine if Ms. Twinn has a copy of the statement from Deloitte & Touche referenced in Twinn Document 007863 (Under Advisement)

Response: Ms. Twinn has reviewed her records and was unable to locate same.

10. Review Ms. Twinn's document collection and if there are any financial statements for Sawridge Holdings during relevant time period produce same (Under Advisement)

Response: Refused. Financial Statements have no probative value as they do not contain information pertaining to the $12,000,000 debenture at issue.

11. Review Ms. Twinn's document collection and if there are any financial statements for Sawridge Enterprises during relevant time period produce same (Under Advisement)

Response: Refused. Financial Statements have no probative value as they do not contain information pertaining to the $12,000,000 debenture at issue.

12. Inquire of Mr. Ewoniak as to his recollection of information to the effect that that $12 million dollar debenture never made it in to the 1985 Trust assets

Response: Same has been requested of Mr. Ewoniak.

13. Produce any documents in Ms. Twinn's collection that would assist in determining whether the $12 million dollar debenture was assigned, replaced, rolled into, combined such that it still exists as an asset of the 85 Trust, but is part of a larger debenture (Under Advisement)

Response: Ms. Twinn was not able to locate any such records and does not recall the debenture being rolled into a larger debenture.

14. Produce any notes or minutes of trustee meetings, or any correspondence indicating that a $12 million dollar asset had disappeared from the trust

Response: Ms. Twinn was not able to locate any such records.

15. Produce any documentation showing who the distribution of about $400,000 was made to in 2003

Response: Ms. Twinn was not able to locate any such records, but believes the distribution was made to Walter Felix Twinn.

16. Inquire of Mr. Ewoniak if he retained any notes of the meetings that he attended and discussed with Ms. Twinn in relation to the asset transfer from the 1982 to 1985 Trust or the creation of the 1985 Trust

Response: Same has been requested of Mr. Ewoniak.

17. Review Ms. Twinn's documents for a draft or final version of the MNP report prepared for passing of accounts

Response: Ms. Twinn has reviewed her records and was unable to locate same.

18. Produce portions of the group discussion/interview transcript in Ms. Twinn's possession relating to history of the 1985 Trust and the transfer of assets and any discussion related to the $12 million dollar debenture (Under Advisement)

Response: See attached excerpts that contain relevant factual statements from Ron Ewoniak, Paul Bujold and Mike McKinney in regards to the history of the 1985 Trust, transfer of assets and the $12 million dollar debenture. Our client takes the position that the statements from Mr. McKinney were provided as executive director of the Sawridge Group of Companies and not as legal counsel. This is supported by the transcript which states the capacity in which Mr. McKinney was present.

19. Produce any written version of the presentation or notes that Ms. Twinn prepared to give the presentation on April 15, 2011 as referenced in DOC 001023 at para. 6.2 (Under Advisement)

Response: Ms. Twinn has reviewed her records and was unable to locate same.

20. Review electronic format of Ms. Twinn DOC 007910 to determine who the author of the document was and the date

Response: The document is a PDF and does not have any metadata that would determine this.

21. Determine if any of the references in the affidavit at Twinn DOC 001006 are pages in the group interview transcript (Under Advisement)

Response: It is Ms. Twinn's understanding that these are references to the group interview transcript.

22. Inquire of Mr. Ewoniak his recollection after the 82 to 85 transfer was completed whether he was asked to address concerns raised by SFN about the transfer (Under Advisement)

Response: Same has been requested of Mr. Ewoniak.

23. Inquire of Mr. Ewoniak his recollection of being approach by SFN about concerns relating to the transfer during his time as chair of the Trust. (Under Advisement)

Response: Same has been requested of Mr. Ewoniak.

Yours truly,

CRISTA OSUALDINI

CCO/pmd

cc/ Doris Bonora (doris.bonora@dentons.com)
cc/ Michael Sestito (michael.sestito@dentons.com)
cc/ Ed Molstad (emolstad@parlee.com)
cc/ Ellery Sopko (esopko@parlee.com)

00144194 - 4127-2990-1347 v.1

HISTORY AND BACKGROUND OF
THE SAWRIDGE TRUSTS

Held at the offices of the Sawridge Trusts

801, 4445 Calgary Trail NW

Edmonton, Alberta

May 10, 2010

(See pages 2 and 3 for Appearances)

APPEARANCES

C. M. Twinn, Ms., Twinn Barristers & Solicitors PO Box 1460 810 Caribou Trail NE Sawridge Indian Reserve 150G Slave Lake AB T0G 2A0 780-849-4319	Appeared on her own behalf as a Trustee of the Sawridge Trusts
[redacted]	[redacted]
P. Bujold Sawridge Trusts 801 Terrace Plaza 4445 Calgary Trail NW Edmonton AB T6H 5R7 780-988-7723	Appeared as Trust Administrator for the Sawridge Trusts
J. A. MacNutt, CA Sawridge Group of Companies 1910 Bell Tower 10104-103 Avenue Edmonton AB T5J 0H8 780-428-3330	Appeared as CEO for the Sawridge Group of Companies
M. R. McKinney, Esq., Sawridge Group of Companies 1910 Bell Tower 10104-103 Avenue Edmonton AB T5J 0H8 780-428-3330	Appeared as Executive Director for the Sawridge Group of Companies
R. Ewoniak, CA Deloitte 14, 500 Lessard Drive NW Edmonton AB T6M 1G1 780-486-5428	Appeared on his own behalf

than what was translated, but yes. And, you know, she got more I think into the addiction issue, which is an issue.

MR. BUJOLD: Before we actually begin with the interviews, there's food in the side room over here. There's fruit and other things. Help yourself, and we'll come back here and we'll start.

(RECESS TAKEN)

(MEETING RESUMES)

MR. BUJOLD: This time we're going to start with you, Mike. We're going to go to these questions.

We've got some general questions that we've listed and then we'll go into the more detailed information for each of the trusts.

So can you begin by providing us a background of the creation of each trust from your perspective? How were the trusts created and why?

MR. MCKINNEY: Well, Ron was probably more involved in the initial creation.

My understanding is that initially the shares of the companies were held as bearer trust by Walter and possibly a couple of the councillors. In around 1980, there was a trust drawn up probably by David Fennel or one of the firms that they dealt with at the time to put it into more of a formal trust. That trust, I believe, was varied in '82 or '83, which you would have all the documents which would sort of show that sequence. I

believe there was even a court order to extend the term of the trustees or vary the term of the trustees at that time.

In 1985, they were working with Maurice Cullity out of Davies Horn & Beck, and he looked at the trusts, and there was some I gather -- it was before my time, but there were some problems or issues, so they essentially resettled the trusts or created new trusts and moved the assets into them. I'm not sure exactly how that was handled, but that trust I believe is dated like April 16th, '85. And then the assets were put into that trust.

Now, how they were put in, initially I think the trust was settled by Walter with a hundred dollars, and the shares of the companies were -- I'm not sure if they were gifted in or how that happened, but maybe the shares of the company were put into that trust. Maybe it was the early one was just a hundred dollars. But that trust essentially at that point could no longer receive any money from the Band because the Band on April 17th, 1985, was the effective date of Bill C-31 which changed the qualifications for Indian Status and Membership. There was uncertainty as to what impact that would have, you know, but the government was reinstating a bunch of people, and they didn't know at the time. There was an uncertainty.

So the membership in the First Nation would

start to change, and that trust, I'll call it the old trust, has, as its beneficiaries, the members of the Band at the time plus anybody who would be a member pursuant to the rules in existence at the time, so before Bill C-31, so hence, the very long definition of who the beneficiaries were.

In 1986, the second trust or the new trust, the Sawridge Trust, was set up, which all beneficiaries were the members of the First Nation, you know, as it changed over time. So it was the same as the First Nation, same as the Indian Band, and therefore, the Band could still contribute money because its beneficiary class membership was the same as the beneficiary class of the trust.

So they set up the new trust. And any new monies that were gifted at the end of each year, because that was the practise at the time was to gift money at the end of each year to the trust so that that money would have gone into the new trust after April 17th, 1985.

MR. BUJOLD: Now, how was the money gifted? You said the money was gifted at the end of each year to the '86 trust.

MR. MCKINNEY: Well, over the course -- I mean, the affairs of the companies and the Band were all sort of intermingled or, you know, run together from a Band office. And as each company, during the year, needed

cash -- this is at this time. In the mid '80s, there were large payments due on the mortgage for Jasper.

The Jasper, when it had been built, had an initial mortgage of 12 million dollars. NuWest had been a partner, but it had gone under, so Sawridge had to basically buy them out and borrowed the money to do so. So the payments were, I believe, like 600,000 a year on this mortgage plus interest. The interest rates were quite high. So they needed cash.

So during the year, as the businesses needed cash, the Band would, you know, put money in. Later on, it became an automatic system at the bank where the bank accounts all zeroed out at the end of each day into the Band account. And, you know, if somebody wrote too many cheques, the money would flow down from the Band. If money came in, it would flow up to the Band. So it was all automated. But in the mid-'80s, it was done on an as-needed basis of actually writing cheques.

At the end of the year, the companies would owe money to the First Nation. You know, the amount would vary, but invariably they owed money to the First Nation. So at the end of the year, Council would declare that a surplus, and it would gift that amount of that loan to the trust. So it no longer was on the books of the First Nation, and it became on the books of the trust. And essentially, you know, my experience with that was always with the new trust.

Now, the old trust it was only set up, you know, in 1985. There were promissory notes and other documents. I'm not sure exactly how that all worked, but the promissory notes became part of the trust property, so they must have been gifted.

Maybe Ron knows more about that.

MR. BUJOLD: Okay. Ron, do you want to fill in the blanks?

MR. EWONIAK: Well, the first trust was created on April 15th, 1982. And in 1985, that first trust was either -- I can't remember. It was either terminated, and then there -- or the new trust came into effect on April 15th, 1985. And it was called the Sawridge Inter Vivos Trust. It was commonly referred to as the old trust or the original trust.

Then the new trust, called the Sawridge Trust, was formed on April 15th, 1986. The reason for the new trust was the changes to the *Indian Act*. Mike might be able to give detail about what that was all about.

But when the new trust was formed, the beneficiaries were similar but not identical to the beneficiaries of the old trust and -- because of the changes of the *Indian Act*. That's why the new trust was formed. And I can't remember, but most -- all the assets of the shares that were owned by the Band were gifted to the trust, whether it was tax provisions we had to account for, I can't recall.

But every year the surplus funds would be gifted to the trust. And the trust had ended up with all the surplus cash, and it had the loans to the operating company, and it would charge interest and the interest would come back either -- from wherever.

The income at the end of the year, to prevent income tax on it, was distributed to the beneficiaries. And under the trust, it was distributed in any way you wanted. In fact I believe, I might be wrong, but I think every year it was distributed to Walter Felix Twin. He got a great big cheque for a million dollars or whatever.

He had a special bank account. The money went into that special bank account. The same day, he wrote a cheque, and he made a gift to the trusts and just ended up converting all capital into trust, tax-paid capital, and made that number somewhere in excess of a hundred million dollars tax paid-capital in the two trusts combined.

[redacted]

MR. EWONIAK: Basically the new trust -- the old trust didn't get any more gifts after the new trust was

formed.

[redacted]

MR. EWONIAK: And it was a great concern that, under the *Indian Act*, they had to keep the two trusts separate. Talk to Mike or Cathy about details of why the concerns were, but the concerns were there. So basically after the second trust was formed, the new trust didn't get any more capital. All the capital went into the new trust.

MR. MCKINNEY: But the distributions to the beneficiary, the beneficiary allocation at the end of each year, it was gifted out by typically the old trust and then put back into the old trust. There may have been some years where each trust had a distribution, but the new trust didn't have as much of that as the old trust because it didn't have the tax issues because, you know, it didn't have the income to shelter.

[redacted]

MR. BUJOLD: Catherine?

MS. TWINN: Well, I can't speak to the flow of money and the Band and trusts and companies because I wasn't involved in that. What I can speak to is my perspective in terms of the background on the creation of each trust.

My understanding is that the very original trust from the very, very early 1980s was done by David Jones, and he was working with Dave Fennel. And from my

understanding -- I recall when the Sawridge companies had an office in Edmonton, in the Melton Building on Jasper Avenue and 103rd Street. Dave Fennel worked out of that office. This now is, you know, 1983, when I began to see this.

Also, at that time, there was Doc Horner and Ernest Manning, who were acting as trustees. I don't know if they had been officially appointed, but I believe that they were being compensated. Records would confirm that or not, but the purpose of this trust structure was as Ron said. There were tax reasons, but there was also this separation from politics and separating the businesses from politics. And they needed a structure that the Department of Indian Affairs would recognize as providing for transparency and accountability and a clear definition in terms of legal obligations and duties. And the trust structure provided that. The Band Council does not.

And so Walter had been, as you saw from the DVD, running into a lot of obstruction from the Department of Indian Affairs, in particular, the Lands, Reserves, and Trusts Unit which had administrative control over the capital and revenue accounts of the Band that were held in Ottawa, but they're all, I think, in one -- they're in the consolidated account in the government.

Aren't they, Mike?

[redacted]

MR. EWONIAK: Well, the Band never really had a pot of money. The money was held by the federal government --

[redacted]

MR. EWONIAK: -- in trust for the Band and --

[redacted]

MR. EWONIAK: And the government had two funds. They had the capital fund and the revenue fund, and the Band could only get monies out of the revenue fund. To get monies out of the capital fund, they needed -- I don't know the right procedure, but they needed government approval anyway.

MR. MCKINNEY: It's more difficult. They did get

money out of both, but it was more difficult to get it out of capital.

MS. TWINN: It's a more onerous process and more criteria.

MR. MCKINNEY: But in all cases, the Band accessed those funds directly as the Band and had to, like, ask for it for its own purposes --

[redacted]

MR. MCKINNEY: -- and invest it or say it was going to put it into something. And then subsequently, after 1985, it did not put any money into the old trust because it didn't want to taint it.

[redacted]

MR. MCKINNEY: It only put it into the new trust, and the new trust did lend money to the old trust, you know, at the corporate level but not the trust level.

MS. TWINN: And one other thing is that this trust-structure piece, it was in the Samson case where I'm not sure what exact year, but in the oil and gas case, the federal government did recognize the trust structure as a legitimate receiving vehicle for capital and revenue monies. And there was a transfer done prior to trial, and Ed Molstad can fill you in on that. But prior to the trial, I believe there was some pretrial settlement or maybe it was in the middle of the trial, I'm not sure, but there is now a Samson trust. And I'm not sure how much money they're holding. It could be

half a billion dollars, but I believe that that came out of the capital and revenue account.

MR. MCKINNEY: Well, they have a new *First Nations Oil and Gas Management Act*, which actually permits First Nations to set up trust accounts, trust structures to have a transfer. And that was done in relation -- in response to the Samson case, but that was only in the last five years or so.

MS. TWINN: Yes. Just --

MR. MCKINNEY: Before that -- like, Sawridge never had any money taken from Indian Affairs directly to the trust. Up until the grocery store, all money just went to the First Nation. There really weren't any questions asked about who was going to own the assets. Once they gave the First Nation the money and the First Nation was able to account for the fact that they spent the money -- because in the first instance, the First Nation did spend the money, the Band did. They would spend the money to buy something and then gift it to the trust so that the -- you know, the First Nation was spending the money and could account for it.

When the grocery store -- they wanted to see the documentation or how is it going to be structured, so a separate trust was actually set up and shown to them and then that trust was wound into the new trust, the funds were. The assets were transferred to the new trust.

MR. BUJOLD: To the '86 trust.

MR. MCKINNEY: Yes.

MR. EWONIAK: When the first --

MS. TWINN: And -- go ahead.

MR. EWONIAK: -- trust was set up, the government -- the monies were held in capital funds and were paid a minimal interest rate. I can't remember. They had a complicated formula, but it came to like 1 or 2 percent a year, and in those days, interest rates were quite high.

MS. TWINN: Yes.

MR. EWONIAK: So I got Walter to lobby with the government and then he got some of the other Chiefs and they lobbied the government, and that's when the government changed and gave them -- and came up with a new formula of how they would pay interest. The interest rates went up too. The rates would be more closely related to the bank prime plus 1 or 2 or something, rather than bank prime minus 5 or something.

MR. MCKINNEY: They were tied to the Government Canada bonds, 10-year -- I can't remember. 10-year bond rates is what they're tied to.

MS. TWINN: But that was a big issue in the Samson oil and gas case because of mismanagement because one of the concerns was the loss of monies that could have come from normal interest rate, rather than this depressed interest rate.

[redacted].

MR. MCKINNEY: And they were not all registered.

MR. MACNUTT: I was going to say I don't believe -- in fact, I would be surprised if there's more than one registered. I recall registering one in about 2004.

MR. BUJOLD: Maybe one or two.

MR. MCKINNEY: There's a few that are registered. Most of them are not, you know, because there was a concern about if you register them, then people are going to go do searches, and they're going to --

MR. BUJOLD: Yes, there's two that --

MR. MCKINNEY: -- there will be all these questions.

MR. BUJOLD: So let me ask you specific questions about specific debentures.

There's a debenture for 12 million between Walter as a trustee for the Indian Band and Sawridge enterprises. Does that still exist?

MR. MACNUTT: There's no debt there, so like --

MR. MCKINNEY: It would have been assigned -- there should be an assignment.

[redacted] [redacted]

MR. MCKINNEY: To the old --

[redacted] [redacted]

MR. MCKINNEY: To the '85 trust.

MR. BUJOLD: So this is part of what was assigned to the '85 trust. So it would be then subsumed

into one of these other debentures?

[redacted]

MR. MCKINNEY: There should be an assignment, a formal assignment.

[redacted]

MR. BUJOLD: Okay. Then there was another

debenture, 1986, and I'm presuming this one is between Sawridge Holdings, and, again, Walter is the trustee, for 35 million. And it's the one that's listed in the company's annual report for the '85 trust.

MR. MCKINNEY: Okay. That probably would have been put in place because the amount of debt was larger than the existing security or there was -- maybe the only existing security was the 12 million dollars in enterprises. Like, I would have to go look through all the paperwork to see what the order of the debentures was. And, you know, there should be assignments and documentation for each of them.

MR. BUJOLD: So then the first one, the 12 million, was registered. The second one wasn't. The third one is registered, and it's between the numbered company and the trust and Sawridge Trust for 50 million. And it's the 28th of August, '89.

MR. MCKINNEY: So that would have been put in place to secure advances to the '86 trust.

[redacted]

there's an argument that the debenture is not valid, so usually you do one ahead of time.

MS. TWINN: I have a question.

What is the net total of the face value of the five debentures, 240-some million?

MS. KEY: It would be 160 on the numbered company and then 47.

(PAUSE IN THE MEETING)

MR. BUJOLD: 207. 207 million.

MS. TWINN: How much?

MR. BUJOLD: 207 million.

MS. TWINN: 207 million, so --

MR. EWONIAK: Whoa, whoa. I think we're mixing things up. There's two key debentures -- there's one key debenture between the old trust and the amount of the holding companies I forget, which is what, the Sawridge Holdings or the numbered company. I forget who owns what, which is --

MR. BUJOLD: The '85 trust is --

MR. EWONIAK: -- the original trust.

MS. KEY: So that's that 12-million-dollar one.

MR. EWONIAK: Okay. And then there's another debenture between the new trust and one of the other holding companies.

MR. BUJOLD: The numbered company.

MR. EWONIAK: Those two debentures I believe

total about 85 million bucks. Then there's debentures between the holding companies and some of the operating companies, so those debentures --

MS. TWINN: I see.

MR. EWONIAK: -- are really security for --

MS. TWINN: For the parent.

MR. EWONIAK: -- the holding companies.

MR. BUJOLD: Not according to these documents.

MR. MCKINNEY: No. Those are just from the trusts to the holding companies.

MR. BUJOLD: These are trusts to the holding companies.

MS. KEY: Yes.

MR. MCKINNEY: Then the other debentures are below that.

MS. KEY: Yes, we haven't seen any of those.

MR. BUJOLD: We haven't seen any of the debentures below. You know, I'm only talking about the top of the debentures, and that's 207 million.

MR. EWONIAK: I would like to see those documents because it doesn't make sense to me. I'm missing something.

MS. TWINN: So here's my question: Was 207 million actually received from the trust, be it the '85 or the '86 trust, to the parent company as these debentures provide for?

MR. MCKINNEY: No. These debentures don't provide

that. They provide the maximum amount of security up to that amount, so they contemplate up to that amount could be advanced, and that would still be secured. Advance a dollar more than that, that dollar would not be secured. That would be unsecured.

MS. TWINN: But my question is, Of that 207 million's capability, how much was in fact advanced? Do we know that?

MR. MCKINNEY: It should be in the Financial Statements.

MS. KEY: Based on the Financials, it's about 115 let's say, 85 and 35.

MR. MACNUTT: That's about the right number. A good portion of that actually advanced is -- that's the debt.

MS. KEY: Well, in one form.

MR. MACNUTT: Yes, in one form or another here.

MS. TWINN: So --

MR. MCKINNEY: Because some of that was --

MR. MACNUTT: If I can give you an example, like, when we did the financing for the -- let me think. Yes, the financing from the Fort McMurray hotel, we did 8-million-dollar financing. I think Scotiabank registered like a 20-million-dollar debenture. I mean, all it is is registering a security interest, so you're anticipating the advances may go beyond, but they don't.

So if the advances ever exceeded the debenture,

So when you go to measure the return on investment, What is the investment, you know, through that? So I think it's, again, not something that can probably be answered today, but I think we can identify the group that can come to terms with that and really dissect each payment out of the trust and each receipt into the trust and try to get to the bottom of that because I think it would be very productive.

MR. MCKINNEY: And the trust started with very little. In the very beginning, when they built the hotel in Slave Lake, they had very little money. They had debts. When they built Jasper, same thing.

MS. TWINN: Yes.

MR. MCKINNEY: It was all by debt. So it was constantly building and investing, going into new things, you know, some better than others, but it was a growth thing over time. So one way to measure income would be to look at, you know, what is the terminal value today versus what went in, and that's your return. I mean, you would get an accountant or an evaluator to put a value.

[redacted]

COURT FILE NO: 1103 14112

COURT: QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

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

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

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

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QUESTIONING RE ASSET TRANSFER ORDER APPLICATION

OF

PAUL BUJOLD

Ms. D. Bonora	For the Applicants
P.J. Faulds, Esq. and Ms. J. Hutchison	For the Public Trustee
Ms. C. Osualdini	For Catherine Twinn
M. Cressatti, Esq.	For Sawridge First Nation
Susan Stelter	Court Reporter

Edmonton, Alberta

26 February, 2020
2 March, 2020

A Sorry, ask me the question again?
Q The question I asked you, I think, was you understood that in addition to the assets transferred to the 1985 Trust by the 1982 Trustees, there was this debenture which was also transferred to the 1985 Trust by Walter Patrick Twinn?
A I -- yes, initially I understood that to be the case, yes.
Q Now you say initially. Did you come to a different understanding?
A Well, I have come to a different understanding recently because we since discovered that this -- I had never seen this actual debenture show up anywhere, I have never seen that value, $12 million show up anywhere as a singular amount. And when we did a title search recently on this debenture and discovered that it had been registered, the, you know, the debenture wasn't -- it didn't follow through. Like it didn't go all of the way to the end. It was released at some point.
Q Okay. Now you understand that a debenture is an instrument reflecting a debt?
A Yeah, it is a mortgage, yeah.
Q Yes, sure. A mortgage which you can register in more ways than you can register a mortgage?
A That is right, yes.
Q And it isn't confined to land either?
A That is right.

Q So it reflects an underlying debt. So are you saying that you came to doubt whether the debt existed, or?
A Well, I came to doubt that the $12 million debenture had any effect on the assets of the Trust.
Q And why would that be?
A Well, it seems like the debenture is -- has a certain value. It is transferred, as far as I can understand it, it is transferred in from these documents. It looks to me like it is transferred in.
Q Right?
A And then when you try and search the, you know, the effect of this asset it is very clear that it was postponed a number of times, and then it was eventually forgiven, or turned off, or somehow -- but that had no effect -- I mean I don't see any of these transactions anywhere in any of the other documents that I looked at. So I can't -- when I try and match the two pieces, it doesn't compute.
Q So if I understand you, you are saying that you didn't in subsequent records find a specific line item --
A Right.
Q -- which reflected a debt owing by Sawridge Enterprises to the Trust?
MS. BONORA: I think his evidence was broader than that. He said he didn't find any evidence of the debenture in the -- I don't think it was a line item. He didn't say that. He said he didn't find any

evidence of the debenture.

Q MR. FAULDS: But that would include a line item?

A Yeah, so there was no line items, nor were there any other references to this $12 million debenture. And when I inquired about it I was told that it had no effect. The debenture was cancelled.

Q Sir, who did you inquire of?

A I inquired of John MacNutt.

Q Who is?

A The CEO of Sawridge Group of Companies.

Q Okay. And where does Sawridge Holdings fit in to that?

A Sawridge Holdings is one of the two holding companies that existed at the time that were administered by the Sawridge Group of Companies.

Q Okay. And Sawridge Enterprises?

A I am not sure where Sawridge Enterprises fit in all of that. It was -- I think Sawridge Enterprises, and I am simply, you know, supposing at this point.

MS. BONORA: Don't speculate. If you don't know, you don't know.

A I don't know.

Q MR. FAULDS: Okay. But you did go to Mr. MacNutt and ask him what about this debenture?

A Yes.

Q Okay. And when did you do that?

A I can't be sure exactly what the date was. It was around 2012, I am guessing.

Q Okay. And why did you do that?
A We were trying to solidify from the Trust perspective, we were trying to solidify -- we had a number of debenture documents. We were trying to solidify which ones applied or continued to apply.
Q When you say "we had a number of debenture documents"?
A So the Trustees, and I did as the administrator for the Trusts.
Q And did any of these debentures concern the 1985 Trust?
A Yes, one was for the 1985 Trust, the other one was for the 1986 Trust. And then there was this $12 million debenture which seemed to be a hanger-on. It didn't seem to have any relevance to anything.
Q So you understand that as of the date of the transfer of the debenture --
A The 15th day of April, right.
Q That the debenture belonged to, or that the rights under the debenture belonged to the 1985 Trustees?
A Yes. Which was why I inquired.
Q Did you have any indication that the 1985 Trustees forgave the debenture?
A I had no indication at all at that point about -- all I had was the debenture document, the one that you showed me earlier. That is all that I had.
Q Okay. So did you make inquiries to determine if the Trustees had forgiven the debenture?
A Yes, I made inquiries to determine what this document

was about. Like was it referring to an asset that belonged to the Trust or not?

Q Okay. Well, you understood the debenture had been transferred to the Trust?

A Yes.

Q So it was an asset of the Trust?

A Yes, but I had many documents that referred to --

MS. BONORA: Sorry, I feel like we are getting away from -- the evidence I think is going in a circle. He testified that the asset -- he never saw any evidence that this debenture was part of the Trust. That is what he said at the beginning.

MR. FAULDS: Well, no. With respect, Ms. Bonora, he said he recognized that this was an asset that was transferred to the Trust.

MS. BONORA: Can you ask him that question again, because I don't think that that is his evidence. And if we can just maybe perhaps go off the record.

(Discussion off the Record.)

Q MR. FAULDS: Okay, Mr. Bujold, if we can go back on the record. Your counsel has said in our discussion off the record that the 1985 Trustees take the position that this debenture never formed a part of the Trust?

A Yes.

Q And let me ask you this. You recognized from your review that this was, if it was an asset of the Trust, it was a substantial asset given its value?

A Yes.
Q So what inquiries did you make about what happened with this debenture?
A I think I explained it to you already. I asked the Sawridge Group of Companies, through John MacNutt, if I should be considering this as part of the assets of the Trust in the holding company.
Q Okay.
A And he said the debenture had no effect.
Q Okay.
A And that it had been discharged a long time ago. So I didn't have any record of that. I didn't find any -- in the materials that were given to me at the time, I didn't find any indication of registration of the debenture, I didn't find anything on it.
Q Okay. So did you ask Mr. MacNutt why it was of no effect?
A I did, and he said that it had -- you know, he had as little information about it as I did.
Q So --
A So John MacNutt didn't come on the scene until 2003, so he had no knowledge of this other than, you know, other than the knowledge that I had, was here is a document that says that you have $12 million in assets, so where is it? Both of us went through the same process of trying to figure out okay, what is this about.
Q Okay.

A And, you know, both of us came to the same conclusion that there was nothing in our records that indicated this debenture had ever actually been transferred into the assets of the '85 Trust.

Q Well, again, other than the documents that we just looked at?

A Other than the assignment and, you know, other than that, that is all that we had.

Q Did you ask Mr. McKinney about the debenture?

MS. BONORA: He can't give you any evidence about Mr. McKinney's discussion. Mr. McKinney is a lawyer.

MR. FAULDS: Well, Mr. McKinney is also an administrator.

MS. BONORA: We are objecting to those questions.

Q MR. FAULDS: Well, I am going to ask you. My question is not asking you what Mr. McKinney told you, my question is did you ask Mr. McKinney?

MS. BONORA: We are not answering that question.

MR. FAULDS: Okay.

Q MR. FAULDS: You are saying that you have not seen any records which reflect this debenture as part of the assets of the 1985 Trust?

A No.

Q Are you confident that you have all of the records relating to the 1985 Trust?

A I have indicated many, many times that I am not confident that I have all of the records concerning the '85 Trust.
Q Okay. And did you make any inquiries as to whether the debenture had been paid?
A Other than what I previously stated, my inquiry to John MacNutt, no.
Q And did you ask Mr. MacNutt if the debenture had been repaid, or if the debt secured by the debenture had been repaid?
A I don't think that I asked him that question specifically. I asked him did this debenture still have effect.
Q Okay. Did you ask Mr. MacNutt whether there had been any subsequent transactions which had resulted in the Trust -- the debenture, I am sorry, being further assigned, or replaced, or replaced with other security?
A I'm not sure I understand the question, sorry.
Q I mean I guess what I am saying, Mr. Bujold, is that a debenture doesn't just disappear. But what you are telling me is it appears to have just disappeared from the 1985 Trust?
MS. BONORA: No, Mr. Faulds, that is incorrect. The evidence is that it was never in the 1985 Trust is the evidence given by Mr. Bujold today. So it didn't disappear from the 1985 Trust. It might have disappeared from Sawridge First Nation's records, but

it didn't disappear from the Trust because it was never there. That is the evidence that he is giving you today.

MR. FAULDS: Well, Ms. Bonora, I am not going to engage in an argument with you about the effect of Mr. Bujold's evidence. He has identified documents transferring the debenture to the 1985 Trust, approved by Band Council Resolution of the Sawridge First Nation, approved by the First Nation itself, and an actual document effecting the transfer. So I am not sure on what basis you say it was never in the 1985 Trust, but --

MS. BONORA: Well, I'm objecting to your question because that is his evidence. In his inquiries, and in respect of the documents that have been signed, it was never taken as a trust asset. So your question cannot be answered in the way that you have phrased it.

Q MR. FAULDS: Just to be clear, Mr. Bujold, you say that you haven't found any reference to it in documents following the documents by which it was transferred into the Trust?

MS. BONORA: I'm objecting to that question because there are no documents where it shows the asset was transferred into the Trust. There are documents that suggest that there was an assignment, but there are no documents showing it actually went in to the

SAWRIDGE BAND INTER-VIVOS SETTLEMENT TRUST ("1985")
SETTLED ON APRIL 15, 1985

History

- Sawridge Band Trust ("Old Trust") was settled on April 15, 1982
- Beneficiaries were the members of the Sawridge Indian Band
- On April 15, 1985, all assets of the Old Trust were transferred to the Sawridge Band Inter-Vivos Settlement Trust ("1985 Trust")
- Primary asset of the Old Trust was 100% of the outstanding shares of Sawridge Holdings Ltd. and a significant advance receivable from Sawridge Holdings Ltd.
- In 1985, at the time the assets of the Old Trust were transferred to the 1985 Trust, Sawridge Holdings Ltd. held investments in the following companies
    - Sawridge Enterprises Ltd.
    - Sawridge Hotels Ltd.
    - Sawridge Development Co (1977) Ltd.
    - Sawridge Energy Ltd.
    - Spruce Land Developments Ltd. – 8.5% interest
- Trust equity as at December 31, 1984 of $23,753,062 was assumed by the 1985 Trust upon the transfer of all assets from the Old Trust

Activity in Sawridge Band Inter-Vivos Settlement Trust

- Information obtained from non-consolidated financial statements on Docushare site
- Have statements from 1986 to 2004
- See Appendix A
- Need non-consolidated financial statements for 2005 to 2009
- 1985 information obtained from comparative figures on 1986 financial statements
- 1985 comparative financial statements show interest income from Sawridge Holdings Ltd. of $3,324,725 – can't cross-reference this to related interest expense on the 1985 Sawridge Holdings f/s for 1985
- No contributions were received by the 1985 Trust from the Sawridge Indian Band
- Interest on advances to Sawridge Holdings Ltd. was waived from 1986 to 1995
- From 1985 to 1990, only other transaction reflected on income statement of the 1985 Trust was professional fees
- Interest income was recorded on the advances to Sawridge Holdings Ltd. from 1996 to 2004
- For 1996 and 1997, the 1985 Trust showed net income virtually equal to the interest charged to Sawridge Holdings Ltd., with no associated tax provision or beneficiary allocation
- Starting in 1998, the Trust's net earnings were allocated to a beneficiary, who subsequently gifted this allocation back to the Trust
- 1999 – first allowance recorded for decline in value of advances to Sawridge Holdings Ltd.
- From 1999 to 2004, allowed for $10,804,228 of the $22,137,839 advanced to Sawridge Holdings Ltd.
- Trustee fees started to be paid by the 1985 Trust in 2001.

- See Appendix ? for summary of trustee fees paid (currently don't have a schedule for the 1985 Trust, but should be similar to the spreadsheet prepared by the company for the 1986 Trust)
- Information not available for the $18,000 of trustee fees paid in 2001
- In 2002 and subsequent years, the 1985 Trust started incurring more expenditures directly, relating primarily to consulting fees and, starting in 2003, management fees

Sawridge Holdings Ltd. ("Holdings")

- Holdings was incorporated on October 8, 1981 and was inactive to December 31, 1981
- See Appendix B
- Information obtained from non-consolidated financial statements prepared by Deloitte from 1981 to 2005
- Incurred expenses only in 1982, funded by advances from the Sawridge Indian Band
- Most significant asset in 1982 was advances to Sawridge Enterprises Ltd., the company that owned the Sawridge Hotel – Slave Lake
- Acquired shares of the following companies on December 17, 1983 from the Old Trust
    - Sawridge Enterprises Ltd. – owned the Slave Lake Hotel
    - Sawridge Hotels Ltd. – owned the Fort McMurray hotel
    - Sawridge Development Co (1977) Ltd.
    - Spruce Land Developments Ltd. (formerly Slave Lake Developments Ltd.) – 8.5% interest
- In 1983, acquired a 25% interest in TAI Resources Ltd.
- In 1985, a further 25% interest in TAI Resources Ltd. was acquired
- Acquired 100% of the shares of the following companies on their incorporation in various years
    - Sawridge Energy Ltd. – 1984
    - Sawridge Glacier Investments Ltd. – 1986
    - Sawridge Enterprises Inc. – 1986 (wound up in 1999)
    - Sawridge Truck Stop – 1994 (sold to 352736 Alberta Ltd. in 2005)
- The primary source of revenue for Holdings is interest charged on advances to subsidiaries, with some additional investment income and management fees from other sources received over the years
- Directors fees of $48,000 were paid in 1983 (likely for 1982 retroactively)
- Annual directors fees of $24,000 were paid from 1984 through to 1994
- No detail has been provided for a breakdown of the recipients of these fees
- After 1994, could no longer isolate annual directors fees paid because financial statements did not provide a breakdown of general and administrative expenses
- Advances have been made to the wholly-owned subsidiaries over the years, with the most significant advances to Sawridge Enterprises Ltd., to fund operations and expansion
- These advances have been financed from primarily through advances from 352736 Alberta Ltd., starting in 1987
- Starting in 1991, allowances were recorded to reflect the estimated decline in collectability of these advances
- In addition, various other investment losses were incurred
- See Appendix C for a summary of the net losses incurred by Holdings over the years

- Significant interest has been paid on the advances from the 1985 Trust and 352736 Alberta Ltd.
- See Appendix D
- Upon adoption of the Accounting Standards for Private Enterprises, certain lands held by Sawridge Holdings Ltd. were restated at their fair market value as of January 1, 2009
- This restatement will be disclosed in the consolidated financial statements issued for the year ended December 31, 2010
- See Appendix F
- The lands held in Nisku, recorded on the financial statements as land held for development or sale at $619,243 as at December 31, 2008, have been appraised at $1,475,000
- This adjustment to report these properties at their estimated fair values results in a decrease to the reported deficit on the non-consolidated financial statements of $855,757

Sawridge Enterprises Ltd. ("Enterprises")

- This company pre-dates the settlement of the 1985 Trust
- Information obtained from non-consolidated financial statements prepared by Deloitte for 1982 to 2005
- Have the 2006 non-consolidated financial statements prepared for 2006, but the presentation changed – schedules by hotel property no longer provided
- Need non-consolidated financial statements for 2007 to 2009
- Shares of Enterprises were acquired by Holdings from the Old Trust, as noted above
- At that time, Enterprises owned the Slave Lake hotel, and the Jasper hotel had just completed construction and had a partial year of operations
- See Appendix E
- Note that Sawridge Hotels Inc. ("Hotels"), another wholly-owned subsidiary of Sawridge Holdings, owned and operated the Fort McMurray hotel from 1988 to 1991
- On November 1, 1991, Enterprises acquired the Fort McMurray hotel property from Hotels
- On Appendix E, there are additional tabs that show detailed operations for each of the 3 hotels, to December 31, 2005
- Each of the 3 hotels have been profitable, before depreciation and other expenses (see row 17 on first tab of Appendix E)
- Net losses have been experienced in most years, however, primarily due to depreciation and interest charged on advances from parent company – overall hotel operations appear to be generating positive cash flow to pay down long-term debt
- Bank financing has decreased from a high point of $11,545,505 in 1986, to being fully paid out as at December 31, 2006, with the exception of a small equipment loan
- During 2003 and 2004, a non-revolving loan of $8,000,000 was advanced to finance additions to the Fort McMurray property
- This loan was fully repaid during the 2006 year
- There is still a significant amount of advances payable to the parent company, Sawridge Holdings Ltd. - $35,788,106 as at December 31, 2005

- This company holds the three hotel properties, which had a recorded net book value as of December 31, 2006 of $16,493,005, plus some other assets with a net book value of $58,464
- Upon adoption of the Accounting Standards for Private Enterprises, the Jasper and Fort McMurray hotel properties, as well as the Fort McMurray staff housing property, were restated at their fair market value as of January 1, 2009
- This restatement will be disclosed in the consolidated financial statements issued for the year ended December 31, 2010
- See Appendix F
- The Slave Lake land, which is recorded on the financial statements at $60,000 as at December 31, 2008, as part of the Slave Lake hotel property, is estimated to have a value of $4,000,000, based on recent sales of similar properties
- The Fort McMurray staff housing was recorded on the financial statements at $1,157,729 as at December 31, 2008, however has been appraised at $4,400,000
- The Fort McMurray hotel was recorded on the financial statements at $8,533,726 as at December 31, 2008, however has been appraised at $42,800,000
- The Jasper hotel (building only) was recorded on the financial statements at $1,590,914 as at December 31, 2008, however has been appraised at $18,487,500
- These appraisal increases result in an increase to the retained earnings, which are currently reported at a deficit, of $58,345,131

Sawridge Trusts **Annual Distribution** **For the year ended December 31, 2004**	2004 Intervivos Trust	2004 Sawridge Trust	2003 Intervivos Trust	2003 Sawridge Trust
Interest from related parties (Holdings)	$600,000	$ -	669,000	$ -
Expenses:		WAIVED		WAIVED
Trustee fees	101,000	-	97,500	
Trustee Travel	19,266		-	
Consulting fees	73,132	-	112,907	
Legal Fees	7,526	-	6,821	
Management fees	246,378		47,302	
Accounting fees	5,933	-	-	
Administrative expenses	550	-	2,702	
	453,785	-	267,232	-
Amounts to be distributed	$146,215	$ -	$401,768	$ -

REVISED

#1600

* Amount due to Beneficiaries

ENTERED

SAWRIDGE BAND INTER VIVOS SETTLEMENT TRUST

TWINWF 3-Nov-05

0425

	3-Nov-05	
WALTER FELIX TWIN	2004 DISTRIBUTION	$146,215.00

TWN007946 - Honour Of All

[START: 4:09]

Narrator:

In 1964, oil was found on the Sawridge reserve. Soon afterward Walter became an elected Chief. He was 30 years old.

