Clerk's Stamp:

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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000, C. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI as Trustees for the 1985 Sawridge Trust;
DOCUMENT	**SUPPLEMENTARY BRIEF OF THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE ("OPGT") FOR THE ASSET TRANSFER ORDER HEARING**

ADDRESS FOR SERVICES AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. STATEMENT OF FACTS

Overview

1. This brief supplements the submissions of the OPGT filed November 15 and 20, 2019. It addresses the comments of the Case Management Justice (CMJ) that gave rise to and defined the issue in the within application, including the following:

> "…how could I possibly interpret the ATO without coming to some conclusion as to what the beneficial ownership of the assets was immediately prior to the order so that I can determine what Justice Thomas was trying to do?"
>
> and
>
> "I'm going to go down to ground zero [in 1985] and go through the whole process and use that as the context in which I can properly interpret the order."[1]

This brief also responds to the last filed briefs of the parties and intervenor and makes submissions arising from the production received from the parties since the previous briefs.

2. The OPGT has expressed its concern that the CMJ's approach to this application amounts to a rehearing rather than interpretation of the ATO and exceeds the scope of case management. Subject to that proviso, the OPGT submits that the facts and law show:

a. The 1982 Trustees acted properly and within the scope of their authority under the 1982 Trust in resettling the 1982 Trust assets to the 1985 Trust in April 1985 for the benefit of the 1985 beneficiaries;

b. The steps taken by the 1982 Trustees were effective in conveying all of the assets of the 1982 Trust to the 1985 Trust for the benefit of the 1985 beneficiaries. As a result, following the transfer, beneficial ownership rested with the beneficiaries of the 1985 Trust;

[1] Case management meeting, November 22, 2019: page 22 lines 17 – 19 and page 15, lines 37 - 38, Appendix Tab J

c. The ATO was consented to by the parties and sought upon the foregoing basis. The context of the ATO makes clear the parties intended the ATO to confirm the transfer had been proper and that the transferred assets were governed by the terms of the 1985 Trust;

d. The brief of the 1985 Trustees in support of the ATO explained that the ATO was sought "for certainty and to protect the assets of the 1985 Trust for the benefit of the beneficiaries". The brief set out the facts, fully described the legal basis for the transfer, and stated: "Given the high level of advice that the Trustees received [in effecting the transfer] it is believed the transaction was carried out properly;"

e. These submissions were accepted by the Court, which said it was "certainly satisfied that the consent order is appropriate and properly based in law."[2] The effect of this finding and of the granting of the ATO was to confirm the propriety of the transfer and thus the passage of the beneficial interest to the 1985 beneficiaries; and,

f. The OPGT submits the issue of who held the beneficial interest in the transferred assets prior to the granting of the ATO is, therefore, *res judicata*.

3. This brief will also address the contractual nature of consent orders and how this affects their interpretation. The OPGT submits:

a. Consent orders like the ATO are contractual in nature and the rules governing the interpretation of orders include those of contractual interpretation. First among these is that the contract must be interpreted to give effect to the intention of the parties when it was made.[3]

b. The evidence adduced since November 20, 2019 further confirms the conclusion that the intention of the parties was to have the transfer of assets to the 1985 Trust for the benefit of its beneficiaries judicially affirmed and to remove any concerns on the part of the Trustees about dealing with the assets. This allowed the parties to move on to the key

[2] Transcript of Case Management Hearing, August 24, 2016, p. 3, l. 35, Appendix Tab C
[3] *Simonelli v. Ayron Development,* 2010 ABQB 565 at para. 74, Authority Tab 1

remaining issue which was the definition of the 1985 Trust beneficiaries so as to allow distributions from the Trust to them.

4. In short, whatever approach is taken to the interpretation of the ATO the result is the same. The ATO confirmed the assets had been properly transferred to the 1985 Trust for the benefit of the 1985 Trust beneficiaries.

Facts

The 1982 Trust and the asset transfer

5. The OPGT refers to its summary of the facts concerning the 1982 Trust and the asset transfer set out at paragraphs 9 to 24 of its November 15, 2019 brief and adds what follows.

6. The individuals who had previously personally held assets in trust for the SFN transferred them into the 1982 Trust by conveying those assets to the 1982 Trustees to be held pursuant to the terms of the 1982 Trust in December, 1983.[4] The 1982 Trustees then transferred those assets to Sawridge Holdings Ltd. in return for the shares in and promissory notes from Sawridge Holdings, which also assumed any outstanding mortgages on real property.[5] The 1982 Trustees thus became the sole shareholders in Sawridge Holdings, the primary asset of the 1982 Trust.

7. The 1982 Trust, at paragraph 6, vested its Trustees with broad discretion to deal with its assets, both capital and income, in the following terms:

> "… 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**". [6] (emphasis added)

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[4] 1985 Trustees Compendium of Documents related to the transfer of assets ("Trustees Compendium"): Exhibit "A" to the Affidavit of Paul Bujold filed February 24, 2020, at Tab 7, SAW000073, Appendix Tab F
[5] *Ibid,* Tab 8, SAW000089
[6] *Ibid*, Tab 1, SAW000063 at page 3

8. On April 15, 1985 then Chief Walter Twinn settled the 1985 Trust with the sum of $100.00.[7]

9. The resolution of the 1982 Trustees to authorize and effect the transfer of 1982 Trust assets to the 1985 Trust began with a preamble which noted that the impending amendments to the *Indian Act* threatened to extend membership in the SFN to "certain classes of persons who did not qualify for membership on the 15th day of April, 1982", the date the 1982 Trust was established.[8]

10. The resolution's preamble recited the "complete and unfettered" discretion vested in the 1982 Trustees to deal with assets for the benefit of the beneficiaries under paragraph 6 of the 1982 Trust. It then expressed the Trustees' desire to exercise that discretion "by resettling the assets of the Trust for the benefit of only those persons (the "Beneficiaries") who qualify, or would in the future qualify, for membership in the Band under the provisions of the Act in force on the 15th day of April, 1982". Finally, the preamble noted the creation of the 1985 Trust "for the benefit of the Beneficiaries".

11. The operative language of the resolution went on to provide that the Trustees' powers under paragraph 6 of the 1982 Trust were "hereby exercised by transferring all of the assets of the [1982] Trust to the undersigned in their capacities as Trustees of the Sawridge Band Inter Vivos Settlement" (the 1985 Trust). The resolution also authorized Chief Walter Twinn to:

> "…execute all share transfer forms and other instruments in writing and to do all other acts and things necessary or expedient for the purpose of completing the transfer of the said assets of the Trust to the Sawridge Band Inter Vivos Settlement in accordance with all applicable legal formalities and other legal requirements."

12. The 1985 Trustees, who were the same persons as the 1982 Trustees but acting in a different capacity, endorsed their acceptance of the transfer in the same document.[9] Their acceptance stated that they:

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[7] *Ibid,* Tab 16, SAW000532 and Tab 18, SAW000039
[8] *Ibid,* Tab 19, SAW000120
[9] Transcript of Questioning on Affidavit of Paul Bujold, page 35, lines 1-22, Appendix Tab U

> "…in their capacities as Trustees of the Sawridge Band Inter Vivos Settlement hereby declare that they accept the transfer of all of the assets of the [1982] Trust and that they will hold the said assets and deal with the same hereafter for the benefit of the Beneficiaries in all respects in accordance with the terms and provisions of the Sawridge Band Inter Vivos Settlement."

13. The resolution passed by the SFN members at its duly convened and constituted meeting on April 16, 2015, referred to this transfer of the assets, noted that the assets had actually been transferred the previous day, and provided "that the said transfer be and same is hereby approved and ratified." In subsequent correspondence with the Executive Director of Sawridge Administration, Mr Cullity noted:

> "…my recollection is that the resolutions of the band approving the transfer of assets and the establishment of the [1985] trust were passed simply to indicate that the decisions and actions of the trustees were approved by the Band. I do not believe there was ever any suggestion that approval by the band was necessary although of course, to the extent that members of the band were beneficiaries of the trust, their approval would normally estop them from objecting to the resettlement."

Mr. Cullity concluded by saying the purpose of the band resolutions was "to demonstrate that the resettlement was made openly and was not a private decision of the Trustees of the 1982 Sawridge Band Trust."[10]

14. The debenture which was also settled into the 1985 Trust at the same time as the assets transferred from the 1982 Trust was issued January 21, 1985 by Sawridge Enterprises Ltd., a subsidiary of Sawridge Holdings Ltd., to Chief Walter Twinn as Trustee for the SFN. The SFN Band Council Resolution directing Chief Twinn to transfer the debenture to the Trustees of the 1985 Trust stated that the debenture was to be held by them "as an accretion to the assets of the trust and subject in all respects to the terms and provisions thereof."[11]

15. The debenture transfer was effected by way of assignment executed by Walter Twinn and consented to by the 1985 Trustees. At the time of the assignment, the sum of $13,157,219.89

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[10] TWN007867, Appendix Tab K

[11] 1985 Trustees Compendium: Tab 14, SAW000495; Tab 17, SAW001895, Appendix Tab F

was due or accruing due and unpaid. The Band Council Resolution directing the transfer of the debenture was also approved and ratified by the SFN at the August 16, 1985 Band meeting.[12]

16. All of these transactions were carried out with the guidance of eminent trust counsel, Maurice Cullity Q.C. of what was then Davies Ward and Beck. Mr. Cullity, whose career included teachings estate and trust law at Oxford and Osgoode Hall, and who subsequently became Mr. Justice Cullity of the Ontario Superior Court of Justice, was awarded the Ontario Bar Association's Award of Excellence in Trust and Estates Law in 2017.

17. The 1982 Trust produced its final financial statement as of December 31, 1984.[13] The Trustees have no record of any financial statements or tax filings by the 1982 Trust after that date. The SFN advises it also has no such records.[14] The Trust's chartered accountant, Ron Ewoniak, who also provided substantial professional advice to Walter Twinn and the SFN concerning the trust, understood the 1982 Trust was dissolved following the asset transfer.[15]

18. This final financial statement of the 1982 Trust was used as a basis for preparing a draft of the first financial statement of the 1985 Trust, for the 1985 financial year. Mr. Bujold stated that he had been unable to locate a final copy of 1985 financial statements for the 1985 Trust, but that he had seen a draft comprising the final financial statement of the 1982, with handwritten notations by the Trust's auditors.[16]

The purpose and context of the ATO

19. As described in the previous briefs of the OPGT, Mr. Bujold provided evidence regarding the Trustees' purpose in seeking advice and direction respecting the asset transfer in his August 30, 2011 affidavit. In his further affidavit filed February 24, 2020, Mr. Bujold provided additional evidence on the Trustees' intentions in seeking the ATO.

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[12] 1985 Trustees Compendium: Tab 21, SAW001445, Appendix Tab F
[13] Questioning of Paul Bujold regarding the Asset Transfer Order Application, filed September 13, 2019 held February 26 and March 2, 2020, p. 98, l. 26 to p. 99, l. 3, Appendix Tab U
[14] Affidavit of Paul Bujold, filed February 24, 2020, para. 9 and 10. Appendix Tab T; Transcript of Questioning of Catherine Twinn March 12, 2020, p. 34, lines. 16-27, p. 35, lines. 1-8 Appendix Tab W
[15] Affidavit of Catherine Twinn, filed January 28, 2020, para 5 (n), Appendix Tab O
[16] Questioning of Paul Bujold regarding the Asset Transfer Order Application, filed September 13, 2019 held February 26 and March 2, 2020, p. 98, l. 16 to p. 99, l. 17, Appendix Tab U

20. This affidavit addressed the origin of the ATO and the current application as follows:

> "4. The Sawridge Trustees made the application to approve the Transfer due to the lack of documentation regarding the Transfer. From the limited documentation, it appeared that the 1982 Trust assets were transferred to the 1985 Trust even though the 1985 Trust was not a beneficiary of the 1982 Trust."
>
> "5. I understand that the Court has recently raised as an issue the effect of the Transfer (the "Asset Transfer issue")…."[17]

21. At Questioning on Affidavit, Mr. Bujold said the Trustees' concern about lack of documentation was that the Trustees "expected that there would be a clearer transfer process that met the legal requirements of having beneficiary approval and to a certain extent court approval."[18] By way of example, he referred to the amendment of the 1982 Trust that varied the Trustees' terms of office and that had been approved by court order.[19]

22. Mr. Bujold's evidence at the Questioning was that this issue regarding documentation was of concern to the Trustees because they intended to seek a passing of accounts for the 1985 Trust and wished to be sure they had "the right information". It was also of concern regarding distributions to the 1985 Trust beneficiaries because "we needed to know that there had been a valid transfer of asset (sic) into the 1985 Trust."[20]

23. Mr. Bujold specifically confirmed the direction the Trustees sought from the Court to address their concerns was as described in his August 30, 2011 affidavit (filed September 12, 2011) at paragraph 25, namely:

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

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[17] Affidavit of Paul Bujold, filed February 24, 2020, paras. 4 and 5, Appendix Tab T
[18] Questioning of Paul Bujold regarding the Asset Transfer Order Application, filed September 13, 2019 held February 26 and March 2, 2020, p. 90, l. 5-8, Appendix Tab U
[19] *Ibid*, p. 90, l. 1 – 10
[20] *Ibid,* page 90, lines 16 - 27

This was eventually brought forward by way of an application in August 2016 resulting in the ATO.[21]

24. At the time he granted the ATO, the then CMJ had been case managing the advice and direction proceedings for five years and had written a number of decisions referring to the nature and purpose of the proceedings. The then CMJ understood the ultimate objective of the proceedings was to determine whether or not the 1985 Trust beneficiary definition could and should be amended to address the perceived discrimination in its terms, prior to distributions from the Trust being made to the 1985 beneficiaries. The 1985 Trustees' request for advice and direction confirming "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" we say it was final relief step in that process.[22]

25. The discussions between the parties and SFN giving rise to the Consent Order regarding the asset transfer are described at paragraphs 44 to 50 of the OPGT's November 15, 2019 brief.

26. Neither the Affidavits of Mr. Bujold, the 1985 Trustees' specific application for the ATO, nor its brief in support (which was reviewed by Mr. Bujold), suggested there was any defect in the transfer due to lack of beneficiary or court approval at the time the transaction occurred.

27. Rather the Trustees' brief sought the Court's confirmation that the transfer had been proper as follows:

> "There are many methods by which a trust can transfer assets to another trust through a series of transactions. Given the high level of advice that the Trustees received, it is believed that the transaction was carried out properly. Based on the searches conducted, there is simply no record of the necessary transactions."

The brief then referred to the principle established in *Pilkington* :

> "On the basis of this case and what has become known as the Pilkington principle, a trust to trust transfer can be appropriate where it is for the benefit of the beneficiary…[I]t is

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[21] *Ibid*, page 91 at lines 15 - 24

[22] 1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799 (CanLII) at paras. 8, 45 and 68, November 20, 2019 Reply Brief of Sawridge Trustees

> submitted that the same principle is applicable as the transfer from the 1982 Trust to the 1985 Trust was for the benefit of the same beneficiaries and preserved their interest in the trust assets. In addition, it is submitted that the Sawridge trust to trust transfer could have been achieved through a series of transactions and as Pilkington says, the transfer should not be held as inappropriate just because it was done directly instead of indirectly if this was the case with the transfer to the 1985 Trust."

28. The submissions stated that the approval of the asset transfer was sought "for certainty and to protect the assets of the 1985 Trust for the benefit of the beneficiaries." It concluded with the statement that approval of the asset transfer *nunc pro tunc* "is in the best interests of the beneficiaries of the 1985 Trust."

29. Counsel for the 1985 Trustees made brief oral submissions in support of the consent order stating:

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

The Court responded:

> "I did, and thank you very much for the brief, because it makes it pretty clear [interjection by counsel for the Trustees omitted] well, what the basis for it is, and I'm certainly satisfied that the consent order is appropriate and properly based in law."[23]

30. The 1985 Trustees submitted a distribution proposal for the 1985 Trust which was also discussed at the same hearing as the ATO. The proposal attached authorities which further supported the propriety of the asset transfer. Specifically, the Trustees attached extracts from Waters' Law of Trusts in Canada, 4th ed. and highlighted, *inter alia*, the following passages:

> "…if a dispositive discretion is sufficiently widely drafted, then a court is likely to conclude that if the trustees have the power to transfer property outright to a beneficiary,

[23] Transcript of Case Management Hearing, August 24, 2016, p. 3, 21-35, Appendix Tab C

> it should be possible to settle property on a new trust for that beneficiary. This was the decision in *Hunter Estate v. Holton* [(1992) 7 O.R. (3d) 372]"[24]

and

> "The discretionary trust normally requires the trustee to dispose of the trust property to whom among the class they think fit, in the amounts and when they think fit…It would seem that even without an express discretion as to the form of disposition, they have an implied discretion stemming from the nature of the trust to make dispositions in the form of re-settlements on new trusts."[25]

As discussed below, the Court in *Hunter Estate* relied upon the decision in *Pilkington* for the proposition cited by Waters.

31. The distribution proposal also included the Trustees' suggestion for an amendment to the 1985 Trust beneficiary definition. Having approved the ATO earlier in the hearing, the then CMJ described this as "the one outstanding issue" in the proceedings.[26]

32. The subsequent steps taken by the parties further confirmed their mutual understanding that following the ATO there were no further issues concerning the asset transfer to be addressed, and that the assets were to be dealt with pursuant to the terms of the 1985 Trust for the 1985 beneficiaries.

a. In subsequent submissions the parties described the remaining matters for case management as narrow in scope and the proceeding close to readiness for trial.

b. In 2018, the Alberta Court of Appeal urged the 1985 Trustees to file an originating application that "sets out the matters for which advice and direction are sought",[27] The resulting application filed by the Trustees was limited to a request for advice and

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[24] Brief of 1985 Trustees for Approval of the Distribution Proposal, filed August 5, 2016, Tab 4, page 1201, Appendix Tab B
[25] *Ibid,* at page 1203
[26] Transcript of Case Management Hearing, August 24, 2016, *supra*, at page 9, lines 5-12, Appendix Tab C
[27] *Twinn v Twinn*, 2017 ABCA 419 (CanLII), at para. 22, Authority Tab 2

direction as to whether the 1985 Trust beneficiary definition was discriminatory, and, if so, the appropriate remedy.[28]

c. In the subsequent Discrimination Consent Order, the parties agreed that the 1985 Trust's beneficiary definition was discriminatory. The Order recited the parties' mutual commitment to "a remedy that will protect the existence of the 1985 Trust and the interests of the beneficiaries." The Order further provided that the discriminatory nature of the beneficiary definition could not be used as a ground for dissolving the 1985 Trust.[29]

33. At the end of 2018, Henderson J. succeeded Thomas J. as Case Management Justice. At the first case management meeting thereafter the 1985 Trustees presented an annotated agenda describing the remaining issues for resolution in case management. Neither the asset transfer or the ATO remained in issue. The parties also presented a consent Order intended to facilitate the determination of the remaining issues concerning the beneficiary definition. The Order provided that "the source and nature of the jurisdiction of this Court to make changes to the definition of beneficiary as set out in the 1985 Trust" be heard by the Case Management Justice as a directed issue (The Jurisdiction Issue).[30] That issue was scheduled to be heard April 25, 2019.

34. Between the granting of the ATO on August 24, 2016 and the date scheduled for the hearing of the jurisdiction issue in April 2019 neither the parties nor the SFN suggested there was any remaining issue to be resolved with respect to the ATO, or that the beneficial ownership of the transferred assets was in question. Neither the parties nor the SFN suggested that the beneficial ownership of the transferred assets did not belong to the 1985 beneficiaries or was uncertain in any way.

Background to the January 2021 ATO Hearing

35. The Jurisdiction Issue hearing was scheduled for the afternoon April 25, 2019. That morning counsel received a message from the CMJ stating he had reviewed the briefs filed for

[28] Application (Statement of Issues and Relief Sought) filed January 9, 2018, Appendix Tab D
[29] Consent Order (Issue of Discrimination), filed January 22, 2018, Appendix Tab E
[30] Consent Order (Hearing of Jurisdictional Question), granted December 18, 2018, Appendix Tab H

the Jurisdiction hearing and had also reviewed the ATO, the Trustees' brief filed in support and the transcript of the proceedings at which the ATO was granted. The CMJ then stated:

> In my view it is necessary, as part of the Jurisdictional Issue, to consider the terms of the Consent Order [the ATO] and to fully consider what impact that Order has on the trust terms pursuant to which the trust assets are currently being held. One possibility is that the trust assets are being held for the benefit of the "Beneficiaries" as defined in the 1985 Trust and the 1985 Trust terms govern. However, that is not the only possibility. The Consent Order says that the transfer of assets is "approved *nunc pro tunc*". But the Order does not address the issue of the terms under which the assets are being held. The Consent Order does not appear to be a variation of the 1982 Trust and a variation would likely not be possible without the consent of the beneficiaries (although this clearly looks like what the trustees were attempting to do in 1985). It is possible that the 1985 Trust is a successor trust, but again that does not address the question of the terms on which the trust assets are being held or whether there is an ongoing requirement for the 1985 Trust to account to the 1982 Trust with respect to the trust assets.

36. The CMJ stated this to be "a foundational issue" that needed to be addressed before the Jurisdiction Issue hearing could proceed. The issue had not been raised in the application before the Court or in the submissions of any party.

37. At the April 25, 2019 afternoon hearing, the CMJ elaborated on his rationale for raising the new issue. After setting out potential difficulties in finding jurisdiction to amend the 1985 Trust's beneficiary definition he stated, *inter alia*:

a. "So I questioned – and I could be totally wrong about this and I'm more than happy to hear all of you out –I question the legitimacy of the 1985 trust declaration at all."

b. "One of the options here that is easily available is this 1985 trust doesn't have anything to do with anything we're talking about here today. The assets, while they may be situated in the 1985 trust – because Justice Thomas said that they were – are still subject to the 1982 trust terms. The definition of beneficiaries is members or future members of the band, that's the end of it….So the easiest thing to do here is just to say that you haven't satisfied me that this 1985 trust is relevant. I'm not going to exercise my discretion to modify the definition of beneficiaries in the 1985 trust. 1982 is where we're going, that's where we are….I'm not saying I've come to that conclusion but that – that is an avenue

that is in my mind available subject to counsel telling me that there are roadblocks that prevent that from happening."

As a result of these comments the Jurisdictional Issue hearing was adjourned.

38. A further case management meeting was convened on September 4, 2019, to consider how to properly address the issue raised by the CMJ. Counsel for the OPGT and Ms. Twinn pointed out the ATO was final, having never been appealed, and that there was no application before the Court concerning the issue raised by the Court. The OPGT also submitted that a reversion to the 1982 Trust would strip a number of persons it represented of their beneficiary status. The CMJ expressed doubt that this was so, but this was confirmed by counsel for the 1985 Trustees. Ultimately, the CMJ stated the issue he had raised concerned the interpretation and effect of the ATO and invited the parties to file a motion, which the 1985 Trustees did on September 13, 2019.

39. In a subsequent series of case management meetings, the CMJ provided further clarification of the issue he had identified including:

a. "….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 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?"

b. "…the issue I need to decide is whether these assets are being held for the 1985 beneficiaries or the 1982 beneficiaries. That is the sole issue and that revolves around the interpretation of the consent order."[31]

c. "…how could I possibly interpret the August 2016 order without coming to some conclusion as to what the beneficial ownership of the assets was immediately prior to the order so that I can determine what Justice Thomas was trying to do? Was he, I mean, if I

[31] Transcript of November 22, 2019 Case Management Meeting, pg. 13, lines .27-29, Appendix Tab J

conclude that the assets were being held beneficially for the 1985 beneficiaries immediately prior to the order, it makes it a lot easier to come to the conclusion that the order endorsed the transfer and confirmed the beneficiary status of the 1985 beneficiaries. If I come to the contrary conclusion, if I say, for instance, that this was an unlawful trust transfer of the 1982 beneficiaries were in breach of their trust obligations, they transferred it to the 1985 trustees who knew that there was a breach of trust giving rise to constructive trust for the benefit of the 1982 beneficiaries, that the totally different ballgame; right?"[32]

d. "I think I have to do that because we have to know what the landscape was when Justice Thomas set about to grant the order. Was – was he doing nothing more than saying everything was done properly in 1985 and therefore and just confirm that everything was done appropriately, so therefore I am confirming the asset transfer, or was he saying, well no things were not done quite properly but I am going to get an order to clean up some of the errors that were made. And if this is that scenario was he intending to clean it up completely by saying that the beneficial ownership was moved to the 1985 beneficiaries…. I don't think I could try to interpret Justice Thomas is order without having a – a clear understanding of what in fact and in law the status was immediately prior to him granting the order." [33]

Further production since the previous filed briefs

40. The OPGT submitted that if the ATO hearing proceeded on the basis described by the CMJ, a more complete evidentiary record should be provided.[34] The OPGT subsequently applied for additional production from the 1985 Trustees and the SFN which resulted in further production by the Trustees and, indirectly, the SFN.

41. On February 20, 2020 the OPGT's production application was resolved by a Consent Order pursuant to which the Trustees were to file an Affidavit addressing aspects of application.

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[32] *Ibid,* at pg 22, lines.16-26
[33] Transcript of Case Management Hearing held December 20, 2019, p. 8, l. 20-29, Appendix Tab M
[34] *Ibid,* at pg 5, line 35 to pg 6, line 21

The Trustees' filed Paul Bujold's Affidavit on February 24, 2020.[35] The Trustees also provided additional documents by letter from their counsel pursuant to paragraph 3 of the Production Consent Order.[36]

42. The Trustees' affidavit and letter provided the following additional materials relevant to the production request:

a. Documents pertaining to $12 million debenture that the Sawridge First Nation (SFN) directed be transferred to the 1985 Trust; and

b. Copies of additional correspondence between representatives of Canada and the SFN relating to Canada's questions about the Trusts;

c. The information of SFN on several of the production requests as provided by Mike McKinney to Paul Bujold. The SFN confirmed that information was accurate and could be relied upon in the proceedings.

43. Mr. Bujold was Questioned on this affidavit on February 26 and March 2, 2020.[37]

44. Catherine Twinn also filed an Affidavit with additional evidence relevant to the Asset Transfer Order application and also a 2nd and 3rd Supplementary Affidavit of Records.[38] She was Questioned on her further affidavits March 12, 2020. Her additional evidence included:

a. A more complete compendium of the correspondence between Canada and the SFN regarding the Trusts, relevant to the SFN's position on the trusts being created from s.64 Indian Act capital and revenue funds. This more fully confirmed that Canada dropped its questions about the trusts and did not ultimately challenge the SFN's position that

[35] Affidavit of Paul Bujold filed February 24, 2020, *supra*, Appendix Tab T
[36] Correspondence from Denton's LLP dated February 14, 2020, Appendix Tab P
[37] Transcript of Questioning of Paul Bujold, February 26 and March 2, 2020; Revised answers to Undertaking from Questioning, Appendix Tab U
[38] Second Supplemental Affidavit of Records of Catherine Twinn, sworn December 18, 2019, Documents, Appendix Tab K; Third Supplemental Affidavit of Records of Catherine Twinn, sworn January 15, 2020. Appendix Tab N; Affidavit of Catherine Twinn, filed January 28, 2020, *supra*, para., Appendix Tab O

Canada had no say in the SFN Trusts, regardless of the origin of the funds used to purchase trust assets.[39]

b. Confirmation that there had in fact been distributions from the 1985 Trust to 1985 Trust beneficiaries over the years, apparently for tax purposes, with the monies being resettled back in the 1985 Trust at a later date.[40]

c. Confirmation the Ron Ewoniak, who was extensively involved in the creation of the Trusts and the 1985 Transfer, understood the 1982 Trust was dissolved at the time of the Asset Transfer. Her evidence suggested Mr. Ewoniak was well positioned to provide a complete evidentiary picture of what occurred in relation to the 1985 Transfer but has not been produced as a witness by the SFN or the Trustees.[41]

d. Evidence that the assets in the 1985 Trust were not derived exclusively from SFN capital and revenue funds as alleged by the 1985 Trustees and the SFN.[42]

e. Additional documentation and evidence regarding the $12 million debenture that had been transferred directly to the 1985 Trust. Ms. Twinn said that in her more than $30 year tenure as Trustee of the 1985 Trust it was never suggested, as the Trustees now claim, that this debenture was not actually transferred into the Trust. Ms. Twinn also said the MNP report relevant to the debenture, which the 1985 Trustees have declined to produce on the basis of privilege, was commissioned by the Trustees, not by legal counsel.[43]

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[39] Twinn production: TWN#7811, 7820, 7825, 7837, 7846, 7848, 7853, 7855, 7856, 7860, 7863, 7867, 7878, and 7880, Appendix Tab K

[40] Twinn production: TWN007806, 7810, 7944, Appendix Tab K

[41] Affidavit of Catherine Twinn, filed January 28, 2020 *supra*; Transcript of Questioning of Catherine Twinn, March 12, 2020, at pages 29-30, Appendix Tab O

[42] Affidavit of Catherine Twinn filed January 28, 2020, *supra,* at para 5 (g); Transcript of Questioning of Catherine Twinn, March 12, 2020, *supra*, pg. 25, line. 9-16 and pg. 26 lines 15-23 and TWN Doc # for video, Appendix Tab O

[43] Twinn production: TWN 007890; Transcript of Questioning of Catherine Twinn, March 12, 2020, *supra*, pg. 70-71, 73, and 90-91, Appendix Tab K

f. Confirmation that there is no credible evidence to suggest the SFN or the Trustees believed the 1982 Trust continued to exist and operate after the 1985 Asset transfer.[44]

g. The intended effect and purpose of the 1985 Trust in preserving assets from claims by Bill C-31 members, most of whom had already received per capita payouts from band assets.[45]

45. The further evidence and production of Mr. Bujold and Ms. Twinn is further referred to in the submissions following.

II. OPGT POSITION ON THE ISSUES

46. The current application seeks to address issues the ATO resolved and which are *res judicata*. The record before the Court clearly shows:

a. The 1982 Trustees intended to transfer the capital and income of the 1982 Trust to the 1985 Trust for the benefit of the beneficiaries of the 1985 Trust;

b. The 1982 Trust provided them with the discretion, power and ability to do so, as recognized by law;

c. The transfer was properly documented and effected to achieve this result; and

d. This application can and should be determined on this ground alone.

47. If the court were to find otherwise, a trial would be required. The relief sought by the SFN would require rulings on applicable limitations, laches, acquiescence and estoppel which are matters for trial. That relief would also be a final determination of the substantive rights of minor beneficiaries the OPGT represents, which the OPGT does not consent to being decided in the case management process.

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[44] Transcript of Questioning of Catherine Twinn, March 12, 2020, *supra*, pg. 34, lines. 16-27 and pg. 35, lines. 1-8, Appendix Tab W

[45] Affidavit of Catherine Twinn filed January 28, 2020, *supra*, at para. 5 (l), Appendix Tab O

III. SUBMISSIONS

These proceedings were commenced, and have been conducted, on the basis of the transferred assets being held by the 1985 Trust for the 1985 beneficiaries. The ATO confirmed this.

48. There is no dispute that the 1982 Trust assets were in fact transferred to the 1985 Trust. The transactions described above clearly have that effect. In addition, as the Court has previously observed, at minimum the ATO confirms the assets moved to the 1985 Trust.

49. There can also be no dispute that the 1982 Trustees carried out the transfer of assets to the 1985 Trust so that the beneficial interest in the assets would thereafter belong to the beneficiary class as described in the 1985 Trust. In doing so, the 1982 Trustees intended to protect the assets for the benefit of the same class of persons as when the 1982 Trust was established, namely present and future members of the SFN in accordance with the *Indian Act* as it existed on April 15, 1982. [46]

50. The asset transfer was effected in the face of the impending amendment to the *Indian Act* by Bill C-31. Bill C-31, which the SFN opposed, was to impose new members on the SFN who would thereby have become beneficiaries of the 1982 Trust. The asset transfer was intended to avoid that result. As counsel for the SFN told the court following the granting of the ATO:

> "The purpose of the transfer in '82, '85, in terms of transfer from trust, was to avoid any claim that others might make in relation to these assets after the enactment of Bill C-31. So Sawridge First Nation would be highly motivated to ensure that those that were acting as trustees made the transfer of all the assets from the '82 Trust to the '85 Trust. That was the reason. The reason clearly was one where it was in everyone's best interest to make sure the transfer took place."[47]

51. In accepting the transferred assets, the 1985 Trustees explicitly confirmed they would administer the assets pursuant to the terms of the 1985 Trust. They have, in fact, administered the 1985 Trust for 35 years for the benefit of the 1985 beneficiary class, including:

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[46] Affidavit of Catherine Twinn, filed January 28, 2020, para. 5(l), Appendix Tab O;
[47] Transcript of August 24 Case Management Hearing at page 39, lines 1-7, Appendix Tab C;

a. distributions to 1985 Trust beneficiaries for tax purposes;[48]

b. by bringing these advice and direction proceedings; and

c. obtaining the ATO.

52. The 1985 Trustees have never taken the position, including on this application, that they hold the Trust's assets for anyone other than the 1985 beneficiary class.

53. The parties to these proceedings consented to the ATO and submitted it to the Court on the basis that the transferred assets were held for the benefit of the 1985 beneficiary class. The SFN was fully involved in, and consulted about, the ATO and the actual terms of the order which they characterized as resolving "any possible concerns with respect to the approval of the transfer of the assets from the 1982 Trust to the 1985 Trust".

54. The ATO fully resolved one arm of the Trustees' original application.[49] Not long before the ATO, the then CMJ directed the parties to proceed with distribution plan to distribute the 1985 assets to the 1985 beneficiaries. The proposed plan was before him in the same time frame as the ATO itself. The ATO cleared a path for the 1985 Trust beneficiary definition issue to be heard and for distribution to proceed.

55. The Court has now redirected the proceeding to address whether the asset transfer actually conveyed the beneficial ownership of the 1982 Trust assets to the 1985 beneficiaries and whether the ATO confirmed the transfer of the beneficial interest.

56. The OPGT submits this question is *res judicata*. To suggest that in approving the ATO the Court did not determine that beneficial ownership of the 1985 Trust assets belonged to the 1985 Trust's beneficiaries is entirely inconsistent with the context in which it was granted, including the history of the proceeding, the submissions of fact and law which the Court accepted, the intention of the parties and the Court's determination to move to distribution and

[48] Catherine Twinn, 2nd Supplemental Affidavit of Records, TWN 007806, 007810, and 007944, Appendix Tab K
[49] Application (Statement of Issues and Relief Sought), filed January 9, 2018, Appendix Tab D

the 1985 beneficiary definition. The issues the CMJ now raises were conclusively determined by the ATO.

The asset transfer was proper, within the powers of the 1982 Trustees, and effected the transfer of the assets to the 1985 Trustees for the benefit of the 1985 beneficiaries

57. The SFN's submissions on the ATO application include the position that the original 1985 asset transfer was invalid and not well founded in law. The OPGT submits these positions are a collateral attack on the ATO. Were there any remaining jurisdiction to consider the arguments, the OPGT submits the SFN analysis would also fail on the merits.

The OPGT submits both the facts and the law before this Court establish:

a. the 1982 Trustees held the discretion under the terms of the 1982 Trust to transfer the capital and income of the 1982 trust to another trust for the same beneficiaries;

b. they properly and effectively exercised that discretion in transferring the 1982 Trust assets to the 1985 Trust; and

c. the effect of the transfer was that the beneficial interest in those assets was held thereafter by the 1985 beneficiary class.

58. The OPGT further submits that all of the foregoing was confirmed by the ATO.

59. The discretion exercised by the 1982 Trustees is of the broadest possible nature. Paragraph 6 of the 1982 Trust gave the 1982 Trustees "complete and unfettered discretion" to pay any or all capital and income of the Trust "as they in their unfettered discretion from time to time deem appropriate for the beneficiaries set out above" and to make such payments "at such time, and from time to time, and in such manner as the Trustees in their uncontrolled discretion deem appropriate."

60. Trustees who enjoy such broad discretion may, *inter alia,* exercise it by transferring the assets to a new trust for the same beneficiary or beneficiaries. As the passages from *Waters'* cited above say, where trustees enjoy broad discretion to transfer trust assets to a beneficiary

directly, the discretion to settle that property on a new trust for that beneficiary will be found. Recognizing *Pilkington* as remaining the leading English authority:

> "One of the powers that trustees may have is to end the trust by settling the trust property on new trusts, whether or not they are the trustees of the new trusts. A general power of appointment may permit this (Thomas, Powers (1998) at 410-18; Hunter Estate v. Holton (1992), 7 O.R. (3d) 372 (Ont. Gen. Div.); see chapter 21, Part V). If this is done, the old trust ends according to its terms, because no property is held in trust under its terms".[50]

61. The SFN relies on a group of cases that consider *Pilkington* to argue was not properly relied on for the asset transfer or the ATO. The OPGT respectfully submits the cases, properly applied, fully support the application of *Pilkington* to the facts relevant to the transfer and the ATO.

62. In *Hunter Estate v. Holton*, the Ontario Court General Division (now the Ontario Superior Court of Justice) approved the following statement from the unreported 1988 decision of Barr J. in *McLean v. Stewart*:

> "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."[51]

63. In approving and applying this statement, the Court in *Hunter Estate* made extensive reference to the decision in *Pilkington* and additional English authority to the same effect. It concluded its reasons on this issue as follows:

> "In the present case, clause III(i)(C) [of the will in question] 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."[52]

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[50] *Waters' Law of Trusts in Canada,* 4th ed., Authorities Tab 3
[51] *Hunter Estate v. Holton*(1992), 7 O.R. (3d) 372 (Ont. Gen. Div.), authorities to the November 15, 2019 brief of the SFN, Tab 6, at para 13, Nov 15, 2019 Brief of Sawridge Trustees
[52] *Ibid,* at para. 18

64. The decision in *Hunter Estate* was relied upon for this proposition in the B.C. Supreme Court decision in *Chalmers v. Chalmers Alter Ego Trust*[53] in which a resettlement into a new trust was challenged. The Court noted:

> "The parties agree that in law a trust may be resettled, so long as nothing in the terms of the original trust precludes such a resettlement. The petitioner cites Hunter Estate v. Holton (1992), 1992 CanLII 7735 (ON SC), 7 O.R. (3d) 372 (Gen. Div.), as authority for this general proposition. There, Steele J., after referring to the House of Lords decision of Pilkington v. Inland Revenue Commissioners, [1964] A.C. 612, found that the terms of the trust in issue permitted the trustee to transfer all the assets of the trust into new trusts, an effective resettlement."

65. A similar conclusion was reached by the English Court of Appeal in *Re Hastings-Bass*. In finding the resettlement of trust assets into a successor trust had been properly effected (to the extent the resettlement did not offend the rule against perpetuities) the Court relied on the decision in *Pilkington*. It noted the decision in *Pilkington* had found nothing in the relevant powers of the trustees "…which in terms or by implication restricted the width of the manner or power of advancement." The Court of Appeal concluded that in the case before it, it too could find nothing to limit the power of the trustees to make "an advancement which creates new beneficial interests in capital".[54]

66. These findings apply here and fully support the validity of the asset transfer. Nothing in the 1982 Trust limits or purports to limit the exercise of discretion by the 1982 Trustees to resettle trust assets in a new trust for the beneficiaries.

67. The SFN argues that the resettlement was impermissible because the beneficiaries of the 1985 Trust are not the same as the 1982 beneficiaries. The OPGT's November 20, 2019 reviews why this position is not well founded.

68. The SFN's argument on this account is also *res judicata*, having been resolved by the ATO. The brief of the 1985 Trustees in support of the ATO (the ATO Brief) specifically

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[53] *Chalmers v. Chalmers Alter Ego Trust*, 2017 BCSC 2646 (CanLII), Authorities Tab 4

[54] *Re Hastings-Bass (deceased)*, [1974] 2 All E.R. 193 (CA) at page 204, Authorities Tab 5; See also *Joy Technologies Canada Inc. v. Montreal Trust Company of Canada* 1995 CarswellOnt 187, 1995 C.E.B. & P.G.R. 8208 (headnote only), [1995] O.J. No. 4135 including at paragraphs 44 and 53-56, Authorities Tab 6

submitted that the principle in *Pilkington* was applicable "as the transfer from the 1982 Trust to the 1985 Trust was for the benefit of the same beneficiaries and preserved their interest in the trust assets." The then CMJ accepted these submissions and confirmed the ATO was "properly supported in law". The CMJ invited counsel for the SFN to speak to the granting of the ATO and counsel for the SFN advised: "I don't have anything to say."

69. The SFN argues the Court should find the transfer was not proper because the composition of the beneficiary class under the 1982 Trust would be changed in the near future by virtue of the new members who would be imposed on the SFN by Bill C-31 and who would thereby become beneficiaries in the 1982 Trust. However, at the time of the asset transfer those persons were neither members of the SFN nor beneficiaries under the 1982 Trust. The OPGT submits the impending advent of Bill C-31 could not and did not have the effect of limiting the Trustees' ability to exercise their discretion for the benefit of the beneficiaries as they existed at the time of the asset transfer.

70. On the contrary, that potential dilution of the existing beneficiaries' interests by the addition of members under Bill C-31 provided a reasonable basis for the Trustees to exercise their discretion to avoid such dilution from occurring. This was specifically referred to by the 1985 Trustees in their submissions in support of the ATO. They noted the 1985 Trust "was designed to protect the assets of the 1982 Trust as they existed in 1985 before the passage of Bill C-31." The rationale was also endorsed by counsel for the SFN in his submissions after the ATO was granted.[55]

71. Ultimately, just as the 1982 Trustees would have been free to exercise their discretion to distribute the Trust assets to the beneficiaries as of April 15, 1982, so they were equally free to resettle the Trust assets into a new Trust for the benefit of that same group of people. That is what they did, and that is what the ATO confirmed.

72. The OPGT notes the November 20, 2019 SFN and Trustee briefs rely on the Queen's Bench decision in *Bruderheim,* recently affirmed by the Court of Appeal. The OPGT notes the

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[55] Transcript of August 24 Case Management Hearing at page 39, lines 1-7; November 15, 2020 Brief of the OPGT, Schedule "J", Appendix Tab C

decision has no application to this case. It concerned beneficiaries who voluntarily placed themselves outside the beneficiary definition of a trust in which they had formerly held a beneficial interest, as a result of which they could no longer claim an interest in the trust. It has no bearing on the exercise of discretion to resettle a trust.

The additional production does not complete the record, but generally confirms the OPGT's previous submissions.

73. The OPGT has made progress in adding to the record before the Court. However, particularly given the evidence withheld on the suggestion it is privileged (and privileged has not already been waived), it does not appear the Court will have the benefit of a complete record regarding the 1985 asset transfer for this application.

Canada's questions about the Trusts were resolved with no challenge to the validity of the asset transfer or the 1985 Trust.

74. Initially, the SFN relied heavily on the 1985 Trust assets having been originally purchased with capital and revenue funds, monies that had to be released by Canada under s.64 and 66 of the *Indian Act* to challenge the assed transfer. SFN suggested the original character of the funds required them to be used solely for the benefit of SFN members. The SFN produced a partial compendium of correspondence between the SFN and Canada regarding the funds and the Trusts to support its position. The OPGT responded to these submissions at paragraphs 30 to 33 of the November 15, 2019 brief.

75. The additional production provided a more complete picture of the correspondence between the SFN and Canada. The final letter in the more complete compendium from Mr. Cullity's firm confirms Canada's inquiries ended in 1995. Canada did not pursue the matter and did not interfere in the operation of the Trusts on the basis of the original nature of the funds or otherwise.[56]

76. As argued by the SFN itself in that complete compendium of correspondence, and later affirmed by the SCC in *Ermineskin*, Canada has no ongoing oversight of the monies. The nature

[56] TWN007867, *supra*, Appendix Tab K

or origin of the funds used to purchase assets in the 1985 Trust is no impediment to the asset transfer or the beneficial ownership of the appeals resting with the 1985 beneficiaries.

There is no credible evidence that the 1982 Trust continues to exist

77. The SFN's previous submissions relied on the position that the 1982 Trust remains in existence and that its current trustees are the present Chief and Council of the SFN. The SFN further submitted the 1982 Trust has never been dissolved by an act of the 1982 Trustees.

78. The SFN also submitted what occurred in 1985 was not a transfer of assets but an unauthorized amendment of the 1982 Trust that did not receive the necessary judicial approval. This SFN argument was based upon a note to the 1986 financial statements to the 1985 Trust which said that the 1982 Trust "changed its name to "The Sawridge Band Inter-Vivos Settlement Trust [i.e. the 1985 Trust] in 1985".

79. The OPGT responded to aspects of these arguments in the November 20, 2019 brief. As these assertions were unsupported by evidence or an apparent misinterpretation of the 1986 financial statements, the OPGT sought additional production to assist the Court in evaluating those positions.

80. The additional evidence obtained has confirmed there is no air of reality to these arguments and confirms the OPGT's previous submissions.

81. In his 2020 Questioning, Mr. Bujold agreed that the note in the 1986 financial statement was not consistent with the documentary record pertaining to the creation of the 1985 Trust and the asset transfer. As for the continued existence of the 1982 Trust, the Trustees have not produced a single document to support the suggestion the 1982 Trust continues to operate. Catherine Twinn's production and evidence confirmed the 1982 Trust was dissolved and never spoken of amongst the Trustees.[57] The OPGT submits this SFN argument should be given no weight.

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[57] Affidavit of Catherine Twinn, filed January 28, 2020, para. 5(n), Appendix Tab O; Transcript of Questioning of Catherine Twinn held March 12, 2020, Appendix Tab W

Implications Regarding the Adequacy of SFN Member's approval of the 1985 Asset Transfer

82. The SFN's submissions have implied the 1985 SFN Members' resolution was not actually indicative of full support of the asset transfer by the SFN Members or somehow did not represent the Members' wishes. The OPGT sought additional production on the issue to allow the Court to assess whether there was any credible basis to question the Member's resolution. The SFN's production reply stated that any internal SFN processes are irrelevant to the Application.[58] The OPGT submits the SFN's positions are inconsistent and that in the absence of any evidence to the contrary which the SFN either does not have or refused to provide, the parties and the Court can and should to rely on the Members resolution as being effective.

83. The additional Twinn production included the letter from Mr. Cullity, quoted above, which says the Members resolution, was not legally necessary, but was passed to indicate "that the decisions and actions of the Trustees were approved by the Band". The Member's resolution, while not passed for that purpose, would also estop Band members who were beneficiaries from raising any future objections to the asset transfer.[59]

Further evidence of Mr. Bujold leaves major questions unresolved concerning the $12 Million debenture in the 1985 Trust.

84. The OPGT's November 15, 2020 submissions reminded the Court that the 1985 Trust held assets beyond those transferred from the 1982 trust, specifically a $12 million debenture. The SFN responded with assertions, unsupported by evidence, to the effect that the debenture may have no remaining value and was not a barrier to finding all assets in the 1985 Trust are held for the benefit of the 1982 beneficiaries.

85. The OPGT sought additional production on this issue, given the value of the asset in question and its potential significance to the minor 1985 trust beneficiaries. The SFN's reply on production acknowledged it had no additional evidence on the debenture.

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[59] Letter from Davies Ward Beck to McKinney, dated March 3, 1997, TWN 0007867, Appendix Tab K

86. Prior to this assertion by the SFN, the Trustees' evidence had been consistent – that the 1985 Trust assets included a $12 Million debenture issued to Walter Twinn by Sawridge Enterprises Ltd. that was not part of the asset transfer from the 1982 Trust.

87. Mr. Bujold testified that the debenture was issued by Sawridge Enterprises Ltd. to Walter Twinn as Trustee for the Band in relation to the construction and development of a hotel. As described above, Walter Twinn transferred the debenture to the 1985 Trust pursuant to an April 15, 1985 SFN Band Council Resolution. The transfer was effected by way of assignment executed by Walter Twinn and by the 1985 Trustees. At the time of the assignment, the sum of $13,157,219.89 was due or accruing due and unpaid.

88. The foregoing reflected the evidentiary record on the topic of the debenture at the time the ATO was granted. In its prior brief, the OPGT noted that it was unlikely the ATO was intended to leave the 1985 Trust with two classes of assets – one (the debenture) held for the 1985 beneficiaries and the other (the assets transferred from the 1982 Trust) whose beneficial ownership remained undetermined.

89. Catherine Twinn's additional production, while not available at the time the ATO was granted, confirmed that in 2010, the Trustees gathered a group with knowledge of the history and background of the Trusts to document their knowledge. At that time, the corporations and the Trustees regarded the $12 million debenture as an asset of the 1985 Trust.[60]

90. Regardless, at the Mr. Bujold's 2020 questioning, Mr. Bujold appeared to resile from his previous evidence, testitfying that:

a. there was nothing in the records of the 1985 Trust or the Sawridge Group of Companies indicating that the debenture had been actually transferred into the 1985 Trust;

b. he was unable to find any reference to the debenture in subsequent documents including financial statements;

[60] Transcript of Sawridge Trust meeting, May 10, 2010, March 12, 2020 Questioning of Catherine Twinn, Answers to Undertakings, UT #18, Appendix Tab X

c. the debenture had been "cancelled", and

d. the Trustees now took the position the debenture never formed part of the Trust.[61]

91. Mr. Bujold acknowledged he was not confident the documentary record he reviewed concerning the debenture was complete. He further acknowledged he could not say whether the $12 Million debenture had converted into another asset, either by repayment or substitution for another asset – specifically, a subsequent $35 Million debenture.[62]

92. Both Ms. Twinn and Mr. Bujold confirmed the Trustees commissioned an accounting review by Meyers Norris Penny (MNP) to determine the status of the debenture in relation to the 1985 Trust.[63] The Trustees have refused to produce the report on the grounds of privilege.[64] Ms. Twinn testified the report was commissioned by the Trustees, not legal counsel.[65]

93. The OPGT stands by its original submissions concerning this debenture, based on the evidence known to the parties and before the Court at the time of the ATO. The OPGT also notes that were the Court to conclude the transferred assets were not held for the 1985 beneficiaries, further proceedings would still be required in relation to the 1985 Trust. These would be necessary to determine what assets the 1985 Trust holds that did not originate in the asset transfer, and whether the 1985 Trust's beneficiary definition should and could be amended prior to any distribution of such assets.

The 1985 Trustees and the SFN have reserved the right to raise objections based on privilege to the OPGT's use of the evidence and production of Catherine Twinn. The OPGT provides the following background concerning such potential objection.

94. The SFN and the Trustees raised potential claims of privilege leading up the Catherine Twinn's March 12, 2020 Twinn questioning. At the Questioning, both placed on the record their

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[61] Transcript of Questioning of Paul Bujold, February 26/March 2 *supra*, at pg 47 line 21 to pg. 48 line 8; pg 46 lines 20 to 24; pg 43 line 19 to pg 44 line 6, Appendix Tab U
[62] *Ibid,* pg 48 line 22 to pg 49 line 11; Answer to Undertaking #9, Appendix Tab V
[63] Transcript of Questioning of Paul Bujold, February 26/March 2 *supra*, pg 62 line 25 to pg 63 line 14 Appendix Tab U; Transcript of Questioning of Catherine Twinn, March 12, 2020, pg. 90-91, Appendix Tab W
[64] Transcript of Questioning of Paul Bujold, February 26/March 2 *supra*, pg 62 line 25 to pg 63 line 14, Appendix Tab U; Answer to Undertaking #11, Appendix Tab V
[65] Transcript of Questioning of Catherine Twinn, March 12, 2020, pg. 90-91, Appendix Tab W

intention to raise any privilege-based objection to evidence at the hearing of the ATO issue. The OPGT submits any such claims, if made, must take into account the existing Privilege Orders.

95. The Trustees and the SFN negotiated Privilege Orders to limit the waiver of privilege associated with document production by Catherine Twinn.[66] The orders do not impact the Trustees' own production, referred to as the "excluded documents" in the Trustees' privilege order. The Trustees' Privilege Order also prohibited objections to the use or admissibility of the disclosed documents or information based solely on solicitor client privilege.

96. The SFN Privilege Order:

a. confirmed the SFN did not object to production of the SAOR if the SFN Privilege Order was granted;

b. stated that "...the terms of this order shall not apply to relieve or rectify any loss or waiver or privilege by Sawridge that arises from matters other than service of the SAOR;" and,

c. Any waiver of privilege in relation to the SAOR is limited to the SAOR's contents and there is no subject matter waiver.[67]

97. In OPGT's production application was resolved with a consent order that required filing of an affidavit by Paul Bujold. [68] The order did not contemplate a general waiver of privilege over the information to be provided by SFN and the Trustees.

98. The OPGT requested document production of items relevant to the issues being argued in the application that, would not normally be privileged as between Trustees and beneficiaries. Unfortunately, those requests were resisted and the Court is left without a complete picture.[69]

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[66] Consent Order (Privilege), filed December 19, 2018 Appendix Tab H; Consent Order (Privilege), filed February 21, 2020, Appendix Tab R
[67] Consent Order (Privilege), filed February 21, 2020, Appendix Tab R
[68] Consent Order (Application by the Officer of the Public Trustee and Guardian for Additional Production), filed February 21, 2020 Appendix Tab S
[69] Transcript of March 12, 2020 Questioning of Catherine Twinn, pg. 1-5 Appendix Tab W; Transcript of February 26/March 2, 2020 Questioning of Paul Bujold, Appendix Tab U

99. The Trustees and the SFN have reserved the right to pursue privilege issues at the ATO Application hearing. The OPGT has encouraged them to at least address the issues by way of this first round of supplementary submissions so as to ensure the OPGT may reply and to avoid unnecessary use of Court time on these matters at the ATO application. [70]

The case management nature of the current application limits the scope of the Court's determination.

100. After the ATO, the remaining matters for case management were narrow in scope and the proceeding close to readiness for a trial which would make a final determination on any amendment to the 1985 Trust's beneficiary definition.

101. In 2018, following the granting of the ATO, the Trustees had been ordered to file an originating application that "sets out the matters for which advice and direction are sought"[71]. The resulting application was limited to a request for advice and direction on the 1985 Trust beneficiary definition.[72] Matters related to the ATO were no longer in issue in the proceeding.

102. A hearing of the Jurisdiction Issue (the sources of jurisdiction on which the Court might rely to vary the 1985 beneficiary definition) was scheduled for April 25, 2019 to further narrow the issues for trial. The issues in the current application were never raised by a party or participant prior to April 25, 2020 and, indeed, an application was only filed at the invitation of the Court.[73]

103. The OPGT has expressed its concerns that the current application has the potential to depart from the proper scope of case management.[74] While the case management process may serve to narrow issues, case management justices must take care not to intrude upon the role of

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[70] Transcript of March 12, 2020 Questioning of Catherine Twinn, pg. 5, Appendix Tab W; Litigation Plan, filed February 20, 2020, Appendix Tab Q; March 30, 2020 Correspondence from Hutchison Law to Dentons and Parlee, Appendix Tab Y; April 14, 2020 Correspondence from Hutchison Law to all parties, Appendix Tab Z
[71] Order <filed?> January 22, 2018, Appendix Tab E
[72] Application (Statement of Issues and Relief Sought) filed January 9, 2018, Appendix Tab D
[73] Transcript of October 30, 2019 Case Management Hearing, pg. 51, l.27-35, Appendix Tab I
[74] *Balogan* v. *Pandher* (2010) A.J. No. 108 (C.A.), at para. 9, Authorities Tab 7; *Condominium Corp. No. 0321365* v. *Prairie Communities Corp.* (2017) A.J. No. 559 (QB) at para. 2-5, Authorities Tab 8

the trial justice or deal with matters which impact the parties substantive rights, such as final relief, without the consent of the parties.[75]

104. The CMJ's comments to date have suggested the Court it is considering the possibility of finding a resulting trust in the transferred assets for the benefit of the 1982 Trust beneficiaries. The SFN explicitly seeks relief in the course of the current application asking the Court to "direct that the assets held in the 1985 Trust are held subject to the terms of the 1982 Trust and for the benefit of the beneficiaries of the 1982 Trust….".[76]

105. The SFN's submissions, and the Trustees' November 20,2019 submissions, indicate they seek the equivalent of a final order that will conclude this action. The Court's own comments recognize the path being chosen will bring the Court to a point where it must rule in a manner that may look like a remedy. [77]

106. The OPGT submits such orders or relief are not properly available outside the trial context. The OPGT has been explicit that it cannot consent to the contemplated order being addressed in this case management process.[78]

107. Such orders or relief are also outside the scope of the application before the Court, which is for:

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

108. It is not within the purview of the application, or the case management process, to make a ruling on who enjoys the beneficial interest in the transferred assets should it be determined the ATO does not confirm the assets are held for the benefit of the 1985 beneficiaries.

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[75] *Tremco Incorporated v. Gienow Building Products Ltd.* (2000) ABCA 105, dissent at para. 80, Authorities Tab 9
[76]

[77] Transcript of November 22, 2019 Case Management Meeting, pg. 8, l. 14-20, Appendix Tab J
[78] Transcript of November 22, 2019 Case Management Meeting, pg. 9-12, Appendix Tab J

109. If this Court were to find the ATO did not confirm the propriety of the asset transfer and did not confirm that the transferred assets are held for the 1985 beneficiaries, further proceedings would be necessary to determine who does hold the beneficial interest in the assets and on what basis. Such a proceeding would require viva voce evidence, that permits assessment of credibility, relevant to issues including applicable limitations, laches, estoppel, and acquiescence.

110. For example, it is well established that equitable remedies, including constructive or resulting trusts, remain subject to the *Limitations Act*. Given the asset transfer occurred more than 35 years ago, the question of limitations would need to be addressed.[79]

111. Even if the relief sought by the SFN were cast as the seeking of declaratory relief with respect to the beneficial ownership of the transferred assets, it would still amount to a remedial order beyond the scope of this application or case management. There cannot be an enforcement of an alleged beneficial interest on the part of the 1982 beneficiaries without entering into the territory of a remedial order.[80]

The parties to the consent order intended that it confirm the transferred assets were held by the 1985 Trustees for the 1985 beneficiaries

112. The conclusion that the ATO confirmed the transferred assets are held in the 1985 Trust for the benefit of the 1985 beneficiaries is consonant with the intentions of the parties. As counsel for the Trustees expressed in her correspondence seeking the parties' consent to the ATO (which the SFN forcefully endorsed) the purpose of the order was to confirm that "the 1985 Trust is the entity with which to deal." This is supported by the surrounding objective circumstances.

113. Consent orders are viewed as contracts to which the rules of contract interpretation apply. Those rules require it be interpreted so as to discover and give effect to the intentions of the

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[79] *Johansson v. Fevang* [2009] A.J. No. 1063 (QB), para. 10-1, Authorities Tab 10; *McConnell v. Huxtable* [2014] ONCA 86 at para. 50, Authorities Tab 11

[80] *Yellowbird v. Samson Cree Nation* (2008) ABCA 270, para41-47, Authorities Tab 12

parties at the time the contract was made. This intent is determined by reference to the terms of the contract and the surrounding circumstances or context of the agreement.[81]

114. This approach to contractual interpretation, which was authoritatively confirmed by the Supreme Court of Canada in *Sattva Capital Corporation v Creston Moly Corporation*[82], requires the Court to look at the context within which the agreement was made in order to obtain an understanding "of the mutual and objective intentions of the parties as expressed in the words of the contract."[83]

115. In this case, the context makes clear that since the outset of the proceedings, the 1985 Trustees sought comfort from the Court that the asset transfer had been properly carried out. Confirmation of that was one key step towards the ultimate goal of distributing the 1985 Trusts assets to the 1985 beneficiaries. The other key step was the potential amendment of the 1985 beneficiary definition to address its discriminatory nature.

116. Given this context, it is evident the parties intended the ATO to affirm the assets were held by the 1985 Trustees for the 1985 beneficiaries. The invocation of the *Pilkington* principle in the submissions supporting the ATO to show that the transfer had been proper, and the subsequent proceedings which were entirely focused on the 1985 beneficiary definition further confirm this.

The meaning and effect of the ATO was to confirm the foregoing. The parties consented to it on that understanding. The issue is res judicata.

117. Rather than simply present the consent order for signature, the 1985 Trustees provided the Court with a brief setting forth the relevant factual and legal considerations. In doing so they set out a summary of the circumstances pertaining to 1982 and 1985 Trusts and the transfer of the assets, including that:

a. the purpose of the transfer to protect the assets for the pre Bill C-31 beneficiaries;

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[81] *Simonelli v. Ayron Development,* 2010 ABQB 565 at para. 74, Authorities Tab 1
[82] Sattva Capital Corporation v. Creston Moly Corporation [2014] SCC 53, Authorities Tab 13
[83] *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157, at para 81, Authorities Tab 14

b. the assets were transferred directly from the 1982 to the 1985 Trust;

c. the transfer was carried out under the guidance of lawyers and accountants who provided a high level of advice;

d. the transfer documents included the April 15, 1985 Resolution of the 1982 Trustees and the April 16, 1985 declaration of both the 1982 and 1985 Trustees;

e. the transfer involved all of the assets of the 1982 Trust;

f. at the time of the transfer the beneficiaries of the 1982 and 1985 Trusts were the same and therefore preserved their interest in the trust assets; and,

g. the 1985 Trustees believed the transaction was carried out properly.

118. The ATO Brief noted the facts were drawn from the Affidavit of Mr. Bujold filed September 12, 2011 and from the Questioning on Affidavit of Mr. Bujold by counsel for the OPGT in May 2014 and by counsel for the SFN in July 2016. A copy of the complete Questioning by SFN counsel was attached to the ATO Brief.

119. The ATO Brief went on to provide legal argument that the trust to trust transfer was appropriate based upon the principle in *Pilkington*, a copy of which was also attached. The brief submitted that the *Pilkington* principle was authority for the validity of a trust to trust transfer where the beneficiaries were the same and it was in the best interests of those beneficiaries, both of which conditions existed in this case.

120. Although Mr. Bujold stated the 1985 Trustees had been concerned about the absence of the beneficiary approval and court approval similar to that obtained in connection with the 1983 amendment to the 1982 Trust, this did not figure in the submissions for good reason. As the submissions and reliance upon *Pilkington* made clear, the asset transfer issue was about confirming the 1982 Trustees exercise of their discretion to resettle the assets in the 1985 Trust had been proper. It did not involve an amendment to the Trust requiring beneficiary or Court approval like the 1983 amendment.

121. The then CMJ accepted the Trustees submissions, ruled that he was satisfied the proposed consent order was "appropriate and properly based in law", and signed it. The OPGT submits in so doing he relied upon the evidence and the legal submissions as to the law before him to confirm that the 1982 Trustees exercise of discretion to resettle the assets into the 1985 Trust had been proper and effective and thus had resulted in the assets being held in the 1985 Trust for the 1985 beneficiaries.

122. The OPGT submits this finding demonstrates that the main issue raised on this application – where the beneficial interest in the transferred assets lay before the ATO was granted – is the very issue the ATO determined and is *res judicata*.

Order Sought

The OPGT respectfully repeats its request for an Order as set out in paragraph 96 of its November 15 brief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of November, 2020

HUTCHISON LAW

Per:

JANET L. HUTCHISON

Solicitors for the Office of the Public Guardian and Trustee of Alberta

FIELD LAW

Per:

P. JONATHAN FAULDS, Q.C.

Solicitors for the Office of the Public Guardian and Trustee of Alberta

LIST OF APPENDICES

Tab	Appendices
A.	Transcript from Questioning of Paul Bujold, May 27 & 28, 2014
B.	Brief of the Trustees for Approval of the Distribution Proposal, filed August 5, 2016
C.	Transcript of Case Management Hearing, August 24, 2016
D.	Application (Statement of Issues and Relief Sought) filed January 9, 2018
E.	Consent Order (Issue of Discrimination), filed January 22, 2018
F.	Affidavit of records of Paul Bujold, filed April 30, 2018, Documents #SAW000063, #SAW000070, #SAW000073, #SAW000089, #SAW000039, #SAW000532, #SAW000120, #SAW000123, #SAW000140, #SAW000495, #SAW001895, #SAW001445
G.	Agenda (Case Management Meeting in Respect of the 1985 Sawridge Trust), filed December 11, 2018
H.	Consent Order (Privilege) filed December 19, 2018
I.	Transcript of October 30, 2019 Case Management Hearing
J.	Transcript of November 22, 2019 Case Management Hearing
K.	Second Supplemental Affidavit of Records of Catherine Twinn, sworn December 18, 2019, Documents #TWN007806-TWN007808, #TWN007810, #TWN007811-TWN007814, #TWN007820-TWN007823, #TWN007825-TWN007826, #TWN007833-TWN007838, #TWN007837-TWN007838, #TWN007841-TWN007842, #TWN007846, #TWN007848-TWN007849, #TWN007853, #TWN007855, #TWN007856, #TWN007860, #TWN007863-TWN0064, #TWN007867-TWN007868, #TWN007878-TWN007880, #TWN007944
L.	Application by the Office of the Public Trustee and Guardian for Additional Production, filed December 20, 2019
M.	Transcript of December 20, 2019 Case Management Hearing
N.	Third Supplemental Affidavit of Records of Catherine Twinn, sworn January 15, 2020, Documents
O.	Affidavit of Catherine Twinn, filed January 28, 2020

P.	Letter from Dentons, dated February 14, 2020
Q.	Litigation Plan for application May 19, 2020, filed February 20, 2020
R.	Consent Order (Privilege), filed February 21, 2020
S.	Consent Order (Application by the Office of the Public Trustee and Guardian for Additional Production), filed February 21, 2020
T.	Affidavit of Paul Bujold, filed February 24, 2020
U.	Transcript from Questioning of Paul Bujold, held February 26 and March 2, 2020
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Z.	Letter from Hutchison Law, dated April 14, 2020

LIST OF AUTHORITIES

Tab	Authorities
1.	*Simonelli v. Ayron Development*, 2010 ABQB 565
2.	*Twinn v. Twinn*, 2017 ABCA 419
3.	*Waters' Law of Trusts in Canada, 4th ed*
4.	*Chalmers v. Chalmers Alter Ego Trust*, 2017 BCSC 2646
5.	*Re Hastings-Bass (deceased),* [1974] 2 All E.R. 193 (CA)
6.	*Joy Technologies Canada v. Montreal Trust Company of Canada* 1995 CaswellOnt 187, 1995 C.E.B. & P.G.R. 8208
7.	*Balogan* v. *Pandher* (2010) A.J. No. 108 (C.A.)
8.	*Condominium Corp. No. 0321365* v. *Prairie Communities Corp.*, [2017] A.J. No. 559
9.	*Tremco Incorporated v. Gienow Building Products Ltd.* (2000) ABCA 105
10.	*Johansson v. Fevang* [2009] A.J. No. 1063 (QB)
11.	*McConnell v. Huxtable* [2014] ONCA 86
12.	*Yellowbird v. Samson Cree Nation* (2008) ABCA 270
13.	*Sattva Capital Corporation v. Creston Moly Corporation* [2014] SCC 53
14.	*IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157

TAB A

Clerk's stamp:	
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**Affidavit of Paul Bujold for Procedural Order**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

JUDICIAL CENTRE OF EDMONTON
FILED
SEP 06 2011
Clerk of the Court of Queen's Bench

AFFIDAVIT OF PAUL BUJOLD

Sworn on August 30, 2011

I, Paul Bujold, of Edmonton, Alberta swear and say that:

1. I am the Chief Executive Officer of the Sawridge Trusts, which trusts consist of the Sawridge Band Intervivos Settlement created in 1985 (hereinafter referred to as the "1985 Trust") and the Sawridge Band Trust created in 1986 (hereinafter referred to as the "1986 Trust"), and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. I make this affidavit in support of an application for setting the procedure for seeking the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust.

3. On April 15, 1982, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "A" to this my affidavit ("1982 Trust").

4. On April 15, 1985, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "B" to this my affidavit ("1985 Trust").

5. On August 15, 1986, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "C" to this my affidavit ("1986 Trust").

6. The Trustees of the 1985 Trust have been managing substantial assets, some of which were transferred from the 1982 Trust, and wish to make some distributions to the Beneficiaries of the 1985 Trust. However, concerns have been raised by the Trustees of the 1985 Trust with respect to the following:

   a. Determining the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary varying the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".

   b. Seeking direction with respect to the transfer of assets to the 1985 Sawridge Trust.

7. In order to determine the beneficiaries of the 1985 Trust, the Trustees of the 1985 Trust directed me to place a series of advertisements in newspapers in Alberta, Saskatchewan, Manitoba and British Columbia to collect the names of those individuals who may be beneficiaries of the 1985 Trust.

8. As a result of these advertisements I have received notification from a number of individuals who may be beneficiaries of the 1985 Trust.

9. I have corresponded with the potential beneficiaries of the 1985 Trust and such correspondence is attached hereto as Exhibit "D".

10. I have compiled a list of the following persons who I believe may have an interest in the application for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust:

    a. Sawridge First Nation;

b. All of the registered members of the Sawridge First Nation;

c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the 1986 Sawridge Trust, but who would now qualify to apply to be members of the Sawridge First Nation;

d. All persons known to have been beneficiaries of the Sawridge Band Trust dated April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;

e. All of the individuals who have applied for membership in the Sawridge First Nation;

f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;

g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;

h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries;

(those persons mentioned in Paragraph 10 (a) – (h) are hereinafter collectively referred to as the "Beneficiaries and Potential Beneficiaries"); and

i. Those persons who regained their status as Indians pursuant to the provisions of *Bill C-31* (An Act to amend the *Indian Act,* assented to June 28, 1985) and who have been deemed to be affiliated with the Sawridge First Nation by the Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister").

11. The list of Beneficiaries and Potential Beneficiaries consists of 194 persons. I have been able to determine the mailing address of 190 of those persons. Of the four individuals for whom I have been unable to determine a mailing address, one is a person who applied for membership in the Sawridge First Nation but neglected to provide a mailing address when submitting her application. The other three individuals are persons for whom I have reason to believe are potential beneficiaries of the 1985 Trust and whose mother is a current member of the Sawridge First Nation.

12. With respect to those individuals who regained their status as Indians pursuant to the provisions of *Bill C-31* and who have been deemed to be affiliated with the Sawridge First Nation by the Minister, the Minister will not provide us with the current list of these individuals nor their addresses, citing privacy concerns. These individuals are not members of the Sawridge First Nation but may be potential beneficiaries of the 1985 Trust due to their possible affiliation with the Sawridge First Nation.

13. A website has been created and is located at www.sawridgetrust.ca (hereinafter referred to as the "Website"). The Beneficiaries and Potential Beneficiaries and the Minister have

access to the Website and it can be used to provide notice to the Beneficiaries and Potential Beneficiaries and the Minister and to make information available to them.

14. The Trustees seek this Court's direction in setting the procedure for seeking the opinion, advice and direction of the Court in regard to:

    a. Determining the Beneficiaries of the 1985 Trust.

    b. Reviewing and providing direction with respect to the transfer of the assets to the 1985 trust.

    c. Making any necessary variations to the 1985 Trust or any other Order it deems just in the circumstances.

SWORN OR AFFIRMED BY THE DEPONENT BEFORE A COMMISSIONER FOR OATHS AT EDMONTON, ALBERTA ON AUGUST 30, 2011.

PAUL BUJOLD

Commissioner's Name:
Appointment Expiry Date:
MARCO S. PORETTI
Barrister / Solicitor

810070; August 29, 2011
810070;August 30, 2011

This is Exhibit " C " referred to in the Affidavit of Paul Bujold
Sworn before me this 30 day of August A.D., 20 11
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
MARCO S. PORETTI

THE SAWRIDGE TRUST

DECLARATION OF TRUST

THIS TRUST DEED made in duplicate as of the 15th day of August, A.D. 1986.

BETWEEN:

CHIEF WALTER P. TWINN,
of the Sawridge Indian Band, No. 19, Slave Lake, Alberta
(hereinafter called the "Settlor")

OF THE FIRST PART,

- and -

CHIEF WALTER P. TWINN, CATHERINE TWINN and GEORGE TWIN,
(hereinafter collectively called the "Trustees")

OF THE SECOND PART,

WHEREAS the Settlor desires to create an inter vivos trust for the benefit of the members of the Sawridge Indian Band, a band within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, and for that purpose has transferred to the Trustees the property described in the Schedule attached hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Deed, the following terms shall be interpreted in accordance with the following rules:

(a) "Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada;

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule attached hereto and any accumulated income thereon;

(B) any further, substituted or additional property, including any property, beneficial interests or rights referred to in paragraph 3 of this Deed and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Deed;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Deed;

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted; and

(E) "Trust" means the trust relationship established between the Trustees and the Beneficiaries pursuant to the provisions of this Deed.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell, lease or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Deed.

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

5. The Trustees who are the original signatories hereto, shall in their discretion and at such time as they determine, appoint additional Trustees to act hereunder. Any Trustee may at any time resign from the office of Trustee of this Trust on giving not less than thirty (30) days notice addressed to the

other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee and the power of appointing additional Trustees to increase the number of Trustees to any number allowed by law shall be vested in the continuing Trustees or Trustee of this Trust and such power shall be exercised so that at all times (except for the period pending any such appointment) there shall be a minimum of Three (3) Trustees of this Trust and a maximum of Seven (7) Trustees of this Trust and no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there are more than Two (2) Trustees who are not then Beneficiaries.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the expiration of twenty-one (21) years after the death of the last survivor of the beneficiaries alive at the date of the execution of this Deed, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then alive.

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

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for trustees' investments by the Trustee's Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Saving Bank Act applies.

8. The Trustees are authorized and empowered to do all acts that are not prohibited under any applicable laws of Canada or of any other jurisdiction and that are necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Trust for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner or to any extent detracted from the generality of the foregoing, the power

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

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

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

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

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

11. The provision of this Deed may be amended from time to time by a resolution of the Trustees that received the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years and, for greater certainty, any such amendment may provide for a commingling of the assets, and a consolidation of the administration, of this Trust with the assets and administration of any other trust established for the benefit of all or any of the Beneficiaries.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and shall be subject to this clause.

13. Any decision of the Trustees may be made by a majority of the Trustees holding office as such at the time of such decision and no dissenting or abstaining Trustee who acts in good faith shall be personally liable for any loss or claim whatsoever arising out of any acts or omissions which result from the exercise of any such discretion or power, regardless whether such Trustee assists in the implementation of the decision.

14. All documents and papers of every kind whatsoever, including without restricting the generality of the foregoing, cheques, notes, drafts, bills of exchange, assignments, stock transfer powers and other transfers, notices, declarations, directions, receipts, contracts, agreements, deeds, legal papers, forms and authorities required for the purpose of opening or operating any account with any bank, or other financial institution, stock broker or investment dealer and other instruments made or purported to be made by or on behalf of this Trust shall be signed and executed by any two (2) Trustees or by any person (including any of the Trustees) or persons designated for such purpose by a decision of the Trustees.

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

16. This Deed and the Trust created hereunder shall be governed by, and shall be construed in accordance with, the laws of the Province of Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED in the presence of:

NAME

#[illegible] 1223 Stony Plain Road, Edm.
ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

A. Settlor
CHIEF WALTER P. TWINN

B. Trustees:

1. CHIEF WALTER P. TWINN

2. Catherine M Twinn
CATHERINE TWINN

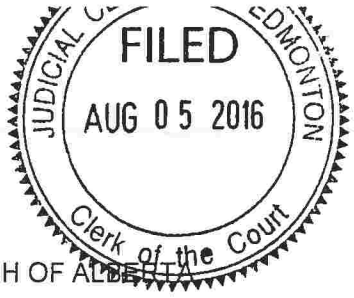
3. GEORGE TWIN

860647-1/6

SCHEDULE

One Hundred Dollars ($100.00) in Canadian Currency.

TAB B



Clerk's stamp:	
COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985
APPLICANTS	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, CATHERINE TWINN, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**BRIEF OF THE TRUSTEES FOR APPROVAL OF THE DISTRIBUTION PROPOSAL**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB Reynolds Mirth Richards & Farmer LLP 3200, 10180 101 Street Edmonton AB T5J 3W8 Attention: Marco S. Poretti Telephone: (780) 497-3325 Fax: (780) 429-3044

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

Attention: Janet L. Hutchison

Counsel for the Office of the Office of the Public Guardian and Trustee

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

Attention: Karen A. Platten, Q.C.Counsel

Counsel for Catherine Twinn as a Trustee of the 1985 Sawridge Trust

TABLE OF CONTENTS

INTRODUCTION

1. By Order of the Court on December 17, 2015, the trustees ("Trustees") of the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "Trust") were directed to submit a proposed distribution arrangement for approval by the Court by January 29, 2016. This Brief is filed in support of an application to approve of the Proposed Distribution Arrangement of the Trust (the "Distribution Proposal"). A copy of the December 17, 2015 decision is attached at **Tab 1**. A copy of the Distribution Proposal is attached at **Tab 2.**

2. The Trustees seek approval of the Distribution Proposal in the form that it is in at Tab 2 with the exception that the approval of the proposal for the definition of Beneficiaries set out in paragraph 4 shall be adjourned to a separate Court application.

PART I – STATEMENT OF FACTS

3. The Trustees prepared the Distribution Proposal attached at Tab 2 in accordance with the direction of the Court, and submitted it to the Court.

4. The Office of the Public Guardian and Trustee ("OPGT") has not brought a Rule 5.13 application in respect of the Distribution Proposal.

5. The Trustees seek the approval of the Court to the Distribution Proposal with the exception of the approval of the definition of beneficiary which is to be adjourned *sine die*. The OPGT advised in correspondence dated July 15, 2016 in respect of the Distribution Proposal:

> "The OPGT will not oppose the application by the Trustees."

6. The Trustees have sought the approval of all parties to the Distribution Proposal and have prepared a form of Order for consideration. The proposed Order is attached at **Tab 3.**

7. To date, the parties have not consented to the terms of the proposed Order.

8. The Distribution Proposal is a comprehensive document with a proposed distribution along with supporting submissions, supporting precedents and should be read in conjunction with this Brief. The Distribution Proposal addresses the policies of the Trustees that are in place now for the beneficiaries of the Trust and their respective minor children (pages 1-5). The Distribution Proposal sets out the proposed distribution including addressing the Two Pools of Funds which the Court directed be addressed. The Distribution Proposal addresses the dangers of a complete capital distribution, and thus no proposal is made for a complete capital distribution.

9. The Distribution Proposal addresses the nature of a discretionary trust and the discretion of the Court to intervene in a discretionary trust.

PART II - ISSUES

(a) Request the Court to adjourn *sine die* the approval of the definition of beneficiary.

(b) Request the Court to approve the balance of the Distribution Proposal as attached.

PART III - SUBMISSIONS

Definition of Beneficiaries

10. The Trust was established to invest assets of the Sawridge First Nation to provide funds for the members of the Sawridge First Nation and for the future generations of members of the Sawridge First Nation ("SFN").

11. The Distribution Proposal sets out a method by which the Trust could be amended to remove the discriminatory elements of the definition of beneficiary such that the beneficiaries of the Trust will be the current members of the SFN. The OPGT and Catherine Twinn have advised that such an application to approve the definition of beneficiary will require extensive arguments. Thus, the determination of the definition of beneficiaries of the Trust is requested to be adjourned *sine die*.

Balance of Distribution Proposal

12. The balance of the Distribution Proposal is submitted to the Court for approval in accordance with the form of Order attached at Tab 3. Such Order was circulated to the parties in the hopes of achieving consensus but to date there has not been agreement among the parties on the form of Order.

Nature of a Discretionary Trust

13. The nature of a discretionary trust is described on page 7 of the Distribution Proposal. The Trustees submit that the nature of the Trust should not be altered.

14. It is the duty of the Trustees to consider when and how the discretion ought to be exercised and the decision of the Trustees in so doing must comply with the terms of the Trust and the power conferred on the Trustees by the Trust deed.

15. The Trustees developed policies for the payment of funds from the Trust. The Trustees thereby exercised their discretionary power to determine the policies to put in place and how funds would be paid under each policy.

16. The above policies have been approved by the Trustees to support the beneficiaries of the Trust after identifying the needs of the beneficiaries. The Trustees continue to investigate the needs of the beneficiaries and their dependents and continue to discuss new policies for payment of benefits.

17. It is submitted that the above policies have been formulated to consider virtually all of the needs of the beneficiaries, including minors. Any needs that are identified in the future and not covered in the within policies may be considered by the Trustees in their discretion and they may implement new or additional policies.

18. To date these policies are in place, but no payments have been made from the Trust due to the discriminatory nature of the definition of beneficiary.

Jurisdiction of the Court to Intervene

19. In relation to discretionary trusts, it is submitted that the Court should only intervene to direct payment of funds from the Trust where the Trustees have failed to give proper consideration as to whether their discretion ought to be exercised, or alternatively, when the discretion was exercised but the Trustees either acted outside the scope of the power conferred upon them in the Trust deed or took into account irrelevant or unreasonable considerations in making their decision. No remedy has been sought in respect of distribution of the Trust and there is no evidence of the Trustees acting outside the scope of their power or taking into account irrelevant or unreasonable considerations. The excerpts from Waters on Trusts and the cases referred to for support of the propositions in the Distribution Proposal are attached hereto at **Tabs 4, 5, 6, 7 and 8**.

20. The Distribution Proposal sets out, *inter alia*, that the Alberta courts have confirmed that if the Trustees are acting within the scope of their duties conferred upon them by the Trust deed, then their exercise of discretion should be "afforded considerable deference".

Lecky Estate v Lecky 2011 ABQB 802 at para. 50 at **Tab 5**

21. There is no evidence or allegation that the Trustees have failed to appropriately exercise their discretion in the development of policies and there have been no payments of benefits under the Trust pending the resolution of this litigation.

Treatment of Minors

22. This Court directed the Trustees of the Trust to propose a distribution scheme and has tasked the OPGT with ensuring the fair treatment of minors in the distribution of assets.

23. This Court is concerned with ensuring the equitable treatment of minor children of the beneficiaries. The above mentioned policies provide for the benefit of the beneficiaries and their children, including their minor children who are not beneficiaries. Only the Seniors Support benefit and the Cash Disbursement benefits do not provide for payment to minors.

24. The Distribution Proposal provides the background to the development of policies for payment of funds from the Trust to provide the Court insight into the exercise of the Trustees' discretion to date in developing policies for payment of funds from the Trust. It is submitted that the Distribution Proposal outlines the appropriate exercise of discretion by the Trustees who have considered the best interests of the beneficiaries and their children.

25. The Trustees request that the Court approve the Distribution Proposal which would allow the Trustees to follow the policies they have implemented, which are more fully described in the Distribution Proposal, and to adjust or make further similar policies for the benefit of the beneficiaries of the Trust and their dependents in the future.

26. The Trustees confirm that no distributions shall be made from the Trust until the beneficiary definition is determined in a separate court application.

PART IV – REMEDY SOUGHT

27. The Trustees respectfully request that the Court approve the Distribution Proposal with the exception of the definition of beneficiary set out in paragraph 4 of the Distribution Proposal which will not be approved by this Order and which will be directed to be determined in a separate application. A form of Order for approval is attached at **Tab 3.**

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

DENTONS CANADA LLP
REYNOLDS MIRTH RICHARDS & FARMER LLP

PER: _____

PER: _____

Doris Bonora
Marco S. Poretti
Solicitors for the Trustees

LIST OF ATTACHMENTS AND AUTHORITIES

Court of Queen's Bench of Alberta

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

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

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

Respondents

- and -

Public Trustee of Alberta

Applicant

Reasons for Judgment
of the
Honourable Mr. Justice D.R.G. Thomas

Table of Contents

I Introduction

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

II. Background

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

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

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

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

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

February 14, 2012 - The Public Trustee applied:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The 1985 Sawridge Trust

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

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

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

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

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

IV. The Current Situation

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

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

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

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

V. Submissions and Argument

A. The Public Trustee

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

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

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

B. The SFN

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

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

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

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

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

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

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

C. The Sawridge Trustees

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

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

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

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

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

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

VI. Analysis

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

A. Rule 5.13

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

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

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

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

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

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

B. Refocussing the role of the Public Trustee

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

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

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

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

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

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

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

4. Supervising the distribution process itself.

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

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

Task 1 - Arriving at a fair distribution scheme

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

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

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

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

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

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

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

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

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

Task 3 - Identification of the pool of potential beneficiaries

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[59] This information should:

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

2. allow timely identification of:

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

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

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

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

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

Task 4 - General and residual distributions

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

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

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

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

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

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

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

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or
2. on a pro rata basis:

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

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

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

C. Disagreement among the Sawridge Trustees

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

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

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

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

D. Costs for the Public Trustee

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

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

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

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

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

Appearances:

Janet Hutchison
(Hutchison Law)
and
Eugene Meehan, QC
(Supreme Advocacy LLP)
for the Public Trustee of Alberta / Applicant

Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge First Nation / Respondent

Doris Bonora
(Dentons LLP)
and
Marco S. Poretti
(Reynolds Mirth Richards & Farmer)
for the 1985 Sawridge Trustees / Respondents

J.J. Kueber, Q.C.
(Bryan & Co.)
for Ronald Twinn, Walter Felix Twin,
Bertha L'Hoirondelle and Clara Midbo

Karen Platten, Q.C.
(McLennan Ross LLP)
For Catherine Twinn

Proposed Distribution Arrangement

of the Sawridge Band Inter Vivos Settlement ("Trust")

A. Introduction

The court has directed that the trustees of the Trust propose a distribution scheme for the Trust. The Public Trustee has been tasked with ensuring fair treatment of minors in the distribution of assets, identifying potential minor beneficiaries and high level review of the distribution process but such supervision is to be done at the highest level and only to ensure a fair and equitable distribution.

This proposed distribution scheme is provided for information as we understand that the Court has concerns and jurisdiction over the protection of minors.

The Trust was established to invest assets of the Sawridge First Nation to provide funds for the members of the Sawridge First Nation and for the future generations of members of the Sawridge First Nation. (Paul Bujold Questioning on Affidavit: page 75 line 7-13) (Tab "A")

The application before the court is to determine a definition of beneficiaries and this proposed distribution scheme will address the payment of funds from the trust and to whom such payments should be made.

B. Intentions of the Settlor

In the trust deed, the opening paragraph says that the Settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution are members of Sawridge Indian band No. 19 .. and the future members of such band... and for that purpose has transferred to the trustees property. (See Trust Deed Tab "B").

The intentions of the Settlor were to set aside funds to provide for the members of the First Nation over many generations. The Settlor was the Chief at the time and he certainly would have had the ability to decide to pay out capital distributions to his members if he thought that was in their best interests. His desire and vision was not to squander the resources of the First Nation but instead to invest the assets so that the resources would be available for many successive generations.

C. Proposed Scheme of Distribution

1. Introduction

The distribution of funds from the Trust must be according to the Trust Deed. The Trust Deed says that the funds will be paid out according to the discretion of the Trustees and based on the benefit to the beneficiaries of the Trust (paragraph 6 of the Trust Deed Tab "B"). In the Trust Deed the Trustees may make payments from the income or the capital of the Trust as they see fit in their unfettered discretion, and as is appropriate for one or more beneficiaries. In paragraph 8 of the Trust Deed, the Trustees are authorized to do all acts necessary, or desirable for the purpose of administering the Trust for the benefit of the beneficiaries. Thus it is clear that the administration of the Trust and the payment to beneficiaries is to be focused on the benefit of the beneficiaries and their families.

2. Distribution of Funds as per the policies of the Trustees

Since the 1985 Trust was established, no distributions have been made from the Trust. Payments have been made from the 1986 Trust. In 2009, the Trustees engaged the Four Worlds Center for Development Learning to prepare recommendations for the development and implementation of the Sawridge Trust's beneficiary program. After consultation with the Trustees and members of the Sawridge First Nation, a number of balancing principles were identified in the report done by the Four Worlds Center for Development Learning. One of the balancing principles was to balance the needs of present and future generations. Further, the beneficiaries identified that there was a need for limits on benefits and understood that there are finite limits to benefits that can flow from the trust in order to benefit all beneficiaries and the community over time.

Following the release of the Four Worlds Center report, the Trustees engaged in a process to develop policies for the payment of funds from the 1985 and 1986 Trusts. The Trustees were exercising their discretionary power to determine which policies to put in place, and how funds would be paid under each policy. To date the policies have been used to make payments from the 1986 Trust. The Trustees will use the same policies for the 1985 Trust once the uncertainty around the beneficiary definition is solved.

The Sawridge Trustees passed a number of policies that provide for benefits to the beneficiaries of both the 1985 and 1986 Trusts and to the dependents of beneficiaries of both trusts. The policies are as follows:

a) **Health, Dental, Vision Care and Life Insurance benefit** - program provides for health, dental, vision care to the beneficiaries and their dependents and life insurance benefit to the beneficiaries;

b) **Education Support Fund benefit** - this benefit provides payments for the beneficiaries or their dependents to provide for tuition and fee support, support for books and equipment, living expense supports while the beneficiaries or their dependents are attending a recognized education program;

c) **Addictions Treatment Support Fund benefit** - this benefit provides for the beneficiaries, or their dependents to attend eligible treatment programs;

d) **Child and Youth Development benefit -** benefit provides up to $10.000 per annum to assist with costs associated with caring and educating a special needs dependent on a reimbursement or prepaid basis and up to $8,500 per annum to assist with childcare costs for a dependent on a reimbursement or prepaid basis;

e) **Compassionate Care and Death benefit** –this benefit provides payments to a beneficiary for travel costs for family members travelling to visit an ill or injured family member, reasonable accommodation costs, reasonable meal costs for the beneficiary and family, parking costs and child care costs for underage children. It also provides for home modifications, special equipment or dietary supplies or special medications not covered by the health plans. The death benefit provides the cost of transporting remains of the deceased, cost of burial or cremation, cost of the wake, the funeral and headstones, cost of transporting the beneficiary and family to the funeral, costs of accommodation, meals for the beneficiary and family, if the funeral is held at some distance;

f) **Seniors Support benefit -** this benefit is to provide support for elders who have provided much to the building of the community and is a monthly supplement to other government programs received by the senior;

g) **Personal Development and Alternative Health benefit -** this benefit provides the beneficiaries, or their dependents, including children, money up to $2,000 per annum for fitness and nutrition, self-esteem building programs, payments for alternative health, herbs and supplements and fitness equipment, visits to traditional healers, including the costs of transportation and other expenses;

h) **Income Replacement benefit -** this benefit provides an income replacement of up to $5,000 per year for any beneficiary if they lose income as a result of attending a personal healing program or because of extended sick leave from work because of an illness;

i) **Recognition of Beneficiaries and Dependents Educational Achievements** - this benefit provide a recognition of $250 or suitable gift along with a framed certificate to a graduate of a recognized educational program to assist with finding employment or celebrating their achievement;

j) **One Time Only "Good Faith" Cash Disbursement -** this benefit provides a one-time payment to every beneficiary of $2,500, either immediately if they are an adult or upon the beneficiary attaining the age of 18.

A copy of each of the policies is attached as Tab "C". The brochures provided in respect of each of the policies which are provided to each of the beneficiaries are attached as Tab "D".

At the present time, these are the policies which have been approved by the Trustees to support the beneficiaries of both the 1985 and 1986 Trusts. The Trustees continue to investigate the needs of the beneficiaries and their dependents and continue to discuss new policies for payment of benefits as needs arise. The principles behind the payments relate to strengthening individuals

in the community and strengthening the community as a whole. These principles were identified as important to the First Nation.

3. **Distributions Available to Minors**

Of interest to the Court and to the Public Trustee is how minor children who are the children of beneficiaries are treated. If a minor is a member of the First Nation then they are entitled to all the benefits under all of the policies. The following policies provide for the benefit of the families and dependents of a beneficiary, including their minor children and dependents who are not members:

a) The **Health, Dental, Vision Care benefit** - program provides for health, dental, vision care for beneficiaries and their **dependents who are under 18 or under 25 if they are attending a post-secondary institution.**

b) The **Education Support Fund benefit** provides funding to an eligible dependent who is a natural or adopted **child of an eligible beneficiary which child is under 25 years of age** and registered in a full-time or part-time education program with an accredited educational institution.

c) The **Addictions Treatment Support Fund benefit** provides a benefit to an eligible dependent which will include a natural or adopted **child of an eligible beneficiary which child is under 25** and living at home with the eligible beneficiary.

d) The **Child and Youth Development benefit** provides funding for a **child of the beneficiary who suffers a permanent physical or mental disability**, who is a natural child or adopted child of an eligible beneficiary, as well as for child care, if required, for all children of beneficiaries who are working or going to school.

e) The **Personal Development and Alternative Health benefit** provides funding for an eligible dependent of a beneficiary which will include a natural or adopted **child who is under 25 years of age** and living at home with an eligible beneficiary. This policy provides for the payment of all manner of programs for children including sports and fitness programs.

f) The **Income Replacement benefit** provides a benefit to an eligible dependent of a beneficiary who is a natural or adopted **child who is under 25 years of age** and living at home with the eligible beneficiary.

g) The **Recognition of Beneficiaries and Dependents Educational Achievements benefit** provides for the dependents of a beneficiary to receive recognition for educational achievements. A dependent is defined as a natural or adopted **child of an eligible beneficiary** provided the dependent is living with the beneficiary or still considered to be a dependent of the beneficiary.

h) The **Compassionate Care and Death benefit** - provides payments to a beneficiary or their children for expenses as set out in the policy.

The policies that do not provide for minors are the Senior's Support benefit and the Cash Disbursement benefit.

Thus it can be said that almost all of the policies provide a benefit to minor dependents (up to the age of 25 or older) of beneficiaries even though the dependent is not a beneficiary. Once the child is no longer dependent as defined in the policies, the child is no longer eligible until they apply and become a member of the Sawridge First Nation. It is submitted that virtually all the needs of a minor child are covered by the policies. If there are needs identified that are not covered above, the Trustees have an ability to implement new policies to cover such needs. The Trustees recognize the need to assess the needs of the beneficiaries and their families and the needs of the community and implement new or replacement policies that best meet the needs of the beneficiaries and their dependents and that best meets the needs of the community.

We must be mindful of the fact that the First Nation considers itself to be a community and a family that supports one another. The principles identified in the Four Worlds Report clearly show that there is a focus on both individual and community development.

The minors of the Sawridge First Nation have not been forgotten in the trust or in the benefits paid by the trust. The Trustees know that the First Nation can only be successful by nurturing and providing for the children who will be the members and leaders of the First Nation in the future.

The struggle of the Trustees in making payments under the policies is that almost 50% of the annual funding provided to the trusts from the companies has been paid in legal fees in this and related litigation. The trusts could provide greater support for its members if this litigation could be concluded.

4. **Proposed Distribution Scheme: Proposal to provide for Present Beneficiaries and their families into the future**

The Trustees are requesting that the Court approve a distribution scheme that would allow the Trustees to follow the policies set out above and future similar policies for the benefit of the beneficiaries of the trust and their dependents as such are defined in each policy.

Beneficiaries: The beneficiaries of the Trust will be the members of the First Nation as is set out in the Membership List maintained by the First Nation. The dependents of those beneficiaries will receive the benefits set out in the policies. The Trustees propose to ask the court to amend the definition of beneficiary in the trust as set out in Tab "E" attached by striking the necessary words from the definition to remove the discriminatory language.

Trust Payments: There will be distributions whether of income or capital in accordance with the policies set out above and future policies passed. These payments are in accordance with the trust deed. In this way the Trust can continue to provide for the needs of the current beneficiaries and their families and for the beneficiaries and their families in the future.

Two Pools of Funds : The court identified the need to establish two pools of funds. The Trustees propose to satisfy this requirement by identifying those funds which are necessary for the provision of payments under the policies on an annual basis for those beneficiaries and their families which are identified at any given time and by keeping invested the funds for future generations of beneficiaries and their families.

Pool Number One: At the present time, the Trustees prepare a budget of their expected requirements and provide that budget to the directors of the corporations whose shares

are owned by the Trust. The directors then provide the trust with the necessary funds to meet the budget. The Trustees always have the ability to request further funds from the directors if the need arises. This will in essence be pool number one.

Pool Number Two: The second pool will be the current and future investments of the Trust, which will be available for the current and future beneficiaries and their dependents according to the policies in place at any given time.

5. **Complete Capital Distribution**

We do not interpret the Court judgment as directing a full and complete capital distribution of the trust but in the event that such is interpreted by any party we set out the dangers of such an interpretation below.

Capital distributions have been examined extensively and have been viewed as a dangerous exercise of discretion for First Nations. First, there would need to be a liquidation of the Sawridge branded hotels and businesses that are currently owned by the Trust. It would destroy the vision of the Settlor of the trust. The ability to know the numbers of future generations is limited and thus it will be very difficult to determine the people who are to be provided for in the future.

Capital distributions from the trust can also be viewed as a form of welfare and can lead to a dependency on payments resulting in the same effect as federal welfare payments: thus, reduced interest in education and diminished motivation and work ethic leading to reduced employment- all contributing to greater social problems. If beneficiaries begin relying on capital distributions as a source of income, a full and complete capital distribution could also leave beneficiaries in a position where reckless decisions are made upon a receipt of a windfall that cannot be sustained by future distributions from the trust.

A full capital distribution would also divert resources away from the social programs outlined in the proposed distribution scheme that were established for the income beneficiaries of the Trust. Capital is a reserve source of funds to supplement the valuable social programs supported by Pool Number One.

An expectation for capital distributions can also lead to greater conflict in the question of tribal enrollment and disputes arising regarding tribal citizenship.

A consideration which is particularly striking given the current economic outlook in Alberta is the uncertainty and unpredictability of natural resource markets. Retaining trust capital will help moderate future uncertainties and can add to Pool Number One established for income beneficiaries in the trust and their dependents. Maintenance of capital will also allow diversification of investments to also moderate risk throughout a recessionary economy.

Some benefits to capital distributions have been identified, such as the ability for beneficiaries to meet their urgent needs and to shift agency in the determination of how the money should be used away from the tribal governments to individuals and families. As well, capital distributions can be used strategically as a policy tool and can incentivize certain goals such as school enrollment. Although, we acknowledge these benefits, in most cases these benefits would also be achieved with small, one-time capital distributions, such as the One-Time Good Faith Cash

Disbursement. The benefits could be eroded with larger capital distributions, if larger distributions exacerbate the dangers we have noted above.

Nature of a Discretionary Trust.

a. **Discretionary payments for the needs of beneficiaries**

The distribution of Trust funds is to be paid to the benefit of the beneficiaries and their families. The Trustees have an unfettered discretion as to how to direct the distribution of income and capital from the Trust in the nature of a discretionary trust. A discretionary trust is described in *Waters on Trusts* as a trust "in which the creator of the trust... imposes the duty upon the trustees to distribute income or capital among the beneficiaries described in the trust instrument... as the trustees think fit" [Donovan W.M. Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Thomson Reuters Canada Limited: Toronto, 2012) at p 36 (*Waters on Trusts*).] It is the duty of the trustees to consider when and how the discretion ought to be exercised and the decision of the trustees must fall within the objects of the trust and the power conferred upon the trustees (*Waters on Trusts* at p 988). The trustees of a discretionary trust are also bound by the fundamental duties of a trustee, that is: not to delegate their duties; not to personally benefit from the trust property; to act with honesty and act with the prudence expected of a reasonable person administering their own affairs; and to decide on the exercise of their discretion in line with the best interests of the beneficiaries (*Ibid* at pp 906, 988).

b. **Avoiding Capital Payments to beneficiaries which destroys the Trust**

In circumstances where the trustees of a discretionary trust have unfettered discretion as to the distribution of income and capital, then their decision as to the quantum of the distribution, allocation of the distribution between income and capital and the recipients of the distribution should be deferred to by the court. The trustees have the duty to consider whether the discretion to distribute income or capital ought to be exercised; however, it may be the case that the trustees determine that it is in the best interests of the beneficiaries to annually distribute income to the benefit of the beneficiaries and their families but to postpone the collapse of the trust by distributing capital. As discussed below, the court should only interfere with the exercise of the trustees' discretion in exceptional circumstances.

c. **Jurisdiction of the Court to direct payment of funds**

The Court should only intervene to direct the payment of funds from the Trust when the Trustees fail to given proper consideration as to whether their discretion ought to be exercised. Or alternatively, when the discretion was exercised but the Trustees either acted outside the scope of the power conferred upon them in the trust deed or took into account irrelevant or unreasonable considerations in making their decision. No remedy has been sought in respect of distribution of the trust and there is no evidence of the Trustees acting outside the scope of their power or taking into account irrelevant or unreasonable considerations.

When considering the degree of control a court can exercise over a trustee that holds absolute discretion, *Waters on Trusts* notes that an axiomatic feature of a trustee's dispositive discretion in a discretionary trust is "that provided the trustees act with good faith (i.e., honestly, thoughtfully, objectively and fairly) in the exercise of their discretion, the court will not interfere or counter their decision" (*Ibid* at p 1203, fn 149). *Gisborne v Gisborne* [(1877), 2 App. Cas. 300 (H.L.)] is the

leading case from the House of Lords which represents the principle that the court should not interfere with the discretion of trustees unless there is some "*mala fides*", meaning bad faith or fraud. The Ontario Court of Appeal in *Fox v Fox Estate* extended the definition of *mala fides* to circumstances where the trustee's discretion is conducted in an undesirable manner or if the discretion is influenced by extraneous matters [28 O.R. (3d) 396 (1996) at para 12 (*Fox*)]. In *Fox,* the extraneous consideration impugned by the Court of Appeal was based on religious discrimination rather than a consideration of what would benefit the beneficiaries as specified in the trust deed.

Alberta courts have confirmed the principle adopted in *Fox* in *McNeil v McNeil* [2006 ABQB 636] and *Lecky Estate v Lecky* [2011 ABQB 802 (*Lecky*)]. Alberta courts have confirmed that if the trustees are acting within the scope of their duties conferred upon them by the trust deed, then their exercise of discretion should be "afforded considerable deference" (*Lecky* at para 50). *Waters on Trusts* summarizes the principle as established in Canadian law. the court will not intervene with the decision of the trustees who are exercising their discretion if they do not agree with the decision or would have not have made the same decision but will intervene if the decision was so unreasonable that no "honest or fair-dealing" trustee would have made it, if the trustee took into account irrelevant considerations with respect to the decision, or when the discretion was not exercised and the trustees could not show that proper consideration was given as to whether the discretion ought to be exercised (*Waters on Trusts* at pp 989-990).

F. Proposal to Provide for the protection of minors and reporting to the Public Trustee

The Trustees would propose to provide a report to the Public Trustee identifying the payments that have been made to beneficiaries from the 1986 trust since 2009. The report would not identify individuals, but would identify the amounts paid. This will allow the Public Trustee to assess whether the payments are being made in a fair and equitable manner.

G. Conclusion

We submit that the above proposed distribution scheme meets all criteria for this discretionary trust, meets the criteria set for the trust by the Court and allows the Public Trustee to satisfy its mandate. The Public Trustee is assured that the trust is providing benefits to minor dependents through their adult beneficiary or to the minor directly if the minor is a member. Parents can apply on behalf of a minor for the minor to become a member of the First Nation in order for the minor to become a beneficiary of the Trust. The child as an adult could on their own apply to become a member. The Sawridge Trust policies provide cradle to grave support programs which is a benefit to the future of the First Nation members.

A I was basing this on documents and conversations that I have had with various individuals including the trustees about the reason for the establishment of the 1985 Trust.

Q Okay. So which trustees did you discuss that with?

A All of them.

Q All of them, okay. Can you give me a bit of a summary of what -- let's start with Catherine Twinn, what her recollection was about the purposes or intention of the Trust?

A What the purpose of the Trust was to provide for the economic future of the members of the Sawridge First Nation. That was pretty much understood by everybody.

Q But not Bill C-31 individuals?

A Well --

Q At that time?

A Right, right.

Q At that time, okay. So when you say the members, you mean the members that existed prior to --

A In 1985.

Q -- Bill 31, okay. And anything else that Catherine Twinn was able to advise you on or inform you about on the background or the purposes of the Trust?

A Well, the concern, and I can't remember exactly where I got the information, but I remember from looking at the court record of the constitutional challenge on Bill C-31, and some of the testimony of Walter, Chief Walter

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:

NAME

ADDRESS

1.

NAME

ADDRESS

2.

NAME

ADDRESS

3.

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

Sawridge Trusts
Board Policy

Name	Health, Dental, Vision Care and Life Insurance Benefit				
Category	Benefits		**Number**	B-09-1	
Proposed	10-05-05	**Approved**	10-05-26	**Revised**	15-12-16

The Trustees of the Sawridge Band Inter-Vivos Settlement and the Sawridge Trust (Sawridge Trusts) are desirous of providing eligible beneficiaries with health, dental, vision care and life insurance coverage;

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries and their dependants must first take advantage of other benefits available through government, First Nation or employer programs or personal insurance plans.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

HEALTH, DENTAL and VISION CARE INSURANCE

In order to achieve this objective, the Trustees have approved a health, dental and vision care insurance program under Great West Life Insurance proposed by the Silverberg Group (summary attached) which covers beneficiaries and their immediate and qualified dependents as of 1 January 2016. This plan will replace previous health insurance plans provided by the Sawridge Trusts under Great West Life, will replace any employee health benefit program presently offered by Sawridge First Nation to beneficiaries and dependants of the Sawridge Trusts and will replace any coverage provided by the Health Canada's Non-Insured Health Benefits (NIHB) for First Nations and Inuit Program.

Where possible, the Sawridge Trusts will enter into an agreement with the Sawridge First Nation in relation to the Sawridge Trusts' health, dental and vision care insurance program, so that if the Sawridge First Nation recovers any eligible amounts from the First Nation Non-Insured Health Benefit Program, or the Government in right of the Crown, with respect to any benefits paid by the Sawridge Trusts on behalf of Status Indians who are Sawridge Trust beneficiaries, that such amounts will be reimbursed or assigned to the Sawridge Trusts.

LIFE INSURANCE

The Sawridge Trusts will provide, to eligible beneficiaries only, a 10 Year Pay Universal Life Insurance policy for providing coverage of $250,000 life insurance to beneficiaries between the ages of 0 and 60 years of age.

The Sawridge Trusts will be a permanent and irrevocable named beneficiary to receive $50,000 from this policy upon the death of the insured the remaining $200,000 being provided to a beneficiary of the insured's choice;

Sawridge Trusts
Board Policy

Name	Health, Dental, Vision Care and Life Insurance Benefit				
Category	Benefits		**Number**	B-09-2	
Proposed	10-05-05	**Approved**	10-05-26	**Revised**	15-12-16

DEFINITION OF "IMMEDIATE AND QUALIFIED DEPENDENTS"

For the purposes of the Health, Dental and Vision Care Insurance Benefit, the immediate dependents of beneficiaries will be covered, even if they are not members of the Sawridge First Nation, provided that they are either living with the beneficiary and are under the age of 18 years of age or are attending a post-secondary institution and are under the age of 25 years of age and still consider the home of the beneficiary to be their own home.

SUPPLEMENTARY BENEFITS

In cases where the Insurance Benefit does not cover a specific service or item or in cases where the beneficiary use exceeds the limits of a particular benefit, the Trustees may consider an appeal for additional benefits paid directly from Trusts' equity to supplement the amount of the benefit not covered under the Insurance Benefit provided that, in the Trustees' estimation, the additional cost is reasonable and warranted.

SELF-INSURED PLAN

The Health, Dental and Vision Care Insurance Benefit is a self-insured plan paid for entirely through Trusts' equity and not part of a group insurance plan. The Benefit is administered for the Sawridge Trusts by Great West Life which charges an administration fee based on the number of beneficiaries and dependents covered by the Benefit.

NON-DEROGATION

Nothing in this Policy shall be construed so as to abrogate or derogate from the existing Aboriginal and Treaty rights of Sawridge First Nation beneficiaries as recognized and affirmed in Section 35 of the *Constitution Act, 1982.*

Sawridge Trusts
Board Policy

Name	Education Support Fund Benefit				
Category	Benefits		**Number**	B-11-1	
Proposed	11-02-15	**Approved**	11-02-15	**Revised**	

WHEREAS the Trustees of the Sawridge Band Inter-Vivos Settlement and the Sawridge Trust (Sawridge Trusts) are desirous of providing the beneficiaries and dependents of beneficiaries 25 years of age and under with support that will assist them in educating themselves;

NOW THEREFORE BE IT RESOLVED that the Sawridge Trusts agree to provide an Education Support Fund of $100,000 annually for the benefit of eligible beneficiaries and eligible dependents as follows:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation programs, student loans and lines-of-credit and scholarship or student bursary programs and through full or part-time employment.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A BENEFICIARY

3. That, for the purposes of this benefit, a beneficiary shall be defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.
4. That, for the purposes of this benefit, an eligible dependant will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and who is registered in a full-time or part-time education program with an accredited educational institution.

DEFINITION OF ELIGIBLE EDUCATION PROGRAMS

5. That, for the purposes of this benefit, eligible education programs include:
    a. Recognised upgrading programs to improve opportunities for higher education.
    b. Recognised technical and skills development training programs
    c. Recognised university programs up to and including doctoral level study but not including post-doctoral studies.

DEFINITION OF EDUCATION SUPPORT BENEFIT CATEGORIES

6. Tuition and Fee Support:
    a. Including a portion of tuition fees and other required fees to attend an educational program.
7. Support for Books and Equipment:
    a. Including a portion of the cost of text books and laboratory and other equipment necessary for the study program, including computers.
    b. Including a portion of any deposits required to cover the cost of damaged or lost equipment.
8. Living Expense Support:
    a. Including a portion of rent or mortgage payments, utilities, telephone, tenant/home insurance, food, transportation, basic furniture and personal expenses.
    b. Does not include any portion of the purchase of a vehicle, payment of credit card or other outstanding debts.

Sawridge Trusts
Board Policy

Name	Education Support Benefit				
Category	Benefits		**Number**	B-11-2	
Proposed	11-02-15	**Approved**	11-02-15	**Revised**	

AVAILABLE FUNDING

9. Because funding is limited each year, funding will be made available on a first-come-first-serve basis and on the basis on total funding provided by other funding agencies and by the individual him or herself, that is, if the individual receives maximum funding available through federal government grants or other scholarship programs or if the individual is able to personally fund her/his education through parental contributions or self-employment, this person will not be placed as high in priority as someone who has no financial support programs available to them.
10. Funding will also be accorded in priority to those with high academic performance records.

ACCESSING FUNDING

11. Those wishing to receive funding for their education from the Trusts will first have to fill out and submit an application for funding available through the Trusts' Office. Applications will be reviewed by the Trusts' Administrator and a decision will be made based on available funding and past academic performance.
12. Successful applicants will be required to provide on-going proof of enrolment, attendance and academic performance in order to be considered for on-going financial support from the Trusts.

Sawridge Trusts
Board Policy

Name	Addictions Treatment Support Fund Benefit				
Category	Benefits		**Number**	B-12	
Proposed	11-02-15	**Approved**	11-02-15	**Revised**	

WHEREAS the Trustees of the Sawridge Band Inter-Vivos Settlement and the Sawridge Trust (Sawridge Trusts) are desirous of providing the beneficiaries with support that will assist them in dealing with addictions resulting from substance abuse, more specifically, alcohol and drug abuse;

NOW THEREFORE BE IT RESOLVED that the Sawridge Trusts agree to provide an Addictions Treatment Support Fund of $40,000 annually for the benefit of eligible beneficiaries and eligible dependents as follows:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation programs, and health insurance programs.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A BENEFICIARY

3. That, for the purposes of this benefit, a beneficiary shall be defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.
4. That, for the purposes of this benefit, an eligible dependent will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and is living at home with the eligible beneficiary.

DEFINITION OF ELIGIBLE ADDICTIONS TREATMENT PROGRAMS

5. Eligible treatment programs will include accredited programs provided by reputable professionals with a proven record of success in treating addictions.
6. Priority will be given first to certified treatment programs first in the Province of residence of the beneficiary; second to certified treatment programs within Canada; third to certified treatment programs with North America.
7. Only in special circumstances will consideration be given to treatment programs outside North America and only then with the approval of the Trustees.

ACCESSING BENEFITS UNDER THE ADDICTIONS TREATMENT FUND

8. Funding for addictions treatment services will only be provided in cases where the beneficiary or dependent has first developed a treatment plan with the Trusts' Administrator and other professionals and has made a commitment to follow through with the full treatment program.
9. While the Trusts recognize that relapses, in the case of addictions, are possible and even likely, the Trusts will not allow abuses of the Addictions Treatment Fund by beneficiaries who repeatedly relapse and have to attend a new treatment program. After the second use of the Fund, every beneficiary application for renewed treatment will require the approval of the Board of Trustees.
10. The Trusts' Administrator is authorized to approve treatment plans and payment for treatment services for the first two applications without having to obtain the approval of the Trustees provided that there remains sufficient funds in the current year's budget for the Addictions Treatment Fund.

Sawridge Trusts
Board Policy

Name	Child and Youth Development Benefit						
Category	Benefits			**Number**	B-10		
Proposed	13-01-15	**Approved**	13-05-21		**Revised**		

WHEREAS the Trustees of the Sawridge Band Inter-Vivos Settlement and the Sawridge Trust (Sawridge Trusts) are desirous of providing the children of eligible beneficiaries who have special needs with support that will assist them in developing their capacities and to assist in the education of all children of beneficiaries;

NOW THEREFORE BE IT RESOLVED that the Sawridge Trusts agree to provide a Child and Youth Development Benefit for the special needs children of eligible beneficiaries and to provide assistance with child care costs for normal children as follows:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation or employer programs or personal insurance plans and government, school or community social service programs.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A BENEFICIARY

3. That, for the purposes of this benefit, a beneficiary shall be defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.
4. That, for the purposes of this benefit, an eligible child will include any child who also suffers from a permanent physical or mental disability either born to an eligible beneficiary, adopted through legal or customary adoption by an eligible beneficiary or for which an eligible beneficiary is the legal guardian.

DEFINITION OF CHILD AND YOUTH DEVELOPMENT BENEFIT

5. That the child and youth development benefit provide the following benefits:
    a. An annual amount of up to $10,000 to assist with the costs associated with caring or educating the special needs child on a reimbursement basis or on pre-paid services.
    b. An annual amount of up to $8,500 to assist with child care costs for a child on a reimbursement basis or on pre-paid services.

APPLICATION

1. That the beneficiary apply for the child and youth development benefit by telephoning, writing or emailing the Trusts' office and providing the necessary information relating to the age of the applicant, the nature of the program the beneficiary wishes to attend and the beneficiary's entitlement to the Trusts Administrator.

Sawridge Trusts
Board Policy

Name	Compassionate Care and Death Benefit				
Category	Benefits		**Number**	B-06-1	
Proposed	10-04-19	**Approved**	10-04-19	**Revised**	

Whereas the Trustees of the Sawridge Band Intervivos Settlement and the Sawridge Trust (hereinafter referred to as the Trusts) are committed to providing benefits that will support the well-being of the beneficiaries under the two trusts, and
Whereas the beneficiaries may, from time to time, require the assistance of the Trusts to defray their expenses related to a prolonged or serious illness or death of an immediate family member,
The Trustees hereby resolve:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation, employer or personal insurance plans and that the Compassionate Care and Death Benefit will only pay the difference between these other benefits and the actual costs incurred. Benefits will only be paid as long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF IMMEDIATE FAMILY

2. That, for the purposes of this benefit, an immediate family member shall be defined as:
    a. A child of the beneficiary or of her/his current, co-habiting spouse or common-law partner,
    b. The current, co-habiting spouse or common-law partner of the beneficiary,
    c. The father or mother or his/her partner of either the beneficiary or her/his current co-habiting spouse or common-law partner,
    d. Brothers, sisters, stepbrothers or step sisters of either the beneficiary or her/his current, co-habiting spouse or common-law partner,
    e. Grandparents or step grandparents of either the beneficiary or her/his current co-habiting spouse or common-law partner,
    f. Grandchildren or step-grandchildren of either the beneficiary or her/his current, co-habiting spouse or common-law partner,
    g. Son-in-law or daughter-in-law of either the beneficiary or her/his current, co-habiting spouse or common-law partner.

DEFINITION OF PROLONGED OR SERIOUS ILLNESS OR INJURY

3. That, for the purposes of this benefit, prolonged or serious illness shall be limited to:
    a. A serious or life-threatening illness resulting in hospital confinement or intense home care of two or more weeks' duration,
    b. A serious or life-threatening injury resulting in hospital confinement, intense home care of two or more weeks' duration or resulting in permanent physical handicap,
    c. An illness, genetic condition or injury, including injury to an unborn foetus resulting in a permanent physical or mental disability.

Sawridge Trusts
Board Policy

Name	Compassionate Care and Death Benefit				
Category	Benefits		**Number**	B-06-2	
Proposed	10-04-19	**Approved**		**Revised**	

DEFINITION OF COMPASSIONATE CARE BENEFIT

4. That the compassionate care benefit provide the following benefits if these are not covered by any other health program:
    a. Reasonable travel costs to and from the location where the ill or injured is in care by personal vehicle or the most economical and reasonable means of public transportation for the beneficiary and her/his family.
    b. Reasonable accommodation costs for the beneficiary and her/his family while visiting the ill or injured family member at the most reasonable and economical hotel, boarding house or public program accommodation including Ronald MacDonald House for parents with children afflicted with cancer, Sawridge Inns where these are available, bed and breakfast establishments and reasonably-priced hotels and motels.
    c. Reasonable meal costs for the beneficiary and her/his family while visiting the ill or injured family member at restaurants and hospital and care facility cafeterias or food purchased and prepared by the beneficiary.
    d. Parking costs while traveling to or from the location where the ill or injured family member is in care.
    e. Child care costs for under-aged children remaining a t home while the parents go to visit the ill or injured family member.
    f. Home modifications, special equipment or dietary supplies, or special medications not covered by other health plans if the ill or injured family member is being brought to the beneficiary's home for long-term care, recuperation or rehabilitation. In this case, the beneficiary has to provide the Trustees with a detailed long-term plan, including costs, for the care of the ill or injured family member at home, medical recommendations for the equipment and/or dietary needs to care for this person at home, costs and plans for any home modifications in order to accommodate caring for this person at home and costs of any homecare professional help that may be needed.

LIMITATION OF COMPASSIONATE CARE BENEFIT

5. That the compassionate care benefit be limited to a maximum of $6,000 per beneficiary per annum with a maximum lifetime benefit of $60,000.
6. As part of the total compassionate care benefit allowed, that the Trustees may provide an immediate cash disbursement of up to $300 within the maximum permitted to cover emergency incidental expenses associated with the incident.
7. That this benefit will only be made available so long as the Trusts have sufficient financial resources to cover this cost.

Sawridge Trusts
Board Policy

Name	Compassionate Care and Death				
Category	Benefits		**Number**	B-06-3	
Proposed	10-04-19	**Approved**		**Revised**	

DEFINITION OF DEATH BENEFIT

1. That the death benefit include:
    a. The cost of transporting the remains to the deceased former home or to the home of the beneficiary.
    b. The cost of burial or cremation, including the purchase of a plot, the cost of the funeral, headstones and the cost of a post-funeral reception.
    c. The cost of transporting the beneficiary and her/his family to the funeral, if this is at some distance away from the beneficiary's home.
    d. The cost of accommodation and meals for the beneficiary and her/his family, if the funeral is being held at some distance away from the beneficiary's home and requires an overnight stay.

LIMITATION OF DEATH BENEFIT

2. That the maximum death benefit be $12,000 per family with a maximum of $24,000 annually based on submitted receipts.
3. That the Trustees may provide an immediate cash disbursement of up to $1000 per beneficiary to cover emergency incidental expenses associated with the funeral and burial or cremation of the former family member but that amount will be subtracted from the total benefit paid for this incident.

LIMITATION OF BENEFIT

4. That the compassionate care and death benefit will only be paid one time, regardless of whether the beneficiary is eligible for both the Trusts or for only one Trust or the other.
5. That the compassionate care and death benefit will only be paid to adult beneficiaries or to recognized guardians or caretakers of minor beneficiaries.
6. That the compassionate care and death benefit will not pay for lost time from work or business not for any costs associated with employment or business income.
7. That this benefit will only be made available so long as the Trusts have sufficient financial resources to cover this cost.

APPLICATION

8. That the beneficiary apply for either the compassionate care benefit or the death benefit by calling or emailing the Trusts office and providing the necessary information relating to the incident and the beneficiary's entitlement to the Trusts Administrator.

Sawridge Trusts
Board Policy

Name	Seniors' Support Benefit				
Category	Benefits		**Number**	B-07-1	
Proposed	10-04-19	**Approved**	10-04-19	**Revised**	15-12-16

Whereas the Trustees of the Sawridge Band Intervivos Settlement and the Sawridge Trust (hereinafter referred to as the Trusts) are committed to providing benefits that will support the well-being of the beneficiaries under the two trusts, and
Whereas the Trustees desire to provide a benefit that will support the elders who have provided so much toward the building of the community,
Whereas the elders may require additional financial support to benefits provided by Federal and Provincial Governments and community agencies,
The Trustees hereby resolve:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation or employer programs or personal retirement and insurance plans.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A SENIOR

a. That, for the purposes of this benefit, a senior shall be defined as a beneficiary who has achieved 65 years of age.

DEFINITION OF SENIORS' SUPPORT BENEFIT

3. That the seniors' support benefit provide the following benefits: A monthly cash disbursement of $2,500 per eligible beneficiary paid directly to the senior person.

APPLICATION

4. That the beneficiary apply for seniors' support benefit by telephoning, writing or emailing the Trusts' office and providing the necessary information relating to the age of the applicant and the beneficiary's entitlement to the Trusts Administrator.

Sawridge Trusts
Board Policy

Name	Personal Development and Alternative Health Benefit				
Category	Benefits		**Number**	B-08-1	
Proposed	14-02-25	**Approved**	14-02-25	**Revised**	15-12-16

Whereas the Trustees of the Sawridge Band Intervivos Settlement and the Sawridge Trust (hereinafter referred to as the Trusts) are committed to providing benefits that will support the well-being of the beneficiaries and their dependants under the two trusts, and
Whereas the Trustees desire to provide a benefit that will support beneficiaries and their dependants in their personal growth and development, and will provide some funding for alternative health treatments,
The Trustees hereby resolve:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries and their dependants must first take advantage of other benefits available through government, First Nation or employer programs or personal insurance plans.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A BENEFICIARY

a. That, for the purposes of this benefit, a beneficiary shall be defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.
b. That, for the purposes of this benefit, an eligible dependent will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and is living at home with the eligible beneficiary.

DEFINITION OF PERSONAL DEVELOPMENT AND ALTERNATE HEALTH BENEFIT

1. That the personal development and alternate health benefit provide the following benefits:
   a. An annual allowance benefit of up to $2,000 per person.
   b. The allowance will not be paid directly to the eligible beneficiary except upon the submission of receipts or invoices for
      i. personal or family counselling provided a recognized traditional healer or elder,
      ii. recognized fitness or nutrition counselling programs,
      iii. recognized self-esteem building programs,
      iv. vitamins, minerals, medicinal herbs, special food supplements,
      v. fitness equipment.
   c. In the case of invoices for services provided sent directly to the Sawridge Trusts office, the allowance will be paid directly to the service provider not the beneficiary.
   d. In the case of visits to traditional healers, the beneficiary will provide an itemized list of the expenses incurred for the visit.

Sawridge Trusts
Board Policy

Name	Personal Development and Alternative Health Benefit				
Category	Benefits		**Number**	B-08-2	
Proposed	14-02-25	**Approved**	14-02-25	**Revised**	15-12-16

e. The allowance may also be used to cover the cost of part of the transportation costs required to attend the personal development or alternative health program on the same basis as provided for the purchase of services under this program. Transportation costs may be reimbursed upon the submission of receipts for gasoline purchase or upon the submission of receipts for public transportation, provided that the cost is related to accessing the personal development program.

APPLICATION

3. That the beneficiary apply for the personal development and alternative health benefit by telephoning, writing or emailing the Trusts' office and providing the necessary information relating to the age of the applicant, the nature of the program the beneficiary or dependant wishes to attend and the beneficiary's entitlement to the Trusts Administrator.

Sawridge Trusts
Board Policy

Name	Income Replacement Benefit				
Category	Benefits		**Number**	B-13	
Proposed	11-10-18	**Approved**	11-10-18	**Revised**	11-12-07

WHEREAS the Trustees of the Sawridge Band Inter-Vivos Settlement and the Sawridge Trust (Sawridge Trusts) are desirous of providing the beneficiaries with support that will assist them in dealing with addictions resulting from substance abuse, more specifically, alcohol and drug abuse;

NOW THEREFORE BE IT RESOLVED that the Sawridge Trusts agree to provide an Income Replacement Benefit of $40,000 annually for the benefit of eligible beneficiaries and eligible dependents as follows:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation programs, and health insurance programs.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A BENEFICIARY

3. That, for the purposes of this benefit, a beneficiary shall be defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.
4. That, for the purposes of this benefit, an eligible dependent will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and is living at home with the eligible beneficiary.

DEFINITION OF ELIGIBILITY

5. That, for the purposes of this benefit, would only provide up to 80% or 90% of total income with a monthly maximum of $2,500 and an annual maximum of $5,000 per individual on a first-come-first-served basis.
6. That would only be available to those already gainfully employed who would lose income as a result of attending a personal healing program or on extended sick leave from work because of an illness.
7. That would only be provided to deal with addictions, mental health or long-term health issues with the assistance of qualified professionals. The issue of dealing with traditional healers has not been addressed satisfactorily at this time.
8. That would be supported by the Personal Development, Health Benefits (for personal and mental health counselling and short-term disability) and the Addictions Treatment Support Fund Benefit (for addictions treatment) and could be limited only to those who attend an accredited treatment program.
9. That would not be repeated.

ACCESSING BENEFITS UNDER THE INCOME REPLACEMENT BENEFIT

10. That individuals wishing to access this benefit first provide the Trusts' Administrator with a treatment plan developed with a certified professional or, in the case of short-term disability, a doctor's note indicating that the person cannot work including the period during which the individual will be off work.
11. That individuals also provide the Trusts' Administrator with pay slips for one full month to prove level of income.

Sawridge Trusts
Board Policy

Name	Recognition of Beneficiaries and Dependants Educational Achievements				
Category	Benefits		**Number**	B-15	
Proposed	14-10-27	**Approved**	14-10-27	**Revised**	

Benefit

The Trustees of the Sawridge Trusts are desirous of supporting and encouraging the educational achievements of the beneficiaries and their dependants. In recognition of the completion of an educational program by any beneficiary or her/his dependants, the Sawridge Trusts will:

1. Issue a certificate to said beneficiary or dependant recognizing the educational achievement signed by the Trustees.
2. Note the accomplishment of the beneficiary or dependant in the Sawridge Trusts Newsletter or a notice to all beneficiaries.
3. Provide the graduate with a token of recognition by issuing a cheque for $250 to assist the graduate with finding employment or celebrating their achievement.

Eligibility

This benefit will be provided to any beneficiary of the Sawridge Trusts and their dependants. For the purpose of this benefit, a dependant means the married or common-law spouse or natural or adopted children of the beneficiary, provided that these dependants are living with the beneficiary or are still considered to be dependants of the beneficiary, that is, still consider their permanent address to be that of the beneficiary.

Recognized Educational Programs

Trustees will recognize the completion of a recognized secondary or post-secondary educational program, including: graduation from high school or a high school upgrading program, graduation from a university degree program, graduation from a technical certificate program, graduation from an apprenticeship program, or graduation from a professional upgrading program that increases the beneficiary or dependants employability or qualification in her/his chosen field.

Application

Upon receiving proof of graduation of a beneficiary or her/his dependant, the Trusts' Administrator will have a framed certificate of recognition prepared and will either issue a cheque for $250 in the name of the graduate or will provide suitable gift according to the graduate's choice.

This benefit will be applied retroactively for a period of one year from the date of the approval of this policy by the Trustees.

Sawridge Trusts
Board Policy

Name	One Time Only "Good Faith" Cash Disbursement				
Category	Benefits		**Number**	B-04	
Proposed	09-09-26	**Approved**	09-10-26	**Revised**	10-06-15

Introduction

The Sawridge Trusts Board of Trustees agrees to a "One Time Only Good Faith Cash Disbursement" to be made to each of the identified and approved adult beneficiaries of either Trust according to the following terms:

Benefit

A single cash disbursement of two thousand five hundred dollars ($2,500) will be issued by cheque drawn on the Trusts' accounts made payable to each adult beneficiary who is 18 years of age and older.

Only one payment of $2,500 will be made to each beneficiary for this benefit regardless of whether the beneficiary is a member of one or both Trusts.

Minor beneficiaries under 18 years of age will not be eligible for this benefit until they reach the age of 18 years of age and apply. Payments will be honoured automatically when these beneficiaries reach the age of majority, subject to available funds.

The Sawridge Trusts Tipi

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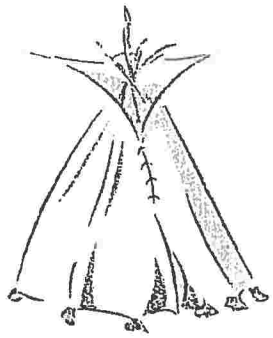
Through the sharing of these virtues, our ancestors build a strong people able to live at peace with ourselves, with our community and with nature.

The Sawridge Trusts tipi is made up of three sacred eagle feathers. The eagle is the messenger of the Creator, who wants us to grow and develop to the best of our capacities so that we can be of service to our people and to others around us.

The benefits developed by the Sawridge Trusts try to help develop these capacities to make the best use of the resources provided by the Creator for our people.



47-Health Support Benefit Pamphlet.pdf

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HEALTH SUPPORT BENEFIT

SAWRIDGE TRUSTS

Health Support Benefit

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. They are meant to support other benefits provided by Sawridge First Nation, the Federal Government, the Provincial Government and the community. Where another similar benefit exists, it must be accessed first.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

The Benefit

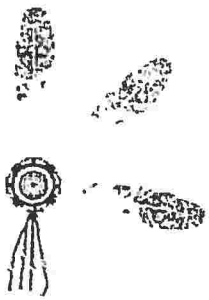
The Sawridge Trusts have contracted J.T. Moland Insurance Consultants to set up three health support programs for beneficiaries.

Health Insurance

The health insurance will cover the difference between what is paid through Alberta Health Care and Non-Insured Health Benefits. It covers health care costs like hospital, ambulance, chiropractors, physiotherapists, speech therapists, psychologists/social workers, hearing aids, prostheses, wheelchair ramps and glucose monitoring equipment. It also covers basic/major/orthodontic dental care, prescriptions and out-of-country emergency medical care.

Life Insurance

The life insurance will provide $250,000 of fully-paid, permanent life insurance for each beneficiary between 18 and 60 years of age. This insurance will pay out $200,000 to the person designated by the beneficiary and $50,000 to the Trust to fund future life insurance plans.



Member Assistance Plan

The member assistance program will provide telephone and in-person counselling and referral and will help people by providing support after they receive treatment and counselling. The program available to all beneficiaries and their families.

Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts.

How to Access the Benefit

J.T. Moland will be contacting all the identified beneficiaries to enrol them in the program, to provide them with a medical card and to provide detailed benefits information. Once the card is provided, beneficiaries can begin accessing health benefits.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

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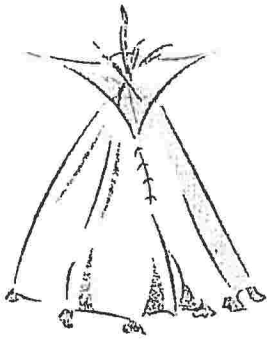

47-Counselling Benefit Pamphlet.pdf
20 March 2014

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COUNSELLING BENEFIT

SAWRIDGE TRUSTS

Counselling Benefit

Supplementary Benefit

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This is also a supplementary benefit, that is, beneficiaries must first take advantage of other benefits available through government, First Nation programs, and health insurance programs.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

Counselling Benefit

The Sawridge Trusts have established a limited annual fund to cover the costs of beneficiaries and their dependants receiving counselling from accredited professionals.

Eligible counselling programs will include services provided by accredited counselling professionals including psychiatrists, psychologists, social workers, marriage and family therapists, art therapists, and psychiatric nurses. Counselling benefits will also include career counselling by professional career counsellors.

Available Funding

Because funding is limited each year, funding will be made available on a **first-come-first-serve basis up to a maximum annual expense of $7000.** Decisions will be governed by the total funding provided by other funding agencies and by the commitment of the individual to a treatment regime.

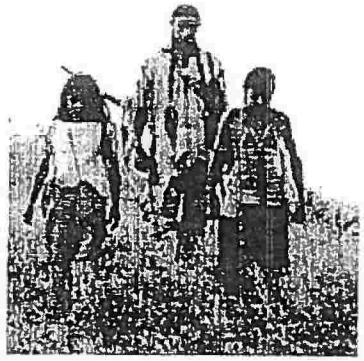
Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts as well as their dependants.

For the purposes of this benefit, an eligible dependant will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and who is registered in a full-time or part-time education program with an accredited educational institution.

How to Access the Benefit

Funding for counselling benefits will only be provided in cases where the beneficiary or dependent has first developed a treatment plan with the Trusts' Administrator and other professionals and has made a commitment follow through with the full treatment program.



Source: Nancy G Photography

More Information

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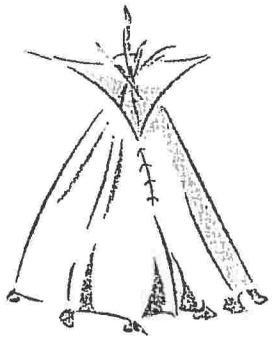

47-Education Support Benefit Pamphlet.pdf
10 March 2011

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EDUCATION SUPPORT BENEFIT FUND

SAWRIDGE TRUSTS

Education Support Benefit Fund

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. Where another similar benefit exists, it must be accessed first.

This will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation programs, student loans and lines-of-credit and scholarship or student bursary programs and through full or part-time employment.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

Education Support Benefit

The Sawridge Trusts have established a limited annual fund to cover the costs of beneficiaries and their dependants attending authorised post-secondary education programs.

For the purposes of this benefit, eligible education programs include:

- Recognised upgrading programs to improve opportunities for higher education.
- Recognised technical and skills development training programs
- Recognised university programs up to and including doctoral level study but not including post-doctoral studies.

Costs that may be covered by this benefit include:

- Tuition and Fee Support: including a portion of tuition fees and other required fees to attend an educational program.
- Support for Books and Equipment: including a portion of the cost of text books and laboratory and other equipment necessary for the study program, including computers and including a portion of any deposits required to cover the cost of damaged or lost equipment.
- Living Expense Support: including a portion of rent or mortgage payments, utilities, telephone, tenant/home insurance, food, transportation, basic furniture and personal expenses.

This benefit does not include any portion of the purchase of a vehicle, payment of credit card or other outstanding debts.

Available Funding

Because funding is limited each year, funding will be made available on a **first-come-first-serve basis.** Decisions will also be governed by the total funding provided by other funding agencies and by the individual him or herself. If the individual receives maximum funding available through federal government grants or other scholarship programs or if the individual is able to personally fund her/his education through parental contributions or self-employment, this person will not be placed as high in priority as someone who has no financial support programs available to them.

Funding will also be accorded in priority to those with high academic performance records.

Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts as well as their dependants.

For the purposes of this benefit, an eligible dependant will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and who is registered in a full-time or part-time education program with an accredited educational institution.

How to Access the Benefit

Those wishing to receive funding for their education from the Trusts will first have to fill out and submit an application for funding available through the Trusts' Office. Applications will be reviewed by the Trusts' Administrator and a decision will be made based on available funding and past academic performance.

Successful applicants will be required to provide on-going proof of enrolment, attendance and academic performance in order to be considered for on-going financial support from the Trusts.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

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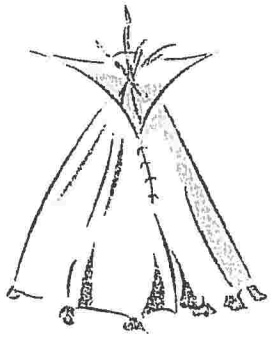

47-Addictions Treatment Support Benefit Pamphlet.pdf
10 March 2011

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ADDICTIONS TREATMENT SUPPORT BENEFIT FUND

SAWRIDGE TRUSTS

ADDICTIONS TREATMENT SUPPORT BENEFIT FUND

Supplementary Benefit

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This will be a supplementary benefit, that is, beneficiaries must first take advantage of other benefits available through government, First Nation programs, and health insurance programs.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

Addictions Treatment Support Benefit

The Sawridge Trusts have established a limited annual fund to cover the costs of beneficiaries and their dependants attending authorised alcohol and drug treatment programs.

Eligible treatment programs will include accredited programs provided by reputable professionals with a proven record of success in treating addictions.
Priority will be given first to certified treatment programs first in the Province of residence of the beneficiary; second to certified treatment programs within Canada; third to certified treatment programs with North America.

Only in special circumstances will consideration be given to treatment programs outside North America and only then with the approval of the Trustees.

Available Funding

Because funding is limited each year, funding will be made available on a **first-come-first-serve basis.** Decisions will be governed by the total funding provided by other funding agencies and by the commitment of the individual to a treatment regime.

Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts as well as their dependants.

For the purposes of this benefit, an eligible dependant will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and who is registered in a full-time or part-time education program with an accredited educational institution.

How to Access the Benefit

Funding for addictions treatment services will only be provided in cases where the beneficiary or dependent has first developed a treatment plan with the Trusts' Administrator and other professionals and has made a commitment to follow through with the full treatment program.

While the Trusts recognize that relapses, in the case of addictions, are possible and even likely, the Trusts will not allow abuses of the Addictions Treatment Fund by beneficiaries who repeatedly relapse and have to attend a new treatment program. After the second use of the Fund, every beneficiary application for renewed treatment will require the approval of the Board of Trustees.

The Trusts' Administrator is authorized to approve treatment plans and payment for treatment services for the first two applications without having to obtain the approval of the Trustees provided that there remains sufficient funds in the current year's budget for the Addictions Treatment Fund.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

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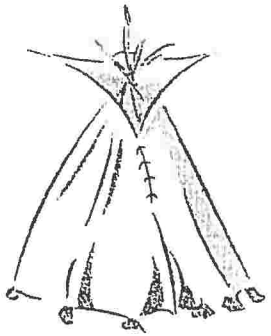

47-Child and Youth Benefit Pamphlet.pdf
17/06/2013

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CHILD AND YOUTH BENEFIT

SAWRIDGE TRUSTS

Child and Youth Benefit

Supplementary Benefit

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Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

The Benefit

The Child and Youth Benefit provides an annual amount of up to $10,000 to assist with the costs associated with caring or educating the special needs child on a reimbursement basis or pre-paid services basis.

The Benefit also provides annual amount of up to $8,500 to assist with child care costs for a child without any special need on a reimbursement basis or pre-paid services basis.

Who is Eligible

For the purposes of this benefit, a beneficiary is defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.
An eligible child will include any child either born to an eligible beneficiary, adopted through legal or customary adoption by an eligible beneficiary or for which an eligible beneficiary is the legal guardian.

How to Access the Benefit

In order to access this benefit, beneficiaries will have to fill out an application form provided by the Sawridge Trusts. Beneficiaries can obtain the application form by requesting it by email or mail from the trusts' Administrator. Once the completed form is submitted to the Trusts' Office, determination will be made as to the eligibility of the child for whom benefits are being requested and payment arrangements will be made if the child is eligible.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

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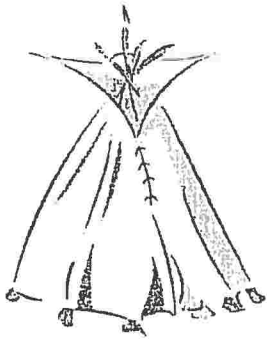

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COMPASSIONATE CARE AND DEATH BENEFIT

SAWRIDGE TRUSTS

Compassionate Care and Death Benefit

Supplementary Benefit

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Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

Compassionate Care Benefit

This benefit provides for travel, meals and accommodation costs for the beneficiary and her/his immediate family in the event of a **serious or life-threatening illness** resulting in hospital confinement or two weeks or more of intense home care of a family member—as defined under **Who is Eligible** section below—of an eligible beneficiary. The maximum amount covered is up to $6,000 per incident and up to a lifetime maximum of $60,000.

Travel costs are covered from the home of the eligible beneficiary to the place where the family member is being treated. If hotel accommodation is required for the beneficiary and his family at this location, this cost is also covered. If a Sawridge Inn exists at this location, arrangements will be made for the beneficiary to stay at the Sawridge Inn and costs will be billed directly to the Trusts. If there is no Sawridge Inn at the location, accommodation will be arranged in other suitably priced hotel accommodations. Costs will be covered only as long as the ill family member is confined to a hospital in a distant location.

Death Benefit

In the event of the **death of a family member**—as defined under **Who is Eligible** section below—the Trusts will assist in covering funeral costs including the cost of the wake, the cost of the funeral, the cost of burial and a headstone and the cost of a reception after the funeral up to a maximum of $12,000 per incident.

If the person was eligible for the Canada Pension Plan Death Benefit of up to $2,500, this amount shall be used first. If other sources of funding are available, these will be used first.

Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts.

A family member of an eligible beneficiary includes:

- a child of the beneficiary or of her/his current, co-habiting spouse or common-law partner, the current, co-habiting spouse or common-law partner of the beneficiary;
- the father or mother or his/her partner of either the beneficiary or her/his current co-habiting spouse or common-law partner;
- brothers, sisters, stepbrothers or step sisters of either the beneficiary or her/his current, co-habiting spouse or common-law partner;
- grandparents or step grandparents of either the beneficiary or her/his current co-habiting spouse or common-law partner;
- grandchildren or step-grandchildren of either the beneficiary or her/his current, co-habiting spouse or common-law partner; or
- son-in-law or daughter-in-law of either the beneficiary or her/his current, co-habiting spouse or common-law partner.

How to Access the Benefit

In either case, illness or death, first call the Trusts' Administrator at the numbers on the back of this pamphlet to inform him of the incident and he will inform you of the requirements. If he cannot be reached, leave a message and your call will be returned as soon as possible.

1. Keep all receipts for expenses—meals purchased, gasoline and oil purchased, parking costs and hotel costs at the time of the incident.
2. Submit these receipts by mail or in-person to the Trusts' Administrator at the address on the back of this pamphlet along with information about the incident on a separate piece of paper including:
   - Name of Eligible Beneficiary
   - Date(s)
   - Persons involved
   - List of Expenses Claimed

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by

The Sawridge Trusts Tipi

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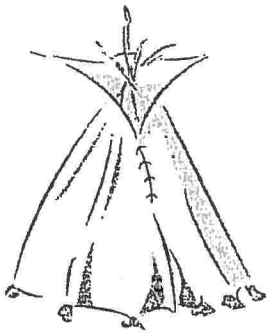
The benefits developed by the Sawridge Trusts try to help develop these capacities to make the best use of the resources provided by the Creator for our people.



SAWRIDGE TRUSTS

801, 4445 Calgary Trail NW
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E-mail: benefits@sawridgetrusts.ca

SENIORS' SUPPORT BENEFIT

SAWRIDGE TRUSTS

Senior's Support Benefit

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. They are meant to support other benefits provided by Sawridge First Nation, the Federal Government, the Provincial Government and the community. Where another similar benefit exists, it must be accessed first.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

Monthly Income Benefit

A monthly cash disbursement of $2,000 effective 1 April 2011 is made to each Senior to assist them by supplementing other senior's income benefits like the Old Age Pension and Canada Pension Plan. This benefit is meant to assist with cost-of-living, transportation and home maintenance expenses.

Seniors Economically Disadvantaged

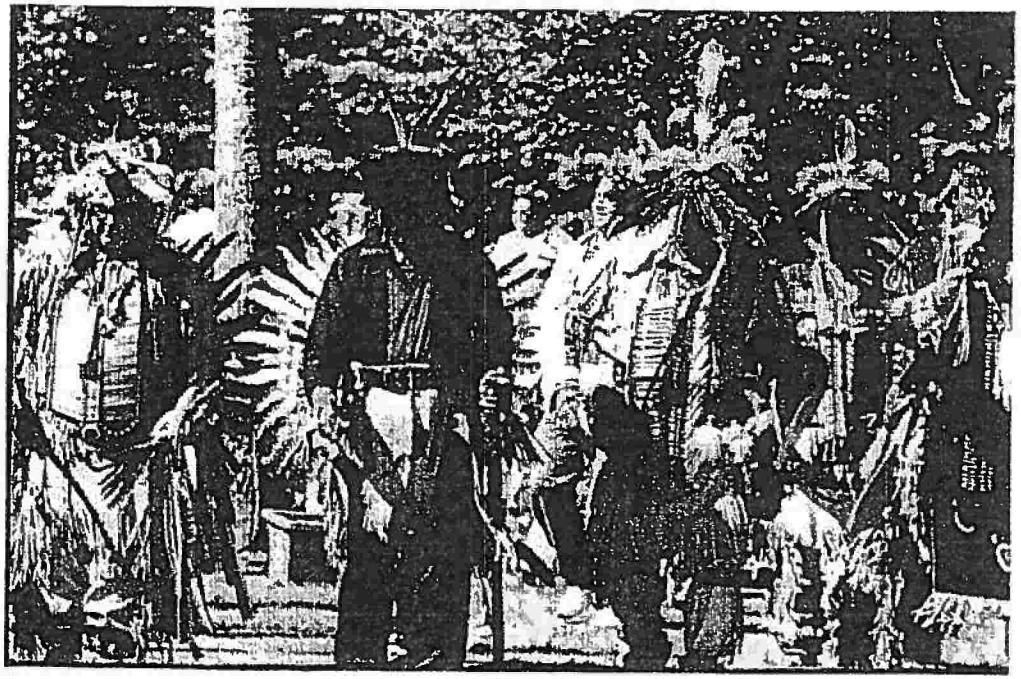
Many seniors in Canada are economically disadvantaged. Indigenous seniors are among the most disadvantaged in this group.

Once they are no longer able to work, seniors must either rely on money that they have saved while they were working or employee pensions. If the senior has no savings or pension, Old Age Pension and the Canada Pension Plan is the only money left to support the senior's living costs.

Without extra financial support from the family or the community, many seniors are faced with a poorer diet and a very restricted social life.

While living costs for most seniors go down once they no longer are working, for many indigenous seniors, these costs may not go down because they often assist in raising their grandchildren.

The Sawridge Trusts Seniors' Support Benefit is meant to provide some relief to these disadvantaged persons in our community.



Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts and who has attained the age of 65 years.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

The Sawridge Trusts Tipi

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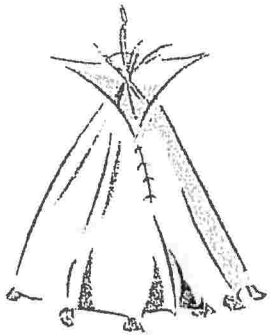

47-Personal Development and Alternative Health Benefit Pamphlet.pdf
10 March 2014

SAWRIDGE TRUSTS

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Personal Development and Alternative Health Benefit

SAWRIDGE TRUSTS

Personal Development and Alternative Health Benefit

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. They are meant to support other benefits provided by Sawridge First Nation, the Federal Government, the Provincial Government and the community. Where another similar benefit exists, it must be accessed first.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

If services requested under the Personal Development and Alternative Health Benefit duplicate other benefits provided by the Sawridge Trusts through other programs, reimbursement for these services will not be provided under the Personal Development and Alternative Health Benefit until these other benefits have been expended first.

The Benefit

In order to promote the health and well-being of the beneficiaries and their dependants, the Sawridge Trusts will provide an annual allowance of up to $2,000 per person. Benefits will be paid upon submission of receipts for expenditures or by payment of invoices from the supplier up to the maximum amount under the benefit.

Eligible expenditures include:

- personal or family counselling provided by a certified professional or the services of a recognized traditional healer or elder,
- treatment services from a recognized mental health or addictions treatment centre,
- recognized fitness or nutrition counselling programs,
- recognized self-esteem building programs,
- vitamins, minerals, medicinal herbs, special food supplements,
- visits to alternative health practitioners such as naturopaths, osteopaths, homeopaths, chiropractors, massage therapists, reiki therapists, acupuncturists, kinesiologists, shiatsu therapists, herbalists, traditional indigenous healers, sweat lodges, and the like.
- in the case of visits to traditional healers, the beneficiary will provide an itemized list of the expenses incurred for the visit.

Who is Eligible

For the purposes of this benefit, an eligible person includes anyone who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts as well as their dependants.

How to Access the Benefit

The annual allowance will not be paid directly to the eligible beneficiary. The beneficiary will first have to submit receipts for eligible expenses listed under **The Benefit** above for reimbursement.

To claim the benefit, the beneficiary should:

1. Get a receipt for every expense they intend to claim from the person, store or company providing a service.
2. Submit these receipts by mail or in-person to the Trusts' Administrator at the address on the back of this pamphlet along with a separate piece of paper including:
   - Name of Eligible Beneficiary
   - A Description of the Service Claimed
   - List of Expenses Claimed and Dates Services Were Provided

Arrangements can also be made for the Trusts to pay the service provider directly provided that eligibility of the service and of the beneficiary has been determined ahead of time and provided that the service provider is willing to bill the Trusts directly.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge

Trusts website at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

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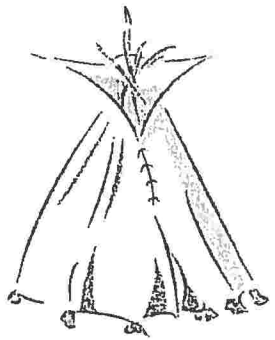

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Income Replacement Benefit

SAWRIDGE TRUSTS

Income Replacement Benefit

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. They are meant to support other benefits provided by Sawridge First Nation, the Federal Government, the Provincial Government and the community. Where another similar benefit exists, it must be accessed first.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

The Benefit

The Income Replacement Benefit is meant to replace income for beneficiaries who have to take time-off from work in order to recover and obtain treatment for physical or mental health conditions, including addictions.

The benefit only covers those persons who are regularly employed but who are not covered for sick leave by their employer or by Employment Insurance Sick Benefits and who have no other source of income during times of illness.

The benefit will provide up to 80% of the salary received in the month immediately preceding the illness requiring time-off up to a maximum of $2,500.00 per month. The benefit is only provided for two (2) months and up to an annual maximum of $5,000.00 per person.

Who is Eligible

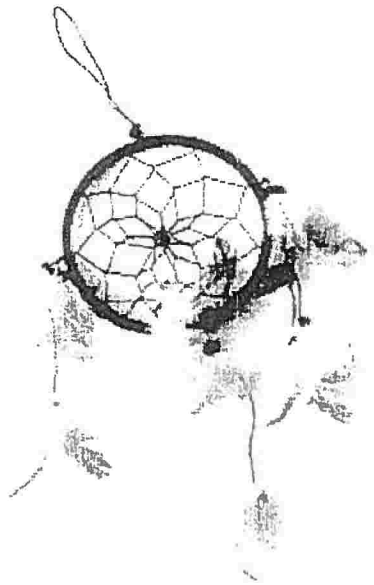
For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts who has attained the age of 18 years and who is employable.

How to Access the Benefit

The beneficiary will first have to submit a physician's note to the Trusts' Administrator indicating when the time-off period begins and ends and the reason for the sick leave being requested. In addition, the beneficiary will have to provide copies of pay slips for the past month indicating the level of income immediately preceding the period of sick leave.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.



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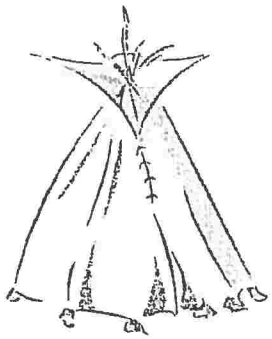

47-Cash Disbursement Benefit Pamphlet.pdf

SAWRIDGE TRUSTS

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CASH DISBURSEMENT BENEFIT

SAWRIDGE TRUSTS

Cash Disbursement Benefit

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. They are meant to support other benefits provided by Sawridge First Nation, the Federal Government, the Provincial Government and the community. Where another similar benefit exists, it must be accessed first.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

The Benefit

The Sawridge Trusts have established a "One Time Only Good Faith Cash Disbursement" to be made to each of the identified and approved adult beneficiaries of either Trust.

A single cash disbursement of $2,500 will be to each adult beneficiary who is 18 years of age and older.

Only one payment of $2,500 will be made to each beneficiary for this benefit regardless of whether the beneficiary is a member of one or both Trusts.

Minor beneficiaries under 18 years of age will not be eligible for this benefit until they reach the age of 18 years of age and apply. Payments will be honoured automatically when these beneficiaries reach the age of majority, subject to available funds.

Payments to newly identified beneficiaries will be made as soon as that beneficiary has been authorized by the Board of Trustees and registered with the Trusts' Office.

While other cash disbursements may be made available to beneficiaries in the future, it is not the intent of the Trusts to make regular cash disbursements at this time.

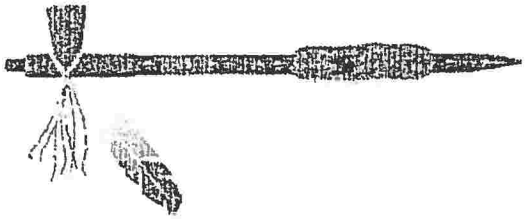
Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts and who has attained the age of 18 years.

How to Access the Benefit

Beneficiaries do not need to do anything to receive this benefit. It will be issued automatically by the Trusts' Office.

If you are eligible for this benefit and have not received payment, you can contact the Trusts' Office at the address on the back of this pamphlet for more information.



More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

Other Benefits

The Sawridge Trusts have developed or are developing a number of benefits that support the growth and development of beneficiaries. You may be interested in receiving information on:

- Compassionate Care and Death Benefit
- Senior's Support Benefit
- Personal Development Benefit
- Educational Support Benefit

Introduction

Under the Inter Vivos Settlement Agreement dated 15 April 1985, the following is the definition of a beneficiary:

"Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 454 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 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 enfranchanised, 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;

Clerk's Stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**CONSENT ORDER – DISTRIBUTION ARRANGEMENT APPROVAL**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Doris C.E. Bonora
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File No.: 551860-1

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Ph. (780) 425-9510
Fx: (780) 429-3044
File No. 108511-MSP

DATE ON WHICH ORDER WAS PRONOUNCED: August 24, **2016**

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, AB

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

CONSENT ORDER- DISTRIBUTION ARRANGEMENT APPROVAL

UPON NOTING that the decision of this Court on December 17, 2015 directed the Sawridge Trustees to prepare and file for approval a Proposed Distribution Arrangement; UPON HEARING representations from counsel for the Sawridge Trustees regarding the Distribution Arrangement which is attached hereto as Schedule "A"; AND UPON REVIEW OFSchedule "A"; AND UPON NOTING that the Trustees are not seeking the Court to approve the definition

of beneficiaries as set out in the Distribution Arrangement at this time and that such approval of the definition of beneficiaries shall be heard in a separate application;

IT IS HEREBY ORDERED THAT:

1. The Distribution Arrangement attached as Schedule "A" is approved, with the exception that, the definition of beneficiary set out in paragraph 4 in the Distribution Arrangement is not approved by this Order and is specifically directed to be determined in a separate application. Thus, the proposal set out in paragraph 4 entitled "Beneficiaries" as set out in Schedule "A" is reserved to a separate Court application.

2. There shall be no distributions from the 1985 Trust until the Beneficiary definition is determined in the separate court application referenced in paragraph 1 above.

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

CONSENTED TO BY:

Dentons Canada LLP

Doris Bonora
Counsel for Sawridge Trustees

Reynolds Mirth Richards & Farmer LLP

Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP

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

Hutchison Law

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

B. Discretionary Trusts

The discretionary trust is one in which the creator of the trust, whether by will or *inter vivos*, imposes the duty upon the trustees to distribute income or capital among the beneficiaries described in the trust instrument or oral declaration as the trustees think fit. This trust is known in the United States and sometimes in Canada as "a sprinkling trust", meaning that the trustees are to distribute or "sprinkle" the trust property among the beneficiaries.

C. Protective Trusts and Spendthrift Trusts

A "protective trust" is an English term which is not widely used in Canada because no Canadian *Trustee Act* contains provision for a statutory protective trust as it exists in English legislation.[72] However, the precedent books in Canada supply suitable wording whereby such a trust can be created. It refers to the situation where the creator of the trust requires the beneficiary's income interest to come to a close upon the beneficiary's bankruptcy or his attempted alienation of his interest. This is the "protected" interest.

The "spendthrift trust" is an American institution, developed by case law in some states and by statute in others, under which the beneficiary is unable to transfer his future entitlement to income or capital to another.[73] The protective trust therefore differs from the spendthrift trust in that, while it is possible for the beneficiary under either of these trusts to alienate, in favour of creditors or others, assets which he has already received from the trustees, if he attempts to alienate his beneficial interest (meaning his entitlement to future income) to third parties or he becomes bankrupt, the protective interest comes to a close. Under the spendthrift provision, the beneficial interest in income or capital continues, but all acts of alienation of that interest to third parties are invalid and the creditors in bankruptcy have no right to attach his interest.[74]

The terms "protective trust" and "spendthrift trust" occasionally appear in Canadian cases with other meanings, the most common of which seems to be a trust controlling disbursements to a beneficiary for fear that the beneficiary might waste the assets. The term "protective trust" or "spendthrift trust" is used even though there

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[72] *Trustee Act, 1925* (Eng.), s. 33. See the discussion in *Underhill and Hayton* at 287-93.

[73] See further, E.N. Griswold, *Spendthrift Trusts*, 2nd ed. (1947); *Scott and Ascher*, vol. 3, §15.2; W.H. Wicker, "Spendthrift Trusts" (1974) 10 Gonzaga L.R. 1; Adam J. Hirsch, "Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives" (1995) 73 Wash. U.L.Q. 1; Anne S. Emanuel, "Spendthrift Trusts: It's Time to Codify the Compromise" (1993) 72 Neb. L. Rev. 179. See also the *Uniform Trust Code, 2000* (U.S.A.).

[74] There is no case law in Canada which validates the spendthrift trust, and no legislation has been introduced validating it. Nevertheless, the protective trust (which is valid in Canada) is sometimes described as a "spendthrift trust". It is true that both trusts are concerned with the beneficiary who in lay terms is a spendthrift, but it is incorrect to describe the protective trust as a spendthrift trust. The reason for this will be apparent from the text.

17

Distinction Between the Powers and Duties of Trustees

I. POWERS AND DUTIES

Once a trustee is appointed and accepts the office, he becomes subject to the duties and takes over the powers of his office. The majority of these duties and powers assume that the trustee is vested with, and administering, the trust property, and as far as an original trustee is concerned there may well be some delay in such vesting. For example, though a testamentary trust takes effect upon the testator's death, the deceased's personal representatives must first administer and wind up the estate before distributing assets to will beneficiaries, and the trustee who is to hold certain assets on trust for one or more of those beneficiaries must also await administration of the estate and the winding up. Nevertheless, not only is the trustee vested with his duties and powers on his accepting office, but some of his duties, as for example his so-called duty of loyalty to the trust beneficiaries, could well make him responsible to the beneficiaries for his conduct even before he receives title to, or possession of, the trust assets. For example, a trustee may not join with third parties and enter into dealings, designed in any way for his own benefit, in expectation of his acquiring title to the trust assets.

Given then that the trustee is vested with his duties and powers on accepting the office, the question arises regarding what are those duties and powers. These will be discussed in detail in the following pages, but a preliminary problem is the distinction between the duties and the powers of trustees. In practice it is often difficult to determine where the border lies between duty and power.

The primary distinction between a duty and a power is not difficult to grasp. A duty is an obligation; a power is an authority to act. A duty of the trustee compels him to act, or prohibits him from acting, in a certain way. A power in the trustee enables him to act in a certain way, but leaves him with the discretion as to whether or not he should so act. When a duty is owed, or a power is possessed, by a person who is not a trustee or other fiduciary, duty and power can easily be distinguished.

As a fee simple owner of a house, I have a duty to pay property taxes. As the donee of a power of appointment exercisable among my children, I can appoint or not appoint, as I choose. That is to say, not only can I choose which among my children is to have benefit from the property, and how much each appointee is to have, I can also give the matter no thought and appoint to no one. The position of a trustee or other fiduciary is different. The whole purpose of the office of trustee is the administration of property on behalf of others, and therefore the office holder must be compellable to perform his task. In other words, the essence of the trustee's position is obligation, an obligation owed to the trust beneficiaries. It is this situation which focuses attention upon the relationship between a trustee's powers and his duties. For example, if the settlor gives a power of appointment to the trustee, does the trustee have exactly the same freedom as the donee of a power who is not a trustee? Is the trustee permitted to give no thought to the matter?

The obligation which lies at the base of trusteeship has resulted in there being three fundamental duties applicable to all trustees. First, no trustee may delegate his office to others; second, no trustee may profit personally from his dealings with the trust property, with the beneficiaries, or as a trustee; third, a trustee must act honestly and with that level of skill and prudence which would be expected of the reasonable man of business administering his own affairs. These might be called the "substratum" duties, to which the duties associated with the particular trust are added. For example, in a trust for sale the trustee has the duties of assembling all the assets making up the trust property, of selling those assets, and of holding the proceeds of sale upon the trust terms. If those terms provide for a retention of the capital over a period of time, the trustee will also have the duty of investment of the proceeds of sale.

II. ADMINISTRATIVE POWERS AND DUTIES

The powers of the trustee will also be governed by the particular nature of the trust. For example, if the trust fund consists in part of land and the trust property is to be administered as an investment, the trustee will no doubt be given a power of sale, a power of mortgaging, and a power of leasing. Each of these activities is associated with active estate management, as are powers of insuring, of repairing at the estate's expense, and of discharging all taxes upon the property. As between successively entitled trust beneficiaries, the trustee may well have to determine whose interests are ultimately to share the burden of these outgoings, and in what proportion, but the trustee must have the immediate power to keep the property intact and to meet all financial claims of third parties against the trust.