...

Narrator cont'd:

Taking a view decades ahead of its time, Walter was instrumental in the creation of the Lesser Slave Lake Indian Regional Council, an organization that would send shockwaves throughout the bureaucracies which governed the natives living in the nine bands which the Regional Council represents.

Frank Halcrow (Grand Chief, Treaty 8):

Back in 1971 when we Walter and myself approached district office and High Prairie and gave them notice that we were going to pursue their administration, we were going to pursue some of the administrative programs they were administering, they then said Indians were not capable of carrying out and administering programs of that magnitude. Keep in mind that we did our homework, we negotiated, we dealt with 10 bands at the time and got their support. We went back with an agreement and offered them employment if they wanted to for us under a new management regime.

Ray Dupres (Former Indian Affairs Official):

I suppose his determination has, Walter always had a very clear idea of where he was going and his determination to get there I suppose is renowned. People didn't, who tried to get in his way not being very comfortable about it.

...

Narrator:

It was Walter's [Twinn] dream to place as much control into his peoples lives as possible. This meant gaining access to their control of their money - indian money - out of the hands of bureaucrats and into their own hands.

Narrator cont'd:

At the time, in the early '70s, the federal government held the policy that no economic development could be undertaken by Indian bands off the reserve. After a long battle, Walter's vision prevailed and Sawridge opened the Slave Lake Sawridge Hotel in 1972 and the Tavern which opened in 1974.

Walter Twinn (Sawridge Indian Band):

We thought a good safe way of investing some of our band funds, it's a totally band project, and more or less so we could get the show on the road and get into other ventures, I think it's an economic problem all Indian reserves have and was our idea to get out of this situation. Maybe it's a little more glamorous than I'd say owning a grocery story, that could be one of the reasons, but there are some other reasons and it had to with the Band Council, it wasn't just my idea, all the people, anything we have done was Band Council approved.

Narrator:

Today, the success of the Sawridge Tavern and Hotel has opened the way for other bands to pursue off-reserve economic development at the same time that the Hotel was opening, the Sawridge band office was under construction. Over the years, it continued to expand. It is from this base that Walter continues to do his most important contributions for the Sawridge Band and the people of Slave Lake.

...

Ron Ewoniak (Deloitte Touche):

My first impression of Walter is, I mean anytime you meet anybody, particularly in my case I'm a consultant, you decide whether you can trust people. Walter was a guy that I, for whatever reason, was a guy that I could trust. Hotel financing is very very difficult for anybody, but one thing the native group and that was their first venture, it was basically impossible. So the only way they could fund the hotel was to get some financing and some grant money from another government agency called DRE, which is Department of Regional Expansion, it's a federal agency. After many, many months they agreed to give a certain amount of grant money and a certain amount of loan money to the Sawridge group, and even after they agreed to give money they still wouldn't fully trust Walter and the Sawridge group. Money, in this case was over a million bucks which was the cost of the Hotel, Walter nor anybody in the Sawridge groups could sign the cheques. DRE gave the money in effect to me in trust and I would write the cheques...

...

Narrator:

While Canada's economy was sinking in the early 80s, Walter capitalized on the growing tourist industry. He organized and constructed a hotel in Jasper, Alberta. Built over 400 miles from the reserve, this was the largest non-government funded project in North America ever undertaken by an Indian Band.

[END: 11:02]

Government of Canada / Gouvernement du Canada

Remaining inequities related to registration and membership

This fact sheet was designed in support of the Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship. The fact sheet provides information on the current situation or issues to ensure participants in the collaborative process can engage in well-informed and meaningful dialogues.

There are three other related fact sheets:

- Background on Indian registration
- Removal of the 1951 cut-off
- Getting out of the business of Indian registration

For a complete package of the fact sheets, please send an email to aadnc.fncitizenship-citoyennetepn.aandc@canada.ca.

On this page

Enfranchisement

What is enfranchisement?

Prior to the Bill C-31 amendments in 1985, enfranchisement resulted in an individual no longer being considered an Indian under federal government legislation. Indians who were enfranchised were removed from their band lists before September 4, 1951, or lost Indian status if enfranchised after September 4, 1951. When an individual was no longer considered an Indian, the individual lost all associated benefits that resulted from being on a band list (pre-1951) or a status Indian (post-1951). It also meant all their descendants were not considered Indian and could not obtain any related benefits. This impact is still felt by current generations.

Prior to Bill C-31, there were three ways Indian men, women and children could be removed from a band list or lose Indian status through enfranchisement.

1. From 1869 to 1985, an Indian woman marrying a non-Indian man would be enfranchised.
2. Previous *Indian Acts* (1876-1920) contained enfranchisement provisions where individuals were removed from their band lists if they:
    a. attained a university degree and joined the medical or legal profession
    b. attained any university degree and met the "fit" or "civilized" enfranchisement requirements
    c. became a priest or minister
3. From 1876 to 1985, individuals could submit an application to be enfranchised by showing they were "fit" for enfranchisement and entering Canadian society.

When a woman was enfranchised due to marriage to a non-Indian man, any children she already had, or would have, were considered non-Indians. When a man enfranchised, his wife and children would also be enfranchised.

Enfranchisement as described in items 1 and 2 above was considered involuntary, meaning that enfranchisement occurred without the consent of the persons concerned. Item 3 above was considered voluntary. This was done by application where Indian men or women had to prove they were "civilized" and able to take care of themselves without being dependent upon the government. This process included submitting a report and getting approval from their band. If all the requirements were met, they would receive a letter (called letters patent), that declared them enfranchised and no longer Indians.

Individuals who enfranchised received the same rights and benefits that existed for non-Indian Canadians. In addition to these rights and benefits, there were a number of benefits that were made available to an enfranchised individual and their family through previous versions of the *Indian Act*.

Land and financial compensation for enfranchised individuals

From 1869 to 1951, an enfranchised individual could receive land compensation by being provided a portion of the band's land to take care of. An enfranchised individual would have three to five years to prove he was able to be independent. If successful, the enfranchised individual would own the land. From 1951 to 1985, land continued to be available to enfranchised individuals by making compensation to the band.

Financial compensation would also be provided to enfranchised individuals. From 1876 to 1985, enfranchised individuals received a percentage (or per capita) payment of what their band would have received from the government. From 1951 to 1985, when a Treaty Indian enfranchised, they would receive an amount equal to twenty years of treaty payments.

Why is the issue of enfranchisement important to registration?

Enfranchisement had an impact on all subsequent generations of people. Regardless of whether an individual was voluntarily, or involuntarily enfranchised, subsequent generations could not appear on band lists or on the Indian Register as a status Indian.

Bill C-31 removed both voluntary and involuntary enfranchisement provisions. Individuals who enfranchised, along with their children, could be reinstated or became eligible for registration.

The 2017 amendments (Bill S-3) corrected sex-based inequities for women, and their descendants, when the woman involuntarily lost entitlement to registration due to marriage to a non-Indian man. Bill S-3 brings entitlement to descendants of women who married a non-Indian man in line with descendants of individuals who were never enfranchised. However, the descendants of individuals who were enfranchised for other reasons (both voluntary and involuntary) remain at a disadvantage in comparison. These remaining inequities within the *Indian Act* continue to have an impact.

It should be noted that the second-generation cut-off is distinct from the issue of enfranchisement and generally for individual born after April 17, 1985, the second-generation applies. Consult the fact sheet on Second-generation cut-off.

COURT FILE NO: 1103 14112

COURT: QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

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

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

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

---

QUESTIONING RE ASSET TRANSFER ORDER APPLICATION

OF

CATHERINE TWINN

S. Elzen-Hoskyn, Esq.	For the Applicants
Ms. J. Hutchison and P.J. Faulds, Esq.	For the Public Trustee
Ms. C. Osualdini	For Catherine Twinn
Ms. E. Sopko	For Sawridge First Nation
Susan Stelter	Court Reporter

Edmonton, Alberta

12 March, 2020

beginning of my awakening.

And then in 1989 Walter finally did gain sobriety. And from 1989 until 1997 he was sober. But when you are inside an addictive system you know there are rules. Don't talk, don't trust, don't feel. There is a lot of scapegoating. I was a scapegoat. There is a lot of blaming, there is a lot of dualism, it is black or white, this or that, and it is chaotic. It is chaotic.

So this period that we are talking about, you know, '82 transfer, '85, '86, that was a period for me personally that was high toxic stress. Also, I was a mother and we have four sons. And one son was born in October of '85, another son was born in January of '88, and the three sons then -- the three oldest sons experienced the alcoholism, the alcoholic family system. And I can say that there was a lot of people that wanted Walter drunk, and there is a lot of exploitation.

Q So what I am hearing, Ms. Twinn, is this was a disruptive time, there wasn't a process or a system to educate new Trustees, to tell you about what your role was or what the history was.

Was there a point in your role as an '85 Trustee when you came to understand why the '85 Trust had been created and what the history of that Trust was?

A Well, my understanding of the '85 Trust was Walter had

a number of concerns. And one of them was the potential high impact of Bill C-31 on the membership number. And Sawridge had experienced a very, very high rate of enfranchisement. One family had enfranchised and received a per capita share of about 1.2 million in those dollars.

Q Do you know what year that was, Ms. Twinn, or roughly?

A I am going to guess early '80s.

Q Okay. And was that 1.3 million per person?

A I think it was 1.2. I think that was the family, and I don't know how many family members there were.

Q Okay.

A And I know that in around that early '80s, that period, it wasn't atypical for a per capita distribution upon enfranchisement to be 3 to $400,000 per person.

Q And when we are talking about enfranchisement, Ms. Twinn, we are including women that lost their status under Section 12 sub --

A However you went out. There were many, many ways in which you could enfranchise, and there was a bit of a legal fiction created around voluntary and involuntary enfranchisement. For example, the male head of household could enfranchise on his application his entire family, which is involuntary in my mind. But -- and it is also a form of sex discrimination. But there were those kinds of examples.

Then there were examples where people voluntarily

enfranchised, and I have heard their personal stories and the stories of others. And there was a lot of duress involved.

And then there were the women who married non-Indians, but even in that instance there were women I knew, like Delia Opekokew, or Marie Marule, or Rita Okanee who married non-Indians but refused to complete the paperwork or provide proof of the marriage. So they retained their status.

Q And sorry to interrupt, Ms. Twinn, the women you just named, were they members of Sawridge First Nation?

A No.

Q Other nations?

A Other nations, other Indian women. So this whole notion of voluntary, involuntary, was -- but however you went out under the Indian Act there was a per capita payment. And Walter's concern was because there had been high rates of enfranchisement that -- and whatever terms the legislation took, there was a potential that all such persons and persons perhaps connected to them, their descendants, may gain an automatic right into membership.

And Walter was concerned because under the Indian Act, for example, 50 percent plus 1 could surrender the land. And he was worried about the dissipation of assets that had been built up from a lot of hard work on his part. And he had made a lot of sacrifices, a

lot of sacrifices. And some probably that, you know, later in life, after sobriety, he may have regretted, because children typically pay the highest price, right, if the parent is not there. And so he wanted to protect what had been built up from dissipation.

And the notable, one notable change between the '82 and '85 Trust was '82 Trustees were automatically members of council, '85 Trustees were not. And so it was a protection to protect assets against dissipation. If people who were not connected or committed were given legal rights, that wouldn't -- they would not be able to liquidate. And it wasn't just external predation concerns, it was also internal disaffection concerns, because as a community disintegrates and the bonds that hold community together disintegrate, people can turn on each other, especially if the trauma that people that have gone through is not healed.

And after Walter sobered up one of the things that he used to say to me was why is it everyone that went to residential school were either dead, drunk, or in jail. And in the '80s I did not have answers to that at all, but I began my journey to learn. And there was also, I guess I call it an equity concern vis-a-vis these '85 assets that whatever had been built prior to April 17th, 1985 would be preserved to benefit those persons and their descendants.

And the formulation that was used in the Trustee

was taken out of the Indian Act and particularized. But that was also the formulation that determined who the members were under the '82 Trust.

Q Ms. Twinn, I'm just going to interject with a question. So the payments that you are talking about on enfranchisement, was it your understanding that those payments came out of capital and revenue funds?

A Correct, that is my understanding.

Q And capital/revenue funds in part were used to settle the Trusts that we are talking about as well?

A Correct. But I might add that not all of those assets came from capital and revenue account monies.

Q Okay.

A Ron Ewoniak --

Q And we are talking '85?

A 85 Trust. I'm talking about the '85 Trust assets, I am talking about the Sawridge Hotel in Slave Lake.

Q Okay.

A I am talking about a video that I did to honour Walter on his 20th anniversary as Chief in 1986, which is a public document.

Q I'm going to interrupt you for two seconds.

MS. OSUALDINI: Can I clarify your earlier question, were you talking about settling the Trust or being transferred into the Trust?

MS. HUTCHISON: The '86 Trust I believe it was settled into.

Q I believe so.
A Yeah, because I remember making a comment to him about going in to the fire. And he said I will be a long distance from that.
Q Okay. And my understanding from reading your Affidavit is that Mr. Ewoniak is willing to share information about these matters?
A He shared with me.
Q Has he indicated if he has maintained any of his own records about these matters?
A I did not ask him if he personally had records, but I would think that these large professional entities like Deloitte, and Davies Ward Phillips & Vineberg and others would have retained records which would be available and helpful.
Q Okay. So we were chatting about your understanding of the purpose of the '85 Trust?
A Yeah.
Q Is there a time frame that you can sort of pinpoint about when you became aware of those purposes?
A Well, I talked about one purpose.
Q M-hm.
A I didn't talk about the other purpose.
Q Okay, please continue.
A So the first purpose being prevention of dissipation and securing some equity as between people who had left and taken out per capita shares and those who had

stayed behind.

Q I am going to interject for just a second. When you say securing some equities, do you mean equal treatment, or are you referring to equity as in capital? I just want to understand your meaning and term.

A Well, to put it in very simple terms, the way I understand it. If you take -- if you enfranchise and take a per capita share, and then parliament legislates you back in, you have taken a share from the per capita that the members who stay did not receive.

Q Okay.

A Therefore, the '85 Trust helps balance equities as between those who took and returned and those who stayed.

Q Yes.

A And were deprived of that per capita.

Q Okay, thank you. That is very helpful, Ms. Twinn. You said that was the second purpose?

A I think that you could call that a second purpose. But the third purpose, and I said there is a notable difference between '82 and '85 in that the Trustees in '85 are not automatically members of council. And again, Walter had tremendous vision and foresight. And he understood, decades before the Harvard project on any Indian Economic Development understood, the need to separate political from economic decision-makers. And

WatersTrusts 5.III

Waters' Law of Trusts in Canada, 4th Ed.

5 — The Three Certainties
Editor: Donovan W.M. Waters, Contributing Editors: Mark R. Gillen and Lionel D. Smith

5.III — Certainty of Subject-Matter

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For a trust to be validly created, it must also be possible to identify clearly the property which is to be subject to the trust. [1] Moreover, even if the trust property is thus clearly defined, the shares in that property which the beneficiaries are each to take must also be clearly defined. Certainty of subject-matter as a term refers to both of these required certainties.

If the language employed provides clear evidence of the intention to create a trust, no trust can yet come into existence if it is impossible to determine what the trust property is. This is so whether the settlor purports to transfer property or declares himself trustee of his property. "The bulk of my residuary estate" is uncertain; nothing can therefore pass to the trustees or be held by the settlor as trustee. [2] But, as Cameron J.A. once put it, "this must be an elementary consideration, and scarcely requires authority to support it." [3] Trusts of such a kind are normally attempted to be grafted upon gifts already made—for example, "$50,000 to my wife, A, the bulk of which I entrust her to appoint between X, Y, and Z"—and the result is that, the trust having failed, the donee (A) takes the whole property.

A. — Relationship Between Certainty of Intention and Certainty of Subject-matter

More difficult questions arise when the settlor's indecisiveness as to the trust property suggests that he did not have in mind a trust obligation at all. He may have used language which, though precatory, appears *prima facie* to show trust intention, and then have left the description of the property of the alleged trust so vague that it reveals his true intention to have been to make an absolute gift with an attached moral obligation or, occasionally, to confer a conditional gift.

Sometimes there is an obvious interaction between the language communicating the intention and the description of the trust property. [4] In *Perry v. Perry* [5] the testator divided his property between his widow and his sons, and continued, "I wish and do want that my only daughter, Edith Florence, shall inherit from her mother a share equal to that of the boys named above, and the balance to be divided in equal shares between all our children then living." The language was precatory, but questionable as to the nature of the obligation it was intending to impose. Whatever that language meant, however, the subject-matter was "inherit from her mother a share"; did this mean a share of the mother's own property or a share of the property devised to her by the testator? And, if that was uncertain, what "balance" was to be divided? Language and property description interacted, therefore, in determining the intent of the testator. [6] The property description being uncertain, this alone would render the trust void.

B. — Residuary Estates

An undivided interest in certain property satisfies the test, [7] as does a chose in action or an interest in a chose in action. A specific share in residuary estate is also sufficiently definite. This is demonstrably so when the trust is testamentary, because the trust, like the will, takes effect from death, and, though the executors have a period thereafter during which they may wind up the estate and ultimately are able to assess the value of the residue, nevertheless the share of residue is taken to be known at the date of death. [8] What is the position, however, when the settlor creates an *inter vivos* trust, under which his beneficiaries are to have interests in his net estate? Has the trust property to be certain both when the trust is set up and when the trust terms

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Waters' Law of Trusts in Canada, 4th Ed.

10 — The Resulting Trust
Editor: Donovan W.M. Waters, Contributing Editors: Mark R. Gillen and Lionel D. Smith

10.I — The Term "Resulting Trust"

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Broadly speaking, a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party is under an obligation to return it to the original title owner, or to the person who paid the purchase money for it. [1] This obligation, which is the resulting trust, may arise in situations where the property holder did not give any value for the property that she acquired; it also arises where the property holder is a trustee, who finds that no express beneficial interest has been validly created in respect of some or all of the benefit of the property.

The courts and the various legislatures of the common law world have sometimes used interchangeably the terms "implied trust", "resulting trust" and "constructive trust", and the terminology is therefore somewhat confusing. [2] But essentially, while express trusts are those which come into existence because settlors have expressed their intention to that effect, constructive trusts arise not because of anyone's expression of trust intent but because B ought to surrender property to A and this is the machinery the court employs in order to get B to do that. In between the express trust, a product of the settlor's intention, and the constructive trust, a machinery imposed by law, are the implied trust and the resulting trust. [3]

The term "implied trust" is commonly used for two situations. The first occurs where the intention to create a trust is not clearly expressed, but has to be discovered from indirect and ambiguous language. This is all that distinguishes such an implied trust from the express trust. A second common use is where one person has gratuitously transferred his property to another, or paid for property and had the property put into another's name. The intention of the transferor or purchaser is implied to be that the transferee is to hold the property on trust for the transferor or purchaser. The implication arises out of the fact that Equity assumes bargains, not gifts, [4] and requires the donee to prove that a gift was intended.

The term "resulting trust", on the other hand, does not allude in any way to intention; it describes what happens to the property in question. It results or goes back to the person who, for reasons we shall examine, is entitled to call for the property. [5] For example, because Equity does not assume gifts, the transferee holds title for the transferor or the one who provided the purchase money. In other words, in this "implied trust" situation the beneficial interest results, or goes back, to the transferor or purchaser. It might well be argued that rather than arising out of implied intent, this resulting trust is imposed by law, because of the rule of law that Equity does not assume gifts. This line of thinking suggests the conclusion that this resulting trust, and indeed all resulting trusts, arise by operation of law. [6] Such an explanation can clearly be given of the resulting trust which arises when, for any reason, the objects of an express trust fail. Since the trustee cannot take beneficially, the property results to the settlor or his estate. This outcome could also be said to be the implied intention of the settlor, and sometimes the courts have said as much, but commonly this is regarded as a resulting back by operation of law. [7] The *Statute of Frauds* explicitly envisages the resulting trust, like the constructive trust, as one which arises by operation of law, since it exempts both categories from writing requirements that apply to intentionally created trusts of land.

Distinguishing the resulting trust from the constructive trust is also not easy because the lines have been blurred. Sometimes the same facts allow both a constructive trust theory and a resulting trust theory to be deployed. A good example is *Denny v. Lithgow*

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Waters' Law of Trusts in Canada, 4th Ed.

11 — The Constructive Trust
Editor: Donovan W.M. Waters, Contributing Editors: Mark R. Gillen and Lionel D. Smith

11.I — Nature of the Trust

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An express trust arises out of the intention of the settlor; a constructive trust comes into existence, regardless of any party's intent, when the law imposes upon a party an obligation to hold specific property for the benefit of another. The person obligated becomes by force of law a constructive trustee towards the person to whom he owes performance of the obligation.

The terms "implied", "resulting" and "constructive" trusts have caused a good deal of confusion in the law of trusts, but, if one keeps in mind that there can be only two sources of trust obligation—the intention of a property owner to create a trust, or the imposition by the law of a trust obligation [1] upon persons—then much of the confusion is alleviated. "Implied" is sometimes used to mean implied intention; occasionally, to mean a trust implied or imposed by law. "Resulting" describes what happens to the property subject to a trust; it goes back to the original owner or the person with the best claim to it. A "resulting" trust sometimes arises from intention, at other times from imposition of law. A constructive trust is construed or imposed by law; it never means anything else. [2]

Let us carry this distinction between intent and imposition of law a little further. The settlor of an express trust will make it clear that particular property is to be enjoyed by certain enumerated beneficiaries and, in the majority of cases, he will name the trustees. His trust will set out the quantum of beneficial interests and when they are to arise, and he will describe the duties, such as investment and the accumulation of infants' income, which he wishes his trustees to perform. Equity will add further duties, requiring the trustee to act as a reasonable and prudent man of business, and, unless he has the settlor's or the beneficiaries' consent, [3] not to allow himself to act in any situation where his personal interest and his duties to the beneficiaries are in conflict. The trust will also confer powers upon the trustee, such as to carry out appropriate management tasks in connection with the property, or to encroach upon capital in favour of a widow whose interest is a life tenancy. The motive of the settlor in setting up the trust may be to provide for a widow, a minor, or an incapacitated person, or this may simply be the best way of passing his property to the next generation with minimum tax loss, but whatever purpose the settlor had in mind, his motive or purpose is irrelevant; the only thing which has legal significance is his intention, and that, as we have seen, will determine trust property, beneficiaries, trustees, their duties and powers. Only where the trust is silent, and evidence of intention is therefore lacking, does equity or statute intervene to specify a duty or power which is otherwise lacking, and is necessary to the operation of the trust.

It is worth reminding oneself in the case of an express trust not only that motive or purpose in creating the trust is irrelevant, but that fundamental significance attaches to the intention of the settlor. On the other hand, if it is the court which is imposing a trust upon parties, regardless of anyone's intention, it is evident that we are faced with a totally new phenomenon. We are therefore bound to ask basic questions. For what reasons does the court impose a trust upon a party who has no such intentions, and what factors determine what is the trust property, and who are to be the beneficiaries? Can we speak of the duties and powers of such trustees?

Though this is obviously a different kind of trust, both in function and source, from the trust arising out of intention, no accepted doctrine of constructive trust has yet emerged in England. And, since English case authority has traditionally been followed in Canada, much of the uncertainty in the meaning, the function and the scope of the imposed trust has been brought to Canada.

The milestone majority decision of the Supreme Court of Canada in *Becker v. Pettkus* in 1980,[4] which recognized that the constructive trust could be a remedy for unjust enrichment, took the law in Canada beyond the position in England. Subsequent cases in the Supreme Court have further developed the concept. In *International Corona Resources Ltd. v. Lac Minerals Ltd.*,[5] a constructive trust was imposed to take away the gain made through a breach of confidence by one of two parties to a commercial negotiation, even though a majority of the Court held that there was no fiduciary relationship between them. In *Rawluk v. Rawluk*,[6] a majority of the Court held that a constructive trust could be imposed to regulate the property rights of a married couple even though there was applicable legislation which regulated those rights and generated a different outcome. Similarly, in *Peter v. Beblow*,[7] it was held that the trust can be imposed between unmarried partners, even though the applicable legislative regime excluded them. In *Soulos v. Korkontzilas*,[8] the Court recognized that some constructive trusts arise to take away wrongful gains, even in the absence of what could properly be called an unjust enrichment. It is impossible to understand these developments without some understanding of what came before.

A. — Historical Background

Traditionally in much of the common law world, the term "constructive trust" has been pressed into service for several purposes, connected with each other not by any common thread concerning the justification for the trust, but only insofar as the end product is a trust imposed by law. The nature of a constructive trust has been the subject-matter of a good deal of academic debate.[9] In the United States, since the early twentieth century, the matter has been approached by treating the constructive trust rather like an order for specific performance: it is a discretionary remedy that the court may impose if it sees fit. Lawyers in that jurisdiction are wont to say that the constructive trust is "just a remedy", and to dismiss as irrelevant the academic debate in the Commonwealth. But English courts, and Australian ones, too, have largely resisted the idea that the imposition of constructive trust is a matter for the discretion of the court. They view it more like a resulting trust: if certain facts are established, then the trust arises by operation of law. Canada, in this as in many things, falls somewhere between the U.S. and the English approaches. In some contexts, Canadian courts have approached constructive trusts as they might approach specific performance; in other contexts, constructive trusts are understood to arise by law out of the facts.

The first use of the term "constructive trust" occurred in the seventeenth century.[10] Then and thereafter English equity courts were clear that, if a person was subject to an obligation to hold specific property for the benefit of another, whatever the source of that obligation, his position was comparable to that of a person appointed to administer a settlement or testamentary provision for successive lives. Though he had not been appointed a trustee, the duty of such an obligated person to recognize the interests of another put him in a similar position in terms of what could be expected of him. The equity courts therefore "construed" his position as that of a trustee with regard to the property in question. As for what those obligations were which led to the imposition of the trustee status, they reflected the whole spectrum of remedies that were available in the equity jurisdiction. Indeed, we might look at this a little closer.

The work of the old courts of Equity is summed up in the seventeenth century rhyme, "Three things are to be helpt in Conscience; Fraud, Accident, and things of Confidence." Fraud, mistake, and fiduciary relationships are the terms we would use today; fiduciary relationships were the concern of the law of trusts, mistake was largely, but not always,[11] redressed with the remedies of rescission, rectification and cancellation, and the impropriety of fraud was recognized by declaring the fraudulent acquirer of property a trustee for the person deprived, whether that person was the original owner or a third party intended by that owner as the recipient. Fraudulent gain—reason enough for Equity's intervention—was thus prevented when Equity courts made the wrong-doing party restore the property in question to the person who in all conscience was best entitled to it. But "fraud" was a broad term in the hands of Equity lawyers, and, as seen by Equity, it covered a multitude of sins. There is actual fraud, which the common law remedied with the action of deceit, and there is "constructive fraud", embracing undue influence, abuse of confidence, unconscionable bargains, all remedied by rescission, and indeed any "breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience."[12] Moreover, as a matter of policy the courts would not define what was fraud, because that might cramp them in the future in dealing with new forms of the defrauder's art. And there are some cases that seem to have nothing to do with fraud even in a very wide sense. The vendor of

.[8] An infant and his mother claimed that certain land, bought by the defendant, in his own name, had in fact been bought on behalf of D, father and husband respectively of the plaintiffs. D had paid part of the price, and for many years prior to his death had had possession of the land. Spragge V.C. found that the defendant had indeed bought the land on behalf of D. This meant that the defendant had acted in the purchase as an agent and, as an agent withholding property from his principal, he became a constructive trustee for D's estate. Such a constructive trust could arise even had the agent used his own money, because it arises out of a fiduciary obligation. In so far, however, as the defendant took in his own name property which had partly been paid for by another, he was a resulting trustee for D's estate.[9] Acquisition of property with another person's purchase money, conversely, can create a resulting trust without any pre-existing fiduciary obligation.

There is even more overlap between resulting trusts and those constructive trusts which arise to reverse unjust enrichment. The reason is that both kinds of trusts typically perform the same function: they return property to the person from whom it came. In *Fulton v. Gunn* ,[10] for example, an interest in land was acquired by a son using purchase money that came from his mother. It was held that this created a resulting trust for the benefit of the mother; and it was also held in the alternative that the son had been unjustly enriched at the expense of the mother, and so held the property on constructive trust for her.[11] To the extent that resulting trusts are seen as arising by operation of law, they are really just a sub-species of constructive trust.[12] The distinction between resulting and constructive trusts is perhaps best put in this way—while constructive trusts have nothing to do with intention, express or implied, resulting trusts can be explained either on the basis of intention or imposition of law. It is important to note that no court has ever suggested that the court has discretion as to whether a resulting trust arises or not. If and to the extent that resulting trusts can be explained as arising by operation of law, and moreover if they arise so as to reverse what would otherwise be an unjust enrichment, then there is at least a lack of fit with the recent evolution in the case law suggesting that *constructive* trusts that arise to reverse unjust enrichment are subject to the discretion of the court.[13]

Footnotes

1 *Pecore v. Pecore,* 2007 SCC 17, 2007 CarswellOnt 2752, 2007 CarswellOnt 2753, [2007] 1 S.C.R. 795¶ 20 (S.C.C.).

2 E.g., *Gissing v. Gissing* (1970), [1971] A.C. 886, [1970] 2 All E.R. 780 (U.K. H.L.) One explanation for this in the English context is that while the *Statute of Frauds 1677*, s. 8, referred to trusts that "arise or result by the Implication or Construction of Law", apparently classifying resulting trusts alongside constructive trusts, this was replaced in England by the *Law of Property Act 1925*, s. 53(2), which refers to "resulting, implied or constructive trusts". This not only separated resulting trusts from constructive trusts, but suggested that implied trusts were an independent third category. See *infra*, Part II G; P. Matthews, "The Words Which Are Not There: A Partial History of Constructive Trusts" in Mitchell (ed.), *Constructive and Resulting Trusts* (2010) 3 at 11-17.

3 Like a constructive trust, a resulting trust in no way depends upon the knowledge of the trustee as to the existence of the trust, and it can arise when a person has become a trustee as a consequence of error: *Re Vinogradoff,* [1935] W.N. 68; *Tattersfield v. Leo Tattersfield Ltd.* (1981), 7 N.Z. Recent Law 79.

4 This old maxim probably arose from the desire that the person alleging he took as donee should have to prove that he was not an agent of the transferor or purchaser. However, the maxim may have been a seventeenth century rationalization of the resulting trust that Courts of Equity inferred by analogy with the then well-established doctrine of resulting use. See, *infra*, Part II C.

5 The word "results" in this sense derives from the Latin *resaltare*, "to jump back": Barber (ed.), *Canadian Oxford Dictionary*, 2nd ed. (2004), s.v. "result."

6 For a thorough and significant argument along these lines, see *Chambers*, a monograph on resulting trusts; for a contrary view, W. Swadling, "A New Role for Resulting Trusts?" (1996) 16 Legal Studies 110. Swadling's argument was mentioned with approval by Lords Goff and Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council,* [1996] A.C. 669 (U.K. H.L.). It is true the whole operation of the presumptions of resulting trust and of advancement are based on a search for the intent of the transferor or purchaser; but the dispute is about whether one is seeking an intention to create a trust, or whether a resulting trust arises by operation of law in the *absence* of an intention to make a gift.

7 In *Goodfellow v. Robertson* (1871), 18 Gr. 572 (Ont. Ch.), A bought land with money of his own, and money received on behalf of R, who was insane. The Court held that because a resulting trust arose by operation of law, no evidence as to any intention of R was necessary.

8 *Denny v. Lithgow,* 1869 CarswellOnt 138, 16 Gr. 619 (Ont. Ch.).

9 The plaintiffs were ordered to reimburse the defendant for the moneys he had put into the purchase of the property, and for the taxes on the property which he had paid.

10 *Fulton v. Gunn,* 2008 CarswellBC 1808, 296 D.L.R. (4th) 1, 88 B.C.L.R. (4th) 42 (B.C. S.C.). See also *Rupar v. Rupar,* 1964 CarswellBC 128, 46 D.L.R. (2d) 553, 49 W.W.R. 226 (B.C. S.C.); *Rascal Trucking Ltd. v. Nishi,* 2011 BCCA 348, 2011 CarswellBC 2154 (B.C. C.A.).

11 The funds that had been advanced were held by the mother as the trustee of a pre-existing express trust, the Sally Gilson Trust, both she and her son being beneficiaries of that express trust. The judge actually stated that the son held the property on resulting or constructive trust *for* the Sally Gilson Trust. This is legally impossible, as was the suggestion in the judgment that the original intention was that the Sally Gilson Trust should itself be the registered holder of the estate that was acquired with the funds. A trust, being a relationship with respect to property, cannot itself hold property. The holding can be understood as a holding that the son held the estate on resulting or constructive trust for the benefit of his mother, but that she herself held that interest on the trusts of the Sally Gilson Trust.

12 This is one implication of the argument in *Chambers*. *Cf. Taylor v. Taylor* (1879), *(sub nom. Taylor v. Wallbridge),* 2 S.C.R. 616 (S.C.C.) at 680, *per* Henry J.: where A and B purchase in the name of B, a constructive trust arises in favour of A.

13 Constructive trusts are the subject of the next chapter, and the question of discretion is particularly addressed in Part I E 4.

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II. THE RESULTING TRUST SITUATIONS

These situations can be divided into two groups. First, if property is purchased by A, and conveyance or transfer is taken in the name of B, or in the names of both A and B, B becomes a resulting trustee of his interest for A. Similarly, if A voluntarily transfers property into the name of B or the names of himself and B, B becomes a resulting trustee of his interest. The second group deals with the situation consequent on the failure of an express trust. If a settlor has failed to dispose of the whole beneficial interest, either because he has created only limited interests in the trust property or the trust objects do not exhaust the trust fund, the trustees hold on resulting trust for the settlor or his estate. They cannot, of course, take beneficially, unless the trust terms make them beneficiaries. Similarly, if an express trust fails for uncertainty or failure of the trust objects, mistake, fraud, duress or undue influence, or contravention of the perpetuity rules, the trustees again hold on resulting trust for the settlor or his estate.[14] If only a particular interest within an express trust fails for some such reason, that interest is held on resulting trust.

In *White v. Vandervell Trustees Ltd.*,[15] Megarry J. distinguished the two groups as "presumed resulting trusts" and "automatic resulting trusts." His reasoning was that in the first group, the question is one of intention – what did the transferor intend when he gratuitously transferred property to another? He called these presumed resulting trusts because, he reasoned, it is presumed that the transferor intended the transferee to hold the property on trust for the transferor or, perhaps more precisely, it is presumed that he did *not* intend the transferee to enjoy the benefit of the

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[12] Constructive trusts are the subject of the next chapter, and the question of discretion is particularly addressed in Part I E 4.

[13] Illegality of trust objects, or a voluntary transfer for illegal purposes, will not prevent a resulting trust arising, but the Courts may not enforce it. See, *infra*, Part II C 5 b.

[14] [1974] 1 All E.R. 47, reversed on appeal on other grounds, [1974] 1 Ch. 269, (sub nom. *Re Vandervell's Trust (No. 2)*) [1974] 3 All E.R. 205 (Eng. C.A.) at 308 [Ch.]).

property.[16] In the second group of cases, there is an express trust already in existence, or at least an attempt to create one; those who receive the property clearly do so as trustees. The problem then arises that the settlor or testator has failed to dispose, in favour of others, of the entire beneficial interest in the trust property. Megarry J reasoned that in such a case, there is no question about determining the intention of the settlor (and therefore no concern with presumptions). The transferee (the trustee), he said, "automatically" holds on resulting trust for the settlor or testator that part of the beneficial interest of which he has failed to dispose. This distinction was, for some time, a matter of orthodoxy in the U.K.[17] Another view is that all resulting trusts arise from a single principle: when the transferor did not intend the transferee to have the benefit, a resulting trust arises. The difference between the two categories is merely that this absence of beneficial intention is obvious in the case of a failed trust while, in the first category of case, it may not be obvious at all, and the law uses presumptions to assist in the inquiry. On this view, the distinction between automatic and presumed resulting trusts is potentially misleading.

It is typical, however, for the purposes of exposition, to treat the two categories of cases separately. The presumptions, of resulting trust and of advancement, play a crucial role in the first category, but not in the second.

A. Essential Characteristics of Resulting Trusts

An essential characteristic of all resulting trust situations is that the trustee has title to the property in question. The claimant to the property seeks to have that title vested in himself. The claim must fail if title cannot be shown to be in the alleged trustee. In *Wilson v. Owens*[18] the plaintiff bought land from his solicitor, but later required the solicitor to strike out the plaintiff's name as grantee and enter on the deed the name of the plaintiff's sister. Possession throughout had remained in the solicitor, but upon this amendment of the deed, the defendant, the sister, went into possession, where she remained. The plaintiff later sought to recover the land, asserting that the defendant was a resulting trustee. During the action it was established that the striking out of the plaintiff's name from the deed, and the insertion of the defendant's name were insufficient to divest the plaintiff of the legal estate. Consequently, what should have been brought was not a resulting trust action, but a common law bill of ejectment to obtain possession of the land.

However, the resulting trust does not require the trustee to have a *legal* estate or title. In the great majority of cases what the trustee has, in fact, is the legal title, but the principle of the resulting trust operates even if the title to the property is

equitable.[19] If, for example, A v under a trust while the life tenan living, the assignee will become unless it is proved that A intende

A second essential characte trust beneficiary) must have "pr the person bound by the trust," a This means that either the claima the alleged resulting trustee, or purchase price when the property the alleged resulting trustee's nai proved fatal to the plaintiff's cla claiming from the defendant cc claim, he asserted that the defe which was owned by the defenc been owned, legally or equitably

Moreover, because a resulti requires a vendor to transfer to E otherwise having nothing to do v a municipal authority under its s improvements, assessing the loc frontages on the highway. After and the municipality proposed tc taxes to the whole body of mun that the excess moneys were he that those who had paid were e this kind of situation which asso

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[16] The difference is crucial in a case like *Goodfellow v. Robertson*, *supra*, note 7, where the on provided the purchase money lacked legal capacity and so could not meaningfully have had a intention to create a trust.