Each of these powers of administration, for such they are, is an authority to the trustee to act, if need arises, in the manner set out by the power. However, in exercising each power the trustee is subject to the "substratum" duties. For example, if a power of sale needs to be exercised he cannot get another to carry out the sale and subsequently wash his hands of any responsibility on the grounds that he had nothing to do with the choice of purchaser or the actual sale. Neither can a trustee sell the property in question to himself, or to a beneficiary or stranger with

arrangement that the trustee will then buy it back from the beneficiary or stranger. Finally, if the trustee sells the trust property he must not only be honest, but show a reasonable level of care and skill in his conduct of the operation. For example, he should not convey title before he has received the agreed remuneration, and if he does do so and loss ensues to the trust, he will be liable to make it good out of his own resources.

An administrative power may commence as such, and then, on the occurrence of an event, become a duty. For instance, the settlor conveys land to the trustee and gives him a power of sale to be exercised if, prior to the beneficiary attaining the age of twenty-five, the trustee in his discretion is made an excellent offer for the land. Prior to sale the income of the property is to be paid to the beneficiary. If the property remains unsold when the beneficiary attains twenty-five, the land is then to be sold and the proceeds paid to the beneficiary. In order that the trustee shall not be compelled to sell whatever the state of the market at that time, however, the settlor confers upon the trustee a power to retain for a reasonable period after the date of the beneficiary's twenty-fifth birthday.

In such a case the trustee possesses a power of sale, and then, when the beneficiary attains twenty-five, the trustee becomes subject to a trust for sale with power to retain. The authority, if not previously exercised, now becomes a duty, but with an attached authority. Nevertheless, because he is a trustee, the trustee is also throughout subject to the three "substratum" obligations or duties previously mentioned. It is the particular action required of him, that is, to sell, which is first an authority and then a subsequently a duty.

III. DISPOSITIVE POWERS AND DUTIES

The significance of the "substratum" obligations when a trustee has a power to [illegible] becomes particularly significant, however, when the power or powers in question are not administrative, but dispositive. A dispositive power is the authority to allocate trust property, either income or capital or both, to a beneficiary or among two or more beneficiaries. For example, the trustee may be given a power to make capital payments to an elderly life tenant should income prove insufficient to provide a reasonable standard of living. Another example might concern a trust of property for the children of X, the income to be accumulated until the youngest attains twenty-five years. X, as trustee, is empowered on that event occurring to distribute the property among the children as he shall judge best, having regard to their then existing and future likely needs. Any property not distributed by the trustee is to pass to Y's child. This is a power of appointment, to which earlier reference was made, and the question is whether the "substratum" obligations imposed upon a trustee limit the freedom of activity which another donee of the power, who is not a trustee, would enjoy.

The answer can probably best be given in this way. Powers to make capital payments, to advance capital to those contingently entitled to shares of capital, or to apply accumulated or accumulating income towards maintenance, are commonly given to trustees. In each of these cases the trustee must adhere to that "substratum"

IV. LIABILITY OF TRUSTEES IN THE EXERCISE OR NON-EXERCISE OF DISCRETION

In the discharge of their duties trustees, as we have seen, must demonstrate both honesty (or good faith) and the standard of care which would be shown by the reasonable and prudent business person. What is the position if the trust instrument confers upon the trustees a power which they may exercise at their own discretion? Do they have more than a duty to act honestly in the thought which they give to the exercise of this power, and the manner in which they exercise it? That is to say, are they to be the sole judges of what is reasonable?

The conferment of discretion arises in this way: the trustees are given a power to act which, wholly or partly, they have a discretion to exercise as they see fit. For instance, the power of encroachment upon capital in favour of a life tenant, should that person be in need, gives them the discretion whether or not to exercise the power and, if they exercise it, to decide how much they draw from capital for the purposes contemplated. On the other hand, trustees have a duty to invest, but may have been given the discretionary power to select such investments as they think best. In this case they have to act, but are free to choose how they carry out their task. When the trustees have a duty, or a power, which they must exercise in a given manner on the occurrence of given circumstances, they have no discretion. They have an obligation which they must discharge, and they will be in breach of trust if they do not discharge the task or they discharge it with anything less than honesty and the standard of care of the reasonable and prudent business person. Whether an apparent power is, in fact, a duty, or there is an element of discretion open to the trustees in the exercise of the power, is a matter of construction of the trust instrument.[338]

The settlor or testator may create a power which by its nature is discretionary, or he may add that it is to be exercised at the discretion or at the absolute and uncontrolled discretion of the trustees. In the latter situation, he is attempting to underline that he wishes no interference with the trustees, and, since the beneficiaries have no such power to intervene in any event,[339] his meaning can only refer to the courts. Indeed, all trustee discretions involve the question of how far the courts are thereby excluded. If, for instance, the trustees have a duty to sell but a power to postpone sale at their discretion, or a power of encroachment on capital to be exercised "in their absolute and uncontrolled discretion", such powers can only mean – or so it appeared to some nineteenth century courts who were confronted with this problem[340] – that decisions are to be made by the trustees within their personal

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Re Barrow (1980), 29 O.R. (2d) 374, 113 D.L.R. (3d) 184 (Ont. H.C.), appeal dismissed (1981), 129 D.L.R. (3d) 767 (Ont. C.A.), leave to appeal to S.C.C. refused (1982), 41 N.R. 536 (S.C.C.). *Cf. Quinn v. Manitoba (Executive Director of Social Services)*, [1981] 5 W.W.R. 565, 124 D.L.R. (3d) 715 (Man. C.A.).

Assuming that the trustees are not acting in such a way that they are in breach of trust. Though the point at which they can be said to be in breach is the very matter in dispute with which these pages are concerned.

Osborne v. Gisborne (1877), L.R. 2 App. Cas. 300 (U.K. H.L.) is the leading authority. The English cases are assembled in *Underhill and Hayton* at paras. 897 *et seq.* and in *Lewin* at 1098 *et seq.*

conception of what is reasonable and proper. The creator of the trust, it was noted, does not intend the courts to make the discretionary decisions. If the settlor or testator had added such words as "absolute and uncontrolled" to the conferment of discretion, the courts were inclined to see this as yet a further degree of removal of the courts from determining what was reasonable and desirable.

On the other hand, the principle of law is that no settlor or testator can take away from the courts their ultimate jurisdiction. There has to be a limit to the extent to which the court can be excluded. Indeed, it is this same principle which has brought exculpatory clauses into question: how far may the trust instrument exclude the trustees from responsibility for what they have done or failed to do? In the present context, the question becomes: how far can the instrument be permitted to make the trustees the only arbiter of what is the proper exercise of a power, or whether it should be exercised at all?

The nineteenth century courts were inclined to see the grant of discretion, especially of uncontrolled discretion, as making the trustees subject only to the duty to demonstrate good faith in the exercise of the power.[341] And the view has prevailed in the courts to this day that in all cases of the conferment of discretion the trustees are to make the decisions and not the courts.[342] Consequently, the courts are not willing to make these decisions on an application to the court by the trustees unless the discretion is surrendered to the court,[343] and when the trustees seek to surrender their discretion as to what they should do in relation to future events as they occur, the courts have refused to make any such decision, giving as their reason that this task lies within the trustees' duty. The task was expressly given to them.[344]

Nevertheless, this does not solve the problem as to the point at which the beneficiaries may properly ask the courts to rule on the propriety of what the trustees have or have not done, or what they intend to do. When discretion is expressly conferred without the addition of such words as "absolute" or "uncontrolled", some courts have taken the view that the trustees must show not only good faith, but that their decision was "properly" made.[345] And, as the conferment of such discretions has become more familiar in the present century, the courts have tended increasingly

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[341] This was the case, e.g., in *Gisborne v. Gisborne*, *ibid.*, in which, however, the will gave "uncontrollable authority" to the trustees. Previous decisions of lower courts had intervened on a variety of grounds which may be summed up as improper conduct on the part of the trustees. Where a simple discretion is given (i.e., not "absolute", "uncontrolled", etc.), the authorities vacillate considerably as to what more than mere honesty is required. See also *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571 (Eng. Ch. Div.). The courts take the same approach whether the discretion is conferred by the instrument or by statute: *Sayers v. Philip* (1973), 38 D.L.R. (3d) 602 (Sask. C.A.).

[342] *Re Boukydis*, 60 O.L.R. 561, [1927] 3 D.L.R. 558 (Ont. C.A.); *Re Mattick* (1967), 60 W.W.R. 505, 62 D.L.R. (2d) 539 (B.C. S.C.) at 543 [D.L.R.].

[343] *Talbot v. Talbot* (1967), [1968] Ch. 1, [1967] 2 All E.R. 920 (Eng. C.A.). *Cf. Re Steed*, [1960] 1 Ch. 407, [1960] 1 All E.R. 487 (Eng. C.A.).

[344] E.G., see *Re Edwards* (1975), [1975] W.W.D. 95 (Sask. Q.B.).

[345] This term was employed by Jessel M.R. in *Tempest v. Lord Camoys*, *supra*, note 341, at 578 (a case of absolute discretion).

to stress this additional requirement that a "proper" or "not unfair" exercise of the discretion be proved by the trustees, even when the discretion is made absolute.[346]

It will be evident, however, that the courts are in a difficult position. The rule of behaviour required of trustees in the discharge of their duties is good faith and the care of the reasonable business person. Yet, as we have suggested, the conferment of discretion appears to make the trustees their own judges of what is reasonable. In attempting to uphold the court's necessary jurisdiction on the one hand, and the trust creator's intention on the other, different courts have described the extent of the court's power of intervention in different ways. Some have spoken only of the requirement of "good faith",[347] while others have said the courts will not permit a "wrongful," "improper," or "unfair" exercise of the power, or refusal to exercise it.[348] Essentially, however, all courts are attempting to discover and formulate in language the elusive mid-way position between imposing the reasonable person test as if there were a duty to accomplish certain ends, and conceding a sheer licence to the trustee to do what he likes.

Nor is this process helped by the ambiguity of such terms as "good faith," "improper" and "unfair." For instance, as has been previously suggested, what exactly does "good faith" mean? A trustee is in bad faith if he intentionally exercises a discretionary power for his own wrongful benefit; but could it be argued, and have courts so intended, that bad faith includes the situation where the trustee abuses his discretion by exercising it in a manner, or not exercising it for a reason, which lies outside the purpose or scope of the discretion?[349]

One solution is to say that the decision belongs to the trustee, and not the court; but the court can supervise the *manner* in which the decision was made.[350] Obviously, the power can only be exercised within its terms. A power to advance property to the settlor's children does not permit advancement to her nephew.[351] Beyond that,

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[346] E.g., *Re Courage's Will* (1975), 10 Nfld. & P.E.I.R. 511 (Nfld. T.D.), *Re Wright* (1976), 14 O.R. (2d) 698, 74 D.L.R. (3d) 504 (Ont. H.C.). See also *Re Blow* (1977), 18 O.R. (2d) 516, 82 D.L.R. (3d) 721 (Ont. H.C.); "absolute and uncontrolled" were shown to be irrelevant where the trustee has simply failed to consider as he should the exercise of the power.

[347] The *Gisborne v. Gisborne* approach, followed in both England and Canada.

[348] In *Tempest v. Lord Camoys*, *supra*, note 341, at 580, Cotton L.J. spoke in terms of the "wrong or unreasonable". In *Re Roper's Trusts* (1879), 11 Ch. D. 272, a simple discretion, Fry J. in a very short judgment appeared to think the court has the right to intervene when the discretionary decision is not "sound". In *Re Locker's Settlement Trusts* (1977), [1977] 1 W.L.R. 1323, [1978] 1 All E.R. 216 (Eng. Ch. Div.), Goulding J. continued to say that, though the discretion conferred is "absolute and uncontrolled", the court will intervene if there is trustee *mala fides*. Nevertheless, given the width of considerations that *mala fides* comprehends (see M.C. Cullity, *supra*, note 335), it seems likely that *mala fides* includes actionable unfairness. The adjectives "absolute" and "uncontrolled" appear today to add nothing. See, however, the Court's examination of "absolute discretion" in *Fox v. Fox Estate*, *infra*, note 366.

[349] See *Ingraham v. Hill* (1920), 53 N.S.R. 442, 51 D.L.R. 98 (N.S. C.A.), and M.C. Cullity, *supra*, note 335.

[350] There is a useful analogy here to the judicial review of administrative action.

[351] Cf. *Canada Trust Co. v. Fasken* (1990), 69 D.L.R. (4th) 575, 37 E.T.R. 216 (Ont. H.C.), affirmed (1994), 98 D.L.R. (4th) 288, 49 E.T.R. 112 (Ont. C.A.): an attempt to appoint property to which the power did not apply; *Breadner v. Granville-Grossman*, [2001] Ch. 523: attempt to exercise power one day after it expired.

the court may conclude that the trustee has breached one of the duties which condition all of his trustee activities. It might be that he did not demonstrate the care or prudence that is required, as where the decision was made without making a reasonable effort to obtain and review the pertinent factors.[352] More likely, it may be arguable that the trustee breached his duty of loyalty as it applied to the power.[353] Apart from requiring good faith, the duty of loyalty generally requires the trustee to make the decision with regard to the best interests of the beneficiary. In the context of a dispositive power, the trustee is specifically authorized to judge between and among interests, possibly favouring the interests of one beneficiary ahead of others, and possibly favouring the interests of someone who is not a beneficiary of the trust over those of someone who is.[354] For this reason, the duty of loyalty as it applies to dispositive powers requires the trustee to act in consideration of the purpose for which the power was given.[355]

Courts in England have set aside discretionary decisions which were dishonest or reached by the consideration of factors outside the scope or purpose of the power, and they have intervened when trustees have done nothing about the exercise of the discretion. In other words, the criteria to be applied to the trustee are these: he must be honest; beyond that, if honesty has a narrow meaning, he must act within the confines of the authority that was given to him; and he must perform the duty, fundamental to the trustee's office, that he give his mind to whether and, if so, how he ought to exercise the discretion. A power given to a trustee as a trustee always imposes upon him the duty to consider whether in the circumstances he should exercise it, and the nature of the power, such as a power to maintain out of accumulating income, may require him to have the circumstances under constant review.

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[352] *Nichols v. Wevill Estate* (1995), (sub nom. *Nichols v. Central Guaranty Trust Co.*) 13 B.C.L.R. (3d) 137, 9 E.T.R. (2d) 292 (B.C. S.C.). This reasoning is also part of the basis of the decision in *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), additional reasons at 2002 CarswellOnt 3579 (Ont. S.C.J. [Commercial List]), leave to appeal refused 2004 CarswellOnt 691 (Ont. C.A.), affirmed (2004), 42 B.L.R. (3d) 34 (Ont. C.A.), reviewing the decision of a corporate board in relation to its power to make contracts.

[353] For a case in which the exercise of a discretion was tested against all of these standards, see *Yates v. Air Canada*, 2004 BCSC 3 (B.C. S.C.).

[354] There may be a trust in favour of A, and a power to appoint to B, who is therefore merely the object of a power and not a trust beneficiary in the technical sense. B has only a hope that the power will be exercised in his favour. But clearly, such an exercise may be proper, even though it is not in the interests of a trust beneficiary.

[355] *Vatcher v. Paull* (1914), [1915] A.C. 372 (U.K. H.L.) at 378; *Dunlop v. Ellis* (1917), 41 O.L.R. 303 (Ont. H.C.) at 307; *Klug v. Klug*, [1918] 2 Ch. 67 (Eng. Ch. Div.); *McPhail v. Doulton* (1970), [1971] A.C. 424 (U.K. H.L.) at 449, 457; *Re Hay's Settlement Trusts*, [1982] 1 W.L.R. 202 at 209; *Turner v. Turner*, [1984] Ch. 100; *Re Beatty*, [1990] 1 W.L.R. 1503 at 1506; *Hayim v. Citibank NA*, [1987] A.C. 730 (Eng. Prob. Ct.) at 746; *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 372, 46 E.T.R. 128 (Ont. Gen. Div.); *Abacus Trust Co. (Isle of Man) Ltd. v. Barr*, [2003] Ch. 409, [2003] 1 All E.R. 778 (Ch. Div.); *Fox v. Fox Estate*, *infra*, note 366; *Wong v. Burt*, [2005] 1 N.Z.L.R. 91 (C.A.), at para. 27-33.

In Canada, working with the English precedents, common law courts have had the same difficulties.[356] However, it is arguable that Canadian courts have been less reluctant than the English courts to intervene where they consider that wrongful exercise or non-exercise of discretionary powers has taken place, whether or not the discretion conferred is "absolute and uncontrolled".[357] An alternative argument is that the grounds upon which intervention will take place are probably the same, and that differences appear to exist because of the ambiguity of terms employed and the difficulty of formulating a precise rule with necessarily general language.[358]

Whatever the respective merits of these arguments, however, the following seems now to be established in Canada. First, it must be ascertained as a matter of construction to what task the discretion is attached.[359] For instance, a discretionary trust may impose the duty upon the trustees to distribute the whole of the trust fund, but confer upon them a discretion as to the members of the class of beneficiaries who are to receive payments, and how much each is to receive. Again, a trustee may have a duty to maintain, and this requires him to act as the law defines maintenance, but at the same time he may have a discretion as to the times at which, and the manner in which, he makes payments for this purpose.[360] Sometimes the line between duty and discretion is not easy to discover, but a trustee who interprets himself to have a discretion when in fact he has a duty does so at his peril. Second, the court will not intervene simply because the beneficiaries or any other complainants do not agree with the decision of the trustees in the exercise of their discretion. Nor will it intervene merely because it would not have come to the same decision itself. The court will intervene,[361] however, if (1) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision; (2) the trustees have taken into account considerations which are irrelevant to the discretionary decision they

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[356] See for a collection and analysis of the authorities; *Re Floyd* (1960), [1961] O.R. 50, 26 D.L.R. (2d) 66 (Ont. H.C.). Also *Re Sievert* (1921), 51 O.L.R. 305, 67 D.L.R. 199 (Ont. C.A.); *Re Rutherford*, [1933] O.R. 707, [1933] 4 D.L.R. 222 (Ont. C.A.).

[357] The English and Canadian authorities are exhaustively surveyed and discussed by M.C. Cullity, *supra*, note 335 (U. of T.L.J.). And see *Re Blow*, *supra*, note 346, where Rutherford J. concluded that non-exercise was a ground of judicial intervention quite distinct from the *Gisborne v. Gisborne* and bad faith grounds.

[358] See, e.g., *Re Williams* (1946), [1947] O.R. 11, [1947] 1 D.L.R. 882 (Ont. C.A.): good faith, *Gisborne v. Gisborne* followed; *Re Banko*, [1958] O.R. 213, 12 D.L.R. (2d) 515 (Ont. C.A.) at 217 [O.R.]: failure to act *bona fide*. Having examined the judicial language of various English and Canadian authorities – including Middleton J. in *Re Bell* (1923), 23 O.W.N. 698 (Ont. H.C.) at 699, and McRuer C.J.H.C. in *Re Banko* – it was the view of Spence J. in *Re Floyd* (1960), [1961] O.R. 50, 26 D.L.R. (2d) 66 (Ont. H.C.), that the trustee must act "honestly and fairly". See also *Re Mattick* (1967), 60 W.W.R. 503, 62 D.L.R. (2d) 539 (B.C. S.C.) at 544 [D.L.R.], and *Sayers v. Philip* (1973), 38 D.L.R. (3d) 602 at 607 (Sask. C.A.).

McNeil v. McNeil, 2006 CarswellAlta 1147, 65 Alta. L.R. (4th) 313, 27 E.T.R. (3d) 262 (Alta. Q.B.).

Re Butler, [1951] O.W.N. 670, [1951] 4 D.L.R. 281 (Ont. H.C.); *Re Evans* (1902), 3 O.L.R. 401. Even if the discretion conferred is absolute and uncontrolled, the court is not prevented from intervening when the power is exercised "improperly": *Re Butler*, *ibid.*

had to make;[362] or (3) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.[363]

Trustees may be subject to court intervention under (1), above, and their decision be set aside if there has been an improper preference of one class of beneficiaries over another. For instance, a trustee is not in good faith or has not dealt properly between the objects of his discretion if his decision obviously prejudices the income beneficiary to the gain of the capital beneficiary. But in this instance the trustee who so exercises his fiduciary powers has also broken the separate and distinct rule of equity that as a trustee he must act impartially as between the income and capital beneficiaries. The conferment of a discretion does not waive the application of this rule. If he wishes that rule not to apply, the settlor or testator must go on to say so. But, for example, a power to advance capital to the income beneficiary clearly authorizes partiality. Consequently, it cannot categorically be said that an act or omission which is not impartial constitutes bad faith or lack of fair dealing as required by criterion (1). It all depends on the total language of the instrument.[364]

As for (2), this is illustrated by the cases in which an exercise of a power has been set aside because the trustees considered factors which they ought not to have considered, or indeed if they failed to consider factors which they ought to have considered.[365] A clear example is *Fox v. Fox Estate*.[366] The trustee was the testator's widow; she was also a life beneficiary as to 75 per cent of the trust. Her son was the life beneficiary of the rest, and also the capital beneficiary of the whole property, should he survive his mother. The widow had a power of appointment over the capital in favour of her grandchildren. She exercised this power, as to the whole capital, so depriving the son of any income or capital interest. That was within the terms of the power; but it was found that she was motivated, at least in part, by her disapproval of the son's marriage. The exercise of the power was set aside, and the widow was removed as trustee.

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[362] Whether a consideration is irrelevant is an issue of fact, and the law often gives little guidance. E.g., it is a familiar subject of discussion in American literature as to whether trustees with a discretionary power to distribute income or capital may take into account the income of the beneficiary from other sources. In *Re Mattick*, *supra*, note 358, Smith Co. Ct. J. treated it as a matter of construction of the power, and in this decision he followed *Re Luke*, [1939] O.W.N. 25, [1939] 1 D.L.R. 764 (Ont. H.C.), and *Re Sanderson* (1857), 3 Kay. & J. 497, 69 E.R. 1206. The court followed and applied *Re Luke* in *Hinton v. Canada Permanent Trust Co.* (1979), 5 E.T.R. 117 (Ont. H.C.), affirmed (February 1980), (Ont. C.A.) (unreported). See also M.C. Cullity, *supra*, note 333 (*Special Lectures*) at 23-25 and, *supra*, chapter 13, note 156.

[363] *Boucher v. Boucher Estate* (1990), (sub nom. *Williams v. Bastarache*) 108 N.B.R. (2d) 220 (N.B. Q.B.); *McNeil v. McNeil Estate*, *supra*, note 359.

[364] See *Martin v. Banting* (2001), 37 E.T.R. (2d) 270 (Ont. S.C.J.), affirmed (2002), 46 E.T.R. (2d) 9 (Ont. C.A.).

[365] *Re Hastings-Bass*, [1975] Ch. 25 (C.A.), 41; *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 272, 94 E.T.R. 178 (Ont. Gen. Div.).

[366] (1996), 28 O.R. (3d) 496, 10 E.T.R. (2d) 229 (Ont. C.A.), leave to appeal refused (1996), [1996] S.C.C.A. No. 241, 207 N.R. 80 (note) (S.C.C.). *Klug v. Klug*, [1918] 2 Ch. 67 (Eng. Ch. Div.) is a similar case. This is a classic case; also each member of the C.A. gave a slightly differently concerned judgment concerning the trustee's conduct. See also *Edell v. Sitzer* (2001), 55 O.R. (3d) 198, 7 E.T.R. (2d) 10 (Ont. S.C.J.), affirmed (2004), 9 E.T.R. (3d) 1 (Ont. C.A.), leave to appeal refused (2005), [2004] S.C.C.A. No. 372, 2005 CarswellOnt 96, 2005 CarswellOnt 97 (S.C.C.).

In England, this possibility recently gave rise to a whole line of cases. In most of them, trustees had made decisions based on a misunderstanding of the taxation situation.[367] They sought to set aside their decisions retroactively on the theory that they had failed to take into account a relevant matter—namely, the true taxation situation. This was said to be the effect of the "rule in *Re Hastings-Bass.*"[368] The English Court of Appeal has now said that this was a misunderstanding of that case.[369] A fiduciary decision can be retroactively set aside when it was made for the wrong reasons, but only when this rises to the level of a decision made in breach of fiduciary obligation. This is a much narrower ground for the availability of relief than the later discovery that the taxation consequences of the decision were different from those expected.[370] In Canadian courts no adoption or consideration of the *Hastings-Bass* decision appears to have taken place.

As with situation (1), the liability of trustees under criterion (3) is also established by the independent rule that a trustee, as a trustee, has the fundamental duty to give his mind to whether he ought to exercise a power.[371] But no settlor or testator is likely to exclude this duty, which arises from the fiduciary nature of the trustee's office.[372]

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[367] There is a thorough review of the cases in *Sieff v. Fox*, [2005] 1 W.L.R. 3811 (Eng. Ch. D.).

[368] *Supra*, note 365.

[369] *Pitt v. Holt*, [2011] EWCA Civ 197. In August 2011, the U.K. Supreme Court granted leave to appeal.

[370] The same interpretation of the relief now available is taken in L. Smith, "Can I Change My Mind? Undoing Trustee Decisions" (2008) 27 E.T.P.J. 284, which in addition discusses rescission and rectification of trustee decisions. *Pitt v. Holt*, *ibid.*, also addresses the question of rescission of trustee decisions for mistake, holding (at para. 210) that "there must be a mistake on the part of the donor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction." This test excludes the possibility of rescission for mistakes as to the taxation consequences. Note that *Pitt* was not followed on this point in *Re R.*, [2011] JRC 117 (Royal Court of Jersey), holding that a dispositive decision can be set aside for mistake so long as the mistake was of "so serious a character as to render it unjust on the part of the donee to retain the property." In that case, a catastrophic mistake as to taxation consequences allowed the decision to be set aside. In British Columbia, outside of trust law and albeit in the context of a rather trivial error, it was held that a mistake as to taxation consequences did not allow a gift to be rescinded: *Richert v. Stewards' Charitable Foundation*, 2005 CarswellBC 315, 15 E.T.R. (3d) 92 B.C. S.C.), affirmed 2006 CarswellBC 72, 49 B.C.L.R. (4th) 138 (B.C. C.A.). See also *Re Motorola New Zealand Superannuation Fund*, [2001] 3 N.Z.L.R. 50 (H.C.), which contains discussion of the ability of trustees to correct their own errors.

[371] E.g., *Sayers v. Philip*, *supra*, note 358: the trustee said and did nothing when requested to exercise a discretion (a statutory power of maintenance in favour of minors). There was "a suggestion" that the testatrix had not wished any part of her estate to fall into the hands of the children's father; if this was the only ground for refusal to make payments, the court considered such a refusal to amount to non-exercise. See also *Turner v. Turner* (1983), [1984] Ch. 100, [1983] 2 All E.R. 745; *Hedley Estate v. Grant* (1998), 74 O.T.C. 234 (Ont. Gen. Div.).

[372] In this section we have been considering the substantive rules of law by which trustees' exercise of their discretion is subject to judicial review. In chapter 20, Part II N, we consider the closely related subject of applications to the court by trustees in respect of their discretions, with a particular focus on the problem arising where trustees cannot agree.

reside. The question is whether the trustees can release property from the trust, acting under their power, by transferring it to other trustees in London, England.[135] Is it an impermissible delegation by the original trustees? If not, what beneficial interests may be created under such a trust? If there is any doubt on either question, can the original settlor give his trustees power both to create new trusts under the power of maintenance (or of advancement or appointment) and to set up what beneficial interests they consider appropriate?

One guide to Canadian thought in this area is *Rutherford v. Rutherford*.[136] A testator left a remainder interest in his residue to his son, A, in the manner that the trustees held it "for the use of" A, his wife and children with full discretion to pay the whole or part of the income and capital to A or his wife for "their proper support and maintenance and for the proper support, maintenance and education of their children." The trustee and A entered into a deed whereby the trustee declared it held the entire trust fund for A's "own use absolutely". A thereupon covenanted that he would settle the property upon himself for life, remainder to his wife and two children. A few days later A died, and the question concerned the validity of this exercise of the testamentary power. Ferguson J. held that it was invalid. A discretion to make payments for maintenance and support did not justify paying over the entire trust fund. The decision is justifiable in the sense that the trustee did not have a sufficiently broad power to enable it to do what it had purported to do. On the other hand, if a dispositive discretion is sufficiently widely drafted, then a court is likely to conclude that if the trustees have the power to transfer property outright to a beneficiary, it should be possible to settle property on a new trust for that beneficiary. This was the decision in *Hunter Estate v. Holton*.[137] Indeed, the ever-changing requirements for sound estate planning, particularly for the purposes of tax planning, are causing such clauses to be increasingly familiar.[138]

VI. DISCRETIONARY TRUSTS

Trustees have administrative powers, and often a testator will state in his will in setting up a trust that the trustees are to have full discretion in the exercise of a

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Though it is sometimes called a "sub-trust", that term is more apt where the beneficial interest under one trust is itself the trust property under the new sub-trust. Conversely, where trust property is advanced by trustees out of one trust to create a new settlement, there is no doubt that the trustees of the new trust are quite independent of the original trust, and are responsible to their beneficiaries only. For an example of a power which makes clear that the resettled property is transferred out of the first trust completely, see Kessler and Hunter, *Drafting Trusts and Will Trusts in Canada*, 3rd ed. (2011) at para. 11.7.

[1961] O.R. 108, 26 D.L.R. (2d) 369 (Ont. H.C.).

(1992), 7 O.R. (3d) 372, 46 E.T.R. 178 (Ont. Gen. Div.). Even though a dispositive discretion is wide enough to permit the creation of a new trust, the power to do so is held in a fiduciary capacity. As a result, it could not be exercised, for example, merely because the first trustee wished to be relieved of the trust: *Hedley Estate v. Grant* (1998), 74 O.T.C. 234 (Ont. Gen. Div.).

Kessler and Hunter, *supra*, note 135, at 200, recommend for the avoidance of doubt that a trust should, where appropriate, include distinct powers of appointment, resettlement and advancement; the drafter "should not rely on one to do the work of the others."

particular power. This does not really add anything to the trustees' power since under trust law they are free to exercise all their powers as they think best for the good of the beneficiaries and the purpose of the trust. However, the testator may wish to demonstrate, by speaking of discretion, over what property and for what purpose it is he wishes the power to be exercised. In *Sea v. McLean*,[139] for instance, the trustees were empowered to sell such portions of the testator's real estate as in their discretion seemed necessary to discharge the testator's debts. This explains the reference to discretion.

Dispositive powers, also by their very nature, give a discretion to the trustees, and, as we have seen, the scope of the discretion will be determined both by the nature of the power in question[140] and by the testator or settlor. He will decide in favour of whom the power may be exercised, and possibly place a ceiling on the amount that may be paid out to them.[141]

Discretionary trusts, or "sprinkling trusts" as they are known in the United States, occur when the trustees are vested with property and are required to allocate it as they think fit among a class of beneficiaries.[142] As we have seen, the trustees may be required to distribute all of the property, income and capital, among the members of the class;[143] alternatively, there may be provision for any property left over at a certain time to revert to the testator's estate or go on as a gift over to another or others.[144] In this second case, there is no obligation to distribute to the class, only a power of appointment in their favour, with a (defeasible) trust for the takers in default.[145] This distinction may be important if there is to be a termination under *Saunders v. Vautier*.[146] In the first case, where there is an obligation to distribute to the class, then if all the members of the class are or become adult, and are of sound mind, they can terminate the trust prematurely, even though the trustees have not as yet determined the proportions or even decided to give every beneficiary some

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[139] (1887), 14 S.C.R. 632 (S.C.C.).

[140] E.g., advancement, maintenance. But see *Re Blow* (1977), 18 O.R. (2d) 516, 82 D.L.R. (3d) 72 (Ont. H.C.) at 524 [O.R.], at 730 [D.L.R.]: an "uncontrolled discretion" to encroach on capital for the benefit of a life tenant means that, given *bona fide* exercise, the testator intends that the remaindermen may ultimately receive nothing. *Sed quaere* if this is not the effect of such a power, even without any adjective. See also *Re Chechik* (1976), 72 D.L.R. (3d) 271 (Man. Q.B.): "unfettered discretion" to encroach on capital – such language affects the construction of both how much may be advanced and the grounds for encroachment.

[141] For an analysis of judicial control of trustee discretions generally, see, *supra*, chapter 18, Part IV.

[142] The term "sprinkling" assumes a discretionary trust in favour of a class of persons, among whom the trust income or capital, or both, is to be distributed. This is an obligation which the trustees must perform, as opposed to a power. See, *supra*, Part I, and chapter 17.

[143] E.g., *Ingraham v. Hill* (1920), 53 N.S.R. 442, 51 D.L.R. 98 (N.S. C.A.); and *Martin v. Bartlett* (2001), 37 E.T.R. (2d) 270 (Ont. S.C.J.), affirmed (2002), 46 E.T.R. (2d) 93 (Ont. C.A.).

[144] Or a member of the class. The principle is the same. This person or persons is called the "taker in default" because they take in default of exercise of the power of appointment. See for example *Breadner v. Granville-Grossman*, [2001] Ch. 523.

[145] *Supra*, text accompanying note 9.

[146] On which see chapter 23.

thing.[147] This is because, together, they account for all possible beneficial interests. On the other hand, if there is a taker in default, that person will also need to join if the trust is to be collapsed prematurely.[148] However, whether or not the trustees must distribute the *whole* property in some manner among the members of the class, they clearly hold a dispositive discretion.[149]

The discretionary trust normally requires the trustees to dispose of the trust property to whom among the class they think fit,[150] in the amounts and when they think fit. Sometimes they also have a discretion as to the form in which disposition is to be made, and even though discretionary trusts normally involve funds so that they will issue cheques, this will allow them to transfer shares or stock, for instance. It would seem that, even without an express discretion as to the form of disposition, they have an implied discretion stemming from the nature of the trust to make dispositions in the form of re-settlements on new trusts.[151] The property which is to be distributed will be decided upon by the settlor or testator. It may be the income of the capital, or income and capital.[152] If the object of the trust is to provide

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[147] Although such beneficiaries can terminate the trust by agreement, they cannot keep the trust on foot and at the same time direct the trustees in the exercise of their discretions: *Re Brockbank*, [1948] Ch. 206 (Eng. Ch. Div.).

[148] *Re Smith*, [1928] Ch. 915 (Eng. Ch. Div.). The taker in default is the trust beneficiary. The members of the discretionary class are only objects of a power, but their potential interest apparently means that they too must join in any termination of the trust (*Schmidt v. Rosewood Trust Ltd.*, [2003] 2 A.C. 709 (England P.C.), at para. 41). See chapter 23, Part II F.

[149] Two things are axiomatic:

(1) that provided the trustees act with good faith (i.e., honestly, thoughtfully, objectively and fairly) in the exercise of their discretion, the court will not interfere or counter their decision. The leading case on this subject is *Gisborne v. Gisborne* (1877), L.R. 2 App. Cas. 300 (U.K. H.L.), which has consistently been followed in Canada. See, e.g., *Singer v. Singer* (1916), 52 S.C.R. 447, 27 D.L.R. 220 (S.C.C.); *Earle v. Lawton* (1908), 4 N.B. Eq. 86 (N.B. S.C.); and *Re Williams* (1946), [1947] O.R. 11, [1947] 1 D.L.R. 882 (Ont. C.A.); *Fox v. Fox Estate* (1996), 28 O.R. (3d) 496, 10 E.T.R. (2d) 229 (Ont. C.A.), leave to appeal refused (1996), [1996] S.C.C.A. No. 241, 207 N.R. 80 (note) (S.C.C.); but see also M.C. Cullity, (1975) U. of T. L.J. 99;

(2) the trustees must be unanimous in their decisions as to the exercise of their discretion, unless the settlor or testator has provided to the contrary. See *Re McLaren* (1922), 51 O.L.R. 538, 69 D.L.R. 599 (Ont. C.A.). See further, *supra*, chapter 18, Part IV. The British Columbia Law Institute, "A Modern Trustee Act for British Columbia", Report No. 33, October 2004, has recommended reversal of the rule, i.e., that trustees may act by majority subject to a contrary intent (see s. 12 of the draft Act).

[150] The trustees may also be empowered to add further beneficiaries to the class, or to both add and delete beneficiaries. Such a clause is familiar in offshore trusts, but it is now appearing in Canadian onshore trusts. See Donovan Waters, "The Power in a Trust Instrument to Add and Delete Beneficiaries" (2012) 31 E.T.P.J. 173.

[151] I.e., instead of paying out a sum, or transferring assets, to a beneficiary (or his guardian) as an outright disposition, the trustees create a trust for the beneficiary, on such terms as they consider appropriate, and pay or transfer to the trustees of this trust. See *Hunter Estate v. Holton*, *supra*, note 137; Kessler and Hunter, *supra*, note 135, at 196.

[152] Any property, realty or personalty, may be the subject-matter of the trust. In *Re Williams*, *supra*, note 149, apparently the only reported Canadian case of a protective trust, income only was available. The importance of this case is that it set up a series of protective and discretionary trusts of a simple, but ingenious nature. See Waters, *Restraints on Alienation and Anticipation*, 1971, a study prepared for the Ontario Law Reform Commission in connection with the Trusts Law project, and available

maintenance for the members of the class, the trust discretion will normally be over the income of the trust fund, possibly with an added power to encroach on capital should need arise. If the object of the trust is to enable the trustees to make payments or transfers to members of the class, so as to secure the maximum advantage to these members under present and future taxing statutes, it will normally be both the income and the capital of the trust fund which is to be distributed.

American trust law commonly distinguishes between discretionary trusts and "support trusts", but this does not mean the discretion to be exercised is any different. This distinction is concerned rather with the object of each trust. A "supportive trust" is obviously concerned with the maintenance of the members of the class,[153] while a "sprinkling trust" may or may not provide the trustees with a purpose that they are to have in mind.[154] In practice the object of the discretionary trust is either to protect the beneficiaries from themselves, or from a heavier tax liability than might otherwise have been incurred in the transmission of the wealth of the settlor or testator.[155] When the beneficiaries are minors, the need of a discretionary trust for maintenance purposes is evident. Such persons are not being protected from themselves; they have no power to hold property for themselves. Beneficiaries who are of age may well require protection; at least that is the view of many settlors and testators of those to whom they wish to donate property. One difficulty is that Anglo-Canadian common law (unlike United States law) does not allow the creation of an inalienable trust interest which is unavailable to creditors.[156] The danger, of course, is that a beneficiary might sell his income interest for a capital sum, or have it taken by his creditors or his trustee in bankruptcy. The traditional solution, still in statutory form in England,[157] is to give the protected beneficiary an income interest, but to provide that the interest is defeasible on certain events, notably any attempt to transfer it, or a bankruptcy. At that time, a new trust arises, which is a discretionary trust for the

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in all Canadian law school libraries. For the effect of a protective trust in an English will, see *Pratt v. Smith*, [1942] 1 W.W.R. 657, [1942] 2 D.L.R. 234 (Man. C.A.).

153 E.g., *Rose v. Edsall* (1872), 19 Gr. 544 (Ont. Ch.).

154 See, e.g., for an American approach to the use of these trusts, J.C. Williams, "Trusts for Groups of Children and Grandchildren" (1975) 114 Trusts and Est. 140.

155 It may also be that the use of a discretionary trust allows the beneficiary to retain access to some funds. For example, a disabled person may have an entitlement to governmental benefits, which entitlement will be lost if the person has assets above a certain threshold. If the person is a beneficiary (or object of a power) under a discretionary trust, his interest may be incapable of clear valuation (since it is a mere hope). The intended result is that the entitlement to government benefits can be retained, while the person may still derive substantial benefits from the trust. See *Ontario (Ministry of Community & Social Services) v. Henson* (1987), 28 E.T.R. 121 (Ont. Div. Ct.), affirmed (1989), 36 E.T.R. 192 (Ont. C.A.); *Ozad v. Director of Income Maintenance Branch* (December 23, 1998), Doc. 785/ D, [1998] O.J. No. 6498 (Ont. Div. Ct.); and *Guy v. Northumberland (County) Department of Social Services* (2001), (sub nom. *Guy v. Ontario Works (Administrator)*) 201 D.L.R. (4th) 752 (Ont. Div. Ct.). See also Kessler and Hunter, *supra*, note 135, at 348-51; L.A. Frolik, "Discretionary Trusts for a Disabled Beneficiary: A Solution or a Trap for the Unwary?" (1985) 46 U. Pitt. L. Rev. 335; and M. Champine, "Using Discretionary Trusts to Benefit Disabled Persons" (1992) 69 U. of Detroit Mercy L. Rev. 581.

156 Quebec law, however, does. See, *infra*, chapter 28, Part III D 3.

157 *Trustee Act*, 1925, s. 33.

protected beneficiary and his family.[158] In this way, the beneficiary, who is to be maintained from a certain fund until he attains what the settlor or testator regards as an age of greater wisdom, is thus protected from himself. The trustee in bankruptcy of a beneficiary can only claim those sums or that property which the trustees have actually transferred to the beneficiary. Since the trustees may determine which of the members of the class is to have anything under the trust, it follows that the beneficiary is entitled to nothing until it is given to him.[159]

The popularity of the discretionary trust in England prior to 1969 was due to the fact that there was no "passing" of the trust capital for the purposes of the then Finance Acts when a trust beneficiary died, unless he were the penultimate surviving member of the class. As long as there were two or more beneficiaries left in the class, therefore, estate duty was not leviable on the capital, or indeed upon any property which had already been paid by the trustees to the deceased beneficiary. The provisions of the *Finance Act*, 1969, introduced the notional periodic passings of the capital, and this has much reduced the usefulness of the device to English estate planners.[160] Later, for similar reasons, the discretionary trust became extremely popular in Australia.[161] In Canada the same phenomenon has not occurred; there was no burdensome inheritance tax or estate duty, and in general higher rates of income tax will normally be found to arise with respect to property taxed in the hands of the trustees, rather than in the hands or the name of beneficiaries. Nevertheless, because of the flexibility it offers, both to settlors and after the trust takes effect to their trustees, the discretionary trust remains in this country a basic and widely employed estate planning instrument for the purposes of the family unit.[162]

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158 As do all discretionary trusts, this raises the difficult drafting issue of how much discretion should be given to the trustees, and conversely how precisely the rights of beneficiaries should be set out. For example, Kessler and Hunter, *supra*, note 135, at 75-76, propose a different kind of protective trust, in which the protected beneficiary's interest is terminable at the trustee's discretion. *Cf. Re Williams*, *supra*, note 149.

159 This also occurs with a maintenance trust in favour of a single beneficiary if there is a gift over or reversion of any income or capital, as the case may be, which is not given by the trustees to the person to be maintained.

160 For a comment, see H.E. Brunt, "Where have all the discretionary trusts gone?" (1979) 36 The Gazette (Law Society, England) 1092. In England, estate duty was replaced by "capital transfer tax" in 1975, which was replaced by "inheritance tax" in 1986.

161 See further, S.E.K. Hulme, (1976) 5 Australian Tax Rev. 134; and L. Shannon and P. Ziegler, "Trust of an Interest in a Discretionary Trust: Is it Possible?" (1986) 60 A.L.J. 387. See also L.G.S. Trotman, "The Use of Discretionary Trusts in Tax Planning" (1988) 3 Canterbury L. Rev. 291.

162 See M.P. Roy, "Discretionary Trusts: Civil Law Perspectives" (2003) 51 Can. Tax J. 1647. In two articles, "Using Discretionary Trusts in Estate Planning", and "The Discretionary Trust in the Age of 'equity and fairness' ", [2012] J. of Int'l Tax, Trusts & Corporate Planning [forthcoming], Donovan Waters examines the character and structuring of the discretionary trust, and the impact of recent statutory court powers in many Commonwealth common law jurisdictions to set aside, or invade the funds of these trusts.

Court of Queen's Bench of Alberta

Citation: Lecky Estate v. Lecky, 2011 ABQB 802

Date: 20120215
Docket: ES01 096832
Registry: Calgary

Between:

The Personal Representatives
The Lecky Foundation
Caroline Frances Lecky, Jonathan Robert Sirling Lecky, Christopher Hartpole Lecky, Edward Alexander Macmillan Lecky and William Anton Hardinge Lecky

Plaintiffs

- and -

Euphemia Sarah Ann Lecky

Respondent

Corrected judgment: A corrigendum was issued on February 15, 2012; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Madam Justice C. A. Kent

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1. Background.

[1] These applications concern the estate of John MacMillan Stirling Lecky (Mr. Lecky), who died on February 25, 2003 at the age of sixty-three. Mr. Lecky was an entrepreneur and a philanthropist. During his lifetime, Mr. Lecky obtained both an economics degree from the University of British Columbia, and a law degree from Cambridge University. He began his career as an investment banker in Montreal and went on to become a successful businessman. He founded an oil and gas company, Resource Service Group, and was the owner of Okanagan Helicopters as well as the Bow Valley Club. He was the chairman and principal shareholder of the charter airline Canada 3000, a company which was at one time the second-largest airline in Canada, but became bankrupt immediately following the September 11, 2001 terrorist attacks. Mr. Lecky was also an avid sportsman.

[2] At the time of his death, Mr. Lecky was married to Euphemia "Effie" Sarah Ann Lecky (Mrs. Lecky), and was the father of five children from a previous marriage to Frances Marie-Jeanne Lecky - Caroline (who died in August 2010), Johnathan, Christopher, Edward and Anton. Mr. Lecky was also the stepfather of Poppy, Thomas, and Fred, the three children of Euphemia Lecky from a prior marriage.

A. The Will (attached as Appendix A)

[3] At the time of his death, Mr. Lecky had considerable assets, which are now the object of these proceedings. In his Will, Mr. Lecky names two categories of beneficiaries:

1) His wife, Euphemia Sarah Ann Lecky (the primary beneficiary of the Will); and
2) The Lecky Foundation.

In accordance with the terms of a Settlement Agreement reached by the parties, Mr. Lecky's children from his first marriage have become a third category of beneficiaries of the Will:

3) Caroline Frances Lecky (deceased),
Johnathan Robert Stirling Lecky,
Christopher James Hartpole Lecky,
Edward Alexander MacMillan Lecky,
William Anton Hardinge Lecky (the Lecky Children).

[4] The Personal Representatives and Trustees of the Will (referred to as "the Trustees") are appointed by Mr. Lecky in clause 2(a) of the Will. They are jointly:

1) Mrs. Lecky;
2) William J. Fowlis, Mr. Lecky's lawyer and drafter of the Will; and
3) John K. Chan, a chartered accountant and long-serving employee of Mr. Lecky.

1) the *amount of the income to be paid* to Mrs. Lecky under the Residual Trust (in which case the Trustees are not required to pay Mrs. Lecky all the income from the Trust); or

2) the *timing, manner and amount* of *each payment* (in which case the Trustees must pay all of the Residual Trust's income to Mrs. Lecky, but may decide when and how much is paid, as long as the total income is paid).

[47] The Trustees say that the requirement to take into account the distributions from the Spousal Trust, as specified in Clause 5(c), could be given no meaning if they were required to pay Mrs. Lecky all the income from the Residual Trust. The Lecky Foundation and the Lecky children are in agreement. They take the position that it is within the discretion of the Trustees to determine whether, when and to what extent income from the Residual Trust ought to be paid to Mrs. Lecky. In their view, the Trustees are under no obligation to pay annually all of that trust's income to Mrs. Lecky.

[48] Mrs. Lecky submits that the Will grants discretion to the Trustees solely to the extent that they may determine the timing, manner and amount of each payment and that based on the language of the Will and the surrounding circumstances, the Trustees are ultimately required to pay her all of the income of the Residual Trust.

A. The Legal Principles

[49] On this application the Court is tasked with interpreting John Lecky's Will to determine the nature and scope of the duties imposed and the powers conferred upon the Trustees. However, the Court cannot exercise discretion on behalf of Trustees. The Court's primary function is to interpret the Will while the function of Trustees is to exercise the discretion vested in them.

[50] As discussed in *McNeil v. McNeil*, 2006 ABQB 636, 408 AR 144 [*McNeil*] at paragraphs 85 and 87, once the nature and scope of those duties and powers have been determined by the Court, it is solely the task of trustees to decide how best to employ the powers bestowed upon them in fulfilling their duties under the Will. The policy reason for this is patent: a testator's intention that his executors and not the court exercise their judgment in administering his estate is to be respected. So long as they act within the scope of their discretion, the Trustees are to be afforded considerable deference.

[51] It is well-established that the Court's main objective in the interpretation of a will is to discover the subjective intent of the testator at the time he or she made the will: see *e.g. Daniels v. Daniels Estate* (1991), [1992] 120 AR 17, 85 DLR (4th) 116, leave to appeal to SCC refused, [1992] 4 WWR lxix [*Daniels*]. Determining the testator's intent is nevertheless circumscribed by rules regarding the admissibility of evidence.

[52] The jurisprudence dealing with wills and estates has distinguished between two types of evidence: 1) evidence of surrounding circumstances; and 2) direct evidence of the will-maker's

ICLR

***300 Charlotte F. Gisborne, Louisa Mann, H. A. Trevelyan and J. H. Trevelyan v. Walter Joseph Gisborne, Abraham Bass and Others**

Image 1 within document in PDF format.

House of Lords
17 April 1877

(1877) 2 App. Cas. 300

The Lord Chancellor (Lord Cairns), Lord Penzance , Lord O'Hagan , Lord Blackburn and Lord Gordon .
1877 April 17

Analysis

Will—Trustees' Discretion—Two Funds—Form of Decree.

Where there are two funds, both of them applicable to the maintenance of a lunatic, under the management of the Court of Chancery, to one of which the lunatic would be absolutely entitled as her own property, the other of which, so far as she might not benefit by it, would pass away to different persons, the Court might direct her maintenance to be provided for out of the latter fund. But where such latter fund is provided by a will which vests the fund in trustees, and gives them an absolute discretion and "uncontrollable authority" over its application, the Court will not exercise its ordinary power. The fund so specially provided will be left to the exercise (*bonâ fide*) of the discretion of the trustees.

A testator (whose wife had, in her own right, property which was not referred to in his will) devised his real and personal estates to trustees upon various trusts, one of which was that "my said trustees in their discretion, and of their nncontrollable authority, pay and apply the whole, or such portion only, of the annual income, of my real and personal estate and investments, &c., as they shall think expedient to or for the clothing, board, &c., for the

*301 personal and peculiar benefit and comfort of my dear wife." One of the trustees was the testator's brother, and he was made the residuary legatee:—

Held, that the trustees were entitled to exercise an absolute discretion in the application of the fund thus provided by the will.

The absolute discretion and "uncontrollable authority" of the trustees being thus recognised, a declaration in the decree that "their Lordships approve that the trustees should exercise such discretion by paying and applying such portion only of the income of the real and personal estate of the testator as with the income from other sources will make up," &c., was ordered to be struck out.

But this varying of the decree of the Court below was not to affect the costs of the appeal.

Directions given as to how this part of the decree was to be framed.

THIS was an appeal against a decision of the Lords Justices, which had reversed a previous decision of Vice-Chancellor *Hall* [1] .

The first Appellant was a lady who, since her husband's death, had been judicially declared a lunatic, and the other Appellants were the committees of her person and estate. The Respondents were the executors and trustees and beneficiaries of her late husband's property under his will. The question raised depended on the construction of certain parts of that will, and was, in substance, whether the cost of the maintenance of the lunatic was a primary charge on the husband's property, or upon the property to which she was entitled in her own right under the settlement made on her marriage in June, 1861, and which was said to be of the annual value of £662.

On the 11th of October, 1860, the husband, who had for some time previously been paying for the maintenance of

his wife at an asylum the sum of £6 6s. a week, made his will. By that will he gave his furniture, books, wines, &c., to his executors and trustees, "upon trust to permit my dear wife to have the use and enjoyment thereof during her life:" after her death such articles as were unconsumed to be sold, and the produce thereof to sink into the residue of his personal estate. He devised all his real estate and bequeathed his personal estate unto his brother, Walter Joseph Gisborne and *Abraham Bass* , their heirs, executors, &c., respectively, upon trust to deal with the investments as might in their ***302** discretion be found necessary. "And upon farther trust that my said trustees in their discretion, and of their uncontrollable authority, pay and apply the whole, or such portion only, of the annual income of my real and personal estate, and of the investment and securities for the time being, as they shall think expedient, to or for the clothing, board, lodging, maintenance, ease, and support, or otherwise for the personal and peculiar benefit and comfort of my dear wife, *C. F. G.* , during her life, whether competent or incompetent to give an acquittance or discharge, at such time and times, and in such proportions and manner in all respects as my said trustees shall think most conducive to her comfort, enjoyment, and convenience, without being liable to account for such payment or application, or pay the same income, or any part thereof, to any other person or persons for the purposes aforesaid, without seeing to its application." There were then directions as to investments and accumulations, and if at the death of the wife there was any unapplied income it was to sink into the residue of the personal estate. And after her death the real and personal estate to be converted into money for the benefit of certain persons specially named; and then legacies were given, the sum of £100 a-piece to the executors for their trouble, and some small legacies to servants. And as to the residue to divide and apportion the same into four equal shares, one to his brother, Walter Joseph Gisborne (one of the executors and trustees), and the rest to other persons specially named.

There was not in the will any allusion to the marriage settlement, or to the property to which it applied. The testator was not at the time of his death entitled to any real estate, but he left personal estate to the value of above £35,000.

On the 6th of June, 1872, *J. H. Trevelyan* (since deceased) as the next friend of *Charlotte Frances Gisborne* (formerly *Trevelyan*), a person of unsound mind, though not then so found by inquisition, instituted a suit against the two executors and trustees of the will of the Rev. *James Gisborne* , praying that it might be declared that *C. F. Gisborne* was entitled to have a provision made for her in the words of the will out of the income of the testator's real and residuary personal estate during her life, and that that annual ***303** income was the primary fund for that purpose. This bill was afterwards amended by making the persons interested in remainder under the will parties to the suit. The answer of the executors was filed on the 15th of November, 1872. An inquisition in lunacy was taken on the 23rd of November, and the lady was found lunatic, and an order in lunacy was made allowing the sum of £696 per annum for her support, but without prejudice to any question as to the fund from which the sum was to be raised. Committees were appointed, and they were authorized, pending the suit in Chancery upon the construction of the will, to pay the money out of the funds of the settlement, and should there be any deficiency, the executors of the will were (also without prejudice to any question as to primary liability) to make it up out of the testator's assets.

The cause came on for hearing before Vice-Chancellor *Hall* , on the 10th of November, 1874, when the annual income of the testator's estate was declared the fund primarily liable for the total amount of the maintenance of *C. F. Gisborne* . On appeal, the Lords Justices, by an order dated the 15th of March, 1875, reversed this decision, and instead thereof declared that the trustees had an absolute discretion to apply the whole, or any portion, of the income of the testator's estate for the maintenance of his widow. The present appeal was then brought.

Mr. *Davey* , Q.C., and Mr. *J. R. Brooke* , for the Appellants:—

There could be no doubt that the intention of the testator was to employ the income of his property for his wife's maintenance. He never even alluded to the property to which she was entitled under the settlement, but he provided for her comfort by his directions to his trustees, and he shewed that he thought they might exhaust the

annual income of his property in obeying his directions, for he spoke doubtfully about the surplus that might then remain to sink into the residue. He did not intend that his residuary legatees should be benefited at the expense of his wife, or of his wife's estate. The fact that he did not mention the income to be derived under the settlement, favoured that construction of his will, and the decisions of the Courts in previous cases were in support of it; for they all proceeded on the principle that ***304** what would be most beneficial to the lunatic, in case of recovery, ought to be done: Re Ashley [2] ; Methold v. Turner [3] ; Rudland v. Crozier [4] . And that principle became not the less but the more applicable, where the trustee of one of the funds (the one not the property of the lunatic) was also residuary legatee of that fund, and would be personally benefited by throwing the primary liability on the other fund. In Foljambe v. Willoughby [5] the same principle was applied where two distinct funds were given for the maintenance of an infant. Coventry v. Higgins [6] . Winch v. Brutton [7] , Ransome v. Burgess [8] , and Nickisson v. Cockill [9] , were also cited.

Mr. *Chitty* , Q.C., and Mr. *E. Rodwell* , and Mr. *Henming* , Q.C., and Mr. *Dundas Gardiner* , who appeared for the various Respondents, were not called on to address the House.

THE LORD CHANCELLOR (Lord Cairns):—

My Lords, I cannot, after hearing the able argument for the Appellants in this case, entertain any doubt as to the correctness of the decision of the Lords Justices, nor do I think that any one of your Lordships entertains any doubt upon the subject.

My Lords, the question, however much it may be discussed, must really come back to and turn upon the construction of the will which we have before us. No doubt various cases have occurred in the Court of Chancery (to some of which reference has been made) in which, either from the trustees submitting to the Court the question of how they ought to exercise a power or a trust reposed in them, or from questions having been raised by the parties interested ac to whether a trust for maintenance or a similar trust had actually arisen and ought to be acted upon, decisions have been arrived at by the Court which I should be very unwilling to throw the least doubt upon; but those decisions appear to me not at all to touch the present case where, as I shall ***305** submit to your Lordships, you have the trustees made the absolute masters of the question, where you have them armed with a complete and uncontrolled discretion, and where they come before you stating that they are prepared to exercise that discretion within the limits within which it is confided to them by the will.

Now, my Lords, the will in this case is that of a husband, the state of health of whose wife was perfectly well known to him, and appears to have been before his mind at the time he was making his will. That wife, by a settlement made upon the marriage, was entitled to property producing an income of a considerable or substantial amount. All those facts must have been perfectly well known to the testator at the time when he made his will, and in that state of facts he gave the residue of his property to the trustees of his will, and after directing its conversion and investment, he continued in these words:—[His Lordship read the words of the will, see *ante* , p. 302.]

My Lords, larger words than those, it appears to me, it would be impossible to introduce into a will. The trustees are not merely to have discretion, but they are to have "uncontrollable," that is, uncontrolled, "authority." Their discretion and authority, always supposing that there is no *mala fides* with regard to its exercise, is to be without any check or control from any superior tribunal. What is the subject-matter with regard to which they are to exercise this discretion and this authority? The subject-matter is the payment, or the application, not merely of the whole of the income of his real and personal estate, but of such portion only as they deem it proper to expend. It is for them to say whether they will apply the whole, or only a part, and if so what part. And how are they to decide, if they do not apply the whole; what is the part which they are to apply? They are to decide upon this principle, that it is to be such part as they shall think expedient, not such part as shall be sufficient, not such part as shall be demanded by or for the person to be benefited, but such part as they shall think expedient; and upon the question of what is expedient it is their discretion which is to decide.

and that discretion according to which they are to decide is to be uncontrolled.

*306

And, my Lords, if the trustees come before your Lordships and say to you, "We have considered the matter, and we find this lady is in receipt of an income of her own of £500 a year (or whatever the sum may be); we have taken that into account—we think that, under those circumstances, it is expedient that she should have in addition to that £500 a year such a farther sum as the Master in Lunacy has said would be adequate to provide for every comfort which, according to her state of health, she can fairly enjoy —that is the additional sum which we think it expedient should be provided out of the income of which we are the trustees; that is the portion only of the annual income of our residuary estate which we think it expedient should be applied to the maintenance of this lady." If they came before you and said this, I am obliged to ask myself, and I am obliged to ask your Lordships, what right have I or what right have you to say that that is an exercise of the discretion of the trustees which, in the face of the statement that their discretion and authority is to be uncontrollable, you are entitled to control?

My Lords, it is nothing to say to me if the Court of Chancery had under its management two funds, to one of which the lunatic was absolutely entitled, and which represented her own absolute property, and the other of which was, if I may use the expression, evanescent, and which, so far as she might not benefit by it, would pass away and would not belong to her estate, that in that state of things the Court of Chancery would save the money which was her own property and maintain her out of the other fund. I answer, that may well be the case, that may be the principle (and I make no objection to the principle, I highly approve of it), by which the Court of Chancery, where it has to exercise its discretion, deems it expedient to proceed in the exercise of that discretion. But am I entitled, in dealing with a will such as is now before your Lordships, to set up against the discretion of the trustees, which is pronounced by this will to be uncontrolled and uncontrollable, the rule which the Court of Chancery adopts for the exercise of its own discretion in a similar or in an analogous case? My Lords, to do so would simply be to reverse the words used by the testator, and to say that the discretion which is given to the trustees by this will, and which is stated to be uncontrollable, shall be controlled *307 and be subjected to that rigid and unbending rule upon which the Court of Chancery acts, (for reasons of which I entirely approve,) upon those occasions when it has to perform the functions which, in this instance, the trustees, and not the Court, have to perform.

Now, my Lords, that is the whole of this case. It appears to me that the Lords Justices have been correct in their exposition of the construction of the will; and agreeing with them in the construction, I must agree with them also in the conclusion at which they have arrived.

My Lords, I cannot but think, when I look at the modification which the Lords Justices have made of the decree of the Vice-Chancellor, that some words have crept into that part of their decree *per incuriam* , because I find that after declaring that the Defendants *Gisborne* and *Bass* , "the trustees of the will of the testator, have an absolute discretion to pay and apply the whole or any portion of the income of the testator's estate for the maintenance of his widow," the modified decree proceeds to add, "and the Defendants, the trustees, by their counsel, concurring, their Lordships approve that the trustees should exercise such discretion by paying and applying such portion only of the income of the real and personal estate of the testator as with the income from other sources of the Plaintiff," "will make up the sum of" £400 odd, or £600 odd, as the case may be. My Lords, in a case like this, where the Court of Chancery recognises that the trustees and not the Court, are to be the judges of the *quantum* to be allowed, where the trustees are willing to exercise the discretion which they claim to exercise, and where the Court allows and declares their right to exercise that discretion, I do not understand it to be the habit of the Court to go on and express any opinion as to whether the exercise of the discretion by the trustees is a wise or an unwise exercise of that discretion. I understand that in such a case the Court of Chancery steps aside and recognises the trustees as the persons to exercise the discretion, and in its decree does nothing more than, with regard to payments which may be necessary, act upon the exercise of the discretion of the trustees so made. I shall submit to your Lordships that, without affecting in any manner the costs of this appeal, the decree ought *308 to be varied in this way: After declaring that the Defendants, the trustees of the will, have an absolute discretion to pay and apply the whole or any portion of the income of the testator's estate for

the maintenance of his widow, the decree should proceed thus, "and the Defendants, by their counsel, stating that they are prepared to exercise such discretion by paying and applying such portion of the income of the real and personal estate of the testator as with the income from other sources of the Plaintiff *Charlotte Frances Gisborne* , will make up" the sums specified in the decree, "or other the sum from time to time to be allowed in the lunacy for the clothing" &c., "or otherwise for the personal and peculiar benefit and comfort of the Plaintiff, Charlotte Frances Gisborne, it is by consent of the Defendants, the trustees, ordered that the Defendants, the trustees, pay such portions to the Plaintiffs, the committees of the person and estate of the Plaintiff, *C. F. G.* "

My Lords, with that variation I submit to your Lordships, and m ur Lordships, that the decree be affirmed, and th appeal be dismissed; and, unless the parties are prepared to submit to your Lordships any consent to a different nent, I should propose to your Lords' in inary rule be followed, and the p costs.

LORD

M desire to add but very few words upon the mea 's trust in the testator's will, agreeing, as I do, with all th om my noble and learned friend upon the su.

The controversy really resolves itself into a very simple question. It is the choice between two opposite propositions, which I will shortly state. On the one side it is contended that the words of the will containing this trust must be so read as that your Lordships should conclude that the testator's intention was that his wife should be maintained, and her personal and peculiar benefit and comfort secured, entirely out of the proceeds of his estates. It is said that that is the intention of the trust; that though to the trustees every discretion is left as to the amount which would be required for that purpose, they are to take that amount out of the testator's estate. That, my Lords, is the view which is presented on the one side. On the other side the view presented is this: that ***309** the testator being minded, above all things, in making his will, to provide for the maintenance and comfort of his wife, and being cognizant of the fact that she had an income of her own, but probably adverting to the fact that all incomes are precarious, and not knowing what that income might be, either by way of increase or decrease upon the amount at which it stood when he made his will, he determined to provide, placing full confidence in his near relations, whom he appointed trustees, that whatever happened they should take care that out of his income, together with all other sources, a sufficient amount should be provided to secure the personal and peculiar benefit and comfort of his wife which it seems to have been his main object to ensure.

It seems to me, my Lords, that the latter is the natural and reasonable construction of this trust; and I am unable to see any words upon which the former construction can be properly supported. I find no words here from which you can conclude that the testator intended that any other sources of maintenance were to be disregarded, and that absolutely out of his own estate his wife should be supported; because all that he says is that the trustees are, in their discretion and of their uncontrollable authority, to pay and apply the whole or such portion of the income of the estate as they think expedient to the maintenance and support, or otherwise for the personal and peculiar benefit and comfort of his wife. Reading these words in their natural sense, I cannot conceive that any sort of restraint or any sort of condition is imposed upon the trustees. The object to be attained is the support of the wife and her comfort, but the means of obtaining that support are left entirely to the discretion of the trustees. The words are as strong as language can make them. If the testator had desired that a particular fund should be resorted to, he might have said so. If he had desired that any particular sum should be applied, he might have said so; but he seems to have desired solely the attainment of his object: and, subject to that object being attained, he seems to have left it absolutely uncontrolled in the discretion of the trustees how that object should be attained.

My Lords, that being so, it seems to me that the trustees exercised a reasonable discretion in first applying the lady's own ***310** income and in supplementing that income in the way which has been done, and which has been approved of. On these grounds, my Lords, I can see no reason for finding fault with the order made by the Lords Justices. I entirely agree with my noble and learned

friend that the latter portion of the order, which appears to introduce into the case some exercise of authority by the Court, had far better be omitted, and that it had better stand in the way that has been suggested.

LORD O'HAGAN:—

My Lords, all the learned Judges who have considered this case seem to have agreed that the authorities cited at the Bar give little aid towards the decision of it. I quite concur with them. The differing intentions of testators are as numerous as testators themselves, and their modes of expressing those intentions are of corresponding variety. We can very rarely, therefore, find a judgment upon the terms of one will which has any governing application to the terms of another. We must look to the frame of the instrument before us, and gather from it, as well as we can, the purpose of the testator, which must strictly regulate our decision.

I venture to differ from the learned Vice-Chancellor in his view of the importance of the contingent beneficial interest of one of the trustees, as bearing on the argument. The testator knew all the circumstances of the parties and the character of the brother, whom he made his trustee, and in whom he vested a discretion so unlimited. He manifestly relied upon that brother's integrity and affection to secure the comfort of his wife, without any corrupt regard to his own possible advantage; and his interest, whatever it was, cannot affect our decision. I think, also, that the principle which decides as between two funds in favour of a lunatic, according to his greater interest in one of them, has no relevancy to this case. It must be ruled by the intention imputable to the testator—that intention, if clear, must prevail against such a principle, however that principle may be applicable in other circumstances. As was said by the Lord Chancellor in In re Ashley [10] ***311** the ruling must be in favour of the view which is for the benefit of the lunatic, if it be not opposed to the will. The real question is, What was the will? what the extent of the discretion thereby vested in his trustees by the testator?

On that question, I feel constrained to hold that the judgment of the Lords Justices ought to be affirmed. The words "in their discretion and of their uncontrollable authority" are as large in their operation as words well can be: they govern the subsequent portions of the clause which they commence, and taken in connection with the words which follow—"as they shall deem expedient"—they appear to me to make the power of decision absolute, and to authorize the trustees to consider and judge, conclusively, as to expediencies of every kind. It seems to me, also, that a reasonable question of expediency did arise with reference to the possession of property by the lunatic, of which the testator was well aware, as affecting the duty of the trustees in determining on the amount of the contribution to be made from the estate which they administer; and on that question their decision has not been, in my opinion, at all unreasonable. I see no reason for limiting the discretion of the trustees, or in any way quarrelling with the mode in which it been exercised.

I am therefore of opinion that the decree appealed from should, with the modification which has been proposed by the noble and learned Lord on the woolsack, be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion. In the unfortunate circumstances in which the testator's wife was at the time when he was making his will, it was a very sensible thing of his adviser to say: The best thing you can do is to select your trustees carefully and prudently, so as to have trustees in whom you can place perfect confidence, and then give them uncontrolled discretion as to how the income shall be applied for the benefit of your wife and for her personal comfort. If that was the advice that was given to him, it seems to me that the words he has used sufficiently carry out that intention. I do not intend to go into any ***312** criticism of the words, except to say that they seem to me to express as strongly as any words I could myself devise, even now, when I have understood that there is a difficulty about it, that there was to be uncontrollable authority and discretion in the trustees to apply such portion of the income as they might think expedient for the benefit of the wife and her personal comfort. And, my Lords, what they have done and are prepared to do is certainly within the scope of that authority. As far as my opinion, speaking as an individual, goes, I think it is a very discreet arrangement on their

C20011

COURT OF APPEAL FOR ONTARIO

McKINLAY, CATZMAN AND GALLIGAN JJ.A.

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BETWEEN:	)	
	)	
WALTER FOX	)	
	)	**Bernard L. Eastman, Q.C.**
Appellant (Applicant)	)	**and Cindy Cohen for the appellant**
	)	
	)	**Rodney Hull, Q. C. and Ian Hull**
- and -	)	**for the respondent Miriam Fox**
	)	
MIRIAM FOX, Executrix of the Estate of Ralph Fox, deceased, and in her personal capacity, RALPH JAMES FOX and SHAYNE MELISSA FOX	)	**Sandra A. Forbes for the respondents Ralph James Fox and Shayne Melissa Fox**
	)	
	)	**Heard: October 10 and 11, 1995**
Respondents	)	
	)	

GALLIGAN J.A. :

Walter Fox is a lawyer. He is the only child of Miriam Fox and the late Ralph Fox. Ralph made his will in 1961 when Walter was 20 years of age and still a student. Ralph died in 1969, two years after Walter was called to the bar. Walter married a few months before his father's death. He has two children from this marriage, a son and a daughter. Both were born after Ralph died. By his will Ralph appointed Miriam as his sole executrix.

> advisable from time to time to or for the benefit of my said son's issue or such one or more of them as my Trustee may select from time to time.

The discretion conferred upon the trustee is absolute.

After a review of a number of leading cases, the trial judge concluded that because she did not find *mala fides* on Miriam's part, the exercise of her discretion had been a proper one.

The entire question of the degree of control which the courts can and should exercise over a trustee who holds an absolute discretion is filled with difficulty. The leading case, or at least the case to which reference is almost always made, is *Gisborne v. Gisborne* (1877), 2 A.C. 300 (H.L.). It stands for the proposition that so long as there is no "*mala fides*" on the part of a trustee the exercise of an absolute discretion is to be without any check or control by the courts.

The courts, however, have not always equated *mala fides* with fraud. I am spared an extensive review of authority by a very learned paper written by Professor Maurice Cullity, *Judicial Control of Trustees' Discretions* (1975), 25 U. of Toronto L.J. 99. I think it can safely be said in the light of Professor Cullity's analysis of the authorities that some conduct which does not amount to fraud will be categorized as *mala*

fides so as to bring it within the scope of judicial supervision. I am in respectful agreement with Professor Cullity when he expresses the opinion, at p. 119, that the term *mala fides* is sufficiently broad "to make the use of the term undesirable." Nevertheless, the term is still used. While I am not bold enough to attempt to define its outside limits, I think the cases do support Professor Cullity's conclusion at p. 117 that the courts may interfere if a trustee's decision is influenced by extraneous matters. I make particular reference to the judgment of Steele J. in *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 372 at p. 379:

> 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 reluctant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass* ... at p. 41 Ch., p. 203 All E.R., 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 trustee ... 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 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. [Emphasis added.]

In this case, in my view, the fact that her son intended to marry a gentile was completely extraneous to the duty which the will obviously imposed upon Miriam, namely to be concerned about the welfare of her grandchildren. This extraneous consideration demonstrated sufficient *mala fides* to bring her conduct within any reasonable interpretation of that term.

The circumstances bear some similarity to those in *Klug v.Klug,* [1918] 2 Ch. at p. 67 (Ch. D.). In that case a trustee refused to exercise a discretion allowing her to pay money for the advancement or benefit of her daughter because her daughter had married without her consent. In those circumstances Neville J. held at p. 71:

> ...[I]t is the duty of the Court to interfere and, in the exercise of its control over the discretion given to the trustees, to direct that a sum be raised out of the capital sufficient to pay...

The duty which rested with the trustee was to pay monies for the advancement or benefit of the children if the trustee saw fit to do so. While Neville J. did not specifically state that the mother's displeasure at her daughter's marriage was an extraneous circumstance, it seems to me that the situation was analogous to this one. In the context of all the facts, disapproval of the marriage was extraneous to the child's advancement or benefit. The court interfered with the trustee's discretion in that case and I think this court ought to do the same.

There is another reason why the discretion which Miriam exercised in this case was improper and must be set aside. It is abhorrent to contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion. It is now settled that it is against public policy to discriminate on grounds of race or religion. This is made clear in the reasons delivered by Robins J.A. in *Canada Trust Co. v. Ontario Human Rights Commission* (1990), 74 O.R. (2d) 481 at pp. 495-96:

> To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced. The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.
>
> To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.

Court of Queen's Bench of Alberta

Citation: McNeil v. McNeil, 2006 ABQB 636

Date: 20060905
Docket: 0501 07369
Registry: Calgary

06 255 161

Between:

Marie Amanda McNeil

Applicant

- and -

**Bruce Harold McNeil, Frederick P. Mannix,
Bruce Harold McNeil and Frederick P. Mannix,
as Executors and Trustees of the Estate of Frederick Harold McNeil,
Deceased and the Estate of Frederick Harold McNeil**

Respondents

**Reasons for Decision
of the
Honourable Madam Justice B.E.C. Romaine**

Introduction

[1] The applicant, a contingent beneficiary of a residuary trust set up under the will of her father, challenges the decision made by the trustees to discontinue distributions to her from the trust and not to establish a reserve for her benefit. The primary issue is whether this Court should intervene in the trustees' exercise of their discretion.

Facts

[2] The applicant, Marie Amanda McNeil ("Marie"), is a beneficiary under a residuary trust established by the will of her late father Frederick Harold McNeil ("Frederick"), who died on September 26, 1995. The trustees of the residuary trust (the "Trustees") appointed under the will are Marie's brother Bruce McNeil ("Bruce") and Frederick P. Mannix ("Mannix").

[3] Marie was diagnosed with multiple sclerosis in 1989. Since then, she has suffered many of the symptoms of this progressive disease.

(c) Although a portion of the payments made to Marie was to cover the premiums payable on her life insurance, she unilaterally and without advising the Trustees cancelled the policy sometime in 1997 and applied that portion of the estate payments to other expenses;

(d) It was not until Marie's Affidavit of May 12, 2005 and her cross-examination thereon in October 2005 that she disclosed that she had used the proceeds of the investment portfolio Marion had gifted to her to pay out a mortgage loan on her Burlington condominium. According to Marie, this loan was taken out to pay to her husband a portion of the equalization payment she had agreed to in the separation agreement, as well as for renovations to the condominium and to contribute to her RRSP;

(e) Marie's purchase of the Turks and Caicos property, her sale of the Burlington condominium and her plans to maintain two homes, one of them not in Canada, all were pursued without any discussion with or disclosure to the Trustees, despite the substantial contribution the estate had made to renovations to the Burlington home. It is still difficult to determine what Marie intends to do about her living accommodations. While her counsel indicated in December 2004 that Marie was abandoning her plans to build a home in the Turks and Caicos, there are contrary and inconsistent statements about this in the more recent affidavits and cross-examinations. Also troubling is that it remains difficult to determine the value of the property from the inconsistent information provided by Marie;

(f) Marie still has not provided satisfactory information on her total financial picture. Though she has recently provided some further information, she previously had failed to disclose details of gifts from Marion and other family members, a full picture of her assets and debts, the true amount of her Mary Kay Cosmetics retirement income and her consulting income from Mary Kay Cosmetics. She has also failed to provide adequate receipts, a complete personal net worth statement in the form requested or meaningful budget information. These failures to respond, along with problems with and deficiencies in the responses that have been received, have concerned the Trustees.

Issues

[77] I agree with the statement of issues formulated by the Trustees. The essential question is whether the Trustees, in exercising their discretion under the will, have misinterpreted the will such that it is appropriate for this Court to intervene in the exercise of such discretion.

[78] The specific questions under this issue are:

(a) What did Frederick intend with respect to whether and to what extent the Trustees should consider:

(i) non-estate resources and means available to Marie for meeting her living expenses, including her assets, her disposition of any assets (by gift or by expenditure), and her sources of income and other financial support;

(ii) what, in their assessment, are reasonable amounts for living expenses; and

(iii) whether payments from the estate should permit or enable savings or other accumulation of assets;

(b) What did Frederick intend with respect to whether and to what extent the Trustees may request from Marie disclosure of her financial circumstances, including her income, expenses, assets, liabilities, dispositions of assets (by gift or by expenditure), and her rights to spousal support and matrimonial property?

[79] A collateral issue is whether and to what extent evidence concerning Frederick's intent from sources other than the will is admissible.

[80] The next issue is whether Bruce's status as a residuary beneficiary disqualifies him from serving as a personal representative and Trustee.

[81] The final issue is whether the Trustees, having made their decision about a reserve, are able to revisit it, particularly in view of additional information provided by Marie.

Analysis

Trustees' discretion

[82] When a beneficiary challenges a personal representative's or trustee's exercise of discretion, the first task of the Court is to determine from the will the nature and scope of the duties imposed and powers conferred upon such personal representative or trustee. Each case must be decided on the basis of the particular will under review. The question is what the testator intended; see, for example, *Kmiec v. Kmiec* (1992), 45 E.T.R. 94 at paras. 10 and 14-16 (Ont. Gen. Div.).

[83] It is the duty of the Court to ascertain the testator's intention through the utilization of common sense and a determination of the plain and ordinary meaning of the wording of the will itself; see, for example, *Lucas-Tooth v. Lucas-Tooth*, [1921] A.C. 594.

[84] When, as in this case, the discretion afforded to the trustees is broad and relatively unfettered, the Court should be reluctant to intervene unless it can be shown that the trustees acted in bad faith, are guilty of obvious misconduct, were not authorized to act in the manner

they did under the will, or took into account irrelevant considerations. See, for example, D.W.M. Waters, *Law of Trusts in Canada*, 3d ed. (Toronto: Carswell, 2005) ("Waters") at p. 933, 1098; *Re Y. (C.F.)*, (2001), 291 A.R. 303, 2001 ABQB 470 at para. 16; *Re Powell Estate*, 2002 PEISCTD 81 at para. 16; *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 372 at 379 (Ont. Gen. Div.); *Re Atwell Estate* (1998), 19 E.T.R. (2d) 234 at para. 7 (Ont. Gen. Div.).

[85] Construction of a will does not permit the Court to substitute its own judgment for that of the individuals appointed to carry out assessment and decision-making duties under the will.

[86] As discussed in Waters at p. 933, I must first ascertain as a matter of construction of the will the task to which the discretion of the Trustees is attached. In this case, at this point in time, that task, as set forth in paragraph 3(j) of the will, is to "use reasonable efforts to assess the degree to which Marie may during her lifetime be or become dependent upon the provisions of this paragraph 3(j) for adequate maintenance and support or to meet the necessities of contingencies or circumstances affecting Marie." In performing this task, the Trustees were to consult with Marie to the extent reasonably practicable. If the Trustees determined it was warranted, they were directed to establish a reserve to be held and administered by them for Marie's benefit during her lifetime. The will specifies that the Trustees "in their discretion" may terminate or reduce the reserve from time to time upon further assessment and that they may encroach on the capital of such reserve to ensure Marie's "adequate maintenance and support or to meet the necessities of contingencies or circumstances" affecting her.

[87] Marie submits that the discretion of the Trustees is not unfettered, given the initial language of paragraph 4.1 of the will which grants such absolute and unfettered discretion "(u)nless otherwise expressly and specifically provided herein". I do not view such language as fettering the discretion of the Trustees to do the task imposed on them by paragraph 3(j). Rather, the task itself delineates their discretion. In other words, the Trustees must make an assessment of how dependent Marie is on the estate for adequate maintenance and support. They cannot merely decide that enough has been paid to Marie from estate funds and that the remainder, for fairness reasons, should enure to the residuary beneficiaries. That would be a failure to act within the scope of their discretion. Conversely, they cannot decide that Marie is entitled to generous or unlimited maintenance and support; the words of paragraph 3(j), "adequate maintenance and support", must guide them. Unless the Trustees step outside the scope of the task allocated to them, their discretion in carrying it out is broad and unfettered and should be afforded considerable deference.

[88] As Waters also outlines at p. 933, the Court will intervene in trustees' decisions if:

> (1) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision; (2) the trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make; or (3) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.

unreasonable, outside the scope of their authority or made on the basis of irrelevant considerations.

Savings or other accumulation of assets

[106] The Memorandum makes clear that Frederick did not intend that Marie's estate would be funded by distributions from his estate. The will, read as a whole and supplemented by the Memorandum, makes it clear that payments from the estate are not to be used by Marie to accumulate savings or to acquire additional assets, nor even to replace the need to use those assets to meet her daily and special needs.

[107] It is troubling that Marie unilaterally terminated her life insurance payments and failed to inform the Trustees of that decision at a time when they were funding such premiums consistent with Frederick's instructions in the Memorandum. While she did advise them that she had changed the premium, she did not advise them of the complete elimination of the policy until much later. She cannot now attempt to remedy the situation and build an alternate pool of assets in her own estate through either the use of estate funds or payment of expenses from such funds rather than from her own assets.

Disclosure of financial information

[108] Since it is clear from the wording of the will and the Memorandum that Frederick intended that the Trustees consider Marie's non-estate assets in determining her level of financial need, the Trustees had a duty to seek such information. In the circumstances, including unreasonable resistance or refusal from Marie in meeting their initial enquiries and frequent after-the-fact notification of major expenditures, nothing that they requested from Marie by way of information-gathering was unreasonable or overly onerous. Contrary to Marie's interpretation of the will, the estate did not exist solely for the benefit of her and Marion and the Trustees were, and are, required to be diligent and prudent in exercising their discretion.

[109] In fact, the Trustees have been patient, sensitive and even apologetic in making their enquiries. Marie complains in part about the Trustees' failure to talk to her after the April 2004 letter before making their June decision, but she had been quite clear in earlier correspondence that she was reluctant to discuss her requirements with the Trustees other than in writing.

Conclusion

[110] In summary, I see no reason to interfere with the exercise by the Trustees of their discretion under the will. Even if I had the jurisdiction to do so, I would not in this case, as it appears to me that the Trustees have acted diligently and responsibly to fulfill their responsibilities in the face of a considerable lack of co-operation by Marie.

TAB C

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

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

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

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

Applicants

P R O C E E D I N G S

Edmonton, Alberta
August 24, 2016

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E.H. Molstad, Q.C.	For Sawridge First Nation
G. Joshee-Arnal	For Sawridge First Nation
S.A. Wanke	For Morris Stoney, et al
C. Wilde	Court Clerk

Discussions

THE COURT: Good morning.

Are you going to do the introductions?

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

THE COURT: All right.

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

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

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

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

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

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

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

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

THE COURT: Yes.

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

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

MR. MOLSTAD: That may be the case.

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

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

THE COURT: All right.

MR. MOLSTAD: What order are you proposing in.

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

MR. MOLSTAD: Number 4?

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

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

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

THE COURT: All right.

MR. MOLSTAD: Okay? Thank you, Sir.

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

MR. MOLSTAD: Thank you.

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

THE COURT: Mr. Molstad, Q.C.

MR. MOLSTAD: Sorry.

Submissions by Ms. Bonora

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

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

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

MS. BONORA: Yeah. So --

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

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

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

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

THE COURT: Thanks, Ms. Bonora.

Submissions by Ms. Hutchison

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

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

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

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

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

Submissions by Ms. Platten

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

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

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

Submissions by Ms. Golding

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

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

Thank you, Sir.

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

MS. BONORA: Just one --

THE COURT: Look, I --

MS. BONORA: -- comment, Sir.

MS. MAJ: Sorry, sorry.

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

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

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

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

Submissions by Ms. Maj

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

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

Ms. Bonora?

Submissions by Ms. Bonora

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

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

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

Order (Consent Order)

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

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

MS. BONORA: Thank you, Sir.

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

Submissions by Ms. Bonora (Distribution Proposal Adjournment)

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

THE COURT: All right. Sure.

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

Twinn.

Subsequent to the filing of those briefs, we received applications by Morris Stoney and his brothers and sisters, and from Patrick Twinn, and his family Shelby Twinn and Debra Sarafinchin.

In respect of the standing of those parties and whether they are beneficiaries, we believe that until those applications are heard, that, as beneficiaries, they probably have a right to speak. If they, in fact, are beneficiaries and are going to be treated as parties, that they have a right to speak to distribution, and so we think it appropriate to postpone that issue. It's ready to go once we've determined the standing of the various other parties and -- and it would be our submission that especially with respect to the clients Ms. Golding represents.

So those are my submissions in respect of the adjournment, and I think all counsel are on board with that adjournment request.

THE COURT: So both the distribution plan, I'll call it, plus the issue of -- the outstanding issue of who the beneficiaries are?

MS. BONORA: Yes. So the beneficiary definition is also postponed. Counsel have advised that they believe it would be perhaps a two-day application to deal with that particular issue, and so we still have to determine exactly how we're going to come to bring that issue before the Court. We're still in discussions among counsel on that issue.

THE COURT: Well, thank you for that, but I'll give you my thinking on that issue. I'm inclined to send that issue to trial, and it won't be me hearing it. It will be some other judge. I'm finding that the estimates of counsel in this matter aren't too accurate, and given the nature of this litigation, I'm thinking -- my thinking is, I'm not making an order, but I'm thinking this is not going to be determined on the basis of affidavit evidence. It's going to go to a trial and get this thing resolved once and for all. So --

MS. BONORA: Thank you, Sir.

THE COURT: -- just so you know my thinking on it.

MS. BONORA: And it --

THE COURT: And that you might want to start preparing a

contingency plan around that approach.

MS. BONORA: M-hm. That's very helpful to all counsel, because there was some discussion about whether you would, in fact, hear that application, and there was a discussion about whether we needed to make an application about whether you would hear that application. So if, in fact, you are saying perhaps you won't and that it should move to a trial, that gives us some direction in our next discussions about scheduling and moving towards that.

THE COURT: Okay.

MS. BONORA: So thank you for those comments.

THE COURT: Yeah. No, I -- the reason I'm saying it is I really came on to this before we had all sorts of rules around case management in -- generally, and specifically in commercial matters. I mean, case managers are meant to deal with process issues, and not substantive disputes. I mean, we deal with a lot of disputes over the appropriate process, but this one is going off in the direction of a more general dispute. So that's why I'm thinking about it, and I -- and clearly if it went to a trial, I would not be the case manager in this case.

MS. BONORA: Yes, Sir.

THE COURT: All right?

MS. BONORA: So perhaps if you could leave the issue of the actual process and whether it would be a trial or whether counsel may be able to agree that it could proceed by affidavit evidence, and whether we could maybe discuss that before you made a decision about that and we could make some -- even if we just did it by way of written submissions to you, that would be helpful to all of us, I think, to have us consider that and consult with our clients.

THE COURT: That would be satisfactory to me.

MS. BONORA: Thank you. Mr. Molstad just asked me if you were talking about trials of other issues on the agenda, but I think you're just talking about --

THE COURT: No, I'm --

MS. BONORA: -- the definition of beneficiary, which was the

original issue in our action.

Order (Distribution Proposal Adjournment)

THE COURT: That's -- well, I think it -- my goal here has been to try and get this litigation focussed, or refocussed in some cases, and it does seem that the issues are narrowing, which is sort of the function of a case manager. We're down to the -- well, the distribution plan, I'll call it, appears to be generally acceptable, subject to some latecomers having a look at it. Whether they'll have anything to say is yet to be decided, but my thinking is that the distribution plan looks like it's -- I mean, I've read it. It seems quite reasonable. It looks like that issue is going to get swept off the table. The -- so the one outstanding issue is the -- the scope of the beneficiary group.

MS. BONORA: Thank you, Sir.

THE COURT: So your request for an adjournment on the distribution proposal application and -- is adjourned *sine die*.

Submissions by Ms. Bonora (Standing)

MS. BONORA: Thank you, Sir.

Perhaps, Sir, we could deal with number 3 on the list, because I don't believe Ms. Wanke has any other matters that she would be attending to. I don't know that for sure, but the -- so the application with respect to Mr. Stoney is an application for standing, an application to be determined as a beneficiary. We're asking that matter to be adjourned. We just got served with it. Obviously, there needs to be some discussion around exactly what's going to happen with that, and questioning. And I don't think there's any opposition to that request to adjourn, but I will leave it for Ms. Wanke to speak, and Mr. Molstad would like to address it, as well.

THE COURT: All right. Well, Ms. Wanke, you're the applicant -- representing the applicant, so if you'd like to speak first?

Submissions by Ms. Wanke (Standing)

MS. WANKE: I am, My Lord. We have no issue with Ms. Bonora's request to adjourn the matter. She had proposed that counsel have a conference and come to you with a proposal in terms of timelines and how the matter will be heard, and we think that's reasonable. And we think counsel can certainly do that by consent.

We have some concerns that matters will be decided in this proceeding before the issue of our application is determined if our application doesn't move forward in a timely manner, and we're wondering if it would be appropriate to suggest that our application would be determined first, before any more matters of -- that effect Mr. Stoney and his brothers and sisters are heard and determined, or, in the alternative, at the very least if we could be added to the service list while their application is pending so we receive notice of what's going on in this proceeding.

Sir, I'd --

THE COURT: Okay.

MS. WANKE: I'd also like to speak briefly to Mr. Molstad speaking. I understand that Mr. Molstad wants to speak today. I appreciate that there's likely hardly anything of substance that's going to be said or determined on the adjournment application, since nothing of -- no merit decision is being made, but as a matter of precedent we think it's important to note that the Sawridge First Nation was, in your decision in 2015, expressly noted not to be a party to these proceedings, and rights and benefit flow and obligations flow from being a party. Since they're not a party or a respondent to our application, our position is they would first need to seek standing to make any submissions. And, again, nothing of merit or substance is being determined today, but for precedent, I think it's important that prior to Sawridge First Nation having a say on anything to do with our application, they first satisfy the Court they have standing to speak.

THE COURT: Mr. Molstad, as an active participant?

Submissions by Mr. Molstad (Standing)

MR. MOLSTAD: Well, we haven't been named as a respondent. However, my friend's application sets out as one of the grounds that Mr. Stoney and his siblings are members of the Sawridge First Nation. So it is a matter that directly affects the Sawridge First Nation.

We can tell you that we will be making an application to intervene in this matter and participate because of this allegation. And also you may or may not be aware that this issue has been litigated before a number of courts previously, including the Federal of Court of Appeal, the Federal Court and the Canadian Human Rights Commission.

THE COURT: Thank you.

MS. WANKE: But the issue that's been litigated is a different issue.

THE COURT: Well --

MS. WANKE: The issue of being a beneficiary of the Trust --

THE COURT: Okay. Well, look --

MS. WANKE: -- versus being a present day member.

THE COURT: -- I'm not going to get into it.

MS. WANKE: And it -- it simply -- you're right. It simply isn't a matter for --

THE COURT: Well, let me --

MS. WANKE: -- to be determined.

Order (Standing)

THE COURT: Let me -- I'll give you some direction right now.

You can make your application in writing, with a written brief, serve it on all of the participants who are here today. They can respond, or not, and you can include in that the Sawridge First Nation application for intervenor status. This matter will be dealt with in writing. It will not be the subject of court appearance. You can stand in line for a decision, because it may take some time to get dealt with, but that's the way it will proceed. Okay?

MR. MOLSTAD: In terms of timing, Sir. We would just ask for a reasonable period of time to prepare and file.

THE COURT: Well, certainly. Well, let's just pick dates. So pick end dates.

MR. MOLSTAD: Pardon me?

THE COURT: The -- the applicant Stoney will have a -- well, they've got an application, or -- all I've got is a Notice of Motion or --

MR. MOLSTAD: Right.

THE COURT: So, but the -- no affidavit ever made it to me, my desk. So all materials, including a written brief in respect of this application to be joined as a party by Maurice Stoney shall be completed, filed and served by September 30th, 2016, and the respondents, including a proposed intervenor, the Sawridge First Nation, by October 31st.

MR. MOLSTAD: But we'll be making an application to intervene. Should -- is that October 31st for us?

THE COURT: Well, you can put it in right -- yeah, just be -- you're a without-prejudice respondent, all right? Sawridge First Nation, you're to be served with this application.

MR. MOLSTAD: Okay.

THE COURT: So double up on the response to the application, and put in your intervenor response.

MR. MOLSTAD: So --

THE COURT: Or position.

MR. MOLSTAD: -- I just want to make sure I understand, Sir. When do we file our application to intervene? September 30th --

THE COURT: You can do it --

MR. MOLSTAD: -- or October --

THE COURT: Well, do it by September 30th.

MR. MOLSTAD: All right. Thank you.

THE COURT: Okay?

MR. MOLSTAD: Yeah.

THE COURT: And then we'll give you until mid-November, November 15th, for the Maurice Stoney applicant to respond in turn in writing to those, and in particular the intervention application.

MS. WANKE: My Lord, my only concern with the proposed schedule is that Ms. Bonora had requested to question on the affidavit last week, and we provided her -- admittedly, it was right before this application -- we provided her with three dates before today, and those weren't acceptable. So if questioning is to take place, I wonder if we could have a commitment? I know that Mr. Stoney will make himself available. Can we have a commitment from Ms. Bonora that any questioning that will take place will take place before September 10th?

THE COURT: Well, why don't you work that out with counsel?

MS. WANKE: Well, my fear is that it will happen after.

THE COURT: Well, I'm not going to get into it. Work it out with counsel. We're not going to stand this litigation still while, you know, the latecomers get their act together. You can deal with her.

MS. WANKE: Thank you, My Lord.

THE COURT: I'm not going to intervene in it.

Now, we've got another matter, another similar latecomer.

Submissions by Ms. Golding (Scheduling)

MS. GOLDING: That is correct, Sir. And, Sir, I had actually prepared an order that I had provided to counsel and have comments on, and it is (INDISCERNIBLE) in accordance with those comments.

Sir, my application and my order in terms of the scheduling just indicated that our application would be adjourned to allow counsel to schedule a hearing of the matter. And, in fact, Ms. Bonora and I may be able to come to an agreement in terms of the standing part of that, although perhaps not the costs part. And then we had put into this order that until the hearing date, and without prejudice to the actual decision that gets made, that we would be considered to be parties and would have standing to make submission, and that any documents that are to be served on our clients could be served

on our office, Sir. And as I've indicated, counsel have all approved the order.

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

MS. GOLDING: Sorry, I apologize. Nancy Golding.

THE COURT: I take it when you say all counsel, it includes the Sawridge First Nation and Mr. Molstad?

MS. GOLDING: I did talk with Mr. Molstad about it --

MR. MOLSTAD: We're not --

MS. GOLDING: But he'd indicated --

MR. MOLSTAD: -- a party to this.

MS. GOLDING: -- he's not a party to this.

THE COURT: Yeah, I know you're not party, but have you seen this?

MR. MOLSTAD: Well, I haven't seen it, no. Sorry.

MS. GOLDING: I -- I tried to show it to him, but he didn't want to look at it.

MR. MOLSTAD: It appears that this is simply an adjournment and deems them to be parties until it's decided, and that seems reasonable, Sir.

THE COURT: I'm just wondering about -- again, I keep clogging this litigation up with additional parties who really don't -- I mean, on the face of it I'm not seeing what Mr. Patrick Twinn and -- who is already a beneficiary. . .

MS. GOLDING: That's correct, Sir.

Order (Standing)

THE COURT: I'm just concerned about clogging this litigation up with unnecessary parties. I'm not saying Mr. Twinn and his relations are unnecessary parties, but the more lawyers and the more people that get added into this litigation

simply make it more difficult to bring to a conclusion, and I'm not sure at this stage that there aren't enough people involved in this to raise all the issues that should be raised.

I'm not prepared to grant this order. I'm prepared to -- you -- I'm not prepared to grant it, and I'm just going to -- Patrick Twinn and company, I'm going to -- you can proceed in the same way as Mr. Stoney.

MS. GOLDING: Thank you, Sir.

THE COURT: In terms of we'll deal with their application in writing. All right? Same timelines?

MS. GOLDING: That -- that's fine, Sir. Thank you, Sir.

THE COURT: In include Sawridge First Nation in terms of the receipt of the materials, and you can decide whether or not you want the band -- pardon me, the Sawridge First Nation can decide whether they want to take a position on intervention.

MS. GOLDING: Thank you, Sir.

THE COURT: All right? So otherwise that is -- you're adjourned *sine die*. Your matter's adjourned *sine die* as of --

MS. GOLDING: Thank you, Sir.

THE COURT: Madam Clerk, I'm just going to pass that proposed consent order back.

Okay. Madam Clerk, I've moved along fairly quickly. Would you like to -- are you okay with -- everything's adjourned? You've got notes?

All right. We're -- you're the only application outstanding.

Submissions by Mr. Molstad (Application)

MR. MOLSTAD: Just I have a couple of preliminary comments before my friend makes her submissions in relation to this matter, and we're really in your hands in terms of the procedure, but the comments are very brief.

When we referred in our brief to the decision of *Francis Kutee (phonetic)* as a decision of

the Supreme Court of British Columbia, we did not indicate that it was reversed by -- on the merits by the BC Court of Appeal, and this was an unintentional oversight on our part. We do say, Sir, that the comment of the trial judge is consistent with the law in Alberta, and will make submissions in that regard when we make our submissions.

We also spoke to our friend and there was an unintentional error in their brief, which is the written submissions of the Public Trustee of Alberta in response to Sawridge First Nation's costs submissions at page 6.

THE COURT: Sorry, which one of the briefs?

MR. MOLSTAD: It's the written submissions of the Public Trustee of Alberta in response to the Sawridge First Nations costs submissions.

THE COURT: Okay. The August 19th -- filed August 19th?

MR. MOLSTAD: August 19th, that's correct.

THE COURT: Okay.

MR. MOLSTAD: And in paragraph 20, my friend has written that at the September 2nd and 3rd hearing, Thomas, J ordered the SFN would prepare and serve an Affidavit of Records. That's a typographical error.

THE COURT: Sorry, I'm still getting the paragraph.

MR. MOLSTAD: Sorry.

THE COURT: Twenty?

MR. MOLSTAD: Paragraph 20.

THE COURT: On page 6?

MR. MOLSTAD: Page 6. It says that the Sawridge First Nation, SFN, would prepare and serve an Affidavit of Records according to the rules. That was the Sawridge Trustee, not the Sawridge First Nation.

THE COURT: Okay.

MR. MOLSTAD: And that was also an unintentional error on the

part of my friend.

MS. GOLDING: Thank you, Mr. Molstad.

THE COURT: All right. Just a request of counsel. I mean, I certainly appreciate the written briefs. I tend to still move on paper, as opposed to electronic, but if you -- you obviously have these briefs in electronic form. I'm not talking the appended authorities, but could you please email the body of your briefs? And I've got two briefs from the Public Trustee and one brief from you. Mr. Molstad, if you wouldn't mind just emailing them to my assistant, Denise Sutton. I think all of you have her email address.

MR. MOLSTAD: Is that without the attachments. Sir?

THE COURT: If you've got the -- if you --

MR. MOLSTAD: We -- we can send it all.

THE COURT: You -- you can send it at all. That's fine. I just -- I don't want to run the costs up for you. If they are -- if they're already scanned in and ready to go, that would be helpful.

All right. I'll just tell you I -- so I have the three briefs. I did note --

MS. HUTCHISON: My Lord, just so that the Court has it in front of -- in front of your -- of My Lord, Sawridge First Nation filed a brief first March 15th.

THE COURT: Right.

MS. HUTCHISON: And then -- and so there are actually four briefs.

THE COURT: And I don't have that brief. I don't know --

MS. HUTCHISON: My Lord, I can certainly hand up my copy for --

THE COURT: Well, it might -- it may have come down here, but it didn't --

Great. Well, thanks. That was the other question I had. So that's the March 15th one.

MR. MOLSTAD: The body of that brief is attached to our brief of August 16th --

THE COURT: Yeah. No, I was --

MR. MOLSTAD: -- as Appendix 1.

THE COURT: Yeah, I saw that, but I didn't -- it was more the attachments to it that was all about.

MS. HUTCHISON: Whenever you're ready, My Lord.

THE COURT: Okay.

Submissions by Ms. Hutchison (Application)

MS. HUTCHISON: My Lord, I just thought I'd start out with some very brief comments on the 513 assets, or settlement application as we referred to, as both. And that is, of course, the application that was withdrawn, and we simply wanted to confirm that before the Court. Our comments are really directed more at some of the submissions the Sawridge First Nation has on costs. And we'll speak to that more fully, but just in the context of that application, as we've set out for the Court in our briefs, it's important for the Court to realize that the OPGT had started some efforts to try to have cooperative discussions in this matter as early as February. The reality was, unfortunately, on this topic, things did not bear fruit until late in the day. There was a clarification offered by the Trustees on May 14th. Counsel, both for the Public Trustee of Alberta and for Trustee Twinn, I think were quite diligently talking to Ms. Bonora about how to modify that clarification, and ultimately we came to an agreement on the terms of it on July 27th. It's unfortunate that that was also the morning that Paul Bujold was being questioned, My Lord, but Sawridge First Nation was made aware of that withdrawal as the questioning began.

And so, you know, certainly, My Lord, one might -- one might hope that everything had been resolved at an earlier date, but this was a very important part of this proceeding. It's final relief, it's a critical issue, and we would submit that the Public Trustee of Alberta was simply exercising due diligence, and the timing of the withdrawal should not be held against the Public Trustee in relation to costs.

In terms of whether the Rule 5.13 assets application was necessary, of course it was filed at the time that there was a broader scope of relevance at play. Once the scope of

relevance was narrowed by the consent order, the assets application was withdrawn. And as we will comment later on our -- our submissions on costs, My Lord, the Public Trustee of Alberta would take the position there's no basis to grant costs in relation to the assets application.

We understand that the Trustees are not seeking costs of that application. It is solely an application by the Sawridge First Nation. Is that correct, Ms. Bonora?

MS. BONORA: That's correct, Sir. Yes.

THE COURT: Thank you.

MS. HUTCHISON: So on to the beneficiary application, My Lord, or the membership 513 application, whichever way the Court wishes to refer to it.

As indicated in our August 5th brief at paragraph 4, the Public Trustee of Alberta has brought that application to insure the parties have appropriately applied Sawridge 3 to confirm the Court is satisfied that all the evidence it needs to identify potential minor beneficiaries is before the Court, and also to confirm that the Court is satisfied with the form in which the information is being put before the Court. At this point, we have lists. We don't have an affidavit. There is obviously a bit of a question about whether any of that information could be questioned on, or examined on, and who would -- who would be questioned.

As the Court is aware, and I'm referring the Court here to our August 5th brief at paragraph 7, the Public Trustee of Alberta was appointed, in part, to assist the Court in identifying the beneficiary class of affected minors. As of Sawridge 3, that does include identifying potential but not yet identified minors who are children of Sawridge First Nation members, or membership candidates.

When the Court explained what was meant by membership candidates, and I'm referring to Sawridge 3, paragraph 37 and paragraph 56 -- and Sawridge 3, My Lord, is available, I think, in almost every brief that's been filed, so I hope the Court can reference it easily -- that there were three categories of minors to be represented by the Public Trustee, minors who are childrens of -- children of members, children of adults with unresolved application, children of adults with rejected applications, so long as there is an intention to challenge the rejection.

The OPGT has brought this matter forward to the Court because it is obviously the Court's ultimate decision to decide whether or not there's adequate evidence to deal with that beneficiary identification, and there were aspects of both Sawridge First Nation's

information which, while very helpful, left some lack of clarity and aspects of Sawridge 3 that the OPGT both wanted to ensure was interpreted correctly by the Public Trustee of Alberta and the Sawridge First Nation, but also to ensure that there was not anything requested that the Court did not want requested.

All of that was done, My Lord, in good faith and very much with the -- with the Public Trustee's intention to carry out the mandate that it's been given. And I realize my friend Mr. Molstad has a different characterization of that. I would firmly say to the Court that the Public Trustee of Alberta has brought this application forward in good faith and with the full intention to meet its mandate appropriately.

My Lord, then going on, and I'll refer you to our brief at paragraph 26 of the August 5th brief, and Sawridge 3 paragraph 48 to 55. Again --

THE COURT: Yeah, just I actually want to get -- this is the part that's outstanding.

MS. HUTCHISON: Yes. Yes.

THE COURT: So just give me those -- you want to -- I'm starting at paragraph 24 of your brief, sort of what I had my eye on, because it sets out the three categories that I guess you're seeking some direction on.

MS. HUTCHISON: The start of that discussion is at paragraph 24 of our August 5th --

THE COURT: Yeah.

MS. HUTCHISON: -- brief, My Lord. It then does go on through to paragraph --

THE COURT: Well, until we shift to costs.

MS. HUTCHISON: Until paragraph 30, actually.

THE COURT: Thirty?

MS. HUTCHISON: Of that brief. But --

THE COURT: Yes.

MS. HUTCHISON: -- the focus of the discussion would be paragraph 24 through to 28 of that paragraph.

THE COURT: Well, it sounded very useful. Now, that -- I must say when I read it, it didn't read it in relation to that March 5th -- the March 15 submission, Sawridge First Nation. But in terms of getting more definition around these categories, or potential categories, the Sawridge First Nation has now in its brief starting at paragraph 39, provided some perspective on at least what Sawridge First Nation believes these terms mean, such as unresolved application.

Can you focus your -- did you -- have you -- I'm sure you've read them. What's your position in respect to the definition as provided by Sawridge First Nation in their brief -- in their brief?

MS. HUTCHISON: My Lord, and with the greatest of respect, I read quite a bit of Sawridge First Nation's submission around paragraph 39 as simply quoting Sawridge 3 to some degree. I'm not completely certain, My Lord, that it's given us complete insight into how Sawridge First Nation determined what qualified as a pending application. And that said, My Lord, part of our written submissions have been quite clear that if the Court is satisfied that the information now before you does meet all of the questions that you set out in Sawridge 3, and the criteria set out in paragraph 48 to 55 of Sawridge 3, the Public Trustee of Alberta accepts that.

My Lord, the one other -- the one other element of this that I don't believe -- I don't believe there is reference to, Sawridge 3 provides a mandate to only deal with rejected applications, if there is an intention. The Court's word referred to an intention to challenge.

THE COURT: Okay. Let work through this --

MS. HUTCHISON: Oh.

THE COURT: -- in a logical --

MS. HUTCHISON: Certainly, My Lord.

THE COURT: -- fashion, if you don't mind. I'm looking at paragraph 24 subparagraph 1 of -- on page 8 of your brief, and you've developed those categories based on Sawridge number 3.

The first one, minors who are children of the members of the Sawridge First Nation. And

then you say, paragraph 25 of your brief in relation to category 1:

> Upon confirmation that the Court does not require anything more formal than the April 5, 2016 list, such as an affidavit, and does not require it to be prepared by Sawridge First Nation, the Public Trustee confirms the Court now has a list of minors who are children of band members up to April 5, 2015, as prepared by the Sawridge trustees.

MS. HUTCHISON: And, My Lord, that's another typo. That should be April 5, 2016.

THE COURT: Okay.

MS. HUTCHISON: The reference was correct at the start of the paragraph, and then --

THE COURT: Yeah, okay.

MS. HUTCHISON: -- not carried through. My apologies.

THE COURT: No problem. Well, I have looked at that material, and I am satisfied with it, so that that category's off the table. Okay?

MS. HUTCHISON: Thank you, My Lord. That's very useful direction.

THE COURT: All right.

MS. HUTCHISON: Thank you. So then, My Lord --

THE COURT: Now, let's go on to unresolved applications. That's the one that -- that's the term that's dealt with by Mr. Molstad in the Sawridge First Nation brief at paragraph 39. So I'd just ask you to have a look at that.

MS. HUTCHISON: And so, My Lord, the -- the statement that Sawridge First Nation makes is that:

> This confirms that in order to be considered an unresolved application, an applicant must have at least submitted a completed application for membership.

And, My Lord, as we've indicated in our brief, that is, of course, one of the other terms that I think all the parties would benefit from clarification for. And it may be, My Lord, that you've already answered that question in Sawridge 3. And having told you it's in every brief, I now have to find a copy of it. I just --

There we go. Yeah.

So, My Lord, paragraph 51 --

THE COURT: Yeah. Which tab of which brief are you --

MS. HUTCHISON: Tab -- tab 7 of the Sawridge August 16th brief.

THE COURT: Okay. And page?

MS. HUTCHISON: It's page 12 of Sawridge 3, which is tab 7, at tab 7 of that brief.

THE COURT: Yeah.

MS. HUTCHISON: And paragraph 52.

THE COURT: Got it.

MS. HUTCHISON: There is a comment, there's an obiter comment, My Lord, about incomplete applications or other potential SFN candidates. And so it may be, My Lord, that the intention is that if Sawridge First Nation has deemed an application complete, that is where the Court -- it's a complete application, deemed complete by the Sawridge First Nation, but not yet -- it has not yet proceeded to the point of a decision.

THE COURT: M-hm.

MS. HUTCHISON: That may be all the Court intended to capture by unresolved applications. It was simply the interplay of the various different terms that, frankly, My Lord, was causing the Public Trustee of Alberta to feel it was necessary to be certain that it had captured the full scope of the potential minor beneficiaries.

THE COURT: Okay. So at least on the category 2 then on the unresolved applications, you simply seek my direction of amplification or clarification of whatever I said in Sawridge number 3 on that subject.

MS. HUTCHISON: Correct, My Lord. If we understand Mr. Molstad's January 19th letter correctly, and we, of course, don't have a full -- full information about how the lists were developed or who was consulted, but if we understand them correctly, the pending applications would be applications where Sawridge First Nation deems the application complete in that it has the information Sawridge First Nation decides it needs for the -- for the application, but there's been no actual membership decision. If I understand Sawridge First Nation correctly, that's what they're saying about pending applications.

Of course the Court's aware of this question of what is a complete application or not. We simply wanted to be certain that that was not included in unresolved applications. If there's an individual who is waiting for decisions about what else they have to provide, if there's an individual waiting for decisions about whether what they provided is adequate, are they within -- and they have minor children obviously, My Lord, are they within the contemplation of the Public Trustee of Alberta, or is the crystallizing moment when the Sawridge First Nation says your application is now considered complete? Because there is this potential time period where something's been submitted and the person is waiting for a determination on whether they are going forward or not in the membership process.

THE COURT: I haven't had time to go back and look at the membership rules of the Sawridge First Nation, but is there a deeming provision in that set of rules about if an application's not dealt with within a certain period of time, it's deemed to be rejected or --

MS. HUTCHISON: I don't believe so, My Lord. I didn't bring those.

MR. MOLSTAD: May I help a bit?

THE COURT: Yes.

MS. HUTCHISON: Absolutely.

THE COURT: Certainly.

Submissions by Mr. Molstad (Application)

MR. MOLSTAD: Ms. -- there is not, Sir, but when we sent the list of the applications to Your Lordship and to my friend, it included one of the names where the application -- the applicant did not include hi address or contact information, so

clearly it was incomplete. An inquiry of our in-house counsel, he advises me that that list is every application they've received.

THE COURT: All right. Thanks.

MR. MOLSTAD: But notwithstanding that --

THE COURT: But there's no -- but there's no drop dead date.

MR. MOLSTAD: Yeah. No, no. And --

THE COURT: It's not -- not like planning legislation.

MR. MOLSTAD: And our submissions were based on your decision where you said it should be completed. Sawridge went beyond that.

THE COURT: Okay.

Submissions by Ms. Hutchison (Application)

MS. HUTCHISON: And, My Lord, that's very useful clarification, I think, for -- for everyone today.

THE COURT: Okay. That's great. Thank you.

So now I think probably we've discussed unresolved enough. What about the third category of rejected?

MS. HUTCHISON: I think the only -- or the central issue on -- on rejected, My Lord, as long as there is no distinction between rejected and unsuccessful, and the reason that we highlight the different terminology, My Lord, it ties in again to this gray area we were talking about where the potential is somebody submits what they consider to be an application, but then it's not treated as an application for a period of time. Is that unsuccessful, or does there have to be an actual written determination by Sawridge First Nation that there's been a denial of membership status?

I realize it's a fine point, My Lord, but the Public Trustee of Alberta wanted to --

THE COURT: Okay.

MS. HUTCHISON: -- ensure it was on point on that.

The other element of the rejection category, My Lord, ties into the Court's reference -- and I apologize, I just have to find the paragraph I'm looking for in Sawridge 3.

I apologize, My Lord, for taking this long.

Paragraph 53 of Sawridge 3, which is at tab 7 of the Sawridge First Nation August 16th submissions.

THE COURT: I have that.

MS. HUTCHISON: Page 13:

> The Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection, or challenge the rejection through judicial review.

Mr. Molstad's January 19th letter is very clear. He advised that there are no pending appeals or judicial reviews, but the letter doesn't go on to provide a list of everyone that's been rejected. And that may be perfectly appropriate, My Lord. The Court may want that inquiry to end there. It's -- it really turns on this question of does the Public Trustee have an obligation to reach out and find out the intention of every adult applicant who's been rejected who has minor children, or is it only relevant to look at whether or not there's an appeal on the books? And if it's the second one, My Lord, I believe Mr. Molstad has provided us with the information we need. If there is an element of assessing intention, there is a question of whether the Court wants the Public Trustee to go farther than that and contact rejected individuals.

As the Court is aware, obviously there can be arguments around limitations and the appeal periods. We don't know if that's part of our scope at this time. And that's the sum of our comments on category number 3.

THE COURT: Okay.

MS. HUTCHISON: As we've referred to it in our sub -- in our paragraph 24, My Lord.

And, My Lord, that really -- that really sums up the clarification element of this matter on the question of the form in which the information has been provided to the Court. The Public Trustee of Alberta is essentially just asking is the Court satisfied with a list attached to a letter from counsel, or do we need something more formal that can be

questioned upon?

And in terms of why that would be necessary, My Lord, it's really a question of whether the Public Trustee has any obligation to try at some point to coalesce all the general information that we have on applicants, and now the named specific information and try to understand that and pull it together. It may prove more difficult to do if there's no ability to question. It may not be impossible, but it may be quite, quite challenging. If the Court has no desire to have that occur, it may be that these lists, in their current form, are all that the Court requires for beneficiary identification.

THE COURT: Well, I think the way we'll have to deal with that is I don't have the time or the resources to start plowing through all of this material to see whether or not certain criteria are met. What I can do for you is give you clarification on the scope of these categories, and then -- but I would then remit it back to the Public Trustee to, you know, look at the material you've got, and you're either satisfied or you're not. If you're not, if there is some additional information you think you need to meet the clarified definitions, then I guess the first place to go is Mr. Molstad and Sawridge First Nation, see if you can resolve it on a voluntary out-of-court basis. If there's still some issue outstanding, then you can come back. Okay? But I'm -- I don't want anybody to be under the misapprehension that I'm going to plow through all this material and decide whether or not the definitions or the clarified categories are satisfied. It's going to go back to the parties to -- or participants to resolve. Okay?

MS. HUTCHISON: That's very helpful, My Lord. Thank you.

I think the final comment on -- sorry, just a few very brief comments to respond to a few items my friend has raised.

Mr. Molstad has raised a concern about lack of specificity or that the Public Trustee has not told Sawridge First Nation exactly what is wanted. The Public Trustee is more than willing to have Sawridge First Nation provide something in a list format to deal with their confidentiality concerns. Frankly, the generality of the application was intended, to some degree, to deal with the confidentiality concerns that were -- that were laid out for us in September which we were not aware of at the time that we filed the amended application my friend has referred to in his materials. It's not the intention of the Public Trustee of Alberta to interfere with the Sawridge First Nation's concerns on that if -- frankly, Sawridge 3 made it clear that that was not appropriate, and the Public Trustee is respecting that.

In terms of some of the comments about whether -- or the submissions about whether the Public Trustee of Alberta has essentially gone on a fishing expedition, My Lord, and

we're certainly extremely sorry if it's come across in that way to anybody, but that's not the case, My Lord. *Kadoura*, although not a 5.13 application, is relevant.

We know in this proceeding, My Lord, that Sawridge First Nation is the repository and the best source of evidence on all membership matters. They've become involved in the matter by voluntarily helping the Trustees with that information. They really are the source, as it were, for membership information that's required for beneficiary identification, and that is the only motivation for the Office of the Public Trustee's request. It's not at all intended to be a fishing expedition, My Lord.

Those are my submissions on the substance of the application, My Lord.

Now, as the Court will be aware, there is a costs application by Sawridge First Nation. I can address that now or I can turn over to Mr. Molstad on substance, and then respond -- and then let him deal with his costs application, and I can respond. Completely in the Court's hands.

THE COURT: Well, I think let's go that way. It's Sawridge -- a Sawridge application.

MS. HUTCHISON: Thank you, My Lord.

THE COURT: Thank you very much. But maybe in -- you know, before you go right into the costs thing, my mind is now focussed on the categories of beneficiaries.

Submissions by Mr. Molstad (Application)

MR. MOLSTAD: Yeah, I was --

THE COURT: If you wouldn't mind.

MR. MOLSTAD: I was going to deal with the -- leave this here. I'll give it back.

THE COURT: Could we jack it up a little higher for him.

MR. MOLSTAD: That would be helpful, too, Sir.

THE COURT: We could just pile --

MR. MOLSTAD: My name is Mr. Molstad, Madam Clerk.

We -- I believe you have everything in front of you in terms of what intend to refer to, but the four briefs for -- and I would like to deal with some of the facts in terms of what brings us here today. And I want to go back a bit, because some of this is interrelated in terms of the substance of the application, as well as what we deal with in terms of costs.

Back on June 15th, 2015, I received on my desk a large box of written material and, in fairness, we were advised later that it was served Friday afternoon, July 12th, 2015.

This box of material included a motion returnable June 30th, 2015, and we have that attached as tab 2 of our written submissions, August 16th.

The motion did not name Sawridge First Nation as a respondent. However, as you read that motion, you can see that it sought an order against the Sawridge First Nation. And the relief that it was seeking against the Sawridge First Nation included an order requiring Sawridge First Nation to file an Affidavit of Records, an order requiring the Nation to produce numerous records, including records related to issues referenced in an unfiled affidavit of Catherine Twinn, records related to another Court of Queen's Bench action, documents produced in Federal Court action T6686, which was a Constitutional challenge that Sawridge First Nation advanced with respect to Bill C-31 that went through two trials in the Federal Court, and appeals, and documents produced in Federal Court action T265589, another Federal Court action. And -- and we would encourage you to reread this motion at tab 2 of our authorities, because it is our submission, Sir, that this application was devoid of merit, and procedurally and substantively incorrect. It, in our submission, is demonstrative of an application of a party who has a blank cheque and who takes the position that there will be never any consequences for them in relation to costs.

The application, tab 2, was filed after the questioning of Mr. Bujold on May 27th and 28th, 2014, and after the Sawridge Trustees provided answers to undertakings December 1, of 2014. And I would point out that the questioning of Mr. Bujold, as a representative of the Sawridge Trust, and his Answers to Undertakings provided what we would submit was a significant amount of information, not all of the information, but a significant amount regarding both the transfer of the assets to the 1985 Trust, and the identification of the Trust beneficiaries. It's important to keep in mind that that information was provided to the Public Trustee in 2014.

We would refer you also, Sir, to tab 6 of the Sawridge First Nation written submissions, and this is the brief that was filed in August of 2015 by the Sawridge First Nation. And in paragraph 7 of that brief, on page 2, it sets out that since the matter was commenced, the trial -- that the Trustees of the Sawridge Trust, and with assistance from Sawridge

First Nation, had provided the Public Trustee with extensive disclosure. And I encourage you to read all of paragraph 7, over to page 3, in terms of just what that disclosure was. We submit that it was extensive and it was provided in 2014, or earlier.

Now, we know that the Public Trustee has not questioned Mr. Bujold in relation to his undertakings that were provided on December 1, of 2014.

In the Public Trustee's response in relation to costs, or it's the -- excuse me, it's the written missions of the Public Trustee in response to Sawridge First Nation's costs submissions.

In paragraph 14 -- are you with me there, Sir?

THE COURT: Yeah, I'm just getting there. Thanks.

MR. MOLSTAD: Yeah. In paragraph 14, they state that on June 17th, 2015, Sawridge First Nation requested an adjournment of all matters scheduled for June 30th, 2015. That is not correct. That is not true, Sir. On June 17th, 2015, we wrote to this Court advising that we were requesting an adjournment of all matters that purport to name Sawridge First Nation as respondent. And our letter that was sent to the Court is found at tab 3 of the Sawridge First Nation written submissions.

THE COURT: And I'm taking it now you're just -- you're always talking about your most recent brief that is filed --

MR. MOLSTAD: That's right.

THE COURT: -- August 16th?

MR. MOLSTAD: Yes, it is.

THE COURT: Thanks.

MR. MOLSTAD: It's the most recent August 16th, '16 brief, and tab 3.

THE COURT: Okay. I've got the June 17 --

MR. MOLSTAD: Yeah. And that June --

THE COURT: -- 2015 letter?

MR. MOLSTAD: -- 17 letter, if you read the second paragraph, and this was sent to the Court and to other counsel:

> We have requested an adjournment of all matters that purport to name Sawridge First Nation as a respondent. All of the parties, with the exception of the Public Trustee, Ms. Kennedy has advised that she will not be appearing at this application, have agreed to consent to the adjournment of all matters that purport to name Sawridge First Nation as a respondent.

We also refer you to your order which is found at tab 4, and we won't read that to you, but in paragraph 1 of that order at tab 4, you make it very clear, Sir, that that's exactly what we were asking for, an adjournment of all matters that were directed at the Sawridge First Nation. And, of course, the transcript of that date is part of the Public Trustee's submissions at tab 4. And at page 5 and 6 of that transcript, that confirms the very same thing.

Now, on June 24th, of 2015, we appeared before you, and our application for an adjournment was granted and the Public Trustee was ordered to provide the Sawridge First Nation with full particulars of the relief claim as against the Sawridge First Nation, and the grounds. We argued that the Public Trustee's refusal to consent to the adjournment was patently unreasonable and that they should pay for the costs of that adjournment, without indemnification from the Sawridge Trust. And you reserved your decision until the final disposition of the matter.

Now, on July 17th, 2015, Sawridge First Nation was served with this amended application. It's found at tab 5 of the Sawridge First Nation most recent written submissions. And, again, this motion sought an order requiring Sawridge First Nation to file an Affidavit of Records or, in the alternative, to produce numerous records. H-mm.

Paragraph 15 of our written submissions, if I could just take you to that briefly.

THE COURT: Sorry, what paragraph number?

MR. MOLSTAD: Paragraph 15 of our written submissions.

THE COURT: Okay.

MR. MOLSTAD: Filed August 16th. We summarize there some of the records that the Public Trustee sought an order in relation to. And I won't read

that to you, Sir, but I encourage you to read it so that you can see the scope of what was being sought again in this application, including records from other actions and from unfiled affidavits.

Now, on August 14th, of 2015, the Sawridge First Nation filed written submissions in response to the Public Trustee's amended application. And that is found at tab 6 of our written submissions. And it's made clear in this response that the Sawridge First Nation would seek costs from the Public Trustee, without indemnification from the Sawridge Trust.

The hearing then proceeded on September 2nd and 3rd, 2015, and of course your Reasons for Judgment are found at tab 7 of our written submissions filed most recently.

This Court in its reasons denied the application, found that the Sawridge First Nation was not a party and stated that any application for production of specific documents would have to be made pursuant to Rule 5.13. And you also directed that the Public Trustee was to refocus in relation to its participation. And if you go to tab 7 of our written brief, in particular paragraph 35, what you said was:

> The same is true for this Court attempting to regulate the operations of First Nations, which are bands within the meaning of the *Indian Act*. The Federal Court is a better forum, and now that the Federal Court has commented on SFN membership process in *Stoney vs. Sawridge First Nation* , there is no need, nor is it appropriate for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from band membership, then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.
>
> It follows that it will be useful to refocus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not relevant. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration, and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.
>
> Instead, the future role of the Public Trustee shall be limited to

> four tasks. One, representing the interest of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment, either direct or incorrect, in the distribution of the assets of the 1985 Trust, two, examining on behalf of the minor beneficiaries, the manner in which the property was placed, settled in the Trust, and, three, identifying potential but not yet identified minors, where children of SFN members are membership candidates. These are potentially minor beneficiaries of the 1985 Trust. And, four, supervising the distribution process itself.

With respect to the future production, what you said in paragraph 45 and 46, again in tab 7:

> There have been questions raised as to what assets were settled in the 1985 Trust. At this point, it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document requests from the SFN, which may relate to that issue. The Public Trustee shall, by January 29th, 2016, prepare and serve a Rule 5.13(1) application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settle in the 1985 Trust.

We submit, Sir, that based upon the affidavits of Mr. Bujold, the questioning of Mr. Bujold, the Answers to Undertakings, that the Public Trustee either knew or ought to have known that it had all of the records in the possession of the Sawridge First Nation and the Sawridge Trustees, related to the transfer of assets, that is the settlement of the assets for the 1985 Trust.

This Court made it very clear that the Public Trustee was representing minors who fell into any one of three categories. And this is found in paragraph 56 of your decision, at tab 7. Category 2 was minors who are children of members of Sawridge First Nation, category 4 was children of adults who have unresolved applications to join Sawridge First Nation, and category 6, children of adults who have applied for membership in Sawridge First Nation but have had that application rejected and are challenging that rejection by appeal or judicial review.

And I emphasize those words, because you used them, Sir, appeal or judicial review.

The -- you then stated, Sir, and you directed that if the information was not already disclosed:

> Sawridge First Nation shall provide to the Public Trustee by the 29th of January, one, the names of individual who have (a) made applications to join the Sawridge First Nation which are pending, category 3, and (b) had applications to join the Sawridge First Nation rejected and are subject to challenge, category 5 and 6, and (2) the contact information for those individuals, where available. This information was provided to the Public Trustee and the Court without any information redacted. It was, of course, included on January 18th, 2016, and a copy of the letter is attached as Appendix D to the Public Trustee written brief.

You also stated in paragraph 61 of your decision, again found at tab 7:

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

Category 2 is the minors who are children of members of Sawridge First Nation.

With respect to the issue of costs at that application, you reserved your decision until you were able to evaluate the Rule 5.13 applications. And in paragraph 71 of your decision, again at tab 7, you stated that as the Court of Appeal observed in Sawridge number 2 at paragraph 29:

> The Public Trustee's activities are subject to scrutiny by this Court. In light of the four task scheme set out above, I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the Rule 5.13 applications which may arise from completion of tasks one to three.

You did make it clear, as it's stated, that the Public Trustee's activities are subject to your scrutiny.

Now, on January 29th, 2016, we were served with two documents that were entitled the Application by the Office of the Public Trustee of Alberta for Production Under Rule 5.3, and one related to the assets settled in the 1985 trust, and the other related to the beneficiaries.

I think it's important to note in terms of resolution of this issue, that on March 10th, 2016, before we were required to file our written submissions, as you'd indicated that we would file them March 15, we sent a letter to the Public Trustee, and based upon the position that we set out in that letter, we asked whether they would withdraw the 5.13 applications in order to avoid having to file written submissions. And that letter is found at tab C-4 of the Sawridge First Nation's brief filed March 15th, of 2016. And I would encourage you, Sir, to read that letter.

The Public Trustee responded on March 14th, 2016.

THE COURT: Sorry, just give that to me again. I just want to mark it.

MR. MOLSTAD: Yeah. It's found at tab C-4 of our March 15th, 2016, brief.

THE COURT: Okay. I'm just trying to find the C. A, B --

MR. MOLSTAD: I just hope it's -- I've got the right -- at the back of the --

THE COURT: Yeah. No, I -- I've got --

MR. MOLSTAD: It's a letter from Parlee McClaws dated March 10th, 2016.

THE COURT: Yeah, I'm just trying -- I'm having trouble finding -- ah, there's C. Okay. C-4?

MR. MOLSTAD: Right.

THE COURT: All right. I've got it.

MR. MOLSTAD: In any event, I encourage you to read it.

The Public Trustee responded on March 15th, 2016, and I encourage you to read this letter, too. It's found at tab 8 of the Sawridge First Nation written submissions.

THE COURT: The more recent one, correct?

MR. MOLSTAD: The most recent one.

THE COURT: Okay.

MR. MOLSTAD: That's correct, Sir. And I won't take you through them now, but basically the Public Trustee advised that if -- if Sawridge First Nation provided an updated list of the Nation's children and a written response to advise whether any of the individuals noted in Schedule 3 of our January 18th, 2016 letter, with pending membership applications have minor children, then that would satisfy the Public Trustee in relation to the beneficiary application.

So following that -- I mean, we filed a brief, but following that on April 5th, 2016, the Sawridge Trustees provided the Public Trustee with an updated list of the Sawridge First Nation minors. And that's found at tab F of the written brief of the Public Trustee.

THE COURT: M-hm.

MR. MOLSTAD: And with respect to the Public Trustee's other request, we were very confused, because -- and we responded on March 16th, pointing out that the Schedule 3 of our January 18, 2016, letter, which is at tab D of the written brief of the Public Trustee --

THE COURT: Sorry, there must be a -- is there a second book of attachments to that March 15 brief? Mine -- you said tab F. Mine runs out at tab C.

MR. MOLSTAD: Sorry, tab D of the brief of the Public Trustee?

THE COURT: Oh, I'm sorry, you're talking about their brief.

MR. MOLSTAD: Yeah.

THE COURT: All right. Got it.

MR. MOLSTAD: And it's tab D of the brief enclosed, but this is our letter of January 18th.

THE COURT: Yeah. Got that. Thanks. I'm just --

MR. MOLSTAD: Now, it -- you know, we were confused by the inquiry because this contains a list of the adult parents, that is Schedule 3 is a list of the adult parents who have made application for their children for membership, and the contact information and the number of children applying. It was not something that we were directed to provide, but we did in order that they had full and sufficient information.

We asked, in our letter, for an application from the Public Trustee based on this, because we didn't understand their request, and --

THE COURT: This is your -- you're talking about your April one now.

MR. MOLSTAD: Yeah.

THE COURT: Yeah.

MR. MOLSTAD: Yeah. So -- and we never did get a response to that. But as you have in front of you, when we filed our written submissions on March 15th, of 2016, that was based upon your directive that we do so. And we assumed that the Public Trustee ought to have filed written submissions by January 29th, because it seemed to us that if we're filing written submissions as a respondent, we should have something to respond to. However, as you know, the Public Trustee had not done that. It filed simply a Notice of Application setting out the grounds.

And in April, of 2016, we told the Public Trustee that we took the position that they hadn't complied with your order of December, 2015, as they did not file any written submissions, but what we did say is let's get this on. We made, as I stated earlier, a reasonable assumption that if we have to file written submissions as a respondent, that we have to file it in response to something.

We any -- in any event, we told the Public Trustee as long as we could agree to a schedule and the Public Trustee would provide particulars of the evidence to be relied upon, with copies, we would be prepared to proceed on the basis that they would make written submissions, we would make a reply. And that procedure was agreed to. It's set out in Exhibit 2 to the questioning that we conducted of Mr. Bujold, and it sets out that they file written submissions, we file a reply, and later on we agreed, because we were

dealing with costs, that they could then file a reply in relation to our submission on costs. But it did provide that the Public Trustee would be required to give us particulars of the evidence to be relied upon in both applications by July 7, 2016, as well as copies of the evidence. And on July 7th, the Public Trustee served us with notice of the records it intended to rely upon in relation to its application. And that's found at tab 9 of Sawridge First Nation's written brief.

And I want to take you to that, because this is July 7th in terms of timing, and these are two applications that relate to both the assets and the beneficiaries that are still fairly broad in terms of what they were seeking. But the evidence on page 2 of their letter, which is the fourth page in, lists the evidence that they will be relying upon in relation to both the membership application and the assets application. And there's transcripts, affidavits, supplementary -- supplemental affidavits, undertakings, and a fairly lengthy list on both, but one of them is the same in both. It's six in one and five in the other. It says:

> Catherine Twinn's affidavit dated September 23rd, 2015, filed in this action on September 30th, 2015, our references will be limited mainly to paragraph 29, period. 29(h) will be referenced in relation to any costs applications made by the respondents.

The word mainly didn't give us comfort, because the position is that this is evidence before the Court, and if we take issue with it, we have to address it.

We arranged for questioning of Mr. Bujold, and this occurred on July 27th. When we attended at the questioning of Mr. Bujold, the Public Trustee advised us that they would no longer be proceeding with the settlement application. And as you know, as you've signed the consent order, and we've got a copy of it at tab 10 of our brief, the preamble of this consent order is, in our submission, relevant and indicative of the information that the Public Trustee was in possession of, because what it says is that:

> The Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of the assets from the '82 Trust to the '85 Trust, that the parties have been given access to all document regarding the transfer of the assets, and the Trustees are not seeking an accounting in relation to the transfer of these assets, and noting that the assets from the '82 Trust were transferred to -- into the 1985 Trust.

And they talk about the little information available.

I think that my friend, Ms. Bonora, made mention of this in her brief. The purpose of the transfer in '82, '85, in terms of transfer from trust, was to avoid any claim that others might make in relation to these assets after the enactment of Bill C-31. So Sawridge First Nation would be highly motivated to ensure that those that were acting as trustees made the transfer of all assets from the '82 Trust to the '85 Trust. That was the reason. The reason clearly was one where it was in everyone's best interests to make sure the transfer took place.

I would point out that the resolution of this matter, in accordance with this order, is similar to the resolution that was proposed by the Sawridge Trustees to the Public Trustee on May 13th, 2016. And a copy of that is Exhibit 5 to the questioning of Mr. Bujold.

When Mr. Bujold was questioned on July 27th --

THE COURT: I take it that's in the file.

MR. MOLSTAD: It's been filed.

THE COURT: Okay. Right.

MR. MOLSTAD: Yes. The questioning and the exhibits --

THE COURT: Well, just so --

MR. MOLSTAD: -- to the questioning.

THE COURT: Just so you know, of course, I mean, the systems internally have totally broken down. So it never made it to my desk, but. . .

MR. MOLSTAD: Yeah, yeah. Well, if you have trouble finding it, Sir, we can send you --

THE COURT: Yeah. No, I just --

MR. MOLSTAD: -- another copy.

THE COURT: -- want to get it on the record so. . .

MR. MOLSTAD: Yeah.

THE COURT: I'll find it eventually.

MR. MOLSTAD: Yeah.

THE COURT: Thanks.

MR. MOLSTAD: In any event, Mr. Bujold confirmed that, first of all, the Public Trustee has not questioned him in relation to his undertakings. Secondly, that Sawridge Sawridge First Nation have fully cooperated with the Sawridge Trustee Request for Information regarding the beneficiaries and potential beneficiaries of the Trust, that paragraph 9 to 28 of his affidavit sworn in September, of 2011, contained a lot of information related to the settlement of the assets. And this information was obtained from the Sawridge First Nation, and that the Sawridge First Nation was cooperative in providing this information, that the Sawridge First Nation provided the Sawridge Trustees with a number of records related to membership, including a membership application form, a flow chart for the membership application process, the membership rules, letters of acceptance or rejection for membership, and all of these were forwarded to the Public Trustee.

So that's sort of an overview of some of the facts.

The application that my friend has in relation to the beneficiaries is the only one that's before you now and, first of all, we adopt our submissions of March 15th, 2016, in response to this and, in particular, in relation to the law as it's recited, dealing with a 5.13 application. And, frankly, it would appear that the Public Trustee does not take issue with the general principles cited in that they -- in our brief. And I refer you to paragraph 20 of the Public Trustee's written brief. And based upon that admission, we respectfully don't know why we're here.

We say, Sir, that the Public Trustee has not clearly specified any records it seeks production of, and as I read its written brief, it does not indicate it's seeking further production. They would appear to be asking for directions, and we submit that we're here to deal with the 5.13 application, and our submission is that it should be dismissed.

Now, touching briefly, and you've taken the Public Trustee through this, the Public Trustee's submissions about words used, unresolved and pending, with the greatest of respect, are devoid of merit. And if you look at tab 7 and read paragraph 52 of your decision, what you say in the last sentence:

> Therefore, I will only allow investigation and representation by the Public Trustee of children of persons who have, at a minimum, completed a Sawridge Band Membership Application.

And as we've stated earlier in our letter of January 18, 2016, found at tab B of the written brief of the Public Trustee, we provided a list which I'm advised was all the persons who had submitted an application, period. And there were 26 names, addresses and telephones, but there was one name without an address or a telephone number, because none had been provided by the applicant. So it was obvious from just looking at the list that there was one that clearly was incomplete.

With respect to the terms rejected and unsuccessful, we also submit, with the greatest of respect, the Public Trustee's submissions are devoid of merit. And, again, if you look at your decision at tab 7 in paragraph 56 and 57, and I won't read them all, but in the first sentence, you say:

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

And then you list the categories. Those two categories at the bottom:

> 5. Adults who applied for membership in the SFN, but have had that application rejected and are challenging that rejection by appeal or judicial review, and children of persons in category 5 above.

The words appeal and judicial review are used.

Our letter of January 18th, 2016, again -- and I just want to take you to that briefly, tab D of the written brief of the Public Trustee.

THE COURT: Okay. Got it.

MR. MOLSTAD: It's tab D of the written brief.

THE COURT: I've got --

MR. MOLSTAD: On the first page at the bottom, what we say is:

> In relation to individuals who have had application to join Sawridge First Nation rejected, Sawridge First Nation advises that the last application for membership in Sawridge First Nation that was denied occurred on December 9th, 2013, and there was no

> appeal in relation to that decision. Sawridge First Nation Membership Rules provide that when a membership application has been denied, an appeal of such decision to the electors of the band must be initiated by delivering notice in writing to the band counsel at the office of the band within 15 days after communication to him or her of the decision of band counsel. Sawridge First Nation advises that there are no appeals with respect to denial of membership outstanding at this time. Sawridge First Nation also advises that there are no outstanding applications for judicial review of denial of any application for membership decided by the electors of the Sawridge First Nation at this time.

So paragraph 27 of the Public Trustee's brief, it again raises membership issues. They also tender the affidavit of Ms. Catherine Twinn, and the Public Trustee relies upon that in this motion. They raise both conflict of interest and membership issues in terms of the evidence and their brief.

THE COURT: Sorry, which one of their briefs are you referring to?

MR. MOLSTAD: The -- the affidavit of Catherine Twinn --

THE COURT: Yeah. Good.

MR. MOLSTAD: -- that the Public Trustee relies upon in this motion, which is found at tab 9 of the Sawridge First Nation. Or, actually --

THE COURT: Oh, of your -- of your brief. Okay.

MR. MOLSTAD: No, it's not. I --

THE COURT: No?

MR. MOLSTAD: It's tab C of the -- of the Public Trustee's brief. The written brief of the Public Trustee.

THE COURT: Okay.

MR. MOLSTAD: Tab C.

THE COURT: Yeah. The --

MR. MOLSTAD: And --

THE COURT: That's the August 5th one.

MR. MOLSTAD: Yeah, the affidavit of Ms. Catherine Twinn is the affidavit that they served us with notice on July 7th, 2016, that they would be relying on this evidence, and mainly on certain parts of it, but we say that this evidence raises both conflict of interest and membership issues. And rather than take you through the affidavit, we'll give you the paragraph numbers in the affidavit that address conflict of interest; paragraphs 29, 33, 34 and 35. And the paragraphs in the affidavit that raise membership issues are 29(a), 29(b), 29(c), 29(g), (for George), 29(i) and (j).

And what we say, Sir, is that this Court in its decision made some very specific directions. And again back to tab 7 of your -- which is your decision, we refer you to paragraph 35. We read this earlier. The last sentence:

> If there are outstanding disputes on whether or not a particular person should be admitted or excluded from band membership, then that should be reviewed in a federal court and not in this 1985 Sawridge Trust modification and distribution process.

Paragraph 36, second line there:

> The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band, and historic disputes that relate to the subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between SFN, this administration and the 1985 Sawridge Trustees.

Paragraph 54:

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

Paragraph 69 of your same decision, the second sentence:

> I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the Sawridge First Nation.

And, lastly, paragraph 70 from your decision, the bottom half on page 15:

> While in Sawridge 1, or Sawridge number 1, I had directed that the Public Trustee may inquire into SFN membership processes at paragraph 54 of that judgment, the need for that investigation is now declared to be over, because of the decision in *Stoney v. Sawridge First Nation*. I repeat that inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

We submit, Sir, that based upon the Court's decision and it's very specific directions to the Public Trustee, the fact that the Public Trustee is making reference to and alleging deficiencies in the Sawridge First Nation membership process and also introducing evidence which alleges deficiencies in the membership process and alleges conflict of interest is inappropriate and we submit should be taken into consideration in relation to costs.

My friend refers in their written brief to the *RBC v. Canada* decision, and particularly to paragraph 17. Our submission is very brief. This case deals with record production of a party, and an Affidavit of Records. And the Court said that with respect to parties and disclosure, if there are fish, the respondents do not have to go fishing for them. And that's a correct statement of law, but it has no application with respect to an application pursuant to 5.13 as against a non-party.

We submit, Sir, that in relation to the beneficiary application, the Public Trustee has all of the information that it requires in order to identify the minors that it represents, and we also submit that the Public Trustee has failed to identify any further records or information it requires and, as a result, the beneficiary application should be dismissed.

I would now turn to my submission on costs.

THE COURT: Now, when you use the term beneficiary application, you're talking about the section 5.13.

MR. MOLSTAD: Right.

THE COURT: Correct.

MR. MOLSTAD: I do have submissions I would intend to make on costs. Perhaps this might be a good time to take a break, Sir?

THE COURT: All right. Well, we'll break.

MR. MOLSTAD: I'm in your hands. If you want to --

THE COURT: Yeah. No, it's okay. If you want to -- how long do you think you might be in your submission on this one? There's just some things I have to do over the noon hour. I'm -- I can't get back here until 2 o'clock, so. . .

MR. MOLSTAD: Well, I'm prepared to carry on, then.

THE COURT: Okay. Let's go for another --

MR. MOLSTAD: Yeah. Okay. Sure. Yeah.

THE COURT: -- ten minutes or so and. . .

MR. MOLSTAD: The -- at tab 11 of our written brief you will find your order, and in paragraph 2 and 3 of that order on the second page --

THE COURT: You're talking about the original order way back.

MR. MOLSTAD: Yeah.

THE COURT: Okay.

MR. MOLSTAD: Your order way back. That's correct, Sir. It's at tab 11 of our written submissions. In paragraph 2, you state that:

> The Public Trustee shall receive full in advance indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.

And also, you say:

> The Public Trustee will be exempted from my responsibility to pay the costs of the other parties in the within proceeding.

We submit, Sir, that it is clear that the exemption from responsibility to pay costs is very specifically the costs of the other parties in the within proceedings, and as you know, our position has always been, and continues to be, that the Sawridge First Nation is not a party in the within proceedings. So our submission is that the costs exemption does not apply to the Sawridge First Nation.

I would point out that when the Public Trustee made their application originally, and I only have one copy of this, but somewhere buried in the court file, to be appointed as a litigation representative. They specifically asked for the terms and conditions of their appointment to include ordering that the Public Trustee shall be exempted from liability for costs to any other party in this proceeding. That was what they asked for, and we submit that's what they got.

We also submit, Sir, that if the cost exemption does not apply to the Sawridge First Nation, this Court has the jurisdiction to exercise its discretion in relation to awarding costs. We submit that this Court must always be in a position to encourage the reasonable and efficient conduct of litigation.

At tab 13 page 7, the Court of Appeal affirmed that the advanced costs order would be subject to your oversight and further directions.

We did refer you to a decision from the Ontario Court of Justice found at tab 5, and it's the *Children's Aid Society* decision. The issue in this case was whether the Ontario office of the children's lawyer, which is referred to, abbreviated the OCL, would be liable for costs in relation to a -- to a necessary multi-day trial. The rule applied to the OCL is described in paragraph 34, and we draw this to your attention because I think my friend in their submissions says that in this case, there was no exemption. We submit that there was a form of an exemption in this case. In paragraph 34, the Court states:

> The relevant provision of Rule 24 are reproduced here.

And number 24 is:

> There is a presumption that a successful party is entitled to the costs of a motion enforcement case, or appeal.

And then sub 2:

> The presumption does not apply in a child protection case, or to a party that is a government agency.

So there is a, although not as extreme, there is a form of an exemption in this case, and Mr. Justice Schnall of the Ontario courts at page -- at, sorry, paragraph 53 and 54 of the same decision, made some what we submit are very relevant comments to this case. Paragraph 53:

> A sense of immunity from costs may blind or desensitize a party or non-party litigant to the fact that other litigants are incurring costs and expenses to be involved in the court process. Immunity from costs could result in a lack of accountability to the court process. No participant in litigation should have carte blanche to pursue litigation that has no focus and no evidentiary basis, without running the risk of being held accountable for wasting time and money and an order to pay compensatory costs to indemnify the other litigants.

In this case, costs were awarded against the OCL on a full recovery basis.

We also submit, Sir, that the foundational rule provisions of our Rules found at tab 16 of our written submissions, specifically prohibit, in mandatory language, a party from filing an application or taking proceedings that do not further the purpose and intention of the Rules.

You, Sir, we submit have the discretion to award costs to the Sawridge First Nation as against the Public Trustee, without indemnification from the Trust.

Rule 5.13(2) provides that if the applicant is successful, the person requesting the record must pay the person producing the record an amount determined by the Court. So in other words, if my friend is successful with her application and the Sawridge First Nation is compelled to produce a record, they have to pay them.

We submit, Sir, that in this case, should you decide that they should not be successful, it seems to me to be inequitable not to order that they pay costs. They've proceeded with an application under 5.13 that has a clear obligation on their part to pay costs, if they succeed. If they don't succeed, we submit it is only fair that they be responsible to pay costs. If, of course, you decide that the exemption applies to them, as we stated earlier, we submit that you still have the discretion to award costs on the basis that they not be paid by the Sawridge Trust.

The conduct that we submit should be considered as unreasonable and unnecessary includes the following.

1. The refusal to consent to Sawridge First Nation's application for an adjournment, requiring us to appear and apply for the adjournments. With the greatest of respect, Sir, no lawyer would take that position without talking to his client and telling his client that we might be subjected to a costs award because we're going to oppose this adjournment, or not consent to it, and it's pretty obvious to us that the adjournment's going to be granted. We submit, Sir, that lawyers have a responsibility to reduce the time required to be spent in court by justices, not increase it.

2. The Public Trustee, in our submission, failed to exhaust obtaining production in accordance with the Rules, before taking this exceptional step of seeking records from a non-party, the Sawridge First Nation. They could have questioned Mr. Bujold on undertakings or just requested the documents. Mr. Bujold testified that Sawridge First Nation had been cooperating completely with any request for the records.

3. They proceeded with an application for relief, contrary to the Rules, when they either knew or should have known that they were only entitled to make an application against a non-party pursuant to Rule 5.13. You, Sir, agreed with this position and denied the application in December, of 2015.

4. With respect to the beneficiary application before you now, we submit that it's contrary to Rule 5.13, and the jurisprudence which supports that Rule, and is devoid of merit.

5. With respect to the settlement application, the Public Trustee's decision to withdraw this application is not based on the production of any documents from us. The Public Trustee has not received any new documents and, as a result, this could have been withdrawn before it was filed in January, of 2016.

6. The Public Trustee's conduct regarding disclosure of evidence intended to be relied upon was, in our submission, unreasonable and caused unnecessary effort to find out what is required under Rule 6.3. We submit, Sir, that it is a fundamental principle of our system of justice that when you make an application, you're required to file and serve on the respondents the evidence and the material that you intend to rely upon.

This is codified in Rule 6.13. Trial by ambush is not stepped, and as a non-party, Sawridge First Nation was served with two Notices of Application on January 19th, 2016. Those applications, one of which has been withdrawn, the other of which is before you,

that stated under the material or evidence to be relied upon, all relevant materials filed to date in Court of Queen's Bench action 110314112, including all transcripts, affidavits, excerpts of evidence and Answers to Undertakings, and such further and other materials as counsel may advise and this Honourable Court may allow. What a ridiculous proposition, that we, as a non-party, should be required to go to the courthouse and review everything filed, or in this case go to the web site and looking at everything that's been put on that web site, which is really no different than going to the courthouse, except that we perhaps don't have to pay the photocopying costs that the courthouse might charge us.

We finally received particulars of the evidence to be relied upon on July 7th, of 2016. And even that, we submit, was equivocal in relation to the affidavit of Ms. Catherine Twinn.

In summary, Sir, Sawridge First Nation's involvement in this proceeding came as a result of the Public Trustee applying for orders, including requiring Sawridge First Nation to prepare an Affidavit of Records and produce documents. We've been required to attend at a number of hearings in person, and essentially respond to these three applications.

Now, notwithstanding the Public Trustee's extensive requests for records at the outset, it's now decided on its own that it no longer requires any records from Sawridge First Nation. We submit, Sir, that this demonstrates that these applications were both devoid of merit and unnecessary litigation.

I think it's trite to say, Sir, that the Rules clearly provide that a successful party is entitled to costs, and that you have a broad discretion in relation to those costs. We refer you to Rule 10.33 which sets out a number of factors, and also paragraph 66 of our written brief which highlights some of those factors.

And with respect to enhanced costs, we refer you to the decision of Madam Justice Moreau found at tab 19 where she awarded enhanced costs in relation to a late application for an adjournment of trial.

In paragraph 63 and 64 of the Public Trustee's submission on costs, and I want to take you to that, Sir, because my friend has suggested that we've mischaracterized the case.

THE COURT: So this is in the response brief?

MR. MOLSTAD: Yes, this is in their brief, written submissions of the Public Trustee in response to Sawridge First Nation's motion on costs.

THE COURT: Got it.

MR. MOLSTAD: In paragraph 63 and 64, the Public Trustee states that SFN has mischaracterized the decision of *Manning vs. Epp*, which is found at tab 17. And then they quote parts of one paragraph that, with the great respect, we submit is a mischaracterization of this decision, and we encourage you read paragraph 64. We'll read to you the full content of what this Court said. And it's found at tab 17 of our written brief, and paragraph 18 of Mr. (Sic) Justice Lax, stated at follows:

> The broad language of section 131 does not limit the award of costs to the parties to a proceeding. The cases involving nonparties mainly addresses the question of whether costs can be awarded against them: see, *Gulf Canada Resources*). There does not appear to be a case where costs have been awarded in favor of a non-party, although this was implicitly recognized and in *Friction Division, et al.*
>
> The City of Waterloo sought the right to appear on the motion and to bring its own motion in response to the position taken by the plaintiffs in a Statement of Claim and factum that they delivered in response to the motion to strike the pleading. They asserted that the Epp defendants could not raise the issue of privilege, as any privilege could only be claimed by Waterloo. Having taken this position, it is fair to say that the plaintiff invited Waterloo's motion in order to avoid the risk of being later said to have waived privilege. When Waterloo appeared, the plaintiffs disputed its right to do so.
>
> The plaintiffs take no position on Waterloo's entitlement to costs, and in their written submission, address only the issue of quantum. The motion was necessary to protect Waterloo's claim for privilege, and ensured that the privilege issue, which was important, was before the Court. It was successful in obtaining an order to expunge the pleading. It is appropriate to award Waterloo its costs, but on a partial indemnity scale.

So a no-party was awarded costs in that decision.

In *Kent vs. the Law Society of Alberta*, Mr. Justice Sanderman at tab 20, and in tab 20 of our brief at paragraphs 18 and 19.

THE COURT: I've got it, yeah.

MR. MOLSTAD: I won't read you those two paragraphs. I encourage you to read them both, Sir. I'd just read you the last sentence in paragraph 19:

> Unfortunately, in this matter he lacked restraint, another important attribute of a successful litigator. Successful litigators know when there is no case to advance and do not tilt at windmills for tactical reasons when it causes pain to innocent parties.

In the decision of --

THE COURT: Of course that was aimed at Arthur Kent, a non-lawyer, right?

MR. MOLSTAD: Right. I understand that Mr. Kent has had much litigation before this Court.

THE COURT: Yeah, he actually got successful later on, so. . .

MR. MOLSTAD: What's that?

THE COURT: He actually succeed in his defamation.

MR. MOLSTAD: Oh, did he? Okay.

The -- in the *Hill v. Hill* decision, the Alberta Court of Appeal, and that's found at tab 21 of our written brief, Sir, this decision noted in paragraph 12 that payment by a third party is not a bar to recovery of costs. And I am instructed today, Sir, to tell you on behalf of the Sawridge First Nation that there shall be no double recovery by the Sawridge First Nation. Any award of costs against the Public Trustee on the basis that there be no indemnification from the Sawridge Trust, will either be paid to that Sawridge Trust, or reduce any fee that comes from that Trust.

In conclusion, Sir, in relation to the issue of costs, we submit that taking into consideration the conduct of the Public Trustee, enhanced costs should be awarded against the Public Trustee on the basis that these costs not be paid by the Sawridge Trust. We submit that the costs be either a multiple of column 5, or a lump sum, and that they should be in relation to; 1, the application for adjournment that was not consented to; 2, the application before this Court on September 2nd and 3rd, including preparing submissions, which application was dismissed; and, 3, this application, including the

cross-examination of Mr. Bujold, and the written submissions that were required to be made. And those, Sir, are our submissions in relation to costs.

THE COURT: Thank you, Mr. Molstad. I don't have any questions. I think we're just going to keep on going, unless --

MS. HUTCHISON: Sure. That's absolutely --

THE COURT: There's nothing to deal with after this matter is dealt with, so. . .

MR. MOLSTAD: Sorry.

Submissions by Ms. Hutchison (Application)

MS. HUTCHISON: It's much later than it looks.

My Lord, I'll try to respond to Mr. Molstad's comments, which I think some deal with the substantive, some deal with the costs and so there may be a bit of a mix in my comments, but I will just begin, My Lord, with our primary responses on the costs application.

As the Court will be aware from reviewing our brief of August 19th, 2016, the Office of the Public Trustee is, of course, of the position that it is not liable to pay costs to the Sawridge First Nation in this matter on an enhanced basis, or otherwise.

First and foremost, My Lord, it's very clear that the costs terms set by Sawridge 1 and Sawridge 2 apply to the Sawridge First Nation.

I don't have my brief from 2012 with me today, My Lord, but I reviewed it before we did our August 19th brief, and I'm fairly sure my friend mischaracterized our submissions. I believe that they referred to a request for costs for all -- from all -- exemption for costs from all participants. And, in fact, that's referenced in the text of the Sawridge 1 judgment.

And most importantly, My Lord, whatever the order that was signed by this Court says, the costs exemption went up to the Court of Appeal. That was party of what was appealed to the Court of Appeal. And if the Court turns to our brief of August 5th, we have Sawridge 2, as we've termed it, the Court of Appeal's decision, at tab 3 of our authorities. And the question under appeal before the Court of Appeal, in its view was did the chambers judge err in granting exemption from the costs of other participants?

And I'm looking at paragraph 30, My Lord.

THE COURT: Okay.

MS. HUTCHISON: Regardless of what anyone said or meant or didn't say or didn't mean at this level, My Lord, the Court of Appeal was dealing with an exemption for costs against all participants. And when one reads paragraph 30, and I certainly encourage the Court to do so, it is completely in line with the rationale being offered by the Court there that an independent litigation representative may be dissuaded from accepting an appoint ment if subject to liability for a costs award, while the -- and it goes on. And so we also note the exemption for costs, while unusual, is not unknown.

There's nothing, My Lord --

> While the possibility of award of costs against a party can be a deterrent to misconduct, we are satisfied the Court has ample other means to control the conduct of parties and counsel before it.

That's reference to a costs award against the OPGT, not a costs award against -- limiting it to other parties.

So our submission, My Lord, the costs exemption that was granted to the OPGT was very much to deal with all participants. And, indeed, if we look at -- and I'm just going to take you, My Lord, to -- jumping ahead in our submissions. At paragraph 24 and 25 of our written brief dated August 19th, My Lord.

THE COURT: Sorry, just say that again. Sorry.

MS. HUTCHISON: Paragraph 24 --

THE COURT: Of which brief?

MS. HUTCHISON: -- 25, and actually 26, My Lord. It's -- it's our August 19th brief.

THE COURT: Okay. Got that.

MS. HUTCHISON: Essentially, what we're putting before the Court, My Lord, is the fact that the very narrow interpretation that Sawridge First Nation is claiming simply can't be supported when the Court looks at the full context of the indemnity and the exemption. The Court, both in Sawridge 1 and Sawridge 2, explicitly

set out the position that was put before it by the OPG, Office of the Public Trustee, My Lord, and I've got two subparagraphs there in paragraph 25 that give you quotes from those two decisions. Sawridge 1 is from paragraph 14, and then the quote from Sawridge 2 is at paragraph 30?

> The Public Trustee is firm in stating that it will only represent some or all of the potentially affected minors if the costs of its representation are paid from the 1985 Trust, and it must be shielded from liability for any costs arising from this proceeding. And the OPGT's --

This is from Sawridge 2, the Court of Appeal:

> The OPGT's willingness to act was conditional on, *inter alia*, the Public Trustee is exempted from liability of the costs of other litigation participants in this proceeding, by an order of the Court.

And as this Court likely remembers, My Lord, by Sawridge 1, Sawridge First Nation was already very actively involved in this matter. They came to the table, with the greatest of respect to my friend, by their own volition. They were not actually obligated to come to the table in Sawridge 1 and make submissions about the OPGT's first application. They did so. Everyone had in contemplation the fact that there were other litigation participants in play, and that is the context in which the costs exemption order was granted, My Lord. In terms -- and I would certainly ask the Court to review our submissions then in paragraph 26 through to 31.

It is the position of the Office of the Public Trustee that when Sawridge First Nation and, indeed, the Trustees, failed to seek leave to appeal from Sawridge 2, the exemption for costs became immutable. It cannot be overturned, My Lord, and that is -- that is our consistent position.

It's also been consistent, as you're aware, My Lord, that the Public Trustee has made that a term and a condition of its representation of the minors in this matter.

In terms of the importance of both the indemnity and the exemption, which I would suggest, My Lord, in some ways Mr. Molstad's application deals with those two items together, and so we'll largely deal with them together. It has to be considered as well that in Sawridge 1 and Sawridge 2, it was recognized that the protection or -- both the exemption and the indemnity were there to ensure that the Public Trustee of Alberta could provide independent representation. And, My Lord, if you look at paragraph 29 of our

submission, August 19th, that will take you to paragraph 40 and 42 of Sawridge 1, and paragraph 27, 28 and 30 of Sawridge 2, that refer to the fact that this order for an exemption for costs and indemnity of costs were integrally linked to ensuring that there would be independent representation of the minors.

Our position, My Lord, is that that exemption and indemnity cannot be interfered with without taking away that independence, or at least undermining the very goals that were being served by those orders in -- when they were initially made, My Lord.

My Lord, I'm at paragraph 12 of our written submissions of August 19th, and that's dealing with the costs of the adjournment applications. Obviously, My Lord, the Public Trustee is making some submissions in response to the merits of Mr. Molstad's application. It's not a concession that the merits should even be reached. With respect, My Lord, the costs application should be dismissed simply on the basis of Sawridge 1 and Sawridge 2's orders on exemption of costs and indemnity, but we -- we will address a few points so that the Court has our position on this.

As we explain from paragraphs 12 through to paragraphs 18 of those submissions, My Lord, the OPGT's inability, and we would characterize it as that, not a refusal, but an inability to consent to Sawridge First Nation's request for an adjournment of the production application, and Mr. Molstad is correct about my paragraph 14. It should -- to have been completely clear, should have said SFN requested an adjournments of all matters scheduled regarding SFN. And that was in no way intended to mislead this Court or misstate the facts, My Lord. It was just a lack of clarity.

In any event, when that request was received, there was much more on the table, as this Court may remember, to be dealt with at the appearance than just the -- the matter of the production application. There was a litigation plan. Most importantly, there was the Offer of Settlement from the Trustees.

The Public Trustee came to the parties, and then ultimately the Court, to indicate that from its point of view, it was premature to deal with a settlement application until production had been dealt with, and that the Public Trustee viewed staging of those applications as integral to the best interests of the minors in this matter. That was expressed fully to the Sawridge First Nation, not that there was a lack of regard for their request or a lack of desire to accommodate it. The OPGT simply could not, because the Trustees refused to adjourn their settlement application.

Interestingly, as matters progressed in June, of 2015, and I note, My Lord, in those paragraphs the Public Trustee did try to propose a compromise solution, there was no attempt to be punitive with Sawridge First Nation or ignore their request. Ultimately, by

the time we got to the June 30th, 2015 case management meeting, and I'm now, My Lord, at about paragraph 20 of our submissions --

THE COURT: M-hm?

MS. HUTCHISON: -- the Trustees actually withdrew their settlement application. And so -- and, sorry, that was in September. So the barrier to the Public Trustee's ability to consent to the first adjournment was gone. By the time we were at the September 2nd, 2015, hearing, we'd actually largely achieved the compromise solution the Public Trustee had initially suggested.

It's not a basis for costs to be awarded, My Lord. The Public Trustee acted in good faith. It has a mandate to represent and protect the interests of the minor beneficiaries. Its position on Sawridge First Nation's request for an adjournment was based entirely on that, and there was ultimately no prejudice to Sawridge First Nation, My Lord. They had three months notice to prepare for the production application, ultimately.

In terms of my friend's submissions on the application for production, a few comments, and they will be few, My Lord, because I don't wish to reargue those matters, obviously. We would suggest that many of my friend's submissions are asking this Court to view pre-Sawridge 3 events through a Sawridge 3 lens, and that simply cannot be done, My Lord. Sawridge 1 set a broad mandate. We've taken the Court through that in our written submissions. The Public Trustee of Alberta followed that broad mandate in good faith and with the intention solely of ensuring that this Court had the information before it that it required to deal with beneficiary identification for minors in a fulsome manner.

This Court chose to narrow the scope of relevance from Sawridge 1 and Sawridge 3, and, My Lord, that's the role of the case manager, but to suggest that the Public Trustee should have anticipated that before filing its 215 applications, frankly, My Lord, is simply not reality.

The Public Trustee has, since Sawridge 3, implemented that narrower focus, it has acted according to that mandate, but it cannot be judged for its 2015 applications on the basis of a decision that was received after those applications were filed and argued.

My Lord, starting at paragraph 32 of the Public Trustee's written response on costs, which is the August 19th brief, we have our submissions as to why the Public Trustee would take the position that there is no basis to revisit the indemnity order or, indeed, the exemptions order, and indeed, My Lord, no longer the jurisdiction to review that.

The Public Trustee does not in any way, shape or form, and I'm referring to paragraph 34

of the brief, My Lord, suggest that there is not ongoing oversight on the matter of costs. And the Court of Appeal spoke to this in Sawridge 2, but I would ask the Court to read that paragraph very carefully. It's at paragraph 29 of Sawridge 2. It speaks to ongoing oversight about quantum, My Lord. It speaks to ongoing oversight about reasonableness of things like hourly rates, amounts to be paid in advance which, in fact, the Public Trustee has never sought, and other mechanisms for ensuring that the quantum of costs payable by the Trust is fair and reasonable.

My Lord, that's a very different level of oversight than saying that a statutory body with a right to refuse a litigation representative role, coming to the Court and asking for certain conditions of appointment, and receiving them, and then having those conditions of appointment confirmed fully by a Court of Appeal, can face a situation where those terms can be changed midstream. And our submission, My Lord, is that's not what we're dealing with here. As we say in paragraph 35, the cost -- aside from quantum of costs, the costs indemnity and the exemption themselves became immutable once the limitation to appeal passed.

And I'm jumping a bit forward in some of my general comments, My Lord.

I believe I have heard my friend say, or suggest, or perhaps imply, that somehow the Public Trustee of Alberta has acted as if it has a blank cheque, or has acted as if it is not subject to the oversight of this Court. And with the greatest of respect that, My Lord, is a submission that is devoid of merit. The Public Trustee has adjusted its mandate. The Public Trustee, as you can see from the progress made on matters such as a consent order today, has worked to try to achieve some resolution and narrowing of issues, but without ever compromising the best interests of the minors, and that is a difficult balance at times. It's understandable that the Trustees may have different points of view on those issues, or that Sawridge First Nation may have different points of view on those issues. The Public Trustee has no role other than to fulfil the mandate of protecting the interests of the minors, and assisting this Court in doing so, if we understand the scope of our role, My Lord.

The Courts refined how we're to carry that out, but the overarching theme is that we're here for the children, and I would suggest to you, My Lord, that any submission by Sawridge First Nation to suggest that the Public Trustee has stepped outside of that role is not supported by any evidence and is not supported by the events in this proceeding.

And I think that's a good point, My Lord, to repeat and remind the Court and my friend what the Public Trustee has said about why we're here on 513 today. And I'm looking at paragraph 4 of our August 5th brief. We're back in front of the Court to make sure that the parties have appropriately applied Sawridge 3. We are back in front of the Court to

confirm that the Court is satisfied that all of the evidence needed to identify potential minor beneficiaries is now before the Court, and we're back in front of the Court to ensure that the form of the information, which is an informal form, My Lord, it's a letter in both cases, is satisfactory.

Those are not unreasonable positions to take, My Lord. Those are not positions taken in bad faith or with an intention to cause an innocent party difficulty, My Lord. Those are positions taken to ensure that when this matter gets before a trial judge, the trial judge has the information that he or she needs to make a final determination in this matter. That is -- that is the only reason, My Lord.

I think for some of my friend's submissions, My Lord, I'll just refer you to -- there -- my friend has made a number of comments about filing of written submissions and whether the Public Trustee acted appropriately or not in that matter. Our position on that is set out in paragraph 37 through 39 of the brief. We certainly take the position that the Public Trustee has not breached Sawridge 3, nor has it breached any agreed deadlines and, in fact, they've all been honored and followed.

In terms of my friend's submissions about the OPGT's questioning of Paul Bujold, and we deal with that at paragraph 40 through to paragraph 46, I would simply ask the Court to consider all of those matters in their full context, as opposed to a narrow context, My Lord.

There was a questioning of Mr. Bujold in 2014. Mr. Bujold did provided Answers to Undertakings, and the Court has those undertakings. They've been filed a number of times. I believe they are in our -- the list of answers, I should say, as opposed to all the documents, are at tab B of our August 5th submission.

THE COURT: Yeah. I've got it.

MS. HUTCHISON: And if the Court looks through some of the later undertakings, it actually speaks to why the production application ways was -- was originally brought. Many of the questions are answered to say for the Trustees to provide information that they got from Sawridge First Nation. Mr. Bujold is passing on information he got from another party. And then there are the undertakings where the Trustees are unable to provide an answer, because Sawridge First Nation won't provide the information.

So for the Sawridge -- for the Public Trustee to question Mr. Bujold further on matters where, A, he was simply passing on information from another entity and, B, where it was clear he couldn't compel more information from the other entity, My Lord, we would

suggest would have been rather inefficient. It was recognized that the Sawridge First Nation was the repository of all membership ident -- membership information that might be relevant to beneficiary identification. That was the reason for approaching Sawridge First Nation for production in the first place, My Lord.

And in terms, My Lord, of the -- why the Public Trustee had not gone forward with a questioning on the assets issues, I don't know if that -- that's part of what Sawridge First Nation is taking issue with. As we explain in our brief from paragraph 40 onwards, My Lord, there were ongoing debates about the scope of relevance, and those matters were at one point thought would be resolved before this Court. They were ultimately resolved by agreement, but to proceed with the questioning of Mr. Bujold while there was another procedural fight brewing over relevance, we would suggest, My Lord, would have been inefficient and a waste of resources. The Public Trustee was waiting until the relevance issues were dealt with. We -- we thought originally that would be by application via the 513 assets matter. It turned out it was dealt with by way of a consent order. Once the scope of relevance became narrowed, as it has been in the consent order, it wasn't necessary for the Public Trustee to press on about issues relating to settlement of assets in 1982.

My Lord, there were -- if I understood my friend's submissions, there are some suggestions or allegations that -- I'm not entirely clear if the allegation is that the O -- the Public Trustee continues to engage in a collateral attack on membership, or if it was that the production applications were so, but we've responded starting at paragraph 52 through to paragraph 57 of our written submissions, My Lord.

The Public Trustee would certainly suggest that the mere mention of membership in its materials can't be treated as a collateral attack. Beneficiary identification, whether we like it or not, will be integrally tied to membership, because that is the beneficiary definition that's being proposed. There is nothing in the Public Trustee's materials, My Lord, that asks this Court to go behind the Sawridge Band membership process, and deal with it in the way a Federal Court would deal with it on judicial review. So I -- we're a bit confused about some of those submissions, My Lord, but we can assure the Court we are not engaging in a collateral attack.

I believe my friend referred quite a bit to the fact that the Public Trustee was relying on Catherine Twinn's affidavit as evidence that the Public Trustee has not honored Sawridge 3, or is attempting to go back into issues of conflict of interest. Again, My Lord, we're somewhat confused by that. There is nothing in our materials that refers to the paragraph numbers of Catherine Twinn's affidavit that Mr. -- that Mr. Molstad has taken you to. The paragraph that we refer to, and it's the paragraph we originally referred to in our July 7th letter disclosing particulars of the evidence that would be relied on, is Catherine

Twinn's -- and I'm looking at our August 5th brief, tab C, page 6, and it's 29(k).

THE COURT: It's the one you've highlighted in the brief?

MS. HUTCHISON: That's correct, My Lord. And it just -- it just sets out the fact that Sawridge First Nation's legal fees are being paid by the Trust.

The Public Trustee has raised that in response to the application for costs, My Lord, and in relation to the double recovery submissions we've made. I'm unaware of anything in the Public Trustee's briefs that would suggest it is seeking some sort of a finding from this Court, directly or indirectly, about conflicts of interests of the Trustees. So that's certainly not our position, My Lord.

THE COURT: Yeah, just -- I just want to make a note. I don't think I -- I'm looking at your footnote 57, page 16 of your brief.

MS. HUTCHISON: This is the August 19th?

THE COURT: The August 19th brief.

MS. HUTCHISON: Page 16, 57. Yes?

THE COURT: So I've got the reference to the Catherine Twinn --

MS. HUTCHISON: Referring --

THE COURT: -- paragraph 29(k).

MS. HUTCHISON: Pinpoint cite to that paragraph, My Lord.

THE COURT: I -- what I don't see, and it's pages 62 to 63 of the questioning of Paul Bujold.

MS. HUTCHISON: My Lord, I don't believe that we included those as a tab, because we were under the impression that this entire transcript had been filed by Sawridge First Nation.

THE COURT: Okay.

MS. HUTCHISON: We can certainly provide those to the Court --

THE COURT: Okay.

MS. HUTCHISON: -- with the electronic version of our brief.

THE COURT: Would you -- would you mind doing that?

MS. HUTCHISON: Not at all, My Lord.

THE COURT: Because I went looking, you know, in the material. Again, the filed materials --

MS. HUTCHISON: My apologies.

THE COURT: -- never made it to me, just the materials you've sent to me directly.

MS. HUTCHISON: I apologize, My Lord. I --

THE COURT: No problem.

MS. HUTCHISON: We debated it, and did not include it.

My Lord, I'm just taking a quick look at my -- a few notes responding to Mr. Molstad.

I -- and, again, it's been a long morning, so if I'm paraphrasing Mr. Molstad at all inaccurately, I apologize, but I believe my friend made some submissions on the costs of the 5.13 assets order, suggesting that some of the wording in the consent order in some way established that the 5.13 application was not necessary. I would simply ask the Court to read that preamble very carefully. That preamble is not drafted as an acknowledgement of fact. The preamble is drafted to set out the representations of the Trustee's counsel upon which the Court and all the parties may rely. So it's not a matter of the preamble referring to affidavit evidence, transcript evidence, undertaking answers. It is a reliance on the representations of Trustee's counsel, and that's a very different animal, I would submit, My Lord, than suggesting that the preamble refers to the evidence before the Court.

Secondly, My Lord, I believe I heard my friend suggest that the final order entered into is very similar to the May 13th, 2016, clarification that was both -- initially proposed by Dentons.

The Public Trustee would certainly disagree with that characterization. There was a great deal of time and effort put into admittedly what ended up being short additions, but critical additions, My Lord. They preserve rights for beneficiaries around accounting. They eliminate an entire issue around settlement into the Trust that was a live issue. And I won't take the Court through Mr. Bujold's entire 214 questioning, but Mr. Bujold was questioned in a very preliminary way on some of those topics. So it's been a live issue in this matter since at least 2014. The ultimate order was critically different than the original clarification that was offered, My Lord.

And if I understood the implication of some of the other submissions, My Lord, it was that Sawridge First Nation perhaps was not expecting the July 27th settlement of the assets consent order the day of Mr. Bujold's questioning. With the greatest of respect, all counsel were involved in the discussions leading up to that order. I think -- I think we were all rather hopeful on the eve of questioning, that that order was about to be finalized. I would -- I would be surprised to hear it was a surprise that that consent order was finalized on that date, but -- and certainly, My Lord, Sawridge First Nation was on notice that the asset issue was completely off the table at the outset of Mr. Bujold's questioning, and if the Court goes through that transcript, I would suggest you'll find that there is almost no time spent on membership issues. There's an extensive amount of time questioning Mr. Bujold on an affidavit he didn't swear, and then there's very little -- or -- and then there's the focus on the assets matter. So I believe we've commented on that in our submissions in terms of whether costs would ever be properly awarded for that questioning.

THE COURT: Well, if you wouldn't mind providing me the full transcript of that?

MS. HUTCHISON: Paul Bujold's questioning?

THE COURT: Of Paul Bujold's questions at the end of July of this year.

MS. HUTCHISON: By -- would email -- by email, My Lord?

THE COURT: Just electronically.

MS. HUTCHISON: Yeah.

THE COURT: Is it in a searchable form, to -- the format you get from the --

MS. HUTCHISON: I will have to check, My Lord, but if it's not, I'm -- the reporters can usually provide it.

THE COURT: Okay.

MS. HUTCHISON: So we'll certainly get you that.

MS. BONORA: Sir, it is at tab 4 of our -- the transcript brief that we had filed, if you want it that way.

THE COURT: Okay. Sorry, of the -- of which brief?

MS. BONORA: The brief in support of the transfer issue. The whole brief. The whole transcript is attached.

THE COURT: Oh. Okay. Well, thanks. I don't know where I -- where that ended up. Anyway, send --

MS. HUTCHISON: I can't -- I can't help.

THE COURT: -- it to me electronically.

MS. HUTCHISON: Absolutely.

THE COURT: And then I've got it.

MS. HUTCHISON: We will, My Lord. If we can get it in a searchable format, we'll get it to you that way.

In terms of Mr. -- or my friend's comments about some of the correspondence that was exchanged between the parties in March and April of 2016, My Lord, I believe I heard my friend suggest that the Public Trustee did not respond in any way to the Sawridge First Nation's April 2016 letter. We don't agree with that, My Lord, although the Public Trustee was certainly in the process of an ongoing review of Sawridge 3, and certainly in the process of an ongoing assessment of its mandate under Sawridge 3. Its June 17th, 2016 letter, which is tab 10 of our August 16th submission, fully responds to all of the parties and participants about what the Public Trustee intends to do with the two 5.13 applications. The explanation on the 5.13 application regarding membership is at page 2 of that letter. We would suggest, My Lord, that what is set out there is exactly what the Public Trustee has done. So with the greatest of respect, we would suggest that there was correspondence in response.

And, My Lord, I -- this is in -- I think this is clear in the materials, but I think we'd best respond. There was some suggestion of trial by ambush by the Public Trustee. Clearly, we would regard that submission as devoid of merit, My Lord. Both parties to this application have had the opportunity to file two written briefs. The Sawridge First Nation, if it had any doubt about the evidence it was going to potentially be confronted with, it was served with it on July 7th, and you've been taken to that letter by Mr. Molstad. All of the evidence is available to all the world on the Trust's web site. And, My Lord, I realize I've given you my March brief.

There is a reference in Sawridge First Nation's March 15th brief that refers to excerpts of evidence that were filed in June. That was a -- actually a bit of an esoteric little volume that only the parties had. It certainly would strike us, My Lord, that Sawridge First Nation has had high level of access. And we're not asking the Court to bend the rules. The evidence was served.

There was an element of our friend's position in correspondence almost suggesting that the evidence had to be refiled. We've been unable to file -- find any, any rule that would suggest we can't rely on evidence that's already filed in this proceeding. We do have to notify Mr. Molstad on that -- of that, and serve him with copies. And we would suggest our July correspondence did that, My Lord.

And as I say, I don't -- I don't think any part or participant in this action can suggest they haven't had ample opportunity to speak to the issues. There has been no trial by ambush.

My Lord, going back to our brief, you will find our submissions on essentially all the merits of Sawridge First Nation's costs application, outside of the initial exemption and costs indemnity issue from paragraph 58 all the way through to -- well, it's paragraph 58, with subparagraphs.

Then our closing point, My Lord, has been this issue that Sawridge First Nation is claiming, claiming costs recovery in a situation where the Sawridge Trust has already agreed to pay the legal fees of the Sawridge First Nation. Particularly given the existence of the indemnity, My Lord, we would submit that that makes a costs award in this case highly inappropriate, and impractical. It's -- the funds will be coming from the Trust one way or the other. Sawridge First Nation has already been paid.

I didn't hear my friend denying that today. We have evidence from both Mr. Bujold and Catherine Twinn and, My Lord, we would suggest that the fact that Sawridge First Nation has already been paid in full does raise real issues as to why we've spent all of this time and money fighting over costs in the first place in light of a very clear order by the Court

of Appeal on that point.

Simply in closing, My Lord, the Public Trustee of Alberta takes the position that granting the Sawridge First Nation's application for costs would be directly contrary to the terms of appointment that the Public Trustee advised, and both level of courts accepted, were preconditions to its acceptance of a role as a litigation representative. They would also be directly contrary to the Court of Appeal's decision which upheld the costs exemption in relation to all participants, not this narrower interpretation of parties.

An order of that nature would also contradict the Court of Appeal's order for full in advance indemnity, bearing in mind, My Lord, that we're not disputing the Court's ongoing discretion and oversight of matters such as quantum, hourly rates, hours spent, et cetera. Those items are detailed by the Court of Appeal, but they don't extend to the indemnity.

And finally, My Lord, the costs award sought by the Sawridge First Nation would undermine the costs terms that were put in place to ensure the independence of the Public Trustee of Alberta in this proceeding.

And finally as well, My Lord, they would essentially punish the Public Trustee of Alberta for efforts that were made in good faith to carry out a mandate to protect the interests of the minors in this matter.

Subject to the Court's questions, those are our submissions.

THE COURT: Well, just one -- actually two questions, while I'm thinking of them.

One, it had taken me some time to sign off on that, the order implementing Sawridge number 3. Do you happen to have a filed copy of that with you, or --

MS. HUTCHISON: My Lord, I did not bring a copy to court with me. I apologize.

THE COURT: Okay. Include it in that emailed package, okay?

MS. HUTCHISON: Absolutely.

THE COURT: And the other question is I take it that if I were to dismiss the costs application of the Sawridge First Nation, so with the result they're

not -- they were unsuccessful, I take it the Public Trustee is not seeking costs against Sawridge First Nation.

MS. HUTCHISON: No, My Lord. The Public Trustee of Alberta has enough costs issues to address with the Trustees. We don't need to address them with anyone else.

THE COURT: All right.

MS. HUTCHISON: We will not seek costs against Sawridge First Nation, My Lord.

THE COURT: All right. Thank you.

MS. HUTCHISON: Thank you very much.

THE COURT: Mr. Molstad?

Discussion

MR. MOLSTAD: I just had one brief comment, Sir. My friend has made a submission that I have mischaracterized her written submissions. That's not true. Here they are. You can read them yourself, Sir, and they're at page 31, paragraph 5.

THE COURT: All right. Which set of submissions is this?

MR. MOLSTAD: Those were the original submissions she made --

THE COURT: Oh, back in 2012.

MR. MOLSTAD: Yeah, back when -- and I believe Ms. Bonora wishes to make a brief comment.

MS. BONORA: And I apologize. My Lord, I would just -- I'm sure that that's the last paragraph in the brief, and I can't take a look at it right now. I would ask the Court to look earlier in the brief, because my recollection is that it's in the substantive argument that we refer to complete protection and a complete exemption that's not --

THE COURT: Well --

MS. BONORA: -- limited to parties.

THE COURT: Well, actually, that's sort of my recollection.

MS. BONORA: Thank you, My Lord.

THE COURT: But, here, I'm going to give this back to you. I no doubt probably have that somewhere in the court record or in my -- while I don't think it's in my parallel set of materials. Would you scan that in and just send it in?

MR. MOLSTAD: I will.

THE COURT: All right.

MS. BONORA: Sir, one brief submission. My friend, Ms. Hutchison, started by saying that she thought all counsel would benefit from the clarification of the definitions. We would submit that we are not in that category. We don't think there was any misinterpretation that could be made of those definitions, and that we want to be very clear that our silence in respect of the costs is not meant to be taken as suggesting we're neutral. We wholly support Sawridge First Nation's application for costs, because we believe this application, in terms of being against a third party, was completely unnecessary.

If a clarification was required, and I don't begrudge Ms. Hutchison for bringing that application to seek a clarification if she needs it, but we didn't need Sawridge First Nation at that table.

So the 5.13 application is a request for documents. Her application was a request for clarification, and so we think that was an unnecessary application, and so support the application for costs.

THE COURT: All right. Well, I'll let you respond to that.

MS. HUTCHISON: My Lord, to be -- and to be clear, we are making a request for documents. We have left it in the discretion of Sawridge First Nation as to the form in which they provide the information.

We've heard a great deal about confidentiality concerns. If the Court determines additional information is required and a list is the only thing that works for Sawridge First

Nation, that is all the Public Trustee is seeking.

The first question to the Court was a clarification of the categories to determine if additional information is needed. We don't have a list of all of the individuals rejected, so we -- as I mentioned, My Lord, we couldn't go and determine their intent, if that's part of our mandate, and we don't have a list of individuals potentially -- when we get into the discussion of what is complete versus incomplete versus pending, do we need a list of individuals who have submitted application, but have not yet been told what's happening with their application, or if it meets Sawridge First Nation requirements? I -- and I'm taking you back to our first discussion --

THE COURT: Okay.

MS. HUTCHISON: -- which I don't really -- and I'm not doing it quite as -- in quite the organized manner we did, My Lord. There's a request for documents. We are content to deal with the documents in the form the Sawridge First Nation presents. Thank you.

THE COURT: All right. But just again so it's clear, I am not plowing through -- I don't even have all the material. I'm not doing that function. All I'll do for you is clarify, if I decide it's necessary to clarify, some of the those terms in Sawridge number 3, and then it will be back to the Public Trustee and you to take those clarification, if there are any, and --

MS. HUTCHISON: And determine if additional documents are required.

THE COURT: Okay.

MS. HUTCHISON: Okay.

THE COURT: All right.

MS. HUTCHISON: Thank you, My Lord.

THE COURT: All right.

MS. HUTCHISON: That's very helpful.

THE COURT: All right. That's it for today. So on that particular I'll say set of applications, I am reserving on it, and you'll be receiving a

decision in due course. It may be that it's quite short and to the point. I might just call counsel back and do it orally, rather than go through all the rigamarole of a published decision. All right?

MS. HUTCHISON: My Lord, I should just mention I'm actually taking a holiday, which never happens, August 27th to September 11th, if you were to --

THE COURT: Oh, all right. Don't worry -- don't worry about it. This thing's -- it might be 2017 before you get this.

Anyways, thanks, counsel, for all your help.

PROCEEDINGS CONCLUDED

Certificate of Record

. . .Christina Wilde, certify that this recording is the record made of the evidence in the proceedings in the Court of Queen's Bench held in courtroom 611 at Edmonton, Alberta, on the 24th day of August, 2016, and that I, Christina, was the court official in charge of sound-recording machine during the proceedings.

Certificate of Transcript

I, Deborah Jane Brower, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) The Certificate of Record for these proceedings was included orally on the record and is transcribed in the transcript.

Digitally Certified: 2016-08-29 13:44:05
Debbie Brower, CSR(A)
Order No. 64442-16-1

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Lines:	3099
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ToC Pages:	1
Transcript Pages:	71
Total Pages:	73
Line Statistics	
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ToC Lines:	26
Transcript Lines:	3022
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Visible Character Count Statistics	
Title Page Characters:	622
ToC Characters:	736
Transcript Characters:	116002
Total Billable Characters:	117360
Multi-Take Adjustment: (-) Duplicated Title Page Characters	116738

TAB D

Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985
APPLICANTS	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, CLARA MIDBO, and CATHERINE TWINN, as trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**Application (Statement of Issues and Relief Sought)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Counsel for the Sawridge Trustees Attention: Doris C.E. Bonora Telephone: (780) 423-7188 Fax: (780) 423-7276 File No: 551860-001-DCEB

NOTICE TO RESPONDENT(S)

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

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

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

Date	To Be Determined
Time	To Be Determined
Where	Law Courts, 1 A Sir Winston Churchill Square, **Edmonton**
Before Whom	To Be Determined

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

Basis for this claim:

1. The Applicants, the Sawridge Trustees, are the Trustees of the Sawridge Band Inter Vivos Settlement ("1985 Trust"). The Applicants seek determination of an issue and advice and directions from this Court. Pursuant to the comments of the Court of Appeal in *Twinn v Twinn*, 2017 ABCA 419, the Applicants file this document to set out and clarify the advice and directions sought in this Application.

2. The 1985 Trust was settled on April 15, 1985. Thereafter, section 15 of the *Canadian Charter of Rights and Freedoms* came into force, following the signing of the *Charter* into law.

3. After the 1985 Trust was settled, Bill C-31 was passed into law, making significant amendments to the *Indian Act*, R.S.C. 1970, Chapter I-6. Those amendments included the reinstatement of status and membership to women who had married non-Indigenous men and therefore lost their status and membership under the *Indian Act* prior to the amendments.

4. The definition of "Beneficiary" in the Trust Deed of the 1985 Trust makes specific reference to determining members of the Sawridge First Nation ("SFN") by reference to the *Indian Act* as it read as at April 15, 1982, before Bill C-31 was passed. The Trust Deed specifically prohibits amendment of the definition of "Beneficiary".

5. The 1985 Trust was funded from assets that had belonged to the SFN. Currently, there are members of SFN who are not beneficiaries of the 1985 Trust, such as the Bill C-31 women. There are beneficiaries of the 1985 Trust who are not members of SFN.

6. There may be other forms of discrimination in the definition of "Beneficiary".

7. The Applicants seek a determination of the following issue:

   Is the definition of "Beneficiary" in the Trust Deed of the 1985 Trust discriminatory, insofar as the

definition refers to provisions of the *Indian Act*, RSC 1970, c I-6, which have since been amended, and reads:

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

Remedy sought:

8. If the definition of "Beneficiaries" is found not to be discriminatory, then the Applicants do not expect to seek any other relief.

9. If the definition of "Beneficiary" is discriminatory, the Applicants seek direction from this Court as to the appropriate remedy, and particularly whether the appropriate remedy is:

   (a) To modify the definition by striking out language that has a discriminatory effect such that the definition of "Beneficiary" in the 1985 Trust will be reduced to members of the Sawridge First Nation?

   (b) If the remedy in paragraph 9(a) is not granted to determine if the 1985 Trust can be amended pursuant to,

      (i) the amending provisions of the Trust Deed, or

      (ii) Section 42 of the *Trustee Act*?

10. If the definition of "Beneficiary" is modified, by striking out language or otherwise, then:

   (a) Should there be "grandfathering" such that any of the individuals who met the definition of "Beneficiary" before this relief is granted will remain Beneficiaries?

(b) If the answer to 10(a) is "yes", what should the terms of such "grandfathering" be and who will be grandfathered?

11. Such further and other relief as this Court may deem appropriate.

Affidavit or other evidence to be used in support of this application:

12. Such material as has been filed to date and has been posted on the applicable court ordered website at www.sawridgetrusts.ca

13. Such further material as counsel may further advise and this Honourable Court may admit.

How the Application is to be heard:

14. The application is to be heard in Special Chambers before the presiding Justice at a date to be determined.

Applicable Acts and regulations and Orders:

15. *Alberta Rules of Court*, Alta Reg 124/2010;

16. *Trustee Act*, RSA 2000, c T-8;

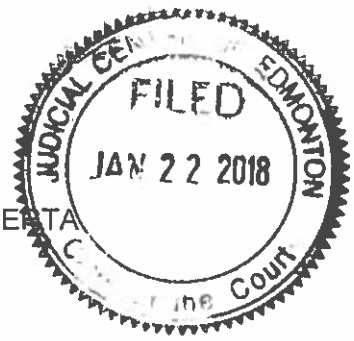
17. Order of the Court of Queen's Bench of Alberta dated January 5, 2018 in case management.

WARNING

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

TAB E

Clerk's stamp:



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

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

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

APPLICANT	ROLAND TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND WALTER FELIX TWIN, as Trustees for the 1985 Trust and the 1986 Trust ("Sawridge Trustees")
DOCUMENT	**CONSENT ORDER (ISSUE OF DISCRIMINATION)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5

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

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

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

for Clerk of the Court

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

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

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

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

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

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

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

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

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

IT IS HEREBY ORDERED AND DECLARED;

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

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

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

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

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

The Honourable D. R. G. Thomas

CONSENTED TO BY:

MCLENNAN ROSS LLP

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

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

SCHEDULE "A"

Clerk's stamp:

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

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

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

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

TAB F

Form 26
[Rule 5.6]

COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TW'NN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**AFFIDAVIT OF RECORDS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-72764 File No: 551860-1-DCEB

Affidavit of Records of, Sworn by Paul Bujold, Chief Executive Officer of the Sawridge Trusts on November 2, 2015.

I, Paul Bujold, of Edmonton, Alberta, have personal knowledge of the following or I am informed and do believe that:

1. I am the corporate representative of the Sawridge Trusts.

2. The records listed in Schedules 1 and 2 are under the control of the Sawridge Trustees.

3. The Sawridge Trustees object to produce the records listed in Schedule 2 on the grounds of privilege identified in that Schedule.

4. Other than the records listed in Schedules 1 and 2, the Sawridge Trustees never had any other relevant and material records under their control.

SWORN BEFORE ME at Edmonton, Alberta, this 2nd day of November, 2015.

Commissioner for Oaths in and for the Province of Alberta

ANNA LOPARCO
BARRISTER & SOLICITOR

PAUL BUJOLD

SCHEDULE 1

Relevant and material records under the control of the Sawridge Trustees, for which there is no objection to produce:

See attached Schedule 1

SCHEDULE 1

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000001	SAW000001	03/04/2010	Letter		Bujold, Paul [Sawridge Trusts]	Penner, Doreen
SAW000002	SAW000003	01/04/2010	Letter		Penner, Doreen	Bujold, Paul
SAW000004	SAW000004	09/01/2011	Letter		Bujold, Paul [Sawridge Trusts]	Bosscha, Frank [Director of Aboriginal Affairs]
SAW000005	SAW000005	09/01/2011	Letter		Bujold, Paul [Sawridge Trusts]	Potskin, Jonathon
SAW000006	SAW000006	12/21/2009	Letter		Bujold, Paul [Sawridge Trusts]	Potential Beneficiary of the Sawridge Inter-Vivos Settlement
SAW000007	SAW000007		Document	Notice to Persons who are or may be Beneficiaries of the Sawridge Band Inter-Vivos Settlement (1985) or Beneficiaries of the Sawridge Trust (1986)		
SAW000008	SAW000008	09/01/2011	Letter		Bujold, Paul [Sawridge Trusts]	Lindberg, Dallas (Rosina)
SAW000009	SAW000009	09/01/2011	Letter		Bujold, Paul [Sawridge Trusts]	Sawan, Juliette
SAW000010	SAW000010	09/01/2011	Letter		Bujold, Paul [Sawridge Trusts]	Paquette, Melvin
SAW000011	SAW000011	04/07/2010	Memo	Filling Out Beneficiary Application Forms	Bujold, Paul [Sawridge Trusts]	Sawridge First Nation Band members
SAW000012	SAW000022	06/15/1983	Pleading	Affidavit of Walter P. Twinn		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000023	SAW000028	07/05/1983	Agreement	Declaration of Trust, Sawridge Band Trust between Chief Walter Patrick Twinn (Settlor) and Chief Walter Patrick Twinn, Walter Felix Twinn and George Twinn (Trustees)		
SAW000029	SAW000029		Minutes	Meeting of the Trustee's and Settlors of the Sawridge Band Trust, June 1982		
SAW000030	SAW000030		Minutes	Meeting of the Trustee's Sawridge Band Trust, 1983		
SAW000031	SAW000032		Minutes	Meeting of the Trustee's of Sawridge Band Trust, 1983		
SAW000033	SAW000038	07/05/1983	Agreement	Declaration of Trust, Sawridge Band Trust between Chief Walter Patrick Twinn (Settlor) and Chief Walter Patrick Twinn, Walter Felix Twinn and George Twinn (Trustees)		
SAW000039	SAW000049	04/15/1985	Agreement	Sawridge Band Inter Vivos Settlement, Declaration of Trust, Deed of Settlement between Chief Walter Patrick Twinn (Settlor) and Chief Walter Patrick Twinn, George V. Twin and Samuel G. Twin (Trustees) (Exhibit 'B' to the Affidavit of Paul Bujold sworn 08/30/2011)		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000050	SAW000053	11/24/2009	Letter	(Exhibit 'D' referred to in the Affidavit of Paul Bujold sworn 08/30/2011)	Bujold, Paul [Sawridge Trusts]	Sawridge Trust Potential Beneficiary
SAW000054	SAW000062	09/13/2011	Pleading	Affidavit of Paul Bujold on advice and direction in the 1985 trust, sworn 09/12/2011	Reynolds, Mirth, Richards & Farmer LLP	
SAW000063	SAW000069	04/15/1982	Agreement	Declaration of Trust, Sawridge Band Trust between Chief Walter Patrick Twinn (Settlor) and Chief Walter Patrick Twinn, Walter Felix Twinn and George Twinn (Trustees) (Exhibit 'A' referred to in the Affidavit of Paul Bujold sworn 09/12/2012)		
SAW000070	SAW000070		Minutes	Meeting of the Trustee's and Settlors of the Sawridge Band Trust, June 1982 (Exhibit 'B' to the Affidavit of Paul Bujold sworn 09/12/2011)		
SAW000071	SAW000072	06/17/1983	Pleading	Order of the Honourable Mr. Justice D.H. Bowen on 06/15/1983 (Exhibit 'C' to the Affidavit of Paul Bujold sworn 09/12/2011)		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000073	SAW000088	12/19/1983	Agreement	Agreement between Walter Patrick Twinn, Walter Felix Twinn, Sam Twinn and David A. Fennell (Old Trustees) and Walter Patrick Twinn, Sam Twinn and George Twinn (New Trustees) (Exhibit 'D' to the Affidavit of Paul Bujold sworn 09/12/2011)		
SAW000089	SAW000096	12/19/1983	Agreement	Transfer Agreement between Walter Patrick Twinn, Sam Twinn and George Twinn (New Trustees) and Sawridge Holdings Ltd. (Purchaser) (Exhibit 'E' to the Affidavit of Paul Bujold sworn 09/12/2011)		
SAW000097	SAW000119		Document	Acts of the Parliament of Canada, 1985 (Exhibit 'F' to the Affidavit of Paul Bujold sworn 09/12/2011)		
SAW000120	SAW000121	04/15/1985	Document	Sawridge Band Trust, Resolution of Trustees (Exhibit 'H' to the Affidavit of Paul Bujold sworn 09/12/2011)	Twinn, Chief Walter Patrick; Twin, Samuel G.; Twin, George V.	
SAW000122	SAW000122	04/15/1985	Document	Sawridge Band Resolution (Exhibit 'I' to the Affidavit of Paul Bujold sworn 09/12/2011)		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000123	SAW000134	04/16/1985	Agreement	Declaration of Trust between Walter Patrick Twinn, Sam Twinn and George Twin (Old Trustees) and Walter Patrick Twinn, Sam Twin and George Twin (New Trustees) (Exhibit 'J' to the Affidavit of Paul Bujold sworn 09/12/2011)		
SAW000135	SAW000143	08/15/1986	Agreement	The Sawridge Trust, Declaration of Trust between Chief Walter P. Twinn (Settlor) and Chief Walter P. Twinn, Catherine Twinn and George Twin (Trustees) (Exhibit 'K' to the Affidavit of Paul Bujold sworn 09/12/2011)		
SAW000144	SAW000148		Report	Sawridge Beneficiaries Proposed Program Summary, July 2009 (Exhibit 'L' to the Affidavit of Paul Bujold sworn 09/12/2011)		
SAW000149	SAW000149		Letter		McDermott, Alan Floyd	Bujold, Paul
SAW000150	SAW000150		Document	Birth Certificate re: Alan Floyd Mcdermott		
SAW000151	SAW000151	12/15/2009	E-mail thread	Re: Sawridge Band	Rennie, Vida	Bujold, Paul
SAW000152	SAW000153	12/14/2009	E-mail thread	Re: Sawridge beneficiary	Anderson, Barb	Bujold, Paul
SAW000154	SAW000154	12/19/2009	E-mail	Sawridge Band inter-vivos settlement	Anderson, Doug	Bujold, Paul
SAW000155	SAW000156		Document	Descendants of N. Albert Potskin (D-Sawridge)		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000157	SAW000157		Document	Descendants of Mary L. Sawan (D-Sawridge)		
SAW000158	SAW000162		Document	Descendants of Charles Neesotasis (D-Sawridge)		
SAW000163	SAW000163		Document	Descendants of Johnny (Jean Baptiste) Stoney (Sawridge)		
SAW000164	SAW000164		Document	Descendants of Rita Ward		
SAW000165	SAW000165		Document	Descendants of (A) Margaret S. Fitzgerald (Sawridge)		
SAW000166	SAW000166	07/04/1985	Document	Sawridge Indian Band, Resolution Adopting Membership Rules	Twinn, Chief Walter Patrick	
SAW000167	SAW000169		Document	Schedule A		
SAW000170	SAW000172		Document	Sawridge Membership Rules		
SAW000173	SAW000173		Document	Descendants of Sophie Cardinal		
SAW000174	SAW000175		Minutes	Meeting of the Trustee's of Sawridge Band Trust, 1983	Twinn, Walter F.; Twinn, George	
SAW000176	SAW000176	03/13/2013	Letter	Brittany Twin (DOB 03/29/1993), Alexander Twin (DOB 01/23/2005), Justice Twin (DOB 09/20/2001)	Twinn, Roland [Sawridge First Nation]	Twin, Wesley
SAW000177	SAW000177	01/13/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Twin, Brittany
SAW000178	SAW000179	06/01/2004	Letter	Membership Application	McKinney, Michael [Sawridge Band]	McDermott, Alan Floyd

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000180	SAW000180	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	McDonald, Allan A.
SAW000181	SAW000181	10/31/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	O'Connell, Gail E.
SAW000182	SAW000182	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Sandra
SAW000183	SAW000183	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Garry
SAW000184	SAW000184	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Conway
SAW000185	SAW000185	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Dion
SAW000186	SAW000186	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Margerie
SAW000187	SAW000187	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	McDermott, Richard W.
SAW000188	SAW000188	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Williams, Kayla
SAW000189	SAW000189	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Williams, Brett
SAW000190	SAW000190	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Cardinal, Louis O.
SAW000191	SAW000191	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Cardinal, Sheena L.
SAW000192	SAW000192	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Cardinal, Dale B.

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000193	SAW000193	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Minchau, Lisa A.
SAW000194	SAW000194	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Cardinal, Barbara J.
SAW000195	SAW000195	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Stoney, Maurice
SAW000196	SAW000196	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twin, Starr
SAW000197	SAW000197	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twin, Rainbow
SAW000198	SAW000198	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twinn, Corey
SAW000199	SAW000199	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twinn, Cody
SAW000200	SAW000200	04/25/2008	Letter	Membership	Twinn, Chief Roland [Sawridge Band]	Cardinal, Kieran
SAW000201	SAW000204		Financial document	Trust Income Tax Return and Information Return	Sawridge Band Trust	
SAW000205	SAW000232	01/21/1985	Document	Sawridge Enterprises Ltd. Demand Debenture - $12,000,000.00	Sawridge Enterprises Ltd.	
SAW000233	SAW000235	04/15/1985	Agreement	Assignment of Debenture between Walter P. Twinn (Assignor) and Walter P. Twinn, Sam Twin and George Twin (Assignees)		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000236	SAW000239	01/21/1985	Document	Statutory Declaration	Sawridge Enterprises Ltd.	
SAW000240	SAW000240	04/15/1985	Document	Band Council Resolution	Sawridge Band	
SAW000241	SAW000254	06/01/1984	Financial document	Sawridge Indian Band #19 Financial Statements for year ended 03/31/1984	Deloitte Haskins & Sells	
SAW000255	SAW000266	05/20/1985	Financial document	Sawridge Indian Band #19 Financial Statements for the year ended 03/31/1985	Deloitte Haskins & Sells	
SAW000267	SAW000274		Form	Sawridge Indian Band Membership Application Form		
SAW000275	SAW000275	01/13/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Twin, Alexander
SAW000276	SAW000276	01/13/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Twin, Justice
SAW000277	SAW000277	01/13/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Twin, Brittany
SAW000278	SAW000278	12/10/2013	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Potskin, Alfred Joseph
SAW000279	SAW000279	10/31/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	O'Connell, Gail E.
SAW000280	SAW000280	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Sandra
SAW000281	SAW000281	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Garry
SAW000282	SAW000282	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Conway

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000283	SAW000283	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Dion
SAW000284	SAW000284	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Margerie
SAW000285	SAW000285	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	McDermott, Richard W.
SAW000286	SAW000286	01/15/2009	Letter	Membership Application	McKinney, Michael [Sawridge Band]	Stoney, William Charles Jr.
SAW000287	SAW000287	01/15/2009	Letter	Membership Application	McKinney, Michael [Sawridge Band]	Ward, Alex Collin
SAW000288	SAW000288	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twin, Starr
SAW000289	SAW000289	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twin, Rainbow
SAW000290	SAW000290	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twinn, Corey
SAW000291	SAW000291	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twinn, Cody
SAW000292	SAW000292	04/17/2008	Letter	Membership	Twinn, Chief Roland [Sawridge Band]	Twin, Naomi
SAW000293	SAW000293	04/17/2008	Letter	Membership	Twinn, Chief Roland [Sawridge Band]	Twin, Wesley
SAW000294	SAW000294	10/31/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Ms. Belcourt
SAW000295	SAW000295	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Sandra

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SAW000296	SAW000296	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Garry
SAW000297	SAW000297	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Conway
SAW000298	SAW000298	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Dion
SAW000299	SAW000299	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Belcourt, Margerie
SAW000300	SAW000300	09/19/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	McDermott, Richard W.
SAW000301	SAW000301	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Williams, Brett A.
SAW000302	SAW000302	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Williams, Debra E.
SAW000303	SAW000303	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Cardinal, Louis O.
SAW000304	SAW000304	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Cardinal, Sheena L.
SAW000305	SAW000305	12/07/2011	Letter	Member Application	McKinney, Michael [Sawridge First Nation]	Cardinal, Dale B.
SAW000306	SAW000306	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Minchau, Lisa A.
SAW000307	SAW000307	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Cardinal, Barbara J.
SAW000308	SAW000308	12/07/2011	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Huzar, Aline

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000309	SAW000309	12/07/2011	Letter	Membership Application	Sawridge First Nation	Kolosky, June
SAW000310	SAW000310	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twin, Starr
SAW000311	SAW000311	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twin, Rainbow
SAW000312	SAW000312	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twin, Corey
SAW000313	SAW000313	09/19/2012	Letter	Membership	Twinn, Chief Roland [Sawridge First Nation]	Twinn, Cody
SAW000314	SAW000314	04/17/2008	Letter	Membership	Twinn, Chief Roland [Sawridge Band]	Twin, Naomi
SAW000315	SAW000315	04/17/2008	Letter	Membership	Twinn, Chief Roland [Sawridge Band]	Twin, Wesley
SAW000316	SAW000316	01/13/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Twin, Alexander
SAW000317	SAW000317	01/13/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Twin, Justice
SAW000318	SAW000318	01/13/2012	Letter	Membership Application	McKinney, Michael [Sawridge First Nation]	Twin, Brittany
SAW000319	SAW000319		Chart	Sawridge First Nation Membership Application Process		
SAW000320	SAW000323		Document	Appeal Procedure		
SAW000324	SAW000326		Document	Sawridge Membership Rules		
SAW000327	SAW000327		Document	Total Applications Received and Processed		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000328	SAW000328		Document	List of people admitted to Membership and their Relationship to Council at time of Admission		
SAW000329	SAW000329	11/26/1985	Letter	(Exhibit 1 at the Examination of Elizabeth Poitras on 05/29/2014)	Freeland, Halyna [Freeland, Royal & McCrum]	Twinn, Chief Patrick Walter
SAW000330	SAW000330	01/30/1986	Letter	(Exhibit 2 at the Examination of Elizabeth Poitras on 05/29/2014)	Petryshyn, Marusia [Freeland, Royal & McCrum]	Twinn, Chief Walter P.
SAW000331	SAW000331	03/31/1987	Letter	Elizabeth Poitras, Clara Loyer (Exhibit 3 at the Examination of Elizabeth Poitras on 05/29/2014)	Freeland, Halyna [Freeland, Royal & McCrum]	Sawridge Administration
SAW000332	SAW000332	04/23/1987	Letter	Elizabeth Poitras, Clara Loyer (Exhibit 4 at the Examination of Elizabeth Poitras on 05/29/2014)	Freeland, Halyna [Freeland, Royal & McCrum]	Thom, Bruce [Sawridge Administration]
SAW000333	SAW000333	04/02/1987	Letter	Elizabeth Poitras, Clara Loyer (Exhibit A for Identification at the Examination of Elizabeth Poitras on 05/29/2014)	Thom, Bruce [Sawridge Administration]	Freeland, Halyna [Freeland, Royal & McCrum]
SAW000334	SAW000334	04/23/1987	Letter	Elizabeth Poitras, Clara Loyer (Exhibit B for Identification at the Examination of Elizabeth Poitras on 05/29/2014)	Thom, Bruce [Sawridge Administration]	Freeland, Halyna [Freeland, Royal & McCrum]
SAW000335	SAW000335	11/28/1988	Letter	Elizabeth Bernadette Poitras v. Walter Twinn et al (Exhibit C for Identification at the Examination of Elizabeth Poitras on 05/29/2014)	Glancy, Terence [Faulkner Rogers Zwaenepoel & Glancy]	Thom, Bruce [Sawridge Administration]

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000336	SAW000336	12/05/1988	Letter	Elizabeth Bernadette Poitras v. Walter Twinn et al (Exhibit D for Identification at the Examination of Elizabeth Poitras on 05/29/2014)	McKinney, Mike [Sawridge Administration]	Glancy, Terence [Faulkner Rogers Zwaenepoel & Glancy]
SAW000337	SAW000337	01/31/1992	Letter	Elizabeth Poitras (Exhibit E for Identification at the Examination of Elizabeth Poitras on 05/29/2014)	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	Cullity, Maurice [Davies, Ward & Beck]
SAW000338	SAW000338	05/14/1992	Letter	Elizabeth Poitras (Exhibit F for Identification at the Examination of Elizabeth Poitras on 05/29/2014)	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	Cullity, Maurice [Davies, Ward & Beck]
SAW000339	SAW000340	05/20/1992	Letter	Poitras v. Twinn et al (Exhibit G for Identification at the Examination of Elizabeth Poitras on 05/29/2014)	Morgan, Edward [Davies, Ward & Beck]	Glancy, Terence [Royal, McCrum, Duckett & Glancy]
SAW000341	SAW000341	06/15/1992	Letter	Poitras v. Twinn et al (Exhibit H for Identification at the Examination of Elizabeth Poitras on 05/29/2014)	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	Morgan, Edward [Davis, Ward & Beck]
SAW000342	SAW000342	08/27/1992	Letter	Poitras v. Twinn et al	Mitchell, Doug [McMaster Meighen]	Glancy, Terence [Royal, McCrum, Duckett & Glancy]
SAW000343	SAW000344	08/28/1992	Letter	Poitras v. Twinn et al	Mitchell, Doug [McMaster Meighen]	Glancy, Terence [Royal, McCrum, Duckett & Glancy]
SAW000345	SAW000348	09/02/1992	Document	Transcription of Elizabeth Poitras, CBC Radio		
SAW000349	SAW000349	09/03/1992	Letter	Poitras v. Twinn	Mitchell, Doug [McMaster Meighen]	Glancy, Terence [Royal, McCrum, Duckett & Glancy]

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000350	SAW000350	09/22/1992	Letter	Poitras v. Twinn et al	Mitchell, Doug [McMaster Meighen]	Glancy, Terence [Royal, McCrum, Duckett & Glancy]
SAW000351	SAW000351	04/14/1993	Letter	Poitras v. Twinn et al	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	Mitchell, Doug [McMaster Meighen]
SAW000352	SAW000352	01/25/1994	Pleading	Order of Judge Daniele Tremblay-Lamer		
SAW000353	SAW000353	03/11/1994	Letter	Elizabeth Poitras - Application for Membership	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]
SAW000354	SAW000354		Pleading	Order of Judge Daniele Tremblay-Lamer		
SAW000355	SAW000356	03/21/1994	Letter	Elizabeth Poitras - Application for Membership	McKinney, Michael [Sawridge]	Glancy, T.P. [Royal, McCrum, Duckett & Glancy]
SAW000357	SAW000357	03/20/1995	Letter	Elizabeth Poitras - Application for Membership	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]
SAW000358	SAW000358	08/20/1994	Document	Declaration in response Sawridge Questionnaire: Question number 8E: Background & Personal interests	Potskin, Jennie	
SAW000359	SAW000359	04/19/1995	Letter	Elizabeth Poitras	McKinney, Michael [Sawridge]	Glancy, T. [Royal, McCrum]
SAW000360	SAW000360	04/26/1995	Letter	Elizabeth Poitras	McKinney, Michael [Sawridge]	Glancy, T. [Royal, McCrum]
SAW000361	SAW000361	05/08/1995	Letter	Elizabeth Poitras - Application for Membership	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000362	SAW000362	05/12/1995	Letter	Elizabeth Poitras	McKinney, Michael [Sawridge]	Glancy, T. [Royal, McCrum]
SAW000363	SAW000364	05/19/1995	Letter	Elizabeth Poitras - Application for Membership	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]
SAW000365	SAW000366	05/30/1995	Letter	Elizabeth Poitras	McKinney, Michael [Sawridge]	Glancy, T. [Royal, McCrum]
SAW000367	SAW000368	06/15/1995	Letter	Elizabeth Poitras - Application for Membership	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]
SAW000369	SAW000369	07/11/1995	Letter	Elizabeth Poitras - Application for Membership	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]
SAW000370	SAW000370	12/20/1995	Letter	Elizabeth Poitras - Application for Membership	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]
SAW000371	SAW000371	01/02/1996	Letter	Elizabeth Poitras	McKinney, Michael [Sawridge]	Glancy, T. [Royal, McCrum, Duckett & Glancy]
SAW000372	SAW000373	01/08/1996	Letter	Elizabeth Poitras - Application for Membership	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]
SAW000374	SAW000374	01/15/1996	Letter	Elizabeth Poitras	McKinney, Michael [Sawridge]	Glancy, T. [Royal, McCrum]
SAW000375	SAW000375	01/16/1996	Letter	Elizabeth Poitras - Application for Membership	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000376	SAW000376	02/07/1996	Letter	Elizabeth Poitras - Application for Membership	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]
SAW000377	SAW000377	02/15/1996	Letter	Elizabeth Poitras - Application for Membership	McKinney, Michael [Sawridge]	Glancy, T. [Royal, McCrum]
SAW000378	SAW000378	07/22/1996	Letter	Sawridge Indian Band, Poitras: Application for Membership	Henderson, Martin [Aird & Berlis]	Glancy, Terence [Royal, McCrum, Duckett & Glancy]
SAW000379	SAW000393		Document	Undertakings from Questioning on Affidavit of Paul Bujold, 05/27/2014 and 05/28/2014		
SAW000394	SAW000394		Document	Historical Councils of First Nation		
SAW000395	SAW000395	07/14/2014	Document	Sawridge Band Intervivos Settlement and Sawridge Trust Trustees from Trust Inception to 07/14/2014		
SAW000396	SAW000416		Document	Code of Conduct, Trustees of The Sawridge Band Inter Vivos Settlement and of the Sawridge Trust		
SAW000417	SAW000451	08/24/2009	Document	Constitution of the Sawridge First Nation		
SAW000452	SAW000471	10/16/2010	Document	Governance Act	Sawridge First Nation	
SAW000472	SAW000472	07/28/2014	Letter	Sawridge Trust - Transfer of Assets from 1982 to 1985 Trust	Fennell, David	Singh, Ashvin [Dentons Canada LLP]
SAW000473	SAW000473		Document	re: we inquired of David Jones of de Villars Jones...	Dentons Canada LLP	

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000474	SAW000487	06/01/1984	Financial document	Sawridge Indian Band #19 Financial Statements for the year ended 03/31/1984	Deloitte Haskins & Sells	
SAW000488	SAW000493	05/05/1987	Financial document	The Sawridge Band Inter-Vivos Settlement Trust Financial Statements for the year ended 12/31/1986	Deloitte Haskins & Sells	
SAW000494	SAW000494	04/15/1985	Document	Band Council Resolution	Sawridge Band	
SAW000495	SAW000521	01/21/1985	Document	Sawridge Enterprises Ltd. Demand Debenture - $12,000,000.00	Sawridge Enterprises Ltd.	
SAW000522	SAW000531	04/16/1985	Minutes	Minutes of a Meeting of the Directors of Sawridge Holdings Ltd.	Twinn, Walter P.; Twin, George; Twin, Sam	
SAW000532	SAW000532		Receipt	Receipt of Deposit	Scotiabank	
SAW000533	SAW000536	01/21/1985	Document	Statutory Declaration	Sawridge Enterprises Ltd.	
SAW000537	SAW000539	04/15/1985	Agreement	Assignment of Debenture between Walter P. Twinn (Assignor) and Walter P. Twinn, Sam Twin and George Twin (Assignees)		
SAW000540	SAW000541	08/26/2014	Letter	Twinn, Roland et al., as Trustees for the 1985 Sawridge Trust QB Action No: 1103 14112	Kindrake, E. James [Department of Justice Canada]	Singh, Ashvin [Dentons Canada LLP]
SAW000542	SAW000549		Document	List of Weekly Newspapers in Which Legal Notice was Placed by Sawridge Trusts 12/07/2009 and 12/14/2009		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW000550	SAW000550	12/01/2009	Invoice	81617 in the amount of $12,299.70	Alberta Weekly Newspapers Association	Sawridge Trust
SAW000551	SAW000551	12/01/2009	Cheque stub	1259 in the amount of $12,299.70	Sawridge Band Inter Vivos Settlement Trust	Alberta Weekly Newspapers
SAW000552	SAW000552		Cheque stubs	1272 in the amount of $$1,083.54; 1327 in the amount of $1,083.53	Sawridge Band Inter-Vivos Settlement Trust; Sawridge Trust	Edmonton Journal
SAW000553	SAW000553	12/18/2009	Letter		Bujold, Paul [Sawridge Trusts]	Edmonton Journal Classifieds
SAW000554	SAW000554	12/08/2009	E-mail thread	Re: Prices for Legal Notice	Blaquiere, Deanna	Bujold, Paul
SAW000555	SAW000555		Cheque stubs	1324 in the amount of $2,290.05; 1269 in the amount of $2,290.05	Sawridge Trust; Sawridge Band Inter Vivos Settlement Trust	The Globe and Mail
SAW000556	SAW000556	12/18/2009	Letter		Bujold, Paul [Sawridge Trusts]	The Globe and Mail
SAW000557	SAW000557	11/27/2009	E-mail thread	Legal Notice	Reynolds-Braun, Kate [The Globe and Mail]	paul@bujold.org
SAW000558	SAW000558		Cheque stubs	1322 in the amount of $937.13; 1267 in the amount of $937.13	Sawridge Trust; Sawridge Band Inter Vivos Settlement Trust	Regina Leader Post
SAW000559	SAW000559	12/18/2009	Letter		Bujold, Paul [Sawridge Trusts]	Regina Leader Post
SAW000560	SAW000560	12/09/2009	E-mail thread	Re: Prices for Legal Notice	Frei, Crystal [Leader Post]	Bujold, Paul
SAW000561	SAW000561		Cheque stub	1325 in the amount of $621.72; 1270 in the amount of $621.72	Sawridge Trust; Sawridge Band Inter Vivos Settlement Trust	Calgary Herald

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SAW000562	SAW000562	12/18/2009	Letter		Bujold, Paul [Sawridge Trusts]	The Calgary Herald Classifieds
SAW000563	SAW000564	12/08/2009	Document	Classified Advertising Proof for Ad # 11976	Calgary Herald	
SAW000565	SAW000566	12/08/2009	Document	Classified Advertising Proof for Ad # 11976	Calgary Herald	
SAW000567	SAW000567		Cheque stubs	1268 in the amount of $1,023.44; 1323 in the amount of $1,023.44	Sawridge Band Inter Vivos Settlement Trust; Sawridge Trust	Saskatoon Star Phoenix
SAW000568	SAW000568	12/18/2009	Letter		Bujold, Paul [Sawridge Trusts]	The Saskatoon Star Phoenix
SAW000569	SAW000569	12/08/2009	E-mail thread	Fw: Report for booking 1430895	Froehlick, Carol [The Saskatoon StarPhoenix]	Bujold, Paul
SAW000570	SAW000571	12/08/2009	Document	Booking Summary Ad# 1430895		
SAW000572	SAW000573	12/08/2009	Document	Booking Summary Ad# 1430895		
SAW000574	SAW000574		Cheque stubs	1326 in the amount of $3,168.14; 1271 in the amount of $3,168.14	Sawridge Trust; Sawridge Band Inter Vivos Settlement Trust	Vancouver Sun and Province
SAW000575	SAW000575	12/18/2009	Letter		Bujold, Paul [Sawridge Trusts]	Vancouver Sun and Province
SAW000576	SAW000576	12/08/2009	E-mail thread	Re: Prices for Legal Notice : Auto-Reply sent 12/07/2009 4:06:45 PM	Pawson, Kathy [Vancouver Sun and Province]	Bujold, Paul
SAW000577	SAW000577	12/08/2009	E-mail thread	Re: Prices for Legal Notice : Auto-Reply sent 12/07/2009 4:06:45 PM	Pawson, Kathy [Vancouver Sun and Province]	Bujold, Paul

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SAW000578	SAW000578	10/17/2011	Cheque stub	000310 in the amount of $155.23	Sawridge Trusts	Lakeside Leader Ltd.
SAW000579	SAW000579	09/14/2011	Invoice	069432 in the amount of $155.23	Lakeside Leader Ltd.	Sawridge Trust
SAW000580	SAW000580	09/14/2011	Ad	Notice to Beneficiaries and Potential Beneficiaries of the Sawridge Band Inter Vivos Settlement		
SAW000581	SAW000581	10/17/2011	Cheque stub	000309 in the amount of $134.06	Sawridge Trusts	South Peace News
SAW000582	SAW000582	09/14/2011	Invoice	087531 in the amount of $134.06	South Peace News	Sawridge Trust
SAW000583	SAW000583		Ad	Notice to the Beneficiaries and Potential Beneficiaries of the Sawridge Band Inter Vivos Settlement		
SAW000584	SAW000584		Ad	Notice to Persons who are or may be Beneficiaries of the Sawridge Band Inter-Vivos Settlement (1985) or Beneficiaries of the Sawridge Trust (1986)		
SAW000585	SAW000585	09/23/2011	Memo	Actions to meet Procedural Order Deadlines.	Bujold, Paul [Sawridge Trusts]	File
SAW000586	SAW000588	03/16/2012	E-mail thread	Re: Question Posted on Web Site	Ward, John	Bujold, Paul
SAW000589	SAW000590	02/08/2010	E-mail thread	Re: beneficiary claim	Bujold, Paul [Sawridge Trusts]	Ward, Peggy
SAW000591	SAW000591	01/25/2011	E-mail thread	Re: Change of Address	C.T.S. - McDonald	Bujold, Paul
SAW000592	SAW000592	12/31/2011	E-mail thread	Fw: Read: The Sawridge Band Inter-Vivos Settlement	Twin, Donna	Bujold, Paul
SAW000593	SAW000593	01/09/2012	E-mail	application forms	Mills, Karen	Bujold, Paul

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SAW000594	SAW000594	09/26/2011	E-mail thread	Fw: In regards to The Order directs that the Trustees	Sawan, Lawrence	Bujold, Paul
SAW000595	SAW000595	09/25/2011	E-mail	Sawridge Online Question Posted	SawridgeTrusts.ca	Bujold, Paul
SAW000596	SAW000596	02/09/2012	E-mail	Anyone who thinks that they may be a beneficiary should contact the Trusts Administrator.	Loyie, Louise	Bujold, Paul
SAW000597	SAW000597	07/31/2013	E-mail thread	Re: Urgent.	Keller, Michael	Bujold, Paul
SAW000598	SAW000599	12/14/2009	E-mail thread	Re: Sawridge beneficiary	Anderson, Barb	Bujold, Paul
SAW000600	SAW000600	03/29/2010	E-mail thread	Re: band membership	Bujold, Paul [Sawridge Trusts]	Loyie, Buddy
SAW000601	SAW000601	07/19/2010	E-mail	Beneficiary Application Form	Bujold, Paul [Sawridge Trusts]	Loyie, Buddy
SAW000602	SAW000602	02/09/2012	E-mail thread	Re: Re:	Bowebers@gmail.com	Bujold, Paul
SAW000603	SAW000603	01/27/2010	E-mail	Application to be a beneficiary	Bujold, Paul [Sawridge Trusts]	Merkley, Darlene
SAW000604	SAW000604	09/15/2010	E-mail	Trust Beneficiary Eligibility Application Form	Bujold, Paul [Sawridge Trusts]	Twin, David
SAW000605	SAW000605	05/15/2012	E-mail	Sawridge Online Question Posted	SawridgeTrusts.ca	Bujold, Paul
SAW000606	SAW000606	04/08/2010	E-mail thread	Re: The Sawridge Band Inter-Vivos Settlement	Bujold, Paul [Sawridge Trusts]	Twin, Donna
SAW000607	SAW000608	01/04/2010	E-mail thread	Re: Newspaper Notice	Bujold, Paul [Sawridge Trusts]	McDermott, Floyd
SAW000609	SAW000609	07/08/2010	E-mail	Beneficiary Application	Bujold, Paul [Sawridge Trusts]	Donald, Gina

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SAW000610	SAW000610	03/04/2010	E-mail thread	Re: Determination of Sawridge Band Intervivos Settlement Eligible Beneficiaries	Bujold, Paul [Sawridge Trusts]	Kautz, Gina
SAW000611	SAW000612	12/16/2009	E-mail thread	Re: Sawridge Band Inter-Vivos Settlement or Trust	Wozny, Gwen	Bujold, Paul
SAW000613	SAW000613	12/14/2009	E-mail thread	Re: Sawridge Band Inter-Vivos Settlement	tcourtoreille [tpc11@valemount.com]	Bujold, Paul
SAW000614	SAW000615	05/19/2010	E-mail thread	Re: Fw: Birth Certificates	Bujold, Paul [Sawridge Trusts]	Poitras, Heather
SAW000616	SAW000617	11/10/2010	E-mail thread	Re: Fw: Birth Certificates	Bujold, Paul [Sawridge Trusts]	Poitras, Heather
SAW000618	SAW000618	07/08/2010	E-mail	Beneficiary Application	Bujold, Paul [Sawridge Trusts]	Farran, Jolene
SAW000619	SAW000621	10/28/2010	E-mail thread	Re: Sawridge Trust	Bujold, Paul [Sawridge Trusts]	Mandel, Karl
SAW000622	SAW000622	06/04/2010	E-mail thread	Re: I am from sawridge	Bujold, Paul [Sawridge Trusts]	Vajna, Karlyn
SAW000623	SAW000623	07/21/2010	E-mail	Beneficiary Application Forms	Bujold, Paul [Sawridge Trusts]	Brule, Martha
SAW000624	SAW000624	09/21/2010	E-mail thread	Fw: Beneficiary Eligibility Application Package	Bujold, Paul [Sawridge Trusts]	Ritchie, Mayann
SAW000625	SAW000625	10/22/2010	E-mail	Sawridge Trusts Beneficiary Application	Bujold, Paul [Sawridge Trusts]	Paquette, Michelle
SAW000626	SAW000626	02/24/2010	E-mail thread	Re: beneficiary claim question	Bujold, Paul [Sawridge Trusts]	Ward, Peggy

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SAW000627	SAW000627	05/11/2010	E-mail thread	Re:	Bujold, Paul [Sawridge Trusts]	Ess, Shanon
SAW000628	SAW000629	09/13/2012	E-mail thread	Re:	S., Shannon	Bujold, Paul
SAW000630	SAW000630	12/21/2009	E-mail	Beneficiary Application Form	Bujold, Paul [Sawridge Trusts]	Sinclair, Sheldon
SAW000631	SAW000631	12/21/2009	E-mail	Beneficiary Application Form	Bujold, Paul [Sawridge Trusts]	Sinclair, Sheldon
SAW000632	SAW000632	10/12/2010	E-mail	Application to become an eligible beneficiary	Bujold, Paul [Sawridge Trusts]	Paquette-Ketlo, Sherry Lynn
SAW000633	SAW000633	03/15/2010	E-mail thread	Re: Sawridge Band Inter-Vivos Settlement	Bujold, Paul [Sawridge Trusts]	tcourtoreille
SAW000634	SAW000634	08/05/2010	E-mail thread	Re: Sawridge Band Inter-Vivos Settlement	Bujold, Paul [Sawridge Trusts]	tcourtoreille
SAW000635	SAW000635	10/15/2010	E-mail thread	Re: Sawridge Band Inter-Vivos Settlement	Bujold, Paul [Sawridge Trusts]	tcourtoreille
SAW000636	SAW000636	03/29/2010	E-mail	Applications	Bujold, Paul [Sawridge Trusts]	vhill@shoal.ca
SAW000637	SAW000637	05/20/2010	E-mail thread	Re: William McDonald	Bujold, Paul [Sawridge Trusts]	McDonald, William
SAW000638	SAW000639	07/15/2010	E-mail thread	Re: William McDonald	Bujold, Paul [Sawridge Trusts]	McDonald, William
SAW000640	SAW000642	08/25/2010	E-mail thread	Re: William McDonald	Bujold, Paul [Sawridge Trusts]	McDonald, William
SAW000643	SAW000643	01/06/2011	E-mail thread	Re: band membership	Bujold, Paul [Sawridge Trusts]	Poitras-Collins, Tracey

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SAW000644	SAW000644	01/26/2011	E-mail thread	Re: Change of Address	McDonald, William	Bujold, Paul
SAW000645	SAW000645	07/21/2010	Fax	Beneficiary Application	Bujold, Paul [Sawridge Trusts]	Brule, Martha
SAW000646	SAW000648	03/08/2011	E-mail thread	Re: Fw: Birth Certificates	Poitras, Heather	Bujold, Paul
SAW000649	SAW000650	09/21/2011	E-mail thread	Re: I am from sawridge	Vajna, Karlyn	Bujold, Paul
SAW000651	SAW000651	11/08/2011	E-mail	Status	Kevin	Bujold, Paul
SAW000652	SAW000653	05/05/2010	Letter		Twinn, Arlene T.	Sawridge Trusts
SAW000654	SAW000654		Letter		Merkley, Darlene	Paul
SAW000655	SAW000655	07/05/2010	Memo	Your letter dated 06/06/2010	Bujold, Paul [Sawridge Trusts]	McDermott, Alan Floyd
SAW000656	SAW000656	06/08/2010	Letter		McDermott, A.	
SAW000657	SAW000657	10/12/2010	Memo	Application Forms	Bujold, Paul [Sawridge Trusts]	McDermott, A.F.
SAW000658	SAW000658	09/25/2010	Letter		McDermott, A.F.	
SAW000659	SAW000659	10/28/2010	Letter		McDermott, Alan Floyd	Bujold, Paul
SAW000660	SAW000660	11/08/2010	Letter		Bujold, Paul [Sawridge Trusts]	McDermott, Alan Floyd
SAW000661	SAW000664	01/07/2011	Letter		Bujold, Paul [Sawridge Trusts]	Applicants, Sawridge Trusts
SAW000665	SAW000665	03/04/2010	Letter		Bujold, Paul [Sawridge Trusts]	Penner, Doreen
SAW000666	SAW000666	09/01/2011	Letter		Bujold, Paul [Sawridge Trusts]	Potskin, Jonathon B.

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SAW000667	SAW000667	09/01/2011	Letter		Bujold, Paul [Sawridge Trusts]	Sawan, Juliette
SAW000668	SAW000668	03/01/2010	Letter		Bujold, Paul [Sawridge Trusts]	Kolosky, June
SAW000669	SAW000672	02/11/2011	Letter		Bujold, Paul [Sawridge Trusts]	Brule, Martha Ann
SAW000673	SAW000673		Document	Notice to Persons who are or may be Beneficiaries of the Sawridge Band Inter-Vivos Settlement (1985) or Beneficiaries of the Sawridge Trust (1986)		
SAW000674	SAW000674	09/01/2011	Letter		Bujold, Paul [Sawridge Trusts]	Paquette, Melvin K.
SAW000675	SAW000676		Form	Beneficiary Application Form		
SAW000677	SAW000678	08/15/2011	Document	Sawridge Band Member List		
SAW000679	SAW000680	10/14/2011	E-mail		Kindrake, E. James [Department of Justice Canada]	Poretti, Marco
SAW000681	SAW000683	09/27/2011	E-mail	Re: Sawridge Trusts: Draft Letter to Affiliated Persons	Kindrake, E. James [Department of Justice Canada]	Poretti, Marco S.
SAW000684	SAW000685	11/22/2011	E-mail	Sawridge Trusts Application Notifications	Kindrake, E. James [Department of Justice Canada]	Poretti, Marco
SAW000686	SAW000687	11/08/2011	Letter		Weston, Susan [Aboriginal Affairs & Northern Development Canada]	

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SAW000688	SAW000688	09/01/2011	Letter		Bujold, Paul [Sawridge Trusts]	Bosscha, Frank [Department of Justice]
SAW000689	SAW000690	08/30/2011	Document	1985 Trust Minor Beneficiaries as of 08/30/2011		
SAW000691	SAW000691		Document	List of Membership Applications Completed		
SAW000692	SAW000692		Document	List of Membership Applications Pending		
SAW000693	SAW000695	06/24/1987	Minutes	Sawridge Indian Band Electors Meeting	Twinn, Dr. Walter P.; Twin, George	
SAW000696	SAW000696		Document	Sawridge Indian Band, Resolution Adopting Membership Rules		
SAW000697	SAW000697	07/18/1985	Document	Statutory Declaration	Twinn, Walter Patrick	
SAW000698	SAW000698	01/31/2013	Letter		Bujold, Paul [Sawridge Trusts]	Sawridge Trust Beneficiary
SAW000699	SAW000700		Pamphlet	Addictions Treatment Support Benefit Fund	Sawridge Trusts	
SAW000701	SAW000702		Pamphlet	Child and Youth Benefit	Sawridge Trusts	
SAW000703	SAW000704		Pamphlet	Compassionate Care and Death Benefit	Sawridge Trusts	
SAW000705	SAW000706		Pamphlet	Counselling Benefit	Sawridge Trusts	
SAW000707	SAW000708		Pamphlet	Education Support Benefit Fund	Sawridge Trusts	
SAW000709	SAW000710		Pamphlet	Income Replacement Benefit	Sawridge Trusts	
SAW000711	SAW000712		Pamphlet	Loans Policy	Sawridge Trusts	

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SAW000713	SAW000714		Pamphlet	Personal Development and Alternative Health Benefit	Sawridge Trusts	
SAW000715	SAW000716		Pamphlet	Special Rates at Sawridge Inns for Beneficiaries	Sawridge Trusts	
SAW000717	SAW000718		Pamphlet	Seniors' Support Benefit	Sawridge Trusts	
SAW000719	SAW000720		Pamphlet	Health Support Benefit	Sawridge Trusts	
SAW000721	SAW000722		Pamphlet	Cash Disbursement Benefit	Sawridge Trusts	
SAW000723	SAW000723		Minutes	Meeting of the Trustee's and Settlors of the Sawridge Band Trust, June 1982	Twinn, Walter P.; Twinn, George; Twinn, Walter Felix	
SAW000724	SAW000724		Minutes	Meeting of the Trustee's Sawridge Band Trust, 1983	Twinn, Walter P.; Twinn, Walter F.; Twinn, George	
SAW000725	SAW000726		Minutes	Meeting of the Trustee's of Sawridge Band Trust, 1983	Twinn, Walter F.; Twinn, George	
SAW000727	SAW000733	03/15/2010	Form	Beneficiary Application Form, with attachments	Hill, Violet Mary	
SAW000734	SAW000741	03/15/2010	Form	Beneficiary Application Form, with attachments	Boudreau, Julis Antoine	
SAW000742	SAW000745	06/22/2010	Form	Beneficiary Application Form, with attachments	Belcourt, Marerie	
SAW000746	SAW000748	01/15/2009	Form	Beneficiary Application Form, with attachment	Belcourt, Sandra Gay	
SAW000749	SAW000751	01/10/2010	Form	Beneficiary Application Form, with attachment	Hommy, Beverly Sharon	

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SAW000752	SAW000763	02/24/2010	Form	Beneficiary Application Form, with attachments	Belcourt, Conway	
SAW000764	SAW000766	01/22/2010	Form	Beneficiary Application Form, with attachment	Belcourt, Dion Wayne	
SAW000767	SAW000769	01/22/2010	Form	Beneficiary Application Form, with attachment	Belcourt, Garry Chuck	
SAW000770	SAW000772	01/22/2010	Form	Beneficiary Application Form, with attachment	Belcourt, Gordon Christopher	
SAW000773	SAW000774	07/26/2010	Form	Beneficiary Application Form	Cardinal, Kieran Trevor	
SAW000775	SAW000779	02/21/2010	Form	Beneficiary Application Form, with attachments	Cardinal, Sheena Lee	
SAW000780	SAW000782	01/22/2010	Form	Beneficiary Application Form, with attachment	Cardinal, Owen Louis	
SAW000783	SAW000793	01/28/2010	Form	Beneficiary Application Form, with attachments	Courtoreille, Thomas Albert	
SAW000794	SAW000796	02/05/2010	Form	Beneficiary Application Form, with attachment	Cardinal, Barbara Jean	
SAW000797	SAW000798	01/06/2010	Form	Beneficiary Application Form	Dokken, Misty Lee	
SAW000799	SAW000801	01/22/2010	Form	Beneficiary Application Form, with attachment	Cardinal, Dale Bernard	
SAW000802	SAW000803	03/15/2010	Form	Beneficiary Application Form	Draney, Frieda M.	
SAW000804	SAW000809	04/27/2010	Form	Beneficiary Application Form, with attachments	Huzar, Aline Elizabeth	
SAW000810	SAW000814	12/31/2009	Form	Beneficiary Application Form, with attachments	Jackson, Arthur Bernard	

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SAW000815	SAW000826	01/27/2010	Form	Beneficiary Application Form, with attachments	Kolosky, June Martha	
SAW000827	SAW000830	07/18/2010	Form	Beneficiary Application Form, with attachments	Kautz, Jennifer Nicole	
SAW000831	SAW000833	07/19/2010	Form	Beneficiary Application Form, with attachment	Kautz, Kristine G.	
SAW000834	SAW000836	07/02/2010	Form	Beneficiary Application Form, with attachment	Kautz, Gina Marilyn	
SAW000837	SAW000845	04/17/2010	Form	Beneficiary Application Form, with attachments	Loyie, Buddy Anthony	
SAW000846	SAW000848	02/28/2010	Form	Beneficiary Application Form, with attachment	L'Hirondelle, Mary Rachel	
SAW000849	SAW000852	07/02/2010	Form	Beneficiary Application Form, with attachments	Lindberg, Rosina Ann	
SAW000853	SAW000855	02/24/2010	Form	Beneficiary Application Form, with attachment	L'Hirondelle, Victoria Zoe	
SAW000856	SAW000858	02/19/2012	Form	Beneficiary Application Form, with attachment	L'Hirondelle, Wayne Victor	
SAW000859	SAW000861	04/04/2010	Form	Beneficiary Application Form, with attachment	Mountain, Lee Kenneth	
SAW000862	SAW000864	02/26/2010	Form	Beneficiary Application Form, with attachment	MacLeod, Joan Annie	
SAW000865	SAW000866	06/23/2010	Form	Beneficiary Application Form	McDonald, Joshilyn May	
SAW000867	SAW000868	07/05/2010	Form	Beneficiary Application Form	Seneca-McDonald, Kyle Alexander	

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SAW000869	SAW000871	04/30/2010	Form	Beneficiary Application Form, with attachment	Midbo, Kiran Paul	
SAW000872	SAW000874	01/22/2010	Form	Beneficiary Application Form, with attachment	Minchau, Lisa Anne	
SAW000875	SAW000875	04/09/2010	Form	Beneficiary Application Form	McDermott, Richard William	
SAW000876	SAW000878	01/28/2010	Form	Beneficiary Application Form, with attachment	Auger (nee Mandel), Shawn	
SAW000879	SAW000881	04/30/2010	Form	Beneficiary Application Form, with attachment	Midbo, Sydney	
SAW000882	SAW000884	04/30/2010	Form	Beneficiary Application Form, with attachment	Midbo, Tristan Gordon	
SAW000885	SAW000888	07/20/2010	Form	Beneficiary Application Form, with attachment	McRee, Theresa Joan	
SAW000889	SAW000890	06/28/2010	Form	Beneficiary Application Form	McDonald, William August	
SAW000891	SAW000893	04/30/2010	Form	Beneficiary Application Form, with attachment	Midbo, Casey Elijah	
SAW000894	SAW000895	09/22/2010	Form	Beneficiary Application Form	Seneca-Mcdonald, Alannah-Lee	
SAW000896	SAW000901		Form	Beneficiary Application Form, with attachments	McDermott, Alan Floyd	
SAW000902	SAW000903	04/21/2010	Form	Beneficiary Application Form	McDonald, Allan Austin	
SAW000904	SAW000906	04/23/2010	Form	Beneficiary Application Form, with attachment	Midbo, Clara Alice Elizabeth	
SAW000907	SAW000908	06/29/2010	Form	Beneficiary Application Form	Seneca-McDonald, Clinton Tyler	

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SAW000909	SAW000911	04/30/2010	Form	Beneficiary Application Form, with attachment	Midbo, Ethan Roy	
SAW000912	SAW000914	04/30/2010	Form	Beneficiary Application Form, with attachment	Midbo, Gordon Alvin	
SAW000915	SAW000919	08/02/2010	Form	Beneficiary Application Form, with attachments	Nesootasis, Yvonne Elizabeth	
SAW000920	SAW000921	01/09/2012	Form	Beneficiary Application Form	Nolan, Violet Marie	
SAW000922	SAW000924	04/05/2010	Form	Beneficiary Application Form, with attachment	Hunt, Jamie Gail	
SAW000925	SAW000927	04/11/2010	Form	Beneficiary Application Form, with attachment	O'Connell, Lucas Daniel	
SAW000928	SAW000930	02/28/2010	Form	Beneficiary Application Form, with attachment	Ostrowski, Mary Magdalene	
SAW000931	SAW000934	03/02/2010	Form	Beneficiary Application Form, with attachments	O'Connell, Gail Elizabeth	
SAW000935	SAW000937	03/22/2010	Form	Beneficiary Application Form, with attachment	O'Connell, Ashley Dee	
SAW000938	SAW000940	10/14/2010	Form	Beneficiary Application Form, with attachment	Paquette, Louis Joseph	
SAW000941	SAW000942	10/28/2010	Form	Beneficiary Application Form, with attachment	Paquette, Lawrence Cecil	
SAW000943	SAW000944	11/07/2010	Form	Beneficiary Application Form	Paquette, Michelle Elizabeth	
SAW000945	SAW000947	10/28/2010	Form	Beneficiary Application Form, with attachment	Paquette, Melvin Kenneth	

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SAW000948	SAW000950	10/25/2010	Form	Beneficiary Application Form, with attachment	Paquette, Ronald George	
SAW000951	SAW000953	10/28/2010	Form	Beneficiary Application Form, with attachment	Paquette, Richard Dale	
SAW000954	SAW000956	10/28/2010	Form	Beneficiary Application Form, with attachment	Paquette, Robert Daniel	
SAW000957	SAW000959	10/28/2010	Form	Beneficiary Application Form, with attachment	Paquette, Ronald Francis	
SAW000960	SAW000966	10/07/2010	Form	Beneficiary Application Form, with attachments	Ketlo (nee Paquette), Sherry Lynn	
SAW000967	SAW000970	11/13/2010	Form	Beneficiary Application Form, with attachments	Paquette, William Francis	
SAW000971	SAW000973	11/02/2010	Form	Beneficiary Application Form, with attachment	Henry (nee Paquette), Yvonne Leona	
SAW000974	SAW000977	10/28/2010	Form	Beneficiary Application Form, with attachment	Paquette, Brenca Lee	
SAW000978	SAW000981	10/28/2010	Form	Beneficiary Application Form, with attachments	Paquette, Anita Marlene	
SAW000982	SAW001001	09/21/2010	Form	Beneficiary Application Form, with attachments	Henry (nee Paquette), Cecile Pauline	
SAW001002	SAW001004	10/28/2010	Form	Beneficiary Application Form, with attachment	Garnot (nee Paquette), Darlene Marie	
SAW001005	SAW001006	04/04/2010	Form	Beneficiary Application Form	Potskin, Elsie Helen	
SAW001007	SAW001012	02/11/2010	Form	Beneficiary Application Form, with attachments	Poitras (nee Potskin), Elizabeth Bernadette	

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001013	SAW001018	05/20/2010	Form	Beneficiary Application Form, with attachments	Poitras, Heather Jacqueline	
SAW001019	SAW001022	02/05/2010	Form	Beneficiary Application Form, with attachments	Potskin, Jeanine Marie	
SAW001023	SAW001026	08/30/2010	Form	Beneficiary Application Form, with attachments	Donald-Potskin, Gina Robin Ann	
SAW001027	SAW001029	08/30/2010	Form	Beneficiary Application Form, with attachment	Donald-Lewis, Nia Brooke	
SAW001030	SAW001031	08/30/2010	Form	Beneficiary Application Form	Donald, Niaomi Mary Ann	
SAW001032	SAW001034	08/30/2010	Form	Beneficiary Application Form, with attachment	Donald, Stiles Ansley	
SAW001035	SAW001037	04/04/2010	Form	Beneficiary Application Form, with attachment	Potskin, Angus James	
SAW001038	SAW001041	01/13/2010	Form	Beneficiary Application Form, with attachments	Potskin, Albert Gene Ernest	
SAW001042	SAW001045	04/30/2010	Form	Beneficiary Application Form, with attachments	Poitras-John, Crystal Marie	
SAW001046	SAW001050	05/13/2010	Form	Beneficiary Application Form, with attachments	Poitras, Corbin Joshua	
SAW001051	SAW001054	03/04/2010	Form	Beneficiary Application Form, with attachments	Potskin, Brent Albert	
SAW001055	SAW001060	05/03/2010	Form	Beneficiary Application Form, with attachments	Poitras, Bruce Patrick Kendal	
SAW001061	SAW001063	04/04/2010	Form	Beneficiary Application Form, with attachment	Potskin, Blaine Almer	

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001064	SAW001066	01/28/2010	Form	Beneficiary Application Form, with attachment	Potskin, Aaron Royce	
SAW001067	SAW001071	04/30/2010	Form	Beneficiary Application Form, with attachments	Poitras-Collins, Tracey Jeanne	
SAW001072	SAW001074	01/28/2010	Form	Beneficiary Application Form, with attachment	Potskin, Trent Ryan Albert	
SAW001075	SAW001077	12/29/2009	Form	Beneficiary Application Form, with attachment	Potskin, Sonia Odette	
SAW001078	SAW001080	05/12/2010	Form	Beneficiary Application Form, with attachment	Piotras, Nicole Tanya Marie	
SAW001081	SAW001082	02/16/2010	Form	Beneficiary Application Form	Potskin, Richelle Marie	
SAW001083	SAW001085	04/05/2010	Form	Beneficiary Application Form, with attachment	Potskin, Robin Tamara Freda	
SAW001086	SAW001088	04/22/2010	Form	Beneficiary Application Form, with attachment	Potskin, Mary Virginia	
SAW001089	SAW001091	04/14/2010	Form	Beneficiary Application Form, with attachment	Potskin, Michael Jonathan	
SAW001092	SAW001094	02/01/2010	Form	Beneficiary Application Form, with attachment	Potskin, Lillian Ann Marie	
SAW001095	SAW001096	08/04/2010	Form	Beneficiary Application Form	Potskin, Jonathon Barret	
SAW001097	SAW001101	01/11/2010	Form	Beneficiary Application Form, with attachments	Potskin, Judy Doreen Ann	
SAW001102	SAW001105	09/08/2010	Form	Beneficiary Application Form, with attachments	Potskin, Jean Baptiste Robert	

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001106	SAW001110		Form	Beneficiary Application Form, with attachments	Potskin, Karlyn Germaine Rose Alex	
SAW001111	SAW001111	11/09/2009	Form	Sawridge Trusts, Beneficiary Information	Potskin, Kevin A.L.	
SAW001112	SAW001116	12/12/2011	Form	Beneficiary Application Form, with attachments	Quintal, Alfred George	
SAW001117	SAW001118	12/12/2011	Form	Beneficiary Application Form	Quintal, Darren Luke	
SAW001119	SAW001121	12/12/2011	Form	Beneficiary Application Form, with attachment	Quintal, Roseanna Mary	
SAW001122	SAW001123	12/12/2011	Form	Beneficiary Application Form	Quintal, Derek Luke	
SAW001124	SAW001126	12/12/2011	Form	Beneficiary Application Form, with attachment	Quintal, Rose Marie	
SAW001127	SAW001129	12/12/2011	Form	Beneficiary Application Form, with attachment	Quintal, Deanna Marie	
SAW001130	SAW001132	12/12/2011	Form	Beneficiary Application Form, with attachment	Quintal, Darrel Jason	
SAW001133	SAW001135	12/12/2011	Form	Beneficiary Application Form, with attachment	Quintal, Grace Mary	
SAW001136	SAW001138	12/12/2011	Form	Beneficiary Application Form, with attachment	Quintal, Harold William	
SAW001139	SAW001152	12/31/2009	Form	Beneficiary Application Form, with attachments	Stoney, Maurice Felix	
SAW001153	SAW001155	12/28/2009	Form	Beneficiary Application Form, with attachment	Calder (Stoney), Terry James	

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001156	SAW001160	12/28/2009	Form	Beneficiary Application Form, with attachments	Stoney, William Charles	
SAW001161	SAW001163	03/31/2011	Form	Beneficiary Application Form, with attachment	Shirt, Eric Cameron	
SAW001164	SAW001165		Form	Beneficiary Application Form	Serafinchon, Deborah Anne	
SAW001166	SAW001168	06/08/2010	Form	Beneficiary Application Form, with attachment	Twin, Justice Walter William	
SAW001169	SAW001181	08/01/2010	Form	Beneficiary Application Form, with attachments	Twin, Jimmy Andrew	
SAW001182	SAW001183	07/22/2010	Form	Beneficiary Application Form	Twin, Mary Rose Bertha	
SAW001184	SAW001189	01/13/2011	Form	Beneficiary Application Form, with attachments	Twin, Nicole Charmaine Clara	
SAW001190	SAW001191	07/22/2010	Form	Beneficiary Application Form	Twin, Orleane Jennifer Claire	
SAW001192	SAW001200	07/29/2010	Form	Beneficiary Application Form, with attachments	Twin, Robert Peter	
SAW001201	SAW001202	07/22/2010	Form	Beneficiary Application Form	Abdi, Miel Bella Twin	
SAW001203	SAW001205	04/28/2010	Form	Beneficiary Application Form, with attachment	Twin, Jaclyn Daniela	
SAW001206	SAW001208	06/08/2010	Form	Beneficiary Application Form, with attachment	Twin, Kerri-Lynne	
SAW001209	SAW001210	05/13/2010	Form	Beneficiary Application Form	Twin, Naomi Isabel	
SAW001211	SAW001215	02/01/2010	Form	Beneficiary Application Form, with attachments	Neesotasis-Twin, Noel Richard	

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001216	SAW001217	06/16/2010	Form	Beneficiary Application Form	Twin, Roland Christopher	
SAW001218	SAW001228	02/10/2011	Form	Beneficiary Application Form, with attachments	Brule, Martha Ann	
SAW001229	SAW001232	02/26/2010	Form	Beneficiary Application Form, with attachments	Twin, Wesley Irving Joseph	
SAW001233	SAW001235		Form	Beneficiary Application Form	Twin, Walter Felix	
SAW001236	SAW001238		Form	Beneficiary Application Form, with attachment	Twin, Yvonne Doris	
SAW001239	SAW001241	06/08/2010	Form	Beneficiary Application Form, with attachment	Twin, Brittany Emma Mary	
SAW001242	SAW001244	06/08/2010	Form	Beneficiary Application Form, with attachment	Twin, Alexander Lennon Luke	
SAW001245	SAW001247	01/05/2010	Form	Beneficiary Application Form, with attachment	Twinn, Cody Roland	
SAW001248	SAW001249	05/13/2010	Form	Beneficiary Application Form	Twin, Darcy Alexander	
SAW001250	SAW001252	02/12/2010	Form	Beneficiary Application Form, with attachment	Twinn, Haitina Elizabeth	
SAW001253	SAW001258	06/25/2010	Form	Beneficiary Application Form, with attachments	Ward, Angeline Dorothy	
SAW001259	SAW001268	06/23/2010	Form	Beneficiary Application Form, with attachments	Cardinal (Ward), Peter Allan	
SAW001269	SAW001272	06/01/2010	Form	Beneficiary Application Form, with attachments	Ward, Frank Joseph	
SAW001273	SAW001276	03/23/2010	Form	Beneficiary Application Form, with attachments	Ward, Johnny Maxwell	

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001277	SAW001282	08/09/2010	Form	Beneficiary Application Form, with attachments	Willier, Kelvin Joseph	
SAW001283	SAW001289	08/05/2010	Form	Beneficiary Application Form, with attachments	Willier, Stephanie Ann	
SAW001290	SAW001295	08/02/2010	Form	Beneficiary Application Form, with attachments	Willier, Shirley Ann	
SAW001296	SAW001298	01/12/2010	Form	Beneficiary Application Form, with attachment	Williams, Kayla Marie	
SAW001299	SAW001302	02/19/2010	Form	Beneficiary Application Form, with attachments	Ward, Margaret Sue	
SAW001303	SAW001306	03/21/2010	Form	Beneficiary Application Form, with attachments	Ward, Margaret Agnes Claire	
SAW001307	SAW001308	06/19/2010	Form	Beneficiary Application Form	Ward, Nathan Alexander	
SAW001309	SAW001311	01/22/2010	Form	Beneficiary Application Form, with attachment	Ward, Debra Elizabeth	
SAW001312	SAW001313	07/25/2011	Form	Beneficiary Application Form	Ward, Grace Erika	
SAW001314	SAW001314		Notice	Newspaper Notice	Sawridge Trusts	
SAW001315	SAW001316		Form	Beneficiary Application Form (blank)		
SAW001317	SAW001322	12/19/1983	Agreement	Agreement between Walter Patrick Twinn, Walter Felix Twin, Sam Twinn and David A. Fennell (Old Trustees) and Walter Patrick Twin, Sam Twinn and George Twin (New Trustees)		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001323	SAW001331	12/19/1983	Agreement	Transfer Agreement between Walter Patrick Twin, Sam Twinn and George Twin (New Trustees) and Sawridge Holdings Ltd. (Purchaser)		
SAW001332	SAW001333		Document	Membership Application Process		
SAW001334	SAW001340	06/06/1984	Document	Declaration	Walter P. Twinn	
SAW001341	SAW001353	06/15/1983	Pleading	Affidavit of Walter P. Twinn, Court of Queen's Bench Action #8303-15822, between Walter P. Twinn, George Twinn and Samuel Twinn (Applicants) and Walter P. Twinn (as representative of the beneficiaries) (Respondent)		
SAW001354	SAW001375	05/10/1983	Pleading	Affidavit of Service of Corinne O. Butti, Court of Queen's Bench Action #8303-15822, between Walter P. Twinn, George Twinn and Samuel Twinn (Applicants) and Walter P. Twinn (as representative of the beneficiaries) (Respondent)		
SAW001376	SAW001378	05/09/1983	Pleading	Order of the Honourable Mr. Justice D.H. Bowen, Court of Queen's Bench Action #8303-15822, between Walter P. Twinn, George Twinn and Samuel Twinn (Applicants) and Walter P. Twinn (as representative of the beneficiaries) (Respondent)		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001379	SAW001380	10/08/1981	Certificate	Share Certificate A-3 for 10 Class A Common Shares	Sawridge Holdings Ltd.	Twin, Walter Felix
SAW001381	SAW001381	10/08/1981	Certificate	Share Certificate A-4 for 20 Class A Common Shares	Sawridge Holdings Ltd.	Twinn, Walter Patrick
SAW001382	SAW001382	04/16/1985	Certificate	Share Certificate A-6 for 2 Class A Common Shares	Sawridge Holdings Ltd.	Twinn, Sam
SAW001383	SAW001383	04/16/1985	Certificate	Share Certificate A-7 for 10 Class A Common Shares	Sawridge Holdings Ltd.	Twinn, Walter Patrick
SAW001384	SAW001384	04/16/1985	Certificate	Share Certificate A-8 for 1 Class A Common Share	Sawridge Holdings Ltd.	Fennell, David A.
SAW001385	SAW001385	04/16/1985	Certificate	Share Certificate A-9 for 1 Class A Common Share	Sawridge Holdings Ltd.	Twinn, George
SAW001386	SAW001386	04/16/1985	Certificate	Share Certificate A-10 for 1 Class A Common Share	Sawridge Holdings Ltd.	Twinn, George
SAW001387	SAW001387	04/16/1985	Certificate	Share Certificate A-11 for 12 Class A Common Shares	Sawridge Holdings Ltd.	Twinn, Sam
SAW001388	SAW001388	04/16/1985	Certificate	Share Certificate A-12 for 4 Class A Common Shares	Sawridge Holdings Ltd.	Twinn, George
SAW001389	SAW001389	04/16/1985	Certificate	Share Certificate A-14 for 10 Class A Common Shares	Sawridge Holdings Ltd.	Twinn, Sam
SAW001390	SAW001399	04/16/1985	Agreement	Declaration of Trust between Walter Patrick Twinn, Sam Twin and George Twin (Old Trustees) and Walter Patrick Twinn, Sam Twin and George Twin (New Trustees)		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001400	SAW001401	04/16/1985	Agreement	Declaration of Trust between Walter Patrick Twinn, Sam Twin and George Twin (Old Trustees) and Walter Patrick Twinn, Sam Twin and George Twin (New Trustees)		
SAW001402	SAW001402	04/15/1985	Corporate document	Sawridge Band Resolution		
SAW001403	SAW001403	12/19/1983	Document	Promissory Note in the amount of $200,320.00	Sawridge Holdings Ltd.	Twinn, Walter Patrick; Twinn, Sam; Twinn, George
SAW001404	SAW001404	12/19/1983	Document	Promissory Note in the amount of $419,941.00	Sawridge Holdings Ltd.	Twinn, Walter Patrick; Twinn, Sam; Twinn, George
SAW001405	SAW001405	12/19/1983	Document	Promissory Note in the amount of $40,000.00	Sawridge Holdings Ltd.	Twinn, Walter Patrick; Twinn, Sam; Twinn, George
SAW001406	SAW001406	12/19/1983	Document	Promissory Note in the amount of $4,620.00	Sawridge Holdings Ltd.	Twinn, Walter Patrick; Twinn, Sam; Twinn, George
SAW001407	SAW001407	12/19/1983	Document	Promissory Note in the amount of $4,564.00	Sawridge Holdings Ltd.	Twinn, Walter Patrick; Twinn, Sam; Twinn, George
SAW001408	SAW001408	12/19/1983	Document	Promissory Note in the amount of $8,138.00	Sawridge Holdings Ltd.	Twinn, Walter Patrick; Twinn, Sam; Twinn, George
SAW001409	SAW001414	07/05/1983	Agreement	Declaration of Trust, Sawridge Band Trust, between Chief Walter Patrick Twinn (Settlor) and Chief Walter Patrick Twinn, Walter Felix Twinn and George Twinn (Trustees)		
SAW001415	SAW001416		Document	AWNA Member Name		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001417	SAW001417		Document	re: Vancouver Sun, Vancouver Province, Calgary Herald...		
SAW001418	SAW001420		Document	re: 100 Mile House Advisor, 100 Mile House Free Press, Abbotsford News...		
SAW001421	SAW001422		Document	re: Assiniboia Times, Battlefords News Optimist, Battlefords Regional Optimist...		
SAW001423	SAW001428		Document	Investing in Ourselves: Recommendations for the Development & Implementation of the Sawridge Trust Beneficiary Programme, July 2009	The Four Worlds Centre for Developoment Learning	Sawridge Trust Board of Directors
SAW001429	SAW001429		Document	Sawridge Band Intervivos Settlement and Sawridge Trust Trustees from Trust Inception to 12/31/2009		
SAW001430	SAW001430		Minutes	Meeting of the Trustee's of Sawridge Band Trust, 1983	Twinn, Walter F.; Twinn, George; Fennell, David A.	
SAW001431	SAW001431		Minutes	Minutes of a Meeting of the Directors of Sawridge Enterprises Ltd., July 1983	Twinn, Walter P.; Twin, George, Twin, Sam	
SAW001432	SAW001444	06/17/1983	Pleading	Affidavit of Walter P. Twinn, sworn 06/15/1983	David A. Fennell Professional Corporation	
SAW001445	SAW001446	04/15/1985	Document	re: the attached Resolution of the Sawridge Band Council...		
SAW001447	SAW001575	10/26/1993	Transcript	Proceedings		

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001576	SAW001699	10/27/1993	Transcript	Proceedings		
SAW001700	SAW001798	10/28/1993	Transcript	Proceedings		
SAW001799	SAW001857	10/29/1993	Transcript	Proceedings		
SAW001858	SAW001858	10/03/1985	Letter	(Exhibit 5 at the Examination of Elizabeth Poitras on 04/09/2015)	Poitras, Elizabeth	Sawridge Chief & Council
SAW001859	SAW001859	04/14/1993	Letter	Poitras v. Twinn et al (Exhibit 7 at the Examination of Elizabeth Poitras on 04/09/2015)	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	Mitchell, Doug [McMaster Heighen]
SAW001860	SAW001860	01/31/1996	Letter	Elizabeth Poitras - Application for Membership (Exhibit 16 at the Examination of Elizabeth Poitras on 04/09/2015)	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]
SAW001861	SAW001862	10/28/1997	Letter	Twinn et al v. Poitras (Exhibit 18 at the Examination of Elizabeth Poitras on 04/09/2015)	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	Chalmers, William [Aird & Berlis]
SAW001863	SAW001863	06/19/1996	Letter	Elizabeth Poitras - Application for Membership (Exhibit R for Identification at the Examination of Elizabeth Poitras on 04/09/2015)	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]
SAW001864	SAW001864	06/28/1996	Letter	Elizabeth Poitras (Exhibit S for Identification at the Examination of Elizabeth Poitras on 04/09/2015)	McKinney, Michael [Sawridge Band]	Glancy, T. [Royal, McCrum]
SAW001865	SAW001865	07/16/1996	Letter	Elizabeth Poitras (Exhibit T for Identification at the Examination of Elizabeth Poitras on 04/09/2015)	Glancy, Terence [Royal, McCrum, Duckett & Glancy]	McKinney, Michael [Sawridge Band Administration]

Begdoc#	Enddoc#	Doc Date	Doc Type	Doc Title	Author	Recipient
SAW001866	SAW001866	12/19/1997	Report	Incident Report (Exhibit V for Identification at the Examination of Elizabeth Poitras on 04/09/2015)		
SAW001867	SAW001874	01/09/2001	Fax	(Exhibit W for Identification at the Examination of Elizabeth Poitras on 04/09/2015)	Sawridge	Mike
SAW001875	SAW001875	05/27/2014	Document	1985 Trust Minor Beneficiaries as of 05/27/2014		
SAW001876	SAW001877	04/15/1985	Document	Band Council Resolution (Exhibit 2 at the Examination of Paul Bujold on 05/27/2014)	Sawridge Band	
SAW001878	SAW001878	09/01/2011	Letter	(Exhibit 3 at the Examination of Paul Bujold on 05/27/2014)	Bujold, Paul [Sawridge Trusts]	Office of the Public Trustee

SCHEDULE 2

Relevant and material records under the control of the Sawridge Trustees, for which there is an objection to produce:

(a) without prejudice communications: none as all privilege on offers has been waived.

(b) communications and copies of communications between solicitor and client and memos or letters exchanged between all lawyers acting for Sawridge: as contained on the solicitors' files.

(c) solicitors' work product, including all interoffice memoranda, correspondence, notes, memoranda and other records prepared by the solicitors or their assistants: as contained on the solicitors' files.

(d) records made or created for the dominant purpose of litigation, existing or anticipated: as contained on the solicitors' files including memoranda, email correspondence, documents, charts, tables, transcripts, letters, faxes, financial documents and research.

(e) records that fall into 2 or more of the categories described above: Records that are both communications between solicitor and client, and are made or created for the dominant purpose of litigation, existing or anticipated or are solicitor work product PRV000001-PVR002094 and further records as added regularly to the solicitors' files.

SCHEDULE 3

Relevant and material records previously under the control of the Sawridge Trustees:

None

NOTICE

The time when the producible records listed in this Affidavit of Records may be inspected is 9:00 am to 4:00 pm., regular business days.

The place at which the producible records may be inspected is Dentons Canada LLP, #2900, 10180 – 101 Street, Edmonton, AB T5J 3V5.

This is Exhibit "A" referred to in the Affidavit of Paul Buiold

Sworn before me this 12 day of September A.D., 2012

A. Magnan

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

Catherine A. Magnan
My Commission Expires January 29, 2012

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 C S M respectively

(hereinafter collectively called the "Trustees")

of the Second Part

AND WITNESSES THAT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SIGNED, SEALED AND DELIVERED
In the Presence of:

Heather Yorke
NAME
1100 One Thornton Court
ADDRESS

A. Settlor: Walter P. [illegible]

Heather Yorke
NAME
1100 One Thornton Court
ADDRESS

B. Trustees: 1. Walter P. [illegible]

NAME Heather York

ADDRESS 1100 One Thornton Court

NAME Heather i York

ADDRESS 1100 One Thornton Court

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

2. [redacted]

3. Walter F [redacted]

4. _____

5. _____

6. _____

7. _____

8. _____

Meeting of the Trustees and Settlors of the
SAWRIDGE BAND TRUST
June, 1982, held at Sawridge Band Office
Sawridge Reserve, Slave Lake, Alberta

IN ATTENDANCE:

WALTER P. TWINN
GEORGE TWIN
WALTER FELIX TWIN

All the Trustees and Settlors being present, formal notice calling the meeting was dispensed with and the meeting declared to be regularly called. Walter P. Twinn acted as Chairman, and called the meeting to order. George Twinn acted as secretary.

IT IS HEREBY RESOLVED:

1. THAT the Solicitors and David A. Fernell and David Jones and the Accountants, Ron Ewoniak of Deloitte, Haskins & Sells presented to the Settlors a Trust Settlement document which settled certain of the assets of the Band on the Trust.

2. THAT this document was reviewed by the Settlors and approved unanimously.

3. THAT the Trustees then instructed the Solicitors to prepare the necessary documentation to transfer all property presently held by themselves to the Trust and to present the documentation for review and approval.

There being no further business, the meeting then adjourned.

WALTER P. TWINN

GEORGE TWINN

WALTER FELIX TWINN

This is Exhibit " B " 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

THIS AGREEMENT made with effect from the 14th 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. FENVELL (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 F Twinn

Walter Felix Twinn

Dec 19/83

Date

.../3

Witness

Sam Twinn

Dec 19/03

Date

Witness

David A. Fennell

Dec 19/03

Date

Witness

Walter Patrick Twinn

Dec 19/03

Date

Witness

Sam Twinn

Dec 19/03

Date

Witness

George Twinn

Dec 19/03

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 Roac 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 amount 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 $ 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 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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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 [illegible] day of [illegible], 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 [illegible] 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 TWENTY FOUR THOUSAND, SIX HUNDRED AND TWO ($24,602.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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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 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 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 9th day of [illegible], 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 ONE ($20,181.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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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 December, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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

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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 [illegible] 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 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 14th day of [illegible], A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: Walter P. Twinn

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 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 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

Witness

Dec 19/83
Date

Sam Twinn

Witness

Dec 19/83
Date

George Twinn

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 19 day of [illegible], 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 346 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 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.	Walter P. Twinn

.../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

D. 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

This is Exhibit "D" referred to in the Affidavit of Paul Bujold
Sworn before me this 30 day of August A.D., 20 11
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

SAWRIDGE BAND INTER VIVOS SETTLEMENT

DECLARATION OF TRUST

THIS DEED OF SETTLEMENT is made in duplicate the 15th day of April, 1985

B E T W E E N :

CHIEF WALTER PATRICK TWINN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter called the "Settlor"),

OF THE FIRST PART,

- and -

CHIEF WALTER PATRICK TWINN,
GEORGE V. TWIN and SAMUEL G. TWIN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter collectively called
the "Trustees"),

OF THE SECOND PART.

WHEREAS the Settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution of this Deed are members of the Sawridge Indian Band No. 19 within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, as such provisions existed on the 15th day of April, 1982, and the future members of such band within the meaning of the said provisions as such provisions existed on the 15th day

of April, 1952 and for that purpose has transferred to the Trustees the property described in the Schedule hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Settlement, the following terms shall be interpreted in accordance with the following rules:

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

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

No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement; and

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule hereto and any accumulated income thereon;

(B) any further, substituted or additional property and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Settlement; and

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement.

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

5. Any Trustee may at any time resign from the office of Trustee of this Settlement on giving not less than thirty (30) days notice addressed to the other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee shall be vested in the continuing Trustees or Trustee of this Settlement and such

power shall be exercised so that at all times (except for the period pending any such appointment, including the period pending the appointment of two (2) additional Trustees after the execution of this Deed) there shall be at least five (5) Trustees of this Settlement and so that no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there is more than one (1) Trustee who is not then a Beneficiary.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the end of twenty-one (21) years after the death of the last survivor of all persons who were alive on the 15th day of April, 1982 and who, being at that time registered Indians, were descendants of the original signators of Treaty Number 8, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under section 12(2) thereunder.

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

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for Trustees' investments by the Trustees' Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Settlement for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner to any extent detracting from the generality of the foregoing, the power

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

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

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

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund,

including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

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

11. The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries" under subparagraph 2(a) of this Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such

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

13. Subject to paragraph 11 of this Deed, a majority of fifty percent (50%) of the Trustees shall be required for any decision or action taken on behalf of the Trust.

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

14. This Settlement shall be governed by, and shall be construed in accordance with the laws of the Province of

Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

A. Settlor [redacted]

B. Trustees:

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

1. [redacted]

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

2. [redacted]

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

3. [redacted]

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

IDENTIFICATION SHEET

SAWRIDGE BAND INTER VIVOS ~~TRUST~~ SETTLEMENT

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

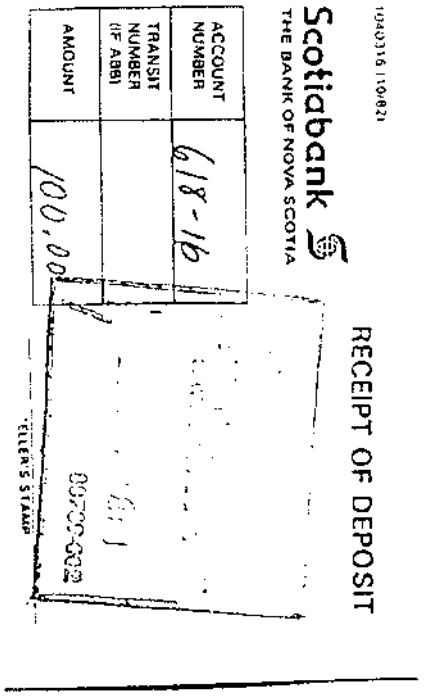
FOR C/A STARTER KIT

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=0021: 00618=16:



This is Exhibit " H " referred to in the Affidavit of Paul Bujold Sworn before me this 12 day of September A.D. 20 11

A. Magnan
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
Catherine A. Magnan
My Commission Expires January 29, 20 12

SAWRIDGE BAND TRUST

RESOLUTION OF TRUSTEES

WHEREAS the undersigned are the Trustees of an inter vivos settlement (the "Sawridge Band Trust") made the 15th day of April, 1982 between Chief Walter Patrick Twinn, as Settlor, and Chief Walter Patrick G. Twinn, Walter Felix Twin and George V. Twin, as Trustees;

AND WHEREAS the beneficiaries of the Sawridge Band Trust are the members, present and future, of the Sawridge Indian Band (the "Band"), a band for the purposes of the Indian Act R.S.C., Chapter 149;

AND WHEREAS amendments introduced into the House of Commons on the 28th day of February, 1985 may, if enacted, extend membership in the Band to certain classes of persons who did not qualify for such membership on the 15th day of April, 1982;

AND WHEREAS pursuant to paragraph 6 of the instrument (the "Trust Instrument") establishing the Trust the undersigned have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for the beneficiaries of the Trust;

AND WHEREAS for the purpose of precluding future uncertainty as to the identity of the beneficiaries of the Trust the Trustees desire to exercise the said power by resettling the assets of the Trust for the benefit of only those persons (the "Beneficiaries") who qualify, or would in the future qualify, for membership in the Band under the provisions of the Act in force on the 15th day of April, 1982;

AND WHEREAS by deed executed the 15th day of ~~March~~ APRIL, 1985 between Chief Walter Patrick Twinn, as Settlor, and the undersigned as Trustees, an inter vivos settlement (the "Sawridge Band Inter Vivos Settlement") has been constituted for the benefit of the Beneficiaries;

NOW THEREFORE BE IT RESOLVED THAT

1. the power conferred upon the undersigned in their capacities as Trustees of the Trust pursuant to paragraph 6 of the Trust Instrument be and the same is hereby exercised by transferring all of the assets of the Trust to the

undersigned in their capacities as Trustees of the Sawridge Band Inter Vivos Settlement; and

2. Chief Walter Patrick Twinn is hereby authorized to execute all share transfer forms and other instruments in writing and to do all other acts and things necessary or expedient for the purpose of completing the transfer of the said assets of the Trust to the Sawridge Band Inter Vivos Settlement in accordance with all applicable legal formalities and other legal requirements.

DATED the 15th day of ~~March~~ April, 1985.

Chief Walter Patrick Twinn

Samuel G. Twin

George V. Twin

ACCEPTANCE BY TRUSTEES

The undersigned in their capacities as Trustees of the Sawridge Band Inter Vivos Settlement hereby declare that they accept the transfer of all of the assets of the Trust and that they will hold the said assets and deal with the same hereafter for the benefit of the Beneficiaries in all respects in accordance with the terms and provisions of the Sawridge Band Inter Vivos Settlement.

DATED the 15th day of ~~March~~ April, 1985.

Chief Walter Patrick Twinn

Samuel G. Twin

George V. Twin

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 TWIN AND GEORGE TWIN
(hereinafter referred to collectively as the "Old Trustees")

OF THE FIRST PART

AND:

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

OF THE SECOND PART

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

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

NOW THEREFORE this Deed witnesseth as follows:

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

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

WITNESS:

OLD TRUSTEES

NEW TRUSTEES

SCHEDULE "A"

SAWRIDGE HOLDINGS LTD. --- SHARES

WALTER PATRICK TWINN	30 CLASS "A" COMMON
GEORGE TWIN	4 CLASS "A" COMMON
SAM TWIN	12 CLASS "A" COMMON

SAWRIDGE ENERGY LTD. --- SHARES

WALTER PATRICK TWINN	100 CLASS "A" COMMON

SCHEDULE 'B'

PROMISSORY NOTE

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

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

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

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

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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

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

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

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

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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

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

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

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

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of TWENTY FOUR THOUSAND, SIX HUNDRED AND TWO ($24,602.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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Per: _____

Per: _____

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

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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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 [illegible] day of [illegible], A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: [signature]

Per: [signature]

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

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

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

11. The provision of this Deed may be amended from time to time by a resolution of the Trustees that received the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years and, for greater certainty, any such amendment may provide for a commingling of the assets, and a consolidation of the administration, of this Trust with the assets and administration of any other trust established for the benefit of all or any of the Beneficiaries.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and shall be subject to this clause.

13. Any decision of the Trustees may be made by a majority of the Trustees holding office as such at the time of such decision and no dissenting or abstaining Trustee who acts in good faith shall be personally liable for any loss or claim whatsoever arising out of any acts or omissions which result from the exercise of any such discretion or power, regardless whether such Trustee assists in the implementation of the decision.

14. All documents and papers of every kind whatsoever, including without restricting the generality of the foregoing, cheques, notes, drafts, bills of exchange, assignments, stock transfer powers and other transfers, notices, declarations, directions, receipts, contracts, agreements, deeds, legal papers, forms and authorities required for the purpose of opening or operating any account with any bank, or other financial institution, stock broker or investment dealer and other instruments made or purported to be made by or on behalf of this Trust shall be signed and executed by any two (2) Trustees or by any person (including any of the Trustees) or persons designated for such purpose by a decision of the Trustees.

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

16. This Deed and the Trust created hereunder shall be governed by, and shall be construed in accordance with, the laws of the Province of Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

A. Settlor
CHIEF WALTER P. TWINN

B. Trustees:

1. CHIEF WALTER P. TWINN

2. CATHERINE TWINN

3. GEORGE TWIN

860647-1/6

SCHEDULE

One Hundred Dollars ($100.00) in Canadian Currency.

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SAWRIDGE [illegible] 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 provide 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 "Debenture"), as a debenture to secure the Present Indebtedness and 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:

1. (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

exist by law or by statute, and the Holder may proceed to realize upon such security howsoever created and to enforce the rights of the Holder thereunder by any one or more of such remedies or any combination of them and in such order as it may deem expedient and shall not release or effect any other security held by the Holder for the payment of the Principal Sum, interest and other sums to be paid hereunder.

37. Except as otherwise herein provided, the monies arising from any sale or other realization of the whole or any part of the Mortgaged Property after default, whether under any sale by the Holder or by judicial process or otherwise shall be applied:

(a) firstly, in payment of all sums extended or advanced by the Holder and interest thereon as in this debenture provided including the remuneration, costs and expenses of any receiver, the costs and expenses of the sale and the proceedings incidental thereto and all encumbrances, taxes, dues, rates, assessments and other charges on the Mortgaged Property (except those subject to which such sale shall have been made), ranking in priority to this debenture and the interest thereon;

(b) secondly, in payment of the accrued and unpaid interest and interest on overdue interest;

(c) thirdly, in payment of the Principal Sum pursuant to this debenture; and

(d) fourthly, as to the surplus (if any) of such monies in payment to the Company or its assigns.

38. No person dealing with the Holder or the receiver or their agents, shall be under any obligation to inquire whether the security hereby constituted has become enforceable or whether the powers which the Holder or receiver is purporting to exercise have become exercisable, or whether any money remains due upon the security of this debenture, or as to the necessity or expediency of the stipulations and conditions subject to which any sale shall be made or otherwise as to the propriety or

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.

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 – N° 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 UANIMOUSLY 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 Bande / 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) ____

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 – Recommandée
Date ____ Recommending Officer – Recommandé par ____

Approved – Approuvée
Date ____ Approving Officer – Approuvé par ____

7-7

THE ATTACHED RESOLUTION of the Sawridge Band Council is hereby approved and ratified by the Sawridge Indian Band at a meeting duly convened and consituted at the Band Office in Slave Lake, Alberta, this 15th day of April, A.D. 1985.

WITNESS

As to all signatures

Bruce E Thom

Yvonne Twin

Walter F Twin

Sam Twin

G V Twin

Walter Twin

Debbie D. Twin

Cheri Twin

Anne Patrick

Catherine Twinn

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 UANIMOUSLY 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 Bande / Pour cette bande le quorum est consists of / fixé à 2 Council Members / Membres du Conseil

(Chief – Chef)

(Councillor – conseiller) ×3

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 / Dépenses $	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 – Recommendable

Approved – Approuvable

Date

Approving Officer – Approuvé par

TAB G

Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")
APPLICANT	ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Trust and the 1986 Trust ("Sawridge Trustees")
DOCUMENT	**AGENDA** **(CASE MANAGEMENT MEETING IN RESPECT OF THE 1985 SAWRIDGE TRUST)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB
DATE OF CASE MANAGEMENT HEARING	**December 18, 2018**
LOCATION WHERE CASE MANAGEMENT HEARING WILL BE HELD	**Edmonton, Alberta**
NAME OF JUSTICE HEARING THIS MATTER	**The Honourable Mr. Justice John T. Henderson**

AGENDA FOR CASE MANAGEMENT MEETING
IN RESPECT OF THE 1985 SAWRIDGE TRUST

DECEMBER 18, 2018

Sawridge Band Inter Vivos Settlement
Q.B. Action No.: 1103 14112

We provide an agenda for the case management meeting set for December 18, 2018. We believe the purpose of the meeting is to provide an overview of litigation and overview of the steps for which we anticipate requiring judicial assistance in leading to the final hearing.

This Agenda has been approved by all of the parties.

AGENDA

1. Identification of parties and interested persons

2. Overview of litigation

3. Jurisdiction Order: which will be presented to the court as a consent order

4. Privilege Order: identifying those issues for which there is agreement and those issues for which the parties require judicial assistance

5. Overview in respect of the Directed Hearing Application

6. Overview of the Agreed Statement of Facts negotiations

7. Direction from the Court on the participation of beneficiaries and potential beneficiaries including dealing with letter from Shelby Twinn.

8. Direction from the Court on a Litigation plan

TAB H

Clerk's stamp:

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

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

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

APPLICANT	ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for the 1985 Trust ("Sawridge Trustees")
DOCUMENT	**CONSENT ORDER (PRIVILEGE)**
DATE ORDER PRONOUNCED	December 18, 2018
LOCATION WHERE ORDER PRONOUNCED	**Edmonton, Alberta**
NAME OF JUSTICE WHO MADE THIS ORDER	**Honourable Justice J.T. Henderson**

I hereby certify this to be a true copy of the original for the Clerk of the Court

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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

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

UPON the Application by the Sawridge Trustees for advice and direction in respect of the Sawridge Band Inter Vivos Settlement ("**1985 Trust**") ("**Application**");

AND WHEREAS certain documents have been filed in these proceedings prior to the date of this Order that refer to legal advice provided to the Sawridge Trustees, including to Catherine Twinn while she was a Sawridge Trustee (the "**Filed Documents**");

AND WHEREAS Catherine Twinn has sworn an affidavit of records dated June 21, 2018, to be filed, which contains records including, but not limited to, the Filed Documents, that refer to legal advice provided to the Sawridge Trustees, including to Catherine Twinn while she was a Sawridge Trustee (the "**Twinn Affidavit of Records**");

AND WHERAS the Sawridge Trustees do not object to Catherine Twinn filing the Twinn Affidavit of Records so long as this Order is granted;

AND WHEREAS Paul Bujold deposed affidavits on September 6, 13 and 30, 2011 exclusively in the within Court File ("**1103 Action**"); the Office of the Public Guardian and Trustee (**"OPGT"**) questioned Paul Bujold on May 27 and 28, 2014 and on June 11, 2018 and transcripts are produced in respect of those questionings; Paul Bujold answered undertakings from such questionings; Exhibits were marked in such questionings; Paul Bujold deposed an affidavit of records dated November 2, 2015 and a supplementary affidavit of records dated April 27, 2018; and collectively such affidavits, transcripts, exhibits and undertakings shall be referred to as the "**Excluded Documents**";

AND WHEREAS certain of the Filed Documents have also been filed in Court File No. 1403 04885 (the "**1403 Filed Documents**");

AND WHEREAS the Sawridge Trustees did not have the intention to waive solicitor-client privilege over any further information or communications to which solicitor-client privilege would otherwise attach and that relates to the subject matter of any of the contents of the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents or the Questioning Responses as that term is defined below;

AND WHEREAS the purpose of this Order is to confirm that waiver of solicitor-client privilege in relation to any further information or communications to which solicitor-client privilege attaches that relate to the subject matter of any of the contents of the aforementioned documents in the prior paragraph (**"Subject Matter Waiver"**) has not occurred;

AND WHEREAS the Sawridge Trustees, the OPGT and Catherine Twinn consent to this Order;

IT IS HEREBY ORDERED AND DECLARED;

1. No response in a questioning to date, whether by way of oral or written response including any answer recorded by transcript or answer to undertaking or interrogatories, that addresses the contents of the Filed Documents, the Twinn Affidavit of Records, and/or the 1403 Filed Documents (collectively "**Questioning Responses**"), can be construed as Subject Matter Waiver over the subject matter of any communications contained therein.

2. Any waiver of solicitor-client privilege in respect of the contents of the Filed Documents, the Twinn Affidavit of Records, the Questioning Responses and the 1403 Filed Documents is expressly declared to be limited to the content of those documents, and it is further declared that Subject Matter Waiver has not occurred in relation to any issue raised in those documents.

3. Further to paragraph 2, nothing in the contents of the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents, and/or the Questioning Responses, can be used to compel the Sawridge Trustees to produce further documents in respect of legal advice received or answer questions in respect of legal advice received by the Sawridge Trustees on the basis that Subject Matter Waiver has occurred.

4. While this is a binding declaratory order, including on the parties to the Application and the beneficiaries of the 1985 Trust, nothing in this Order is intended to expand or limit the disclosure or production to which a beneficiary of the 1985 Trust may otherwise be entitled to at law to request and obtain as a beneficiary of the 1985 Trust.

5. If the Sawridge Trustees, the OPGT, Catherine Twinn, or any beneficiary of the 1985 Trust who may choose to participate in the manner permitted by this Court, seek to file or otherwise admit evidence any other document or record in the 1103 Action, other than those covered by this Order (being the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents, and the Questioning Responses) to which a claim of solicitor-client privilege may be made, the admissibility of such document and/or the terms for protecting the privilege of such document may be determined on a case-by-case basis, either by agreement of the Sawridge Trustees, the OPGT and Catherine Twinn, or by the direction of this Court.

6. For clarity, the *Alberta Rules of Court* and such other rules of evidence as would ordinarily apply will continue to apply to the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents and the Questioning Responses in respect of their use in any aspect of the 1103 Action, and none of the parties may object to the use or admissibility of any of these documents on the basis of an argument of solicitor-client privilege. For further clarity, all transcripts from cross examination on affidavit can be relied upon as evidence at trial and all associated undertakings, exhibits or written interrogatories may be used in these proceedings, including at trial, as though they were used in an application and the rules of evidence shall be applied as the hearing Justice shall determine.

7. This order shall not apply to the Excluded Documents.

The Honourable Justice J.T. Henderson

CONSENTED TO BY:
MCLENNAN ROSS LLP

Crista Osualdini
Counsel for Catherine Twinn

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

TAB I

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

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

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

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

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

Applicants

PROCEEDINGS

Edmonton, Alberta
October 30, 2019

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

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

THE COURT CLERK: Order in court, all rise.

THE COURT: Good afternoon. Please be seated.

MR. FAULDS: Good afternoon.

MS. HUTCHISON: Good afternoon.

MS. OSUALDINI: Good afternoon.

MR. MOLSTAD: Good afternoon.

THE COURT: Okay. Mr. Molstad?

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

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

MR. MOLSTAD: All right. We have the -- representing the Public Trustee, Ms. Hutchison and Mr. Faulds; the Sawridge Trustees, Mr. Sestito and Ms. Martin; Ms. Catherine Twinn is represented by Ms. Osualdini and Mr. Risling. Ms. Sopko and I appear on behalf of the Saw -- Sawridge First Nation. And Ms. Shelby Twinn is also present.

THE COURT: Excellent. Thank you very much.

MR. MOLSTAD: All right. Sir, this is my application on behalf of the Sawridge First Nation, and I'm going to refer briefly to the brief of Sawridge First Nation, the affidavit of Darcy Twinn, and the book of documents for Sawridge First Nation that was just filed recently.

THE COURT: Yes, I --

MR. MOLSTAD: Yeah.

THE COURT: -- I have that, yes.

Submissions by Mr. Molstad

MR. MOLSTAD: Okay, great. First of all, Sir, the position of the Sawridge First Nation in relation to the 1985 Trust has always been to find a reasonable solution for their members. And they want to see a reasonable solution before more substantial funds are expended in relation to legal fees.

In response to the jurisdiction question, this Court directed the participants to respond to the question as to what was and is the effect of the transfer order of August 24th, 2016. The Court also directed the filing of a -- an application to address whether the assets are being held subject to the 1985 Trust or the 1982 Trust. The application is Exhibit H to the affidavit of Councillor Darcy Twinn. The 1982 Trust is Exhibit A to the affidavit of Darcy Twinn, and as you no doubt are aware, having reviewed it, Sir, it provides that the Chief and Council are the Trustees, and the Trust assets are held for the benefit of the members present and future.

One of the documents in the Sawridge Trustees' production is a document entitled "Sawridge Band Resolution," and that was marked as Exhibit D for Identification in the questioning of Councillor Darcy Twinn. It's signed by ten persons. You should know, Sir, that documents in the production from Sawridge Trustees shows that at that time, 1985, there were approximately 37 members of the Sawridge First Nation,

notwithstanding that document, purportedly signed by approximately 10.

We submit that when the Court is called upon to interpret the 1982 Trust and the 1985 Trust, it will be required to consider both the Trust agreements and the factual matrix surrounding those Trust agreements. The Sawridge reserve lands, as you no doubt are aware, Sir, were set aside for the Sawridge First Nation pursuant to Treaty Number 8, and it is the Sawridge First Nation and their members, we submit, that are entitled to the benefit of all resources on or under those reserve lands.

We have provided you with a copy of Section 4 of the *Indian Oil and Gas Act*. It's at tab 2 of our brief. It was recently amended, I believe it was in August, and that is found at tab 1 of our book of documents, the amended version of Section 4. But we submit that both before and after the amendment to Section 4 it required that royalty money be paid to Canada in trust only for the benefit of Sawridge as the First Nation concerned, just as it was applied to all First Nations across Canada related to production of oil and gas from their reserve lands.

When the royalty monies are paid to Canada, they're held in the Consolidated Revenue Fund, and interest is paid to the First Nation based on the yields of long-term Government of Canada bonds. And today that's a very low rate because it's close to the rate of interest that we see. Chief Walter Twinn, we submit, was ahead of his time. He found a way back in the '80s to transfer money from their capital account to invest it for the benefit of the members of Sawridge. But clearly it was only for the benefit of the members of Sawridge.

As we point out in our brief in paragraph 27, royalty monies are capital monies. And Section 64 of the *Indian Act*, which is at tab 3 of our brief -- and I just want to take you to that briefly, if I could, Sir.

THE COURT: Section...

MR. MOLSTAD: 64.

THE COURT: 64? Thank you.

MR. MOLSTAD: It's at tab 3 --

THE COURT: Yes, I have it.

MR. MOLSTAD: -- of our brief. Section 64 provides in subparagraph 1 that with the consent of the Council of a Band, the Minister may authorize

and direct the expenditure of capital monies of the Band. So it requires both the consent of the Council and the authorization of the Minister. It then sets out a number of matters where monies -- capital monies may be used for, from A to K. I encourage you to look at that. They basically are different items that are for the benefit of the First Nation.

THE COURT: Yes.

MR. MOLSTAD: And then you get to K, which says, for any other purpose that in the opinion of the Minister is for the benefit of the Band. That section created doubt for many years, and, in fact, it's our submission before the Supreme Court of Canada decides the *Ermineskin* decision, which is found at tab 4 -- and I'd refer you to paragraph 151 of that decision. In 2009 there was uncertainty as to whether a First Nation could transfer capital under 64(1)(k) to an independent trust. And obviously the *Ermineskin* decision resolved that in terms of the ability of a First Nation to do that.

Now, as you know from the affidavit of Councillor Twinn, former Chief Walter Twinn, testified at the Bill C-31 trial, the first time it went to trial before Mr. Justice Muldoon in 1993, and his testimony, which is attached to Mr. Darcy Twinn's affidavit, sets out that the 1982 Trust was established because Sawridge First Nation was not considered a legal entity. And that was a problem in early years in terms of First Nations doing business because there were -- there was jurisprudence that essentially pronounced that in some cases a First Nation was not a legal entity. Of course they're recognized of that -- as that today, and there's no issue now. But that reason is found in Exhibit B to the affidavit of Darcy Twinn at page 3957.

Chief Walter Twinn also testified back in '93 that Sawridge was concerned that Bill C-31 would result in automatic addition of a large number of persons as members of Sawridge First Nation. That was the concern. And that's found in Exhibit B, pages 371 -- pardon me, pages 3761, line 8 to 17. Former Chief Walter Twinn also testified that the 1985 Trust was created two days before Bill C-31 became law, with the objective that the beneficiaries of the 1985 Trust would be people who were members before the passage of Bill C-31, and people who would become members under Bill C-31 would be excluded as beneficiaries. That's what he testified to in 1993. And that is found in Exhibit B to Mr. Twinn's affidavit, pages 3906 to page 3909.

Chief Twinn also testified that it was the intention that the assets in the 1985 Trust be placed in the 1986 Trust, and the 1986 Trust has the beneficiaries of Sawridge members. And that reference is found in Exhibit B, pages 3948 to 3949.

This application is, as you know, pursuant to Rule 2.10. And it is an application to intervene in the applications and to be permitted to make written and oral submissions.

Chief Justice Fraser's summary of the two-step approach for reviewing applications to intervene in *Papaschase* is helpful. They are, one, consider the subject matter, and, two, determine the proposed intervenor's interest in the subject matter.

Our submission is that the subject matter relates to an asset that we say is held only for the benefit of the members of the Sawridge First Nation. Ms. -- Mr. Faulds, Ms. Hutchison, and counsel on behalf of Ms. Twinn want to, in our submission, reduce the value to the members, take it away and attribute it to persons who are not members. And, in our submission, ultimately you may find that many of them are not entitled to them. You may find that some are. The subject matter, we submit, is critical to the Sawridge First Nation.

With respect to the interest of the Sawridge First Nation, Sawridge is directly affected. It is the only party representing all of the members and has special expertise concerning the subject matter. We also submit that in the application directed Sawridge and its members have an interest that will not be fully protected by the parties. We also note and draw to your attention that the applicant in these proceedings, the Sawridge Trustees, do not oppose the application of the Sawridge First Nation.

Now, we have provided in our additional material -- and I should explain why it's there and tell you what it is. At tab 2 is the Public Trustee application for relief as against Sawridge First Nation for production. Tab 3 is Mr. Justice Thomas's decision dismissing the application of the Public Trustee in -- in paragraph 26. Tab 4 is the order flowing from Justice Thomas's decision at tab 3, and that order is dated December 17th, 2015. Tab 5 is the further application of the Public Trustee for production of documents as against the Sawridge First Nation. And tab 6 is the decision of Mr. Justice Thomas of April 28th, '17, in response to that application. And tab 7 is the order which, as you can see, dismisses the Public Trustee's application for production of records.

We provide these to you so that you can see for yourself what we submit was a ridiculous overreaching position that was previously advanced by the Public Trustee in relation to production. And, in particular, in terms of the positions of the parties and how they do change, I would refer you to Sawridge Number 3, which is tab 3 of the book of the documents that we sent to you recently.

THE COURT: Okay. Yes.

MR. MOLSTAD: Go to paragraph 14 of that decision.

THE COURT: Okay.

MR. MOLSTAD: Justice Thomas summarizes the position of the

Public Trustee as follows: (as read)

> The Public Trustee's position is that the Sawridge Band is party to this proceeding or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information.

It says that the Court can add Sawridge Band as a party.

If I can now just briefly deal with information we have received from the Public Trustee. They served their brief on our offices on Friday afternoon at around 4 PM in the afternoon, which was the 25th, which was the date that they were required to serve. That was the first time that we were advised that they intend to argue that there was a lack of a valid Band Council Resolution passed at a duly convened meeting as a factor for the Court to consider. That was contained in their brief.

We submit, Sir, that it is often the practice of First Nations, and including the Sawridge First Nation, to meet as councillors, decide, and in Sawridge's case, by consensus and to circulate a Band Council Resolution following the meeting later for signature. That's not unusual. In the written submissions filed by the Public Trustee, they argue that the Chief and Council did not pass the BCR authorizing this application. We submit that this is not just directive at the Sawridge First Nation. It is attack -- an attack on my integrity as an officer of the court, and I want to assure the Court as an officer of the court that I am properly instructed to represent the Sawridge First Nation in relation to this application.

What I can also tell the Court, and this is not evidence, that a BCR was signed by the councillors --

MS. HUTCHISON: My Lord --

MR. MOLSTAD: -- after Ms. --

THE COURT: Just --

MR. MOLSTAD: -- Twinn's cross-examination.

THE COURT: Ms. Hutchison has something to say.

MS. HUTCHISON: My Lord --

THE COURT: Ordinarily I wouldn't permit an interjection in the middle of an argument, but --

MS. HUTCHISON: I --

THE COURT: -- what's the --

MS. HUTCHISON: I --

THE COURT: -- problem here?

MS. HUTCHISON: I apologize, My Lord. We've had some extensive correspondence about the OPGT's position on what Mr. Molstad's referring to, and we have advised Sawridge First Nation that we take the position they're trying to submit new evidence. We object to that strenuously --

THE COURT: Okay. Well, you'll have your chance to speak. I thought you were going to say something different. But go ahead.

MR. MOLSTAD: Yeah.

What I want to further advise the Court in terms of being properly instructed, that we always carry out due diligence to ensure that our instructions from a First Nation are proper, and that's been done in this case. And no one has the right to interrogate our office as with respect to those instructions. I -- I can tell you, and this is not evidence, that a BCR was signed by the councillors after Mr. Twinn's cross-examination, and it was provided to all counsel on October 28th, 2019, which was the month following the day that we received this notice that they were taking this position. And it showed that the Resolution was passed on August 26, 2019. We provided that to our friends. It's not before you as evidence. I submit that the Court should take into consideration that we received this on Friday of last week, and the Band Council Resolution was circulated on Monday of this week.

MR. FAULDS: My --

MR. MOLSTAD: We're prepared to -- sorry.

THE COURT: Now --

MR. FAULDS: I -- I'm sorry, My Lord. May I -- may I just intervene to say that the OPGT in no way intended to impugn the integrity of Mr. Molstad.

THE COURT: Good. Okay, thanks. I --

MR. FAULDS: That was --

THE COURT: -- I would have -- I would have guessed that.

MR. FAULDS: -- that -- that -- that was --

THE COURT: So when you go --

MR. FAULDS: -- not part of (INDISCERNIBLE).

THE COURT: -- you're properly instructed. You tell me you're properly instruct -- instructed. I accept that.

MR. MOLSTAD: Thank you.

THE COURT: You're an officer of the court, so --

MR. MOLSTAD: Thank you.

THE COURT: -- no one is questioning that.

MR. MOLSTAD: So in conclusion, Sir, in relation to our application for status as an intervenor, we submit that we should be granted that status to make written and oral submissions and also be able to rely upon the affidavits filed in this action, the questioning on the affidavits, the undertakings, and documents produced in the action. Those are our submissions.

THE COURT: Good. Thank you very much.

All right. Ms. Twinn, do you want to make your submissions now? You can come on up to the podium if you like and just -- feel free to take your time and relax and take as much time as you like.

Submissions by Ms. Twinn

MS. TWINN: Okay, good afternoon, Sir.

THE COURT: Good afternoon.

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

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

MS. TWINN: Okay.

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

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

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

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

THE COURT: Okay. Good. Thank you. I'm just wondering if one of the other counsel can help you out a little bit in answering a question that I have, and that is just to try to understand your position a little more clearly --

MS. TWINN: Okay.

THE COURT: -- in terms of where you are vis-á-vis the Trusts. Now --

MS. TWINN: Yeah.

THE COURT: -- you tell me -- and you tell me so I accept for the purpose of this motion, and I see that Justice Thomas in an earlier decision has confirmed that you are a beneficiary of the 1985 Trust.

MS. TWINN: Yes, yes.

THE COURT: But you are not a member of the Sawridge First Nations.

MS. TWINN: No.

THE COURT: Were you ever a member?

MS. TWINN: No.

THE COURT: You did qualify for membership otherwise you wouldn't be a beneficiary under the 1985 Trust.

MS. TWINN: At -- at a time before --

THE COURT: No, the other lawyers can help you out.

MS. HUTCHISON: Do you want me to speak, Shelby?

MS. TWINN: Oh, sure. Thank you.

THE COURT: I -- it's -- I'm just struggling trying to --

MS. TWINN: Yeah, yeah.

THE COURT: -- understand so what your particular situation is, so --

MS. TWINN: Yeah.

MS. HUTCHISON: My Lord, we represent Shelby's sister Kayla (phonetic) --

MS. TWINN: Yeah.

THE COURT: Right. Okay.

MS. HUTCHISON: -- and so definitely has some in --

THE COURT: She's in the same spot.

MS. HUTCHISON: She is --

MS. TWINN: Yes (INDISCERNIBLE).

MS. HUTCHISON: -- in the identical spot.

THE COURT: She's -- she has applied as well for membership in the Band?

MS. HUTCHISON: She has not.

MS. TWINN: No.

MS. HUTCHISON: She has not.

THE COURT: She has not, okay.

MS. HUTCHISON: But essentially, My Lord, the -- the crux of the matter is that there was a considerable change in the legislative landscape -- landscape when Bill C-31 was passed in 1985. So had Ms. Twinn been born before Bill C-31 was passed, she would have by legislative requirement become a member of Sawridge First Nation. Prior to 1985 Sawridge First Nation wasn't able to determine their membership list. Canada's Registrar at Indian --

THE COURT: Yes.

MS. HUTCHISON: -- affairs did that.

THE COURT: Yes.

MS. HUTCHISON: Ms. Twinn was born after Bill C-31 came in --

THE COURT: Yes.

MS. HUTCHISON: -- which did -- that legislation did a number of things, but one of the things it did was to empower First Nations who pass a Band membership code properly and had it --

THE COURT: Okay.

MS. HUTCHISON: -- approved by the Minister --

THE COURT: Okay.

MS. HUTCHISON: -- to begin to determine their own membership. Ms. Twinn was born after that date, and so in order to become a member of Sawridge First Nation post 1985, she must comply and go -- comply with Sawridge First Nation's criteria and go through their membership process. Still, though, at that point in time we have got the 1985 Trust that is preserving the requirements of the *Indian Act* that existed in 1982. And that -- and under that legislation Ms. Twinn is clearly a beneficiary of the Trust.

THE COURT: Because she qualifies under 19 -- pre 1982 rules --

MS. HUTCHISON: Of the *Indian Act.*

MS. TWINN: Yes.

THE COURT: -- to have -- become --

MS. HUTCHISON: Correct.

THE COURT: -- a member of the Sawridge First Nation --

MS. HUTCHISON: Correct.

THE COURT: -- or Sawridge Band, as it was --

MS. TWINN: Yes.

THE COURT: -- but she can no -- she -- she is trying --

MS. HUTCHISON: She may --

THE COURT: -- she is trying now --

MS. HUTCHISON: She's trying.

MS. TWINN: Yes, I have -- I have applied, yeah.

MS. HUTCHISON: Yeah.

THE COURT: But she has to comply with Sawridge internal mechanisms to become a member, whereas before -- pre 1982 she --

MS. HUTCHISON: It was federal --

THE COURT: -- would have been --

MS. HUTCHISON: -- legislation.

THE COURT: -- the federal -- okay.

MS. HUTCHISON: Correct.

THE COURT: And --

MS. HUTCHISON: Is that of assistance, My Lord?

THE COURT: I got you. Yes.

MS. HUTCHISON: Okay, thank you.

MS. TWINN: Yeah. Thank you. Thank you.

THE COURT: Is that -- is that all correct?

MS. TWINN: Yeah.

THE COURT: As far as your understanding?

MS. TWINN: Yeah.

THE COURT: Mr. Molstad has something to add.

MR. MOLSTAD: I was just going to stand up and say, with the greatest of respect to Ms. Hutchison, Sawridge First Nations does not agree with her interpretation of the legislation. We say that the Sawridge First Nation did have control in relation to the membership before C-31 in terms of Section 13 of the right of Chief and Council to approve those that the Registrar proposed to add. So that's a debate that we'll have down the road in the --

THE COURT: Well, does --

MR. MOLSTAD: -- substance of this matter.

THE COURT: -- does the Sawridge First Nation challenge this person's status as beneficiary under the 1985?

MR. MOLSTAD: I -- I have no instructions in that regard. I know the Sawridge First Nation --

THE COURT: Okay.

MR. MOLSTAD: -- is prepared to talk about grandfathering people. I know that this young woman has applied for membership, and should that membership be granted, that will end the issue.

THE COURT: Sure. It will all -- all -- it will all evaporate.

MR. MOLSTAD: Okay.

THE COURT: Okay. I think --

MS. TWINN: Okay.

THE COURT: -- I think I understand your position. Thank you

very much --

MS. TWINN: Okay.

THE COURT: -- for your presentation.

MS. TWINN: Okay. Thank you.

THE COURT: Thank you.

Okay. Who is responding?

MS. HUTCHISON: My Lord, if it's acceptable to you, the OPGT will start --

THE COURT: Sure.

MS. HUTCHISON: -- off, and then I believe Ms. Osualdini has a number of things to cover with you as well.

MR. SESTITO: And the Trustee would like to speak as well.

THE COURT: Okay.

MR. SESTITO: Yeah.

MS. HUTCHISON: Did -- are you -- did you want to speak now and I'd follow?

MR. SESTITO: No, no, I just meant --

MS. HUTCHISON: Oh.

MR. SESTITO: -- response.

Submissions by Ms. Hutchison

MS. HUTCHISON: Understood.

Good afternoon, My Lord. I don't think it's news to you, having read the submissions, that the OPGT is before you opposing the application for intervention by the Sawridge First

Nation. And we recognize, My Lord, that under different circumstances and different facts these applications might tend to be treated as rather uncontentious and run-of-the-mill. But those aren't the facts before you, My Lord.

The issues that the SFN wishes to raise before you by way of intervention go far beyond run-of-the-mill and seriously jeopardize the interests of the minors that the OPGT has been appointed to represent. Protecting the vested interests of an existing interest of the current minor beneficiaries of the 1985 Trust goes to the heart of the OPGT -- OPGT's role in this proceeding. And SF -- SFN's proposed positions are a distinct threat to those minors' interests.

THE COURT: But isn't it for me to decide whether there's any substance to what the Band may put forward? I mean, they can argue whatever they want, and if it doesn't make sense, I'm not going to buy into it.

MS. HUTCHISON: And -- and it --

THE COURT: If it does make sense, then I want to hear about it.

MS. HUTCHISON: And indeed --

THE COURT: Aren't -- aren't we all -- don't we all benefit by having on an important issue like this benefit of different perspectives? That's how we come to the best decisions, usually.

MS. HUTCHISON: With respect, My Lord, when the submissions that are to be presented are so flawed and so contrary to the past positions of the Sawridge First Nation, we would ask the Court to seriously consider their value.

THE COURT: Okay.

MS. HUTCHISON: And given that there's also a real impact on the proceedings in -- in terms of their involvement, it's very relevant to examine those factors. And I know Mr. Faulds will be covering some of that with you in more detail. I'm --

THE COURT: Sure. But what --

MS. HUTCHISON: -- focusing on the evidence.

THE COURT: -- we're -- we're -- we're talking about motions

that will be argued in a day. We're not talking about a six-week trial.

MS. HUTCHISON: Well, My Lord --

THE COURT: Right?

MS. HUTCHISON: -- one of the examples today being the question of how the OPGT's ability to even cross-examine on evidence, that was going to be put forward. And we start to get involved in these rather involved discussions about how things will move forward. There is a great deal of time and energy being spent on trying to deal with Sawridge First Nation's involvement in the matter. But I -- I think where I'd like to focus here at this point, My Lord, is the --

THE COURT: Right.

MS. HUTCHISON: -- significance of the threat.

THE COURT: I will stay quiet, and you can make your submissions.

MS. HUTCHISON: I -- I'd actually love to answer the -- any questions you have, My Lord, during my submissions or after.

THE COURT: Okay.

MS. HUTCHISON: The significance of this threat is not small, My Lord. In Sawridge First Nation the Court actually commented on this -- Saw -- Sawridge First Nation -- or, sorry, Sawridge 1 commented on an estimate that the 23 minors impacted by the OPGT's representation were probably entitled to approximately 1.1 million dollars as an interest. And that was paragraph 24 in Sawridge 1. We don't know if those figures are exactly the same today. But it gives you a sense of the magnitude and the financial value of the -- of the interest that Sawridge First Nation wishes to intervene to impact.

In terms of the -- a practical example of how this all impacts the minors that the -- that the OPGT represents, Ms. Twinn actually was very helpful in providing some materials. And if you turn to Exhibit G of the affidavit of Shelby Twinn, and it's -- it's quite a ways into that -- into that exhibit, My Lord. It's part of Dentons -- Dentons letter.

THE COURT: Okay. Tab what?

MS. HUTCHISON: Tab G of --

THE COURT: G?

MS. HUTCHISON: -- Shelby Twinn's affidavit.

THE COURT: Yes, yes.

MS. HUTCHISON: And it's an attachment to a June 1st, 2006 -- 2015, I apologize --

THE COURT: Yes.

MS. HUTCHISON: -- letter from Dentons to -- to the OPGT. Do you have that, Sir?

THE COURT: June 1st, 2015?

MS. HUTCHISON: Yes.

THE COURT: Yes, I have it, yes.

MS. HUTCHISON: So the first few pages are with-prejudice communication, and then --

THE COURT: Yes.

MS. HUTCHISON: -- if you go past the signature page, you'll find two tables.

THE COURT: Yes, I have them, yes.

MS. HUTCHISON: And as you'll see, that's a table of minor beneficiaries identified by the Sawridge Trustees as at August 31st, 2011, and up --

THE COURT: Yes.

MS. HUTCHISON: -- dated to 2015.

THE COURT: Yes.

MS. HUTCHISON: And certainly, My Lord, we're not suggesting to you that all of these names and individuals are identical today. But that was the discussion at the time, and it's a good object lesson in terms of what we're talking about on impact. It's Sawridge First Nation's position on the '82 to '85 transfer and the existence of the '85 Trust is accepted, if you turn to table 2, those 4 minor beneficiaries out of the 24 minor beneficiaries named are the only minors that were -- continued to have any rights in the Trust. The other 20 would completely lose their interest, their 1.1 million dollar interest in the trust.

THE COURT: All right.

MS. HUTCHISON: So that's the magnitude of the interests and the magnitude of the impact that Sawridge First Nation is purported to raise in this matter, My Lord.

THE COURT: All right. But that -- that --

MS. HUTCHISON: The OPGT's --

THE COURT: -- but -- but -- but the point -- the point is that there will be consequences that flow from whatever decision comes out of this.

MS. HUTCHISON: Clearly.

THE COURT: And you advocate for an outcome that preserves the interests of the minors, which is your function. You're going to do that.

MS. HUTCHISON: Clearly.

THE COURT: Others may argue for an outcome, the consequences of which will not be welcomed by the children. But it -- it's a question -- what -- what is the proper legal outcome --

MS. HUTCHISON: Yeah.

THE COURT: -- that's the question. And the consequences that flow from that will flow, to me.

MS. HUTCHISON: My Lord, we're dealing with an application for intervention.

THE COURT: Right.

MS. HUTCHISON: None of the parties have any interest or any desire to go in the direction. They don't want to follow the soccer ball that Sawridge First Nation is kicking downfield. It's nothing that the parties are seeking from you. It is -- it is now an outsider to this proceeding, an entity that has strenuously -- strenuously resisted any involvement in this proceeding, who is now coming to you to ask that we head in this new direction. And we're simply here, My Lord, for obviously a variety of other reasons, but our point at the moment is to make sure the Court is aware of the impacts of what Sawridge First Nation's --

THE COURT: Listen, I --

MS. HUTCHISON: -- proposal --

THE COURT: -- I understood from --

MS. HUTCHISON: Yeah.

THE COURT: -- Mr. Faulds' comments last week or the week before, whenever it was we met last, there are serious consequences. I understand that.

MS. HUTCHISON: Thank you, My Lord. So --

THE COURT: And when I tried to explain to him at the time, just as I've tried to explain to you now, is I understand there are consequences, but I need to come to the right conclusion.

MS. HUTCHISON: And, My Lord, we recognize the Court has discretion in intervention applications. But the applications must still be determined in accordance with governing principles of intervention.

THE COURT: Exactly.

MS. HUTCHISON: So going back to those principles, My Lord --

THE COURT: Good.

MS. HUTCHISON: -- the OPGT is also here to talk to you about the concerns about the timing of SFN's application --

THE COURT: Yes.

MS. HUTCHISON: -- the SFN's past position on the issues they seek to now address before you in the intervention and the significant flaws and weaknesses in the SFN's positions which clearly inform the utility of involving them as an intervenor on this particular application.

Paragraph 3 of our submission lists all of those concerns on behalf of the OPGT. I will defer to Mr. Faulds to take you through some of the legal submissions on those points. I'd like to spend a bit of time drawing the Court's attention to some of the key evidence that should be uppermost in your consideration as --

THE COURT: Okay.

MS. HUTCHISON: -- you're dealing with this matter.

Including the evidence before you that demonstrates the Sawridge First Nation's proposed positions in this intervention application are directly contrary to the available evidence about the purpose and intentions of the Sawridge First Nation's members, the Sawridge First Nation's Chief and Council, the 1982 Trustees and the 1985 Trustees at the time of the 1982 to '85 transfer -- asset transfer, the evidence that the Sawridge First Nations stated positions at the time of and directly related to the 2016 asset transfer order are directly contrary to the positions they now seek to advance. And the positions -- the evidence before you as to the positions of the Sawridge First Nation's advisors, positions, My Lord, that were later vindicated by the Supreme Court of Canada in *Ermineskin.*

In terms of the evidence before you, My Lord, on the original purpose and intent of the asset transfer, we would submit that that evidence uniformly demonstrates the Sawridge First Nation and its Trusts and Trustees made a clear and direct decision to create a disconnect or a divergence between Band membership and trust beneficiary status. That was not accidental, My Lord. That was not an unintended consequence. It was the entire focus of the transaction that they structured. And in that regard, My Lord, I'd refer you to Exhibit B, C, and D of the exhibits of the questioning from Darcy Twinn's -- Darcy Twinn's questioning, which are found at, I believe, tab P of our -- of our submissions.

And in particular, My Lord, looking at Exhibit C, which is a resolution of the Trustees in 1985, we direct the Court's attention to paragraph 3 and paragraph 5. Those preambles to the Trustees' resolution speak quite directly to the concept that there is an interest in protecting the assets of the Sawridge First Nation against incoming members who will become Sawridge First Nation members under Bill C-31.

So far from being inconsistent with what was in the nation's best interests, My Lord, the asset transfer was carefully designed by Sawridge First Nation to protect those very interests, that the intention was to separate membership and beneficiary status was confirmed by Chief Walter Twinn in his evidence before the Federal Court, and by Paul Bujold, as was Sawridge First Nation's commitment to ensure that the asset transfer occurred.

And I'm going to take you to a few important excerpts, My Lord, the first being Exhibit B from the affidavit of Darcy Twinn. And that is a transcript of Walter Twinn's testimony before the Federal Court of Canada in the constitutional challenge. And the relevant portion -- or the portion we'd like to direct you to, My Lord, begins at page 03908.

THE COURT: Okay. So this is at tab...

MS. HUTCHISON: Tab B of Darcy Twinn's affidavit.

THE COURT: Tab B, okay.

MS. HUTCHISON: Or Exhibit B, My Lord.

THE COURT: Yes, okay. And page numbers -- okay, there they are. Page number, you say...

MS. HUTCHISON: 3 -- 39 -- well, the top of the page is 3907.

THE COURT: Yes, I have it.

MS. HUTCHISON: The passage we're referring you to is 3908, line --

THE COURT: Okay --

MS. HUTCHISON: -- 1.

THE COURT: -- good.

MS. HUTCHISON: (as read):

> The object of that was to exclude people who might become members of the Sawridge Band under Bill C-31 as --

THE COURT: Yes.

MS. HUTCHISON: (as read):

-- beneficiaries.

THE COURT: Yes.

MS. HUTCHISON: (as read):

A. Yes, to a certain extent.

And then over at the very bottom of the page, line 14, (as read)

Q. But I just want to know, when this agreement was being prepared, what your objective was. And your first objective, was it people who might become Band members under Bill C-31 wouldn't be beneficiaries?
A. M-hm.
Q. That's correct. That was Objective Number One?
A. Right.

So that is straight from the mouth of the architect of --

THE COURT: Yes.

MS. HUTCHISON: -- of this transfer. And entirely we submit, My Lord, inconsistent with the current positions of Sawridge First Nation on this matter.

I would then take the Court to the 216 questioning of Paul Bujold by Mr. Molstad. And that's found at tab F of the OPGT's brief, starting at page 22.

THE COURT: Yes.

MS. HUTCHISON: And this questioning, My Lord, by way of background, was a questioning Sawridge First Nation chose to conduct in relation to the OPGT's 2513 document production applications. The OPGT had withdrawn its asset transfer application -- or its asset production -- asset document production application at the beginning of this questioning.

THE COURT: Yes.

MS. HUTCHISON: But Sawridge First Nation went into quite some depth with Mr. Bujold around the entire asset transfer history. And the Trustees ultimately relied quite heavily on that evidence in their asset transfer brief. It's a very informative dialogue, My Lord, starting at the top of page 22.

THE COURT: Yes.

MS. HUTCHISON: Mr. Molstad asks, (as read)

Now, in paragraph 1350 --

THE COURT: This is actually D, not F, right?

MS. HUTCHISON: This is Exhibit F, I believe, My Lord.

THE COURT: F doesn't --

MS. HUTCHISON: Or tab F, I believe.

THE COURT: Tab F doesn't go to 22 pages, but tab G does. Mr. Molstad is speaking there.

MS. HUTCHISON: Tab F of the OPGT's brief, My Lord?

THE COURT: Oh, I've got the affidavit of Darcy Twinn. I'm sorry.

MS. HUTCHISON: No, I apologize. I switched documents on you.

THE COURT: Okay.

MS. HUTCHISON: I apologize, My Lord. We have quite a bit of -- quite a bit of paper on the go.

THE COURT: I see that. Tab F at page 22?

MS. HUTCHISON: Correct.

THE COURT: With -- I've gotcha.

MS. HUTCHISON: Great. Top of the page --

THE COURT: Okay, gotcha. Oh.

MS. HUTCHISON: -- (as read):

> Q. Now, on paragraph 13 to 15 of your affidavit this refers to legislation we know previously referred to as Bill C-31. And you're, I assume, familiar with the fact that Sawridge First Nation challenged the constitutionality of the legislation and lit -- litigation where they asserted a right that they as the First Nation had a right to determine membership.
> A. Yes, I'm aware of that.
> Q. And it was during that challenge that women that include Ms. Poitras were ordered to be added as members of Sawridge First Nation, and as a result for the way in which the 1985 Trust was structured, she did not become a beneficiary when the Court declared her to be a member of Sawridge First Nation.
> A. No.
> Q. Is that correct?
> A. That's correct.

We go on to a further dialogue about the purpose of the Trust on page 23, My Lord. (as read):

> Q. And what we know at this time was that the purpose of the 1985 Trust when it was structured was to protect the assets of the Trust from those persons who might be forced upon the Sawridge First Nation as members under what was then Bill C-31.
> A. That's correct.

And --

THE COURT: Yes.

MS. HUTCHISON: -- going a bit farther down, (as read)

> Q. They were trying -- "they" referencing the Sawridge Trustees -- were trying to protect those assets, so their objective was to transfer those assets.

And Mr. Bujold goes through, then, the evidence or information he has from Maurice

Cullity (phonetic) about the structure of the '85 Trust. And I go down to page 24, line 9, then, My Lord.

THE COURT: Yes.

MS. HUTCHISON: (as read):

> Q. But in terms of the '85 Trust in those circumstances, both the saw -- both the Sawridge First Nation and the Trustees would be motivated to ensure all the assets were transferred.
> A. That's right. Absolutely.
> Q. The reason to fulfill the purpose at that time?
> A. That's right. And to protect those assets.

Now, Mr. Faulds has quite a bit to say to you about why that affects why Sawridge First Nation should be participating in this intervention application. The key, My Lord, is that the evidence of their -- what they deliberately intended to structure in '85 is quite clear and is directly contrary to what they submit to this Court at this point in time.

I'm going to fast forward at this point, My Lord, to 2011, at the start of this proceeding. And the Trustees' pleadings were clear at the outset, that they were seeking approval of a regularization of the transfer from 1982 to the 1985 Trust. That was on the table from Day One. The SFN was given notice of that proceeding. They were given full opportunity to participate. In fact, there were, as you -- as you'll be aware from Sawridge 3, significant attempts to involve them in the proceeding, and they resisted that strenuously. So Sawridge was fully aware that that relief was on the table and did not seek to intervene, did not oppose the relief sought, and did not contribute -- seek to contribute a unique perspective on the asset transfer.

We all became, I think, clearer on the reason that Sawridge First Nation was not concerned about this issue in 2016, when the asset transfer order came forward. And they express their extremely strong support for the Trustee's proposed form of asset consent order. And -- and here, My Lord, it's key to note that we would submit Mr. Twinn's affidavit almost implies that Sawridge First Nation was not involved in the 2016 asset transfer consent order, and the evidence is rather clear that they were extremely involved. They may not have signed the order, but they were absolutely involved in negotiating the terms of the order. They were absolutely involved in approving the terms of the order --

THE COURT: Yes.

MS. HUTCHISON: -- as amongst discussions with the parties. And

I'd like to take the Court to a few items of evidence that are relevant to that. In particular, the OPGT's submissions at tab P, which are the exhibits from Darcy Twinn's questioning --

THE COURT: Yes.

MS. HUTCHISON: -- Exhibit E, F, and G. And I'm just going to read from Exhibit G, My Lord. It's the middle paragraph --

THE COURT: Okay.

MS. HUTCHISON: -- of a letter --

THE COURT: Yes.

MS. HUTCHISON: -- from Parlee McLaws --

THE COURT: Yes.

MS. HUTCHISON: -- to Hutchison Law that says, (as read)

> It is the position of the Sawridge First Nation that this settlement offer -- that's referring to the asset transfer consent order --

THE COURT: Yes.

MS. HUTCHISON: -- (as read):

> -- is reasonable and resolves any possible concerns with respect to the approval --

THE COURT: Yes.

MS. HUTCHISON: -- (as read):

> -- of the transfer of assets from the '82 Trust to the '85 Trust.

They go on in that letter, My Lord, to threaten the OPGT with cost consequences if the OPGT does not accept the asset transfer consent order. So hard to suggest that there's any -- any room for ambiguity about the position that was being taken on that particular asset transfer consent order. If there was any, My Lord, we'd refer you to page 39 of the --

of tab I.

THE COURT: Well, just hold on a minute, please, if you don't mind.

MS. HUTCHISON: Yeah.

THE COURT: Okay. I'm sorry, where were we?

MS. HUTCHISON: Tab I of the OPGT submissions, My Lord.

THE COURT: Okay, yes.

MS. HUTCHISON: Page 39 of the case management conference from August 24th, 2016.

THE COURT: Yes.

MS. HUTCHISON: And these are the submissions made on behalf of the Sawridge First Nation. I think that my friend -- by Mr. Molstad, I believe, yes -- I think what my friend Ms. Bonora made mention of this in her brief. The purpose of the transfer in '82, '85 in terms of the transfer from Trust was to avoid any claim that others might make in relation to these assets after the in -- enactment of Bill C-31. So Sawridge First Nation would be highly motivated to ensure that those that were acting as Trustees made the transfer of all assets from the 1982 Trust to the 1985 Trust. That was the reason. The reason clearly was one where it was in everyone's best interests to make sure the transfer took place. Dramatically different than the position that is being taken before this Court as --

THE COURT: Yes.

MS. HUTCHISON: -- a proposed position as an intervenor --

THE COURT: Yes.

MS. HUTCHISON: -- My Lord.

Moving on, My Lord, then, to what occurred with the asset transfer order. It was granted, and, actually, the -- in the face of a dual cost threat. If -- if the Court refers to Exhibit F of the questioning of Darcy Twinn. The Trustees also threatened the OPGT with cost consequences if they didn't accept the -- the consent order. So the -- the --

THE COURT: Yes.

MS. HUTCHISON: -- OPGT consented --

THE COURT: Yes.

MS. HUTCHISON: -- and part and parcel of that, My Lord, was the OPGT withdrew its 513 asset document --

THE COURT: Sure.

MS. HUTCHISON: -- application on the basis of Sawridge First Nation's agreement with the --

THE COURT: Yes, right, but --

MS. HUTCHISON: -- entire consent order.

THE COURT: -- what you're -- what you're telling me is that everyone was in agreement that this consent order should -- including Mr. Molstad, was in agreement that this consent order should be put before Justice Thomas.

MS. HUTCHISON: Correct.

THE COURT: The issue that we're going to be talking about on November 27th is what was the impact of that?

MS. HUTCHISON: M-hm.

THE COURT: Can -- in terms of a trust of this nature, can you come to a settlement agreement on something like this? And can -- does the Court have the ability to make that sort of an order?

MS. HUTCHISON: And -- and, My Lord --

THE COURT: And if -- and if it does, how far can it go?

MS. HUTCHISON: M-hm. And I --

THE COURT: And that's -- and, you know, I feel --

MS. HUTCHISON: M-hm.

THE COURT: -- badly because this is an issue that I have raised, and I have raised it, the reasoning, because, in my view, until you have a trust on a solid foundation, talking about making changes to it doesn't make any sense to me. If you -- if you start talking about making changes to a trust that isn't on a solid foundation, then it comes crashing down two years or five years from now. That's not helping anyone out. So you -- you may all have agreed, it may -- it may have been a hard-thought negotiation which resulted in a consent order being placed to Justice Thomas. My question is, what does it mean?

MS. HUTCHISON: And --

THE COURT: That's -- that's the question.

MS. HUTCHISON: And, My Lord, we completely appreciate that we will be arguing that with you -- or before you --

THE COURT: I know.

MS. HUTCHISON: -- extensively --

THE COURT: I'm eager --

MS. HUTCHISON: -- on November 27th.

THE COURT: -- I'm eager to hear all about it.

MS. HUTCHISON: And I -- I'm certain that you are. The question for us today is --

THE COURT: And I'm hoping --

MS. HUTCHISON: -- whether --

THE COURT: -- you can satisfy my concerns easily.

MS. HUTCHISON: I believe we can, My Lord, but --

THE COURT: Good. Well, I --

MS. HUTCHISON: -- I don't believe I'm --

THE COURT: -- I'm hoping so.

MS. HUTCHISON: -- I'm permitted to get into that today. The question today --

THE COURT: Well --

MS. HUTCHISON: -- is whether or not Sawridge First Nation's --

THE COURT: Right.