[17] *Underhill and Hayton* state, at para. 22.14, that resulting trusts were "formerly" understood into these categories, taking the view that *Westdeutsche Landesbank Girozentrale v. Islington Borough Council*, [1996] A.C. 669 (U.K. H.L.) presents a more unified view of resulting trusts also paras. 23.2-23.4 and *Chambers*, at chapter 2.

[18] (1878), 26 Gr. 27 (Ont. Ch.).

[19] *Pecore v. Pecore*, 2007 SCC 17, 20(795 (S.C.C.) at para. 20; see also *Ca*

[20] (1915), 22 D.L.R. 150 (B.C. S.C.) at

[21] It is not enough to activate this prin jointly liable on the mortgage; if all owner: *Carlton v. Goodman*, [2002]

[22] In *British Columbia Teachers' Cre* thief stole money from the plaintiff a $1,000 of his own, and title was tak held on a resulting trust as to a share claim in relation to his contribution,

[23] [1944] O.R. 385, [1944] 3 D.L.R. 31 1 W.W.R. 520 (Sask. C.A.).

[24] Here the resulting trust merely expl court order was that the subscribers trust arises by operation of law to transfers of wealth. Constructive tru agent makes a secret profit, and mu giving up. Other constructive trusts Trusts in Canada" (1999) 37 Alta. I 38 Alta. L. Rev. 378; and chapter 11

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An express trust arises out of the intention of the settlor; a constructive trust comes into existence, regardless of any party's intent, when the law imposes upon a party an obligation to hold specific property for the benefit of another. The person obligated becomes by force of law a constructive trustee towards the person to whom he owes performance of the obligation.

The terms "implied", "resulting" and "constructive" trusts have caused a good deal of confusion in the law of trusts, but, if one keeps in mind that there can be only two sources of trust obligation—the intention of a property owner to create a trust, or the imposition by the law of a trust obligation [1] upon persons—then much of the confusion is alleviated. "Implied" is sometimes used to mean implied intention; occasionally, to mean a trust implied or imposed by law. "Resulting" describes what happens to the property subject to a trust; it goes back to the original owner or the person with the best claim to it. A "resulting" trust sometimes arises from intention, at other times from imposition of law. A constructive trust is construed or imposed by law; it never means anything else. [2]

Let us carry this distinction between intent and imposition of law a little further. The settlor of an express trust will make it clear that particular property is to be enjoyed by certain enumerated beneficiaries and, in the majority of cases, he will name the trustees. His trust will set out the quantum of beneficial interests and when they are to arise, and he will describe the duties, such as investment and the accumulation of infants' income, which he wishes his trustees to perform. Equity will add further duties, requiring the trustee to act as a reasonable and prudent man of business, and, unless he has the settlor's or the beneficiaries' consent, [3] not to allow himself to act in any situation where his personal interest and his duties to the beneficiaries are in conflict. The trust will also confer powers upon the trustee, such as to carry out appropriate management tasks in connection with the property, or to encroach upon capital in favour of a widow whose interest is a life tenancy. The motive of the settlor in setting up the trust may be to provide for a widow, a minor, or an incapacitated person, or this may simply be the best way of passing his property to the next generation with minimum tax loss, but whatever purpose the settlor had in mind, his motive or purpose is irrelevant; the only thing which has legal significance is his intention, and that, as we have seen, will determine trust property, beneficiaries, trustees, their duties and powers. Only where the trust is silent, and evidence of intention is therefore lacking, does equity or statute intervene to specify a duty or power which is otherwise lacking, and is necessary to the operation of the trust.

It is worth reminding oneself in the case of an express trust not only that motive or purpose in creating the trust is irrelevant, but that fundamental significance attaches to the intention of the settlor. On the other hand, if it is the court which is imposing a trust upon parties, regardless of anyone's intention, it is evident that we are faced with a totally new phenomenon. We are therefore bound to ask basic questions. For what reasons does the court impose a trust upon a party who has no such intentions, and what factors determine what is the trust property, and who are to be the beneficiaries? Can we speak of the duties and powers of such trustees?

Though this is obviously a different kind of trust, both in function and source, from the trust arising out of intention, no accepted doctrine of constructive trust has yet emerged in England. And, since English case authority has traditionally been followed in Canada, much of the uncertainty in the meaning, the function and the scope of the imposed trust has been brought to Canada.

The milestone majority decision of the Supreme Court of Canada in *Becker v. Pettkus* in 1980,[4] which recognized that the constructive trust could be a remedy for unjust enrichment, took the law in Canada beyond the position in England. Subsequent cases in the Supreme Court have further developed the concept. In *International Corona Resources Ltd. v. Lac Minerals Ltd.*,[5] a constructive trust was imposed to take away the gain made through a breach of confidence by one of two parties to a commercial negotiation, even though a majority of the Court held that there was no fiduciary relationship between them. In *Rawluk v. Rawluk*,[6] a majority of the Court held that a constructive trust could be imposed to regulate the property rights of a married couple even though there was applicable legislation which regulated those rights and generated a different outcome. Similarly, in *Peter v. Beblow*,[7] it was held that the trust can be imposed between unmarried partners, even though the applicable legislative regime excluded them. In *Soulos v. Korkontzilas*,[8] the Court recognized that some constructive trusts arise to take away wrongful gains, even in the absence of what could properly be called an unjust enrichment. It is impossible to understand these developments without some understanding of what came before.

A. — Historical Background

Traditionally in much of the common law world, the term "constructive trust" has been pressed into service for several purposes, connected with each other not by any common thread concerning the justification for the trust, but only insofar as the end product is a trust imposed by law. The nature of a constructive trust has been the subject-matter of a good deal of academic debate.[9] In the United States, since the early twentieth century, the matter has been approached by treating the constructive trust rather like an order for specific performance: it is a discretionary remedy that the court may impose if it sees fit. Lawyers in that jurisdiction are wont to say that the constructive trust is "just a remedy", and to dismiss as irrelevant the academic debate in the Commonwealth. But English courts, and Australian ones, too, have largely resisted the idea that the imposition of constructive trust is a matter for the discretion of the court. They view it more like a resulting trust: if certain facts are established, then the trust arises by operation of law. Canada, in this as in many things, falls somewhere between the U.S. and the English approaches. In some contexts, Canadian courts have approached constructive trusts as they might approach specific performance; in other contexts, constructive trusts are understood to arise by law out of the facts.

The first use of the term "constructive trust" occurred in the seventeenth century.[10] Then and thereafter English equity courts were clear that, if a person was subject to an obligation to hold specific property for the benefit of another, whatever the source of that obligation, his position was comparable to that of a person appointed to administer a settlement or testamentary provision for successive lives. Though he had not been appointed a trustee, the duty of such an obligated person to recognize the interests of another put him in a similar position in terms of what could be expected of him. The equity courts therefore "construed" his position as that of a trustee with regard to the property in question. As for what those obligations were which led to the imposition of the trustee status, they reflected the whole spectrum of remedies that were available in the equity jurisdiction. Indeed, we might look at this a little closer.

The work of the old courts of Equity is summed up in the seventeenth century rhyme, "Three things are to be helpt in Conscience; Fraud, Accident, and things of Confidence." Fraud, mistake, and fiduciary relationships are the terms we would use today; fiduciary relationships were the concern of the law of trusts, mistake was largely, but not always,[11] redressed with the remedies of rescission, rectification and cancellation, and the impropriety of fraud was recognized by declaring the fraudulent acquirer of property a trustee for the person deprived, whether that person was the original owner or a third party intended by that owner as the recipient. Fraudulent gain—reason enough for Equity's intervention—was thus prevented when Equity courts made the wrong-doing party restore the property in question to the person who in all conscience was best entitled to it. But "fraud" was a broad term in the hands of Equity lawyers, and, as seen by Equity, it covered a multitude of sins. There is actual fraud, which the common law remedied with the action of deceit, and there is "constructive fraud", embracing undue influence, abuse of confidence, unconscionable bargains, all remedied by rescission, and indeed any "breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience."[12] Moreover, as a matter of policy the courts would not define what was fraud, because that might cramp them in the future in dealing with new forms of the defrauder's art. And there are some cases that seem to have nothing to do with fraud even in a very wide sense. The vendor of

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21 — Dispositive Powers and Discretions of Trustees
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21.III — Power of Advancement

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1

An advancement is the payment to a beneficiary of part of the capital of a gift before the time has come at which the capital falls into the beneficiary's hands.[2] It applies where the beneficiary has an interest in capital which is vested in interest, but the beneficiary is an infant; it also applies where there is a vesting in interest, but possession is postponed to a future date. During the nineteenth century, however, it became familiar for settlors and testators in England to permit their trustees to exercise this power when the interest of the beneficiary in the capital was contingent on the occurrence of some future event, or was vested but defeasible on the occurrence of such an event. The thinking of such settlors and testators was that, though they expressly intended other persons to take the capital by way of gift over, should the contingency not occur or the defeasance occur, it was not their intention to deprive the beneficiary of the opportunity of capital payments just because his interest was contingent or defeasible. For instance, when I bequeath capital, I may have other work for it to perform should the beneficiary die before he attains the age of twenty-five, and is therefore not in a position to ask the trustees or the court for the capital, as he would have been at that age under my will. However, that does not mean that I want my responsible and able beneficiary at the age of twenty-two to be deprived of a partnership opportunity which he might have taken up had he been able to put his hands on some capital at that time. If the trustees think the offer is one in which the young man ought to invest, that is agreeable to me, even without the cost of insurance to the estate against the young man dying before he attains twenty-five, because it is his interest in which I am primarily interested.

Advancement is an eighteenth-century word depicting the setting up in life of a young person. It survives also in the phrase "presumption of advancement".[3] Consequently payment for such a purpose includes starting a person in business or in a profession, paying apprenticeship fees, and supplying capital to enable an existing business to be carried on. It can also include the payment of a debt if the debt is substantial and the payment is once-for-all.[4] The test to be applied is whether the payment, whatever it is for, is of a casual nature. If it is, it is not an "advancement." Middleton J. adopted an American judicial statement when he said in *Brooke v. Brooke* :[5]

> It may not be easy to define with precision what is meant by "advancement in life", since the meaning may depend, to a greater or less degree, on circumstances, but it seems to us to point to some occasion out of the everyday course, when the beneficiary has in mind some new act or undertaking which calls for pecuniary outlay, and which, if properly conducted, holds out a prospect of something beyond a mere transient benefit or employment.

As illustration Middleton J. cited entrance upon a business or profession, getting married, building a house, or making some unusual repairs or renovation.

Canadian courts may have been inclined to take a more restricted view of the scope of this term than has been the case in England. Certainly in 1887 Boyd C. took the view that, whatever the English cases had said,[6] "under our law an advancement is neither a loan or debt to be repaid."[7] By this he meant that "advancement" connotes payments to start a person off on an

activity, not the paying of existing debts which is part of the ongoing assistance one person, especially in a parental situation, might be expected to give to another, for instance, his child. In recent years the English courts have been much more disposed to give a broad meaning to the term; some Canadian courts have done as well. Even the payment of a debt may be an advancement if it is of a significant nature. [8]

Both express advancement powers, and those in statutes, have sought to widen the scope of the power by adding the word "benefit", [9] as in the phrase "advancement or benefit". This has enabled the courts to escape any uncertainty or limitation which is inherent in "advancement". "Advancement" refers to the status of the beneficiary and the improvement of his situation [10] and "benefit" serves to enlarge the number of things which the trustees can do to improve the beneficiary's situation. [11] The addition of the word "benefit" also makes clear that the exercise need not be an advancement in the sense of paying capital to a person who will presumptively become entitled to it at some later date. Such a widely drafted power could certainly include persons as objects who do not necessarily have such an entitlement. [12]

As is the case with powers of maintenance, English texts are primarily concerned with the operation of the *Trustee Act* provisions upon which most settlors and testators will rely. The provision here in question is s. 32 of the *Trustee Act, 1925*, which contains a statutory power of advancement. [13] However, in only two Canadian jurisdictions is there a statutory power, and it therefore becomes necessary to say something of the inherent jurisdiction of the court in this respect, and of express powers of advancement.

A. — Inherent Jurisdiction of the Court

The courts do possess the inherent power to make orders permitting the payment of capital as advancement, and in England prior to 1925 such orders had been familiar for over a century. The Supreme Courts of the Canadian jurisdictions took over this inherent jurisdiction of the Court of Chancery in England, and they, too, will exercise it. Indeed, payments of capital for advancement are easier to justify than for maintenance. Trustees can therefore, as with payments for maintenance, often assume that court consent would be forthcoming, and make advancements without prior approval of the court. However, the risk of ultimate disapproval is always present, and the wise trustee in practice will seldom consider the payment of capital to a beneficiary ahead of an absolute vesting in interest to be a course which he ought to take without prior judicial consent. Where the moneys are already in court, application to the court will in any event be necessary.

However, if the beneficiary's interest is contingent or defeasible upon a future event occurring, the court has no inherent power to approve of payments of capital to the beneficiary. The beneficiary must be entitled to the capital absolutely. [14] The only way an advancement can be the subject-matter of a court order under the inherent jurisdiction in these circumstances is if the parties entitled in remainder, being adult and capacitated, appear and give their consent, [15] and it is rare that this class of persons is *in toto* adult. Occasionally in England the courts have approved of the accounts of trustees who have paid out capital in expectation of the contingency occurring or the defeasible interest becoming absolute, when that event did take place, but these are exceptional authorities. [16] If the province or territory in question has given a statutory power to the courts to approve of such a payment, then the inherent jurisdiction and the consent of the other beneficiaries need not be called upon, but without that it seems that there is nothing that can be done. An application under the variation of trusts provisions of the jurisdiction in question will also generally be impossible where consent of the adult and capacitated beneficiaries is withheld, even as to one such beneficiary. [17]

B. — Express Power of Advancement

Some of the problems associated with powers of maintenance also arise in connection with powers of advancement, and where this is so reference has already been made to them in the discussion of maintenance powers.

The most consistent problem associated with powers of advancement is the inclination of the settlor or testator to have particular kinds of situations in mind rather than the whole range of situations which fall within "advancement". The hesitancy of the

settlor or testator to allow too liberal a payment of capital ahead of contingencies occurring or defeasance not occurring, and even before the vesting in possession of an interest already vested in interest, has been another factor leading instruments to authorize payments for the particular situations only. "For the purpose of establishing the said A in business", "to start A in any business or employment to enable him to work his own way in life", "to embark in or carry on any trade or business": these are the formulae which are often found in express clauses. These can raise difficult construction problems. Does the first clause exclude a profession? Does "employment" in the second clause mean occupation or salaried position? Are the fees payable on call to the Bar within "any trade or business" in the third clause? The testator may choose a general term, but couple it with another of less precise meaning, as, for instance, "advancement and preferment". Any activity which the beneficiary wishes to pursue must satisfy both terms, a requirement which would not have been necessary if a disjunctive had been used.

For this reason settlors and testators are best advised to confer powers of advancement in the widest terms, leaving it to the trustees in the circumstances which arise to use their good sense in determining whether a payment ought to be made. [18] As we have noticed, "advancement or benefit" is a formula which is considerably more liberal. This course involves placing considerable confidence in the good sense of the trustees. There is the security, of course, that the trustees must act unanimously unless the instrument authorizes anything less. There is an alternative course which the reluctant testator can take, and that is to require the trustees to seek the prior approval of the court. That condition can be imposed if there is to be any payment of capital, or consent can be required for payments over a certain dollar amount or after a stated amount of the capital entitlement of the beneficiary has been paid out. Another compromise course which avoids the expense of application to the court is for the testator to place a ceiling on the amount which can be paid out by way of advancement, although, since unpredictable situations can arise, this too has dangers.

If trustees are to be given the power to make capital payments for the purpose of advancement to beneficiaries whose interests are contingent or defeasible, the instrument should make this clear. Otherwise, the trustees may have to seek a construction of the instrument before it is wise for them to pay capital. In *Re Finlayson* , [19] for instance, the beneficiaries in question took vested capital interests in remainder, defeasible on the failure to survive the life tenant and the trustees had a power of advancement in favour of them. The question was whether the trustees could exercise it during the lifetime of the life tenant. Drake J. decided that that was possible, but his construction of the instrument was based on the fact that "to hold otherwise would practically render the advancement of little value." [20] It may also be advisable that the instrument require the consent of any person with a prior interest. In *Re Finlayson* , the court ordered the two capital beneficiaries to pay five per cent *per annum* on the shares of capital advanced, and this interest went to compensate the widow as life tenant. It is preferably the instrument which should make it clear what the prior interested party's protection, if any, is to be.

Care has to be taken over a number of small points in the drafting of express powers of advancement. The power of the trustees to pay capital to a remainderman, whether his interest is vested or contingent, which is exercisable during the life tenant's lifetime, may have undesired tax consequences. If there is a power of advancement in favour of a remainderman exercisable during the survivorship of the life tenant, and that tenant is the spouse of the settlor or testator, there can be no postponement of capital gains tax. If it were not for the power of advancement, the payment of this tax could be postponed from the date of the trust's taking effect to the date of the death of the life tenant. As it is the spousal trust has been "tainted"; whether or not the power is exercised, or the life tenant must consent to the exercise, it is possible for another to derive a benefit from the trust during the lifetime of the spouse. [21] And if a spousal "roll-over" was intended, this outcome can prejudice good family provision planning. For instance, the typical will trust gives the widow a life interest, and the children of the marriage equal capital shares on her death. It would be standard form to empower the trustees, with or without the court's consent, to make payments of capital for maintenance or advancement purposes during the lifetime of the widow, for these are the years when those needs will be at their greatest, assuming the testator's wife is widowed while her children are under age or just of age. However, the *Income Tax Act* requires that the widow as life tenant must be entitled to receive all the income arising before her death, and that no person, other than herself, shall "receive or otherwise obtain the use of" any of the income or the capital during her lifetime. [22] The usual response of the estate planner to this situation is that the testator empower his executors to allocate assets to the spouse, or to a trust for her or in which she is the life tenant. Under the terms of the *Income Tax Act*, they have fifteen months from the death of the testator for this purpose, and this will allow them to allocate any asset to her (or a trust

for her) according to whether they wish to accelerate capital gains tax payment or delay it. Assets which are to be subject to a power of maintenance, advancement or encroachment would then be put into a wife and children trust which is not to qualify as a spousal trust, or into a separate trust for the children, or trusts for each child. Assuming that the children's interests are to vest in possession on attainment of majority, or to vest in interest at that age or a later age, powers to pay out income or capital in expectation of those times can be used to meet the wants of the beneficiary.

Second, if the power is "to pay or apply", the trustees will be deemed to have released the property in question from the trust by merely deciding to make a payment for advancement purposes. Neither payment to the beneficiary nor a guardian is necessary; the decision itself will constitute an application. [23] If the mode of the exercise of the power is crucial, this wording can be of great assistance to the trustees. [24]

Third, if the power of advancement is to take effect in favour of a class of beneficiaries among whom at some future time or on the occurrence or non-occurrence of some future event the fund is to be divided, the instrument should make the testator's purpose clear if any payment of capital is to be taken into account when the shares of capital are ultimately being determined. In other words, if payments by way of advance are to be brought into hotchpot, the will must say so. [25] And the same applies to *inter vivos* trusts. [26]

Finally, the instrument should also make clear whether the trustees are to take other income or assets belonging to the beneficiary into account when asked to exercise, or they are themselves contemplating the exercise of, a power to advance or encroach upon capital in favour of the beneficiary. Such clarification is widely made in the United States [27] but seems seldom to be followed as a practice in Canada. The problems arising from silence can be considerable and embarrassing for the trustee. In the absence of express intention in the instrument creating the power, the donor's intention is often entirely ambiguous. He may have assumed that discretion would inevitably involve the consideration of the beneficiary's other available resources, or have been concerned only with the adequacy of the manner of his gift to meet his intended purpose. In *Hinton v. Canada Permanent Trust Co.* , [28] however, the court followed "the principle enunciated" in *Re Luke* [29] that "if the testator intended the trustees to have regard to the private means of the beneficiary derived from sources outside the trust fund, [he] would have used appropriate language to express that intention." And the court held that the language of the particular will did not require other sources to be taken into account. [30] On the other hand, in *Paterson (Attorney of) v. Paterson Estate* , [31] it was held that a trustee who did take other resources into account when assessing need could not be faulted for so acting. In the absence of clear direction in the instrument, it seems difficult to fault a trustee for taking account of all the circumstances.

Whether there is a principle requiring the court to lean towards one construction rather than the other, it may be that the judicial remarks in both *Re Luke* and *Hinton v. Canada Permanent Trust Co.* were based upon the particular facts in those cases. In any event, until the matter is clarified, prudence seems to dictate that express provision should be made to clarify the testator's intention in this regard.

C. — Statutory Power of Advancement

Again the statutory powers which have been introduced in Canadian jurisdictions are directly inspired by the English precedent, so that we must start there.

1. — In England

The first statutory power was introduced in 1925, and was again a copy of the precedent then commonly in use in well drafted instruments. Until that date English testators and settlors who omitted such a power in their instruments were reliant upon the inherent jurisdiction. Section 32 of the *Trustee Act, 1925*, is based upon two central characteristics: first, that the statutory power shall be implied in all trusts of personalty unless there is provision to the contrary and apply to all beneficial interests whatever the contingency, defeasibility or postponement of enjoyment, and whether the beneficiary's interest is immediate, in remainder or in reversion. Second, the power only applies to half the capital interest. [32] The thinking behind the statutory power

is therefore that it shall be drawn in the widest terms, and in this way avoid construction litigation as to its scope. Its limitation derives from its clear restriction to part only of the capital available.

As to the first characteristic, the power is even implied in relation to an interest which may be defeated by the exercise of a power of appointment. For instance, if the testator leaves his residue on trust for his widow for life, remainder as she shall by will appoint, and in default of appointment to the children of the marriage equally, the trustees can exercise this trustee power in favour of the children during the widow's lifetime, though on her death it is likely (as she does) that she will appoint the whole fund to the Stray Cats' Home. Moreover, the language of the section authorizes payment for "the advancement or benefit, in such manner as [the trustees] think fit", of any person with a capital interest. It was this breadth of language which authorized the trustees in *Pilkington v. Inland Revenue Commisioners* [33] to pay a considerable sum of capital to subtrustees by way of advancement of little Penelope, who was four years old when the trustees decided on this course of action, and whose family life was stable and comfortable. It was clearly to Penelope's "benefit" that these sums be released from the head trust if substantial estate duty was to be avoided.

As to the second characteristic, a further limitation is that any payment must be brought into hotchpot. Should the advancee die before a contingency occurs or in some other way fail to take an interest in possession, this limitation will not assist the capital beneficiaries among whom the fund is ultimately divided, but it means that those advancees who do ultimately take in possession have to account for what they have already received. The section also requires the consent of persons entitled to prior interests.

The section has worked well in practice, and it has been adopted largely as it stands in most of the states of Australia. NewZealand has also adopted it and arguably improved upon the English model. [34]

2. — In Canada

Only Manitoba and Prince Edward Island have a statutory power of advancement. [35]

Up until 1968 Manitoba had a statutory power of advancement which, save for the necessity of court approval of the trustees' intended payments, was a copy of the English provision, even to the extent that it was applicable to "capital money" only. [36] Since Manitoba has no settled land legislation, it had no need to restrict its power of advancement in the English manner. In that year, however, together with the adoption of the English statutory power of maintenance, Manitoba made amendments to its advancement power. [37] First, it was now extended to include "land or any interest therein" as well as personalty, and a lead was possibly taken from New Zealand with the extension of the power to cover explicitly maintenance and education, in addition to advancement and benefit. The latter probably does not widen the power in any way, given the comprehensiveness of "benefit", but it put the scope of the power beyond any question. However, Manitoba still requires the trustees to obtain the court's consent every time they wish to exercise the power, whether for maintenance, education, advancement, or benefit. Whether this expense and the delay involved are today necessary or desirable, given the usual express power of advancement (or encroachment) that is employed in contemporary instruments, seems highly questionable. In the Commonwealth tradition, the statutory powers have always been intended to mirror standard clauses of well-drawn contemporary instruments.

In 1956 Prince Edward Island adopted s. 32 of the English *Trustee Act* with the amendment that the Prince Edward Island provision also applies to realty and personalty. [38] The trustees may "transfer" realty in exercise of the power, but whether the trustees may use their express or statutory powers to sell, mortgage or charge land for the purpose of advancement is possibly an arguable point. The Manitoba section by contrast permits the trustees to sell, mortgage or charge the land, and so raise moneys. Another change of substance from Manitoba's enactment is that Prince Edward Island follows the English power in not requiring the consent of the court to any proposed advancement up to one half of the capital expectation of the beneficiary. [39]

Footnotes

1 See, *supra*, note 10.

2 The settlor or testator may provide, if he wishes, that the whole of the capital involved may be paid by way of advancement.

3 It also arises in the context of devolution of property; an advancement *inter vivos* may need to be taken into account on an intestacy (*Re Evashuk* (1983), 23 Man. R. (2d) 208, 15 E.T.R. 56 (Man. Surr. Ct.)), or pursuant to an express "hotchpot" clause.

4 *Re Scott,* [1903] 1 Ch. 1 (Eng. Ch. Div.).

5 *Brooke v. Brooke* (1911), 3 O.W.N. 52, 20 O.W.R. 27 (Ont. H.C.), citing a description of advancement given in *Bailey v. Bailey* (1888), 14 Atl. R. 917.

6 *Re Scott* , *supra*, note 94, where the difference of opinion among English courts was reconciled in favour of the argument that in certain circumstances the payment of the beneficiary's debts could be an advancement.

7 *Re Hall* (1887), 14 O.R. 557 at 559.

8 *Re Evashuk* , *supra*, note 93.

9 Though the scene is changing, "benefit" is not widely employed in the express powers of reported cases in Canada, and is not used with any clear purpose in view. It can be found used in earlier cases, but only in *Hospital for Sick Children v. Chute* (1902), 3 O.L.R. 590 (Ont. C.A.) does it appear to have been employed in an exclusive advancement clause. It can be extremely significant in contemporary terms: see *Pilkington v. Inland Revenue Commissioners* , *infra*, note 100. On the other hand, it may be that the use of a wider term means that the exercise of a power is less open to challenge and hence to litigation.

10 *Pilkington v. Inland Revenue Commissioners* (1962), [1964] A.C. 612, [1962] 3 All E.R. 622 (U.K. H.L.) at 635 [A.C.], *per* Lord Radcliffe. He distinguished the term from "advancing money", which means the paying out of money for purposes which have to be otherwise stated. *Cf. Re Cross* (1965), 51 W.W.R. 377 (B.C. S.C.): a power of "advancing" capital out of the testator's residue did not mean any such moneys had to be deducted from an independent legacy which was to vest on the attainment of age thirty.

11 *Pilkington v. Inland Revenue Commissioners* , *ibid.* For "benefit" in maintenance powers, see, *supra*, note 36. In *X v. A* (2005), [2006] W.T.L.R. 171 (Ch. D.), the question was whether it was for the benefit of an object to make, or to have the trustees make, a substantial donation to a charity. Hart J. held that it could be, if it discharged a perceived moral obligation of the object, that would otherwise have to be met from other assets. On the facts he ruled that the proposed donation was not within the power.

12 This is certainly the approach in Kessler and Hunter, *Drafting Trusts and Will Trusts in Canada*, 3rd ed. (2011), at 193-200, where it is recommended that powers of advancement be drafted widely as powers to pay or apply property to or for the benefit of an object. See however the judgment of Blanchard J. for the majority in *Kain v. Hutton,* [2008] 3 N.Z.L.R. 589 (S.C.), expressing the view (at para. 32) that it is definitionally true of a power of advancement that it is "a purely ancillary power enabling the trustees to anticipate … the date of actual enjoyment by a beneficiary". See also Tipping J., at para. 55.

13 *Pettit* at 475 *et seq.*; *Hanbury and Martin* at 622 *et seq.*; *Lewin* at 1170 *et seq.*; and *Underhill and Hayton* at paras. 63.1 *et seq.*

14 *Lee v. Brown* (1798), 4 Ves. Jun. 362, 31 E.R. 184, cited with approval by Barker C.J. in *Re Forster* (1910), 39 N.B.R. 526 (N.B. C.A.).

15 *Evans v. Massey* (1826), 1 Y. & J. 196, 148 E.R. 643.

16 E.g., *Worthington v. M'Craer* (1856), 23 Beav. 81, 53 E.R. 32.

17 But see, *infra*, chapter 27, Part IV C 4.

18 See also *Sheard, Hull, and Fitzpatrick* at 244, to the same effect.

19 *Re Finlayson* (1897), 5 B.C.R. 517 (B.C. Co. Ct.).

20 *Ibid.*, at 520. The power read: "In the event of any assistance being required to start them or either of them [meaning the testator's sons] in any business or employment to enable them to work their own way in life, a sum of money, not exceeding $4000, may be advanced by my trustees out of each of their shares for this purpose."

21 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 70(6).

22 *Ibid.* It would obviously be a breach of trust for the trustees to exercise a power of encroachment upon capital in favour of a life tenant, when they know or reasonably suspect that the moneys so paid out are to be given or used for others, and not employed in accordance with the life tenant's declared purpose, which justified the trustees in exercising this power. *Cf. Re Pauling's Settlement Trusts* (1963), [1964] Ch. 303, [1963] 3 All E.R. 1 (Eng. C.A.); and *Re Collett Estate* (2000), 36 E.T.R. (2d) 43 (B.C.).

23 *Lloyds Bank v. O'Meara* (1950), [1951] Ch. 209, *(sub nom. Re Vestey's Settlement),* [1950] 2 All E.R. 891 (Eng. C.A.).

24 To "pay such part or parts of the corpus of my estate", as my trustees think fit, authorized transfer of assets within the estate rather than their converted cash form: *Re Banko,* [1958] O.R. 213, 12 D.L.R. (2d) 515 (Ont. C.A.), which contains a reference to *McDonell v. McDonell* (1894), 24 O.R. 468 (Ont. Q.B.)—"to pay or apply".

25 *Royal Trust Corp. v. Hasle* (1996), 15 E.T.R. (2d) 257 (B.C. S.C.). See M.M.K. Whitaker, "Hotchpot Clauses" (1992) 12 E. & T.J. 7.

26 *Re Cross* , *supra*, note 100.

27 See J.A. Rogerson (1972) 111 Trusts and Est. 438.

28 *Hinton v. Canada Permanent Trust Co.* (1979), 5 E.T.R. 117 at 122 (Ont. H.C.); affirmed (February 1980), (Ont. C.A.) (unreported). See also *Re Atwell Estate* (1997), 19 E.T.R. (2d) 234 (Ont. Gen. Div.); and *O'Donnell (Litigation Guardian of) v. Canada Trust Co.* (1996), [1996] O.J. No. 3461, 1996 CarswellOnt 3895 (Ont. Gen. Div.).

29 *Re Luke,* [1939] O.W.N. 25 (Ont. H.C.).

30 *Cf. Knox United Church v. MacLeod* (1965), 51 W.W.R. 111, 49 D.L.R. (2d) 176 (Alta. C.A.).

31 *Paterson (Attorney of) v. Paterson Estate* (1996), *(sub nom. Paterson v. Paterson Estate),* 109 Man. R. (2d) 294, 13 E.T.R. (2d) 86 (Man. Q.B.). See also *Re McVean* (1985), 51 O.R. (2d) 685, 20 E.T.R. 308 (Ont. H.C.). See further, *supra*, chapter 13, note 156.

32 If the trustees have advanced one-half of the capital, but later the remaining half increases considerably in value, no new advances are possible; the power has already been fully exercised: *Re Marquess of Abergavenny's Estate Act Trusts,* [1981] 1 W.L.R. 843, [1981] 2 All E.R. 643, and for a short comment, 125 Sol. J. 401.

33 *Supra*, note 100.

34 *Trustee Act, 1956* (N.Z.), s. 41. *Re Pauling's Settlement Trusts* , *supra*, note 111, suggests that s. 32 of the English *Trustee Act, 1925* could usefully be reviewed.

35 Sections 34-35 of the *Trustee Act*, R.S.A. 2000, c. T-8, also refer to advancement, but these only authorize payments out of income.

36 R.S.M. 1954, c. 273, s. 29.

37 Now *Trustee Act*, C.C.S.M., c. T160, s. 30. There are inherent risks in addition to the insolvency of the advanced beneficiary, in allowing advancements to contingently interested persons, however: *Patterson v. Royal Trust Co.,* [1973] 4 W.W.R. 490, 36 D.L.R. (3d) 590 (Man. Q.B.). As to the position of the Public Trustee seeking access to a minor's interest when the minor is receiving welfare payments, see *Manitoba (Public Trustee) v. Manitoba* (1979), 105 D.L.R. (3d) 376 (Man. Q.B.).

38 *Trustee Act*, R.S.P.E.I. 1988, c. T-8, s. 40.

39 Note also that if the settlor is a trustee, he is disabled from participating in decisions regarding this power. There are some other features of the Prince Edward Island trusts legislation which are quite unique. Prince Edward Island makes the *Trustee Act* section

applicable not only to trusts created or arising after the date of the legislation, but to existing trusts unless a beneficiary of the trust is resident in Prince Edward Island when he or the trustees must secure the consent of the court for the section to apply, or the trustee has an office in Prince Edward Island when he must register with the court his intent that the trust be governed by the section. The same is true of the Prince Edward Island power of maintenance (s. 39(6) as amended), also adopted in 1956. These are curious provisions in light of the conflict of laws rules governing trusts. Those rules are not concerned with the residence of beneficiaries, except perhaps in connection with the discovery of the "proper law" governing the trust's essential validity. And the "office" of the trustee is only relevant as the determining factor of the place of administration of the trust.

End of Document

I. INTRODUCTION

A. Proprietary Remedies

A beneficiary may bring his action for breach of trust in order to assert an interest of his own in the trust property, denied or overlooked by the trustee, or he may be suing, effectively on behalf of all the beneficiaries, because trust property has been misappropriated or otherwise improperly handled. In either case his prime remedy is against the trustee (or trustees) personally, and in most cases this remedy secures to the beneficiary compensation for the loss which the breach has caused. If the trustee successfully pleads one of the defences to an action for breach, is the beneficiary or the trust left without compensation? If the trustee or each trustee is insolvent, has the trust beneficiary or the trust to be content with a claim in bankruptcy and to take his or its place with the trustee's creditors? Insolvency of the trustee is a frequent companion of the misappropriation of trust property.

The answer is that, placed in either of these positions, the beneficiary has another recourse, namely, the pursuit and recovery of the wrongly alienated or misappropriated trust property. Again he is seeking to restore the trust corpus to its original condition, but instead of requiring the trustee to reconstitute the trust fund out of his own pocket, the beneficiary's object is to make good the loss by recovering the trust property. To make the Latin distinction, the remedy against the trustee is personal or *in personam*, the remedy to recover the trust property is proprietary or *in rem*. It will be clear that the particular value of the *in rem* remedy arises when the trustee is insolvent or the trust property has got into the hands of innocent third parties.

B. Tracing, Following and Claiming

There are really two distinct ideas which are involved when tracing of trust property is discussed. The first is the possibility of recovering the property from some third party into whose hands it has come. The starting point is that trust property remains trust property, unless the recipient positively establishes the defence that he acquired a legal interest in the property,[1] in good faith, for value, without notice of the breach of trust or other want of authority on the part of the trustee.[2] The defendant must establish all elements of
contexts, especially in relatio
displace the work done by the
The effect of this is that subj
status of an asset as subject to
to someone other than the ori
manifestations of the benefi
decision that some property
mean that the third party is
might be the original trustees
sors. Only if the trust was a l
the property from the truste
transfer it directly to the bene
personally liable. If, for exam
liable for a kind of breach of
finding of wrongdoing.[5]

The second is a quite
disposition of trust property
in the hands of the trustee, w
ficiaries so elect. In other wo
the original trustee, rather th
original asset being subject t
The process of tracking a p
called *following*, while the p
can properly be called *tracin*
often both be found in the sa
sell trust property, use the
accomplice. The beneficiari

[1] The defence cannot be used by someone who only acquired an equitable interest; equitable interests are ranked according to the time of their creation.

[2] The crucial time for determining whether the transferee lacked notice is the time at which value was given, not the time of the acquisition of the legal interest, which might have been earlier or later: see *Bailey v. Barnes*, [1894] 1 Ch. 25 (Eng. C.A.); *McCarthy & Stone Ltd. v. Julian S. Hodge & Co.*, [1971] 1 W.L.R. 1547; and *MacMillan Inc. v. Bishopsgate Investment Trust plc (No. 3)*, [1995] 1 W.L.R. 978, 1000, 1003-4, affirmed on other grounds, [1996] 1 W.L.R. 387 (C.A.); see also *Botiuk v. Collison* (1979), 26 O.R. (2d) 580, 103 D.L.R. (3d) 322 (Ont. C.A.).

[3] In other words, if the defendant
have been aware that the transfe
53 O.R. (3d) 567, 197 D.L.R. (4
No. 242, 2001 CarswellOnt 306

[4] For a conceptual and historical a

[5] For a full discussion, see chapte
an argument (there discussed) th
to defences) based on unjust enr
stands, an innocent recipient is
property, it is arguable that he b
impoverishing the trust beneficia
See L. Smith, "Restitution: The

[6] This terminology has been adop
A.C. 102, [2000] 3 All E.R. 97 (
Ltd., [2012] EWHC 10 (Ch) at p
CarswellAlta 71, 39 Alta. L.R. (
Bank of Nova Scotia, 2009 Cars
(4th) 292 (S.C.C.) at para. 75, th
process." The older usage of "fc

SAWRIDGE BAND INTER VIVOS SETTLEMENT

DECLARATION OF TRUST

THIS DEED OF SETTLEMENT is made in duplicate the 15th day of April, 1985

B E T W E E N :

CHIEF WALTER PATRICK TWINN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter called the "Settlor"),

OF THE FIRST PART,

- and -

CHIEF WALTER PATRICK TWINN,
GEORGE V. TWIN and SAMUEL G. TWIN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter collectively called
the "Trustees"),

OF THE SECOND PART.

WHEREAS the Settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution of this Deed are members of the Sawridge Indian Band No. 19 within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, as such provisions existed on the 15th day of April, 1982, and the future members of such band within the meaning of the said provisions as such provisions existed on the 15th day

of April, 1952 and for that purpose has transferred to the Trustees the property described in the Schedule hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Settlement, the following terms shall be interpreted in accordance with the following rules:

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

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

No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement; and

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule hereto and any accumulated income thereon;

(B) any further, substituted or additional property and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Settlement; and

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement.