MS. HUTCHISON: -- participation at the table adds any actual meritorious issue or argument --

THE COURT: Yes.

MS. HUTCHISON: -- that the Court should hear.

THE COURT: Yes.

MS. HUTCHISON: That's -- that's what we're dealing with today.

THE COURT: Yes.

MS. HUTCHISON: And we certainly ask you to -- to consider our submissions in that regard.

In terms of why we're taking the Court through some of this, My Lord, I'm sure the Court has reviewed the affidavit of Darcy Twinn. But I'll take you specifically to paragraph 10 of his affidavit where, as I say, the -- the essential implication of that paragraph is that Sawridge First Nation wasn't a party to the asset transfer order, didn't have an opportunity to speak to it. And so somehow I -- I -- I read that evidence as suggesting Sawridge First Nation should now through the vehicle of intervention be allowed to undo that consent order. So that --

THE COURT: Yes.

MS. HUTCHISON: -- that is where our submissions are directed --

THE COURT: Yes, okay.

MS. HUTCHISON: -- My Lord. A few very brief comments about the evidence, and I'm going to hand over to Mr. Faulds who will deal with the law with you, My Lord.

We would ask the Court as you review and weigh the evidence that the Sawridge First Nation has put before you in support of its application to consider a number of factors. Mr. Twinn was a child at the time of the events that he gives -- he provides evidence on. And I'll refer the Court to page 28 to 29 and portions of page 30 of his transcript. He effectively had no personal knowledge of the matters sworn to in his affidavit. Mr. Twinn's evidence was confirmed as being largely based on a selection of documents chosen by legal counsel.

And I'll refer you to page 12, 13, 14, and page 16 of his cross-examination. When Mr. Twinn swore his affidavit, he was clearly unaware of the full history of the asset transfer and full history of the asset transfer order. And that's at page 16 to 17 of his questioning, and then 31 to 37.

Mr. Twinn was able to provide some evidence that was extremely useful and is very pertinent to your consideration of the merits of this application, My Lord, including Mr. Twinn gave very specific evidence that Council did not pass a BCR to authorize it to intervene on behalf of the Nation in the jurisdiction applications. And I refer the Court to page 7, line 16 to 27, and page 8, line 1 to 3. And, My Lord, to be clear, the OPGT isn't casting aspersions on SFN's legal counsel in this regard. But if SFN Chief and Council has not passed a BCR to authorize their intervention at a duly convened meeting, they don't actually have a legal right to be before you to see -- to represent the members. And I -- I would refer you to the authorities that we have cited for you in Footnote 27 of our submissions. It's also dealt with in the submissions at paragraph 16(b). It's not --

THE COURT: But didn't --

MS. HUTCHISON: -- an unimportant --

THE COURT: -- Mr. Molstad --

MS. HUTCHISON: -- point, My Lord.

THE COURT: -- just finish telling us that there is a resolution being circulated to you on the 28th of October?

MS. HUTCHISON: It was circulated to us, My Lord, at a point in time when we would no longer cast the evidence in the face --

THE COURT: Yes.

MS. HUTCHISON: -- of Mr. Darcy Twinn's clear evidence that there is no BCR --

THE COURT: Yes.

MS. HUTCHISON: -- clear evidence that there was no duly convened meeting, My Lord. And I'd refer you --

THE COURT: Yes.

MS. HUTCHISON: -- to page 26 and 27 of his questioning. We --

THE COURT: Okay.

MS. HUTCHISON: -- we went through all of this with Mr. Twinn.

THE COURT: All right.

MS. HUTCHISON: And in terms of Chief and Council offering a unique perspective on the Trust, Mr. Twinn was very consistent throughout his questioning in stating that Chief and Council don't even discuss the Trusts. They in fact seem to actively avoid the Trusts, My Lord. And I'll take you to tab O of the OPGT's submissions, a portion of the transcript of the questioning of Darcy Twinn, page 25, line 1: (as read)

> A. No, we don't discuss anything about the Trusts. That's a separate entity. We are Council of the First Nation. We deal with First Nation business. Trust business is Trust business. He takes that elsewhere.

These irregularities in Sawridge First Nation's application, My Lord, are amplified by the complete lack of consultation with Sawridge First Nation's members, their actual members on this matter, My Lord. And Mr. Twinn confirms at page 9, line 8 to 11, that there has been no consultation with Sawridge First Nation's members about the position they want to take on the Trust transfer, the asset transfer, or the intervention application.

And, My Lord, that has to be compared with Exhibit D of the Darcy Twinn questioning, which is also -- I think I have taken you to it a number of times, tab P of the OPGT's submissions which was an explicit resolution passed by the Sawridge First Nation's members. At least on the evidence available to us, that's the last word from the very individuals that this intervenor says they want to speak for. And they haven't been consulted on the issues since, My Lord.

THE COURT: Okay.

MS. HUTCHISON: And unless the Court has questions for me, I will hand over to Mr. --

THE COURT: Okay.

MS. HUTCHISON: -- Mr. Faulds. Thank you.

THE COURT: Thank you.

Submissions by Mr. Faulds

MR. FAULDS: My Lord, I wanted to first of all point out that what we really have in front of us are two applications in the sense of an application to intervene in the issue raised by Your Lordship concerning the effect of the asset transfer order --

THE COURT: Yes.

MR. FAULDS: -- and an application to intervene in relation to the jurisdiction application --

THE COURT: Yes.

MR. FAULDS: -- which was going to be argued on April 25th, but which is now adjourned off to -- to some point in the future. And I think that somewhat different considerations apply to -- to those two matters, or at least some different considerations apply.

THE COURT: Yes.

MR. FAULDS: And I'd just like to speak to the jurisdiction application because Your Lordship may recall that one of the first steps that you took in

relation to these proceedings was to approve a litigation plan which was submitted to you for the determination of the jurisdiction application --

THE COURT: Yes.

MR. FAULDS: -- on April 25th.

THE COURT: Yes.

MR. FAULDS: And that jurisdiction -- and that litigation plan included deadlines for applications --

THE COURT: Yes.

MR. FAULDS: -- to be made by parties to intervene. And so --

THE COURT: Yes. It's come and gone, and Mr. Molstad didn't apply.

MR. FAULDS: This -- right --

THE COURT: Gotcha, read your material.

MR. FAULDS: -- right. And -- and -- and so, you know, we -- and we haven't been told there -- of anything that's changed in -- in relation to --

THE COURT: Well, it has --

MR. FAULDS: -- the material.

THE COURT: -- it has changed because I've interspersed myself in this litigation and have raised concerns that weren't previously raised.

MR. FAULDS: That's correct, My Lord. But depending on -- but -- but those may have act -- no ultimate bearing upon the --

THE COURT: May --

MR. FAULDS: -- jurisdiction application.

THE COURT: You know what? It -- this may have just been

something that I should never have raised. And I may -- I may conclude that you have given me a perfectly good explanation, and we'll drive on.

MR. FAULDS: Right. But my -- my submission is that absent something arising out of the asset transfer application --

THE COURT: Yes.

MR. FAULDS: -- Sawridge First Nation made its choice, didn't see a need to --

THE COURT: Yes.

MR. FAULDS: -- intervene --

THE COURT: Okay.

MR. FAULDS: -- the jurisdictional application --

THE COURT: Okay, hear you.

MR. FAULDS: -- shouldn't have --

THE COURT: Yes.

MR. FAULDS: -- be permitted to do that.

THE COURT: Yes. Yes.

MR. FAULDS: So I -- I am getting very strong signals, My Lord, about where -- where the -- where the Court is inclined to go --

THE COURT: Well -- well --

MR. FAULDS: -- on -- on this.

THE COURT: -- I don't mean to be impatient, Mr. Faulds, so --

MR. FAULDS: Right.

THE COURT: -- you take your time. But, you know,

intervenor applications are usually done on a pretty streamlined basis, not usually with binders of materials that take hours to read.

MR. FAULDS: Right. And -- and one of the reasons for --

THE COURT: And I'm happy to read them. I mean, that's -- I get paid to do that, so I'm happy to do it. But it strikes me that it's time that we rolled up our sleeves and get down to the meat of the matter here.

MR. FAULDS: And in -- so let me talk about the asset transfer issue for a moment --

THE COURT: Sure, yes.

MR. FAULDS: -- because really the -- the heart of our position is that -- is that the Sawridge First Nation's done a 180-degree U-turn on -- on --

THE COURT: Yes.

MR. FAULDS: -- this without any explanation of why and --

THE COURT: They may have -- they may have seen the light. Who knows? I don't know. I don't know, but, Mr. Faulds, let --

MR. FAULDS: Yeah.

THE COURT: -- let me say this: If -- if anyone starts taking ridiculous positions in their submissions, taking up everyone's time and draining even more money out of this Trust, then that is going to be of concern to me --

MR. FAULDS: Yes.

THE COURT: -- and there will be consequences if I'm concerned --

MR. FAULDS: Yes.

THE COURT: -- about people wasting time and the Trust's money. So --

MR. FAULDS: Yes.

THE COURT: -- flip-flopping on positions is usually an indicator that there's a problem. But it may be a situation where people have just taken a different perspective. I don't know. But --

MR. FAULDS: Right.

THE COURT: -- I'm going to be pretty in tune with trying to figure out who is taking up my time unnecessarily and who is not.

MR. FAULDS: Well, My Lord, I -- on that point, I -- you know, Ms. Hutchison has been at pains to explain why this matter is of such significance to the --

THE COURT: Yes.

MR. FAULDS: -- to the Public Trustee's office and why we considered that it warranted scrutinizing the intervention application --

THE COURT: Okay.

MR. FAULDS: -- in a way that might not otherwise have been the case.

THE COURT: Yes, okay.

MR. FAULDS: And in relation to -- to that, just to -- just to conclude a thought which Ms. Hutchison provided to you, she took you to Exhibit G for Identification from the questioning of Darcy Twinn, which is at tab --

THE COURT: Is that tab P?

MR. FAULDS: -- P of our brief.

THE COURT: Yes.

MR. FAULDS: And we have just, like -- just to -- just to underscore the point which was being made there, if you -- if you turn to the previous exhibit for identification, which is --

THE COURT: F.

MR. FAULDS: -- tab F --

THE COURT: Yes.

MR. FAULDS: -- or Exhibit F --

THE COURT: Yes, yes.

MR. FAULDS: -- for Identification --

THE COURT: That's the Dentons letter --

MR. FAULDS: -- that's the Dentons --

THE COURT: -- June 22nd?

MR. FAULDS: -- letter.

THE COURT: Yes.

MR. FAULDS: In which -- in which the asset transfer order is being proposed.

THE COURT: Yes.

MR. FAULDS: And if you turn to a second page of that letter --

THE COURT: Yes.

MR. FAULDS: -- you'll see that in the paragraph which begins with the word "the 1985 Trust" --

THE COURT: Yes.

MR. FAULDS: -- Ms. Bonora set out the purpose of the asset transfer order. We simply wish to have the Court agree the transfer is approved and the 1985 Trust is the entity with which to deal.

So when Mr. Molstad in his subsequent letter threatened the OPGT with costs if they did not agree, that's what was -- and -- and I -- and I just point to the irony --

THE COURT: Okay.

MR. FAULDS: -- of the --

THE COURT: Okay.

MR. FAULDS: -- fact that we're now being threatened with costs for posing the intervention to argue the opposite.

THE COURT: Okay.

MR. FAULDS: In terms of the -- the issue relating to the Band Council Resolution, which has been brought before you, in our submissions, we noted in footnote, as it -- as it turns out, that Bands make decisions fundamentally in two ways: One of those is by way of Band member meetings, and one of those is by resolutions of the Chief and Council. And the evidence which had flowed from the questioning of Darcy Twinn was that neither of those things had happened. Darcy Twinn stated in evidence that there was no meeting of the Band members to discuss this, and he also stated that, first of all, there had never been a Band Council Resolution passed. And the Resolution isn't a piece of paper. Resolution is a decision. He said there had been no Band Council Resolution to do this. And he also said that there had never been a duly convened meeting of the Sawridge Chief and Council of which intervention had been discussed. And that's important because a duly convened meeting is a --

THE COURT: Yes.

MR. FAULDS: -- prerequisite --

THE COURT: Yes.

MR. FAULDS: -- to a Band and Council Resolution.

THE COURT: Yes.

MR. FAULDS: So, in our submissions, we pointed out that there did not seem to be an authorization for the bringing of this application in the manner that's --

THE COURT: Yes.

MR. FAULDS: -- contemplated.

THE COURT: Mr. Molstad stands in front of me and says that he has instructions to proceed.

MR. FAULDS: I -- and I have no doubt that he has instructions to pursue --

THE COURT: Yes.

MR. FAULDS: -- the -- the -- the underlying question is whether or not the First Nation is in a position to issue those --

THE COURT: Yes.

MR. FAULDS: -- instructions. The -- there was absolutely no intention to suggest that Mr. Molstad was acting --

THE COURT: Yes.

MR. FAULDS: -- outside the scope of his -- of his proper retainer. It was simply whether or not the Band itself had done --

THE COURT: Yes.

MR. FAULDS: -- what it needed to do.

THE COURT: Yes.

MR. FAULDS: And that's the point that was -- that -- that was brought forward. And -- and we were a little surprised when a Band Council Resolution document which appeared to contradict what Mr. Twinn had said appeared, you know, before us. So --

THE COURT: Okay.

MR. FAULDS: -- that's what -- that's what that issue was about.

So in terms of the standard test for intervention, there's two fundamental elements --

THE COURT: Yes.

MR. FAULDS: -- the first one is a direct interest --

THE COURT: Yes.

MR. FAULDS: -- and the second one is a unique perspective -- special expertise or a unique perspective. And we have asked the Court to consider whether or not a direct interest actually exists in this point in -- in this application on the part of the Sawridge First Nation given that while it was the architect of this process, its role was essentially spent. And Darcy Twinn went so far as to say that the Chief and Council of the Band do not discuss Trust business at all. They see that as being a matter for the Trustees, and there's evidence upon that point, which is quite clear. And if perhaps I can --

THE COURT: Yes, Ms. Hutchison referred me to it.

MR. FAULDS: Yes, yes, I believe we have the --

THE COURT: Yes.

MR. FAULDS: -- we have the quote as page 25 of the transcript of lines 1 to 4. And he appears to be drawing a distinct line between First Nation business and Trust business.

THE COURT: Yes.

MR. FAULDS: And -- and our -- and, in our submission, that's actually consistent with Trust law --

THE COURT: Yes.

MR. FAULDS: -- that the Sawridge First Nation does not have it -- does not have a direct interest.

The question of the special perspective, well, we have made the point about -- about our views on that.

So the last point I'd like to -- to -- to refer you to is -- has to do with the production of the records. And our submission is that when an intervenor chooses to participate in proceeding, its ultimate objective is to be helpful to the Court. And in it being helpful with the Court means producing records that it may have in its possession being relevant

and -- and being open to inquiries or questions about such materials.

And, in our view, were the Sawridge First Nation to be added as an intervenor, it would be appropriate to require them to provide an affidavit of records or something equivalent to an affidavit of records.

THE COURT: Didn't -- didn't you sign off on an order in August of 2016 that said you were satisfied that there was a lack of records, but you were content that you had everything that you could possibly get given the circumstances --

MR. FAULDS: We were con --

THE COURT: -- or word -- words to that effect?

MR. FAULDS: -- we were content with the order that made -- that made it unnecessary to pursue the matter further.

THE COURT: Yes.

MR. FAULDS: And that's the order which --

THE COURT: Okay, I -- because it -- it said a bit more than that, but...

MR. FAULDS: But -- but the -- I -- if your -- if Your Lordship recalls, the origin of that order was there had been a broader application for documents by the Sawridge --

THE COURT: That's right.

MR. FAULDS: -- by -- by -- by the OPGT which --

THE COURT: Yes.

MR. FAULDS: -- was rejected in Sawridge Number 3. Justice Thomas in --

THE COURT: Yes.

MR. FAULDS: -- that decision directed the Public Trustee to bring a Rule 5.13 application. That was a direction from the Court to do that. That had

two aspects to it: One was production of documents relating to membership issues, and that --

THE COURT: Yes.

MR. FAULDS: -- ultimately got dismissed --

THE COURT: Yes.

MR. FAULDS: -- the other was production of documents relating to the asset transfer issue --

THE COURT: Yes.

MR. FAULDS: -- when the asset -- when the OPGT agreed to the asset transfer order, it withdrew the Section 513 application concerning that --

THE COURT: Yes.

MR. FAULDS: -- because it -- it was --

THE COURT: Yes.

MR. FAULDS: -- no longer relevant. And Your Lordship will recall that the order in question preserved out some matters which weren't decided by the order of having to do with, you know, counting of assets, and all those kinds of things --

THE COURT: Yes.

MR. FAULDS: -- which would -- which were preserved, and, therefore, the opportunity to pursue issues relating to that remained at a later date. So it was unnecessary at that time for the OPGT to pursue any further documentation relating to the asset transfer order given the terms of that order.

But now we're back in a position where that order is -- you know, everything's been thrown up in the air about that if -- if the Sawridge First Nation intervenes. And our submission is it -- it would be -- if -- if the Sawridge First Nation is here to assist the Court, then production of whatever records it has and -- and --

THE COURT: Yes.

MR. FAULDS: -- allowing --

THE COURT: Yes.

MR. FAULDS: -- questions to be asked of concerning that is only appropriate.

THE COURT: Right. But we -- if we did that, we are not doing this application on November 27th.

MR. FAULDS: If -- if --

THE COURT: Is that right? I mean, realistically, how -- how -- how could we accommodate that?

MR. FAULDS: Well, My Lord, people can move mountains when they put their mind to it.

THE COURT: Yes.

MR. FAULDS: If you say we have to do it by then and they have to produce something by then and we have to ask our questions by then, you know --

THE COURT: Yes.

MR. FAULDS: -- we'll find a way to make it happen.

THE COURT: Well, right --

MR. FAULDS: Yeah.

THE COURT: -- but I'm happy to get these types of briefs two days in advance. When I come to things that have more standing or substantive rights are being affected, I'm in a lot of pretty clear understanding and opportunity to understand what the positions of the parties are. So I -- I don't want those briefs two days ahead of time.

MR. FAULDS: Right, un -- understood. I -- so, I mean, that -- that's a -- that's a conundrum because if the Sawridge First Nation's perspective --

THE COURT: Yes.

MR. FAULDS: -- is appropriate and necessary, and if it's there because it's -- it's of assistance and value to the Court, then --

THE COURT: Yes.

MR. FAULDS: -- you know, presumably it should be accompanied with, you know, a fulsome and reasonable --

THE COURT: Sure.

MR. FAULDS: -- you know, production of -- of --

THE COURT: But --

MR. FAULDS: -- materials that are pertinent to the position it wants to advance, in which the -- which the other parties can contest. And -- and I'm -- I'm not asking for an adjournment, My Lord. I'm not, but I -- but -- but I --

THE COURT: Well --

MR. FAULDS: -- it -- it seems to me that the purpose of the intervention will be defeated if that didn't happen.

THE COURT: Sure. But, Mr. Faulds, the issue that is going to be argued on the 27th of November is really a legal issue. The facts are important by way of context, but only the law -- a lot of paper here that shows what the context is. And Ms. Hutchison's taken me through what I consider some of the most context this afternoon, but ultimately it's -- it's a legal issue, isn't it? What -- what is the effect of that order? Because it's -- it --

MR. FAULDS: And there's -- there's probably a lot of -- a -- a lot of legal opinion on that in files of the Sawridge First Nation.

THE COURT: Oh, well, you're not getting that anyway because that's the subject of privilege --

MR. FAULDS: Well --

THE COURT: -- right?

MR. FAULDS: -- well, it could be waived by the Sawridge First Nation.

THE COURT: Yes.

MR. FAULDS: And -- and -- and as we suggested in our brief, it may not be unreasonable to consider --

THE COURT: Yes.

MR. FAULDS: -- that perhaps as -- you know, it -- we're talking about the legal advice received in 1985.

THE COURT: Yes.

MR. FAULDS: So it's not as though we are actually, you know -- you know, in -- intruding into -- into current affairs of the -- of the First Nation. This is -- this is --

THE COURT: Yes.

MR. FAULDS: -- a historical endeavour. The Court is asking what -- what happened back then in 1985, what's the effect of that? Doesn't seem to me that the -- that there's any -- any actual reason why a waiver of privilege as a -- of -- in relation to the advice received at that time was --

THE COURT: Well, I --

MR. FAULDS: -- a conditional (INDISCERNIBLE).

THE COURT: -- won't be asking them to waive privilege.

MR. FAULDS: Well, in -- in that case, it's not going to happen.

THE COURT: Well, I -- you know, I -- I can't. I have no authority to do that.

MR. FAULDS: I -- well, I would suggest, My Lord, that -- that, as we said in our brief, at the minimum we could be asked -- they could be asked to produce a list of documents akin to an affidavit of records, which would -- which -- which could then be reviewed by -- by the parties and --

THE COURT: Yes, yes.

MR. FAULDS: -- if -- if there seemed to be questions about some of it, that could be -- about, you know, claims of privilege and whether stuff is or isn't, that could be -- that could be tested. Again, I realize there's a ton involved with that. But, you know, if -- if -- if the -- if the intervention is viewed as necessary and is going to be helpful, it seems that something of that sort would -- which will inform the factual matrix of the legal question of the --

THE COURT: Oh, apart from legal opinions, what -- what -- what do you think you might need that you haven't been able to access?

MR. FAULDS: Well, for example, there's a discussion between the Sawridge First Nation's legal advisor, Mr. Cullity, and Indian Affairs, as I think it was called at the time --

THE COURT: Yes.

MR. FAULDS: -- relating to the issue that my friend, Mr. Molstad, raised. Mr. Molstad raised this question about the role of the Department in relation to monies which were capital monies of the Band which were --

THE COURT: Yes.

MR. FAULDS: -- released.

THE COURT: Yes.

MR. FAULDS: And there is -- and -- and in the correspondence that occurred between Mr. Cullity and the Department of Indian Affairs, the -- Mr. Cullity says he kept on saying that the Department had no right to make those inquiries, which, again, is somewhat contradictory of where --

THE COURT: Yes.

MR. FAULDS: -- the First Nation wants to go now. But -- but the correspondence -- the -- that's -- that's available so far simply cuts off in midstream. There's a -- there was an exchange -- the -- the -- the documents themselves are at tab K of our brief.

THE COURT: Yes.

MR. FAULDS: And there's an exchange which never says how the matter resolved. Now, Mr. Molstad made a point of referring to that, you know, the -- the -- the nature of -- of the funds that were being held and the controls which they were subject to --

THE COURT: Yes.

MR. FAULDS: -- refer to federal legislation.

THE COURT: Yes.

MR. FAULDS: This exchange concerns exactly that point. We don't know how it was resolved. It does appear from the evidence of Mr. Darcy Twinn that the Government of Canada ultimately never took any action to interfere in the operation of the 1985 Trust, that we -- that's -- that appears to have been the outcome. But we don't know -- we -- we don't have any sort of documentary confirmation of that --

THE COURT: Yes.

MR. FAULDS: -- fact or of what the -- of what the ultimate positions were. And -- and that appears to be a central point of -- of my friend, Mr. Molstad's, position. And so, for example, a production of the records relating to that exchange, how it was resolved, how that -- how that issue was resolved would be directly pertinent to -- to the -- to the issue which Mr. Molstad wants to advance.

So that's -- that's an example of -- of -- of the kind of record that -- that might be produced. And I don't believe that would be subject to privilege, per se.

THE COURT: Yes.

MR. FAULDS: So that's -- so -- so, I mean, we've -- we've -- we've kind of summarized that in our -- in -- in the relief requested in a section of our brief. We have outlined the fact that we -- we take the view that the intervention should not be granted. If it is granted, we take the position that it should be limited to the asset transfer order, and that should -- it should come with some obligations involving cooperation and production of relevant --

THE COURT: Right. It --

MR. FAULDS: -- documents.

THE COURT: -- should all be done so that the timeline can be put together for November 27th.

MR. FAULDS: It's -- yes, it's -- it's tough. But -- but, I mean, we -- we are -- we are where we are by virtue of circumstances --

THE COURT: Yes.

MR. FAULDS: -- you know? And we couldn't question Mr. Darcy Twinn on his -- on his affidavit until the 18th of October simply because that was when --

THE COURT: Yes.

MR. FAULDS: -- people were available --

THE COURT: Yes.

MR. FAULDS: -- you know, that kind of compressed all of the timelines for...

THE COURT: Okay. Mr. Molstad, what's the story with these documents, the -- I'm -- so --

Submissions by Mr. Molstad

MR. MOLSTAD: The only reason that we've produced these documents is to show the source of funds.

THE COURT: Yes.

MR. MOLSTAD: So I'm not sure what my friend's looking for in --

THE COURT: Well --

MR. MOLSTAD: -- terms of our position.

THE COURT: And he's looking for some exchanges with the

federal government --

MR. MOLSTAD: You know --

THE COURT: -- in 1985 time frame that --

MR. MOLSTAD: Yeah, my --

THE COURT: -- a -- apparently your client --

MR. MOLSTAD: -- my information from my client is that they provided all of the documentation that they had related to the transfer of the assets from '82 to '85 to the Trustees, and that they --

THE COURT: Yes.

MR. MOLSTAD: -- have made those available to my friends. So that's my information. I'm not sure what he's looking for. But, you know, one of the things that you have to keep in mind in terms of the Public Trustee, read their applications that I gave you in that book. Take the time to go through and see how Draconian and ridiculous the positions that they have taken in the past are.

THE COURT: He's -- he's looking for something much narrower now.

MR. MOLSTAD: Yeah. No, I understand that. But as I -- as you said, Sir, this is a legal issue. And it's a legal issue that is extremely important. And we're involved because you directed our attention to it. We have only become involved in this matter when something has a -- an extreme effect in terms of the Sawridge First Nation when the Maurice Stoney matter came before the Court when he was applying essentially for membership. We intervened in that and were granted intervenor status. We're back again to ask for intervenor status because you have directed the parties that are participating in this matter to address an extremely important issue that no one has addressed up to this point. And I thank you for at least identifying that issue because it should be addressed, and all of the participants should be able to speak to it in terms of a legal question.

In terms of what he is looking for, in terms of documents, I -- I have to admit, I have not reviewed every document in the production that the Public Trustee has produced. But I have been told by my client that they gave everything that they had that was not privileged . So that's where we are.

THE COURT: Okay. So the Trustees have the documents.

Submissions by Ms. Hutchison

MS. HUTCHISON: My Lord -- I'm sorry, apologies. Quickly on documents, My Lord. I do think it's important that the Court be aware of a couple of documents in our brief. We have got at tab N of the OPGT's submissions, there's a with-prejudice exchange as a result of Ms. Osualdini's original question about access to the evidence of Maurice Cullity. And -- and, frankly, My Lord, the suggestion that there is still privilege over Maurice Cullity's file is extremely questionable. If the Court goes to Mr. Molstad's own questioning of Paul Bujold in 2016, he takes Mr. Bujold through the evidence and information he obtained from Mr. Cullity. If Sawridge First Nation was worried about maintaining privilege over Mr. Cullity's files, if they felt that there was something in those files that shouldn't be divulged, why would they have taken Mr. Bujold directly to the conversations he had? He's not a client of Mr. Cullity's in the way that Sawridge First Nation was.

And in Ms. Bonora's letter of October 15th, which we have got here at tab N, My Lord, there's a very clear invitation to Sawridge First Nation to speak to whether or not they will waive the privilege over those documents. And Mr. Cullity was the architect of the very transfer that you're concerned about, My Lord. It's the essence of what you want us to speak to about in November.

THE COURT: Yes.

MS. HUTCHISON: And for Sawridge First Nation to be before you and say, This was our clear stated purpose in 1985, we are now switching positions, but we will --

THE COURT: Yes.

MS. HUTCHISON: -- not share with you the available documentation about why the transfer was structured that way, why the '85 Trust was created that way, but we will question Trustee witnesses in and around that privileged information. My Lord, that's not a helpful intervention. And --

THE COURT: Yes.

MS. HUTCHISON: -- although we certainly disagree with the Court about the necessity of the intervention, if it's going to happen, it needs to happen in a way

that gives this Court the best chance to make an accurate decision based on full information and evidence about what --

THE COURT: Yes.

MS. HUTCHISON: -- really happened, My Lord. Thank you.

THE COURT: Okay. The Trustees' position, just with respect to documents. I'll -- I want to go to --

MR. SESTITO: Yeah.

THE COURT: -- Ms. Twinn's counsel.

Submissions by Mr. Sestito

MR. SESTITO: Yeah, yes, My Lord. The Trustees have made available earlier in this proceeding -- I can't give you an exact date, but we have made available a binder of material that we were able to find from everything that's been produced in this litigation with respect to the transfer. That would have contained whatever material historically we had received from the First Nation. And in order to create that binder, we simply looked for the time frame and anything that could touch this transfer issue that we had. We made it available to the parties, not -- not by way of a formal affidavit. It's material that has already been produced in this litigation, but we did provide that binder of material to the parties with respect to this transfer issue.

THE COURT: Okay. Good. Thanks.

Submissions by Mr. Faulds

MR. FAULDS: And -- and, My Lord, just to be clear, we -- we do not dispute in any sense that the Trustees have provided everything that they have, you know, for the -- we're now talking about what the Sawridge First Nation has.

THE COURT: Sure. What -- what -- what you're really asking, Mr. Faulds, is if -- if I were to -- to firstly agree that there should be an intervention and secondly agree that there should be some documents produced, we would be asking the Sawridge First Nation to go back 35 years to look for scraps of paper that might or might not exist and do it all within a span of time that would permit it to be delivered to you so briefs could be delivered to me so that we could proceed on November 27th. That -- that's a tall order --

MR. FAULDS: Yeah, I --

THE COURT: -- but --

MR. FAULDS: -- I don't disagree.

THE COURT: -- it --

MR. FAULDS: I -- I guess the -- the -- the question is, is it -- is it necessary and appropriate thing to happen, and our submission is, yes, it is.

THE COURT: Well, is it so important to you that we'll put the application off to the spring and give them a reasonable opportunity to gather together the materials only to find out perhaps that they can't find anything? Is -- is -- is that what we want to do? Or is it time to get on with it and do the best we can with what information we have?

MR. FAULDS: My Lord, yes, it is time to get on with it.

THE COURT: Good. Let's get --

MR. FAULDS: No --

THE COURT: -- on with it, then.

MR. FAULDS: -- but -- but -- but in saying that, I -- I do have to observe, we -- we didn't have an intervention application until the 26th of September --

THE COURT: Yes.

MR. FAULDS: -- I mean, which is only two months before the deadline, you know, on an -- on an issue which was raised by --

THE COURT: Right. But we set --

MR. FAULDS: -- the Court in April.

THE COURT: -- we set the timeline for the filing of that motion, and --

MR. FAULDS: That's -- that's correct.

THE COURT: -- timelines have been met.

MR. FAULDS: That -- that's -- that's correct, and --

THE COURT: Well, hopefully gearing up to -- I mean, we set those timelines that we would be ready for November 27th. We didn't --

MR. FAULDS: That was the --

THE COURT: -- contemplate that there would be this application today. Originally it was going to be a situation where we would determine if it was going to go by consent, and, if not, whether I could just do it by way of --

MR. FAULDS: Right.

THE COURT: -- paper.

MR. FAULDS: Right. Right. Right. And I -- and --

THE COURT: But here we are today.

MR. FAULDS: We are. And -- and -- and, My Lord, I -- I'm -- I'm compelled to say that -- that this question about document production was raised when we set the -- when we set the schedule. And I -- and -- and I did --

THE COURT: You did raise it --

MR. FAULDS: -- advise the Court --

THE COURT: -- I -- I -- I do remember that, yes.

MR. FAULDS: -- that -- that -- that it was something that we anticipated --

THE COURT: Yes.

MR. FAULDS: -- would likely be required.

THE COURT: Okay. Good. Thanks.

Submissions by Ms. Osualdini

MS. OSUALDINI: Thank you, My Lord. For the record, Osualdini, first initial 'C.' We're counsel to Catherine Twinn. Sir, my submissions in terms of the SFN's application for intervention are going to be brief. Simply put, we are supportive of the OPGT's position. We agree that in terms of the test, the SFN does not have a direct interest in the outcome of this application, they are not a beneficiary of the Trust, and they do not bring any special expertise or perspective to this matter, and they've certainly demonstrated that their information is unreliable in terms of these issues.

Now, turning to the issue that's re -- that we've been discussing in terms of the order -- the transfer order, the Court's directed us in November to ask what is the effect of that order? And I would submit to you, My Lord, that is a legal question. What the parties are speaking to now is Step 2, that if the Court says that the effect of that order is not to confirm that the '85 Trust is the Trust with which to deal, now that becomes a factual question.

THE COURT: Well, that's a very good point. And --

MS. OSUALDINI: And --

THE COURT: -- and so to go back to Mr. Faulds' position, maybe we ought to be considering these applications separately, deal with the legal -- lee -- deal with whether or not intervention should be given for the legal issue, depending on the outcome of that, entertain another application if necessary. That might involve something that might require documents like --

MS. OSUALDINI: Right. Because -- and that was going to be my point about Mr. Cullity's files --

THE COURT: Yes.

MS. OSUALDINI: -- frankly at this point Mr. Cullity, as far as I'm aware from my client, he's still alive. He's with us. He's a person who could really speak to these issues. And we're speaking about privilege over Mr. Cullity's files because he's both counsel to the Trustees and to the First Nation at the relevant time. And we have never been given an opportunity to challenge whether there is privilege over that file, because we want to have the best information before the Court in the event that we do get to Step 2 in this process.

THE COURT: Well, was -- he was acting as counsel for Sawridge First Nation.

MS. OSUALDINI: And the Trustees.

THE COURT: And the Trustees?

MS. OSUALDINI: Yeah, sorry, the -- the letter from Ms. Bonora that was referred to by my --

THE COURT: If he's --

MS. OSUALDINI: -- friend --

THE COURT: -- acting for two clients, both clients are going to have to waive privilege in order for --

MS. OSUALDINI: Right.

THE COURT: -- permission to be waived.

MS. OSUALDINI: Because in Shelby's affidavit we have the letter from the Trustee's counsel taking position on this issue.

THE COURT: Affidavit of Shelby Twinn?

MS. OSUALDINI: Yeah, it's the -- oh, sorry, it's the responding brief of the Office of the Public Guardian and Trustee, and it's tab N.

THE COURT: Okay.

MS. OSUALDINI: Because at tab N you can see the correspondence that was provided to our office --

THE COURT: Yes.

MS. OSUALDINI: -- where the Trustees are saying that, No, they're asserting solicitor-client privilege over Mr. Cullity. Because initially, as I had raised at the prior case management meeting, we were considering calling viva voce evidence, you can hear from the man himself on what happened. The Trustees are objecting to that. And then they also alerted us to the fact that --

THE COURT: Well, isn't that the end of it, then?

MS. OSUALDINI: Well, I think we might -- if we get to Step 2, because, frankly, if Step 1 says, No, this order means what we all thought it meant at the time, this all becomes a moot point.

THE COURT: Okay.

MS. OSUALDINI: Because we -- as of right now, we have an unchallenged order. Nobody's here suggesting that it was an improperly granted order of the Court. We're simply defining what it means.

THE COURT: That's right. No, I -- the order was there.

MS. OSUALDINI: Right.

THE COURT: It hasn't been taken away.

MS. OSUALDINI: Right. But I think we need to have a process that in the event we have to get to Step 2 to be challenging these positions on privilege, because it appears that there is information that potentially is relevant. We aren't going to decide that today, but we need to have that process from the Court.

THE COURT: Okay.

MS. OSUALDINI: So in terms of the -- of the SFN's intervention application, in terms of direct interest in the outcome, they weren't a signatory to the order, they specifically didn't want to be. Did they bring any special expertise to the legal question of what the order means? I submit not.

THE COURT: Okay.

MS. OSUALDINI: But I won't belabour that point. I wanted to focus on the application of Shelby for intervention status. So, Sir, it will probably come to you as no surprise that we're very supportive of Shelby's application for intervention status. My client would like to see the beneficiaries have a voice before the Court given that the outcome of these matters could be very prejudicial to their address.

I would draw to the Court's attention that the necessity for beneficiary participation in these proceedings was recognized by the Court of Appeal in their December 2017

decision. The Court will likely recall that this was an appeal by Shelby and others seeking party status in these proceedings. While the Court of Appeal did not grant party status, they did recognize that a procedure should be implemented for beneficiaries and/or potential beneficiaries to participate in this litigation either individually or as representatives of a particular category of beneficiary. And this decision you can find at tab 3 of Shelby's written submissions, at paragraph 22.

And I would submit, Sir, that this is the foundational basis for Shelby's intervention. The Court of Appeal has directed that beneficiary participation must be considered, albeit not in party form. And we'd also --

THE COURT: Yes, they made it clear that adding all beneficiaries and potential beneficiaries as full parties to the Trust litigation is neither necessary nor advisable.

MS. OSUALDINI: As parties. But they did -- they were very clear, though, in paragraph 22 to state a second issue is what procedure will be implemented for beneficiaries to participate --

THE COURT: Sure.

MS. OSUALDINI: -- so they did --

THE COURT: Wasn't that what the participation order was all about, though?

MS. OSUALDINI: Right. But now, as we've all discussed, the landscape has shifted --

THE COURT: Yes.

MS. OSUALDINI: -- I think I've heard many counsel today acknowledge the fact that it shifted. And I think it shifted in terms of that participation order as well.

THE COURT: Yes.

MS. OSUALDINI: So the issue of how beneficiaries are to participate is live and well and recognized by the Court of Appeal. And I would submit to you, Sir, that the Court of Appeal also left open the possibility for advance indemnity funding for these beneficiaries --

THE COURT: Yes.

MS. OSUALDINI: -- that that -- that is left open by this decision.

THE COURT: Okay.

MS. OSUALDINI: So, Sir, Shelby is seeking to define her participatory rights through an intervenor role on these jurisdictional applications. As we've said, the landscape has changed since January. The issues before the Court now, especially if we start getting to Step 2 of this process we have talked about, these are the potential to form final relief. Earlier you said we're not heading to a six-week trial. Well, in -- in some ways we are because we're heading into a landscape that could lead to final relief. So this is the time -- this is a very, very crucial time for these beneficiaries. And if the relief sought by the Sawridge First Nation, if they get intervenor status and -- and what they're seeking is granted, that is fatal to Shelby's interest in this Trust.

The common-law test for --

THE COURT: Well, it's -- if -- if they get stat -- okay, well --

MS. OSUALDINI: No, Sir, not if they get intervenor status but if they get the relief that they're seeking to obtain through that status --

THE COURT: Right, but it's --

MS. OSUALDINI: -- it becomes fatal to Shelby's interest.

THE COURT: They -- they're not -- Sawridge First Nation is not looking for relief.

MS. OSUALDINI: No, they are.

THE COURT: They're -- they are providing their argument with respect to the issue I have raised.

MS. OSUALDINI: I think my friend is going to pass me that, but, no, Sir, in their application for intervention in terms of the jurisdictional question that we are supposed to be arguing in April --

THE COURT: Yes.

MS. OSUALDINI: -- they're actually seeking specific relief of the Court. They are seeking that the Court is -- the Court -- Court's jurisdiction is restricted to finding that the beneficiaries are the Band's or the First Nation members. And my friend has kindly passed to me the application of the Sawridge First Nation --

THE COURT: Right, but --

MS. OSUALDINI: -- for intervention --

THE COURT: -- but --

MS. OSUALDINI: -- and -- and I refer you to paragraph 1(a)(5) where they are seeking specific relief.

THE COURT: Okay.

MS. OSUALDINI: My -- my point, Sir, to the Court, though, is this: What -- what is coming down in these applications that are building have the potential to be fatal to Shelby's interest. And that -- and that's the point I'm trying to make.

THE COURT: Well, her and many others as the --

MS. OSUALDINI: And many others.

THE COURT: -- as the schedule have -- has provided. But looks to me like the Office of the Public Trustee has those people firmly in mind in terms of their submissions.

MS. OSUALDINI: Well, those are the minors, Sir. The adults have been lost, I would --

THE COURT: But --

MS. OSUALDINI: -- I would argue --

THE COURT: -- but --

MS. OSUALDINI: -- in this process.

THE COURT: -- it -- it's the same issue, though, isn't it?

MS. OSUALDINI: Well, Sir, as -- as we're seeing, perhaps there's multiple perspectives to this problem --

THE COURT: Yes.

MS. OSUALDINI: -- I certainly -- my client certainly doesn't profess to know them all.

THE COURT: Yes.

MS. OSUALDINI: And there could be different view points, and --

THE COURT: Yes.

MS. OSUALDINI: -- frankly, there could be different ways to solve this problem. I think actually in that Court of Appeal decision Deborah Serafinchon was an individual seeking party status. She is the daughter of the late Chief Walter Twinn. And she was offering -- trying to offer another perspective to this. She doesn't qualify as an '85 beneficiary, but if the Court is going to amend this definition, there's different ways to do it. So I think a lot of the adult beneficiaries --

THE COURT: Yes.

MS. OSUALDINI: -- or potential beneficiaries which are recognized by the participation order --

THE COURT: Yes.

MS. OSUALDINI: -- could bring different views to this Court.

So turning to the common-law test for intervenor status, it allows the Court to grant an intervenor status to those who would be specifically affected by the outcome of the decision. I don't think that there's any duty that Shelby will be specifically affected by the outcome. And, as I've said, could be seriously po -- or prejudiced by it.

I note that in the Trustees' response to Shelby's application they suggest that the participation order issued in January could be amended to allow oral submissions with leave of the Court. And I would just -- I would just note that the participation order only pertains to the jurisdiction application that was supposed to be argued in April. The --

THE COURT: Yes.

MS. OSUALDINI: -- application by Shelby before the Court today is seeking intervenor status on that issue and also on the transfer issue --

THE COURT: Yes.

MS. OSUALDINI: -- and she's wanting the same ability as the other parties to make written and oral submissions. So I would submit to the Court the time to decide her ability to make oral submissions is now and not at a future date as suggested by the Trustees.

Sir, there have been submissions or at the very least suggestions from the Trustees that they represent Shelby's interests and thus Shelby's participation is unnecessary. With respect, if the Trustees are representing Shelby's interests and the interests of other non SFN members who happen to all -- who happen to be '85 beneficiaries, then those persons are in serious trouble. The Trustees have made it clear from the outset of this litigation that their goal is to amend the definition to only include First Nation members. That is found in the affidavit of Paul Bujold filed September 13th, 2011, at paragraph 33. They have pulled no punches in what the objective is.

On a couple of occasions in this litigation, which have been referred to by my friends in their submissions, the Trustees have made proposals to resolve this litigation and with the hope that it would, and each of those proposals would have the effect of Shelby losing her rights. For instance, they filed an application on June 12th, 2015. That was referred to by Ms. Hutchison seeking to amend the definition and grandfathering rights for a select few of minor -- a -- affected minor beneficiaries. And those beneficiaries did not include Shelby. And that is found -- that proposal and application is found at tab G of Shelby's affidavit.

Then once again in 2016 the Trustees presented a distribution proposal to the Court that requested once again the definition -- or proposed the definition be changed to membership in the First Nation and pro -- offered that any minor beneficiaries affected could simply apply for membership in the First Nation. We can see from Shelby how effective that that solution really is.

And, in fact, these Trustees have quite candidly admitted in the course of these proceedings that they accept that their preferred outcome to this litigation would lead to, and I quote, "collateral damage," and I quote, "winners and losers" amongst the current beneficiary group. And that's found in the transcript of questioning of Paul Bujold. That's referenced in Shelby's affidavit to the cite, and that's on the court file.

And, further, these Trustees admitted in that same questioning that they haven't taken steps to fully identify the existing 1985 beneficiary group. So I'd submit to you, Sir, that it is very hard to represent the interests of a group that you don't even know who they are.

So in sum, Sir, these Trustees do not represent Shelby's interest, and we fully agree with her on that front.

And I suspect that you might hear from my friends that Catherine Twinn is advancing those interests. And while it is true that Catherine is acting as -- she has party status and it's understood that she's acting as though she were a Trustee even show she has now resigned, and she believes that -- she believes these putting forward positions that are protective of the existing beneficiary class, I would make two points to the Court on this: First, Catherine is self-funded in this litigation. She is not being indemnified by the assets of the Trust. And that is contrary to the Trustees of this Trust that have access to Trust assets to fund their -- their legal positions. And, Sir, no doubt her ability to participate in these proceedings is affected by that. And I think that's, you know, become more apparent. You might have noticed in the questioning of Darcy Twinn, she was self-represented on that questioning and did her own questioning. Access to legal funding is an issue. It's very expensive.

And, secondly, my client doesn't presuppose that she's aware of all of the interests and positions that the beneficiaries may put forward. I'd submit that as part of advocating for beneficiary interests, it's a necessary corollary to allow beneficiaries to come before the Court and present views when they wish to do so. We should not be stopping them from doing that. Because -- and I give you an example of this, Sir. This isn't a situation where the Trustees of the Trust are -- have brought litigation to seek a -- a debt claim against an unrelated party. In that sort of context we don't need all the beneficiaries at the table, talking about how they, you know -- their views on the -- on the collection of the debt. This is very different. This is advice and direction of the Court on an issue that could take away their beneficial status. And in a situation like this, beneficiaries should be able to come to the Court and put their views to the Court and not have to rely on representatives to speak for them, and especially in a situation where those representatives are trying to take away their status.

And, Sir, just quickly to point out in terms of the transfer order, I do note that Shelby was represented by Nancy Golding of BLG when that order was entered in August. So I -- she may have a position to put forward on her understanding of that order that would be relevant for Step 1 of this process.

And, Sir, you have made some suggestion that the OPGT might be covering the interests

of Shelby. And I just --

THE COURT: Not -- not covering her interest but representing people who --

MS. OSUALDINI: Similar.

THE COURT: -- share the same interest.

MS. OSUALDINI: Sure. And I just -- just to be clear on that, the OPGT's mandate was very restricted by, I believe it was, Sawridge Number 3. And I think that would be very dangerous to infer or to deny Shelby access to the Court based on party who has a very restricted status or restricted scope in this litigation.

THE COURT: But they tell me they're acting for Shelby's sister --

MS. OSUALDINI: Right.

THE COURT: -- who is in the identical position that Shelby's in. And they're fighting hard for the sister.

MS. OSUALDINI: Right. But the positions they may advance only have the minors in mind. Because, for instance, we can see how this could conflict with the settlement proposal that was put forward by the Trustees, where they say to the OPGT, We'll grandfather your people if you agree to our definition. That's how people like Shelby could -- should -- could be affected.

THE COURT: That's why you can't do settlements of trusts, right? That's the reason --

MS. OSUALDINI: That's very true.

THE COURT: -- we're here.

MS. OSUALDINI: Very true, Sir.

THE COURT: You -- you can't -- this isn't like a debt claim where you can go out and make whatever deal you want with the other side. You -- you can't do that with a --

MS. OSUALDINI: Right.

THE COURT: -- trust.

MS. OSUALDINI: But -- and to speak to that point, Sir, in order for the Court to make a deal for us, if you will, all the voices --

THE COURT: Well, I don't know if I can make a deal for you either --

MS. OSUALDINI: Right. But in order to --

THE COURT: -- which -- which really --

MS. OSUALDINI: -- make a decision --

THE COURT: -- leads to the bigger -- the bigger issue is, are you in the right forum? Is -- is the -- is there -- is the real proper way to solve this -- I -- I am using a improper term, but mess, is -- is the way to solve this legislative as opposed to a series of never-ending legal proceedings?

MS. OSUALDINI: I'm not -- I'm not sure I follow, Sir.

THE COURT: The legislature can cure problems that the Courts cannot.

MS. OSUALDINI: M-hm.

THE COURT: And I'm just wondering what -- as I look at this, every time I turn a corner, there are more issues that put road blocks up in front of me. Just I'm speaking off the top of my head now. But I just wonder whether you're in -- you're in the right place.

MS. OSUALDINI: I suspect, Sir, you're -- you're getting more into the jurisdictional questions given that there's a bit of a legislative confinement --

THE COURT: Well, the --

MS. OSUALDINI: -- and the --

THE COURT: -- legislature can do lots of things that --

MS. OSUALDINI: Right.

THE COURT: -- the Courts can't.

MS. OSUALDINI: Right.

THE COURT: Courts are restricted in terms of what we can do.

MS. OSUALDINI: Understood, Sir.

THE COURT: Well...

MS. OSUALDINI: So, Sir, I don't get the sense really that it's Shelby's participation in making oral or written submissions that's really the -- the controversial point on her application. My sense of reading the parties' submissions is that it's her funding from the Trust. That -- that's really the more controversial point.

And we read Shelby's submissions, and we concur with her that there is a very significant power imbalance that is happening right now in these proceedings. The Trustees and the Sawridge First Nation are well-funded participants. They have access to far more resources than Shelby Twinn has. I don't think anyone's going to debate that. The minor beneficiaries are represented by the Office of the Public Guardian and Trustee, which is also indemnified through Sawridge Number 1 and the confirmation by the Court of Appeal.

THE COURT: Yes.

MS. OSUALDINI: As I'm sure you'd agree, Sir, this is very complex, and it's very expensive litigation. And I would submit to you, Sir, that it is unfair to Shelby and other adult beneficiaries who may find themselves in her shoes who wish to join this litigation and are left to navigate it alone.

I submit, Sir, that the Court should ensure that the ability of Shelby and anyone who may join a class of beneficiary with her is able to participate on equal footing as the other parties. Effective participation requires legal counsel in this process. Shelby points to case law to support that what the advice and direction of the Court is sought in relation to a trust, which is what's happening here, the parties' legal fees are typically paid from the trust fund. And we would submit that is the case here. Her beneficiary status is being sought to be taken away from her. She has a direct interest. She, I would argue, has a right to participate, and those are costs which should come out of the trust fund. And we

would submit that that needs to be in the form of advance funding, because otherwise, as you can see, Shelby's going to be trying to navigate this alone. And that is far too much to place on her. She needs legal counsel.

And as I said earlier, Sir, I believe that the Court of Appeal left this very issue open for determination and case management, and it has -- the door has not been closed. And I would submit, Sir, that this -- this is especially so in light of the apprehension of conflict that is existing in this situation. Not only do we have the Chief of the First Nation on one hand seeking to end the 1985 Trust one way or the other; he's also acting as a Trustee of that Trust who is apparent -- who's tasked with upholding and defending the Trust. We have that conflict of interest. But, in addition, three of the five Trustees are Band members. My client, for that matter, is a Band member, and certainly the councillors that Mr. Molstad represent are Band members. And they would all -- they would all personally benefit if the definition is changed to Band membership, because then it's only them and 4 -- 44 -- there's 45 Band members, people that would be able to share in the wealth of this Trust. So they all actually have personal interests in seeing that outcome.

So I'd submit in light of that context and the app -- the apprehension of conflict that exists here, that is a heightened reason why the Court should advance -- advance -- should award advance funding and indemnity funding to Shelby Twinn.

THE COURT: So if I were to do that, when would we argue the asset transfer issue? When do you think we would do that?

MS. OSUALDINI: Oh, in terms of when Shelby could obtain legal counsel?

THE COURT: Yes.

MS. OSUALDINI: I don't want to speak on behalf of Shelby, because I -- I don't know the answer, but I'm --

THE COURT: My --

MS. OSUALDINI: -- I'm thinking that it's probably quite quickly.

THE COURT: My guess is November wouldn't be happening.

MR. SESTITO: My -- My Lord, on this point I -- and this would have been the outset of my submissions, and I don't mean to interrupt my friend, but the Trustees are going to be taking a position that this notion of advance costs was not part of

the initial application. We received notice in the written submissions that were filed, and if we're going to seriously consider the issue of advance costs, the Trustees would like to supplement with written submissions on this very significant issue to the Trust that has been before the Court multiple times with respect to this specific litigant. The wording of the application is that the 1985 Trustees be required to pay legal fees associated with the representation out of the funds. We took that to mean that costs that she was asking for, solicitor/client costs at the end, the issue of advance costs and not come up until her written submissions. And so we would like the opportunity -- that is a significant remedy, and it is a remedy that has been discussed by multiple parties in this litigation with extensive written materials. If the Court is seriously considering that, we would like the opportunity to supplement on that point. And I just rise because we were in the middle of discussing that, so --

MS. OSUALDINI: Sure.

MR. SESTITO: -- I'd like to say that.

MS. OSUALDINI: And, Sir, I'd just submit to the Court, I'm not sure if you have a copy of Shelby's application before you.

THE COURT: Yes, it's here someplace. I'm not sure where I --

MS. OSUALDINI: Yeah. It's at paragraph 1(b) where she seeks to -- that the 1985 Trustees be required to pay the legal fees associated with her representation out of the 1985 Trust funds, and then in a separate paragraph asked for costs of this application on a full indemnity basis. Sir, this is actually frankly all the more reason why Shelby needs indemnity and a lawyer --

THE COURT: Yes.

MS. OSUALDINI: -- because if we're going to critique her pleadings, this is why she needs a lawyer.

MR. SESTITO: I -- I'm sorry, My Lord, the -- the issue of advance costs is a significant issue. It has been raised by this litigant before. This is not simply an issue over -- over wording. This is a significant issue that -- that we really need additional submissions on.

THE COURT: Okay.

MS. OSUALDINI: Well --

THE COURT: Thank you.

MS. OSUALDINI: And -- and, Sir, I suppose if that's going to be the case, then November would not be happening --

THE COURT: Yes, yes.

MS. OSUALDINI: -- by the time we do that.

MR. SESTITO: So, to be clear, we can do this in writing and work around Your Lordship's schedule.

MS. OSUALDINI: Those are my submissions, Sir.

THE COURT: Okay. Thank you very much.

Anything arising from any of that? I guess we haven't heard from the Trustees.

Submissions by Mr. Sestito

MR. SESTITO: I -- I'm -- I'm sorry, My Lord, I'm sure you're not eager to hear too much from me. And so I will be --

THE COURT: No, I'm prepared to hear whatever you'd like to say.

MR. SESTITO: I appreciate that, My Lord. I -- I will -- mindful of the time. My Lord, I -- I will be brief, and I may be making a few references to the brief of the Office of the Public Trustee and Guardian --

THE COURT: Okay.

MR. SESTITO: -- the brief of Shelby Twinn and then the brief of the Sawridge Trustees. I will not refer you to anything else except for those three briefs.

THE COURT: Okay.

MR. SESTITO: And I will be --

THE COURT: I will have them --

MR. SESTITO: -- brief.

THE COURT: -- I'm ready.

MR. SESTITO: So, My Lord, with respect to the brief of the OPGT, we just --

THE COURT: Yes.

MR. SESTITO: -- have one comment. If you go to paragraph 32 of their brief --

THE COURT: Yes.

MR. SESTITO: -- and this also dovetails with the submissions of my friend, Ms. Osualdini, and -- and Ms. Twinn herself -- Ms. Shelby Twinn herself. Just to be clear on the record, the -- the OPGT states in paragraph 32, second sentence, (as read)

> The OPGT notes that this, being the SFN's argument, is the preferred remedy already sought by the 1985 Trustees and their application filed January 9, 2018, and then the brief on behalf of the 1985 Trustees on March 29, 2019 argued in favour of this outcome.

My Lord, there's a lot of history on this file. And I think you and I both came onto the file around the same time, so I don't wish to belabour any of the past submissions. But just to be clear for everyone here, the Trustees clarified for the record that an amendment to the definition would be an incomplete remedy, as grandfathering would remain an issue. And, furthermore, the Trustees have never advocated that the assets of the 1985 Trust ought to be governed by the 1982 Trust deed. We need to be clear on that point. It was an -- it was an important point raised by Your Lordship, the Trustees have not advocated that we are in favour of that outcome. And, again, at the end of the day --

THE COURT: So you and the Public Trustee will adopt a similar position, then --

MR. SESTITO: Well, I -- I suspect --

THE COURT: -- on that point.

MR. SESTITO: -- I suspect, My Lord, and you will have our -- our brief by the end of the week, we're hoping, but I suspect that the Trustees' position will be rather neutral. We are in a bit of an awkward position since you're talking about this essential issue, that, yes, we will not be arguing that the assets themselves are not held in the 1985 Trust. We obviously cannot make that specific argument on the record.

THE COURT: Well, they are there.

MS. OSUALDINI: M-hm.

MR. SESTITO: That -- that's right.

THE COURT: As a matter of fact, they are there.

MR. SESTITO: That's right. That's right, My Lord.

THE COURT: What are the -- what terms are they being held under?

MR. SESTITO: And -- and --

THE COURT: That's the question.

MR. SESTITO: -- and I appreciate that, My Lord. And I -- I suspect on that we will not -- we will not have much to add that hasn't already been presented in our submissions. There are plenty of other voices at the table on that --

THE COURT: Yes.

MR. SESTITO: -- on that point.

In any event, My Lord, with -- with respect to the application of Shelby Twinn, the Trustees have said that we do not oppose her participation in general terms. My friend points out that the participation order may be technically geared towards the hearing of the jurisdiction application. I -- I had interpreted these issues as arising out of that application, and we had through our litigation plans and through our planning of submissions contemplated that the same rights would apply to the beneficiaries for the hearing of -- of this issue on November the 27th. Indeed, it was our contemplation when this interlocutory application was to be heard that we would also give the same right to the beneficiaries for their five-page submission. If Ms. Twinn is looking for an added

voice at the table, that she wishes to make oral argument, we believe that that is reasonable. We -- and -- but we again caution you, My Lord. You've -- you've seen in this litigation what has happened when we raise a new issue. We -- we tend to -- we tend to go off course a lot. We need to remain focused in this litigation. There have been additional parties applying for intervention many times over the course. In fact, Ms. Twinn partic -- Ms. Twinn's participation in this action were the subject of two -- two items, one Sawridge 5, and one, the participation order which she was a signatory to and which she had a legal counsel pro -- prepare in the negotiating of.

So I just -- I make -- I make that point, My Lord. I certainly did not read the participation order as not applying to these new steps that would come through. If we need another order to satisfy everyone at the table, I'm fine with that. I don't think that that would be necessary. I would think that counsel could just agree that they would have those participatory rights as extending from that order.

My Lord, one -- one other point, and this is where I know you have got a lot of material, and I just want to flag for you in our brief at paragraph 14 -- I don't need to read it into the record, but I flag to you, we quote paragraph 18 of the Alberta Court of Appeal's decision in Sawridge 5. And that is with respect to the fact that beneficiary -- that Ms. Twinn is represented by the Trustees in this matter. It is a matter of law that she is represented by the Trustees in this matter. Her interests are also canvassed by Catherine Twinn, and as you saw my friend was very competent in her submissions on her behalf.

With respect to the Public Trustee, it is acknowledged that Ms. Twinn is not, as you -- as you've pointed out, although she is not a minor, her in -- her sister is represented by the Public Trustee and has --

THE COURT: Yes.

MR. SESTITO: -- I would submit, identical interests.

THE COURT: Yes.

MR. SESTITO: If we move, then, to paragraph 16, My Lord, of Ms. Twinn's submissions, and this is something that has come up a few times, she quotes in this paragraph, paragraph 22, of the appeal in Sawridge 5. And I just want to take you briefly to that -- to that reference, which is tab 2 of our brief, if you have it handy.

THE COURT: Right.

MR. SESTITO: Or, I'm sorry, My Lord, tab 3 of our brief.

During the -- and I'll just read from the case. During the oral hearing this issue, and a number of others arose that have not yet been the subject of an application or direction of a case management judge -- oh, I'm sorry, My Lord, my apologies. Sorry, I -- move down in the paragraph, a second issue.

THE COURT: It's tab --

MR. SESTITO: It's -- yes, same paragraph --

THE COURT: -- tab 3.

MR. SESTITO: -- paragraph 22 --

THE COURT: Yes.

MR. SESTITO: -- tab 3.

THE COURT: Yes.

MR. SESTITO: A second issue is what --

THE COURT: Yes, okay.

MR. SESTITO: -- procedure will be implemented for beneficiaries and other beneficiaries to participate in the Trust litigation either individually or as representatives of a particular category of beneficiary. And at the end --

THE COURT: Yes.

MR. SESTITO: -- after listing a few issues, the Court of Appeal says, We strongly recommend that they be dealt with forthwith. It was the direction of the -- or the comments of the Court of Appeal that led to subsequent discussions that were the genesis of the participation order. We have -- I have my friend's interpretation of that order. But, again, I would have thought that Ms. Twinn's involvement in the negotiation of the participation order had indicated that she was satisfied with those participatory rights. The theme of the day is that the landscape has changed. Fair enough. I still think that the mechanism of doing that is through the participation order itself.

Finally, My Lord, Ms. Twinn's affidavit and written submissions both contain collateral attacks on the Sawridge First Nation membership process. Your Lordship has our

submissions on that point. Again, you have a lot of material, so I just direct your attention to this Court's comments in Sawridge 3, that the issue of membership falls under the exclusive jurisdiction of the Federal Courts.

On that point, I -- if you have any other questions on it, I would refer you to my friend, Mr. Molstad, who would be in a better position to speak to the proper forum for dealing with issues of -- of a First Nations membership process. So, My Lord, we have a participation order, a decision from the Court of Appeal dealing with Ms. Twinn's participation. If we allow full-party standing for Ms. Twinn, we are inviting a slippery slope of further diversions from the central matter at hand. The Trustees are alive to the issue that people like Ms. Twinn need to be addressed and are on the record that grandfathering is an issue. We -- we -- we -- we are alive to that point. The Trustees propose that the participation order allow for oral submissions on application as a reasonable compromise that will allow Ms. Twinn to participate, to provide her commentary, and at the same time to keep the litigation focused.

Unless you have any questions, My Lord -- and, again, I -- I would repeat my -- my ask, that if advance costs are to be seriously considered in this case, that we be allowed to supplement with written submissions on that point.

THE COURT: Okay.

MR. SESTITO: I will note, My Lord, that advance costs was before this Court in Sawridge 5, Mr. Justice Thomas's -- doesn't address it specifically but does address the notion of costs itself for the participating beneficiaries. You'll have his comments on that, and they're set out in our brief.

THE COURT: You don't have anything further, do you, Mr. Molstad?

MR. MOLSTAD: Pardon me?

THE COURT: You don't have anything further, do you?

MR. MOLSTAD: No, I don't, Sir.

THE COURT: Excellent. Thank you very much.

Anyone else have anything to say?

Submissions by Ms. Osualdini

MS. OSUALDINI: My Lord, I just wanted to make a very brief --

THE COURT: Sure.

MS. OSUALDINI: -- point given that my friend raised the issues --

THE COURT: Yes.

MS. OSUALDINI: -- of discussing membership in the SFN. I wanted to point out to the Court that what my friend did not reference is -- was Justice Thomas's original decision in Sawridge Number 1, where the -- it's at paragraphs 53 through 55 of that decision. Justice Thomas talks about the fact that the proposed new definition for beneficiary is the membership in the First Nation. And it's not that we're seeking to effect the membership process, but we're putting that definition up as the proposed new definition and thus the quality of that process --

THE COURT: Yes.

MS. OSUALDINI: -- needs to be examined. So I think that's an important distinction to be aware of, and that also the -- the decision of Justice Thomas in Sawridge Number 5, it was a -- in the context of a case management decision on document production. And I think it's still a live issue, is -- if we are going to argue that that's -- should be the new definition, which is what the SFN is seeking to do in the -- in its intervenor role, we need to be able to examine the quality of that definition.

MR. MOLSTAD: I would just encourage you to read Sawridge 3 and the order made by Mr. Justice Thomas which is part of our (INDISCERNIBLE).

THE COURT: Okay. All right. I will -- so I will give you a decision tomorrow morning at 10:30 or 10:45.

MR. FAULDS: Do you require that we attend, Sir? Do you require that we attend?

THE COURT: No. You can send agents. I'm --

MR. FAULDS: Okay.

THE COURT: -- quite content with that.

MR. FAULDS: All right.

THE COURT: Is that -- is that going to be suitable for everyone? I've got a summary conviction appeal I'm doing at 10, take about 45 minutes. I should be free after that.

Shelby, you're good with that? Okay. Good. Tomorrow morning.

MR. MOLSTAD: Thank you very much, Sir.

THE COURT: Thank you.

MR. FAULDS: Thank you, My Lord.

THE COURT CLERK: Order in court.

PROCEEDINGS ADJOURNED UNTIL 10:30 AM, OCTOBER 31, 2019

Certificate of Record

I, Rachel Lee, certify that this recording is a record made in the proceeding in the Court of Queen's Bench, held in Courtroom 513 at Edmonton, Alberta, on the 30th of October 2019, and that I, Rachel Lee, was the court official in charge of the recording machine during the proceedings.

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I, Jill Williams, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

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Jill Williams, Transcriber
Order Number: AL-JO-1004-3071
Dated: November 2, 2019

TAB J

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

P R O C E E D I N G S

Edmonton, Alberta
November 22, 2019

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D.C.E. Bonora	For R. Twinn, M. Ward, B. L'Hirondelle, E. Twinn, and D. Majeski
E. Molstad	For Sawridge First Nation
C. Osualdini	For Catherine Twinn
R.J. Faulds, Q.C.	For the Office of the Public Trustee
(No Counsel)	For S. Twinn
D. Tayloo	Court Clerk

THE COURT CLERK: Order in court, all rise.

THE COURT: Good morning.

MS. BONORA: Good morning.

THE COURT: Please be seated.

MS. BONORA: So maybe I'll just start by just introducing everyone who's here. So, Doris Bonora. Michael Sestito is with me from Dentons representing the Sawridge Trustees.

THE COURT: Yes.

MS. BONORA: Janet Hutchison and Jonathan Faulds here representing the Office of the Public Trustee and Guardian. Ed Molstad and Matthew Cressatti are here representing Sawridge First Nation, Christa Osualdini is here representing Catherine Twinn, and Shelby Twinn is here as a self-represented party.

THE COURT: Excellent. Thank you very much.

Submissions by Ms. Bonora

MS. BONORA: Sir, perhaps just by way of introduction, we're here because of a letter written by Ms. Osualdini.

THE COURT: Yes.

MS. BONORA: Obviously, there's been much said about the nature of this application. We filed an application. You described it is pivotal and foundational and we desire that it go ahead. On the 27th we wanted to canvass whether there might be a full day on the 27th, if you were free in the morning. And so, you know, if it -- if you thought this was because of the nature of the briefs that it should go to a full day, we canvassed those days for January and February, but certainly, we feel it's important in respect of the fact that this could be an issue which concludes litigation as it's an issue that if the Court decided that the terms of 82 or if 86 would apply of the Trust, then we would be satisfied with the advice and direction and the only issue remaining would be grandfathering. And so, we understand that it's a very rather crucial part of the litigation and it has to be canvassed fully.

So, those are all the things that I want to say to start. Thank you, Sir.

THE COURT: Okay, thank you.

Submissions by Ms. Osualdini

MS. OSUALDINI: Good morning, My Lord. As per my letter, it appears that the parties are on very different planes about what the purpose of next week is and what is to be argued next week. It was our understanding that the first question before the Court was what is the proper interpretation of the consent order because until we understand whether the subject consent order provides direction on which trust terms govern it, it is very hard to move forward on this litigation without a clear understanding of that point.

THE COURT: Yes, that's what I thought we were doing.

MS. OSUALDINI: That's what I thought we were doing and that's what our submission is.

THE COURT: Yes, that's what I'm doing.

MS. OSUALDINI: Okay.

THE COURT: That's my goal is to try to provide an interpretation of the August 2016 order so that we will know where we are. And, you know, Mr. Molstad has provided a brief which I must say I have only just superficially looked at. I haven't had time to really roll up my sleeves and look at any of the briefs in detail, but I gather you're concerned that he's focussing on another issue.

And I'll certainly let Mr. Molstad speak, but from my very high level look at it, I think what he was trying to do and he can correct me if I'm wrong, but I think he was trying to provide some background information and I think as a public trustee, he takes the position that this order can't be interpreted in isolation; you need to look at some of the principles that have been described by courts as to how to properly interpret an order. Mr. Molstad I think is saying you have to look at the broader picture here. How did we get here? What was the situation as it existed, for example, immediately before the granting of the consent order? What do the law and the facts tell us was the situation before Justice Thomas granted the order so that we can have that sort of context or that background so that that can assist in attempting to interpret it? I think that's what he was trying to do.

So, I don’t know that you're totally at odds, but for me, the issue is very clear. The issue is as you described it. What does that order mean? And to be specific, the 1985 Trustees are clearly holding these assets. Who are they holding them for and under what terms? And it seems to me that's the issue. I don’t know that we′ve gotten off the rails, but ...

MS. OSUALDINI: Well, My Lord, the concern with the submissions of the Trustee and the SFN is they pre-presume that the consent order does not resolve the issue of which trust is holding the assets and particularly, the submissions of the SFN jump into point 2, like the next step is if the order does not cover that issue by saying which trust should -- which trust term should govern these assets. And it also appears that the SFN is attempting to overturn the consent order through argument that the legal transfer was --

THE COURT: It is not being overturned. I don’t have authority to overturn it.

MS. OSUALDINI: So, and that's the --

THE COURT: The order is in place.

MS. OSUALDINI: And that's --

THE COURT: That's the starting point.

MS. OSUALDINI: And that was the concern of our office and our client is that our submissions are fully dialled into what are the interpretation conditions of a consent order and how to apply those --

THE COURT: Well, Mr. Molstad wants to try to overturn the order, he's in the wrong place. He can try to argue that up and down if he likes, but he's going to have to be pretty persuasive to tell me that I have authority to overturn it. I'm pretty sure I don't.

MS. OSUALDINI: And the second concern is if we start getting into arguments about which trust should - assuming that the consent order doesn't cover it - which one should, we would want to make submissions about evidence and production requirements because we're now turning into a factual issue about what the facts were. And the parties have never explored that, so that's not something that we -- from our perspective -- that we can deal with on Thursday and we want to ensure the Court is not expecting submissions in that regard.

THE COURT: Well, I'm going to take as much guidance as I can from the information provided by counsel and the submissions of counsel and the evidence that's presented to me so that I can do my level best to try to come to a proper interpretation of the terms of the consent order. And, you know, it seems to me that there's a lot of material here and sometime -- I mean the rubber's got to hit the road at some point, right? It seems to me it's time. It's time to make some decisions on this case.

MS. OSUALDINI: I agree. As I said, our only concern is that if we're going to say -- it's still a wide-open field as to whether -- as to which trust terms govern these assets ...

THE COURT: Well, that is the question that I need to determine.

MS. OSUALDINI: But that would be the second issue because first, we have to determine if the consent order already provides for that.

THE COURT: Well, if the consent order -- if I interpret the consent order on the basis that the assets were transferred from 1982 to 1985 and that the 1985 trust terms govern, that's the end of it.

MS. OSUALDINI: That is the end of it.

THE COURT: If I decide that the assets were transferred to

1982 but that the 1985 Trustees hold for the benefit of the 1982 Trustees, that's one other option. And there might be something else. I don't know, but in order to get there, I need to understand - and I think this is where Mr. Molstad's brief actually was helpful - is to provide background. Like, how did we get here? What was this -- what was the lay of the land prior to Justice Thomas' order? That provides the necessary context to me.

So, I mean if you want to apply to strike out parts of his brief or something, I'm -- I'll hear you, you know? And as I say, I've only looked at it superficially, so I'm really speaking off the top of my head here, but I didn't see anything totally offensive, but if you wanted to try to stricken (sic) parts of his brief, I'd hear you on that.

MS. OSUALDINI: My concern for our client is clarifying what exactly is the issue that we're arguing on Thursday because if the issue's just a consent order --

THE COURT: Well, you know, I've -- you obviously have transcripts of everything I've said over the last eight months. I don't have the benefit of those transcripts, but I think I've tried to be as clear as I possibly can. The issue is pretty narrow to me. And, I don't -- I do think it should get done. It's time to make some decisions here.

MS. OSUALDINI: Thank you, Sir.

THE COURT: Mr. Molstad?

Submissions by Mr. Molstad

MR. MOLSTAD: If I may, Sir? Just to clear up one question that was put to the Court, a proposition that was put to the Court, we do not seek to overturn the -- we do not seek to overturn the order.

THE COURT: Okay, good, because that's a non-starter to me.

MR. MOLSTAD: Yeah, right. It's a non-starter for us, too. But I just want to point out to remind everybody that this matter started as an application by the Sawridge Trustees for advice and direction including what the definition was of the beneficiaries of this '85 trust. And you, Sir, identified foundational and pivotal issues. In the Sawridge First Nation brief, we identified in a number of paragraphs where you did that - in paragraph 45, paragraph 47, paragraph 47 to 53.

And in paragraph 49 it's very helpful to look at that, Sir, in terms of what you did say in

our brief and we quoted here from your remarks: (as read)

> When the order says that the transfer of assets from 1985 to 1982 (sic) is approved, it's approved. So, the assets are here to there. What terms are these assets -- those assets -- being held? Are they being held subject to the '85 or subject to the '82? That's the issue for me.

And we say that is the issue for you, Sir. And we also point out that there was an application that was filed by the Sawridge Trustees that identified very clearly that that's what the issue is that they're asking you to determine. We say that you define the issue and we responded to that.

The only matter that we have a concern about is that based upon the briefs that have been filed whether or not a half-day is sufficient.

THE COURT: Yes. Yes, that's fair.

MR. MOLSTAD: And in that regard, because of the importance of this issue, because this issue is pivotal --

THE COURT: Yes.

MR. MOLSTAD: -- and could result in the determination of a very important matter, we would encourage yourself, Sir, and the parties to consider rescheduling to one day.

Now, I've done some detective work and I've found out that there's one day available on January 16th. I'm not sure if -- I've not talked to counsel about that date in terms of their availability, but my concern is that this is a very important issue and my concern is as an intervenor, I'm going to probably be heard last when there's not much time left. So, I'm suggesting that this matter, because of the importance, because of the fact that it's important that all parties be given a full opportunity to make submissions and be considered, it be set for a full day.

THE COURT: Mr. Faulds?

Submissions by Mr. Faulds

MR. FAULDS: Thank you, My Lord. The Public Trustee shares the concerns that were expressed by Ms. Osualdini about the direction of the briefs and the fact that they seem to be going different ways.

One of the reasons for that is that the Sawridge First Nation in its brief filed on November 15th makes it clear that it is seeking a remedy. It uses that term. Now, and it seeks a remedy which has the -- in the nature of the Court declaring that the assets are held pursuant to the '82 Trust.

THE COURT: Right.

MR. FAULDS: And they make that argument for that remedy on the basis that the transfer of the assets was improper and that therefore, a remedy is required. And they -- in making the argument that the asset transfer is improper, they are of course going behind the consent order which says that the asset transfer is approved.

THE COURT: Sure.

MR. FAULDS: So, that's the nature of the concern that the OPGT has and the concern has two aspects. One aspect of that is the fact that our understanding was the Sawridge First Nation was not seeking relief in -- through its intervention and the transcript of the proceeding before (INDISCERNIBLE) in September showed that that was also the Court's understanding, that they would not be seeking relief. We've had an exchange with Ms. Osualdini on that point.

The second point is of course that the remedy which my friend Mr. Molstad says in his brief that he is seeking is a final remedy that was eluded to by Ms. Bonora and by Mr. Molstad and, as such, is something that's beyond the scope of the case management process.

THE COURT: But, Mr. Faulds, I just want to try to follow through with this so that everyone has a clear understanding of where we're going. I think uniformly, the view is that there has to be a decision with respect of the interpretation of this order that will necessarily cause me to say either these assets are being held for the 1985 beneficiaries or they are being held for the 1982 beneficiaries or I can't tell or something else.

That would be what I would be intending to say, but I would need -- I just can't have a -- I just can't come to a conclusion on that. I have to follow a path to get me to whatever conclusion I come to and that necessarily involves an analysis I think of where we have been, what was Justice Thomas facing, and as you say, what pleadings and materials were before him and I would come to a conclusion. But it isn't just a conclusory statement, it is an analysis that leads to the conclusion. And that may not sound like granting a remedy, but if I say that subject to what the Court of Appeal might have to say about my decision, that looks like a remedy. I mean it isn't intended to be granting a remedy, but once I give

that interpretation, that sets the direction for where we go forward, does it not?

Like, if -- just if I were to say, for example, that these assets are being held for the 1982 beneficiaries, where would we be? Like --

MR. FAULDS: And the Court of Appeal, My Lord, as you indicated, but --

THE COURT: Well, of course. I expect -- listen, don't get your -- I expect this to be in the Court of Appeal no matter what I do, so there you go. That's the lay of the land here.

MR. FAULDS: Right.

THE COURT: But in terms of next steps, like, maybe, Mr. Molstad, and I didn't see this in his brief to be totally honest, but maybe he is asking me to make a direction that one thing or another that amounts to a remedy. I don't know, but I have a pretty clear vision as to where -- the type of order I need to make, but my concern is listening to your submissions that you think that wouldn't be a remedy, but it comes awfully close to that, doesn't it?

MR. FAULDS: My Lord, my concern is not that the Court have regard to the context and circumstances and the relevant law. My concern only is that we have a common understanding that what the purpose of the hearing is is to interpret the order that has been granted as opposed to granting a remedy based on submissions that they -- that the -- that that which the order approved in fact shouldn't have been approved.

THE COURT: True. Well, I don't think that I'm going to be saying the order shouldn't have approved anything. I'm going to -- because it's not for me to say whether we should have done one thing or another. That's for other people, not me.

MR. FAULDS: Right.

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 Ms. Bonora's brief that I got yesterday which again, I just superficially scanned, is

relatively clear that this is getting pretty close to the end of the road; if I find one way or another it may be that there's nothing left to do in this litigation. I think she's saying that, but again, I looked at it just superficially.

So, Mr. Faulds, I hear you and what you're saying, I hear you saying you don't want me to grant a remedy, but the necessary implication of whatever I conclude is looking awfully close to a remedy to me. So ...

MR. FAULDS: I think that Ms. Hutchison would like to add (INDISCERNIBLE) --

THE COURT: Absolutely. Yes, sure.

Submissions by Ms. Hutchison

MS. HUTCHISON: My Lord, I think you're identifying exactly the problem and Ms. Osualdini engaged in a very useful conversation with you I believe on October 30th about step 1 and step 2. The OPGT and I believe Ms. Twinn understood that we were dealing on November 27th with step 1, the question of whether or not the 2016 consent order achieved what the parties and the Court intended it to achieve. If your answer to that question is no, to go on and decide what the actual effect of the 1985 transfer was or was not is to go into final relief, My Lord. We have not consented to dealing with final relief before a case management justice on this matter. We have consented to dealing with it before Justice Thomas as a consent order. So, if we are now going back to completely revisit what the 1995 transfer did or did not do, we are into what Ms. Osualdini characterized as the step 2 process. We are into the process that the OPGT has submitted to you, My Lord, you cannot decide without a full evidentiary record before you.

And my friends in previous appearances have told you that this is just a question of law; no additional evidence is required. It's really not such a massive issue. Today, I'm hearing that it's such an important issue, it may conclude the entire proceeding. It's such an important issue we may need a full day which suggests to me, My Lord, we have moved into final relief and that was not where we were on September 4th or on October 30th, with respect. And certainly, our client has a grave concern if that is where we are now headed, My Lord.

If -- I can take the Court through the briefs, but that's not the purpose of the appearance today. We have before you now a number of submissions from both the Trustees and the Sawridge First Nation based on their understandings of critical points, My Lord, not evidence, not evidence that the OPGT and Ms. Twinn or Shelby Twinn have been able to test, My Lord, just their understandings. And if we are going forward to a final remedy that

will conclude this matter on the basis of understandings, we have a serious problem in the process, My Lord. That's our concern, that we've gone from step 1 to step 2 when with the best efforts of Ms. Osualdini, Mr. Faulds, and myself, we tried to secure assurances and understandings we were dealing with step 1.

THE COURT: I thought though that step 1 was trying to interpret what the August 2016 order means in terms of '82 and '85.

MS. HUTCHISON: Correct.

THE COURT: Step 2 is the issue that we tried to deal with way back in April until the process was diverted and that issue was whether or not this Court has jurisdiction as described as the jurisdictional issue, does this Court have jurisdiction to vary the terms of a trust so as to modify the definition of "beneficiary" under the 1985 Trustee. That is what I thought step 2 was. I think that step 1 is the interpretation of the meaning and effect of the consent order, but to me, once I've come to a conclusion as to what the meaning and effect was ...

MS. HUTCHISON: But, My Lord, the parties are going beyond the median effect of the 2016 consent order and, indeed, it's not as if the Court wishes to go beyond that - to revisit the effect of the 1985 transfer itself. And there lies the problem, My Lord. You can certainly decide what the effect of the 2016 order was or was not. To go back to the point that we were at before we presented this consent order to Justice Thomas and actually make a decision on what the effect of the 1985 asset transfer was goes beyond the scope of relief that is available in case management absent consent of all parties at this table and with respect, My Lord, you don't have that consent.

THE COURT: So, let me just try to understand exactly what you're saying. You are saying that I can determine what the interpretation and the effect of the consent order was and if I decide that the assets were transferred to 1985 to be subject to the terms of the 1985 Trustee, that's A-Okay; we move on to the jurisdictional issue. If, on the other hand, I decide that no, no, no, this couldn't be --

MS. HUTCHISON: The order didn't do what the parties thought it did.

THE COURT: Because it's being held for the 1982. Or, you say I can't say that, but isn't that exactly the very issue I raised the minute I looked at this file? And I sent you an email, like, way back in April as we were trying to get ready for the jurisdictional issue. I focused that and the issue I raised was am I satisfied that these assets are being held --

MS. HUTCHISON: Under the terms of the '85 Trust. And, My Lord, we've addressed you repeatedly to say if you're going to go to step 2, which is what terms are the assets held under, if they're not held under the terms of the 1985 Trust, we've repeatedly submitted to you that that is a bridge that can only be crossed with proper evidentiary production, with proper questioning as far as (INDISCERNIBLE) witnesses, and with proper argument on what the entire 1985 transfer dealt with.

MS. HUTCHISON: The Court, at least in all of the exchanges I've read, My Lord - and you're quite right, we've poured over every word of these transcripts - the Court has repeatedly assured the parties at least as we understood it that you would only be dealing with the pure legal issue of whether the 2016 consent order did what the parties understood it to do. And if you say it does not, we go on to what Ms. Osualdini characterized as step 2. I would suggest to you the jurisdiction order has become step 3.

THE COURT: Right.

MS. HUTCHISON: And if we go on to step 2, that is where we require evidentiary production and, My Lord, a final remedy. I mean, this is then stepping back into -- Justice Thomas was actually permitted to deal with final relief in his consent order. It's not that common that the parties agree to allow a case management judge to do that. We did that as a consent order. If this Court finds that the consent order which was final relief didn't do what it was intended to do, it cannot then go on to grant a new version of final relief without a full hearing. That's our point, My Lord.

THE COURT: So, you would like me to give a decision that says only yes or no to the question whether or not these assets are being held for the beneficiaries of the 1985 Trust.

MS. HUTCHISON: (INDISCERNIBLE) some direction, My Lord, as to next step because if --

THE COURT: If I find that they are not being held for the benefit of 1985 beneficiaries, wouldn't I have to explain to you why that's the case?

MS. HUTCHISON: My Lord, I don't believe you have adequate evidence before you to do that and I don't believe you have the consent of the parties to go into that territory.

THE COURT: Well, if that's the case, I don't have the ability

then to come to a conclusion as to whether the assets are being held for the benefit of the 1985 beneficiaries.

MS. HUTCHISON: Of the 1985 beneficiaries, My Lord?

THE COURT: Yes.

MS. HUTCHISON: You do indeed. If the parties accomplished and the Court accomplished what they intended to accomplish, you can make that finding.

THE COURT: Well, the answer to that is either yes or no.

MS. HUTCHISON: Correct.

THE COURT: If the answer is yes, we′re in business. We′ll move forward.

MS. HUTCHISON: Fine. If the answer's no --

THE COURT: If the answer is no, I have to explain why the answer is no.

MS. HUTCHISON: -- we'll move on to another stage of this hearing.

THE COURT: I need to explain why the answer is no and once I give that explanation, it -- you know --

MS. HUTCHISON: But, My Lord, if that was the Court's purpose and intent from day 1 in this process, then we would submit that the exchanges particularly around whether Sawridge was seeking relief, Ms. Osualdini's exchanges with you on step 1 and step 2 certainly have left these two parties with the understanding that if the answer was no, we would go on to another phase of this issue that involved production, likely applications by both of these parties to access privileged evidence or potentially if it's still privileged evidence about how the 1985 transfer was structured.

The reality, My Lord, is you would be moving onto to this (INDISCERNIBLE) transaction that you have almost no evidence about. And --

THE COURT: Didn’t I read in the preamble to the 2016 order that you were satisfied that you basically had everything that there was?

MS. HUTCHISON: That the Trustees had produced -- and the wording was very careful as I recall, My Lord, and I didn't bring the order today, but I recall negotiating the wording in that order very carefully that we were relying on the Trustees' representation that they had done what they could do to provide evidence. That has nothing to do with Sawridge First Nation and what Sawridge First Nation has available to it as evidence, My Lord. And if the Court wishes to have submissions on that order, I'll locate it, but it was not an acknowledgement that no other evidence could possibly be brought to bear on the issue.

THE COURT: Well, to me, I -- firstly, I hear what you're saying.

MS. HUTCHISON: Thank you, My Lord.

THE COURT: But to me, I don't know how I could get to step 1 and satisfy the concerns that you raise. I can't come to a conclusion that these assets are being held under the terms of a 1985 trust for the purpose of the beneficiaries of 1985 without explaining how I get there and that necessarily involves an analysis of what's taken place in the past. And on the flip side, if I come to the conclusion that it's not being held for the 1985 beneficiaries, I have to say something about that and --

MS. HUTCHISON: My Lord --

THE COURT: -- but you know, I -- and the other thing that I need to look at and I would be grateful if you could get me a booklet of transcripts of everything we've said so that I could go back and see, but I mean as far as I can remember, I have been saying from the very outset that the issue I need -- including the morning -- the issue I need to decide is whether these assets are being held for the 1985 beneficiaries or the 1982 beneficiaries. That is the sole issue and that revolves around the interpretation of the consent order.

MS. HUTCHISON: And the interpretation --

THE COURT: I guess that presupposes, and maybe this is part of the analysis that has to be done, I don't know, that that would presuppose that prior to Justice Thomas' order the assets were being held for the 1982 beneficiaries and maybe that's the reason that there is a third alternative I'm not able to determine that because there's uncertainty.

MS. HUTCHISON: But, My Lord, and the Court is suggesting that to decide this issue you must go deeply into what happened in 1985.

THE COURT: I intend to.

MS. HUTCHISON: The 2016 consent order, and what it was intended to do, is the issue before this Court. And that deals, My Lord, with the test under (INDISCERNIBLE) that my friend's have not even spoken to at this point in time.

THE COURT: M-hm. Yes, but fortunately you have, so I have the benefit of that.

MS. HUTCHISON: And that deals with what occurred in 2016, what the intention of the parties were --

THE COURT: M-hm.

MS. HUTCHISON: -- what the pleadings said.

THE COURT: M-hm.

MS. HUTCHISON: That's the issue before this Court. If the Court says, I'm not satisfied that the parties achieved what they said they intended to achieve, and it is still an open question whether these assets are held in the '85 trust on terms that benefit the '82 beneficiaries or that the transfer wasn't done properly, all the other options this Court has suggested. Our understanding from our many exchanges with this Court, including listening to some of your very useful discussions with Ms. Osualdini on step 1, step 2, is if we got into that deeply, if that issue was actually decided, it would occur after there was an appropriate production of evidence, after there's an appropriate testing of evidence so that the Court had a full and complete picture of what actually occurred --

THE COURT: M-hm.

MS. HUTCHISON: -- between 1982 and 1985.

THE COURT: M-hm.

MS. HUTCHISON: And then the Court would be in a position to decide if these assets are not being held with the '85 Trust or the '85 beneficiaries, what else has happened? The Court cannot make that decision with respect to an award on the basis of what is before you. This is a case management process, this is not a final --

THE COURT: So would you like me to direct a trial of an issue then and --

MS. HUTCHISON: I'm sorry?

THE COURT: Do you want a trial? Is that where we're headed?

MS. HUTCHISON: If that's -- if the Court finds that the 2016 consent order did not achieve what it has intended to achieve, I believe that is where we must properly go forth - a trial of an issue. We've tried to give a very clear report about the need for evidence, about why there is a concern about moving on to deal with those deeper issues.

THE COURT: Yeah.

MS. HUTCHISON: We certainly regret that the Court didn't fully appreciate what we were saying. I -- I certainly listened to Ms. Osualdini in that step 1, step 2 exchange --

THE COURT: M-hm.

MS. HUTCHISON: -- and understood that she'd clearly communicated the position of our client as well.

THE COURT: Yes.

MS. HUTCHISON: And I thought the Court actually had an understanding of what she was saying as well. So I -- perhaps it's very useful that we're here today, My Lord. It seems that we've --

THE COURT: M-hm.

MS. HUTCHISON: -- got some different understandings.

THE COURT: As you're speaking, I guess I'm wondering how I could even address the first issue without, as you say, the full evidentiary basis. Because I can tell you right now that this is not going to be an exercise of me sitting down and looking at the order and saying you must've meant this or you must've meant that. That is not what I will do. I'm going to go down to ground zero and go through the whole process and use that as the context in which I can properly interpret the order. What you're telling me is I don't have the context. That's what you're telling me.

MS. HUTCHISON: I'm telling you, My Lord, you have the context

of what occurred in 2016, and you should go to ground zero about what the knowledge of the parties was, what the intention of the -- what is laid out in the pleadings of the Trustees in 2016. You should go to ground zero on what was happening in 2016.

THE COURT: But not go beyond that.

MS. HUTCHISON: If you wish to go to ground zero in 1985, My Lord, that is a different process.

THE COURT: Well, I think I have to go there.

MS. HUTCHISON: Well, perhaps you do, but you cannot do it in this application.

THE COURT: I can't do anything then in relation to this application.

MS. HUTCHISON: You just --

THE COURT: These are --

MS. HUTCHISON: I disagree, My Lord. Because if the 2016 order did what it was intended to do, we're done and we move on to the jurisdiction application. And you absolutely have jurisdiction to decide whether or not Ms. Osualdini's client and our client are presenting a proper and reasonable interpretation of the 2016 order. If we are correct that the 2016 order did what it's intended to do, we're done with the step and we move on to the jurisdiction application.

THE COURT: Right. Exactly.

MS. HUTCHISON: And those are both proper steps. If this Court finds by going to ground zero on what was before the Court in 2016, that the 2016 order didn't do what it was intended to do, then there must be a triable issue or some sort of a final remedy to go back to the relief that the Trustees took off the table with the consent order. Which was a litigation -- a trying of the question of whether the '85 transfer had been done properly or not. And, as I hear the Court, My Lord, you sound tempted to go to ground zero on whether 1985 was done properly or not. That is beyond the scope of this application.

THE COURT: Well, I can't possibly understand how I could determine whether or not Justice Thomas' order should be interpreted so that the assets of

the transfer were for the benefit of the 1985 beneficiaries without understanding what the situation was immediately prior to him granting that order. I would have to come to a conclusion as to what the status of the 1982 beneficiaries was at that time, what the status of the 1985 beneficiaries was at that time. That -- that is the most important piece of context, in my mind, to what was the situation that existed immediately prior to the order being granted. And what changes were to be effected by that order. That is --

MS. HUTCHISON: That is --

THE COURT: -- critical.

MS. HUTCHISON: With respect, My Lord, that is different with the whole litigation, a whole hearing of what the 1985 transfer itself did or did not do. And you -- to go beyond the discussion of what a 2016 consent order did, we must go into a different process. We're not suggesting to the Court you can't consider history, we're not suggesting to the Court you cannot look at the evidence that was available to the parties and the Court in 2016.

THE COURT: But why --

MS. HUTCHISON: But to go back --

THE COURT: It's not fair, in my mind, for us to go into a process where I'm constrained in terms of what I can do. I can only find one way, but not the other. That's not the way litigation goes. You may be correct, as I say, I want to go back and I want to look at the transcripts, so can someone get me these transcripts --

MS. HUTCHISON: My Lord, we're saying you're constrained on this application. If this Court wants to direct the parties to go forward to a trial of a hearing, that is absolutely within this Court's purview. But there is critical evidence --

THE COURT: What critical evidence are you looking at?

MS. HUTCHISON: -- that has not -- (INDISCERNIBLE) file, My Lord.

THE COURT: This litigation has been going on for eight years or more.

MS. HUTCHISON: Correct, My Lord. And in 2016, our client stopped pushing for critical evidence that related to the assets because the issue was settled.

For the Court to suggest that that is an indicator that nothing else exists with the Sawridge First Nation simply is not supported by the facts, My Lord.

THE COURT: But didn't --

MS. HUTCHISON: We stopped pushing --

THE COURT: -- we go through this last time and Mr. Molstad represented that everything had been turned over subject to the privilege documents?

MS. HUTCHISON: And there's a massive issue to be discussed, My Lord, about whether there is actually privilege over those documents. We've -- My Lord, we've gone through this with the Court in the past, the parties have said it's not relevant, the Court has said it's not relevant because we were dealing with a discreet legal issue. If we are now dealing what -- with effectively a trial of the 1985 transfer, that cannot be dealt with in this application, My Lord. The Court can identify that that issue needs to be determined and that that issue remains outstanding. It cannot be dealt with on the basis of the application before you.

THE COURT: Okay. Thank you.

MS. HUTCHISON: Thank you, My Lord.

MS. BONORA: Sir, may I just address a few things my friend's brought up?

THE COURT: Sure.

MS. BONORA: So if we look at the -- I think this is something that you had said, if we look at the consent order of 2016, we preface it by saying the whole purpose of bringing the transfer issue forward was because there was no documentation to show how it happened. And we have been saying that over and over again. But despite that, consent order says that upon hearing representations from counsel for the Sawridge Trustees and that the Sawridge Trustees had exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from '82 to '85, and that the parties to this consent order had been given access to all documentation regarding the transfer of access from '82 to '85. When you look at our brief that we filed in 2016, there are several paragraphs that deal with the fact that there was documentation, there is supporting affidavits, all of those affidavits were examined on, there were undertakings given. And so it's not as -- there is no other documentation. Mr. Molstad said before you, as an officer of the Court, there are no documents that Sawridge First Nation has. We are

done with production. This is -- if we had another application, you'd have affidavits saying there is nothing more. So we are -- and my friends have examined on these affidavits.

So this is not a position where we now need to have a trial, now have to have more production. There is no more.

When my friend said that it's not appropriate for you to decide any issue which might end this litigation, I think we need to remember that it is advice and direction, and if you gave us advice and direction that we could then withdraw our application, that might be enough. That's all that's -- this application isn't a statement of claim, we're seeking advice and direction.

And I think the other important point that is -- that should be made, is that the jurisdiction order may end this litigation. So this is not a situation where the parties are not before you on other issues that end this litigation if the advice and direction is given in a certain direction. We would have that ability to withdraw our application if you gave direction in a certain way.

THE COURT: M-hm.

MS. BONORA: We are absolutely encouraging you to go ahead with this application. We will give you the transcripts. I think it will be very clear that -- we believe you have been very clear that the whole issue of the transfer of assets from '82 to '85 is before you. And the whole transcript, Sir, we don't have is the intervenor brief -- or transcript which is for your approval.

I'll let my friend -- oh, yes, Sir. Sorry. Just to be clear, we just don't have your decision on the intervenor brief -- or transcript because it's for your review. We have all the other transcripts and we'll provide those to you.

THE COURT: Didn't I review that? I think I looked at that a couple days ago. I've been away, so.

MR. MOLSTAD: I was just going to encourage my friends who represent the Public Trustee to read the application that we've got before you, Sir.

THE COURT: Right.

MR. MOLSTAD: Because my friend, Ms. Bonora, on behalf of her client, filed an application on September 13th --

THE COURT: Right.

MR. MOLSTAD: -- of this year and the reliefs that she sought in that application --

THE COURT: M-hm.

MR. MOLSTAD: -- is a determination and direction of the effect of the consent order made by Mr. Justice Thomas, pronounced on August 24th, 2016.

THE COURT: M-hm.

MR. MOLSTAD: Respecting the transfer of assets from the Sawridge Band Trustee April 15th, 1982, the 1982 trust, to the Sawridge Band Inter Vivos Settlement dated April 15th, 1985. And more particularly described the (INDISCERNIBLE). This is an application that's before you. It's been identified --

THE COURT: M-hm.

MR. MOLSTAD: -- to seek your direction in that regard. The affidavit -- the affidavits that are relied upon are set out in her application including affidavits previously filed in the action, questionings filed in the action, undertakings filed in the action, affidavits of records and supplemental affidavits of records to the action and such further material. For my friend to stand up today and suggest that you don't have jurisdiction to deal with this is taking us by surprise because it wasn't in her brief in terms of your jurisdiction to deal with this application.

THE COURT: M-hm.

MR. MOLSTAD: And I think it's just more -- more evidence that this is going to take longer than a half a day.

THE COURT: M-hm.

MR. MOLSTAD: And I'd encourage you to consider that, Sir.

MR. FAULDS: My Lord, may I (INDISCERNIBLE) --

THE COURT: Sure.

MR. FAULDS: -- if I might just make this observation. The

understanding of the Public Trustee and I believe the Court, and I believe all the parties, is that the purpose of this application is to -- of this hearing on the 27th is to interpret the asset transfer.

THE COURT: M-hm.

MR. FAULDS: In other words, what (INDISCERNIBLE) it do.

THE COURT: M-hm.

MR. FAULDS: And Your Lordship talked about the possible options.

THE COURT: Right.

MR. FAULDS: One of them was that you find that in fact (INDISCERNIBLE) that the 1985 -- that the trust assets transferred are held for the benefit of the 1985 beneficiaries.

THE COURT: Yes.

MR. FAULDS: Another possible outcome is that you find, based upon the principles that apply to the interpretation of that order, that its effect is the assets are held for the benefit of the 1982 beneficiaries. I'll say plainly I have a very difficult time seeing how an interpretation of that order -- how such an interpretation of that order could be achieved. But if applying the ordinary principles of the interpretation of orders, that's the conclusion, then that's the conclusion.

The third possibility is that you conclude that the effect of the order is that it confirms that the assets that are in the 1985 trust but the terms on which they're held are not resolved.

THE COURT: M-hm.

MR. FAULDS: Seems to me those are the -- those are the three principal available options --

THE COURT: Yes. That's --

MR. FAULDS: -- before the Court.

THE COURT: -- probably right.

MR. FAULDS: I -- the point I think we've been trying to make is that if Your Lordship goes beyond those kinds of interpretation of the order in order to draw a conclusion about what ought to be the case, then you're going farther than an interpretation of the order, then you're going into question of the effect of what the asset transfer was and -- and that's a separate matter. And that was the basis for your discussion I believe with Ms. Osualdini on October the 3rd. I think if Ms. Osualdini was suggesting that the most likely outcomes were -- either were in the 1985 or we don't know. And that if we --

THE COURT: Maybe that's right, but if --

MR. FAULDS: And if that's the case -- I'm sorry, My Lord.

THE COURT: Mr. Faulds, I mean, I don't -- maybe I don't understand this well enough. I don't know, so you'll have to help me out, but how could I possibly interpret the August 2016 order without coming to some conclusion as to what the beneficial ownership of the assets was immediately prior to the order so that I can determine what Justice Thomas was trying to do? Was he, I mean, if I conclude that the assets were being held beneficially for the 1985 beneficiaries immediately prior to the order, it makes it a lot easier to come to the conclusion that the order endorsed the transfer and confirmed the beneficiary status of the 1985 beneficiaries. If I come to the contrary conclusion, if I say, for instance, that this was an unlawful trust transfer of the 1982 beneficiaries were in breach of their trust obligations, they transferred it to 1985 Trustees who knew that there was a breach of trust giving rise to a constructive trust for the benefit of the 1982 beneficiaries, that's a totally different ballgame; right?

MR. FAULDS: So --

THE COURT: How can I interpret the 19 -- I mean 2016 order without coming to some of those preliminary determinations?

MR. FAULDS: My Lord, with respect, I think the issue on the interpretation on the order is what were the circumstances and the context before Justice Thomas when he granted that.

THE COURT: Exactly.

MR. FAULDS: And those context and circumstances are what was -- what was advanced and presented to Justice Thomas in connection with that order. And if there is material which demonstrates that Justice Thomas was acting on the basis of

one belief or another about where the beneficial (INDISCERNIBLE), then that would be relevant -- a relevant circumstance. But I'm concerned that to do what Justice Thomas would do in the (INDISCERNIBLE) of interpreting his order is going too far and is revisiting the order as opposed to interpreting it.

That -- those are my further submissions.

THE COURT: M-hm. M-hm. Okay.

MS. OSUALDINI: And, My Lord, just finally, I'd ask, in considering this matter, to look at very specifically page 56 of the October 30th transcript.

THE COURT: Okay.

MS. OSUALDINI: Because in that transcript, the comments, My Lord, is they were talking about step 1 and step 2 --

THE COURT: M-hm.

MS. OSUALDINI: -- is that once we deal with step 1, you were contemplating a further application before the Court if the SFN was to intervene, and that might involve document production for that future application.

THE COURT: For the jurisdictional issue.

MS. OSUALDINI: But the jurisdiction issue is a question of law which is I think what put us down the --

THE COURT: I think both of the -- both of these are questions of law.

MS. OSUALDINI: Well the question though of which trust terms govern these assets is a question of mixed fact and law. It is not a (INDISCERNIBLE) question of pure law.

THE COURT: Well then why did you agree to have this process go forward then? Like, really --

MS. OSUALDINI: Which process, My Lord?

THE COURT: The process of interpreting the order. That,

ultimately, seems to me, will determine, as Mr. Faulds says, that either the 1985 beneficiaries are the beneficiaries of these trust assets, or the 1982, or I can't tell. Those are the three choices.

MS. OSUALDINI: My Lord, I think an important distinction here is the interpretive exercise of the 2016 order is based on the record before the Court. The record that's now before the Court and the evidence that's been put before the Court by the SFN was not before the Court. So we've now turned this into a different issue and you're considering different factors than what Justice Thomas did. I think that's the crux of where this divergence is arriving, is we've now turned it into a new application.

THE COURT: Sure. Okay. Well I don't want to repeat myself but, as I say, I don't think I can interpret his order without knowing what the lay of the land was immediately prior to him granting the order.

MS. OSUALDINI: And that's based on what was before Justice Thomas at the time, not what new submissions are about that.

THE COURT: That's based upon everything that's in the record before me.

MS. OSUALDINI: Well, with respect, My Lord, I think when you turn to the test for interpretation of a consent order, it's based on the record before the Court.

THE COURT: Well --

MS. OSUALDINI: Which would be an issue to be argued, but I think that --

THE COURT: Sure.

MS. OSUALDINI: -- that's where the difficulty's arising.

THE COURT: Okay.

MS. OSUALDINI: And our point simply is that there's new evidence now before you which, from our perspective, would go towards if we haven't -- if the 2016 consent order does not resolve the final relief that we thought it was resolving, that final relief now remains open. And as part of resolving that issue, we're going to need to test evidence and seek production because there's now new evidence before the Court.

THE COURT: M-hm. I just think we're really spinning our wheels here to be totally honest. I mean, we've been around the block on this thing for a long time. And if there was some -- some substantial piece of evidence that was available, I want you to have it. But I'm hearing your friend say there isn't anything there. So why --

MS. OSUALDINI: Well --

THE COURT: -- why are we delaying the final outcome of this thing? Let's just get on with it. Why not?

MS. OSUALDINI: Well, one particular issue, My Lord, that's come up is the SFN have an entirely new argument that's being raised now for the first time in these proceedings --

THE COURT: M-hm.

MS. OSUALDINI: -- is that the effect of the provisions of the *Indian Act* and the access to the capital and revenue accounts impact the determination of this transfer.

THE COURT: Right.

MS. OSUALDINI: That's new.

THE COURT: Okay.

MS. OSUALDINI: We have not been allowed to explore the source of these funds. The SFN has not put before the Court an accounting record of where these funds actually came from. They're asking you to assume that that's where they came from because they say so, and we'd like the opportunity to test that. So there is new evidence and while all the parties I think would like to come to a resolution, we have to do it through a proper process.

THE COURT: M-hm.

MS. OSUALDINI: These are very, very serious issues that are before the Court and they can't be rushed or decided on an incomplete evidentiary record.

THE COURT: How are you going to get access to the records? If I were to say to you, go ahead, you've got a month to get the records, what would you

do? You'd write to Mr. Molstad and ask for the records, he's going to write back and say sorry, I've given you everything I have. So, where are we going?

MS. OSUALDINI: We don't know that everything's been given in terms of the tracing of these assets. And, also, there's another issue about privilege, whether it exists over these files. Whether vis-à-vis the beneficiaries and the Trustees have ever existed at all, and whether the vis-à-vis the Sawridge First Nation, whether that's been waived. These are all evidentiary issues that we need to sort out.

MS. HUTCHISON: My Lord, and Ms. Osualdini, I apologize for interrupting, if I may speak to your question of what would we do --

THE COURT: Yes.

MS. HUTCHISON: -- if we were now to engage in a process to seek out evidence to deal with the issues that have been raised by my friends, in the OPGT's original questioning of (INDISCERNIBLE), we largely stayed away from 1982 and 1970, or more to the point, we were largely prevented from going into those matters, because the position of the Trustees, and indeed to some degree the parties, was that pre-'85 was largely irrelevant. When the consent order came through and when the 513 application was resolved, the OPGT was able to accept that position because, and didn't pursue it, because we had resolved the issue of the asset transfer with the consent order.

THE COURT: M-hm.

MS. HUTCHISON: So, one piece of the OPGT's efforts in this area would be to go back to question Mr. Pugault (phonetic), we've never questioned Catherine Twinn on her affidavit of records because since we've had the affidavit of records we've been stuck in this jurisdictional issue. We would most certainly be questioning Ms. Twinn about the evidence and information she has about 1982 and 1970. We would be seeking documents from the SFN about their position that all of the funds that are -- that were used to purchase the assets in these trusts were taken from capital revenue funds. And we would also be seeking production of the records that show how Canada dealt with that issue both in the 1970s at the time that the trust was created and at the time the '85 trust was created. Because we believe, My Lord, that there will either be an absence of evidence that disproves some of the positions taken by the SFN, or there will be documentation that explicitly proves that Canada has taken very different positions on what happens to capital and revenue funds once they're released and is being advanced to the Court.

THE COURT: Yes.

MS. HUTCHISON: That's one piece, My Lord. I expect there would also be an application for production of Maurice Cullamy's (phonetic) file on the basis that any privilege that exists over that file has been waived. It was waived by the SFN in their questioning of Mr. Pugault in 2016. The OPGT has not pursued that issue because we understood that the asset transfer issue was settled in 2016.

If we are now back to where we are examining the entire process of the 1985 transfer, My Lord, we have not even scratched the surface in request for document production. And I'd invite the Court to look at the copy of our 513-asset production application. It was included in the intervention materials. There's a shopping list longer than my arm, My Lord --

THE COURT: M-hm.

MS. HUTCHISON: -- of the documents that did not and have not been produced. That is why we have been before this Court saying if the Court wishes to go here, we must fill the evidentiary gaps before we go there. It's not enough to do the best we can with what we have, My Lord. We have to have production of the relevant evidence. The issues changed in 2016. There have been supplementary affidavits filed by both Mr. Pugault and Ms. Twinn that have not been questioned on around these issues. It's simply not appropriate to go forward to step 2 without the documentary piece, My Lord. Thank you. Sorry (INDISCERNIBLE) thank you for allowing me to interrupt.

Discussion

MS. BONORA: Sir, I'll just be very brief. I honestly can say as an officer of this Court that my friend asked us to write to so many individuals to ask for records specifically with respect to the assets and the documents and the records of the 1982 trust and 1985 trust and we did all of those and nothing was produced. And, My Lord, I am confident that there will be nothing coming from now, yet another attempt to get more records. It will just be more money spent. And, as you know, we're paying for the Office of the Public Trustee (INDISCERNIBLE) to go down those paths. Trustees don't -- are not fulfilling their fiduciary duties if they don't say that is a path that will cost a lot of money and lead to nothing.

The evidence is before the Court. Not the -- the evidence with respect to the funds that came from the capital and revenue accounts, the information that we have that we pursued is before the Court. The whole record is there. And we implore you not to go down that path. There is a letter that is part of the affidavit of records where Mr. Cullamy says, I act for the Sawridge First Nation in respect of the trust. That's -- then privilege belongs to Sawridge First Nation. And this idea of the case that my friend put forward from the 1920s that says documents belong to the beneficiaries is old law. There is new law that we can

look at what in fact does belong to beneficiaries. But we don't believe we have Mr. Cullamy's privilege even to release.

And so, My Lord, I implore you to take the evidence that we have, which we say is absolutely everything there is, because Mr. Pugault has said he's gone through an extensive exercise of asking for all of the records in respect of the trust going back and there is nothing more. So we can do this --

THE COURT: Has he been cross-examined on his affidavit of --

MS. BONORA: He's been cross-examined on the affidavit. So if you look at our brief that we filed for the 2016 application, and because that obviously was an issue, that we thought the Court should know. So we go through, on page 3 of that brief that was before the Court in 2016 and say very categorically what documents were produced, who was examined, when they were examined, what undertakings were filed so that we could prove to the Court that there were no other records so that the preamble was accurate.

THE COURT: M-hm.

MS. BONORA: And so I would say that we can try that, we can spend a lot of money, but we will find nothing because we've already said that on the record and under oath.

THE COURT: M-hm.

MS. BONORA: And then Mr. Molstad confirmed that Sawridge First Nation doesn't have (INDISCERNIBLE). So I would ask that you not entertain that because that has already been fully explored and will produce nothing more for this Court.

THE COURT: M-hm.

MR. MOLSTAD: Can I just add, excuse me, Sir, you've got the application before you, no one's asked for the adjournment except I've suggested that we set it for a date. I submit, Sir, that the application should be heard on the merits and full argument made at that time and then you can decide exactly, you, Sir, what jurisdiction you have and what your decision is.

THE COURT: M-hm. Okay.

MR. FAULDS: And, My Lord, given the nature of the discussion we've had this morning, the OPGT wouldn't be opposed to saying that we should have (INDISCERNIBLE).

THE COURT: We should have a what?

MR. FAULDS: That we should have day rather than a half a day for this.

THE COURT: You're opposed to that?

MR. FAULDS: Yeah. I mean -- no, we're not opposed. No.

MS. BONORA: We're in support of.

THE COURT: I was going to say, you think we need less time for this?

MR. FAULDS: No, no. No. Just the opposite.

THE COURT: Okay. Well, what we're going to do here is -- the Trustees are going to get me these transcripts from the last -- can you get me the transcripts of all the sessions that I've had with you over the last six months or whatever? So I can try to, and particularly this October 30th transcript, so I can understand a little more clearly. I thought I understood as I walked in the courtroom this morning but I'm being told that maybe I didn't understand quite correctly. But I would like a clear grip on what I thought we were doing, what directions I thought I was giving in the context of the notice of motion that was filed. And I will review those, I will take into account the submissions of all the parties. We'll come back on Wednesday afternoon, the 27th, at 2:00, and I will give you some direction with respect to what we're going to do. In the meantime, someone told me we had a date booked or available for --

UNIDENTIFIED SPEAKER: Ms. Bonora advised me, Sir, that she checked and January 16th was available.

THE COURT: Is that a day that we can log in with everyone? What I would, I mean, we are not going to do this application in a half a day. I mean, that just doesn't make any sense. We can't even agree on what we're going to do in an hour. So it's -- a day is required for sure. But I also want to address my mind, and I will over the next few days, as to what exactly we're going to do, so whether I'm going to direct that we go ahead with the application on the date we book, or whether we're going to give some

direction for a timeline for investigation, examination, disclosure, whatever, leading to a date where we can actually get this decision done. So I need to look at the transcripts to make a decision as to what we're going to do on that and we'll do that on Wednesday afternoon.

MS. BONORA: Sir, I'll just say, we normally order the transcripts so we'll expedite this one for you --

THE COURT: Could you do that?

MS. BONORA: -- so we'll give you the others right away, and then as soon as we get this one, we'll give it to you as well.

THE COURT: Okay. Good. Thank you very much. Yes. That'll give me a better idea.

MR. FAULDS: But the applications will not be going ahead next week.

THE COURT: No, no. Next week is so that I can try to give you some direction as to what we are going to do. So just a preliminary --

MS. BONORA: Sir, shall we book the 16th then? January 16th?

THE COURT: Yes. Well, provided the parties are in agreement.

All right. I'll get you to drop this off at the trial coordinator's office just to make sure that's still available.

MS. BONORA: Thank you. We checked yesterday and we're free that day, so.

THE COURT: Okay. Excellent. Thank you very much.

Okay. Well, thank you for your assistance today.

THE COURT CLERK: Order in court, all rise.

PROCEEDINGS ADJOURNED UNTIL 2:00 PM, NOVEMBER 27, 2019

Certificate of Record

I, Danielle Tayloo, certify that this recording is the record made of the evidence in the proceedings in the Court of Queen's Bench, held in courtroom 611, at Edmonton, Alberta, on the 22nd day of November, 2019, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Gaye Laing, certify that

(a) I transcribed the record, which was recorded by a sound recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

TEZZ TRANSCRIPTION, Transcriber
Order Number: AL-JO-1004-4463
Dated: November 26, 2019

TAB K

Form 26
Alberta Rules of Court
Rules 5.6 and 5.10

Clerk's Stamp

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 VIVIOS 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	**2nd SUPPLEMENTAL AFFIDAVIT OF RECORDS**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLENNAN ROSS LLP Suite 600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: David Risling & Crista Osualdini Telephone: 780-482-9200 Fax: 780-482-9100 Email: cosualdini@mross.com File No.: 144194

2nd SUPPLEMENTAL AFFIDAVIT OF RECORDS OF CATHERINE TWINN, RESPONDENT, SWORN/AFFIRMED ON THE 18 DAY OF DECEMBER, 2019

I, Catherine Twinn, of the City of Edmonton, in the Province of Alberta, have personal knowledge of the following and do believe that:

1. I am one of the above-named Respondents.

2. The supplemental records listed in Schedules 1 and 2 are under my control.

3. I object to produce the supplemental records listed in Schedule 2 on the grounds of privilege identified in that Schedule.

4. The supplemental records listed in Schedule 3 were previously under my control, but ceased to be so at the time and in the manner stated in Schedule 3.

5. Other than the supplemental records listed in Schedules 1, 2, and 3 and the records set out in the Affidavit of Records sworn by myself on June 21, 2018 and the Supplemental Affidavit of Records sworn by myself on November 8, 2018, I do not have and never had any other relevant and material records under my control.

SWORN/AFFIRMED BEFORE ME at the)
City of Edmonton,)
in the Province of Alberta)
the 18 day of December, 2019)
)
)
Crista C. Os)
A Commissioner for Oaths in and)
for the Province of Alberta)

Catherine Twinn
CATHERINE TWINN

Crista C. Osualdini
a Notary Public and Commissioner for Oaths
in and for the Province of Alberta
My Appointment expires at the Pleasure
of the Lieutenant Governor

SCHEDULE 1

Relevant and material records under my control for which there is no objection to produce:

ProdBeg	ProdEnd	DocDate	DocType	DocTitle	Author	Recipient
TWN007805	TWN007809	12/20/1990	Memo	Sawridge Trusts - Questions for Maurice Cullity	Blatt, M.	Ewonlak, Ron
TWN007810	TWN007810	12/14/1992	Letter	re Funds exchanged with Walter P. Twinn	Cullity, Maurice [Davies, Ward & Beck]	McKinney, Michael R. [Sawridge]
TWN007811	TWN007819	10/05/1994	Letter	re Letter Margaret McIntosh DIAND List of Expenditures	McIntosh, Margaret [Department of Justice Canada]	Cullity, Maurice [Davies, Ward & Beck]
TWN007820	TWN007824	04/07/1994	Letter	re Discussion with Gregor McIntosh DIAND Sawridge Trusts	Cullity, Maurice [Davies, Ward & Beck]	McKinney, Michael R. [Sawridge]
TWN007825	TWN007831	08/09/1994	Letter	re draft letter to Margaret MacIntosh DIAND	Cullity, Maurice [Davies, Ward & Beck]	McKinney, Michael R. [Sawridge]
TWN007832	TWN007836	03/30/1994	Letter	Existence of trusts that were apparently established on behalf of members of the Sawridge Band...	Van Iterson, Bill [Indian and Northern Affairs Canada]	Cullity, Maurice [Davies, Ward & Beck]
TWN007837	TWN007843	11/09/1994	Letter	re Letter from Margret McIntosh DIAND Sawridge Band Expenditures	McIntosh, Margaret [Department of Justice Canada]	Cullity, Maurice [Davies, Ward & Beck]
TWN007844	TWN007852	07/08/1994	Fax Cover Sheet	Sawridge Trusts, with attached documents	Cullity, Maurice [Davies, Ward & Beck]	McKinney, Michael [Sawridge Band Administration]
TWN007853	TWN007855	08/29/1994	Letter	re Letter Margaret MacIntosh DIAND	McIntosh, Margaret [Department of Justice Canada]	Cullity, Maurice [Davies, Ward & Beck]
TWN007856	TWN007857	09/28/1994	Letter	re DIAND request information Sawridge Trusts	Cullity, Maurice [Davies, Ward & Beck]	McKinney, Michael R. [Sawridge]

ProdBeg	ProdEnd	DocDate	DocType	DocTitle	Author	Recipient
TWN007858	TWN007861	03/16/1994	Letter	re Sawridge Indian Band	Cullity, Maurice [Davies, Ward & Beck]	McKinney, Michael R. [Sawridge]
TWN007862	TWN007866	06/05/1995	Letter	Sawridge Trusts	McIntosh, Margaret [Department of Justice Canada]	Cullity, Maurice [Davies, Ward & Beck]
TWN007867	TWN007876	03/03/1997	Letter	re Transfer of 1983 Trust to 1985 Trust	Cullity, Maurice [Davies, Ward & Beck]	McKinney, Michael R. [Sawridge]
TWN007877	TWN007880	06/26/1995	Letter	Sawridge Trusts	Cullity, Maurice [Davies, Ward & Beck]	McIntosh, Margaret [Department of Justice Canada]
TWN007881	TWN007883		Index	The Sawridge Trusts	Youdan, Timothy [Davies, Ward & Beck]	
TWN007884	TWN007885	09/06/2005	Letter	re Debenture Registration Priorities	Youdan, Timothy [Davies, Ward & Beck]	McKinney, Michael R. [Sawridge]
TWN007886	TWN007902	06/03/1985	Resolution	Sawridge Band, BCR, 10288 ($3,000,000)	Sawridge Band	
TWN007903	TWN007903	06/06/1985	Resolution	Sawridge Band, BCR, 114-85 ($300,000)	Sawridge Band	
TWN007904	TWN007904	08/19/1985	Resolution	Sawridge Band, BCR, 114-85 ($1,000,000)	Sawridge Band	
TWN007905	TWN007905	09/27/1985	Resolution	Sawridge Band, BCR, ($800,000)	Sawridge Band	
TWN007906	TWN007906	03/31/1985	List	Sawridge Group, Approved BCRS, 850331	Sawridge Group	
TWN007907	TWN007943	04/15/1985	Summary	Accounting to Beneficiaries, Trust 1985	Sawridge Band	
TWN007944	TWN007945	12/31/2004	Financial Document	Financial Reports, Sawridge Trusts, Annual Distribution 2004	Sawridge Trusts	
TWN007946	TWN007946		Movie	Honor Of All - Movie 1 of 3		
TWN007947	TWN007947		Movie	Honor Of All - Movie 2 of 3		
TWN007948	TWN007948		Movie	Honor Of All - Movie 3 of 3		

SCHEDULE 2

Relevant and material records under my control for which there is an objection to produce:

(a) without prejudice communications;

(b) communications and copies of communications between solicitor and client;

(c) solicitors' work product, including all interoffice memoranda, correspondence, notes, memoranda and other records prepared by the solicitors or their assistants;

(d) records made or created for the dominant purpose of litigation, existing or anticipated;

(e) other; and/or

(f) records that fall into 2 or more of the categories described above.

SCHEDULE 3

Relevant and material records previously under my control:

	DESCRIPTION OF RECORD	WHEN THIS RECORD CEASED TO BE UNDER MY CONTROL	MANNER IN WHICH THIS RECORD CEASED TO BE UNDER MY CONTROL	PRESENT LOCATION OF THE RECORD
1.	Not aware of any such records.			

NOTICE

The time when the producible records listed in this Supplemental Affidavit of Records may be inspected is from 9:00 a.m. to 4:00 p.m. on weekdays, excluding statutory holidays.
The place at which the producible records may be inspected is McLennan Ross LLP, Suite 600, McLennan Ross Building, 12220 Stony Plain Road, Edmonton, AB T5N 3Y4.

Deloitte & Touche

Memorandum/Note de service

Date: September 19, 1990

To/A: Ron Ewoniak, File

From/De: M. Blatt

Subject/Sujet: SAWRIDGE TRUSTS - QUESTIONS FOR MAURICE CULLITY

The following are some questions that have come to mind which should be discussed with Maurice Cullity in order to get the Trusts into line.

1. Who are the beneficiaries of the Trusts? Are they the individual members, or the Band as such.

2. During an earlier meeting Cullity felt that Revenue Canada might apply GAAR if the income of the Trust is distributed to Walter, knowing full well that this is only done if he will gift the funds to the Band. Would he have the same concerns if the Trust and Walter entered into a preferred beneficiary election? This would be permissable since Walter was a settler of the Trusts.

3. During that earlier meeting, Cullity said that when the Band got "municipal status" the problem would be resolved because the income could be gifted to the Band. My reading of Section 118.1(1) would limit the Trust or a taxable corporation to a deduction of only 20% of net income with respect to a gift to a municipality. This is because a gift to a Canadian municipality is included with gifts to registered charitable organizations as opposed to a gift to Her Majesty in Right of Canada or a province. Is there any argument to made that since a municipality is a creation of a province, the gift to a municipality is in fact a gift to a creation of the province and therefore a gift to the province itself?

4. If the Trusts are wound up would the capital go to a member or members, or to the Band? My interpretation is that it would go to the individual members since they are the beneficiaries and not the Band.

5. Could the Trustees make a gift of capital to the Band, the municipality, or a corporation controlled by the municipality? If a gift could be made to any of the above entities, the income would not be taxable, for reasons discussed above.

Deloitte & Touche

Memorandum/Note de service

Date: September 19, 1990

To/A: Tax File

From/De: M. Blatt

Subject/Sujet: SAWRIDGE TRUSTS, 1 AND 2

The following is a transcription of my handwritten notes dated February 1, 1990.

Maurice Cullity came to our office on January 29, 1990 to discuss the self-governing status of the Band with Ron Ewoniak and Marty Blatt. We discussed the Trusts and the taxation of them. Both Trusts are discretionary, as to income and capital.

In 1984-1985 Trust 1 had large incomes - $2 - 3,000,000. This was distributed to Walter and he made a gift back to the Band. In subsequent years neither Trusts had income. The corporations did not pay or accrue interest on the loans, because they did not need the expenses. The interest was in fact waived.

My inclination was to pay interest and allow the corporations to have losses, even if they are to expire, in order that GAAR not be applied in years when interest was in fact paid. I felt that Revenue Canada would apply GAAR if interest is waived in one year and not in the other, on the argument that interest was not legally payable.

Cullity felt that GAAR might be applied if the income of the Trusts are distributed to Walter, knowing full well that this is only done if he in fact gifted the income to the Band. It was decided for the current year to continue to waive the interest.

Cullity said that when the Band got "municipal status" the problem will be resolved because the income can be gifted to the Band. (See my comments below.)

My reading of the Trust documents is that it is the members, not the band, who are the beneficiaries. If the income is distributed to the members there might be a problem getting the funds back to the Band. This is because some of the members are minors, and also other members might decide that they would rather keep their hands on the funds.

If the Trust made a gift to the municipality, it can only deduct 20% of the amount of income, since the gift to a municipality is not considered a gift to the Crown. Section 118.1(1) includes the gifts to a Canadian municipality with gifts to registered charities and limits the deduction under the definition "total gifts" to 1/5 of the income in the year. Gifts to Her Majesty in Right of Canada or of a province, on the other hand, are deductible without applying the "20% rule".

Ron felt that Cullity said that Trust would be wound up. If that is done the funds would have to go to the members or a member, if the Trustees exercise their discretion to allocate the capital to only one member. However, this would probably be considered to be a distribution to a member in his capacity and not the Band, because the Band is not a beneficiary of the Trust. If this is so, we would have the same problem that Cullity feared with respect to a distribution of the annual income to Walter.

Per Section 149(1)(d), a corporation owned by a municipality or a subsidiary of such a corporation is exempt from tax. Therefore, even if the corporation carries on for a commercial activity it will not be taxable. The problem then would be to get the loan capital and shares to the Band or to the municipality.

PREVIOUSLY FAXED

DAVIES, WARD & BECK

BARRISTERS & SOLICITORS

Scanned in Jan 1986 Corresp.

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

1600-5

VIA TELECOPIER & MAIL

December 14, 1992

RECEIVED
DEC 21 1992
Sawridge

Michael McKinney, Esq.
Sawridge Administration
Box 326
Slave Lake, Alberta
T0G 2A0

Dear Mike:

The Sawridge Trust

I am enclosing documents with respect to the payment of income from the Sawridge Trust to Walter together with Walter's Deed of Gift.

The resolution of the Trustees should obviously be signed before the end of the year and the cheque from the Trustees to Walter should be cleared before he executes the Deed of Gift and gives them his cheque. The gift by Walter does not have to be made in 1992 but the Trustees' cheque to Walter should be cleared before January 1, 1993.

If you have any questions, please call me.

Yours very truly,

Maurice C. Cullity

Maurice C. Cullity

MCC/dp
Attch.

Department of Justice Canada / Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

October 5, 1994

Mr. Maurice C. Cullity, Q.C.
Davies, Ward, Beck
P.O. Box 63, Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X1B1

Sawridge Indian Band List of Expenditures

Dear Mr. Cullity:

Further to our previous discussions, please find attached a document provided by my client which lists the expenditures made pursuant to sections 64 and 66 of the Indian Act for the Sawridge Indian Band for the years 1970-71 to 1992-93.

I trust this will facilitate the preparation of the statement from Sawridge's accountants regarding the use of funds released to the Sawridge Indian Band.

Please do not hesitate to contact me if I may provide you with any assistance or if you would like to discuss this matter in further detail.

M. C. McIntosh

Margaret McIntosh
Counsel

Attach.

Canada

ASSETS

[redacted]

1970-71	OPERATING EXPENSES SAWRIDGE DEVEL	66(1)	$ 3,500.00	BCR 4-70-71
	REPAYABLE LOANS	66(1)	$ 500.00	BCR UNNUMBERED
1972-73	SLAVE LAKE DEVELOPMENTS	66(1)	$ 500.00	BCR
	HOTEL EXPANSION	64(1)(k)	$ 100,000.00	BCR Unnumbered
	OPERATING CAPITAL-SAWRIDGE HOTEL	64(1)	$ 5,000.00	BCR 8-72-73
1973-74	GUARANTEE - ROYAL BANK	64(1)	$ 30,000.00	BCR
	ROYAL BANK - SHAREHOLDERS LOANS	64(1)(k)	$ 20,000.00	BCR 9-73-74
	OVERDRAFT - ROYAL BANK	64(1)(k)	$ 50,000.00	BCR 11-73-74
1974-75	LEGAL FEES FIELD OWEN	64(1)(k)	$ 10,127.50	BCR 9-74-75
	LEGAL FEES-LEFSRUD, CUNNINGHAM ETC	64(1)(k)	$ 3,134.30	BCR 9-74-75
	LOAN TO SAWRIDGE HOTEL	64(1)(k)	$ 50,000.00	BCR 11-74-75
	LOAN GUARANTEE	64(1)(k)	$ 35,000.00	BCR UNNUMBERED
	PURCHASE OF LAND	64(1)(d)	$ 98,000.00	BCR UNNUMBERED
1975-76	GUARANTEE	64(1)(k)	$ 100,000.00	BCR 13-75-76
1976-77	SHAREHOLDERS LOAN	66(1)	$ 25,000.00	BCR 8-76-77
	SHAREHOLDERS LOAN	66(1)	$ 60,000.00	BCR 13-76-77
	BUILDING } check BCR 10-76-77.	64(1)(g)	$ 290,000.00	BCR 777/10-76/77
	VAULT }	64(1)(g)	$ 28,000.00	BCR 777/10-76/77
	SHAREHOLDERS LOAN	64(1)(k)	$ 50,000.00	BCR 14-76-77
	LOAN GUARANTEE	66(1)	$ 50,000.00	BCR 76-77.
1977-78	NEW HOME	64(1)(j)	$ 35,000.00	BCR 02/77-78
	PAVING,LANDSCAPING & FENCING } check BCR 2-77-78	64(1)(g)	$ 70,000.00	BCR 02/77-78
	DRIVEWAYS - HOMES }	64(1)(j)	$ 30,000.00	BCR 02/77-78
1979-80	IEDF LOAN-SAWRIDGE ENTERPRISES	66(1)	$ 1,440.00	BCR 7-79-80
	ARCOM SYSTEM BUILDING	66(1)	$ 50,000.00	BCR 10-79-80
	PURCHASE OF ARCOM TIMBER	64(1)(k)	$ 60,000.00	BCR 6-79-80
1980-81	HOUSING } check BCR 1&2-80-81	64(1)(g)	$ 100,000.00	BCR 01-80/81
	HOUSING DEVELOPMENT }	64(1)(g)	$ 400,000.00	BCR 01-80/81
	JOINT VENTRE - BIGSTONE BAND	64(1)(k)	$ 100,000.00	BCR 3-80-81
	JOINT VENTRE	64(1)(k)	$ 100,000.00	BCR 3-80-81
	LENNIE DEBOW & MARTEN	64(1)(k)	$ 1,500,000.00	BCR UNNUMBERED
1981-82	VEHICLE EXPENSE(MAIN., LEASE, GAS } BCR 23+26 81-82	66(1)	$ 40,000.00	BCR 26-81-82
	BAND HOLDINGS-TAX MAIN, ETC. }	66(1)	$ 225,000.00	BCR 26-81-82
	AIRCRAFT PURCHASE & MAINTENANCE }	66(1)	$ 210,000.00	BCR 26 81-82
	EQUITY FUNDING-SAWRIDGE JASPER	64(1)(k)	$ 2,500,000.00	BCR 27-81-82
	PURCHASE PROPERTY	64(1)(k)	$ 1,600,000.00	BCR UNNUMBERED
1982-83	PROFESSIONAL & LEGAL } Budget BCR	66(1)	$ 180,000.00	
	INSURANCE BAND BLDGS & HOLDINGS }	66(1)	$ 75,000.00	
	PURCHASE MUTTART BUILDERS SUPPLIES	64(1)(k)	$ 3,770,445.00	BCR 51-81-82
	LOAN GUARANTEE	64(1)(k)	$ 2,400,000.00	BCR 82/83 - 68
	NORTHWOOD BUILDING DEVELOPMENT Budget BCR	64(1)(k)	$ 500,000.00	
1983-84	LOAN GUARANTEE	64(1)	$ 3,000,000.00	BCR 83/84 - 80
			$17,955,645.00	

ASSETS

awridge #:454

983-84	PROFESSIONAL & LEGAL	66(1)	$ 250,000.00	BCR 454-73-83/84
	BAND HOLDINGS - TAX MAIN	66(1)	$ 300,000.00	BCR 454-73-83/84
	AIRCRAFT - MAIN	66(1)	$ 100,000.00	BCR 454-73-83/84
	BAND MEMBER GRANTS & LOANS	66(1)	$ 100,000.00	BCR 454-73-83/84
	PAVING & LANDSCAPING	64(1)(b)	$ 140,000.00	BCR 454-72-83/84
	DRIVEWAY CONSTRUCTION	64(1)(b)	$ 110,000.00	BCR 454-72-83/84
	TRUCK STOP COMPLEX (BUILDING & EQUIP)	64(1)(k)	$ 1,835,000.00	BCR 454-72-83/84
984-85	PROFESSIONAL & LEGAL	66(1)	$ 250,000.00	BCR 87-83/84
	BAND HOLDINGS - TAX MAIN	66(1)	$ 300,000.00	BCR 89-83/84
	AIRCRAFT MAINTENANCE	66(1)	$ 100,000.00	BCR 89-83/84
	BAND MEMBER GRANTS & LOANS	66(1)	$ 100,000.00	BCR 89-83/84
	TRUCK STOP	64(1)(g)	$ 2,000,000.00	BCR 84/85 - 97
	ON RESERVE DRILLING	64(1)(g)	$ 1,000,000.00	BCR 80-83-84
	2 NEW HOMES	64(1)(g)	$ 300,000.00	BCR 90-83/84
	OFFICE RENO's, IMPROVEMENTS	64(1)(i)(g)	$ 100,000.00	BCR 90-83/84
	PAVING & LANDSCAPING	64(1)(b)	$ 122,500.00	BCR 90-83/84
	DRIVEWAY CONSTRUCTION	64(1)(b)	$ 127,500.00	BCR 90-83/84
	ON RESERVE LAND FILL	64(1)(g)	$ 250,000.00	BCR. 90-83/84
985-86	PROFFESSIONAL & LEGAL	66(1)	$ 500,000.00	BCR 117-85-86
	VEH. & EQUIP. MAIN. & LEASE	66(1)	$ 175,000.00	BCR 117-85-86
	TAX	66(1)	$ 300,000.00	BCR 117-85-86
	AIRCRAFT	66(1)	$ 200,000.00	BCR 117-85-86
	BAND MEMBER GRANTS & LOANS	66(1)	$ 100,000.00	BCR 117-85-86
	HOTEL SHAREHOLDERS EQUITY (LOAN)	66(1)	$ 1,000,000.00	BCR 117-85-86
	APARTMENT CONSTRUCTION	66(1)	$ 1,440,000.00	BCR 85/86 UNNUMBERED
	WAREHOUSE	64(1)(g)	$ 300,000.00	BCR 116-85-86
	TRUCKSTOP SITE PAVING	64(1)(b)	$ 200,000.00	BCR 116-85-86
	LANDFILL - NEW CONSTRUCTION	64(1)(g)	$ 200,000.00	BCR 116-85-86
	CONTRACT RENO, LEASEHOLDING	64(1)(g)	$ 500,000.00	BCR 116-85-86
986-87	BAND BUILDINGS	64(1)(g&i)	$ 350,000.00	Not Numbered 86-87
	TRAVEL EXP & AIRCRAFT	64(1)(i)	$ 200,000.00	Not Numbered 86-87
	LEGAL & PROFESSIONAL	64(1)(i)	$ 450,000.00	Not Numbered 86-87
	TRUCK WASH	64(1)(g)	$ 350,000.00	Not Numbered 86-87
987-88	BUIDINGS UTIL. MAIN. & LANDSCAPING	64(1)(g&i)	$ 400,000.00	BCR 87 - C.B. #1
	TRAVEL EXP & AIRCRAFT	64(1)(i)	$ 200,000.00	BCR 87 - C.B. #1
	COMPUTER PURCHASE	64(1)(i)	$ 135,000.00	BCR 87 - C.B. #1
	LEGAL & PROFESSIONAL	64(1)(i)	$ 350,000.00	BCR 87 - C.B. #1
	GREEN HOUSE	64(1)(g)	$ 134,000.00	BCR 87 - C.B. #1
	TRAILER COURT	64(1)(g)	$ 150,000.00	BCR 87 - C.B. #1
	VEH & EQUIP MAIN & LEASE	64(1)(i)	$ 150,000.00	BCR 87 - C.B. #1
	HOTEL PURCHASE	64(1)(k)	$ 3,000,000.00	BCR 87/88 - 04
	SAWRIDGE HOTEL	66(1)	$ 1,450,000.00	BCR 87/88 - 01
			$19,719,000.00	

ASSETS

Sawridge #:454

cont'd

1988-89	HOTEL RENOVATIONS	66(1)	$ 425,000.00	BCR 88/89-015-S
	SUBDIVISION DEVELOPMENT	66(1)	$ 350,000.00	BCR 88/89-015-S
	SLAVE LAKE TOWN CENTER DEVEL	66(1)	$ 1,200,000.00	BCR 88/89-015-S
	BAND BUILDINGS	64(1)(g&i)	$ 200,000.00	BCR 88/89-001
	LEGAL & PROFFESSIONAL	64(1)(i)	$ 300,000.00	BCR 88/89-001
1989-90	SHOPPING CENTRE	66(1)	$ 1,380,000.00	BCR 89/90 - 04
	SHOPPING CENTRE	66(1)	$ 690,000.00	BCR 89/90 - 08
	GROCERY STORE	64(1)	$ 2,766,919.80	BCR 89/90 - 07
	BAND BUILDINGS	64(1)(i)	$ 225,000.00	BCR 89/90-001 S
	TRAVEL & AIRCRAFT	64(1)(i)	$ 375,000.00	BCR 89/90-001 S
1990-91	SHOPPING CENTRE	66(1)	$ 650,000.00	BCR 90/91 - 06
	TRAVEL EXP & AIRCRAFT COSTS	64(1)(i)	$ 180,000.00	89/90-013-S
	LOANS	64(1)(h)	$ 200,000.00	89/90-013-S
1991-92	BAND BUILDINGS O&M	64(1)(g&i)	$ 300,000.00	90/91-017-S
	TRAVEL EXP & AIRCRAFT COSTS	64(1)(k)	$ 261,500.00	90/91-017-S
	VARIOUS EXPENDITURES	66(1)	$ 1,300,000.00	BCR 91/92-010
1992-93	VARIOUS EXPENDITURES	66(1)	$ 1,200,000.00	BCR 92/93-010-S
	VARIOUS EXPENDITURES	66(1)	$ 800,000.00	BCR 92/93-020-S
	LEGAL & PROFESSIONAL	64(1)(k)	$ 617,067.00	BCR 92/93-008S
	LEGAL & PROFESSIONAL	64(1)(k)	$ 836,650.00	BCR 92/93-028S
			$51,931,782.80	

DAVIES, WARD & BECK

BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

April 7, 1994

VIA TELECOPIER

Michael McKinney, Esq.
Sawridge Administration
Box 326
Slave Lake, Alberta
T0G 2A0

Dear Mike:

Sawridge Trusts

I received a call this afternoon from Gregor MacIntosh with respect to the trusts.

Our conversation - but not its flavour - can be summarized as follows:

1. He told me that he was acting on behalf of "the whole department" and was "at the second level from the top";

2. The issue of the trusts was raised by lawyers from the Department of Justice who, fairly certainly, included Dogan Akman;

3. The issue arose as a result of evidence by Walter that Sawridge had created "private trusts that the Department does not know about";

4. Justice wanted to call in the RCMP immediately;

5. He, Gregor MacIntosh, managed to placate the justice lawyers on condition that Indian Affairs would investigate the matter;

6. He insists that he be given "visible proof" that all of the money that "we have given to the Band" is held in trust for the members of the Band;

7. He is not concerned, at this stage, whether the Band is defined for purposes of the trusts in accordance with the pre-1985 *Indian Act* or the post-1985 Act;

8. If he does not get the information he will call in the RCMP;

9. The conversation went on for a considerable time in which he alternated between threats and claims that he was in a difficult position and wanted to be reasonable.

It was not clear from his comments precisely what documentation he has. He said that the trust documents he had seen were only two or three pages long but that he was appalled to see that, under the terms of the trusts, the entire property could be given to any member of the Band. I told him that a trust of that kind was a very common kind of discretionary trust and that I had seen trusts of those kinds set up for other Indian Bands with government approval. I explained to him that although, in order to provide the greatest possible flexibility, it was customary to give complete power to distribute all or any part of the property to any one or more of the beneficiaries, the trustees were governed by fiduciary obligations and that they were not permitted to act capriciously, arbitrarily, or in disregard of relevant circumstances. I told him it was ridiculous to insist that, because of the terms of the discretionary powers of distribution, the property could be distributed to any member of the Band at the whim of the trustees. He eventually seemed to accept those points and I think he was basically just ignorant about standard forms of trust.

He does seem to have information that the beneficiaries of one of the trusts are confined to Band members as defined under the *Indian Act* prior to Bill C-31. As I have mentioned above, this did not seem to concern him. He was more concerned that one of the trust documents stated that $100 had been transferred to the trust! He thought this might be all that was left of the property distributed by the Department.

I suggested to him that it was not necessary to meet with members of the Department and that, if he told me precisely what information he wanted, I would see

if that information would be provided. I warned him that, in my view, the Minister probably has no power to interfere with or demand information about *inter vivos* trusts created with money that has been properly delivered to the Band and accounted for by the Band and that, if he wanted detailed financial information, the Band might well refuse to provide it.

He kept repeating that he wanted "physical proof" of what had happened to the 50 or 60 million dollars "we have given" to the Band and he wanted to be assured that it was still in the trusts. I suggested that one possibility would be for him to specify the amounts that were handed over on particular dates and to ask for an assurance from the auditors that those amounts or investments representing them were held in the trusts. I told him that I had no instructions and could not predict what the Bands reaction would be to a request of that kind. I continued to press him to tell me precisely what information he wanted, and he ultimately backed off and said that it would be sufficient if we provided a statement by the auditors that all funds distributed to the Band by the Minister pursuant to section 64 or section 69 of the *Indian Act* for the acquisition of specific assets, or property or investments into which those funds have been converted, are now held in trusts for the members of the Band.

I told him that I would seek instructions and, if the Band declines to provide such a statement, this should be construed only as an indication that the Band has been advised that the Minister has no legal right to demand it and that the Band sees no reason to waive its rights.

Can a statement of the kind referred to above be provided and, if so, is there any reason why it should not be given to the Minister? I should add that MacIntosh's acceptance that the statement would be sufficient was a long way from his starting position.

If the statement can be provided I see no reason why the Band should not do this. There is enough ill will towards Sawridge in the Department of Justice and in DIAND that the possibility that an attempt will be made to investigate Sawridge's finances at sometime in the future cannot be disregarded. If Sawridge wishes to challenge any such attempt in the courts, I think it would help if it has on the record evidence that it gave the Department the information that MacIntosh had stated would

DAVIES, WARD & BECK

be sufficient. At the same time, our response should make it clear that the Band is not conceding that the Minister has any rights to disclosure and is not waiving any of its rights.

I have not had a response from you to my previous letter with which I forwarded a draft response to Mr. Van Iterson. I think we should reply to Van Iterson's letter as soon as possible and to MacIntosh in connection with my conversation with him today.

Please let me have your instructions.

Yours very truly,

Maurice C. Cullity

MCC/aw

DAVIES, WARD & BECK

BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

August 9, 1994

VIA TELECOPIER

Michael McKinney, Esq.
Sawridge Administration
Box 326
Slave Lake, Alberta
T0G 2A0

Dear Mike:

Sawridge Trusts

Further to my earlier fax of this morning, I have just received a call from Margaret MacIntosh of the Department of Justice.

Ms. MacIntosh indicated that the Department is not concerned to obtain a lot of financial information and she said that they were not concerned with details of disbursements made from the trusts.

I discussed the draft letter from Ron Ewoniak with her in general terms without providing any details. The effect of her comments was that she believes that a letter that had paragraphs I, II, VII and VIII (with amendments) might be enough.

Would it be possible to change paragraph VIII so that it reads

INCLUDED ALL AMOUNTS

That all contributions made by the Sawridge Indian Band to the two trusts were used for the purposes for which the funds were requested by the Band Council and authorized by the Minister.

Ms. McIntosh stated that she could not guarantee that a letter in the above terms would be accepted by the Department but she believes that it may well be sufficient.

I think it is quite clear that DIAND would like this issue to go away and she stated that the Department wishes to "cool things off" and not cause any further aggravation to the Band. Obviously, the original pressure came from the Department of

Justice and, I think, probably from Ackman and now that the issue has been raised, the Department feels that it has to deal with it. At the same time, I believe her when she says that the Department has no desire to pry into Sawridge's financial affairs on this matter except to the extent required to resolve the issue raised by Justice.

Yours very truly,

Maurice C. Cullity

MCC/dp

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

COPY

MAR 3 0 1994

Mr. Maurice C. Cullity
Davies, Ward & Beck
Barristers & Solicitors
P.O. Pox 63, Suite 4400
1 First Canadian Place
TORONTO ON M5X 1B1

Dear Mr. Cullity:

Thank you for your letter of March 16, 1994 concerning the existence of trusts that were apparently established on behalf of members of the Sawridge Band. I appreciate your willingness to meet to discuss this matter.

A meeting is desirable because of the Minister's statutory responsibilities for ensuring that moneys released to the band, pursuant to sections 61 to 69 of the *Indian Act*, are used for the benefit of the band and its members.

It may be that a relatively small amount of infomation on the above trusts, the existence of which was unknown to the Minister, will provide sufficient assurances that the above concerns have been met. We may also be assured that the assets are being held in those trusts for the benefit of all band members, including those who may be entitled to membership, as will be determined by the current related litigation.

To make the necessary arrangements for the meeting, would you please contact my office at (819) 953-5577.

Yours sincerely,

W. (Bill) Van Iterson
A/Assistant Deputy Minister
Lands and Trust Services

c.c.: Chief Walter Twinn
Gregor MacIntosh
Ken Kirby
Chris McNaught

Canada

DRAFT

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

April 5, 1994

W. (Bill) Van Iterson
A/Assistant Deputy Minister
Lands and Trusts Services
Indian and Northern Affairs Canada
Ottawa, Ontario
K1A 0H4

Dear Mr. Van Iterson:

Sawridge Trusts

Thank you for your letter of March 30, 1994.

Given that you may wish to receive only a relatively small amount of information with respect to trusts for members of the Sawridge bands, I wonder if it is absolutely necessary for us to have a meeting or whether it might not be more efficient and less expensive if you were simply to set out in a letter the questions to which you would like to receive responses. I suggest this, in part, because I believe you may be labouring under a misapprehension as to the existence of trusts of which the Minister has not been aware. To my knowledge, all trusts created for the benefit of Sawridge Band members have been mentioned either in the annual audit reports or in correspondence with the Department. The existence of the trusts was also disclosed, and their importance to the Band emphasized, in the lengthy negotiations with respect to self-government. Their importance is simply that the trust concept provides by far the best means of ensuring that assets will be preserved for succeeding generations of Band members.

With respect to the beneficiaries of the trusts, you will understand that, unlike the position in Manitoba, it is not possible to create trusts in accordance with the laws of Alberta, or of any other province, that will include all present and future members of the band. Extensive discussions on this question took place during the negotiations with respect to the Sawridge self-government legislation and it is addressed in the draft bill. Similarly, legislative provisions have been drafted for the purpose of enabling the class of beneficiaries of particular trusts to be expanded in the event that the rules governing the membership of the band are changed from time to time.

The only other significant difference between the classes of beneficiaries under the various trusts is that the membership of the Band and, therefore, the beneficiaries of trusts created prior to the enactment of Bill C-31 in 1985 are governed by the provisions of the *Indian Act* then in force while membership and the class of beneficiaries under trusts created thereafter are governed by provisions now in force and the membership rules of the Band.

As these trusts were created under provincial laws with funds owned by the Band, I believe that they are enforceable only at the instance of the beneficiaries and are subject to supervision only by the courts of Alberta. It is my view that nothing in the *Indian Act* or in any other applicable laws confers upon the Minister power to interfere with the administration of the trusts or to require disclosure with respect to their assets or the details of their administration. I mention this simply so that you should be aware of the legal advice we have provided to the Band and not because of any desire or intention to be less than cooperative. If you believe I am wrong in the advice I have given the band, I will be happy to discuss that with you.

Yours very truly,

Maurice C. Cullity

MCC/dp

Department of Justice Canada / Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

Nov 9 3 29 PM '94

November 9, 1994

VIA FAX NUMBER (416) 863-0871

Mr. Maurice C. Cullity, Q.C.
Davies, Ward & Beck
P.O. Box 63, Suite 1400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Sawridge Indian Band Expenditures pursuant to Sections 64 and 66 of the *Indian Act*

Dear Mr. Cullity:

We are in receipt of your letter of October 24th, 1994.

Although we note the concern expressed in your letter regarding the inclusion on the list of amounts for recurring and other expenditures which would not involve the acquisition of specific assets, we should remember that the suggestion for the production of such a statement originated from your letter of April 19, 1994.

We and our client, the Department of Indian Affairs and Northern Development, are concerned regarding the delay in resolving this matter.

In an attempt to accelerate the resolution of the current situation, we are prepared to limit the scope of the statement to be provided by your client's auditors. Accordingly, we hereby request confirmation by way of statement from Sawridge's accountants that all funds that were released for the acquisition of capital assets were in fact used for that specific purpose, and further confirmation that those assets are held in trust, or have been converted into other assets which are held in trust, for the members of the Band. In other words, at this time we do not seek confirmation regarding amounts released for purposes other than the acquisition of capital assets.

.../2

We would appreciate receiving confirmation of this proposal at your earliest convenience.

Yours very truly,

M. C. McIntosh

Margaret McIntosh
Counsel

DAVIES, WARD & BECK
BARRISTERS & SOLICITORS

COPY

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

VIA TELECOPIER

July 8, 1994

Legal Services
Indian Affairs and Northern Development
Room 1018
Les Terrasses de la Chaudière
10 Wellington Street
Hull, Quebec
K1A 0H4

Attention: Margaret McIntosh

Dear Ms. McIntosh:

Sawridge Trusts

Further to our conversation by telephone earlier today, I confirm that I have been advised on behalf of my client that the auditors of the Sawridge Indian Band are engaged in the review that will be required before they could give the certificate discussed in my previous correspondence with your department.

You will appreciate that the review required will involve a significant expenditure of time by the auditors as the period involved is almost 20 years. I will, however, be in touch with you as soon as I have received a response from them.

Yours very truly,

Maurice C. Cullity

MCC/dp

DAVIES, WARD & BECK

BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

VIA TELECOPIER

October 20, 1994

Ms. Margaret McIntosh
Counsel, Legal Services
Indian Affairs and Northern Development
Room 1018
Les Terrasses de la Chaudière
10 Wellington Street
Hull, Quebec
K1A 0H4

Dear Ms. McIntosh:

Sawridge

Further to our recent discussions, I am writing to confirm that I do not believe that the list of expenditures provided with your letter of October 5, 1994 is helpful for the purposes we have discussed. Many of the amounts referred to on the list relate to recurring expenditures, such as legal and other professional fees, and some are as small as $500. They extend back over a period of 20 years and to ask for a statement from the auditors that all were properly expended on the particular purposes referred to in the BCRs would be prohibitively expensive even if, after such a period, it were possible to deal with them.

In my discussion with Mr. Gregor MacIntosh on April 7, 1994, I was told that the Department's concern was to ensure that all funds distributed to the Band pursuant to section 64 or section 69 were either held in trust, or could be traced into assets held in trust, for members of the Band. I suggested that the auditors might be asked to certify that all funds distributed to the band by the Minister pursuant to section 64 or section 69 of the *Indian Act* for the acquisition of specific assets, or property or investments into which those funds have been converted, are now held in trusts for members of the band. In my letter of April 19 to Mr. Van Iterson, I referred too generally to funds distributed to the band for specific purposes pursuant to those sections of the *Indian Act*. A large number of the amounts on the list you have provided refer to section 66 of the Act but, more importantly, many of them were amounts for recurring and other expenditures that would not involve the acquisition of assets and could not be expected to end up in trusts or otherwise in property of the Band.

DAVIES, WARD & BECK

In order to try to resolve this matter without further delay and expense, I wonder whether it would be an acceptable solution to ask the auditors to confine their attention to amounts on your list of $500,000 or more that were advanced for the purpose of acquiring specific assets. If this is not satisfactory from the viewpoint of the Department, perhaps you would suggest another alternative.

As I have indicated to you on a number of occasions, we do not agree that the Department is entitled to demand details of expenditures made by the band in the past or with respect to the assets that it now holds. At the same time, in the interests of avoiding the litigation that will be inevitable if your client intends to make unreasonable demands, I have attempted to find a solution that will satisfy the Department without involving the Band in unnecessary expense. I still wish to do this if it is possible.

Yours very truly,

Maurice C. Cullity

MCC/dp

cc: M. McKinney, Esq.

Department of Justice Canada | Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

July 7, 1994

Mr. Maurice C. Cullity, Q.C.
DAVIES, WARD, BECK
P.O. Box 63, Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Subject: Sawridge Trusts

Dear Mr. Cullity:

Please be advised that since my colleague Mr. McNaught has assumed other duties in the Department of Justice, I have taken over carriage of the above-noted matter.

Your letter of April 19, 1994 addressed to W. (Bill) Van Iterson of our client, the Department of Indian Affairs and Northern Development, proposed that the Department be provided with a written statement from the auditors of the Sawridge Band to the effect that the funds distributed to the Band pursuant to sections 64 and 69 of the *Indian Act* are held in trust for the Band. Mr. McNaught's letter of May 20, 1994 set out our understanding that the statement would also confirm that these funds were used for the purposes for which they were authorized by the Minister. I understand that this was subsequently confirmed in a telephone conversation between yourself and Mr. McNaught.

My client would be pleased to receive the proposed statement at your early convenience. I would appreciate if you would contact me upon your return to advise me of when we may anticipate its receipt. I may be reached at (819) 953-2288.

We thank you for your assistance in this matter and we look forward to hearing from you.

Margaret McIntosh
Counsel

Department of Justice Canada
Ministère de la Justice Canada

Ottawa, Canada
K1A 0H8

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudiere
10 Wellington Street
Hull, Quebec
K1A 0H4

August 29, 1994

Mr. Maurice C. Cullity, Q.C.
Davies, Ward Beck
P.O. Box 63, Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Subject: Sawridge Trusts

Dear Mr. Cullity:

Further to our telephone conversation of August 9, 1994, we continue to anticipate a statement from the auditors of the Sawridge Indian Band to the effect that funds released to the Band pursuant to sections 64 and 69 of the *Indian Act* are being held in trust for the members of the Band, and that any funds were used for the purposes for which they were authorized by the Minister of Indian Affairs and Northern Development.

My client is anxious to have this matter settled as expeditiously as possible. Accordingly, I respectfully request some written indication of when this information will be available.

Thank you for your consideration of this matter.

Margaret McIntosh
Counsel

Canada

DAVIES, WARD & BECK

BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

September 1, 1994

VIA TELECOPIER

Michael McKinney, Esq.
Sawridge Administration
Box 326
Slave Lake, Alberta
T0G 2A0

Dear Mike:

Sawridge Trusts

I am enclosing yet another missive received from DIAND and my response thereto.

Yours very truly,

Maurice C. Cullity

MCC/dp
Enc.

DAVIES, WARD & BECK

BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

September 28, 1994

VIA TELECOPIER

Michael McKinney, Esq.
Sawridge Administration
Box 326
Slave Lake, Alberta
T0G 2A0

Dear Mike:

Sawridge Trusts

I spoke this morning with Margaret McIntosh of the Department of Justice. She advised that the Department is preparing a list of the payments they are concerned with and that she will let me have it shortly.

For the meantime, I presume we simply wait.

Yours very truly,

Maurice C. Cullity

MCC/dp

DAVIES, WARD & BECK

BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

March 16, 1994

W. Van Iterson, Esq.
A/Assistant Deputy Minister
Lands and Trust Services
Indian and Northern Affairs Canada
Ottawa, Ontario
K1A 0H4

Dear Sir:

Sawridge Indian Band

I refer to the letters of May 7, 1994 and December 23, 1993 addressed to Chief Walter Twinn.

For some years we have been retained to advise the Band with respect to, among other matters, any trusts established for its members. Accordingly, I have been instructed to respond to any questions you may have in connection with such trusts to the extent that you are entitled to receive answers.

You will understand that the Band, like any other community, organization or entity engaged in business and other activities for the benefit of its members is reluctant to release financial information relating to such activities to anyone other than such members unless it determines that this is in its best interests or is required by law. For this reason, although I have no objection to meeting with individuals from your department, it would be helpful if you would indicate in advance why you believe such a meeting to be desirable and the grounds, if any, on which you believe you are entitled to receive information about the trusts referred to in the letter from Ms. Porteous.

It would be appreciated if you would address your reply and any further correspondence or questions on this matter to this office.

Yours very truly,

Maurice C. Cullity

MCC/dp

cc: Chief Walter Twinn

bcc: M. Henderson

2190.

Department of Justice Canada / Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

IA2545-59

June 5, 1995

VIA FAX NUMBER (416) 863-0871

Mr. Maurice C. Cullity, Q.C.
Davies, Ward & Beck
P.O. Box 63, Suite 1400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Sawridge Trusts

Dear Mr. Cullity

We are in receipt of your correspondence of May 8, 1995 and appended statement from the firm of Deloitte & Touche. We note that the statement from Deloitte & Touche is limited to "Band Council Resolutions Funds Received - 1985 - 1993."

In your letter of April 19, 1994 to the then Acting Assistant Deputy Minister of DIAND you stated that a solution to resolve the Department's concerns regarding the release of funds to the Sawridge band would be to

> "obtain a written statement from the Band's auditors, Messrs. Deloitte & Touche, that the funds distributed to the Band for specific purposes pursuant to the above sections of the *Indian Act*, or investments or property into which those funds had been converted, are now held in trust for the members of the Band".

My colleague, Christopher McNaught, responded to your correspondence in a letter dated May 20, 1994 stating that "DIAND would be pleased to receive such a statement at your early convenience, and would ask that it reflect the relevant distributed funds from the Department for the period of 1975 to the present."

Canada

Subsequently, on July 8, 1994 you wrote stating that the auditors of the Sawridge Indian band were engaged in the review but "[y]ou will appreciate that the review required will involve a significant expenditure of time by the auditors as the period involved is almost 20 years." Furthermore, in response to your request, DIAND provided your client with a list of B.C.R. requests for expenditures for the years 1970-1971 to 1992-1993.

In summary, we have relied on your undertaking to provide a written statement from the Band's auditors regarding the distribution of funds to the Sawridge Indian Band. The correspondence referred to above clearly confirms that it had been agreed that the statement would relate to the period of 1975 to the present. Would you therefore confirm as soon as possible when a statement from the band auditors covering the period of 1975 to 1984 will be forthcoming?

Since this matter has been outstanding for over a year we would appreciate your immediate response.

Yours very truly,

M.G. McIntosh

Margaret McIntosh
Counsel

DAVIES, WARD & BECK
BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
(416) 863-0900

File No. 21902

VIA TELECOPIER

March 3, 1997

Mr. Michael R. McKinney
Executive Director
Sawridge Administration
P.O. Box 326
Slave Lake, Alberta
T0G 2A0

Dear Mike:

Sawridge Band *Inter Vivos* Settlement

I refer to your letter faxed to us on February 26, 1997.

Although the relevant files are at storage, my recollection is that the resolutions of the Band approving the transfer of assets and the establishment of the above trust were passed simply to indicate that the decisions and actions of the trustees were approved by the Band. I do not believe there was ever any suggestion that approval by the Band was necessary although, of course, to the extent that members of the Band were beneficiaries of the trust, their approval would normally estop them from objecting to the resettlement. However, I do not think that was the reason for obtaining approval and ratification by the Band. Rather, the resolutions were intended to demonstrate that the resettlement was made openly and was not a private decision of the Trustees of the 1982 Sawridge Band Trust.

If I can be of any further assistance, please do not hesitate to contact me.

Yours very truly,

Maurice C. Cullity

MCC/dp

Fax, Maurice Cullity to Mike McKinney re Transfer of 1983 Trust to 1985 Trust, 970303

Sawridge

via FAX

Davies Ward & Beck
Box 63, 44th Floor
1 Canadian Place
Toronto, Ontario
M5X 1B1

ATTENTION: Maurice Cullity

Dear Sir:

RE: Sawridge Inter Vivos Settlement Trust

I have been asked in Discoveries to answer the questions set out below. I am contacting you to see if you know the answers. This litigation involves a party who is trying to pierce the corporate veil of two companies and alleging that the Band is a party to a contract which one company signed and of which the other took an Assignment.

Please let us know if you have any information about these issues. If you have any questions or wish to discuss this matter, please do not hesitate to contact us. The questions are:

1. To determine why the Band passed the resolution relating to the transfer of assets to the new Trust (U/T 358). See attached "Sawridge Band Resolution".

2. To determine why the Sawridge Indian Band approved the settlement as defined in the Declaration of Trust dated April 18th, 1985 at a meeting held in the Band office at Slave Lake, Alberta on April 15th, 1985. (U/T 359).

Thank you for your assistance in this matter.

Yours truly,

Michael R. McKinney, B. Comm., LL.B.
Executive Director

cc Darren Becker
encl\qantel\davis.ward

BOX 326, SLAVE LAKE, ALBERTA T0G 2A0 • TEL: (403) 849-4311 • FAX: (403) 849-3446

DAVIES, WARD & BECK
BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

VIA TELECOPIER

June 26, 1995

Ms. Margaret McIntosh
Counsel, Legal Services
Indian Affairs and Northern Development
Room 1018
Les Terrasses de la Chaudière
10 Wellington Street
Hull, Quebec
K1A 0H4

Dear Madam:

Sawridge Trusts

I refer to your letter of June 5, 1995.

Please be advised that I gave no undertaking of the kind mentioned in the second last paragraph of your letter and I have no intention of providing you with the confirmation referred to at the end of that paragraph.

The decision to limit the auditor's review to the period of the last ten years was made at your suggestion in our discussion following my receipt of your letter of November 9, 1994. I passed on that suggestion to our clients in a letter dated November 20, 1994.

I will be prepared to discuss this matter further if and when you feel able to do so in a constructive manner.