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

5. Any Trustee may at any time resign from the office of Trustee of this Settlement on giving not less than thirty (30) days notice addressed to the other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee shall be vested in the continuing Trustees or Trustee of this Settlement and such

power shall be exercised so that at all times (except for the period pending any such appointment, including the period pending the appointment of two (2) additional Trustees after the execution of this Deed) there shall be at least five (5) Trustees of this Settlement and so that no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there is more than one (1) Trustee who is not then a Beneficiary.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the end of twenty-one (21) years after the death of the last survivor of all persons who were alive on the 15th day of April, 1982 and who, being at that time registered Indians, were descendants of the original signators of Treaty Number 8, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under section 12(2) thereunder.

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

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for Trustees' investments by the Trustees' Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Settlement for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner to any extent detracting from the generality of the foregoing, the power

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

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

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

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund,

including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

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

11. The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries" under subparagraph 2(a) of this Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such

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

13. Subject to paragraph 11 of this Deed, a majority of fifty percent (50%) of the Trustees shall be required for any decision or action taken on behalf of the Trust.

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

14. This Settlement shall be governed by, and shall be construed in accordance with the laws of the Province of

Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

NAME

ADDRESS

A. Settlor

B. Trustees:

1.

NAME

ADDRESS

2.

NAME

ADDRESS

3.

NAME

ADDRESS

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

2017 NSSC 318, 2017 CarswellNS 891, 286 A.C.W.S. (3d) 596, 35 E.T.R. (4th) 40

2017 NSSC 318
Nova Scotia Supreme Court

The John Risley Family Trust 2009 (Re)

2017 CarswellNS 891, 2017 NSSC 318, 286 A.C.W.S. (3d) 596, 35 E.T.R. (4th) 40

The John Risley Family Trust 2009 (Re) (Applicant)

Peter P. Rosinski J.

Heard: December 1, 2017
Judgment: December 11, 2017
Docket: Hfx 470716

Counsel: Peter Rogers, Q.C., Jeffrey Blucher, for Applicant

Subject: Civil Practice and Procedure; Estates and Trusts

Headnote

Estates and trusts --- Trusts — Express trust — Variation — Under legislation

Trustees of family trust entered into arrangement to add J Ltd. as beneficiary of trust to enable transfer of shares held by trust to J Ltd. as part of settlement of JR's rights arising out of breakdown of marriage — Trustees claimed distribution to JR directly would be less favourable to JR and children — JR received independent legal advice and supported proposed variation — Trustees brought ex parte application for order approving arrangement — Application granted — Proposed arrangement was not resettlement of trust — All shares of J Ltd. were owned directly or indirectly by existing beneficiaries of trust or by family trust for benefit of existing beneficiaries of trust — No existing beneficiary of trust would cease to be beneficiary — Proposed arrangement was not detrimental to interests of any beneficiary incapable of providing consent — It was appropriate to approve variation of trust.

EX PARTE APPLICATION by trustees of family trust for approval of arrangement.

***Peter P. Rosinski J.*:**

Introduction

1 The trustees of The John Risley 2009 Family Trust ("the trust") have made an *ex parte* application for an order confirming an arrangement with respect to the terms of the trust indenture. Counsel argues that the arrangement is a "variation" of the trust as defined by s. 2 (a) of the *Variation of Trusts Act*, RSNS 1989 c. 486 as amended by 2011 SNS c. 42, s. 6.

Background

2 The settlor of the trust, Jim Cruickshank, and each of the trustees, John Risley, Brendan Paddick and Hugh Smith have filed affidavits indicating that they are in support of the proposed variation of the trust. Judith Risley filed an affidavit indicating that, she is in favour of the variation of the trust, and is a party to the agreement relating to the proposed variation of the trust. She has obtained independent legal advice with respect to this matter and her professional advisors have had significant involvement in settling the terms of the proposed variation and of the steps intended to occur if the proposed variation is approved by the court. She expressly agrees with the content of John Risley's affidavit.

3 Mr. Risley states in his affidavit:

> 12 - The purpose of the addition of Judi's Holdings Limited ("Judith Newco") as a beneficiary of the trust is to enable a transfer of some of the shares of LPHL held by the trust to Judith Newco as part of the settlement of Judith Risley's rights

arising out of the breakdown of our marriage. I have been advised by the trust's professional advisors, Jeff Blucher and Faye Shaw of McInnis Cooper, and verily believe that a distribution to Judith Risley directly would be less favourable to her and our children and other issue from a tax and estate planning perspective than a distribution of the same amount to Judith Newco, including for example...

13 - The purpose of revising the class of potential corporate beneficiaries is to create more flexibility in the class of corporate beneficiary to whom distributions of the income and capital of the trust may be made... I have been advised by the trust's professional advisors, Jeff Blucher and Fae Shaw of McInnis Cooper, and verily believe

A - That the existing clause in the trust indenture dealing with corporate beneficiaries is insufficiently flexible in the context of planning for beneficiaries who are not resident in Canada in light of the restriction referred to above in paragraph 10 of this affidavit and the California residency of Michael Risley and his family referred to above in paragraph 6 of this affidavit;

B - that it would be most efficient for Michael Risley and his family if the existing provisions of the trust indenture permitted a distribution to a corporation owned by a trust for the benefit of Michael Risley and his family with provisions in such trust addressing US estate tax.

4 Jim Cruickshank in his affidavit states that:

I believe the proposed variation of the trust does not change the ultimate beneficiaries of the trust, and such variation is consistent with my intention in settling the trust. I am in support of the proposed variation of the trust.

The key questions the court must answer

5 The *Variation of Trusts Act*, RSNS 1989, c. 486, (as amended by 2011 SNS c. 42, s. 6) requires this court to consider the following questions.

1 Is the proposed Arrangement a variation of the trust? [It is]

6 Section 2(a) of the *Act* defines "arrangement":

means a variation, resettlement or revocation of a trust in relation to property or a variation, deletion or termination of, or in addition to, the powers of a trustee in relation to the management or administration of the property subject to the trust;

7 The test to determine whether a proposed arrangement is a variation, as opposed to a revocation or resettlement of the trust, may be considered from the following perspective of excluding alternatives:

(a) is the proposed arrangement a revocation of the trust?

8 Simply stated, it is not.

A settlor cannot revoke his trust unless he has expressly reserved the power to do so. This is a cardinal rule, and it involves two important concepts. The first is that the trust is a mode of disposition, and once the instrument of creation of the trust has taken effect or a verbal declaration has been made of immediate disposition on trust, the settlor has alienated the property as much as if he had given it to the beneficiaries by an out-and-out gift. This almost self-evident proposition has to be reiterated because it is sometimes said that the trust is a mode of "restricted transfer". So indeed it is, but the restriction does not mean that by employing the trust the settlor inherently retains a right or power to intervene once the trust has taken effect, whether to set the trust aside, change the beneficiaries, name other beneficiaries, take back part of the trust property, or do anything else to amend or change the trust. By restriction is meant that he has transferred the property, but subject to restrictions upon who is to enjoy and to what degree. The mode of future enjoyment is regulated in the act of transferring, but the transfer remains a true transfer. The second concept which is involved is that a settlor may expressly

reserve not only a power of revocation, but any power he likes provided that he does not contravene any principle of public policy. - *Waters Law of Trusts in Canada*, [4th edition, 2012, Thomson Carswell, Toronto, Ontario, Canada pages 383-4).

9 Paragraph 35 of the trust indenture reads:

This trust agreement is intended by the parties and is hereby declared to be irrevocable."

10 Moreover, all the existing trustees of the trust intend that it be characterized by the court as a "variation", as does the settlor Jim Cruickshank.

(b) Is the proposed Arrangement a resettlement of the trust?

11 I conclude that it is not, for the following reasons:

1. A resettlement occurs when there is, in effect, a creation of an entirely new trust - *Purves, Re*, [1984] B.C.J. No. 3059 (B.C. S.C.), per Meredith J. This determination will always be fact driven. It is permissible to view an arrangement not as a resettlement, but rather as a variation, "if an arrangement, while leaving this substratum [of the original trust] effectuates the purpose of the trust by other means... even though the means employed are wholly different, and even though the term is completely changed." - *Ball's Settlement, Re*, [1968] 2 All E.R. 438 (Eng. Ch. Div.) per Megarry J; see also *Waters Law of Trusts in Canada*, (4th ed. 2012, Thomson Carswell, Toronto, Ontario, Canada) at page 1390;

2. It must be accepted that taxation considerations drive the creation and content of many express trusts. It is therefore significant that the Canada Revenue Agency's general position on whether a proposed a modification of the terms of a trust is in effect a "resettlement" was outlined in CRA Document No. 920965, July 22, 1992, "Window on Canadian Tax Commentary", wherein the Director of Manufacturing Industries, Partnerships and Trusts Division Rulings Directorate as:

> ... The Department is not in a position to give you a definitive response as to the tax consequences regarding variations of trusts as this involves a thorough review of all governing documents and a finding of fact. However, we can offer you the following comments which may be of assistance.
>
> It is our opinion that, in general, a variance of a trust may have the consequence of causing the trust to be resettled *if the variance is of significant magnitude to cause a fundamental change in the terms of the trust*. If this occurs there would be an actual disposition of the trust's property from the "old" trust to the "resettled" trust.
>
> [Taken from 2014 CCH Canadian Limited]

3. As counsel for the applicants has stated in its brief:

> The Arrangement contemplates that all of the shares of Judith Newco will be owned directly or indirectly either by existing beneficiaries of the trust or by a family trust for the benefit of existing beneficiaries of the trust. The amendment of the class of potential corporate beneficiaries only modifies and improves the existing provisions dealing with corporate beneficiaries and is consistent with the original intent of such provisions. No existing beneficiary of the trust would cease to be a beneficiary as a result of the proposed variation of the trust. The trust herein is discretionary with respect to capital, and the interest of each existing beneficiary of the trust will be unaffected by the proposed Arrangement. All of the beneficiaries will have the same right to be considered for a distribution of capital as they presently enjoy at the discretion of the trustees.

2 Is the Arrangement detrimental to any beneficiary incapable of consenting? The proposed arrangement is not materially and demonstrably detrimental to any beneficiary incapable of consenting.

12 Having concluded that the proposed arrangement is properly characterized as a variation of the trust, I turn to the next question.

To avoid that result, the Chapman family approached the courts with an arrangement to transfer the trust funds into a new settlement, identical to the existing trusts but without the encroachment clauses. This, they understood, would avoid the estate duty. The House of Lords held that the courts do not have an inherent jurisdiction to vary the terms of a trust. This inability exists even when beneficiaries who are *sui juris* agree to the variation and the variation would clearly benefit the minor and unascertained beneficiaries. Indeed, that was the situation in *Chapman* itself, in which all parties were in agreement and a variation would have prevented the imposition of estate duty on the death of the settlors — an obvious advantage to the beneficiaries.

The House stated that the courts can only vary trusts in conversion, compromise, emergency, and maintenance situations. Each situation warrants a word of explanation.

First, the court has jurisdiction to convert a minor's property from realty to personalty and *vice versa*. The applicant must demonstrate that the conversion is for the minor's benefit.

Second, the court may approve settlements in disputes but only in cases of true compromise.[92] A true compromise arises when an actual lawsuit requires settlement. The court's compromise jurisdiction is now governed by the rules of court.[93]

Third, the court may approve variations in emergencies. Emergencies are situations unforeseen by the settlor, not provided for and that threaten the existence of the trust.

Finally, the court can direct that the terms of a trust be varied so that income, which the settlor directed be accumulated or used to pay debts, be used for the maintenance of beneficiaries who need the money but who are not immediately entitled to it.

6.5.2 By the Trustee

In *Hunter Estate v. Holton*,[94] the court allowed the trustees to vary the trust as an exercise of the trustee's discretionary power. The testator established a trust fund to be paid to his issue upon a certain event. The trustees applied to the court to determine whether it was within their power to divide the trust for the benefit of the testator's two children. The court held that the trustees did have the power to alter the trust as the testator had expressly provided that the trustees "pay to or for the benefit" of the beneficiaries as they "in their sole discretion may from time to time determine."[95] The proposed change to the trust did not deviate from the testator's intentions and thus the arrangement was not an inappropriate exercise of the trustee's discretion.

It was an essential aspect of the court's decision that the testator had made an express provision that the trustees be given broad discretion to administer the trust. To what extent such variations will be permitted is not clear, but it appears that changes will be acceptable if they are within the

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[92] Before the *Chapman* case, the courts used this head to consent to variations without requiring proof of a genuine dispute. After *Chapman*, such an approach was unacceptable.

[93] See, *e.g.*, the Ontario *Rules of Civil Procedure*, rule 14.05(1)(f).

[94] (1992), 46 E.T.R. 178, 7 O.R. (3d) 372 (Gen. Div.).

[95] *Ibid.*, at E.T.R. 180.

trustee's prescribed powers and are not "alien to the testator's intentions."[96]

Notes and Questions

1. Trusts which contain powers of encroachment may be terminated in this way too. Thus, if a trust gives B a life interest and a power to the trustees to encroach on capital for B's benefit, the trustees may be able to transfer all of the capital to B.[97] However, they can do so only if the power is sufficiently wide. If it is merely to provide support and maintenance for the life tenant, they are precluded from advancing all of the capital to B.[98] Significant tax repercussions can attach to retaining extensive control over the trust property.[99]

2. The extent to which a court is willing to accept a trustee's exercise of the power to vary a trust depends on whether the court applies a narrow or broad interpretation to the trustee's discretion. The court's choice of interpretation hinges largely on the degree to which the variation conforms with the intentions of the testator.

Fox v. Fox Estate[100] illustrates the point. The testator gave both M and W a life interest in his estate. If M survived W, he was to receive the residue. W, as sole trustee, had been granted a wide discretionary power to encroach on the capital for the benefit of M's children. W disapproved of M's remarriage and, therefore, used her discretion to transfer all of the residue to M's children. The result of W's transfer was to deprive M of any interest in the residue and of any income from it. The transfer therefore ran contrary to the testator's intentions to benefit M. For this reason, the Ontario Court of Appeal did not approve of W's exercise of her power. Consequently, the court gave a narrow interpretation to the discretionary power granted to W.[101]

3. *Edell v. Sitzer*[102] is another example. G created two separate trusts in favour of her children, M and J, in her will. G named her husband, P, the trustee for both. The trusts conferred on the trustee a broad discretionary power to distribute the capital. P exercised his power of encroachment by transferring shares from the J trust to M. J objected to the transfer and argued that it was an invalid exercise of P's power because, as a matter of interpretation, the power to encroach only authorized payments of money. The court determined that the testator's intent in creating the power was to provide the trustee with sufficient flexibility to permit dispositions of capital to be overridden if he considered it to be for the benefit of any one or more of the objects of the power. Having found that the variation conformed to G's intentions, the court gave a broad interpretation to the wide discretionary power conferred on P.[103] Therefore it approved the variation of the trust because the trustee's discretionary power enabled the trustee to make the variation.[104]

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96 *Ibid.*, at E.T.R. 186.

97 See, for example, *Re Powles*, [1954] 1 W.L.R. 336, [1954] 1 All E.R. 516.

98 *Re Rutherford and Rutherford*, [1961] O.R. 108 (H.C.). But see *Saunders v. Halom* (1986), 25 E.T.R. 186 (B.C. C.A.) in which T gave W, who was both the trustee and the life tenant of the estate, power to encroach on the capital to provide proper care and maintenance for the life tenant. W advanced all of the capital to herself. The court refused to intervene in the exercise of W's discretion because it opined that T had given her a sufficiently wide power.

99 See, *e.g.*, *Chapman v. Chapman*, [1954] A.C. 429, [1954] 1 All E.R. 798 (H.L.).

100 (1996), 28 O.R. (3d) 496, 10 E.T.R. (2d) 229 (C.A.), leave to appeal to refused [1996] S.C.C.A. No. 241, 207 N.R. 80 (note).

101 The court also rejected the transfer because W's decision was made *mala fide*.

102 (2001), 40 E.T.R. (2d) 10 (Ont. S.C.J.).

103 The court also held that the circumstances in which powers may be exercised and their potential effects on other dispositive powers are relevant factors that bear directly on the propriety of a trustee's exercise of the power to vary a trust.

104 The court also found that the variation was not motivated by *mala fides* on the part of the trustee.

6.5.3 Resettlement by Settlor

A settlor cannot normally "vary" a trust by resettling it, that is, by creating another trust and transferring the assets of the first trust to the second. However, if the original trust gives the settlor power to resettle the trust fund into a new trust she may do so.[105] *Chalmers v. Chalmers Alter Ego Trust*[106] illustrates the point. The settlor created an alter ego trust in 2007 of which she was, of course, sole beneficiary during her lifetime. The main beneficiaries after her death were her three sons. This trust was irrevocable but it contained a provision permitting the settlor to resettle the trust. In 2014 the settlor created a second trust with the same assets as the 2007 trust, but with some changes in its terms. In 2015 she executed two deeds of appointment in which she transferred all the assets in the 2014 trust to herself. The court held that the resettlement was effective.

6.5.4 Under Statute

Because of the common law restrictions on the court's ability to vary trusts, most Canadian jurisdictions have passed remedial legislation giving the court wider powers of variation. The Ontario *Variation of Trusts Act*, first passed in 1959, is reproduced below, together with the corresponding provisions of the Alberta *Trustee Act* and of the *Uniform Trustee Act*. The Ontario legislation is representative of all other provincial legislation except Manitoba's and New Brunswick's. The Alberta legislation, which Manitoba followed, is markedly different.

Trustees have the right to bring an application for advice and directions in the administration of the trust.[107] An application to vary a trust differs from an application by trustees for advice and directions. The court does not have jurisdiction to vary a trust on an application for advice and directions.

Further Reading

A.J. McClean, "Variation of Trusts in England and Canada" (1965), 43 Can. Bar Rev. 181;

J.W. Harris, "Ten Years of Variation of Trusts" (1969), 33 Conv. (N.S.) 113;

Wilson A. McTavish and Ronald A. Anger, "Variation of Trusts: The Official Guardian's View" (1989), 9 E. & T.J. 132.

Committee on the Modernization of the Trustee Act (B.C.), "Report on the Variation and Termination of Trusts" (2004), 23 E.T.P.J. 156.

Siân M. Matthews, "Enigma Variations" (2009), 28 E.T.P.J. 355.

Douglas Rienzo, "The Variation of a Pension Trust" (2010), 30 E.T.P.J. 69.

Timothy C. Matthews, "Abolition of the Rule against Perpetuities in Nova Scotia and Amendments to the *Variation of Trusts Act* and Real Property Act" (2012), 31 E.T.P.J. 143.

Donovan Waters, "Estate Planning when Authorizing Trust Terms Are Absent" (2016), 35 E.T.P.J. 251.

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105 *Pilkington v. Inland Revenue Commissioners*, [1964] A.C. 612 (H.L.); *Hunter v. Holton* (1992), 7 O.R. (3d) 372 (Gen. Div.).

106 2017 BCSC 2646, 40 E.T.R. (4th) 7.

107 See, for example, s. 60 of the *Trustee Act*, R.S.O. 1990, c. T.23, as am. by S.O. 2000, c. 26, Sched. A, s. 15(2) (item 14).

Province of Alberta

TRUSTEE ACT

Revised Statutes of Alberta 2000
Chapter T-8

Current as of December 17, 2014

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(4) Every transfer, payment and delivery made pursuant to an order under subsection (3) is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.

RSA 1980 cT-10 s40

Personal liability

41 If in any proceeding affecting trustees or trust property it appears to the court

(a) that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or might be personally liable for any breach, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but

(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed that breach,

then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

RSA 1980 cT-10 s41

Variation of Trusts

Variation of trusts

42(1) In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust where the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by any beneficiary's renunciation of the beneficiary's interest so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who after reasonable inquiry cannot be located, or

(d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.

(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

RSA 2000 cT-8 s42;2004 cP-44.1 s52

Application to court for advice

43(1) Any trustee may apply in court or in chambers in the manner prescribed by the rules of court for the opinion, advice or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property.

(2) The trustee acting on the opinion, advice or direction given by the Court is deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in respect of the subject-matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or direction of the Court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

RSA 1980 cT-10 s43

ICLR

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

Image 1 within document in PDF format.

House of Lords
8 October 1962

[1962] 3 W.L.R. 1051

[1964] A.C. 612

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

Analysis

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

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

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

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

By his will dated December 14, 1934, a testator directed his trustees to hold the income of his residuary estate upon protective trusts in equal shares for all his nephews and nieces living at his death with a provision that their consent to any exercise of any applicable power of advancement should not cause a forfeiture of their interests; and after the death of a nephew or niece to hold the capital and income of such beneficiary's share for his or her children or remoter issue as he or she should appoint and in default of appointment for his or her children at 21. The will contained no provision replacing or excluding the power of advancement contained in section 32 of the Trustee Act, 1925 . [1] The testator died on February 8, 1935. One of his nephews was married and had three infant children. The second child, a daughter, was born on December 29, 1956, and the trustees, for the purpose of avoiding death duties, desired to exercise the statutory power of advancement in her favour by applying up to one moiety of her expectant share in the testator's trust fund by adding it to a fund, which it was proposed should be subject to the trusts of a new settlement, under which the income of the fund was to be applied for her maintenance until she attained 21, and from then and until she attained 30 was to be paid to her, when the capital was to be held on trust for her absolutely. If she should die under that age the trust fund was to be held upon trust for her children who should attain the age of 21 years and, subject as aforesaid, upon trust for the nephew's other children.

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

Held:

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

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

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

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

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

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

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

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

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

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

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

On July 18, 1960, the Court of Appeal, on the motion of the *617 respondent trustees, ordered that the Commissioners of Inland Revenue might be added as parties and further that (not withstanding that the time for appealing had expired) the trustees or the commissioners might be at liberty to appeal from the order of Danckwerts J.

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

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

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

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

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

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

(6) Because In re Fox [3] and In re Joicey [4] are authority for the proposition that a power of advancement did not enable the trustees to alter the devaluation of the estate or to destroy the contingent interest of the person sought to be advanced.
*618

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

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

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

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

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

The Court of Appeal allowed the appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In conclusion, it is submitted that In re Ropner's Settlement Trusts [42] was wrongly decided. [Reference was also made to Lowther v. Bentinck [43] ; In re Kershaw's Trusts. [44]]

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

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

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

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

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

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

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

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

Their Lordships took time for consideration.

1962. October 8.

LORD REID.

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

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

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

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

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

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

I agree that this appeal must be allowed.

LORD HODSON.

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

VISCOUNT RADCLIFFE.

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

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

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

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

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

The trusts of the new settlement can be sufficiently stated as follows. Until Miss Penelope is 21, the trustees are to apply the income of her trust fund for her maintenance, education or benefit and to accumulate any unexpended balance. When she attains 21, the income is to be held on protective trusts for her until she is 30, and if she attains 30 the capital and income are to be hers absolutely. If she dies before that age leaving children surviving her, those children take her share: but if she does not leave any such children, her share is to go over to such of her brothers and sisters as attain 21 or being female marry, with an ultimate gift over back to the testator's residuary trust fund. Under this new settlement, therefore, Miss Penelope could not take a capital share unless and until she attained the age of 30.
*632

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the conclusion, therefore, there are legal objections to the proposed settlement which the trustees have placed before the court. Again I agree with Upjohn L.J. that these objections go to the root of what is proposed and I do not think that it would be satisfactory that the court should try to frame a qualified answer to the question that they have propounded, which would express the general view that the power to advance by way of a settlement of this sort does exist and the special view that the power to make this particular settlement does not. Norm I think, is such a course desired either by the appellants or the trustees. They will, I hope, know where they stand for the future, and so will the commissioners, and that is enough.

LORD HODSON.

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

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

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

Footnotes

1 Trustee Act, 1925, s. 32: "(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property ... Provided that - (a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property ..."

2 [1961] Ch. 466; [1961] 2 W.L.R. 776; [1961] 2 All E.R. 330 , C.A.

3 [1904] 1 Ch. 480 .

4 [1915] 2 Ch. 115, C.A.

5 (1871) L.R. 11 Eq. 452 .

6 (1874) L.R. 19 Eq. 166 .

7 (1868) L.R. 6 Eq. 322 .

8 [1937] 2 All E.R. 570 .

9 L.R. 19 Eq. 166 .

10 [1961] Ch. 466 , 486.

11 L.R. 11 Eq. 452 .

12 [1937] 2 All E.R. 570 .

13 [1956] 1 W.L.R. 902, 904, 905; [1956] 3 All E.R. 332 .

14 [1961] Ch. 466 , 480, 481, 484.

15 (1881) 30 W.R. 99 .

16 [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 .

17 [1915] 2 Ch. 115 , C.A.

18 L.R. 11 Eq. 452 .

19 (1854) 19 Beav. 529 , 534, 535.

20 (1858) 4 K. & J. 142 .

21 [1904] 1 Ch. 480 .

22 [1961] Ch. 466 , 488, 489.

23 [1913] 1 Ch. 404, 413; 29 T.L.R. 306, C.A.

24 [1938] Ch. 39; 53 T.L.R. 1036; [1937] 3 All E.R. 823 , C.A.

25 L.R. 11 Eq. 452 .

26 [1958] 1 W.L.R. 165; [1958] 1 All E.R. 386 .

27 [1959] Ch. 699 , 705, 706.

28 (1886) 55 L.T. 554, 556, C.A.

29 [1951] 2 All E.R. 528 , C.A.

30 [1951] 2 All E.R. 528 , 532.

31 [1962] Ch. 273, 275, 287; [1961] 3 W.L.R. 825; [1961] 3 All E.R. 389, C.A.

32 19 Beav. 529 , 535, 536.

33 11 Eq. 452.

34 [1937] 2 All E.R. 570 .

35 [1915] 2 Ch. 115, 120, C.A.

36 [1934] Ch. 112 .

37 [1926] Ch. 136 .

38 [1913] 1 K.B. 83, 90, C.A.

39 [1936] Ch. 161 .

40 [1951] Ch. 209; [1950] 2 All E.R. 891 , C.A.

41 [1954] Ch. 334, 340, 341; [1954] 2 W.L.R. 386; [1954] 1 All E.R. 725 .

42 [1956] 1 W.L.R. 902 .

43 L.R. 19 Eq. 166 .

44 L.R. 6 Eq. 322 .

45 [1937] 2 All E.R. 570 , 572.

46 [1956] 1 W.L.R. 902 .

47 55 L.T. 554 .

48 (1874) L.R. 19 Eq. 166 .

49 (1871) L.R. 11 Eq. 452 .

50 (1875) 1 Ch.D. 226 .

51 (1860) 27 Beav. 645 .
52 1 Ch.D. 226 , 228.
53 L.R. 19 Eq. 166 , 169.
54 (1881) 30 W.R. 99 , 100.
55 [1937] 2 All E.R. 570 , 671.
56 [1958] 1 W.L.R. 165, 168; [1958] 1 All E.R. 386 .
57 [1915] 2 Ch. 115, C.A.
58 [1926] Ch. 136 .
59 [1934] Ch. 112 .
60 (1886) 55 L.T. 554, 556, C.A. : "It is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy, before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled."
61 L.R. 19 Eq. 166 .
62 (1868) L.R. 6 Eq. 322 .
63 [1961] Ch. 466 , 481, 486.
64 [1937] 2 All E.R. 570 , 572.
65 [1956] 1 W.L.R. 902 , 906.
66 L.R. 11 Eq. 452 .
67 [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 .
68 [1961] Ch 466 , 481.
69 Ibid. 484.
70 [1961] Ch 466 , 487.
71 [1961] Ch. 466 , 488 et seq.

[1964] A.C. 612

1992 CarswellOnt 537, 32 A.C.W.S. (3d) 335, 46 E.T.R. 178, 7 O.R. (3d) 372

1992 CarswellOnt 537
Ontario Court of Justice (General Division)

Hunter Estate v. Holton

1992 CarswellOnt 537, 32 A.C.W.S. (3d) 335, 46 E.T.R. 178, 7 O.R. (3d) 372

Re the Estate of DONALD FLEMING HUNTER, late of the City of Toronto, in the Municipality of Metropolitan Toronto, deceased

JOHN MILLER HOLTON, DONALD HOLTON HUNTER and MARY MARGARET McCALLUM (Continuing Executors and Trustees of the Estate of DONALD FLEMING HUNTER, deceased) v. JOHN MILLER HOLTON, DONALD HOLTON HUNTER, MARY MARGARET McCALLUM, D. HOLTON HUNTER, JOHN HUNTER, JOHN EDWARD HUNTER, KATINA MARIE HUNTER, WENDY JEANNE HUNTER, LINDA SCHUR and OFFICIAL GUARDIAN

Steele J.

Heard: February 17-19, 1992
Judgment: March 5, 1992
Docket: Doc. Toronto RE 2282/91

Counsel: *Barbara L. Grossman*, for applicants.
Maurice C. Cullity, Q.C. and *Christina H. Medland*, for Mary Margaret McCallum.
Ronald R. Anger, for Official Guardian.

Subject: Estates and Trusts

Headnote

Estates --- Personal representatives — Duties and powers

Trusts and trustees — Powers and duties of trustees — Will giving trustees power to encroach on entire estate — In circumstances trustees having power to transfer entire estate to new trusts as long as terms of new trusts not alien to testator's intention.

The testator died in 1976. By his will he set up a trust fund (the "fund")which, after his wife's death, which occurred in 1988, was to be held for the benefit of his issue until 2006, when the net income was to be divided among his issue in equal shares per stirpes. The will then stipulated that 20 years after the death of the last survivor of certain named family members, the balance of the fund was to be distributed to the testator's issue in equal shares per stirpes. The will gave the power to the trustees to pay to such issue as they determined "such amounts out of the capital of the said Fund as my trustees in their sole discretion may from time to time determine."

The fund now represented the entire residue of the estate and was of great value. The trustees proposed to enter into certain transactions whereby the assets of the fund were to be settled on two new trusts, which were to have substantially the same terms and conditions as the will, except that the primary beneficiaries of one of the new trusts were to be the testator's daughter and her issue and those of the other new trust were to be the testator's son and his issue. The purpose of the new arrangement was to separate the interests of the two families so that decisions could be made having regard to the separate circumstances of each family.

The trustees applied under s. 60 of the *Trustee Act* (Ont.) and r. 14.05(3)(*a*) of the *Rules of Civil Procedure* (Ont.) for advice as to whether they had the power under the will to transfer all the assets of the fund to the new trusts. The Official Guardian opposed the application.

Held:

The trustees had the power to establish the new trusts and to transfer the assets of the estate to them.

new trusts. In my opinion, that case was solely a tax case and no details of the requested advice were set out. I do not consider it to be a deterrent to giving advice in the present case.

12 In construing a will, the court must ascertain the intention of the testator by looking at the whole will, and the court can look to other cases only to the extent that they explain applicable rules of construction and principles of law. In looking at the present will, it is clear that the testator gave the trustees power to encroach on the entire estate which, if done, would make the balance of the will redundant.

13 It was conceded by counsel for the Official Guardian that the clause in the will would allow the trustees to exercise their power of encroachment to pay out all the assets of the Family Fund, one-half to Donald Hunter and one-half to Margaret McCallum, but he contended that there is no power given to the trustees to resettle the assets into the new trusts. *McLean Estate v. Stewart* (June 1, 1988), Doc. RE 822/82, Barr J. (Ont. H.C.) (unreported) is the only similar case for which any reasons were given. The terms of that will are not the same as the present will but I believe that the principle is the same. The reasons are brief and refer to no prior authorities, but include the following statement:

> It would be incongruous if the law were to hold that the trustees might pay to the beneficiaries their shares outright, but might not pay them to trustees to be held in trust for them. Nor need the terms of the new trust be the same as those in the original trust providing they are beneficial.

14 I agree with that statement if it is supported by authority.

15 The leading English authority is *Pilkington v. Inland Revenue Commissioners*, [1964] A.C. 612, [1962] 3 All E.R. 622 (H.L.). In that case, reliance was made upon a provision of the English *Trustee Act, 1925* [15 & 16 Geo. 5, c. 19], which permitted the application of any capital money for the "advancement or benefit" of a beneficiary. The issue before the House was the resettlement of the funds into a new trust and most of the arguments made were the same as have been advanced by the Official Guardian in the present case. At p. 631, Viscount Radcliffe, in effect, stated that it was irrelevant as to who the trustees of the old and new trusts were. He said, "What matters is that there are new trusts, not that there are old trustees." I agree. That case relied on the interpretation of the words of a statute but it was stated, at pp. 634 and 635, that the statute merely adopted the customary common law terminology that is often included in wills. I do not believe that the decision is limited to statutory provisions.

16 I adopt the following statements in *Pilkington* at pp. 638 and 639 as being applicable to the present case:

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

> to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises.

I also adopt the statement at pp. 640-641 as follows:

> That would be a proper answer from a court to which trustees had referred their discretion with a request for its directions; but it does not really solve any question where, as here, they retain their discretion and merely ask whether it is impossible for them to exercise it.
>
> . . . . .
>
> ... First, I do not believe that it is wise to try to cut down an admittedly wide and discretionary power, enacted for general use, through fear of its being abused in certain hypothetical instances. ...

17 I believe that *Re Hampden Settlement Trusts*, [1977] T.R. 177 (Ch. D.), *Re Hastings-Bass*, [1975] Ch. 25, [1974] 2 All E.R. 193 (C.A.) and *Re Ropner's Settlement Trusts*, [1956] 1 W.L.R. 902, [1956] 3 All E.R. 332 (Ch. D.), and other cases, confirm this proposition. Counsel for the Official Guardian frankly conceded that he was not aware of any case anywhere in the Commonwealth that has been decided to the contrary.

18 While "advancement" may have a technical meaning, "benefit" does not. In *Pilkington*, supra, both "advancement" and "benefit" were considered and it was held that the word "benefit" was very wide in its meaning. In the present case, clause III(i)(C) gives an unfettered right to pay "for the benefit" of the testator's issue. In my opinion this includes the settlement of new trusts. I therefore find that the trustees have the power and it is lawful for them to transfer all of the assets of the Family Fund to new trusts.

19 The next question is whether the court should approve the transfer to these specific two trusts. Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluc tant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass*, supra, at p. 41 [Ch.] as being applicable to the court's review of the exercise of such power:

> To sum up the preceding observations, in our judgment, where by the terms of a trust (as under section 32) a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account. ...

Put in the reverse wording, I also adopt the opinion of Middleton J. in *Dunlop v. Ellis* (1917), 41 O.L.R. 303 (H.C.) at 307:

> Where there is, as here, a trust coupled with a discretionary power, the Court is entitled and bound to interfere when there is no attempt to exercise the discretion for the purpose for which it was given, but an attempt to accomplish a purpose quite alien from the intention of the testatrix, the author of the power.

20 It is not the function of the court to approve the specific words of the proposed new trusts and I do not do so. However, I have reviewed the proposed new trusts to determine whether or not they are alien to the intention of the testator, or would be beyond the scope of the power of the trustees. As I have stated, subject to the approved basic division into two family trusts rather than the one, the new trusts closely mirror the provisions of the will, with certain minor modifications. Basically, they provide the interests to the children, grandchildren and issue of the testator, with the ultimate gift over to the Horace Hunter family and the employees of MacLean Hunter Limited. Counsel for the Official Guardian submits that some of the changed provisions in the new trusts are so great that the court should interfere and refuse approval. I would like to comment upon some, but not all, of these issues.

21 1. Under the will, if only one person shall be acting as an executor, then such trustee is directed to appoint a trust company to act as an additional trustee. Also, no reference is made to trustee's compensation, which presumably would be set in the

normal way by the courts. Under one of the new trusts, Holton, Donald Hunter and R.G.H. McAslin are to be the trustees, and in the other, Holton, Margaret McCallum and Donald Campbell are to be trustees. In the event of a vacancy, the continuing trustees have power to appoint any person to fill the vacancy. In the event of Margaret McCallum ceasing to be a trustee, each of her children who attains the age of 30 years has the right to be appointed a trustee. Decisions shall be made by a majority of trustees and a maximum compensation to be paid to trustees is imposed. There is to be no compensation paid to any child or grandchild of the testator. In view of the size of the estate, the old trustees believe that this compensation is less than would be commonly awarded by a court. I believe that this change is within the discretion of the trustees.

22 2. There is a possibility of a violation of the rule against perpetuities under the terms of the new trusts. However, in view of s. 3 of the *Perpetuities Act*, R.S.O. 1990, c. P.9, I do not believe that this is sufficient ground for the court to say that the trustees have exceeded their discretion.

23 3. In the new trusts there is a new total exculpatory clause in favour of the new trustees for any of their acts. In my opinion this is a detail of the new trust and is within the discretion of the trustees in setting up the new trusts.

24 4. The effect of the new trusts is to divide the Family Fund into two units. Counsel for the Official Guardian submits that this deprives some beneficiaries of future potential gifts over while conceding that it may benefit them under different circumstances. I believe that this is within the general discretion of the trustees in setting up the new trusts.

25 I believe that the trustees have the power to establish new terms in the new trusts within the parameters of the overall principles that I have set out. I have reviewed the provisions of the new trusts and find that they are substantially for the benefit of the family members within the contemplation of the testator, and find that they do not go beyond the powers of the trustees.

26 For these reasons the answer to the question presented to the court is yes.

27 Costs of all parties on a solicitor-and-client basis are to be paid out of the Family Trust. The costs of the Official Guardian may be agreed upon, but otherwise are to be assessed.

Order accordingly.

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Alberta Statutes
Limitations Act

R.S.A. 2000, c. L-12, s. 1

s 1. Definitions

Currency

1.Definitions
In this Act,

(a) **"claim"** means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order;

(b) **"claimant"** means the person who seeks a remedial order;

(c) **"defendant"** means a person against whom a remedial order is sought;

(d) **"duty"** means any duty under the law;

(e) **"injury"** means

(i) personal injury,

(ii) property damage,

(iii) economic loss,

(iv) non-performance of an obligation, or

(v) in the absence of any of the above, the breach of a duty;

(f) **"law"** means the law in force in the Province, and includes

(i) statutes,

(ii) judicial precedents, and

(iii) regulations;

(g) **"limitation provision"** includes a limitation period or notice provision that has the effect of a limitation period;

(h) **"person under disability"** means

(i) a represented adult as defined in the *Adult Guardianship and Trusteeship Act* or a person in respect of whom a certificate of incapacity is in effect under the *Public Trustee Act*, or

(ii) an adult who is unable to make reasonable judgments in respect of matters relating to a claim;

(iii) [Repealed 2002, c. 17, s. 4(2).]

(i) **"remedial order"** means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes

(i) a declaration of rights and duties, legal relations or personal status,

(ii) the enforcement of a remedial order,

(iii) judicial review of the decision, act or omission of a person, board, commission, tribunal or other body in the exercise of a power conferred by statute or regulation, or

(iv) a writ of habeas corpus;

(j) **"right"** means any right under the law;

(k) **"security interest"** means an interest in property that secures the payment or other performance of an obligation.