Yours very truly,

Maurice C. Cullity

MCC/dp

21902

Department of Justice Canada | Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

July 28, 1995

Mr. Maurice C. Cullity, Q.C.
Davies, Ward & Beck
P.O. Box 63, Suite 1400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Dear Mr. Cullity,

This is further to your letter to my colleague Margaret McIntosh dated June 26, 1995.

As indicated in Ms. McIntosh's letter of June 5, 1995 we had understood that the statement from the Band's auditors would cover the period from 1975 to present as requested in the letter from my colleague Christopher McNaught to you dated May 20, 1994.

I take from your letter that you had a different understanding and that we should not expect a further statement from you, your client or its auditors.

We will consult with our client and advise you if we are instructed to pursue the matter further at this time.

Yours truly,

William J.S. Elliott, Q.C.
Senior General Counsel

Canada

DAVIES, WARD & BECK
BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

VIA TELECOPIER

August 3, 1995

William J.S. Elliott, Esq., Q.C.
Senior General Counsel
Legal Services
Indian Affairs and Northern Development
Room 1018
Les Terrasses de la Chaudière
10 Wellington Street
Hull, Quebec
K1A 0H4

Dear Mr. Elliott:

Sawridge Trusts

Thank you for your letter of July 28, 1995.

The third paragraph in your letter is correct and I regret that this misunderstanding arose. What I believe happened was that after we received the correspondence referred to in Ms. McIntosh's letter of June 5, 1995 I discussed with Ms. McIntosh the difficulty and the expense of doing a review back to 1975. As a result of that discussion, my understanding was that it was agreed that the Band's auditors should be asked to conduct a review for the period of the last 10 years and forward that to you to see if it would be satisfactory for the purposes of your client. I advised my client of this and, in consequence, was very surprised indeed by the contents and the tone of the letter dated June 5, 1995 that was signed by Ms. McIntosh.

I should add that in the numerous discussions I had with Ms. McIntosh on this matter, she was always courteous, cooperative and completely professional and, as I was quite sure we had a common understanding of the review the auditors would make, I did not attribute to her the authorship of the letter of June 5.

Yours very truly,

Maurice C. Cullity

MCC/dp

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

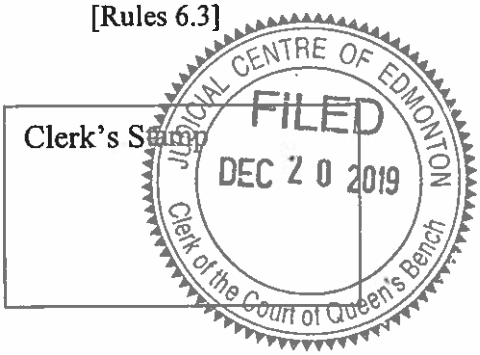
0425

	3-Nov-05	
WALTER FELIX TWIN	2004 DISTRIBUTION	$146,215.00

TAB L

Form 27
[Rules 6.3]

Clerk's Stamp



COURT FILE NUMBER:	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000, C. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI as Trustees for the 1985 Sawridge Trust;
DOCUMENT	**APPLICATION BY THE OFFICE OF THE PUBLIC TRUSTEE AND GUARDIAN FOR ADDITIONAL PRODUCTION**

ADDRESS FOR SERVICES AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Hutchison Law** #190 Broadway Business Square 130 Broadway Boulevard Sherwood Park, AB T8H 2A3 Attn: **Janet L. Hutchison** Telephone: (780) 417-7871 Fax: (780) 417-7872 File: 51433 JLH	**Field Law** 2500 - 10175 101 ST NW Edmonton, AB T5J 0H3 Attn: **P. Jonathan Faulds, Q.C.** Telephone: (780) 423-7625 Fax: (780) 428-9329 File: 551860-8 JLH

NOTICE TO RESPONDENTS: ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust; and SAWRIDGE FIRST NATION, as intervenor

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

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

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

Date: ~~January 16~~ February 5, 2020, or as otherwise directed by the Case Management Justice
Time: ~~10:00AM~~ 2:00

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

Before: The Honorable Mr. J.T. Justice Henderson in Chambers

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

Remedy claimed or sought:

1. An order requiring the intervenor, the Sawridge First Nation or the 1985 Trustees to provide an Affidavit that:

    a. Provides the tax filings and financial statements of the 1982 Trust from January 1, 1985 to present;

    b. Provides the 1985 Trust financial statements from 2005 to present and any other financial records that establish the current value of the $12 million debenture;

    c. Provides copies of the notices issued in 1985, with any attachments, to provide notice to SFN Band Members of the Band member meeting ultimately held on April 15, 1985 approving the transfer of assets from the 1982 Trust to the 1985 Trust;;

    d. Explains the notice and consultation process held for SFN Members prior to the April 15, 1985 vote;

    e. Provides Minutes of the 1982 Trustees meetings, held prior to April 15, 1985, including Trustee resolutions, referencing the proposal to transfer the 1982 Trust assets to the 1985 Trust and to hold Band members' or beneficiary meetings regarding the transfer;

    f. Provides Minutes of the Sawridge Chief and Council meetings, held prior to April 15, 1985, including Band Council resolutions, referencing the proposal to transfer

the 1982 Trust assets to the 1985 Trust and to hold Band members' or beneficiary meetings regarding the transfer;

g. Provides correspondence or financial reporting documents dated prior to April 15, 1985 that address the source of funds used to buy the assets now held in the 1985 Trust, including correspondence to or from Canada approving the original release of SFN capital and revenue funds for the purchase of those assets;

h. The complete exchange of correspondence between Sawridge First Nation, or its advisors, and Canada beginning in December 1993 and continuing into at least 1994, regarding the existence of the 1985 Trust and Canada's concerns in relation to s.64 and s.66 of the *Indian Act*;

i. Provides documents prepared prior to May 1985 and directed to the SFN, the 1982 Trustees and the 1985 Trustees from their respective financial or legal advisors, including Deliotte Touche (Ron Ewoniak), Davies Ward and Beck or David Fennell that address:
    i. Advice, comments or discussion regarding the 1982 Trustees' authority to implement, and recommendations for the structuring of, a transfer of assets from the 1982 Trust to a new trust;
    ii. Advice, comments or discussion regarding the consequences of an asset transfer for the interests of the 1982 Beneficiaries;
    iii. Advice, comments or discussion regarding the need to consult with, inform, or hold a vote by the SFN Members or 1982 beneficiaries in relation to a transfer of assets.

2. If necessary, an order adjourning the hearing of the Asset Transfer issue, currently scheduled to be heard January 16, 2020, until a date after production of the above documents and questioning on the same.

Grounds for Making this Application:

3. On November 27, 2020 the Court provided clarification respecting the scope of the asset transfer issue currently scheduled to be heard January 16, 2020. The OPGT understands from that clarification that the Court intends to make factual and legal findings concerning the nature and effect of the 1985 asset transfer in order to deal with the submissions of the SFN and the relief it seeks, to which the OPGT and Catherine Twinn have objected on the basis that it constitute a decision on final relief by a case management justice and would constitute a re-argument of the ATO, which is a final order that has never been appealed.

4. As part of the Court's clarification, it directed that if there were particular documents the parties needed to advocate their position or if the parties had suggestions as to how to conduct the Asset Transfer issue process in a manner that would come to a fairer result for everyone, the party should file an application.

5. The relief sought by the SFN puts the significant interests of the minor beneficiaries and potential beneficiaries the OPGT represents in grave jeopardy. The Sawridge Trustees do not oppose the relief being sought and appear, at least tacitly, to support it.

6. The SFN's November 2019 submissions put in issue matters and records that the SFN previously maintained were irrelevant, as set out in counsel for the SFN's March 10, 2016, correspondence to counsel for the OPGT. These matters have not been the subject of Questioning to date and the records in issue have not been produced;

7. The OPGT relied on the consent of all parties to the 2016 ATO and on SFN's agreement with the terms of the ATO and withdrew its application to require production from SFN on issues related to the 1985 asset transfer. The OPGT has not had the benefit of production or questioning on these matters as it relied on the ATO to have made those issues moot in the within proceeding.

8. SFN's November 2019 submissions rely on positions and representations by counsel, not evidence that has been tested by the parties.

9. The OPGT has taken the position that additional production is required if the Asset Transfer Issue hearing is to be based on a complete and accurate evidentiary record. The Supplemental Affidavit of Records of Catherine Twinn, sworn December 18, 2019, establishes that additional documents relevant to the Asset Transfer Issue do exist.

10. The SFN's submissions on the issues on which production is sought are currently assertions, unsupported by actual evidence, and untested.

11. These circumstances, which involved protection of the interests of minors and fiduciary obligations to protect the interests of minor beneficiaries, requires the highest standards of fair process be brought to bear. The OPGT takes the position that additional question on the Asset Transfer issue and the new documents, and additional production on matters relevant to the positions raised by SFN must occur before the Asset Transfer Issue is argued before this Court.

12. In relation to the request for documentation from advisors which may be the subject of privilege in the hands of the Trustees, such privilege does not arise against the beneficiaries of the Trust. Beneficiaries of a trust are entitled to the records of the Trustees and the Trustees may not raise a claim of privilege against the persons for whose benefit they hold them.. In the alternative, the OPGT submits that any privilege that may have once attached to these documents has been waived.

Material or Evidence to be Relied Upon:

13. All pleadings, affidavits and submissions filed to date in this proceeding;

14. Catherine Twinn's Supplementary Affidavit of Records sworn December 18, 2019;

15. The Affidavit of Roman Bombak, sworn December 19, 2019; and

16. Such further and other materials as Counsel may advise and this Court may permit.

Applicable Rules and Legislation:

17. Rules 2.10 5.2, 5.10, 5.11, 5.13 , 5.27 and 6.3,

18. Applicable Acts and regulations:

Any irregularity complained of or objection relied on:

19. The OPGT's maintains its position that the issue as framed by the Court and SFN:

    a. Represents as Collateral attack on the ATO;
    b. Constitutes a hearing of a matter of final relief. The OPGT has not consented to the assigned Case Management Justice dealing with final relief in the Asset Transfer Issue

    The OPGT's involvement and submissions with respect to this issue are without prejudice to that position.

20. The SFN's filed submission includes assertions that are unsupported by evidence. The SFN should be required to provided evidence on relevant and material matters or their submissions should be struck.

How the application is proposed to be heard or considered:

21. To be heard orally before Justice Henderson on ~~January 16~~, 2020 or as directed by the Court. February 5

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

TAB M

Action No.: 1103-14112
E-File Name: EVQ19TWINNW
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

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 ("1985 Sawridge Trust")

P R O C E E D I N G S

Edmonton, Alberta
December 20, 2019

Transcript Management Services
1901-N, 601 - 5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392
Email: TMS.Calgary@csadm.just.gov.ab.ca

TABLE OF CONTENTS

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

December 20, 2019	Morning Session
The Honourable Mr. Justice Henderson	Court of Queen's Bench of Alberta
D.C. Bonora	For the Trustee
M.S. Sestito	For the Trustee
C. Osualdini	For Catherine Twinn
E.H. Molstad, QC	For Sawridge First Nations
E. Sopko	For Sawridge First Nations
J.L. Hutchison	For the Office of Public Trustee and Guardian
P.J. Faulds, QC	For the Office of Public Trustee and Guardian
R. Lee	Court Clerk

THE COURT: Good morning, please be seated.

MS. BONORA: Thank you, Sir. I'll just introduce the parties if - -

THE COURT: Sure.

MS. BONORA: So Doris Bonora is speaking and she is here with Michael Sestito for the Sawridge Trustees, Ed Molstad, and Ellery Sopko are here for Sawridge First Nation, Janet Hutchison and John Faulds are here for the Office of the Public Trustee and Guardian, Crista Osualdini is here for Catherine Twinn and I don't believe Shelby (phonetic) Twinn is here. The - the application today unfortunately has just become a scheduling application.

THE COURT: M-hm.

Submissions by Ms. Bonora

MS. BONORA: We had -- when we were before you on November 27, you had made a direction that your prior ruling was that there was no need for further document production.

THE COURT: M-hm.

MS. BONORA: That is the ruling. That's what you said. If there was something in particular that any of the parties think they need in order to properly advocate their position you have prepared to at least on the surface to reconsider your ruling.

THE COURT: M-hm.

MS. BONORA: If you want to tell me what and why you need -- it might impact the decision. This is from paragraph -- or page 6 and 7 of the November 27. And sorry just -- I -- we order all of the transcript I am wondering if you would like you to send you the transcripts --

THE COURT: That would be helpful.

MS. BONORA: -- as we receive them.

THE COURT: Yes, that would be helpful.

MS. BONORA: So we will do that. You further went on to say -- so if any --

THE COURT: Just electronically.

MS. BONORA: Pardon me?

THE COURT: Just electronically.

MS. BONORA: Electronically?

THE COURT: Trying to avoid the paper.

MS. BONORA: Very good, Sir. So if any of the parties want to deal with either of these issues and you dealt with production as well as procedure and if there is any particular document that you want to see tell me in what in -- tell me what in particular you want and tell me how those document will impact you in a material way --

THE COURT: Yes.

MS. BONORA: -- or materially out -- impact the outcome of the decision. So just call my assistant and I have no free days between now and Christmas but there's always 8:30, there's lunch hours and there's 4:30 if we need to.

THE COURT: M-hm.

MS. BONORA: And, Sir, none -- obviously those applications did not happen.

THE COURT: M-hm.

MS. BONORA: From April 25th to November 27th there was seven appearances before you. And at least in three of those appearances the Office of the Public Trustee and Guardian addressed production.

THE COURT: M-hm.

MS. BONORA: And yet there is still no application for production before you.

THE COURT: M-hm.

MS. BONORA: And none that we have received.

THE COURT: M-hm.

MS. BONORA: Although, we received a letter, yesterday, from the Office of the Public Trustee and Guardian late in the day. That's -- that has a paragraph that I think is -- should be concerning to all of us, which says, (as read)

> … without prejudice to the Office of the Public Trustees and Guardians fundamental objections to the current transfer issue proceeding the Office of the Public Trustee and Guardian has taken the position that further protection is required.

And then proceeded to say that the reason there was no application was because Catherine Twinn filed the supplemental affidavit of documents and they wanted to see what was in there. But then the Office of the Public Trustee and Guardian goes on to say that there are documents they need. These documents would not have been in Catherine Twinn's possession and they would have been at least in Sawridge First Nation's possession.

THE COURT: Yes.

MS. BONORA: And, so, it is not necessarily my practice to try

and address bad behaviour in litigation, but I say this because I feel now we are off of January 16th, there is no way to achieve that. Mr. Molstad's going to address a new schedule for us. And that we want the application to be peremptory on the Office of the Public Trustee and Guardian because we don't think we're ever going to proceed unless it is peremptory on them. I think your direction was very clear that the applications for production should have happened between now and Christmas. And - and they were limited because your direction was already that no production was required. And so then we unfortunately I don't think can achieve it and we of course want the procedural fairness. But the problem is now because we don't have an application and it hasn't been made and now it's Christmas and all of those delays happened we won't be able to get to January 16.

THE COURT: Yes.

MS. BONORA: Catherine Twinn for -- filed a supplementary affidavit that was produced. Ms. Os -- there's a lot of video, Ms. Osualdini has offered to direct us to the parts of the video that are relevant. So I think Catherine Twinn has been an active participant and has followed your direction. But we do think that we need some direction from you now after seven appearances --

THE COURT: M-hm.

MS. BONORA: -- on this issue.

THE COURT: M-hm.

MS. BONORA: To get to a conclusion.

THE COURT: M-hm.

MS. BONORA: So, I - I am going to end my submissions there and allow Mr. Molstad to put forward a schedule that I think is generally in agreement among the parties.

THE COURT: Okay.

MR. MOLSTAD: I am not sure my friends have agreed to the schedule but I advised them of it this morning --

THE COURT: Okay.

MR. MOLSTAD: -- myself and Ms. Bonora have agreed to it and I

believe that it's going to be satisfactory to them. But we're advised that we will be served today with an application for production. We haven't seen it, so we don't know what the scope is or what will be requested. So the time line is that we be served today with the Public Trustee's application for production and as I understand it her submission is going to be served today as well. Am I correct, in that understanding?

MR. FAULDS: No it won't be served today but it will be served as soon as possible.

MR. MOLSTAD: Oh, okay. Well then we should set a day for the service of the submission. Is it - is it completed or is it?

Submissions by Mr. Faulds

MR. FAULDS: No it's not. And, My Lord, may I perhaps just before Mr. Molstad presents his proposed schedule if I might just provide a little bit of additional background or insight into what's - what's occurred.

THE COURT: Sure. Mr. Molstad we will give you plenty of opportunity to say whatever you'd like.

MR. MOLSTAD: Thank you, Sir.

MR. FAULDS: Thank you, I'd --

THE COURT: Mr. Faulds, it seem I should know what the issue is rather than letting you give the schedule without me knowing what the issue is.

MR. MOLSTAD: Yeah. True.

MR. FAULDS: Just - just by way of time lines.

THE COURT: Yes.

MR. FAULDS: On November the 27th --

THE COURT: Yes.

MR. FAULDS: Your Lordship clarified -- made a further clarification which included the comments which Ms. Bonora said --

THE COURT: M-hm.

MR. FAULDS: -- inviting any party to --

THE COURT: Yes.

MR. FAULDS: -- seek further production if they considered it essential, and to make any suggestions regarding process.

On December 3rd we received instructions to proceed with such an application. On December 6th we received advice that Catherine Twinn was filing a supplementary affidavit of records, the contents of which at that point we had no idea what it is about. As a result of that, on December 6th Ms. Hutchison advised all of the parties that we wished to review what Ms. Twinn was producing before we proceeded with an application. On December the 16th, that is this Monday, we received the actual production of the documents from - from Ms. Twinn and have had some opportunity to review it but certainly not a full opportunity to review its contents.

On -- yesterday we issued a letter to all of the parties advising that having reviewed -- having conducted at least a preliminary review it appeared that there were additional materials that we would be seeking.

THE COURT: M-hm.

MR. FAULDS: And we ser -- and we made two alternative suggestions. We suggested that if the parties were willing to voluntarily produce those materials that we might then take all of the steps necessary to conduct any questioning in relation to those materials before the 10th of January and that that would permit the application to proceed on January the 16th.

THE COURT: M-hm.

MR. FAULDS: If on the other hand the production was contested then it was our view that - that the matter would have to be adjourned somewhat, we'd anticipated perhaps we could use January 16th to argue about the production issues and proceed from there. My friend's schedule doesn't - doesn't take advantage of - of that. But that's - that - that's the - the factual background. I - I --

THE COURT: But what - what are we looking for? Like what - - how -- what --

MR. FAULDS: We're - we're looking for things that directly relate to assertions in the - in the Sawridge First Nation's submission.

THE COURT: M-hm.

MR. FAULDS: On which there has been no production, or for which there - there is no current --

THE COURT: M-hm.

MR. FAULDS: -- evidentiary support.

THE COURT: M-hm.

MR. FAULDS: For example, we are looking for documents relating to the status of the 1982 Trust. You may recall that Mr. Bujold the corporate representative of the Sawridge Trustees gave evidence in response to a question from Mr. Molstad in questioning in the run up to the August 2016 order that the 1982 Trust did not exist.

THE COURT: M-hm.

MR. FAULDS: Mr. Molstad contests that in his submissions --

THE COURT: M-hm.

MR. FAULDS: But we have no records that - that would allow that - that assertion to be assessed.

THE COURT: So who -- to that -- and I apologize if - if I don't understand the complexities as well as I should at the moment. But to that I say so what. The trust either exists or it doesn't right now. How does that effect the interpretation of Justice Thomas' order which is really what we are looking for right now? How - how - how does that?

MR. FAULDS: Well, I suppose that if the trust ceased to exist on -- in 1985 are we understand --

THE COURT: Yes.

MR. FAULDS: -- to be the case. Any suggestion that the assets

are held for the 1982 Trust is moot. There is --

THE COURT: The beneficiaries didn't go anywhere. They were still there. They are still there today. The '82 beneficiaries. So the assets can be transferred to 1985, and held for the '85 beneficiaries or held for someone else. That - that is one of the issues that has to be assessed in the context of what Justice Thomas meant when he gave his order.

MR. FAULDS: Right. And --

THE COURT: So how -- whether the trust exists or not why - why - why --

MR. FAULDS: Well perhaps again our -- we have appeared before Your Lordship a number of times and - and - and - and I think our struggle with the issue has been apparent. Our understanding is that Your Lordship intends to address what the legal and factual situation was immediately prior to the granting of the asset transfer ordered by Justice Thomas.

THE COURT: Right. I think I have to do that because we have to know what the landscape was when Justice Thomas set about to grant the order. Was - was he doing nothing more than saying everything was done properly in 1985 and therefore I am just confirming that everything was done appropriately, so therefore I am confirming the asset transfer, or was he saying, well no things were not quite done properly but I am going to get an order to clean up some of the errors that were made. And if it is that scenario was he intending to clean it up completely by saying the beneficial ownership was moved to the 1985 beneficiary. So, I mean I -- it's -- I don't think I could try to interrupt Justice Thomas' order without having a - a clear understanding of what in fact and in law the status was immediately prior to him granting the order. That - that is what I intended to convey and that is my plan for trying to deal with this, and I will be guided by your submission.

MR. FAULDS: And in -- and on that basis the - the Public Trustee is of the view that the landscape relevant to that determination would include whether or not the 1982 Trust continued to exist after the transfer occurred.

THE COURT: Okay. I am -- you - you could be right. I - I can't see it right now. But you -- you know I haven't given it any thought until just this minute, so you - you can --

MR. FAULDS: Sure. That -- sure that - that - that's --

THE COURT: -- persuade me of that.

MR. FAULDS: -- that's - that's one instance --

THE COURT: Okay.

MR. FAULDS: -- of the kind of thing.

THE COURT: Yes.

MR. FAULDS: Another instance there is reference in the -- in - in our submissions that were filed initially relating to the fact that the 1985 Trust contained assets which did not originate in the 1982 Trust.

THE COURT: Okay.

MR. FAULDS: And one of the examples of that was a $12,000,000 --

THE COURT: Debenture.

MR. FAULDS: -- debenture.

THE COURT: Yes. No, I see that.

MR. FAULDS: And in the - the Sawridge First Nation's submissions there are submissions to the effect that they understand that debenture is of limited value. If it - it seems to me that whether or not a 1985 Trust has $12,000,000 in it but originates from somewhere else or $10 in it that originates from somewhere else could be of significance.

THE COURT: I am not seeing how, but the --

MR. FAULDS: Well if the na --

THE COURT: Could be - could be right.

MR. FAULDS: If there are assets in the 1985 Trust.

THE COURT: Yes.

MR. FAULDS: Which did not originate in the ’82 transfer --

THE COURT: Yes.

MR. FAULDS: And therefore were not affected by Justice Thomas’ order they’re simply assets placed in that trust.

THE COURT: Sure.

MR. FAULDS: Then we have to still deal with a 1985 Trust.

THE COURT: All right. Well sure, whatever, yes --

MR. FAULDS: And - and - and that would --

THE COURT: Sure. Okay --

MR. FAULDS: -- involve the -- you know the --

THE COURT: -- so you want some - you want some other materials, okay. So what are we going to do?

MR. FAULDS: So -- well that’s the - that’s the background, My Lord.

THE COURT: Okay.

MR. FAULDS: And - and as I say, Mr. Molstad has the --

THE COURT: Yes. Yes.

MR. FAULDS: -- schedule which he was going to now speak to.

THE COURT: Yes.

MR. FAULDS: And I just wanted to -- I wanted - I wanted to respond to the suggestions that the OPGT was acting in a dilatory fashion and was acting improperly which --

THE COURT: Yes.

MR. FAULDS: -- obviously --

THE COURT: True.

MR. FAULDS: We - we - we can't accept.

THE COURT: Yes, I am not - I am not pointing fingers at anyone and I am sure Ms. Bonora was not trying to point fingers at anyone. But at - at the end of the day, you know, it is time to - to make some real progress on this. And, you know, when we start talking about document production in most lawsuits the concept of diminishing returns comes into play. And you can - you can spend forever chasing down every scrap of paper and the last few pieces of paper that you manage to get generally have next to no impact on the outcome. And so at some point you have to say to yourself, you know, when - when do we have enough of a factual background in place so that -- (UNREPORTABLE SOUND) excuse me. Excuse me. So that we can come to a proper determination. And that is really what I am driving at. And that is why I opened the window to permit any of the parties to - to come forward and if there is something that will be helpful, I want it. Trust me, I want it. But I don't want to be in a situation for the next year we are chasing down that last scrap of paper that may have totally marginal value and isn't going to impact my decision in any event.

MR. FAULDS: And - and --

THE COURT: Because ultimately the - the facts -- the raw facts are pretty well established in terms of when the trusts were created and the purpose of the trusts were created and what the flow was. It is -- what - what - what arises from those series of transactions that was presented to Justice Thomas when he made his decision. That - that is --

MR. FAULDS: Yes. And --

THE COURT: -- that is what - that is what I am after but --

MR. FAULDS: I -- and - and My Lord, I -- I hope the OPGT is not giving the impression that it is chasing the last scraps of paper. This is an issue that is the legal effect of the asset of the transfer. This is ground which was not plowed before Justice Thomas.

THE COURT: M-hm.

MR. FAULDS: This is ground which is OPGT was beginning to

explore before the asset transfer was - was approved.

THE COURT: M-hm.

MR. FAULDS: And which the OPGT then considered need not be explored at that time --

THE COURT: M-hm.

MR. FAULDS: -- because the asset transfer order appeared to resolve matters. So from a perspective --

THE COURT: Well it may well have -- it may well have Mr. Faulds that is one of the options.

MR. FAULDS: Yeah.

THE COURT: That this may be totally over and if so we will - we will - we will move on in that direction.

MR. FAULDS: So with -- so -- and - and we just -- then the OPGT just wants to make it clear we're dealing with substantial interest of minors who the OPGT was appointed by the Court to --

THE COURT: I am --

MR. FAULDS: -- to protect them --

THE COURT: I am totally painfully aware of the consequences of any decision that I make. I am totally aware of that and it will have an impact on many, many lives. But - but --

MR. FAULDS: So --

THE COURT: -- the reality is I want to come to the right decision. Okay.

MR. FAULDS: Yes. And - and the - the OPGT of course wants to assist in that process.

THE COURT: Good. Thank you.

MS. OSUALDINI: My Lord, if I might speak as well --

THE COURT: Sure.

MS. OSUALDINI: -- about an issue that has arisen this morning that may require some scheduling.

THE COURT: Does this - does this fit into Mr. Molstad's schedule or --

MS. OSUALDINI: It does. It's an issue raised by Mr. Molstad.

THE COURT: Oh okay.

MR. MOLSTAD: Perhaps I should speak to it first before you apply to --

MS. OSUALDINI: Okay. Well I'd like to start because the process was initiated by our office. I'd like to speak to it first, if that pleases the Court.

THE COURT: Sure.

Submissions by Ms. Osualdini

MS. OSUALDINI: So as mentioned by Mr. Faulds our client served a supplemental affidavit of records earlier this month and following your directions about the types of issues and the nature of the arguments that you are seeking at the asset transfer application.

THE COURT: M-hm.

MS. OSUALDINI: So following that our client re-reviewed her records, as the Court will know she's a former trustee, she was a trustee for 30 - 30 some odd years in trust.

THE COURT: Yes.

MS. OSUALDINI: We reviewed her records and located some records that came -- unadvised came into her possession as a trustee and were part of the Trustee's records. Those records speak to the 1985 asset transfer, it speaks to the source --

in part speaks to the source of funding for the assets that - that were transferred to 1985 Trust. And it also speaks to beneficial distributions being made from the 1985 Trust. All of which when we reviewed believed were relevant to the issues before the Court.

THE COURT: Okay.

MS. OSUALDINI: And directly respond to some of the issues. Particularly issues being raised by the intervenor. When we first advised the parties that were intending on circulating a supplemental affidavit of records the trustee's requested that that they had the opportunity to review it first as they were concerned about other privilege documents were in that doc -- were in our affidavit of records, which we did, and subsequently it was resolved by saying, go ahead and distribute the records to the Office of the Public Guardian and Trustee but we reserve our rights to say that they are privileged.

This morning Mr. Molstad brought to my attention the *Code of Conduct* for lawyers, this is the first time this was brought to my attention. With a suggestion that Mr. Molstad's client believes those are privileged records belonging to his client. So at this point now that the code has been brought to our attention we are going to require Court direction on how to resolve this. It's my understanding that these are not privileged records because they're coming from the Trustee records. If Mr -- if the documents originate with Mr. Molstad's clients it would appear to me that the privilege is waived when they were provided to another party.

THE COURT: M-hm.

MS. OSUALDINI: But it appears - it appears that a dispute is wanting to be asserted about these records and certainly our office does not want to be violation of the code.

THE COURT: M-hm.

MS. OSUALDINI: So we're going to require direction on what we are to do.

THE COURT: Okay.

MR. MOLSTAD: Do I get a chance now?

THE COURT: So, you are - you are on, Mr. Molstad.

Submissions by Mr. Molstad

MR. MOLSTAD: Thank you, Sir. First of all I just want to speak to the schedule that -- and proposal, and the reason that I proposed today for the filing of the Public Trustee's application and also for the submission to be filed is that yesterday the Public Trustee's counsel sent us a letter with a proposed schedule that had as item 1 the December 20, 2019 OPGT production application and submission file. So I assumed that they were read to go today but if they're not tell us when.

MR. FAULDS: My Lord, I would suggest having regard to the schedule that Mr. Molstad is proposing now I would suggest the 2nd of January, which is technically free - free working days for him.

THE COURT: So - so you are planning that - that I would hear the application?

MR. FAULDS: We're planning that you -- that Mr. Molstad -- I don't think that's offensive to the schedule that Mr. Molstad is going to suggest --

MR. MOLSTAD: My schedule is based upon the letter that they sent me yesterday and that says December 20th Public Trustee files application and submission. If they want a later date, I think that's what my friend is saying that they want a later date. We're proposing January 17th to reply to the production and February 5th at 2:00 to hear the application before you, Sir, as we're advised that you're available on that date at 2:00.

THE COURT: Just hold on a minute. Yes, I think I am Edmonton that week. Yes.

MR. MOLSTAD: And - and May 19th we're advised you're available that full day for the application in relation to the asset transfer.

THE COURT: Oh just a minute now. I've got a 2019 calendar that is not helping me out. I should have brought my --

MR. MOLSTAD: We were advised I think was it yesterday by -- or the day before? Very recently.

THE COURT: May 19th?

MR. MOLSTAD: May 19th for the full day for the asset transfer issue.

THE COURT: Yes. I - yes, I think -- okay.

MR. MOLSTAD: And - and if - if this schedule --

THE COURT: So the trial coordinators have told you that I am available on that day?

MR. MOLSTAD: They have. Yes, yeah.

THE COURT: Okay. Okay.

MR. MOLSTAD: And if these dates are set we would ask that they be set based on your direction and that they be set peremptory in relation to the parties including the Public Trustee.

And I just want to say in terms of our past experience the Sawridge First Nation has been the respondent in an application for production by the Public Trustee previously that we say was devoid of merit and which was dismissed in terms of its application.

THE COURT: Yes.

MR. MOLSTAD: And you don't have to take my word for it you can read Mr. Justice Thomas' decisions in that regard. In that case we asked for cost against the Public Trustee on the basis that they not be reimbursed.

THE COURT: M-hm.

MR. MOLSTAD: And the learned justice reserved but he ultimately decided that they would be. We want them to be on notice that if -- we haven't seen this application.

THE COURT: M-hm.

MR. MOLSTAD: But if this application is devoid of merit we will on behalf the Nation seek instructions to seek costs as against the Public Trustee on the basis that they not be reimbursed by the trust, and I want them to be aware of that.

THE COURT: Okay.

MR. MOLSTAD: Secondly, Sir, the documents received from Ms.

Osualdini's office on December 16, we've asked her to advise us how and in what capacity her client came into possession and we heard today I think from her that they were part of the trust documents. Keep in mind that her client has served in different capacities and at times she has acted as legal counsel on behalf of the Sawridge First Nation as well as having served as a trustee. And, we've also asked for particulars of the redacted documents because documents had been redacted with no information as to the reason --

THE COURT: M-hm.

MR. MOLSTAD: -- that they have been redacted. I understand that she'll be providing particulars of that to Ms. Bonora and providing her with copies of what has been redacted and they can then decide whether we should see it. But based upon what we seen so far the documents are clearly solicitor client privileged in any respect, some are not, but most are.

THE COURT: M-hm.

MR. MOLSTAD: And we say, Sir, we don't have to make an application in relation to these documents. They're in their possession and we can simply make a demand pursuant to 7.2-13 of the *Code of Conduct.* That these privileged documents are in their possession and that they be returned to our offices forthwith and that's what we intend to do in relation to this matter.

So if you - if you agree with the schedule, Sir, and I'm not sure what day -- they told us yesterday that they would be filing their submission today and I believe now they want to change it to January 2nd, is that correct?

MR. FAULDS: That's my suggestion, My Lord. Where -- our -- just to be clear, our application and supporting affidavit are ready to be filed.

THE COURT: Okay.

MR. FAULDS: If - if the parties wish I can circulate them now with my undertaking to file them and provide them with a copy --

THE COURT: Sure.

MR. FAULDS: -- that was filed with a stamp page.

THE COURT: Sure.

MR. MOLSTAD: Today is fine, I don't -- we don't need them now. But you know --

THE COURT: Okay.

MR. MOLSTAD: -- we'd like to get the submission in --

THE COURT: Sure. Okay.

MR. MOLSTAD: In a timely way.

THE COURT: What we are going to do first is we are just going to take a 2 minute break. I want to go get my calendar because I know that you may have spoken with a trial coordinator but I don't want to start making firm dates.

MR. MOLSTAD: All right. Fine, Sir.

THE COURT: And then have --

MR. MOLSTAD: Yeah.

THE COURT: -- have to get back to you to try to get a reasonable work -- so I will be back in just --

MR. MOLSTAD: Yeah.

(ADJOURNMENT)

Discussion

THE COURT: Please be seated. Sorry Mr. Molstad you were in the middle of your submissions when I interrupted you.

MR. MOLSTAD: Oh no I - I - I completed my --

THE COURT: Okay.

MR. MOLSTAD: I - I am concerned about procedural fairness.

THE COURT: Sure.

MR. MOLSTAD: And that's why I proposed that, Sir.

MS. BONORA: Sir, just -- Mr. Molstad's schedule I think just misses a few dates that I think we should also set so that we are sure to get to February, at least to February 5th. And, so our proposal is that all questioning on -- in respect of the production be done by January the 17th, and then briefs be filed by January 24th, and the replies by January 31st. My friends had offered to file a brief with their application and we're suggesting that's unnecessary that one brief by the OPGT would be sufficient especially, you know, given the costs involved in a brief we would prefer they do one as opposed to two.

THE COURT: M-hm.

MS. BONORA: Given that we have to pay those costs. And we think that's more efficient in any event. And so, if we could just set those dates for questioning and briefs, as well this morning, as directed by the Court, so that there is no chance that we will also lose our February 5th date. I asked my friends if we could set those dates, they had some difficulties, so I'll allow them to respond to those dates.

MR. FAULDS: My Lord, the - the -- in general terms, that sounds reasonable, and I thank my friend for the suggestion that the OPGT just file a - a - a single brief --

THE COURT: Yes.

MR. FAULDS: -- once whatever questioning and so forth has - has conducted and with - with same right of replies everybody else has. They -- one of the questions that now arises in the relation to the January 17th dates suggested by my friend for the conclusion of questioning is there has been this preliminary privilege issue that has been raised which may affect the ability to conduct the questioning. And so it - it would seem that that issue requires resolution in order that we -- in - in order that the questioning can occur. And that the OPGT is not directly concerned in that --

THE COURT: M-hm.

MR. FAULDS: -- appears to be an issue between the Saw -- primarily between the Sawridge First Nation and Ms. Twinn. But that -- we just flag that but that's one issue --

THE COURT: So you - you say February 5th is potentially in jeopardy?

MR. FAULDS: Well I am - I am just -- I am just identifying that as - as an issue that's been raised --

THE COURT: Yes.

MR. FAULDS: -- because of that - of that controversy, yeah.

MR. MOLSTAD: The February 5th date was a date that we simply proposed that Sawridge would file a reply. The dates --

MS. BONORA: No, no.

THE COURT: No.

MS. BONORA: That would be the date for the hearing.

MR. FAULDS: No, that was the hearing.

MR. MOLSTAD: Oh sorry.

MS. BONORA: Yes.

MR. MOLSTAD: Pardon me, the hearing of the -- oh, sure, yeah, you're right, sorry.

MS. BONORA: Sir, I don't think that that's a very extensive application. You had offered to do a production application either at 8:30 or noon or at 4:30 and perhaps sometime before January 7 -- before let's see perhaps January 12th we would allow those parties to bring an application before you to deal with the privileged documents, if that's in fact necessary. So if we could deal with that before January 12th. The original schedule by the OPGT certainly had a number of things happening before January 16th and so I think that could occur, if you would indulge them in an early morning application on that to preserve the February 5th date.

MS. OSUALDINI: And, My Lord, just in terms of the privilege issue, it appears that part of the privilege issue is - is disseminating from where these records came from. Did they come from the Trustee records or did they come from the SFN's records. So we're also going to need disclosure and affidavits from the parties that speak to those issues because my client's going to say that they come from the Trustee records, and I understand the Trustees are saying that they don't all from from the records,

so that's going to be a very relevant determination for you to have to make. It's -- the privilege application is not -- I think as - as simple and able to be heard on a weeks' notice over Christmas as - as is being suggested.

THE COURT: Well, there is no application on privilege at the moment. Mr. Molstad's position is either you will get a letter this afternoon demanding the return of the documents and you will either comply with his demand or you won't, and if you don't presumably you better do something about it. So it looks to me like the onus is on you to do something and unless I have misunderstood the landscape.

MR. MOLSTAD: Yes, that's - that's the position he takes, Sir.

THE COURT: So --

MS. OSUALDINI: Well it appears to me - it appears to me that the rule -- I'm sorry My Lord, this was only brought to my attention this morning so I haven't had time to properly prepare, but it doesn't - it doesn't appear that there is a -- the rule is clear about whose obligation it is to - to bring the application. Because we - we very clearly advised the parties that our understanding is these aren't privileged records, and I would say if Mr. Molstad believes otherwise there is an onus upon him to bring an application to assert his privilege.

THE COURT: Well, I guess we better have an application to determine who has the onus to bring the application. You know, I -- at - at some point - at some point all the money in this trust is going to be gone paying lawyers, to be totally honest, and there is going to be nothing left for the beneficiaries no matter who they are if - if keep going around in circles like this. So, what are we going to do about the schedule then?

MS. BONORA: Sir, could we just say by February -- sorry January the 12th their applications will be made with respect to privilege and the parties can determine who has to bring it. We won't decide today whose onus it is. The parties will decide obviously whose obligation that is. And that I think we also want to say that all applications on production by any party have to be brought. The 12th is a Sunday, Sir, so the 13th would be the date that I am proposing. And --

THE COURT: So -- and then we would have to try to find some time to hear that application.

MS. BONORA: Yes, I am suggesting that it has to be brought before that date.

THE COURT: It has to be brought before -- the application has to be brought before the 13th?

MS. BONORA: Yes.

THE COURT: Okay. Is that -- and -- yes, you could try to find some time to do that if you like but why --

MR. FAULDS: My Lord, I wonder if we might at minimum snag the dates that are available which appear to be available February the 15th and March the 19th. So --

MR. MOLSTAD: February the 5th.

THE COURT: February the 5th.

MR. FAULDS: February the 5th, I am sorry. Yes February the 5th and - and May the 19th.

THE COURT: Yes. Well I can - I can tell you that when the trial coordinator tells you that those days are available that means that I am in Edmonton on those days and it doesn't mean to say I am doing nothing else that day, and you know, if you want an opportunity on a case like this to have a meaningful motion, you know, I would like an opportunity to read the materials before I steer -- start hearing you. And so when I look at both February 5th and May 19th, when I look at what is going in the days and weeks leading up to that, you know it -- it is -- now that is not your problem that is - that is my problem. So, whatever we will - we will books those days and I will do whatever so --

MR. FAULDS: Yes I -- it just --

THE COURT: But it - but it -- but what I am saying is that if you know this - this is not something that I am going to be able to sit and at the end of hearing you say, yeah, yeah sure you win, go ahead, go ahead and do whatever you want. But it - it takes a little energy to - to properly review this stuff. And -- whatever.

MR. FAULDS: And - and we're - we're aware that this was complex and the - and the parties -- the parties experience some of what Your Lordship is --

THE COURT: M-hm. Right.

MR. FAULDS: -- referring to as well. Given the nature of these issues and the --

THE COURT: Yes.

MR. FAULDS: -- that have arisen.

THE COURT: This is -- what I am saying this isn't something you can do off the corner of your desk.

MR. FAULDS: Yes, yes I -- we --

THE COURT: Which - which is what most case managements are. Getting together and saying, yes you can bring your notion on 2 days from today or whatever it is -- these -- this is different?

MR. FAULDS: Yes. Yes. That has -- that has not been the history of this proceeding since the outset, I think that is fair to say.

THE COURT: Yes. Okay.

MR. FAULDS: But if we had -- it seems we are looking for three - three determinations one is a determination of this privilege issue; two, is a determination of the production issues that will follow that; and then three, is the actual asset transfer order and those - those events aren't -- now - now it's clear those aren't going to have to be determined and --

THE COURT: M-hm.

MR. FAULDS: And so whatever dates that the Court is able to provide that are suitable.

MS. OSUALDINI: And, My Lord, I just might stand up at this point.

THE COURT: Yes.

MS. OSUALDINI: I have advised my friends that the May 19th date isn't available in my calendar, it requires some cancellations, and I was hoping there might be another day to -- for the actual asset transfer application.

MS. BONORA: Sir, it is difficult to find full days if we don't chose May 19th we may be off to the end of the year. Certainly into the fall. We think the parties have to make some adjustments in order to have this procced and so we're asking you to set May 19th as a peremptory application date. We also -- in terms of the actual scheduling you had also made reference to the ability of parties to bring an application for procedural fairness.

THE COURT: M-hm.

MS. BONORA: And, so I wonder if we could just have an all-encompassing January 2nd, 2020, every application that is going to be brought will in fact be brought by that day. And at least filed and served because we - we can't have the position where you know we deal with production --

THE COURT: M-hm.

MS. BONORA: And then suddenly we are back to square one on the - on the issue of fairness. And so, I wonder if we could have that as an all-encompassing day. And so then on the days we have our -- with my proposal, subject to my friends' submissions January 2nd, January 12th for privileged -- 13th I'm sorry. And then January 17 for questioning, first briefs, primary briefs on the 24th, reply briefs on the 31st and then the production application on February 5th and the asset transfer issue on May 9th, with those dates being peremptory. Sorry May 19th -- ha --

THE COURT: So the only issue we have is that one of the counsel isn't available the 19th and is that a hard --

MS. OSUALDINI: Well I can make some calculations but I was hopeful that there might be a different day.

THE COURT: Well, I am sure there is a different day but I mean try - trying to - trying - trying to find a day when this array of people and myself are available is going to be tough. That is presumably the reason we are off to May 19th. Is there anything before that Mr. Molstad? Like what's the --

MR. MOLSTAD: We weren't advised of any dates before that, Sir.

MS. BONORA: I think that was --

MR. SESTITO: Yeah, no, those --

MS. BONORA: Those were dates the Trustees were --

MR. SESTITO: -- those were the only -- May 19th we're advised was the only full day on your calendar that has been set so far.

MS. HUTCHISON: And, My Lord, we just spoke to Ms. Hinz yesterday so that's pretty current information I think about your calendar.

THE COURT: Okay. Well I - I -- you know, I don't know what to say. I -- I mean I - I gather it is the end of the fall. The fall, my time in the fall at the moment is free. Because the fall schedule hasn't come out, but the fall is a long way away. You know for something that has been kicking around for 9 or 10 months already going to the fall would be problematic for me. So, like it -- are -- is this a major imposition to you or --

MS. OSUALDINI: I mean I'll make my schedule work I was just hoping that I would -- there might be some other date available.

THE COURT: Well, it - it doesn't -- it doesn't look like that is likely to me. So I apologize if it is problematic for your personal schedule, and I hate to do that to you but I am not thinking there is much alternative here unless we put it off into the time horizon that is totally unsatisfactory.

MS. OSUALDINI: Okay.

THE COURT: Okay.

MR. FAULDS: My Lord, Ms. Bonora proposed a schedule which -- well it's a very tight time line and which - which doesn't necessarily resolve the concern that we identified, but the privilege issue may not actually be resolved before the deadline for conducting questioning on the documents. And so if -- I - I don't know if - if this is feasible but I mean if February the 5th which we know is available were the date to resolve the - resolve the privilege issue, the question then would be is there some dates say within the - the next month, say you know by early March when we could address the production issue before Your Lordship and then that -- and then we have March the 19th for the actual --

THE COURT: May - May the 19th.

MR. FAULDS: Yeah -- or May, I am sorry, I keep on saying

March, yeah, May 19th for the actual hearing if -- that would seem to --

THE COURT: Well we have the whole day booked on the 16th of January. That - that time is now all --

MR. FAULDS: Of course, yes. Then perhaps we could do the privilege subject to - to my friends if we could deal with the privilege issue on the 16th, deal with the production issues on the 5th. Right, and then - and then we would be looking at - at -- in terms of the -- what's - what's - what's produced is clarified then you know I am sure the parties can work out a schedule for any final examinations and solutions in -- to work towards the May 19th date. I wouldn't imagine that's a problem.

MS. BONORA: Sir, we - we - in fact do find that problematic. We - we though there was a clear direction that the app -- the production application should be filed.

THE COURT: M-hm. Yes.

MS. BONORA: At least filed by today.

THE COURT: Sure.

MS. BONORA: And it hasn't been.

MR. FAULDS: But it will be.

MS. BONORA: And so, we I think need dates directed by the Court.

THE COURT: M-hm.

MS. BONORA: So that we don't have another delay and another postponement that puts us into the fall.

THE COURT: M-hm.

MS. BONORA: And so, my new proposal is then, Sir, is that privilege will be deal with by -- on the January 16th date, and then that just puts us into some tighter timelines, questioning by the 22nd, primary briefs by the 28th, replies by the 31st. And the Trustees then are taking the smallest amount of time in getting their reply ready for -- in the 4 day period. So that then we can for sure get to the February 5th by

giving you still only 5 days to read our reply briefs.

MS. HUTCHISON: My Lord, just one comment. At the moment the schedule we're discussing doesn't allow for questioning after the production application is decided, which sort of presupposes there will be no further production and that's a bit problematic if there is -- if there is further production it's quite likely that there will be questioning on it because we will never have seen those documents before. And there will only be production of them if they're relevant and material to the asset transfer issue. And it also raises the question, My Lord, about the appropriateness of some of these dates being peremptory. I think you are hearing that there are a lot of pieces -- moving parts at the moment. I ought -- I am hearing all counsel --

THE COURT: Yes I am - I am - I am hearing a lot of that. But I have yet to hear anything that tells me that there is anything material that is going to have any impact on the decision that I am going to make on this -- on this asset transfer issue, like --

MR. HUTCHISON: With res - with respect, My Lord, that is not something this Court can determine until the application is before it.

MS. BONORA: Sir, two points, I agree with my friend we have not addressed questioning after production but we have from February 5th to May 19th to deal with that. And if there's a problem we can come back to you. The other thing as presupposes is that there actually be a production application. It was our view that we would try and be cooperative in the list of ques -- documents that are being requested. We think there is probably zero documents that will be produced. Perhaps -- sorry, no, there is a - a couple -- perhaps a couple in respect to the debenture issue because that has never been an issue. The rest -- we will -- I am sure the answer will be they have all be produced.

We started the transfer issue -- I just wanted to say this, we started the transfer issue on the basis that there were no documents to show that the transfer was done properly. And that's why we needed the Court to confirm it. So that's the whole basis for the transfer issue is that there are no documents. But we will look at our clients -- our - our friend's application. It is our intention to be cooperative. We wrote a letter earlier this month saying please give us a preview we can start to work on it and we had no response to that. And that is - that is fine. But, we also didn't get an application. So that is why we're saying, I think at this point we need the Court's direction on dates so that we can get to at least February -- well January 16th and February 5th.

THE COURT: Okay. Does anyone have any concerns with the dates that have been proposed? The deadlines that have been proposed?

MR. FAULDS: Could - could Ms. Bonora just please repeat, I -- sorry, I wasn't -- didn't make a note of that.

MS. BONORA: Sir, I would say all applications of any sort addressed in November - November 27th hearing have to be filed - filed and served by January 2nd. That any applications with respect to privilege have to be bought - brought by January 12th and will be heard on January 16th.

THE COURT: Filed by January 13th?

MS. BONORA: 13th.

THE COURT: I keep remembering the 12th is a Sunday.

THE COURT: I will - I will -- I am so sorry. So any applications with respect to privilege will be brought by January 13th and heard on January 16th. The questioning with respect to the applications that are filed on January 2nd will happen by January 22, the primary briefs on production will have --

THE COURT: The question - the questioning on those applications will take place by January 22nd?

MS. BONORA: Correct.

THE COURT: Yes, I thought you said the applications but -- yes.

MS. BONORA: Sorry the questioning on all the applications that are filed will happen by January 22nd. The primary briefs with respect to the February 5th application will happen on January 28th, the replies to those primary briefs will be filed by January 31st, and the February 5th application -- with respect to the applications filed January 2nd will be peremptory, so that's on February 5th, and the asset transfer issue will happen on May 19th.

MS. OSUALDINI: My Lord, just so I am understanding so no dates are being set at this point and by court order for the OPGT's questioning of Catherine Twinn or Paul Bujold on the produced documents, is that correct? You are talking about questioning on affidavits filed in support of the applications only, I am just not clear on that.

MR. SESTITO: I - think our intention is that all questioning that will be required in advance of the February 5th application occur on or before the 22nd of January.

MS. OSUALDINI: And the February 5th date would be for production -- including the production application is that --

THE COURT: That is the principle reason for February 5th.

MS. OSUALDINI: Yes. Okay. And so then after February 5th we're all in agreement that there may be -- if there is a production, even if -- and if the privilege issue allows production of the documents in dispute there will be -- there well -- maybe questioning before May 19th. And we're just not setting dates or deadlines for that?

MR. SESTITO: That -- we will - we will need to get the results of the February 5th application and it may involve another appearance.

MS. OSUALDINI: Yes, thank you, Mike. Thanks.

MS. BONORA: Sorry, Mr. Mol said - said I was confusing and I probably was. The applications are being filed by January the 2nd, all applications. And then the briefs are being filed -- the primary briefs are being filed by anyone who is seeking production on January 28th.

MR. FAULDS: No, no their brief has to be filed January 2nd.

MR MOLSTAD: And the brief -- their application for production is filed today. Their brief in relation to that application is filed January 2nd.

THE COURT: You -- actually that was the old position we have moved from there.

MS. BONORA: Yes. I know there is so many dates planned.

MR. FAULDS: Ms. - Ms. Bonora proposed that we not do - do repetitive briefs --

THE COURT: To minimize the number of briefs.

MR. FAULDS: Yeah.

MR. MOLSTAD: Well, you know, you are going to give me two days to reply? No that is not enough. If you want to file your brief on -- if I am filing a reply to your production application, in which I will likely be perhaps seeking costs against the Public Trustee without indemnification, I - I don't want to be in the position where you have -- we have to -- you're filing on the 28th and we have to file on the - the 31st.

THE COURT: Yes. That is pretty tight Mr. Mol - or Mr. Faulds.

MS. BONORA: So we -- we will concede that there needs to be two briefs then, Sir.

MR. MOLSTAD: Yeah we want their brief now. It was to have been filed and served today.

THE COURT: When - when can you realistically get that Mr. Faulds?

MR. FAULDS: Well My Lord --

THE COURT: Cause Mr. Molstad needs a couple of weeks at least to respond, I think is what he is saying.

MR. FAULDS: Sure. So -- well then let's - let's -- if I can look at the calendar again. But working backwards from Mr. Molstad would file --

MR. MOLSTAD: We want it January 2nd that's when we want it.

THE COURT: Can you do January 2nd?

MR. FAULDS: As somebody said you can't always get what you want.

MR. MOLSTAD: Well you told us you would give it to us. It was your date.

MR. FAULDS: Sure, I am -- sorry I -- My Lord, I had lost my calendar.

THE COURT: Well January 2nd is a - a Tuesday.

MR. FAULDS: It's - it's a --

MR. MOLSTAD: It's a Thursday.

THE COURT: Or a Thursday, sorry.

MR. FAULDS: It's a Thursday. It's - it's the day after - after --

THE COURT: Right. So --

MR. FAULDS: -- New - New Years and I - I mean I will - I will - I will say, I was attempting to be as cooperative as possible in terms of getting things moving, but given - given the way things have unfolded, I am going to suggest January the 7th.

THE COURT: Mr. Molstad, will that give you enough time to - -

MR. MOLSTAD: Yes.

THE COURT: -- respond.

MR. MOLSTAD: Thank you, Sir.

THE COURT: January 7th for the Public Trustee to file a brief.

MS. HUTCHISON: I apologize, My Lord, I -- if counsel could -- when would briefs on the privilege application be made -- filed? I am not clear on our schedule for that.

MS. OSUALDINI: Yeah, I was just about to say that. Because, My Lord, yeah it appears even in terms of a privilege application that we need to give some structure around evidence because it sounds like evidence is going to be important on sourcing the documents. And my other suggestion too is perhaps today given that we're running under very tight time lines to do things is that we decide today who is bringing the application because we don't really have a lot of time to waste on determining that. And my suggestion given the tight time line is Mr. Molstad apparently knows what - what he believes is privileged in that. So let's have his client bring that application. Put forward what they think is privileged and why and then I can respond to it.

MR. MOLSTAD: We haven't seen the documents yet, Sir. It's send over a bunch of documents that are redacted in - in many ways so we have to see them all before we can -- they've seen them.

MS. OSUALDINI: Sir, this can become a much larger issue than what Mr. Molstad's saying because my client has other trustee records so what - what am I to do that I have seen.

THE COURT: Well if they are privileged you turn them back to where they have come from. If they are not privileged you keep them and use them. Well that is pretty straightforward to me.

MS. OSUALDINI: But from my perspective these documents weren't privileged because they're trustee records. I don't know how a third party --

THE COURT: Well then - then - then we would have an issue.

MS. OSUALDINI: So that is what I am saying --

THE COURT: Mr. Molstad says there are.

MS. OSUALDINI: This isn't an easy issue because the records from my understanding is in the Trustee's possession. And now a third party is trying to assert privilege over them which in my perspective would have been waived if - if they were released to a third party. So this - this is not an easy issue. And we would like to have it dealt with properly so there -- this -- there isn't any confusion going forward.

THE COURT: M-hm.

MS. OSUALDINI: And it would appear to be an issue from the Trustee's perspective as well because from my understanding they're also in possession of them. So are we to be returning these documents to the SFN. It's also an issue that affects the OPGT because these records are now in their possession as well. So what are we to do in the interim?

THE COURT: Well, I think what Mr. Molstad has done is to say that quite apart from this litigation you have a professional obligation, a duty to the Law Society to ensure that you are not using privileged documents that may have come into your possession inadvertently or into your client's possession inadvertently and he wants them back. So -- but he hasn't seen them yet so he can't tell you fully what his position is on that. So --

MS. OSUALDINI: Sure.

MS. SOPKO: The redacted ones are going to the Trustees?

MS. OSUALDINI: Yeah.

MS. SOPKO: Is my understanding.

MS. OSUALDINI: So they - they have seen the underacted documents.

MS. SOPKO: The - the redacted ones.

THE COURT: Right. The unredacted.

THE COURT: The redacted but not the underacted?

MS. SOPKO: The redacted.

MR. MOLSTAD: Yeah, we haven't seen the unredacted documents. We've only been provided with documents that are redacted that have portions of them that have been deleted.

MS. OSUALDINI: Oh I see - I see what you are saying. You have seen the pages that don't have --

MR. MOLSTAD: Yes.

MS. OSUALDINI: I see what you're saying.

THE COURT: So when can you get those to him?

MS. OSUALDINI: Today. I can let my paralegal know to send those today.

THE COURT: Okay. So, Mr. Molstad you will get those documents today and can we at least narrow down the documents that you think are subject to privilege?

MR. MOLSTAD: I feel that -- I can tell you what we seen so far, the communications between the Sawridge First Nation in house counsel and legal counsel that was acting for the Sawridge First Nation.

THE COURT: Oh okay.

MR. MOLSTAD: So it's not really a complicated issue, Sir.

THE COURT: Okay. Okay. So, the question is how did - how did those documents get into possession of other people. That is --

MS. OSUALDINI: And - and Sir --

MR. MOLSTAD: I - I don't - I don't know that Sir. One of the problems we have too, Sir, with the First Nation is that they closed down their offices for approximately 2 weeks over the Christmas period, so it makes it difficult to communicate with them.

MS. SOPKO: They close after today till the 6th.

MR. MOLSTAD: I think the 6th of January.

MS. SOPKO: After today until the 6th, yeah.

MR. MOLSTAD: Yeha.

MS. OSUALDINI: And - and the other issue, Sir, is that these documents are about the trusts. So, they're not about First Nation business, they're about the trusts.

THE COURT: Well sure. But if - if it is communications between counsel presumably a First Nation can seek advice with respect to a trust. So just because the subject matter is the trust doesn't mean to say it is not privileged.

MS. OSUALDINI: M-hm.

THE COURT: So it may well be a privilege.

MS. OSUALDINI: And - and another issue that may have to be dealt with is whether there is a privilege vis-à-vis the beneficiaries. And the Trustee's and the First Nation in regards to this information. So this --

THE COURT: M-hm.

MS. OSUALDINI: This actually is a quite complicated --

THE COURT: M-hm.

MS. OSUALDINI: -- issue.

THE COURT: Well I sure hope there is something of substance that is going to impact the outcome when we start going down this path, because it looks to me like this is totally going off the rails. That is the way it looks to me.

MS. OSUALDINI: So My Lord, I think we just need direction on who is to file the application by January 2nd.

THE COURT: Well I am not going to give a direction on that. One of you is going to decide that it is an issue that you want me to make a ruling on. And when a motion comes to me I will make a decision. Do you think you want to bring an application go right ahead. If Mr. Molstad does he can go right ahead but I don't know enough about it to determine who should be making the motion.

MS. OSUALDINI: Okay.

THE COURT: But if there is a motion I will hear it.

MS. BONORA: So Sir, can we have a direction that that schedule then is ordered?

Ruling

THE COURT: All right. We will make that a direction that -- with the amendments that Mr. Faulds has suggested. So January 2nd the applications, January 7th the Public Trustee will file its brief, January 13th the privilege materials, January 16 the privilege application to the extent that there might be one, January 28th for a questioning -- I am sorry, January 22nd questioning.

MR. MOLSTAD: On or before, I believe.

MR. SESTITO: On or before, yeah.

MR. MOLSTAD: On or before January 22nd, Sir.

THE COURT: 22nd?

MR. MOLSTAD: Yeah.

THE COURT: And the 28th of January for the brief -- primary brief; January 31st for the rebuttal brief; April 5th for the production application.

MR. SESTITO: February, Sir.

THE COURT: February 5th.

MR. SESTITO: February 5th

THE COURT: February 5th, whatever.

MS. BONORA: And - and May 19th for the asset transfer --

THE COURT: And May 19th for the actual application.

MS. BONORA: Are - are those peremptory, Sir?

THE COURT: I am telling you that I want them to happen. Peremptory is a funny word and never - never means never. So, I mean, the message I want to convey is if there is something that is going to be important that will help me make the right decision I want to have access to it.

MS. BONORA: Of course.

THE COURT: But at the same time I want this to get dealt with. So I implore you to get it ready for May 19th. So if I said peremptory and something came up on the 5th of May I would -- I am not going to force it on if there is something about to be available that would help me. So --

MS. BONORA: Thank you for those comments.

THE COURT: -- I don't -- I would be tempted to say peremptory but I would be fooling myself if I said that.

MS. BONORA: Thank you, Sir.

MS. HUTCHISON: Thank you, My Lord I - I just want to be sure we're clear January 7th is the OPGT's brief of production application.

THE COURT: The pro --

MS. HUTCHISON: January 28th are the responding briefs to the production applications, is that correct?

THE COURT: Well I think there were going to be two briefs. One is the Public Trustee would file its brief on January 7th.

MS. HUTCHISON: Yes.

THE COURT: Once you got some additional material from questioning you would file a supplemental brief if that is what you wanted to do. And then the responding briefs would be filed by the 31st.

MS. HUTHCINSON: So --

THE COURT: That -- so I think --

MS. HUTCHISON: Thank you, My Lord. So if --

THE COURT: -- Ms. Bonora was trying to avoid having you do two briefs.

MS. HUTCHISON: So if we are able to question on a privileged materials between January - January 16th priv - privilege motion being argued and January 28th we would -- got it. Thank you. Thank you, My Lord.

THE COURT: Okay are we - are we there?

MR. MOLSTAD: I hope. I think - I think I know what the schedule is but I am not sure.

MS. BONORA: I think - I think we got it.

MR. SESTITO: We'll - we'll bring Mr. Molstad up to speed.

THE COURT: I know it is - it is a tight time frame in January for sure there is a lot going on. But it sounds to me is if we don't get that schedule in place everything else is going to fall apart on us. It seems to me. So let's try to get that done, if we can.

MS. BONORA: Thank you for your indulgence today, Sir.

THE COURT: Thank you very much.

MS. OSUALDINI: Thank you very much, My Lord. Merry Christmas.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Rachel Lee, certify that this recording is the record made in the evidence in the proceeding in the Court of Queen's Bench, held in courtroom 415 at Edmonton, Alberta, on the 20th day of December, 2019, and that I, Rachel Lee, was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Abby Gagné, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Gagné Transcription Services
Order Number: AL-JO-1004-6489
Dated: December 23, 2019

TAB N

Form 26
Alberta Rules of Court
Rules 5.6 and 5.10

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

Clerk's Stamp

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	**3rd SUPPLEMENTAL AFFIDAVIT OF RECORDS**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLENNAN ROSS LLP Suite 600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: David Risling & Crista Osualdini Telephone: 780-482-9200 Fax: 780-482-9100 Email: cosualdini@mross.com File No.: 144194

3rd SUPPLEMENTAL AFFIDAVIT OF RECORDS OF CATHERINE TWINN, RESPONDENT, SWORN/AFFIRMED ON THE 15th DAY OF JANUARY, 2020

I, Catherine Twinn, of the City of Edmonton and the Sawridge Indian Reserve, in the Province of Alberta, have personal knowledge of the following and do believe that:

1. I am one of the above-named Respondents.

2. The supplemental records listed in Schedules 1 and 2 are under my control.

3. I object to produce the supplemental records listed in Schedule 2 on the grounds of privilege identified in that Schedule.

4. The supplemental records listed in Schedule 3 were previously under my control, but ceased to be so at the time and in the manner stated in Schedule 3.

5. Other than the supplemental records listed in Schedules 1, 2, and 3 and the records set out in the Affidavit of Records sworn by myself on June 21, 2018 and the Supplemental Affidavit of Records sworn by myself on November 8, 2018 and the 2nd Supplemental Affidavit of Records sworn by myself on December 18, 2019, I do not have and never had any other relevant and material records under my control.

SWORN/AFFIRMED BEFORE ME at the)
City of Edmonton,)
in the Province of Alberta)
the 15 day of January, 2020)
)
)
A Commissioner for Oaths in and)
for the Province of Alberta

Crista C. Osualdini
a Notary Public and Commissioner for Oaths
in and for the Province of Alberta
My Appointment expires at the Pleasure
of the Lieutenant Governor

CATHERINE TWINN

SCHEDULE 1

Relevant and material records under my control for which there is no objection to produce:

ProdBeg No.	ProdEnd No.	DocDate	DocType	DocTitle	Author	Recipient
TWN007949	TWN007949		Movie	"One For All: A Tribute to Chief Walter Twinn" (23 minutes long) Ron Ewoniak talks on the video from 9:27 to 11:00 minutes Sigmond Sowada talks on the video at the following times: 11:00 to 12:52 minutes, 15:41 to 17:10 minutes, 19:03 to 19:13 minutes.		

SCHEDULE 2

Relevant and material records under my control for which there is an objection to produce:

(a) without prejudice communications;

(b) communications and copies of communications between solicitor and client;

(c) solicitors' work product, including all interoffice memoranda, correspondence, notes, memoranda and other records prepared by the solicitors or their assistants;

(d) records made or created for the dominant purpose of litigation, existing or anticipated;

(e) other; and/or

(f) records that fall into 2 or more of the categories described above.

SCHEDULE 3

Relevant and material records previously under my control:

	DESCRIPTION OF RECORD	WHEN THIS RECORD CEASED TO BE UNDER MY CONTROL	MANNER IN WHICH THIS RECORD CEASED TO BE UNDER MY CONTROL	PRESENT LOCATION OF THE RECORD
1.	Not aware of any such records.			

NOTICE

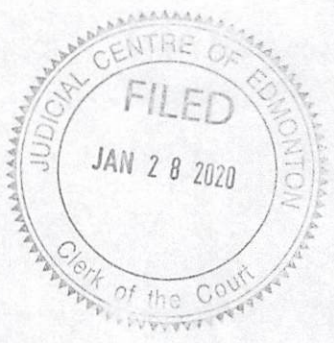
The time when the producible records listed in this Supplemental Affidavit of Records may be inspected is from 9:00 a.m. to 4:00 p.m. on weekdays, excluding statutory holidays.
The place at which the producible records may be inspected is McLennan Ross LLP, Suite 600, McLennan Ross Building, 12220 Stony Plain Road, Edmonton, AB T5N 3Y4.

TAB O

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, CT-8 AS AMENDED
IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO.19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985

Clerk's Stamp



APPLICANTS	**ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST**
RESPONDENTS	**THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE and CATHERINE TWINN**
DOCUMENT	**AFFIDAVIT OF CATHERINE TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

McLennan Ross LLP
Suite 600
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E-mail: cosualdini@mross.com
File No. 144194

I Catherine Twinn, of the Sawridge Indian Reserve 150 G and the City of Edmonton, in the Province of Alberta, SWEAR AND SAY THAT:

1. I am a former trustee of the Sawridge Band Inter Vivos Settlement, April 15, 1985 (the "1985 Trust") and the Sawridge Trust, August 15, 1986 (the "1986 Trust") (collectively referred to as the "Trusts"), and, as such, have a personal knowledge of the matters hereinafter deposed to, save where stated to be based upon information and belief. I served as a trustee of the Trusts from 1986 until 2018. I was one of the original trustees of the 1986 Trust. I am also the widow of Chief Walter Twinn, the settlor of the Trusts.

2. As a long serving trustee of the Trusts, I have a great deal of personal familiarity with the circumstances that arose in and around 1985 and which led to the assets of the Sawridge Band Trust (the "1982 Trust") being transferred to the 1985 Trust (the "Asset Transfer").

3. I am aware that my late husband, Chief Twinn engaged a good deal of professional expertise to advise on the Trusts and the Asset Transfer. I am aware that one of those individuals was Ron Ewoniak, Chartered Accountant, of the accounting firm now know as Deloitte.

4. I recently spoke with Mr. Ewoniak, who is now a retired partner of the Edmonton office of Deloitte.

5. Mr. Ewoniak advised me of the following:

(a) In his capacity as an accountant at Deloitte, he provided professional advice to my late husband, Chief Walter Twinn ("Walter"). While he was a partner at Deloitte, Walter was the instructing client for numerous matters that Mr. Ewoniak worked with him on. Mr. Ewoniak first met and began to provide professional advice to Walter in or about 1969-1970.

(b) He was aware that Walter was the settlor of the Trusts and Mr. Ewoniak provided professional services to Walter in relation to these Trusts and the assets held by them until his retirement from Deloitte in 1996.

(c) After his retirement from Deloitte, he was asked and accepted the position as chair of the Trusts. Mr. Ewoniak held that position in 2008 and withdrew as chair in 2009.

TRUST STRUCTURE AND ASSETS

(d) At some point in the late 1970s, he suggested to Walter it was advantageous to create and use a trust structure to hold corporate assets. Walter accepted his advice. They established a trust in 1982 and subsequently established the 1985 Trust and the 1986 Trust. Mr. Ewoniak understood that Walter wished to keep assets out of the Band and keep ownership of the assets separate from the SFN. This would allow for tax planning and limit the exposure of the assets to Band politics. They engaged a number of lawyers with expertise in trust law to assist with the structure from various law firms. Over the years, these lawyers included Dave Fennel, David Jones, Maurice Cullity who became a Justice in Ontario as well as others. A great deal of legal expertise was engaged.

(e) Throughout the period of Mr. Ewoniak's assistance to Walter, several businesses were created and developed. Ultimately these corporations were owned by the 1985 Trust and 1986 Trust. A chronology of some of the developments and events that Mr. Ewoniak recalled or had some involvement with or knowledge of included the following:

- 1972 – Sawridge Motor Hotel opens in the Town of Slave Lake;
- 1981 – Additions are made to the Sawridge Motor Hotel and staff apartments are built in Slave Lake;
- 1983 – The Sawridge Hotel in Jasper is constructed;
- February 12, 1984 – There is a grand opening of the Sawridge Hotel, in Jasper;
- January 15, 1985 – The Sawridge Truck Stop is opened;
- 1985 – The Sawridge Manor Apartment complex (56 Suites) is opened;

- April 7, 1988 – The Sawridge Hotel in Fort McMurray is acquired;
- March 1990 – The Sawridge Plaza Mall in the Town of Slave Lake is opened;
- 1993 – The Water Bottling Plant is acquired.

(f) The first entrepreneurial venture to build the hotel in Slave Lake in 1972 was financed by money from outside the SFN. Third Parties provided funding for this project, such as grants from the Department of Regional Economic Expansion ("DREE"). His recollection is that SFN funds were not invested into the Slave Lake Hotel. He recalls there was a mortgage on that property and the mortgagor required various conditions with respect to the operations of the hotel that included outsourcing the hotel manager who ultimately was recruited from the Hotel MacDonald in Edmonton.

(g) He recalls a video created in 1987 wherein he spoke about the financing of the Slave Lake Hotel. In that video he specifically addressed that it was basically impossible for a Band to obtain funding to finance projects like the projects Walter was pursuing. In that video he indicated that, after several months of negotiations, money was obtained from DREE and provided to a corporate entity, consistent with the intention to separate assets from the SFN.

(h) He believed that Walter obtained a skilled group of professional advisors to assist him with developing these assets and the structure within which they were held. He believed it was done properly and that was certainly the advice that he and Walter were receiving at the time.

(i) Mr. Ewoniak was involved when the 1985 Trust and the 1986 Trust were created. He took care to ensure that everything was properly completed. Walter retained and received advice from quality advisors in relation to the Asset Transfer, again including Maurice Cullity. At the time of the transfer from the 1982 Trust to the 1985 Trust they had the same beneficiaries and this was determined by the same Legislation. He attended many meetings that addressed details with respect to establishing the 1985 Trust and the 1986 Trust, including what assets were created and transferred.

(j) His recollection was that a combination of the 1985 Trust and the 1986 Trust captured all of the interests of the beneficiaries, including people who may become SFN members pursuant to Bill C-31.

(k) At the time, he understood that Walter was concerned that proposed Legislation changes would result in a significant increase in Band members with voting power. This in turn would result in potential changes to voting rights and would possibly result in a significant transfer of power and control to a potential influx of new members. He understood that one of Walter's concerns was that this influx may result in a new Band council which may dissipate assets. This is partly why that trust structure was contemplated to protect the assets.

(l) He recalled that Walter was concerned about the equitable treatment of band members who had previously enfranchised compared to members who remained. People who previously enfranchised received a per capital payment of money from the SFN. His recollection is that there was large sum of money paid out during this process and that, afterwards, Walter felt it would be unfair if these peoples' memberships were restored

without repayment of those funds when people who did not enfranchise did not receive a payout.

(m) At the time the Trusts were set up, which is now several decades ago, there were certainly numerous compelling reasons why he and Walter set up the Trust structure and legal advice was obtained throughout the process.

(n) He understood that the 1982 Trust was dissolved after the Asset Transfer and he and Walter conducted themselves on that understanding. After the 1982 Trust was dissolved, he believes there were no financial statements created for the 1982 Trust, no tax filings, no meetings, no resolutions or records of decisions because they believed it had ceased to exist.

(o) He inquired with Deloitte whether it had maintained any records in relation to these historical transactions and Deloitte did not have records that far back. However, he expected that there are records either held by the Trusts, at law firms or in the possession of the SFN that would corroborate the information he provided to me.

(p) It was the intention and the understanding of himself and Walter that the companies and corporate assets that were transferred into the 1985 Trust and 1986 Trust were owned by those Trusts for the beneficiaries of each of those Trusts. This was clear to him and appeared to him to be clear to all whom he was involved with at the time, including Walter.

(q) For many years, the 1985 Trust distributed a large cheque to one or more of the beneficiaries, for the purpose of triggering a tax advantage. This distribution was then wholly gifted back to the 1985 Trust by the beneficiary. Therefore there were distributions made from the 1985 Trust. He believes the Trusts should have records of these distributions. Any suggestion that the 1985 Trust has never made a distribution of its assets to its beneficiaries is inaccurate.

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

SWORN BEFORE ME at the)
City of Edmonton,)
in the Province of Alberta)
the 24 day of January 2020)
)
)
)
A Commissioner for Oaths in and)
for the Province of Alberta

Crista C. Osualdini
a Notary Public and Commissioner for Oaths
in and for the Province of Alberta
My Appointment expires at the Pleasure
of the Lieutenant Governor

Catherine Twinn

CATHERINE TWINN

TAB P

大成DENTONS

Doris Bonora

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

Dentons Canada LLP
2500 Stantec Tower
10220 - 103 Avenue NW
Edmonton, AB, Canada T5J 0K4

dentons.com

February 14, 2020

File No.: 551860-1

DELIVERED VIA EMAIL

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

Attention: Janet Hutchison

Field Law
#2500, 10175 - 101 Street
Edmonton AB T5J 0H3

Attention: P. Jonathan Faulds

Dear Sir/Madam:

RE: Sawridge Trust – 1103 14112
Litigation Plan - Asset Transfer Order Application

We write further to the Litigation Plan setting the schedule for steps to be taken ahead of the application concerning the effect of the 2016 Consent Order of Justice Thomas concerning the transfer of assets from the 1982 Trust to the 1985 Trust (the "**Asset Transfer Order Application**"). We also write with reference to the negotiated consent order with respect to the OPGT's application for certain production (the "**Production Consent Order**").

You have asked that the Trustees identify records that are privileged but may contain information relating to the Asset Transfer Order Application. The Trustees have reviewed their records and are not prepared to waive Privilege on any of the documents. The records over which we maintain our position are from the following sources:

1. Letters, memoranda and other legal work product from legal advisors regarding the history and development of the 1985 Sawridge Trust;

2. Letters between Davies Ward and Beck and Mr. Michael McKinney regarding the strategy of dealing corresponding with the federal government; and

3. Memoranda, legal opinions, correspondence and other legal work product from and to legal counsel pertaining to the litigation.

Notwithstanding the position of the Trustees with respect to the above records, the Trustees are providing further limited disclosure pertaining to the advice provided by Davies Ward and Beck to Mr. Michael McKinney regarding interactions with the Federal Government. These documents are attached. We are not waiving any further privilege in respect of these documents. The orders with respect to Privilege will apply to these documents. Some of this material has already been produced and while the Trustees may not agree with the production of same, they are providing this material in context. We have consulted with Sawridge First Nation and they also agree to release these documents as a sign of good faith but advised us that they reiterate strongly that the production is limited to the documents and that the documents are released on the express condition that there is no further release of privilege.

We are providing these documents on the trust conditions that no use be made of these records until the filing of the Production Consent Order. We are not providing these records to Ms. Shelby Twinn as she

is unable to accept trust conditions. However, we will provide the enclosures to her once the Production Consent Order is entered.

In the event that the Production Consent Order (or a similar order as agreed to by the Trustees) is filed, then the documents are provided on the understanding that they may be used in the written briefs to be filed ahead of the Asset Transfer Order Application.

Yours truly,
Dentons Canada LLP

Doris Bonora
Partner

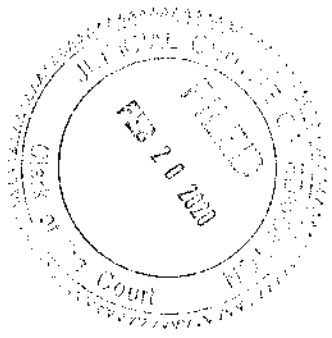
Attachments
Copies forwarded by Email to:

Cc Parlee McLaws (Sawridge First Nation)
Attention: Edward H. Molstad/Ellery Sopko

Cc McLennan Ross (Catherine Twin)
Attention: Crista Osualdini/David Risling

Cc Shelby Twinn (Without Attachments)

TAB Q

CLERK'S STAMP	
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	Edmonton
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c, T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**LITIGATION PLAN for application May 19, 2020**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora and Michael Sestito Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

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

NO.	ACTION	DEADLINE
1.	The Trustees will review the privileged documents from the Trustees' Affidavit of Records and Supplemental Affidavit Records and identify any documents concerning the Asset Transfer Application together with the Trustees' position on privilege concerning those documents by	February 14, 2020
2.	Any additional Affidavits to be filed by the parties or intervenors in relation to the Asset Transfer Application are to be filed by	February 14, 2020
3.	Questioning by all parties and intervenors in respect of the May 19, 2020 application to occur on or before	March 13, 2020
4.	All undertakings answered by anyone questioned	within two weeks of the date of the questioning
5.	Interlocutory applications in respect of anything arising from the questioning by	April 1, 2020
6.	All further questioning on undertakings to be complete by	April 15, 2020
7.	Supplementary Briefs of all parties and Intervenors are due by	May 1, 2020
8.	Response Briefs to the Supplementary Briefs filed by all parties and intervenors referred to in item 6 above are due by	May 12, 2020
9.	Application Hearing on effect of the transfer	May 19, 2020

The Honourable Justice J. T. Henderson

CONSENTED TO BY:
MCLENNAN ROSS LLP

Crista Osualdini
Counsel for Catherine Twinn

HUTCHISON LAW

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

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

Parlee Mclaws LLP

Edward Molstad Q.C.
Counsel for the Sawridge First Nation

Shelby Twinn, Self Represented

Hagerman, Susan

From: Shelby Twinn <s.twinn@live.ca>
Sent: February 19, 2020 2:51 PM
To: Bonora, Doris
Cc: Hagerman, Susan
Subject: Re: consent order and litigation plan

Hello,

I have no objections to the litigation plan.
I'm sorry I haven't signed anything, things got really confusing when the back and forth between everyone started happening.

Thank you,
Shelby Twinn

TAB R

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

for Clerk of the Court

Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**CONSENT ORDER (PRIVILEGE)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Parlee McLaws LLP Barristers and Solicitors 1700 Enbridge Centre 10175-101 Street Edmonton, AB T5J 0H3 Attention: Edward H. Molstad, Q.C. Telephone: 780-423-8506 Facsimile: 780-423-2870 File No.: 64203-7/EHM

Granted this 20, February, 2020 by Justice J.T. Henderson in Edmonton, AB.

UPON the Application filed September 13, 2019, by the Sawridge Trustees for determination and direction of the effect of the consent order made by Mr. Justice D.R.G. Thomas pronounced on August 24, 2016 and upon the hearing on the Jurisdictional Question ordered by the Honourable Mr. Justice J.T. Henderson pursuant to a Consent Order on December 18, 2018 (the "**Applications**");

And whereas Catherine Twinn has sworn a second Supplemental Affidavit of Records ("**SAOR**") dated December 18, 2019which contains records including, but not limited to, documents that the Sawridge First Nation ("**Sawridge**") alleges to contain legal advice provided to Sawridge and that Catherine Twinn alleges are trust records and came from the file maintained by the Sawridge Trustees and are not privileged records of Sawridge;

And whereas Sawridge does not object to Catherine Twinn producing the SAOR so long as this Order is granted;

And whereas Sawridge does not have the intention to waive solicitor-client privilege, to the extent same exists, over any further information or communications to which solicitor-client privilege would otherwise attach and that relates to the subject matter of any of the contents of the SAOR as that term is defined below;

And whereas the purpose of this Order is to confirm that waiver of solicitor-client privilege in relation to any further information or communications to which solicitor-client privilege attaches that relate to the subject matter of any of the contents of the SAOR ("**Subject Matter Waiver**") has not occurred for the purposes of the Applications;

IT IS HEREBY ORDERED:

1. Any waiver of solicitor-client privilege by Sawridge in respect of consenting to the production of the contents of the SAOR is expressly declared to be limited to the purposes of the Applications only. For clarity, the terms of this order shall not apply to relieve or rectify any loss or waiver of privilege by Sawridge that arises from matters other than the service of the SAOR.

2. For the purpose of the Applications only, any waiver of solicitor-client privilege in respect of the contents of the SAOR by Sawridge is expressly declared to be limited to the contents of the SAOR, and it is further declared that Subject Matter Waiver has not occurred in relation to any issue raised in those documents.

3. Further to paragraph 2 and for the purpose of the Applications only, nothing in the SAOR can be used to compel Sawridge to produce further documents in respect of legal advice received or answer questions in respect of legal advice received by Sawridge on the basis that Subject Matter Waiver has occurred.

4. For the purposes of the Applications only, if the Sawridge Trustees, the OPGT, Catherine Twinn, Shelby Twinn or any beneficiary of the 1985 Trust who may choose to participate in the manner permitted by this Court, seek to file or otherwise admit as evidence any document other than those covered by this Order to which a claim of solicitor-client privilege may be made by Sawridge, the admissibility of such document and/or the terms for protecting the privilege of such document may be determined on a case-by-case basis, either by agreement of the parties and interveners, or by the direction of this Court.

The Honourable Mr. Justice J.T. Henderson

CONSENTED TO BY:

DENTONS CANADA LLP

Doris Bonora/Michael Sestito
Counsel for the Sawridge Trustees

HUTCHISON LAW

Janet Hutchison/P. Jonathan Faulds, Q.C.
Counsel for the OPGT

McLENNAN ROSS LLP

Crista Osualdini/David Risling
Counsel for Catherine Twinn as Trustee for the 1985 Trust

PARLEE McLAWS LLP

Edward H. Molstad, Q.C.
Counsel for the Sawridge First Nation

SHELBY TWINN

Shelby Twinn
Self-Represented

4. For the purposes of the Applications only, if the Sawridge Trustees, the OPGT, Catherine Twinn, Shelby Twinn or any beneficiary of the 1985 Trust who may choose to participate in the manner permitted by this Court, seek to file or otherwise admit as evidence any document other than those covered by this Order to which a claim of solicitor-client privilege may be made by Sawridge, the admissibility of such document and/or the terms for protecting the privilege of such document may be determined on a case-by-case basis, either by agreement of the parties and interveners, or by the direction of this Court.

The Honourable Mr. Justice J.T. Henderson

CONSENTED TO BY:

DENTONS CANADA LLP

Doris Bonora/Michael Sestito
Counsel for the Sawridge Trustees

HUTCHISON LAW

Janet Hutchison/P. Jonathan Faulds, Q.C.
Counsel for the OPGT

McLENNAN ROSS LLP

Crista Osualdini/David Risling
Counsel for Catherine Twinn as Trustee for the 1985 Trust

PARLEE McLAWS LLP

Edward H. Molstad, Q.C.
Counsel for the Sawridge First Nation

SHELBY TWINN

Shelby Twinn
Self-Represented

TAB S

Clerk's stamp:

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

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

for Clerk of the Court

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

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

APPLICANT	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**CONSENT ORDER (Application by the Office of the Public Trustee and Guardian for Additional Production)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTYFILINGTHIS DOCUMENT	Dentons Canada LLP 2500 Stantec Tower 10220 – 103 Avenue Edmonton, AB T5J 0K4 Attention: Doris C.E. Bonora and Michael Sestito Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

Granted 20, February, 2020 by Justice J.T. Henderson in Edmonton, AB.

UPON the application by the Office of the Pubic Guardian and Trustee ("OPGT") against the Sawridge Trustees and the Sawridge First Nation as Respondents, for certain relief regarding additional production filed December 20, 2019 (the "Production Application");

AND UPON noting that the parties do not agree on the relevance of the documents sought by the OPGT in the upcoming application regarding the effect of the Order of the Honourable Mr. Justice Thomas granted on August 24, 2016, regarding the transfer of assets from the 1982 Trust to the 1985 Trust (the "Asset Transfer Order");

AND UPON being advised that the Applicant and Respondents to the Production Application have agreed to resolve that application upon terms that include this Order, including the Affidavit of the Trustees referred to herein, and representations made by the Respondents to the Applicant OPGT on which the OPGT may rely in Court;

AND UPON noting that the Sawridge Trustees and Sawridge First Nation ("Sawridge") wish to preserve privilege but are prepared to allow certain privileged documents to be produced provided that such production does not amount to a full release of any privilege owing to the Sawridge Trustees or to Sawridge.

AND UPON reviewing the court file, including the Asset Transfer Order and the order granted on Dec 19, 2018 by the Honourable Mr. Justice Henderson regarding privilege (the "Privilege Order");

IT IS HEREBY ORDERED:

1. The Production Application is hereby withdrawn on a without costs basis, and the affidavit of Roman Bombak filed December 20, 2019 in support of the Production Application is also withdrawn and shall not be referred to in the proceedings by anyone.

2. The Sawridge Trustees shall file an affidavit that addresses paragraph 1(a) – (i) set out in the Production Application that will address the results of searches for the documents requested.

3. The Sawridge Trustees shall provide further records in its possession that may otherwise be privileged and which may relate to the subject matter of the Asset Transfer Order.

4. The affidavit contemplated in paragraph 2 and the material contemplated in paragraph 3 do not constitute an admission by the Sawridge Trustees or by Sawridge that such documents are relevant and the Sawridge Trustees and Sawridge are given the right to address the relevance of such documents at any future application.

5. The affidavit contemplated in paragraph 2 and the material contemplated in paragraph 3 do not constitute a general waiver of privilege by the Sawridge Trustees or by Sawridge.

6. The parties are still bound by the Privilege Order and nothing in this order affects the contents of the Privilege Order in respect of documents that have already been produced.

The Honourable Mr. Justice J.T. Henderson

APPROVED AS TO FORM AND CONTENT:

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

McLENNAN ROSS LLP

Crista Osualdini
Counsel for Catherine Twinn as Trustee for the 1985 Sawridge Trust

PARLEE McLAWS LLP

Edward H. Molstad, Q.C.
Counsel for the Sawridge First Nation

Crista Osualdini
Counsel for Catherine Twinn as Trustee for the 1985 Sawridge Trust

Edward H. Molstad, Q.C.
Counsel for the Sawridge First Nation

Hagerman, Susan

From: Shelby Twinn <s.twinn@live.ca>
Sent: February 18, 2020 3:14 PM
To: Sestito, Michael; Hagerman, Susan; jhutchison@jlhlaw.ca; 'cosualdini@mross.com'; esopko@parlee.com; 'emolstad@parlee.com'; Dave Risling
Cc: Bonora, Doris
Subject: Re: Litigation Plan and Consent Order - Please Execute Today

Good afternoon,

I do not object to that consent order.
I don't know if I need to sign or not, since there isn't a spot for me to.

Shelby Twinn

TAB T

Form 26
[Rule 5.6]

Clerk's Stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**AFFIDAVIT OF PAUL BUJOLD –** **Application for Further Production of Office Of The Public Trustee And Guardian ("OPGT")**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2500 Stantec Tower 10220 - 103 Avenue Edmonton, AB T5J 0K4 Attention: Doris C.E. Bonora and Michael S Sestito Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-1-DCEB

AFFIDAVIT OF PAUL BUJOLD
SWORN ON THE 20th DAY OF JANUARY, 2020

I, Paul Bujold, of the Edmonton, Alberta, make oath and say:

1. I am the Chief Executive Officer ("CEO") of the 1985 Sawridge Trust (the "1985 Trust") and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. I have reviewed the application filed December 20, 2019, by the Office of the Public Guardian and Trustee (the "OPGT") in relation to further production (the "Production Application").

3. When the Sawridge Trustees commenced the application for advice and direction in 2011, I searched all the trust records that I had gathered from various sources and found very few documents in relation to the transfer of assets from the 1982 Sawridge Trust (the "1982 Trust") to the 1985 Trust (the "Transfer"). I said that in my affidavit sworn September 12, 2011 (my "2011 Affidavit"). Subsequent to filing of my 2011 Affidavit, Janet Hutchison of the OPGT questioned me on the same; I undertook to write to various individuals to determine if they had any other records in relation to the Transfer. Any such documents were either produced in undertakings or were produced in the affidavit of records that I deposed on November 2, 2015.

4. The Sawridge Trustees made the application to approve the Transfer due to the lack of documentation regarding the Transfer. From the limited documentation, it appeared that the 1982 Trust assets were transferred to the 1985 Trust even though the 1985 Trust was not a beneficiary of the 1982 Trust.

5. I understand that the Court has recently raised as an issue the effect of the Transfer (the "Asset Transfer Issue"). In the interests of facilitating the ability of the parties to address the Asset Transfer Issue, and in light of the voluminous production in this litigation, the Sawridge Trustees provided binders of potentially relevant records previously produced, as well as a reference to where these documents had already been produced (the "List"). Attached hereto as **Exhibit "A"** a copy of the List.

6. The List attached hereto as Exhibit "A", includes those documents mentioned above and references to all of the searches which the Sawridge Trustees agreed to do by way of undertaking to determining whether there were any other documents available in respect of the Transfer.

7. Furthermore, and in an attempt to be as responsive to the Production Application as possible, I made inquiries of Mr. Michael McKinney Q.C., in house counsel of the Sawridge First Nation ("SFN") to see if he had any other documents. I have been advised by Mr. McKinney as to the results of searches conducted by the SFN in response to the Production Application.

8. The below are both my responses to the searches on behalf of the Sawridge Trustees, as well as information provided by Mr. McKinney to me in respect of the searches done. Where information is provided by Mr. McKinney, I have indicated as such. In every case where I have said that I have not been able to find any documents, I have not included those that have already been produced, as referenced in Exhibit "A". I have included paragraph references to the Production Application.

1.(a) "Provides the tax filings and financial statements of the 1982 Trust from January 1, 1985 to present"

9. I have been unable to locate any financial statements or tax filings for the 1982 Trust commencing in January 1, 1985 to the present.

10. I have been advised by Mr. McKinney that the SFN does not have any such documents in its possession.

1.(b) "Provides the 1985 Trust financial statements from 2005 to present and any other financial records that establish the current value of the $12 million debenture"

11. I have reviewed the 1985 Trust financial statements and have been unable to locate any reference to the $12 million debenture. Attached hereto as **Exhibit "B"** is a copy of the discharge of said debenture. This is a document that we obtained on a recently performed historical search at the land titles office.

12. I have been advised by Mr. McKinney that the SFN does not have this information.

1. (c) "Provide copies of notices issued in 1985, with any attachments, to provide notice to SFN Band Members of the Band member meeting ultimately held on April 15, 1985 approving the transfer of assets from the 1982 Trust to the 1985 Trust"

13. I have reviewed the records of the 1985 Trust and can find no notices to SFN band members for the meeting held on April 15, 1985.

14. I have been advised by Mr. McKinney that the SFN has not been able to locate any such records.

1. (d) "Explain the notice and consultation process held for SFN members prior to the April 15, 1985 vote"

15. I have not located any documents which explain the notice and consultation process held for SFN members prior to the April 15, 1985 vote.

16. I have been advised by Mr. McKinney that the SFN has not been able to locate any such records.

1. (e) "Provide Minutes of the 1982 Trustees meetings, held prior to April 15, 1985, including trustee resolutions, referencing the proposal to transfer the 1982 Trust assets to the 1985 Trust and to hold band members or beneficiary meetings regarding the transfer"

17. I have not located any minutes of the 1982 trustee meetings held prior to April 15, 1985 nor have I found any additional trustee resolutions referencing the proposal to transfer the 1982 Trust assets to the 1985 Trust, nor any resolutions to hold band members or beneficiary meetings regarding the transfer.

18. I have been advised by Mr. McKinney that the SFN has not been able to locate any such records.

1. (f) "Provide Minutes of the Sawridge Chief and Council meetings held prior to April 15, 1985 including Band Council resolutions referencing the proposal to transfer the 1982 assets to the 1985 Trust and hold band member or beneficiary meetings regarding the transfer"

19. I have been unable to locate any such documents.

20. I have been advised by Mr. McKinney that the SFN has not been able to locate any minutes of meetings or band council resolutions referencing the proposal to transfer the assets.

1. (g) "Provide correspondence or financial reporting documents dated prior to April 15, 1985 that address the source of funds used to buy the assets now held in the 1985 Trust, including correspondence to or from Canada approving the original release of SFN capital and revenue funds for the purchase of those assets"

21. I have reviewed the trust records and can find no such records.

1. (h) "The complete exchange of correspondence between Sawridge First Nation, or its advisors, and Canada beginning in December 1993 and continuing into at least 1994, regarding the existence of the 1985 Trust and Canada's concerns in relation to section 64 and section 66 of the Indian Act"

22. Many of these documents have been produced in my supplemental affidavit of records. Some of the documents have been produced by Catherine Twinn in her most recent affidavit. I have also been able to locate additional documents which were given to me by SFN. I attach all of the documents relating to this request as **Exhibit "C"** to this my affidavit.

23. I am informed that the SFN currently has no otherrecords and that any such records that they may have had in its possession were provided to the Sawridge Trust.

1. (i) "Provide documents prepared prior to May 1985 and directed to SFN, the 1982 Trustees and the 1985 Trustees from their respective financial or legal advisors, including Deloitte Touche (Ron Ewoniak), Davies Ward and Beck or David Fennell that address:

i. Advice, comments or discussion regarding the 1982 Trustees authority to implement, and recommendations for the structuring of, a transfer of assets from the 1982 Trust to a new trust;

ii. Advice, comments or discussion regarding the consequences of an asset transfer for the interests of the 1982 Beneficiaries;

iii. Advice, comments or discussion regarding the need to consult with, inform or hold a vote by the SFN Members or 1982 beneficiaries in relation to the transfer of assets."

24. I have located no other documents in relation to the requests made above.

25. I have been advised by Mr. McKinney that the SFN currently has no such records in its possession.

SWORN/AFFIRMED BEFORE ME at the City of Edmonton, in the Province of Alberta this 20th day of January, 2020.

(Commissioner of Oaths in and for the Province of Alberta)

MICHAEL S. SESTITO
Barrister & Solicitor

PAUL BUJOLD

TAB A

THIS IS EXHIBIT " A " TO THE AFFIDAVIT OF

Paul Bujold

SWORN BEFORE ME THIS 20th DAY

OF January, 20 20

COMMISSIONER FOR OATHS IN AND FOR

THE PROVINCE OF ONTARIO

MICHAEL S. SESTITO

Barrister & Solicitor

TABLE OF CONTENTS
DOCUMENTS RELATED TO TRANSFER OF ASSETS

TAB	DATE OF DOCUMENT	DOCUMENT ID (where applicable)	DESCRIPTION	SOURCE
1	15/04/1982	SAW000063-67	Declaration of Trust, Sawridge Band Trust April 15, 1982	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018 Exhibit A to the Affidavit of Paul Bujold sworn September 12, 2011
2	01/06/1982	SAW000070	Meeting of Trustee's and Settlors of Sawridge Band Trust June, 1982. approving the transfer of all property held by the Trustees and Settlors to the Trust	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018 Exhibit B to the Affidavit of Paul Bujold sworn September 12, 2011
3	20/04/1983	SAW000724	Minutes of Meeting of Trustees of the Sawridge Band Trust re: Court Order (only dated 1983)	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
4	20/04/1983	SAW000174 – 175	Minutes of Meeting of Trustees of Sawridge Band Trust to stage election of Trustees and related documents (only dated 1983)	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
5	05/07/1983	SAW000023-28	Declaration of Trust Sawridge Band Trust July 5, 1983	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
6	05/10/1983	SAW001354 – 1378	Affidavit of Service of Court documents to amend 1982 Trust Sworn May 10, 1983 including: Exhibit A – Originating Notice of Motion, Exhibit B - Order pronounced by Justice D.H. Bowen April 20, 1983, Exhibit C – Notice to Members	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
7	19/12/1983	SAW000073-88	Agreement 19th December 1983 between Walter Patrick Twinn, Walter Felix Twinn, Sam Twinn, David A Fennel "Old Trustees" with Walter Patrick Twinn, Sam Twinn, and George Twinn "New Trustees"	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018 Exhibit D to the Affidavit of Paul Bujold sworn September 12, 2011

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TAB	DATE OF DOCUMENT	DOCUMENT ID (where applicable)	DESCRIPTION	SOURCE
8	19/12/1983	SAW000089-96	Agreement 19th of December 1983. Transfer Agreement between "New Trustees" and "Old Trustees".	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018 Exhibit E to the Affidavit of Paul Bujold sworn September 12, 2011
9	19/12/1983	SAW001317 – 1322	Agreement of December 19, 1983 to transfer assets.	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
10	19/12/1983	SAW001323 – 1331	Transfer Agreement to Trust of December 19, 1983 (similar to SAW001317 – 1322)	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
11	06/01/1984	SAW000242 – 254	Financial Statement of Sawridge Indian Band #19 as at March 31, 1984 dated June 1,1984	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
12	06/06/1984	SAW001334 – 1340	Statutory Declaration to transfer assets to Trust dated June 6, 1984	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
13	21/01/1985	SAW000236 - 239	Statutory Declaration related to Debenture executed January 21, 1985	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
14	21/01/1985	SAW000495 – 521	Sawridge Enterprises Ltd. Demand Debenture ($12,000,000.00) dated January 21, 1985	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
15	15/04/1985	SAW000537 - 539	Assignment of Debenture of January 21, 1985 for $12,000,000.00 from Assignor Walter Twinn to Sawridge Band Inter Vivos Settlement (Walter Twinn, Sam Twin and George Twin as Trustees)	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
16	15/04/1985	SAW000532	Deposit confirmation for $100 to Create Sawridge Band Intervivos Settlement Trust	Affidavit of Records sworn by Paul Bujold April 27, 2018 filed April 30, 2018

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TAB	DATE OF DOCUMENT	DOCUMENT ID (where applicable)	DESCRIPTION	SOURCE
17	15/04/1985	SAW001895	Band Council Resolution of April 15, 1985 (BCR-454-117-85/860)	Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018 filed April 30, 2018
18	15/04/1985	SAW000039-49	Sawridge Band Inter Vivos Settlement Declaration of Trust April 15, 1985	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018 Exhibit D to the Affidavit of Paul Bujold sworn August 30, 2011
19	15/04/1985	SAW000120-121	Sawridge Band Trust Resolution of Trustees. April 15, 1985	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018 Exhibit H to the Affidavit of Paul Bujold sworn September 12, 2011
20	15/04/1985	SAW000122	Sawridge Band Resolution April 15, 1985 authorizing the transfer of trust assets to the Trustees	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018 Exhibt I to the Affidavit of Paul Bujold sworn September 12, 2011
21	15/04/1985	SAW001445 – 1446	Ratification by the Trustees of Band Council Resolution 454-117-85/86 to transfer Debenture to Trust	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
22	16/04/1985	SAW000123-134	Declaration of Trust made April 16, 1985 between "Old Trustees" and "New Trustees" confirming that the "New Trustees" hold legal title to the assets in the Sawridge Band Inter Vivos Settlement.	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018 Exhibit J to the Affidavit of Paul Bujold sworn September 12, 2011
23	16/04/1985	SAW000522 – 531	Minutes of a Meeting of The Directors of Sawridge Holdings of April 16, 1985 authorizing the Transfer of shares pursuant to Transfer Agreement of December 19, 1983 attached as Schedule A	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018

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TAB	DATE OF DOCUMENT	DOCUMENT ID (where applicable)	DESCRIPTION	SOURCE
24	16/04/1985	SAW001379 – 1389	Share Certificates of Sawridge Holdings Ltd. Registered in the members' names October 8, 1981 and April 16, 1985	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
25	16/04/1985	SAW001390 – 1399	Declaration of Trust to transfer assets with Promissory Notes attached dated April 16, 1985 signed by Walter P. Twinn	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
26	16/04/1985	SAW001400 – 1408	Declaration of Trust to transfer assets with Promissory Notes attached dated April 16, 1985 signed by George Twin (?)	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
27	20/05/1985	SAW000255 – 266	Financial Statement of Sawridge Indian Band #19 dated May 20, 1985 for 1984-1985 (See comment on Trust as SAW000259 and SAW000262	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
28	22/07/1985	SAW002316 – 2320	Correspondence from INAC of July 22, 1985 attaching Band List as of June 27, 1985	Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018 filed April 30, 2018
29	04/10/1985	SAW002321-2323	Correspondence from INAC of October 4, 1985 attaching Band List as of October 4, 1985	Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018 filed April 30, 2018
30	05/05/1987	SAW000488 – 493	Financial Statement of Sawridge Band Inter Vivos Settlement Trust for 1985-1986 dated May 5, 1987 with accountant's comments	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
31	31/12/1987	SAW000201 - 204	Trust Income Tax Return for Sawridge Band Trust for 1987	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
32	23/12/1993	SAW00184	Letter from Indian and Northern Affairs to Chief Walter Twinn RE: Existence of the Trusts	Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018 filed April 30, 2018

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TAB	DATE OF DOCUMENT	DOCUMENT ID (where applicable)	DESCRIPTION	SOURCE
33	16/03/1994	SAW001893	Letter from Davies, Ward & Beck (Maurice Cullity) to Indian and Northern Affairs (W. Van Iterson) RE: Sawridge Indian Band	Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018 filed April 30, 2018
34	21/03/1994	SAW001886 to 001889	Letter to Davies, Ward & Beck (Maurice Cullity) from Michael McKinney RE: Disclosure of the Trusts to the Department	Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018 filed April 30, 2018
35	30/03/1994	SAW001892	Letter from Indian and Northern Affairs to Davies, Ward & Beck (Maurice Cullity) Re: Assets in the Trust	Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018 filed April 30, 2018
36	29/08/1994	SAW001885	Letter from Department of Justice (Margaret McIntosh) to Davies, Ward & Beck (Maurice Cullity)	Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018 filed April 30, 2018
37	20/10/1994	SAW001881 to 001882	Letter from Davies, Ward & Beck (Maurice Cullity) to Department of Justice (Margaret McIntosh)	Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018 filed April 30, 2018
38	09/11/1994	SAW001879 to 001880	Letter from Department of Justice (Margaret McIntosh) to Davies, Ward & Beck (Maurice Cullity) RE: Sawridge Indian Band Expenditures Pursuant to Sections 64 & 66 of the Indian Act	Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018 filed April 30, 2018
39	31/12/2009	SAW0001429	Sawridge Band Inter Vivos Settlement and Sawridge Trust Trustrees from Trust Inception to 31 December 2009	Affidavit of Records sworn by Paul Bujold November 2, 2015 filed April 30, 2018
40	11/08/2011	Written Interrogatory # 17	Letter from Aboriginal & Northern Development Canada sent to persons on the Affiliates List maintained by Indigenous and Northern Affairs Canada which letter arises from Written Interrogatory No. 18 filed October 5, 2017.	Undertakings and Written Interrogatories on Questioning of March 7-10, 2017 with respect to the affidavit of Paul Bujold dated February 15, 2017.

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TAB	DATE OF DOCUMENT	DOCUMENT ID (where applicable)	DESCRIPTION	SOURCE
41	30/08/2011		Affidavit of Paul Bujold for Procedural Order. Court file number 1103 14112. August 30, 2011.	Filed Pleadings (without exhibits)
42	30/08/2011		Exhibit A from questioning of Catherine Twinn of September 9, 2016 . Declaration of Trust dated April 5, 1982.	Tab 72 from Written Interrogatories and undertakings arising from continued questioning of Catherine Twinn July 20 & 21, 2017 Exhibit A from the Affidavit of Paul Bujold sworn August 30, 2011
43	31/08/2011		Procedural Order of August 31, 2011 Filed September 6, 2011 originating order. Exhibit A to affidavit of Paul Bujold sworn October 31, 2016. Filed November 1, 2016.	Filed Pleadings
44	01/11/2011	UT-14	Example of Letters of January 11, 2011 sent to Beneficiaries. This is an example of all letters produced.	Undertakings and Written Interrogatories on Questioning of March 7-10, 2017 with respect to the affidavit of Paul Bujold dated February 15, 2017.
45	09/12/2011		Affidavit of Paul Bujold sworn September 12, 2011 with Exhibits B, H, I, and J Court file number 1103 14112.	Filed Pleadings (not full Affidavit - only pertinent Exhibits attached)
46	27/05/2014	P 6-7 P 33-36 P 41-44 P 45-49 P 50-57 P 58-59 P 62-66 P 68 P 70-76 P 145-146 P 177-185	Transcript pages referencing the establishment and transfer of assets from the 1982 Trust to the 1985 Trust	TRANSCRIPT on Questioning of May 27 & 28, 2014 with respect to the Affidavits of Paul Bujold dated August 30, 2011, September 12, 2011 and September 30, 2011

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TAB	DATE OF DOCUMENT	DOCUMENT ID (where applicable)	DESCRIPTION	SOURCE
47	27/05/2014	UT-16	Documents setting out the transfer of assets from individuals to the 1982 Trust and the transfer of assets from the 1982 Trust to the 1985 Trust	UNDERTAKINGS on Questioning of May 27 & 28, 2014 with respect to the Affidavits of Paul Bujold dated August 30, 2011, September 12, 2011 and September 30, 2011
48	27/05/2014	UT-17	Response to Undertaking. Re: Inquire of the various individuals and sources previously discussed to determine if they have any documentation or information that would assist in understanding what specific assets were intended to be settled as the certain assets referred to in Exhibit B, and what specific assets were intended to be included in the declaration of trust at exhibit a. We have made inquiries and there is no listing of any "intended" assets. The only assets listed are those that were settled into the Trust.	UNDERTAKINGS on Questioning of May 27 & 28, 2014 with respect to the Affidavits of Paul Bujold dated August 30, 2011, September 12, 2011 and September 30, 2011

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TAB	DATE OF DOCUMENT	DOCUMENT ID (where applicable)	DESCRIPTION	SOURCE
49	27/05/2014	UT-49	Response to Undertaking. Re: inquire of Catherine Twinn her recollection of what was discussed at the April 15, 1985 meeting that the Sawridge band resolution presented at exhibit 1 of Mr. Bujold's September 12, 2011 affidavit dealt with. Specifically does she recall if there was any discussion or documentation presented in relation to the transfer of assets from the 1982 trust to the1985 trust. Also inquire if Ms. Twinn has any documentation of that particular meeting. We made this inquiry and were informed that she has no memory of this meeting or documentation in her possession, we made one further inquiry pursuant to this undertaking and no response was received.	UNDERTAKINGS on Questioning of May 27 & 28, 2014 with respect to the Affidavits of Paul Bujold dated August 30, 2011, September 12, 2011 and September 30, 2011
50	27/05/2014	UT-50	Minutes of Meetings relating to the transfer of assets and attachments to such Minutes. Re: review any trustee meeting minutes available relating to the transfer of assets from individuals into the '82 trust, or '82 trust into '85 trust, or the one individual transfer to the '85 trust.	UNDERTAKINGS on Questioning of May 27 & 28, 2014 with respect to the Affidavits of Paul Bujold dated August 30, 2011, September 12, 2011 and September 30, 2011
51	21/07/2014	UT-12	UT: Provide copies of any communications sent to Mr. Fennell, whether they were by letter, email, or otherwise, documenting the request that was being made. Our letter to David Fennel of July 21, 2014 requesting copies of documentation related to the transfer of assets	UNDERTAKINGS from Questioning of May 27 & 28, 2014 with respect to the Affidavits of Paul Bujold dated August 30, 2011, September 12, 2011 and September 30, 2011

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TAB	DATE OF DOCUMENT	DOCUMENT ID (where applicable)	DESCRIPTION	SOURCE
52	22/07/2014	UT-14 and 15	Response to our request of David Jones for copies of documentation relating to the transfer of assets. Re: Provide copies of any documentation sent attempting to seek information from David Jones. We e-mailed David Jones and received the response provided at tab 15. Re: contact Mr. Jones and advise whether or not he has access to documents that relate to the assets held by individuals that were ultimately transferred to the 1982 trust, or the assets that were then transferred from the 1982 trust to the 1985 trust. Our response from David Jones is included at tab 15.	UNDERTAKINGS on Questioning of May 27 & 28, 2014 with respect to the Affidavits of Paul Bujold dated August 30, 2011, September 12, 2011 and September 30, 2011
53	28/07/2014	UT-13	Response from David Fennel to our request for documentation UT: contact Mr. Fennell and advise whether or not he has any documentation or access to documentation or is aware of another resource or source that may have documents relevant to the assets that were held by individuals and then the transfer from those individuals to the '82 trust, or relevant to the transfer of assets from the '82 trust to the '85 trust. Our response from David Fennell is included at tab 13.	UNDERTAKINGS from Questioning of May 27 & 28, 2014 with respect to the Affidavits of Paul Bujold dated August 30, 2011, September 12, 2011 and September 30, 2011

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TAB	DATE OF DOCUMENT	DOCUMENT ID (where applicable)	DESCRIPTION	SOURCE
54	26/08/2014	UT-18	Correspondence from the Department of Indian Affairs responding to the request for information relating to the transfer of assets NTD do we now have a response from CRA? Re: inquire of CRA and department of Indian Affairs to determine if they have documentation showing what assets were intended to be included within the trust settlement at exhibit a, the 1982 trust or declaration of trust, and any documentation indicating what happened with the transfer from the 1982 trust to the 1985 trust. See attached letter from Department of Indian Affairs at tab 18. We confirm that it does not appear that any information was shared with the Department of Indian affairs regarding the transfer from 1982 to 1985, nor with regards to which assets were intended to be included We wrote to the CRA but have not yet received a response.	UNDERTAKINGS on Questioning of May 27 & 28, 2014 with respect to the Affidavits of Paul Bujold dated August 30, 2011, September 12, 2011 and September 30, 2011
55	15/12/2015	TWN001286	Exhibit I from the Affidavit of Catherine Twinn sworn December 15, 2015. Sawridge Band Inter Vivos Settlement April 15, 1985.	Affidavit of Records of Catherine Twinn sworn June 21, 2018
56	11/09/2016	Pages 287-290	Excerpts from Transcript on Questioning of November 9 & 10, 2016 RE: questions to Catherine Twinn relating to obtaining trust records.	Continued Questioning on Affidavits of November 9 & 10, 2016 - Court Actions 1103 14112 and 1403 04885
57	15/02/2017	Page 23, para 75	Affidavit of Paul Bujold sworn and filed February 15, 2017 in Action 1103 14112	Affidavit of Paul Bujold sworn and filed February 15, 2017 in Action 1103 14112

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DOCUMENTS RELATED TO TRANSFER OF ASSETS

TAB B

ALBERTA GOVERNMENT SERVICES
LAND TITLES OFFICE

IMAGE OF DOCUMENT REGISTERED AS:

032443307

ORDER NUMBER: 38365229

THIS IS EXHIBIT " B " TO THE AFFIDAVIT OF
Paul Bujold
SWORN BEFORE ME THIS 20th DAY
OF January 20 20
COMMISSIONER FOR OATHS IN AND FOR
THE PROVINCE OF ALBERTA
MICHAEL S. SESTITO
Barrister & Solicitor

225 983 — Alberta Regulation 538/82 THE LAND TITLES ACT Form 7 Section 39, 108

DISCHARGE BY MORTGAGEE

CANADA
PROVINCE OF ALBERTA

To the Registrar of the NORTH Alberta Land Registration District:

I, (We) WALTER P. TWINN, as Trustee of the Sawridge Indian Band,

the mortgagee(s), (~~executor, administrator~~) do hereby acknowledge to have received all the money to become due under the mortgage (~~or charge~~) made by SAWRIDGE ENTERPRISES LTD.

to WALTER P. TWINN, as Trustee of the Sawridge Indian Band,

which mortgage (~~or charge~~) was registered in the LAND TITLES OFFICE for the North Alberta Land Registration District on the 14th day of March A.D. 19 85, as instrument No. 852050951

that the Mortgage has not been transferred; and that the same is wholly discharged.

IN WITNESS WHEREOF I (We) have hereunto subscribed my (our) name(s) (~~or caused the Corporate Seal to be hereunto affixed~~) this 22 day of October A.D. 1986.

SIGNED by the above named

in the presence of

James F. Dion Q.C.

Walter P. Twinn

WALTER P. TWINN

032443307 REGISTERED 2003 11 16
DISC - DISCHARGE
DOC 1 OF 1 DRR#: 1321183 ADR/SFERNAND
LINC/S: 0017646373 +

to

SAWRIDGE ENTERPRISES LTD.

Discharge by Mortgagee

AFFIDAVIT OF EXECUTION

CANADA)
)
PROVINCE OF ALBERTA)
)
TO WIT:)

I, Bruce E. Thom

of EDMONTON

in the Province of Alberta

MAKE OATH AND SAY:

1. I was personally present and did see

WALTER P. TWINN

named in the within instrument, who is (are) personally known to me to be the person(s) named therein, duly sign and execute the same for the purpose(s) named therein.

2. That the same was executed at EDMONTON in the Province of Alberta and that I am the subscribing witness thereto.

3. That I know the said person(s) and he (she, each) is in my belief of the full age of eighteen years.

Bruce E. Thom

SWORN before me Darren Becker

at EDMONTON
in the Province of Alberta
this 22nd day of
A.D. 19 86.

DARREN BECKER
BARRISTER & SOLICITOR
A Commissioner for Oaths for Alberta

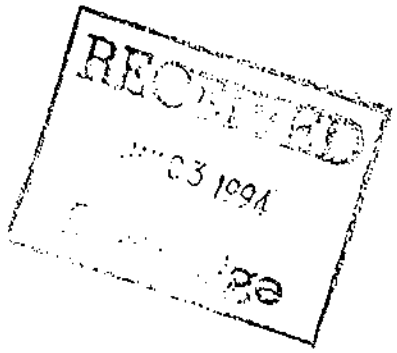
TAB C

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

DEC 23 1993



Chief Walter Twinn
Sawridge Band
P.O. Box 326
SLAVE LAKE AB T0G 2A0

Dear Chief Twinn,

As a result of the proceedings of the Bill C-31 legal action which is now before the courts, I have recently been informed of the existence of trusts which have been established on behalf of the members of the Sawridge Band.

I understand that these trusts hold substantial sums which, to a large extent, have been derived from band capital and revenue moneys previously released by the Minister of the Department of Indian Affairs and Northern Development. The capital and revenue moneys were expended pursuant to sections 64 and 66 of the *Indian Act*, for the benefit of the members of your band.

Along with Ken Kirby and Gregor MacIntosh from this department, I would be pleased to meet with you and your band council or other representatives in Alberta, preferably sometime in January 1994, to discuss these trusts.

I trust you will find this satisfactory. My office will contact you in January 1994, to make the necessary arrangements.

Yours sincerely,

Wendy Porteous

Wendy F. Porteous
Assistant Deputy Minister
Lands and Trust Services

THIS IS EXHIBIT "C" TO THE AFFIDAVIT OF
Paul Bujold
SWORN BEFORE ME THIS 20th DAY
OF January, 2020
COMMISSIONER FOR OATHS IN AND FOR
THE PROVINCE OF ALBERTA

MICHAEL S. SESTITO
Barrister & Solicitor

Canada

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

MAR - 7 1994

Chief Walter Twinn
Sawridge Band
P.O. Box 326
SLAVE LAKE AB

Dear Chief Twinn:

I am writing further to Wendy Porteous' letter of December 23, 1994 (copy attached) concerning the existence of trusts which have been established on behalf of the members of the Sawridge Band.

As no response has been received to date, I am requesting that we all meet to discuss the points raised in the above letter.

I would appreciate receiving your concurrence within the next two weeks. To make the necessary arrangements, please contact my office at (819) 953-5577.

W. (Bill) Van Iterson
A/Assistant Deputy Minister
Lands and Trust Services

Canada

ORIGINAL in Capital/Rec file 93-94

COPY

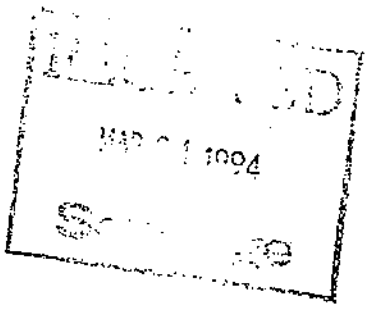
DAVIES, WARD & BECK

BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

March 16, 1994



W. Van Iterson, Esq.
A/Assistant Deputy Minister
Lands and Trust Services
Indian and Northern Affairs Canada
Ottawa, Ontario
K1A 0H4

Dear Sir:

Sawridge Indian Band

I refer to the letters of May 7, 1994 and December 23, 1993 addressed to Chief Walter Twinn. to Hend'n

For some years we have been retained to advise the Band with respect to, among other matters, any trusts established for its members. Accordingly, I have been instructed to respond to any questions you may have in connection with such trusts to the extent that you are entitled to receive answers.

You will understand that the Band, like any other community, organization or entity engaged in business and other activities for the benefit of its members is reluctant to release financial information relating to such activities to anyone other than such members unless it determines that this is in its best interests or is required by law. For this reason, although I have no objection to meeting with individuals from your department, it would be helpful if you would indicate in advance why you believe such a meeting to be desirable and the grounds, if any, on which you believe you are entitled to receive information about the trusts referred to in the letter from Ms. Porteous.

It would be appreciated if you would address your reply and any further correspondence or questions on this matter to this office.

Yours very truly,

Maurice C. Cullity

MCC/dp

cc: Chief Walter Twinn

bcc: M. Henderson

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

COPY

MAR 3 0 1994

Mr. Maurice C. Cullity
Davies, Ward & Beck
Barristers & Solicitors
P.O. Box 63, Suite 4400
1 First Canadian Place
TORONTO ON M5X 1B1

Dear Mr. Cullity:

Thank you for your letter of March 16, 1994 concerning the existence of trusts that were apparently established on behalf of members of the Sawridge Band. I appreciate your willingness to meet to discuss this matter.

A meeting is desirable because of the Minister's statutory responsibilities for ensuring that moneys released to the band, pursuant to sections 61 to 69 of the *Indian Act*, are used for the benefit of the band and its members.

It may be that a relatively small amount of infomation on the above trusts, the existence of which was unknown to the Minister, will provide sufficient assurances that the above concerns have been met. We may also be assured that the assets are being held in those trusts for the benefit of all band members, including those who may be entitled to membership, as will be determined by the current related litigation.

To make the necessary arrangements for the meeting, would you please contact my office at (819) 953-5577.

Yours sincerely,

W. (Bill) Van Iterson
A/Assistant Deputy Minister
Lands and Trust Services

c.c.: Chief Walter Twinn
Gregor MacIntosh
Ken Kirby
Chris McNaught

Canada

Department of Justice Canada | Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

July 7, 1994

Mr. Maurice C. Cullity, Q.C.
DAVIES, WARD, BECK
P.O. Box 63, Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Subject: Sawridge Trusts

Dear Mr. Cullity:

Please be advised that since my colleague Mr. McNaught has assumed other duties in the Department of Justice, I have taken over carriage of the above-noted matter.

Your letter of April 19, 1994 addressed to W. (Bill) Van Iterson of our client, the Department of Indian Affairs and Northern Development, proposed that the Department be provided with a written statement from the auditors of the Sawridge Band to the effect that the funds distributed to the Band pursuant to sections 64 and 69 of the *Indian Act* are held in trust for the Band. Mr. McNaught's letter of May 20, 1994 set out our understanding that the statement would also confirm that these funds were used for the purposes for which they were authorized by the Minister. I understand that this was subsequently confirmed in a telephone conversation between yourself and Mr. McNaught.

Canada

My client would be pleased to receive the proposed statement at your early convenience. I would appreciate if you would contact me upon your return to advise me of when we may anticipate its receipt. I may be reached at (819) 953-2288.

We thank you for your assistance in this matter and we look forward to hearing from you.

Margaret McIntosh
Counsel

DAVIES, WARD & BECK
BARRISTERS & SOLICITORS

COPY

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

VIA TELECOPIER

July 8, 1994

Legal Services
Indian Affairs and Northern Development
Room 1018
Les Terrasses de la Chaudière
10 Wellington Street
Hull, Quebec
K1A 0H4

Attention: Margaret McIntosh

Dear Ms. McIntosh:

Sawridge Trusts

Further to our conversation by telephone earlier today, I confirm that I have been advised on behalf of my client that the auditors of the Sawridge Indian Band are engaged in the review that will be required before they could give the certificate discussed in my previous correspondence with your department.

You will appreciate that the review required will involve a significant expenditure of time by the auditors as the period involved is almost 20 years. I will, however, be in touch with you as soon as I have received a response from them.

Yours very truly,

Maurice C. Cullity

MCC/dp

Department of Justice Canada
Ministère de la Justice Canada

Ottawa, Canada
K1A 0H8

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudiere
10 Wellington Street
Hull, Quebec
K1A 0H4

August 29, 1994

Mr. Maurice C. Cullity, Q.C.
Davies, Ward Beck
P.O. Box 63, Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Subject: Sawridge Trusts

Dear Mr. Cullity:

Further to our telephone conversation of August 9, 1994, we continue to anticipate a statement from the auditors of the Sawridge Indian Band to the effect that funds released to the Band pursuant to sections 64 and 69 of the *Indian Act* are being held in trust for the members of the Band, and that any funds were used for the purposes for which they were authorized by the Minister of Indian Affairs and Northern Development.

My client is anxious to have this matter settled as expeditiously as possible. Accordingly, I respectfully request some written indication of when this information will be available.

Thank you for your consideration of this matter.

Margaret McIntosh
Counsel

Canada

Department of Justice Canada / Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

October 5, 1994

Mr. Maurice C. Cullity, Q.C.
Davies, Ward, Beck
P.O. Box 63, Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X1B1

Sawridge Indian Band List of Expenditures

Dear Mr. Cullity:

Further to our previous discussions, please find attached a document provided by my client which lists the expenditures made pursuant to sections 64 and 66 of the Indian Act for the Sawridge Indian Band for the years 1970-71 to 1992-93.

I trust this will facilitate the preparation of the statement from Sawridge's accountants regarding the use of funds released to the Sawridge Indian Band.

Please do not hesitate to contact me if I may provide you with any assistance or if you would like to discuss this matter in further detail.

Margaret McIntosh
Counsel

Attach.

Canada

ASSETS

[redacted]

1970-71	OPERATING EXPENSES SAWRIDGE DEVEL	66(1)	$ 3,500.00	BCR 4-70-71
	REPAYABLE LOANS	66(1)	$ 500.00	BCR UNNUMBERED
1972-73	SLAVE LAKE DEVELOPMENTS	66(1)	$ 500.00	BCR
	HOTEL EXPANSION	64(1)(k)	$ 100,000.00	BCR Unnumbered
	OPERATING CAPITAL-SAWRIDGE HOTEL	64(1)	$ 5,000.00	BCR 8-72-73
1973-74	GUARANTEE - ROYAL BANK	64(1)	$ 30,000.00	BCR
	ROYAL BANK - SHAREHOLDERS LOANS	64(1)(k)	$ 20,000.00	BCR 9-73-74
	OVERDRAFT - ROYAL BANK	64(1)(k)	$ 50,000.00	BCR 11-73-74
1974-75	LEGAL FEES FIELD OWEN	64(1)(k)	$ 10,127.50	BCR 9-74-75
	LEGAL FEES-LEPSRUD, CUNNINGHAM ETC	64(1)(k)	$ 3,134.30	BCR 9-74-75
	LOAN TO SAWRIDGE HOTEL	64(1)(k)	$ 50,000.00	BCR 11-74-75
	LOAN GUARANTEE	64(1)(k)	$ 35,000.00	BCR UNNUMBERED
	PURCHASE OF LAND	64(1)(d)	$ 98,000.00	BCR UNNUMBERED
1975-76	GUARANTEE	64(1)(k)	$ 100,000.00	BCR 13-75-76
1976-77	SHAREHOLDERS LOAN	66(1)	$ 25,000.00	BCR 8-76-77
	SHAREHOLDERS LOAN	66(1)	$ 60,000.00	BCR 13-76-77
	BUILDING } check BCR 10-76-77	64(1)(g)	$ 290,000.00	BCR 777/10-76/77
	VAULT }	64(1)(g)	$ 28,000.00	BCR 777/10-76/77
	SHAREHOLDERS LOAN	64(1)(k)	$ 50,000.00	BCR 14-76-77
	LOAN GUARANTEE	66(1)	$ 50,000.00	BCR 76-77.
1977-78	NEW HOME } check BCR 2-77-78	64(1)(j)	$ 35,000.00	BCR 02/77-78
	PAVING,LANDSCAPING & FENCING	64(1)(g)	$ 70,000.00	BCR 02/77-78
	DRIVEWAYS - HOMES	64(1)(j)	$ 30,000.00	BCR 02/77-78
1979-80	IEDF LOAN-SAWRIDGE ENTERPRISES	66(1)	$ 1,440.00	BCR 7-79-80
	ARCOM SYSTEM BUILDING	66(1)	$ 50,000.00	BCR 10-79-80
	PURCHASE OF ARCOM TIMBER	64(1)(k)	$ 60,000.00	BCR 6-79-80
1980-81	HOUSING } check BCR 14-2-80-81	64(1)(g)	$ 100,000.00	BCR 01-80/81
	HOUSING DEVELOPMENT	64(1)(g)	$ 400,000.00	BCR 01-80/81
	JOINT VENTRE - BIGSTONE BAND	64(1)(k)	$ 100,000.00	BCR 3-80-81
	JOINT VENTRE	64(1)(k)	$ 100,000.00	BCR 3-80-81
	LENNIE DEBOW & MARTEN	64(1)(k)	$ 1,500,000.00	BCR UNNUMBERED
1981-82	VEHICLE EXPENSE(MAIN., LEASE, GAS } BCR 25+26 81-82	66(1)	$ 40,000.00	BCR 26-81-82.
	BAND HOLDINGS-TAX MAIN, ETC.	66(1)	$ 225,000.00	BCR 26-81-82.
	AIRCRAFT PURCHASE & MAINTENANCE	66(1)	$ 210,000.00	BCR 26 81-82.
	EQUITY FUNDING-SAWRIDGE JASPER	64(1)(k)	$ 2,500,000.00	BCR 27-81-82
	PURCHASE PROPERTY	64(1)(k)	$ 1,600,000.00	BCR UNNUMBERED
1982-83	PROFESSIONAL & LEGAL } Budget BCR	66(1)	$ 180,000.00	
	INSURANCE BAND BLDGS & HOLDINGS	66(1)	$ 75,000.00	
	PURCHASE MUTTART BUILDERS SUPPLIES	64(1)(k)	$ 3,770,445.00	BCR 51-81-82
	LOAN GUARANTEE	64(1)(k)	$ 2,400,000.00	BCR 82/83 - 68
	NORTHWOOD BUILDING DEVELOPMENT Budget	64(1)(k)	$ 500,000.00	
1983-84	LOAN GUARANTEE	64(1)	$ 3,000,000.00	BCR 83/84 - 80
			$17,955,645.00	

ASSETS

awridge #:454

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983-84	PROFESSIONAL & LEGAL	66(1)	$ 250,000.00	BCR 454-73-83/84
	BAND HOLDINGS - TAX MAIN	66(1)	$ 300,000.00	BCR 454-73-83/84
	AIRCRAFT - MAIN	66(1)	$ 100,000.00	BCR 454-73-83/84
	BAND MEMBER GRANTS & LOANS	66(1)	$ 100,000.00	BCR 454-73-83/84
	PAVING & LANDSCAPING	64(1)(b)	$ 140,000.00	BCR 454-72-83/84
	DRIVEWAY CONSTRUCTION	64(1)(b)	$ 110,000.00	BCR 454-72-83/84
	TRUCK STOP COMPLEX (BUILDING & EQUIP)	64(1)(k)	$ 1,835,000.00	BCR 454-72-83/84
984-85	PROFESSIONAL & LEGAL	66(1)	$ 250,000.00	BCR 87-83/84
	BAND HOLDINGS - TAX MAIN	66(1)	$ 300,000.00	BCR 89-83/84
	AIRCRAFT MAINTENANCE	66(1)	$ 100,000.00	BCR 89-83/84
	BAND MEMBER GRANTS & LOANS	66(1)	$ 100,000.00	BCR 89-83/84
	TRUCK STOP	64(1)(g)	$ 2,000,000.00	BCR 84/85 - 97.
	ON RESERVE DRILLING	64(1)(g)	$ 1,000,000.00	BCR 80-83-84
	2 NEW HOMES	64(1)(g)	$ 300,000.00	BCR 90-83/84
	OFFICE RENO's, IMPROVEMENTS	64(1)(i)(g)	$ 100,000.00	BCR 90-83/84
	PAVING & LANDSCAPING	64(1)(b)	$ 122,500.00	BCR 90-83/84
	DRIVEWAY CONSTRUCTION	64(1)(b)	$ 127,500.00	BCR 90-83/84
	ON RESERVE LAND FILL	64(1)(g)	$ 250,000.00	BCR. 90-83/84
985-86	PROFFESSIONAL & LEGAL	66(1)	$ 500,000.00	BCR 117-85-86
	VEH. & EQUIP. MAIN. & LEASE	66(1)	$ 175,000.00	BCR 117-85-86.
	TAX	66(1)	$ 300,000.00	BCR 117-85-86
	AIRCRAFT	66(1)	$ 200,000.00	BCR 117-85-86
	BAND MEMBER GRANTS & LOANS	66(1)	$ 100,000.00	BCR 117-85-86
	HOTEL SHAREHOLDERS EQUITY (LOAN)	66(1)	$ 1,000,000.00	BCR 117-85-86.
	APARTMENT CONSTRUCTION	66(1)	$ 1,440,000.00	BCR 85/86 UNNUMBERED
	WAREHOUSE	64(1)(g)	$ 300,000.00	BCR 116-85-86.
	TRUCKSTOP SITE PAVING	64(1)(b)	$ 200,000.00	BCR 116-85-86
	LANDFILL - NEW CONSTRUCTION	64(1)(g)	$ 200,000.00	BCR 116-85-86
	CONTRACT RENO, LEASEHOLDING	64(1)(g)	$ 500,000.00	BCR 116-85-86.
986-87	BAND BUILDINGS	64(1)(g&l)	$ 350,000.00	Not Numbered 86-8
	TRAVEL EXP & AIRCRAFT	64(1)(i)	$ 200,000.00	Not Numbered 86-8
	LEGAL & PROFESSIONAL	64(1)(l)	$ 450,000.00	Not Numbered 86-87
	TRUCK WASH	64(1)(g)	$ 350,000.00	Not Numbered 86-87
987-88	BUIDINGS UTIL. MAIN. & LANDSCAPING	64(1)(g&i)	$ 400,000.00	BCR 87-C.B. #1
	TRAVEL EXP & AIRCRAFT	64(1)(i)	$ 200,000.00	BCR 87-C.B. #1
	COMPUTER PURCHASE	64(1)(i)	$ 135,000.00	BCR 87-C.B. #1.
	LEGAL & PROFESSIONAL	64(1)(l)	$ 350,000.00	BCR 87-C.B. #1
	GREEN HOUSE	64(1)(g)	$ 134,000.00	BCR 87-C.B. #1.
	TRAILER COURT	64(1)(g)	$ 150,000.00	BCR 87-C.B. #1.
	VEH & EQUIP MAIN & LEASE	64(1)(l)	$ 150,000.00	BCR 87-C.B. #1
	HOTEL PURCHASE	64(1)(k)	$ 3,000,000.00	BCR 87/88 - 04
	SAWRIDGE HOTEL	66(1)	$ 1,450,000.00	BCR 87/88 - 01
			$19,719,000.00	

ASSETS

Sawridge #454

cont

1988-89	HOTEL RENOVATIONS	66(1)	$ 425,000.00	BCR 88/89-015-S
	SUBDIVISION DEVELOPMENT	66(1)	$ 350,000.00	BCR 88/89-015-S
	SLAVE LAKE TOWN CENTER DEVEL	66(1)	$ 1,200,000.00	BCR 88/89-015-S
	BAND BUILDINGS	64(1)(g&i)	$ 200,000.00	BCR 88/89-001
	LEGAL & PROFFESSIONAL	64(1)(i)	$ 300,000.00	BCR 88/89-001
1989-90	SHOPPING CENTRE	66(1)	$ 1,380,000.00	BCR 89/90 - 04
	SHOPPING CENTRE	66(1)	$ 690,000.00	BCR 89/90 - 08
	GROCERY STORE	64(1)	$ 2,756,919.80	BCR 89/90 - 07
	BAND BUILDINGS	64(1)(i)	$ 225,000.00	BCR 89/90-001 S
	TRAVEL & AIRCRAFT	64(1)(i)	$ 375,000.00	BCR 89/90-001 S
1990-91	SHOPPING CENTRE	66(1)	$ 650,000.00	BCR 90/91 - 06
	TRAVEL EXP & AIRCRAFT COSTS	64(1)(i)	$ 180,000.00	89/90-013-S
	LOANS	64(1)(h)	$ 200,000.00	89/90-013-S
1991-92	BAND BUILDINGS O&M	64(1)(g&i)	$ 300,000.00	90/91-017-S
	TRAVEL EXP & AIRCRAFT COSTS	64(1)(k)	$ 261,500.00	90/91-017-S
	VARIOUS EXPENDITURES	66(1)	$ 1,300,000.00	BCR 91/92-010
1992-93	VARIOUS EXPENDITURES	66(1)	$ 1,200,000.00	BCR 92/93-010-S
	VARIOUS EXPENDITURES	66(1)	$ 800,000.00	BCR 92/93-020-S
	LEGAL & PROFESSIONAL	64(1)(k)	$ 617,067.00	BCR 92/93-008S
	LEGAL & PROFESSIONAL	64(1)(k)	$ 836,650.00	BCR 92/93-028S
			$31,931,782.80	

DAVIES, WARD & BECK

BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

VIA TELECOPIER

October 20, 1994

Ms. Margaret McIntosh
Counsel, Legal Services
Indian Affairs and Northern Development
Room 1018
Les Terrasses de la Chaudière
10 Wellington Street
Hull, Quebec
K1A 0H4

Dear Ms. McIntosh:

Sawridge

Further to our recent discussions, I am writing to confirm that I do not believe that the list of expenditures provided with your letter of October 5, 1994 is helpful for the purposes we have discussed. Many of the amounts referred to on the list relate to recurring expenditures, such as legal and other professional fees, and some are as small as $500. They extend back over a period of 20 years and to ask for a statement from the auditors that all were properly expended on the particular purposes referred to in the BCRs would be prohibitively expensive even if, after such a period, it were possible to deal with them.

In my discussion with Mr. Gregor MacIntosh on April 7, 1994, I was told that the Department's concern was to ensure that all funds distributed to the Band pursuant to section 64 or section 69 were either held in trust, or could be traced into assets held in trust, for members of the Band. I suggested that the auditors might be asked to certify that all funds distributed to the band by the Minister pursuant to section 64 or section 69 of the *Indian Act* for the acquisition of specific assets, or property or investments into which those funds have been converted, are now held in trusts for members of the band. In my letter of April 19 to Mr. Van Iterson, I referred too generally to funds distributed to the band for specific purposes pursuant to those sections of the *Indian Act*. A large number of the amounts on the list you have provided refer to section 66 of the Act but, more importantly, many of them were amounts for recurring and other expenditures that would not involve the acquisition of assets and could not be expected to end up in trusts or otherwise in property of the Band.

DAVIES, WARD & BECK

In order to try to resolve this matter without further delay and expense, I wonder whether it would be an acceptable solution to ask the auditors to confine their attention to amounts on your list of $500,000 or more that were advanced for the purpose of acquiring specific assets. If this is not satisfactory from the viewpoint of the Department, perhaps you would suggest another alternative.

As I have indicated to you on a number of occasions, we do not agree that the Department is entitled to demand details of expenditures made by the band in the past or with respect to the assets that it now holds. At the same time, in the interests of avoiding the litigation that will be inevitable if your client intends to make unreasonable demands, I have attempted to find a solution that will satisfy the Department without involving the Band in unnecessary expense. I still wish to do this if it is possible.

Yours very truly,

Maurice C. Cullity

MCC/dp

cc: M. McKinney, Esq.

Department of Justice Canada / Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

Nov 9 3 29 PM '94

November 9, 1994

VIA FAX NUMBER (416) 863-0871

Mr. Maurice C. Cullity, Q.C.
Davies, Ward & Beck
P.O. Box 63, Suite 1400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Sawridge Indian Band Expenditures pursuant to Sections 64 and 66 of the *Indian Act*

Dear Mr. Cullity:

We are in receipt of your letter of October 24th, 1994.

Although we note the concern expressed in your letter regarding the inclusion on the list of amounts for recurring and other expenditures which would not involve the acquisition of specific assets, we should remember that the suggestion for the production of such a statement originated from your letter of April 19, 1994.

We and our client, the Department of Indian Affairs and Northern Development, are concerned regarding the delay in resolving this matter.

In an attempt to accelerate the resolution of the current situation, we are prepared to limit the scope of the statement to be provided by your client's auditors. Accordingly, we hereby request confirmation by way of statement from Sawridge's accountants that all funds that were released for the acquisition of capital assets were in fact used for that specific purpose, and further confirmation that those assets are held in trust, or have been converted into other assets which are held in trust, for the members of the Band. In other words, at this time we do not seek confirmation regarding amounts released for purposes other than the acquisition of capital assets.

.../2

We would appreciate receiving confirmation of this proposal at your earliest convenience.

Yours very truly,

M. C. McIntosh

Margaret McIntosh
Counsel

2190.

Department of Justice Canada / Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

IA2545-59

June 5, 1995

VIA FAX NUMBER (416) 863-0871

Mr. Maurice C. Cullity, Q.C.
Davies, Ward & Beck
P.O. Box 63, Suite 1400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Sawridge Trusts

Dear Mr. Cullity

We are in receipt of your correspondence of May 8, 1995 and appended statement from the firm of Deloitte & Touche. We note that the statement from Deloitte & Touche is limited to "Band Council Resolutions Funds Received - 1985 - 1993."

In your letter of April 19, 1994 to the then Acting Assistant Deputy Minister of DIAND you stated that a solution to resolve the Department's concerns regarding the release of funds to the Sawridge band would be to

> "obtain a written statement from the Band's auditors, Messrs. Deloitte & Touche, that the funds distributed to the Band for specific purposes pursuant to the above sections of the *Indian Act*, or investments or property into which those funds had been converted, are now held in trust for the members of the Band".

My colleague, Christopher McNaught, responded to your correspondence in a letter dated May 20, 1994 stating that "DIAND would be pleased to receive such a statement at your early convenience, and would ask that it reflect the relevant distributed funds from the Department for the period of 1975 to the present."

Canada

Subsequently, on July 8, 1994 you wrote stating that the auditors of the Sawridge Indian band were engaged in the review but "[y]ou will appreciate that the review required will involve a significant expenditure of time by the auditors as the period involved is almost 20 years." Furthermore, in response to your request, DIAND provided your client with a list of B.C.R. requests for expenditures for the years 1970-1971 to 1992-1993.

In summary, we have relied on your undertaking to provide a written statement from the Band's auditors regarding the distribution of funds to the Sawridge Indian Band. The correspondence referred to above clearly confirms that it had been agreed that the statement would relate to the period of 1975 to the present. Would you therefore confirm as soon as possible when a statement from the band auditors covering the period of 1975 to 1984 will be forthcoming?

Since this matter has been outstanding for over a year we would appreciate your immediate response.

Yours very truly,

Margaret McIntosh
Counsel

DAVIES, WARD & BECK
BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

VIA TELECOPIER

June 26, 1995

Ms. Margaret McIntosh
Counsel, Legal Services
Indian Affairs and Northern Development
Room 1018
Les Terrasses de la Chaudière
10 Wellington Street
Hull, Quebec
K1A 0H4

Dear Madam:

Sawridge Trusts

I refer to your letter of June 5, 1995.

Please be advised that I gave no undertaking of the kind mentioned in the second last paragraph of your letter and I have no intention of providing you with the confirmation referred to at the end of that paragraph.

The decision to limit the auditor's review to the period of the last ten years was made at your suggestion in our discussion following my receipt of your letter of November 9, 1994. I passed on that suggestion to our clients in a letter dated November 20, 1994.

I will be prepared to discuss this matter further if and when you feel able to do so in a constructive manner.

Yours very truly,

Maurice C. Cullity

MCC/dp

21902.

Department of Justice Canada | Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

July 28, 1995

Mr. Maurice C. Cullity, Q.C.
Davies, Ward & Beck
P.O. Box 63, Suite 1400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Dear Mr. Cullity,

This is further to your letter to my colleague Margaret McIntosh dated June 26, 1995.

As indicated in Ms. McIntosh's letter of June 5, 1995 we had understood that the statement from the Band's auditors would cover the period from 1975 to present as requested in the letter from my colleague Christopher McNaught to you dated May 20, 1994.

I take from your letter that you had a different understanding and that we should not expect a further statement from you, your client or its auditors.

We will consult with our client and advise you if we are instructed to pursue the matter further at this time.

Yours truly,

William J.S. Elliott, Q.C.
Senior General Counsel

Canada

DAVIES, WARD & BECK
BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

VIA TELECOPIER

August 3, 1995

William J.S. Elliott, Esq., Q.C.
Senior General Counsel
Legal Services
Indian Affairs and Northern Development
Room 1018
Les Terrasses de la Chaudière
10 Wellington Street
Hull, Quebec
K1A 0H4

Dear Mr. Elliott:

Sawridge Trusts

Thank you for your letter of July 28, 1995.

The third paragraph in your letter is correct and I regret that this misunderstanding arose. What I believe happened was that after we received the correspondence referred to in Ms. McIntosh's letter of June 5, 1995 I discussed with Ms. McIntosh the difficulty and the expense of doing a review back to 1975. As a result of that discussion, my understanding was that it was agreed that the Band's auditors should be asked to conduct a review for the period of the last 10 years and forward that to you to see if it would be satisfactory for the purposes of your client. I advised my client of this and, in consequence, was very surprised indeed by the contents and the tone of the letter dated June 5, 1995 that was signed by Ms. McIntosh.

I should add that in the numerous discussions I had with Ms. McIntosh on this matter, she was always courteous, cooperative and completely professional and, as I was quite sure we had a common understanding of the review the auditors would make, I did not attribute to her the authorship of the letter of June 5.

Yours very truly,

Maurice C. Cullity

MCC/dp

P.O. BOX 63, SUITE 4400 1 FIRST CANADIAN PLACE, TORONTO, ONTARIO, CANADA M5X 1B1
TELEPHONE (416) 863-0900 FAX (416) 863-0871

DAVIES, WARD & BECK
BARRISTERS & SOLICITORS

TIMOTHY G. YOUDAN
Direct Line (416) 367-6904
tyoudan@dwb.com

File No. 21902

April 1, 1999

BY FAX

Mr. Michael R. McKinney
Executive Director
Sawridge Administration
P.O. Box 326
Slave Lake, Alberta T0G 2A0

Dear Mr. McKinney:

Sawridge Indian Band

Further to your question about correspondence in 1995 relating to an audit, there is no record in our files of any correspondence subsequent to Maurice Cullity's letter dated August 3, 1995 to William J.S. Elliott. For your information, I enclose the only letters in our file subsequent to Ms Margaret McIntosh's dated June 5, 1995. These are, apart from the letter of August 3, 1995 referred to above, a letter dated June 26, 1995 from Maurice Cullity to Margaret McIntosh and a letter dated July 28, 1995 from William Elliott to Maurice Cullity.

Please call me if you have any questions.

Yours very truly,

Timothy G. Youdan

TGY/man
Encls.

Fax, Tim Youdan to Mike McKinney re Maurice Cullity correspondence with DIAND, 990401

TAB U

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

PAUL BUJOLD, AFFIRMED AT 10:00 A.M., FEBRUARY 26, 2020,
QUESTIONED BY MR. FAULDS:

Q MR. FAULDS: Good morning, Mr. Bujold.
A Good morning.
Q I understand that you are being produced here this morning on behalf of the Trustees of the 1985 Sawridge Trust?
A Yes.
Q And you are the Chief Executive Officer, is that your official title?
A My official title is Trust administrator.
Q Okay. And what does being the Trust administrator involve?
A It involves administering the affairs of the Trusts, the beneficiaries, assisting the Trustees to carry out their business.
Q And are you, in effect, the Chief Executive Officer of the Trust?
A I am.
Q Okay. Now you understand that this morning you are being questioned in relation to the application which has been filed by the Trustees in Court of Queen's Bench Action 1103 14112, and it was filed on September the 13th of 2019. I'm just showing you that to confirm that. We are agreed about that?
A Yes.
Q And I don't want to -- I am not asking you this by way

of legal characterization, but you understand that the main issue that we are concerned with is the interpretation of the Order that was granted on August the 26th of 2016 in relation to the transfer of assets into the 1985 Trust?

MS. BONORA: I wouldn't characterize it that way, so I am going to object to that question.

Q MR. FAULDS: You understand that that is one of the issues that we are concerned with in the application?

MS. BONORA: I think he perhaps understands now that that is one of the issues that you are perhaps raising.

Q MR. FAULDS: Well, your application seeks determination and direction of the affect, I think you meant effect, of the Consent Order made by Justice D.R.G. Thomas pronounced on August the 24th, 2016 respecting the transfer of assets from the Sawridge Band Trust dated April 15th, 1982, the 1982 Trust, to the Sawridge Band Inter Vivos Settlement dated April 15th, 1985, the 1985 Trust, more particularly described.

So you understand that is the subject, one of the subjects of the application?

A Yes.

Q Okay. And in the application on the third page there is a reference to a list of materials that will be

relied upon, and you will see that it is general in the sense that it refers to previous Affidavits and previous questionings and materials. Do you see that?

A Yes, I do.

Q Just so that I am clear, the Affidavits previously filed in this action sworn by yourself would be two Affidavits sworn in 2011, one on August 31st, I believe, and the other on September 12th of 2011?

A That is correct.

Q And then there was a third Affidavit that you swore February the 15th of 2017, which was filed jointly, I believe, in two actions. This one and a related action involving Catherine Twinn. Do you recall that Affidavit?

A Yes, I think I do.

Q Okay.

A It is a long time ago, so.

Q Not as long ago as 2011.

A That is true.

Q And then there is the Affidavit which you swore this year in relation to the production application that was brought by the Office of the Public Guardian and Trustee?

A Yes.

Q And then there was an Affidavit of Records which you swore on November the 2nd of 2015?

A Yes.

Q And there was a Supplemental Affidavit of Records which you swore on April the 27th, 2018?
A Yes.
Q Okay. Does that cover all of the Affidavits that you have sworn?
A As far as I can recall at this moment, yes.
MS. BONORA: I think that you are missing one.
MR. FAULDS: Go ahead.
MS. BONORA: I think you are missing -- I don't have the date or I don't have it here. If you want us to provide you with a complete list I am happy to do that for you.
MR. FAULDS: Sure, that would be helpful, thank you.

UNDERTAKING NO. 1:
RE PROVIDE A COMPLETE LIST OF ALL THE AFFIDAVITS SWORN BY MR. BUJOLD.

Q MR. FAULDS: And, Mr. Bujold, going back to the application itself, it refers to the fact that those materials are going to be relied upon in this application. And this may be a question that Ms. Bonora can answer, and I ask this partly because of some practical implications of how we conduct this questioning.
MR. FAULDS: When you refer, Ms. Bonora, to the fact that you are relying on the Affidavits of Records, does that include the documents themselves that are

listed therein?

MS. BONORA: Yes.

MR. FAULDS: Okay. So what I was just going to suggest was that perhaps rather than marking a whole bunch of individual documents then we can just identify them by reference to the Affidavit of Record number or some other listing number if that is agreeable.

MS. BONORA: Of course. That is very practical, m-hm.

Q MR. FAULDS: Okay. So Mr. Bujold, when did you begin working for the Sawridge Trust?

A In September of 2009.

Q Okay. And was your position essentially the same then as it is today?

A No.

Q Okay. Can you tell me how it changed?

A This legal action changed it significantly. So my initial responsibility was to gather information -- gather the documents of the Trust, help to administer the affairs of the Trustees, and to develop policies around the benefits.

Q Okay. And prior to your engagement had there been somebody fulfilling that function on behalf of the Trust?

A No. As a hired employee, no.

Q Okay. So who was handling those matters?

A The Trustees themselves were handling it. So various

Trustees took on administrative responsibility of various levels.

Q And as far as you are aware there was no dedicated staff?

A As far as I am aware, no.

Q So you were essentially the first dedicated staff for the 1985 Sawridge Trust?

A That is correct.

Q And let me just, so that we are on the same page about this, you are aware that a Trust was established for the benefit of the present and future members of the Sawridge First Nation in April of 1982 which was, I believe, formally known as the Sawridge Band Trust?

A Yes, I am aware of that.

Q So I am going to refer to that as the 1982 Trust?

A That is what we have been calling it.

Q And then there was a trust that was established on April the 15th of 1985 which I think was formally known as the Sawridge Inter Vivos Settlement, and I am going to refer to that as the 1985 Trust?

A Yes, that is what we refer to it as well.

Q Then there is a trust that was established in 1986 which I think is formally known as the Sawridge Trust and I am going to refer to that as the 1986 Trust?

A Yes.

Q And your responsibilities are in relation to the 1985 and 1986 Trusts?

A That is correct.
Q You don't have any responsibility in relation to the 1982 Trust?
A None at all.
Q Okay. So you were saying that your role changed from what you described as your original duties. Can you tell me how that occurred, or how it changed?
A How my duties changed?
Q Yes, how the nature of your position changed.
A Once the Trustees decided to proceed with the 1103 action then my responsibility was to represent the Trustees and to gather the documents that were necessary and to provide any information that I could to assist in that legal action.
Q Okay. So you took on what I am going to call a litigation support function?
A Yes.
Q And I take it you continued to be responsible for the original duties which you identified as well?
A Absolutely.
Q And just by way of background, when you took on the position in 2009 did you have any background in trust administration?
A No.
Q Okay. Did you have any background in financial administration?
A Yes.

Q Can you tell me a bit about that?
MS. BONORA: Can you tell me the relevance of a questioning around Mr. Bujold's role and his background in respect of this application?
MR. FAULDS: I am asking him these questions in order to understand what expertise or background he brought to bear on his duties. I am including the interpretation of financial documents.
MS. BONORA: But his duties are not in question here, and nor is his role in question or being on trial. So I don't see the relevance of his background and questioning his expertise.
MR. FAULDS: You are entitled to object if you wish.
MS. BONORA: Okay, my objection is on the record.
Q MR. FAULDS: Okay. So, Mr. Bujold, maybe you could answer me this. What were your initial priority tasks when you became the administrator?
MS. BONORA: I am going to object to that.
Q MR. FAULDS: Did you, in your capacity as trust administrator, begin to assemble documents and review documents relating to the origins of the Trust and the origins of the assets in the Trust?
A Yes.
Q Okay. And how did you go about that? Where did you find documents and records?

MS. BONORA: Mr. Faulds, so this line of questioning was done extensively by Ms. Hutchison when she questioned in 2011. So is it that you are asking him the same questions and testing his credibility, or are you just asking the questions for repetition? I am trying to understand, because certainly this line of questioning was asked when we produced the transfer of assets binder, all of that questioning was produced. So I am wondering why we need to revisit that issue.

MR. FAULDS: You are referring to the questioning in 2014. I think you said 2011.

MS. BONORA: Sorry, it was on the Affidavits in 2011.

MR. FAULDS: I don't intend to spend a lot of time dealing with this, but I am just trying to establish a bit of context and ground work for the substantive questions. I'm not interested in repeating, and I am certainly not interested in testing Mr. Bujold's credibility in relation to answers that he has previously given. I'm just trying to get a bit of a narrative so that we are on the same page in terms of the questions that I am asking.

MS. BONORA: I'm going to say the questions in respect of the document production and his investigation have all been asked and answered.

Q MR. FAULDS: So, Mr. Bujold, in the course of your carrying out those investigations you became aware

that some of the assets in the 1985 Trust had their origins in assets that were transferred from the 1982 Trust?

A I certainly saw documents that stated that.

Q Okay. And do you remember a concern arising amongst the Trustees in relation to that transfer?

A Actually, no, I can't.

Q Okay. Well, let's just, if we could, let's just go through and confirm exactly what happened in relation to that transfer. And I am wondering, do you happen to have handy the collection of documents which your counsel provided as a compendium of previously produced records relating to the asset transfer?

A If it is this binder I do.

Q I am looking at a Table of Contents which had documents 1 to 59 and it is entitled Table of Contents, Documents Related to Transfer of Assets?

A Yes, yeah.

Q Okay. So maybe we can short-circuit a little bit of this by my asking you this. Did you become aware, through your review of records, that prior to the establishment of the 1982 Trust a number of individuals from the Sawridge First Nation held assets in trust personally for the benefit of either the Band or the members of the First Nation?

A I saw documents to that effect, yes.

Q And did you become aware that, from your review of the

documents, that the 1982 Trust was established on April the 15th of 1982 with the intention that the assets being held by those individuals would be transferred into the 1982 Trust?

A I didn't see documents relating to the intention, nor could I surmise that that was the intent.

Q So at this moment you are not aware of what the intention was. Did you become aware that, in fact, assets held by individuals on behalf of the Sawridge First Nation, or members of the Sawridge First Nation were, in fact, transferees of the 1982 Trust?

A That there were documents to that effect, yes.

Q And I am going to refer you to your Document Number 9 in that collection. And have you seen that document before?

A Yes, I did.

Q Okay. And you will see in the second paragraph of that document on the first page the statement that, 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.

A That is what it says, yes.

Q So you understand from that document that at least to that extent you know what the intention of the Sawridge Trust was?

MS. BONORA: I don't think he can answer about intention. He can say what the document says. I don't

think he can say what the intention was, unless you are saying that that is what that is saying, it is their intention. But intention is a state of mind.

Q MR. FAULDS: Okay. You accept, you acknowledge the statement of intention that is stated there?

A I see it.

Q You don't have any reason to dispute it?

A I don't have any reason to dispute or confirm that, so, yeah.

Q Okay. Now you will see in this document that we have attached to it a list of property listed as Appendix A?

A Yes.

Q And you will see that on page 2 of the actual agreement under numbered paragraph 1 that each of the old trustees is transferring all of his legal interest in those properties to the new trustees.

A Yes, I see that.

Q And that occurred, according to this document, on December the 19th of 1983?

A Yes, I see that, too.

Q Okay. And then --

MS. BONORA: I am sorry for interrupting, do you want to put the Sawridge document number actually as opposed to just Document Number 9, because this doesn't have any reference to 9 except as a tab. So it might be useful for everyone if we just put the range of the Sawridge document number at the bottom.

Q MR. FAULDS: Sure. So we have been looking, Mr. Bujold, at Sawridge document listed in that Table of Contents that I referred to as Document Number 9, which is identified as Sawridge 001317 to 1322 which was referred to in your Affidavit of Records sworn November the 2nd of 2015, right?
A Yes.
Q And you reviewed this at the time that -- this was part of your review of documents that occurred when you took over the position?
A At some point in the collection of documents, yes.
Q Why did you look for that and review it?
A I didn't specifically look for this document. It happened to be one of the documents in the boxes that were provided me.
Q And the boxes that you are referring to are the 11 boxes of records that were made available to you for review?
A 11 boxes?
Q If that doesn't ring a bell we will come to it.
A No, it doesn't ring a bell.
Q Okay.
A So I mean I received many boxes. I may have received one consignment of 11 boxes, but there were many boxes of information.
Q And who did you receive these boxes from?
A Well, as Ms. Bonora has pointed out, we have gone

through this already of all of the different sources of documents. But the documents were received from trustees, from the Sawridge Group of Companies, from Mike McKinney, from various former officers of the Trust, from the Sawridge First Nation. So there were many sources of documents. Some were individual, some were corporate documents.

Q And did you receive those -- did those just come out of the blue, or did you --

A No, they were all requested.

Q By you?

A Yes.

Q So you made requests of various people to provide you with information relating to the background of the Trusts?

A Yes.

Q Why did you do that?

A Because that is what the Trustees had requested me to do.

Q Okay.

A And because the Trust had up to that point no consolidation of all of its records in any one location.

Q Okay. And did you also consider that doing that was necessary to fulfill your function as the administrator?

A It certainly became more necessary as we got involved

in these legal actions. Prior to that, you know, as far as the administration of the Trust, my primary concern was the two Trust deeds, the 1985 and 1986 Trust deeds, and, you know, the beneficiaries, list of beneficiaries that was approved by the Trustees for the 1986 Trust, and various reports that the Trustees provided me on benefits.

Q And were you interested also in getting a handle on what the assets of the Trust were?

A My expectation was that the Sawridge Group of Companies, the manager of the Trust's assets, would provide me with whatever information I needed regarding the assets of the Trust.

Q So you had some understanding that the assets of the Trust constituted corporate interest of some kind?

A Yes.

Q Okay.

A Corporate interest of the Trust, yes.

Q And I suppose that you had to find out exactly what those corporate interests were, and what it was that the Trust had under its administration?

A To a certain extent, yes. I mean we needed to figure out did we have enough money to administer the office of the Trust, did we have enough money to pay benefits that may have been set out by the Trustees.

Q Okay. So coming back to the document that we were looking at, you understood that this was part of the

package of documents that you reviewed?
A It was, but it wasn't of any great import to me because it didn't specifically relate at that point to the 1985 Trust.
Q But you understand that now, at least, the question has arisen as to the implications of this for the 1985 Trust?
A I do.
Q And I take it that you reviewed the records in somewhat more detail as a result of that?
A I have.
Q And so when we look at the transfer, which I have been referring to at tab 9 of the collection of documents, you understood, or have come to understand from your further review of the materials, that the items listed in Appendix A are property that was held by the individuals who are being referred to here as the old trustees, and which they transferred into the 1982 Trust?
A That certainly seems to be the effect of it, yes.
Q And those assets consisted both of interests in real property as well as shares and corporations?
A Yes, that is what is on the list here.
Q Okay. And you understood that this transfer was the document by which that transfer of those assets into the 1982 Trust took place?
A Well, the only thing that I can -- I can't determine

what the intent was, or if this is all of the assets that ever existed that were transferred into this Trust. I know that this is a list of a certain number of assets that were in bare Trusts that were transferred to the 1982 Trust.

Q And you are not aware of any other documents reflecting any other assets being transferred?

A I mean there certainly could be other documents. I am not aware of them at the moment, no.

Q And then if you turn to tab 10. You have seen this document before?

A Yes.

Q And in the document that we were just previously looking at at tab 9 we had Walter Patrick Twinn, Sam Twin, and George Twin of the second part who were referred to there as the new trustees.

A Right.

MS. BONORA: Sorry, are you looking at tab 9 now?

Q MR. FAULDS: Sorry, I took him back to tab 9.

A Oh, sorry.

Q I just wanted to be sure that --

A Okay.

Q And they are described there as the new Trustees, and they are also described as together being the current Trustees of the Sawridge Band Trust?

A They are described as the Trustees of the second part.

Is that the parties of the second part?
Q The parties of the second part.
A And the parties of the first part in the other one.
Q Yes, in the next document those same people, being the Trustees of the Sawridge Band Trust, the 1982 Trust, referred to as the new Trustees, and this is a further transfer agreement by which they transfer the assets which have just been transferred to them collectively as Trustees of the 1982 Trust, they are now transferring them on to Sawridge Holdings?
A Yes.
Q Okay. And the attachment to the document that we have been looking at at tab 10, also called Schedule A, but it has some additional columns to it now. You see it has a column called Adjusted Cost Base, and another column entitled Consideration?
A Yes, I understand.
Q And you understand from the document that these additional columns relate to what Sawridge Holdings effectively is paying for the assets to be transferred?
MS. BONORA: Mr. Faulds, you understand that Mr. Bujold was not around. He is only just reading the document as you are. So he can only answer questions in respect of exactly what the document says. You understand that, correct? So we are both just looking at a document and putting on the record what the document says.

MR. FAULDS: I'm not entirely sure that I agree with you, Ms. Bonora, since Mr. Bujold has been working with these documents for the past 11 years, and I am sure has made inquiries in relation to them, which we can follow up on. But I am confident that Mr. Bujold is able to place these documents in context and that is what I am asking him to do.

MS. BONORA: I think your question related to his understanding about the consideration paid. So I will let him answer if he has any more knowledge than what the document says.

MR. FAULDS: And, Ms. Bonora, there is no secret here and I'm not trying to trick Mr. Bujold in any way. The point is that the consideration paid become the assets of the 1985 Trust -- 1982 Trust.

MS. BONORA: If that consideration was paid. That is the part that -- all we have is documents that Mr. Bujold can read and that you can read. And for sure if you want to ask him if that is what the document says, you are welcome to do that. But I think he has told you that he doesn't have any greater knowledge other than what has been read in the documents.

Q MR. FAULDS: So, Mr. Bujold, do you understand that what the document conveys is what the consideration to be paid for the assets being transferred is? That is what is set out in that

schedule?
A That is what the document says, yes.
Q Sure. And as a result of that you understood that the Trustees of the 1982 Trust conveyed to Sawridge Holdings all of the assets that they were holding as Trustees, they conveyed them to Sawridge Holdings, and the expectation based upon this document was that they would then hold the consideration being paid?
MS. BONORA: Mr. Faulds, Mr. Bujold cannot have an understanding or know the expectation of the Trustees back in 1983 when this document was signed. He doesn't have any personal knowledge of that. We can both read the document and make conclusions, but I am not allowing him to make conclusions today unless he had personal knowledge of it.
MR. FAULDS: Well, Mr. Bujold is, I understand, being produced as the Chief Executive Officer of the Sawridge Trust.
MS. BONORA: Not of the 1982 Trust and not of the Sawridge First Nation when they held assets personally, and that is what these documents relate to.
Q MR. FAULDS: Okay. Let me ask you this, Mr. Bujold. Do you know if any assets were transferred from the 1982 Trust to the 1985 Trust?
A Do I know?
Q Do you know if any assets were transferred?
A I wasn't around in 1985. So I know that, you know, I

know from reflection of various information that I have seen that there were assets transferred, yes.