Amendment History
2002, c. 17, s. 4(2); 2008, c. A-4.2, s. 138

Currency
Alberta Current to Gazette Vol. 116:18 (September 30, 2020)

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Alberta Statutes
Limitations Act

R.S.A. 2000, c. L-12, s. 3

s 3. Limitation periods

Currency

3. Limitation periods

3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

3(1.1) If a claimant who is liable as a tort-feasor in respect of injury does not seek a remedial order to recover contribution under section 3(1)(c) of the *Tort-feasors Act* against a defendant, whether as a joint tort-feasor or otherwise, within

(a) 2 years after

(i) the later of

(A) the date on which the claimant was served with a pleading by which a claim for the injury is brought against the claimant, and

(B) the date on which the claimant first knew, or in the circumstances ought to have known, that the defendant was liable in respect of the injury or would have been liable in respect of the injury if the defendant had been sued within the limitation period provided by subsection (1) by the person who suffered the injury,

if the claimant has been served with a pleading described in paragraph (A), or

(ii) the date on which the claimant first had or in the circumstances ought to have had the knowledge described in subclause (i)(B), if the claimant has not been served with a pleading described in subclause (i)(A),

or

(b) 10 years after the claim for contribution arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim for contribution.

3(1.2) For greater certainty, no claim for contribution against a defendant in respect of damage referred to in section 3(1)(c) of the *Tort-feasors Act* is barred by the expiry of a limitation period within which the person who suffered that damage could seek a remedial order.

3(2) The limitation period provided by subsection (1)(a) or (1.1)(a) begins

(a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a),

(b) against a principal when either

(i) the principal first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a), or

(ii) an agent with a duty to communicate the knowledge prescribed in subsection (1)(a) or (1.1)(a) to the principal, first actually acquired that knowledge,

and

(c) against a personal representative of a deceased person as a successor owner of a claim, at the earliest of the following times:

(i) when the deceased owner first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a), if the deceased owner acquired the knowledge more than 2 years before the deceased owner's death;

(ii) when the representative was appointed, if the representative had the knowledge prescribed in subsection (1)(a) or (1.1)(a) at that time;

(iii) when the representative first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a) or (1.1)(a), if the representative acquired the knowledge after being appointed.

3(3) For the purposes of subsections (1)(b) and (1.1)(b),

(a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;

(b) a claim based on a breach of a duty arises when the conduct, act or omission occurs;

(c) a claim based on a demand obligation arises when a default in performance occurs after a demand for performance is made;

(d) a claim in respect of a proceeding under the *Fatal Accidents Act* arises when the conduct that causes the death, on which the claim is based, occurs;

(e) a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability on which the claim for contribution can be based, whichever first occurs;

(f) a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property.

3(4) The limitation period provided by subsection (1)(a) does not apply where a claimant seeks a remedial order for possession of real property, including a remedial order under section 69 of the *Law of Property Act*.

3(5) Under this section,

(a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (1)(a) or (1.1)(a), and

(b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b) or (1.1)(b).

3(6) The re-entry of a claimant to real property in order to recover possession of that real property is effective only if it occurs prior to the end of the 10-year limitation period provided by subsection (1)(b).

3(7) If a person in possession of real property has given to the person entitled to possession of the real property an acknowledgment in writing of that person's title to the real property prior to the expiry of the 10-year limitation period provided by subsection (1)(b),

(a) possession of the real property by the person who has given the acknowledgment is deemed, for the purposes of this Act, to have been possession by the person to whom the acknowledgment was given, and

(b) the right of the person to whom the acknowledgment was given, or of a successor in title to that person, to take proceedings to recover possession of the real property is deemed to have arisen at the time at which the acknowledgment, or the last of the acknowledgments if there was more than one, was given.

3(8) If the right to recover possession of real property first accrued to a predecessor in title of the claimant from whom the claimant acquired the title as a donee, proceedings to recover possession of the real property may not be taken by the claimant except within 10 years after the right accrued to that predecessor.

Amendment History
2007, c. 22, s. 1(3); 2014, c. 13, s. 4(2); 2017, c. 7, s. 2

Currency
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1982 CarswellAlta 137
Alberta Court of Queen's Bench

Lawrence v. Lindsey

1982 CarswellAlta 137, [1982] A.W.L.D. 673, [1982] A.W.L.D. 674, [1982] W.D.F.L. 1032, [1982] W.D.F.L. 1047, [1982] A.J. No. 33, 14 E.T.R. 194, 15 A.C.W.S. (2d) 495, 21 Alta. L.R. (2d) 141, 28 R.F.L. (2d) 356, 38 A.R. 462

LAWRENCE v. LINDSEY

Stratton J.

Judgment: July 23, 1982
Docket: Edmonton No. 7903-02188

Counsel: *F. S. McMenemy*, for plaintiff.
A. A. Robinson, for defendant.

Subject: Family; Estates and Trusts; Property

Headnote

Family Law --- Family property on marriage breakdown — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Constructive trusts generally

Trusts and Trustees --- Constructive trust — Family — Claims against estates — By spouse

Trusts and trustees — Resulting trusts — Family transactions — Parties not intending in common that plaintiff acquire interest in property owned by defendant.

Trusts and trustees — Constructive trusts — Elements — Plaintiff's services benefiting defendant in circumstances where he knew of her reasonable expectation of acquiring interest in his property.

Equity — Equitable doctrines — Laches and acquiescence — Claim for property interest under constructive trust being advanced 18 years after parties' separation — Unreasonable delay prejudicing defendant.

The female plaintiff and the male defendant (who died prior to the trial of this action) had lived in a common law relationship for a period of 24 years, commencing in 1936 and terminating in 1960. At all times during this relationship, the real property owned by the defendant had been registered solely in his name. In 1979 the plaintiff commenced this action alleging that she was entitled to an interest in the defendant's real property on the basis of either a constructive trust or a resulting trust in her favour.

Held:

Action dismissed.

On the evidence it was impossible or unreasonable to impute a common intention that the plaintiff should obtain an interest in the defendant's property such as is required to support the establishment of a resulting trust. However, the constructive trust principle could be applied to the arrangement between the parties notwithstanding it being a so-called common law relationship. The plaintiff had carried out the normal services of a wife and mother and helped take care of the property in which she reasonably expected to obtain an interest. The defendant had freely accepted the benefits conferred upon him through the plaintiff's efforts in circumstances where he knew, or ought to have known, of her reasonable expectation of acquiring a property interest.

Nevertheless, the plaintiff's lengthy delay in seeking enforcement of her rights was fatal. At the time of separation she was fully aware that she had no interest in the defendant's property and there was no evidence that she was unable for any reason to advance her claim earlier. It was particularly significant that her claim was not raised while the defendant's age and health would have permitted him to put forward directly his own position from his intimate and firsthand knowledge of the situation.

Actions continued by court order under s. 8 of the Survival of Actions Act for an interest in assets on the basis of an alleged resulting trust or, alternatively, a constructive trust.

***Stratton J.*:**

1 The plaintiff, who lived in a common law relationship for many years with the defendant, has claimed certain assets owned by the defendant on the basis of an alleged resulting trust or, alternatively, a constructive trust.

2 The defendant died before trial and this action has been continued by court order under the provisions of s. 8 of the Survival of Actions Act, R.S.A. 1980, c. S-30.

3 The plaintiff's claim was set forth in a caveat filed against property registered in the defendant's name and the defendant counterclaimed against the plaintiff on the grounds of alleged damages arising from that caveat. However, prior to trial the estate of the deceased instructed counsel for the defendant to abandon the counterclaim.

4 For convenience, in this judgment I will refer to the deceased as the defendant.

The Facts

5 The plaintiff, now 75 years of age, commenced employment with the defendant, who was 15 years her senior, in or about the year 1936. Initially he paid for housekeeping services the sum of $15 to $20 per month, but this ceased after approximately three months when, according to the plaintiff's testimony, she became pregnant by the defendant.

6 There were five children born of the union, all between the years 1937 and 1946. Three of the children, now adults, testified at the trial as witnesses for the defendant.

7 Except for separations of limited duration, the parties lived together for approximately 24 years. The plaintiff was unsure of the exact date of their final separation, but from all the evidence, I have concluded that the separation occurred in or about the year 1960.

8 During the period of the cohabitation of the parties the plaintiff earned, in her words, "a little money" knitting for third parties. Nevertheless, it is clear that virtually the entire support of the household came from the defendant's earnings or, later after retirement, his pensions.

9 From the very outset of the relationship of the parties the defendant owned his own home in Edmonton, having acquired it in 1925, approximately nine years before the common law union began. Up to 1949 the defendant had been gainfully employed at the C.N.R.'s Calder railway shops in Edmonton. He was laid off in 1949 because of his age which was then 65. At that time the defendant decided to move to Wabamun, a town approximately 40 miles west of Edmonton, and for that purpose he exchanged his Edmonton home for 20 acres (including a home) at or near Wabamun. This move was against the wishes of the plaintiff who felt that the family had "better chances" in Edmonton.

10 The plaintiff and defendant attended with a real estate agent in Edmonton to complete the papers necessary to effect the land exchange above-mentioned. The exact nature of the papers which were produced for signature to the plaintiff was not made clear from the evidence, and both the understanding and the memory of the plaintiff was uncertain on this point. It is clear, however, and I so find that the defendant made no express promise or other assurances to the plaintiff that she was named or would be named as having an interest in the Wabamun property. I also find that the plaintiff believed that she had some interest therein because of an assumption made by her which was based on the very fact that she signed one or more of the papers submitted to her by the Edmonton real estate agent at the time of the exchange of property. Her assumption was also based on a statement or comment made by the real estate agent which she remembers as, in effect, stating that she would have an interest in the Wabamun property. It is clear however that the defendant did not in any way react positively to that statement.

11 I find from the evidence that there was no intention on the part of the defendant that he intended to allow anything other than that which in fact occurred, namely the registration of the Wabamun property in his name only.

12 The parties continued to live on the Wabamun property until their final separation. Although the plaintiff testified that money was scarce during the years of retirement, the evidence disclosed that the defendant had income from three pensions, as well as from a part-time job as caretaker at the nearby Wabamun school.

13 The plaintiff testified that she (along with the "boys" and the defendant), looked after the garden, did most of the canning, milked goats, fed chickens, did housework and looked after the personal needs of the children. She contributed some furniture which had come from the Edmonton home and before that from her own family. She also carried on throughout most of the years of her life with the defendant commercial knitting, particularly for the Bay and Eatons department stores. She also testified to having the obligation of looking after the business affairs of the family, such as keeping records and placing insurance.

14 During the 1950s she experienced both physical and mental problems. For the former she was placed on medication which continued over the years and often required her travelling to Edmonton for both medication and treatment. With respect to her mental health problems she was hospitalized on a number of occasions at the Oliver hospital near Edmonton.

15 Three of the children (two sons and one daughter) testified on behalf of the defendant. Their testimony indicated that the parties did not get along very well, that the children along with the defendant (and not the plaintiff) performed most of the household chores, that the plaintiff was often absent from the Wabamun home without reasonable explanation, that her contribution to the household was minimal and that on one occasion the plaintiff rather seriously assaulted the defendant with a milk pail causing some injuries.

16 In 1960 the defendant required the plaintiff to leave the Wabamun home. With some difficulty the plaintiff subsequently succeeded in removing the furniture which she claimed as being her own as having come from her family prior to her commencing the relationship with the defendant. It is clear that at the time of leaving she was neither given nor promised any interest in any other property real or personal owned by the defendant.

17 I find from the evidence that at the time of this final separation the plaintiff knew that she was not a joint owner of any of the Wabamun property.

18 The 20 acres constituting the Wabamun property was subsequently subdivided by the defendant.

19 The defendant was admitted to a veteran's home in 1977 suffering from ill health, the details of which need not be set forth at this time. They were covered in general terms in a doctor's report which was admitted as Ex. 7 to these proceedings.

20 On 1st January 1978, approximately 18 years after the final separation of the parties, the plaintiff filed a caveat against the five acres of the Wabamun property then still remaining in the defendant's name.

21 The defendant died in January 1982. Presently the title to the five acres is in the name of four of the children of the union, but it remains subject to the plaintiff's caveat. The plaintiff's claim is not only for an interest in the five-acre parcel on which the caveat rests but also for the equivalent in value of such interest as the court should determine in the entire 20-acre parcel. The plaintiff also claims an interest in personal property owned by the defendant at the time of the final separation. Again, the nature and extent of the interest claimed by the plaintiff in this personal property is not specified.

The Issues

22 The primary issues to be determined are:

23 1. Do the facts support the establishment of a resulting trust?

24 2. Alternatively, was there here a constructive trust in the plaintiff's favour?

25 3. If I should determine that a trust existed so as to benefit the plaintiff, then the question is raised as to whether the plaintiff is nevertheless precluded from obtaining a judgment by reason of s. 2 of the Alberta Evidence Act, R.S.A. 1980, c. A-21.

26 4. Is the plaintiff barred by application of the doctrine of laches?

27 5. If the answer to this last question is in the negative, the question then arises as to whether she would be barred in any event by the Limitation of Actions Act, R.S.A. 1980, c. L-15.

Resulting Trust

28 This issue must be determined in accordance with a majority decision of the Supreme Court of Canada as set forth in the judgment of Dickson J. in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R 384. At p. 175 of his judgment, Dickson J. has this to say:

> A majority of the court in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, 13 R.F.L. 185, [1974] 1 W.W.R. 361, 41 D.L.R. (3d) 367, adopted the "common intention" concept of Lord Diplock in *Gissing v. Gissing*, [1971] A.C. 886, [1970] 3 W.L.R. 255, [1970] 2 All E.R. 780 [at p. 438]:
>
> > Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other.
>
> In *Murdoch* it was held that there was no evidence of common intention. In *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 1 R.F.L. (2d) 1, [1978] 2 W.W.R. 101, 1 E.T.R. 307, 83 D.L.R. (3d) 289, 19 N.R. 91, common intention was held to exist. Although the notion of common intention was endorsed in *Murdoch* and in *Rathwell*, many difficulties, chronicled in the cases and in the legal literature on the subject, inhered in the application of the doctrine in matrimonial property disputes. The sought-for "common intention" is rarely, if ever, express; the courts must glean "phantom intent" from the conduct of the parties. The most relevant conduct is that pertaining to the financial arrangements in the acquisition of property. Failing evidence of direct contribution by a spouse, there may be evidence of indirect benefits conferred: where, for example, one partner pays for the necessaries while the other retires the mortgage loan over a period of years, *Fibrance v. Fibrance*, [1957] 1 All E.R. 357.

29 Then, at pp. 176-77 of the report, Dickson J. continues as follows:

> Although the resulting trust approach will often afford a wife the relief she seeks, the resulting trust is not available, as Professor Waters [53 Can. Bar. Rev. 366] points out, at p. 374: "where the imputation of intention is impossible or unreasonable". One cannot imply an intention that the wife should have an interest if her conduct before or after the acquisition of the property is "wholly ambiguous", or its association with the alleged agreement "altogether tenuous". Where evidence is inconsistent with resulting trust, the court has the choice of denying a remedy or accepting the constructive trust.

30 In the present case the evidence completely fails to support a common intent which is surely the basis for the establishment of a resulting trust. On the contrary, the evidence indicates to me that the defendant intended to keep the Wabamun property in his own name to the exclusion of any interest of the plaintiff. At the meeting in the real estate office in Edmonton when, according to the plaintiff, she raised the question of having a share in the ownership of the property being newly acquired, the defendant did not respond in any positive way; instead, according to the plaintiff's own testimony, when she later raised the subject, he simply said, "we'll see about it later".

31 She also stated that when at a subsequent date she asked the defendant to marry her so that the children would have a proper name and so that she would have a share in the home, he gave no definite answer.

32 Surely on the above evidence it is impossible or unreasonable to impute a common intention such as is required to support the establishment of a resulting trust.

Constructive Trust

33 As pointed out in *Pettkus*, supra, at p. 179, the principle of unjust enrichment lies at the heart of the rules relating to constructive trust. At p. 179, Dickson J. adopted Lord Mansfield's observation in *Moses v. MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676, as follows:

> ... the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Then at p. 180 Dickson J. continues as follows:

> How then does one approach the question of unjust enrichment in matrimonial causes? In *Rathwell* [supra] I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.

34 In the present case the parties lived together on the Wabamun property for at least 11 years. This followed upon the episode in Edmonton involving the conference with the real estate agent wherein the plaintiff was led to believe by the words of the agent circumstances of the situation that she would have an interest in the property being newly acquired.

35 To use the words of Dickson J. (p. 180) the "compelling inference" is that she believed that she had then or would soon receive some interest in the property and that expectation was, in my view, reasonable under the circumstances. Even though she may have at times caused difficulties either by reason of her health or disposition, in my view the plaintiff nevertheless carried out with, with perhaps less than perfect efficiency, the normal services of a wife and mother and, in addition, helped take care of the property in question until, unfortunately, irreconcilable differences occurred and the relationship terminated. Again, as in *Pettkus*, Mr. Lindsey in the present case freely accepted the benefits conferred upon him through the labour and efforts of the plaintiff. In addition, he accepted by way of supplement to the family's finances the minimal financial assistance being obtained through the plaintiff's knitting.

36 Thus, I find that the first two requirements set out by Dickson J. in the *Pettkus* decision have been met. As to the third requirement, I adopt the words of Dickson J. from p. 181 of his excellent judgment, as follows:

> As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

37 On the basis of *Pettkus*, I have no hesitation in applying the constructive trust principle to the arrangement between Mrs. Lawrence, the plaintiff, and Mr. Lindsey, the defendant, notwithstanding their arrangement being a so-called common law relationship.

Corroboration

38 Section 12 of the Alberta Evidence Act reads as follows:

> 12 In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

39 At p. 416 of Law of Evidence in Civil Cases (1974), by Sopinka and Lederman, the applicable rule is stated as follows:

> In statutes which require the evidence to be corroborated "by some other material evidence", the word "material" is not to be taken as synonymous with every fact required to be proved to establish a cause of action. It is sufficient if there is

> evidence strengthening the evidence requiring corroboration "which appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to". This is generally the test in civil cases. The corroborative evidence cannot, however, be in respect of irrelevant and immaterial matters; it must be corroborative of the party's evidence in essential matters.

40 Within this rule I am satisfied that the testimony of the plaintiff relating to the three elements necessary to support a constructive trust, as I have found it to exist, are corroborated by the following evidence which I consider to be material within the wording of s. 12:

41 1. The testimony of the three children of the union who appeared as witnesses, namely Ronald Lindsey, Frederick Lindsey, and Sherry Regamey.

42 2. The fire insurance policy (Ex. 2) covering the dwelling on the Wabamun property, taken out for the period from 4th June 1958 to 4th June 1961 and showing the plaintiff and the defendant as joint owners. Even though consistent with the duties of looking after the business affairs of the family, the plaintiff may herself have taken out this policy, I consider it nevertheless an inescapable inference that the defendant knew of that policy and permitted the ownership to be as stated in it, namely in the joint names of the plaintiff and the defendant.

Respective Proportions

43 Dickson J. in the *Pettkus* decision at p. 187 accepts the proposition that when contributions are unequal the shares will also be unequal, however, because of my ruling as to the final issue of laches, I do not propose to decide the exact share of the plaintiff in the subject property other than to say that the evidence convinces me that the superior contribution was made by the defendant.

44 For the same reason I find it also unnecessary to deal with the application of the Limitations of Actions Act.

Laches

45 The defendant contends that, notwithstanding the fact that the plaintiff may be able to establish a trust in her favour, her lengthy delay in seeking enforcement of her rights is fatal to her action. In response, the plaintiff argues that by disposing of part of the lands allegedly held in trust by him for the plaintiff, he was guilty of fraudulent breach of trust and on the basis of the rule that "he who seeks equitable relief must have clean hands" the defendant is precluded from relying on the equitable doctrine of laches.

46 From the evidence before me, I do not consider the defendant to have been guilty of fraud or other dishonest conduct that could preclude his reliance on equitable relief. Thus it is unnecessary to deal with the defendant's other contention on this point, namely that the plaintiff failed to expressly plead the defendant's fraud which she now alleges through counsel to have existed.

47 I now return to a consideration of whether the plaintiff's delay in asserting her rights is fatal to her action.

48 At p. 862 of Professor Waters' text, Law of Trusts in Canada (1974), the following is stated:

> No legal system could allow a person who has a legal claim to do nothing over a long period of time to assert it, and then to bring his action because it pleases him at that moment to do so. A would-be defendant is reasonably entitled to ask that action shall be brought when the evidence, particularly in his own favour, is still available and at least relatively fresh.

49 And again at p. 872 Professor Waters continues as follows:

> What the defending party must provide in order to establish laches and acquiescence is very much a question of fact in the circumstances of each case. It is very difficult to lay down any rules on this, and the courts have refrained from doing so. By and large, when delay is in question the court is concerned with the justice of giving the remedy sought as between the parties.

50 In Limitations of Actions by Michael Franks, the doctrine is described thus:

> The gist of this equitable doctrine is that a plaintiff will be barred unless he has been reasonably diligent in seeking relief from the court, and this principle is broadly applied by the courts in the light of the type of relief sought and the circumstances.

51 Counsel for the defendant drew to my attention a rather old case decided in the Nova Scotia Court of Appeal, *McIlreith v. Payzant* (1893), N.S.R. 377, where an action was taken to enforce an equitable claim more than 20 years old and in the interval several parties involved in the transaction had died. In applying the doctrine of laches to defeat the claim, the court held the delay to be fatal by reason of the passage of time and the occurrence of certain deaths. Thus the court felt unable to adequately deal with the claim.

52 In the present case, the plaintiff did not make any claim for an interest in the Wabamun property at the date of separation (1960); nor did she raise any claim on that land until she filed a caveat in 1978 against the balance of the lands then remaining in the defendant's name. Her statement of claim was actually issued in August 1979. Well before those dates the defendant had transferred all but five acres of the land comprising the Wabamun property to others and had died before her claim came before the courts. I am satisfied from the evidence that at the time of separation she was fully aware that she had no interest nor was being offered any interest in either the real property or personal property owned by the defendant at that time. It is clear from her own testimony that immediately following the separation she had extreme difficulty in even obtaining release from the defendant's possession the furniture which she quite properly claimed through her own immediate family.

53 There is no evidence before me that the plaintiff was unable for any reason to put forward her claim before the expiration of 18 years from the time at which she could have first raised it. It is particularly significant that no claim was raised during that period while the property remained unsubdivided and in the defendant's sole name, and while his age and health would have permitted him to put forward directly his own position from his intimate and firsthand knowledge of the situation. By the time he decided to subdivide and dispose of all but five acres of the Wabamun land he was surely convinced, and I suggest on reasonable grounds, that no claim would be made by the plaintiff against him or his lands. I am satisfied that the plaintiff has been guilty of unreasonable delay in asserting her claim and this delay has prejudiced the defendant. Thus it is my view that reason and justice require an application of the doctrine of laches so as to bar the plaintiff's claim and I so hold.

54 In addition, I will order that the plaintiff's caveat be removed from the subject lands.

55 The defendant is entitled to costs of the action.

Action dismissed.

2015 ONSC 6962, 2015 CarswellOnt 17671, 15 E.T.R. (4th) 151, 260 A.C.W.S. (3d) 648

2015 ONSC 6962
Ontario Superior Court of Justice

Kaufman Estate v. Wilson

2015 CarswellOnt 17671, 2015 ONSC 6962, 15 E.T.R. (4th) 151, 260 A.C.W.S. (3d) 648

Anthony Keller and Robert Hilton, as Attorneys for Margaret Isabelle Kaufman and as Executors and Trustees of her Last Will and Testament dated July 14, 2006, Applicants and Ross Alexander Wilson, Jennifer ("Land") Dunn, Jillian Redfern, Blain Redfern, Linzi Murray, Callum Murray, Erin Murray, Jamieson Murray, The Canadian National Institute for the Blind (Ontario Division), The Kitchener-Waterloo Community Foundation, Respondents

Ross Alexander Wilson and Hajra Wilson, Applicants and Anthony Keller and Robert Hilton, as Attorneys for Margaret Isabelle Kaufman and as Executors and Trustees of her Last Will and Testament dated July 14, 2006, Respondents

D.A. Broad J.

Heard: September 25, 2015
Judgment: November 17, 2015
Docket: ES-1234-14, ES-95-15

Counsel: James H. Bennett, for Applicants, Respondents
Timothy M. Fleming, for Respondent, Ross Alexander Wilson
Timothy M. Fleming, for Applicants, Ross Alexander Wilson and Hajra Wilson

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Public

Headnote

Estates and trusts --- Estates — Passing of accounts — Miscellaneous

Applicants were attorneys for property of MK — They were also named as estate trustees in will — MK was 91 years of age and suffered from advanced dementia — Respondent RW was son of MK and sole surviving residuary beneficiary of estate under will — Remaining respondents were named legatees under will — Attorneys applied for opinion, advice and direction of court as to whether requests for money from estate of MK by RW were to be honoured by estate and whether RW was dependant of MK — Attorneys said RW had been pursuing MK, both in litigation and directly, to obtain money and property from her prior to death — RW brought application for order that attorneys pass accounts and be removed as attorneys for MK — Application dismissed — Attorneys' purpose in bringing application for directions was, at least to significant degree, to seek to insulate themselves from liability to RW for refusing or declining to make gifts or loans to him from MK's property, or conversely, to other beneficiaries under MK's will should they, in their discretion, decide to make such gifts or loans — Section 32(1) of Substitute Decisions Act, 1992 protected attorneys from liability if they exercise discretion honestly and with due care — It was not appropriate for attorneys to attempt to shift their responsibility in that regard to court by way of application for directions — RW had never asserted that he was "dependant" of MK and it was not necessary for court to determine that question — RW failed to seek leave of court for order that attorneys pass their accounts — There was no evidence of misconduct or neglect on part of attorneys to justify removal — Moreover, RW failed to file management plan that was prerequisite to replacement of attorneys.

APPLICATION by son for order that attorneys pass accounts and are removed as attorneys for estate.

***D.A. Broad J.*:**

Nature of the Applications

1 The applicants in file ES-1234-14, Anthony T. Keller and Robert Hilton (the "Attorneys"), are the attorneys for property of Margaret Isabelle Kaufman. The Power of aAtorney appointing Messrs. Keller and Hilton as attorneys for property was made by Mrs. Kaufman on May 6, 2010. Mr. Keller has been Mrs. Kaufman's personal lawyer for many years. Mr. Hilton is Mrs. Kaufman's son-in-law. Mrs. Kaufman is 91 years of age and currently suffers from advanced dementia. Mrs. Kaufman also named Messrs. Keller and Hilton as estate trustees in her will made July 14, 2006 (the "Will"). The title of proceedings in file ES-1234-14 indicates that Messrs. Keller and Hilton are making application both as attorneys for Mrs. Kaufman and as "executors and trustees" under the Will.

2 The respondent Ross Alexander Wilson in file ES-1234-14 is the son of Mrs. Kaufman and the sole surviving residuary beneficiary of Mrs. Kaufman's estate under the Will. The remaining respondents in file ES-1234-14, with the exception of The Canadian National Institute for the Blind (Ontario Division) ("CNIB") and The Kitchener-Waterloo Community Foundation (the "Community Foundation"), are named legatees under the Will. CNIB and the Community Foundation, along with The Hospital for Sick Children are named as the residuary beneficiaries of Mrs. Kaufman's estate in the Will in the event of Mr. Wilson predeceasing her. Aside from the filing of Submissions of Rights by the charitable beneficiaries, the remaining beneficiaries did not otherwise respond to the application or participate in the argument.

3 The Attorneys make application for the opinion, advice and direction of the Court as to "whether the requests for money from the Estate of Margaret Isabelle Kaufman by Ross Alexander Wilson are to be honoured by the Estate of Margaret Isabelle Kaufman" and whether Mr. Wilson is a dependant of Mrs. Kaufman. Two other heads of relief in the notice of application namely for the opinion, advice and direction of the Court as to whether the property owned by Mrs. Kaufman known as "Hillhead" should be listed for sale and sold and if monies may be paid from the proceeds of sale to Mr. Wilson for his use and benefit were not referred to in the Attorneys' Factum nor pursued in argument.

4 The Notice of Application in ES-1234-14 does not set forth any specific grounds for the application other than to cite Rule 14.05 of the *Rules of Civil Procedure* and sections of 39 and 37(2) of the *Substitute Decisions Act, 1992* S.O. 1992, c.30. However, the affidavit of Mr. Keller filed in support of the application deposed that that for many years, Mr. Wilson has been pursuing Mrs. Kaufman, both in litigation and directly, to obtain money and property from her prior to her death. Mr. Keller also deposed that Mr. Wilson has threatened litigation against him and Mr. Hilton in their capacities both as estate trustees and as attorneys for property.

5 Mr. Wilson along with his spouse, Hajra Wilson, have brought an application in file ES-95-15 against Messrs. Keller and Hilton as attorneys for Mrs. Kaufman and as "executors and trustees" under the Will for an order that they pass their accounts as attorneys, that they be removed as attorneys for property and as attorneys for personal care of Mrs. Kaufman and that they also be removed as "executors and trustees" under the Will.

6 The Notice of Application in file ES-95-15 similarly does not set forth any specific grounds for the application other than to recite rules 38.03(4), 74.16, 74.17 and 74.18 of the *Rules of Civil Procedure*, sections 32, 39, 42, 66 and the subsections 35.1(1), 35.1(3) and 37(3) of the *Substitute Decisions Act, 1992*, sections 5 and 7 of the *Trustee Act*, subsection 21(2) of the *Health Care Consent Act, 1996*, section 131 of the *Courts of Justice Act* and section 9 of the *Estates Act.* However, in his affidavit filed in support of the application, Mr. Wilson deposed that there are voluminous documents relating to matters in dispute between the Attorneys and himself and his wife dating back to 2002 which demonstrate a continuing antagonistic, adversarial and improper attitude on the part of the attorneys towards him and his wife. He expressed his view that Messrs. Keller and Hilton have no standing to bring the application in file ES-1234-14 as "executors and trustees" of the Will, as Mrs. Kaufman is still alive, and that they did so solely to serve the other contingent beneficiaries in order to embarrass him and his wife. He deposed further that Messrs. Keller and Hilton brought their application at a time when he has no funds to properly respond and that their application was made for the improper purpose of protecting themselves from personal liability at the expense of the *inter vivos* estate of Mrs. Kaufman and it was therefore brought for a cynical, bad faith and improper purpose.

7 The parties agreed that the evidence on each application would constitute evidence on both. The affidavit material, filed in respect of both applications, consists of the following:

(a) the affidavit of Mr. Keller sworn December 22, 2014 in file ES-1234-14;

(b) the affidavit of Mr. Wilson sworn January 27, 2015 in file ES-95-15;

(c) the affidavit of Mr. Hilton sworn February 13, 2015 in file ES-95-15;

(d) the affidavit of Shirley Jeanette McKee sworn February 12, 2015 in file ES-95-15;

(e) the affidavit of Mr. Wilson sworn June 30, 2015 in file ES-1234-14; and

(f) the affidavit of Mr. Wilson sworn July 8, 2015 in file ES-1234-14.

8 Mr. and Mrs. Wilson were each cross-examined on June 24, 2015 and the transcripts of their examinations are included in the Supplemental Application Record of the applicants in file ES-1234-14.

Application of the Attorneys in file ES-1234-14

9 The legal framework to the application of the Attorneys can be summarized as follows. They apply pursuant to section 39(1) of the *Substitute Decisions Act, 1992* (the "SDA") which provides that if an incapable person has a guardian of property or an attorney under a continuing power of attorney, the court may give directions on any question arising in connection with the guardianship or power of attorney. Subsection 39(4) of the SDA provides that, on an application for directions, the court may, by order, give such directions as it considers to be for the benefit of the person and his or her dependants and consistent with this Act.

10 Subsection 37(1) of the SDA prescribes the nature of the expenditures from the incapable person's property that guardians (deemed to include attorneys under a continuing power of attorney for property of an incapable person pursuant to subsection 38(1) of the SDA) are required to make, namely expenditures that are reasonably necessary for the person's support, education and care, expenditures that are reasonably necessary for the support, education and care of the person's dependants, and expenditures that are necessary to satisfy the person's other legal obligations.

11 Subsection 37(3) provides that a guardian may make gifts or loans to the person's friends and relatives and may make charitable gifts.

12 Subsection 37(4) sets forth rules governing the making of gifts or loans to friends or relatives and of charitable gifts. Para. 1 provides that gifts or loans to friends or relatives and charitable gifts may only be made if the property is and will remain sufficient to satisfy the requirements of subsection (1). This is not in issue in the present case.

13 Paragraph 2 of subsection 37(4) provides that gifts or loans to friends or relatives may be made only if there is reason to believe, based on intentions the person expressed before becoming incapable, that he or she would make them if capable and para. 5 provides that a gift or loan to a friend or relative shall not be made if the incapable person expressed a wish to the contrary.

14 S, 32(1) of the SDA provides that a guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.

15 Subsection 37(6) of the SDA provides that expenditures made under section 37 shall be deemed to be for the incapable person's benefit. This would therefore include gifts or loans to the incapable person's friends or relatives made in accordance with the rules in subsection (4).

16 The affidavit material, Factum and oral submissions of the Attorneys indicate that they are of the belief, or they are at least concerned, that the applicable rules in subsection 37(4) prevent gifts or loans to be made to Mr. Wilson based upon the available evidence. In this respect they point to the following factors:

(a) Mrs. Kaufman expressed to her lawyers that she did not want to support Mr. Wilson with an allowance and did not want him to have an interest in her real property, Hillhead;

(b) that one of Mrs. Kaufman's caregivers, Shirley McKee, overheard a telephone conversation between Mrs. Kaufman and Mr. Wilson in which Mr. Wilson was reported to have said "you always said you would never do to me what your father did to you, so I hope you die". The reference to Mrs. Kaufman's father relates to a dispute that she and her sister had over ownership in Hillhead which was originally their father's property;

(c) that Mr. Wilson and Mrs. Kaufman have had a difficult relationship and that Mrs. Kaufman has refused to provide him with financial assistance;

(d) that in 2010, Mr. and Mrs. Wilson commenced an application, which was subsequently discontinued, against Mrs. Kaufman in which they sought an interest in Hillhead and related relief. Mrs. Kaufman was upset by this lawsuit having been brought against her.

17 In my view, it is not necessary to make findings of disputed facts, nor to make findings as to whether the evidence establishes that the making by the Attorneys of gifts or loans to Mr. Wilson from the property of Mrs. Kaufman would breach one or more of the rules in subsection 37(4) of the SDA, as there is a threshold impediment to the Attorneys' application, rendering it inappropriate for the Court to give the directions which they seek.

18 In the case of *Fulford, Re* (1913), 29 O.L.R. 375 (Ont. H.C.) it was held that the court is not authorized give directions to trustees on whether or how to exercise their discretion. Middleton, J. stated as follows at paras. 21 and 22:

> The question is then raised as to the duty of the executors to realise. I do not for one moment suggest that these stocks should be hastily and improvidently thrown upon the market. The executors are intrusted by the testator with a discretion as to realisation, and they must exercise that discretion, realising as best they can upon the stocks which they are not authorised to hold.
>
> It is suggested that some scheme should be devised by which the Court should approve of realisation in each particular case, taking the opinion of some advisory committee, if necessary, upon each particular transaction. I do not think that any such scheme can be authorised. The executors are protected from all liability if they honestly and with due care exercise the discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the Court. The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorised to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.

19 *Fulford, Re* was followed in the case of *Wright, Re*, [1976] O.J. No. 2367 (Ont. H.C.) in which an estate trustee applied to the court for an order approving the sale of shares comprising just over half the value of the estate. In dismissing the application, Craig, J. adopted the language of Middleton, J. in *Fulford, Re* as well as the principle in *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571 (Eng. Ch. Div.) (a case cited by counsel for Mr. and Mrs. Wilson in his Factum this case) that the court has no power, save in the case of *male fides* or a refusal to discharge the duty undertaken, to put a control on the exercise of the discretion which the testator has left to the trustees.

20 More recently Justice D.M. Brown, as he then was, in the case of *Kaptyn Estate, Re* (2009), 48 E.T.R. (3d) 278 (Ont. S.C.J.), applied the principle in *Fulford, Re*, and adopted in *Wright, Re*, to a case where an estate trustee brought an application to the court pursuant to section 60(1) of the *Trustee Act*, R.S.O. 1990, c. T.23 for directions on whether an action should be commenced on behalf of the estate. Section 60(1) of the *Trustee Act* provides as follows:

> A trustee, guardian or personal representative may, without the institution of an action, apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of a ward or a testator or intestate.

21 Justice Brown, at paragraph 31 of *Kaptyn Estate, Re*, observed that "it is the obligation of the executors, not the courts, to decide whether an action should be commenced for the benefit of the estate and how to do so. Any risks associated with a decision about whether or not to sue should rest squarely on the shoulders of the executors."

22 Justice Brown made similar observations in the case of *Primo Poloniato Grandchildren's Trust, Re* (2009), 46 E.T.R. (3d) 310 (Ont. S.C.J.) at paras. 13-15, being a case involving an application by the trustee of an *inter vivos* trust for the opinion, advice or direction of the Court on a question dealing with payments to income beneficiaries and a question as to whether the solvency provisions in the relevant corporate statute permitted the trustee to continue to declare dividends to fund the payments to the income beneficiaries.

23 Counsel for the Attorneys in the present case argued that the principle in *Fulford, Re* has no application because subsection 39(1) of the SDA specifically authorizes them to bring an application for directions and subsection 39(4) authorizes the court to give such directions as it considers to be for the benefit of the person and his or her dependants and consistent with this Act. Essentially the Attorneys argue that the enactment of 39(1) had the effect of overriding the principle in *Fulford, Re*.

24 In my view, the enactment of subsection 39(1) of the SDA did not have the effect of overriding or neutralizing the principle in *Fulford, Re*. As exemplified in the *Kaptyn Estate, Re* and *Primo Poloniato Grandchildren's Trust, Re* cases, the ability of trustees of testamentary or *inter vivos* trusts to apply for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property derives from Section 60(1) of the *Trustee Act*.

25 The fact that trustees are expressly permitted by the *Trustee Act* to apply for the opinion advice or direction of the Court does not authorize the court to exercise discretionary powers on behalf of trustees, thereby shifting responsibility from the trustees, on whom the settlor of the trust placed such responsibility, to the court. This is so even though subsection 60(2) of the *Trustee Act* provides a specific indemnification to trustees who act upon the opinion, advice or direction of the court.

26 In my view, there is no functional difference, for the purposes of the Attorneys' application in this case and the application of the principle in *Fulford, Re*, between subsection 60(1) of the *Trustee Act* and subsection 39(1) of the SDA, which reads as follows:

> If an incapable person has a guardian of property or an attorney under a continuing power of attorney, the court may give directions on any question arising in connection with the guardianship or power of attorney.

27 As indicated above, section 32(1) of the SDA provides that the powers and duties of guardians, including Attorneys for property, shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit. The power to make gifts or loans from the incapable person's property to friends or relatives is permissive only and is discretionary to the Attorneys. It is for the Attorneys to determine, in their discretion, whether gifts or loans should be made to Mr. Wilson and, in particular, whether any such gifts or loans would be prohibited by application of the rules in subsection 37(4) of the SDA.