Q Okay. So you know that there were assets transferred?

A Yes. I can't be specific about what assets were transferred.

Q So how do you know the assets were transferred?

A I know it to the extent that various documents that I have read indicate that they were transferred. Just like this document indicates that there was a transfer, I know it to that extent. I wasn't present, so I don't know if this is a list of all of the assets, I don't know if they were actually transferred, you know. So I don't know the effect of the document. I just know what the document is telling me. I can't -- other than, you know, surmising what these documents mean I can't guarantee because I haven't seen any of these things.

Q You weren't involved in the transactions?

A None.

Q But you are now administering assets which may be connected to those transactions?

A Right, so ...

Q And do you have any reason to believe that the transactions which were reflected in these documents did not occur as they are set out?

A I haven't been given any reason by any other documents to believe that the transfers didn't happen.

Q Sure.
A And to the extent that these documents reflect that a transfer did happen, and there isn't a corroborating document that says it didn't happen, that is as far as I can go. I can say yes, it looks like from this document, this document is telling me that this is what happened. I have to accept that as being the truth because I don't have anything else.
Q Sure, sure. And that is really all I am asking.
A Yes, so.
Q I'm not asking you for anything more than that.
A Okay.
Q So this document that we have been referring to, Document Tab 10, that is identified as the document in your November 2nd, 2015 Affidavit of Records as beginning at Sawridge 001323 through to Sawridge 001331?
A That is correct.
Q Okay. And the Schedule A attached to that refers to the consideration that was issued by Sawridge or that was to be paid by Sawridge Holdings Ltd. in relation to this transfer, and the consideration consists of shares in Sawridge Holdings and promissory notes?
A That is what it says here, yes.
Q And have you seen promissory notes that are referred to there?
A I haven't -- I have seen some promissory notes. I

haven't matched them to these promissory note references, so. There has been no reason for me to match them at this point.

Q Okay. So the promissory notes that you have seen, maybe I will have you turn back to tab 7 in this document. And at tab 7, Sawridge 000080 to 88.

A Just a second. I'm looking at 7?

Q Yes, and if you go to the end of that.

A Okay.

Q Sorry, I am looking at the attachment there.

A 000080.

Q Yes, through to 88.

A Okay.

Q Those are the promissory notes that you have seen?

A Yes.

Q And you are telling me that you haven't added them up to see if they add up to the total of the promissory notes in the transfer?

A No, nor have I matched them to the actual list that is in this other schedule.

Q Okay. So you don't know if these are the promissory notes which are referred to there?

A No, I don't. I just know that they came attached to this other document that I have got.

Q Right. And have you seen share certificates issued by Sawridge Holdings that match the consideration that is referred to in the document at tab 10?

A Again, I have seen a number of share certificates of various types. I haven't matched them to any of these share certificates to see if they are the same ones referred to in the document.
Q If I could ask you to turn to tab 24. Are those the share certificates that you have seen?
A Yes, these are some of the share certificates that I have seen, yes.
Q Are there other share certificates in Sawridge Holdings Ltd. that you have seen? And at this moment I am referring to the whole package under tab 24.
A Okay. So, yeah, I have seen these and I have seen other share certificates issued by Sawridge Holdings, yes.
Q And just again for the benefit of the transcript, the share certificates that we are looking at at tab 24 of the document collection comprise Document Sawridge 001379 to 1389 from your November 2nd, 2015 Affidavit of Records?
A Yes.
Q And I would like you to turn, if you would, to the preceding document.
A Preceding to --
Q Number 23.
A Tab 23, yes.
Q Have you seen that document before?
A Yes, I have.

Q And it describes itself as a minute of a meeting of the directors of Sawridge Holdings Ltd.?
A Yes.
Q And you will see that that minute records on a motion duly made, seconded, and unanimously carried, it was resolved that a resolution be passed authorizing the issuance of 15 Class A common shares pursuant to the transfer agreement, and authorizing the issuance of the promissory notes pursuant to the transfer agreement attached hereto as Schedule A. And if you turn to Schedule A.
A Okay.
Q That is the transfer agreement that we were just looking at pursuant to which the 1982 Trustees transferred assets to Sawridge Holdings Ltd.?
A It seems to be. It has the same typographical errors.
Q Right. And it is the same page?
A Yes.
Q So, Mr. Bujold, are you aware of any other documents concerning the transfer of assets by the 1982 Trustees to Sawridge Holdings?
MS. BONORA: Wait a minute. These are not the -- these are from the old Trustees which are individuals, right? It isn't the 1982 Trustees, as far as I am reading these documents.
MR. FAULDS: Perhaps we could just go off the record.

(Discussion off the Record.)

A Ask your question again, please.

Q MR. FAULDS: Yes, are you aware of any other records related to the transfer of assets by the 1982 Trustees to Sawridge Holdings?

A I'm not aware of any other records. That doesn't mean they don't exist. We have a real shortage of records concerning the early days of the '85 Trust or any of the interactions of the '82 Trust.

Q Well, I am going to leave this call with you, Mr. Bujold. If you are satisfied that your review has -- that further review would not be productive of anything, then I will treat your answer as being final on that topic. But if you wish the opportunity to review your records to look for other documents, I am happy to take an undertaking to that effect.

MS. BONORA: We will give an undertaking to take a quick review.

MR. FAULDS: Okay.

UNDERTAKING NO. 2:
RE REVIEW RECORDS TO DETERMINE IF THERE ARE RECORDS RELATED TO THE TRANSFER OF ASSETS BY THE 1982 TRUSTEES TO SAWRIDGE HOLDINGS OTHER THAN THOSE PRODUCED.

Q MR. FAULDS: Are you aware of any assets held by the 1982 Trustees pursuant to and for the benefit of the beneficiaries of the 1982 Trust, other than the

assets which are referred to in the Transfer Agreement from the 1982 Trustees to Sawridge Holdings?

A Am I aware of --

Q Any other assets held by the 1982 Trustees in their capacity as 1982 Trustees in addition to the assets which are referred to in the transfer from the 1982 Trustees to Sawridge Holdings?

A I am not aware of any other documents that would show that any other assets were held by the '82 Trustees.

Q So based on the documentary record which you have been able to locate, the assets of the 1982 Trust, following the transfer to Sawridge Holdings by the Trustees --

A Yes.

Q -- comprised the consideration paid by Sawridge Holdings to the Trustees? That is, the promissory notes and the shares?

A I don't know. I couldn't swear on that, because I don't know. I mean this looks like everything that I know of, and this is the only record that I have got.

Q And that is all I am asking you. I am not trying to foreclose the possibility that something may come to light that may show something else at some future point. But based on the record which it has been possible to locate to date, there are no other assets in the 1982 Trust following this transfer to Sawridge Holdings, other than the promissory notes and the shares?

MS. BONORA: He has been very clear that all he can do is rely on these records. He can't give you any other personal information. So that question is not appropriate, because he is relying entirely on records that we don't even know are complete.

Q MR. FAULDS: But what I am seeking to obtain is the information of the 1985 Trustees. And you are telling me that what we have is all of the documentary record that you have been able to locate?

A Yes.

Q And that documentary record reflects the fact that the only assets in the 1982 Trust that you know of, that you know of, are the promissory notes and the shares?

MS. BONORA: I am objecting to that question.

MR. FAULDS: Were there other assets in the 1982 Trust?

MS. BONORA: I'm objecting to that question.

MR. FAULDS: Well, we are talking, Ms. Bonora, about the transfer of assets from the 1982 Trust to the 1985 Trust, so if you are objecting to him answering questions about what was in the 1982 Trust we are going to have a problem.

MS. BONORA: Yes.

MR. FAULDS: So you are objecting to my asking him questions about the assets that were transferred from the 1982 Trust to the '85 Trust?

MS. BONORA: That wasn't your question, and if

it was your question my apologies for misunderstanding it. You are welcome to ask the question again. Of course the transfer is entirely relevant, but I don't believe that was your question.

MR. FAULDS: My question is what were the assets known to the 1985 Trustees in the 1982 Trust immediately prior to the transfer.

MS. BONORA: So that is a question that for sure is relevant and can be asked.

Q MR. FAULDS: Are you aware, Mr. Bujold, of any other assets in the 1982 Trust immediately prior to the transfer of assets from that Trust to the 1985 Trust, other than the shares in Sawridge Holdings and the promissory notes issued by Sawridge Holdings?

A I am not aware of any other document.

Q Okay. So now if we move ahead I imagine that you as part of your review of the records reviewed the documents relating to the creation of the 1985 Trust of which you are the administrator?

A Yes.

Q And, Mr. Bujold, when was the Trust of which you are the administrator created?

A The 15th of April, 1985 according to the Trust Deed.

Q And that Trust Deed is the Trust Deed of the Trust which you continue to administer today?

A It is.

Q And that Trust Deed reflects a settlement made by

Walter Patrick Twinn who was then the Chief of the Sawridge First Nation?

A Yes.

MS. BONORA: What do you mean by settlement, sorry?

A You mean he was the settler?

Q MR. FAULDS: He was the settler, yes.

A Yes, yes.

Q It is called the Sawridge Inter Vivos Settlement?

A That is right.

Q And maybe you could tell me what your understanding is of the assets that were settled into the 1985 Trust at the time of its creation, based upon your review of the records?

A I am not sure I understand what you are asking.

Q I am asking you what your understanding is based on your review of the records of what assets were settled into the 1985 Trust at the time of its creation?

A My understanding is that whatever assets existed in Sawridge Holdings Limited as of the 15th of April, 1985 are what became part of the -- became the entirety of the 1985 Trust. That is as much as I understand.

Q Okay. You said Sawridge Holdings?

A Yes, so each Trust has a holding company. Yeah, each trust had a holding company.

Q And tell me if I understand this correctly. That when you say each Trust has a holding company, what you are

saying is that each Trust owns shares in a holding company?

A Yes.

Q Okay. And I was just curious about this. To whom are these shares in Sawridge Holdings Ltd. now issued?

A To the five trustees, or to the current -- whoever the current trustees of the Sawridge -- of the 1985 Trust, those shares are issued in their name.

Q Okay.

A Jointly.

Q When you assumed administration of the 1985 Trust did you determine in whose names the shares were at that time?

A Did I determine?

Q Yes, did you conduct a review to see who the shares of Sawridge Holdings Ltd. were issued to at that time?

A I became aware because I received the share certificates, you know, of the holding company.

Q And so when you took over were the shares issued to the Trustees, who were the Trustees at the time of your being hired?

A Yeah, there has been -- at different points some of the times that shares were issued in the names of the Trustees, sometimes they were issued in the name of the Trust which doesn't have a legal existence. And so we had to make corrections from time to time as to who those share certificates should be registered to.

Q Okay.
A So as far as I know, that was one of the things that, you know, we continually had to track was were the share certificates in the names of the existing Trustees. And every time the Trustees changed we needed to change the share certificate.

So as far as I know I was only concerned about were the share certificates in 2009 issued in the correct names of the Trustees. There may have been from 1985 to 2009 a variety of names on those share certificates.

Q And were they issued in the correct names in 2009?
A I can't recall. I know that we had to make a correction at one point because it was issued in the name of the Trust rather than in the name of the Trustee, so.
Q Okay. I would like to ask you, Mr. Bujold, if you would, to undertake to advise me in whose names the shares were issued when you took over as administrator in 2009, and in whose names the shares are issued today?
MS. BONORA: We will take that under advisement.

UNDERTAKING NO. 3:(UNDER ADVISEMENT)
RE ADVISE IN WHOSE NAMES THE SHARE CERTIFICATES WERE ISSUED WHEN MR. BUJOLD TOOK OVER AS ADMINISTRATOR IN 2009, AND IN WHOSE NAMES THE SHARE CERTIFICATES ARE ISSUED TODAY.

A Can I take a break?
MR. FAULDS: Let's take ten minutes.
(Questioning adjourned.)
(Questioning resumed.)
Q MR. FAULDS: So when we broke, Mr. Bujold, we were just starting to talk about the 1985 Trust. And I would like you, if you would, to look first of all at tab 18 which is Sawridge Production Number 000039 to 49, and just get you to confirm that that is, in fact, a copy of the 1985 Trust?
A Yes, this is a copy of the 1985 Trust Deed.
Q And you understood that at the time it was created the assets in the 1985 Trust at the outset comprised the $100 listed in the schedule?
A Yes.
Q And again, I am not asking you to provide any sort of legal interpretation, but you understood from the terms of the Trust Deed at page 4 that it was anticipated that further assets would be added to the Trust?
MS. BONORA: You are asking him to read the document?
Q MR. FAULDS: He understood from the document that that was what the Trust contemplated?
A Other than the $100.
Q Yes, that it was anticipated -- that the Trust document contemplated the addition of other property?
A It permitted it, yes.

Q So then I would like you to turn to tab 19. And you are aware that this is a resolution passed by the 1982 Trusts? 1982 Trustees, sorry?
A Sawridge Band Trust, yes.
Q And you reviewed this document as part of your research into the history of the Trusts?
A I did.
Q And you would have understood that at the time that this resolution was passed the individuals who signed it, Chief Walter Patrick Twinn, Samuel Twin and George Twin, were Trustees of the 1982 Trust and were also Trustees of the 1985 Trust?
A Yes.
Q You understood that they signed this document in both their capacities?
A Yes.
Q And you understood that the stated purpose of the document was for the Trustees of the 1982 Trust to transfer all of the assets of the 1982 Trust to themselves in their new capacity as Trustees of the 1985 Trust?
A That is what I understood from the document.
Q And I didn't see anything in this document which indicated what all of those assets were.
A Nor did I.
Q But if I could have you turn to tab 22, and that is comprised of the Sawridge Document Production Number

000123 through to 134?
A Yes.
Q Again, you have seen this document in the past in your research?
A Yes, I have.
Q Okay. And you understood that this was again a document where Walter Patrick Twinn, Sam Twin, and George Twin were parties to the document, both in their capacity as Trustees of the 1982 Trust and as Trustees of the 1985 Trust?
A The only thing that I can see here is that only Walter Twinn signed.
Q Okay.
A But I mean the beginning of the agreement says that all three are involved.
Q Right. You don't recall seeing a copy of this document which has the other two signatures?
A No, I don't.
Q In any event, you did understand that the nature of this document was that the three parties identified of the first part and the three parties identified of the second part, the 1982 Trustees and the 1985 Trustees, it is the same people in two different capacities?
A Yes.
Q And leaving aside the question of whether or not this document was ever fully executed, you understood that this declaration provided that those three people would

hence, again assuming that it is fully executed, those three people would be holding the assets described in the document in their capacity as 1985 Trustees?

MS. BONORA: Mr. Faulds, again I'm going to just reiterate that when you say Mr. Bujold understands, you are not asking him to interpret the document. All you are asking him to do is confirm that the content of the document is what you say it is. That is all you are asking him to do, because he can't do anything more, right? So you are not asking for interpretation, you are just asking him to confirm that when you read that those three people are Trustees he is reading the same thing, correct?

MR. FAULDS: I'm asking him to confirm his understanding that that was the effect of the document.

MS. BONORA: He is not going to give you an understanding of the effect of the document, because that is a legal question. So what I am understanding your question to be is that he is confirming what you are reading in the document. That is all he can do for you. He wasn't there in 1985.

Q MR. FAULDS: Did you understand, Mr. Bujold, that this document was one of the documents relating to the transfer of assets from the 1982 Trust to the 1985 Trust?

A That is what the document says. I can't go beyond what the document says, so.

Q And you accept the document is what it purports to be. You have no reason to disagree with that?
A I have no reason to doubt this document.
Q You understood that this document was a part of the asset transfer transaction?
A It certainly is part of the -- yes, I do understand that.
Q And the assets which are referred to in this document are listed at Schedule A, and you will see those are shares in Sawridge Holdings held by the three individuals?
A Yes.
Q And shares in Sawridge Energy held by one of those three individuals?
A Yes.
Q And then the additional assets are the promissory notes which are listed as Schedule B?
A Yes.
Q And are you satisfied that those promissory notes are the same promissory notes that were issued by Sawridge Holdings as part of the consideration for the transfer to it of assets by the 1982 Trustees? Those are the same promissory notes?
A I have never done the comparison, but if that is what it is purported to be, then I have no reason not to accept that.
Q Okay. And then if I could get you to look at tab 21,

and that is Sawridge Production Number 001445 and 1446. Did you see those documents as part of your review?

A Yes.

Q And the second page of that document is Band Council Resolution which refers to a debenture dated the 21st of January, 1985?

A I don't understand what you are asking me.

Q I was just drawing your attention to that fact.

A Yeah, I see that.

Q And have you seen in your records a debenture issued January the 21st of 1985?

A I can't recall at this moment.

Q I am going to ask you, if you would -- well, I will have you go back to tab 14.

A Okay.

Q And you will see --

A Do you want to refer to the numbers?

Q Good idea, thank you. That is Sawridge 000495 to 521. Do you see that?

A Yes, I do.

Q Okay. And if you would turn to page -- well, first of all you see that this document is identified as a demand debenture for $12 million?

A Yes, I see that.

Q And you will see if you turn to page 6 that it was issued on the 21st of January, 1985?

A I see that.

Q And if you flip back to the first page you will see that the terms of the debenture indicate that at the time the debenture was entered into Walter Twinn as Trustee for the Sawridge Indian Band has advanced a sum of approximately $10,870,000 previous to the issuance of this debenture, and that the company is asking for a further $1.130 million. You see all of that?
A I see that, yes.
Q And then if you would turn to the next page you will see a document from the next tab, tab 15, which is Sawridge 000537 to 539.
A Yes.
Q You will see this is a document entitled an Assignment of a Debenture?
A Yes.
Q And it is the 15th day of April, 1985?
A Yes.
Q And it refers to the assignor, who is Walter Patrick Twinn, holding a debenture issued on January 21st of 1985 in the principal amount of $12 million?
A Yes.
Q Are you prepared to go out on a limb and agree that that is the same debenture?
A I mean it seems to be.
Q And this debenture is being assigned, according to this document, to the Trustees of the 1985 Trust?
A That is what this document says, yes.

Q And then if you can go back to the tab 21 documents that we looked at, that was the Band Council Resolution?
A Tab 21?
Q Tab 21, yes.
A Yes.
Q If you go to the first page under that tab prior to the Band Council Resolution?
A Yes.
Q You see there is a reference to an attached resolution of the Sawridge Band Council being approved and ratified by the Band at a meeting on April the 15th of 1985.
A Yes.
Q Okay. And I take it that you reviewed all of those documents and records as part of your research into the history of the Trust and history of the assets to the Trust?
MS. BONORA: What do you mean by all of the records? The records you just referred to?
Q MR. FAULDS: The ones I just referred to.
A Yes.
Q And so you understood from these records that in addition to the assets which were transferred by the 1982 Trustees to the 1985 Trust, these records indicated that this debenture was transferred to the 1985 Trust by Walter Twinn? Walter Patrick Twinn?

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

Trust. So I am objecting to that question.

Q MR. FAULDS: Okay. I just want to make sure that we are clear about this, Mr. Bujold. The debenture that we are talking about was originally issued by Sawridge Enterprises?

MS. BONORA: Can we get the document so he can read it to you in terms of what you are asking him?

MR. FAULDS: Sure, I think it was 14, but I could be wrong.

A Yes, okay.

Q MR. FAULDS: The debenture was issued by Sawridge Enterprises to Walter Twinn as Trustee for the Sawridge Indian Band.

A Okay, yeah.

Q And Sawridge Enterprises is a wholly-owned subsidiary of Sawridge Holdings, isn't it?

A I don't know that. I don't know what Sawridge Enterprises is. It is not part of the list of stuff that I have got right now.

Q Is Mr. MacNutt, in his capacity, responsible for Sawridge Enterprises?

A If Sawridge Enterprises exists I would imagine that he would be, but I don't --

MS. BONORA: Don't speculate.

A I don't know.

Q MR. FAULDS: So why did you go to Mr. MacNutt to ask about this?

A Well, because I didn't have any other source of information at that time.
Q Did you go to anybody at the Sawridge First Nation other than Mr. McKinney?
MS. BONORA: You haven't asked him whether he went to Mr. McKinney.
MR. FAULDS: I am just telling you, excluding Mr. McKinney.
A I never went to the Sawridge First Nation.
Q MR. FAULDS: You didn't make any inquiries of the Sawridge First Nation about what happened to this debenture?
A No.
Q And you don't know whether or not you talked to anybody who could speak on behalf of Sawridge Enterprises?
A No, I don't.
Q Maybe we will just jump ahead for a moment here. I am going to ask you, if you would, to turn to a document that was in the package of materials that I provided to you and your counsel this morning. And it is a document which begins with the heading Sawridge Band Inter Vivos Settlement Trust 1985 settled on April 15th of 1985, and it was produced by Catherine Twinn as Twinn Document Number 007907, and I believe it carries right through until 7943.
Are you familiar with that document, Mr. Bujold?
A I am.

Q And how are you familiar with it?
MS. BONORA: We are going to object to questions in relation to this document as this document was prepared in anticipation of and for the purposes of litigation.
Q MR. FAULDS: Can you tell me when it was prepared?
A Can I?
MS. BONORA: We will take that under advisement.
UNDERTAKING NO. 4: (UNDER ADVISEMENT)
RE ADVISE WHEN TWINN DOCUMENT 7907 THROUGH TO 7943 WAS PREPARED.
Q MR. FAULDS: Okay. Can you tell me by who it was prepared.
MS. BONORA: We will take that under advisement.
UNDERTAKING NO. 5: (UNDER ADVISEMENT)
RE ADVISE WHO TWINN DOCUMENT 7907 THROUGH TO 7943 WAS PREPARED BY.
Q MR. FAULDS: And can you tell me the circumstances under which it was prepared?
MS. BONORA: We will take that under advisement.
UNDERTAKING NO. 6:(UNDER ADVISEMENT)
RE PROVIDE THE CIRCUMSTANCES UNDER WHICH TWINN DOCUMENT 7907 THROUGH TO 7943 WAS PREPARED.
Q MR. FAULDS: And when you say it was prepared in contemplation of litigation, what litigation?

MS. BONORA: We will take that under advisement.
UNDERTAKING NO. 7:(UNDER ADVISEMENT)
RE ADVISE WHAT LITIGATION TWINN DOCUMENT
7907 THROUGH TO 7943 WAS PREPARED IN
CONTEMPLATION OF.
Q MR. FAULDS: Mr. Bujold, did you examine the financial statements, or have somebody on your behalf examine the financial statements of the Sawridge Inter Vivos Settlement for, or the 1985 Trust as we are referring to it, for the period from its creation up until 2003?
A Yes.
Q Okay. And do we have copies of those financial statements?
A I don't know.
MS. BONORA: No.
Q MR. FAULDS: Can I ask you to produce copies of those financial statements?
MS. BONORA: No, we will not undertake to do that.
MR. FAULDS: And why is that?
MS. BONORA: They are not relevant. Some financial statements have been produced around the transfer time, but after the transfer of assets those documents in our mind are not relevant to this litigation.
MR. FAULDS: Well, may those documents not be

relevant to the question that we are just discussing, namely the status of the $12 million debenture?

MS. BONORA: If you look at the financial statements that have been produced, there is no reference to the debenture in those financial statements.

MR. FAULDS: That only covers the records which have been produced.

MS. BONORA: Correct.

MR. FAULDS: So.

MS. BONORA: And Mr. Bujold has told you he saw no reference in the financial statements to the debenture.

MR. FAULDS: So I'm asking you to produce those financial statements because I think that we are entitled to see the basis for the witness's statement.

MS. BONORA: We are objecting to that.

MS. HUTCHISON: Can we go off the record.

UNDERTAKING NO. 8: (REFUSED)
RE PRODUCE COPIES OF FINANCIAL STATEMENTS OF THE SAWRIDGE INTER VIVOS SETTLEMENT, OR THE 1985 TRUST, FOR THE PERIOD FROM ITS CREATION UP UNTIL 2003.

Q MR. FAULDS: Have you, Mr. Bujold, have you examined the financial records of Sawridge Holdings for that same period that I spoke about, 1985 to 2003?

A The financial reports of Sawridge Holdings?

Q Holdings, yes.
A For which period?
Q For 1985 to 2003.
MS. BONORA: Why are we looking at Sawridge Holdings?
MR. FAULDS: Because it is the asset of the Trust.
MS. BONORA: And what is the purpose of that though? Why is it relevant when the debenture was issued to Sawridge Enterprises? What is the purpose of looking at Sawridge Holdings in relation to this litigation?
MR. FAULDS: Well, I will get to it.
MS. BONORA: No, you need to get me there before he answers the question.
MR. FAULDS: You are not going to let him answer whether or not he has examined the financial statements of the assets of the Trust.
MS. BONORA: He is here to answer relevant questions.
Q MR. FAULDS: Well, Mr. Bujold, you have referred to the $35 million debenture which was issued by Sawridge Holdings. And I believe that that is referred to in some of the documents which I provided to you and your counsel earlier this morning. And in particular I am looking at Twinn Document 007884.
MS. BONORA: So this is a document also covered

by solicitor-client privilege, and the privilege orders say that everyone has agreed that there is no further release of privilege. So Mr. Bujold will not be answering questions on this document.

MR. FAULDS: Okay, then let's ask you this then, Mr. Bujold. Did you examine the transactions surrounding the issuance of the $35 million debenture?

A I have to say no.

Q Okay. Do you know whether or not the $35 million debenture issued by Sawridge Holdings was intended to act in some fashion as a substitute for the debenture of Sawridge Enterprises?

MS. BONORA: Sorry, can you repeat the question?

Q MR. FAULDS: Do you know whether the debenture of $35 million issued by Sawridge Holdings was intended in some fashion to replace the debenture of $12 million issued by Sawridge Enterprises?

A No, I don't know.

Q Did you make any inquiries about that?

A Not specifically, no.

Q Okay. Well, I'm going to --

A Because I saw these as two separate issues. I mean the $35 million debenture is a separate document from the $12 million.

Q Sure. But you understood that Sawridge Holdings was the parent of Sawridge Enterprises?

MS. BONORA: He has told you repeatedly he

doesn't know anything about Sawridge Enterprises.

Q MR. FAULDS: So you never made any inquiries in that vein?

A No.

Q Well, I am going to ask you to do that now. Would you, please, make inquiries of Sawridge Holdings Ltd. and its financial advisors and provide me with information relating to the issuance of the $35 million debenture which we have been just discussing, and advise me whether that debenture in whole or in part was intended to act as substitute security for the debenture of $12 million?

MS. BONORA: We will give that undertaking.

UNDERTAKING NO. 9:
RE INQUIRE OF SAWRIDGE HOLDINGS LTD. AND ITS FINANCIAL ADVISORS AND PROVIDE INFORMATION RELATING TO THE ISSUANCE OF THE $35 MILLION DEBENTURE AND ADVISE WHETHER THAT DEBENTURE IN WHOLE OR IN PART WAS INTENDED TO ACT AS SUBSTITUTE SECURITY FOR THE DEBENTURE OF $12 MILLION.

Q MR. FAULDS: And you did, I am assuming, in your review of the financial records, observe that there were substantial amounts of money owing by Sawridge Holdings?

A Sorry?

Q That there were substantial amounts of money owing by Sawridge Holdings in and around 1985 and 1986 to the Sawridge First Nation?
A Yes.
Q And those monies were by virtue of the assignment of the 1986 $35 million debenture payable to the 1985 Trust?
MS. BONORA: Well, he has already told you -- do you know the answer to that? I thought you said you didn't know anything about that.
A Maybe I didn't understand the question. Ask me again.
MR. FAULDS: Can you read that question back again, please.
COURT REPORTER: (By Reading)
"Q And those monies were by virtue of the assignment of the 1986 $35 million debenture payable to the 1985 Trust?"
MS. BONORA: Mr. Faulds, where is there an assignment of the $35 million debenture? I don't see any records of the assignment so I don't understand the basis for your question.
Q MR. FAULDS: Let me ask you, Mr. Bujold. Who was the $35 million debenture payable to? Who is entitled to enforce payment?
A Sawridge Holdings Limited.
Q And Sawridge Holdings Limited is wholly owned by?
A 1985 Trust.

Q Okay. So any monies that would be paid to Sawridge Holdings -- I am sorry, Sawridge Holdings issued the debenture?
A Yes.
Q And Sawridge Holdings was indebted to who?
A I don't have that debenture in front of me so I can't see.
Q Well, maybe you could make that a part of the undertaking that I have requested.
MS. BONORA: What is your question?
MR. FAULDS: Who the debenture issued by Sawridge Holdings was payable to, is now payable to. Sawridge Holdings issued the debenture, as I understand it, to Mr. Twinn on behalf of the Sawridge First Nation.
A And without seeing the document I can't.
Q MR. FAULDS: So if you could undertake to advise me, in addition to the previous undertaking, who the debenture was issued to and who it is currently -- who is currently entitled to enforce payment.
A Okay.
MS. BONORA: We will give that undertaking, as much as we are able to determine it.
MR. FAULDS: Sure.

UNDERTAKING NO. 10:
RE ADVISE WHO THE DEBENTURE BY SAWRIDGE HOLDINGS WAS ISSUED TO AND WHO IS

CURRENTLY ENTITLED TO ENFORCE PAYMENT.

MR. FAULDS: Let's take a break.

(Questioning adjourned 12:25 p.m.)

(Questioning resumed 1:40 p.m.)

Q MR. FAULDS: Mr. Bujold, before we broke we were continuing to talk about the $12 million debenture issued by Sawridge Enterprises Ltd. And I think you told me you weren't exactly sure where Sawridge Enterprises fit in to the transaction, is that --

A That is correct, yes.

Q So I would just like to take you back briefly to the transfer of assets from the individual Trustees to the 1982 Trust which was tab 9. And if you would look at the appendix which listed what was transferred, and look at page number 8 at the top. Actually if you go back to page number 7 you will see that there is a heading Shares in Companies?

A Yes.

Q And the first company is listed as Sawridge Holdings. And then if you turn over to page 8 you will see that there were shares in Sawridge Enterprises Ltd.?

A Yes.

Q That formed part of what was intended to be transferred into the 1982 Trust. And then if you go to the next tab, the tab 10 document, which was the transfer from the 1982 Trustees to Sawridge Holdings, and then if you go to the schedule which is attached to that, the

assets transferred to the holding company and the consideration for that, and look at page 3 at the top?

A Yes.

Q And you will see that item Number 2 is Sawridge Enterprises Ltd., and the consideration paid for each share in Sawridge Enterprises Ltd. was one common share in Sawridge Holdings Ltd.?

A I see that, yes.

Q Okay. So you understand from that that the nature of the transaction that is described by these documents is that the shares held by the Trustees, by the individual Trustees in Sawridge Enterprises got transferred into the 1982 Trust, and then got transferred to the holding company in return for shares in the holding company?

A That is what the document seems to say.

Q And were you not aware of that?

A Well, it is not anything that I was paying attention to.

Q Okay. So when you were making your inquiries in regard to the status of that debenture, did you talk to Mr. Ewoniak from Deloitte's about that?

A No.

Q Was there any reason why you didn't?

A No, there was no reason.

Q Okay. Did you commission any kind of accounting review by professional accountants to determine what the status was of that debenture in relation to the 1985

Trust?
A Yes, I did.
Q And who did you commission that from?
A Meyers Norris Penny.
Q And did they provide you with some kind of report, or?
MS. BONORA: We will take that question under advisement.
MR. FAULDS: So just to, you know, cover it off, I would like you to provide me with a copy of whatever report or analysis that they gave you in relation to that question?
MS. BONORA: We will take that under advisement.
MR. FAULDS: Can you tell me when that occurred?
MS. BONORA: We will take that under advisement.

UNDERTAKING NO. 11:(UNDER ADVISEMENT)
RE PRODUCE ANY REPORT OR ANALYSIS MEYERS NORRIS PENNY PREPARED, AND WHEN THAT OCCURRED.

Q MR. FAULDS: I would like then to take you to the documents that were produced in relation to the debenture most recently. And those were documents that were produced under cover of Mr. Sestito's letter of February the 20th, 2020.

Sorry, just before we go to those. Can you tell me, Mr. Bujold, whether the report or review that you commissioned from Meyers Norris & Penny was related to the Trustee's intention to seek passing of accounts in

relation to the 1985 Trust?

MS. BONORA: We will take that under advisement.

UNDERTAKING NO. 12:(UNDER ADVISEMENT) RE ADVISE WHETHER THE REPORT OR REVIEW COMMISSIONED FROM MEYERS NORRIS & PENNY WAS RELATED TO THE TRUSTEE'S INTENTION TO SEEK PASSING OF ACCOUNTS IN RELATION TO THE 1985 TRUST.

Q MR. FAULDS: Okay, so you have the February 20, 2020 letter in front of you. And perhaps we can go by the tab numbers that are referred to here. And these don't have production numbers or anything of that sort on them, I take it?

MS. BONORA: Sorry, you don't have an extra copy, do you?

MR. FAULDS: This is the February 20th package.

MS. HUTCHISON: So all of the land title searches.

MR. FAULDS: The letter of February 20th, 2020 from Mr. Sestito, and how many tabs are there? There is five tabs, I believe, attached to that.

A Which one am I looking at?

Q MR. FAULDS: Sorry, I'm just talking about the letter as a whole to begin with. There is a letter of February 20th, 2020 from Mr. Sestito and then five tabs attached to it?

A Yes.

Q What I am going to suggest is that we mark that whole

package as an exhibit. And would you prefer to mark your copy that you have there, or we can mark mine?

MS. BONORA: I think only the document should be marked, not the letter. I mean all the letter does is enclose documents that could be entered as evidence without them being part of anything, because they come from Land Titles. So I don't think that the letter needs to be attached as an exhibit.

You are welcome to enter the exhibit, or the tabs that are attached to the letter if you think that you need to.

MR. FAULDS: Well, given that the letter sets forth the basis on which the documents are being produced, I mean there isn't anything in the letter that -- is there? It is not without prejudice, it is not --

MS. BONORA: We just didn't expect our letter would be put in evidence. I'm just going to say I think you should just deal with the documents.

MR. FAULDS: Well, I would prefer to mark the whole package. And as I say, I'm going to --

MS. BONORA: So then you can mark it for identification, because I am objecting to the letter going in.

MR. FAULDS: Well, okay, let's mark the letter for identification, so that is a letter February 20th, 2020.

EXHIBIT NO. D-A FOR IDENTIFICATION:
LETTER DATED FEBRUARY 20, 2020 FROM MR. SESTITO.

Q MR. FAULDS: And, Mr. Bujold, you are familiar with this letter, and you have reviewed it and the documents which were attached to it?
A Yes.
Q And the first document, I understand, is a historical record from the Land Titles office relating to a particular block of land, legal description is on there. Do you know what block of land that is, what is on that land?
A No, I don't.
Q You are aware that at the time covered by this certificate the property in question was owned by Sawridge Holdings Ltd.?
MS. BONORA: Well, what do you mean by the time that it was covered? Are you saying from every registration it was owned by Sawridge Holdings? Is that your question?
MR. FAULDS: No, I said the time that is covered by this certificate.
MS. BONORA: I don't understand the question, because the time covered by the certificate, because it is historical, goes back from 1976 through to 2012.
Q MR. FAULDS: Well, I'm only interested in that period of time starting with the 14th of March, 1985

when the $12 million debenture is registered.
MS. BONORA: There is nothing on this document that would tell us that that is the case.
Q MR. FAULDS: Mr. Bujold, do you know who owned this piece of property when the mortgage was registered against it?
A No.
Q So you don't know whether it was owned by Sawridge Holdings, you don't know whether it was owned by Sawridge Enterprises?
A No, I have no idea.
Q Okay. What you do know is that at the date that this title was cancelled, I take it, the registered owner was Sawridge Holdings Ltd.?
MS. BONORA: I mean are you reading something on this title that tells him that, because I don't know that, he wouldn't know that. If you want to point him to something on this title we can both agree the title says that.
Q MR. FAULDS: Well, okay. So yes. Thank you, Ms. Bonora. Mr. Bujold, you will notice that on the Land Titles certificate that we are looking at there is a heading Registered Owner. Do you see that on the front page?
A Yes.
Q And there is a registration number, and then there is a date?

A Yes.
Q 29/11/1985?
A Yes, I see that.
Q And the owner as of that date was Sawridge Holdings Ltd.?
A Yes.
Q Okay. And this title we know from the top subsisted until September the 4th of 2012 when it was cancelled?
A Yes.
Q Okay. All right. And this historical certificate shows on the second page that the $12 million debenture that we have been talking about was registered as a mortgage against that property on March the 14th, 1985?
A I see that on the paper, yes.
Q Okay. Let's mark that as the next exhibit.

EXHIBIT NO. D-1:
DOCUMENT ENTITLED HISTORICAL LAND TITLE CERTIFICATE, TITLE CANCELLED ON SEPTEMBER 4, 2012.

Q MR. FAULDS: Then I would like you to turn to tab 2, and the first page of that indicates that this is an image of a document registered as 852050951. Do you see that?
A Yes, I do.
Q If I can just show you Exhibit 1, and if you look at the top of the page, of the second page rather, you will see that is the number for the debenture?

A For the debenture.
Q And if we look through that, if you carry on, there is on the second page, the instrument number appears again with the date of March the 14th, 1985 with a stamp that is accepted for registration. And then what follows is a copy of the debenture; is that correct?
A Yes, that is correct.
Q Maybe we can mark that as Exhibit 2.
MS. BONORA: That is fine.
MR. FAULDS: We can call that debenture as registered at Land Titles office, Instrument 852050951.

EXHIBIT NO. D-2:
DEBENTURE AS REGISTERED AT LAND TITLES OFFICE, INSTRUMENT NO. 852050951.

MS. BONORA: Mr. Faulds, for the record it is not an exact copy of the debenture that you were talking about this morning. There are notations that are different in this document.
MR. FAULDS: Are you referring to handwritten notations?
MS. BONORA: Yes.
A There is also formatting notations that are different. Maybe those aren't as important.
MR. FAULDS: Okay. Is there any suggestion that it is not the same debenture?
MS. BONORA: We are not making any opinions about these documents. We found documents at Land

Titles that we provided to you.

MR. FAULDS: Okay. In that event, I will ask you if you find any information that indicates that this is not the same debenture, then I'm going to ask you to let me know. I'm going to ask you to give me an undertaking.

MS. BONORA: I am telling you right now it is not the same document. I am not sure that we have any ability to tell you whether it is the same debenture because we weren't around for the registration. It is clearly not the same document.

MR. FAULDS: Because there are handwritten notations on it?

MS. BONORA: I'm telling you on my first glance there is handwritten notations. I have not done a black line version to tell you this is the exact same document. What we know just from a quick review, is that it is not the same document.

MR. FAULDS: I take it that it was provided to us on the basis that it appeared to have some connection with the debenture.

MS. BONORA: We provided it to you in respect of the document that was registered at Land Titles. That is what we did.

MR. FAULDS: So the Trustees are not taking any position on whether or not this is the same debenture, just to be clear?

MS. BONORA: I am not answering that question.
MR. FAULDS: Sounds like you are not taking any position.
Q MR. FAULDS: Mr. Bujold, I think the next document that has been provided is a copy of a document described as a Postponement of Debenture being Document Number 862135756. And if I can just have you refer back to Exhibit D-1, I think that you will see that is a document that was registered on the 30th of June, 1986?
A Yes.
Q Okay. If we can mark that as Exhibit 3. And again, Postponement of Debenture Registration Number 862135756.

EXHIBIT NO. D-3:
POSTPONEMENT OF DEBENTURE REGISTRATION NUMBER 862135756.

Q MR. FAULDS: And if you still have that one in front of you, Mr. Bujold, you will note that this postponement document was signed on the 6th day of June, 1986 by Walter P. Twinn who is indicated on his signature line, Walter P. Twinn as Trustee for the Sawridge Indian Band?
A That is right.
Q Now if I can get you to turn to tab Number 4. This is a document once again described as Postponement of Debenture, and the registration number is 932118429.

Do you see that?
A Yes, I do.
Q And you will see that that is listed as having been registered on May the 3rd, 1993. Just again look at the second page of Exhibit 1.
A Yes, I see that.
Q If we can mark that as the next exhibit. Again, same thing, Postponement of Debenture, Registration Number?

EXHIBIT NO. D-4:
POSTPONEMENT OF DEBENTURE REGISTRATION NUMBER 932118429.

Q MR. FAULDS: Mr. Bujold, if you look at the document we just marked as Exhibit 4, you will see that the actual postponement, I am looking at the fourth page of the document, the actual postponement as signed was signed on the 31st of March, A.D. 1993?
A Yes.
Q And once again, it was signed as Walter P. Twinn as Trustee for the Sawridge Indian Band, do you see that?
A Yes.
Q And, in fact, there is actually, on the last page there is an Affidavit of Execution to that signature?
A I see that.
MS. BONORA: The previous postponement had an Affidavit of Execution as well.
MR. FAULDS: I think this date is probably a little more significant.

Q MR. FAULDS: And so I would like you then to turn to the last tab, which is tab 5. And that is a document entitled Discharge By Mortgagee and it is registered as Document Number 032443307?
A Yes.
Q And just before we mark that, if you could just have a look at Exhibit 1, and you will see that that is shown on Exhibit D-1 as having been filed at a date in 2003?
A Yes.
Q So if we could mark that as Exhibit 5.

EXHIBIT NO. D-5:
DISCHARGE BY MORTGAGEE, REGISTRATION NUMBER 032443307.

Q MR. FAULDS: And you will note that it appears that on the face of the discharge that it was signed on the 22nd of October, 1986. Do you see that?
A Yes, I see that.
Q And that would appear to be consistent with the Affidavit of Execution on the next page in which Mr. Thom says that he saw Walter P. Twinn execute that document, and Mr. Thom's Affidavit of Execution is dated the 22nd of October, 1986. Do you see that?
A Yes.
Q But as we previously noted it wasn't registered until 2003?
A That is right.
Q Now when did you become aware of the existence of these

documents?
A About a month ago.
Q Okay. So I take it that up until that time you hadn't conducted any sort of review in relation to the debenture at the Land Titles office?
A No.
Q And you hadn't asked anybody else to do that?
A No.
Q Okay. And after you received those documents and saw that, did you make any inquiries of anybody about the events that these documents related to? Or the transactions that these documents related to?
A No.
Q So you don't have any information about the reason for the postponements that we see in Exhibits 3 and 4?
A No, I don't.
Q And you don't have any information as to why it was that a discharge was signed in 1986?
A No.
Q Or why it was not registered until 2003?
A No idea.
Q And you don't have any information as to the circumstances giving rise to the discharge of the mortgage?
A No, I don't.
Q But you do know that between the time the mortgage was registered in 1985, and the time that the discharge was

signed in 1986, that Sawridge Holdings became the owner of the land against which this was --

MS. BONORA: He doesn't know that. You are asking him to interpret that document, and he cannot do that.

MR. FAULDS: He has already agreed that --

MS. BONORA: He's agreed to what the document says. You are now asking him to make a conclusion based on that document and that is a legal conclusion, and he is not equipped to do that.

MR. FAULDS: Okay.

Q MR. FAULDS: Mr. Bujold, I am going to ask you to undertake to review the records of the Trust and of its subsidiary Sawridge Holdings Ltd., or its assets Sawridge Holdings Ltd., and advise me of the transaction which led to Sawridge Holdings Ltd. becoming the registered owner of this piece of property as reflected on Exhibit D-1?

MS. BONORA: We will not give that undertaking. It is irrelevant.

UNDERTAKING NO. 13:(REFUSED)
RE REVIEW THE RECORDS OF THE TRUST AND OF ITS ASSETS SAWRIDGE HOLDINGS LTD., AND ADVISE OF THE TRANSACTION WHICH LED TO SAWRIDGE HOLDINGS LTD. BECOMING THE REGISTERED OWNER OF THE PROPERTY REFLECTED ON EXHIBIT D-1.

MR. FAULDS: And I am going to ask you to make the same inquiries with the same sources, and also of Sawridge Enterprises Ltd., of the circumstances giving rise to the signing of the discharge.

MS. BONORA: He has already told you that he has no information, so we won't give that undertaking.

MR. FAULDS: That is why I am asking him to undertake to make inquiries of persons and records within his control to answer that question.

MS. BONORA: No, we are not giving that undertaking. It has already been answered. He doesn't have any more information. He has made the inquiries, he has looked at documents, he doesn't have anything more.

UNDERTAKING NO. 14: (REFUSED)
RE REVIEW THE RECORDS OF THE TRUST AND SAWRIDGE HOLDINGS AND SAWRIDGE ENTERPRISES AND ADVISE OF THE CIRCUMSTANCES GIVING RISE TO THE SIGNING OF THE DISCHARGE.

Q MR. FAULDS: Have you made that inquiry, Mr. Bujold? Have you asked Sawridge Holdings, Sawridge Enterprises, and people from the Trust --

MS. BONORA: Mr. Faulds, I have given you our position.

MR. FAULDS: You gave me a statement that he had made those inquiries.

MS. BONORA: I'm objecting to the question.
MR. FAULDS: I'm asking if he in fact has made that specific inquiry.
MS. BONORA: I'm objecting to that question.
MR. FAULDS: On what basis?
MS. BONORA: On the basis it has been asked and answered, and he is not answering it again.
MR. FAULDS: No, you said that. He hasn't said that.
MS. BONORA: So, I have said it and I'm his counsel.
MR. FAULDS: I would like Mr. Bujold to answer the question whether or not he made the specific inquiry that I asked him to make.
MS. BONORA: Mr. Faulds, I have made the objection. Move on. We can quit on this basis if you want, but my objection is on the record.
MR. FAULDS: Your objection is on the basis that he has asked that question of those people.
MS. BONORA: Mr. Faulds, you have my position.
MR. FAULDS: Yes, I think I understand your position exactly. Okay. Let's talk for a moment about documents over which privilege has been claimed. And perhaps we can just have a discussion off the record about that.

(Discussion off the Record.)

Q MR. FAULDS: Mr. Bujold, after that long

off-the-record discussion I am going to ask you to undertake to provide me with the following information respecting the numbered items 1 to 5 listed in the Sawridge Trustee's counsel's letter of February 24th, 2020, and the information I am asking you to undertake to provide is the date of each document, the circumstances under which the document was created, and the basis on which privilege is asserted over the document as against the minor beneficiaries of the 1985 Trust.

MS. BONORA: We are refusing that undertaking.

UNDERTAKING NO. 15:(REFUSED)
RE RESPECTING THE NUMBERED ITEMS 1 TO 5 LISTED IN SAWRIDGE TRUSTEE'S COUNSEL'S LETTER OF FEBRUARY 24, 2020 PROVIDE THE DATE OF EACH DOCUMENT, THE CIRCUMSTANCES UNDER WHICH THE DOCUMENT WAS CREATED, AND THE BASIS ON WHICH PRIVILEGE IS ASSERTED OVER THE DOCUMENT AS AGAINST THE MINOR BENEFICIARIES OF THE 1985 TRUST.

Q MR. FAULDS: Okay, I am going to change topics now. I am going to ask you about the exchange of correspondence between Mr. Cullity and various legal representatives of Canada, and some related correspondence between Mr. McKinney and Mr. Cullity which began with an inquiry from a legal representative

of the Government of Canada in 1993 concerning the Trusts.

Do you know the correspondence I am referring to?

A Yes, I do.

MS. BONORA: Mr. Faulds, you know that we won't answer further questions with respect to correspondence between legal counsel of the Trust and Mr. McKinney, and you know we provided that correspondence to you on the basis that there would be no further release of privilege.

So you are welcome to ask him questions about what these documents say, although he has no personal knowledge of them, in respect of the correspondence that is not privileged.

MR. FAULDS: Well, I'm not entirely sure I understand what you are saying about that, but.

MS. BONORA: Go ahead and ask the questions and I will tell you where my objections stand then.

MR. FAULDS: Okay, let's do that.

Q MR. FAULDS: So let's just start with a general question. You are aware, Mr. Bujold, that in late 1993 the Government of Canada wrote to the Sawridge First Nation raising questions about the Trusts which the Government of Canada said they had just become aware of? You are aware of that sort of starting point to that correspondence?

A I have seen the correspondence that purports to ask

those questions, yes.
Q Okay. And you are aware that ultimately Mr. Cullity took on the task of responding to the inquiries that came from the Government of Canada?
MS. BONORA: Can you ask him if he has seen letters where Mr. Cullity has written to the Government of Canada? He does not know anything about what tasks Mr. Cullity took on. He wasn't around during this time frame.
Q MR. FAULDS: Well, so let's -- I think I provided you with a copy of this package of documents this morning. And it begins with the December 23rd, 1993 letter from Wendy Porteous at Indian and Northern Affairs Canada to Chief Walter Twinn. Do you see that?
A I do.
Q And that is actually a document that has been produced by the Trustees in this litigation. Do you see that?
A Yes, I do.
Q Okay. And that would have been included in the first Affidavit of Records which you swore; is that correct?
A I think this was in the first one, yes.
Q And then if you turn to the second page -- and sorry, just for the record that production number is SAW 001894, correct?
A That is right.
Q And if you turn to the next page this is a letter from Mr. Cullity back to the, I don't know if A means

assistant or acting or associate or whatever, but Assistant Deputy Minister W. Van Iterson. And you will see in the second paragraph Mr. Cullity says, Accordingly, I have been instructed to respond to any questions that you may have in connection with such Trust to the extent that you are entitled to receive answers. Do you see that?

A Yes, I do.

Q And that was also produced by the Sawridge Trustees. It is Document SAW 001893.

A Yes, I see that.

Q And you will see that, I am going to ask you to turn to -- I think these documents are in chronological order -- June 5th, 1995. This was a letter from Margaret McIntosh at the Department of Indian Affairs to Mr. Cullity relating to the Sawridge Trusts. Do you have that?

A Yes, I see it.

Q And you will note that in the first paragraph there is a reference to the fact that Indian Affairs is in receipt of Mr. Cullity's correspondence of May 8th, 1995, and appended statement from the firm of Deloitte Touche. We know the statement from the firm of Deloitte Touche is limited to Band Council Resolutions, funds received 1985 to 1993. Do you see that there?

A I do.

Q Have you ever seen the statement from Deloitte & Touche

that is referred to in that paragraph?
A No.
Q So you don't have any information as to what was said by Deloitte Touche, or what information was provided to Indian Affairs in that statement?
A No, I don't.
Q Okay. And then if you carry on -- have you read this letter before? I'm just asking because it makes it quicker if you have.
A I may have, I don't recall exactly, no.
Q Well, you will see if you review that correspondence that Ms. McIntosh on behalf of Indian Affairs is saying we wanted more information. I'm just paraphrasing, but she said you gave us information for a period of time through this Deloitte statement, but we expected more.
MS. BONORA: What is your question?
MR. FAULDS: I'm just asking if he understands that that is the essence of the correspondence?
MS. BONORA: Mr. Faulds, the letter speaks for itself. He is not going to interpret it. If you interpret it that way, you can read it that way. He is not going to interpret this document. It says what it says.
Q MR. FAULDS: So then let's go to July 28th, 1995.
A Are these sequential?
Q They should be in chronological order, yes.

A Okay.
Q July 28th, 1995, this is a letter from Mr. Elliott who is described as senior general counsel at Legal Services, back to Mr. Cullity. And you will see that he says, As indicated in Ms. McIntosh's letter of June 5th, 1995, which we just looked at, we had understood the statement from the Band's auditors would cover the period from 1975 to present as requested in the letter from my colleague, Christopher McNaught, to you dated May 20th, 1984. I take from your letter that you had a different understanding, and that we should not expect a further statement from you, your client, or its auditors. We will consult with our client and advise you if we are instructed to pursue the matter further at this time. Do you see all of that?
A I do.
Q Did the Sawridge Trust, or the Sawridge First Nation, or did anybody on their behalf receive any indication that the Government of Canada and Department of Indian Affairs was pursuing the matter after the date of this letter?
A I have no idea.
Q Well, let's just -- if you can flip to the next page you will see this is a reply to Mr. Elliott by Mr. Cullity dated August the 3rd of 1995.
A I see that.
Q And then if you flip to the next page this is a letter

from Timothy Youdan at Mr. Cullity's former firm to Mike McKinney in which he states, There is no record in our files of any correspondence subsequent to Maurice Cullity's letter dated August 1995.

MS. BONORA: Mr. Bujold will not answer questions on privileged correspondence.

Q MR. FAULDS: So, Mr. Bujold, you have no information to suggest that there were any further inquiries from the Government of Canada after Maurice Cullity's letter of August 3rd, 1995?

A I have no knowledge, I have no records, no.

Q And you don't have any record of the Government of Canada having raised objection to or demand changes in the manner in which the Trusts were operated?

A No.

Q So, Mr. Bujold, that letter that we are looking at is attached as an exhibit to your Affidavit of the 20th day of January, 2020, if you would look at that. It is actually, I believe, the last page of that exhibit and forms part of Exhibit C to that Affidavit.

MS. BONORA: The whole purpose of the privilege order and the only reason this Affidavit was provided to you under trust conditions so that there would be no further questions around privilege, even though that document was attached. So he won't be answering questions about privileged documents.

MR. FAULDS: Well, I'm going to ask some

questions anyway and you can take the position that you will.

Q MR. FAULDS: Did you review these exhibits for the purpose of swearing your Affidavit?

A I did.

Q And when you reviewed them did you have any role in selecting these documents as being pertinent to your Affidavit?

MS. BONORA: Mr. Faulds, we are not answering that question.

MS. HUTCHISON: Can we go off.

(Discussion off the Record.)

Q MR. FAULDS: So, Mr. Bujold, and perhaps I will just state my position respecting the Privilege Order for the record. The Consent Order pursuant to which your Affidavit sworn January the 20th, 2020 was filed suggests to me that the disclosure of the documents attached to your Affidavit do not constitute a general waiver of privilege, but my interpretation of the order is that it does not preclude asking questions about the documents that are produced.

So that is my position. And Ms. Bonora, do you take a contrary view?

MS. BONORA: I do. But you are welcome to put your questions on the record so at least we know what they are. But I mean to date all you have done is ask Mr. Bujold to confirm the contents of letters and the

dates of those letters. And if you want to continue on doing that with respect to the privileged documents, please put those on. We may reconsider and answer questions in respect of him confirming the contents of letters, so.

Q MR. FAULDS: And I think, Mr. Bujold, you have agreed that you are not aware of any steps that were taken by Canada in relation to the Trust after Mr. Cullity's letter of August the 3rd, 1995. And I think the only undertaking that I would ask is that you advise me if you become aware of there having been any such action.

MS. BONORA: I don't think that we will give that undertaking. I think if you want to ask the first part of the question, I don't want to be under a continuing undertaking for I don't know how long.

MR. FAULDS: And I don't want to be presented with something at a hearing that I wasn't aware of.

MS. BONORA: That is not obviously going to happen. We produced an Affidavit of Records and said those are all of our records, and a Supplemental, so.

MR. FAULDS: All I'm asking you is if something comes to your attention that we be advised in a timely way.

MS. BONORA: Mr. Faulds, obviously if we wanted to rely on a record you would be given notice of that in advance.

MR. FAULDS: Okay.

MS. BONORA: So I think ...

MR. FAULDS: Or any other information, because that is the nature of the undertaking. If you become aware of any information which suggests that Canada did continue its attempts to extract information in relation to the Trust or take any other action that you let us know that.

MS. BONORA: We won't give that undertaking.

UNDERTAKING NO. 16:(REFUSED)
RE ADVISE IF THE TRUST BECOMES AWARE OF ANY FURTHER INFORMATION WHICH SUGGESTS THAT CANADA CONTINUED ITS ATTEMPTS TO EXTRACT INFORMATION IN RELATION TO THE TRUST OR TAKE ANY OTHER ACTION.

Q MR. FAULDS: Well, perhaps because we looked at some documents that were not identified in your Affidavit of Records -- well, maybe we should just confirm where they did come from. We looked at, Mr. Bujold, we looked at the letter of June 5th, 1995, from the Department of Justice to Mr. Cullity. And you can confirm, I think, that that is part of Exhibit C to your Affidavit of January the 20th, 2020?

MS. BONORA: How do you know that, John?

MR. FAULDS: Because you attached the document to the Affidavit.

MS. BONORA: Exhibit C to January 20th. Sorry.

A Yeah.
Q MR. FAULDS: And similarly with the letter to Mr. Cullity from Mr. Elliott of July 28th, 1995?
A So what am I confirming?
Q Just confirming that that forms part of the documents that were attached to your Affidavit of January 2020?
A Yes.
Q And similarly with Mr. Cullity's reply to Mr. Elliott dated August 3rd, 1995, that was part of the documents in your Affidavit?
A Yes.
Q And lastly, the letter of April 1st, 1999 from Mr. Youdan to Mr. McKinney, that was part of your Affidavit of January 2020?
A Yes.
Q Thank you. Whose notes are those in the bottom?
A Those are mine. It is a file reference.
Q All right. Mr. Bujold, I would like to turn to the origins of the issues that we are concerned with here, namely the effect of the asset transfer order. And in the original application, or in the original appearance before Justice Thomas in relation to this application you had filed an Affidavit that I think was dated August the 31st of 2011?
A Yes.
Q That was your first Affidavit. And in that Affidavit, as I recall, you indicated that advice and direction

was going to be sought in relation to two main matters?
MS. BONORA: Do you have a copy of the Affidavit? I didn't bring it.
MR. FAULDS: I thought I did but I don't seem to have it handy. Just give me one more second.
MS. BONORA: September 12th, 2011?
MR. FAULDS: August 30th, 2011, filed September 6th.
A Okay.
Q MR. FAULDS: And if you look at paragraph 6 of that Affidavit?
A I am looking.
Q You deposed in that Affidavit concerns raised by the Trustees of the 1985 Trust with respect to, and then you identify two matters?
A That is right.
Q Determining the definition of beneficiaries and if necessary varying the Trust to clarify the definition of beneficiaries, and seeking direction with respect to the transfer of assets to the 1985 Sawridge Trust?
A That is right.
Q Okay. So I take it, then, that the Trustees had at that point identified concerns in relation to the transfer of assets, and I am wondering if you can tell me what those concerns were?
A Our concern was that we had no documentation, or not sufficient documentation.

Q And what was it in relation -- first of all, in relation to the documentation that was lacking? What did you expect to see that you did not see? Or could not find, I should say?
A I think that we expected that there would be a clearer transfer process that met the legal requirements of having beneficiary approval and to a certain extent court approval. There had been a previous variation of the '82 Trust to vary the term of the Trustees, and then we expected something of that nature.
Q Right. And I take it that while documentation was deficient, you were satisfied that there had not been any kind of court application or court order granted in relation to the transfer?
A I hadn't found any documents to that effect.
Q Right, right. And I take it that that was the subject of concern to the 1985 Trustees?
A If we had to do -- because part of this process was -- the initial part of the process was to eventually lead up to a passing of accounts of both Trusts. We wanted to be sure that we had the right information for the passing of accounts of the 1985 Trust.
Q Okay. And distribution, for the purpose of distributions also?
A Well, distributions to the extent that we needed to know that there had been a valid transfer of asset into the 1985 Trust.

Q Sure. And you have to know that you properly have control of assets which you are proposing to distribute?
A That is right. So there had to be some certainty as to the asset that we actually were deemed to be holding.
Q Right. And that is what you were referring to in your Affidavit, in a summary kind of way?
A Yes.
Q Okay. And in terms of what the Trustees were seeking by way of direction on that point, I take it that that is what you were referring to in paragraph 25 of your second Affidavit, the September the 12th, 2011 Affidavit?
A Sorry, what --
Q So in terms of the kind of direction that you were seeking, that is what you were referring to -- on that point, concerning the asset transfer, that is the subject of paragraph 25 of your second Affidavit of September 12th, 2011 Affidavit?
A Yes.
Q Okay. And that was ultimately brought forward an unfortunate length of time later in August of 2016, which is when the Trustees filed a formal, specific application seeking the court's approval?
A Yes.
Q And a brief was prepared by counsel on behalf of the Trustees and was submitted to the court in support of

that application. Did you read that?
A Yes, of course.
Q Did you have any sort of input into its contents, or were you simply --
MS. BONORA: I think that is protected by solicitor-client privilege in terms of what input he had into legal briefs.
Q MR. FAULDS: I noticed in the documents produced by Ms. Twinn, and this is among the package of documents that I provided to you, there was some discussion about this issue at at least a couple of the meetings of the Trustees. And one of those is the minutes of a meeting on the 15th of April of 2014, and that is Twinn Document Number 002214 to 002218. Do you have that before you?
A Yes.
Q If you look at the second page of those minutes under Action Items, Number 4, in the second-last paragraph of the entry under that heading you will see reference to Items 1403003 and 004. Roland pointed out the transfer of assets problem now seems to be preventing the companies from taking any action on new proposals.

Do you see that? Do you recall what the issue was, and how the asset transfer problem was doing that?
A No, I don't.
Q Okay. Do you have any recollection at all of any discussion at that meeting regarding that?

MS. BONORA: Can we go off the record for a second, John?
MR. FAULDS: Sure.
(Discussion off the Record.)
MR. FAULDS: Ms. Bonora, I understand from our discussion off the record that the reference to transfer of assets problem that I just took Mr. Bujold to is not really the asset transfer that we are concerned with in the current application?
MS. BONORA: That is correct, and I think Mr. Bujold adopts that answer.
A Yes.
Q MR. FAULDS: The next reference to asset transfer is on page 2217, near the top of the page after a motion in relation to Justin's status. You will see there is an entry there, Catherine pointed out she had requested a history of the Trust assets from Paul but had not received it. I take it that Paul would be yourself?
MS. BONORA: We are not answering questions about this paragraph. It is clearly privileged.
Q MR. FAULDS: Well, if I understand correctly this is a meeting of the Trustees, and the Trustees are the individuals who deal with assets on behalf of the beneficiaries. And so how is that privileged as against beneficiaries?
MS. BONORA: When they talk about their legal

advice that is privileged information. So we are not answering questions about this paragraph.

MR. FAULDS: Again, I just want to be clear because this has come up previously. You are taking the position that legal advice received by the Trustees is privileged as against the beneficiaries of the Trust, even if it relates to historical events concerning the Trust?

MS. BONORA: In relation to litigation that is ongoing, yes.

Q MR. FAULDS: But I gather that you did give at this meeting a verbal description of the history of the Trust assets including the Trust transfer from 1982 to 1985?

MS. BONORA: We are not answering that question.

MR. FAULDS: On the basis?

MS. BONORA: As you can see even the minutes refer to it. As Donovan Waters pointed out the information received by the Trustees is confidential and cannot be shared outside of their meetings.

MR. FAULDS: I'm not sure that Mr. Waters was providing an opinion in relation to the existence of privilege against beneficiaries. You are not suggesting that?

MS. BONORA: I am suggesting we are not answering questions in relation to this paragraph.

Q MR. FAULDS: Do you recall, Mr. Bujold,

providing information to the Trustees at this meeting to the effect that the manner in which the transfer had been carried out was wrong?

MS. BONORA: We are not answering that question.

Q MR. FAULDS: And do you remember advising the persons attending this meeting that it was necessary for the Trustees to go to court and get approval for what had happened --

MS. BONORA: We are objecting.

MR. FAULDS: -- in the transfer in 1985.

MS. BONORA: We are objecting to that question.

MR. FAULDS: What is the basis for that objection?

MS. BONORA: He would be providing advice, legal advice that he had been given, and that is privileged information.

MR. FAULDS: Are you suggesting again that it is privileged vis-a-vis the beneficiaries of the Trust?

MS. BONORA: That is right.

MR. FAULDS: Is it privileged because it is some in some way not in the interests of the beneficiaries of the Trust?

MS. BONORA: Mr. Faulds, I'm not going to argue with you on this on the record. I'm giving you my objection. If you disagree, you know what options you have.

MR. FAULDS: I want to be clear that I

understand the basis for it. And you are being clear that you take the position that privilege exists vis-à-vis the beneficiaries.

MS. BONORA: I'm not answering that question. You know my objection. We are running out of time today. Please move on.

Q MR. FAULDS: I am going to refer you then, Mr. Bujold, to a resolution of the Sawridge Trust Trustees which is listed as Ms. Twinn's Document 001611. And it is headed Resolution of the Sawridge Trust Trustees, and it is dated the 16th of March, 2016.

A Okay.

Q Can you tell me who drafted that resolution?

MS. BONORA: No, we are not going to tell you that. It is very clear, the preamble is that it was within the realm of receiving legal advice. I am really having trouble understanding the relevance of this to the asset transfer issue.

MR. FAULDS: Well, let me refer you to the preamble where it refers to Action 1103 14112 which describes the Sawridge Trust application for advice and direction on the definition of beneficiaries in the 1985 Trust and on the normalization of the transfer of assets from the Sawridge Band Trust to the 1985 Trust.

MS. BONORA: So it is describing the action.

MR. FAULDS: And it is characterizing the action

in relation to the transfer of assets.

MS. BONORA: In a resolution.

MR. FAULDS: A resolution of the Trustees.

MS. BONORA: So what is your question?

Q MR. FAULDS: My question is, do you agree, Mr. Bujold, that that is an accurate statement of the purpose of the Trustee's application as it concerns the asset trust?

MS. BONORA: We are objecting to that question.

Q MR. FAULDS: Maybe we could -- are you content if we just refer to it by the production numbers from Catherine's Affidavit of Records?

MS. BONORA: M-hm.

Q MR. FAULDS: So we can leave it on that basis. But I just want to get it on the record that the previous document that we looked at, the minutes of the meeting of April 15th, 2014 that we referred to previously, can you just confirm, Mr. Bujold, that that is also a document from Catherine Twinn's production, being Twinn 002214 to 2218?

MS. BONORA: Sorry, I just lost that. What is the date of the minutes?

MR. FAULDS: April 15th, 2014.

A 14 to 18, yes.

Q MR. FAULDS: Those are the minutes that we discussed just a moment ago, correct?

A Yes.

Q I am going to take you now, Mr. Bujold, to some financial statements that have been produced. And this would take us back to the package of documents, Number 1 to 59, that were originally put together by the Trustees as a consolidation of the produced documents. And in that production you produced a financial statement for the 1985 Trust, and this would be at tab 30 of those materials.
A Okay.
Q And am I correct in understanding the Trust financial year-end is the calendar year-end?
A It is.
Q So this financial statement relates to calendar year 1986?
A That is correct.
Q And I am wondering, did you locate a copy of the Sawridge Band Inter Vivos Settlement Trust, or 1985 Trust, financial statement for calendar year 1985?
A No, I did not. Not like this financial statement.
Q Did you locate a financial statement for 1985 for the 1985 Trust in some other form or format?
A It was a restatement of the 1982 Trust as of December 31, 1984 in draft form for 1985, for December 31st, 1985. But it was just in draft form. Like it was just auditor's notes.
Q I am sorry, this was a restatement of -- sorry, maybe I can just ask you to provide me with that description

again of what it was.
A So there was a final statement of the 1982 Trust produced 31 December, 1984.
Q Okay.
A Then the 1985 Trust was created the 15th of April, 1985. As of the 31st of December, 1985 there hadn't been any activity, I presume, between the creation of the Trust and the transfer from 1982 to '85 and the end of the year. And so the only thing that we have got for 1985 is a statement that looks like this, but it is the 1982 Trust financial statement simply scratched out, because the transfer was simply straight across.
Q Okay.
A So, you know, there is different notations, auditor's notations on it but there was never, or I couldn't find a copy, anyway, of a formal statement like this for the 1985 Trust as of December 31, 1985.
Q And has that sort of draft or whatever you would like to call it, has that been produced?
A It was produced early on. I am not sure if it is ...
MS. BONORA: We'll undertake to locate a copy for you.
MR. FAULDS: Could you do that.

UNDERTAKING NO. 17:
RE PRODUCE THE DRAFT FINANCIAL STATEMENT FOR THE 1985 TRUST AS OF DECEMBER 31, 1985 AS REFERRED TO.

Q MR. FAULDS: And in the 1986 financial statement for the 1985 Trust, which is the document that we are looking at here at tab 30, the first note to that financial statement, the page number is Sawridge 000492, that is the number down in the bottom right. It refers to, Note Number 1 refers to operations, and then it says the Sawridge Band Trust was established on April 15th, 1982. And that is consistent with the documents that we have looked at?

A Yes.

Q And during 1985 changed its name to the Sawridge Band Inter Vivos Settlement Trust. That is not consistent with the documents that we have looked at?

A No.

Q And this financial statement lists on the balance sheet, which is page number 000490?

A Okay.

Q It lists assets as being primarily composed of amounts due from Sawridge Holdings Ltd.?

A Yes.

Q And the note, that has got Note Number 3 next to it, and if you go back to the notes that we were just looking at here you will see Note Number 3 relates to that item, what is due to the Trust from Sawridge Holdings Ltd., a wholly-owned subsidiary.

Just on that point of being a wholly-owned subsidiary, do you know, does Dave Fennell still have a

share in Sawridge Holdings Ltd.?

MS. BONORA: We are not answering that question.

Q MR. FAULDS: You will see that there is reference to a promissory note unsecured payable on demand bearing interest of prime plus 3 percent. Have you ever seen that promissory note?

A No.

Q And then there is a reference to advances bearing interest at prime plus 3 percent and secured by a demand debenture. Do you know what debenture that is referring to?

A I do.

Q Is that the $35 million debenture?

A Yes, it is.

Q And that debenture was issued in 1986?

A I can't be sure because I don't have the debenture document in front of me.

Q I think that was the subject of the previous undertaking, so.

A Yes, we said we would produce that for you.

Q Right. So other than that kind of draft document that you are going to search for for me, you don't have any other financial statements for the 1985 Trust for 1985 and 1986? There isn't anything else?

A This is the only thing that I have got for 1986. The 1985 financial statement, as I told you, was sort of a draft thing.

Q Right. And you have also produced some financial statements for this Sawridge First Nation for the years 1985 and 1986, if I remember correctly. Or I am sorry, no, we have -- if I can get you to turn to tab 47 of the consolidated. And unfortunately this appears to be a compendium of documents that was provided by way of an answer to undertaking.

And the first one that I find in this package is the 1984 financial statements for the Sawridge Indian Band Number 19. Do you have that? It is not the first document in the package, it is the first financial statement in the package. And it is, it looks like it is about ten pages in or so.

A Okay.

Q And I gather from this that the Sawridge First Nation's financial year-end is March the 31st of the year?

A That is what it says on this statement.

Q And I just flagged that just because we know what period of time that covers. And if you look at the Statement of Revenue and Expenditures and Fund Balance, year-ended March 31st, 1984, you will see down at the bottom that there is a reference to distribution to Band members with Note 16 in brackets after that?

A Yes.

Q And if we go to Note 16?

A Okay.

Q That refers to the transfer of assets into the Sawridge

Band Trust?
A Yes.
Q And it says December 17th, 1983, but I think when we looked at the documents the actual day was December 19th, 1983?
A Okay.
Q And I don't imagine you have any information about this, but do you have any information as to how the valuation that is indicated there was attached to the assets that were transferred into the Sawridge Band Trust?
A Like I said, I have no records of the 1982 Trust.
Q Okay. And then if you flip ahead, the next financial statement in this package is the 1986 financial statements for the 1985 Trust, which we already looked at?
A Right.
Q The next tab is that Band Council Resolution regarding the debenture. The next tab is the financial statements for Sawridge Indian Band Number 19 for the year-ended March 31st, 1985?
A You're missing something in between.
MS. BONORA: You skipped some documents, right? There is documents in between and then there is a Band Council Resolution?
MR. FAULDS: Yes, I am sorry, I was really just trying to get us to the financial statement.

A Okay.
Q MR. FAULDS: And make sure that we were on the same page?
A Okay.
Q And that is the Sawridge Indian Band Number 19 financial statement for March 31st, 1985?
A That is what it says, yes.
Q And then there is on the Statement of Revenue and Expenditures and Fund Balance which is the second page, you have again a reference to distributions to Band members with reference to Note 11?
A Yes.
Q And then if we go to Note 11 it indicates distributions to Band members, and then the first line is assets transferred to the Sawridge Band Trust, in other words the 1982 Trust, and there is a reference to $3,706,016. Do you have any information regarding what assets are represented by that?
A No.
Q For example, do you know if that represents additional assets which were transferred to the 1982 Trust by any person, or whether it represents effectively income earned by the assets in the 1982 Trust?
A I couldn't tell you.
Q Okay. And can you tell me how it was that you had the financial statements of the Sawridge First Nation for these two years?

A No, I couldn't tell you that. It was in one of the boxes. I don't -- it could have been a box from Mike McKinney, or it could have been a box from the companies, because the affairs of the companies and the Trusts and the First Nation were all mixed together for a while. So I don't know where it comes from. I just know that I had them.

Q Right.

A And I didn't have to ask for them.

Q So I take it that you do not have copies of the Sawridge First Nation's financial documents for the calendar year-ending either March 31st -- or not the calendar year, the financial year-ending either March 31st, 1986 or March 31st, 1987?

A I don't know without looking at my record.

Q Could I ask you to undertake to do that, and with respect to those two years, the first year-end March 31st, 1986 would cover the period during which the transfer of assets from the 1982 to the 1985 Trust occurred, and also the period when the debenture held by Walter Twinn would have been transferred to the 1985 Trust. And with respect to 1987 -- actually, I should really be asking for 1987 and 1988 because the purpose of that question is to determine whether or not there is any information there that casts lights on the $35 million debenture and whether or not it has some relationship with the $12 million debenture?

MS. BONORA: We will take that under advisement.

UNDERTAKING NO. 18: (UNDER ADVISEMENT) RE PRODUCE COPIES OF SAWRIDGE FIRST NATION'S FINANCIAL DOCUMENTS FOR THE YEARS ENDING MARCH 31ST, 1986, MARCH 31ST, 1987, AND MARCH 31ST, 1988.

MR. FAULDS: And if you don't locate copies of those records, I'm asking you to undertake to make a request of the Sawridge First Nation to provide those financial statements.

MS. BONORA: We will take that under advisement. These were produced because they had a specific reference to the Sawridge Band Trust. Other records of the Sawridge Band that don't have reference to the Trust I don't think are relevant.

MR. FAULDS: Right. That is why I say one would imagine that a transfer of the kind that is shown here into the 1982 Trust would also show up into the 1985 Trust.

MS. BONORA: If it was a transfer. It may not have been a transfer and it may not have been an assignment. So you have to make those assumptions in order for them to show up in financial statements.

MR. FAULDS: But it is relevant and material to answering that question.

MS. BONORA: The point is that it may say nothing, right. And that is the whole point, is that

these were produced because they had a reference to the Trust.

MR. FAULDS: But not to the 1985 Trust, because these all predate the 1985 Trust.

MS. BONORA: Yeah, the Trust was created a month later.

MR. FAULDS: In any event, you have taken those under advisement and that is fine.

MS. BONORA: I will take that under advisement.

UNDERTAKING NO. 19: (UNDER ADVISEMENT) RE IF DOCUMENTS REQUESTED IN UNDERTAKING NO. 18 ARE UNAVAILABLE REQUEST THE SAME OF SAWRIDGE FIRST NATION.

Q MR. FAULDS: In relation to this question about the debenture, have you, Mr. Bujold, reviewed the financial statements of Sawridge Holdings Ltd. for the period of time from the beginning of 1985 to the end of 1986 in relation to what light, if any, that can cast on the debenture issue?

A No, I haven't.

Q I am going to ask you to undertake to provide the financial statements of Sawridge Holdings Ltd. for that period of time. Do you know whether they do their financial statements on a calendar year, or --

A I think they are calendar.

MS. BONORA: We will take that under advisement. First of all, we will look and see if it exists. Most

of these statements don't exist. And secondly, we have been very worried about protecting the information of the companies. If it has a reference to the debenture, clearly we will likely answer the question if we can find it, but.

MR. FAULDS: And if, I mean, if there is issues on the, you know, the commercial front or proprietary front or whatever, you know, we can I am sure reach an agreeable arrangement to deal with it.

MS. BONORA: Sure.

A So for which year?

MR. FAULDS: I am asking for this covering calendar 1985 and 1986. And maybe that is just two financial statements, but it could be three, depending on the year-ends.

A Okay.

MS. BONORA: Okay.

UNDERTAKING NO. 20:(UNDER ADVISEMENT) RE PROVIDE THE FINANCIAL STATEMENTS OF SAWRIDGE HOLDINGS LTD. FOR THE CALENDAR YEARS 1985 AND 1986.

Q MR. FAULDS: I think this is just clearing up a misconception that may exist, but I noticed in the records that there is a document which purports to be a Declaration of Trust dated July of 1983?

A Yes.

Q And again, I know that -- first of all, you are not

aware of a 1983 trust as distinct from the 1982, 1985, and 1986 Trusts that we have been talking about?

A No.

Q And my review of that document indicates that it is kind of an office consolidation of the 1982 Trust with the amendment to the Trustee terms of office incorporated into it?

MS. BONORA: So are you asking him to speculate as well, or?

MR. FAULDS: No, I am asking him if that is what it appears to be.

MS. BONORA: I don't think he can give an opinion on what it appears to be. It looks like what it is, but he can't give that opinion.

Q MR. FAULDS: In terms of dealing with that document, do you have any -- do you deal with that document in any way?

A No.

Q Have you seen any, you know, documents that refer to assets from the 1982 Trust -- or the 1983 Trust, I mean, or --

A No.

Q Mr. McKinney -- it has been said, and I am sorry, I can't recall by who, that there have been no distributions from the 1985 Trust since its inception. And I wanted to ask you whether you have found, in fact, records which do reflect distributions from the

1985 Trust?
A No.
Q Have you found references to distributions from the 1985 Trust?
A There are a couple of financial statements that do talk about distributions to beneficiaries.
Q And what can you tell me about what those distributions were?
A I know that they are not the normal kind of distribution where you give something to a beneficiary and they keep it.
Q Okay. I have seen reference to the distribution being made out of income earned by the Trust which was then gift back the next tax year. Is that the kind of distribution that you are talking about?
A Yes.
Q And do you have any information about how many times that occurred?
A No, I don't.
Q As far as you are aware were those distributions made to Chief Twinn, Walter Twinn?
A I don't know.
Q And you said that you saw these in the financial statements?
A In some financial statements.
Q I wonder if I could ask you to produce any references to such distributions?

MS. BONORA: Can you tell me why these distributions are -- "these distributions" and I put that in quotation marks, because they weren't distributions to beneficiaries, the money was paid back into the Trust, why they are relevant?

MR. FAULDS: Well, they were a distribution to the beneficiary. The fact that they were paid back has to do with the purpose of the distribution, but it doesn't change the fact that it was a distribution.

MS. BONORA: We can agree to disagree on the word distribution. But can you tell me why it is relevant?

MR. FAULDS: Sure, because actions involving the distribution of assets in the 1985 Trust to beneficiaries of the 1985 Trust is a relevant fact in the determination of the interpretation of the asset transfer order and the volume of issues identified by Justice Henderson.

MS. BONORA: Tell me why. You said it is related to the asset transfer issue. But you need to tell me, what I am asking you is why is it related.

MR. FAULDS: I told you as much as I am going to tell you. I don't have to disclose our legal theory on that to you to justify production. I am asking for the production. If you object, you object, and we will follow up.

MS. BONORA: Okay, I object. But, John, I would

say that you can tell me now and I could change my mind, or you can tell Justice Henderson, but either way you are going to have to reveal the reason on why it is relevant.

MR. FAULDS: I have had limited success in changing your mind so I am playing the percentages here.

MS. BONORA: All right. Well, eventually you will have to tell me, right, because obviously you won't get the question answered if you just say to Justice Henderson, hey, just trust me on this one. So, you know, obviously we are going to take all of the objections that I have made and the things I have taken under advisement and rethink them, and so I am saying it would be helpful for us in terms of rethinking the objections to know your reason on why these distributions are relevant.

MR. FAULDS: That is a very generous offer, and I will consider it.

MS. BONORA: Okay.

MS. HUTCHISON: And we will certainly extend the same offer on providing us actual detail about the grounds of privilege so that we can make a considered decision on whether to make an application on these as well.

MS. BONORA: Sure. Well, I took those under advisement, which means I will consider them and get

back to you.

Q MR. FAULDS: I am, in relation to this question of distributions, going to refer you to a couple of documents that have been produced by Ms. Twinn. The first one is -- and this is part of the package that I passed on to you, Twinn Documents 007806 to 007808. And I am referring particularly to the second page.

MS. BONORA: Mr. Faulds, these relate to legal advice given and relate to clearly advice given by Mr. Cullity, so we will not be answering any questions about this document.

MR. FAULDS: I am unable to see any legal advice on this.

MS. BONORA: Maurice Cullity appears in, I think, every single paragraph.

MR. FAULDS: Well, he doesn't appear in the paragraph I am referring to, so. The paragraph that begins "In 1984-1985", this appears to be an accountant's memorandum.

MS. BONORA: Okay. So what is your question?

Q MR. FAULDS: You have had a chance to look at that paragraph on page 007807 which begins, In 1984-85 Trust 1 had large incomes. This was distributed to Walter and he made a gift back to the Band.

Is that one of the distributions that you had in mind when you said that you had seen references to it?

MS. BONORA: We will take that question under

advisement. It is in relation to a privileged document. And in any event, it is a distribution -- I don't know what that even means, a gift back to the Band. Anyway, I am taking that under advisement.

MR. FAULDS: Okay. And in the event that you answer that, I wonder if you could indicate whether that gift back reflects -- whether it refers to the 1982 Trust, which would have to be the case if it was 1984, or the 1985 Trust; and whether that gift back is the additional distribution that we saw in the financial statements of the Sawridge First Nation after the initial gift to the 1982 Trust.

MS. BONORA: He already told you that he had no information about that reference in the financial statement.

MR. FAULDS: Perhaps he does now.

MS. BONORA: Perhaps he does now? Well --

MR. FAULDS: I'm content with you taking it under advisement, so you will let me know in due course.

Q MR. FAULDS: There is also another document produced by Ms. Twinn, 007944 and 945. And this is a document headed Sawridge Trust Annual Distribution for the Year-Ended December 31st, 2004. Do you see that? Have you seen that document before?

A Yes.

Q Is that kind of a standard form of document that is

issued by the Trust on an annual basis?
A No.
Q Do you know what the purpose was of the creation of this?
A It was before I started. I have no idea.
Q Is this the only one, or are there other similar documents?
A As far as I know this is the only one. Yeah, I haven't seen many of those.
Q Okay. I am not quite sure what you mean by that. You say you haven't seen many?
A I haven't seen any other except for this one.
Q And you will see that there is a list of expenses, and then there is amounts to be distributed. And under the list of expenses for 2004 there is a list of expenses under the Inter Vivos Trust, or you would understand that to mean the 1985 Trust?
A That is right.
Q And then there is a list under the Sawridge Trust, and you would understand that to be the 1986 Trust?
A That is right.
Q Okay. And these expenses appear to be expenses related to the management of the Trust?
A That is usually what Trustee fees and consulting fees and legal fees relate to, yes.
MS. BONORA: He doesn't want you to speculate.
Q MR. FAULDS: You have no reason to think that it

is anything else?
A I couldn't tell you.
Q And you will see that there are expenses listed under the '85 Trust, but there is an indication that those items under the '86 Trust have been waived?
A Yeah.
Q Did you make inquiries about that?
A No.
Q Did you come to any conclusion about that?
A No.
MS. BONORA: I am sorry, how is this relevant to the transfer of assets between '82 and '85?
MR. FAULDS: At this point I am trying to understand what the document is.
MS. BONORA: This is a document that he doesn't have any knowledge about because it was before he started. So what is the relevance, though, to the transfer? That is what I need to understand.
MR. FAULDS: First of all, he has seen the document before. So it is not accurate to say that he does not have any knowledge of it.
Q MR. FAULDS: In the final row at the bottom there is an amount to be distributed of $146,215, do you see that, from the 1985 Trust?
MS. BONORA: I have asked you a question, Mr. Faulds. What is this 2004 statement relevant -- why is it relevant to the transfer in 1985, between the 1982

Trust and the 1985 Trust?

MR. FAULDS: As I said before, it has been asserted that there have been no distributions from the Trust. This appears to suggest otherwise, and I am trying to find out what this distribution actually is.

MS. BONORA: And you still refuse to tell me why distributions are relevant?

MR. FAULDS: I have told you my position. You have invited me to expand on it and I said I will consider it.

MS. BONORA: Then we are in the same position then.

MR. FAULDS: I think in the last one you said you would take it under advisement. So I am going to ask you to take under advisement what this distribution from the 1985 Trust is and why Walter Felix Twin was getting a distribution of $146,215?

MS. BONORA: Why he was getting it, that is your question?

MR. FAULDS: Why was it being distributed, yes.

MS. BONORA: We will take that under advisement.

UNDERTAKING NO. 21:(UNDER ADVISEMENT)
RE ADVISE WHAT THE DISTRIBUTION FROM THE 1985 TRUST IS AND WHY WALTER FELIX TWIN WAS GETTING A DISTRIBUTION OF $146,215 AS IDENTIFIED ON TWINN DOCUMENT 007944.

Q MR. FAULDS: And then the last document on this

topic is Ms. Twinn's Document 007810. The first one in this area in the package that I gave you, a letter to Mr. McKinney from Mr. Cullity relating to the payment of income from the Sawridge Trust to Walter, together with Walter's deed of gift. And this --

MS. BONORA: I'm sorry, Mr. Faulds, it might be better if you waited -- is it March 3rd, 1997?

MR. FAULDS: No, December 14th, 1992. And it should be immediately before the document that we were just looking at in the package.

MS. BONORA: This is the package that you gave me. Do you have another copy of the letter?

MR. FAULDS: I have 007810.

MS. BONORA: 7810?

MR. FAULDS: 7810.

MS. BONORA: This is a letter between lawyers.

Q MR. FAULDS: This appears to be a letter from Mr. Cullity of Davies Ward & Beck to Mr. McKinney. Do you see that there?

Now that is referring to a payment of income from the Sawridge Trust to Walter, together with Walter's deed of gift back to the Trust. Is that one of the instances of the distribution that we had previously seen reference to?

MS. BONORA: This is a privileged document so we won't answer questions further on privileged documents.

Q MR. FAULDS: Do you know why -- or sorry, in

1992 what was Mr. McKinney's responsibility for the 1985 Trust?

A I don't know.

Q In 1992 Mr. McKinney held a position with Sawridge First Nation's administration; is that correct?

A I don't know.

Q I am going to refer you now to Ms. Twinn's Document 007867. And this is also another of these letters between Mr. Cullity and Mr. McKinney.

A I see that.

Q You have talked to Mr. Cullity, correct?

MS. BONORA: We are not answering the question.

MR. FAULDS: You answered it when Mr. Molstad asked it. So you were saying that --

MS. BONORA: You know what, we are going to refuse to give you the contents of any conversations that Mr. Bujold has had with Mr. Cullity.

MR. FAULDS: Although you allowed Mr. Bujold to answer such questions when Mr. Molstad asked those questions.

MS. BONORA: I don't know if I did and I don't remember what happened at that questioning. But in any event, today our position is that we are not proceeding with any further release of privileged information.

Q MR. FAULDS: You also spoke with Mr. Ewoniak; is that correct?

A That is correct.

Q And you had a discussion with Mr. Ewoniak about his understanding of the purpose of the creation of the 1985 Trust and transfer of assets to it; is that correct?
A It is not entirely correct.
Q Okay. Please correct me.
MS. BONORA: Now I am going to object because those discussions happened in the course of preparing for litigation. And so I am not going to allow him to answer further questions about those discussions.
MR. FAULDS: Notwithstanding the fact that you permitted those questions to be answered when they were asked by Mr. Molstad?
MS. BONORA: Well, you know what, certainly we, you know, if something happens you are welcome to put the questions on the record, we may reconsider them. But the idea that we are just going to lay open and release all of this privilege is so foreign to most litigation, so.
MR. FAULDS: Other than the fact that this is not conventional, adversarial litigation, and other than the fact that the Trustees are presumably engaging in this for the benefit of the beneficiaries, those would seem to be significant considerations in your position, and how you choose to take the position.
MS. BONORA: I would disagree with you in the adversarial nature of this litigation. But in any

event, you have our position. You are welcome to put your questions on the record and we will consider them.

Q MR. FAULDS: Mr. Bujold, I want to ask you exactly what Mr. Ewoniak told you about the circumstances surrounding the asset transfer and what information he provided you about that, and his recollections, and I understand that Ms. Bonora is going to object to that. So I'm going to tell you, that is the general area of my questions.

MS. BONORA: In addition to the problem with the hearsay element of that, we will take that under advisement.

UNDERTAKING NO. 22:(UNDER ADVISEMENT) RE ADVISE WHAT INFORMATION AND RECOLLECTIONS MR. EWONIAK PROVIDED MR. BUJOLD ABOUT THE CIRCUMSTANCES SURROUNDING THE ASSET TRANSFER.

MR. FAULDS: Let's take 5 minutes.

MS. BONORA: Sure.

(Questioning adjourned 5:10 p.m.)

QUESTIONING RESUMED AT 9:35 A.M., MARCH 2, 2020.

PAUL BUJOLD RE-AFFIRMED, QUESTIONED BY MR. FAULDS:

Q MR. FAULDS: Okay, Mr. Bujold, I wanted to ask you a couple of questions about the Sawridge Trust website, if I could?

A Okay.

Q Was that set up by yourself?

A Yes, it was.
Q And so that was set up in when, 2009 or 2010?
A It was set up, I think, in 2010. No, it would have been set up after the Court Order. So it is set up in 2011.
Q Okay. And you said it was set up after the Court Order, that was to fulfill the terms of the Order about communicating with beneficiaries, generally speaking; is that correct?
A Yes.
Q And also giving notice to beneficiaries by posting materials on that website?
A That is right.
Q And the website, it refers to the Sawridge Trust. And when it refers to the Sawridge Trust, it refers to two Trusts?
A Yes.
Q And those are the 1985 and the 1986 Trusts?
A Yes.
Q And it doesn't purport to contain any information about the 1982 Trust?
A No.
Q And it contains, if I remember correctly from when I looked at it, it contains a description of who the beneficiaries are of those two Trusts, the 1985 and 1986 Trust?
A It contains a description quoted from the Trustees for

both Trusts, but it doesn't list the beneficiaries.
Q Right, right. It contains the description which those Trust documents themselves contain?
A That is right.
Q It doesn't contain any information about the 1982 beneficiaries?
A No.
MR. FAULDS: Okay. I wanted to go back very briefly to the topic of distributions from the 1985 Trust. Ms. Bonora, you had asked what the rationale or relevance of that was. And I thought that I had explained it, but when I read the transcript it didn't appear to me that I had. The general position that we take is that dealings with the 1985 Trust assets as 1985 Trust assets, and distributions of those assets to beneficiaries as 1985 beneficiaries, are relevant to the question of the asset transfer.
MS. BONORA: And as you know, at our last questioning Mr. Bujold, his definition of distribution was that, in fact, there was no distribution because the funds were paid back, correct?
MR. FAULDS: Well, I don't remember if we talked about characterizing payments not as distributions on that basis. I do remember that we talked about the fact that monies were paid out, and then those monies were paid back.
Q MR. FAULDS: And I had asked you, Mr. Bujold, if

you recalled how often that had happened and I think that you said that you weren't sure? That is correct?
A That is correct.
Q We saw a reference to one such distribution in 1992. Do you recall that?
A 1992?
Q I believe it was 1992, to Walter Twinn. It was referred to in Mr. Cullity's letter to Mr. McKinney?
MS. BONORA: So of course we are not answering questions on privileged documents.
Q MR. FAULDS: And there was another reference in a memorandum of Deloitte & Touche which I think we identified as Document 7807, which referred to a distribution to Walter who then made a gift back to the Band in 1984 or 1985?
MS. BONORA: I believe, Mr. Faulds, that we also took the position that that memorandum, because it refers to advice given by Mr. Cullity, was privileged. But I am not exactly sure which document that you are referring to, so.
MR. FAULDS: A memorandum dated September 19th, 1990 on Deloitte Touche memorandum letterhead from an M. Blatt, to something called the tax file.
MS. BONORA: We are taking the position that this is a privileged document.
Q MR. FAULDS: Well, let me ask you, Mr. Bujold. Are you aware, other than the two distributions that

are referred to in those two documents, and I have to put it that way because otherwise --

MS. BONORA: I believe you have reference to another one that isn't privileged. I think your co-counsel provided you with a reference. So you are welcome to refer to other documents that refer to distribution.

MR. FAULDS: What I am asking Mr. Bujold is whether or not he is aware of any other distributions to Chief Walter Twinn of the sort that I have just referred to.

MS. BONORA: We are not going to answer further questions on privileged documents. If you would like to ask him a question about other distributions, then -- other distributions generally, you are welcome to ask him that question. But as you know, our position is that the privilege orders prevent further disclosure of privileged information, and so I believe your question requires him to answer questions around privileged information.

MR. FAULDS: And you understand we have a different interpretation of what the privilege is.

MS. BONORA: Yes, m-hm.

MR. FAULDS: Our interpretation is they don't prohibit questioning in relation to documents which have been produced.

MS. BONORA: Yes. And our position is we would

never produce the documents, especially the second round, if we thought that that was the interpretation. The whole purpose of the privilege order was to be able to produce those, and why we gave you the Affidavit under trust conditions. And only when the privilege order was entered did we allow the trust conditions to be released.

MR. FAULDS: So you are content to have the documents which you identify as privileged simply stand on their own without further information?

MS. BONORA: We provided the history between 1993 and '94 because we believed it provided a complete picture of the correspondence. But it doesn't -- we don't believe that we have any obligation to answer further questions in respect of those documents.

MR. FAULDS: Sorry, just off the record.

(Discussion off the Record.)

Q MR. FAULDS: Mr. Bujold, in terms of distributions to Chief Twinn, which he subsequently repaid, do you have any information about how many such distributions there were?

A No.

Q Okay. So you don't know if there were three or four or five or ten?

A No.

Q And then we had looked, if I remember correctly, at Twinn Document 007944, which showed a distribution, it

would appear, to Walter Felix Twin on the 3rd of November, 2005. And then from that document it would appear that distribution was made out of the -- it would appear that was made out of the 1985 Trust. Do you see that?

A Yes, I do.

Q And do you have any information what that distribution was for?

A No, I don't.

Q Just looking at the second page which appears to be a cheque stub, the post it stamp there, does that indicate that the cheque was cashed or does it just indicate it was entered into the Trust's financial system?

A I am not sure what it means. That is just the way that they came to me, so.

Q Okay. When we spoke last Wednesday I had asked you some questions in relation to the role of Meyer Norris & Penny and in relation to the passing of accounts. Am I correct that the notion of passing of accounts for at least the 1985 Trust was first considered in late 2009?

A That is correct.

Q And Meyers Norris & Penny was the accounting firm that was retained in order to assist the Trustees in that endeavour?

A That is correct.

Q Okay. And if I can refer you to the minutes of the

Trustees' June 15th, 2010 meeting, which is 002561, do you have that in front of you?

A I do.

Q If you could turn to the page that says 2564. You will see down near the bottom there is a section headed 6.4, Passing of Accounts?

MS. BONORA: Yes.

Q MR. FAULDS: And, Mr. Bujold, in that heading there is a reference to the fact that interviews were held with key players in the development of the Trust to obtain history of the Trust as part of the passing of accounts?

MS. BONORA: Mr. Faulds, this was done in respect to the contemplation of litigation with respect to the passing of accounts, and you see my name referenced in that paragraph. Mr. Bujold will not be answering questions with respect to the privileged information.

Q MR. FAULDS: Well, just so that my question is on the record, Mr. Bujold, I would like to ask you who conducted those interviews, who was interviewed, whether those interviews were recorded in some fashion, what information was obtained as a result of those interviews, and to produce copies of any records related to those interviews?

MS. BONORA: We are objecting to all of those questions.

MR. FAULDS: Sorry, and the litigation that was being contemplated?
MS. BONORA: Was the passing of accounts.
MR. FAULDS: Was that anticipated to be litigation?
MS. BONORA: Yes.
MR. FAULDS: In June of 2010?
MS. BONORA: Yes.
MR. FAULDS: With whom was litigation anticipated?
MS. BONORA: It was anticipated to be a passing of accounts application.
MR. FAULDS: Right.
MS. BONORA: So litigation.
MR. FAULDS: With whom? I am just -- sorry, I'm not hearing litigation necessarily in the passing of accounts.
MS. BONORA: In the passing of accounts litigation the Trustees bring an application for their passing of accounts.
MR. FAULDS: Right. And was it anticipated that the information obtained from this would be relied upon in the passing of accounts?
MS. BONORA: Yes, it would be.
MR. FAULDS: So that information would be produced?
MS. BONORA: No, it was used -- it was prepared

for, and in preparation, and in anticipation of the litigation. So it is privileged information.

MR. FAULDS: And the position of the Trustees is that it is privileged vis-à-vis the beneficiaries?

MS. BONORA: Yes.

MR. FAULDS: And was there litigation between the Trustees and the beneficiaries at that time?

MS. BONORA: It was in anticipation of litigation. Mr. Faulds, I'm not answering any further questions. I'm not being questioned here. You have my objection on the record.

MR. FAULDS: Yes, I am just exploring the basis for that objection. And do the Trustees still anticipate bringing an application for the passing of accounts in relation to the 1985 Trust?

MS. BONORA: That is privileged information.

MR. FAULDS: So you are not going to tell me whether or not litigation is currently anticipated?

MS. BONORA: Well, Mr. Faulds, you have my objections around these questions. Please go on. We are not going to answer these questions.

Q MR. FAULDS: Okay. Mr. Bujold, I would like to refer you to a document that was produced by Ms. Twinn which -- I am sorry, it is a Document 1006 which is an earlier draft of your Affidavit in support of the advice and direction application. So I think it was in the package which I provided you last week. And it is

Twinn Document, it starts at 001006 and ends at 001020.

MS. BONORA: Mr. Faulds, this would have been produced in the process of getting ready for the litigation and, therefore, would be privileged. And Mr. Bujold will not be answering questions on this privileged document.

Q MR. FAULDS: In that document, Mr. Bujold, there is reference to a variety of materials. One of them is a transcript which is referred to throughout in the Affidavit, different pages of the transcript is referred to. Can you tell me what that transcript is?

MS. BONORA: He will not tell you what that transcript is.

Q MR. FAULDS: There is reference to a binder of 1982 to 1985 documents. Can you tell me what that binder was?

MS. BONORA: If there were documents that were relevant and producible, they would have been produced. If they aren't, then they would be privileged documents.

MR. FAULDS: Have we been provided with a list of what those privileged documents are?

MS. BONORA: They would have been produced in the Affidavit of Records. All of these references are done by counsel, and this document should never have been produced.

MR. FAULDS: Nonetheless, the privileged order

relevance of this recognizes that it has been produced and is not sought to have it removed from the production.

MS. BONORA: Correct, in the interests of expediency we have just prevented further questioning on these documents.

MR. FAULDS: Sure. But my question is, you are saying that -- or you are suggesting that there are privileged documents in the binder that I just referred to?

MS. BONORA: Mr. Faulds, we are objecting to the questions you are asking on these documents.

MR. FAULDS: Have those documents been listed in a manner by which we possibly could identify them by date and nature?

MS. BONORA: Mr. Faulds, we are objecting to your question.

MR. FAULDS: Similarly with respect to the transcript which I just asked about, has that transcript been identified by date and nature in a way that allows privilege to be examined?

MS. BONORA: Mr. Faulds, we are objecting to your question.

MS. HUTCHISON: Just off.

(Discussion off the Record.)

Q MR. FAULDS: At paragraph 10 of this draft Affidavit there is reference to a 1985 Trust binder.

Have the documents over which privileged is claimed from that binder been disclosed by the document date and author and nature so as to allow the claim of privilege to be tested?

MS. BONORA: We are objecting to the question.

Q MR. FAULDS: Paragraph 22 of that Affidavit there is a reference to the 1985 and 1986 resolutions binder. Can you tell me, first, whose resolution that refers to?

MS. BONORA: We are objecting to the question.

Q MR. FAULDS: Has that binder been produced?

MS. BONORA: We are objecting to the question.

Q MR. FAULDS: Have any documents contained in that binder over which privilege is claimed been identified by date and author and nature and any information that would allow the claim of privilege to be tested?

MS. BONORA: We are objecting to the question.

MR. FAULDS: Do you know if there are any documents in that binder over which privilege is claimed?

MS. BONORA: We are objecting to the question.

Q MR. FAULDS: Mr. Bujold, another of the documents that I had passed over to you was Twinn Document 7881 to 7883. And this appears to be some kind of presentation made by Mr. Youdan of Davies Ward Phillips & Vineberg. And the document which I provided

to you has an index of materials which apparently made up this presentation by Mr. Youdan. Do you see that?
A I do.
Q And are you familiar with that presentation?
A No, I am not.
Q As far as you are aware you weren't present when that presentation was made?
A I don't think so, no.
Q Okay. Have you ever seen the materials which are referred to there?
A I don't recall seeing it, no.
Q I am going to ask you to undertake to see if you can locate and provide to me Item Number 3, the organizational charts of the Sawridge Trust and corporations; Item Number 6, the establishment of Trusts; and Item Number 9, assets held in Trust, as at December 31, 1998.
MS. BONORA: We are objecting to that undertaking.
MR. FAULDS: On the basis that?
MS. BONORA: This is a privileged document.

UNDERTAKING NO. 23:(REFUSED)
RE PROVIDE COPIES OF ITEMS 3, 6, AND 9 LISTED IN TWINN DOCUMENTS 7881 THROUGH TO 7883.

Q MR. FAULDS: Did I in the package of documents provide you with a copy of Twinn Document 001151 which

was Mr. Youdan and Ms. McLeese's memo of June the 4th, 2010?

MS. BONORA: What is the number?

MR. FAULDS: 001151 in the Twinn production.

MS. BONORA: No.

Q MR. FAULDS: I'm going to shoot it across the table. It is fat, but I actually only have one question about one sentence. You have had a chance to look at that document. Have you seen that document before?

A Yes.

Q And if I might, could you shoot it back across the table to me for a second? Thank you. I just refer you to the last sentence of the first paragraph which says that the authors have not considered issues relating to the settlement of assets of the Trust.

And my question to you is were the authors subsequently asked to examine issues relating to the settlement of the trust?

MS. BONORA: We are objecting to that question.

Q MR. FAULDS: And just for clarity, the document that I have been referring to is Twinn 001151 to Twinn 001196?

A Yes, I saw it.

Q Thank you. I would like to refer you to Twinn Documents 007903, 04, and 05 which are a series of Band Council Resolutions all, if I am not mistaken, from

1985. Do you have those?
MS. BONORA: We have 7903 and 7904; we don't have 7905.
MR. FAULDS: I will just shoot you over a copy of that.
Q MR. FAULDS: Okay. And have you seen these Band Council Resolutions before, Mr. Bujold?
A Yes.
Q And have you seen them just in preparation for questioning, or have you seen them previously in the past in your review of the historical records?
A I had seen them previously in the past.
Q Okay. And these three resolutions appear all to involve the transfer of funds from the Sawridge First Nation to Sawridge Holdings Ltd.?
A That is what it seems to say, yes.
Q And Sawridge Holdings Ltd. is wholly-owned by the 1985 Trust?
A That is correct.
Q And the indication in each of these BCRs is that the funds are to be used for Sawridge Enterprises Ltd.? Do you see that?
A I do.
Q And Sawridge Enterprises Ltd. is wholly-owned by Sawridge Holdings?
A As far as I -- I mean that seems to be what the form is saying, yes.

Q Sure. And you are aware in your role as Trust administrator that Sawridge Holdings, which the Trust wholly owns, wholly owns Sawridge Enterprises?
MS. BONORA: You are asking about in 1985?
MR. FAULDS: Yes, I am asking about as of June and thereafter, 1985.
A Well, I wasn't present in 1985, so it is difficult for me to answer on that basis, on the basis of your question.
Q MR. FAULDS: You, I would imagine that as the Trust administrator that you have reviewed the assets of the Trust and are aware of the corporate structure of the assets of the Trust?
MS. BONORA: Are you asking if he's currently aware since his time as administrator?
MR. FAULDS: I'm asking him if in his role as administrator he is familiar with that.
MS. BONORA: We are talking about two different time frames. I need to understand the question. Are you asking him if he's familiar with the current structure of the Trust?
MR. FAULDS: I am asking him if in his role as administrator he has familiarized himself with the corporate structure and Trust assets.
MS. BONORA: Right. And I'm asking you to specify the time frame that you are asking about.
MR. FAULDS: Well, I'm interested in the time

frame from 1985 to the present.

MS. BONORA: Okay.

A Yes, so since I began in 2009, yes, I have familiarized myself with the existing assets of the Trust at this time.

Q MR. FAULDS: And you examined that on a historical basis?

A I did, but I don't have detailed information about that.

Q Okay. And is that because you didn't make inquiries, or because there were not sufficient records to allow you to complete a full historical review?

A In most cases it is because there are not sufficient records.

Q But you did look at these records?

A Yes.

Q Okay. And do you have any understanding why the Sawridge Band transferred monies to be used for Sawridge Enterprises to Sawridge Holdings?

A I have no idea.

Q Okay. You don't have any information to suggest that that is not what happened? You don't have any contrary information to what these BCRs say?

A No, I don't have any contrary information, but I have no detailed information about why they would have made this. I wasn't present, so.

Q Okay. I understand, Mr. Bujold, that Mr. Ewoniak, the

accountant formerly from Deloitte -- is it Deloitte or KPMG, now I have forgot.

A Deloitte.

Q That he served as the chair of the 1985 Trust for a period of time?

A Again, this is as was told me by someone else, and by documents, it seemed like he served for maybe a year.

Q And if I understand correctly from, I'm looking at Twinn Document 2378 which I think was part of the materials that we passed on to you, and that is an email exchange between you and Catherine Twinn. You are familiar with that email chain?

A Yes.

Q And if you just look at the bottom of the third page, Item Number 7, prior chairs of the Sawridge Trust and period of service?

A Yes.

Q You see Mr. Ewoniak listed there from August 2, '08 to January of 2009?

A That is correct.

Q And that was the information that you filled in on that email, right?

A That is right.

Q Okay. And did Mr. Ewoniak's time as chair overlap with your time as Trust administrator?

A No.

Q You became Trust administrator in what month?

A September 2009.
Q Thank you. Who was the chair by that point?
A Dale Dewhurst was chair from October -- or up to October 2009.
Q And did you in your capacity as Trust administrator go back to Mr. Ewoniak to gather information about the operation of the Trusts?
A On one occasion, yes.
Q Okay. And do you recall when that was?
A I believe it was May 2010.
Q And were you asking him about information related to his period of time as chair person of the Trust?
A No.
Q You were asking him for historical information?
A That is correct.
Q And the historical information you were asking him for related to the creation of the Trust and the placement of assets in them?
MS. BONORA: Mr. Faulds, that conversation took place in the preparation and course of litigation, and so we won't answer questions on that conversation.
MR. FAULDS: And what litigation was contemplated in May of 2010?
MS. BONORA: It was litigation involving the accounting.
MR. FAULDS: Are you talking about the passing of accounts?

MS. BONORA: Yes.
Q MR. FAULDS: Mr. Bujold, was legal counsel involved in your conversation?
MS. BONORA: Mr. Faulds, we are objecting to that question.
Q MR. FAULDS: And insofar as you could tell, Mr. Bujold, this is the complete email chain between you and Ms. Twinn in relation to her questions?
A As far as I can tell.
Q Sure. And your last email is in response to her questions immediately below? The last email being on the first page, because these things go backwards. That was in response to Ms. Twinn's questions immediately below?
A Yes.
Q If I could have you look at Twinn Document, I think it is 2291. Do you have that in front of you?
A I do.
Q Now that you have it in front of you could I ask to look at your copy because I have lost the first page of mine. Hang on a second, maybe we can find it over here.

Well, you will recall, Mr. Bujold, I asked you a question about 11 boxes of documents that were referred to. I am referring to Twinn Document 000434. And this is Catherine Twinn's notes from the meeting of December 15th, 2009 which is the same meeting that I just

referred you to in 2291. And I appreciate that there is no reason why you would have seen these notes, but these are Ms. Twinn's notes of a discussion which occurred. And you will see that there is a reference on the first page just above the heading Amendments to Trustees which indicates records are being cataloged, 11 boxes have been located containing Trust records.

Do you see that? And I am just wondering if that reference twigs your memory --

A I don't see that reference, sorry.

Q Sorry, it is in the -- do you see where the heading Amendments to the Trustees?

A Yes.

Q If you go three lines above that, or two lines above that?

A Oh, okay.

Q Do you see that?

A Yeah.

Q Does that twig your memory about records that were received for your review?

A Yes.

Q And do you recall -- and I am sorry, if I can have you look at that set of minutes as well?

A Which set of minutes, the previous?

Q Document 2291, the minutes of the same meeting. Sorry, I made a note of the wrong page on there. If you look at page 2296 there is a heading HC Records,

Collections, Scanning and Storing?
A Yes.
Q And you will see that refers to you informing the Trustees on the progress of the scanning of documents of files. Structure has been laid out to begin scanning the 11 boxes of files. Do you see that?
A Yes.
Q Do you remember where those files came from?
A No, I don't.
Q You don't know whether they were lawyer's files, or accountant's files, or files of the Trusts, files maintained by the Trust itself?
A I couldn't be sure, no.
Q It refers to the fact that the plan is that once documents are scanned, minutes, resolutions, some historical correspondence, minutes and legal documents will be kept in the office while the rest get put in storage?
A Yes.
Q Are there documents from those 11 boxes which are currently being held in storage?
A Yes, most of them are.
Q And when did you last view those records?
A When they were scanned.
Q So that would be back in around --
A You mean the original paper documents?
Q Yes.

A Yes, when they were scanned.
Q And so you haven't gone back to examine the ones that went in to storage since that time?
A No.
Q I am going to ask you to do that and identify for me whether you can locate any documents that have anything to do with the issues that we have touched on in this questioning relating to the asset transfer?
MS. BONORA: Can we go off the record for a second?
MR. FAULDS: Sure.
(Discussion off the Record.)
Q MR. FAULDS: I understand from our discussion off the record that all of the contents of the 11 boxes were scanned?
A That is correct.
Q And then some paper copies were kept of the kinds of documents that are referred to in this minute, they were kept in the office?
A At the time, yes.
Q And then the remainder of the documents went into storage?
A That is correct.
Q And did the scanned copies of the documents distinguish between those two categories?
A Which two categories?
Q Categories of documents that were kept in the office --

the hard copies that were kept in the office, and the documents, the hard copies of which went in to storage?
A No.
Q So do you have a single database comprising all of the documents that were contained in those 11 boxes?
A That is correct.
Q When did you last review -- I am sorry, let me start. Who did the scanning?
A I had staff who I hired to do that.
Q Okay. And did you review all 11 boxes?
A Yes, I did.
Q Okay. And when did you do that?
A From the time I started in 2009 until scanning was complete.
Q Was that later in 2009?
A No, it took almost a year to scan everything.
Q Okay. So some time in 2010?
A That is correct.
Q And then have you reviewed that entire database since that time?
A Many times.
Q The whole thing from beginning to end?
A Well, not sequentially, but certainly different parts of it, yes.
Q How many documents are we talking about?
A At the time there were about 10,000 documents.
Q Is that 10,000 pages or documents?

A Documents.
Q And some of those documents would be multi-page documents?
A Yes.
Q So do you have a rough estimate of the total page count?
A Not of the page count, no.
Q You don't know whether it is closer to 10,000 or closer to 100,000?
A I have no idea.
Q And were the documents assigned identifying numbers when they were scanned?
A Were they assigned identifying numbers?
Q Yes.
A No. They were given titles, not numbers.
Q And who gave them titles?
A Me.
Q And at the time that you went through that process do you recall if those boxes contained documents relating to the 1985 transfer of assets from the 1982 Trust to the 85 Trust?
A Yes, they were.
Q And did you identify all of the documents relating to that transfer in some particular way?
A I identified all documents according to a standard convention.
Q Okay. And what was that standard convention?

A So the convention that I used, and that I identified for the staff that I had hired to scan the documents and type the name of the document in, is generally the type of document, so letter, email, report, financial report, legal opinion, those sort of things.
Q Right.
A Comma, who it was written to and who it was from.
Q Right.
A And then comma, and then regarding, and the subject of the document. And then a comma, and then the date in SI format. The date of the document in SI format.
Q We had previously looked at -- sorry, if you could turn up Document 7867. It is the 1997 letter from Maurice Cullity to Mr. McKinney, but I am not asking about the contents of the letter. At the bottom there was a handwritten note which you said was yours. Is that an example of the convention that you are talking about?
A Yes, exactly.
Q Thank you. And have you generated an index of those documents?
A I haven't generated it. The computer does.
Q Okay. So you can print off an index of all of the documents that are scanned from that 11 boxes?
A Well, some documents have since been added to the archive, so I couldn't distinguish between documents that have been added since that original scanning. But I could generate an index, yes.

Q And that index would contain all of the documents from those 11 boxes plus original documents added since?
A Exactly.
Q And has that additional document been an ongoing process?
A Yes.
Q And is that because new documents are being generated, created, relating to the Trust, or because additional documents are being discovered, or both?
A Both.
Q Okay. Well, Mr. Bujold, I am going to ask you to produce to me a copy of the index of that archived document.
MS. BONORA: We are objecting to that. Mr. Bujold has done his Affidavit of Records and a Supplemental Affidavit. He has reviewed and produced the records relevant to this lawsuit, and we are not going to produce a complete list of all of the Trust records.

UNDERTAKING NO. 24:(REFUSED)
RE PRODUCE THE INDEX OF THE ARCHIVED DOCUMENTS.

MR. FAULDS: Can we take 5 minutes.

(Questioning adjourned.)

(Questioning resumed.)

MR. FAULDS: Mr. Bujold, subject to the undertakings that have been given and the applications

arising out of questions which have been objected to, or taken under advisement, those are my questions for you.

A Thank you.

(Questioning adjourned 11:00 a.m.)

PROCEEDINGS ADJOURNED
SUBJECT TO UNDERTAKINGS

Certificate of Transcript

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

Dated at the City of Edmonton, Province of Alberta, this 6th day of March, 2020.

_____
Susan Stelter
Court Reporter

EXHIBITS

UNDERTAKINGS

C

D

E

F

G

M

N

O

P

Q

R

S

T

U

TAB V

Clerk's stamp:

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

UNDERTAKING NO. 1: page 5

Re: Provide a complete list of all the affidavits sworn by Mr. Bujold.

Response:

1. Affidavit of Paul Bujold (filed Aug 30, 2007)
2. Affidavit of Paul Bujold for Procedural Order (sworn August 30, 2011 and filed on September 6, 2011)

3. Affidavit of Paul Bujold on advice and direction in the 1985 trust (sworn September 12, 2011 and filed on September 13, 2011)
4. Supplemental Affidavit of Paul Bujold on advice and direction in the 1985 Trust (sworn September 30, 2011 and filed on September 30, 2011)
5. Affidavit of Paul Bujold (sworn March 5, 2014 and filed April 1, 2014)
6. Affidavit of Paul Bujold (sworn September 9, 2014 and filed September 10, 2014)
7. Affidavit of Paul Bujold (sworn October 15, 2015 and filed on Oct 16, 2015)
8. Affidavit of Records of Paul Bujold (sworn November 2, 2015 and filed April 30, 2018)
9. Affidavit of Paul Bujold in Support of Application for Security for Costs – Maurice Felix Stoney (sworn September 29, 2016 and filed on September 30, 2016)
10. Affidavit of Paul Bujold (sworn October 31, 2016 and filed November 1, 2016)
11. Affidavit of Paul Bujold (sworn and filed February 15, 2017)
12. Affidavit of Paul Bujold (sworn and filed August 30, 2017)
13. Supplemental Affidavit of Records sworn by Paul Bujold (sworn April 27, 2018 and filed on April 30, 2018)
14. Affidavit of Paul Bujold re Jurisdiction Application (sworn January 9, 2019 and filed Jan 10, 2019)
15. Affidavit of Paul Bujold re Application for Further Production of Office Of The Public Trustee And Guardian ("OPGT") (sworn January 20, 2010 and filed on Feb 24, 2020)

UNDERTAKING 2: page 27

Re: Review records to determine if there are records related to the transfer of assets by the 1982 Trustees to Sawridge Holdings other than those produced

Response: No other documents were located

UNDERTAKING 3: Under Advisement page 33

Re: Advise in whose names the share certificates were issued when Mr. Bujold took over as administrator in 2009, and in whose names the share certificates are issued today.

Response: Refused. This information is not relevant to the application.

UNDERTAKING 4: Under Advisement page 53

Re: Advise when Twinn document 7907 through to 7943 was prepared.

Response: Refused. This information is not relevant to the application.

UNDERTAKING 5: Under Advisement page 53

Re: Advise who Twinn document 7907 through to 7943 was prepared by.

Response: Refused. This information is not relevant to the application.

UNDERTAKING 6: Under Advisement page 53

Re: Provide the circumstances under which Twinn document 7907 through to 7943 was prepared.

Response: Refused. This information is subject to privilege.

UNDERTAKING 7: Under Advisement page 54

Re: Advise what litigation Twinn document 7907 through to 7943 was prepared in contemplation of.

Response: Refused. This information is subject to privilege.

UNDERTAKING 8: Refused page 55

Re: Produce copies of financial statements of the Sawridge Inter Vivos Settlement, or the 1985 Trust, for the period from its creation up until 2003.

Response: Refused.

UNDERTAKING 9: page 58

Re: Inquire of Sawridge Holdings Ltd. and its financial advisors and provide information relating to the issuance of the $35 million debenture and advise whether that debenture in whole or in part was intended to act as substitute security for the debenture of $12 million.

Response: we have searched our records and have not located any information relating to the issuance of the $35 million debenture

UNDERTAKING 10: page 60

Re: Advise who the debenture by Sawridge Holdings was issued to and who is currently entitled to enforce payment.

Response: On the face of the $35 million Debenture which is undated other than 1986 it was issued to Walter P. Twinn.

UNDERTAKING 11: Under Advisement page 63

Re: Produce any report or analysis Meyers Norris Penny prepared, and when that occurred.

Response: Refused. The report is privileged

UNDERTAKING 12: Under Advisement page 64

Re: Advise whether the report or review commissioned from Meyers Norris & Penny was related to the Trustee's intention to seek passing of accounts in relation to the 1985 Trust.

Response: Refused. The report is privileged.

UNDERTAKING 13: Refused page 75

Re: Review the records of the trust and of its assets Sawridge Holdings Ltd., and advise of the transaction which led to Sawridge Holdings Ltd. becoming the registered owner of the property reflected on Exhibit D – 1.

Response: The Sawridge Trustee do not know the transaction which led to Sawridge Holdings Ltd. becoming the registered owner of the property reflected in Exhibit D-1.

UNDERTAKING 14: Refused page 76

Re: Review the records of the Trust and Sawridge Holdings and Sawridge Enterprises and advise of the circumstances giving rise to the signing of the discharge.

Response: The Sawridge Trustees are not aware of the circumstances giving rise to the signing of the discharge. They have searched their files and have not located any documents or records which provide any information about the circumstances that gave rise to the signing of the discharge.

UNDERTAKING 15: Refused page 78

Re: Respecting the numbered items 1 to 5 listed in Sawridge Trustee's Counsel's letter of February 24, 2020 provide the date of each document, the circumstances under which the document was created, and the basis on which privilege is asserted over the document as against the minor beneficiaries of the 1985 Trust.

Response: The basis of the privilege is that it is solicitor and client communication. No other information is necessary to be provided.

UNDERTAKING 16: Refused page 87

Re: Advise if the trust becomes aware of any further information which suggests that Canada continued its attempts to extract information in relation to the trust or take any other action.

Response: The Sawridge Trustees agree to advise if the trust becomes aware of any other information

UNDERTAKING 17: page 99

Re: Produce the draft financial statement for the 1985 Trust as of December 31, 1985 as referred to.

Response: To date Mr. Bujold is unable to locate the draft document described by Paul Bujold in the questioning. He will continue to search for it. We advise that Tab 30 of the Asset Transfer binder contains Sawridge production document SAW 00488-00493 which are the financial statements for 1986 and which contain the comparative figures for 1985, which are not in draft form and are reliable, unlike the draft.

UNDERTAKING No. 18: Under Advisement page 106

Re: Produce copies of Sawridge First Nation's financial documents for the years ending March 31st, 1986, March 31st, 1987 and March 31st,1988.

Response: We do not agree that this information is relevant but we advise the trustees do not have these financial statements in their possession.

UNDERTAKING 19: Under Advisement page 107

Re: If documents requested in Undertaking No. 18 are unavailable request the same of Sawridge First Nation.

Response: The same have been requested. Again, we do not agree that it is relevant, but advise they do not have this information.

UNDERTAKING NO. 20: Under Advisement page 108

Re: Provide the financial statements of Sawridge Holdings Ltd. for the calendar years 1985 and 1986.

Response: A search has been conducted and no statements have been found.

UNDERTAKING 21: Under Advisement page 117

Re: Advise what the distribution from the 1985 Trust is and why Walter Felix Twinn was getting a distribution of $146,215 as identified on Twinn document 007944.

Response: We do not agree this is relevant. This not a distribution. These funds were given to Walter Felix Twinn to hold for tax purposes and the funds were returned to the trust the next year.

UNDERTAKING 22: Under Advisement page 121

Re: Advise what information and recollections Mr. Ewoniak provided Mr. Bujold about the circumstances surrounding the asset transfer.

Response: Refused. This information is privileged.

UNDERTAKING 23: Refused page 134

Re: Provide copies of items 3, 6, and 9 listed in Twinn documents 7881 through to 7883.

Response: We do not have these records but if we had them they would be privileged.

UNDERTAKING 24: Refused page 148

Re: Produce the index of the archived documents.

Response: Refused

TAB W

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

CATHERINE TWINN, SWORN AT 10:05 A.M., MARCH 12, 2020
QUESTIONED BY MS. HUTCHISON:
MS. HUTCHISON: Good morning, Ms. Twinn. Before we get started I understand that we have counsel today that would like to put some statements on the record so I am just going to wait until they have an opportunity to do that and then we will begin.
A Thank you.
MS. SOPKO: I am Ellery Sopko, I represent the Sawridge First Nation which I will refer to just as Sawridge. We are in receipt of Ms. Osualdini's letter of March 6th and Ms. Hutchison's letter of March 10 and responded in turn with our letter yesterday of March 11th. Sawridge is reserving its rights with respect to the evidence that will be given by Ms. Twinn today, and Sawridge wishes to make the following points on the record:

First, it is Sawridge's position that this is a questioning on an Affidavit. Second, Sawridge is concerned over disclosure of information that Ms. Twinn would have in her former capacity as counsel to Sawridge. Ms. Twinn acted for Sawridge beginning in the 1980s on matters involving the Sawridge Trust and the Sawridge Trust assets. And third, Sawridge First Nation questions the appropriateness of this examination as the Public Trustee and Catherine Twinn are not parties adverse in interest on the asset

transfer application. And Sawridge takes the position that questioning can only be conducted by parties adverse in interest under the Rules of Court.

Consequently, and having regard to those rules, Sawridge reserves the right to make further submissions at the application, the asset transfer application, on May 19th relating to the appropriateness of the Public Trustee's questioning of Ms. Twinn and the admissibility of any evidence obtained through questioning, and Sawridge reserves its right to challenge the admissibility of evidence on the grounds that it was obtained through questioning by a party who is not adverse in interest, that it is subject of privilege, that it is irrelevant or immaterial, or any other proper objection.

MR. ELZEN-HOSTYN: And I am Simon Elzen-Hostyn of Dentons Canada, and I represent Roland Twinn, Margaret Ward, and Tracey Scarlett and Everett Justin Twinn and David Majeski as Trustees for the 1985 Sawridge Trust, and who I will refer to as the 1985 Trustees.

We have Ms. Osualdini's letter of March 6th, 2020 and Ms. Hutchison's letter of March 10th, 2020 and the 1985 Trustees are reserving their rights with respect to the evidence that will be given by Ms. Twinn today. The 1985 Trustees make the following points on the record:

Firstly, the 1985 Trustees question the

appropriateness of this examination as the OPGT and Catherine Twinn are not parties adverse in interest and indeed whose interests appear very much to align in this litigation. The 1985 Trustees take the position that this examination can only be conducted by parties adverse in interest pursuant to the applicable Rules of Court.

Secondly, the 1985 Trustees are concerned over the disclosure of information that Ms. Twinn would have obtained either in her capacity as a former Trustee of the 1958 Sawridge Trust, or in her capacity as a former legal advisor to the 1985 Sawridge Trust or its holdings.

Thirdly, while Ms. Twinn or her counsel have characterized her involvement in this litigation as acting in a capacity as if she were a Trustee, the 1985 Trustees want to make it very clear on the record that she does not speak for the 1985 Sawridge Trust, nor do the 1985 Trustees adopt her testimony.

Fourthly and finally, the 1985 Trustees have the positions of both Ms. Twinn and the OPGT with respect to the privilege orders, and maintain their interpretation as set out in previous correspondence. I do not intend to make any other comments on the record today. If necessary and appropriate the 1985 Trustees will bring the appropriate applications at the appropriate time to preserve their rights. Thank you.

MS. OSUALDINI: Crista Osualdini, counsel for Catherine Twinn.

In first hearing these statements on the record from the Trustees and Sawridge First Nation, I wish to reiterate on behalf of my client that we maintain the position in our March 6th, 2020 correspondence with a process to resolve these concerns, and also note that the substantive response to the concerns raised in regards to our client's alleged role as former counsel for these entities have not been responded to.

MS. HUTCHISON: Thank you, everyone. Not that it is particularly necessary to note on the record, but since we are doing it I would just note that the OPGT takes the position that if any of the parties have issues that they want to be resolved prior to the May 19th, 2020 hearing, the parties have clearly agreed that those will be dealt with by interlocutory applications being filed by April 1st, 2020. And that is our client's position and we expect that all parties will abide by the timeline. Thank you.

MR. ELZEN-HOSKYN: Sorry, counsel, just off the record.

(Discussion off the Record.)

Q MS. HUTCHISON: Ms. Twinn, let's begin. I first just wanted to confirm that you are the Catherine Twinn that swore an Affidavit in Court File 1103 14112 dated January 24th, 2020. That is in your binder.

A Yes.
Q And, Ms. Twinn, you swore that Affidavit, at least in part, I assume, because of the asset transfer order application that is pending and will be heard by the court in May of 2020, is that fair?
A Yes.
Q Thank you. We will come back to your Affidavit, but I just wanted some context for what we are doing today.

And, Ms. Twinn, you have also sworn three separate Affidavits of Records, as I recall. There was an original Affidavit of Records, a supplementary and a second supplementary. The most recent, I believe -- the first Affidavit of Records dated February 1 of 2019, filed February 1, 2019, but sworn June 21st, 2018. You are the Catherine Twinn that swore that Affidavit?
A Yes.
Q Thank you. A Supplemental Affidavit of Records filed November 16th, 2018, and sworn on November 8th, 2018?
A Yes.
Q A second Supplemental Affidavit of Records which I don't have a filed copy of, but which was sworn December 18th, 2019?
A Yes.
Q And a third Supplemental Affidavit of Records sworn by yourself on January 15th, 2020?
A Yes.

Q Thank you, Ms. Twinn. And would you agree with me, Ms. Twinn, that the OPGT has not prior to today exercised its right as a party to question you on your production?
A Yes.
Q Thank you. I might come back to another question, Ms. Twinn. Let's get some understanding on a few different terms. If I refer to the 1982 Trust you will understand I am referring to the Sawridge Band Trust that was created by a Trust Declaration dated April 15th, 1982?
A Yes.
Q Great. If I refer to the 1985 Trust you will understand that I am referring to the Sawridge Band Inter Vivos Trust created by a Trust Declaration dated April 15th, 1985?
A Yes.
Q And if I refer to the 1986 Trust you will understand that I am referring to the Sawridge Trust created by a Trust Declaration dated August 15th, 2016?
A Yes.
Q If I short form refer to the "within action", you will understand that I am referring to Court of Queen's Bench Action 1103 14112?
A Yes.
Q And if I use any other terms or abbreviations or any phrasing that you don't understand, you will ask me for

clarification?
A Yes.
Q Thank you so much. Okay, in part because of our friends' concerns on the record I think it is important that we establish some background and some of the facts around your involvement with the Trust and with the SFN. So do you recall when you became a member of the Sawridge First Nation?
A I believe it was in 1984.
Q Was it when you married Walter Patrick Twinn?
A Correct, I am a Section 11(1)(f) of the 1970 Indian Act, and my membership at Saddle Lake was transferred to Sawridge.
Q Thank you. And so you would have been a member of Sawridge First Nation at the time of the membership meetings in April of 1985 that related to the asset transfer?
A Correct.
Q And do you recall what date you became a Trustee of the 1985 Trust?
A Not the exact date I don't. I know that it is in filings, but I don't recall the exact date.
Q I am going to take you to tab, it should be tab 18 of the binder of documents that I gave you. And for counsel, it will be after the minutes of a Trustee meeting dated December 15th, 2009. And your packages are all chronological.

MS. SOPKO: Is there a Sawridge document number on it?
MS. HUTCHISON: Sawridge Document Number 1429, or 001429.
Q MS. HUTCHISON: Now, Ms. Twinn, the origin of this document, it was produced by Mr. Bujold in response to his own answers to undertakings. But is the date given there for your commencement as a Trustee at December 18th, 1986, do you have any reason to believe that that date is not accurate?
A No reason to believe it is not accurate. I did not do the underlying research, and I had never seen the underlying documentation. But I would accept those dates.
Q Okay. And then in the course of this litigation, Ms. Twinn, I understand you resigned as a Trustee, and that was announced to be effective March 19th of 2018?
A Which is that?
Q If that date doesn't ring a bell, tab 27. Do you recognize that document, Ms. Twinn?
A Yes.
Q I think that we will actually mark that as an exhibit if the date doesn't ring a bell for you.
So. Ms. Twinn, you agree that your term as a Sawridge Trustee ended March 19th, 2018?
A Correct.
Q Can we mark that.

EXHIBIT NO. D-1:
NOTICE OF MS. TWINN'S RETIREMENT DATED MARCH 19, 2018.

Q MS. HUTCHISON: Ms. Twinn, at any time, even prior to the date that you became a Sawridge First Nation's member, did you act as legal counsel for the 1982 Trust?

A No.

Q Did you ever act as legal counsel for the 1985 Trust?

A That is a question that I did a quick search, and there was a retainer under which I did some policy and procedure work for John MacNutt of the Sawridge Group of Companies. And that was in relation to HR.

Q So no retainer that related to the creation of the 1985 Trust?

A No.

Q No retainer that related to the transfer of assets from the 1982 Trust to the 1985 Trust?

A No.

Q No retainer that related to clarification of the beneficiary definition under the 1985 Trust?

A No. In fact that was an issue, a contentious issue, because the Trustees had made a decision in June of 2004 to identify the beneficiaries, all of the beneficiaries of both Trusts. And Davies Ward, Tim Youdan from Davies Ward & Beck as it then was, was to lead that. And he wanted support from me. And my

recollection is that the Trustees refused to enter into a retainer to permit me to carve out just simply the legal categories under Section 11 and Section 12 of the 1970 Indian Act.

Q Okay. Ms. Twinn, do you have a general recollection of when the retainer that you referred to for the work for John MacNutt for Sawridge Holdings was?

A Roughly I think it was around 2003.

Q So fairly close to when John MacNutt was first hired?

A Yes. He was recruited to replace the Band as the --who was in a management role over Trust assets and had been, and there were concerns about that. And so that contract or arrangement was terminated. And I recall it was effective March of 2003. And John MacNutt came in and his job was to build a senior management team and take control of Trust assets. And as he was gearing up one of the responsibilities was that he was to work with Mike McKinney who was the Sawridge Band administrator and legal counsel, in-house legal counsel, and all of the records in relation to the Trusts' holding companies or parent companies, and all of the subsidiary companies, and all of the records were to be turned over to MacNutt. And that would have been around the spring of 2003.

Q Okay. But that document collection and consolidation was not part of your retainer as legal counsel?

A No, no, no.

Q Let's just talk -- and sorry, I am going to cover off one other time period. Were you retained to act as legal counsel for the Sawridge Trust, the 1985 Trust, any time between 2008 and the present?

A I don't believe so. As I say, I did a quick check and I know I was doing a lot of the heavy lifting. Paul Bujold came on board in September 2009, so I was actually the working Trustee doing the work of the Trust.

Q And when you say "work of the Trust", Ms. Twinn, administrative work or legal work?

A Well, it was administrative work in the sense that I was, for example, wanting to bring in Four Worlds to do a consultation with the beneficiaries of the Trust, and potential beneficiaries of the Trust, for them to work with legal counsel which was Davies Ward, to gather up the facts in relation to each individual, and then for independent legal counsel to assess their entitlement, were they a beneficiary or not. And I know that Tim Youdan reached out to different lawyers well-versed in the Indian Act and the constitution to try to find someone that he could work with, because that wasn't his area of expertise. He was a Trust lawyer.

So Four Worlds did come in, but it was a big struggle for that to occur, and they did finally provide a report and that is the basis upon which the benefits were established. So that was the type of

work that was being done.

Now another example was in around 2007, so you need to understand that Mike McKinney is in-house counsel and administrator to the Band, or executive director, I'm not sure exactly of his title, and he is also legal counsel to the Sawridge group of companies. And a proposal came forward around tax planning. And I and a Trustee-in-training were authorized to represent the Trustees at that table that comprised the group of companies.

Q And as a Trustee?

A As a Trustee.

Q Okay.

A And the Band, and to hear this tax strategy out. And I said at the time, I am not a tax lawyer and you need to have -- the Trustees need to have tax expertise, and that is David Ward. So David Ward was involved heavily, and I would work with him as a Trustee. And while I put in a lot of extra hours on that and was never paid, Deana Morton submitted an invoice and she was promptly paid.

Q Deana Morton was?

A She was a Trustee-in-training.

Q For the?

A For both Trusts. Her and Peggy Ward at one time were Trustees-in-training, which was something that I had recommended to the Trustees, that we should have that

type of a program for proper succession planning, as well as directors-in-training to see if we could engage and build capacity amongst the beneficiaries. But if you don't identify the beneficiaries, then you can't really have a large pool to draw from.

Q Okay.

MS. HUTCHISON: Ms. Osualdini, I realized I should have asked for your agreement on one point. Can we agree that if we refer to a document number in the production, that is in evidence and we don't need to mark each one of those as an exhibit?

MS. OSUALDINI: Agreed.

MS. HUTCHISON: Thank you.

Q MS. HUTCHISON: Ms. Twinn, let's talk also, because there was an assertion by our friends that there may be privilege held by the Sawridge First Nation as well over some of your evidence. So just so we don't get into that territory unintentionally, or without any ability to do so, we do know that you were legal counsel for the Sawridge First Nation on the Federal Court constitutional challenge?

A I was solicitor of record. There was legal counsel. Parlee was the last legal counsel on that matter.

Q Other than the constitutional litigation for Sawridge, did you represent Sawridge First Nation in relation to anything related to the Trusts, either the '86 or the '85 Trusts?

A In court?
Q As legal counsel. So outside of the constitutional litigation were you retained to represent them in relation to --
A I have no recollection of such a retainer as I said earlier.
Q And I apologize, earlier I was asking about acting for the Trust. Now I am asking about any retainer that you may have had as legal counsel for Sawridge First Nation. So I am asking about a different area at this point.
A I'm sorry, then I am confused on your question. Are you asking me did I act as legal counsel to the Sawridge First Nation vis-a-vis the Trusts?
MS. OSUALDINI: In relation to.
Q MS. HUTCHISON: In relation to issues arising within the 1985 or 1986 Trust.
A No.
Q Were you ever retained by Sawridge First Nation to represent them in relation to issues regarding the assets that were settled into either the '82, '85, or '86 Trust?
A No. There were -- there was a whole group of professionals, and the names that come to mind are Maurice Cullity, Davies Ward & Beck; from Deloitte it was Ron Ewoniak and Marty Black. There was Dave Fennell who had been involved with the, I believe the

'82 Trust, and I believe David Jones as well on that matter. And there were others that were involved as well.

Someone who has a lot of knowledge on these matters, and who has been involved in the corporate/commercial side of it is Mike McKinney, because he was, I believe, I think he started with the Sawridge First Nation in around 1987. He was called to the bar the day of the Evergreen hurricane, which I think was July 31st, 1987. That is how I date it. So he has been there all of the way through.

Q We are going to talk in a bit, Ms. Twinn, about a $12 million debenture that was granted in 1985. Are you generally familiar with the debenture that I am referring to? I mean just the topic, the fact that -- yes?

A Yes, I was present at Paul Bujold's questioning.

Q Were you retained by Sawridge First Nation as legal counsel in relation to the debenture?

A No, I am not a corporate/commercial lawyer.

Q Okay. And, Ms. Twinn, can we agree if I ask you a question about something that I haven't just covered off, and it is a question that relates to a topic that you were retained to act as legal counsel for any of the Trusts, '82, '85, '86, or for Sawridge First Nation, would you please alert me to that if I have somehow missed something, so that I know before I ask

any substantive questions that a retainer existed on that topic? Can we agree on that?

A Sure, I will do my best. And I have asked the Trustees and the Band, through my legal counsel, to particularize what retainers exactly they are referring to. They have refused to do that, or failed to do that, so I would suggest that my answers are not necessarily based on a full review of old work from a long time ago.

But I can tell you I am not a corporate/commercial lawyer. I was not involved on these things.

Q You generally practiced in litigation, or what was the scope of your practice?

A Well, I did a lot of local work, a lot of pro bono work for Sawridge members in particular, to help them on different things. And I did work for different groups. For example, an issue arose, an elder came to me from Treaty 8, and that went into the Federal Court. I did work in relation to self-government. That would have been for Sawridge First Nation.

Q Okay.

A That work stopped, I don't even remember when. Probably when Roland Twinn became Chief in 2003 which is when I was forced to -- well, I moved out of the band office.

Q And, Ms. Twinn, so you became a member of Sawridge First Nation sometime in 1984?

A Yes.
Q Were you working for Sawridge First Nation as legal counsel in any capacity prior to becoming a member?
A I was, at that time Bill C-47 was precursor to Bill C-31 and I was involved on C-47 through a retainer with the Lesser Slave Lake Indian Regional Council. And there was -- Walter Twinn was working and instructing on that, but it was not just Sawridge, it was --
Q A group?
A -- a group. And in the course of that, because there was -- that led into C-31 which came in the early part of 1985, and there was a brief presented to parliament, Treaty 8 brief, June Ross, Maurice Cullity, David Ward, myself, Moe Litman were involved in the preparation of that Treaty 8 brief. And Sawridge was a member of Treaty 8.
Q Okay. And then did your retainer for Sawridge First Nation on Bill C-31 issues continue, essentially, until the end of the Federal Court litigation?
A No.
Q Okay.
A I believe the Statement of Claim on that was filed on behalf of six First Nations in around January 1986 by Maurice Cullity. And then it -- there was a trial, and I believe that trial ran '93-94. I could be wrong about those dates.
Q And were you retained on that first trial?

A Yeah, I was involved as a solicitor, but there was legal counsel. And then there was a decision and that decision was successfully appealed to the Federal Court of Appeal on the basis -- there were a number of grounds, but the Court of Appeal accepted a reasonable apprehension of bias ordering a new trial, and the new trial process began sometime after that June 1997 decision from the Court of Appeal.

Q And you were retained --

A And I was involved in the constitutional litigation second trial.

Q And did your involvement as legal counsel for Sawridge First Nation continue until about 2009 when --

A No, it ended before then. I am not sure exactly when.

Q Okay. But it ended prior to the commencement of this action?

A Yes.

Q Okay.

A It would have been, let me think for a moment if I can get my dates and years right. I think the Supreme -- Sawridge First Nation, and I am not sure if Tsuu T'ina First Nation as well, represented by Ed Molstad from Parlee, appealed to the Federal Court of Appeal, and I believe that was dismissed. And then I think a leave application went to the Supreme Court of Canada and I believe that that leave application was dismissed. And I think that it was December 2009. I may be wrong on

the years. But I was off the file before then.
Q Okay. Do you have a general recollection of, was it a year before the Supreme Court of Canada leave decision, two years?
A I would have to check, but I think that that is a rough measurement. So if the Supreme Court was 2009 I think I left early 2009.
Q Okay.
A Or, you know, somewhere in there.
Q Great. Thank you. So, Ms. Twinn, when you were appointed as a 1985 Trust beneficiary, and --
A Trust beneficiary?
Q Sorry, Trustee, was there an orientation process?
A No.
Q Were you given any sort of package of documents to familiarize yourself with?
A No. 1986, that was a very difficult period. And my late husband went to Indian residential school, and he was an alcoholic. And his drinking was becoming extremely worrisome to me. And in 1986 I asked him to go to treatment, and he agreed, but then he left partway through. And he returned home and I was heartbroken. But I went to the family portion in any event, of this treatment facility that he had left and I stayed there for two weeks to learn about addiction, the addictive family system, and addictive systems in general, and my role in that. And that was sort of the

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.

MS. OSUALDINI: Settled or transferred?
MS. HUTCHISON: Don't take my statement as a definitive position, Ms. Osualdini. Certainly in relation to the '85 Trust we are talking about a transfer. I haven't looked at the '86 Trust much for the purpose of this questioning, so.
MS. OSUALDINI: Because that requires a legal conclusion, is what the Trust was settled at.
MS. HUTCHISON: That is a fair comment.
Q MS. HUTCHISON: And I would prefer to deal with you, Ms. Twinn, with a document in front of you on some of those questions.
A Can I complete my thought?
Q Absolutely. Please go right ahead.
A In this video Ron Ewoniak, who is a wealth of information during this time frame, in the video is interviewed saying that the monies for the Slave Lake Sawridge Hotel, which I understand began in around 1970, came from DREE grants and loans.
Q What was DREE?
A The Department of Regional and Economic Expansion? I am not sure. It is, I think, in the video. And it is probably in my January 2020 Affidavit.
Q And I just wanted to ask, Ms. Twinn, the video that we are talking about right now, is that the document that has been identified as Twinn 007949 in your --
A Yes, this is the correct video, One For All. I had

accidentally -- I had a video that was labelled One For All, but it turned out to be about Alkali Lake, which was a First Nation community with a 95 percent rate of addiction that became 95 percent sober. Then I think everyone thought Alkali Lake. So I corrected that once that I realized that there was that error. So that is correct.

Q And the video that has been identified as Twinn 007949, did you indicate that you created that video?

A Yeah.

Q And you created it as a attribute to your husband?

A Yeah.

Q It wasn't created for the purposes of litigation?

A No, not at all.

Q It wasn't created in any way in relation to the commencement of this action?

A No, this was, I think, 1986.

Q Okay.

A And it was an honoring of him for his hard work and his efforts.

Q Okay.

A You know, I recall him telling me that he put up personal guarantees himself.

Q Sorry, your husband did?

A Yeah. I don't have documents, but that is what I clearly remember.

Q Just because we are on Mr. Ewoniak, I was going to get

to him a bit later, but let's chat about him for a bit now.

A Okay.

Q When do you recall first dealing with Ron Ewoniak after you became a member of Sawridge First Nation?

A Well, he was before my time.

Q Okay. He was already there when you --

A He was already there. He was a partner at Deloitte. He was the one who suggested the Trust structure, because --

Q I'm going to stop you for a second. When you say the Trust structure, do you mean the dual 1985 and 1986 Trust structure, or the asset transfer from '82 to '85, or all of it?

A Neither.

Q Okay.

A Back then Indian Bands did not have legal standing, and it was really, really complex to do economic development, especially off reserve. And he was apparently the one who suggested a Trust structure. And I believe he was involved in the 1982 Trust. I think he and Dave Fennell were very involved, along with David Jones.

Q 1 will interject if I may, Ms. Twinn. Did Mr. Ewoniak indicate that to you in some of your discussions?

A Yes.

Q Okay. Please continue, sorry. So he was there when

you became a member, he was already involved as --
A I think my Affidavit says when he became involved with Sawridge, and I don't recall the timeline.
Q We are referring to your January --
A So paragraph 5 of my January 2020 Affidavit, sworn January 24th, filed January 28th, 2020, Ron Ewoniak advised that in his capacity as an accountant at Deloitte he provided professional advice to my late husband. While he was a partner at Deloitte Walter says he instructed client in matters that Ron Ewoniak worked with him on. He first met and began to provide professional advice to Walter in or about 1969, 1970.
Q Now --
A And he was with Walter all of the way through Walter's building, all of the way through until Walter's death.
Q And, Ms. Twinn, in this Affidavit when you refer to him, to Mr. Ewoniak providing professional advice to your late husband, I am assuming that he was providing him with advice as Chief of Sawridge First Nation, not just as an individual? The advice that you are talking about here relates to Nation assets; is that correct? Or were you talking about he worked with your husband on all fronts?
A Well, he worked during this time frame all of the way through. So there were different legal vehicles.
Q Okay.
A So '82 Trust, '85 Trust, '86 Trust, and I am not sure

when he retired. It says until his retirement from Deloitte in 1996.

Q Okay. And obviously Mr. Ewoniak is still alive?

A He is still alive. He is very competent. And by the way, so is Maurice Cullity, despite suggestions from Dentons that he was not. He is very competent. He has frailties given his age.

Q It appears from this January 24th, 2020 Affidavit that you had a fairly recent conversation with Mr. Ewoniak, is that fair?

A Correct.

Q Do you recall roughly the time frame?

A It was probably --

Q I see in paragraph 4 you recently spoke to him?

A Yeah, it would have been probably December and January of 2020.

Q Okay.

A So before I filed, you know, just before I filed this Affidavit.

Q And is Mr. Ewoniak --

A The discussions with Ron Ewoniak were very fresh, which is why I wanted to file this Affidavit.

Q Thank you. Is Mr. Ewoniak still living in Alberta, in Canada?

A He lives in Edmonton. He vacations typically from January to March in Australia, and I believe -- wasn't that when Australia was burning in January?

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

it is too conflictual, it is too -- you just have a lot of issues with it. So he already saw and understood that. And to me it was tremendous foresight.

Q And, Ms. Twinn, was it your understanding that the 1986 Trust played some role in fulfilling any of these three purposes that you described?

A Yes. So '86 basically was whatever came April 17th, '85 forward in terms of economic development, assets, acquisitions, companies, investments. And that would be for persons who are defined as beneficiaries which unfortunately, in my opinion, has been bread down from the definition in the Trustee to simply whoever Chief and Council put on the Band list or removed from the band list. But it is actually subject to the laws of Canada and customary laws. And the membership rules have to comply within the overall legal framework.

Q But it was your understanding that the '86 Trust was intended to benefit individuals that regained membership under the legislation that we have talked about as Bill C-31?

A They were to be -- as you know, 1985 amendments, Bill C-31, created this legal fiction of voluntary, involuntary enfranchisement. Persons who were deemed to be involuntarily enfranchised were categories that included women who married non-Indians, double mother clause, and I believe may have been the children of women who were enfranchised and the child was born at

the time of that enfranchisement and was also enfranchised with the mother. I am a little fuzzy on the exact legal categories, but I think those three. And then everyone else was deemed voluntary.

And so the question became do those three absolute entitlement categories require Band membership as a matter of law on April 17th, 1985, or if the Band -- if any Band has past membership roles within the two-year window provided by Bill C-31, so prior to June 1987, membership rules have been passed and approved by the minister, while checked for compliancy, do those people have to go through a membership application process.

Q Okay. That is very useful, Ms. Twinn, thank you. Another question about sort of early days of the Trust, so in the early days of your role as a 1985 Trustee do you recall ever being informed that the 1982 Trust continued to exist?

A No.

Q Do you recall being informed of that at any point prior to your resignation in March of 2018?

A No, and in fact there was a band of professionals all of the way through including Mike McKinney. I would have expected that we would have been informed. But everyone operated on the basis of the 1985 Trust, the 1986 Trust, and the assets of the 1985 Trust being those assets that were acquired prior to April 17th, 1985, and the assets of the '86 Trust being those

assets that came after, on or after April 17th, 1985.

So all of the Trustee meetings were predicated on these two Trusts. There were four elected officials of the Band who were sitting at the Trustee table at one point. I was the only nonelected Band official. No one ever said anything to me about the 1982 Trust, A, being alive; and B, owning or claiming to own '85 assets.

Q Thank you, Ms. Twinn. Just to provide some additional context in relation to some of the privilege issues that have been raised by the statements of counsel. And let's divide this up into a couple of time periods.

So from 1985 -- or 1986, I apologize, your appointment as a 1985 Trustee, until I am going to say the end of 2008 simply because we don't have Trustee minutes prior to 2009, do you recall anyone suggesting to you that the Trustees were adverse in interest in relation to the 1985 Trust beneficiaries, in relation to the settlement of assets -- or the transfer of assets from the 1982 Trust to the 1985 Trust?

So in that time period from 1986 to 2008 were you ever advised that you were adverse in interest as a Trustee to the beneficiaries on that issue?

A The beneficiaries of the --

Q Of the '85 Trust.

A -- of the '85 Trust, no. My entire modus was to serve those beneficiaries and act in their best interests.

Q Okay.
A Which is why it was important to identify them. And whether or not they received benefits, that was a separate decision. But I can tell you that other processes involving First Nation Trust have in six months, for less than $300,000, identified 300 plus persons as entitled to a First Nation Trust benefit.

So there was -- it was very critical to fulfill, in my opinion, my fiduciary duty. And there was a duty of evenhandedness as well.

Q So then let's look at the 2009 time period, start of 2009 until the date that this within proceeding was commenced, which was in September of 2011. Do you recall being advised in that time period that the 1985 Trustees were adverse in interest in relation to the 1985 beneficiaries on the matter of the asset transfer from the '82 Trust to the '85 Trust?
A No.
Q Okay. And did that change at any point from the start of this action until the date of your resignation? Were you advised that you were adverse in interest on that matter?
A This asset transfer issue was -- the way it has come to be now with the Trustees in lock step with the Sawridge First Nation, who they funded, legal fees.
Q Did they fund them in relation to the asset transfer --
A I can't speak after --

MS. OSUALDINI: You have to let her ask her questions.
A I can't speak about after I resigned.
Q MS. HUTCHISON: Understood.
A But I can tell you that up to then the Trust had funded the Sawridge First Nation. And I was very concerned about that. I found that troubling. And I calculated in my -- based on what I knew, that as of March 2018 the Trust had probably spent about $8 million.
Q I am sorry, not just on Sawridge First Nation fees?
A No, but Parlee would have been included in there.
Q I see, thank you for clarifying.
A So this asset transfer has taken me by surprise in terms of what it is now. And the way I see it we had a jurisdiction application to be heard April 2019 and the law, as I understand it, doesn't support what was being asked. And then that was adjourned and the asset transfer issue was raised. And now we have gone down this very expensive rabbit hole.

And as I said, the entire operation from the time I was the Trustee to the time that I resigned was predicated on these two Trusts and the ownership of these two Trusts, and financial statements, CRA filings, Trustee minutes. So it is surprising.

Q I am just going to take you if I may, Ms. Twinn, to Paul Bujold's September 6th -- or sorry, October 30th, 2011 Affidavit filed, September 6, 2011. It is tab 23

of your binder.

MS. OSUALDINI: What paragraph?

Q Take a read through paragraph 6, if you would.

A Okay.

Q And just let me know when you have had a chance to read.

A Yes.

Q I am looking particularly at the statement prior to subparagraph (a) and (b), However concerns have been raised by the Trustees of the 1985 Trust with respect to the following: And then one of the items that is listed is seeking direction with respect to the transfer of assets to the 1985 Trust.

A M-hm.

Q Do you have a recollection of what concerns the Trustees themselves had raised on that topic prior to September of 2011?

A I would really like to know.

Q Okay.

A I don't know where all of this comes from. I have my guesses as to where it came from, but I was certainly not a party to those discussions. And I think that this was legally generated, and having particulars on this would be very helpful.

Q Okay. I am going to take you to another document in your binder. It is at tab 26, and it is identified in your production as Twinn 001611. And it is a Trustee's

resolution dated March 16th, 2016. And in the preamble, if you just take a read through the sentence that follows this Action Number 1103 14112?

A I'm just going through the preamble.

Q Absolutely. Please just let me know when you have had a chance to read that.

Have you had a chance to read those first couple of lines in the resolution?

A I'm just reading Number 1 right now.

Q I am not going to ask you about the contents. Just the preamble.

A Preamble.

Q I am wondering if the phrasing of the preamble helps you in recollecting what the Trustees were originally concerned about in relation to the asset transfer? It is referred to here as a normalization of the transfer of the assets from the Sawridge Band Trust, the 1982 Trust to the 1985 Trust. Does that accurately reflect your understanding of those Trust --

A That is the word that I would agree to. Normalization. I know that there was problems with recordkeeping, I know that there was burning of records by the Band. I know that the Band had the records and there were some gaps and some holes, but I would also think that reaching out to these -- this army of professionals involved at that time, which is well-known, it is not who was involved, everybody knows who was involved,

reaching out to see if their records could assist. But this idea that the '82 Trust exists and the claim now that it owns '85 assets is very shocking to me.

Q Okay.

A And troubling.

Q I'm just going to go back then to characterize any time periods where the 1985 Trustees may have been adverse in interest to the 1985 beneficiaries. So we talked about the asset transfer issue. So from 1985 to 2008 were you made aware that the 1985 Trustees were adverse in interest in relation to the '85 beneficiaries on the passing of accounts?

A No.

Q Okay.

A I mean this idea that we are adverse in interest is foreign to me.

Q Okay. Right up to the date of your resignation, Ms. Twinn? Is that fair?

A The passing of accounts, there was a resolution, I recall, in 2009 to get it done.

Check the date. And Eileen Kay, K-A-Y, I think from Meyers Norris & Penny was working with Paul Bujold for a very long period of time to do just that. And I do know that my granddaughter, Shelby Twinn, who is a beneficiary of the '85 Trust but not a beneficiary of the '86 Trust, I know that she asked Paul Bujold for an accounting and was denied. It has been delayed and,

you know, it is now 2020. And this resolution was passed in 2009.

Q Thank you.

A We have to -- as a Trustee, you have to account to beneficiaries. You serve them, not the other way around.

Q And I might be able to shorten things here a bit, Ms. Twinn. I'm hearing you, and I am hoping that I am hearing you correctly, you don't recall a period of time when you were a 1985 Trustee that you had been told that as Trustees you were adverse in interest in relation to this 1985 Trust beneficiary. Is that --

A Not at all.

Q Okay. Thank you, that is very helpful.

A And, you know, I believe -- I believe that if there had been some serious problems we would have been told by these very competent lawyers from Davies Ward & Beck, or Davies Ward Phillips & Vineberg now.

Q Okay.

(Questioning adjourned.)

(Questioning resumed.)

Q MS. HUTCHISON: Ms. Twinn, you acknowledge that you are still under oath?

A Yes.

Q I am going to ask you to turn to tab 6 of the documents that I gave to you. And the production number is a Sawridge production number, SAW 000122?

A Sawridge Band Resolution?
Q That is it.
A Okay.
Q Do you want to take a second to take a look over that?
A Sure. Yes, I have read it.
Q Am I correct that the very last signature is your signature, Ms. Twinn?
A Yes, it is.
Q Thank you. Do you recall that Sawridge members' meeting?
A That is a long time ago.
Q M-hm.
A And that is clearly my signature, and I was there. But I can't say that I have a crisp memory of all of the details of that.
Q Do you remember how you found out about the meeting?
A I don't recall. I would imagine that first of all my husband would have told me.
Q Okay.
A And there would have been probably postings, and I don't know what other steps Bruce Thom would have taken. Bruce Thom was a lawyer, he was in-house at Sawridge.
Q Okay.
A And --
Q I was going to get to him, so maybe we will just cover him now if I may, Ms. Twinn.

A Okay.
Q So Bruce Thom, was his position as legal counsel, or was --
A I think that it would be similar to the title or designation that Mike goes by, which is I am not sure if it is executive director, or -- and in-house legal counsel.
Q And I apologize --
A He may have just gone by a different title.
Q Okay.
A It may have been executive director. I honestly don't recall. I could probably see if I have anything that would indicate that.
Q I mean if you do have something that tells us his exact position, that would be very useful, if you could undertake to --
A He was in-house and doing a lot of administrative work, but he was also a lawyer.
MS. OSUALDINI: We will accept that undertaking.
MS. HUTCHISON: Thank you, Ms. Osualdini.

UNDERTAKING NO. 1:
RE ADVISE WHAT BRUCE THOM'S OFFICIAL POSITION WAS.

Q MS. HUTCHISON: Just so I am clear, Ms. Twinn, Mr. Thom, is it your understanding that he was the in-house legal counsel and executive director for Sawridge First Nation or for one of the Trusts, or was it a dual --

A No, he would have -- for example, Mike McKinney's role, he is paid by the Band, employed by the Band, and then he has also got this position with the Sawridge Group of Companies.
Q Okay.
A And I don't know the internal structure, but Bruce, I would assume, would have been a Band employee.
Q He was not working for the 1982 or the 1985 Trust, as far as you know?
A As far as I know, no. He was working for, as I said, he was a Band employee. He was an administrator, and he also was a lawyer.
Q And, Ms. Twinn, do you know -- well, first I will ask about yourself. Have you ever reached out to Mr. Thom to inquire if he has any documents available around the 1982 to 1985 Trust transfer, or around the Band members' meeting?
A No, I have not.
Q Do you have any way to locate Mr. Thom? Do you know where he is?
A The last I knew he was in Ontario, and I think that he was a city solicitor. But I don't know what city, and I can't put a time frame on that.
Q Am I correct that he held a position with the City of Edmonton for a period of time?
A He may have, yeah. I think that he was partners in Hinton for a period of time with Rod Hope, and Rod Hope

actually replaced Bruce in the Sawridge Band office. And I can't remember when Bruce left.

Q So Mr. McKinney wasn't Mr. Thom's replacement. There was somebody --

A I think that there was someone in between, but Mike, as I said, was called to the bar the day of the hurricane. I believe that was July 31st, 1987. And then I think it was shortly thereafter that he worked for the Band.

Q So Mr. Thom may have left his position not long after this?

A It is possible, yeah. I just can't put a time frame around it.

Q Okay. Is there anything else that you can tell me about that members' meeting, Ms. Twinn, from your recollection, just from your personal recollection today?

A I can't. It is fuzzy for me.

Q Have you checked your records to see -- I realize that it was a much different time period, but I saw in the production that in the 2000s you kept a lot of notes, were very diligent about notes. Was that a practice at this point in time?

A I don't recall. I don't know if I have any notes of this.

Q Okay.

A 1985, so I was pregnant. And the Ottawa work was -- Ottawa parliamentary process on Bill C-31 was in

motion.
Q Okay.
A So.
Q Do you have any records back to this time period in your possession?
A I don't know. I can check, but I honestly don't know. I really don't know.
Q Well, I don't know what is involved, but I am going to ask if there is a possibility that you might have handwritten notes of this meeting, or the notices that you mentioned that might have been posted in the community, if you have any records of that nature we would ask you to undertake to look for them and produce them.
MS. OSUALDINI: We can undertake to review records and produce what is located.
A Yeah.
MS. HUTCHISON: Thank you.

UNDERTAKING NO. 2:
RE PRODUCE ANY NOTES KEPT BY MS. TWINN OF THE BAND MEMBERS' MEETING OR THE NOTICES THAT MIGHT HAVE BEEN POSTED IN THE COMMUNITY RESPECTING THE MEETING AT SAW 000122.

Q MS. HUTCHISON: If you flip two tabs forward to Sawridge 001445.
A Tab 8?

Q Tab 8, yes, correct, which appears to be another resolution of the Sawridge members.
A M-hm, same date.
Q Correct. And if you look at the document attached for a moment?
A Yes.
Q My understanding is that the document that is attached is a Band Council Resolution dated April, I believe, 15th of 1985 that deals with the direction of the Sawridge First Nation Council to transfer the $12 million debenture we have been talking about into the 1985 Trust. Is that your understanding of what that BCR was dealing with?
A I have to read the BCR.
Q Absolutely. Please take as much time as you need.
A That is what this document to me is saying as I read it.
Q Do you have -- so before I ask that question, I will ask this. The covering document, the members' resolution?
A Yes.
Q That is your signature at the very bottom of the document?
A Yeah.
Q Do you have any recollection of the discussion about that members' resolution on April 15th of 1985 to date, apart from the document?

A Well, just as I have already given evidence about the intention of putting everything that existed pre April 17th, '85 into the '85 Trust, and the -- this would be consistent with that.

Q Okay. As part of the undertaking, or as a separate, it can be a separate undertaking, if you wish, when you are checking your records for notes of the members' meeting in relation to the resolution to approve this transfer of assets from the 1982 Trust to the 1985 Trust, if there is anything in those records that relates to the second members' resolution at Sawridge 001445, personal notes, notices, information given to members before they were asked to vote on that resolution, I would ask you to undertake to provide that as well.

MS. OSUALDINI: That is agreeable.

A Okay.

MS. HUTCHISON: Thank you.

UNDERTAKING NO. 3:
RE PRODUCE ANY RECORDS OF MS. TWINN OF PERSONAL NOTES, NOTICES, OR ANY INFORMATION GIVEN TO MEMBERS BEFORE THEY WERE ASKED TO VOTE ON THE RESOLUTION THAT RELATES TO THE SECOND MEMBERS' RESOLUTION AT SAWRIDGE 001445.

Q MS. HUTCHISON: Just going back to Mr. Thom for a moment, Ms. Twinn. Do you recall Mr. Thom ever being

characterized as the executive director of either of the Sawridge Trusts? Do you remember him holding a position as an executive director of one of the Sawridge Trusts?