28 It is evident that the Attorneys' purpose in bringing the application for directions is, at least to a significant degree, to seek to insulate themselves from liability to Mr. Wilson for refusing or declining to make gifts or loans to him from Mrs. Kaufman's property, or conversely, to the other beneficiaries under Mrs. Kaufman's Will should they, in their discretion, decide to make such gifts or loans. At paragraph 58 of their Factum, the Attorneys respond to the suggestion that the application was not brought in good faith by stating that they "must properly carry out their duties as attorneys, and may be liable if they do not do so. Herein they merely seek advice and direction in that regard." Mr. Keller, in his affidavit in support of the application, noted that Mr. Wilson has threatened litigation against him and Mr. Hilton, in their capacities both as executors and as powers of attorney for property. The Attorneys are therefore evidently of the view that Mr. Wilson's threat of litigation is relevant to their application.

2017 BCSC 1478
British Columbia Supreme Court

Jones v. McLeod

2017 CarswellBC 2285, 2017 BCSC 1478, [2017] B.C.W.L.D. 5615, 283 A.C.W.S. (3d) 445

Philip James Jones, as Trustee of the McLeod III Trust, and Philip James Jones, as Trustee of the McLeod IV Trust (Petitioners) and Sheila Elizabeth McLeod, William Ronald Thomas McLeod and Malcolm Roy James McLeod (Respondents)

Pearlman J., In Chambers

Heard: August 2, 2017
Judgment: August 4, 2017
Docket: Vancouver S170650

Counsel: R.R.E. DeFilippi, for Petitioners
H. Shapray, Q.C., for Respondents

Subject: Civil Practice and Procedure; Estates and Trusts

Headnote

Estates and trusts --- Trustees — Powers and duties of trustees — Supervision by court — Miscellaneous

Deceased was wealthy businessman who created several trusts for estate planning purposes — Trustee of trust in issue agreed under seal to be bound by trust indenture — Deceased's will made no provision for his two children from his first marriage — Trustee added children as beneficiaries of trust, but deceased's second wife claimed she was only beneficiary of trust and that trustee acted in breach of his fiduciary duties by appointing children as beneficiaries — Trustee claimed that appointments of children as beneficiaries were part of plan to roughly equalize distribution of deceased's assets — When parties were not able to resolve wife's claim to all of assets of trust, trustee brought petition seeking court's opinion, advice or directions on questions concerning management and administration of trust — Trustee applied to amend petition — Application granted — Trustee could seek advice, opinion or directions of court on legal question and then act on that advice — Court's opinion, advice or directions would be sought on question of whether trustee owed any duty to wife, rather than whether he acted in breach of any fiduciary or other duty — Amendments sought by trustee should be granted, as they would not prejudice wife, trustee had right to frame questions on which he sought court's advice, and there was no impending distribution of estate.

APPLICATION by trustee to amend petition seeking opinion, advice or directions of court on certain questions concerning management or administration of trust.

***Pearlman J., In Chambers* (Oral):**

1 The petitioner, Philip James Jones, as trustee of the McLeod IV Trust, applies to amend his petition filed January 20, 2017. By his petition brought pursuant to s. 86 of the *Trustee Act*, R.S.B.C. 1996. c. 464, Mr. Jones seeks the opinion, advice or directions of the court on certain questions concerning the management or administration of the McLeod IV Trust.

2 The McLeod IV Trust is one of several trusts created for estate planning purposes by the late Ross John McLeod, a wealthy businessman who I will refer to in these reasons as "Ross McLeod".

3 The respondent, Sheila Elizabeth McLeod, who I will refer to as "Mrs. McLeod", is the second wife and widow of Ross McLeod. She opposes one of the amendments sought by the petitioner. As I will discuss later in these reasons, Mrs. McLeod contends Mr. Jones has breached fiduciary duties he owed to her. She submits that the petitioner should not be permitted to

amend or replace a question by which he seeks the opinion and advice or directions of the court on whether he acted in breach of any fiduciary or other duty owed to Mrs. McLeod.

4 The respondents, William Ronald Thomas McLeod, who I will refer to as "William", and Malcolm Roy James McLeod, who I will refer to as "Malcolm", are the adult sons of Ross McLeod by his first marriage. They neither appeared nor were represented on the hearing of this application, although Malcolm filed an application response consenting to all of the amendments sought by the petitioner.

5 The background of this application may be briefly stated.

6 The McLeod IV Trust was established on November 15, 2006 by an indenture made between Dora McLeod, as settlor, and Ross McLeod, as trustee, for the benefit of such persons as the trustee might from time-to-time appoint as beneficiaries from classes of persons defined in the trust document.

7 As of November 15, 2006, the beneficiaries of the McLeod IV Trust were Ross McLeod and Mrs. McLeod.

8 Article 8.02(d) of the McLeod IV Trust provides that:

> In the event that the Trustee should die before the Trust Property has been fully distributed, the Protector may, by Deed or Will, appoint some person, or a trust company, to fill such vacancy. Notwithstanding the foregoing, no person shall be appointed trustee unless he or she agrees under seal to be bound by this indenture.

9 The indenture named Mr. Jones as protector.

10 On November 20, 2006 Ross McLeod made his will.

11 On September 5, 2011 Ross McLeod died. Under the will, Mrs. McLeod was to inherit approximately $22 million before taxes. Ross McLeod made no provision for William or Malcolm in his will.

12 On September 13, 2011, Mr. Jones resigned as protector and was appointed as the trustee of the McLeod IV Trust. The petitioner acknowledges that his appointment of September 13, 2011 as trustee was not by deed or will and that he did not then agree under seal to be bound by the trust indenture of November 15, 2006.

13 Also on September 13, 2011 the petitioner, as trustee of the McLeod IV Trust, added the Salvation Army as a beneficiary to the McLeod IV Trust.

14 On August 15, 2014 the Salvation Army was removed as beneficiary of the McLeod IV Trust and William and Malcolm were added as beneficiaries of that trust.

15 Mrs. McLeod says the designation of the Salvation Army as a beneficiary was made without her informed consent. She has also claimed, since August 2014, that the petitioner, as trustee of the McLeod IV Trust, acted in breach of his fiduciary duty by appointing Malcolm and William as beneficiaries. Mrs. McLeod claims that upon the death of Ross McLeod on September 5, 2011, she became the only beneficiary of the trust and was entitled in law to call for the winding up of the trust in accordance with the rule in *Saunders v. Vautier* (1841), 49 E.R. 282 (Eng. Rolls Ct.), aff'd (1841), 41 E.R. 482 (Eng. Ch. Div.).

16 The petitioner says that the appointments of the beneficiaries, about which Mrs. McLeod complains, were part of a plan to roughly equalize the distribution of the late Ross McLeod's assets among Mrs. McLeod, William and Malcolm. The total value of the assets in dispute is approximately $150 million.

17 On September 13, 2016 the petitioner was appointed trustee of the McLeod IV Trust by deed and agreed under seal to be bound by the trust indenture. When the petitioner and the respondents were unable to resolve Mrs. McLeod's claim to all of the assets of the McLeod IV Trust, the petitioner, as trustee, applied to the court for its opinion and advice or directions on the questions concerning the management and administration trust.

18 Section 86(1) of the *Trustee Act* provides:

> 86 (1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.

19 The petition is set for hearing for five days commencing October 23, 2017. Accordingly, the petitioner brings this application pursuant to Rule 16-1(19) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, which provides a party may amend a petition at any time with leave of the court.

20 The amendments sought are set out in paras. 1 through 7 of Part 1 of the petitioner's notice of application. The only contested amendment is set out in para. 4 and relates to para. 1(c) of the petition.

21 Paragraph 1(c) of the petition seeks the following relief:

> 1. A declaration setting out the opinion, advice or directions of the court on the following questions concerning the management or administration of the McLeod IV Trust, being:
>
> . . .
>
> (c) whether, in the circumstances that have occurred, the petitioner, Philip James Jones, as the trustee of the McLeod IV Trust, acted in breach of any duty, fiduciary or otherwise, to the Respondent, Sheila Elizabeth McLeod, in appointing the Respondents, William Ron add Thomas McLeod and Malcolm Roy James McLeod, as beneficiaries to the McLeod IV Trust on August 15, 2015.

22 The amendments sought would strike out the words "acted in breach of" and replace them with the word "owed."

23 The court's opinion, advice or directions would be sought on the question of whether the petitioner owed any duty, fiduciary or otherwise, to the respondent, Sheila Elizabeth McLeod, rather than whether he had acted in breach of any fiduciary or other duty.

24 The petitioner says this amendment is intended to clarify the particular legal question on which the opinion, advice or direction of the court is sought by the trustee, and only the trustee may seek the opinion, advice or direction of the court under s. 86(1) of the *Trustee Act*.

25 Mrs. McLeod submits the court should not be confined to answering any question about whether the petitioner owed a fiduciary duty. She says the court should also provide its opinion on whether Mr. Jones acted in breach of a fiduciary duty owed to her. Mrs. McLeod says Mr. Jones was also the lawyer for Ross McLeod, and the architect of her late husband's estate planning. She says Mr. Jones had a solicitor and client relationship with her. Mrs. McLeod says Mr. Jones appointed himself as trustee of the McLeod IV Trust without notice to her and that the appointments of first the Salvation Army, and later William and Malcolm, as beneficiaries of the McLeod IV Trust, prevented her, as the true sole beneficiary of the trust following her husband's death, from calling for the winding up of the trust and the distribution to her of all of its assets.

26 On July 28, 2017, Mrs. McLeod commenced an action by notice of civil claim against Mr. Jones and his former law firm in which she claims damages for breach of fiduciary duty. In that action she alleges breaches of fiduciary duty by Mr. Jones in his capacity as a lawyer; as the protector of the McLeod IV Trust; and in his appointments of the Salvation Army, William and Malcolm as beneficiaries of the trust.

27 Mr. Shapray has informed the court that Mrs. McLeod also intends to bring a counter-petition seeking the removal of Mr. Jones as trustee. He also refers to Rule 16-1(18) which provides the court with the discretion to apply any of the *Supreme Court Civil Rules* to a petition proceeding. The hearing of this petition was set for five days in contemplation of Mrs. McLeod applying for the cross-examination of Mr. Jones on his affidavit, or for the examination or cross-examination of witnesses at the hearing.

28 Mr. Shapray says that if these processes are invoked the court will be able to make findings of fact necessary to determine whether the petitioner acted in breach of the fiduciary duty.

29 Mrs. McLeod does not dispute the proposition that only the trustee may seek directions under s. 86(1) of the *Trustee Act* (see *Mayer v. Mayer*, 2013 BCSC 1958 (B.C. S.C.), aff'd 2014 BCCA 293 (B.C. C.A.), at paras. 62-63).

30 The authorities provide some assistance on the scope of the questions which may be asked of the court on an application under s. 86(1).

31 In *Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd.*, 2013 BCSC 2071 (B.C. S.C.), rev'd on other grounds, 2014 BCCA 227 (B.C. C.A.), Madam Justice Loo said this at para. 116:

> [116] The seeking of legal advice on legal issues arising in connection with the trustee's obligations is an appropriate category of application under s. 86 of the *Trustee Act* . . .

32 In *Chemainus Team Development Training Trust (Trustee of), Re*, 2004 BCSC 1605 (B.C. S.C.), Madam Justice Loo also discussed s. 86 of the *Trustee Act*. At para. 51 she said this:

> [51] On an application for directions under s. 86 of the *Trustee Act*, the court should not exercise the trustees' powers, but rather confine itself to advice on any legal issues that arise in connection with the trustees' obligations. This principle is enunciated by Middleton J. in *Re Fulford* (1913), 29 O.L.R. 375 at p. 382:
>
> > It is suggested that some scheme should be devised by which the Court should approve of realisation in each particular case, taking the opinion of some advisory committee, if necessary, upon each particular transaction. I do not think that any such scheme can be authorized. The executors are protected from all liability if they honestly and with due care exercise the discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the Court. The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorised to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.

33 What I take from these authorities is that an executor or trustee may seek the advice, opinion or directions of the court on a legal question and then act on that advice.

34 These, of course, are proceedings by petition. In *Strata Plan 1086 v. Coulter*, 2005 BCSC 146 (B.C. S.C.), Mr. Justice Wilson dealt with an application by the petitioner for an order that the notice to admit procedure, then governed by Rule 31 of the former *Rules of Court*, applied to petition proceedings. At para. 20, he referred to the petitioner's argument that Rule 31 ought to be applicable to originating proceedings. Mr. Justice Wilson went on to reject that argument, noting that a response is not equivalent or the same as a statement of defence, an answer or a counter-petition.

35 At paras. 24 to 26 Wilson J. said this:

> [24] A "response" in Form 124, pursuant to R. 10(5), contains no allegation of material fact. It does not signify the close of pleadings, because there are no pleadings. Issue is joined simply by the statement of the position to be taken in the response.
>
> [25] R. 1(5) is of no assistance, because R. 10 addresses the object, by permitting summary proceedings for the resolution of certain disputes.
>
> [26] An originating application presupposes that there will be no dispute about the material facts; although the inferences to be drawn from those material facts may very well be in dispute. Unlike a pleading, the facts are not alleged, they are testified to on affidavit by oath or affirmation.

36 While on the hearing of an application for directions under s. 86(1) the court may have to make some findings of fact in order to provide its opinion or directions on a legal question put to it, a petition proceeding is not suitable for the determination of contested issues of fact on questions relating to the trustee's liability.

37 In my view the amendments sought by the petitioner should be granted unless there would be prejudice to Mrs. McLeod. Here, the amendments sought will not prejudice Mrs. McLeod. There is no impending distribution of the estate.

38 Mrs. McLeod intends to counter-petition for Mr. Jones' removal. It is possible that counter-petition, if brought, may be heard at the same time as Mr. Jones' petition.

39 Further, Mrs. McLeod will have the full opportunity to make submissions on the question of whether the petitioner owed her a fiduciary or other duty.

40 Taking into account my finding that there will be no prejudice to Mrs. McLeod, and the right of the trustee to frame the questions on which he seeks the court's advice, I conclude that the amendments should be granted as sought.

41 Costs of this application will be costs in the cause.

Application granted.

2016 BCSC 1223
British Columbia Supreme Court

Tomlinson Estate, Re

2016 CarswellBC 1831, 2016 BCSC 1223, [2016] B.C.W.L.D. 4839, [2016] B.C.W.L.D. 4840, [2016] B.C.W.L.D. 4841, 268 A.C.W.S. (3d) 248

In the Matter of the Estate of Neta Louise Tomlinson, deceased

J.L. Dorgan J.

Heard: March 15, 2016
Judgment: June 30, 2016
Docket: Duncan P15693

Counsel: R.B. McDaniel, M.S. McConchie, for Lezlie Gayle Foster
A.J. Eden, for James Ryan Eugene Kamm and Bonnie Elaine Kamm

Subject: Civil Practice and Procedure; Estates and Trusts

Headnote

Estates and trusts --- Estates — Actions involving personal representatives — Rights and liabilities of personal representative — Actions against personal representative — General principles

Deceased's will named niece as executor and sole beneficiary of estate — Niece brought probate action and was issued grant of probate — Deceased's nephew and his wife brought civil action against niece in personal capacity and in capacity as executor claiming that deceased lacked testamentary capacity and was unduly influenced by niece, and they sought order that will was invalid and damages for unjust enrichment and quantum meruit — In probate action niece applied for relief, including order under s. 86 of Trustee Act for advice and directions respecting management or administration of trust property and that she was entitled to use estate funds in defending civil action — Application granted in part — Directions sought by niece did not relate to management or administration of will as envisioned by s. 86 of Act and order was not made under s. 86 — Executor was entitled to be indemnified by estate for out-of-pocket expenses properly and reasonably incurred in administering estate — Niece, as executor, was stepping into shoes of deceased and was attempting to fulfill terms of will — Niece was obligated to defend action and was entitled to be indemnified for expenses incurred in doing so, and fact that she was beneficiary of will was irrelevant.

Estates and trusts --- Estates — Actions involving personal representatives — Practice and procedure — Parties — Miscellaneous

Standing — Deceased's will named niece as executor and sole beneficiary of estate — Niece brought probate action and was issued grant of probate — Deceased's nephew and his wife brought civil action against niece in personal capacity and in capacity as executor claiming that deceased lacked testamentary capacity and was unduly influenced by niece, and they sought order that will was invalid and damages for unjust enrichment and quantum meruit — In probate action, nephew and wife applied for relief, including production of records and ordering niece not to use estate funds to pay legal fees — Application dismissed — Nephew and wife were not beneficiaries under will and would not inherit on intestacy — Nephew and wife were strangers to will and their only interest in estate was that of creditors who alleged that deceased owed them money for services rendered — Nephew and wife had no standing to challenge validity of will and pleadings in civil action seeking order pronouncing against validity of will on basis of lack of capacity or undue influence were struck out — As creditors nephew and wife had no standing or right to dictate to niece, who was appropriately carrying out duties as executor, how she was to use estate funds.

Estates and trusts --- Estates — Personal representatives — Discharge

Deceased's will named niece as executor and sole beneficiary of estate — Niece brought probate action and was issued grant of probate — Deceased's nephew and his wife brought civil action against niece in personal capacity and in capacity as executor claiming that deceased lacked testamentary capacity and was unduly influenced by niece, and they sought order that will was invalid and damages for unjust enrichment and quantum meruit — In probate action, nephew and wife applied for relief,

42 In *Dunsdon* at para. 203, Madam Justice Ballance notes that "in all cases, the fundamental guide must be the welfare of the beneficiaries: *Letterstedt v. Broers* (1884), 9 App. Cas. 371 (South Africa P.C.)."

43 Overall, the authorities reflect the fact that courts are hesitant to interfere with the discretion of a testator to name an executor and good reason must be shown for believing that the interests of the persons entitled under the will are in danger: see *Blitz Estate, Re*, 2000 BCSC 1596 (B.C. S.C.) citing Feeney's *Canadian Law of Wills*, (4th ed.) 2000 at para. 8.12.

44 I am satisfied that the evidence does not support a finding of any misconduct, negligence, or incapacity on the part of Ms. Foster. She has fulfilled all of the duties of an executor, including defending the action brought against the estate. The evidence does not suggest that she has been unwilling or has unreasonably refused to carry out the duties of an executor. There is no cogent evidence that the Kamms, as creditors, can point to which could lead the court to conclude that Ms. Foster's conduct has endangered the estate assets. And it must be noted, the Kamms are not beneficiaries and therefore cannot assert that their interests, arising from an entitlement under the will, are in jeopardy.

45 Further, the Kamms argue that Ms. Foster is not neutral; that she is in conflict because she is both the executor of the estate its sole beneficiary. No authority was cited in support of this argrument. The Kamms argue Ms. Foster has used her position as executor to advocate for her personal interests as the sole beneficiary of the estate. No cogent evidence was led in support of that contention.

46 Even if Ms. Foster was removed as executor, the new executor would be obliged to defend the will against the action of the Kamms and would be obliged to take a similar position to protect the beneficiaries of the estate. Furthermore, to remove Ms. Foster on the basis that one cannot act as executor because being both an executor and a beneficiary creates a conflict, would call into question one of the most basic and common arrangements used in wills. The deciding factor is whether proven acts or omissions endanger the trust property, show a lack of honesty, show a lack of capacity to execute the duties, or a lack of reasonable fidelity, such that the welfare of the beneficiaries is at risk.

47 There is no cogent evidence that Ms. Foster's actions as executor could possibly lead to her removal. In fact, the evidence is to the contrary.

48 Paras. 2 and 3 of the Kamms' notice of application are dismissed.

Ms. Foster's Application

49 Following the Kamms' demand that she cease using estate funds to pay the legal fees related to the Vancouver claim, Ms. Foster filed an application under s. 86 of the *Trustee Act* seeking the assistance of the court.

50 Section 86 of the *Trustee Act* reads as follows:

> 86 (1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.

51 In *Bailey, Re* (1982), 38 B.C.L.R. 227 (B.C. S.C.), Taylor J. in following the decision of this court in *Royal Trust Co., Re* (1962), 39 W.W.R. 636 (B.C. S.C.), stated the object of s. 86 (then section 82) as:

> . . . the section is designed to enable the court to assist trustees in 'little matters of discretion' concerning 'the management and investment of trust property', and it is not to be used as the basis for applications to construe an instrument, or to affect 'the rights of parties to property'.

52 In *Chemainus Team Development Training Trust (Trustee of), Re*, 2004 BCSC 1605 (B.C. S.C.) at para. 51, Madam Justice Loo said that s. 86 was designed in order to provide trustees with advice on legal issues rather than advice on the discharge of their powers:

[51] On an application for directions under s. 86 of the *Trustee Act*, the court should not exercise the trustees' powers, but rather confine itself to advice on any legal issues that arise in connection with the trustees' obligations. This principle is enunciated by Middleton J. in *Re Fulford* (1913), 29 O.L.R. 375 at p. 382:

> It is suggested that some scheme should be devised by which the Court should approve of realisation in each particular case, taking the opinion of some advisory committee, if necessary, upon each particular transaction. I do not think that any such scheme can be authorised. The executors are protected from all liability if they honestly and with due care exercise the discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the Court. The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorised to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.

53 *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 1164 writes:

> The issue of "management or administration as a limitation upon the *Trustee Act* power of the court to give its opinion, advice, or direction has been more particularly raised in connection with motions which turn out to involve a conflict as to ownership of the assets. The courts refuse to give such assistance when there is essentially a conflict between interested parties, and this is not merely because the court has not the necessary evidence before it, but because it is felt that a 'fight', whether or not it is patent, is not a matter of management or administration."

54 I am of the opinion that the directions sought by Ms. Foster do not relate to the management or administration of the will as envisioned by s. 86 of the *Trustee Act*. The focus of the section is for the court to help the trustees administer the trust by giving advice not in respect of conflicting parties, but advice regarding the obligations of a trustee. On that basis, I decline to make the order sought by Ms. Foster under s. 86.

55 Although the *Trustee Act* is not the appropriate tool for determining whether an executor is permitted to use estate funds to defend against the claims brought against the estate, I note that the common law may provide some guidance. An executor is entitled to be indemnified by the estate for all out-of-pocket expenses properly and reasonably incurred in the due administration of the estate — including legal expenses which are reasonably incurred, which could include litigation fees incurred in defending the estate. See *Thompson Estate, Re*, [1945] 2 D.L.R. 545 (S.C.C.) and *Jackson v. Jackson Estate*, 2003 BCSC 328 (B.C. S.C. [In Chambers]) at para. 12 where Burnyeat J. said:

> [12] As Executors, the Respondents are entitled to be indemnified out of the Estate for all proper expenses incurred in relation to the Estate and this right of indemnity is a first charge upon the capital and the income of the Estate: Halsbury's *Laws of England*, vol. 17, 4th ed. (London: Butterworths, 1976) at 612, paragraph. 1190. The Respondents are also entitled to be indemnified for all costs including legal costs which are reasonably incurred: *Geffen v. Goodman* (1991), 81 D.L.R. (4th) 211 (S.C.C.). As well, the Respondents are entitled to full indemnity for all costs and expenses properly incurred in the due administration of the Estate: *Thompson v. Lamport*, [1945] S.C.R. 343.

56 And finally, I note that the will itself contains the standard charging clause for the provision of payments for services rendered:

> I AUTHORIZE my Trustee to employ or pay any other person or persons in any profession, trade, or business to transact any business or business or do any act of whatsoever nature in relation to the trusts contained in this Will, including without limiting the generality of the foregoing, the receipt and payment of money, without being liable for the loss thereby incurred.

57 Ms. Foster, as the executor, is stepping into the shoes of the deceased and attempting to fulfill the terms of the will. In this case she is obliged to defend the estate against contested claims advanced by creditors and she is entitled to be indemnified for any expenses incurred in doing so. That she is the executor as well as the beneficiary of the estate is entirely irrelevant.

58 In the result:

1) The portions of the Kamms' Notice of Civil Claim in respect to the validity of the will are struck;

2) The Kamm's application before me is dismissed with ordinary costs payable forthwith;

3) Ms. Foster's application for directions is dismissed without costs.

59 Finally, Ms. Foster is entitled to full indemnification from the estate in respect to both the Kamms' application and her own.

Executor's application granted in part; nephew and wife's application dismissed.

WiddifieldE&T 12.3

Widdifield on Executors and Trustees, 6th Edition

12 — APPLICATION TO THE COURT FOR ADVICE OF THE COURT
Contributing Editor: Mary L. MacGregor, Editor: Carmen S. Thériault

12.3 — LIMITS ON THE USE OF THE SECTION AND RULE

12.3 — LIMITS ON THE USE OF THE SECTION AND RULE

Mary L. MacGregor *

12.3.1 — JUDICIAL CONTROL OF THE EXERCISE OF TRUSTEES' POWERS AND DISCRETIONS

See also chapter 8.5.

The court will not generally assist trustees in exercising the discretions given to them by the trust instruments. See *Collins, Re, supra* and *Reinisch Estate, Re,* 2011 CarswellMan 457 (Man. Master). If they act honestly, in good faith, and in accordance with the standard of care that would be shown by a reasonable and prudent business person managing his or her own affairs, neither the unhappy beneficiary nor the court will have a say as to how those discretions must be exercised. *Boukydis, Re* (1927), 60 O.L.R. 561 (Ont. C.A.); *Mattick, Re* (1967), 60 W.W.R. 503 (B.C. S.C.); *Floyd, Re,* [1961] O.R. 50 (Ont. H.C.).

However, there are many instances where the courts have assisted trustees if the dilemma arises out of legal matters rather than out of business matters. See the recent case *Jones v. McLeod*, 2017 BCSC 1478, 2017 CarswellBC 2285 (B.C. S.C.) in which the court held that an executor or trustee may seek the advice, opinion or directions of the court on a legal question and then act on that advice. Also see *Toigo Estate (Re)*, 2018 BCSC 936, 2018 CarswellBC 1469 (B.C. S.C.) where the court found that it could consider the trustee's application which raised the legal question of whether the trustee's decision to permit a significant encroachment was made lawfully and in conjunction with his duties as a trustee.

The following sections examine instances where the courts have been asked to intervene. Note, however, that it is difficult to reconcile the many cases which do not always proceed on full argument, because the trustees and beneficiaries often do not oppose each other vigorously and are content with submitting their questions to the court.

12.3.2 — HOSTILITY AMONG THE TRUSTEES

In *Davis, Re* (1983), 14 E.T.R. 83 (Ont. C.A.), the court found that, because of hostility between the executor and three beneficiaries, it would no longer be possible for the executor to exercise, in a completely impartial and objective manner, the very wide discretion she was given by the will with respect to payment of income to any one or more of the beneficiaries for living expenses and educational purposes. In consequence, the executor was replaced by a trust company.

12.3.3 — FAILURE TO EXERCISE DISCRETION

Trustees may fail to exercise their discretions for many reasons. They may simply refuse to do so, or are so hopelessly deadlocked on an issue, they cannot exercise their discretion. In *Sayers v. Philip* (1973), 38 D.L.R. (3d) 602 (Sask. C.A.), the trustees'

where the trustee had already determined to make the sale. It appeared that the trustee feared litigation by one of the unhappy beneficiaries and, therefore, sought approval.

In approving the sale, the court said,

> If an executor makes and acts upon his own decision, he is subject to attack by a beneficiary on the grounds of lack of bona fides or unfairness. In my opinion, R. 14.05(3)(f) allows the executor to apply to the Court for approval of his decision before it has been acted upon, so that subsequent litigation may be avoided. Counsel were unable to refer me to any decided case which sets out the principles upon which a Court should act in considering an application under para (f). I see no reason why the considerations should not be the same as those where his decision is attacked after the fact. In other words, the issues to be looked at are: *(1) has the executor the power to make the sale; (2) has he acted in good faith; and (3) has he acted fairly as between the beneficiaries* [emphasis added].

The court should not look at whether or not the sale is the most advantageous sale. If it did so, it would be interjecting its view into the decision-making process. However, the court should look at evidence before it to determine whether the sale is so improper that it infringes on the issue of good faith or fairness. See also *von Hopffgarten Estate v. Rommel*, 2012 BCSC 393, 2012 CarswellBC 679, 77 E.T.R. (3d) 235 (B.C. S.C.); *Jochem v. MacPherson*, 2010 ONSC 6391, 2010 CarswellOnt 8771 (Ont. S.C.J.).

Finally, a Nova Scotia Supreme Court decision is of interest. In *Nathanson, Re* (1971), 18 D.L.R. (3d) 495 (N.S. T.D.), the court authorized sale of an asset where all adult beneficiaries and the trustees wished it sold, although the testator had specifically directed its retention. The court felt it had inherent jurisdiction to authorize such a sale because the asset was becoming a financial burden to the estate.

12.3.6 — TRITE LAW

The courts have held that some legal principles and administrative rules are so clear that a solicitor's opinion is ample protection to the trustee: *Vant, Re* (1958), 27 W.W.R. 429 (Man. Q.B.); *Gordon, Re* (1912), 3 O.W.N. 1458 (Ont. Q.B.); *Kent, Re* (1924), 26 O.W.N. 19; *Collins, Re* (1927), 61 O.L.R. 225. The trustees may be penalized in costs if they bring such applications to deal with such issues: see, for example, *Mathe, Re* (1910), 17 O.W.R. 656 (Ont. C.A.), where an executor's costs on request for the construction of a will were denied by the judge hearing the application because the judge found the application to be unnecessary. This offers little assistance to non-professional trustees in deciding which legal matters are beyond question in this sense and which are not, and leaves them with the responsibility in the matter, particularly if they receive incorrect legal advice: *National Trustees Co. of Australasia Ltd. v. General Finance Co. of Australasia Ltd., supra.*

12.3.7 — ISSUES OF OWNERSHIP BETWEEN THE ESTATE AND THIRD PARTIES

Some cases go so far as to suggest that, in proceedings under the Rules or Acts, the court may not determine "legal rights" and that its jurisdiction is confined to advising "a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties *inter se* . . . Judges generally now consider that it ought not to be done." *Lorenz's Settlement, Re* (1861), 1 Dr. & Sm. 401 (Eng. V.-C.).

This case was cited in *Tecumseh Public Utilities Commission v. MacPhee* (1930), 66 O.L.R. 231 (Ont. C.A.). The judge also referred to *Hooper, Re* (1861), 29 Beav. 656 (Eng. Rolls Ct.), where the case was not allowed to proceed, the court observing that the object of the legislation was to assist trustees in the execution of the trusts, as to "little matters of discretion"; and that this was not a case of that description. See also *Bailey, Re* (1982), 12 E.T.R. 242 (B.C. S.C.), where the administrator *pendente lite* asked the court to determine the class among whom the residue of the estate was to be distributed, and to name the persons in the class, with a view to distributing to them. Taylor J. held that the British Columbia *Trustee Act* was not to be used as

the basis for applications to construe an instrument, or to affect the rights of parties to property. The court would not give its opinion, advice or direction pursuant to the section with respect to the class of persons among whom the residue of the estate was to be distributed, nor would it name the persons falling within that class.

The limitation seems to be that the court on such motions will refuse to decide ownership questions between an estate and a third party who is not a beneficiary. Canadian judges generally take a liberal view. They have adopted the approach of Middleton J. in *Fulford, Re, supra,* where he said, "The advice which the Court is authorized to give . . . is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern." See *Davis, Re, supra; Boukydis, Re, supra,* and *Wright, Re, supra.*

In *Collins, Re* (1927), 61 O.L.R. 225, advice was sought on the question of whether certain bonds had been effectively given away by the testator in his lifetime, or whether they were assets of the estate. The Court reviewed the older cases and concluded that it was beyond the jurisdiction of the court on such a motion to decide whether or not property belongs to an estate. The reasons relied on by the court were, *inter alia,* the very large value of the property, that a finding of fact must be made, and the fact that the issue was complicated and involved much more than the mere construction of documents. Similar reasoning was adopted in *Jeffery, Re, supra.*

In *Mayer, Re,* [1950] 2 W.W.R. 858 (Alta. T.D.), the court came to a similar conclusion. This was a motion to construe a will as to whether the testatrix had left a life estate to her husband or an absolute interest. The court held that questions in respect of the husband's dealings with the assets as executor and as a beneficiary, which arose out of its interpretation of the will, should not be gone into by the court in summary proceedings even if it had the power, because there were important questions of fact and law to be decided, including a question of onus of proof. In *Elliott, Re,* [1949] 2 W.W.R. 188 (Sask. K.B.), the result was similar.

Other cases confirming this general principle are *Elliott, Re,* [1949] 2 W.W.R. 188 (Sask. K.B.); *Ripstein, Re,* [1929] 1 W.W.R. 788 (Man. C.A.); *Turner, Re* (1912), 3 O.W.N. 1428 (Ont. H.C.); *Martin, Re* (1904), 8 O.L.R. 638; and *McDougall, Re* (1904), 8 O.L.R. 640. See also *Fisher v. Fisher Estate*, 2007 SKQB 407, 2007 CarswellSask 763, 37 E.T.R. (3d) 313, 309 Sask. R. 62 (Sask. Q.B.), varied 2008 CarswellSask 856 (Sask. C.A.) where the Testator, AF Sr., owned several parcels of land including mines and minerals occurring thereon. He entered into agreement to sell a certain parcel of land to his son, AF Jr. with the balance of debt to be forgiven in the event AF Sr. died before completion of the agreement. The agreement failed to indicate whether mines and minerals were included. AF Sr. passed away leaving a will appointing AF Jr. as executor and JB as executrix. In the course of the administration of the estate, AF Jr. and JB transferred the minerals connected to said parcel of land to AF Jr. An interested party brought originating notice under R. 452 of the Queen's Bench Rules asking the court for directions as to whether the testator intended to include the mines and minerals when the testator entered into agreement to sell land to AF Jr. AF Jr. brought a motion for order striking or dismissing the notice as frivolous, vexatious or abuse of court process. The motion was struck. The court held that the applicant was seeking to have substantive issues decided under the guise of the determination of a question arising under will or letters probate. Rule 452 did not contemplate or authorize answering questions determining the intentions of a testator when an agreement was entered into. See also *Simonson Estate v. Simonson Estate*, 2011 SKQB 165, 2011 CarswellSask 294, 68 E.T.R. (3d) 264, (*sub nom.* Simonson Estate, Re) 373 Sask. R. 214 (Sask. Q.B.).

Some cases do, however, show a more liberal approach, particularly where the parties do not object to the jurisdiction, where the issues are relatively simple (although not trite law), and where the subject matter is not of very large value. The following cases illustrate this.

Funk, Re, [1940] 1 W.W.R. 491 (Man. C.A.) illustrates a slight variation of the rule in *Collins, Re, supra,* and other like cases. There was a dispute as to whether insurance money was payable to the estate or to the widow. The court held that, if the insurance money had been paid to the estate, there would have been jurisdiction on such a motion, but since it was paid to the widow, there was no jurisdiction.

In *Matheson, Re* (1925), 29 O.W.N. 243, a motion was brought by executor A asking that executor B be compelled to issue a cheque to executor A as beneficiary, despite his contention that he was entitled to withhold the cheque as a set-off against

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1993 CarswellBC 1258, 1993 CarswellBC 44, [1993] 1 S.C.R. 980, [1993] 3 W.W.R. 337, [1993] R.D.F. 369, [1993] B.C.W.L.D. 1264, [1993] W.D.F.L. 721, [1993] S.C.J. No. 36, 101 D.L.R. (4th) 621, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 39 A.C.W.S. (3d) 646, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, J.E. 93-660, EYB 1993-67100

CATHERINE PETER v. WILLIAM BEBLOW

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: November 12, 1992
Judgment: March 25, 1993
Docket: Doc. 22258

Proceedings: reversed *Peter v. Beblow* ((1990)), 1990 CarswellBC 237, 50 B.C.L.R. (2d) 266, 29 R.F.L. (3d) 268, 39 E.T.R. 113, [1991] 1 W.W.R. 419 ((B.C. C.A.))

Counsel: *G. William Wagner* and *R.C. Bernhardt*, for appellant.
Nuala J. Hillis and *Jessie MacNeil*, for respondent.

Subject: Family; Insolvency; Estates and Trusts; Property

Headnote

Family Law --- Family property on marriage breakdown — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Constructive trusts generally

Family law — Unmarried couples — Property — Constructive and resulting trusts — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment — Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.

Trusts — Constructive trusts — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment — Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.

Restitution — Unjust enrichment — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment — Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.

The man and woman lived together in a common law relationship in the man's house for over 12 years. The woman cared for both sets of children while they remained at home. She cooked, cleaned, washed clothes, looked after the garden and worked on the property. The man did not pay the woman for her work. Both contributed to the purchase of groceries and supplies, the man contributing a greater share. The woman worked outside the home part-time during the summers, and purchased a property elsewhere. The man paid off his mortgage on the house and bought a houseboat and a van. After the parties separated, the house remained vacant. The woman brought an action claiming that the man had been unjustly enriched by her work. She sought to have a constructive trust imposed respecting the house or, alternatively, damages. The trial judge found that the man had been unjustly enriched since he had obtained the woman's services without compensation. He also found that the woman was under no obligation to perform the work without reasonable expectation of compensation, and that the man ought to have known that. He concluded that she had conferred a proprietary benefit upon the house in an amount just over its assessed value. As the man was living elsewhere and a monetary judgment would be impracticable since he was living on his pension, the fairest

apportionment would be to transfer the house to the woman. The British Columbia Court of Appeal allowed the man's appeal on the grounds that the woman was not deprived, that she had no reasonable expectation of compensation, and that there was insufficient nexus between her contribution and the property. The woman appealed.

Held:

Appeal allowed.

Per MCLACHLIN J. (LA FOREST, SOPINKA and IACOBUCCI JJ. concurring): Unjust enrichment has three elements: 1) an enrichment; 2) a corresponding deprivation; and 3) the absence of a juristic reason for the enrichment. One remedy for unjust enrichment is a monetary award. The remedy of constructive trust arises where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed. Here the three elements necessary to establish a claim for unjust enrichment were established. The woman's housekeeping and child-care services constituted a benefit to the man. Those services constituted a corresponding detriment to the woman. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment, there was no juristic reason for the enrichment.

In determining whether there is an absence of juristic reason for the enrichment, the test is flexible. The fundamental concern is the legitimate expectation of the parties. In family cases, this concern may raise certain subsidiary matters: whether the plaintiff conferred the benefit as a valid gift, or obligation owed the defendant; whether the plaintiff submitted to, or compromised, the defendant's honest claim; whether public policy supports the enrichment. Here the first and third factors could be argued. The law presumes no duty on a common law spouse to perform work and services for her partner. As the trial judge found on the facts that the woman was under no obligation to perform the work without reasonable expectation of compensation, the woman's services were neither performed pursuant to obligation nor were they a gift. Concerning public policy, there is no logical reason to distinguish domestic services from other contributions. Refusing to put a price on these services systematically devalues women's contributions to the family economy and contributes to the feminization of poverty. Today courts regularly recognize the value of domestic services. Although the legislature has excluded unmarried couples from matrimonial property legislation, it is precisely where an injustice arises without a legal remedy that equity finds a role. Accordingly, there were no juristic arguments that would justify the unjust enrichment.