A I connect him to his employer which, in my mind, was the Band.

Q Okay. And I am going to take you to a different topic for a moment that might help us. When you started in your term as a 1985 Trustee, how was the administration of the Trust handled? Was there a predecessor to Mr. Bujold?

A No.

Q So tell me how the administration of the staff was handled? Who dealt with it? Or the Trust, I am sorry, was handled?

A Well, as I mentioned, up until 2003 with John MacNutt the housing was the Sawridge Band administration building.

Q Okay.

A And I believe, but I don't know this, there may have been a distinction within who was employed by who. I say that because I recall Shannon Twin, who is a beneficiary of the '85 Trust but not a beneficiary of the '86 Trust, worked on the Trust corporate side. And I seem to have a recall of Trustee resolution regarding her in her employment in that capacity, and how payables were to be -- the process for the submission

of payables.
Q And is it your recollection that Shannon Twin acted as sort of an admin assistant to the Trustees, or was she more of an executive --
A She was an accountant.
Q An accountant, okay.
A So she would have been housed in the Sawridge administration building.
Q Okay.
A And how all of that worked I don't know. Mike McKinney would know all of this.
Q Okay. And I realize that it is a long time ago, but if I try to take you back to some of the -- well, I should ask this. Between '86, your appointment, and 2003 did the 1985 Trustees meet on a regular basis?
A No.
Q Did they meet at all?
A Well, they may have met. Sorry, 2003. No, let me go back to --
Q I am using that for --
A I'm thinking when things for me became very active was 1997. Walter died October 1997.
Q Okay.
A And November 1997 is when I started to become active.
Q Okay.
A And prior to that I was not. And I believe Bertha was appointed in November of 1997 as a Trustee. But I need

to look at the tab with the list.
Q Tab 18.
A Tab 18.
Q So Sawridge 001429 indicates November 21st, 1997.
A That sounds right.
Q Okay.
A And she was also installed as a Chief in around then. And the reporting and affairs regarding the management of Trust assets was going through that Sawridge Band administration. And I was outside of that. I was not a Band employee, I was not -- I didn't have any employment capacity.
Q Okay.
A So I was not in the know, per se.
Q Okay. And did that change in November 1997?
A Yes. Well, it started to change. And my involvement grew from there.
Q Okay. So in terms of how things were managed, how meetings were organized, who attended Trustee meetings prior to that November 1997, I take it that you have limited information?
A Well, there were meetings between '97 and 2003.
Q Okay. Let's go before '97, though. Do you have any information?
A Again, records would have been in the Sawridge Band administration.
Q And you don't have those records?

A And I don't recall being a participant in any of those meetings on any kind of a regular basis.
Q Okay.
A In fact, I would be hard pressed at this moment to recall being at any meeting.
Q Okay. That saves some questions. So November 1997 forward, at that point were there meetings occurring on a regular basis for the '85 Trustees?
A Well, there weren't five.
Q Sorry, for the 1985 Trustees?
A Yes, for the 1985 Trustees we started to become involved.
Q Okay.
A And ...
Q How often do you recall meeting?
A Well, I think there were some things that we were paying close attention to that I had become aware of by accident.
Q Okay.
A And so there was quite a bit of -- quite a bit that was going on in relation to Trust assets.
Q Okay. So was there anything going on in relation to the $12 million debenture that we chatted about in a general way?
A I don't recall. That would have been in Mike McKinney's bailiwick.
Q Okay. And when you say his bailiwick, is that because

it was owed by one of the corporations?
A Well, he was involved on the corporate/commercial side of things.
Q Okay.
A And he worked with outside lawyers and accountants. And as I said, there was a bit of a mush.
Q Okay. I am going to ask a few questions about Mr. McKinney, just so that I can get some context before I go into some other areas.

As best as you can recall, Mr. McKinney started his position in the summer, in July, I think of --
A Well, he was called in the summer of 1987, and it is my recollection that it was shortly after that he, I believe, became an employee of Sawridge administration. Now if that was an entity within the Band or the Band itself, I am not sure.
Q So let's just -- we will go from your appointment as a Trustee to pre getting more active in 1997.
A M-hm.
Q Was it your understanding that Mike McKinney was advising the Sawridge Trusts, or was he a legal advisor to Sawridge First Nation, or was he both in that time frame?
A Well, he was administrator.
Q Okay.
A And so in that capacity he would deal with Band issues, be it water, sewage, housing, whatever, administrative

matters. Like Bruce Thom, he was also a lawyer, and there were outside lawyers, firms, that were involved in aspects. So I would assume that he would be the interacting party.

Q For Sawridge First Nation, or for Sawridge 1985 Trust, or 1986 Trust, or all three?

A Well, as I said, the -- everything was housed in the Sawridge Band administration building.

Q Yes, okay.

A In the beginning of the disassembling of the plate of spaghetti, okay, think of a plate of spaghetti, the disassembling of that began really with the appointment of an outside CEO, John MacNutt, in 2003.

Q Okay.

A That was followed by an independent Board of Directors. Those were both things that I championed.

Q Okay.

A And they were very difficult to achieve. But they were a good result.

Q So just going from 1997 until John MacNutt's appointment in 2003, so you are more involved in that time period, but it is prior to John MacNutt's appointment. Did you have any dealings with Mr. McKinney in your role as a 1985 Trustee?

A Yes.

Q And when that happened did he take any steps to let you know what role he was acting in?

A Well, he was a director as well as I on some of these Trust-owned assets.
Q Okay.
A And I don't have a record of who was a director of what when.
Q Okay.
A But he would show up on that.
Q Do you have any recollection of 1985 Trustee meetings in that '97 to 2003 time period?
A I am sure that there would be records.
Q Do you have any recollection of what they were like today, without having minutes in front of you to refresh your memory?
A Do I recall what I have and what is in them?
Q No, do you have a recollection of how those meetings were conducted in that time period, without looking at -- we don't have documents from that time period right now.
A Right. Well, there were some helpers. We did not have an administrator, but there were helpers. And so I am just trying to get some time frames here of who and when and what.
Q Was Mike McKinney a helper for the Trustees?
A Well, he was, as I said, a director. And there was a lot of work taking place with respect to what was going on in various companies. He was a director, Walter Felix was a director, Bertha, myself.

Q What I am really just trying to understand, Ms. Twinn, and maybe we will just say from '97 until your resignation, if you were interacting with Mr. McKinney as a Trustee of the 1985 Trust, what role was he playing in that interaction, and did he advise you? Did he tell you I am here as --

A He was a director.

Q Did he say I am here as a director of a company, did he say I am here as SFN's administrator, or did he say he was there as legal counsel? Did he take any steps to say in what capacity he was speaking to you?

A I have no recollection of him doing that. What I would recall is that he was acting as a director at these meetings.

Q And is it fair to say then you don't recall a period of time where his practice, in terms of setting out exactly his role or capacity in the Trustees' meetings, changed? Like let's say after the litigation in this action started did he start to make it very clear that he was there as legal counsel, or that the matters that he was discussing were privileged, or did he just come --

A No, at some point in our evolution, what I call this unpacking the enmeshment, he no longer attended meetings.

Q 1985 Trustee meetings?

A Trustee meetings, director meetings.

Q Okay.
A And in 2006 an outside Board of Directors came in and none of us were directors anymore. And I can't recall timelines for his cessation in involvement, but.
Q Okay. You don't have a business card for Mr. McKinney by any chance, do you, that states what his title is?
A I have his signature on emails, and he has got, as I say, two hats. So he has the work under the Sawridge Group of Companies, which is Trust property, Trust assets, and he works for the Band. And I believe all of his salary is paid through the Band or its entity. And then I believe the companies reimburse the Band for one-half of his salary. That is my recollection.
Q How far back do you think that you have an email signature for Mr. McKinney? Do you think that you would have anything from about 2009?
A Yeah, I would.
Q Okay. I'm going to ask you then to undertake, Ms. Twinn, if you can find an email signature or another document that would identify for us how Mr. McKinney's position was described when he started, so in 1987, how it was described in 2003 which you have identified as a time of considerable structural change, how it was identified in 2009 which is a time that I understand the Trustees were talking quite intensively about what became this action, and then how it was identified from 2009 until present.

MS. OSUALDINI: Are you looking for the email or just confirmation of the email signature?
MS. HUTCHISON: It can be either. If you'd like to give us a copy of the email signature and the letterhead, that is fine. It doesn't need to have contents.
MS. OSUALDINI: We would be agreeable to providing a copy of the date of the email and the email signature block, but not the contents of the email itself.
A Correct.
MS. HUTCHISON: That would be very helpful, thank you.

UNDERTAKING NO. 4:
RE PRODUCE COPIES OF EMAILS WITH THE DATE AND SIGNATURE BLOCK WHICH WOULD INDICATE MR. MCKINNEY'S TITLE FROM 1987, 2003, 2009, AND FROM 2009 TO PRESENT.

A I mean I have an email from him with his Band hat which says executive director/general counsel.
Q MS. HUTCHISON: And that is what vintage of email?
A That is 2018/08/08.
Q Okay. Thank you, Ms. Twinn.
MS. HUTCHISON: Ms. Osualdini, I am about to go into a different area. I know it is earlier than I was suggesting, but it might be a logical time to break.

(Questioning adjourned 12:10 p.m.)
(Questioning resumed 1:25 p.m.)

Q MS. HUTCHISON: Ms. Twinn, you acknowledge that you are still under oath?
A Yes.
Q Thank you very much. I just wanted to go back to two things that we talked about before the break, Ms. Twinn. We had asked for an undertaking to provide us with some emails or business cards for Mike McKinney that might confirm what his position description was. Could I also ask you for a similar undertaking for Bruce Thom. I realize that is a very different time frame, but if you do have something in your records, whether it is letterhead or a business card, it might be a little early for email, I'm not sure.
MS. OSUALDINI: I think it would have been.
MS. HUTCHISON: But something that would give us an insight into the title that was actually being used for his position, that would be very helpful.
MS. OSUALDINI: Same comment as before, we can provide a copy of the, I assume that at that time period it would be correspondence with the date and the signature block without the content of the correspondence.
MS. HUTCHISON: That would be more than acceptable.
A Thank you.

UNDERTAKING NO. 5:
RE PRODUCE BUSINESS CARDS OR
DOCUMENTATION WITH DATES AND SIGNATURE

INDICATING MR. THOM'S TITLE.

Q MS. HUTCHISON: Also before the break you were talking about the Trustees paying for Sawridge First Nation's legal fees in this proceeding. Do you have a recollection of whether or not Sawridge First Nation's fees for their participation in the lead up to the 2015 asset transfer consent order were paid by the Trustees?

A I would have to look at my records to see if I can determine payment dates which would then hint at what was being indemnified.

Q So as Trustees you did not see copies of the actual accounts that were paid?

A I never did.

Q If you have a way to determine that, that would be useful. If you just use best efforts to advise us?

A Sure.

MS. OSUALDINI: That is fine.

MS. HUTCHISON: Thank you.

UNDERTAKING NO. 6:

RE ADVISE WHETHER OR NOT SAWRIDGE FIRST NATION'S FEES FOR THEIR PARTICIPATION IN THE LEAD UP TO THE 2015 ASSET TRANSFER CONSENT ORDER WERE PAID BY THE TRUSTEES.

Q MS. HUTCHISON: Okay. Turning to tab 14 of the document collection that I gave you. There is a bundle of documents there that consist of both Sawridge production and your own production with I think what we

generally talked about is the back and forth between Canada and Sawridge on the issue of the assets in the 1985 Trust, and whether or not there is any issue around Section 64 and 66 in relation to those assets.

I just want to take you to two particular documents. So the first one is an August 9th, 1994 letter. It is a Davies Ward & Beck letter.

A Are these in chronological order?

Q They should be if we are on our game.

A I note that there is a Michael McKinney executive director, by the way.

Q Oh, thank you.

A Dated March 21st, 1994 to Maurice Cullity.

Q That is very helpful, thank you.

A Now I am looking for August?

Q You are looking for Twinn 7825 which is August 9th.

A Yes, I have it. August 9th, 1994.

Q And what I am really interested in is the content of the letter. It refers to a draft letter from Ron Ewoniak. We have already established that Mr. Ewoniak was an accountant, not a lawyer?

A Correct.

Q Have you ever seen that draft letter?

A Well, first of all, I was not involved in this.

Q Okay.

A I do see on earlier correspondence M. Henderson, copy Chief Walter Twinn and M. Henderson. M. Henderson

would be Martin Henderson.
Q Was he also at Deloitte?
A No. He was the counsel on the Bill C-31 constitutional challenge.
Q I see.
A And I believe that the inquiry came out of that challenge.
Q Yes, I believe it did.
A So to August 9th, 1994.
Q Do you have any records that you could check to see if you have a copy of that draft letter by Deloitte Touche?
A I can. The information that I have is what I received as a Trustee through the collection of records that belong to the Trustee.
Q Right.
A And I can check and see if I have this document that is referred to, a draft letter from Ron Ewoniak, but I don't know.
Q That would be very useful, if you could undertake to check for that.
A Okay.
MS. OSUALDINI: We will accept that undertaking.

UNDERTAKING NO. 7:
RE DETERMINE IF MS. TWINN HAS A COPY OF THE DRAFT LETTER FROM RON EWONIAK REFERRED TO IN TWINN DOCUMENT 7825,

DATED AUGUST 9TH, 1994.

Q MS. HUTCHISON: Ms. Twinn, just so I have a sense. These documents that you had access to as a Trustee, in electronic form, hard copy?

A Both.

Q Both, okay. And you still have access to those documents?

A Yes.

Q Can you give me some idea of volume? Do you have any idea of volume? Whether we talk about number of binders, or boxes, or files?

A I don't know off the top of my head.

Q Okay.

A Yeah, I really, really don't know. There is, I would think, a lot.

Q Do you have any sort of an index that just lists the date and document description without getting into the content of the document?

A I may have for some of the hard copies. Some of the hard copy records that I have I may have.

Q Like a list?

A Yeah, something that you would call an index or a list.

Q Did the documents come with any sort of a listing like that, or are you talking about something that you prepared after?

A Yeah, it was all my own --

Q Okay.

A -- work.
Q I am really interested mainly in documents between about 1982 and about 1987. And from your answer it is a little hard for me to tell what the status of that list is. But if there is a listing that provides identification of documents in that time period that are not already listed in one of your Affidavit of Records, we would appreciate just seeing the listing description. So the date, who the author was, who the recipient was, that type of thing, or the type of document?
MS. OSUALDINI: We'll take that under advisement.
MS. HUTCHISON: Thank you.

UNDERTAKING NO. 8:(UNDER ADVISEMENT)
RE PROVIDE AN INDEX OR A LISTING OF THE DOCUMENTS IN MS. TWINN'S POSSESSION AS A TRUSTEE BETWEEN 1982 AND 1987.

Q MS. HUTCHISON: Did we deal with the undertaking on, I think we did, looking for the draft letter by Mr. Ewoniak?
MS. OSUALDINI: Yes, we accepted that.
MS. HUTCHISON: Thank you.
Q MS. HUTCHISON: So the only other letter in that collection that I wanted to ask about, Ms. Twinn, and it is a similar inquiry. If you go all of the way close to the end to the June 5th, 1995 letter from the Department of Justice.

A Yes, is that 007863?
Q It is 007863, Twinn document. That refers to a statement by Deloitte & Touche that was appended to one of Mr. Cullity's letters, and obviously was sent to Canada.

Have you seen that statement? Do you recall ever seeing that Deloitte Touche statement? Apparently it might be titled, I don't think we can tell from this, but it might be titled Band Council Resolution Funds Received 1985 to 1993?
A I don't recall.
Q Would it be possible for you, could you search the documents that you got to see if you do have a copy of that particular statement by Deloitte & Touche?
MS. OSUALDINI: We will take that under advisement.
MS. HUTCHISON: Thank you.

UNDERTAKING NO. 9:(UNDER ADVISEMENT) RE DETERMINE IF MS. TWINN HAS A COPY OF THE STATEMENT FROM DELOITTE & TOUCHE REFERENCED IN TWINN DOCUMENT 007863; IF SO, PRODUCE SAME.

Q MS. HUTCHISON: Ms. Twinn, I am going to ask you to flip to tab Number 3.
A I am there.
Q That is Sawridge Number 000205, and it is a demand debenture that was executed on January 21st, 1985.
A M-hm.

Q Did you have any involvement in the preparation of that debenture?
A No.
Q And were you doing any work for Sawridge Enterprises around debentures or loans at that point in time?
A No, no. As I said, I'm not a corporate/commercial lawyer.
Q Do you remember having any discussions with your husband about that $12 million debenture?
A I don't recall.
Q Okay. We have also looked at --
A What I can tell you about Sawridge Enterprises is that it was owned by Sawridge Holdings which was the parent company under the '85 Trust, and I believe there were other companies. Sawridge Enterprises, Sawridge Development, Sawridge Energy. And then Holdings also had -- so Holdings owned those completely, and then I believe Holdings also had interests in three other companies, Tai, Slave Lake Developments which I believe was something that Walter had started with the son of Ernest Manning, first name escapes me.
Q Preston?
A Preston, thank you. And they did some development in Slave Lake, and I am not sure off the top of my head if that morphed into Spruceland Developments, and then I think that came to -- Spruceland came to an end in the past number of years. So in addition to Tai and Slave

Lake Developments there was another one, something Commonwealth. I can't remember off the top of my head.

Q Let's go back to Holdings for a moment, Ms. Twinn. So my understanding is that the Trust, or the Trustees on behalf of the Trust own all of the shares or hold all of the shares in Sawridge Holdings. Is that your understanding?

A Yes.

Q While you were Trustee of the Sawridge Trust?

A Yes.

Q And while you were a Trustee of the 1985 Trust did you receive at least somewhat regular reports from Holdings about its financial status?

A Well, after the separation from out of the enmeshment in the Sawridge administration and beginning with the outside management team led by John MacNutt, yes.

Q Okay. And if the 1985 Trustees had requested financial information from Sawridge Holdings, were they refused access to that, that you can recall, or was Holdings pretty forthcoming in sharing financial information?

A What period are we talking about?

Q After 2003.

A I would say between 2003 and 2006 when the outside Board of Directors came in that we worked fairly closely with John MacNutt. Once there was an appointment of an outside Board of Directors there were some issues with respect to the flow of information,

and that, I remember David Ward having to rassle with the Board of Directors over what information to the Trustees and when. And the Trustees, even though they had delegated their authority to an outside Board of Directors, still had oversight responsibilities as a reasonable, prudent business person to know what was going on in the businesses. And that became an issue that we had to deal with.

Q Okay. In the documents that you have seen in your time as a 1985 Trustee, do you recall seeing financial statements for Sawridge Holdings for any period of time?

A There were financial statements.

Q Okay. Do you know if those would exist in any documents, the document collection that we talked about that you have?

A I believe they would exist.

Q Okay. I would ask you to undertake to check those records and if there are any financial statements for Sawridge Holdings from the time period of April 1985 until present in that collection, we would appreciate copies of those financial statements.

MS. OSUALDINI: Counsel, the relevance?

MS. HUTCHISON: The debenture, Ms. Osualdini. We are interested in what happened to the debenture.

MS. OSUALDINI: That is under advisement.

UNDERTAKING NO. 10:(UNDER ADVISEMENT)

RE REVIEW MS. TWINN'S DOCUMENT COLLECTION AND IF THERE ARE ANY FINANCIAL STATEMENTS FOR SAWRIDGE HOLDINGS FROM THE TIME PERIOD OF APRIL 1985 UNTIL PRESENT IN THAT COLLECTION, PRODUCE SAME.

Q MS. HUTCHISON: Now let's talk about, when I say '86 to 2003, Ms. Twinn, I appreciate that there was a period of time between '86 and '97 when you told me that you weren't extremely hands-on, but I am still going to use that first time period.

So from 1986, the time of your appointment, to before 2003, prior to John MacNutt's appointment, do you recall if you would have received as a Trustee of the 1985 Sawridge Trust financial statements for Sawridge Enterprises?

A I wouldn't know for sure how to answer that question at this time without --

Q Checking?

A -- seeing what I have.

Q Do you recall ever seeing financial statements for Sawridge Enterprises in your role as a 1985 Trustee?

A I would have thought that I would.

Q Okay. I think that I will ask for the same undertaking, and Ms. Twinn, if there are any financial statements for Sawridge Enterprises in the collection that we discussed from 1985, April of 1985, until

present, or until the date of your resignation more appropriately, we would appreciate copies of those.

MS. OSUALDINI: Once again, we will take that under advisement.

MS. HUTCHISON: Thank you.

UNDERTAKING NO. 11: (UNDER ADVISEMENT) RE REVIEW MS. TWINN'S DOCUMENT COLLECTION AND IF THERE ARE ANY FINANCIAL STATEMENTS FOR SAWRIDGE ENTERPRISES FROM THE TIME PERIOD OF APRIL 1985 UNTIL MS. TWINN'S RESIGNATION, PRODUCE SAME.

Q MS. HUTCHISON: So looking for a moment at a document we have already discussed, Ms. Twinn, regarding the debenture, it is Sawridge tab 8, Sawridge Production Number 001445. That was the members' resolution that we discussed that ratified the Band Council Resolution to transfer the $12 million debenture that we have been discussing into the '85 Trust?

A Yes.

Q Prior to your attendance at Mr. Bujold's questioning, February 26th, had it ever been suggested to you that that debenture had never actually made it into the 1985 Trust?

A I have no recollection of such a suggestion.

Q So you certainly didn't have a discussion with Mr.

Ewoniak to that effect?
A No.
Q Have you discussed that concept with Mr. Ewoniak?
A I don't believe I have.
Q And you haven't asked Mr. Ewoniak if he would have documents that are relevant to that issue at this point in time?
A I haven't had that discussion.
Q I realize I am asking a bit, Ms. Twinn, but I'm going to ask you to undertake to reach out to Mr. Ewoniak and ask for his recollection about whether he has information to the effect that the $12 million debenture never made it in to the 1985 Trust assets.
MS. OSUALDINI: We will give that undertaking.
MS. HUTCHISON: Thank you.

UNDERTAKING NO. 12:
RE INQUIRE OF MR. EWONIAK HIS RECOLLECTION OF INFORMATION TO THE EFFECT THAT THE $12 MILLION DEBENTURE NEVER MADE IT IN TO THE 1985 TRUST ASSETS.

Q MS. HUTCHISON: Now we have talked, or Mr. Faulds talked to Mr. Bujold about a larger debenture, a $35 million debenture that Holdings owes to the Trust -- or sorry, that Holdings has. Do you have any information that might indicate whether the $12 million debenture ended up being essentially rolled in to that 35

million? Was there a refinancing? Was there a restructuring of the debt at some point in time?

A I may have.

Q Okay.

A But I don't know off the top of my head.

Q Okay. If you have documents that would assist us in determining whether the $12 million debenture was essentially assigned, replaced, rolled into, combined, such that it still exists as an asset of the '85 Trust, but is part of a larger debenture, we would appreciate any documentation that you could provide in that regard.

MS. OSUALDINI: We will take that under advisement.

UNDERTAKING NO. 13:(UNDER ADVISEMENT) RE PRODUCE ANY DOCUMENTS IN MS. TWINN'S DOCUMENT COLLECTION THAT WOULD ASSIST IN DETERMINING WHETHER THE $12 MILLION DEBENTURE WAS ASSIGNED, REPLACED, ROLLED INTO, OR COMBINED SUCH THAT IT STILL EXISTS AS AN ASSET OF THE '85 TRUST, BUT IT IS PART OF A LARGER DEBENTURE.

Q MS. HUTCHISON: And I think that you have answered this, Ms. Twinn, and I apologize, I'm not trying to be repetitive. But I take it at no point in time that you were a Trustee for the '85 Trust did a financial advisor come to you to say that essentially an asset worth $12 million or more in value had effectively

disappeared from the Trust?
A I have no recollection of that.
Q And would that be a magnitude of a problem that you would expect to stand out in your memory as a Trustee?
A I would think so. The -- my recollection on this was when Paul Bujold came in as Trust administrator there were a number of key responsibilities, and one of them was the collecting, organizing Trust documents for -- to enable the passing of accounts, as well as to take the next step to implement recommendations accepted by the Trustees made by Four Worlds to establish benefits. And thirdly, to proceed on past decisions to identify beneficiaries of both Trusts in order to enable the beneficiaries to benefit from these Trusts.

And I recall asking Paul for the work in progress, if you will, in relation to the passing of accounts. And I seem to recall that that was not forthcoming to me.
Q Okay. But in any event, Ms. Twinn, as a result of that process that you just described that Mr. Bujold was assigned, or the task that he was assigned by the Trustees, at no point did he come back and report to the Board, or to the Trustees, I apologize, to say that there was a $12 million asset --
A I don't recall that.
Q Okay.
A And I would hope that it would be something that would

stand out for me, but.

Q If you locate something in your records, and in particular I would be interested in minutes of Trustee meetings that we haven't seen, or your notes of Trustee minutes that we haven't seen, if you identify something in those records that indicates that a discussion of that nature did occur, the Trustees were advised of that particular issue, I would appreciate seeing those documents.

MS. OSUALDINI: At Trustee meetings?

MS. HUTCHISON: I said particularly at a Trustee meeting. If there is something else that demonstrates that the Trustees were advised by correspondence outside of the meeting, but I am looking at identification to the Trustees that that asset was actually not in the Trust.

MS. OSUALDINI: We will take it under advisement.

MS. HUTCHISON: Thank you.

UNDERTAKING NO. 14:(UNDER ADVISEMENT) RE PRODUCE ANY NOTES OR MINUTES OF TRUSTEE MEETINGS, OR ANY CORRESPONDENCE INDICATING THAT A $12 MILLION ASSET HAD DISAPPEARED FROM THE TRUST.

Q MS. HUTCHISON: I am going to show you a document that we have received recently from Dentons, the discharge of mortgage. Have you seen that document before?

A I don't recall this document.
Q Can we just marked it for identification?
MS. OSUALDINI: Sure.
EXHIBIT NO. D-A FOR IDENTIFICATION:
DISCHARGE OF MORTGAGE DATED OCTOBER 22,
1986.
Q MS. HUTCHISON: If you look at the document, the date the mortgage appears to be discharged is October 22, 1986. Is there anything that you can recall that was significant about that date in terms of the '85 Trust history? Or any -- I'll just leave the question at that. Anything significant about that date?
A So I don't recall.
Q I don't want you to guess, Ms. Twinn. I just was curious if it had any significance.
If you turn to the last page?
A Yes.
Q And the Land Titles stamp is dated 2003.
A There is a stamp there? I don't see it.
MS. OSUALDINI: You are referring to 2003/11/15, which I take it to be November 15.
Q MS. HUTCHISON: Correct, November 15th, 2003. Apparently that is when the discharge was actually filed at Land Titles, or registered at Land Titles. Is there any significance to that date for you?
A Well, 2003 MacNutt would already have been in place.
Q So the cleanup would have started?

A And he started in I believe April 1st, in there.
Q Okay.
A And as I had already mentioned John was to gather from Mike McKinney all of the Trust records and corporate records that were in the Sawridge Band administration office, so.
Q So 2003 we know was a year of cleanup, I guess would be the --
A Well, that was the beginning.
Q Okay, thank you. That is very helpful. Ms. Twinn, if I could ask you to have your January 20, 2020 Affidavit which should be, I believe, tab 28 of that binder. And then also you will want to have tab 12, which is Twinn Production Number 007806, tab 13 which is Twinn Production Number 007810, and tab 16 which is Twinn Production --
A Sorry, I don't see 7810. I see it goes up to 7809.
MS. OSUALDINI: Is that 13?
Q MS. HUTCHISON: Yes, tab 13, just a one-page letter. And then tab 16 which is 7944.
A Okay.
Q And I will just give you a chance to take a quick look at those before I ask you a question.
A Is there a particular paragraph of the Affidavit?
Q Your Affidavit would be paragraph 5 sub (q) that I in particular want you to be aware of. So it is all to do with distribution. Just give me a sense of when you

have had a chance to read those.
A Okay, I have read paragraph (q). Now I am going to read 007810.
Q Okay.
A And now I am going to read 007944.
Q And there are two pages to that document that you might want to take a quick look at.
A Yes, I have read it.
Q Great. So the first question, Ms. Twinn, I'm just hoping that you can help me clarify something. So when I look at the Deloitte Touche memorandum that is at tab 12, Twinn 007806, I --
A 7806?
Q 7806, yes. And if you look at that second page of that memorandum, paragraph 3, starts off with the 1984 to '85 Trust.
A Sorry, I'm not seeing -- I'm seeing 7806.
Q Yes, and if you turn to the next page, which is page 7807.
A 7807?
Q Yes.
A The third paragraph.
Q The one that starts, In 1984 to 1985 Trust?
A Yes.
Q So the middle sentence talks about, it says this was distributed to Walter and he made a gift back to the Band. And then there is also a reference two

paragraphs below to gifting the income to the Band.

And then in your Affidavit, Ms. Twinn, the distributions are characterized as being something that is ultimately gifted back to the 1985 Trust by the beneficiaries.

Do you know with these distributions that you have discussed in your Affidavit, and that are discussed in this Deloitte document, do you know if the distributions went to the Band or back to the Trust from the beneficiaries they were gifted to?

A My recollection is that they came back to the Trust.

Q The Trust, okay. So your recollection would be -- you would say that the Deloitte Touche memorandum is not accurate?

MS. OSUALDINI: I don't think that that is fair because it is referencing a time period where the 1982 Trust would have been in effect and my client wasn't a Trustee ...

Q MS. HUTCHISON: So in relation to the distributions from the 1985 Trust, Ms. Twinn, your understanding is that they were gifted to a 1985 Trust beneficiary and they always came back to the 1985 Trust?

A That is correct. So when I answered the first question, I thought that you were asking me about the 1985 Trust.

Q I thought that I was, too.

A So.

Q Okay, thank you. And so then for a specific example on that, if we can go to tab 16, Twinn Document 007944?
A Yes.
Q So there is a notation there under the 2004 fiscal year that an amount to be distributed was $146,215, and we have a cheque stub attached for that amount to Walter Felix Twin?
A Correct.
Q So is this one of the distributions that you were discussing in your Affidavit, where it was gifted back ultimately by Walter Felix Twin back to the '85 Trust?
A Or whoever it was issued to, because it may have been issued to other people.
Q Okay.
A Like my late husband, or possibly Bertha L'Hirondelle, Walter Felix Twin.
Q That was one of my other questions to you. We know that your husband received some of those gifts that were gifts back to the Trust. We know from this Document 7944 that Walter Felix Twin received some of those distributions. I wonder, were there other 1985 Trust beneficiaries that had those types of amounts gifted to them and then they gifted them back to the Trust?
A Right. I stand corrected on something. I am just looking at 007945, a cheque. And at the top it says Sawridge Band Inter Vivos Settlement Trust, so I need

to be more specific about which beneficiary would have received the distribution from which Trust. I misspoke if I suggested that Bertha L'Hirondelle would have received a Sawridge Band Inter Vivos Settlement Trust, because she did not qualify as a beneficiary of that Trust. She -- if she did receive a cheque, and I have a recollection of such, it would have probably been the same type, but in relation to the Trust, the '86 Trust of which she was a beneficiary of.

Q Do you recall any other beneficiaries of the 1985, other than your late husband and Walter Felix Twin, do you recall any other beneficiaries of the 1985 Trust receiving these sorts of distributions that they then gifted back to the '85 Trust?

A I don't recall.

Q Okay. I will just ask, just in case this jogs your memory, the 2003 distribution that we see on 7944?

A Yes.

Q Of a bit over $400,000?

A Yes.

Q Do you recall which 1985 beneficiary that amount was gifted to?

A I don't recall.

Q Do you have any records that you could check?

A I probably -- I may have.

Q Just given that identification of beneficiaries has been a live issue, if that document exists we would

appreciate a copy of it.

MS. OSUALDINI: What I was taking concern with was the reference to it being a gift. It was a beneficial distribution.

MS. HUTCHISON: I apologize. The gift is the gift back to the Trust. The payment to the beneficiaries is a distribution. Thank you, Ms. Osualdini. If there is a copy of the cheque that you have in your possession that shows who the distribution of about $400,000 was made to in 2003 we would appreciate a copy of that.

MS. OSUALDINI: I will give that undertaking.

MS. HUTCHISON: Thank you.

UNDERTAKING NO. 15:

RE PRODUCE ANY DOCUMENTATION SHOWING WHO THE DISTRIBUTION OF ABOUT $400,000 WAS MADE TO IN 2003.

Q MS. HUTCHISON: And then just looking at Twinn Document 7944 for another purpose, Ms. Twinn. I was trying to understand what the table means exactly. It shows that there are cost of administration for the '85 Trust, or the Inter Vivos Trust we refer to it sometimes. But no costs that are actually charged to, or appears to be saying there are no costs charged to the '86 Trust. Can you help me understand what that is intended to mean?

A I wish I could.

Q Was there an arrangement where the 1985 Trust bore the

administrative costs of operating both Trusts at that point in time?

A It -- I don't recall there being such an agreement.

Q Okay.

A And what does come to my mind is the duty of evenhandedness, that if there were administrative cost expenses, that those would be --

Q Split, perhaps, or shared?

A -- shared in a way that was justified.

Q In 2003 and 2004 am I correct in saying that the Trustees for the 1986 Trust were identical to the Trustees for the 1985 Trust? They were the same people with different roles?

A Yes. That is correct.

Q Okay. If I could ask you to look at your January 28th, 2020 Affidavit again for a moment, Ms. Twinn. We have already talked quite a bit actually about the amount of legal and other professional advice that the 1985 Trustees and Sawridge First Nation had at the time of the 1982 to '85 transfer?

A Yeah.

Q I did just want to be clear. In a number of paragraphs, an example of that would be paragraph 5(i), and I'm looking at the second sentence where you refer to, you say "Walter retained and received advice from quality advisors in relation to the asset transfer".

I just want to be clear or confirm with you, when

you say Walter retained and received advice, it wasn't just your late husband receiving that advice, I take it? It was the Nation, Chief and Council, and the Trustees, is that fair?

A I would believe that to be the case.

Q Great. I just wanted to be sure that you weren't trying to communicate to us that the advice was only given to Walter P., your late husband. Okay, thank you.

A So he had different hats, right.

Q Yes, absolutely. I think everyone does in this process, but thank you.

Also under subparagraph (i), Ms. Twinn, there is the last sentence. You say, "He attended many meetings". Was that a reference to your late husband, or to Mr. Ewoniak attending many meetings?

A Ron Ewoniak attended.

Q Thank you.

A '85 and '86.

Q And have you inquired with Mr. Ewoniak whether he maintained any notes of those meetings?

A I don't know what he has or doesn't have.

Q Okay.

A And he was with Deloitte.

Q And I appreciate that he may have left any documentation he had with Deloitte, but I am going to ask you to inquire of Mr. Ewoniak if he retained any

notes of the meetings that he attended that he discussed with you in relation to the asset transfer from the 1982 Trust to the '85 Trust, or the creation of the 1985 Trust?

A Okay.

MS. OSUALDINI: Yes.

UNDERTAKING NO. 16:
RE 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 TRUST TO THE '85 TRUST, OR THE CREATION OF THE 1985 TRUST.

Q MS. HUTCHISON: I think the rest of my questions will be covered by another document, Ms. Twinn.

Let's flip to tab 17, which is Twinn Document Production Number 002291, and it is a set of Board of Trustees meeting minutes dated December 15th, 2009.

A Yes.

Q And the first item that I am going to ask you to turn to is on page 3, item 5(d)?

A Sorry, 5 sub (d)?

Q Correct.

A Company payment of principal or interest?

Q Correct. And I'll just ask you to read through that. What I am interested about, Ms. Twinn, while you take a read through that, is the references to the debentures.

A Okay. Yes, I have read it.
Q And I just want to take you to that in the event that this passage in any way jogs your memory about whether there was any discussion at that point in time about the $12 million debenture, or about any substantial debenture assets not having made it into the 1985 Trust?
A I don't recall.
Q Okay. Certainly not in the minutes, but you don't recall independently a discussion about that?
A No.
Q Okay, thank you. Turning then to page 4 of those minutes, item 6, there is a discussion about the Trustees authorizing Mr. Bujold to obtain the Deloitte & Touche records. Do you recall that at all?
A I am reading it.
Q Okay.
A So that would be consistent with the gathering of the records.
Q Do you recall when those records were eventually -- sorry, do you recall if those records were eventually received?
A My understanding is they were.
Q Do you recall if you saw them?
A I don't recall. This was the work of the Trust administrator.
Q Okay. In the document collection that you have that we

discussed, are you able to tell whether the Deloitte Touche documents are included in that collection, or were you able to tell?

A I mean I have -- I have seen documents from Deloitte's, but I don't know that other than what is on the face of the document that I would know what documents were retrieved by Paul Bujold from Deloitte.

Q Okay. So you didn't receive a report at some point in time?

A I don't recall. I just know that he was to gather, he made trips to Sawridge First Nation. I remember him describing the location where records were, and there was -- I recall environmental issues with the location in terms of moisture and mice. And he was to gather from all sources and then organize, scan, and enable the passing of accounts.

Q Okay. Similar question, page 6 of those minutes. There is reference to 11 boxes of files?

A 8(c)?

Q 8(c). Now as I read those minutes my understanding was that the 11 boxes could not have included the Deloitte Touche documents?

A Yeah.

Q Was that your understanding as well?

A That would be my understanding because he was being authorized. So he had not yet.

Q Do you have any information about whose files were

contained in the 11 boxes? Was it --
A My recollection is that there were a lot of records from Sawridge administration.
Q Okay.
A And that his trips to Sawridge to retrieve, I think that was -- my recollection would be that that is what was constituting.
Q So there is a reference just below that to David Ward. So the 11 boxes were not necessarily boxes of Davies Ward & Beck files. Is that your understanding?
A No, no, no. There were -- there was, my recollection is that Davies Ward did provide Paul with documents, but I am not sure when and I don't know if I know how much. Paul Bujold would certainly know. I also know that Davies Ward has boxes relating to the Trust today. Well, they had them as of I am thinking 2017.
Q And it was your understanding that the documents that you just identified for me were not included in the collection of documents that you have a copy of from your time as a Trustee?
A I'm sorry? I'm not --
Q You are saying that Davies Ward had files in 2017. Were they included in the collection of documents that you have?
A Sent to Paul?
Q I am asking is it your understanding --
A I don't know. I don't know.

Q Okay.
A I would assume --
MS. OSUALDINI: I don't want you to assume.
Q MS. HUTCHISON: We don't want you to assume.
A Well, I just know that Davies Ward has boxes. Had boxes as late as 2017.
Q But you don't know whether those documents were ever sent to the Trust?
A Well, there was a turning over of records a number of years prior to that by Davies to Paul as part of his gathering. So he gathered from presumably many sources. But the primary source would have been Sawridge administration, plus the professionals that were involved. And that would include Deloitte, that would include Davies, I would assume it included Dave Fennell and David Jones because they were very involved in the 1982 Trust.
Q So you say you would assume. I mean had you seen documents in the document collection that you told me you still have access to from David Fennell and David Jones?
A Well, I don't know off the top of my head.
Q Is it your understanding that David Fennell represented the Sawridge First Nation, or a Trust?
A I don't know.
Q Okay, you don't know. And was it your understanding that David Jones represented the Sawridge First Nation

or a Trust?
A I don't know. I just know that they were involved in the '82 Trust, as was Ron Ewoniak.
Q In relation to the collection of documents that you have access to, Ms. Twinn, is it fair to say that with your various Supplementary Affidavits of Records, as far as you know you have now produced any documents from that collection that are relevant to the asset transfer from the 1982 Trust to the 1985 Trust?
MS. OSUALDINI: Well --
Q MS. HUTCHISON: Have you reviewed those documents to look for anything that is relevant to the 1982 to 1985 transfer?
MS. OSUALDINI: And properly producible.
MS. HUTCHISON: Correct.
A Do I think I have seen and done everything? I don't think that I can say that. I think that I have made -- I think there may be other records, but those would be with Paul Bujold and the Trustees. So I have to believe that they as the primary party have complied with production.
Q MS. HUTCHISON: I think that we have an earlier undertaking about a listing of documents from that time period that will probably assist us, so I'm not going to ask for another undertaking around that.

Let's turn to tab 20, Ms. Twinn. It is another set of Trustee meeting minutes, Twinn Document 2569. And I

would ask you to turn in particular to page 4, item 6.4.

A 6.4, passing of accounts?

Q Yes. Now my first question, Ms. Twinn, is, and we talked about this this morning but I just want you to confirm, in June of 2010 am I correct that it was not your understanding that the Trustees were adverse in interest in relation to the 1985 Trust beneficiaries on the topic of passing of accounts?

A No adversity. Total alignment, and total service, and utmost duty of loyalty and service.

Q Okay. So my understanding from this passage, and then I believe a later set of minutes we will come to, is that Meyers Norris & Penny developed some sort of a report or document around passing of accounts in this time period. Was that your understanding?

A Sorry, the question again?

Q My understanding is that Meyers Norris & Penny developed some sort of a report or an overview to assist the Trustees with passing of accounts in this time period, in or around this time period. Is that your understanding?

A Yes, Meyers Norris was to do that work. And I am trying to recall, I know that I had some --

Q I am going to interrupt you for one second to ask an important question. Do you know if Meyers Norris & Penny was hired by the 1985 Trustees or were they hired

by the Trustees' legal counsel?
A They were hired by the Trustees.
Q You were going to tell me something that you were trying to recall about the report?
A Yeah, I am trying to recall if the Meyers report, because I recall two things. One, that they were retained by the Trustees to support our resolution, to pass the accounts.
Q M-hm.
A Preliminary to that Paul had to gather records and complete that database, and then they had to do their accounting piece. And I also recall wanting that Meyers information, and I recall having some struggle with Paul about that. It may be that, and I would have to check, at a meeting information from it was shared, but I don't recall having that final Meyers report.
Q Thank you, Ms. Twinn. You have gone exactly where I was about to go with you to ask if you ever actually saw the document, and I think your answer is no. And I am assuming that you also don't have that in the collection of documents that we have been discussing?
A Well, as I said, I don't recall having the final report. Now I am seeing here that Doris Bonora will review the financial report once it is complete to see what else is needed to present the information, but has stressed that the beneficiary selection needs to be completed before the passing of accounts can be

completed. And we were on track to pass the accounts of both Trusts to both sets of beneficiaries.

Q That has not occurred at this point in time, correct?

A No.

Q Or sorry, did not occur prior to your resignation; is that correct?

A It has not -- it did not occur prior to my resignation, and it has not occurred as of today.

Q Okay. Given that this is a fairly discreet time period, and given that the Meyers, even the draft report, could be quite pertinent to this issue of whether the $12 million debenture is actually an asset of the 1985 Trust, I am going to ask you to undertake to search this collection of documents that we have talked about to see if there is a draft of the MNP report, or a final version --

A Okay.

Q -- that was prepared for the passing of accounts.

MS. OSUALDINI: We'll take that under advisement.

MS. HUTCHISON: Thank you.

UNDERTAKING NO. 17:(UNDER ADVISEMENT) RE REVIEW MS. TWINN'S DOCUMENTS FOR A DRAFT OR FINAL VERSION OF THE MNP REPORT PREPARED FOR THE PASSING OF ACCOUNTS.

Q MS. HUTCHISON: There is also reference in these minutes just below the passage that we were looking at, Ms. Twinn, but I was going to take you to it in another

document in any event, about interviews being held with key players in the development of the Trust to obtain a history of the Trust?

A M-hm.

Q Do you recall, were those interviews done, first of all? Do you recall if they were done?

A Yes.

Q Do you recall who conducted the interviews?

A We all gathered and it certainly had nothing to do with litigation. And the people present included myself and Paul Bujold, John MacNutt, Mike McKinney, I believe Ron Ewoniak. I have records of that.

Q So sorry, it was like a group meeting as opposed to individual interviews?

A Yes.

Q Okay.

A There may have been -- I don't know if Doris and Paul held private one-on-one interviews, but we had a group interview. And the idea behind that was that memories would -- my memory might trigger another memory, and so forth. So it was just a group interview to try to get the history and background of the Trust. It had nothing to do with litigation.

Q Do you recall roughly what time period?

A This interview, the group interview?

Q Yes, that that occurred in. Would it have been shortly after this Trustee meeting?

A I can check my records. I would have an accurate date, and I would have a transcript.
Q Okay. Well, I am going to -- I suspect this will be taken under advisement because I'm not quite sure who was there. I will just ask this. Did somebody conduct the meeting? I mean was there somebody in charge of asking all of the questions at that meeting, or was it a group discussion?
A It was a group discussion. I mean there were areas, but my recollection it was very much free flowing. And that was the intention of it, was to get people that had pieces of the puzzle to put together their pieces on to the table with everyone else. And not only to trigger, but to validate or invalidate.
Q I am being a bit cautious, Ms. Twinn. But do you have -- you sound like you have a good recollection of the meeting. Do you recall discussions at that meeting that would have suggested that the 1985 Trust beneficiaries were somehow adverse in interest to the '85 beneficiaries --
A To the '85 beneficiaries?
Q To the '85 beneficiaries in relation to the topics that you were discussing as a group. And I ask that because it sounds like, am I right, that some lawyers were present at that?
A I am a lawyer.
Q You mentioned, I think you mentioned Mr. McKinney?

A Mike McKinney, yeah.
Q Were there other lawyers present at that meeting?
A I think Doris was there, but I am not sure. Paul Bujold was there, John MacNutt, and I am pretty sure Ron Ewoniak.
Q And so in and about the time that that meeting was held, you have already told me that you don't recall any time that the 1985 Trustees were adverse in interest to the '85 beneficiaries while you were a Trustee. We talked about --
A Well, we shouldn't be.
Q Okay. Do you recall in that meeting any discussion that suggested that the Trustees were expecting beneficiaries to sue them, or that they were somehow adverse in interest to the 1985 beneficiaries?
A I don't recall that. And I don't recall any -- Trustees have to pass the accounts. And the truth is the truth.
Q In the meeting, Ms. Twinn, was there discussion of the events leading up to, or that resulted in the 1982 to 1985 asset transfer? Did it go to --
A I don't recall if that particular topic came up.
Q Okay. Well, I think that I am going to ask for this undertaking, and I am a little concerned not to ask your counsel for something that is privileged. If there are portions of that transcript that discuss the history of the 1985 Trust either in terms of its

purposes or in terms of anything relevant to the transfer of assets from the 1982 Trust to the 1985 Trust, or if there are passages of that transcript that discuss the $12 million debenture, either its existence or its existence within the 1985 Trust as an asset, or its nonexistence within the 1985 Trust as an asset, I'm going to ask you to undertake to produce portions -- the portions of that transcript that are relevant so long as your counsel doesn't determine that it is a privileged document.

MS. OSUALDINI: I will take it under advisement.

MS. HUTCHISON: Thank you.

A Okay.

UNDERTAKING NO. 18:(UNDER ADVISEMENT) RE 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 DEBENTURE.

Q MS. HUTCHISON: And other than that group meeting then, Ms. Twinn, at least as far as you know, there weren't all of these individual key player interviews? It wasn't something where --

A It was a group interview, and it was to try to understand the history, the vision, the purpose, where things had been, and it was all in service to the

beneficiaries.

Q Okay, thank you. Next document at tab 21 of that binder. And it is Twinn Production -- and I apologize, this is page 2 of the larger document. The larger document begins at Twinn 001022, and I have just given you page 2, which is 001023, minutes of a Trustee meeting held on April 15th, 2011. And I would like you to look under 6.2.

A Court application?

Q And at the very bottom where it is talking about I assume you, Catherine Twinn, presented an extensive history of the legal legislative Band Company and Trust actions that led to the present situation.

Is that a reference to you making a presentation?

A It says, Trustees welcome Doris Bonora, Marco Poretti and Donovan Waters. That was the legal team.

Q Yes.

A And they presented the Trustees with a revised binder of information and legal documents. And I have a vague recollection about that Affidavit. I know that it was certainly not final.

Q Okay. I'm going to ask you to focus on the very end of the paragraph because it is talking about your presentation.

A Catherine presented an extensive history of the legal legislative Band Company and Trust actions that led to the present situation.

I don't know what that means, Trust actions.
Q Do you remember in 2011 making some sort of a presentation to the rest of the Trustees?
A I am sure that I expressed -- I think what this was -- I would have to go back to my notes.
Q Okay.
A But, yeah.
Q That is really my question for you, Ms. Twinn. If you did make this presentation, first I would like to just confirm, although I think that you have answered this question in a general way, you weren't acting as legal counsel to the Trust?
A No, no, I'm a Trustee, and I am sharing what I know. And I happen to know some things as a lawyer. That doesn't mean that it is a lawyer for, that just means as a lawyer.
Q If in your documents you are able to locate a written version of the presentation, or notes that you prepared to give this presentation on April 15th, 2011, something that would give us more substance about what you talked about. I'm not obviously looking for what Mr. Poretti or Ms. Bonora or Mr. Waters talked about. I'm not asking you for that.
A Right.
Q I am looking for your presentation on that date.
A Well, I don't believe that it would have been a written presentation.

Q Okay.
A I think that it would have been an oral sharing.
Q Okay.
A But the way this is framed it is a little sarcastic.
MS. OSUALDINI: I'll take it under advisement.
MS. HUTCHISON: Thank you.

UNDERTAKING NO. 19:(UNDER ADVISEMENT) RE PRODUCE ANY WRITTEN VERSION OF THE PRESENTATION OR NOTES THAT MS. TWINN PREPARED TO GIVE THE PRESENTATION ON APRIL 15TH, 2011 AS REFERENCED IN DOCUMENT 001023, 6.2.

Q MS. HUTCHISON: Going to tab 15, which the first page is Twinn 7882, and --
A I am there.
Q It is a title page, the Sawridge Trust, Timothy G. Youdan, Davies Ward Phillips & Vineberg LLP. So I understand that Davies Ward were legal counsel for the Trust, so I would like you to be careful about what you talk to me about, Ms. Twinn, because I am not seeking privileged information here. I'm seeking what might have existed at the tabs that are described in this index.

So at tab 6 of the second page there is a topic, Establishment of Trust, tab 6. And then we also see Trust definitions of beneficiaries, tab 8; assets held in the Trust as at December 31, 1998, tab 9?

A M-hm.
Q The first question, do you recall ever receiving the full package from Mr. Youdan in your capacity as a Trustee of the 1985 Trust?
A I don't recall. I'm trying to look to see if this has a date to it.
Q I was not able to locate one.
A I don't see one, and I don't know if this was part of the turnover of information.
Q Here is what I think that I will ask you to do. So you don't have a specific recollection of this presentation?
A Presentation or information?
Q Either. Do you have --
A I don't have a specific recollection of this document, assuming it had all of these tabs.
Q So I am going to ask you to review the documents that you have. If you are able to locate tab 6, tab 8, or tab 9, and assuming that you are able to confirm the contents of those tabs were not original work product of the Trust's legal counsel, unless of course the Trustees were not adverse in interest to the beneficiaries. I mean your counsel has our position that the only claim for privilege that exists against the minor beneficiaries is on matters in which the 1985 Trustees are adverse in interest to the children we represent.

But assuming that you can locate these tabs and determine they are not privileged, we could like copies of them.

MS. OSUALDINI: Counsel, could you, please, ask the witness if they have already done that and if they were able to locate same.

MS. HUTCHISON: Certainly.

Q MS. HUTCHISON: Ms. Twinn, have you tried to find these tabs?

A I have tried, but I don't know if -- and I didn't locate.

Q Okay.

A And I don't know if there is any other location possibility.

Q So you are saying you have already made best efforts to locate the tabs to this document?

A I have.

MS. HUTCHISON: I will withdraw my undertaking.

MS. OSUALDINI: Thank you.

Q MS. HUTCHISON: Thank you, Ms. Twinn. It was just a question of whether anyone had searched. Thank you.

(Questioning adjourned.)

(Questioning resumed.)

Q MS. HUTCHISON: If you turn to tab 19 of the documents that I provided to you. And it is an undated document, Twinn 007907?

A Yes.

Q And I apologize, it is described in your Affidavit of Records as being dated 1985. But when I read through the contents of the document it refers to dates all of the way up to 2010, and if you look at Twinn 007910 you will see some dates there into 2010.

So let me give you a minute to take a look at that document, because I am hoping that you can help me with a few things in relation to that document.

A So it is four pages?

Q Yes. The original document has some financial summaries attached as well, but I have just given you the actual typed up document.

Do you have any idea who prepared that document? Have you even seen it before?

A I don't recall.

Q Okay. Do you recall if you received a copy of it while you were a 1985 Trustee, other than by way of the, I'll call it a bit of a data dump where you had access to the large database? Did you actually get a copy of it in a meeting?

A I don't know. I would have to check, and as I say --

Q Do you think that you have records that might help you identify who the author was and/or whether a copy of this document was given to the Trustees at a meeting, or by email?

A The question is do I know that?

Q Do you think that you may have records that would help

you determine those? I mean is there anything else that you can reasonably check?

I will ask this question while you are reading. This is a document that you have both in electronic and hard copy form in the documents that you had access to, that you talked to me about this document collection that you had access to as a 1985 Trustee, and you have it in electronic and hard copy, as I understand, is that right? Is it one of those documents?

A Are you asking if this was from my hard copy or from electronic?

Q I am asking if it was one of the documents in that big collection that you have both in hard copy and electronic?

A I believe so, yes, as a Trustee, my work, m-hm.

Q If this is one of the documents that you have in electronic format I am going to ask you to undertake to check the document properties to tell you if it gives you any insight into who the author was?

MS. OSUALDINI: We can undertake to do that.

A Yes.

MS. HUTCHISON: All right. And I can always ask the question on the undertakings when we get that.

UNDERTAKING NO. 20:

RE REVIEW ELECTRONIC FORMAT OF TWINN DOCUMENT 007910 IN MS. TWINN'S POSSESSION TO DETERMINE WHO THE AUTHOR

OF THE DOCUMENT WAS AND THE DATE.

A It looks to me like this was something relative to the passing work, or work leading into that, right.

Q MS. HUTCHISON: But you don't know today who prepared it?

A I don't know off the top of my head.

Q Okay. Let's turn to tab 24.

MS. OSUALDINI: Can we go off the record for a second.

(Discussion off the Record.)

Q MS. HUTCHISON: So Twinn Document 1006 at tab 24 of that collection, Ms. Twinn.

A Sorry?

Q Twinn 001006?

A Yes, I am there. Affidavit of Paul, Draft.

Q I am just going to ask you a few pretty direct questions here. If you go to paragraph 5 on page 2 there is reference to transcript page 8, Catherine Twinn, at the very end of the paragraph. Do you know if that is the same transcript that we were talking about earlier, the one of the group meeting?

A I don't know.

Q Do you recall if another transcript of an interview with you was made around the history and purposes of the Trust in or around 2011?

A I don't recall. I recall the group interview. And just looking at paragraph 6, transcript page 14, video

narrative.
Q I was about to ask you if you know if that is a reference to the video that we talked about earlier today, Twinn Document 7949, One For All. Do you know?
A Could be.
Q Okay.
MS. OSUALDINI: I don't want you to speculate.
Q MS. HUTCHISON: Ms. Twinn, do you have any way of checking whether or not these references to a transcript are -- well, you do. You have the transcript. I'm going to ask you to undertake to check in the transcript that we have been talking about that we all appreciate may or may not be producible, if any of the references in this Affidavit that are references to your information, and so specifically paragraph 5, paragraph 7, paragraph 16, 17, 18, 19, 20 --
A Sorry, those are all paragraphs that you want --
Q Sorry, in the draft Affidavit, paragraph 27, and then honestly I don't need anything past that. So if it turns out that those are pages in the group interview transcript that we have been discussing, and if your counsel determines that they are not otherwise privileged, we would like to see copies of those pages of the transcript.
MS. OSUALDINI: We will take it under advisement.
UNDERTAKING NO. 21:(UNDER ADVISEMENT)
RE DETERMINE IF ANY OF THE REFERENCES IN

THE AFFIDAVIT AT TWINN DOCUMENT 001006, SPECIFICALLY AT PARAGRAPHS 5, 7, 16, 17, 18, 19, 20 AND 27, ARE PAGES IN THE GROUP INTERVIEW TRANSCRIPT PREVIOUSLY DISCUSSED; IF SO, PRODUCE SAME.

Q MS. HUTCHISON: Ms. Twinn, there is also reference in this draft Affidavit, if you turn to paragraph 9, to a 1982 to '85 document binder?

A Sorry, I am just getting to paragraph 9.

Q It is near the end of paragraph 9. It is above the list, it is right near the end of that paragraph.

A Sorry, you are wanting me to look at the first bullet?

Q Not the bullet actually. Just towards the end of paragraph 9 above the bullet there is a bold reference to 1982-85 document binder, tab 35?

A Right, I see that.

Q Do you recall seeing a document binder with that title?

A I don't recall.

Q Okay. So then you wouldn't know who prepared that binder?

A I would think that it would be Paul Bujold.

Q But do you know?

A From the gathering. I don't know. I just know that Paul is not sure whether he held assets in his name, so that is all part of the same bracket.

Q Yes. Mr. Ewoniak, Paul is not sure, right. In your review of this collection of documents that we have

been discussing that you had as a Trustee, do you remember running across a discreet document that appeared to be a history binder, or a multi-tabbed history binder on the 1982 to '85 Trust?

A I don't recall seeing a documents binder, and it sounds like it has a lot of tabs.

Q Yes, m-hm.

A But I don't recall it.

Q Okay. I don't think that we have a basis for an undertaking there, thank you.

We have talked a couple of times today, Ms. Twinn, about the fact that at various points in time Sawridge First Nation legal fees were paid by the 1985 Trust in relation to the within proceeding?

A Action 2011?

Q 1103 14112.

A Right.

Q Do you have a recollection about how involved, and I'm not talking about Sawridge's lawyers, I'm talking about employees or other representatives of Sawridge, how involved were they in the discussions with the 1985 Trustees about what steps needed to be taken to allow the '85 Trust to distribute to beneficiaries? So I am talking like 2008, 2009.

A How involved was --

Q The Nation.

A I know that Paul Bujold relied on lists of names of

beneficiaries or potential beneficiaries that came from Mike McKinney, and so that was an involvement. I have no recollection of Band employees sitting at Trustee meetings and discussing the issues in relation to beneficiary identification, or.

Q Do you consider Mr. McKinney an employee of the Band?

A Yes, he is. It is my understanding.

Q You have no recollection of him participating in those discussions?

A I think Paul and he had a lot of private conversations, and possibly with other people, and possibly with Doris. But I don't know, like I have no recollection of Band employees sitting at our table.

Q Do you have a recollection of the Trustees authorizing --

A Other than the tax issue that I mentioned in around 2007, 2008.

Q Do you have a recollection of the 1985 Trustees either authorizing or requesting collaboration with the Sawridge First Nation on the issues of beneficiary identification, and regularization of the asset transfer at any point leading up to this proceeding?

A A resolution authorizing it?

Q That would be ideal. I haven't seen that in the minutes. I am wondering if there was something less formal. Do you recall a resolution to that effect?

A I don't recall a resolution to that effect.

Q Certainly if you see one, please let me know. I haven't seen that in your production.

Do you recall any other more informal authorizations?

A Well, there was some -- I am trying to go back now. There is just so much that has gone on here. I recall in a document a comment about Mike McKinney being Roland's man, and that there had to be an accommodation with them. And that was in relation to this whole issue of the beneficiaries under the Trusts. So there was something definitely happening, but I can't say that that was happening at the Trustee table and that I was privy to it.

Q What do you recall about the discussions when the Trustees passed the various resolutions to allow Sawridge First Nation legal fees to be paid in this proceeding?

A What do I recall about that?

Q Yes, what do you recall?

A Well, I know that I had my concerns about that. And I would have to go back and check my notes.

Q Do you have a general recollection of what your concerns were, or did you voice those concerns, I guess, at a meeting?

A I recall being concerned about the payment of the Band's fees, and I recall being a minority.

Q Okay.

A And I recall being ostracized because I wasn't part of the group think.
Q Do you recall the Trustees who were in the majority on that, on those resolutions, expressing why they thought that it was a good idea to pay the Sawridge First Nation's legal fees in the matter?
A Again, I would have to go back to my notes, but it struck me as, you know, it was a done deal. It was ...
Q What was a done deal, Ms. Twinn, the decision to pay?
A The decision to pay, the decision to involve. That there were things going on that I was not privy to.
Q Okay. Going back to Mr. Ewoniak for a moment. Now I understand that after Mr. Ewoniak -- I'm looking at your January 28th, 2020 Affidavit again for a moment. That after he retired from Deloitte he actually took on a position as chair of I take it both the 1986 and the 1985 Trust; is that correct?
A Yes.
Q For a short period of time?
A Yes.
Q And you were obviously active on the Board at that time?
A Yes.
Q Do you recall when Mr. Ewoniak took on the position of chair of the Trust, do you recall him raising any concerns with the other Trustees about the manner in which the assets had been transferred from the 1982

Trust to the 1985 Trust?
A I have no recollection of that.
Q And it is your understanding that Mr. Ewoniak was extensively involved in structuring that transfer?
A Yes.
Q Okay. So his withdrawal as chair had nothing to do with the concern around the '82 to '85 asset transfer, is that fair?
A No, no. As I said, everyone operated on the basis of the Trust's ownership, 1985 Trust's ownership of holdings and related.
Q Because you seem to be the only person in touch with Mr. Ewoniak, I am going to ask you to ask him one additional -- or two additional questions actually. Does he have a recollection in the time after the 1982 to '85 transfer was completed, so after April of '85, up until the time that he retired from Deloitte in 1996, does he have any recollection of being asked to address concerns raised by Sawridge First Nation about the 1982 to '85 asset transfer?
MS. OSUALDINI: We'll take that under advisement.
MS. HUTCHISON: Okay.

UNDERTAKING NO. 22:(UNDER ADVISEMENT) RE INQUIRE OF MR. EWONIAK HIS RECOLLECTION AFTER THE '82 TO '85 TRANSFER WAS COMPLETED, APRIL OF 1985, UP TO THE TIME HE RETIRED FROM DELOITTE

IN 1996, BEING ASKED TO ADDRESS CONCERNS RAISED BY SAWRIDGE FIRST NATION ABOUT THE 1985 TO '85 ASSET TRANSFER.

MS. HUTCHISON: Then does he have any recollection of being approached by Sawridge First Nation about concerns of that nature during his time as chair of the Trust.

MS. OSUALDINI: Take it under advisement.

UNDERTAKING NO. 23:(UNDER ADVISEMENT) RE INQUIRE OF MR. EWONIAK HIS RECOLLECTION OF BEING APPROACHED BY SAWRIDGE FIRST NATION ABOUT CONCERNS RELATING TO THAT ASSET TRANSFER DURING HIS TIME AS CHAIR OF THE TRUST.

MS. HUTCHISON: Okay. Ms. Twinn, I wouldn't want to leave the impression that we will never ask a question again because we are not conducting this questioning for the purposes of every issue in this proceeding, but with a focus on the asset transfer order. So I am going to say that we are adjourning our questioning of you, rather than concluding it, and we may have questions for you on your undertakings. And we will deal with those under the work plan, but I really appreciate your time today and the information that you provided.

A Thank you.

MS. OSUALDINI: I have a very brief direct of my

client.

MS. OSUALDINI QUESTIONS THE WITNESS:

Q MS. OSUALDINI: You will recall that Ms. Hutchison referred you to tab 20 of the materials that she prepared, and to document in your production 002564, and in particular she was referencing you to paragraph 6.4 of that document with reference to interviews being held. And she had asked you whether any lawyers were in attendance and you indicated that you were a lawyer?

A Yes.

Q Can you clarify that comment? Were you counsel to any --

A I am a lawyer, but I was not counsel to any of these entities. I was there as a Trustee. A Trustee who happens to be a lawyer.

Q Thank you.

A And, yeah.

Q Thank you.

A Sorry if that wasn't clear.

MS. OSUALDINI: That was my question.

MS. HUTCHISON: Thank you both.

(Questioning adjourned 3:20 p.m.)

_____

PROCEEDINGS ADJOURNED

_____

Certificate of Transcript

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

Dated at the City of Edmonton, Province of Alberta, this 13th day of March, 2020.

_____

Susan Stelter

Court Reporter

EXHIBITS

UNDERTAKINGS

UNDERTAKING NO. 23:(UNDER ADVISEMENT) 112
RE INQUIRE OF MR. EWONIAK HIS RECOLLECTION OF BEING APPROACHED BY SAWRIDGE FIRST NATION ABOUT CONCERNS RELATING TO THAT ASSET TRANSFER DURING HIS TIME AS CHAIR OF THE TRUST.

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TAB X

Clerk's Stamp:

COURT FILE NUMBER:	1103 14112	
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000, C. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")	
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI as Trustees for the 1985 Sawridge Trust;	
DOCUMENT	**INTERROGATORIES ON MARCH 26, 2020 UNDERTAKING RESPONSES FROM CATHERINE TWINN**	
ADDRESS FOR SERVICES AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Hutchison Law** #190 Broadway Business Square 130 Broadway Boulevard Sherwood Park, AB T8H 2A3 Attn: **Janet L. Hutchison** Telephone: (780) 417-7871 Fax: (780) 417-7872 File: 51433 JLH	**Field Law** 2500 - 10175 101 ST NW Edmonton, AB T5J 0H3 Attn: **P. Jonathan Faulds, Q.C.** Telephone: (780) 423-7625 Fax: (780) 428-9329 File: 551860-8 JLH
LOCATION WHERE ORDER PRONOUNCED	**Edmonton, Alberta**	

INTERROGATORY NO. 1 (arising from UNDERTAKING NO. 8) **page 64**

Please confirm that the Affidavits of Records served to date by Ms. Twinn in this proceeding include all relevant and producible documents on the list that are dated between 1982-1987. Alternatively, please provide the descriptions in the list for all relevant and producible documents dated between 1982-1987 or a redacted version of the list itself that provides this information.

INTERROGATORY NO. 2 (arising from UNDERTAKING NO. 18) page 96

How many pages is the full transcript?

INTERROGATORY NO. 3 (arising from UNDERTAKING NO. 18) page 96

Has the full transcript been withheld on the basis that the other pages are not relevant to this proceeding or on other grounds? If other grounds, please explain.

INTERROGATORY NO. 4 (arising from UNDERTAKING NO. 18) page 96

What is Ms. Twinn's recollection of why she was asked to participate in the meeting, and what she was told about the purpose of the meeting prior to the date it was held? If Ms. Twinn has correspondence referring to the plans to hold the meeting and which contain information regarding the purpose of the meeting, please provide copies.

INTERROGATORY NO. 5 (arising from UNDERTAKING NO. 18) page 96

i.) Is Ms. Twinn aware of any facts that would support the position that the meeting was held in contemplation of litigation?

ii.) If yes, what litigation was being contemplated by the Trustees?

iii.) What is Ms. Twinn's information regarding for whose benefit the contemplated litigation was being considered, and specifically, was the contemplated litigation to be for the benefit of the 1985 Trust's beneficiaries?

INTERROGATORY NO. 6 (arising from UNDERTAKING NO. 18) page 96

Does Ms. Twinn have information or documentation not already produced that differs from the information provided by Mr. Michael McKinney on page 79-81 of the transcript in relation to the $12 million debenture?

1200-18

SAWRIDGE

April 2, 1987

Exhibit D: A For Identification
Date: May 29, 2014
Exam. of: Elizabeth Poitras
Court Reporter: Susan Stelter, CSR (A)

Freeland, Royal & McCrum
Barristers & Solicitors
215 Palomar Building
8204 - 104 Street
EDMONTON, Alberta
T6E 4E6

Attention: Halyna C. Freeland

Dear Sirs:

Re: Elizabeth Poitras
Clara Loyer

Further to your letter of March 31, 1987, I advise that our membership code and related by-law problems are not yet resolved and are at this time the subject of litigation.

I will advise you when the difficulties have been resolved.

Yours truly,

Bruce E. Thom, Q.C.
Executive Director
Sawridge Administration

BET:lhw

CTW000579

Catherine Twinn

From:	Mike McKinney <m.mckinney@sawridgefirstnation.com>
Sent:	Friday, December 10, 2010 2:36 PM
To:	'Donovan Waters'
Cc:	Catherine Twinn; 'Doris Bonora'
Subject:	RE: Sawridge Trusts
Attachments:	Sawridge - lawyers' meeting Nov 10 2010 With McKinney Comments.doc; 1986 Trust Beneficiary Options.docx

I have finally had some time to review most of the materials provided in respect of the Trusts by yourself and Paul Bujold. I have made some comments on your document entitled "Sawridge-lawyers meeting Nov 10, 2010" which are contained in the attachment. Also as requested at the meeting, I have written out the three Options that occurred to me at the meeting. This is a Draft document for consideration.

Michael R. McKinney B.Comm., LLB.
Executive Director/General Counsel
Sawridge First Nation
Box 326
Slavelake, AB T0G 2A0
Phone (780) 849-4331
Fax (780) 849-3446
m.mckinney@sawridgefirstnation.com

From: Donovan Waters [mailto:donovan.waters@shaw.ca]
Sent: Sunday, November 21, 2010 5:46 PM
To: Catherine Twinn; Michael McKinney
Subject: Fwd: Sawridge Trusts
Importance: High

With any luck I have the addresses correct now! DWW

-------- Original Message --------
Subject: Sawridge Trusts
Date: Sun, 21 Nov 2010 16:34:37 -0800
From: Donovan Waters <donovan.waters@shaw.ca>
To: Catherine Twinn <ctwinn@twinnlaw.com>, Doris Bonora <dbonora@rmrf.com>, Michael McKinney <mckinney@sawridgefirstnation.com>

Dear Catherine, Doris, and Mike,

I am in Ottawa from tomorrow (Monday) to the following Monday (29 Nov.), so ahead of my departure I am attaching copies (1) of the minutes of our meeting (I think the copy sent earlier with the others to Catherine must have failed to reach her; screw up in the address, I think), (2) of the Davies Ward opinion concerning the matters that need addressing with the Band Membership Code, and (3) a draft of a trust instrument representing a merger of the 1985 Sawridge Trust with the 1986 Sawridge

Trust. My note is that Catherine had suggested I draft a merged trust. I have essentially kept to the 1986 Trust, because everyone is familiar with that language, and amended only where I thought change was advantageous over the lifetime of the proposed instrument.

While I am in Ottawa I can be reached at <donovan.waters@shaw.ca>, and on my cell 1-250-744-4745 (messages can be left if I am in a meeting or whatever).

Regards,
Donovan

CTW000388

#16

Merry Jane Mendoza

F[illegible]:	Mike McKinney <sawridgeband@telus.net>
Sent:	Tuesday, January 06, 2009 10:54 AM
To:	'Ron Ewoniak'
Cc:	Catherine Twinn; Clara Midbo; Roland Twinn; 'Donna '
Subject:	Beneficiary List
Attachments:	BENEFICIARY ANALYSIS Jan 5 2009 II.xls

Here is the most up to date list of beneficiaries which we have. This list may have errors and omissions as we do not have complete information on all individuals and there may be some interpretation issues.

Donna Please Distribute to Walter and Bertha.

Thanks.

Michael R. McKinney B.Comm., LL.B.
Executive Director/General Counsel
Sawridge Indian Band
Box 326
Slave Lake, AB T0G 2A0
P[illegible] (780) 849-4331
Fax (780) 849-3445
sawrideeband@telus.net

CTW000389

BAND MEMBERS	COUNT	SIVT BENEFICIARIES
Twin, Walter Felix	1	Twin, Walter Felix
L'Hirondelle, Bertha	2	
Twin, Darcy Alexander	3	Twin, Darcy
Neesotasis, Noel Richard	4	Neesotasis, Noel
Potskin, Jennie	5	Potskin, Jennie
Potskin, Jonathon Barrett	6	Potskin, Jonathon
Potskin, Jeanine Marie	7	Potskin, Jeanine
Potskin, Aaron Royce B.	8	Potskin, Aaron Royce
Potskin, Trent Ryan A.	9	Potskin, Trent Ryan
Twin, Yvonne Doris	10	Twin, Yvonne Doris
Twin, Vera Irene	11	
Twin, Winona Nadine	12	
Twin, Everett Justin	13	Twin, Everett Justin
Twin, Jaclyn Daniela	14	Twin, Jaclyn Daniela
Twinn, Paul Henry	15	Twinn, Paul Henry
Twinn, Catherine May	16	Twinn, Catherine May
Twinn, Irene Marie	17	Twinn, Irene Marie
Twinn, Roland Christopher	18	Twinn, Roland
Twinn, Ardell Walter	19	Twinn, Ardell Walter
Twinn, Arlene Theresa	20	
Ward, Margaret Sue	21	Ward, Margaret Sue
Ward, Nathan Alexander	22	Ward, Nathan
Ward, Georgina Rose	23	Ward, Georgina Rose
Twinn, Walter Patrick	24	Twinn, Walter
Twinn, Samuel Louis A.	25	Twinn, Samuel Louis
Twinn, Issac Finley	26	Twinn, Issac Finley
Midbo, Clara	27	
Draney, Frieda	28	
Lindberg, Roseina A.	29	
Poitras, Elizabeth	30	
Potskin, Lillian A.	31	
Ward, Margaret A. Claire	32	
L'Hirondelle, Mary R.	33	
Draney, Brenda Ann	34	
Midbo, David Paul	35	
Midbo, Denise Marie	36	
Midbo, Kristina Gayle	37	
Morton, Deana Irene	38	
Naomi Twin	39	Naomi Twin
Wesley Twin	40	Wesley Twin
Kieran Cardinal	41	Kieran Cardinal
Destin Twin	42	Destin Twin

43 Twinn, Graham
44 Twinn, Clinton
45 Twinn, Hytina
46 Twinn, Roy
47 Twinn, Alexander
48 Twinn, Shannon
49 Twinn, Cody
50 Twinn, Corey
51 Twinn, Chase
52 Twinn, Kristel
53 Twinn, Shelby
54 Twinn, Kaitlin
55 Twin, Rainbow
56 Sarafinchin, Debbie
57 Cheser's Illegit Son
58 Twin, Justice III
59 Twin, Everett Justin IV
60 Twin, Autumn
61 Twin, Star

Sawridge

July 29, 1998

Davies Ward & Beck
Box 63, 44th Floor
1 Canadian Place
Toronto, Ontario
M5X 1B1

ATTENTION: David Ward

Dear Sir:

RE: Treaty 8 and Taxation

Further to our discussion of yesterday, please find attached a map of Treaty 8 upon which we have marked the location of our businesses and reserves. We apologize for the poor quality of this map and will endeavor to get an original of it for you.

The map shows that the majority of the businesses are located within the Treaty 8 area. The only exceptions are our water companies (tax is not a concern with these now or well into the future) and our engineering company. The engineering company is in Calgary (Treaty 7) although they do work on projects in many areas, including Treaty 8. We currently draw annual management fees from this company of close to one million dollars.

The Sawridge Hotel Jasper is most likely within Treaty 8, we base this conclusion on the Treaty 6 area boundary which is incorporated into the Treaty 8 area boundary. The Treaty 6 boundary appears in part to run west up the Athabasca River to Jasper house and then south along the eastern range of the rockies. Our information is that Jasper house is located down stream (north east) from the current town site. The house was located on Jasper Lake, which is in line with the eastern range of the rockies. Our hotel is located in the Jasper townsite which is north west of the Athabasca River, and west of the eastern range of the rockies but east of the central range (the great divide).

Letter, Mike McKinney to David Ward re Treaty 8 and Taxation, 980729

We have also attached a map of our reserve lands which are all located around Slave Lake. We have marked the location of our local businesses on this map as well.

I have noted that while the Treaty 8 area is specifically set out in the treaty, the area is followed by general language which refers to the Northwest Territories (which included the prairie provinces), British Columbia and the Dominion of Canada. This language may help us, but others may read it as only applying to situations where rights, titles and privileges are proven to have existed in these areas at the time of treaty, something that may be presumed for the treaty area, although this is not supported by the parallel construction of these two parts of the treaty.

We have not yet been able to determine if Indians were subject to the drafts for the World Wars. We suspect that they were exempt. Some people have told us that Indians were required to surrender their treaty rights in order to volunteer. This does not appear to be reflected in the Indian Acts of 1906 or 1927 (which applied from 1906 through 1951). These acts clearly contemplated that Indians could be soldiers and that they were to be handled differently than other soldiers - see sections 196 through 199 of the 1906 Act (R.S.C. c.81) as amended by S.C. 1919 c.56, s.3 and S.C. 1922 c. 26, s.2 and section 187-190 of the 1927 Act R.S.C. c. 98 (copies enclosed).

Perhaps you could have a student or researcher research the acts which imposed the drafts to see if Indians were excluded.

We trust that you will find the foregoing helpful. If you require any further information, please do not hesitate to contact us. We look forward to discussing this matter with you further.

Yours truly,

SAWRIDGE BAND

Per: Signed in the Writer's Absence by

for: Michael R. McKinney, B. Comm., LL.B.
Executive Director

smck\lal\treaty 8 and taxation\docs

SAWRIDGE

Exhibit #: D For Identification
Date: May 29, 2014
Exam. of: Elizabeth Poitras
Court Reporter: Susan Stelter, CSR (A)

December 5, 1988

WITHOUT PREJUDICE

Faulkner Rogers
Zwaenepoel & Glancy
Barristers and Solicitors
10129 - 123 Street
Edmonton, Alberta
T5N 1N1

ATTENTION: Mr. Terence P. Glancy

Dear Sir:

RE: Elizabeth Bernadette Poitras v. Walter Twinn et al.

Further to your letter of November 28th, 1988, we wish to advise that we are still awaiting documentation and funds from Indian Affairs. We recently made fresh requests for this information and we have been advised that Ottawa is considering our request. Until our request has been fulfilled, we are unable to deal with the flood of people seeking membership in the Band.

With respect to your demand for per capita distributions, we regret to advise you that the Band has not made any such payments since September 15, 1985.

After we have received the materials and funding requested, we will be preparing membership forms and procedures. We will forward these to you when they are ready. We trust you will find this in order.

Yours truly,

Mike McKinney, B. Comm., LL.B.
Executive Director

MM/dd

SAWRIDGE ADMINISTRATION BOX 326, SLAVE LAKE, ALBERTA TOG 2AO (403) 849-4311 FAX (403) 849-3446

Answers to
Undertaking #s 12, 16, 22, 23
from March 12, 2020 Questioning of
Catherine Twinn

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]

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

ACTION NO. 1103 14112 & FILE NO. 144194

QUESTIONING OF CATHERINE TWINN HELD ON MARCH 12 2020

LIST OF INTERROGATORIES OF CATHERINE TWINN

INT. NO.	UT NO.	PAGE	INTERROGATORY & RESPONSE	STATUS
1.	8.	63	Please confirm that the Affidavits of Records served to date by Ms. Twinn in this proceeding include all relevant and producible documents on the list that are dated between 1982-1987. Alternatively, please provide the descriptions in the list for all relevant and producible documents dated between 1982-1987 or a redacted version of the list itself that provides this information. **RESPONSE: [Apr-17-2020]** Refused. It has not been established that a "list" exists and further, Ms. Twinn has been unable to locate any "list".	Complete
2.	18.	96	How many pages is in the full transcript? **RESPONSE: [Apr-17-2020]** The transcript is 203 pages, excluding indexing information.	Complete
3.	18.	96	Has the full transcript been withheld on the basis that the other pages are not relevant to this proceeding or on other grounds? If other grounds, please explain. **RESPONSE: [Apr-17-2020]** Portions were withheld because they were not requested in the original undertaking.	Complete

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")

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INT. NO.	UT NO.	PAGE	INTERROGATORY & RESPONSE	STATUS
4.	18.	96	What is Ms. Twinn's recollection of why she was asked to participate in the meeting, and what she was told about the purpose of the meeting prior to the date it was held? If Ms. Twinn has correspondence referring to the plans to hold the meeting and which contain information regarding the purpose of the meeting, please provide copies. **RESPONSE: [Apr-17-2020]** Ms. Twinn's recollection is that the purpose of the meeting was to gather together persons with relevant historical knowledge of the Sawridge Trusts for the purpose of preserving that information and creating an information base. At the time the trustees were intending to pass their accounts and it was anticipated this information would be relevant to that process. Ms. Twinn was asked to participate as she was a long serving trustee and had relevant historical knowledge. Enclosed is correspondence Ms. Twinn has located that relates to the planning and purpose of the meeting. **Please see the attached documents in answer to Interrogatory No. 4 numbered: TWN007950 to TWN007972**.	Complete

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

ACTION NO. 1103 14112 & FILE NO. 144194

QUESTIONING OF CATHERINE TWINN HELD ON MARCH 12 2020

LIST OF INTERROGATORIES OF CATHERINE TWINN

INT. NO.	UT NO.	PAGE	INTERROGATORY & RESPONSE	STATUS
5.	18.	96	**i**.) Is Ms. Twinn aware of any facts that would support the position that the meeting was held in contemplation of litigation? ii.) If yes, what litigation was being contemplated by the Trustees? iii.) What is Ms. Twinn's information regarding for whose benefit the contemplated litigation was being considered, and specifically, was the contemplated litigation to be for the benefit of the 1985 Trust's beneficiaries? **RESPONSE: [Apr-17-2020]** As set out in written interrogatory 4, the trustees were intending to pass the accounts of the Sawridge Trusts at that time. That would be the "litigation" being contemplated, although Ms. Twinn did not view this process as litigation, but rather informing the beneficiaries about their Trusts. In addition, the Trustees were contemplating presenting their accounts to the beneficiaries privately and outside a Court process. To the best of Ms. Twinn's recollection there was not any discussion as to for whose benefit the "litigation" would be for, but Ms. Twinn understood her role as a trustee to be to serve the beneficiaries and thus any processes undertaken by the Trustees would be for their benefit. That said, the broader purpose of the meeting was to secure historical information of the Sawridge Trusts for future use and reference, whether for the passing of accounts or otherwise.	Complete

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

ACTION NO. 1103 14112 & FILE NO. 144194

QUESTIONING OF CATHERINE TWINN HELD ON MARCH 12 2020

LIST OF INTERROGATORIES OF CATHERINE TWINN

INT. NO.	UT NO.	PAGE	INTERROGATORY & RESPONSE	STATUS
6.	18.	96	Does Ms. Twinn have information or documentation not already produced that differs from the information provided by Mr. Michael McKinney on page 79-81 of the transcript in relation to the $12 million debenture? **RESPONSE: [Apr-17-2020]** Any conclusive records relating to the debenture, such as the assignment and BCR, have already been produced in this litigation. Ms. Twinn does not have any personal knowledge of the origins, assignment or current status of the debenture.	Complete

The Trustees of the Sawridge Trusts wish to announce that after many years of dedicated service, Catherine Twinn has decided to retire from the Board of Trustees of the Sawridge Trusts. The remaining Trustees would like to recognize and thank Catherine for her many years of service and hard work. Although Catherine has retired, she has agreed to assist with some of the more difficult decisions relating to the 1985 Trust currently before the Courts.

Catherine is particularly grateful to have contributed along with other Trustees, to the development and implementation of the benefits package enjoyed by beneficiaries today and the transition to professional management and an independent Board of Directors for the Sawridge Group of Companies.

In light of Catherine's retirement, a new trustee position has become available that will be filled by an independent trustee. Catherine's replacement is scheduled to be in place no later than 6 April 2018. The Trustees and Catherine are pleased to announce a new Trustee Board policy that will provide for two of the five trustee positions being held by independent trustees and terms that all trustees believe will promote an effective and qualified Board of Trustees, such as limiting trustee appointments to a maximum six year term.

The remaining trustees and staff appreciate Catherine's dedication and commitment to the Sawridge Trusts and wish her the best of luck in her future endeavours.

19 March 2018

Exhibit D: -1
Date: March 12, 2020
Exam of: Catherine Twinn
Court Reporter: Susan Stelter, CSR(A)

228 983 [illegible] Alberta Regulation 538/82 THE LAND TITLES ACT Form 7 Section 39, 108

DISCHARGE BY MORTGAGEE

CANADA
PROVINCE OF ALBERTA

To the Registrar of the NORTH

Alberta Land Registration District:

I, (We) WALTER P. TWINN, as Trustee of the Sawridge Indian Band,

the mortgagee(s), ~~[illegible]~~ do hereby acknowledge to have received all the money to become due under the mortgage ~~[illegible]~~ made by SAWRIDGE ENTERPRISES LTD.

to WALTER P. TWINN, as Trustee of the Sawridge Indian Band,

which mortgage ~~[illegible]~~ was registered in the LAND TITLES OFFICE for the North Alberta Land Registration District on the 14th day of March A.D. 19 85, as instrument No. 852050951

that the Mortgage has not been transferred; and that the same is wholly discharged.

Exhibit D: A For Identification
Date: March 12, 2020
Exam of: Catherine Twinn
Court Reporter: Susan Stelter, CSR(A)

IN WITNESS WHEREOF I (We) have hereunto subscribed my (our) name(s) ~~[illegible]~~ this 22 day of October A.D. 1986.

SIGNED by the above named

in the presence of

Anne S. Dion Q.C.

WALTER P. TWINN

0032443307 REGISTERED 2003 11 15
DISC - DISCHARGE
DOC 1 OF 1 DRR#: 1321183 ADR/SFERNAND
LINC/S: 0017646373 +

to

SAWRIDGE ENTERPRISES LTD.

Discharge by Mortgagee

AFFIDAVIT OF EXECUTION

CANADA)
)
PROVINCE OF ALBERTA)
)
TO WIT:)

I, Bruce E. Thom

of EDMONTON

in the Province of Alberta

MAKE OATH AND SAY:

1. I was personally present and did see

WALTER P. TWINN

named in the within instrument, who is (are) personally known to me to be the person(s) named therein, duly sign and execute the same for the purpose(s) named therein.

2. That the same was executed at EDMONTON in the Province of Alberta and that I am the subscribing witness thereto.

3. That I know the said person(s) and he (she, each) is in my belief of the full age of eighteen years.

Bruce E Thom

SWORN before me Darren Becker

at EDMONTON
in the Province of Alberta
this 22nd day of October
A.D. 1986.

DARREN BECKER
BARRISTER & SOLICITOR
A Commissioner for Oaths for Alberta

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

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

May 4, 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 your correspondence of April 15, 2020, please find enclosed our client's responses to the written interrogatories.

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)
cc/ Shelby Twinn (s.twinn@live.ca) 00144194 - 4150-7693-0084 v.1

Archived: Monday, 30 November 2020 2:50:22 PM
From: Crista Osualdini
Sent: Thu, 26 Mar 2020 17:00:55
To: Janet Hutchison
Cc: David Risling
Subject: FW: Questions - I was asked to ask you by the Public Trustee
Sensitivity: Normal

Please find attached the response that was received in relation to the requests made of Mr. Ewoniak.

Crista Osualdini | Partner | direct 780.482.9239 | toll free 1.800.567.9200 | fax 780.733.9723
McLennan Ross LLP | www.mross.com | Biography | COVID-19 Resources Centre | Member of Meritas
600 McLennan Ross Building, 12220 Stony Plain Road, Edmonton, AB T5N 3Y4

From: Wared, Arash <awared@deloitte.ca>
Sent: Thursday, March 26, 2020 3:05 PM
To: Catherine Twinn <ctwinn@twinnlaw.com>
Subject: RE:Questions - I was asked to ask you by the Public Trustee

Ms. Twinn:

As you are aware, Ron is the former partner of Deloitte LLP ("Deloitte") and is not currently affiliated with Deloitte. Moving forward, any questions related to any Deloitte engagement should be directed to the undersigned.

Deloitte has a professional obligations to protecting its client confidentiality and under no circumstances would be willing to voluntarily share any information relating to its current or former clients with a third party. Further, we understand that there is an ongoing litigation involving the Trusts. Accordingly, Deloitte will NOT be in a position to comment on any of its current or former engagements unless there is a legal or regulatory requirements to do so.

Should you have any questions, please do not hesitate to contact me.

Regards,

--
Arash Wared
Legal Counsel | Office of the General Counsel
D: +1 (416) 775 4776 | M: +1 (647) 926-9240
awared@deloitte.ca | deloitte.ca
--

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?

Redacted

Mike Mirasol

From: Paul Bujold <Paul@sawridgetrusts.ca>
Sent: Wednesday, March 03, 2010 8:42 AM
To: Doris Bonora; Eileen Key
Subject: RE: Fw: Valuation

Doris,

Just to clarify. The debentures are owed to the Trusts not the Band. Once the money or asset was transferred from the Band to the Trusts by BCR, there is a complete separation between the Trusts and the Band finances and nothing will flow back from the Trusts to the Band.

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

>>> Eileen Key <Eileen.Key@mnp.ca> 3/2/2010 11:55 AM >>>
Hi Paul

I thought you might be interested in the attached. This is the summary of the valuations that have been prepared by John McNutt, based on recent formal valuations, and applying similar methodologies for properties for which no valuations have been performed. It supports the $150 million value that has been mentioned in the past.

The top portion assumes that the f/s values for all accounts receivable, etc approximate their market value. Recorded liabilities (with the exception of the debentures owing to the Trusts) have been netted against the estimated Dec08 fair market values for the properties, to arrive at a net asset position for each of the 2 holding companies. These net asset positions would then represent the underlying value supporting the debentures owing to the trusts, which had balances of $33,781,617 and $82,712,143 respectively as at Dec 31/08.

Please note that the debenture owing to the Sawridge Trust of $82,712,143 is supported by assets of 352736 Ab Ltd with a net value of $54,790,615, so there is a shortfall in this Trust, whereas the debenture owing to the Sawridge Inter Vivos Trust of $33,781,617 is supported by the assets of Sawridge Holdings Ltd which have a net value of $113,690,080. As you can see, there is some disparity between the two trusts and the underlying assets. I'm not sure what this means from a legal perspective, given that the 2 trusts have different beneficiaries.

Just thought I'd share this information with you, so you get a sense of where the values of the companies are currently in relation to the amounts advanced from the trusts over the years.

John McNutt made a comment to me yesterday that we get an understanding of the reasons behind why certain transactions were undertaken. From what he understands, many of the assets transferred into the Sawridge companies from the Band (presumably using the Trusts as a vehicle by which to transfer the assets) were done so for tax reasons. We'll need to try to get an understanding of this from Mike McKinney and from Deloitte's, as it could provide an explanation for why certain transactions were undertaken over the years.

I'll get back to you on my questions later this week.

Thanks!

Eileen Key, CA
SENIOR MANAGER, ASSURANCE

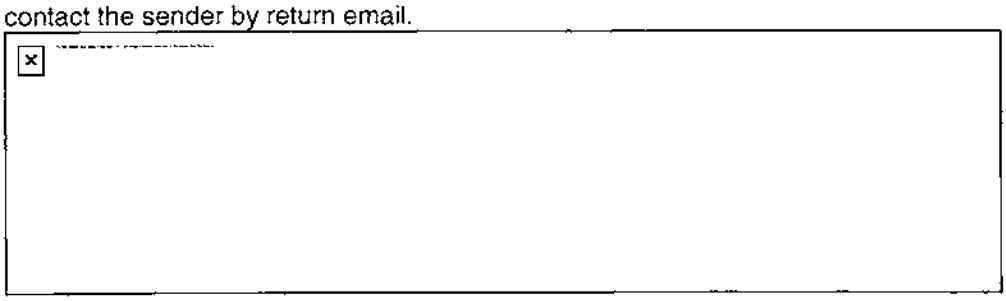
DIRECT 780.453.5369
FAX 780.454.1908
Suite 400
10104 - 103 Avenue NW
Edmonton, AB T5J 0H8
eileen.key@mnp.ca
mnp.ca

MEYERS NORRIS PENNY LLP

Member of Praxity, AISBL
Global Alliance of Independent Firms

----- Forwarded by Eileen Key/Edm/mnp on 02/03/2010 11:01 AM -----

From: John Macnutt <JMacnutt@Sawridge.com>
To: "eileen.key@mnp.ca" <eileen.key@mnp.ca>
Date: 01/03/2010 01:42 PM
Subject: Valuation



Mike Mirasol

From: Paul Bujold <Paul@sawridgetrusts.ca>
Sent: Monday, February 22, 2010 9:11 AM
To: Catherine Twinn
Subject: RE: Questions for 'Historical' Interview

The computers have a DVD player.

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

From: Catherine Twinn [mailto:ctwinn@twinnlaw.com]
Sent: February-22-10 9:02 AM
To: Paul Bujold
Subject: RE: Questions for 'Historical' Interview

Do you have a DVD player at the office? I will bring the DVD today for Andrew Ross.

Catherine M Twinn
Ph: (780) 849-4319
Fax: (780) 805-3274
Email: ctwinn@twinnlaw.com
Mailing Address: P.O. Box 1460
Slave Lake, Alberta
T0G 2A0

From: Paul Bujold [mailto:Paul@sawridgetrusts.ca]
Sent: Monday, February 22, 2010 8:55 AM
To: Catherine Twinn
Subject: RE: Questions for 'Historical' Interview

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Thanks

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

From: Catherine Twinn [mailto:ctwinn@twinnlaw.com]
Sent: February-22-10 8:14 AM
To: Mike McKinney; Paul Bujold; Doris Bonora; Eileen Key
Subject: RE: Questions for 'Historical' Interview

February 22, 2010

Good Morning,

RE: Sawridge Economic Development History

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What are your thoughts?

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

Mike Mirasol

From: Paul Bujold <Paul@sawridgetrusts.ca>
Sent: Monday, March 01, 2010 10:20 AM
To: Mike McKinney; John Macnutt; Catherine Twinn
Cc: Doris Bonora; Eileen Key
Subject: RE: History of the Sawridge Trusts Interview(s)

Thanks, Mike. The team managing the process talked about the 'deposition' versus 'discovery' approaches and felt that we wanted something more interactive. By providing the questions a bit ahead of time, you will still be able to prepare a bit but we are also interested in your impressions, judgements about why certain things were done, etc. As well as the facts, and a chronological development of the events.

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

From: Mike McKinney [mailto:MMcKinney@Sawridge.com]
Sent: March-01-10 10:15 AM
To: Paul Bujold; John Macnutt; Catherine Twinn
Cc: Doris Bonora; Eileen Key
Subject: RE: History of the Sawridge Trusts Interview(s)

Paul

Was there any thought given to letting us answer the questions in writing first. This certainly would seem to be more cost effective and efficient. I had suggested this a month ago and it appeared that Catherine agreed with this suggestion. Please see the email trail copied below. If you still feel that a 'discovery' process is a better process, I can advise that the dates in March which are currently open for me (subject to other bookings arising) are:

Mar 2-5 (will be going to Slave Lake one of these days- not yet known which one)
Mar 10-12
Mar 15-17
Mar 29

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Sent: Tuesday, February 02, 2010 2:34 PM
To: Mike McKinney; Paul Bujold; Doris Bonora; Eileen Key
Subject: RE: Questions for 'Historical' Interview

I agree with Mike's suggestion.

I am concerned about process ridden costs.

Catherine M Twinn
Ph: (780) 849-4319
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Sent: Monday, March 01, 2010 9:15 AM
To: Mike McKinney; John Macnutt; Catherine Twinn
Cc: Doris Bonora; Eileen Key
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I would like to set up a time for interviews to develop the history of the trusts as far back as you can remember. Catherine and Mike should be able to provide the distant history and all of you should be able to provide more recent history. We have developed a set of questions which I will provide prior to the interview session. The questions will not

be provided long in advance because we want an interactive conversation not a deposition. We feel that responses to the written questions will likely provoke supplementary questions. We will have a court reporter recording the meeting and providing us with a transcript.

Can you give me times in March when you would be able to spend at least four hours without interruption? We may need a couple of sessions to get through the entire history so more than one date would be appreciated. Responses as soon as possible would be appreciated.

Paul Bujold
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Mike Mirasol

From: Paul Bujold <Paul@sawridgetrusts.ca>
Sent: Thursday, April 29, 2010 11:10 AM
To: Catherine Twinn
Subject: Re: Questions for Historical Interviews

No i only have the video you produced I don't know if these are different videos.

Paul Bujold-Sent from my iPhone

On 2010-04-28, at 3:39 PM, "Catherine Twinn" <ctwinn@twinnlaw.com> wrote:

> Paul,
>
> There is a Video I produced in the early 1990's with historical interviews, shortly after Walter was called into the Senate.
>
> Do you have a copy and would it be helpful if this were shown?
>
> C

Catherine M Twinn
Ph: (780) 849-4319
Fax: (780) 805-3274
Email: ctwinn@twinnlaw.com
Mailing Address: P.O. Box 1460
Slave Lake, Alberta
T0G 2A0

From: Paul Bujold [mailto:Paul@sawridgetrusts.ca]
Sent: Wednesday, April 28, 2010 3:18 PM
To: Catherine Twinn; Doris Bonora; Eileen Key; John MacNutt; Mike McKinney; Ron Ewaniuk
Subject: Questions for Historical Interviews

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

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TAB Y

HUTCHISON LAW

Our File: 51433 JLH

SENT BY EMAIL ONLY

March 30, 2020

Dentons Canada LLP
2500 Stantec Tower
10220 - 103 Avenue NW
Edmonton, AB T5J 0K4

Attention: Doris Bonora Q.C. and Michael Sestito

McLennan Ross LLP
600 McLennan Ross Building
12220 Stony Plain Road
Edmonton, Alberta T5N 3Y4

Attention: Crista Osualdini and Dave Risling

Parlee McLaws LLP
10175-101 Street NW,
1700 Enbridge Centre
Edmonton, AB T5J 0H3

Attention: Edward Molstad, Q.C. and Ellery Sopko

Shelby Twinn
9918-115 Street
Edmonton, AB T5K 1S7

Dear Mesdames and Sirs:

Re: In the Matter of the Sawridge Band Inter Vivos Settlement – Court of Q.B. Action No. 1103 14112

We are writing by way of follow up to the counsel teleconferences held on March 23 and 26, 2020. Our discussions on both dates included a dialogue around the Trustees' and the SFN's position on privilege issues, in particular, their claims of privilege in relation to documents produced by Ms. Twinn and in relation to her evidence on questioning.

As we understood the positions taken by the Trustees and SFN, they do not intend to bring any interlocutory applications by the April 1, 2020 deadline in the litigation plans to protect their claims

#190 Broadway Business Square, 130 Broadway Boulevard, Sherwood Park, Alberta, T8H 2A3
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Email: jhutchison@jlhlaw.ca Website: www.jlhlaw.ca

of privilege or to pursue their positions that the March 12, 2020 questioning was not permitted under the *Alberta Rules of Court*.

As we advised, the OPGT takes the position that if the Trustees or the SFN oppose the use of Ms. Twinn's evidence (including answers to undertakings) on questioning or the use of any documents she has produced which are relevant to the issues in the Asset Transfer Order application, they must proceed with an application by April 1, 2020 (or such other date as counsel may agree). The OPGT's correspondence of March 10, 2020 also spoke to the OPGT's position on these matters.

We understood counsel for the Trustees and the SFN to suggest that they could not know what documents the OPGT would rely on for the May 19, 2020 hearing until after briefs are filed. We advised in the discussions that the OPGT had made clear documents it considered relevant and admissible in the course of the Bujold and Twinn questionings. However, in order to remove the potential for confusion, we are writing to provide a list of the documents and evidence provided by Catherine Twinn in this proceeding that the OPGT expects to refer to in the May 2020 submissions.

We note this list is not intended to include the "Excluded Documents" as defined by the 2018 Privilege Order or other evidence voluntarily provided by the SFN or the Trustees. In relation to the Excluded Documents, to the extent there may have been any claims of privilege available, that privilege has been lost or waived. We also refer counsel to our March 10, 2020 correspondence in this regard.

In relation to the materials that the OPGT relies on which fall into the category of "Filed Documents" under the 2018 privilege order, or which may be subject to the two subsequent privilege orders, the evidence the OPGT expects to refer to in the course of the May 2020 submissions is as follows:

1.) Any documents, affidavits, exhibits or transcript references relied upon in the OPGT's written submissions filed to date;

2.) The Transcript of Catherine Twinn's March 12, 2020 questioning, included marked exhibits;

3.) Ms. Twinn's March 26, 2020 Answers to Undertakings;

4.) The package of documents provided to all counsel at both Mr. Bujold's and Ms. Twinn's questioning, containing the more complete version of the exchange of correspondence between Mr. Cullity and Canada on the capital and revenue funds issues (copy attached);

5.) Catherine Twinn's Second Supplemental Affidavit of Records, sworn December 18, 2019 (including the records themselves);

6.) Catherine Twinn's affidavit dated January 24, 2020 (filed January 28, 2020)

7.) If not otherwise included above, the following documents from Catherine Twinn's Affidavits of Records:

- TWN 00256
- TWN 00434
- TWN 01006-1020
- TWN001023
- TWN 01151-1196
- TWN 01611
- TWN 02214-02218
- TWN 02291-2300
- TWN002321-TWN002326
- TWN 02378
- TWN002561-TWN002567
- TWN 07805-7810
- TWN 07810
- TWN 07881-7883
- TWN007886
- TWN 07890-TWN 07893
- TWN 07903, 7904, 7905

- TWN007907-TWN007910
- TWN 07944-07945

It is the OPGT's position that with this information the Trustees and the SFN are now in a position to proceed with any applications they consider advisable pertaining to privilege issues and should do so. This is necessary in order for the OPGT to know what evidentiary material it may rely on at the hearing. It will also ensure the hearing itself is devoted to the substantive issues rather than being sidetracked on questions of admissibility of evidence.

We note that while our discussions last week were focused on the existing litigation plan deadlines, and those references continue in this correspondence, the OPGT is very willing to accommodate reasonable extensions to the April 1, 2020 deadline should counsel for the SFN or the Trustees required additional time to prepare and file their applications.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
JLH/cm

cc: Client

cc: J. Faulds, Q.C., *Field Law*

TAB Z

HUTCHISON LAW

Our File: 51433 JLH

SENT BY EMAIL ONLY

April 14, 2020

Dentons Canada LLP
2500 Stantec Tower
10220 - 103 Avenue NW
Edmonton, AB T5J 0K4

Attention: Doris Bonora Q.C. and Michael Sestito

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Dear Mesdames and Sirs:

Re: In the Matter of the Sawridge Band Inter Vivos Settlement – Court of Q.B. Action No. 1103 14112

We are writing in response to the correspondence from Parlee, both dated April 6, 2020 and from Dentons, dated April 1 and 6, 2020.

Parlee's April 6 Information Request

We note the OPGT is not aware of any basis on which the SFN could "require" the requested information in relation to the Asset Transfer Consent Order application. In particular, we note the SFN failed to bring any applications prior to April 1, 2020, as required by the Litigation Plan. The

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OPGT will treat the SFN letter as an informal request. Before responding we would ask the SFN to advise:

a.) As to the relevance of the information to the Asset Transfer Consent Order application; and,

b.) Given the potential privacy issues, how the SFN intends to utilize the information?

Once we hear further from the SFN on the above, we will consider the request further.

Denton's letters of April 1 and 6/ Parlee's letter of April 6

In the circumstances, including the contents of the above letters and the current restrictions on access to Court resources, we advise as follows:

1.) Denton's letter of April 1, 2020 contains a number of corrections, clarifications and amendments to the answers to undertakings of Mr. Bujold. Kindly provide us with amended answers on which the OPGT may rely.

2.) We appreciate Mr. Sestito's acknowledgement that the Litigation Plan did provide for the OPGT to question Mr. Bujold on his undertakings. Given that the Trustees' positions leave little prospect for responsive answers without an extensive application, the OPGT will not be Questioning Mr. Bujold on his answers to undertakings prior to May 19 but reserves its right to do so at a later date, particularly if the current schedule is changed by the Court.

3.) The OPGT does not intend to pursue, prior to May 19, any applications arising from the questions and undertakings that were refused during Mr. Bujold's Questioning, including on the grounds of privilege, but reserves its right to do so at a later date. Specifically, the OPGT takes issue with the Trustees' positions concerning claims of privilege, including maintaining claims of privilege without establishing an evidentiary basis for withholding information from the beneficiaries of the 1985 Trust.

4.) The OPGT remains of the view that any privilege issues raised by the SFN or Sawridge Trustees concerning the evidence the OPGT and Ms. Twinn have indicated they will rely

on in the Asset Transfer Consent Order application should be addressed prior to the hearing. We refer you to our previous correspondence in that regard. We note the transcript reference attached to Parlee's correspondence of April 6, 2020 refers to the Court deciding matters of relevance at the hearing and does not assist on the current dialogue about addressing privilege issues prior to the hearing. Accordingly:

a. In the event the May 19 date is adjourned as a result of the Covid-19 closures, the OPGT takes the position that any revised litigation plan should provide a separate date, in advance of the substantive hearing, to deal with privilege issues.

b. Should the Asset Transfer Consent Order application hearing proceed on May 19, the OPGT repeats its suggestion of March 26, 2020 that the parties and intervener agree to time limits for their respective oral submissions. This will ensure the Trustees' and SFN's privilege issues do not detract from the other parties' opportunity to speak to the substantive application.

c. The OPGT would also suggest that the Trustees and the SFN should advise the Court, well in advance of the Asset Transfer Consent Order application hearing, of their intention to argue the privilege issues during the course of the main hearing.

5.) Denton's letter of April 1, 2020, asserts the May 10, 2010 transcript was prepared in anticipation of litigation. The OPGT has yet to have an opportunity to question Mr. Bujold on that transcript, but reserves the right to do so. The position raises some important questions that merit further discussion. If the transcript was, as you assert, prepared in contemplation of litigation for whose benefit was that litigation? If it was for the benefit of the 1985 Trust beneficiaries then there is no basis for a claim of privilege against them. If it was not for the benefit of the 1985 Trust beneficiaries, whose benefit were the Trustees pursuing? Given the serious nature of our concerns our client reserves its right to pursue these matters in the future.

6.) We do not agree with the Trustees suggestion that the OPGT's production application and recent Questioning have "yielded nothing substantial" and delayed the proceedings. While

the Trustees' positions vis a vis the 1985 Trust beneficiaries' rights to information held by the Trust may have reduced the scope of the evidence that will be made available to the Court, the application and Questioning yielded both critical evidence and greater clarity on several fronts. The OPGT will rely on the additional evidence its further submissions.

We look forward to hearing from you concerning the foregoing.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
JLH/cm

cc: Client

cc: J. Faulds, Q.C., *Field Law*

TAB 1

Simonelli v. Ayron Developments Inc., [2010] A.J. No. 1000

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Calgary

A.G. Park J.

Heard: January 22, 2010.

Judgment: September 3, 2010.

Docket: 0401 12232

Registry: Calgary

[2010] A.J. No. 1000 | 2010 ABQB 565 | 34 Alta. L.R. (5th) 341 | 506 A.R. 50 | 2010 CarswellAlta 1753 | [2011] 3 W.W.R. 140 | 192 A.C.W.S. (3d) 1343

Between Giulio Simonelli and Elbow Lake RV Club Ltd., Plaintiffs, and Ayron Developments Inc., Doug Chaluk, 934619 Alberta Ltd., Jim Ona, and Vantage Ranching Ltd., Defendants

(178 paras.)

Case Summary

Civil litigation — Civil procedure — Injunctions — Interlocutory or interim injunctions — Stay or revocation of interim injunction — Quia timet injunctions — Preservation of property — Mareva injunctions — Application by defendants for order vacating order prohibiting defendant corporation from dealing with its property or entering into contracts without written agreement of all parties allowed — Parties were beneficial owners of corporation — Plaintiff alleged defendants were carrying on business of corporation without him — In 2004, plaintiff obtained preservation order against defendants — Order was interim order — Court had jurisdiction to vacate it on its merits — No basis for continuing order — No conditions for maintaining Mareva injunction, proprietary order or quia timet injunction — No basis for continuing attachment order.

Application by the defendants for an order vacating an order prohibiting the defendant Aryon Developments from dealing with its property or entering into any contracts without the written agreement of all of the parties. Aryon Developments was beneficially owned by the three parties to the actions, Simonelli, Ona and Chaluk, through their respective corporations. Simonelli alleged that Ona and Chaluk were carrying on the business of Aryon without providing information to him or soliciting his agreement. In 2004, Simonelli obtained the preservation order, which prohibited Aryon from dealing with its property without approval and froze Aryon's assets.

HELD: Application allowed.

There was no serious issue to be tried with respect to the breach of contract claims in the statement of claim. Simonelli alleged sufficient facts to base a claim for relief from oppression. The 2004 order was an interim order which the court had jurisdiction to vacate or vary on its merits. If the order was in the nature of a Mareva injunction, the conditions for

continuing the order on that basis did not exist. The conditions for a proprietary order did not exist. Simonelli did not establish a strong prima facie case based on oppression. There was no evidence that Simonelli would suffer irreparable harm. The balance of convenience favoured vacating the order. There was no basis for continuing the order as a quia timet injunction. If the order was an attachment order, there was no basis for continuing it.

Statutes, Regulations and Rules Cited:

Alberta Business Corporations Act, RSA 2000, c. B-9, s. 1(jj), s. 101, s. 107(g), s. 146, s. 242, s. 242(3), ss. 242(3)(a) to (q)

Civil Enforcement Act, RSA 2000, c. C-15, s. 17, s. 17(1)(a), s. 17(2), s. 17(2)(b)(ii), s. 17(4), s. 17(8)

Rules of Court, Rule 390, Rule 390(1), Rule 390(2), Rule 467

Counsel

Robert Simpson, Q.C., for the Plaintiffs.

Emi Bossio, for the Defendant, Ayron Developments Inc.

C. Michael Smith, for the Defendants, Doug Chaluk and 934619 Alberta Ltd.

Reasons for Judgment

A.G. PARK J.

1 The Defendants apply for an order vacating or varying an order granted by this Court on August 13, 2004 enjoining and prohibiting Ayron Developments Inc. from dealing with its property or entering into any contracts without the express written agreement of all three individual parties to this lawsuit or a further order of this Court.

Background

2 The parties are involved in a number of lawsuits, including the within action. The facts surrounding each lawsuit provide context for the issues to be decided in this case.

The AS4 Action

3 In late 2002 or early 2003, the Plaintiff, Giulio Simonelli ("Simonelli"), and the Defendants, Doug Chaluk ("Chaluk") and Jim Ona ("Ona"), entered into an informal, oral, joint venture agreement to build airplane hangars at Springbank Airport, west of Calgary. They pursued this joint venture through a corporation, Ayron Developments Inc. ("Ayron"), which was, at all material times, beneficially owned by the three individual parties in this action through their respective corporations as follows: Elbow Lake RV Club Ltd. ("Elbow Lake") was the nominee shareholder of Simonelli and owned 40 percent of Ayron's shares; 934619 Alberta Ltd. ("934619") was the nominee shareholder of Chaluk and owned 40 percent of Ayron's shares; and Vantage Ranching Ltd. ("Vantage") was the nominee shareholder of Ona and owned 20 percent of Ayron's shares.

4 Ayron and the Calgary Airport Authority entered into a construction lease in which Ayron agreed to build airplane hangers on lands at the Springbank Airport ("the Springbank property"). Ayron registered its leasehold interest at the Land Titles Office. The hangars were built and sublet to a number of different parties.

5 The joint venture agreement between Simonelli, Chaluk and Ona was spawned by Ona's wish to construct an aircraft hangar for his own purposes. However, when Ona contacted Simonelli to obtain a cost estimate, it was determined that the cost of constructing one hangar was too high. Ultimately, Simonelli, Ona and Chaluk agreed to jointly invest in the construction of three buildings and to sell or sub-lease hangar space in the buildings, thereby lowering the per unit cost for a hangar and providing them with the opportunity to sell or sub-lease the hangar space at a profit. Under the joint venture agreement, Simonelli was responsible for constructing the hangars, and he did so through AS4 Steel Ltd. ("AS4"), a corporation in which he had a partial share ownership interest. Chaluk was responsible for the day-to-day operations of Ayron. Ona was responsible for marketing the hangars and, at all material times, he was Ayron's sole director.

6 Prior to and during the time when the hangars were being constructed, Ona or his corporation, Vantage, provided Ayron with various sums of money, totalling at least $130,000, which sums were deposited into Ayron's bank account. Although it is unclear, it appears that these funds were provided as startup capital, loans and payments for a hangar space and that it was intended that a hangar space would eventually be transferred to Ona or Vantage, in return for these payments. It is not disputed that a hangar space was transferred to Ona or Vantage, and according to Ayron's records this occurred sometime in 2003.

7 AS4 constructed the hangars, but prior to their ultimate completion, disputes arose between Simonelli on the one hand, and Ona and Chaluk on the other, regarding payments for, and alleged deficiencies in, the construction.

8 On March 17, 2004, AS4 filed a builders' lien against the Springbank property, claiming $425,000 owing. On March 26, 2004, AS4 commenced a civil action against Ayron alleging, among other things, that it was owed approximately $525,000 for construction, management, interest and damages. In July 2004, AS4 filed a certificate of *lis pendens* for both the builders' lien and civil actions. Ayron defended the civil action and filed a counterclaim alleging, among other things, that AS4 owed Ayron approximately $1.5 million in damages as a result of deficiencies in construction, billing and payment errors. This civil action is referred to herein as the "AS4 Action".

Lienholders and Holdback Actions

9 Other contractors and subcontractors involved in the hangar construction filed liens against the Springbank property (the "Lienholders' Actions").

10 Third parties to whom the hangars had been subleased held back payments for the hangars on the basis of alleged deficiencies, and Ayron became involved in litigation with these parties (the "Holdback Actions").

The Within Action

11 The case at bar was commenced on August 6, 2004. The statement of claim alleges that the Plaintiffs are being prejudiced because the Defendants, Chaluk and Ona, are carrying on the business of the joint venture and Ayron without providing information to or soliciting the agreement of Simonelli, contrary to the joint venture agreement. The Plaintiffs claim relief for, among other things, an accounting in respect of the business of Ayron; judgment in damages of $150,000 for any loss or damages sustained by the joint venture as a result of the Defendants' conduct; and an order "in the nature of a Preservation Order, enjoining and prohibiting the Defendants from making of any contracts, entering into on [sic] any agreements, making any payments, transferring and selling any interest in Land [the Springbank property], and signing any documents on behalf of Ayron or the Joint Venture, or in respect of the Lands, without the express written agreement of [Simonelli, Chaluk and Ona] or further Order of the Court". Ona and Vantage filed a statement of defence on August 31, 2004. Ayron filed a statement of defence on December 13, 2005. Chaluk filed a statement of defence on June 14, 2005.

August 13, 2004 Proceedings

12 On August 6, 2004, at the same time that the statement of claim was filed in the within action, the Plaintiffs also filed a Notice of Motion and supporting Affidavit of Simonelli applying for, among other things, an order directing the Defendants to provide an interim accounting in respect of all of the business of Ayron; an order, in the nature of a Preservation Order, the description of which mirrored that of the preservation order sought in the statement of claim; and an order directing the Registrar of the South Alberta Land Titles Office to register any order obtained against the interest of the Defendants in the Lands (the Springbank property) and not to register any disposition of transfer of the Lands by the Defendants except in compliance with the order applied for.

13 This application was heard in justice chambers on August 13, 2004 by Justice K. Horner, and on the parties' consent, Justice Horner ordered that; 1) the time for bringing the application was abridged; 2) "the Defendants, and the Plaintiffs, and any of them, be enjoined and prohibited from making of any contracts, entering into on [sic] any agreements, making of any payments, transferring and selling any interest in Land [the Springbank property] on behalf of Ayron Developments Inc., and signing any documents on behalf of or in respect of Ayron Developments Inc., without the express written agreement of [Simonelli, Chaluk and Ona] or further Order of the Court"; and 3) the application be "otherwise adjourned to Thursday, August 26, 2004 at 10:00 a.m. without prejudice to the right of any party to bringing any application before the Court in the interim." ("the Order" or "the 2004 Order").

14 The 2004 Order had the effect of freezing all of Ayron's assets, which primarily consisted of approximately $500,000 in Ayron's HSBC bank account ("the HSBC account") and Ayron's Springbank property, and preventing Ayron from carrying on business. This application involves a dispute over the nature and effect of that Order.

15 The Order was prepared by Plaintiffs' counsel at that time. The transcript of the application proceedings states that Plaintiffs' counsel advised the court that the motion was for "an application in the nature of an injunction", that all counsel for the Defendants had consented to it, and that "[b]asically there's a term of the order that no one deal with the assets of the corporation or make any contracts in respect to that corporation, and to have the matter go over by consent on adjournment to Thursday, August 26th."

16 The Plaintiffs argue that the 2004 Order was a final order; that, as a result, this Court is *functus officio* and lacks jurisdiction to vacate it; and that although clause two of the Order states that it can be varied by "further Order of the Court", this jurisdiction to vary is very limited.

17 The Defendants argue that the 2004 Order is an interim order in the nature of an attachment order or Mareva injunction; that its merits have never been argued and that, as a result, this court has the jurisdiction to hear and decide its merits; and that it has no merit and should be vacated or, alternatively, varied.

Subsequent Proceedings and Orders

18 The 2004 Order provided that it was otherwise adjourned to August 26, 2004 without prejudice to the right of any party to bring any application before the court in the interim. On August 26, 2004, the chambers justice adjourned the matter to September 1, 2004.

19 On September 1, 2004, the matter came before me in chambers, as well as an additional application for, among other things, an order that all parties provide the documentation required for the preparation of an interim accounting by Ayron and that an interim accounting be provided. An order to that effect was granted. The order expressly states that "any other matters are adjourned to Friday, September 17, 2004." The proceedings record indicates that the "injunction order" was adjourned *sine die*, and the transcript of the proceedings does not indicate that the matters in the 2004 Order were addressed.

20 On September 13, 2004, both the AS4 Action and the within action were placed before me under case management.

21 On September 17, 2004, the above matters came before the chambers justice. The proceedings record indicates that the matter of the injunction order, as well as other matters, were adjourned *sine die* so they could be dealt with under case management.

22 The proceedings record indicates that in September 2004, there were miscellaneous orders granted relating to the provision of accounting, the production of documents and the timing of applications in the

AS4 Action and the within action. There is no indication that the merits of the 2004 Order were addressed during this time.

23 On October 6, 2004, the AS4 Action and the within action again came before me as case management judge. The transcript indicates that counsel for both the Plaintiffs and Defendants were of the view that this Court remained seized with the jurisdiction to deal with the 2004 Order. Both parties agreed, and I ordered, that the *status quo* as to the "injunction" be maintained as a matter of convenience, but without prejudice to the Defendants. The issue of the Plaintiffs bringing an application to deal with the merits of the Order and the timing for a full hearing of that application were discussed.

24 From and including 2005 to 2009, I varied the 2004 Order on a number of occasions to permit various sums of money to be released from Ayron's HSBC account to its legal counsel for payment of its legal expenses in the actions in which it was involved, as well as to pay for other of its expenses, such as taxes.

25 During this time Ayron brought two applications for a special application at which Ayron would be seeking an order vacating or, alternatively, varying the 2004 Order. Both of these applications were adjourned.

26 On January 8, 2010, Ayron filed the Amended Amended Notice of Motion in this application seeking an order vacating the 2004 Order or alternatively, varying the Order to allow Ayron to use its corporate funds for the purpose of paying its ordinary business expenses, including the legal fees necessary to defend the AS4 Action, the Lienholders' Action, the Holdback Actions and the within action; its GST, taxes or statutorily required payments; and its legal or other professional fees required to maintain its corporate registration.

27 This application was heard on January 22, 2010.

Issues

1. Should the 2004 Order be vacated on the basis that the statement of claim fails to raise a cause of action against the Defendants sufficient to sustain the Order?
2. If the statement of claim raises a cause of action sufficient to sustain the 2004 Order, does this Court have jurisdiction to vacate or vary the Order?
3. If this Court has jurisdiction to vacate or vary the 2004 Order, what is the nature of the Order, and should it be vacated or varied?
4. Should the 2004 Order be vacated due to the Plaintiffs' delay in proceeding to trial?

Analysis

Issue One: Should the 2004 Order be vacated on the basis that the statement of claim fails to raise a cause of action against the Defendants sufficient to sustain the Order?

28 The Defendants argue that the statement of claim discloses no cause of action against them; that as such, there is no basis to continue the 2004 Order; and that the Order should be vacated. The Plaintiffs

argue that the statement of claim raises a cause of action for relief from oppression under business corporations law and that the Order grants relief from oppression in the nature of a preservation order.

29 This application is an interlocutory application. The purpose of such an application is not to determine the issues raised in the underlying cause of action, and a court should refrain from doing so: ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311;***Dreco Energy v. Wenzel Downhole Tools***, 2008 ABCA 290, 440 A.R. 273 at para. 21. However, if the Plaintiffs have no cause of action against the Defendants, there is obviously no basis for continuing the 2004 Order. It is therefore, necessary to examine the possible causes of action raised by the Plaintiffs' statement of claim.

30 Clauses six and seven of the statement of claim contain the main allegations grounding a cause of action and state:

> 6. Pursuant to the Joint Venture Agreement, each of Simonelli, Chaluk, and Ona, have specific duties to the Joint Venture and Ayron, but they are obliged to keep the other informed of any and all activities of the Joint Venture and Ayron, and not to enter into any agreements or sign any cheques except with the agreement of all three, being Simonelli, Chaluk, and Ona.
> 7. Relations between Simonelli, Chaluk and Ona have broken down whereby Chaluk and Ona are carrying on business of the Joint Venture and Ayron without providing information to or soliciting the agreement of Simonelli, all of which prejudices the interests of the Plaintiffs.

31 The above clauses allege causes of action based on breach of contract and arguably, on oppression under corporate law.

Cause of action based on breach of joint venture contract

32 Clauses six and seven allege the existence of a joint venture agreement between Simonelli and the individual Defendants, Ona and Chaluk, and a breach of that agreement. The statement of claim may allege sufficient facts to establish a serious issue to be tried as to the existence and breach of a joint venture agreement between Simonelli, Chaluk and Ona. However, the statement of claim does not allege that Ayron was a party to the joint venture agreement and, as such, there is no serious issue to be tried, and no basis for continuing the Order against Ayron, on this basis.

Cause of action based on breach of contract

33 Clauses six and seven also allege, in essence, that the three individual parties agreed that no funds could be expended and no contracts entered into, on behalf of Ayron, without the unanimous agreement of the three individuals, and that Chaluk and Ona have breached this agreement. The clauses also allege that the three individual parties agreed that they were obliged to keep each other informed of any and all activities and all information regarding Ayron and that Chaluk and Ona have also breached this agreement.

34 Shareholders are entitled to receive certain information regarding the corporation, for example, annual

financial statements. However, shareholders are not generally entitled to be consulted or receive information regarding the day-to-day business activities or decisions of the corporation in which they hold shares.

35 The business of spending funds and entering into contracts on behalf of a corporation is part of the business of managing the corporation. It is a fundamental principle of corporate law that a corporation's directors have the power and the obligation to manage the business and affairs of the corporation. Section 101 of the *Alberta Business Corporations Act*, R.S.A. 2000, c. B-9 (the "*ABCA*") states:

> Directors
>
> 101(1) Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation.

36 In order to enforce an agreement between shareholders to keep each other informed about all matters relating to the corporation and to jointly manage the business and affairs of the corporation, including making payments or entering into agreements on its behalf, the shareholders must enter into a "unanimous shareholder agreement" (USA), defined under s.1(jj) of the *ABCA* as follows:

> "unanimous shareholder agreement" means
>
> (i) a written agreement to which all the shareholders of a corporation are or are deemed to be parties, whether or not any other person is also a party, or
>
> (ii) a written declaration by a person who is the beneficial owner of all the issued shares of a corporation, that provides for any of the matters enumerated in section 146(1); ...

37 Section 146 sets out the matters which may be governed under a USA, and they include the management of the business and affairs of the corporation and the regulation of rights and liabilities as between shareholders:

> 146(1) A unanimous shareholder agreement may provide for any or all of the following:
>
> (a) the regulation of the rights and liabilities of the shareholders, as shareholders, among themselves or between themselves and any other party to the agreement;
>
> (b) the regulation of the election of directors;
>
> (c) the management of the business and affairs of the corporation, including the restriction or abrogation, in whole or in part, of the powers of the directors;
>
> (d) any other matter that may be contained in a unanimous shareholder agreement pursuant to any other provision of this Act

38 The Plaintiffs' allegation is that Simonelli, Chaluk and Ona entered into an agreement to share information and jointly make decisions regarding Ayron. These three individuals are not shareholders of Ayron. They are shareholders in their own individual corporations, which are themselves shareholders of Ayron. They are thus beneficial shareholders of Ayron. There is no allegation or evidence that a written USA exists between Ayron's corporate or beneficial shareholders.

39 Thus, the power and duty to make decisions, including decisions about the expenditure of Ayron's funds and the contracts that it will enter into, rests with and has always rested with its sole director, Ona. If Simonelli or his nominee corporation, Elbow Lake, disagree with Ona's management of Ayron, absent any wrongful acts by the Defendants (discussed below), Simonelli's remedy is to remove Ona as a director, by ordinary resolution at a special shareholders meeting under s. 107(g) of the *ABCA*.

40 As a result of the foregoing, there is no serious issue to be tried, and no basis for continuing the Order, against Ayron on this basis.

Cause of action based on oppression under the *ABCA*

41 The statement of claim, the notice of motion and affidavit in support of the application for the 2004 Order, and the submissions of Plaintiffs' counsel when the Order was granted did not expressly allege oppression, nor did they apply for relief from oppression under the *ABCA*. The relief sought was relief in the nature of a preservation order or injunctive order.

42 Clause seven of the statement of claim may allege sufficient facts to ground a cause of action for oppression under s. 242 of the *ABCA*, as it states that the Defendants' conduct, as alleged therein, "prejudices the interests of the Plaintiffs."

43 Relief from oppression may be granted on sufficient proof that the Defendants have engaged in conduct that is oppressive, unfairly prejudicial or that unfairly disregards the interests of the Plaintiffs as security holders, creditors, directors or officers of Ayron. Section 242 of the *ABCA* states:

> 242 (1) A complainant may apply to the Court for an order under this section.
>
> (2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

44 If oppression is proved, s. 242(3) of the *ABCA* states that "the Court may make any interim or final order it thinks fit including" the relief set out in s. 242(3) (a) to (q). The relief that can be granted is broad and includes relief in the nature of a preservation or injunctive order.

45 The courts have drawn a distinction between oppressive conduct and conduct that is unfairly prejudicial or that unfairly disregards the interests of complainants. The latter has been interpreted by the

courts as being conduct that is contrary to the complainant's legitimate and objectively reasonable expectations: ***Calmont Leasing Ltd. v. Kredl*** (1993), 142 A.R. 81, [1993] A.J. No. 569 (Q.B.) at paras. 130 - 134, aff'd 165 A.R. 343, [1995] A.J. No. 475 (C.A.). To establish this, the court must determine what the complainant's expectations were; whether they were reasonable and legitimate; whether the conduct complained of has resulted in an imbalance between the parties who have an interest in the corporation including the complainant; and whether this has resulted in the unjustifiable, unequal treatment of the complainant: ***Agrium Inc. v. Hamilton***, 2005 ABQB 54 at paras. 33 - 36. Proof of conduct that is unfairly prejudicial or that unfairly disregards the interests of security holders, creditors, directors or officers does not require proof of breach of fiduciary duty: *Calmont* at para. 130.

46 In the Queen's Bench decision in *Calmont*, the Court quoted the following authority distinguishing oppressive conduct from conduct that unfairly disregards or is unfairly prejudicial to a complainant, at para. 130:

> ... Counsel for both parties adopt the views of Keith A. Ferguson in his paper entitled The Oppression Remedy: Trends Anyone? prepared for the Legal Education Society of Alberta in 1992. That author says at p. 640:
>
> > "... conduct which will be found to be oppressive, as opposed to unfairly prejudicial or constituting unfair disregard, will involve something amounting to a direct or indirect expropriation, or substantial diminishment, of the value of the complainant's investment in the corporation in question. Frequently the conduct of the respondent involves an abuse of position, where the individual moves arbitrarily outside the recognized structure for corporate decision-making."

47 A claimant must provide evidence of bad faith in order to establish oppressive conduct whereas evidence of bad faith is not required to find unfair prejudice or unfair disregard of a complainant's interests. In determining whether the complainant's interests have been unfairly prejudiced or unfairly disregarded, it is the effect of the impugned conduct on the complainant's interests that is in issue: *Calmont* at para. 13.

48 The Plaintiffs allege that the Defendants have committed various acts that have been unfairly prejudicial, have unfairly disregarded or have been oppressive to them as shareholders or beneficial shareholders in Ayron.

49 They allege that Ona and Chaluk have failed to provide Simonelli with information about the joint venture or Ayron. They complain that the Defendants have failed to call shareholder meetings or provide financial statements and that they are wrongfully withholding financial information, in particular, information regarding Ayron's income and expenses relating to the construction, repair, sale and lease of the hangars. The conduct of majority shareholders or directors in withholding information from a minority shareholder may be oppressive or unfairly disregard the minority shareholders' interests, especially if the corporation is closely held, as is the case with Ayron: ***Envirodrive Inc. v. 836442 Alta.***, 2005 ABQB 446, 7 B.L.R. (4th) 61; supplementary reasons 2005 ABQB 807, 12 B.L.R. (4th) 257.

50 The Plaintiffs also allege that Ayron's affairs are being conducted without the Plaintiffs' knowledge or consent. Conduct of majority shareholders or directors in running a corporation without the input or

agreement of a minority shareholder may be oppressive, especially if the corporation is closely held. Failure to involve the complainant in the corporation's ordinary business decisions is unlikely to warrant relief under the oppression remedy, if the complainant was not ordinarily involved: ***Famaf Holdings Ltd. v. Rosede Ventures***, 2006 ABQB 199, [2006] A.J. No. 295. However, where the inside directors or shareholders of a closely held corporation are making decisions out of the ordinary course of business and contrary to the reasonable expectations of the complainant, relief from oppression may very well be warranted: *Agrium.*

51 The Plaintiffs allege that expenditures were being made without the Plaintiffs' knowledge or agreement. Such conduct may also warrant relief under the oppression remedy if the expenditures are substantial: *Famaf*. However, the Defendants have been prevented from making virtually any payments or acquisitions without the Plaintiffs' agreement, or the approval of this Court, since the Order was granted in August 2004.

52 The Plaintiffs allege that ownership in one of Ayron's hangars was wrongfully transferred to Ona for an amount less than its fair market value and in breach of Ona's fiduciary duty, as Ayron's sole director. They allege that it was a reasonable expectation of the Plaintiffs at the time that Elbow Lake became a shareholder of Ayron, that Ayron would not transfer title to hangars unless all parties consented. The unilateral act of directors, officers or majority shareholders, in transferring corporate property to themselves for less than market value or without the knowledge of the complainant, has been found to amount to conduct that is oppressive, or that unfairly prejudices or unfairly disregards a complainant's rights. Where the actions are those of a director, they may also amount to breach of fiduciary duty, unless authorized, as directors must not put themselves in a position where their personal interests conflict with those of the corporation: *Calmont*.

53 With regard to this last allegation, there is evidence from both sides that one of the main purposes for incorporating Ayron was to use it as a vehicle through which the parties would contract for the construction and subsequent lease of hangars at the Springbank Airport, and that it was intended that one of those hangars would be transferred to Ona. There is evidence of cancelled cheques from Ona to Ayron, paid prior to and during construction. The Defendants allege this constitutes prepayment for an ownership interest in a hangar. The allegations and preliminary evidence on this issue are conflicting, but they do raise issues of breach of fiduciary duty and preferential treatment of creditors: *Calmont* at para. 99.

54 The cumulative effect of a corporation's, directors' or majority shareholders' actions in preferring their interests over that of a complainant may also amount to conduct that is oppressive, unfairly prejudicial or unfairly disregards the interests of the complainant: ***Kuefler v. Barene Inv. Ltd.***, 214 A.R. 93, [1997] A.J. No. 535 (Q.B.); *Famaf* at para. 80.

55 I am satisfied that the Plaintiffs have alleged sufficient facts on which to base a claim for relief from oppression under s. 242 of the *ABCA*.

56 The ultimate purpose of this application is to determine whether there are sufficient grounds for maintaining the 2004 Order, which leads to the second issue.

Issue Two: If the statement of claim raises a cause of action sufficient to sustain the 2004 Order, does this Court have jurisdiction to vacate or vary the Order?

57 As stated above, this application comes before this Court as a result of Ayron's Amended Amended Notice of Motion, filed January 8, 2010, seeking the termination or variation of the 2004 Order. The meaning of the express provisions of the Order are at issue, the substantive provisions of which state:

> 1. THAT the time for the bringing of this application is abridged.
> 2. THAT the Defendants, and the Plaintiffs, and any of them, be enjoined and prohibited from making of any contracts, entering into on any agreements, making of any payments, transferring and selling any interest in Land on behalf of Ayron Developments Inc., and signing any documents on behalf of Ayron Developments Inc., without the express written agreement of Giulio Simonelli, Doug Chaluk and Jim Ona, or further Order of this Court;
> 3. This application is otherwise adjourned to Thursday, August 26, 2004 at 10:00 a.m., without prejudice to the right of any party to bringing any application before the Court in the interim.

58 The Plaintiffs argue that the Order is a final order, which was not appealed, and that, as such, this court has no jurisdiction to vacate it. The Plaintiffs emphasize that the 2004 Order was a consent order, the effect of which was to order what the parties had already agreed to. They argue that it is very clear from the face of the Order that both the Plaintiffs and the Defendants agreed, under clause two, that they would not make any contracts, enter into any agreements, make any payments, transfer or sell any interest in the Springbank property, or sign any documents on behalf of Ayron, unless the unanimous, written agreement of Simonelli, Chaluk and Ona, or a further order of the Court, was obtained. They argue that this is simply a recognition of their prior agreement under their joint venture agreement.

59 They argue that this Court has very little jurisdiction to vary a final order and that, to the extent that this jurisdiction exists, an informed decision to vary the Order to release Ayron's funds for the payment of its expenses cannot be made unless the Defendants provide the Plaintiffs and this Court with an accounting of the funds that have been released to date, and an indication of the funds that will be required in the future and how those funds will be used.

60 They point to the specific wording in clause three of the Order, which states that the application is "otherwise adjourned", and argue that the word "otherwise" refers to the relief sought in the application, other than the parties' agreement under clause two. As a result, they argue that the only issues that were left open and that could be argued at a later time were whether the Plaintiffs were entitled to the relief applied for under clauses one, three, four and five of their August 6, 2004 Notice of Motion, which deal with matters other than the preservation order granted under clause two.

61 The Plaintiffs argue that clause two of the 2004 Order was a final interlocutory order, and that, as such, it was immediately effective and could not be varied other than according to its terms, which provided that it could only be varied by the express, written, unanimous agreement of Simonelli, Ona, and Chaluk or by "further Order of the Court".

62 The Defendants argue that the 2004 Order was an interim order having been granted until its merits could be heard on the adjourned date. They argue that the Order was in fact an interim, interim order as it specifically provided that the application was otherwise adjourned without prejudice to the right of the parties to bring any application before the court in the interim. They distinguish an interim order, which they say refers to an order for a period of time, from an interlocutory order, which they say is intended to be effective until the disposition of the underlying action, subject to any other provisions of the order. They argue that the purpose and express terms of the 2004 Order were that the merits of the Notice of Motion were to be argued at an adjourned date, and that, as such, the Order must be characterized as an interim order and not a final order.

63 This issue requires an examination of the distinction between interim relief and interlocutory relief; between a judgment and an order; and between an order granted on the merits and an order granted on the consent of the parties.

64 In *RJR-MacDonald*, the court explained the difference between interim and interlocutory relief, but noted that one may be a hybrid of the other, at para. 42:

> We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

65 It is the nature of the relief that is granted, not the manner in which it is granted, which distinguishes a judgment from an order. Both are final decisions. A judgment is a final decision regarding the underlying issues in a cause of action. An order is a final decision regarding a procedural question or an issue collateral to the issues in the underlying action: ***Alberta Turkey Producers v. Lethbridge (City of)***, 2006 ABQB 283, 399 A.R. 259 at para. 22.

66 An order is granted on the merits after the court has considered the strength of each side's case. A consent order has been described as a contract, although it has also been said that it is more accurate to describe it as evidence of a contract. A consent order sets out, in the form of an order, the agreement which the consenting parties have made: ***155569 Can. Ltd. v. 248524 Alta.***, 126 A.R. 396, [1992] A.J. No. 135 (Q.B.).

67 Since a consent order is a contract or sets out the agreement between the consenting parties, the rules for variation of a contract apply. A contract, and thus a consent order, can generally only be varied on grounds of common mistake, misrepresentation or fraud: *155569 Can.* In *155569 Can.*, the court set aside a prior consent order appointing a receiver and providing for the collection and payment of rent to the plaintiff on the basis that the defendants would not have consented to the order if they had been aware of a prior agreement to do otherwise. The court found that the consent order could be vacated on grounds of unilateral mistake since the defendant consented to the order on the basis of a mistaken understanding on a crucial point, and the plaintiff knew the defendant was mistaken.

68 An order may also be terminated or varied under Rule 390, but only in very limited circumstances.

Rule 390 states:

> 390(1) Any order may be set aside, varied or discharged on notice by the judge who granted it.
>
> (2) On consent of all parties interested the court may set aside, vary or discharge any order.

69 Rule 390 has been interpreted as giving a court the jurisdiction to vary an order that has not been entered, and only then if an error or new and significant facts have subsequently been discovered: *Alberta Turkey Producers* at para. 24. In the preceding case, the court stated at paras. 30 - 31:

> Rule 390 is not intended to function as a "try again" provision ... and it does not allow the revisitation of an issue because an applicant is not satisfied with the original decision or has since devised better arguments..[citations omitted].
>
> Finality in litigation is of fundamental importance ...

70 Rule 390(1) authorizes a judge to vary his or her own order, however, this may only be done if the order has not been settled, signed and entered. After that, the judge is *functus officio*, and a party who objects to the order must appeal. In ***Riviera Dev. Inc. v. Midd Financial***, 167 A.R. 69, [1995] A.J. No. 107 (Q.B.), the court interpreted Rule 390(1), noting the general rule that a judge's power to reconsider a finalized order was severely restricted, and referring to an article outlining eight exceptions to that rule, at paras. 15 - 17:

> McKinnon then goes on to outline eight exceptions to that standard: the slip rule, (in our province rule 339); the working out of an order made; rehearing where there was an abuse of process; where there has been a procedural irregularity; in some provinces, where there has been an inadvertent procedural mistake; in some provinces, to extend a time limit set by the order sought to be varied; fraud; and discovery of new evidence.

The court ruled that it was "... exceptional for even the same judge to hear re-argument of a motion".

71 In *Riviera*, the court also ruled that the word "court" in Rule 390(2) referred to a judge other than the one who had originally made the order sought to be varied. The court found that Rule 390(2) was to be interpreted as applying only if the parties affected by the order had consented to going before another judge, and to the terms of the varied order requested from that judge: at paras. 20 - 22.

72 I have no jurisdiction to vacate or vary the Order under Rule 390(1), as I did not grant the Order. I have no jurisdiction to vacate or vary the Order under Rule 390(2), as the parties have not consented to that. However, I find that the 2004 Order was an interim, but not a final, interlocutory order, and that, as such, this Court does have the jurisdiction to vacate or vary it on its merits.

73 The Order was a consent order and thus sets out the agreement between the consenting parties. The issue is whether they agreed that clause two of the Order was to have effect until the underlying issues had been determined or only for an interim period until the merits of the application could be argued and determined by this Court.

74 Since the Order is to be viewed as a contract, the rules of contract interpretation apply. These rules

require that a contract be interpreted so as to discover and give effect to the intentions of the parties at the time that the contract was made. The Court looks for the reasonable objective intent of the parties, not their subjective intent. This intent is determined by considering both the express terms of the contract and the surrounding circumstances: *Chitty on Contracts*, 27th ed., vol. 1 (London: Sweet & Maxwell, 1994), at paras. 12-039 - 12-040;***Paddon-Hughes Development Co. v. PanContinental Oil Ltd.***, 1998 ABCA 333, 223 A.R. 180, leave to appeal to S.C.C. refused, 243 N.R. 199, [1998] S.C.C.A. No. 600 (Note).

75 The Order is extremely broad in scope. The effect of the Order was to grant the Defendants extraordinary relief in the nature of a prejudgment injunction or attachment order.

76 Clause two prohibits the Defendants from dealing with Ayron's property or making any payments on Ayron's behalf without the unanimous consent of the individual parties or a further order of the Court. Since Ayron's only substantial assets are its Springbank property and the funds in its HSBC account, the Order effectively freezes all of Ayron's assets. As noted below, even a Mareva injunction, which is based on very serious allegations that the respondent is disposing of its assets or removing them from the jurisdiction for the purpose of removing them from the applicant's reach, usually includes a provision giving the defendant the right to continue to pay for its ongoing, ordinary business or living expenses: ***Aetna Financial Services Ltd. v. Feigelman***, [1985] 1 S.C.R. 2, [1985] S.C.J. No. 1 at para. 28. The 2004 Order contains no such provision.

77 Clause two of the Order also prohibits the Defendants from making any contracts, entering into any agreements, or signing any documents on Ayron's behalf, without the unanimous consent of the individual parties or a further order of the court. This effectively paralyzes the Defendants' ability to carry on Ayron's business or even deal with its ordinary business operations.

78 The Defendants' inability to access Ayron's property to pay for its ordinary business expenses or to carry on its ordinary business has crippled its operations, which has, in turn, resulted in the parties to this action spending an inordinate amount of time, and a substantial portion of Ayron's funds, seeking directions and orders from this Court to release funds for this purpose.

79 The surrounding circumstances were that the Order was granted on an *ex parte* basis at the very inception of the litigation and prior to the Defendants having considered or filed their defences. Plaintiffs' counsel was the only counsel at the application. He not only advised that the application was for relief in the nature of an injunction, but also stated that the "... matter go over by consent on adjournment" to the specified date for the adjournment. [Emphasis added]

80 Courts are reluctant to grant interlocutory injunctive relief. This stems, in part, from the fact that it is completely contrary to the well recognized principle that execution cannot be obtained before judgment and judgment cannot be obtained before trial. This principle was set down in ***Lister & Co. v. Stubbs***, [1886-90] All E.R. 797 and has long been accepted as a fundamental principle of Canadian law: *Aetna* at para. 9. An order, such as the subject Order, which restricts a party's rights to deal with its own property, is a form of execution granted before trial: *Aetna* at para. 8. Not only is an interlocutory injunction granted before trial, it is granted while the litigation is progressing, and often well before trial. In the case at bar, the 2004 Order was granted at the very inception of the litigation and has now been in force for six years without ever having its merits adjudicated upon.

81 There is an added reluctance to grant an interlocutory injunction because of the unfair hardship that is inevitably experienced by the party against which it is issued, described by Estey J. in *Aetna* at para. 43:

> There is still, as in the days of *Lister*, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed of or moved out of the country or put beyond the reach of the courts of the country. This sub-rule or exception can lead to serious abuse. A plaintiff with an apparent claim, without ultimate substance, may, by the Mareva exception to the *Lister* rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial ...

82 Based on the foregoing, Estey J. ruled that the injunction at issue in that case should never have been granted under the principles of interlocutory *quia timet* orders in Canada.

83 The Defendants have suffered a significant hardship as a result of the 2004 Order. The Order has completely tied the Defendants' hands from dealing with Ayron's routine, day-to-day business and expenses. This hardship is compounded by the fact that the Order has been in effect for six years.

84 The 2004 Order not only granted execution before judgment but did so in the broadest of terms and before the parties had the opportunity of arguing, or this Court had the opportunity of determining, its merits.

85 Even on a strict reading of the Order, I find that the Plaintiffs' interpretation is too narrow. Clause two of the Order prohibits any of the parties from dealing with Ayron's property "without the express written agreement of [Simonelli, Chaluk and Ona] or further Order of the Court". The obvious converse of the wording of clause two is that the Order can be vacated or varied by Court order. Clause three of the Order also indicates the interim nature of the Order. It expressly states that it is made "without prejudice to the right of any party to bringing <u>any application</u> before the Court <u>in the interim</u>". [Emphasis added] There is no reason to interpret the phrases "further Order of the Court" or "any application ... in the interim" narrowly.

86 The record of proceedings also supports the view that the Order was intended to be interim in nature. At the application for the Order, Plaintiffs' counsel, who was the only counsel who appeared, stated that the application was for an injunction and that the "matter" was to go over to the adjournment date by consent of the parties. There is no reason to interpret the word "matter" as referring to matters other than those dealt with under clause two of the Order. The record of subsequent proceedings also shows that the merits of the application were never argued until this application, that the Defendants always treated the Order as an interim order, and that even the Plaintiffs did not assert that the Order was a final interlocutory order until later on in the litigation.

87 I cannot find that the parties would have reasonably intended to agree that such an order would be in

effect until the underlying issues between the parties were finally determined. Rather, I find that the Order is an interim order that can be vacated or varied by this Court.

88 This conclusion is supported by the Alberta Court of Appeal decision in ***1048497 Alberta Corp. v. Lessoway***, 2008 ABCA 234, wherein the Court focussed on the narrow issue of whether a chambers justice had erred in law in varying and vacating a prior interim consent order. The facts in *Lessoway* are very similar to the facts in the case at bar. Three individuals incorporated the plaintiff to act as the vehicle through which they would own and operate a commercial property. The property was purchased and registered in the name of the corporation and the three individuals were its shareholders. The corporation was operated by all three parties for a time but they then had a falling out, and only two of the three continued its operation. The corporation sued the third shareholder, Lessoway, and parties related to him, and Lessoway defended and filed a counterclaim alleging, among other things, mismanagement and breach of fiduciary duty by the shareholders who continued to operate the corporation. While the dispute was ongoing, the corporation had an opportunity to sell the property. Lessoway disagreed with the sale and applied for and obtained a consent order providing that if the property was sold, the net sale proceeds were to be held in trust by the vendor's solicitor until agreement between the parties or a further order of the court; that the order was without prejudice to the adjudication of any issue in the action; and that the matter was adjourned for approximately one week.

89 The Court of Appeal framed the issue in the first paragraph of its judgment as being whether the chambers judge erred "in law in varying and vacating a prior interim consent order?", or in other words, "... whether the chambers judge was entitled to order that his order replaced the earlier interim consent order ...": at para. 10. The Court found that the prior order was expressly interim in nature as it contemplated on its face future variation by agreement of the parties or "further order of the court". The Court ruled that the chambers judge had expressly intended to replace the earlier interim consent order, that he was entitled to do so and that there was no error in his decision in this regard: at para. 13.

90 I find that the parties intended that the 2004 Order would only be effective for a short period of time, until its merits could be argued and determined, and that it is therefore an interim order, which can be vacated or varied by this Court.

Issue Three: If this Court has jurisdiction to vacate or vary the 2004 Order, what is the nature of the Order and should it be vacated or varied?

91 The Defendants argue that the Order should be vacated on the basis that the Plaintiffs have failed to satisfy the tests required to maintain the Order, which they say is in the nature of an interlocutory injunction or attachment order. In the alternative, they argue that the Order should be varied to grant Ayron access to its corporate funds from which to pay its legal expenses, taxes and other fees required to maintain its corporate existence.

92 The Plaintiffs argue that the Order is in the nature of a preservation order, that it was properly granted to protect the Plaintiffs from oppression under the *ABCA*, and that it should be continued on that basis.

93 Both the statement of claim and the notice of motion filed when the within action was commenced

apply for relief in the nature of a preservation order. During the application for the Order, Plaintiffs' counsel stated that the Plaintiffs were applying for an injunction.

94 The main relief sought under the statement claim is for an accounting; judgment against the Defendants in damages for any loss or damages suffered by the Joint Venture; indemnity for any liabilities incurred by the Plaintiffs arising out of the Joint Venture or Ayron; and "... an Order, in the nature of a Preservation Order ..."

95 The August 2004 Notice of Motion sought three main forms of relief: an order directing the Defendants to provide an interim accounting for Ayron, particularly in respect of the Springbank property; an order in the nature of a "Preservation Order" the wording of which mirrored the wording in the statement of claim; and an order directing the Registrar of the South Alberta Land Titles Office to register any order obtained against any interest of the Defendants in the Springbank property and not to register any disposition of transfer by any of the Defendants in the property except if it complied with the order.

96 The Defendants argue that the Order is in the nature of a Mareva injunction or an attachment order under the *Civil Enforcement Act*, R.S.A. 2000, c. C-15 (*CEA*). It may also be in the nature of preservation order under Rule 467 of the Alberta Rules of Court or the *ABCA*. The nature and grounds for obtaining each of these types of relief will be examined to determine if the Order can be so characterized and continued on that basis.

Basis and grounds for characterizing and continuing the Order as an Injunction

Mareva injunction

97 A Mareva injunction is granted on sufficient proof that the defendant's remaining significant assets are about to be removed from the jurisdiction or disposed of, with the purpose of rendering hollow any judgment that may be obtained by the plaintiff. The primary basis for granting a Mareva injunction is evidence of a real risk that the defendant is about to put its assets out of the reach of the plaintiff for the purpose of protecting them from being taken to satisfy any judgment that the plaintiff might ultimately obtain in the underlying action: *Aetna* at para. 25. If there is no evidence of any such risk, there is no basis for granting a Mareva injunction. In *Aetna*, Estey J., summarized the requirements necessary for obtaining an Mareva injunction under English law and stated that this also generally summarized the requirements for obtaining such an injunction in Canada. His Lordship emphasized, at paras. 25 to 26:

> ... There must be a real risk that the remaining significant assets of the defendant within the jurisdiction are about to be removed or so disposed of by the defendant as to render nugatory any judgment to be obtained after trial. Mareva injunctions are therefore available not just to prevent the removal of assets from the jurisdiction, but also disposal within the jurisdiction...
>
> ... The overriding consideration qualifying the plaintiff to receive such an order as an exception to the *Lister* rule is that the defendant threatens to so arrange his assets as to defeat his adversary, should that adversary ultimately prevail and obtain judgment, in any attempt to recover from the defendant on that judgment. Short of that, the plaintiff cannot treat the defendant as a judgment-debtor, the defendant's right to defend the claim may not be impaired, and the defendant in proper

> circumstances may, within such an order, pay current expenses incurred in the ordinary course of his business.
>
> [Emphasis added]

98 In ***Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology***, [2003] O.T.C. 7, [2003] O.J. No. 40 (Sup. C. J.), cited to O.J., the Court described a Mareva injunction as follows, at para. 16:

> A Mareva injunction does not require the plaintiff to show any ownership interest in the property subject to the injunction and does not require the plaintiff to establish a case of fraud or theft. It is a recognized exception to the rule established in ***Lister v. Stubbs*** (1890), 45 Ch. D. 1 that the court has no jurisdiction to attach the assets of a debtor for the protection of a creditor prior to the creditor obtaining judgment. Because of the exceptional nature of the relief, the test on the merits for obtaining a Mareva injunction is more onerous than for other injunctive relief and requires that the plaintiff establish a strong *prima facie* case: ***Chitel v. Rothbart*** (1983), 39 O.R. (2d) 513 at 522 and 532 (C.A.). In addition to the other requirements for an injunction, the plaintiff must show that the defendant is taking steps to put his assets out of the reach of creditors, either by removing them from the jurisdiction of the court or by dissipating or disposing of them other than in the normal course of business or living: ***Chitel v. Rothbart*** at p. 532-533. [Emphasis added]

99 Because the basis for obtaining a Mareva injunction is a serious threat that the defendant will put its assets beyond the reach of the plaintiff, it is usually sought and granted on an interim, *ex parte* basis, subject to the defendant's right to apply for a variation order to, among other things, permit it to make payments for ordinary business or living expenses, including the legal expenses required to defend the lawsuit. Such orders are subject to the defendant showing that it has no other assets from which to make the payments: *Credit Valley* at paras. 18 - 19. In that case, the court stated at para. 18:

> ... Thus, even where the *Mareva* injunction may have been originally granted in a broad and sweeping form, this is in contemplation that it will likely later be modified to permit the defendant to maintain his normal standard of living and to meet legitimate debt payments accruing in the normal course. It is common for such exemptions to include the payment of ordinary living expenses and reasonable legal expenses to defend the lawsuit...

100 Where a defendant has openly disposed of or removed assets for a legitimate business purpose and the plaintiffs were aware of the defendant's intention to do so prior to any claim being initiated by the plaintiff, there are no grounds for granting a Mareva injunction: ***Grosvenor Park National Gas Fund v. Ocelot Energy***, 1999 ABQB 501, 242 A.R. 159.

101 The process to be followed to obtain a variation of a Mareva injunction may differ depending upon whether the injunction freezes all, or only part, of the defendant's assets. In *Credit Valley,* the court ruled that in order to obtain a variation of a Mareva injunction, a defendant must prove that it has no other assets from which to pay its ordinary expenses, but that there are otherwise "few strictures on the release of funds not covered by the proprietary injunction.": at para. 38. The reason is that assets subject to a Mareva injunction belong to the defendant and as such, the defendant is "clearly entitled under the case law to the use of that money to pay legitimate living and business expenses": *Credit Valley* at para. 37. A

Mareva injunction is not meant to interfere with a defendant's right to use its assets to pay for its legitimate, ordinary expenses, and a court will not normally scrutinize too closely the appropriateness of such expenses: *Credit Valley* at para. 39.

102 Where a Mareva injunction freezes all of a defendant's assets worldwide, a defendant does not have to prove that it has no other assets from which to pay its ordinary expenses because that follows from the fact that all of its assets have been frozen. In order to obtain a variation of a worldwide Mareva injunction, the defendant must prove that the injunction catches assets over which the plaintiff lays no claim: ***Lyons v. Creason***, 2008 ABQB 216, [2008] A.J. No. 359. Thus it would seem that once this is proved, the defendant is entitled to a variation of a Mareva injunction releasing sufficient of its assets to pay for its legitimate, ordinary expenses.

103 In *Lyons*, the court had granted an attachment order, characterized as a worldwide Mareva injunction, preventing the defendants from dealing with any of their exigible property worldwide, pending further order of the court. The order was granted based on the plaintiff's allegation that the defendants had obtained and converted the plaintiff's funds under a fraudulent investment scheme. The plaintiffs claimed that the funds belonged to them and therefore, the attachment order was, in part, a proprietary injunction. As such, the defendants were required to prove that the injunction froze assets that were not subject to the plaintiff's claim before they were entitled to a variation of the injunction allowing them to use their assets to pay for their ordinary expenses. Hart J. varied the injunction on the condition that the particular defendants provide proof that the plaintiff had no proprietary interest in a duplex owned by them. On providing such proof, the defendants were given permission to use the duplex to obtain $40,000 in funds to pay for their legal expenses.

104 Legal fees are legitimate, ordinary expenses. In *Credit Valley*, the court held that the defendants had an unfettered right to use funds protected under a Mareva injunction, and a more limited right to use funds protected under a proprietary injunction, to fund their legal defence and that this right included the right to retain counsel of their choice, including lead counsel charging a higher hourly rate. The court stated at para. 43:

> ... Finally, insofar as funds subject only to the *Mareva* injunction are concerned, there should be no fetter on how expensive a defence Mr. Mpamugo chooses to mount. To the extent the amount of the legal costs is an issue at all, it is only because the non-proprietary claim assets are limited and insufficient to cover everything requested by the defendant. Since those funds are limited, however, only reasonable legal costs will be permitted. [Emphasis added]

105 The Plaintiffs made no claim and proffered no evidence, either at the time the 2004 Order was granted or subsequently, that the Defendants would remove substantial assets from the jurisdiction or dispose of substantial assets, for the purpose of preventing the Plaintiffs from realizing on a future judgment.

106 There is evidence that one of Ayron's hangars was transferred to Ona. The Plaintiffs allege that it was transferred without their knowledge or consent and at a price below market value. The Defendants allege that Ona paid for the hangar prior to or during construction of the hangars. There is evidence from both sides that there was an agreement between Simonelli, Chaluk and Ona, prior to the transfer and from the

beginning of the joint venture, that a hangar would be transferred to Ona. There is also evidence that hangars have been sub-let to various third parties. Even if these transfers were made without the Plaintiffs' knowledge or consent, they are not sufficient to warrant the granting of a Mareva injunction since they do not constitute all or substantially all of Ayron's assets and there is no evidence that the transfers were made for the purpose of moving assets beyond the Plaintiffs' reach in the event that they eventually obtain a judgment against the Defendants in this action.

107 If the 2004 Order is in the nature of a Mareva injunction, I find that the conditions for continuing the Order on this basis do not exist.

Proprietary injunction

108 A proprietary injunction may be obtained on proof that the essence of the plaintiff's underlying action involves a proprietary claim to the very assets that it seeks to preserve by way of the injunction, and on sufficient evidence that those assets will or may be destroyed or lost prior to the resolution of the underlying action if the injunction is not granted: *Aetna* at para. 9. It is described in *Credit Valley* at para. 15 as follows:

> It is important at the outset to distinguish between the proprietary injunction and the Mareva injunction. A proprietary injunction is granted to preserve an asset in the possession of a defendant, which the plaintiff says belongs to the plaintiff, or is subject to a trust in favour of the plaintiff. It is typically sought in cases of alleged theft, conversion, or fraud where the defendant, by some wrongdoing, comes into the possession of the plaintiff's property. The purpose of the injunction is to preserve the disputed property until trial so that the property will be returned to the plaintiff if successful at trial, rather than used by the defendant for his own purposes.

109 Because a proprietary injunction is granted to prevent the defendant from dealing with assets over which the plaintiff claims an interest, before varying such an injunction, the court will put more conditions in place and scrutinize requests for exemption more closely: *Credit Valley* at para 39. Despite this, in *Credit Valley*, the court ruled that the proprietary injunction could be varied to allow the defendants to use the protected assets to pay for certain of their expenses, including the legal expenses required to defend the criminal and civil actions against them, on the condition that the defendants establish on the evidence that 1) they had no other assets available to pay their expenses other than the assets frozen under the injunction; 2) there were assets protected by the proprietary injunction which did not belong to the plaintiff, for example, assets protected by a Mareva injunction; and 3) the defendants had exhausted the assets protected by the injunction that did not belong to the plaintiffs to pay for their reasonable living expenses, debts and legal costs. Once the defendants had established the foregoing three conditions, the court ruled that it must weigh the plaintiff's interests in protecting its assets from being used by the defendants for their expenses against the defendants' interests in ensuring that they had the proper opportunity to present their case claiming the assets. The court ruled that in weighing the parties' interests, a court should consider the strength of the plaintiff's and the defendants' cases. The court ruled that the defendants' interests outweighed the plaintiff's and therefore, that the assets protected under the proprietary injunction could be used to pay for certain of the defendants' expenses, including their legal expenses. However, before the assets could be used to pay for the defendants' legal expenses, the court ordered that the defendants' legal counsel must submit its account for approval by the defendants and by

the plaintiff, and failing that, for approval by a master who was to consider the usual tests for assessment of an account from a solicitor to his own client: at para. 58.

110 The Plaintiffs made no proprietary claim to the assets preserved under the 2004 Order, either at the time the Order was granted or subsequently. I find that the conditions for granting a proprietary injunction did not exist at the time the Order was granted and do not presently exist. As a result, the Order cannot be continued on this basis.

Quia timet injunction

111 An injunction may be granted on evidence of a real or genuine fear of future harm if the injunction is not granted, often referred to as a *quia timet* injunction.

112 A *quia timet* injunction is based on a fear of prospective irreparable harm. In *Injunctions and Specific Performance,* looseleaf (Aurora, Ont.: Canada Law Book, 1992), the Honourable Robert J. Sharpe clearly articulates the difficulties in issuing an injunction where the alleged harm is prospective, at 1-28 - 1-29:

> All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered...
>
> Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues *quia timet*- because he fears - and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction. Thus while all injunctions involve predicting the future, the label *quia timet* and the problem of prematurity relates to the situation where the difficulties of prediction are more acute in that the plaintiff is asking for injunctive relief before any of the harm to be prevented by the injunction has been suffered.

113 The prejudice suffered by a defendant against whom an interlocutory injunction has been issued is even greater where the injunction is granted *quia timet*, since it is issued only on the basis that the applicant fears irreparable harm rather than on evidence of actual harm: ***CIBA-Geigy Can. v. Novopharm Ltd.*** (1997), 141 F.T.R. 95, [1997] F.C.J. No. 1836, at paras. 24 - 25 F.C.J.

114 One of the issues raised in this litigation was whether the Order should be continued because of the fear that if the Order is not continued, Ayron will have no assets to satisfy any future judgment that the Plaintiffs may obtain. I am not satisfied that there was sufficient evidence to grant the 2004 Order on this basis, however, the issue has been raised and will be considered. If the Order is continued on this basis, it will be based on the fear of prospective irreparable harm to the Plaintiffs and could therefore be characterized as relief in the nature of a *quia timet* injunction. As a result, it is necessary to determine the grounds for obtaining an interlocutory *quia timet* injunction.

115 An applicant seeking an interlocutory injunction, including a *quia timet* interlocutory injunction, must satisfy the court 1) of the merits of its underlying case; 2) that the applicant will suffer irreparable harm if the injunction is not granted; and 3) that the balance of convenience favours the granting of the injunction: *RJR-MacDonald*. On a motion to continue or vacate an existing interlocutory injunction, the

same three factors are considered, but in addition, the court may consider other factors including delay, inequitable conduct and policy considerations: *Dreco Energy* at para. 27.

- Merits of the Plaintiffs' claim

116 The first prong of the tripartite test for injunctive relief requires the party seeking the injunction to show that their underlying case has some strength; it operates as a threshold test. The applicant does not have to prove that the respondent's conduct is wrongful. An interlocutory injunction may be granted if the court is satisfied that the applicant's claim has merit. The extent of the merit that must be shown depends upon the nature of the applicant's claim.

117 In most cases, an applicant must only show that it has a serious issue to be tried. This is a very low test and is to be made on the basis of common sense and an extremely limited review of the merits of the case. Proof of a serious issue to be tried is satisfied as long as the applicant's cause of action is not frivolous or vexatious: *RJR-MacDonald* at paras. 45 - 49 and 78; ***Rigaux v. Presslogic Inc.***, 2005 ABQB 884, [2005] A.J. No. 1649.