In determining the proper remedy for unjust enrichment the same general principles apply in both commercial and in family cases. The first step is to determine whether a monetary award is insufficient and whether sufficient nexus between the contribution and the property has been made out. In considering whether a monetary award is insufficient the court may consider the probability of the award being paid as well as the special interest in the property acquired by the contributions. The extent of the interest is to be determined on the basis of the actual value of the matrimonial property — the "value-survived" approach. The "value-received" approach applies only to a monetary award. Where the claim is for an interest in the property one must necessarily determine what portion of the property's value is attributable to the plaintiff's services. A "value-received" approach to property would present practical problems with calculation. Moreover, a "value-survived" approach would accord best with the expectations of most parties, who expect to share in the wealth generated by their partnership. The trial judge's approach accorded with these principles. He assessed the value received by the woman, held that a monetary judgment would be inadequate, and concluded that there was a sufficiently direct connection between the services rendered and the property to support a constructive trust. Considering the woman's proper share of all the family assets, the evidence supported the trial judge's conclusion that the woman had established a constructive trust entitling her to title to the family home. Her services helped preserve the property and saved the man large sums of money which he used to pay off his mortgage and to purchase a houseboat and a van.

Per CORY J. (concurring) (L'HEUREUX-DUBÉ and GONTHIER JJ. concurring):

A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he or she would be unjustly enriched if he or she were permitted to retain it. The constructive trust may be applied where the spouse has contributed either to the acquisition of property or to its preservation, maintenance or improvement. This remedy may be applied to common law relationships. Here the trial judge specifically found that the woman's services had enriched the man.

Particularly in a matrimonial or long-term common law relationship it should, in the absence of cogent evidence to the contrary, be taken that the enrichment of one party will result in a deprivation of the other. The constructive trust is used to redress gains made through a breach of trust in a commercial or business relationship. Parties involved in long-term common law relationships

will also base their actions on mutual trust. They too are entitled, in appropriate circumstances, to the remedy of constructive trust. In today's society it is unreasonable to assume that the presence of love automatically implies the gift of one party's services to another. Nor is it unreasonable for the party providing the domestic labour to share in the parties' property when the relationship is ended. The balancing of benefits in a matrimonial or common law relationship cannot be accomplished with the precision possible in a commercial relationship. The trial judge must consider the nature of the relationship, its duration and the contributions of the parties. Here there was ample evidence to justify the trial judge's finding that the woman had suffered deprivation. As a result of the relationship, including the efforts of the woman, the house was looked after and maintained. A 12-year relationship was long enough to provide a strong presumption that the services provided by the woman would not be used solely to enrich the man. The woman worked to create a home for the man, which involved many hours of work per week. The test regarding juristic reasons for the enrichment is an objective one. In a common law relationship, it is not necessary that there be evidence of promises to marry or to compensate the claimant for the services provided. Rather, where a person provides "spousal services" to another, those services should be taken as having been given with the expectation of compensation unless there is evidence to the contrary. Here the trial judge appropriately drew the inference that the woman would reasonably have had an expectation of sharing the wealth she helped to create. All the conditions for unjust enrichment were made out.

While there is a need to limit the use of the constructive trust remedy in a commercial context, the same proposition should not be rigorously applied in a family relationship. Unlike a commercial relationship, in a family relationship the work, services and contributions provided by one of the parties need not be directly linked to a specific property. As long as there was no compensation provided for one party's services then it can be inferred that the provision of those services permitted the other party to acquire lands or to improve them. It follows that in a quasi-marital relationship where third party rights are not involved, the choice between a monetary award and a constructive trust will be discretionary and should be exercised flexibly. The decision as to which property, if there is more than one, should be made the subject of a constructive trust is also a discretionary one. Where the relationship is short or there are no assets surviving its dissolution, a monetary award should be made. A monetary payment might also be more appropriate than a constructive trust if the plaintiff's entitlement is small or could be satisfied apart from the property, if the defendant has any special attachment to the property, or if an award to the plaintiff of an interest in the property might cause hardship to the defendant. Here the woman contributed to the maintenance and preservation of the house. The trial judge was correct in finding that a monetary award would be impracticable. The property was vacant and the woman might have formed an emotional attachment to it. It was both reasonable and appropriate to choose the house for a constructive trust.

The two methods of evaluating the contribution of a party in a matrimonial relationship are the "value received" approach and the "value surviving" approach. While the former has traditionally been used in constructive trust cases, there is no reason why the latter approach could not be used. The remedy should be flexible. Nevertheless, the value surviving approach will often be preferable. This method will usually be more equitable and will more closely accord with the parties' expectations. Further, this method will avoid the difficult task of putting a dollar value on domestic services. Here the trial judge used a value received approach. Awarding the house to the woman reflected a fair assessment of her contribution to the relationship.

Appeal from judgment of British Columbia Court of Appeal, [1991] 1 W.W.R. 419, 50 B.C.L.R. (2d) 266, 39 E.T.R. 113, 29 R.F.L. (3d) 268, reversing judgment of Arkell L.J.S.C. awarding common law wife matrimonial home under constructive trust.

***McLachlin J. (La Forest, Sopinka and Iacobucci JJ.* concurring):**

1 I have had the advantage of reading the reasons of Justice Cory. While I agree with his conclusion and with much of his analysis, my reasons differ in some respects on two matters critical to this appeal: the issues raised by the requirement of the absence of juristic reason for an enrichment and the nature and application of the remedy of constructive trust.

2 In recent decades, Canadian courts have adopted the equitable concept of unjust enrichment inter alia as the basis for remedying the injustice that occurs where one person makes a substantial contribution to the property of another person without compensation. The doctrine has been applied to a variety of situations, from claims for payments made under mistake to claims arising from conjugal relationships. While courts have not been adverse to applying the concept of unjust enrichment in new circumstances, they have insisted on adhering to the fundamental principles which have long underlain the equitable doctrine of unjust enrichment. As stated by La Forest J.A. (as he then was) in *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236, at p.

246, "... the well recognized categories of unjust enrichment must be regarded as clear examples of the more general principle that transcends them."

3 The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of quantum meruit or quantum valebat. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, the Canadian jurisprudence recognized that in some cases it might be insufficient. This may occur, to quote Justice La Forest in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 678, "if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property." Or to quote Dickson J., as he then was, in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 852, where there is a "contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon sale of [the property]." In other words, the remedy of constructive trust arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.

4 Notwithstanding these rather straightforward doctrinal underpinnings, their application has sometimes given rise to difficulty. There is a tendency on the part of some to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties. In the rush to substantive justice, the principles are sometimes forgotten. Policy issues often assume a large role, infusing such straightforward discussions as whether there was a "benefit" to the defendant or a "detriment" to the plaintiff. On the remedies side, the requirements of the special proprietary remedy of constructive trust are sometimes minimized. As Professor Palmer has said: "The constructive trust idea stirs the judicial imagination in ways that assumpsit, quantum meruit and other terms as sociated with quasi-contract have never quite succeeded in duplicating" (G.E. Palmer, *The Law of Restitution*, vol. 1, at p. 16). Occasionally the remedial notion of constructive trust is even conflated with unjust enrichment itself, as though where one is found the other must follow.

5 Such difficulties have to some degree complicated the case at bar. At the doctrinal level, the simple question of "benefit" and "detriment" became infused with moral and policy questions of when the provision of domestic services in a quasi-matrimonial situation can give rise to a legal obligation. At the stage of remedy, the trial judge proceeded as if he were making a monetary award, and then, without fully explaining how, awarded the appellant the entire interest in the matrimonial home on the basis of a constructive trust. It is only by a return to the fundamental principles laid out in cases like *Pettkus v. Becker* and *Lac Minerals*, that one can cut through the conflicting findings and submissions on these issues and evaluate whether in fact the appellant has made out a claim for unjust enrichment, and if so what her remedy should be.

1. Is the Appellant's Claim for Unjust Enrichment Made Out?

6 I share the view of Cory J. that the three elements necessary to establish a claim for unjust enrichment — an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment — are made out in this case. The appellant's housekeeping and child-care services constituted a benefit to the respondent (1st element), in that he received household services without compensation, which in turn enhanced his ability to pay off his mortgage and other assets. These services also constituted a corresponding detriment to the appellant (2nd element), in that she provided services without compensation. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment and no other arguments under this broad heading were met, there is no juristic reason for the enrichment (3rd element). Having met the three criteria, the plaintiff has established an unjust enrichment giving rise to restitution.

7 The main arguments on this appeal centred on whether the law should recognize the services which the appellant provided as being capable of founding an action for unjust enrichment. It was argued, for example, that the services cannot give rise to a remedy based on unjust enrichment because the appellant had voluntarily assumed the role of wife and stepmother. It was also said that the law of unjust enrichment should not recognize such services because they arise from natural love and affection. These arguments raise moral and policy questions and require the Court to make value judgments.

8 The first question is: where do these arguments belong? Are they part of the benefit — detriment analysis, or should they be considered under the third head — the absence of juristic reason for the unjust enrichment? The Court of Appeal, for example, held that there was no "detriment" on these grounds. I hold the view that these factors may most conveniently be considered under the third head of absence of juristic reason. This Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment: *Pettkus v. Becker*, supra; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 [[1986] 5 W.W.R. 289]; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (hereinafter "*Peel*"). It is in connection with the third element — absence of juristic reason for the enrichment — that such considerations may more properly find their place. It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

9 What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? The test is flexible, and the factors to be considered may vary with the situation before the court. For example, different factors may be more relevant in a case like *Peel*, supra, at p. 803, a claim for unjust enrichment between different levels of government, than in a family case.

10 In every case, the fundamental concern is the legitimate expectation of the parties: *Pettkus v. Becker*, supra. In family cases, this concern may raise the following subsidiary questions:

11 (i) Did the plaintiff confer the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he or she owed to the defendant?

12 (ii) Did the plaintiff submit to, or compromise, the defendant's honest claim?

13 (iii) Does public policy support the enrichment?

14 In the case at bar, the first and third of these factors were argued. It was argued first that the appellant's services were rendered pursuant to a common law or equitable obligation which she had assumed. Her services were part of the bargain she made when she came to live with the respondent, it was said. He would give her and her children a home and other husbandly services, and in turn she would look after the home and family.

15 This Court has held that a common law spouse generally owes no duty at common law, in equity or by statute to perform work or services for her partner. As Dickson C.J., speaking for the Court put it in *Sorochan v. Sorochan*, supra, at p. 46, the common law wife "was under no obligation, contractual or otherwise, to perform the work and services in the home or on the land." So there is no general duty presumed by the law on a common law spouse to perform work and services for her partner.

16 Nor, in the case at bar was there any obligation arising from the circumstances of the parties. The trial judge held that the appellant was "under no obligation to perform the work and assist in the home without some reasonable expectation of receiving something in return other than the drunken physical abuse which she received at the hands of the respondent." This puts an end to the argument that the services in question were performed pursuant to obligation. It also puts an end to the argument that the appellant's services to her partner were a "gift" from her to him. The central element of a gift at law — intentional giving to another without expectation of remuneration — is simply not present.

17 The third factor mentioned above raises directly the issue of public policy. While it may be stated in different ways, the argument at base is simply that some types of services in some types of relationships should not be recognized as supporting legal claims for policy reasons. More particularly, homemaking and childcare services should not, in a marital or quasi-marital relationship, be viewed as giving rise to equitable claims against the other spouse.

18 I concede at the outset that there is some judicial precedent for this argument. Professor Marcia Neave has observed generally that "analysis of the principles applied in English, Australian and Canadian courts sometimes fails to confront this question directly ... Courts which deny or grant remedies usually conceal their value judgments within statements relating to doctrinal requirements." (Marcia Neave, "Three Approaches to Family Property Disputes — Intention/Belief, Unjust Enrichment and Unconscionability," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts*, at p. 251). More pointedly, Professor

Farquhar has observed that many courts have strayed from the framework of *Sorochan* for public policy reasons: "the courts ... have, after *Sorochan*, put up warning signs that there are aspects of relationships that are not to be analyzed in the light of unjust enrichment and constructive trust." (Keith B. Farquhar, "Causal Connection in Constructive Trust After *Sorochan v. Sorochan*" (1989), 7 Can. J. of Family Law 337, at p. 343). The public policy issue has been summed up as follows by Professor Neave at p. 251: "whether a remedy, either personal or proprietary, should be provided to a person who has made contributions to family resources." On the judicial side, the view of the respondent is pointedly stated in *Grant v. Edwards*, [1986] 2 All E.R. 426, at p. 439, per Browne-Wilkinson V.C.:

> Setting up house together, having a baby and making payments to general housekeeping expenses ... may all be referable to the mutual love and affection of the parties and not specifically referable to the claimant's belief that she has an interest in the house.

Proponents of this view, Professor Neave, at p. 253 argues, "regard it as distasteful to put a price upon services provided out of a sense of love and commitment to the relationship. They suggest it is unfair for a recipient of indirect or non-financial contributions to be forced to provide recompense for those contributions." To support this position, the respondent cites several cases. *Kshywieski v. Kunka Estate* (1986), 50 R.F.L. (2d) 421 [[1986] 3 W.W.R. 472] (Man. C.A.); *Houghen v. Monnington* (1991), 37 R.F.L. (3d) 279 (B.C.C.A.); *Prentice v. Lang* (1987), 10 R.F.L. (3d) 364 (B.C.S.C.); *Hyette v. Pfenniger*, B.C.S.C., Dec. 19, 1991 [now reported (1991), 39 R.F.L. (3d) 30, additional reasons at 39 R.F.L. (3d) at 44].

19 It is my view that this argument is no longer tenable in Canada, either from the point of view of logic or authority. From the point of view of logic, I share the view of Professors Hovius and Youdan [*The Law of Family Property*] that "there is no logical reason to distinguish domestic services from other contributions" (at p. 146). The notion that household and childcare services are not worthy of recognition by the court fails to recognize the fact that these services are of great value, not only to the family, but to the other spouse. As Lord Simon observed nearly thirty years ago: "The cock-bird can feather his nest precisely because he is not required to spend most of his time sitting on it" ("With All My Worldly Goods," *Holdsworth Lecture* (University of Birmingham, 20th March 1964), at p. 32). The notion, moreover, is a pernicious one that systematically devalues the contributions which women tend to make to the family economy. It has contributed to the phenomenon of the feminization of poverty which this Court identified in *Moge v. Moge*, [1992] 3 S.C.R. 813 [[1993] 1 W.W.R. 481], per L'Heureux-Dubé J., at pp. 853-54.

20 Moreover, the argument cannot stand with the jurisprudence which this and other courts have laid down. Today courts regularly recognize the value of domestic services. This became clear with the Court's hold ing in *Sorochan*, leading one author to comment that "the Canadian Supreme court has finally recognized that domestic contribution is of equal value as financial contribution in trusts of property in the familial context" (Mary Welstead, "Domestic Contribution and Constructive Trusts: The Canadian Perspective," [1987] Denning L.J. 151, at p. 161). If there could be any doubt about the need for the law to honestly recognize the value of domestic services, it must be considered to have been banished by *Moge v. Moge*, supra. While that case arose under the *Divorce Act*, R.S.C. 1985 c. 3 (2nd Supp.), the value of the services does not change with the legal remedy invoked.

21 I cannot give credence to the argument that legal recognition of the value of domestic services will do violence to the law and the social structure of our society. It has been recognized for some time that such services are entitled to recognition and compensation under the *Divorce Act* and the provincial Acts governing the distribution of matrimonial property. Yet society has not been visibly harmed. I do not think that similar recognition in the equitable doctrine of unjust enrichment will have any different effect.

22 Finally, I come to the argument that, because the legislature has chosen to exclude unmarried couples from the right to claim an interest in the matrimonial assets on the basis of contribution to the relationship, the court should not use the equitable doctrine of unjust enrichment to remedy the situation. Again, the argument seems flawed. It is precisely where an injustice arises without a legal remedy that equity finds a role. This case is much stronger than *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, where I dissented on the ground that the statute expressly pronounced on the very matter with respect to which equity was invoked.

23 Accordingly, I would agree with Cory J. that there are no juristic arguments which would justify the unjust enrichment, and the third element is made out. Like him, I conclude that the plaintiff was enriched, to the benefit of the defendant, and that no justification existed to vitiate the unjust enrichment claim. The claim for unjust enrichment is accordingly made out and it remains only to determine the appropriate remedy.

2. Remedy — Monetary Judgment or Constructive Trust?

24 The other difficult aspect of this case is the question of whether the remedy which the trial judge awarded — title to the matrimonial home — is justified on the principles governing the action for unjust enrichment. Two remedies are possible: an award of money on the basis of the value of the services rendered, i.e., quantum meruit; and the one the trial judge awarded, title to the house based on a constructive trust.

25 In Canada the concept of the constructive trust has been used as a vehicle for compensating for unjust enrichment in appropriate cases. The constructive trust, based on analogy to the formal trust of traditional equity, is a proprietary concept. The plaintiff is found to have an interest in the property. A finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust. As I wrote in *Rawluk*, supra, for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution. This is the notion underlying the constructive trust in *Pettkus v. Becker*, supra, and *Sorochan v. Sorochan*, supra, as I understand those cases. It was also affirmed by La Forest J. in *Lac Minerals*, supra.

26 My colleague Cory J. suggests that, while a link between the contribution and the property is essential in commercial cases for a constructive trust to arise, it may not be required in family cases. He writes [pp. 31-32]:

> ... La Forest J. concluded [in *Lac Minerals*, supra] that the constructive trust should only be awarded when the personal monetary award is insufficient; that is, when there is reason to grant to the plaintiff the additional rights that flow from recognition of a right to property.
>
> I agree with my colleague that there is a need to limit the use of the constructive trust remedy in a commercial context. Yet I do not think the same proposition should be rigorously applied in a family relationship.

27 I doubt the wisdom of dividing unjust enrichment cases into two categories — commercial and family — for the purpose of determining whether a constructive trust lies. A special rule for family cases finds no support in the jurisprudence. Neither *Pettkus*, nor *Rathwell* [*Rathwell v. Rathwell*, [1978] 2 W.W.R. 101], nor *Sorochan* suggest such a departure. Moreover, the notion that one can dispense with a link between the services rendered and the property which is claimed to be subject to the trust is inconsistent with the proprietary nature of the notion of constructive trust. Finally, the creation of special rules for special situations might have an adverse effect on the development of this emerging area of equity. The same general principles should apply for all contexts, subject only the demonstrated need for alteration. Wilson J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 [35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385], at p. 519 (adopted by La Forest J. in *Lac Minerals*, supra, at p. 675), warns against confining constructive trust remedies to family law cases stating that: "to do so would be to impede the growth and impair the flexibility crucial to the development of equitable principles." The same result, I fear, may flow from developing special rules for finding constructive trusts in family cases. In short, the concern for clarity and doctrinal integrity with which this Court has long been preoccupied in this area mandates that the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases.

28 Nor does the distinction between commercial cases and family cases on the remedy of constructive trust appear to be necessary. Where a monetary award is sufficient, there is no need for a constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact the claimant's efforts have given her a special link to the property, in which case a constructive trust arises.

29 For these reasons, I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which

the trust is claimed. Having said this, I echo the comments of Cory J. at p. 28 [p. 32] that the courts should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases.

30 The next question is the extent of the contribution required to give rise to a constructive trust. A minor or indirect contribution is insufficient. The question, to quote Dickson C.J. in *Pettkus v. Becker*, supra, at p. 852, is whether "[the plaintiff's] contribution [was] sufficiently substantial and direct as to entitle her to a portion of the profits realized upon sale of the ... property." Once this threshold is met, the amount of the contribution governs the extent of the constructive trust. As Dickson C.J. wrote in *Pettkus v. Becker*, supra, at pp. 852-53:

> Although equity is said to favour equality, as stated in *Rathwell*, it is not every contribution which will entitle a spouse to a one-half interest in the property. *The extent of the interest must be proportionate to the contribution, direct or indirect, of the claimant. Where the contributions are unequal, the shares will be unequal.* [Emphasis added.]

Cory J. advocates a flexible approach to determining whether a constructive trust is appropriate; an approach "based on common sense and a desire to achieve a fair result for both parties" (at p. 28 [p. 32]). While agreeing that courts should avoid becoming overly technical on matters which may not be susceptible of precise monetary valuation, the principle remains that the extent of the trust must reflect the extent of the contribution.

31 Before leaving the principles governing the remedy of constructive trust, I turn to the manner in which the extent of the trust is determined. The debate centres on whether it is sufficient to look at the value of the services which the claimant has rendered (the "value received" approach), or whether regard should be had to the amount by which the property has been improved (the "value survived" approach). Cory J. expresses a preference for a "value survived" approach. However, he also suggests, at p. 31 [pp. 33-34], that "there is no reason why quantum meruit or the value received approach could not be utilized to quantify the value of the constructive trust." With respect, I cannot agree. It seems to me that there are very good reasons, both doctrinal and practical, for referring to the "value survived" when assessing the value of a constructive trust.

32 From the point of view of doctrine, "the extent of the interest must be proportionate to the contribution" to the property: *Pettkus v. Becker*, supra, at p. 852. How is the contribution to the property to be determined? One starts, of necessity, by defining the property. One goes on to determine what portion of that property is attributable to the claimant's efforts. This is the "value survived" approach. For a monetary award, the "value received" approach is appropriate; the value conferred on the property is irrelevant. But where the claim is for an interest in the property one must of necessity, it seems to me, determine what portion of the value of the property claimed is attributable to the claimant's services.

33 I note, as does my colleague, that there may also be practical reasons for favouring a "value survived" approach. Cory J., alludes to the practical problems with balancing benefits and detriments as required by the "value received" approach, leading some to question whether it is the least attractive approach in most family property cases (see *Davidson v. Worthing* (1986), 6 R.F.L. (3d) 113 [9 B.C.L.R. (2d) 202] (S.C.), McEachern C.J.S.C.; Hovius and Youdan at pp. 136ff). Moreover, a "value survived" approach arguably accords best with the expectations of most parties; it is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship.

34 To summarize, it seems to me that the first step in determining the proper remedy for unjust enrichment is to determine whether a monetary award is insufficient and whether the nexus between the contribution and the property described in *Pettkus v. Becker* has been made out. If these questions are answered in the affirmative the plaintiff is entitled to the proprietary remedy of constructive trust. In looking at whether a monetary award is insufficient the court may take into account the probability of the award's being paid as well as the special interest in the property acquired by the contributions: per La Forest J. in *Lac Minerals*. The value of that trust is to be determined on the basis of the actual value of the matrimonial property — the "value survived" approach. It reflects the court's best estimate of what is fair having regard to the contribution which the claimant's services have made to the value surviving, bearing in mind the practical difficulty of calculating with mathematical precision the value of particular contributions to the family property.

1980 CarswellOnt 299
Supreme Court of Canada

Becker v. Pettkus

1980 CarswellOnt 299, 1980 CarswellOnt 644, [1980] 2 S.C.R. 834, [1980] S.C.J. No. 103,
117 D.L.R. (3d) 257, 19 R.F.L. (2d) 165, 34 N.R. 384, 6 A.C.W.S. (2d) 263, 8 E.T.R. 143

Lothar Pettkus v. Rosa Becker

Laskin C.J.C., Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

Heard: June 23, 1980
Judgment: December 18, 1980
Docket: None given

Counsel: *B.B. Swadron, Q.C.*, and *S.G. Himel*, for appellant.
S.N. Lederman and *G.E. Langlois*, for respondent.

Subject: Family; Insolvency; Estates and Trusts; Property

Headnote

Family Law --- Family property on marriage breakdown — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Businesses

Applications as to title and possession of property — Title to property — Principles for determining — Unmarried persons — Constructive trust — Unjust enrichment — Indirect financial contribution — Direct contribution of labour — Woman entitled to one-half interest in property held by man.

A man and woman lived together as man and wife for approximately 20 years. The woman supported the couple during the first five years, while the man saved so as to be able to acquire a farm. The woman aided the man in obtaining and maintaining his bee-keeping business and helped with the farm labours. The man subsequently purchased additional land and built a home on part of it with the profits from the bee-keeping business. The farm was subsequently sold and the proceeds deposited into the man's bank account.

The woman sought a declaration that she was entitled to a one-half interest in the real property and assets acquired by them as a result of their joint efforts. The trial judge rejected her claim, and the woman appealed.

The Court of Appeal allowed the appeal and the man appealed.

Held:

Appeal dismissed.

Per Dickson J. (Laskin C.J.C., Estey, McIntyre, Chouinard and Lamer JJ. concurring)

As there was no evidence of common intention, there was no resulting trust. However, a constructive trust arose in favour of the respondent by virtue of joint effort and teamwork as a result of which the appellant was able to acquire property. There was no basis for any distinction, in dividing property and assets on equitable grounds, between marital relationships and those more informal relationships which subsist for a lengthy period. There was a clear link between the contribution and the disputed assets. The indirect contribution of money and the direct contribution of labour was clearly linked to the acquisition of property the beneficial ownership of which was in dispute. Although the appellant may have contributed somewhat more to the material fortunes of the joint enterprise, each started with nothing, and each worked continuously, unremittingly and sedulously in the joint effort. Accordingly, an equal division was appropriate.

Per Ritchie J.

Where advances made by one party were used by the other to acquire and operate a common household throughout the period of the relationship between the parties, there arose a presumption of intention to create a resulting trust. Thus, an equal entitlement was proper.

Per Martland J. (Beetz J. concurring)

To extend the constructive trust by applying the principle of unjust enrichment to cases of this type was undesirable. It was possible to find a resulting trust and dismiss the appeal on that basis.

Annotation

Pettkus v. Becker represents a true landmark decision in Canadian law. Its effects reach out to the law surrounding matrimonial property, the law surrounding the rights of unmarried yet cohabiting persons in property, trust law, the law of restitution, the law of evidence and the conflict of laws.

In connection with the conflict of laws, Dickson J. stated [at p. 184]:

I would not wish to conclude without reference to the conflict of laws question lurking in the background in this case. The evidence discloses that the parties domiciled in the province of Quebec from 1955 until at least August 1971, when vacant property was purchased in East Hawkesbury, Ontario. It is arguable that the laws of the province of Quebec, and not those of Ontario, should govern the rights of the parties. This point was not pleaded, nor was it addressed by court or counsel in any of the earlier proceedings. It was not alluded to during argument in this court.

Since proceedings were commenced in Ontario, the internal law of Ontario, lex fori, would apply unless the court was directed by an Ontario choice of law rule to apply another system of law. For every choice of law rule, there must be a legal issue. The interesting point is: What is the legal issue which could "arguably" lead to the application of Quebec law? The possibilities are: (1) the creation, retention and transfer of property rights in (a) movables and (b) immovables; or (2) the effect of "living together" on the property rights of the parties. In the former case the issue would fall to be decided in accordance with the lex situs principle: Ontario (two rural properties) and Quebec (a third property). In the latter case there has traditionally been no acknowledged conflict of laws, legal issue or choice of law rule. On the tenor of Dickson J.'s reasons for judgment, it is submitted that His Lordship would have adopted the latter approach and, as closely as possible, approximated the common law legal issue (effect of marriage on property) and choice of law rule (the common domicile at the time of acquisition) for movables and lex situs for immovables, in the absence of a marriage contract. Such contract could be express or implied. Traditionally, a contract could be implied by law by reference to the domicile at the time of "union": Quebec (*De Nicols v. Curlier*, [1900] A.C. 21 (H.L.)). The unwillingness to apply the Family Law Reform Act, 1978 (Ont.), c. 2 ("F.L.R.A."), with respect to the division of property implies the court would be unwilling to apply s. 13 of the Act (conflict of law provisions). The willingness to apply the common law domestic matrimonial law may indicate a willingness to apply the common law, conflict of law, matrimonial law. The reference to the domicile of the parties and the acquisition date of property reflects this tendency. If the simple property (as opposed to matrimonial property) rules were under examination, domicile would have been irrelevant. If, on the other hand, a "matrimonial" property analysis were adopted, the domicile at "union" (at least) would have come under consideration. If common law domestic "matrimonial" law is applicable to "extra-marital unions" it is only reasonable that common law matrimonial law with respect to conflict of law (property) should also be available (as to interface between domestic law and conflict of laws (property); see annotation, *Sinnett v. Sinnett* (1980), 15 R.F.L. (2d) 115 (Ont. Co. Ct.)). If no reason, aside from statute (F.L.R.A.), exists to apply different property law in connection with "married" and "unmarried" couples at a domestic level, there is no reason to impose one "internationally" or at least "inter-provincially" indicated in the reasons for judgment.

In connection with the law of evidence, Dickson J. has reaffirmed the uncomfortable compromise of *Can. Nat. SS. Co. v. Watson*, [1939] S.C.R. 11, [1939] 1 D.L.R. 273; and *C.P.R. v. Parent*, [1917] A.C. 195, 33 D.L.R. 12, with respect to the proof of foreign law. Whether or not the technical reconciliation of such decisions is wise, the Supreme Court's willingness to state the rule must be appreciated. One interesting point, however, has to do with the acceptance of a work on Quebec conflict of laws as authority. The proof of foreign law is a fact and must be proved as any other fact. Such proof is a matter of procedure to be governed by the lex fori (Ontario law), not the law of the foreign country (Quebec). However, Dr. Castel does state the law applicable in Ontario in the work referred to.

On the same issue, it is somewhat surprising that Dickson J. did not cite *C.P.R. v. Parent* or refer to the relevant Evidence Act, R.S.C. 1970, c. E-10 provisions which deal with proof of foreign (inter-provincial) law.

The juxtaposition of the decisions of Dickson J. and Martland J. perfectly illustrates the case law surrounding the law of restitution: a scarred and uncertain battlefield. The development of the law of restitution involves the interaction of two distinct rationales: implied contract and unjust enrichment. At various points in history each have held sway. Whilst "in power" the advocates of each theory have expressly or impliedly denigrated the other. The reasons for judgment of Martland J. clearly show the shifting development from unjust enrichment (*Moses v. MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676) to implied contract (*Holt v. Markham*, [1923] 1 K.B. 504) to unjust enrichment (*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour*, [1943] A.C. 32) to implied contract (*Reading v. A.G.*, [1951] A.C. 507, [1951] 1 All E.R. 617 (H.L.)). With respect, however, His Lordship has stopped the legal clock too soon. On the strength of Canadian law and current English law, it is submitted that the law has accepted that the true basis for the law of restitution is the prevention of unjust enrichment, and not the fiction of implied contract (*Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 1 R.F.L. (2d) 1, [1978] 2 W.W.R. 101, 1 E.T.R. 307, 19 N.R. 91, 83 D.L.R. (3d) 289; *Babrociak v. Babrociak* (1978), 1 R.F.L. (2d) 95 (Ont. C.A.); *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.*, [1979] 3 All E.R. 522. See also Goff & Jones, The Law of Restitution, (1966) 2nd ed., pp. 3-42.)

This is not to say that the law has abdicated certainty for pure individual justice. Rather the determination of whether there has been an unjust enrichment must be done on a judicial basis; the discretion is not absolute and limitless but structured by precedent and principle (*Pettkus; Rathwell*; and *Goff & Jones*, pp. 11-42).

The step from accepting that unjust enrichment and not implied contract forms the basis for the law of restitution to holding that the constuctive trust is a remedial device designed to prevent unjust enrighment is not, by any means, an automatic step. The history of the constructive trust is clearly pointed up by Martland J. (*Pettkus v. Becker*) and Laskin J. (as he then was) in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, 13 R.F.L. 185, [1974] 1 W.W.R. 361, 42 D.L.R. (3d) 367. The "crossover" from "institution" to remedial device is succinctly stated by Snell, Principles of Equity, 27th ed. at p. 186, and commented on by both Scott, (1955) 71 L.Q.R. 39 and Waters, 53 Can. Bar Rev., 366. Traditionally, the constructive trust has been imposed in certain situations involving, in general, a fiduciary relationship. The "discovery" of this fiduciary relationship is not, however, always easy to explain: see *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.). The dilemma, shortly stated, is whether the individual categories, where the trust has been imposed, are compartmentalized and individual or whether they represent particular instances representative of a more general situation which justifies the imposition: The conferring of a benefit on (or with respect to) property which it is unjust for the recipient to retain as against his benefactor. Is the claimant to be restricted to a personal claim for money (obligation) or is he to be entitled to look to the property he "benefitted"? Historically, Anglo-Canadian law has said the former. Why? The traditional response has been dogma and precedent. The social and economic realities which gave rise to the original law do not remain static. A rule of law correct at one time in history may not be acceptable at another, not because the original rule was wrong but because the original social and economic climates have changed. To give credence to the original rule, in the face of contrary expectations, is to define "law" not as an instrument of social justice and regulation but as an exercise of naked power. The history of restitution shows this in general and the judicial development of matrimonial property law shows it in particular. The majority of the Supreme Court of Canada in *Murdoch* attempted to maintain rules of law utilized in *Thompson v. Thompson*, [1975] 1 S.C.R. 423, 13 R.F.L. 185, [1974] 1 W.W.R. 361, 41 D.L.R. (3d) 367. In the face of changed social opinion and community expectations legislators and the judiciary were forced to reappraise the principles. Whether *Pettkus* and the forerunners, *Rathwell* and *Murdoch* are consistent with precedent or not, they most likely have anticipated and accepted the changing face of community expectations.

Agreement or disagreement with the above sentiments involves an appraisal of the realities of the fabric of Canadian society. Historically, people who lived together outside of marriage have been in large part ignored. Current society has generated so many such unions that the law has been forced to face the issue. By legislation children born of such unions are given greater rights than before, "spouses" are given support rights and the Supreme Court of Canada has extended modified property rights. The family is the building block of society. The same social and economic effect of breakdown is felt by members of extra-legal families as by those of legal families. Although extra security may justifiably be given to legal family members because of social pressure, to ignore extra-legal families is unrealistic.

In *Pettkus* the Supreme Court of Canada has attempted to come to grips with the problem in an economic and social setting. The relationship more closely resembles married persons than strangers. The same evidentiary problems husbands and wives

generate because of their intimate relationship are generated by unmarried couples living together. Not all coupes living together should fall within the scope of the decision, but only those whose long-standing relationship has generated the trust and lack of formality which surrounds married couples. The search for this boundary may prove to be the most difficult legacy of the decision. The relaxation in matrimonial cases of the principles utilized in "stranger" property cases justifies the relaxation of such principles in cases of unmarried couples falling within the boundary. What lies unexpressed in the reasons for judgment of Dickson J. is that current morality will accept the "special treatment" of unmarried couples.

Perhaps the most interesting aspect of the decision lies in its interaction with the Family Law Reform Act, 1978 (Ont.), c. 2. *Pettkus* attempts to set out the matrimonial property law that governs the rights of the spouses in the absence of statute. The question is: What change does the statute effect on these rights? With respect to family assets the only change in "ownership rights" is presented by s. 11 and the abolition of the presumption of advancement (see *McLaren v. McLaren* (1979), 8 R.F.L. (2d) 301 (Ont. C.A.); and *Ling v. Ling* (1980), 17 R.F.L. (2d) 62 (Ont. C.A.)). More dramatically the legislation provides for a general division otherwise than according to ownership, which overrides ownership rights (see ss. 4(1), (4); 7). The major proprietary changes appear to be concerned with non-family assets. The ownership (legal and beneficial) rights set out by the Supreme Court of Canada in *Pettkus* are again affected by s. 11 and an overriding division otherwise than according to ownership established, in restricted cases, by s. 4(6). As well, the ownership rights are affected by s. 8. The question shortly put, is: What is the effect of ss. 4(6) and 8 on the common law rights as to non-family assets set out in *Pettkus*? Do the sections provide the total law as to the rights of spouses in non-family assets or does the common law apply except where it is inconsistent with particular aspects of the common law?

The common law provided that the non-titled spouse could claim an interest in property pursuant to express trust or implied trust. An implied trust could be resulting or constructive and the resulting trust could be further divided into trusts arising by common intention or contribution.

Section 8 deals merely with resulting trust by contribution. The Court of Appeal decisions in *Page v. Page* (ante, p. 135) and *Leatherdale v. Leatherdale* (ante, p. 148) have interpreted the section so that it varies the common law. The section broadens the type of contribution (money, work, labour, etc.) but restricts the contribution causally to a direct contribution. Apparently, the indirect contribution dealt with in *Madisso v. Madisso* (1975), 11 O.R. (2d) 441, 21 R.F.L. 51, 66 D.L.R. (3d) 385, and *Whiteley, Re* (1974), 4 O.R. (2d) 393, 16 R.F.L. 309, 48 D.L.R. (3d) 161 (C.A.), has outlived its usefulness given the current statutory régime (see annotations, *Leatherdale v. Leatherdale* (trial), 14 R.F.L. (2d) 263, and Court of Appeal (ante p. 148). The scheme allows recognition of such contributions by reference to family assets (s. 4(1), (4)) and non-family assets (s. 4(6)).

What then is the status of contructive trust, resulting trust by common intention and express trust? The choice is either to allow them to continue and to view s. 8 as in addition to such devices and in replacement only of resulting trust or to view it, in the context of the legislation as exhaustive.

The difference between the two approaches is, it is suggested, more a difference of form than substance. An express trust, to be enforceable, must be in writing according to the Statute of Frauds. Where such formalization is present it is likely the agreement will be applicable as a domestic contract (s. 54), ousting the statutory régime (s. 2(9)). Where it is not in proper form it may be considered under s. 4(6)(*b*) pursuant to s. 4(4)(*a*). Similarly, a common intention could be covered by s. 4(4)(*f*), or perhaps (*a*), if "agreement" is held to be something different than "contract" (i.e. no consideration) and in respect of non-family assets, pursuant to s. 4(6)(*b*) via s. 4(4) (see 4(6)(*b*)(i)). Those situations which would fall within the Supreme Court's concept of constructive trust would also seem to fall within s. 4(6)(*b*) as conferring benefits to acquisition, etc., of assets which creates an inequity which can be satisfied out of non-family assets (s. 4(6)(*b*)(i), (ii)). See also *Silverstein v. Silverstein* (1978), 20 O.R. (2d) 185, 1 R.F.L. (2d) 239, 1 F.L.R.A.C. 20, 87 D.L.R. (3d) 116 (H.C.); *Weir v. Weir* (1978), 23 O.R. (2d) 765, 6 R.F.L. (2d) 189, 1 F.L.R.A.C. 63, 96 D.L.R. (3d) 725 (H.C.); *Bregman v. Bregman* (1978), 21 O.R. (2d) 722, 7 R.F.L. (2d) 201, 91 D.L.R. (3d) 470, 1 F.L.R.A.C. 79, affirmed (1979), 25 O.R. (2d) 254, 104 D.L.R. (3d) 703 (C.A.); *Ling v. Ling*, supra; *O'Reilly v. O'Reilly* (1979), 23 O.R. (2d) 776, 9 R.F.L. (2d) 1 (H.C.).

The situations covered by the common law and outside the scope of s. 8 are therefore dealt with in s. 4(6) and 4(4) of the F.L.R.A. In the case of the common law the claim was as of right. In the case of the Act, it is arguable the claim is discretionary

(but see s. 4(6)(*b*), "shall"). This difference, as well, is more illusionary than real since the test under s. 4(6) is "inequitable" and the test under the constructive trust is "unjust". As well the common intention was a "phantom" intention, more often imputed than inferred; a conclusion stated as a reason, the end result of a value process.

It may, finally, be argued that the common law trust impressed the property, before breakdown and allowed tracing (*Sinclair v. Brougham*, supra; *Re Diplock*, [1948] Ch. 465, affirmed *Ministry of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137) while the breakdown provisions of s. 4 are inchoate and do not permit tracing (*Bregman v. Bregman*, supra; but see *Irwin, Re* (1979), 25 O.R. (2d) 251, 12 R.F.L. (2d) 5 (Co. Ct.)). Disposition however can be dealt with under s. 4(4) or s. 4(6)(*a*).

Accordingly, although it may be more technically correct to retain the common law of trusts, excepting resulting trust by contribution (see annotation, *Leatherdale v. Leatherdale*, ante p. 148) and to give effect to the statute in addition as a remedial device, in any particular case the same factors can be dealt with treating s. 8 as exhaustive at least in the case of breakdown (s. 4(6)) and invoking s. 4(6). This also treats the Act in large part as a code. On the other hand, prior to breakdown, such an approach could deny the common law rights over commercial assets and render a remedial statute more restrictive than the common law. Perhaps the best course by analogy to family assets is to allow the common law, subject to ss. 8 and 11, to apply until breakdown and then to treat the Act as exhaustive. This, however, does not appear to accord with the language of the Act. The solution to the dilemma awaits a particular case when the distinction is material to the case. At that time, it is submitted that the common law rules, subject to specific ouster by s. 8 apply and s. 4(6) be relegated to a role to redress inequity after division of family assets, in light of the proprietary rights in non-family assets.

James G. McLeod, Faculty of Law, University of Western Ontario

Appeal by the defendant from a decision of the Ontario Court of Appeal [[1978] 20 O.R. (2d) 105, 5 R.F.L. (2d) 344, 87 D.L.R. (3d) 101] granting the plaintiff a one-half interest in property.

***Dickson J. (Laskin C.J.C., Estey, McIntyre, Chouinard* and *Lamer JJ.* concurring):**

1 The appellant Lothar Pettkus, through toil and thrift, developed over the years a successful bee-keeping business. He now owns two rural Ontario properties, where the business is conducted, and he has the proceeds from the sale, in 1974, of a third property located in the province of Quebec. It is not to his efforts alone, however, that success can be attributed. The respondent Rosa Becker, through her labour and earnings, contributed substantially to the good fortune of the common enterprise. She lived with Mr. Pettkus from 1955 to 1974, save for a separation in 1972. They were never married. When the relationship sundered in late 1974 Miss Becker commenced this action, in which she sought a declaration of entitlement to a one-half interest in the lands and a share in the bee-keeping business.

I

The facts

2 Mr. Pettkus and Miss Becker came to Canada from central Europe separately, as immigrants, in 1954. He had $17 upon arrival. They met in Montreal in 1955. Shortly thereafter, Mr. Pettkus moved in with Miss Becker, on her invitation. She was 30 years old and he was 25. He was earning $75 per week; she was earning $25-$28 per week, later increased to $67 per week.

3 A short time after they began living together, Miss Becker expressed the desire that they be married. Mr. Pettkus replied that he might consider marriage after they knew each other better. Thereafter, the question of marriage was not raised, though within a few years Mr. Pettkus began to introduce Miss Becker as his wife and to claim her as such for income tax purposes.

4 From 1955 to 1960 both parties worked for others. Mr. Pettkus supplemented his income by repairing and restoring motor vehicles. Throughout the period Miss Becker paid the rent. She bought the food and clothing and looked after other living expenses. This enabled Mr. Pettkus to save his entire income, which he regularly deposited in a bank account in his name. There was no agreement at any time to share either moneys or property placed in his name. The parties lived frugally. Due to their husbandry and parsimonious life-style, $12,000 had been saved by 1960 and deposited in Mr. Pettkus' bank account.

5 The two travelled to western Canada in June 1960. Expenses were shared. One of the reasons for the trip was to locate a suitable farm at which to start a bee-keeping business. They spent some time working at a bee-keeper's farm.

6 They returned to Montreal, however, in the early autumn of 1960. Miss Becker continued to pay the apartment rent out of her income until October 1960. From then until May 1961 Mr. Pettkus paid rent and household expenses, Miss Becker being jobless. In April 1961 she fell sick and required hospitalization.

7 In April 1961 they decided to buy a farm at Franklin Centre, Quebec, for $5,000. The purchase money came out of the bank account of Mr. Pettkus. Title was taken in his name. The floor and roof of the farmhouse were in need of repair. Miss Becker used her money to purchase flooring materials and she assisted in laying the floor and installing a bathroom.

8 For about six months during 1961 Miss Becker received unemployment insurance cheques, the proceeds of which were used to defray household expenses. Through two successive winters she lived in Montreal and earned approximately $100 per month as a baby-sitter. These earnings also went toward household expenses.

9 After purchasing the farm at Franklin Centre the parties established a bee-keeping business. Both worked in the business, making frames for the hives, moving the bees to the orchards of neighbouring farmers in the spring, checking the hives during the summer, bringing in the frames for honey extraction during July and August and the bees for winter storage in autumn. Receipts from sales of honey were handled by Mr. Pettkus; payments for purchases of beehives and equipment were made from his bank account.

10 The physical participation by Miss Becker in the bee operation continued over a period of about 14 years. She ran the extracting process. She also, for a time, raised a few chickens, pheasants and geese. In 1968, and later, the parties hired others to assist in moving the bees and bringing in the honey. Most of the honey was sold to wholesalers, though Miss Becker sold some door to door.

11 In August 1971, with a view to expanding the business, a vacant property was purchased in East Hawkesbury, Ontario at a price of $1,300. The purchase moneys were derived from the Franklin Centre honey operation. Funds to complete the purchase were withdrawn from the bank account of Mr. Pettkus. Title to the newly acquired property was taken in his name.

12 In 1973 a further property was purchased, in West Hawkesbury, Ontario, in the name of Mr. Pettkus. The price was $5,500. The purchase moneys came from the Franklin Centre operation, together with a $1,900 contribution made by Miss Becker, to which I will again later refer. 1973 was a prosperous year, yielding some 65,000 pounds of honey, producing net revenue in excess of $30,000.

13 In the early 1970's the relationship between the parties began to deteriorate. In 1972 Miss Becker left Mr. Pettkus, allegedly because of mistreatment. She was away for three months. At her departure Mr. Pettkus threw $3,000 on the floor; he told her to take the money, a 1966 Volkswagon, 40 beehives containing bees, and "get lost". The beehives represented less than ten per cent of the total number of hives then in the business.

14 Soon thereafter Mr. Pettkus asked Miss Becker to return. In January 1973 she agreed, on condition he see a marriage counselor, make a will in her favor and provide her with $500 per year so long as she stayed with him. It was also agreed that Mr. Pettkus would establish a joint bank account for household expenses, in which receipts from retail sales of honey would be deposited. Miss Becker returned; she brought back the car and $1,900 remaining out of the $3,000 she had earlier received. The $1,900 was deposited in Mr. Pettkus' account. She also brought the 40 beehives, but the bees had died in the interim.

15 In February 1974 the parties moved into a house on the West Hawkesbury property, built in part by them and in part by contractors. The money needed for construction came from the honey business, with minimal purchases of materials by Miss Becker.

16 The relationship continued to deteriorate and on 4th October 1974 Miss Becker again left, this time permanently, after an incident in which she alleged that she had been beaten and otherwise abused. She took the car and approximately $2,600 in cash, from honey sales. Shortly thereafter the present action was launched.

17 At trial Miss Becker was awarded 40 beehives, without bees, together with $1,500, representing earnings from those hives for 1973 and 1974.

18 The Ontario court of Appeal varied the judgment at trial by awarding Miss Becker a one-half interest in the lands owned by Mr. Pettkus and in the bee-keeping business.

II

Resulting trust

19 This appeal affords the court an opportunity to clarify the equivocal state in which the law of matrimonial property was left, following *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 1 R.F.L. (2d) 1, [1978] 2 W.W.R. 101, 1 E.T.R. 307, 19 N.R. 91, 83 D.L.R. (3d) 289.

20 Broadly speaking, it may be said that the principles which have guided development of recent Canadian case law are to be found in two decisions of the House of Lords: *Pettitt v. Pettitt*, [1970] A.C. 777, [1969] 2 W.L.R. 966, [1969] 2 All E.R. 385; and *Gissing v. Gissing*, [1971] A.C. 886, [1970] 3 W.L.R. 255, [1970] 2 All E.R. 780. In neither judgment does a majority opnion emerge. Though it is not necessary to embark upon a detailed analysis of the two cases, the legacy of *Pettitt* and *Gissing* should be noted. First, the decisions upheld the judicial quest for that fugitive common intention which must be proved in order to establish beneficial entitlement to matrimonial property. Second, the Law Lords did not feel free to ascribe or impute an intention to the parties, not supported by evidence, in order to achieve "equity" in the division of assets of partners to a marriage. Third, in *Gissing* four of the Law Lords spoke of "implied, constructive or resulting trust" without distinction.

21 A majority of the court in *Murdoch v. Murdoch*, [1955] 1 S.C.R. 423, 13 R.F.L. 185, [1974] 1 W.W.R. 361, 41 D.L.R. (3d) 367, adopted the "common intention" concept of Lord Diplock in *Gissing* [at p. 438]:

> Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other.

22 In *Murdoch* it was held that there was no evidence of common intention. In *Rathwell*, supra, common intention was held to exist. Although the notion of common intention was endorsed in *Murdoch* and in *Rathwell*, many difficulties, chronicled in the cases and in the legal literature on the subject, inhered in the application of the doctrine in matrimonial property disputes. The sought-for "common intention" is rarely, if ever, express; the courts must glean "phantom intent" from the conduct of the parties. The most relevant conduct is that pertaining to the financial arrangements in the acquisiton of property. Failing evidence of direct contribution by a spouse, there may be evidence of indirect benefits conferred: where, for example, one partner pays for the necessaries while the other retires the mortgage loan over a period of years, *Fibrance v. Fibrance*, [1957] 1 All E.R. 357.

23 The artificiality of the common intention approach has been stressed. Professor Donovan Waters in a comment in (1975) 53 Can. Bar Rev. 366 stated [at p. 368]:

> ... In other words, this 'discovery' of an implied common intention prior to the acquisition is in many cases a mere vehicle or formula for giving the wife a just and equitable share in the disputed asset. It is in fact a constructive trust approach masquerading as a resulting trust approach.

24 Professor Waters also observed, in a discussion of the resulting trust and constructive trust doctrines [at p. 377]:

> After all, in few cases will the inferring of an agreement be impossible or unreasonable, and, where it is so, justice and equity may well come to the same conclusion as that produced by the law of resulting trusts. But too often the resulting trust theory produces a result at odds with what would seem the more desirable outcome, or there is a fight through the appeal courts, and then what may well be difference of judicial opinion on the factual merits becomes a difference on the subtleties of the law of trusts.

25 In *Murdoch v. Murdoch* Laskin J. (as he then was) introduced in a matrimonial property dispute the concept of constructive trust to prevent unjust enrichment. It is imposed without reference to intention to create a trust, and its purpose is to remedy a result otherwise unjust. It is a broad and flexible equitable tool which permits courts to gauge all the circumstances of the case, including the respective contributions of the parties, and to determine beneficial entitlement. It was described this way in *Rathwell*, at p. 455:

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation and the absence of any juristic reason — such as a contract or disposition of law — for the enrichment.

26 Although the resulting trust approach will often afford a wife the relief she seeks, the resulting trust is not available, as Profes sor Waters points out, at p. 374: "where the imputation of intention is impossible or unreasonable". One cannot imply an intention that the wife should have an interest if her conduct before or after the acquisition of the property is "wholly ambiguous", or its association with the alleged agreement "altogether tenuous". Where evidence is inconsistent with resulting trust, the court has the choice of denying a remedy or accepting the constructive trust.

27 Turning then to the present case and common intention, the evidence is clear that Mr. Pettkus and Miss Becker had no express arrangement for sharing economic gain. She conceded there was no specific arrangement with respect to the use of her money. She said: "No, we just saved together. It was meant to be together, it was ours". The arrangement "was without saying anything ... there was nothing talked over ..." She testified she was not interested in the amount Mr. Pettkus had in the bank. In response to the question "but he never told that what he was saving was yours?" she replied: "I never asked".

28 It is apparent Mr. Pettkus took a negative view of Miss Becker's entitlement. His testimony makes it clear that he never regarded her as his wife. The finances of each were completely separate, except for the joint account opened for the retail sales of honey. Mr. Pettkus was asked in cross-examination: "you both saved together?" and replied: "I saved, she didn't". Uncommitted to marriage or to a permanent relationship it would be difficult to ascribe to Mr. Pettkus an intention, express or implied, to share his savings. Miss Becker said they were to "save together" but the truth is that Mr. Pettkus saved at the expense of Miss Becker.

29 With respect to the period from 1955 until the spring of 1961, the trial judge found:

> Now the plaintiff claims a share in the said farm on the ground that at the beginning of their relationship they had implicitly agreed to carry on a common enterprise, the plaintiff paying the living expenses and the defendant doing the saving. I am sure that the plaintiff would not have voiced such a proposition explicitly at the time, bent as she was on marriage, for fear of scaring away a prospective husband. *I find that her contribution to the household expenses during the first few years of their relationship was in the nature of risk capital invested in the hope of seducing a younger defendant into marriage.*
>
> Moreover, the evidence does not clearly show that form 1955 to May 1961 the plaintiff contributed more than the defendant to the overall expenses of the household, so that *I find that the $12,000 accumulated by the defendant was due to his superior salary, his frugal living and his off-job gains from repairs*. It is to be noted that the plaintiff made also some savings.

(The italics are mine.)

30 Whatever the passage may lack in point of gallantry, the words italicized represent findings of fact by the trial judge, negating common intention.

31 As to the contribution by Miss Becker to the bee-keeping business, the trial judge found:

> As the honey business is a seasonal one, the defendant continued his side line, repairs of German cars, but both businesses were not enough sometimes to keep the household solvent so that the plaintiff had to work outside a few times. I also find that during that period the plaintiff helped the defendant to a certain degree in the operation of the honey business, especially during the extracting period but such help was seasonal and marginal as the defendant employed outside help in the peak periods.

32 The trial judge dealt with Miss Becker's claim to a part interest in the Ontario properties, for the 1971 to 1974 period, in the following manner:

> The plaintiff alleges that those sums came from the Franklin Centre honey operation and claims a part interest in those Ontario properties and on account of her active participation in the honey business. Once again, it would never have occurred to the plaintiff to make such a claim explicitly at the time because such *a trust was not in the contemplation of either party, even implicitly*. (The italics are mine.)

Again there is a rejection of the notion of implied intention and resulting trust. At trial Mr. Pettkus testified:

> Q. All right. Now did you ever have any discussions with her as to whether or not she had an interest in either your garage business or your bee business?
>
> A. It was all mine. She had no interest in the business, no.
>
> Q. Did she ever suggest that she did?
>
> A. No.

33 With regard to the arrangement under which Miss Becker was to receive $500 per year, Mr. Pettkus testified:

> A. Well, I knew the whole business is in my name and she had nothing so I figures it's only fair to give her a little bit of money and I figured the $500, pay for all the expenses and she would have $500 every year as long as she stayed with me and if there's a good crop, if there's no crop, well of course I can't pay.

34 In the view of the Ontario Court of Appeal, speaking through Wilson J.A., the trial judge vastly underrated the contribution made by Miss Becker over the years. She had made possible the acquisition of the Franklin Centre property and she had worked side by side with him for 14 years, building up the bee-keeping operation.

35 The trial judge held there was no common intention, either express or implied. It is important to note that the Ontario court of Appeal did not overrule that finding.

36 I am not prepared to infer, or presume, common intention when the trial judge has made an explicit finding to the contrary and the appellate court has not disturbed the finding. Accordingly, I am of the view that Miss Becker's claim grounded upon resulting trust must fail. If she is to succeed at all, constructive trust emerges as the sole juridical foundation for her claim.

III

Constructive trust

37 The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. MacFerlan* (1760), 2 Burr. 1005, 97 E.R.

676, put the matter in these words: "the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise. (See A.W. Scott, "Constructive Trusts", (1955), 71 L.Q.R. 39; Leonard Pollock, "Matrimonial Property and Trusts: The Situation from Murdoch to Rathwell", (1978) 16 Alta. Law Rev. 357.) The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury. See *Babrociak v. Babrociak* (1978), 1 R.F.L. (2d) 95 (Ont. C.A.); *Re Spears* (1975), 52 D.L.R. (3d) 146 (N.S.C.A.) ; *Douglas v. Guar. Trust Co.* (1978), 8 R.F.L. (2d) 98 (Ont. H.C.); *Armstrong v. Armstrong* (1978), 22 O.R. (2d) 223, 93 D.L.R. (3d) 128 (Ont. H.C.).

38 How then does one approach the question of unjust enrichment in matrimonial causes? In *Rathwell* I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.

39 The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another. Lord Halsbury scotched this heresy in the case of *Ruabon SS. Co. Ltd. v. London Assce.*, [1900] A.C. 6 (H.L.) with these words, at p. 10: "I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it." Lord Macnaughten,in the same case, put it this way, at p. 15: "There is no principle of law that a person should contribute to an outlay merely because he has derived a benefit from it". It is not enough for the court simply to determine that one spouse has benefited at the hands of another and then to require restitution. It must, in addition, be evident that the retention of the benefit would be "unjust" in the circumstances of the case.

40 Miss Becker supported Mr. Pettkus for five years. She then worked on the farm for about 14 years. The compelling inference from the facts is that she believed she had some interest in the farm and that that expectation was reasonable in the circumstances. Mr. Pettkus would seem to have recognized in Miss Becker some property interest, through the payment to her of compensation, however modest. There is no evidence to indicate that he ever informed her that all her work performed over the 19 years was being performed on a gratuitous basis. He freely accepted the benefits conferred upon him through her financial support and her labour.

41 On these facts, the first two requirements laid down in *Rathwell* have clearly been satisfied: Mr. Pettkus has had the benefit of 19 years of unpaid labour, while Miss Becker has received little or nothing in return. As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

42 I conclude, consonant with the judgment of the Court of Appeal, that this is a case for the application of constructive trust. As Wilson J.A. noted [at R.F.L. p. 348]: "The parties lived together as husband and wife, although unmarried, for almost 20 years, during which period she not only made possible the acquisition of their first property in Franklin Centre by supporting them both exclusively from her income during 'the lean years', but worked side by side with him for 14 years building up the bee-keeping operation which was their main source of livelihood."

43 Wilson J.A. had no difficulty in finding that a constuctive trust arose in favour of the respondent by virtue of "joint effort" and "team work", as a result of which Mr. Pettkus was able to acquire the Franklin Centre property, and subsequently the East Hawkesbury and West Hawkesbury properties. The Ontario Court of Appeal imposed the constructive trust in the interests of justice and, with respect, I would do the same.

IV

The "common law" relationship

44 One question which must be addressed is whether a constructive trust can be established having regard to what is frequently, and euphemistically, referred to as a "common law" relationship. The purpose of constructive trust is to redress situations which would otherwise denote unjust enrichment. In principle, there is no reason not to apply the doctrine to common law relationships. It is worth noting that counsel for Mr. Pettkus, and I think correctly, did not, in this court, raise the common law relationship in defence of the claim of Miss Becker, otherwise than by reference to the Family Law Reform Act, 1978 (Ont.), c. 2.

45 Courts in other jurisdictions have not regarded the absence of a marital bond as any problem. See *Cooke v. Head*, [1972] 1 W.L.R. 518, [1972] 2 All E.R. 38; *Eves v. Eves*, [1975] 1 W.L.R. 1338, [1975] 3 All E.R. 768 ; *Re Spears*, supra; and, in the United States, *Marvin v. Marvin* (1976), 557 P. (2nd) 106 and a comment thereon, (1977) 90 Harv. L.R. 1708. In *Marvin* the Supreme Court of California stated that constructive trust was available to give effect to the reasonable expectations of the parties, and to the notion that unmarried cohabitants intend to deal fairly with each other.

46 I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period. This was not an economic partnership, nor a mere business relationship, nor a casual encounter. Mr. Pettkus and Miss Becker lived as man and wife for almost 20 years. Their lives and their economic well-being were fully integrated. The equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs.

47 In recent years, there has been much statutory reform in the area of family law and matrimonial property. Counsel for Mr. Pettkus correctly points out that the Family Law Reform Act of Ontario, enacted after the present litigation was initiated, does not extend the presumption of equal sharing, which now applies between married persons, to common law spouses. The argument is made that the courts should not develop equitable remedies that are "contrary to current legislative intent". The rejoinder is that legislation was unnecessary to cover these facts, for a remedy was always available in equity for property division between unmarried individuals contributing to the acquisition of assets. The effect of the legislation is to divide "family assets" equally, regardless of contribution, as a matter of course. The court is not here creating a presumption of equal shares. There is a great difference between directing that there be equal shares for common law spouses and awarding Miss Becker a share equivalent to the money or money's worth she contributed over some 19 years. The fact there is no statutory régime directing equal division of assets acquired by common law spouses is no bar to the availability of an equitable remedy in the present circumstances.

V

Settlement or estoppel

48 Another question argued is whether acceptance by Miss Becker of $3,000, 40 beehives and a car, upon temporary separa tion, and the imposition of terms on her return, estopped further claim. The trial judge answered this question in the affirmative. With respect, I think that he was wrong in so holding. A person is not estopped by accepting a sum of money, the amount of which is not negotiated, thrown at one's feet. There was no agreement by Miss Becker as to her interest in what I would regard as joint assets, nor can the conditions exacted by Miss Becker upon resumption of cohabitation be any bar to her claim. The filing by Mrs. Rathwell in *Rathwell*, supra, of a caveat claiming a one-tenth interest was held to be no basis for rejecting her claim to share equally in assets accumulated by her and her husband.

VI

Causal connection

49 The matter of "causal connection" was also raised in defence of Miss Becker's claim, but does not present any great difficulty. There is a clear link between the contribution and the disputed assets. The contribution of Miss Becker was such as enabled, or assisted in enabling, Mr. Pettkus to acquire the assets in contention. For the unjust enrichment principle to apply it is

obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property, the beneficial ownership of which is in dispute. Miss Becker indirectly contributed to the acquisition of the Franklin Centre farm by making possible an accelerated rate of saving by Mr. Pettkus. The question is really an issue of fact: Was her contribution sufficiently substantial and direct as to entitle her to a portion of the profits realized upon sale of the Franklin Centre property and to an interest in the Hawkesbury properties and the bee-keeping business? The Ontario Court of Appeal answered this question in the affirmative, and I would agree.

VII

Respective proportions

50 Although equity is said to favour equality, as stated in *Rathwell*, it is not every contribution which will entitle a spouse to a one-half interest in the property. The extent of the interest must be proportionate to the contribution, direct or indirect, of the claimant. Where the contributions are unequal, the shares will be unequal.

51 It could be argued that Mr. Pettkus contributed somewhat more to the material fortunes of the joint enterprise than Miss Becker but it must be recognized that each started with nothing; each worked continuously, unremittingly and sedulously in the joint effort. Physically, Miss Becker pulled her fair share of the load; weighing only 87 pounds, she assisted in moving hives weighing 80 pounds. Any difference in quality or quantum of contribution was small. The Ontario Court of Appeal in its discretion favoured an even division and I would not alter that disposition, other than to note that in any accounting regard should be had to the $2,600 and the car, which Miss Becker received on separation in 1974.

VIII

52 I would not wish to conclude without reference to the conflict of laws question lurking in the background in this case. The evidence discloses that the parties were domiciled in the province of Quebec from 1955 until at least August 1971, when vacant property was purchased in East Hawkesbury, Ontario. It is arguable that the laws of the province of Quebec, and not those of Ontario, should govern the rights of the parties. This point was not pleaded, nor was it addressed by court or counsel in any of the earlier proceedings. It was not alluded to during argument in this court.

53 The position in law would seem to me to be as stated by Professor Jean Castel, in "Droit international privé québécois" (Butterworths 1980, pp. 803-804). Although, before an inferior court, the law of another province in Canada has to be proven in the same manner as the law of a foreign country, that rule does not have application in an appeal to this court. This court follows the rule drawn by the House of Lords in the case of *Cooper v. Cooper* (1888), 13 A.C. 88 (H.L.), and takes judicial notice of the statutory or other laws prevailing in every province and territory in Canada even in cases where such statutes or laws may not have been proved in evidence in the courts below. This court, however, does not take judicial notice of the law of another province unless that law has been pleaded in the first instance. As Cannon J. held in *Canadian Nat. SS. Co. v. Watson*, [1939] S.C.R. 11 at 18, [1939] 1 D.L.R. 273, it would be unfair for this court to take, suo motu, judicial notice of the statutory laws of another province, ignored in the pleadings.

54 I would dismiss the appeal with costs to the respondent.

***Ritchie J.*:**

55 I have had the benefit of reading the reasons for judgment prepared for delivery by my brother Dickson which contain an accurate account of the facts giving rise to this appeal.

56 I agree with the conclusion reached by Dickson J. but as my reasons for doing so are substantially different from those adopted by him, I find it necessary to express myself separately.

57 The difference between us stems from the fact that I find that the advances made by the plaintiff throughout the period of the relationship between the parties to be such as to support the existence of a resulting trust which is governed by the legal

principles adopted by the majority of this court in *Murdoch v. Murcoch*, [1975] 1 S.C.R. 423, 13 R.F.L. 185, [1974] 1 W.W.R. 361, 41 D.L.R. (3d) 367, and *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 1 R.F.L. (2d) 1, [1978] 2 W.W.R. 101, 1 E.T.R. 307, 19 N.R. 91, 83 D.L.R. (3d) 289, whereas Dickson J., in applying the reasoning contained in the dissenting opinions in those cases to the evidence as he interpreted it, concluded that the circumstances disclosed the existence of a constructive trust arising out of and dependent upon the applicability of the doctrine of "unjust enrichment".

58 The leading cases of *Pettitt v. Pettitt*, [1970] A.C. 777, [1969] 2 W.L.R. 966, [1969] 2 All E.R. 385 (H.L.), and *Gissing v. Gissing*, [1971] A.C. 886, [1970] 3 W.L.R. 255, [1970] 2 All E.R. 780 (H.L.), afford a comprehensive though not entirely consistent review of the law respecting the disposition to be made of matrimonial property in the event of a marital breakup and it is made plain from the judgment of Lord Denning in *Cooke v. Head*, [1972] 1 W.L.R. 518, [1972] 2 All E.R. 38 at 40, that the same considerations apply in the case of a man and his mistress who had been living in what is now frequently referred to as a "common law" relationship.

59 I should make it plain at the outset that in my opinion contributions made by one spouse and freely accepted by the other for use in the acquisition and operation of a common household give rise to a rebuttable presumption that, at the time when the contributions were made and accepted, the parties both intended that there would be a resulting trust in favour of the donor to be measured in terms of the value of the contributions so made. This opinion appears to me to be borne out in the following passage taken from the reasons for judgment of Lord Pearson in *Gissing v. Gissing*, where he said at p. 102:

> If the respondent's claim is to be valid, I think it must be on the basis that by virtue of contribution made by her towards the purchase of the house there was and is a resulting trust in her favour. If she did make constributions of substantial amount towards the purchase of the house, there would prima facie be a resulting trust in her favour. That would be the presumption as to the intention of the parties at the time or times when she made and he accepted the contributions. The presumption is a rebuttable presumption: it can be rebutted by evidence showing some other intention. The question as to what was the intention is a question of fact to be decided by the jury if there is one or, if not, by the judge acting as a jury.

60 The same proposition is elaborated in the reasons for judgment of Lord Reid, speaking for himself, in the case of *Pettitt v. Pettitt*, supra, where he said at p. 390:

> But it is, I think, proper to consider whether, without departing from the principles of the common law, we can give effect to the view that, even where there was in fact no agreement, we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquistion or improvement of property owned by the other spouse. There is already a presumption which operates in the absence of evidence as regards money contributed by one spouse towards the acquisition of property by the other spouse. So why should there not be a similar presumption where one spouse has contributed to the improvement of the property of the other? I do not think that it is a very convincing argument to say that, if a stranger makes improvements on the property of another without any agreement or any request by that other that he should do so, he acquires no right. The improvement is made for the common enjoyment of both spouses during the marriage. It would no doubt be different if the one spouse makes the improvement while the other spouse owns the property is absent and without his or her knowledge or consent. But if the spouse who owns the property acquiesces in the other making the improvement in circumstances where it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position I can see nothing contrary to ordinary legal principles in holding that the spouse who makes the improvement has acquired such a right.
>
> Some reference was made to the doctrine of unjust enrichment. I do not think that that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to be any English case of the doctrine being applied where one person has improved the property of another.

61 It will be seen that in the case of *Gissing v. Gissing*, surpa, four of the Law Lords spoke of "implied constructive or resulting trusts" without any apparent distinction and this is to be found in other English authorities, but it is nevertheless noteworthy that when there is a conjugal relationship between the parties the presumption of a resulting trust arises for the benefit of the

donor wherever there is evidence of a contribution of money or money's worth having been made by one spouse toward the acquisition of property by the other, and this presumption persists until the relationship is dissolved unless it is rebutted by "evidence showing some other intention".

62 It is contended on behalf of the appellant that the five-year difference in age between the parties constituted evidence justifying the learned trial judge in making the following finding:

> Now, the plaintiff claims a share in the said farm on the ground that at the beginning of their relationship they had implicitly agreed to carry on a common enterprise, the plaintiff paying the living expenses and the defendant doing the saving. I am sure that the plaintiff would not have voiced such a proposition explicitly at the time, bent as she was on marriage, for fear of scaring away a prospective husband. I find that her contribution to the household expenses during the first few years of their relationship was in the nature of risk capital invested in the hope of seducing a younger defendant into marriage.

With the greatest respect for those who take a different view, I cannot but find that this gratuitously insulting conclusion is based upon the trial judge's opinion that, whatever her motives may have been, the respondent's intention in making the contributions was to benefit the appellant and it is clear that they were acquiesced in and indeed freely accepted by him to be applied for and toward the maintenance and operation of a joint household. Accordingly, the last quoted comments of the trial judge in my view support the existence of a common intention giving rise to a presumption of a resulting trust and nothing said by him in this paragraph can be considered as evidence rebutting the presumption to which the contributions made by the respondent give rise.

63 In the latter part of his reasons for judgment the learned trial judge made a further finding to the effect that a trust entitling the respondent to a part interest in the Ontario farm properties "was not in the contemplation of either party even implicitly".

64 My brother Dickson has made a finding that "the trial judge held there was no common intention either expressed or implied. It is important to note that the Ontario Court of Appeal did not overrule that finding".

65 For my part, however, I would adopt the following paragraph from the judgment of Wilson J.A. in the Court of Appeal [at p. 348]:

> With all due respect to the learned trial judge, I think he vastly underrated the contribution the appellant made to the acquisition of the assets held in the respondent's name. The parities lived together as husband and wife, although unmarried, for almost 20 years, during which period she not only made possible the acquisition of their first property in Franklin Centre by supporting them both exclusively from her income during 'the lean years', but worked side by side with him for 14 years building up the bee-keeping operation which was their main source of livelihood. The respondent did not deny that she supported him for the first five or six years of their lives together, while he put away all of his earnings in the bank.

In my view these findings constitute evidence that the Hawkes-bury properties and the bee-keeping operation were subject to a resulting trust in favour of the respondent and I do not find it necessary to import the doctrine of "unjust enrichment" from the law of quasi contract in order to dispose of this appeal.

66 As to the share to which the respondent is entitled upon the dissolution of the relationship, I am, like my brother Dickson, in accord with the disposition made of the matter by the Court of Appeal.

67 As I reach the same conclusion as my brother Dickson, it may be thought that these reasons are somewhat superfluous, but I find myself unable to subscribe to the application of the doctrine of constructive trusts under the circumstances here disclosed and I wish to disassociate myself with any suggestion in conformity with the trial judge's bitter criticism of the respondent.

68 In view of all the above, I would dismiss this appeal with costs to the respondent.

***Martland J. (Beetz J.* concurring):**

69 I am in agreement with the reasons of Ritchie J. I would like to outline my reasons for my concurrence with his opinion as to the application of the theory of a constructive trust in the circumstances of this case.

70 This is the third case to come before this court in which claim has been made for the recognition of an interest in what is claimed to be "family property". In the first two cases, the claim was made by a wife as against her husband. In the present case the claimant is not the wife of the defendant.

71 In *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, 13 R.F.L. 185, [1974] 1 W.W.R. 361, 41 D.L.R. (3d) 367, the wife claimed a partnership interest in three quarter-sections of land and in all the other assets of her husband. The trial judge held that the parties were not partners and also held that no relationship existed which would give the plaintiff the right to claim as a joint owner in equity any of the farm assets. Before this court, the wife's claim was placed, not on the basis of partnership, but on the existence of a resulting trust. In rejecting the wife's claim, the majority of the court referred to the two leading English authorities, *Pettitt v. Pettitt*, [1970] A.C. 777, [1969] 2 W.L.R. 966, [1969] 2 All E.R. 385 (H.L.); and *Gissing v. Gissing*, [1971] A.C. 886, [1970] 3 W.L.R. 255, [1970] 2 All E.R. 780 (H.L.), and also pointed out that in those cases the wife's claim related only to the matrimonial home. The following passages were cited with approval from the judgment of Lord Diplock in the latter case at pp. 905 and 909:

> A resulting, implied or constructive trust — and it is unnecessary for present purposes to distinguish between these three classes of trust — is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land ...
>
> Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arises in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other.

72 The conclusion reached was that in the light of the evidence in the case and the findings of the trial judge it could not be said that there was any intention that the beneficial interest in the property in issue did not belong solely to the husband.

73 The majority of the court did not adopt the opinion expressed in the dissenting judgment that the court could find a constructive trust, not dependent upon evidence of intention.

74 In *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, 1 R.F.L. (2d) 1, [1978] 2 W.W.R. 101, 1 E.T.R. 307, 19 N.R. 91, 83 D.L.R. (3d) 289, this court was again concerned with a claim by a wife to a beneficial interest in land, the legal ownership of which was in the husband and such interest was found, on the evidence, to exist. Three members of the court were of the view that the claim could be supported on the basis of either a resulting trust, founded upon common intention, or a constructive trust, founded upon unjust enrichment. Two members of the court decided that a resulting trust had been established and that a decision as to the application of the principles of unjust enrichment and constructive trust was unnecessary. Four members of the court rejected the application, in cases of this kind, of the doctrine of a constructive trust as a means of preventing unjust enrichment. The reasons for so deciding are to be found at pp. 471-74 of the report, and it is unnecessary to repeat them here.

75 As pointed out earlier, the present case is not concerned with the rights of a wife and so is not concerned with matrimonial property. Any recognition by this court of the right of a court to impose on one party the obligations of a trustee in respect of his property for the benefit of another founded on unjust enrichment has very wide implications and involves judicial legislation in that it extends substantially the existing law.

76 The scope of the doctrine of unjust enrichment in English law is somewhat nebulous. The broad statement of Lord Mansfield in the case of *Moses v. MacFerlan* (1760), 2 Burr 1005, 97 E.R. 676, was made in relation to an action for money had and received to the plaintiff's use. It was in this context that he said: "The gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money".

77 Later decisions did not support the generality of this statement but held that the action for money had and received had to be placed on a contractual basis founded upon an implied promise to pay. Scrutton L.J. in *Holt v. Markham*, [1923] 1 K.B. 504 at 513, referred to the "now discarded doctrine of Lord Mansfield". Lord Greene in *Morgan v. Ashcroft*, [1938] 1 K.B. 49 at 62, said that: "Lord Mansfield's view upon those matters, attractive though they be, cannot now be accepted as laying the true foundation for the claim".

78 Although Lord Wright in the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour*, [1943] A.C. 32 at 62 expressed sympathy with Lord Mansfield's view, it may be noted that some years later in *Reading v. A.G.*, [1951] A.C. 507, [1951] 1 All E.R. 617, Lord Porter said:

> It was suggested in argument that the learned judge founded his decision solely on the doctrine of unjust enrichment and that that doctrine was not recognised by the law of England. My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland, and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated.

79 In the *Pettitt* case Lord Reid dealt with the theory of unjust enrichment as follows, at p. 390:

> Some reference was made to the doctrine of unjust enrichment. I do not think that that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to be any English case of the doctrine being applied where one person has improved the property of another. And in any case it would only result in a money claim whereas what a spouse who makes an improvement is seeking is generally a beneficial interest in the property which has been improved.

80 He did not suggest that in that case recognition of the beneficial interest could be effected by means of a constructive trust.

81 It would appear that in English law the existence of an unjust enrichment has been recognized in the claims for the return of money, which was the case in *Moses v. MacFerlan*, supra, in which Lord Mansfield's statement was made.

82 I turn now to the nature of a constructive trust as so far recognized. The areas in which a constructive trust has been found to exist have usually been in cases where a fiduciary relationship exists, e.g., a trustee or fiduciary taking advantage of his position to make a profit for himself. Such a trust has also been found to exist where a person having knowledge of an existing trust acquires the legal title to the trust property. In relation to the matter of unjust enrichment, the following passage appears in Snell's Principles of Equity, 27th ed., at p. 186:

> In some jurisdictions the constructive trust has come to be treated as a remedy for many cases of unjust enrichment; whenever the court considers that the property in question ought to be restored, it simply imposes a constructive trust on the recipient. In England, however, the constructive trust has in general remained essentially a substantive institution; ownership must not be confused with obligation, nor must the relationship of debtor and creditor be converted into one of trustee and *cestui que trust*. Yet the attitude of the courts may be changing; and although the constructive trust is probably not confined to cases arising out of a fiduciary relationship, it is far from clear what other circumstances suffice to raise it or how far it can be employed as a species of equitable remedy to enforce legal rights.

83 The authority for the statement "the attitude of the courts may be changing" is given in the case of *Hussey v. Palmer*, [1972] 1 W.L.R. 1286. In that case, the plaintiff went to live with her daughter and son-in-law and paid the cost of adding an extra bedroom to their house. The arrangement did not work and the plaintiff left. She sued to recover the money she had expended. In the Court of Appeal, Lord Denning found there was a constructive trust. Phillimore L.J. regarded the matter as a resulting trust and Cairns L.J. dissented.

84 The validity of the judgment is questionable as indicated in the discussion of it in (1973), 89 L.Q.R. 2. Lord Denning, at p. 1290, referred to a constructive trust as a "trust imposed by law whenever justice and good conscience require it". Commenting on this generalization, the note in the L.Q.R. says, at p. 4:

> These large generalisations will be more familiar to American than English lawyers. This applies especially to the notion that resulting and constructive trust run together and the amalgam is an equitable remedy: see *e.g.* A. W. Scott (1955) 71 L.Q.R. 39. Indeed, even those writers who have some sympathy with the notion do no suggest that it is already part of English law: see Hanbury's *Modern Equity* (9th ed. 1969) pp. 222, 223; Goff & Jones, *Restitution* (1966) p. 37.

85 In my opinion, the adoption of this concept involves an extension of the law as so far determined in this court. Such an extension is, in my view, undesirable. It would clothe judges with a very wide power to apply what has been described as "palm tree justice" without the benefit of any guidelines. By what test is a judge to determine what constitutes unjust enrichment? The only test would be his individual perception of what he considered to be unjust.

86 As stated in the reasons of my brother Ritchie, the determination of this appeal in the respondent's favour can be made in accordance with existing authority and without recourse to the concepts of unjust enrichment and constructive trust.

Appeal dismissed.