118 It is generally neither necessary nor desirable to conduct more than a preliminary assessment of the merits on an application for interlocutory injunctive relief unless the result of the interlocutory motion will, in effect, amount to a final determination of the action; a constitutional issue raises a simple question of law; or the factual record is largely settled prior to the application: *RJR-MacDonald* at paras. 50 - 55. This is because of the difficulties in deciding complex factual and legal issues based on the limited evidence available to a court at a interlocutory hearing: *RJR-MacDonald* at paras. 44 - 45.

119 If a more thorough assessment is required, the more stringent "strong *prima face* case" test is applied: *RJR-MacDonald* at paras. 44 - 45. This test has been applied where the applicant seeks a Mareva injunction or interlocutory relief based on oppression: ***Gazit Inc. v. Centrefund Realty Corp.***, [2000] O.J. No. 3070, 8 B.L.R. (3d) 81 at paras. 77 - 78 O.J.; ***Amaranth LLC v. Counsel Corp.***, [2005] O.T.C. 882, [2005] O.J. No. 4329 (Sup. C. J.) at para. 15;***Groeneveld v. 1034936 Alta. Ltd.***, 2005 ABQB 834, [2005] A.J. No. 1554; *Grosvenor* at para. 10.

120 Based on my foregoing decision that the statement of claim alleged sufficient facts upon which to base a claim for oppression under the *ABCA*, I am satisfied that the Plaintiffs have established a serious issue to be tried. Based on the affidavit evidence and briefs of argument proffered by the Plaintiffs in support of this application, I am not satisfied that the Plaintiffs have established a strong *prima facie* case based on oppression under the *ABCA*.

121 However, as a general rule, a court hearing a motion for interlocutory injunctive relief should proceed to consider the second and third tests for an interlocutory injunction, even if it has decided that the plaintiff's case is unlikely to succeed: *RJR-MacDonald* at para. 50.

- Irreparable harm

122 The second part of the three-part test for injunctive relief requires that the party seeking the injunction satisfy the court that it will suffer irreparable harm if the injunction is not granted. In *RJR-*

MacDonald the irreparable harm test was described as follows at paras. 58 - 59:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (***R.L. Crain Inc. v. Hendry*** (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid,[1974] A.C. 396*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (***MacMillan Bloedel Ltd. v. Mullin***, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration ***(Hubbard v. Pitt***, [1976] Q.B. 142 (C.A.)). [Emphasis added]

123 The above description of the test has been applied in numerous Canadian cases and was recently applied by the Alberta Court of Appeal in *Dreco* at para. 33.

124 Irreparable harm must be established on the balance of probabilities by clear and compelling evidence. It cannot be inferred or established by mere conjecture: ***Millennium Charitable Foundation v. Canada (Minister of National Revenue)***, 2008 FCA 414, 384 N.R. 119 at para. 18; *Rigaux* at para. 17.

125 Irreparable harm also requires a finding that, if the injunction is not granted or continued, there is a likelihood that the defendants will, through their conduct, irreparably harm the plaintiffs. The issue is not whether there is a likelihood that the injunction will injure the defendants; it may well do so. The issue is whether there is a likelihood that the plaintiffs will be irreparably injured by the defendants' conduct, if the injunction is not granted or continued. The focus is on whether the defendants' wrongful conduct is likely to result in the plaintiffs' irreparable harm: *RJR-MacDonald* at para. 57.

126 In order to obtain an interlocutory injunction, the defendants' conduct must be so threatening and grave that it reverses the fundamental legal principle that execution will not be granted before judgment and judgment will not be granted before trial. The conduct must be such that it justifies a court order prohibiting the defendants from carrying on their business or using their property as they see fit. An interlocutory injunction is an extraordinary remedy and should only be granted in extraordinary circumstances. In *Aetna,* Estey J. explained the requirement as follows at para. 7:

> As a general proposition, it can be fairly stated that in the scheme of litigation in this country, orders other than purely procedural ones are difficult to obtain from the Court prior to trial. Where the injunction maintains the *status quo* in a way which is fair to both sides, the order is attainable; but, simply because the order would not injure the defendant is not sufficient reason to move the Court to grant what is generally regarded as an extraordinary intervention. In ***Law Society of Upper Canada v. MacNaughton***, [1942] O.J. No. 235, Rose C.J.H.C. stated at p. 551:

> I have always understood the rule to be that the question is not whether the injunction will harm the defendant, but whether it is probable that unless the defendant is restrained, wrongful acts will be done which will do the plaintiff irreparable injury. [Emphasis added]

127 It is expressly stated in the above passage, and implicit if not explicit in the jurisprudence, that interlocutory injunctions should only be granted where the defendant's conduct is in some way "wrongful" to the plaintiff. The wrongful conduct is usually the conduct complained of in the underlying action; conduct taken to dispose of assets or remove them from the jurisdiction so as to keep them beyond the reach of the plaintiff, namely, conduct prohibited under a Mareva injunction; or conduct that may strip the plaintiff of the very assets over which it claims a right in the underlying action, namely, conduct prohibited under a proprietary injunction.

128 The financial well-being of the party against whom the injunction is sought is one factor to be considered in determining whether the refusal to grant or continue an injunction will cause the applicant to suffer irreparable harm. However, a defendant's conduct is not "wrongful" if the defendant is entitled to conduct itself in that manner. A mere allegation, without evidence, that the corporation may cease to exist or may become impecunious if an injunction is not granted is not enough to satisfy the test for irreparable harm: *Rigaux* at para 17; *Aetna*.

129 It may be argued that in many of the cases cited in support of this proposition there was no evidence that the defendant was impecunious, would become so, or would cease to exist if the injunction was not granted. In both *Rigaux* and *Aetna*, the parties against whom the injunctions were sought were operating businesses that were generating profits and had other substantial assets from which to pay ongoing expenses. However, in *Aetna*, Estey J. stated, in *obiter*, that he would have refused to grant the injunction in any event. He reasoned that even if the winding up of the business did result in Aetna's insolvency, the party seeking the injunction had extensive and easily enforceable rights under bankruptcy and business corporations legislation.

130 There is no basis for granting an interlocutory injunction simply on the allegation that the plaintiff is a potential creditor and fears that if an injunction restraining the defendant from dissipating its assets is not granted, there will be no assets to satisfy the plaintiff's potential judgment. An injunction on such grounds is not supportable even if the plaintiff proves that it is highly probable that its action will be successful. In *Aetna*, Estey J. quoted the following passages in support of this proposition, at paras. 8 and 9:

> This was enunciated by Cotton L.J. in ***Lister & Co. v. Stubbs***, [1886-90] All E.R. 797, at p. 799, as follows:
>
> > I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant, the defendant has been ordered to give a security till the debt has been established by the judgment or decree.
> >
> > ...
>
> The principle has been restated in modern times in ***Barclay-Johnson v. Yuill***, [1980] 3 All E.R. 190, where Megarry V.C. stated, at p. 193:

> In broad terms, this establishes the general proposition that the court will not grant an injunction to restrain the defendant parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets *pendente lite* merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.
>
> [Emphasis added]

131 An interlocutory injunction is not intended to give the plaintiff the status of a secured creditor by giving it priority over the defendant's other creditors, nor is it intended to restrain the defendant from carrying on business in the usual course, which includes paying its other creditors: *Aetna* at para. 38.

132 Although it is not expressly stated in the above judgments, in my view, a major reason why an injunction is not granted simply on the basis that the party against whom it is sought is impecunious or may become impecunious or insolvent, is because that party's conduct is not wrongful. In other words, a defendant's actions are not "wrongful" if the defendant has assets, although few, to allow it to continue to carry on business and pay its ordinary expenses, and it does not breach insolvency or other laws in doing so.

133 In this case, the evidence does not establish that Ayron is insolvent. There is no evidence that the conduct complained of in the Plaintiffs' underlying action is causing the Plaintiffs irreparable harm; that the Defendants have or are wrongfully dissipating Ayron's assets or moving them beyond this Court's jurisdiction; or that Ayron's assets belong to the Plaintiffs. Ayron is simply attempting to carry on its business and pay its legitimate and ordinary expenses.

134 A corporation such as Ayron is entitled to attempt to carry on its business, and it is entitled and required to defend legal claims, make legal claims, and pay its ordinary, legitimate business expenses, if its officers and directors determine that it is in its best interests to do so. If the directors make decisions that are not in the best interests of the corporation, its stakeholders have remedies under business corporations and bankruptcy legislation: *Aetna*.

135 Lastly, Ayron is not the only Defendant in this litigation. If the Plaintiffs are ultimately successful in establishing that Ayron's affairs have been conducted in a manner that justifies relief under the oppression remedy, the Plaintiffs may also have a remedy against Ona, Ayron's sole director, and possibly against Ona and Chaluk, as controlling shareholders. I raise this as a mere consideration. It should not be taken as suggesting that Ona or Chaluk have breached any duties or conducted themselves improperly with regard to the Plaintiffs or Ayron.

136 Based on the foregoing, I cannot find that the Defendants' conduct will cause the Plaintiffs to suffer irreparable harm.

137 In the event that I am wrong, and there is sufficient evidence of irreparable harm to the Plaintiffs, I

will go on to determine the balance of convenience.

- Balance of convenience

138 The third prong of the tripartite test is to balance the harm that will be suffered by the plaintiff if the injunction is not granted against that which will be suffered by the Defendant if it is granted. Given the difficulty of determining the merits of the case and whether the plaintiff will suffer irreparable harm, the determination of whether or not an interlocutory injunction should be granted often turns on this test: *RJR-MacDonald* at para 62; *Dreco* at para. 37.

139 The evidence is that Ayron's only remaining, substantial asset is the money in its HSBC account. That money has already been depleted by half, from approximately $500,000 to $250,000, since this action was commenced in 2004 as a result of court orders releasing funds to be used to pay for its legal expenses and other ongoing business and corporate expenses. If the Order is not continued, there will be nothing to stop the Defendants from continuing to use these funds for those purposes. The evidence also indicates that Ayron is a holding company, and that its only income flows from revenue obtained from the lease of the hangars to third parties. There is not sufficient evidence before this Court at this preliminary stage of the proceedings to determine whether this income will be enough to cover Ayron's ongoing, ordinary business expenses.

140 There is a possibility that Ayron's remaining assets will be eaten up to pay for its ordinary, legitimate business and legal expenses, and there is a risk that the Plaintiffs will suffer harm if Ayron has no funds to satisfy any judgment the Plaintiffs may ultimately obtain. However, in my view, the potential harm that may be suffered by the Plaintiffs as a result will be less than the potential harm that may be suffered by Ayron if the Order is continued.

141 If the Defendants are prevented from using Ayron's own funds to carry on its business and pay for its ordinary expenses, this will inevitably result in judgments being rendered against it. In addition, this will also prevent Ayron from obtaining judgments or taking other actions to obtain the funds that it alleges are owing to it in this action and in other litigation in which it is involved. If Ayron's hands are tied in this fashion, it is very likely that this will result in its dissolution, which will in turn likely result in all the parties to this action losing the capital and effort that they have invested in Ayron.

142 I must also consider the fact that the Plaintiffs have given no undertaking as to damages. Such an undertaking would give greater weight to the Plaintiffs' application to continue the 2004 Order. The Alberta courts have ruled that such an undertaking is a vital part of determining the balance of convenience as, without it, the respondent may very well suffer irreparable harm: *Groeneveld* at para. 64; ***Interclaim Holdings Ltd. v. Down***, 1999 ABCA 329, 250 A.R. 94 at para. 63.

143 Based on the foregoing, I find that on the balance of convenience, the Defendants will suffer the greater harm if the Order is not vacated or varied.

144 In conclusion, I find that the 2004 Order can be characterized as an interlocutory *quia timet* injunction but that the tripartite test for continuing the injunction has not been satisfied.

Basis and grounds for characterizing and continuing Order as an Attachment Order

145 An attachment order may be granted under s. 17 of the *Civil Enforcement Act* (the *CEA*). The August 2004 statement of claim, notice of motion and Order make no express mention of the *CEA* and do not claim or grant relief on that basis.

146 Section 17 of the *CEA* states:

> Attachment order
>
> 17(1) A claimant may apply to the Court for an attachment order where
>
> (a) the claimant has commenced or is about to commence proceedings in Alberta to establish the claimant's claim ...
>
> ....
>
> (2) On hearing an application for an attachment order, the Court may, subject to subsection (4), grant the order if the Court is satisfied that
>
> (a) there is a reasonable likelihood that the claimant's claim against the defendant will be established, and
>
> (b) there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property,
>
> (i) otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and
>
> (ii) in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.
>
> (8) Any interested person may apply to the Court to vary or terminate an attachment order.
>
> ...

147 Section 17 of the *CEA* has been considered in a number of Alberta decisions.

148 The applicant bears the burden of satisfying the Court that the conditions for granting an attachment order under s. 17 of the *CEA* are present. An attachment order is an extraordinary remedy, and the court has the ultimate discretion to decide whether or not it should be granted, even if the s. 17 *CEA* requirements have been satisfied: ***1482221 Alta. v. Haney Farms Ltd.***, 2009 ABQB 760 at paras. 38 - 39.

149 A party can obtain an attachment order over money under section 17 of the *CEA*. Section 17 deals with "exigible" property, defined under the *CEA* as "property, not exempt from writ proceedings": *CEA*, s. 1(1)(u). Money is not exempt from writ proceedings.

150 The first requirement for obtaining an attachment order under the *CEA* is that there is a reasonable likelihood that the claimant's claim against the defendant will be established: *CEA* s. 17(1)(a). The standard is lower than a strong *prima facie* case but higher than the standard for obtaining summary

judgment, which requires that there be a genuine issue to be tried. Where the plaintiff's claim is based on an allegation of an oral contract, and there is conflicting evidence before the court dealing with an application for an interlocutory attachment order, the standard will be difficult to meet without corroborating evidence: ***Ridge Development Corporation v. Crestwood Condominiums Inc.***, 2008 ABQB 599, 463 A.R. 341 at paras. 28 to 33; *Haney Farms* at paras. 42 - 43. The Plaintiffs in the case at bar allege that the parties entered into an oral agreement, but the affidavit evidence is conflicting on this issue.

151 The Plaintiffs also allege that they have suffered oppression based on the fact that the Defendants have operated Ayron without the Plaintiffs' consent, failed to share information with them regarding Ayron's affairs, and transferred property belonging to Ayron to third parties and Ona. There is evidence of the first two allegations. There is also evidence that a hangar was transferred to Ona but the evidence is conflicting as to whether the Plaintiffs agreed to the transfer. It is not my role to decide whether this transfer was improper, nor do I.

152 However, the test to be applied in determining whether there is a reasonable likelihood that the Plaintiffs' claim against the Defendants will be established is low, and I find that it has been satisfied in the circumstances.

153 The second requirement for obtaining an attachment order under s. 17 of the *CEA* is that there be reasonable grounds for believing that the Defendants have dealt with Ayron's exigible property, or are likely to deal with that property, otherwise than for the purpose of meeting Ayron's reasonable and ordinary business expenses and in a manner that would be likely to seriously hinder the Plaintiffs in the enforcement of a judgment against the Defendants: s. 17(2)(b)(ii). This raises issues as to Ayron's solvency and the manner in which the Defendants have dealt with Ayron's assets.

154 There is a chance in any suit that a plaintiff will not be able to collect on its judgment. The test under s. 17(2)(b)(ii) is "not the likelihood that the plaintiffs will not be able to recover on any judgments they get. It is not simply a probability of non-recovery.": ***Naughton v. Can-Ber Testing Alta.***, 1999 ABQB 88, 242 A.R. 183 at paras. 9 - 10.

155 Where a defendant is paying its debts as they become due, there is no evidence of insolvency. Unless there is a sudden diversion of funds, the fact that a corporation regularly makes payments on a debt owing to its sole shareholder does not establish reasonable grounds for believing that the corporation is dealing with its property other than for the purpose of meeting its reasonable and ordinary expenses; nor is the fact that the controlling shareholder of a corporation can wind it down at any time: *Naughton*.

156 In none of the authorities provided to me by the parties was an attachment order granted where the respondent had substantial remaining assets and was taking no actions to dispose of those assets or move those assets beyond the applicant's reach.

157 The fact that there are dealings between non-arms-length parties does not, without more, establish that a defendant has dealt with its property, or is likely to deal with that property, in a manner that would be likely to seriously hinder the plaintiff in the enforcement of a judgment against the defendants: *Ridge Development* at para. 36.

158 In *Haney Farms*, one brother in a farming operation purchased the family farm from his siblings, issuing security in the form of promissory notes and a general security agreement. The brother then sold substantially all of the farm assets to pay down debts and scaled back the farming operation to running a seed plant and farming mostly leased land. The siblings sought an attachment order over the proceeds of sale of part of the farm, under s. 17 the *CEA*, to secure their rights as creditors. The court refused to grant the order ruling that the farm corporation had substantial assets with which to meet its debts to the siblings and could earn future profits with which to pay its debts by running the scaled-down farming business. The defendants were paying their ordinary business expenses as they became due, including ongoing payments to the creditor siblings. As a result, the court ruled that the applicants had not established that there were reasonable grounds for believing that the defendants were dealing with their exigible property, or were likely to deal with that property, in a manner that would be likely to seriously hinder the claimants in the enforcement of a judgment against the defendants.

159 An attachment order cannot be granted simply on the basis that the defendant may later become insolvent, but must be based on a serious examination of the defendant's situation to determine whether the plaintiff is likely to be seriously hindered in enforcing its judgment as a result of the way in which the defendant is dealing or is likely to deal with its property: *Haney Farms* at para. 58.

160 As to Ayron's solvency, there was no evidence at the time of the hearing of this application, that Ayron was failing to meet its ordinary business expenses. There was no evidence of any intention to default on any of its creditor obligations. There is also some likelihood that the Defendants' counterclaim against the Plaintiffs will be established. However, there is also some likelihood that the Plaintiffs' claim against the Defendants will be established. Based on the preliminary evidence before me, I cannot say that one claim has a greater chance than the other or that one judgment will be any greater than the other.

161 There is no basis for finding any reasonable threat that the Defendants will or may intentionally put their assets beyond the Plaintiffs' reach. Although the transfer of the hangar to Ona raises issues relating to Ona's fiduciary duties, it would be most unfair, given the preliminary nature of these proceedings, to attribute any wrongful intent to Ona in relation to the transfer, and I do not do so.

162 I am not satisfied that there are reasonable grounds for believing that the Defendants have dealt with or are likely to deal with their exigible property in a manner that would be likely to seriously hinder the Plaintiffs in the enforcement of any judgment they may obtain against the Defendants. Further, even if I were so satisfied, before the 2004 Order could be continued under the *CEA*, the Plaintiffs must comply with s. 17(4) of the Act, which requires the Court to obtain an undertaking as to damages or indemnity from the Plaintiffs, and none has been obtained or offered.

163 If the Order can be characterized as an attachment order under the *CEA*, it was clearly an interim order as s. 17(8) of the Act specifically provides that "[a]ny interested person may apply to the Court to vary or terminate an attachment order." Where the attachment order is granted *ex parte*, as was the case here, s. 17(8) expressly provides that it will expire within 21 days from the day that it is granted (with some exceptions) unless the order is extended on an application on notice to the defendant. Thus if the Order is an attachment order under the *CEA*, it is an interim order and can be vacated or varied.

164 The existence of the *CEA* likely does not preclude the Court from granting a Mareva injunction, preservation order, or attachment order under the common law. However, in granting such orders the court should be guided by the principles of the *CEA*: *Interclaim* at paras. 76 - 83.

165 If the 2004 Order is in the nature of an attachment order under the *CEA*, or a like order under the common law, I find that the conditions for continuing the Order on this basis do not exist.

Basis and grounds for characterizing and continuing Order as a Preservation Order

166 Rule 467 of the Alberta Rules of Court provides:

> 467. Where there is a dispute respecting the title to any property, the court may make an order for the preservation or interim custody of the property or may order the amount in dispute be brought into court or otherwise secured or may order the sale of the property and the payment of the proceeding into court.

167 Rule 467 does not apply to the case at bar as its application is confined to disputes over the title to property and there is no such dispute in this case. The Plaintiffs do not claim that Ayron's assets belong to them.

Issue Four: Should the 2004 Order be vacated due to the Plaintiffs' delay in proceeding to trial?

168 In order to continue to enforce the 2004 Order, the Plaintiffs must take diligent steps to move the within action forward.

169 The Order has had the effect of an interlocutory injunction or attachment order. Interlocutory injunctions and attachment orders are meant to be temporary in nature and are granted, either expressly or impliedly, on the condition that the plaintiff will proceed to trial with reasonable dispatch or due diligence: *CIBA-Geigy* at paras. 17 - 18.

170 In an application to vacate an interim injunction based on the inordinate delay of the plaintiff to proceed with the underlying action, there is no burden on the defendant to establish that it has suffered additional irreparable harm, over and above that which results from the imposition of the interim injunction. However, the court will consider whether the defendant's actions have contributed to the delay, for example, if the defendant has been obstructionist or uncooperative: *CIBA-Geigy* at paras. 27 - 30.

171 The prejudice suffered by a defendant against whom an interim injunction has been issued is even greater where the injunction is granted *quia timet*, since it is issued only on the basis that the applicant fears irreparable harm. As a result, there is a stronger basis for vacating such an injunction based on inordinate delay: *CIBA-Geigy* at paras. 24 - 25.

172 As termination for delay is not based on whether the defendant has been prejudiced by the delay, the defendant is entitled to have the matter proceed without delay whether or not the delay causes further

prejudice: ***Guarantee Co. of North America v. Noonan***, (1996), 138 Nfld. & P.E.I.R. 210, [1996] N.J. No. 60 (Nfld. T.D.) cited with approval in ***Calmusky v. Hodgins***, 2007 ABQB 417, 420 A.R. 85.

173 Although there has been little progress made in moving the within action forward, this is not a sufficient reason to vacate the 2004 Order. Both parties have been delayed, in part, because the within action has been entangled with the AS4 Action, the Lienholders' Action and the Holdback Actions. The parties have also been delayed by the Order itself. The Defendants have been delayed because they cannot effectively respond to any actions taken by the Plaintiffs unless they obtain the unanimous consent of the three individual parties or a further order of this Court, varying the Order to give Ayron access to its funds to pay for the legal expenses required to respond. This has in turn delayed the Plaintiffs.

174 The court has a very broad discretion in determining whether an attachment order or a like order should be vacated as a result of the plaintiff's delay in moving the action forward: *Calmusky*. I find that there is insufficient cause for vacating the 2004 Order on this basis.

Conclusion

175 The statement of claim raises a cause of action for oppression under the *ABCA* sufficient to sustain the 2004 Order.

176 This Court has jurisdiction to vacate or vary the 2004 Order and that the Order should be vacated for the reasons given above.

177 If I am wrong and there are grounds for continuing the Order, the Order is hereby varied to allow the Defendants to use Ayron's corporate funds for the purpose of paying for its ordinary and reasonable business expenses, including the legal expenses needed to defend and make claims in the within action and the other actions in which it is involved, its GST, taxes or other statutorily required payments and the legal or other professional fees required to maintain its corporate registration.

178 If the parties cannot agree on costs, they may speak to them within a reasonable period of time.

A.G. PARK J.

End of Document

TAB 2

Twinn v. 1985 Sawridge Trust, [2017] A.J. No. 1340

Alberta Judgments

Alberta Court of Appeal

M.S. Paperny, B.L. Veldhuis and S.L. Martin JJ.A.

Heard: November 1, 2017.

Judgment: December 12, 2017.

Docket: 1703-0193-AC

Registry: Edmonton

[2017] A.J. No. 1340 | 2017 ABCA 419

Between Patrick Twinn, on his behalf, Shelby Twinn and Deborah A. Serafinchon, Appellants (Applicants), and Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees"), Respondents (Respondents), and Public Trustee of Alberta ("OPTG"), Respondent (Respondent), and Catherine Twinn, Respondent (Respondent), and Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley, Not Parties to the Appeal (Respondents)

(28 paras.)

Case Summary

Appeal From:

On appeal from the Order by the Honourable Mr. Justice D.R.G. Thomas Dated the 5th day of July, 2017, Filed on the 19th day of July, 2017 (2017 ABQB 377; Docket: 1103 14112).

Counsel

N.L. Golding, Q.C., for the Appellants.

D.C. Bonora and A. Loparco, for the Respondents Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Trust.

J.L. Hutchison, for the Respondent The Office of the Public Guardian and Trustee.

D.D. Risling, for the Respondent Catherine Twinn.

Memorandum of Judgment

The following judgment was delivered by

THE COURT

Introduction

1 This appeal is part of ongoing litigation involving the 1985 Sawridge Trust (the Trust), which was established by the Sawridge Indian Band No. 19 (the Band, now known as the Sawridge First Nation, or SFN) to hold certain assets belonging to the Band. Disputes regarding membership in the SFN have a history going back decades, but the current Trust litigation deals specifically with potential amendments to the Trust. The Trust litigation has been case managed since 2011, and several procedural orders have been made including the one on appeal: *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377 (Sawridge #5). The specific procedural issues on this appeal are straightforward: did the case management judge err in declining to add three potential parties to the Trust litigation, and did he err in awarding solicitor and his own client costs against those potential parties?

Background to the Sawridge Trust Litigation

2 In 1982, various assets purchased with Band funds were placed in a formal trust for Band members. On April 15, 1985, then Chief Walter Patrick Twinn established the 1985 Sawridge Trust, into which those assets were transferred. The Trust was established in anticipation of proposed amendments to the *Indian Act*, RSC 1970, c I-6, intended to make the *Indian Act* compliant with the *Canadian Charter of Rights and Freedoms* by addressing gender discrimination in provisions governing band membership. It was expected that the legislative amendments (later known as Bill C-31) would result in an increase in the number of individuals included on the Band membership list. Specifically, it was expected that persons, mainly women and their descendants, who had been excluded from Band membership under earlier membership rules, would become members of the Band under the new amendments. Since 1985, and continuing to the present day, there has been extensive litigation regarding who is entitled to be a member of the SFN: see, eg., *Sawridge First Nation v Canada*, 2009 FCA 123, 391 NR 375, leave denied [2009] SCCA No 248; *Twinn v Poitras*, 2012 FCA 47, 428 NR 282; *Stoney v Sawridge First Nation*, 2013 FC 509, 432 FTR 253.

3 The 1985 Sawridge Trust restricts the Beneficiaries of the Trust to those persons who qualified as members of the Band under the provisions of the *Indian Act* in existence as of April 15, 1982, that is before the legislative amendments of Bill C-31. The Trust is currently administered by five Trustees, at least four of whom are also Beneficiaries. In 2011, the Trustees sought advice and direction from the court with respect to possible amendments to the Trust, and specifically to the definition of Beneficiaries, which the Trustees recognize as potentially discriminatory. It is not clear how the Trust might be amended to address any discrimination, although there is a suggestion that Beneficiaries could be defined as present members of the SFN. As of April 2012, the SFN had 41 adult and 31 minor members. Most, but not all, of those members qualify as Beneficiaries of the Trust under the existing definition. If the Trust is amended,

some individuals may cease to be Beneficiaries, and others, not currently Beneficiaries, may come within the amended definition.

4 On August 31, 2011, the case management judge issued a procedural order intended to provide notice of the application for advice and direction to potentially affected persons. The current parties to the litigation include four of the Trustees, Roland Twinn, Walter Felix Twinn, Berta L'Hirondelle and Clara Midbo. A fifth Trustee, Catherine Twinn, is a separately named and separately represented party. Ms. Twinn, who was married to the late Chief Walter Patrick Twinn, is a dissenting trustee; although her position is not entirely clear, she seems to take the position that the Trust does not necessarily have to be amended. In 2012, the Public Trustee was added as a party to act as litigation representative for affected minors and those who were minors at the commencement of the proceeding but who have since become adults: 2012 ABQB 365 (Sawridge #1).

The application to be added as parties (Sawridge #5)

5 The application that gives rise to this appeal was filed by three individuals who wish to be added as party respondents to the Trust litigation. Each of the three is differently situated. Patrick Twinn is the son of Catherine Twinn. He is a member of the SFN and a beneficiary of the Trust. Shelby Twinn is Patrick Twinn's niece (she is the daughter of Paul Twinn, who is Patrick Twinn's half-brother). Roland Twinn, one of the trustees, is also Shelby's uncle. Catherine Twinn is her great-aunt. Shelby is a beneficiary of the Trust but not a member of the SFN. The third applicant, Deborah Serafinchon, is neither a member of the SFN nor a current beneficiary of the Trust. She says that her father is the late Walter Twinn. She is not currently a status Indian under the *Indian Act*.

6 The appellants submit that their interests are directly affected by the Trust litigation and that they should be added as parties to that litigation. Shelby Twinn, in particular, wishes to argue that she may cease to be a beneficiary under the Trust if it is amended. Both she and Patrick Twinn wish to argue that the Trust cannot and ought not be amended. The position to be taken by Ms. Serafinchon is currently unclear.

7 The first procedural order, as amended on November 8, 2011, provided that any person interested in participating in the advice and direction application was to file an affidavit no later than December 7, 2011. Two of the three applicants were served with that order. There was no suggestion any of the applicants was unaware of the application and the time lines.

8 The case management judge denied the applications to be added as parties. He held that the addition of more parties would add to the complexity of the litigation, increase the costs to the Trust and the assets held in it, and expand the issues beyond those identified during case management.

9 With respect to the applications of Shelby and Patrick Twinn, the case management judge held that their participation in the advice and direction application would be redundant as their interests are already represented. He noted that both Shelby and Patrick are currently Beneficiaries under the Trust and opined that this status would not be eliminated by the outcome of the Trust litigation, a conclusion that is challenged by the appellants. He further held that the ongoing involvement of current Beneficiaries would

be better served by transparent communications with the Trustees and their legal representatives, in order to ensure that their status as Beneficiaries is respected.

10 With respect to the application of Deborah Sarafinchon, the case management judge noted that she has not applied for membership in the SFN and apparently has no intention to do so. He also noted that the Trust litigation is not intended to address membership issues, and that the purpose of case management has been to narrow the issues in the litigation rather than expand them. He held that Ms. Sarafinchon can monitor the progress of the Trust litigation, review proposals made by the Trustees as to the definition of Beneficiaries under the Trust, and provide comments to the Trustees and the court.

11 The case management judge then went on to consider costs. He concluded that Patrick and Shelby Twinn "offer nothing and instead propose to fritter away the Trust's resources to no benefit". He concluded that they had no basis to participate in the Trust litigation, and that their proposed litigation would end up harming the pool of beneficiaries as a whole. They appeared late in the proceeding, and they did not promise to take steps to ameliorate the cost impact of their proposed participation, instead proposing to have the Trust pay for that participation. Based on the Supreme Court's decision in *Hryniak v Mauldin*, 2014 SCC 7 at para 2, [2014] 1 SCR 87, he noted a "culture shift" toward more efficient litigation procedure and concluded that one aspect of that culture shift is to use costs awards to deter dissipation of trust property by meritless litigation activities. He therefore ordered Patrick and Shelby Twinn to pay solicitor and own client indemnity costs of the Trustees in respect of the application. He awarded party and party costs against Deborah Serafinchon in favour of the Trustees.

12 All three applicants appeal the denial of their applications to be added as parties to the Trust litigation. Patrick and Shelby Twinn also appeal the award of solicitor and own client costs made against them.

Standard of review

13 Case management decisions are entitled to considerable deference on appeal. Absent a legal error, this Court will not interfere with a case management judge's exercise of discretion unless the result is unreasonable. This is particularly the case where a decision is made by a case management judge as part of a series of decisions in an ongoing matter: *Ashraf v SNC Lavalin ATP Inc*, 2017 ABCA 95 at para 3, [2017] A.J. No. 276; *Goodswimmer v Canada (Attorney General)*, 2015 ABCA 253 at para 8, 606 AR 291; *Lameman v Alberta*, 2013 ABCA 148 at para 13, 553 AR 44.

14 Cost awards are also discretionary, and are entitled to deference on appeal. The standard of review for discretionary decisions of a lower court was succinctly stated by the Supreme Court in *Penner v (Niagara Regional Police Services Board)*, 2013 SCC 19 at para 27, [2013] 2 SCR 125:

> A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations [*citations omitted*].

15 This Court has noted that when reviewing discretionary decisions, appellate intervention is required where a) a case management judge failed to give sufficient weight to relevant considerations; b) a case

management judge proceeded arbitrarily, on wrong principles or on an erroneous view of the facts; or c) there is likely to be a failure of justice if the impugned decision is upheld: *Bröeker v Bennett Jones*, 2010 ABCA 67 at para 13, 487 AR 111.

Did the case management judge err in declining to add the appellants as parties to the Sawridge Trust litigation?

16 The Alberta *Rules of Court* provide a discretionary procedure for the addition of parties to litigation. Rule 3.75 applies to litigation commenced by way of originating application. It requires that the court be satisfied that the order adding a respondent *should* be made, and that the addition of the party will not result in prejudice that cannot be remedied through costs, an adjournment, or the imposition of terms.

17 Two main questions have been identified when considering whether a party should be added to litigation under the Rules: (1) Does the proposed party have a legal interest (not only a commercial interest) that will be directly affected by the order sought? (2) Can the question raised be effectually and completely resolved without the addition of the party as a party? (*Amoco Canada Petroleum Co v Alberta & Southern Gas Co* (1993), 10 Alta LR (3d) 325 (QB) at paras 23-25). In a narrow sense, the only reason that it is necessary to make a person a party to an action is to ensure they are bound by the result: see *Amoco* at paras 13-15, citing *Amon v Raphael Tuck & Sons Ltd*, [1956] 1 QB 357 at 380. That the person may have relevant evidence or arguments does not make it necessary that they be added as a party. In the appropriate circumstances, such a person may be added as an intervenor, or may be a necessary witness.

18 In this case, it is unclear what interest the individual appellants have that is not represented by the parties already before the court, or what position they would bring to the litigation, necessary to permit the issues to be completely and effectually resolved, that will not be presented by those existing parties. As a matter of law, the Trustees represent the interests of the Beneficiaries, who include Patrick and Shelby Twinn. Catherine Twinn, as dissenting trustee, is separately represented, has taken an opposing view as to the need for amendment of the Trust, and will place that position before the court. The Public Trustee is tasked with representing the interests of all Beneficiaries who were minors when the litigation began, although it is acknowledged that the Public Trustee does not represent the interests of Patrick and Shelby Twinn (notwithstanding a comment made by the case management judge to the contrary).

19 Neither the record, nor the oral or written submissions of the appellants, puts forward the positions each of the proposed parties intends to advance. As such, it is impossible for us to conclude that each proposed party has an interest that is not yet represented. Given the absence of information about the actual views of the appellants, we have no foundation to conclude otherwise. It is to be presumed that the Trustees and Public Trustee will put forward the various arguments regarding proposed amendments to the Trust and how those proposed amendments could affect the interests of various categories of current and potential beneficiaries. That there is a separately represented dissenting Trustee before the court adds to the likelihood that all views will be canvassed and all interests protected.

20 The case management judge has been involved in the Trust litigation for several years, and deference is owed to his assessment of which parties need to be before the court in order for the questions raised in the litigation to be effectively resolved. His cautious approach to increasing the cost burden on the Trust and its beneficiaries, and unnecessarily expanding the Trust litigation, is well founded. Adding all the

beneficiaries and potential beneficiaries as full parties to the Trust litigation is neither advisable nor necessary. We would not interfere with the case management judge's decision not to grant party status to the appellants.

21 The appellants and Catherine Twinn also argue that the process followed here is flawed, as no originating application was filed to commence the Trust litigation. The Trustees say that it was always intended that the Procedural Order made by the case management judge on August 31, 2011 would be the constating document for the application for advice and direction. We agree with the Trustees that the lack of an originating application is not fatal to the litigation. However, the lack of an originating application, setting out specifics of the relief being sought, has resulted in a lack of clarity regarding if and how the Trust will be varied, whose interests will be affected by the variation, and how those interests might be affected. The Procedural Order provides details of how the litigation will proceed, including notice provisions and timelines, but it does not address the nature of the relief being sought.

22 During the oral hearing, this issue and a number of others arose that have not yet been the subject of an application to, or direction from the case management judge. One such issue is whether there is a need for a formal pleading setting forth the position of the Trustees and the relief being sought; specifically, whether the Trust is discriminatory; and if so, what remedy is being sought. A second issue is what procedure will be implemented for beneficiaries and/or potential beneficiaries to participate in the Trust litigation either individually or as representatives of a particular category of beneficiary. In addition, concern was raised to whether discrete legal issues could be determined prior to the merits of the Trust litigation being heard. These include whether the Trust is discriminatory, and whether s 42 of the *Trustee Act* applies. To date, we understand no formal application has been made to the case management judge on any of these matters. We strongly recommend that they be dealt with forthwith.

Did the case management judge err in awarding solicitor and own client costs?

23 The case management judge awarded solicitor and own client costs against two of the appellants, Patrick and Shelby Twinn, in favour of the Trustees. His rationale for doing so was "to deter dissipation of trust property by meritless litigation activities by trust beneficiaries": see para 53.

24 Solicitor and own client costs allow for a complete indemnification of legal fees and other costs for the successful party. This can include payment for "frills and extras" authorized by the client, but which should not fairly be passed on to a third party. They are distinct from solicitor-client costs, which allow for recovery of reasonable fees and disbursements, for all steps reasonably necessary within the four corners of the litigation: *Brown v Silvera*, 2010 ABQB 224 at para 8, 25 Alta LR (5th) 70; *Luft v Taylor, Zinkhofer & Conway*, 2017 ABCA 228 at para 77, 53 Alta LR (6th) 44.

25 Awards of solicitor-client costs are reserved for exceptional circumstances constituting blameworthy conduct of litigation; cases where a party's litigation conduct has been described as reprehensible, egregious, scandalous or outrageous: see *Stagg v Condominium Plan 882-2999*, 2013 ABQB 684 at para 25; *Brown v Silvera* at paras 29-35; aff'd 2011 ABCA 109. The increased costs award is intended to deter others from like misconduct. This court has reiterated recently that awards of solicitor and client costs are rare and exceptional; awards of solicitor and "own client" costs are virtually unheard of except where provided by contract: see *Luft* at para 78.

26 In an earlier case management decision in the Trust litigation, the case management judge issued an *obiter* warning to all parties, including counsel for Patrick Twinn, who seems to have been in attendance, of the possibility of awards for increased costs, saying:

> I have taken a "costs neutral" approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers) on a punitive or indemnity basis. True outsiders to the Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.
>
> *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299 (Sawridge #4) at para 30.

27 The case management judge's concerns in this regard may provide the basis for an award of solicitor-client costs in appropriate circumstances, but they do not eliminate the requirement to assess the appropriateness of such an award on a case by case basis. The judgment under appeal here does not set out what exceptional circumstances existed to justify an award of solicitor and own client costs against these appellants on this application, nor is it apparent from the reasons, or from the record, what litigation misconduct on the part of these appellants led to the making of this costs award. Moreover, an award for increased or punitive costs ought not be made in the absence of notice of the possibility of such an order and an opportunity for parties to make submissions as to whether the order is warranted. Although the case management judge raised the prospect of punitive cost awards in Sawridge #4, there was no specific notice or specific submissions on the issue in this application and no party to the proceedings sought those costs. On that basis alone the costs award should be set aside.

28 In the circumstances, we conclude that there was not a sufficient basis for the award of extraordinary costs against the appellants on this application, and the appeal from the costs award is allowed. The case management judge awarded party and party costs against Deborah Serafinchon in favour of the Trustees, and we make the same award against Patrick and Shelby Twinn.

Memorandum filed at Edmonton, Alberta this 12th day of December, 2017

M.S. PAPERNY J.A.
B.L. VELDHUIS J.A.
S.L. MARTIN J.A.

TAB 3

23.I — Introduction

1

A trust comes to a close, and the trustee is entitled on a passing of his final accounts to a discharge, when the terms of the trust have been carried out.[2] As we have seen, the terms may be of the simplest, requiring for instance the holding of land until the beneficiary is of age, or more complex, as when the trust creates a number of successive interests and confers upon the trustee extensive discretions and duties additional to those which are imposed by the law.[3] But whatever the terms, and in practice in almost all cases there is an instrument creating the trust which will contain those terms, the natural end of the trust is the moment when the trustee has properly transferred to beneficiaries all the remaining trust property in his name and possession, and has had his final accounts passed.[4]

3 **One of** the **powers that trustees may have is to end** the **trust by settling** the **trust property on new trusts**, whether or not they are the trustees of the new trusts. A general power of appointment may permit this (Thomas, *Powers* (1998) at 410-18; *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 372 (Ont. Gen. Div.); see chapter 21, Part V). If this is done, the old trust ends according to its terms, because no property is held in trust under its terms. This is a question that has generated litigation in the context of pension plan trusts, where the validity of successive amendments to such plans will be dependent upon the proper interpretation of the powers granted in the original plan. See *Joy Technologies Canada Inc. v. Montreal Trust Co. of Canada* (1995), 7 E.T.R. (2d) 243 (Ont. Gen. Div.); *Metropolitan Toronto Pension Plan (Trustees of) v. Toronto (City)* (2003), *(sub nom. Markle v. Toronto (City))*, 63 O.R. (3d) 321 (Ont. C.A.); leave to appeal refused (2003), 2003 CarswellOnt 4371 (S.C.C.).

TAB 4

Chalmers v. Chalmers Alter Ego Trust, [2017] B.C.J. No. 2885

British Columbia Judgments

British Columbia Supreme Court

(In Chambers)

Vancouver, British Columbia

Tammen J.

Heard: June 26, 28 and 29, 2017 by teleconference.

Oral judgment: July 18, 2017.

Docket: S1610774

Registry: Vancouver

[2017] B.C.J. No. 2885 | 2017 BCSC 2646 | 294 A.C.W.S. (3d) 670 | 40 E.T.R. (4th) 7 | 2017 CarswellBC 3967

Between Duncan Andrew Chalmers, Petitioner, and David S. Shymko and Ian R. Black, in their capacities as co-Trustees of the Elizabeth Chalmers Alter Ego Trust dated June 21, 2007, Solus Trust Company Limited, Cameron David Chalmers, in his personal capacity, Cameron David Chalmers, in his capacity as the Executor of the Estate of Elizabeth Mary Day Chalmers and the Estate of John David Chalmers, Gordon Robert Chalmers, Colleen Elizabeth Chalmers, Kristen Chalmers, Quentin Bryce Krez Chalmers, Daphne Paulina Mary Chalmers, and Paulina Cynthia Christine Chalmers, Respondents

(72 paras.)

Counsel

Counsel for the Petitioner: A.D. Francis.

Counsel for the Respondents David S. Shymko and Ian R. Black, in their capacities as co-Trustees of the Elizabeth Chalmers Alter Ego Trust dated June 21, 2007: E.F. Macaulay.

Counsel for the Respondents Cameron David Chalmers, in his personal capacity and Cameron David Chalmers in his capacity as the Executor of the Estate of Elizabeth Mary Day Chalmers and the Estate of John David Chalmers, Gordon Robert Chalmers, Colleen Elizabeth Chalmers and Kristen Chalmers: K. Geddes.

Oral Reasons for Judgment

TAMMEN J. (orally)

1 The main issue I must determine is which of two alter ego trusts created by Elizabeth Mary Day Chalmers, who I shall refer to as Mrs. Chalmers, is operative.

2 Mrs. Chalmers created one such trust in 2007, another in 2014. The parties agree that the 2007 trust was fully and completely constituted in June 2007. Mrs. Chalmers, as settlor, settled the following assets into the trust:

* two accounts with CIBC Wood Gundy;
* all of the settlor's right, title, and interest in and to the real property situate at 5665 Westport Road, West Vancouver, British Columbia, V7W 1V3, legally described as the Municipality of West Vancouver, Parcel Identifier 016-136-098, Lot K, Block E, District Lot 1374, Plan 22883, and any other real property substituted therefore during the settlor's lifetime, subject to the reservation to the settlor of a life estate therein;
* all of the settlor's right, title, and interest in and to Trans America Life Canada Policy No. 1176904, as the owner and beneficiary thereof; and finally
* an irrevocable pledge in the amount of $60,000 with respect to an RRSP account then valued at $140,000, owned by her husband, John David Chalmers.

3 Clause 1.4 made the trust irrevocable. Thus, the question of the effect of the 2014 trust will turn on whether or not it amounted to a resettlement of the 2007 trust. The 2007 trust names Mrs. Chalmers as trustee and David Shymko and Ian Black as successor co-trustees. Mr. Shymko was for many years a trusted financial advisor to Mrs. Chalmers.

4 Mrs. Chalmers, the settlor of the trust, was the sole beneficiary during her lifetime. The main beneficiaries of the trust upon Mrs. Chalmers' death were her three sons: Cameron, born in 1957, Duncan, born in 1959, and Gordon, born in 1960. The 2007 trust contained a provision for Mrs. Chalmers' husband, David, to be permitted to reside at the Westport Road property until his death or such time as he no longer wished to do so.

5 Thus, although Mrs. Chalmers did not wish for her husband, should she predecease him, to share in her estate, she did not wish for him to be rendered homeless. This intention is evinced by a letter she wrote dated January 12, 2008.

6 The parties agree that the main reasons Mrs. Chalmers created an alter ego trust were to effectively disinherit her husband and to avoid probate fees.

7 An alter ego trust, if fully constituted, potentially avoids claims under the *Wills, Estates and Succession Act*, since trust assets fall outside the ambit of the testator's will. The 2007 trust stipulates that upon Mrs. Chalmers' death, all trust assets are to be divided into three equal shares, with each of her sons, in essence, taking a one-third interest. If any of the sons are deceased, their issue benefits on a *per stirpes* basis.

8 Other provisions of the 2007 trust include the following: Until the distribution date, the trustee shall pay the settlor all the net income of the trust, potentially up to the point of exhausting the entire capital. The successor trustee has discretion to distribute from time to time such part of the income of each trust residue share to a designated son and the designated son's issue as the successor trustee considers advisable. At termination date, the successor trustee is to distribute each trust residue share to each designated son and his issue who are alive at the termination date as the successor trustee sees fit.

9 Section 3.7 of the 2007 trust granted the trustee the power to resettle the trust fund into a new trust. It reads as follows:

> Notwithstanding the provisions of Subsections 3.3 to 3.6 hereof, from time to time the Trustee may appoint, transfer and convey the whole or any part of the Trust Fund to another trust, provided that the Trustee is of the opinion that the Persons beneficially interested in such other trust are substantially the same Persons and have similar interests, contingent or otherwise, in such other trust as the applicable Beneficiaries have in respect of the Trust Fund or such part thereof, and that the terms of such other trust are substantially the same as the terms upon which the Trustee holds the Trust Fund or such part thereof. The appointment, transfer or conveyance of the Trust Fund or such part thereof as aforesaid shall be in satisfaction of the applicable Beneficiaries' interests in the Trust Fund or such part thereof.

10 Section 4(g) of the 2007 trust deed gave Mrs. Chalmers the power to deal in any way with any of the assets comprising the trust fund from time to time during the administration of the trust in the same manner as the trustee might do personally as if the trustee were the beneficial owner of such assets.

11 Two notes penned by Mrs. Chalmers, one dated January 12, 2008 and one dated March 31, 2008, express her overarching intention that her estate be divided equally among her three sons, as well as her desire that her estate be distributed as soon as possible after her death. Although there was a sound legal reason for the outside window for termination of the trust, namely 80 years, Mrs. Chalmers viewed that timeframe as "absolutely ridiculous".

12 Mrs. Chalmers took no steps to address these concerns until 2014, when a second alter ego trust was created. Clearly, the petitioner Duncan Chalmers played a role in the central events leading to the execution of that trust deed on April 14, 2014, including putting his mother in touch with counsel who prepared the documents. However, it is equally clear that Mrs. Chalmers played an active role in the entire process, including several meetings, at least two at her residence, with counsel, documented in his account as being related to estate planning. The amount billed for legal services was $6,382.56. Mrs. Chalmers, as shown by her handwritten note on the account, paid it forthwith. Thus, she was obviously of the view that the legal work performed was in keeping with her wishes.

13 The assets of the 2014 trust, appended as Schedule A, are these:

* all of the settlor's right, title, and interest in and to the following accounts at CIBC Wood Gundy, and there are two account numbers listed which were the original two accounts

from the 2007 trust. Apparently the numbers had changed. In addition, a registered retirement income fund account and a tax free savings account;

* all of the settlor's right, title, and interest in and to the property commonly known as 5665 Westport Road, West Vancouver, British Columbia, V7W 1V3, and legally described as Lot K, Block E, District Lot 1374, Plan 22883;

* in addition, all of the settlor's right, title, and interest in a life insurance policy with Sun Life Financial, which was apparently owned by her husband, David Chalmers, and as well the same irrevocable pledge in respect of the $60,000 from the RRSP of her husband, David Chalmers.

14 As with the 2007 trust, Mrs. Chalmers is named as the settlor, the trustee, and during her lifetime the sole beneficiary in the 2014 trust.

15 The main differences between the 2007 trust and the 2014 trust are as follows:

1) there is a mechanism put in place in the 2014 trust with respect to subdivision of the West Vancouver property;

2) pursuant to s. 11(e), the remaining assets of the 2014 trust are to be divided into three equal shares, each share held for the benefit of a son and his issue and each share to be distributed within two years of Mrs. Chalmers' death in the following order of priority: first to the son while such son is alive, and second, to the issue of such son on a *per stirpes* basis from and after the death of such son;

3) the 2014 trust eliminated the right of occupancy of Mrs. Chalmers' spouse, David Chalmers, in the Westport Road property;

4) the 2014 trust required the successor trustees to obtain approval of the beneficiaries before taking fees from the trust. There was a mechanism in place for a 30-day window for any of the beneficiaries to object to a specific account.

16 Mr. Shymko, as one of the named successor trustees, received a copy of the 2014 trust. He set out six concerns he had regarding the trust in a letter to Mrs. Chalmers dated August 27, 2014. Those were as follows:

* a concern about who had authority to act for the benefit of the trust should Mrs. Chalmers become incapacitated before she died;

* the purported termination of the 2007 trust;

* a concern that Schedule A referred to assets which were not properly transferrable or not eligible to be held by a trust (and he was referring there to the RRIF and TFSA accounts);

* a concern that the life insurance policy referred to in Schedule A was not owned by Mrs. Chalmers but was owned by her husband David;

* some definitional concerns with respect to the trust indenture and a note that it would have been better had he been consulted prior to the execution of the trust deed;

* finally, a concern about the terms of trustee remuneration, upon which Mr. Shymko said he would not be prepared to act.

17 Of note, Mr. Shymko's letter contains no assertion, as he forcefully submits in these proceedings, that the 2014 trust is merely an empty shell, nor that it is ineffective because it does not specifically state that Mrs. Chalmers is resettling the trust in her capacity as trustee.

18 On March 23, 2015, the petitioner, purportedly acting under a power of attorney granted by Mrs. Chalmers, executed various amendments to the 2014 trust. Among the changes was the appointment of a new successor trustee, Solus Trust Company Limited. Some of the other changes appear to be responsive to the concerns expressed by Mr. Shymko in the August 27, 2014, letter.

19 Mrs. Chalmers did not sign the 2015 amendments and there is strong evidence that she, in fact, refused to sign those documents. Duncan Chalmers left an unsigned copy with her, along with a self-addressed envelope to the law office which prepared the amendments. Mrs. Chalmers apparently did not sign and return the amendments. Mrs. Chalmers made a diary entry on March 22, 2015, one day prior to the execution of the amendments by the petitioner, stating that she had spoken with the lawyer and told him that she would not sign anything and was unavailable to come to his office.

20 The unsigned amendments were apparently placed by Mrs. Chalmers in an envelope on which she wrote:

> These papers all brought to me by Duncan and Cindy on Sat. 04 April 2015. I told him I would not sign anything.

21 On May 1, 2015, Mrs. Chalmers revoked the power of attorney granted to both Duncan and Gordon Chalmers, leaving Cameron Chalmers as her sole attorney. Of the three sons, only Cameron lived in Canada. This may have been the primary motivation for the change, although in my view nothing turns on that fact in this hearing.

22 Mrs. Chalmers executed an enduring power of attorney on October 20, 2015, appointing Cameron as her primary attorney and Mr. Shymko as the alternate attorney. Clearly Mrs. Chalmers still trusted Mr. Shymko and it appears that she still wished for him to be involved in her legal and estate matters. There is no evidence of any relationship between Mrs. Chalmers and Solus Trust Company Limited.

23 Also on August 20, 2015, Mrs. Chalmers executed two deeds of appointment of trust which purported to transfer all assets of the 2014 trust and the 2015 amended trust to Elizabeth Chalmers personally.

24 Mrs. Chalmers died on February 28, 2016. Her husband David Chalmers died April 16, 2016.

25 Upon the death of Mrs. Chalmers, there were four possible scenarios for the co-trustees to consider as regards their legal situation:

1) the 2007 trust was the operative trust, in which case they should assume duties as successor trustees and administer the trust;

2) the 2014 trust was the operative trust, in which case they should determine whether or not they were prepared to act under the terms of remuneration set out therein and proceed accordingly;

3) the 2014 trust, along with the 2015 amendments was operative, in which case Solus was the successor trustee, not Messrs. Shymko and Black;

4) the 2014 trust was the operative trust, but the deeds of appointment effectively transferred all assets back to Mrs. Chalmers personally, in which case there was no trust to administer.

26 Apparently the co-trustees did not consider any possibility other than the first. They transferred trust assets into their own names as trustees and commenced administering the 2007 trust. In my view, the failure of the co-trustees to consider legal scenarios 2 through 4 was imprudent. I agree with the petitioner that the co-trustees should have wanted to know which of the two trusts was operative at the time of Mrs. Chalmers' death.

27 The subsequent actions of the co-trustees could also be described as imprudent. These actions include:

1) failing to respond to correspondence received from petitioner's counsel in a timely fashion and ultimately responding through counsel;

2) declining a request for an in-person meeting with the beneficiaries;

3) refusing to provide quarterly reports as required by the terms of the 2007 trust;

4) failing to obtain an independent third party written legal opinion as to which trust was operative.

28 It is, of course, impossible to say whether, for instance, an immediate in-person meeting to identify common ground and perhaps clear the proverbial air might have made litigation avoidable. Equally, one cannot say if an independent legal opinion would have satisfied all parties and rendered this litigation unnecessary.

29 Suffice it to say I must now determine which of the 2007 and 2014 trusts is operative.

30 The three certainties of a trust are:

1) certainty of intention;

2) certainty of subject matter;

3) certainty of objects.

31 A trust is fully constituted when there is a clear intention to create a trust, the trust property is clearly defined, and the trust objects are clear: see, for instance, *Mordo v. Nitting et al*, 2006 BCSC 1761; *Waters' Law of Trusts in Canada*, 3rd ed. 2007.

32 The parties agree that in law a trust may be resettled, so long as nothing in the terms of the original trust precludes such a resettlement. The petitioner cites *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 372

(Gen. Div.), as authority for this general proposition. There, Steele J., after referring to the House of Lords decision of *Pilkington v. Inland Revenue Commissioners*, [1964] A.C. 612, found that the terms of the trust in issue permitted the trustee to transfer all the assets of the trust into new trusts, an effective resettlement.

33 The petitioner says that Clauses 4(g) and in particular, 3.7 in the 2007 trust permit resettlement and that is what occurred in 2014.

34 The respondents do not take issue with the ability to resettle in general or even in this specific case. Rather, the respondents advance the following points in aid of a submission that what occurred in 2014 was not a legally effective resettlement:

1) all that Mrs. Chalmers did in 2014, she did in her personal capacity, not as trustee of the 2007 trust. Only the trustee has the power to resettle;
2) Clause 3.7 of the 2007 trust stipulates that the persons beneficially interested in a subsequent trust be substantially the same as the original beneficiaries. The failure to provide for David Chalmers in 2014 is therefore fatal to the resettlement;
3) no assets were legally transferred into the 2014 trust. It thus remains an empty shell.

35 In addition, the respondent co-trustees point to certain assets in Schedule A of the 2014 trust which were not transferrable, and to an insurance policy which was owned by another individual.

36 The respondents Gordon and Cameron Chalmers also submit that the 2014 trust, which they say is a trust-to-trust transfer, does not meet the requirements for an alter ego trust pursuant to the *Income Tax Act*.

37 In response to these last mentioned points, the petitioner says they all merely speak to the quality of the trust as opposed to its effectiveness.

38 Finally, the respondents Gordon and Cameron Chalmers rely on the deeds of appointment if the court finds that the 2014 trust was an effective resettlement of the 2007 trust.

39 In considering the 2014 trust, I must give effect to the plain language of the document. I must have in mind, insofar as it is possible, the clear intentions of Mrs. Chalmers and, where legally permissible, I should attempt to give effect to her testamentary wishes.

40 I am satisfied that what occurred in 2014 was an effective resettlement of the 2007 Elizabeth Chalmers alter ego trust.

41 I turn first to compliance with Clause 3.7, in particular, whether or not the beneficiaries were substantially the same. In my view, Mrs. Chalmers' failure to stipulate that her husband be permitted to reside at the Westport Road property is of no legal significance. Apparently by 2014, he was no longer living there, so it was not factually significant.

42 Moreover, David Chalmers was not a primary beneficiary of the 2007 trust. The primary beneficiaries

were Mrs. Chalmers' three sons. The secondary beneficiaries were their issue, if any. Thus, the beneficiaries of both alter ego trusts were substantially the same.

43 Next I will address the argument regarding execution of the 2014 trust.

44 The respondents argue that Mrs. Chalmers, in her personal capacity, had no power to resettle the trust. Only Elizabeth Chalmers, trustee of the 2007 alter ego trust, had that power. Similarly, Elizabeth Chalmers, in her personal capacity, did not own the assets which are listed in Schedule A of the 2014 trust. Elizabeth Chalmers, trustee of the 2007 trust, owned those assets.

45 As I understand the respondents' position, the failure of the drafting solicitor to refer to the settlor of the 2014 trust deed as "Elizabeth Chalmers, Trustee of the Elizabeth Chalmers Alter Ego Trust" is fatal to the trust document. I cannot accept that argument.

46 Rather, I am persuaded, for the reasons advanced by the petitioner, that the court can and should presume that in executing the 2014 trust deed, Mrs. Chalmers was acting in her capacity as trustee of the 2007 trust. Those reasons are as follows:

1) the terms "settlor" and "trustee" on page 1 of the 2014 trust deed are definitional for purposes of the powers and responsibilities under the 2014 trust. They do not inform the capacity in which Mrs. Chalmers acted in creating the 2014 trust;
2) at worst, the failure to spell out Mrs. Chalmers' role as "trustee of the 2007 trust" is a minor drafting error by the drafting solicitor that should not defeat Mrs. Chalmers' clear intention;
3) there is ample evidence that Mrs. Chalmers intended to resettle the 2007 trust assets into the 2014 trust and I so find.

47 As noted by the petitioner, with respect to both trusts, Mrs. Chalmers wore several hats. She was the settlor of both trusts and during her lifetime was also the trustee of both and the sole beneficiary. Since she had the power as trustee of the 2007 trust to resettle the trust, I can and do presume that she acted in that capacity when she effected the resettlement in 2014.

48 The primary argument advanced by the respondents regarding alleged ineffectiveness of the 2014 trust is the failure to properly transfer assets in 2014. Before analyzing this question, I must comment on the erroneous position of the respondent co-trustees set out at paragraph 90 of written submissions and repeated in oral submissions, later corrected, that the 2007 trust owns the assets at Schedule A. That is not so. The trustee owns the assets, not the trust. In law, a trust cannot own assets.

49 The change in ownership which occurred in 2007 respecting all trust assets was a transfer from Elizabeth Chalmers to Elizabeth Chalmers, trustee of the Elizabeth Chalmers alter ego trust. For example, that is, in essence, the legal transfer of ownership which appears on the *Land Title Act* Form A transfer of the Westport Road property. Thus, as of June 21, 2007, the property was owned by Elizabeth Chalmers as trustee of the Elizabeth Chalmers alter ego trust.

50 After April 14, 2014, that property was still owned by Elizabeth Chalmers, trustee of the Elizabeth Chalmers alter ego trust. In short, there was no wording to be changed as regards ownership.

51 Both the 2007 and 2014 trusts are simply called the Elizabeth Chalmers alter ego trust, without reference to calendar year of creation. Mrs. Chalmers was sole trustee of both trusts and, as such, the owner of all trust property under both trusts. In my view, that simple set of facts effectively disposes of this argument. However, I will also consider the broader argument of incomplete or imperfect transfer advanced by the respondents.

52 I first observe that, in law, a gift can be made to a trust by declaration of trust. Actual transfer is not necessary. I agree with the following paragraph from *Elliott v. Elliott Estate* (2008), 45 E.T.R. (3d) 84 (Ont. S.C.J.), which is para. 37:

> An express trust must be duly constituted. Constitution may take place in various forms, but the method applicable to this case is by declaration of one's self as trustee, which is sometimes also referred to as automatic constitution. This type of constitution occurs when the settlor and the trustee are the same person. The settlor effectively declares himself or herself to be trustee of a trust for someone else. Since the settlor is already the owner of the trust property, no physical transfer is necessary as title is already vested in the owner. Such declaration means that the owner is thereafter divested of title in equity in favour of the beneficiary: Waters, *supra*, at 172.

53 As noted at para. 38 of that decision, it is often difficult to determine whether the owner actually intended to become a trustee and the burden of proof is on the party asserting creation of a trust.

54 In this case, I find Mrs. Chalmers clearly intended to become a trustee. The 2014 trust deed in Schedule A represents a clear declaration of trust. There is no ambiguity in Mrs. Chalmers' declaration of herself as a trustee. I thus find there is certainty of intention with regard to the 2014 trust.

55 The objects of the trust, the beneficiaries, are likewise certain and readily identifiable in the 2014 trust deed. As for subject matter, Schedule A clearly identifies trust assets. Thus, the requirement of certainty of subject matter is met.

56 I find that the Elizabeth Chalmers alter ego trust made on April 14, 2014, is a properly constituted and valid trust.

57 Before turning to the 2015 amendment, I wish to comment on the ancillary points made by all respondents. These are the points made in respect of transferability and potential non-compliance with the provisions of the *Income Tax Act*. I am in general agreement with the submissions of the petitioner that these arguments speak only to the quality of the 2014 trust, not its effectiveness.

58 With regard to the specific points advanced concerning the *Income Tax Act*, I adopt as a correct statement of the law what was said by Madam Justice Wedge at para. 260 of *Mordo*:

> Before turning to those issues, I will make the following comments about the alter ego trust provisions of the *ITA*. Those provisions have no bearing on whether the Trust was properly formed or valid. The *ITA* merely determines whether the settlor is required to pay capital gains tax at the time of settlement, or defer the triggering of capital gains until his or her death.

59 At para. 262, Wedge J. concluded as follows:

> Because compliance of the Trust with the *ITA* was not in issue in this case, the tax aspects of the Trust will not be considered further.

60 I turn now to the 2015 amendments. I cannot find that these were validly made by the petitioner acting under a personal power of attorney granted by Mrs. Chalmers. I have considerable reservation about whether there was a proper delegation of the trustee's powers or if such delegation was permissible.

61 The petitioner cites *Easingwood v. Cockroft*, 2013 BCCA 182, for the proposition that an attorney acting under a valid general power of attorney may create a valid *inter vivos* trust. I accept that general proposition. However, it is noteworthy that in that decision, Madam Justice Saunders, at paras. 61 and 70 emphasized the attorney's duty to act in accordance with the principal's intentions and in her best interests. I cannot find that execution of the 2015 amendments did accord with Mrs. Chalmers' intentions. The evidence compels me to reach the contrary conclusion.

62 Here I refer specifically to her March 22, 2015 diary entry and the notation respecting her refusal to sign the very documents on April 4, 2015. Clearly Mrs. Chalmers neither wished nor intended to implement the 2015 amendments. I decline to give legal effect to those amendments.

63 I have been invited by the respondents Cameron and Gordon Chalmers to make a declaration regarding the validity of the two deeds of appointment. I decline to do so. It is unnecessary for me to pass on the validity of those deeds of appointment in order to address the declaratory relief sought by the petitioner.

64 The deeds of appointment were not pled by the respondents. At this hearing, the petitioner sought very specific declaratory relief; namely, a legal determination that the 2014 trust was legally constituted. The deeds of appointment have no bearing on that question.

65 I grant the petitioner the following relief:

1) a declaration that the Elizabeth Chalmers alter ego trust made April 14, 2014 is a properly constituted and valid trust;
2) a declaration that the Elizabeth Chalmers alter ego trust made June 21, 2007, is no longer of legal force or effect because all assets that were previously held in the 2007 trust have since been settled into the 2014 trust.

66 I direct that the certificate of pending litigation be removed from the Westport Road property.

67 Finally, I understand that all parties wish to make further written submissions on costs. I would simply

ask that the parties do their best to exchange submissions, prior to submission to the Court, so that in due course I am able to consider one set of full submissions from each counsel on that score. I leave the timing of all of that to counsel.

68 Is there anything else, counsel?

69 MS. FRANCIS: Not from me, My Lord.

70 MS. GEDDES: No, My Lord.

71 MR. MACAULAY: No, My Lord.

72 THE COURT: Very good. We will adjourn.

TAMMEN J.

End of Document

TAB 5

Re Hastings-Bass (deceased) Hastings and others v Inland Revenue Commissioners

COURT OF APPEAL, CIVIL DIVISION
MEGAW, BUCKLEY AND ROSKILL LJJ
28th, 29th, 30th, 31st JANUARY, 1st FEBRUARY, 14th MARCH 1974

Settlement – Advancement – Power of advancement – Exercise of power by trustees – Validity – Understanding of trustees – Trustees failing to have proper understanding of effect of advancement – Advancement of funds of settlement to son of life tenant – Advanced funds to be held on trusts of sub-settlement – Trust for son for life with certain other powers and trusts – All powers and trusts other than life interest void for perpetuity – Whether advancement for benefit of son – Whether advancement effective to create a life interest in possession in son.

Trust and trustee – Powers of trustee – Advancement – Application of capital money for advancement of beneficiary – Advancement creating no interest in capital – Validity – Funds advanced to trustees of sub-settlement – Life interest with certain trusts and powers over – Trusts and powers over void for perpetuity – Whether capital money 'applied' – Whether advancement within powers of trustees – Trustee Act 1925, s 32(1).

By a settlement made in 1947 ('the 1947 settlement') property was settled on trusts under which the beneficial interests were: (a) a protected life interest for A, (b) after A's death on trust for such of his sons or remoter male issue as A should by deed revocable or irrevocable or by will or codicil appoint; (c) on specified trusts in default of and subject to any such appointment; (d) certain remainders over, and (e) a power for A to appoint a life interest in half the settled fund in favour of any wife that might survive him. A had four children. The first was a son, W, born on 30th January 1948. By a revocable deed of appointment dated 2nd January 1958 A appointed that the trustees of the settlement should from and after his death (and subject to any interest appointed in favour of his widow) stand possessed of the trust fund in trust for W, if and when he should attain the age of 25 years, absolutely. In 1957 A's sister had made a settlement ('the 1957 settlement') of a sum of £500 on trust under which she gave a life interest to W, and created certain powers and other interests. The rate of estate duty prospectively payable on property passing on A's death was high. Accordingly, a scheme was devised whereby estate duty might be reduced. The scheme took the form of an advancement by the trustees of the 1947 settlement, under the powers conferred on them by the Trustee Act 1925, s 32(1)[a], of a fund valued at £50,000 to the trustees of the 1957 settlement to be held on the trusts of the 1957 settlement. Since W was not a life in being at the date of the 1947 settlement it followed that the powers and beneficial trusts of the advanced fund declared by reference to the 1957 settlement, other than W's life interest, were void for perpetuity, although, in the existing state of the law, the trustees did not appreciate

a. Section 32(1), so far as material, provides: '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 or of any share thereof, 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, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs . . .'

that at the time of the advancement. A died on 4th June 1964. On a summons by the trustees to determine whether or not estate duty was payable on the advanced fund on A's death, the Inland Revenue Commissioners contended that the advancement was ineffective to create a life interest in possession in W in the advanced fund, which therefore remained subject to the trusts of the 1947 settlement, on the grounds (a) that trustees making an advancement by way of a sub-settlement must have a proper understanding of the effect of the sub-settlement for otherwise they could not take into account all the relevant circumstances, or give due consideration and weight to the benefit to be conferred on the person advanced; and (b) that in any event the advancement was in excess of the powers conferred on the trustees by s 32 of the 1925 Act which did not authorise a sub-settlement creating no interest at all in capital. It was common ground that if the advancement was effective to create a life interest in possession in W no estate duty was payable on the advanced fund on A's death.

Held – The advancement was effective to create a life interest in possession in W for the following reasons—

(1) Where, by the terms of a trust (as under s 32 of the 1925 Act), a trustee was given a discretion as to some matter under which he acted in good faith, the court should not interfere with his action, notwithstanding that it did not have the full effect which he intended, unless (i) what he had achieved was unauthorised by the power conferred on him or (ii) it was 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 (see p 203 *f*, post).

(2) If the advancement were effective W thereupon became entitled to an indefeasible life interest in possession in a fund of £50,000. Because of the incidence of estate duty, if the advancement were ineffective his interest in that £50,000 would remain a contingent interest, dependent on his attaining the age of 25, in a net sum of 27 per cent of £50,000, i e £13,500. Although the trusts of the sub-settlement intended to take effect on W's death would also have benefited W indirectly those benefits were of far less significance than the major benefits of the saving of death duties coupled with an acceleration of W's interest; in the circumstances there could be no doubt that the duty-saving aspect of the scheme was the primary consideration in the minds of the trustees. The commissioners had, therefore, failed to establish that, had the trustees realised that the ulterior trusts would fail for perpetuity, they would not have acted as they did, for the trustees could not reasonably have thought that failure would mean that the scheme could not be regarded as being for the benefit of W (see p 201 *e* to *j* and p 202 *b e* and *j* to p 203 *b* and *e g*, post); *Re Abrahams' Will Trusts* [1967] 2 All ER 1175 distinguished.

(3) Although the sub-settlement was ineffective to create any beneficial interests in the capital of the advanced fund it did not follow that the trustees had acted in excess of the power conferred on them by s 32 of the 1925 Act. The trustees had 'applied' part of the capital of the trust fund, within s 32(1), when they transferred the investments to the trustees of the 1957 settlement for that was manifestly a disposition of a part of the capital assets of the trust (see p 203 *j* to p 204 *c*, post).

Notes

For powers of advancement, see 21 Halsbury's Laws (3rd Edn) 177-180, paras 384-391, and for cases on the subject, see 28(2) Digest (Reissue) 781-788, *1107-1164*.

For the Trustee Act 1925, s 32, see 38 Halsbury's Statutes (3rd Edn) 143.

Cases referred to in judgment

Abrahams' Will Trusts, Re, Caplan v Abrahams [1967] 2 All ER 1175, [1969] 1 Ch 463, [1967] 3 WLR 1198, Digest (Cont Vol C) 797, *4606*.

Pauling's Settlement Trusts, Re, Younghusband v Coutts & Co [1963] 3 All ER 1, [1964] Ch 303, [1963] 3 WLR 742, CA, 47 Digest (Repl) 513, 4656.
Pilkington v Inland Revenue Comrs [1962] 3 All ER 622, [1964] AC 612, 40 Tax Cas 416, [1962] 3 WLR 1051, 41 ATC 285, [1962] TR 265, HL; *rvsg* sub nom *Re Pilkington's Will Trusts, Pilkington v Pilkington* [1961] 2 All ER 330, [1961] Ch 466, [1961] 2 WLR 776, CA; *affg* [1959] 2 All ER 623, [1959] Ch 699, [1959] 3 WLR 116, 28(2) Digest (Reissue) 785, 1139.

Cases also cited

Allan's Will Trusts, Re, Curtis v Nalder [1958] 1 All ER 401, [1958] 1 WLR 220.
Bristow v Warde (1794) 2 Ves 336, 30 ER 660, LC.
Dean v Prince [1953] 2 All ER 636, [1953] Ch 590; *rvsd* [1954] 1 All ER 749, [1954] Ch 409, CA.
Dundee General Hospitals Board of Management v Walker [1952] 1 All ER 896, sub nom *Dundee General Hospitals v Bell's Trustees* 1952 SC (HL) 78, HL.
Gisborne v Gisborne (1877) 2 App Cas 300, HL.
Gresham's Settlement, Re, Lloyds Bank Ltd v Gresham [1956] 2 All ER 193, [1956] 1 WLR 573.
Gulbenkian's Settlement Trusts, Re, Whishaw v Stephens [1968] 3 All ER 785, [1970] AC 508, HL.
Morgan v Gronow (1873) LR 16 Eq 1.
Roper-Curzon v Roper-Curzon (1871) LR 11 Eq 452.
Ropner's Settlement Trusts, Re, Ropner v Ropner [1956] 3 All ER 332, [1956] 1 WLR 902.
Turner, Re, Hudson v Turner [1932] 1 Ch 31, [1931] All ER Rep 782.
Vestey's Settlement, Re, Lloyds Bank Ltd v O'Meara [1950] 2 All ER 891, [1951] Ch 209, CA.
Wollasten v King (1869) LR 8 Eq 165.

Appeal

By an originating summons dated 18th April 1972 the plaintiffs, (1) Robin Hood William Stewart Hastings, (2) Martin Wakefield Jacomb (the trustees of a settlement dated 1st April 1947 ('the 1947 settlement') and made between Sir William Arthur Hamar Bass of the first part, Peter Robin Hood Hastings of the second part and others of the third part) and (3) Francis Bellett Cockburn (with the first plaintiff a trustee of a settlement dated 29th October 1957 ('the 1957 settlement') and made between Diana Wilmot Hastings and others) sought the determination of the court on a question arising on the construction of the 1947 and 1957 settlements and a deed of appointment made on 2nd January 1957 by Peter Robin Hood Hastings-Bass, formerly Peter Robin Hood Hastings ('the deceased'). The defendants were the Inland Revenue Commissioners. By an order made on 2nd November 1972 Plowman J, in answer to the question raised in the summons, declared that, on the true construction of the settlements, the deed of appointment and the Finance Act 1894, as amended, and in the events which had happened, estate duty became payable on the death of the deceased under ss 1 and 2(1)(*b*) of the Finance Act 1894 in respect of the investments and property then representing the investments transferred out of the 1947 settlement on 21st March 1958 by the trustees of the 1947 settlement to the trustees of the 1957 settlement as an advancement for the benefit of William Edward Robin Hood Hastings-Bass ('William'). The plaintiffs appealed against that order on the grounds (1) that the judge had been wrong in holding (a) that the case was on all fours with *Re Abrahams' Will Trusts*[1] and that no distinction in principle could be drawn between the two cases; (b) that the decision in *Re Abrahams' Will Trusts*[1] was correct; (c) that the decision in that case was binding on him, and (d) that in view of that decision he was bound to hold that estate duty became payable on the death of the deceased in respect of the investments and property then representing the advanced funds; (2) that, even if the relevant advance did no more than create a valid life interest in

1 [1967] 2 All ER 1175, [1969] 1 Ch 463

favour of William in respect of the advanced funds, it was still for his 'benefit', within the meaning of s 32(1) of the Trustee Act 1925, and still fell within the statutory powers of advancement possessed by the trustees of the 1947 settlement; and (3) that the relevant advance, being made in good faith and within the statutory powers possessed by the trustees of the 1947 settlement, was a valid advance and was not invalidated merely because the other beneficial interests and powers which the trustees believed that they were creating in relation to the advanced funds, in addition to the life interest in favour of William, were, contrary to their understanding of the law, perpetuitous. The facts are set out in the judgment of the court.

Christopher Slade QC and *H Hillaby* for the plaintiffs.
N C H Browne-Wilkinson QC and *Peter Gibson* for the commissioners.

Cur adv vult

14th March. **BUCKLEY LJ** read the following judgment of the court. This appeal raises a difficult question relating to an advancement under the Trustee Act 1925, s 32, by way of sub-settlement, some of the beneficial trusts of which are void for perpetuity. The appeal is from a judgment of Plowman J delivered on 2nd November 1972.

By a settlement dated 1st April 1947 (which we will call 'the 1947 settlement'), made on the marriage of Peter Robin Hood Hastings (who later assumed the additional surname of Bass and whom we will call 'Captain Hastings-Bass'), his uncle, Sir William Bass, settled property on trusts under which the beneficial interests were as follows: (a) a protected life interest for Captain Hastings-Bass; (b) after his death on trust for such of his sons or remoter male issue as Captain Hastings-Bass should by deed revocable or irrevocable or by will or codicil appoint; (c) in default of and subject to any such appointment on trust for such son of Captain Hastings-Bass as should first attain the age of 25 years before the expiration of 21 years after the death of Captain Hastings-Bass and, if there should be no such son, on trust for such son of Captain Hastings-Bass as should first attain the age of 21 years; (d) with remainders on similar trusts to two other nephews of the settlor and their respective male issue and an ultimate trust in favour of a named person; (e) with power for Captain Hastings-Bass by deed revocable or irrevocable executed prior to and in contemplation of any marriage or by will or codicil to appoint a life or less interest in not exceeding one-half of the trust fund in favour of any wife who might survive him. Captain Hastings-Bass had four children, a son (William) born on 30th January 1948, a son (Simon) born on 2nd May 1950, a son (John) born on 5th June 1954, and a daughter.

By a revocable deed of appointment dated 2nd January 1958, Captain Hastings-Bass in exercise of his power in that behalf under the 1947 settlement appointed that the trustees should from and after his death (and subject to any interest appointed in favour of his widow) stand possessed of the trust fund in trust for his son William, if and when he should attain the age of 25 years absolutely. William was then nearly ten years old, and he was bound to attain the age of 25 years, if at all, within 21 years of his father's death. The appointment appears to have had no significant effect on his contingent interest.

In the preceding year, on 29th October 1957, Miss Diana Hastings, a sister of Captain Hastings-Bass, had made a settlement of a sum of £500 on trusts under which the beneficial interests were as follows: (a) a life interest for William; (b) after his death in trust for such of his issue as he without transgressing the rule against perpetuities should by deed revocable or irrevocable or by will or codicil appoint; (c) in default of and subject to any such appointment in trust for his children who should attain the age of 21 years and if more than one in equal shares subject to hotchpot; (d) if there should be no such child of William in trust for such of the issue of Captain Hastings-Bass living at the date of the failure of the foregoing trusts as the trustees without transgressing the rule against perpetuities should by deed appoint; (e) in

default of and subject to any such appointment in trust for Captain Hastings-Bass's youngest son John absolutely; (f) with power for William by deed made in contemplation of marriage or by will or codicil to appoint to any wife who might survive him a life or lesser interest in the whole or any part of the trust fund. This settlement (which we will call 'the 1957 settlement') contained a power for the trustees in their absolute discretion from time to time and at any time after William should have attained 21 to hand over the whole or such part of the capital of the trust fund to him free from the trusts of the settlement as they might think fit. It also contained a power for the trustees at their discretion with the consent in writing of William to revoke by deed all or any of the trusts therein contained concerning the whole of the trust fund or any part or parts thereof and to declare such new or other trusts for the benefit of William or any child or remoter issue of his as the trustees might think proper.

The rate of estate duty prospectively payable on property passing on the death of Captain Hastings-Bass was high, and accordingly the solicitor to the 1947 settlement trustees devised a scheme which was described by Captain Hastings-Bass in a contemporary letter as 'a scheme whereby some of the enormous death duties may be reduced on the settlement'. This scheme took the form of a transfer by the 1947 settlement trustees under the statutory power of advancement to the 1957 settlement trustees on the trusts of the 1957 settlement of a fund valued at £50,000. On 21st March 1958 the 1947 settlement trustees with the consent of Captain Hastings-Bass and in exercise of the statutory power of advancement transferred out of the 1947 settlement to the trustees of the 1957 settlement investments to the value of £50,000 by way of advancement for the benefit of William to be held on the trusts of the latter settlement. The trusts of the 1957 settlement, as applied to the trust fund settled by that settlement, were innocent of any offence against the perpetuity rule. It is evident that the trustees' solicitor conceived that the trusts of the 1957 settlement as applicable to the funds transferred out of the 1947 settlement would also escape infringing the perpetuity rule. This view was consistent with the subsequent decision of Danckwerts J, dated 14th May 1959, in *Re Pilkington's Will Trusts*[1]. But the Inland Revenue Commissioners appealed from that decision and eventually in the House of Lords[2] it was held that a power of advancement was a special power and that accordingly trusts called into existence by its exercise must be written into the instrument creating the power for the purposes of applying the perpetuity rule.

William was not a life in being at the date of the 1947 settlement, and accordingly it is now common ground that all the powers and beneficial trusts of the advanced fund declared by reference to the 1957 settlement other than the life interest of William are void for perpetuity.

It is also common ground that, if the transaction of 21st March 1958 was effective to create a life interest in possession in William in the advanced fund, no estate duty became payable on that fund on the death of Captain Hastings-Bass, which occurred on 4th June 1964. The Inland Revenue Commissioners, however, contend that the effect of the transaction was not to create any new beneficial interests in the £50,000 fund, but that this fund at all times remained subject to the trusts of the 1947 settlement. On this footing it is clear that estate duty would have become payable on the fund on Captain Hastings-Bass's death.

In these circumstances, the plaintiffs, who are the present trustees of the 1947 settlement, applied by originating summons in the Chancery Division for the determination of the question whether estate duty did or did not become payable on the death of Captain Hastings-Bass in respect of the advanced fund. The only defendants to these proceedings are the Inland Revenue Commissioners. William attained the age of 25 years on 30th January 1973 and accordingly no one but he has any interest in the capital of the 1947 settlement fund, and the only persons interested in the

1 [1959] 2 All ER 623, [1959] Ch 699, 40 Tax Cas 416

2 *Pilkington v Inland Revenue Comrs* [1962] 3 All ER 622, [1964] AC 612, 40 Tax Cas 416

income of that fund are himself and his mother, who is at present entitled under a testamentary appointment made by Captain Hastings-Bass to half the income of the fund. She does not, however, seek to assert that the 1958 advancement was not effective to create a life interest in possession in William in the advanced fund.

The case came in due course before Plowman J for decision, and, following an earlier decision of Cross J in *Re Abrahams' Will Trusts*[1], the learned judge held that the result actually produced by the 1958 advance was substantially or essentially different from the intentions of the 1947 settlement trustees when they made it. Following Cross J, Plowman J took the view that the 1947 settlement trustees never effectively exercised the power of advancement, and that accordingly the £50,000 fund at all times remained subject to the trusts of the 1947 settlement. He therefore decided that estate duty did become payable on that fund on the death of Captain Hastings-Bass. From that decision the plaintiffs appeal.

We have had the advantage of excellently clear arguments on both sides in the appeal. The contentions can be shortly stated in this way. The plaintiffs contend, first, that, notwithstanding that the 1958 advancement did no more than create a valid life interest for William, it was nevertheless for his benefit and fell within the terms of the trustees' statutory power of advancement; secondly, that in these circumstances, the advancement having been made in good faith, it was valid and was not invalidated by reason of the fact that the beneficial interests intended to take effect after William's death were, contrary to the trustees' understanding, void for perpetuity; thirdly, that *Re Abrahams' Will Trusts*[1] was wrongly decided; and fourthly, that if this was not the case, *Re Abrahams' Will Trusts*[1] is distinguishable on its facts from the present case. We add parenthetically that counsel for the plaintiffs reserved the right to argue in the House of Lords that *Pilkington v Inland Revenue Comrs*[2] had been wrongly decided in their Lordships' House. The commissioners contend, first, that *Re Abrahams' Will Trusts*[1] was rightly decided and cannot be distinguished from the present case; secondly, that the statutory power of advancement confers a fiduciary discretion which can only be properly exercised after giving due consideration to all relevant factors and, in particular, the benefit proposed to be conferred on the person advanced; thirdly, that the essential features of a power of advancement are (a) that it is a power to pay or apply capital, and (b) that it is exercisable for the benefit of one person only, namely, the person advanced, and that beneficial interests for other persons can only be conferred as incidental to and part and parcel of the benefit to him; fourthly, that consequently trustees making an advancement by way of a sub-settlement must have a proper understanding of the effect of that sub-settlement, for, if they do not, they have not exercised it validly; fifthly, that in the present case the trustees never directed their minds to an advancement which merely gave William a life interest in income; sixthly, that the court cannot retrospectively substitute its own discretion for that of the trustees by determining that the advancement in its attenuated form of a mere life interest for William was for his benefit, since the discretion was conferred on the trustees; finally, that s 32 does not authorise either (a) an advancement by way of sub-settlement under which all capital interests are void for perpetuity or (b) a sub-settlement creating no interest at all in capital.

The facts in *Re Abrahams' Will Trusts*[1] were in many respects similar to those in the present case. By the combined effect of the will of a testator and of a settlement made on the occasion of the marriage of his son, Gerald, under a power in that behalf contained in the will the residuary estate of the testator was at the relevant time held on trust for Gerald for life (in part protected) and thereafter on trust for Gerald's children or remoter issue as he should appoint and in default of and subject to such appointment in trust for any or all of his children who should attain the age of 21 years or, being female, marry under that age, and if more than one in equal shares

1 [1967] 2 All ER 1175, [1969] 1 Ch 463
2 [1962] 3 All ER 622, [1964] AC 612, 40 Tax Cas 416

absolutely, with remainder on trust for the children and remoter issue of another son of the testator and an ultimate remainder in favour of nephews and nieces of the testator living at his death. Gerald had two children only, daughters born after the death of the testator. In 1957, when these two children were aged respectively nine and six years, the trustees with Gerald's consent purported to make an advancement of £25,000 for the benefit of each of them by way of sub-settlement under the trusts of which in each case the daughter took a protected life interest with trusts in remainder for the benefit of her children and remoter issue and otherwise which were all void for perpetuity. If the advancements were effective, they operated to create valid defeasible life interests in favour of the daughters respectively but created no other valid powers or beneficial interests. Counsel for the Inland Revenue Commissioners there contended that the trustees had exercised the power of advancement on the footing that they were producing a certain result and that in fact they produced a totally different result and so could not be rightly said to have exercised the power at all. Cross J dealt with this argument as follows[1]:

> 'The power which the trustees purported to exercise by setting up Carole's fund (to take her as an example) and declaring the trusts of it which are contained in the 1957 settlement was a power exercisable for the benefit of Carole, and for nobody else. The various other persons to whom the settlement purported to give benefits were not objects of that power of advancement. The position was that the trustees had a discretion as to the manner in which they would benefit Carole, and they considered that an appropriate way to benefit her would be to create this settlement under which beneficial interests were given to other members of her family besides herself. If one looks at the matter in that way it seems to me reasonable to hold that the effect of the invalidity of some of the limitations in the 1957 settlement by reason of the rule against perpetuities may not be the same as it would have been had the 1957 settlement been created by the exercise of a special power of appointment under which all the supposed beneficiaries were objects. It is one thing to say that if a trustee has power to appoint a fund to all or any of a class of objects and he appoints a life interest to one object which is not void for perpetuity and remainders to other objects which are void, then the life interest survives the invalidity of the remainders; but it is another thing to say that if a trustee has power to benefit A in a number of different ways and he chooses to benefit him by making a settlement on him for life with remainders to his issue, which remainders are void for perpetuity, then A can claim to obtain that part of the benefit intended for him which is represented by the life interest. The interests given to separate objects of an ordinary special power are separate interests, but all the interests created in Carole's fund were intended as part and parcel of a single benefit to her.'

The learned judge went on to say that, if the invalidity caused by the operation of the rule against perpetuities were quite small as compared with the parts of the sub-settlement which were unaffected by the rule, the court might be prepared to say that the valid parts of the sub-settlement would survive intact; but he went on to say that on the facts of the case before him there was no doubt that the effect of the operation of the rule was wholly to alter the character of the sub-settlement, and accordingly he held that the trustees had never validly exercised the power of advancement. As we understand him, Cross J decided this question on the basis of what we have called the fourth submission of the commissioners in the present case. We must therefore consider whether that submission is sound in principle.

Counsel for the commissioners supports the submission on the following grounds. The power of advancement is, he says, a fiduciary power, and as to this we think there is really no dispute. He says that the trustees can only properly exercise such a power

1 [1967] 2 All ER at 1191, [1969] 1 Ch at 484, 485

after giving due consideration and weight to all relevant circumstances. As they must weigh the benefit which the advancement will confer on the person advanced against those interests under the settlement which will be adversely affected by the advancement, they cannot give due consideration and weight to the benefit to be conferred on the person advanced unless they appreciate the true nature of that benefit. Counsel for the commissioners contends that, if in the present case when the trustees made the advancement they believed that all the trusts of the sub-settlement would take effect, they cannot have applied their minds to the right question.

In support of these contentions he relies on what was said in this court in *Re Pauling's Settlement Trusts*[1]:

> 'Being a fiduciary power, it seems to us quite clear that the power can be exercised only if it is for the benefit of the child or remoter issue to be advanced or, as was said during argument, it is thought to be "a good thing" for the advanced person to have a share of capital before his or her due time. That this must be so, we think, follows from a consideration of the fact that the parties to a settlement intend the normal trusts to take effect, and that a power of advancement be exercised only if there is some good reason for it. That good reason must be beneficial to the person to be advanced; the power cannot be exercised capriciously or with some other benefit in view. The trustees, before exercising the power, have to weigh on the one side the benefit to the proposed advancee, and on the other hand the rights of those who are or may hereafter become interested under the trusts of the settlement.'

He also relied on observations made by Upjohn LJ[2] and Lord Radcliffe in *Pilkington v Inland Revenue Comrs*[3]. That case related to a testamentary settlement to which the statutory power of advancement was applicable. The trustees, being minded to make an advancement under the statutory power on the terms of a sub-settlement, applied to the court for directions whether they could lawfully so exercise the power. The trusts of the proposed sub-settlement were such that, as in the present case, they would have been to a considerable extent void for perpetuity, although this fact was not realised by the trustees. In the Court of Appeal[2] the case was decided on the basis that the statutory power did not enable the trustees to make a sub-settlement. Of the judges who constituted the court, only Upjohn LJ dealt with the perpetuity point, on which he disagreed with the view which had been expressed by Danckwerts J[4], referred to earlier. Having held that all the trusts proposed to be declared in respect of the period after the date when the child advanced should have attained the age of 30 were void for perpetuity, Upjohn LJ said[5]:

> 'The effect, therefore, of the rule against perpetuities on the proposed settlement is basic; it entirely alters the settlement, and that seems to me to be fatal to this case, for the trustees have never been asked to express any opinion as to whether they would think the proposed settlement, modified by reason of the rule against perpetuities in the manner I have mentioned, is for the benefit of Penelope. That is a matter to which they have never addressed their minds, and, therefore, it cannot possibly be justified under s. 32, for it has not been shown that the trustees think that the settlement, as so modified, is for the advancement or benefit of Penelope.'

1 [1963] 3 All ER 1 at 9, [1964] Ch 303 at 303
2 [1961] 2 All ER 330, [1961] Ch 466, 40 Tax Cas 416
3 [1962] 3 All ER 622, [1964] AC 612, 40 Tax Cas 416
4 [1959] 2 All ER 623, [1959] Ch 699, 40 Tax Cas 416
5 [1961] 2 All ER at 341, [1961] Ch at 489, 490, 40 Tax Cas at 430

The House of Lords[1] differed from the Court of Appeal[2] on the main ground of decision, holding that it is within the powers of trustees to make an advancement under the statutory power by way of sub-settlement, but they agreed with the view of Upjohn LJ on the perpetuity point. They accordingly reached the conclusion that there were legal objections to the proposed sub-settlement which the trustees had placed before the court, which, as Lord Radcliffe[3] said, went to the root of what was proposed.

It is, in our opinion, important to bear in mind that in *Pilkington v Inland Revenue Comrs*[1] the trustees were seeking the directions of the court before taking action. The court would of course not authorise trustees to set up a sub-settlement many of the trusts of which would be void. The trustees were not asking the court to consider any other form of sub-settlement, nor had they presumably applied their own minds to that question at all.

It is at this point relevant, we think, to state that at the death of Captain Hastings-Bass the value of the advanced fund was £57,318 and that there were investments representing accumulations of income of that fund which were then of the value of £8,373. If Captain Hastings-Bass were liable for surtax in respect of the income of the advanced fund this liability amounted at the time of his death to £7,500. Accordingly, at his death the estimated net value of the fund and accumulations (if surtax was payable) was £58,191. If duty became payable on his death in respect of that fund, it would have amounted to £42,318, and the total additional liability in the event of the funds becoming aggregable for estate duty purposes, including the surtax liability, would have been £59,588. The rate of duty payable on Captain Hastings-Bass's death in respect of the aggregable assets which were liable to duty at the full rate was 75 per cent with the benefit of marginal relief. Accordingly, the duty on the advanced fund would have been at the rate of, say, 73 per cent.

If the advancement was effective, William thereupon became entitled to an indefeasible life interest in possession in a fund of £50,000. If the advancement was ineffective his interest in that £50,000 remained a contingent interest, dependent on his attaining the age of 25, in a net sum of 27 per cent of £50,000 or £13,500. There can be no doubt that the capitalised value of an indefeasible life interest in possession in £50,000 for a boy of ten would greatly exceed the value of a right for the same boy to receive a capital sum of £13,500 in the event of his attaining the age of 25. In this respect, apart from other considerations, the advancement was calculated to benefit William very greatly.

We can feel no doubt that in such circumstances the duty-saving aspect of the scheme was a primary consideration in the minds of the trustees. The trusts of the sub-settlement which were intended to take effect after William's death in favour of his issue could also (had they been capable of taking effect) legitimately be regarded as beneficial to him as making some provision for any issue he might have for whom he would otherwise be expected to wish to make provision out of his free estate, and as securing the fund for that end. The intended power for William to make provision for a widow under the sub-settlement could also legitimately be regarded as benefiting William indirectly in a similar manner, and the power for the trustees to pay capital to him for his own use could also clearly be regarded as conferring a contingent benefit on him. But, in our opinion, these indirect or contingent benefits (had they been capable of taking effect) should be regarded as mere make-weights which might be treated as enhancing the benefit to William of the scheme as a whole, but which were of far less significance than the major benefits of the saving of death duties coupled with an acceleration of William's interest.

In these circumstances, to what considerations is it reasonable to suppose that the trustees addressed their minds before making the advancement? No doubt it is

1 [1962] 3 All ER 622, [1964] AC 612, 40 Tax Cas 416
2 [1961] 2 All ER 330, [1961] Ch 466, 40 Tax Cas 416
3 [1962] 3 All ER at 632, [1964] AC at 642, 40 Tax Cas at 442

right to say that they should and would have considered whether the aggregate of all the provisions of the sub-settlement (if fully effective) would be for William's benefit, but in doing so they could not, we think, have failed to consider to what extent each of those provisions could properly be regarded as contributing to the aggregate benefit, and in particular they could not have failed to consider to what extent the conferring on William of an immediate and indefeasible life interest in possession would benefit him. The circumstances of the case, in our view, make it clear that this aspect of the arrangement must have been the prime consideration in the minds of the trustees, and this is, we think, borne out by the terms of Captain Hastings-Bass's contemporary letter to which we have already referred.

The fact that the ulterior trusts of the sub-settlement failed for perpetuity cannot decrease the element of direct benefit to William in the scheme. Moreover, the effect of the failure of those trusts was to leave William's contingent interest in capital under the 1947 settlement intact. He was consequently left with a greater prospect of securing the ownership of the capital of the fund than would have been the case had the trusts of the sub-settlement taken effect in full.

As regards weighing the benefit to William of the intended sub-settlement against the expectant interests of others under the 1947 settlement, the true effect of the sub-settlement necessarily affected those expectant interests less adversely than the sub-settlement would have done, had it taken effect as intended. Instead of those expectant interests being entirely displaced, so that, for instance, Simon would have been cut out entirely, they were left intact with the benefit of the saving of estate duty at a high rate on the death of Captain Hastings-Bass. Had it occurred to the trustees that the ulterior trusts might all fail for perpetuity, they could not reasonably have thought that this could tip the scales in the weighing operation against the scheme. The law cannot, in our judgment, require the trustees' exercise of their discretion to be treated as a nullity on the basis of an absurd assumption that, had they realised its true legal effect, they would have reached an unreasonable conclusion as the result of the weighing operation.

In these circumstances, can it be said that the trustees have never exercised their discretion under s 32? There can be no doubt that the transfer of investments to the 1957 settlement trustees was an exercise of some kind of discretion. What the 1947 settlement trustees did was not obligatory; they chose to do it. If one asks what discretion they exercised, there can be no doubt that they believed themselves to be acting under s 32. They made the transfer to the 1957 settlement trustees because they considered that it would benefit William. Can the fact that they believed their action would have a different legal effect from the limited effect which alone it could have result in the transfer not having been an exercise of their discretion under that subsection? There is no reason to suppose that, in the light of their own understanding or advice as to the law, they failed to ask themselves the right questions or to arrive in good faith at a reasonable conclusion. Amongst the questions they must have asked themselves was the question whether a sub-settlement limiting William's interest in the advanced fund to a life interest would be for his benefit. For reasons which we have already indicated, the only answer which they could reasonably have given themselves to that question would have been affirmative, even without regard to any indirect or contingent benefits intended to be conferred on William by the other provisions of the sub-settlement. They may not have asked themselves whether to give William an immediate life interest without any further variation of the trusts of the 1947 settlement would benefit William, but the consequence would not, in our opinion, be that their action should be regarded as something other than an exercise of their discretion under s 32.

Where trustees intend to make an advancement by way of sub-settlement, they must no doubt genuinely apply their minds to the question whether the sub-settlement as a whole will operate for the benefit of the person advanced; but this does not, we think, involve regarding this benefit as a benefit of a monolithic character.

It is, in our opinion, more naturally and logically to be regarded as a bundle of benefits of distinct characters. Each and all of those benefits is conferred, or is intended to be conferred, by a single exercise of the discretion under s 32. If by operation of law one or more of those benefits cannot take effect, it does not seem to us to follow that those which survive should not be regarded as having been brought into being by an exercise of the discretion. If the resultant effect of the intended advancement were such that it could not reasonably be regarded as being beneficial to the person intended to be advanced, the advancement could not stand, for it would not be within the powers of the trustees under s 32. In any other case, however, the advancement should, in our judgment, be permitted to take effect in the manner and to the extent that it is capable of doing so.

In *Re Abrahams' Will Trusts*[1] the beneficial interest of each daughter in her advanced fund was a protected life interest only, not, as in the present case, an indefeasible one. This was the only beneficial interest under the sub-settlement in that case which was capable of taking effect; and the interest of each daughter under the head settlement —that is, the combined effect of the will and marriage settlement—in the capital of her advanced fund was a right to one-half only of the capital contingently on her attaining the age of 21 or marrying. Cross J might well have been justified in that case in considering that the intended sub-settlement in its attenuated form could not reasonably be regarded as beneficial to the daughter intended to be advanced and so could not be treated as an exercise of discretion falling within the terms of s 32. If so, we think he reached the right conclusion. His decision should not, in our judgment, be regarded as authority for the fourth contention of the commissioners in the present case. It should not, we think, be treated as laying down any principle applicable in any case other than one in which the effect of the perpetuity rule has been to alter the intended consequences of an advancement so drastically that the trustees cannot reasonably be supposed to have addressed their minds to the questions relevant to the true effect of the transaction. We do not consider that the operation of the rule has produced such a drastic effect in the present case.

To sum up the preceding observations, in our judgment, where by the terms of a trust (as under s 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 unauthorised by the power conferred on 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. In the present case (2) above has not, in our judgment, been established; but the commissioners contend that for reasons stated in their third submission, sub-head (a), and their final submission what the trustees achieved in the present case was in excess of their power.

Before dealing with that point we should say one word about the commissioners' sixth contention. In our judgment, the court is not being asked to exercise any discretion, but only to determine whether the trustees have validly exercised their discretion. Accordingly, we think that there is nothing in this submission.

The commissioners' third submission, sub-head (a), and their last submission can be conveniently considered together and amount in the present case to this: that since the sub-settlement was ineffective to create any beneficial interest in the capital of the advanced fund, there was no payment or application of capital within the contemplation of s 32. In our judgment, the 1947 settlement trustees did 'apply' part of the capital of the trust fund within the meaning of the section when they transferred the investments to the 1957 settlement trustees. This was manifestly a disposition of a part of the capital assets of their trust. The fact that the sub-settlement declared no effective beneficial trusts of capital but created only a limited beneficial interest

1 [1967] 2 All ER 1175, [1969] 1 Ch 463

in income does not, in our judgment, deprive the transaction of that character. Its effect was that the 1957 settlement trustees held the transferred assets on an express trust for William for life and subject thereto on constructive trusts for the persons beneficially interested therein under the 1947 settlement with the powers and subject to the provisions conferred by and contained in the latter settlement. The position is, we think, no different from what it would have been had the sub-settlement expressly declared such constructive trusts. The 1947 settlement trustees parted with the transferred assets and could not, we think, have recovered them even after William's death. They parted with the legal ownership and had no equitable interest in the transferred assets which would have enabled them to assert any claim to them at any time thereafter. We consequently feel unable to accept these submissions of the commissioners. In *Pilkington v Inland Revenue Comrs*[1] Lord Radcliffe said that he had been unable to find in the words of s 32 anything which in terms or by implication restricted the width of the manner or purpose of advancement. We also can find nothing in the language of the section to limit the power of trustees thereunder to making an advancement in a manner which creates new beneficial interests in capital.

For these reasons, we allow this appeal and substitute for the order of the learned judge a declaration that estate duty did not become payable on the death of Captain Hastings-Bass.

Appeal allowed. Leave to appeal to the House of Lords.

Solicitors: *Bircham & Co* (for the plaintiffs); *Solicitor of Inland Revenue.*

A S Virdi Esq Barrister.

R v Scott

COURT OF APPEAL, CRIMINAL DIVISION
ROSKILL, JAMES LJJ AND MICHAEL DAVIES J
19th, 20th DECEMBER 1973, 29th JANUARY 1974

Criminal law – Conspiracy – Conspiracy to defraud – Fraud – Elements of fraud – Deceit – Whether deceit a necessary ingredient of fraud – Whether necessary to prove that accused had agreed to deceive intended victim and by such deceit to defraud him.

The appellant was charged with conspiracy to defraud, the particulars of the count alleging that he and others had 'conspired together and with other persons unknown to defraud such companies and persons as might be caused loss by the unlawful copying and distribution of films the copyright in which and the distribution rights of which belonged to companies and persons other than the said persons so conspiring and by divers subtle, crafty and fraudulent means and devices'. The appellant admitted agreeing with employees of cinema owners that, in return for payment, those employees would, without their employers' consent, temporarily abstract cinematograph films for the purpose of enabling him to make and distribute copies of those films on a commercial basis, the abstraction, copying and distribution being made without the knowledge or consent of the owners of the copyright in, or distribution rights of, those films. The appellant was convicted and appealed, contending

1 [1962] 3 All ER at 628, [1964] AC at 636, 40 Tax Cas at 438

TAB 6

Joy Technologies Canada Inc. v. Montreal Trust Co. of Canada, [1995] O.J. No. 4135

Ontario Judgments

Ontario Court of Justice (General Division)

Spence J.

Heard: January 24 and 25, 1995.

Judgment: April 7, 1995.

Commercial Court File No.: B207/94 and Court File No.: 196/91

[1995] O.J. No. 4135 | 12 C.C.P.B. 182 | 7 E.T.R. (2d) 243 | 54 A.C.W.S. (3d) 783

Between Joy Technologies Canada Inc., applicant, and Montreal Trust Company of Canada and Robert A. Allan et al., respondents

(29 pp.)

Case Summary

Master and servant — Remuneration — Pension benefits — Entitlement to surplus on termination.

Application for a declaration that the applicant was entitled to $6,971,000 with interest. That money was the surplus resulting from the winding-up in December 1988 of the applicant's pension plan for its salaried employees. The individual respondents disputed entitlement to the surplus and contended that all or part of that surplus was held in trust for persons who were employees of the applicant and beneficiaries of the trust obligation. At the centre of the parties' dispute was the interpretation of Articles 6 and 15.3 of the terminated plan. While Article 15.3 provided that the fund be applied to the purposes specifically named thereunder so that each purpose be given effect to the maximum extent possible before any later purpose was to be carried out, Article 6.9 provided a cap on the amount of retirement benefits payable under the plan. The applicant contended that paragraph 15.3 mandated the payment of retirement benefits in amounts determined without reference to the surplus, to the extent of the amounts available in the fund and, in its fifth paragraph, required any balance in the fund, namely the surplus, to be paid to the applicant.

HELD: Application allowed.

There was no basis for the respondents' claim that Article 6 allowed for an increase in the amount of benefits otherwise determined. By its terms, the Article clearly imposed a cap or a limitation on the amount that was to be payable in respect of benefits otherwise determined. Given that salary and benefit levels might well be increased during the life of the plan, it was entirely plausible that the plan would be drafted to include a cap that applied to these circumstances.

Counsel

H. Freedman and J.A. Prestage for the applicant. M. Zigler for the respondents Montreal Trust Company of Canada.

SPENCE J.

1 The applicant seeks a declaration that it is entitled to the sum of $6,971,240 together with the interest accrued thereon. This count was the surplus on the wind-up on December 2, 1988 of the applicant's pension plan for its salaried employees (the "Terminated Plan"). The respondents, other than Montreal Trust, dispute the entitlement to the surplus. Their position is that all or some part of the surplus is held in trust for persons who were employees of the applicant and beneficiaries of the trust obligation applicable to the assets held for the Terminated Plan.

2 The matter of entitlement to pension surpluses has been the subject of considerable controversy in recent years. Counsel for the respondents referred to the following description of the conflicting policy considerations and perspectives that have been expressed about pension surplus entitlement, as set out in the decision of Adams J. in Bathgate et al. v. National Hockey League Pension Society et al., (1992) 11 O.R: (3d) 449 at p. 496:

> The general contours of competing claims to these funds illustrate the difficulties policy-makers face. Employers point to "defined benefit" language in plan documents and to the fact that interest rates over the last two decades have produced funds from contributions considerably in excess of those now required to pay for the promised benefits. Having to honour these pension promises regardless of investment experience, employers readily see themselves entitled to any excess funds. Had the employees wanted ownership of excess funds, it is argued they should have negotiated "defined contribution" or "money purchase" plans, thereby submitting themselves to the investment risk. Instead, they opted for the security of a specific benefit guaranteed by their employer.
>
> Trade unions and employees, in response, point to the absence of explicit ownership language in favour of employers; to the fact pension contributions, whether made by employees or employers, effectively constitute employee wages; and that the high interest rates which have made the surplus funds possible have, at the same time, eroded the value of the promised benefits. From this perspective, employee advocates submit that worker ownership is at least as reasonable a contractual implication as employer ownership and that employee ownership, in contrast to an employer windfall, is more consistent with the fundamental public policy objective of providing for the aged ...

3 It is common ground in this case that such considerations, important as they may be for public policy purposes, do not provide assistance in resolving the issues in the dispute before the court. The issues to be addressed are issues of law, and in particular the law relating to trusts. The proper determination depends on the decisions about these legal issues.

Trust Issues

4 The first set of issues concerns the effect of movement of assets from one to another of the pension plans which preceded the Terminated Plan. (The terms used below for the various predecessor plans are those used in the applicant's factum).

5 In summary, the chain of succession of the plans is as follows. The original Contributory Plan was brought together with the Precipitation Plan and the Alpha Plan to form the Prior Contributory Plan in 1961.

6 The Non-Contributory Plan and the Denver Equipment Plan were brought together with the Prior Contributory Plan to form the Terminated Plan in 1973.

7 The issues raised by the respondents concern the Precipitation Plan, the Non-Contributory Plan, the Denver Equipment Plan and the Terminated Plan. In summary, the position of the respondents with respect to the first three of these plans is that when the assets of these plans were brought directly or (via the Prior Contributory Plan) indirectly into the Terminated Plan, those assets remained subject to a trust obligation under each of the predecessor plans which required that they were to be used for the exclusive benefit of the beneficiaries of the plan (meaning, probably, the employee members of the plans and not the employer). Thus, when those assets were brought together with other assets which were not subject to the same trusts, and in respect of which the company itself had a right in certain circumstances to receive assets that are surplus to the needs of the plan, there was an improper commingling of assets and, consequently, the entire pool of assets, including the surplus, became actually or potentially distributable solely to the beneficiaries to the exclusion of the company.

8 The position of the applicant is that in the case of each of the three plans, the trust obligations for the exclusive benefit of the beneficiaries were fulfilled at the time the assets of those plans were moved to the successor plans and those trust obligations ceased to have any further application, so that there is now no impediment by reason of these earlier obligations against the applicant receiving the surplus in the Terminated Plan to the extent that it is entitled to do so under the terms of that plan.

The Precipitation Plan

9 The preamble to the Plan stated:

> "whereas the Company desires to have the Plan provide for the establishment of a trust into which such contributions by the Company may be made for the purpose of distributing to such employees, their beneficiaries or their estates, the corpus and income of the fund accumulated in the trust in accordance with the Plan..."

10 The Plan, in Article 1, defined "Trust Fund" as including "all contributions made by the Company under the Plan, together with all accruals therefrom".

11 The Company did maintain a right to amend the Precipitation Plan. However, according to Article

IX(1) of the Precipitation Plan, no amendment could divert funds to a purpose other than the exclusive benefit of Plan Members, and there could be no reversion of assets to the company:

> "The company shall have no power to amend the Plan in such manner as would cause or permit any part of the Trust Fund to be diverted to purposes other than for the exclusive benefit of Participants or their beneficiaries or estates, or as would cause or permit any portion of the assets of the Trust to revert to or to become the property of the Company".

12 According to Article IX(2), if the Precipitation Plan was to be terminated, the entire interest of each of the Participants would vest solely in favour of the Plan Members.

13 The Precipitation Plan Trust Fund was administered through a Trust Agreement with National Trust Company Limited dated November 5, 1956 (the "Precipitation Trust Agreement"). The Precipitation Trust Agreement specifically established an irrevocable trust wherein no portion of the Trust Fund could revert to the Company. Article IV of the Precipitation Trust Agreement provided that:

> "Notwithstanding anything to the contrary contained herein or in the Plan attached hereto, it shall be impossible for any part of the corpus or income of the Trust Fund to revert to the Company or be used for or diverted to any purpose other than the exclusive benefit of Participants as defined in the Plan attached hereto or Beneficiaries or their estates".

14 The Precipitation Trust Agreement provided that the Company could amend the Agreement but reversions to the Company were prohibited. Article IX(i), like Article IX(1) of the Plan itself, specifically stated:

> "the Company shall have no power to amend the Plan or Trust in such manner as would cause or permit any part of the Trust Fund to be diverted to purposes other than for the exclusive benefit of Participants or their beneficiaries or estate, or as would cause or permit any portion of the assets or the Trust to revert to or to become the property of the Company; ..."

15 The Precipitation Trust Agreement, like the Precipitation Plan, stated that, upon termination, the entire interest of each of the Participants would vest to the extent of 100% immediately.

The Non-Contributory Plan

16 All permanent full-time salaried employees of Joy with one year of service automatically became members of the Non-Contributory Plan at age thirty. This Plan was funded by means of employer contributions and provided defined benefits for its members. Joy was to provide for the administration of the Plan.

17 The Non-Contributory Plan was established as a trust. The irrevocable nature of the trust created was explicitly set out in Article XI of the Non-Contributory Pension Plan which stated that:

> "The Company will make provisions for the payment of benefits under the Plan by irrevocable payments in amounts sufficient to provide the benefits under the Plan".

18 Section XI(8) of the Non-Contributory Plan gave Joy a restricted power to amend the Plan. Further, the section stated that, should the Plan ever be terminated, then all trust funds were to be used for the sole benefit of Plan Members:

> "The company may amend, alter or discontinue the, Plan at any time without prejudice to the right of any person to whom a pension shall have been awarded prior to such date of amendment, alteration or discontinuance. In the event of final discontinuance of the Plan, no money paid into the Plan may be recovered by the company, but all such money shall be applied to provide benefits for employees, retired employees and beneficiaries in an equitable manner".

19 The trust fund of the Non-Contributory Plan was held pursuant to a Trust Agreement dated October 1, 1956, between Joy and Montreal Trust Company (the "Non-Contributory Trust Agreement"). The preamble to the Non-Contributory Trust Agreement stated, in part:

> "Whereas it is deemed desirable that funds irrevocably contributed for the payment of benefits under the Plan be segregated and held in trust in a Trust Fund (hereinafter referred to as the "Fund") for the exclusive benefits of such employees..."

20 Article 5(1) of the Non-Contributory Trust Agreement permitted Joy to amend the agreement, but only to the extent that such amendment did not permit diversion of any part of the Fund for purposes other than the exclusive benefit of Plan Members:

> "Subject as herein and in the Plan provided, the Company reserves the right at any time and from time to time by action of its Board of Directors, ... in whole or in part, any or all of the provisions of this Trust Agreement provided that no such amendment which affects the rights, duties, compensations or responsibilities of the Trustee shall be made without its consent, and provided further that no such amendment shall authorize or permit any part of the corpus or income of the Fund to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in the Plan, and or the payment of taxes or other assessments provided in Paragraph 2 of the Article II hereof..."

21 A later trust agreement was entered into with Montreal Trust Company dated April 14, 1969 (the "1969 Non-Contributory Trust Agreement") which purported to replace the Non-Contributory Trust Agreement made in 1956. Contrary to the provisions of the Plan and the earlier Non-Contributory Trust Agreement, the 1969 Non-Contributory Trust Agreement contained a provision purportedly allowing the company an interest in any surplus upon termination. This provision appears to be in direct conflict with the NonContributory Trust Agreement entered into in 1956 and is accordingly disregarded in the analysis which follows below.

22 Effective July 1, 1973, the assets of the Non-Contributory Plan's trust were combined with those of other pension plans and the pension plan was continued as the Terminated Plan. At the time, approximately $232,319.00 of assets existed in the NonContributory Plan Trust Fund. As of July 1, 1973, the Non-Contributory Plan had 126 members and at least 3 retired members.

The Denver Equipment Plan

23 Denver Equipment (Canada) Limited ("Denver Equipment") was a wholly owned subsidiary of the U.S. parent of Joy. Prior to the amalgamation creating the Terminated Plan, Denver Equipment sponsored the Denver Equipment Plan for its permanent full-time employees. The Denver Equipment Plan was originally established effective January 1, 1958 and was funded by employer contributions based on profit. Denver Equipment was appointed the administrator of the Plan.

24 The Denver Equipment Plan was administered through a trust fund to which contributions were deposited. The company could amend the pension plan; however, according to section 24 of the Denver Equipment Plan, no amendment could "affect the terms of payment, nor reduce the amounts, or retirement income actually being received by retired Members prior to the date of such change or modification".

25 Section 24 of the Denver Equipment Plan also provided that, if the Plan should be discontinued, "each Member's entire account, accumulated from all sources, shall immediately vest completely in such member...".

26 The Denver Equipment Plan trust fund was administered by a Board of Trustees pursuant to a Trust Agreement between Denver and the individual trustees dated December 29, 1958 (the "Denver Equipment Trust Agreement"). The preamble to the Denver Equipment Trust Agreement states in part as follows:

> "Whereas under the Plan contributions will be made to the Trustees, which contributions as and when received by the Trustees will constitute a trust fund (hereinafter referred to as the "Fund") to be held and administered for the benefit of the employee members of the Plan, their beneficiaries or their estates, as may from time to time be designated in the Plan...".

27 The Denver Equipment Trust Agreement is specific as to the nature of the trust. Article II(4) states:

> "Anything contained in this Agreement to the contrary notwithstanding, no part of the Fund (other than such part as is required to pay taxes, administration fees, assessments and expenses) shall be used for, or diverted to, purposes other than for the exclusive benefit of the employee members of the Plan or their beneficiaries or estates".

28 Under the Denver Equipment Trust Agreement, the Company's right to amend the Plan is restricted as follows, in Article V(1):

> "... no such amendment shall authorize or permit any part of the corpus or income of the Fund to be used for or diverted to purposes other than for the exclusive benefit of the employee members of the Plan, their beneficiaries or their estates as from time to time may be designated in the Plan, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof".

29 Effective July 1, 1973, all assets of the Denver Equipment Plan Trust Fund were transferred by Joy to the Terminated Plan Trust Fund. The assets as of that date were $135,542.88. At the time of the transfer, there were seven members in the Denver Equipment Plan.

The Terminated Plan

30 The Terminated Plan was established effective July 1, 1973. This plan was an amalgamation of the Non-Contributory Plan, the Prior Contributory Plan and the Denver Equipment Plan. The prior plans were said by the relevant instruments to be consolidated and continued as the Terminated Plan. Joy contributed no additional funds on the establishment of the Terminated Plan.

31 Section 1.1. of the Terminated Plan provides as follows:

> "The purpose of this Plan is to improve the benefits presently being provided under the terms of the Prior Plans and to consolidate the Prior Plans into one Pension Plan with effect from July 1, 1973".

32 Under Section 15.3(v) of the Terminated Plan, the company could become entitled to some portion of the funds held for the Plan. Section 15.3 of the Plan provides for the procedure on a discontinuance of the Plan as follows:

> "In the event the Plan shall at any time be terminated or contributions thereunder discontinued, the then value of the assets of the Fund shall be determined and used for the benefit of the Members and Retired Members (and their Beneficiaries and Joint Annuitants) who are Employees of the Company, or terminated Employees with rights by reason of Article XI as follows:
>
> The Fund shall be applied (to the extent the value of same may permit) to the following purposes in the order named subject to the requirements of The Pension Benefits Act, 1965 (Ontario), so that each such purpose shall be given effect to the maximum extent possible before any later purpose is carried out:
>
> i) To be used to provide Retirement Benefits to be paid hereunder to each Retired Member or Beneficiary or Joint Annuitant of a deceased Retired Member.
>
> ii) To be used to provide Retirement Benefits to each Member who has reached his Normal Retirement Date but not yet retired.
>
> iii) To be used to provide Retirement Benefits to each Member who is eligible for Early Retirement Benefits in accordance with Section 5.3 or a vested Retirement Benefit in accordance with Article XI.
>
> iv) To be used to provide Retirement Benefits and other benefits to all other Members.
>
> v) To return to the Company any balance which shall remain after all liabilities under the Plan with respect to Retired Members, Beneficiaries, and Joint Annuitants have been fully satisfied as hereinbefore provided.
>
> The value of the Retirement Benefits and the amount of the actuarial reserve required to provide such Retirement Benefits shall be determined by the Actuary. The Company may direct that the allocation so found to be due to any person shall be paid to him as a Retirement Benefit through the continuance of the existing Fund, or used to purchase an annuity from an insurance company for his benefit".

33 When originally established, the assets of the Terminated Plan trust fund were held partly by Mutual Life in accordance with a group annuity policy and the remainder of the assets were held by Guaranty Trust Company of Canada to be administered pursuant to the Trust Agreement dated July 1, 1973.

34 On September 30, 1980, the Board of Directors of the company passed a resolution terminating the Guaranty Trust Agreement and the Mutual Life policy. Montreal Trust Company of Canada ("Montreal Trust") was appointed trustee of all registered pension plans sponsored by the company, including the Terminated Plan. Joy entered into a Trust Agreement dated November 1, 1979 with Montreal Trust (the "Montreal Trust Agreement"). The Montreal Trust Agreement constituted a master trust pursuant to which the trust fund assets of the Terminated Plan were administered.

35 By resolutions dated February 13, 1989, the Board of Directors of Joy resolved to amend the Terminated Plan to fully vest the benefits of each active member of the Plan as of December 2, 1988 and to discontinue and terminate the Plan effective December 2, 1988.

Analysis

The Precipitation Plan

36 The Precipitation Plan was originally created as a pension plan for the employees of Precipitation Company of Canada ("Precipco"). After the acquisition of Precipco by the applicant, the board of directors' of Precipco passed the following resolution:

> WHEREAS
>
> (1) The company has had in the past a pension plan for salaried employees and
>
> (2) The Company has been designated by the Board of Directors of Joy Manufacturing Company (Canada) Limited as being an affiliated company whose employees are entitled to participate in the Joy plans when eligible, therefore it is
>
> RESOLVED
>
> (1) That the company make application to Joy (Canada) for admission of the company's employees to the Joy pension plans.
>
> (2) That upon confirmation from Joy (Canada) that the application has been approved, the Precipco pension plan be terminated and the employees be enroled in the Joy (Canada) plan.
>
> (3) That the decisions of the Joy (Canada) Pension Committee govern the transfer of equities from the Precipco Plan to the Joy (Canada) Plan, provided that in no event shall the equities be paid directly to Joy (Canada) and also that no Precipco employee shall suffer a loss of equity by reason of the transfer.

37 The following text in the materials filed purports to describe the way the assets held for the Precipitation Plan were brought under the Prior Contributory Plan. Counsel did not dispute the correctness of the description.

> As of December 1, 1961 the trustee was authorized to liquidate the assets of the trust fund, including the securing of the cash surrender value of Group Annuity Contract No. GA. 279 and requested to transmit the entire amount to Mutual Life Assurance Company of Canada Limited for deposit under Policy No. 563 in connection with the amalgamation of the two plans.

38 No assets head under the trust for the Precipitation Plan were distributed to its beneficiaries. All the assets were transferred to be held for the Prior Contributory Plan.

39 The trust agreement for the Precipitation Agreement provides as follows in Article IX.2 with respect to the termination of the Plan:

> Upon termination of the Plan by the Company, the entire interest of each of the participants shall vest to the extent of one hundred per cent (100%) immediately. The Trustee shall, with reasonable promptness, liquidate all assets remaining in the Trust Fund. Upon liquidation of all assets, the Committee shall make (after deducting estimated expenses of liquidation and distribution, all debts and obligations of the Trust, costs, charges and counsel fees incurred by the Committee or the Trustee), the allocations required under Article V of the Plan where applicable, with the same effect as though the date of completion of liquidation was an anniversary date of the Plan. Following these allocations the Committee shall send instructions to the Trustee to distribute the Trust Fund and the Trustee shall within ninety (90) days after receipt of instructions from the Committee, distribute outright to each Participant a benefit equal to the amount credited to his account by the Committee as of the date of completion of the liquidation. When distribution shall be completed as provided herein, the Trustee, the Committee, and the Company shall be fully and finally discharged from any and all obligations under the Plan and Trust and no Participant shall have any further right or claims thereunder.

40 Essentially the same provision is found in the Plan.

41 No provision in the Plan or the trust agreement prohibited Precipco from terminating the Plan. By the board resolution referred to above, the board authorized the termination of the Plan. Article IX.2 of the trust agreement provides that, upon termination the plan, the assets are to be liquidated and the trustee of the plan is to be instructed "to distribute outright to each participant a benefit" equal to that person's account. When that has been done, the trust is discharged and no claims may arise thereunder.

42 The materials filed contain the following statement of the benefit arrangements accorded to beneficiaries of the Precipitation Plan and its trust:

> Employees who were members of the Employees' Profit Sharing Retirement Plan of Precipitation Company of Canada Ltd. as of November 30, 1961, became members of the Non-Contributory Pension and Retirement Plan and the Retirement Income Plan for Employees of Joy Manufacturing Company (Canada) Limited as of December 1, 1961 and were granted credit for Continuous Service retroactive to the date of their employment with Precipitation Company of Canada Ltd.
>
> The Company guarantees each former member of the Employees' Profit Sharing Retirement Plan that the pension benefits to which he will be entitled at normal retirement date under the Non-

> Contributory Pension and Retirement Plan and the Retirement Income Plan combined will be not less than the pension benefits to which he was entitled at normal retirement date based on his membership in the Employees' Profit Sharing Retirement Plan as at November 30, 1961.
>
> In the event of the death or termination of employment for any reason other than retirement of a former member of the Employees' Profit Sharing Retirement Plan of Precipitation Company of Canada Ltd. whose benefits were merged with the Non-Contributory pension and Retirement Plan and the Retirement income Plan for the Joy Manufacturing Company (Canada) Limited the Company hereby guarantees that such member, his designated beneficiary or his estate will receive no less benefits arising from Company contributions under the Non-Contributory Pension and Retirement Plan and the Retirement Income Plan combined than was vested in such' member in accordance with the terms of such former plan as of November 30, 1961.
>
> The Company assures each member of the former Employees Profit Sharing Retirement Plan of Precipitation Company of Canada Ltd. who became a member of the Non-Contributory Pension and Retirement Plan and the Retirement Income Plan for Employees of Joy Manufacturing Company (Canada) Limited as of December 1, 1961 that the provisions of this Plan now and in the future will not be applied in such a fashion as to reduce in any way whatsoever the vested benefits or rights to which such former member of the Employees' Profit Sharing Retirement Plan was entitled by reason of membership therein as of November 30, 1961.

43 (The statement in this account that members of the Precipitation Plan became members of the "Non-Contributory Pension and Retirement Plan" as well as the Retirement Income Plan - which latter plan is referred to in these reasons as the Prior Contributory Plan - is apparently inconsistent with other statements in the same document and with the submissions of counsel. They submitted that the members went into the Prior Contributory Plan only. No issue was raised on this point. It appears to me that nothing turns on it).

44 Since the trustee under the Precipitation Plan Trust Agreement was instructed to transfer the entire amount of the liquidated assets of the trust fund to Mutual Life for deposit in connection with the Prior Contributory Plan and, under that Plan, the members of the Precipitation Plan were granted the benefits described in the above excerpt, and such benefits were to be not less than the benefits to which they would have been entitled under the Precipitation Plan, it must be concluded that the trustee complied with the requirements of Article IX.2. In particular, the trustee, in my view, distributed "outright to each Participant a benefit equal" to that person's account. Accordingly the requirements of Article IX.2 were satisfied, the trust obligations were discharged and no claim may be asserted thereunder.

The Non-Contributory Plan and the Denver Equipment Plan

45 On September 27, 1973 the board of directors of Denver Equipment (Canada) Limited passed the following resolution:

> SALARIED EMPLOYEES' RETIREMENT INCOME
>
> The Chairman laid before the meeting a copy of the Salaried Employees' Retirement Income Program of Joy Manufacturing Company (Canada) Limited which is an amendment and consolidation of the Retirement Income Plan, the Non-Contributory Pension and Retirement Plan

for Salaried Employees, of Joy Manufacturing Company (Canada) Limited and the Profit Sharing Retirement Plan for Employees of the Company. After discussion, upon motion duly made, seconded and carried unanimously:

IT WAS RESOLVED THAT:

A) In accordance with the right vested in the Company pursuant to Section 2 of Article V of the Trust Agreement dated the 29th day of December, 1958 relating to the Profit Sharing Retirement Plan for Employees of the Company, the said Agreement be terminated with effect from the 30th day of June, 1973; and

B) The Trustees under the said Agreement be directed to pay the Fund to Guaranty Trust Company of Canada to be applied under the Agreement between Joy Manufacturing Company (Canada) Limited and Guaranty Trust Company of Canada providing for the trusteeship of the retirement pension plans of Joy Manufacturing Company (Canada) Limited; and

C) Subject to the Program being registered for the purposes of the Income Tax Act (Canada), and being approved by the various Provincial Tax authorities where the Company carries on business, the Company approves and adopts the Joy Manufacturing Company (Canada) Limited Employees' Retirement Income Program, a copy of which is annexed hereto as "Exhibit "B" and which is an amendment and consolidation of the Retirement Income Plan, the Non-Contributory Pension and Retirement Plan for Salaried Employees of, Joy Manufacturing Company (Canada) Limited and the Profit Sharing Retirement Plan for Employees of Denver Equipment (Canada) Limited, all as amended from time to time.

46 On November 8, 1973, the board of directors of the applicant passed the following resolution:

SALARIED EMPLOYEES' RETIREMENT INCOME PROGRAM

The Chairman laid before the meeting two exhibits, "Exhibit "A" and "Exhibit "B". "Exhibit "A" was an Agreement between Joy Manufacturing Company (Canada) Limited and Guaranty Trust Company of Canada providing for the trusteeship of the funds of the retirement pension plans of the Company. "Exhibit "B" was an amendment and consolidation of the Retirement Income Plan, the Non-Contributory Pension and Retirement Plan for Salaried Employees, of the Company and the Profit Sharing Retirement Plan for Employees of Denver Equipment (Canada) Limited, all as of June 30, 1973. After discussion, upon motion duly made, seconded and carried unanimously:

IT WAS RESOLVED THAT:

A) The trust agreement between Joy Manufacturing Company (Canada) Limited and Montreal Trust Company dated the 14th day of April, 1969 be terminated as of the 30th day of June, 1973 and the value of the assets under such trust be paid to Guaranty Trust Company of Canada; and

B) The value of the assets of the Profit Sharing Retirement Plan for Employees of Denver Equipment (Canada) Limited be paid to Guaranty Trust Company of Canada; and

C) The Agreement between Joy Manufacturing Company (Canada) Limited and Guaranty Trust Company of Canada; a copy of which is annexed hereto as "Exhibit "A" be adopted with effect from the 1st day of July, 1973; and

D) Subject to the Program being registered for the purposes of the Income Tax Act (Canada), and being approved by the various Provincial Tax authorities where the Company carries on business, the Company approves and adopts the Joy Manufacturing Company (Canada) Limited Employees' Retirement Income Program, a copy of which is annexed hereto as "Exhibit "B" and which is an amendment and consolidation of the Retirement Income Plan, the Non-Contributory pension and Retirement Plan for Salaried Employees of Joy Manufacturing Company (Canada) Limited and the Profit Sharing Retirement Plan for Employees of Denver Equipment (Canada) Limited all as amended from time to time; and

E) Denver Equipment (Canada) Limited be included as a participating company under the aforesaid program with effect from the 1st day of July, 1973.

47 In the case of the Denver Equipment Plan, these resolutions authorized the following:

i) the termination of the trust for the Plan;

ii) the transfer of the assets held in trust for the Plan to Guaranty Trust to be held in trust for the Terminated Plan, and

iii) the approval and adoption of the Terminated Plan, which is described as an amendment and consolidation of the Prior Contributory Plan, the Non-Contributory Plan and the Denver Equipment plan; and

iv) the inclusion of the Denver Equipment Plan as a participating program under the Terminated Plan with effect from July 1, 1973.

48 In the case of the Non-Contributory Plan, the resolutions of the board of the applicant authorized the following.

i) the termination of the trust for the Plan;

ii) the transfer of the assets held in trust for the Plan to Guaranty Trust to be held in trust for the Terminated Plan;

iii) the adoption of the trust agreement for the Terminated Plan with effect from July 1, 1973; and

iv) the approval and adoption of the Terminated Plan, which is described as an amendment and consolidation of the Prior Contributory Plan, the Non-Contributory Plan and the Denver Equipment Plan.

49 On the basis of the relevant plan documents and trust agreements; the board of directors of each of Denver Equipment (Canada) Limited and the applicant was acting within its authority in adopting the Terminating Plan to succeed the Non-Contributory Plan and the Denver Equipment Plan and adopting directly or by implication the new trust agreement with Guaranty Trust for the Terminated Plan.

50 The dispute between the parties centres on the effect of the termination of the trusts for the Non-Contributory Plan and the Denver Equipment Plan and the transfer of assets from those trusts to the new trust. The respondents contend that those actions could not have the effect of eliminating the obligation

under the prior trusts that those assets were to be used for the exclusive benefit of the members of the prior plans and that those trust obligations therefore continue to be in effect.

51 It is necessary to look at the relevant specific terms of each of the prior trust agreement.

52 Article V.2 of the trust agreement for the Denver Equipment Plan provides that on termination of the Plan, "the Fund shall be paid out by the Trustee as directed by the Company". This is consistent with the final provision of the Plan, which provides that if the Plan is terminated, "each Member's entire account ... shall immediately vest completely in such Member, and the entire trust fund will be wound up in an equitable manner to be determined by the Company".

53 Article V.2 of the Non-Contributory Trust Agreement provides that upon termination of the Plan, "the Fund shall be paid out by the Trustee as directed by the Company". Article Twelve of the 1969 Non-Contributory Trust Agreement is to the same effect. Section XI(8) of the Plan is set out earlier in these reasons. It requires, in the event of final discontinuance of the Plan, that "all such money (paid into the Plan) shall be applied to provide benefits for employees, retired employers and beneficiaries in an equitable manner".

54 On the basis of these and other provisions of the trust agreements and the related plans, the obligation of each of the companies upon termination of the trust agreements for their respective prior plans was to pay out the assets in the funds "for the exclusive benefit of the members" of those plans. There is no further restriction as to the use of the funds. In particular, there is no requirement that, if the funds are paid over to another trust, the successor must have the same provision with respect to the distribution of funds upon termination of the successor trust or that it must not have any provision that any surplus may be paid to the sponsoring company. What is required, and all that is required, is that the funds are to be used for the exclusive benefit of the members.

55 The applicant contends that this requirement was satisfied because, under the Terminated Plan, the benefits provided to members were improved over the predecessor plans and, as a result, the Terminated Plan had an unfunded liability at the outset and for some period after its inception. There is evidence that this unfunded liability existed on whichever basis, either going concern or wind-up, is used to determine the liabilities of the plan. This factual claim is not disputed. Under the Terminated Plan, the applicant guaranteed the payment of the benefits under the Plan. The applicant made payments to the Plan for a member of years and the unfunded liability was reduced and finally eliminated.

56 In view of the terms of the predecessor plans and their trust agreements, it appears to me that the companies acted properly in transferring assets from the predecessor trusts to the trust for the Terminated Plan. The fact that the benefits under the Terminated Plan were an improvement over the predecessor plan benefits and at the outset of the Terminated Plan and for some period afterward it had an unfunded liability necessarily indicates that all of the funds so transferred were applied, upon transfer, for the benefit of employees and other beneficiaries of the plan and not for the benefit of the applicant. Because the funds were applied in this manner, the requirements of the predecessor trusts were complied with and were discharged through that compliance and have no further application to those funds.

57 The above analysis appears to me to reflect the principles set out in Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611.

The Interpretation of the Terminated Plan

58 The dispute with respect to the interpretation of the Terminated Plan concerns section 15.3, and Article VI (principally, section 6.9) of the Plan. In section 15.3 the provision that gives rise to the dispute is the opening part of the second paragraph. It provides that the fund shall be applied "to the following purposes in the order named ... so that each such purpose shall be given effect to the maximum extent possible before any later purpose is carried out". The paragraph then lists, in subparagraphs (i) to (iv), specific types of Retirement Benefits and in subparagraph (iv) also mentions "other benefits". Subparagraph (v) provides for the return to the Company of "any balance which shall remain after all liabilities under the Plan with respect to Retired Members, Beneficiaries and Joint Annuitants have been fully satisfied as hereinbefore provided".

59 Retirement Benefit is defined in Article II (29) as follows:

> "Retirement Benefit" means the annuity or other payment or payments to be provided under the Plan to a Retired Member, his Joint Annuitant or his Beneficiary in accordance with Article VI whether such annuity is payable as a result of retirement or otherwise.

60 The applicant asserts that paragraph 15.3 mandates the payment of retirement benefits in amounts determined without reference to the surplus, to the extent of the amounts available in the fund, and in subparagraph (v) requires any balance in the fund (i.e. the surplus) to the applicant.

61 The respondents contend that the clause "so that each such purpose shall be given effect to the maximum extent possible before any later purpose is carried out" requires the Trustee to apply the amount of the surplus to increase the payments of the benefits referred to in subparagraphs (i) to (iv) to the maximum extent possible over the amounts of these benefits determined without reference to the surplus. In support of this contention, the respondents refer to the provisions of Article VI of the Plan. Sections 6.1 through 6.9 set out rules for the determination of the amounts of pensions and Retirement Benefits of various specific kinds.

62 Section 6.9 provides as follows:

> Maximum Retirement Benefit
>
> Notwithstanding anything contained herein to the contrary, the combined annual Normal Retirement Benefit granted to any Member under this Article VI shall not exceed an annuity on the life of such Member of an amount equal to:
>
> i) In the aggregate, the lesser of 70% of the average of the best five years of remuneration which has been paid to the Member by thee Company and $40,000 per year, and

ii) For each year of service with the Company, the lesser of 2% of the average of the best five years of remuneration which has been paid to the Member by the Company and $1,143.00, and

iii) Such other limits adopted from time to time by the Department of National Revenue with regard to the registration of employees' pension plans under the Income Tax Act (Canada).

The respondents contend that section 6.9 should be interpreted as allowing for increases in the Retirement Benefits determined under sections 6.1 to 6.8 up to the maximum amounts determined under 6.9. On this basis, it is said, the provisions of subparagraphs 15.3(i) through (iv) are to be understood as requiring the application of the funds available to pay the benefits referred to in those subparagraphs up to the maximum amount of those benefits, as determined under section 6.9.

63 There is no basis in the terms of Article VI or in section 6.9 for the claim that section 6.9 allows for an increase in the amount of benefits otherwise determined. By its terms section 6.9 clearly imposes a cap or a limitation on the amount that is to be payable in respect of benefits otherwise determined. The evidence was that it would have been possible for a member who had a very high salary and/or very long service, to become entitled to benefits in excess of the limitation in s. 6.9, if the limitation were not in the Plan. Moreover salary and benefit levels might well be increased during the life of the Plan, so it is entirely plausible that the Plan would be drafted to include a cap intended to have application in such circumstances. If there were some ambiguity in section 6.9, it would be necessary to consider the application of the contra proferentum rule, but I can find no such ambiguity.

64 As further confirmation of this view, it should be noted that if "Retirement Benefits" were to be interpreted in the expanded manner proposed, it is difficult to see how the allocation system proposed in subparagraphs (i) through (iv) of section 15.3 could be made to work as among those subparagraphs in a manner that makes any sense. The reference in subparagraph (v) to "all liabilities" to the Retired Members and others is, in my view, more consistent with the concept of a Retirement Benefit determined in accordance with the rules in the Plan than with the expanded concept proposed.

65 I note that in Allegheny International Canada Ltd. v. Adams [1992] O.J. No. 2148, J. MacDonald J. of this court took essentially the same view as is expressed here of a provision virtually the same as section 15.3.

Conclusion

66 For the reasons given, an order is to go declaring that the applicant is entitled to the surplus in the Terminated Plan and directing that the surplus and the accrued interest thereon is to be paid to the applicant upon filing the consent of the Pension Commission of Ontario. The counter-application of the respondents is dismissed.

67 Counsel may make submissions as to costs.

SPENCE J.

End of Document

TAB 7

Balogun v. Pandher, [2010] A.J. No. 108

Alberta Judgments

Alberta Court of Appeal

Edmonton, Alberta

J. Watson, F.F. Slatter and P.A. Rowbotham JJ.A.

Heard: February 1, 2010.

Judgment: February 5, 2010.

Docket: 0903-0144-AC

Registry: Edmonton

[2010] A.J. No. 108 | 2010 ABCA 40 | 474 A.R. 258 | 184 A.C.W.S. (3d) 976 | 2010 CarswellAlta 177

Between Alexander O. Balogun, Esther Elizabeth Balogun (by her Next Friend, Alexander O. Balogun), Pauline Jessica Balogun (by her Next Friend, Alexander O. Balogun), Daniel Richard Balogun (by his Next Friend, Alexander O. Balogun) and Alexander Otto Balogun Jr. (by his Next Friend, Alexander O. Balogun), Appellants, (Plaintiffs), and Harbhajan Singh Pandher, Respondent, (Defendant)

(11 paras.)

Case Summary

Civil litigation — Civil procedure — Actions — Case management — Trials — Jury trials — Right to jury — Appeal by the plaintiffs from a 2009 order by a case management judge denying a jury trial in a motor vehicle personal injuries lawsuit dismissed — Case management judge had already determined in 2007 that action was not suitable for jury trial and refused to re-consider the issue in 2009 — Appellate deference on the exercise of discretion was particularly appropriate in case management decisions which declined to re-open a procedural adjudication which had settled an issue — No basis for interfering with decision not to re-open, or substantive decision.

Appeal by the plaintiffs from a 2009 order by a case management judge denying a jury trial in a motor vehicle personal injuries lawsuit. The appellants' claims included general damages, loss of income earning capacity, and cost of future care. The case management judge had concluded in 2007 that this was not a case that could be conveniently heard by a jury taking into account the number of issues involved with five plaintiffs, the length of trial time required, the amount and complexity of the expert evidence, the number of medical reports, and the history of the litigation. He refused to re-consider the issue in 2009 and found that there was no basis for ordering a jury trial in 2009.

HELD: Appeal dismissed.

There was no basis for interfering with the decision of the case management judge not to re-open his 2007 decision or with his decision not to order a jury trial, if he did re-consider the matter on the merits. Appellate deference on the exercise of discretion was particularly appropriate as to case management decisions which declined to re-open a procedural

adjudication which settled an issue for case management purposes. The very essence of case management was judicial supervision of the litigation process in order to provide coherence, predictability, and stability to that process. The substantive ruling was not arbitrary, erroneous in law or fact, nor productive of injustice.

Statutes, Regulations and Rules Cited:

Jury Act, RSA 2000, c. J-3, s. 17, s. 17(1)(b), s. 17(2)

Jury Act Regulation, Alta. Reg. 68/83, s. 4.1

Appeal From:

Appeal from the Order by The Honourable Mr. Justice J.J. Gill. Dated the 22nd day of April, 2009. Filed on the 28th day of April, 2009 (Docket: 0303-12927).

Counsel

Appellant Alexander O. Balogun in person.

B.E. Wallace, for the Respondent.

Memorandum of Judgment

The following judgment was delivered by

THE COURT

1 The adult appellant challenges a Court of Queen's Bench case management judge's order denying a jury trial in a motor vehicle personal injuries lawsuit. The adult appellant is a plaintiff in his own right and proceeds without counsel. He purports to represent, as next friend, his four children also as appellants. His representation of two children is problematic as those two children are no longer minors and should be represented by their own solicitor: ***Salamon v. Alberta (Minister of Education)*** (1991), 120 A.R. 298, [1991] A.J. No. 922 (QL) (C.A.), leave denied [1991] S.C.C.A. No. 535 (QL); see also ***Holland v. Marshall*** (2009), 96 B.C.L.R. (4th) 55, [2009] B.C.J. No. 1294 (QL), 2009 BCCA 311, leave denied, [2008] S.C.C.A. No. 327 (QL) and affirmed as ***Holland v. Marshall***, [2009] B.C.J. No. 2535 (QL), 2009 BCCA 582;

Balogun v. Pandher, [2009] A.J. No. 1339 (QL), 2009 ABCA 409. Under the circumstances of this case, however, we do not need to address this procedural concern.

2 The case management in the Court of Queen's Bench relates to an incident on May 14, 2003 where the respondent (defendant)'s vehicle collided with the back end of a vehicle containing the appellants. The appellants' claims include general damages, loss of income earning capacity, and cost of future care. The respondent disputes the damage claims. Issues at trial will include causation and quantum of damages.

3 The ruling under appeal dated April 22, 2009 is the second ruling during the case management process by the same judge denying a jury trial, the earlier ruling being at (2007), 430 A.R. 229, [2007] A.J. No. 1134 (QL), 2007 ABQB 615. The case management judge in the ruling under appeal held that the basis for his 2007 ruling had not changed and that there was no reason to decide differently in 2009.

4 In his 2007 ruling, the case management judge referred to s. 17(1)(b) of the *Jury Act*, R.S.A. 2000, c. J-3, which allows for jury trials in lawsuits such as this where the amount claimed "exceeds an amount prescribed by regulation". The regulation in this instance provides that the "amount claimed" must exceed $75,000 for actions commenced after March 1, 2003: s. 4.1 of *Jury Act Regulation*, Alta. Reg. 68/83. The Statement of Claim in this instance claims an amount in excess of $75,000 for each plaintiff. By this and the other terms of s. 17 of the Act, the Legislature has set the criteria for eligibility for a civil jury trial in this province. There is no residual discretion of case management judges to order a civil jury trial on a basis not provided for by legislation: ***Purba v. Ryan*** (2006), 397 A.R. 251, [2006] A.J. No. 963 (QL), 2006 ABCA 229.

5 A jury trial, however, can be refused where the trial involves matters that cannot "conveniently be made by a jury": s.17(2) of the *Act*. The case management judge looked at the criteria from case law for determining inconvenience under s. 17(2) of the *Act*. Those criteria include "(a) a prolonged examination of documents or accounts, or (b) a scientific or long investigation". To assess these criteria, a case management judge will consider such factors as the number of parties and factual issues, the number of experts, the need for interpretation, the legal issues, the potential for conflicts of expert opinion, questions of causation and other factors including, in our view, what the history of the litigation suggests about the approach the parties can be expected to take. He concluded in his 2007 ruling that "this is not a case that can be conveniently heard by a jury taking into account the number of issues involved with five Plaintiffs, the length of trial time required, the amount and complexity of the expert evidence, the number of medical reports and the history of the litigation": at para. 43. No appeal was taken from that 2007 decision. As to the more recent 2009 ruling, the case management judge referred to his previous decision declining to order a jury trial and concluded that he saw "no reason to change [his] previous decision and order a jury trial."

6 In sum, the appellants argue that the trial of this action would not be so prolonged or complex that it could not be conveniently heard by a jury. The respondent submits that the case management judge properly considered the applicable criteria in determining that the case was inappropriate for a jury trial. The respondent also submits that the case management judge properly considered whether he should re-visit his earlier ruling.

7 The decision of the case management judge to decline to reverse his prior ruling, and his decision to find no basis to order a jury trial in this case, were both exercises of discretion. As such, the standard of review

for the factual underpinnings of the exercise of discretion is deferential absent palpable and overriding error: ***L. (H.) v. Canada***, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24 (QL), 2005 SCC 25 at paras. 52 to 56. The standard of review for the exercise of discretion by a case management judge is also deferential and appellate intervention is warranted only if the case management judge has clearly misdirected himself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice: see *e.g.* ***Chevron Canada Resources v. Canada (Executive Director of Indian Oil and Gas Canada)*** (2009), 457 A.R. 132, [2009] A.J. No. 496 (QL), 2009 ABCA 180 at paras. 4 to 6; ***Trigg v. Lee-Knight***, [2009] A.J. No. 653 (QL), 2009 ABCA 224, leave denied, [2009] S.C.C.A. No. 429 (QL) at para. 9; ***Balogun v. Pandher***, [2009] A.J. No. 1339 (QL), 2009 ABCA 409 at paras. 10 and 11.

8 Here we are unable to discern any basis for intervention either on (a) the decision of the case management judge to refrain from re-considering his earlier decision (if, indeed, that is what he did since he appears to have taken a renewed look at the matter substantively) or (b) the decision of the case management judge on the merits under s. 17 of the *Act* if indeed the case management judge did re-consider the matter.

9 As to point (a), case management would not be a very effective method for civil proceedings if rulings of case management judges could simply be re-visited as of right at the instance of an unsatisfied party to the action - even if there might have been some adjustment of the factual platform on which the earlier decision was made. Accordingly, appellate deference on the exercise of discretion is particularly appropriate as to case management decisions which decline to re-open a procedural adjudication which settled an issue for case management purposes. That high deference is not merely because of the policy resistance to fragmentation of proceedings and piecemeal appellate review, nor because it may be that a specific case management ruling may be subject to appeal at the end of the trial if its effects can be traced through to that stage, but also because the very essence of case management is judicial supervision of the litigation process in order to provide coherence, predictability and stability to that process. We detect no error in the case management judge's decision not to re-open his earlier ruling.

10 As to point (b), we find no error in the substantive ruling on a jury trial that is within reach of the applicable standard of review. The decision was not arbitrary, erroneous in law or fact, nor productive of injustice.

11 The appeal is dismissed.

J. WATSON J.A.
F.F. SLATTER J.A.
P.A. ROWBOTHAM J.A.

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TAB 8

Condominium Corp. No. 0321365 v. Prairie Communities Corp., [2017] A.J. No. 559

Alberta Judgments

Alberta Court of Queen's Bench

R.J. Hall J.

Heard: May 16, 2017.

Judgment: June 2, 2017.

8 C.P.C. (8th) 129

[2017] A.J. No. 559 | 2017 ABQB 359 | 58 Alta. L.R. (6th) 204 | 280 A.C.W.S. (3d) 327 | 2017 CarswellAlta 953Docket: 0701 00737Registry: Calgary

Between Condominium Corporation No. 0321365, and Lynnette Weisbeck, as Representative Plaintiff, Plaintiffs, and Prairie Communities Corp., Joanne Wright, Hans Kneppers, Kneppers Consultants Inc., James Cuthbert, Cuthbert Smith Consulting Inc., Cuthbert Smith Consulting Partnership Inc., Residential Warranty Company of Canada Inc., Kingsway General Insurance Company, Jevco Insurance Company, Alberta Permit Pro Inc., Archiasmo Architectural Works Limited, Macleod Dixon LLP, Burstall Winger LLP, David Marshall, European Housing Corporation Inc., formerly known as Nascor Incorporated, Defendants, and Prairie Communities Corp., Joanne Wright, Hans Kneppers, Kneppers Consultants Inc., Alberta Permit Pro Inc., Archiasmo Architectural Works Limited, David Marshall, Real Estate Strategies Group Inc., David Bamber, Allan Penner and European Housing Corporation Inc., Third Parties

(20 paras.)

Case Summary

Civil Litigation — Civil evidence — Opinion evidence — Expert evidence Admission of reports — Qualification as expert — Inadmissible opinions — Regarding findings of law — Application for order excluding sue of expert report at trial allowed — Issue of expert's qualifications was left to trial judge — Expert repeatedly provided opinion that defendants breached requisite standard and took on fact-finding role not appropriate to expert opinion — Report contained numerous irrelevancies that should be removed — Report was inadmissible — Plaintiff granted leave to provide new report — Alberta Rules of Court, Rule 4.14.

Application for an order excluding the use of an expert report at trial. The action arose out of structural problems with a condominium project. The plaintiff intended to rely on the expert report of Todd Mohr. The defendants raised three objections to the admissibility of the report. Firstly, they maintained that Mohr was not an expert in the areas in which he opined. Secondly, they argued that the report purported to decide the very question that was to be decided by the trial judge. Thirdly, they maintained that parts of the report were irrelevant. The plaintiff conceded some irrelevancies in the report, but otherwise argued that the report was admissible expert evidence, and any further rulings should be left to the trial judge.

HELD: Application allowed.

The issue of Mohr's qualifications was left to the trial judge. The trial judge should not be fettered by a case management judge's ruling on qualifications, except in the clearest of cases. Mohr repeatedly provided his opinion that the defendants breached the requisite standard. He also presumed to state what steps were or were not taken by the defendants, which was a fact-finding role not appropriate to expert opinion. Discussions in the report about builder's liens, front end loaded costs, verification and measurement of completed work, compliance with monthly timelines, individual cost factors and whether the defendants should have reported to the architects and engineers were irrelevant, and should be removed from the report. The report, as written, was inadmissible. The plaintiff was given leave to provide a new report authored by Mohr.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 4.14

Counsel

L. Grant Vogeli, QC and Jonathan Selnes, for the Plaintiffs.

T.P. O'Leary, for the Defendants, James Cuthbert, Cuthbert Smith Consulting Inc. and, Cuthbert Smith Consulting Partnership Inc.

Memorandum of Decision

R.J. HALL J.

1 The Applicants, James Cuthbert, Cuthbert Smith Consulting Inc. and Cuthbert Smith Consulting Partnership Inc. (hereinafter, collectively, the Cuthbert Defendants) have applied pursuant to Rule 4.14 of the *Alberta Rules of Court* for an order from me, as case management judge, excluding or otherwise limiting the use at trial, in whole or in part, of the expert report of Todd Mohr of FTI Consulting (the "Report") dated September 21, 2016. Because the parties are set to commence a very lengthy trial in the fall of 2017, my decision on this application is urgently required. I will therefore be brief in my reasons.

2 Rule 4.14 allows a case management judge to 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 expert witnesses.

3 Counsel advise there are no reported cases in Alberta commenting upon this provision in the *Rules*. In Ontario, there is no such provision, but nonetheless the Courts there have determined that a judge other than the trial judge, has the jurisdiction to rule upon expert evidence before trial; but only in the rarest of

cases; see *Harrop (Litigation Guardian of) v Harrop*, 2010 ONCA 390 at paras 2 and 3; *Forbes v Net Ministries of Canada*, 2011 ONSC 6006 at para 31.

4 As noted by the Supreme Court of Canada in *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, proposed expert evidence can, or should be a matter for consideration at the case management stage of proceedings, so that if such evidence would not be admissible at trial, much of the cost of engaging experts may be avoided.

5 I am of the view that Rule 4.14 may be used by the case management judge, but should be used cautiously; where the trial judge would be in a substantially better position to rule on admissibility of an expert's report, the case manager should refuse to become involved.

6 In this case, the Cuthbert Defendants raise three separate objections to the admissibility of the report. Firstly, they maintain that the author is not expert in the areas in which he opines. Secondly, they argue that the report purports to decide the very question that is to be decided by the trial judge. Thirdly, they maintain that parts of the report are irrelevant.

7 Counsel for the Plaintiff concedes some irrelevancies in the Report, but otherwise argues that the report is admissible expert evidence, and any further rulings should be left to the trial judge.

8 I should say at the outset that I am satisfied this is an appropriate area for expert evidence. The first three *Mohan* factors (related to a material issue, necessity to assist the trier of fact, and the absence of any exclusionary rule) are met.

9 I leave the issue of qualifications of the expert to the trial judge. There are arguments on both sides that may find merit in whole or in part with the trial judge, depending upon the precise area in which it is proposed that the expert be qualified. The trial judge may place limitations on the areas where he qualifies the witness as expert. The trial judge should not be fettered by a case management judge's ruling on qualifications, except in the clearest of cases.

10 Dealing with the second grounds of objection, I agree with the Cuthbert Defendants' position. The expert's role is to assist the Court with his expert opinion as to the standard to be met, and the acts to be performed by the Cuthbert Defendants. However, repeatedly, the author provides his opinion that the Cuthbert Defendants have breached the standard. In addition, the expert presumes to state what steps were or were not taken by the Cuthbert Defendants, which is a fact finding role not appropriate to expert opinion.

11 In *Marathon Canada Ltd v Enron Canada Corp*, 2008 ABQB 408 Justice McMahon of this court discussed the proper scope of expert opinion. He held it is generally not the role of an expert to draw legal conclusions or to engage in legal analysis, though evidence of the commercial context is admissible within limits. Where there is a standard or common practice in an industry in relation to the performance of contracts that evidence is in some cases admissible. An expert can also opine that a party's conduct was inconsistent with that standard practice. What he cannot do is offer an opinion that a party was therefore, at law, in breach of its contract.

12 I would say that, equally, where a party's conduct is governed by a statute, the expert may opine as to applicable standards, and as to what the party was required to do, but he cannot offer an opinion that the party was in breach of the statute.

13 The Report is replete with such opinions, that the Cuthbert Defendants are in breach of their contractual or statutory obligations. That is not the province of the expert. The Report, as written, is not admissible at trial, for those reasons. I exercise my discretion, as case management judge, to make that determination at this stage. The Defendant should not be put to the expense of replying to the Report as it is presently written.

14 Thirdly, the Cuthbert Defendants argue that the report contains many irrelevancies; suggesting duties, obligations and statements that have nothing to do with the case pleaded against them. The Cuthbert Defendants characterize this as a smear tactic.

15 Counsel for the Plaintiffs acknowledged in argument that some parts of the report are irrelevant; discussions about builder's liens, front end loaded costs, verification and measurement of completed work, compliance with monthly timelines, individual cost factors and whether the Cuthbert Defendants should have reported to the Architects and Engineers. I agree that they are irrelevant, and all of those references should be removed from the report.

16 As to other alleged irrelevancies, the Plaintiffs argue they are relevant. I am of the view that should be left to the trial judge to determine.

17 In the result, I find that the Report, as written, is inadmissible. The Plaintiff is given leave to provide a new report authored by the expert Todd Mohr that accords with these reasons. That is to say, Mr. Mohr can give his expert opinion as to what the Cuthbert Defendants were required to do to meet his description(s) of applicable standards; he may explain why he reaches that conclusion; but he may not speak to whether the Cuthbert Defendants have breached the standard such as to render them liable to the Plaintiffs. When he relies upon facts to be proven at trial, he must set out the facts as assumptions upon which he has relied, since he is not the finder of fact.

18 The acknowledged irrelevances listed above are not to appear in the revised report.

19 If the Plaintiffs intend to submit a new report they must immediately notify the solicitor for the Cuthbert Defendants and propose timing of the provision of the report. If the parties cannot agree upon the timing, they may each address me briefly in writing.

20 The parties may speak to me regarding costs of this special application if they cannot agree.

Dated at the City of Calgary, Alberta this 2nd day of June, 2017.

R.J. HALL J.

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TAB 9

Tremco Inc. v. Gienow Building Products Ltd., [2000] A.J. No. 366

Alberta Judgments

Alberta Court of Appeal

Calgary, Alberta

O'Leary, Picard and Fruman JJ.A.

Heard: June 15, 1999.

Judgment: filed April 3, 2000.

Dockets: 99-18167 and 99-18216

[2000] A.J. No. 366 | 2000 ABCA 105 | 186 D.L.R. (4th) 730 | 78 Alta. L.R. (3d) 40 | 255 A.R. 273 | 42 C.P.C. (4th) 1 | 96 A.C.W.S. (3d) 212

Between Tremco Incorporated and Tremco Ltd., appellants (defendants), and Gienow Building Products Ltd., respondents (plaintiffs)

(85 paras.)

Appeal from the order of Dixon J. Dated December 18, 1998 and filed January 19, 1999. Appeal from the order of Dixon J. Dated February 16, 1999 and filed February 18, 1999.

Counsel

J.A. Bancroft, Q.C. and T. Mayson, Q.C., for the appellant. B.E. Leroy and J.B. Laycraft, for the respondent.

REASONS FOR JUDGMENT RESERVED

The judgment of the Court was delivered by Fruman J.A., concurred in by Picard J.A. Separate dissenting reasons delivered by O'Leary J.A. (para46).

FRUMAN J.A.

1 Two former employees of Tremco were asked questions at examination for discovery about a significant issue in the litigation, the reason a Tremco product leaked. They had been involved in research into the product failure while they were employed at Tremco, and continued the research after the business was to sold to their new employer, TruSeal. They refused to answer questions about knowledge acquired after their employment with Tremco ended. The case management judge decided that a witness must answer if the information is within his personal knowledge, even if the information was acquired while employed by a company other than Tremco. The former employees, both Ohio residents, retreated to the United States and sent along a message that they would make no further appearances in Alberta to complete their examinations

for discovery. The case management judge then ordered that a party could not present a witness at trial unless that witness complied with all examination for discovery obligations.

2 Tremco appealed both orders. The appeal raises issues about the scope of examination for discovery of former employees, and the power of a case management judge to make orders that might influence the course of a trial. I would confirm the orders and dismiss the appeal.

FACTS

3 Gienow Building Products Ltd. manufactures windows. Gienow sealed thousands of its windows with a product called Swiggle Seal, which it purchased from Tremco Incorporated and Tremco Ltd. Unfortunately, the windows leaked. Gienow sued Tremco, alleging that Swiggle Seal was defective.

4 The lawsuit is expected to take more than 25 trial days and has been designated a "very long trial." A case management judge was appointed under Queen's Bench Practice Note 7: Practice Note on the Very Long Trial, which introduced mandatory case management for lengthy trials. The litigation has not been easy. More than 3 years, 40 case management meetings and 30 orders or directions later, the litigation has reached the examination for discovery stage.

5 A year and a half after Gienow started the lawsuit, Tremco went through a corporate metamorphosis. On June 23, 1997, TruSeal Technologies Incorporated became the owner of the Swiggle Seal operation. The case management judge observed that the TruSeal operation had the same "commanders, scientists, laboratories, facilities, dealers and customer base" as Tremco. "The history and background of TruSeal in its Swiggle operation is the history and background of Tremco in its Swiggle operation" (AB 95). There is no allegation that the restructuring was designed to defeat the litigation.

6 Baratuci and Coppola were both employees of Tremco, and Coppola was president and chief executive officer. After the sale, they continued in exactly the same capacities with TruSeal. Investigations to determine the cause of the leakage started when the Swiggle Seal operation was owned by Tremco and continued after it was sold to TruSeal. Baratuci and Coppola, both residents of Ohio, were produced at examinations for discovery in Calgary.

7 Gienow asked Baratuci about his knowledge concerning the Swiggle problem. While Baratuci confirmed he knew about Swiggle Seal, he refused to answer questions relating to his current knowledge. He asserted the information to be the property of TruSeal and not a proper subject for discovery, as this knowledge was acquired after his employment with Tremco ended.

8 Coppola, another former employee of Tremco, was produced as an officer, though he no longer held any position with Tremco at the time of the discovery. He refused to disclose whether TruSeal continued Tremco's evaluation of a product which competed with Swiggle Seal, and whether TruSeal provided documents to Tremco to assist in its defence of the case. He expressed a concern about answering questions relating to TruSeal, which is not a party to the litigation. The participants at the discovery broke for lunch, intending to reconvene. Instead, Coppola hastily left Calgary and subsequently withdrew as Tremco's officer.

9 Gienow complained to the case management judge. He directed that any witness appearing for

examination for discovery must answer questions arising from issues defined in the pleadings if the witness has personal knowledge, regardless of the source of the knowledge or the corporation employing the witness when the knowledge was acquired. The judge ruled that Baratuci's and Coppola's objections were improper; he ordered Baratuci to answer, but made no special direction to Coppola (AB 119-20).

10 After the episodes at examinations for discovery, Coppola and Baratuci, from their home base in Ohio, retained their own lawyer who asserted that Coppola and Baratuci were strangers to the litigation and that the Alberta proceedings were flawed. He said that Baratuci and Coppola had extended enough voluntary assistance and would make no further appearances in Alberta in connection with these examinations (AB 100-01).

11 Gienow made another trip to court. The case management judge directed that a party could not call a witness at trial unless the witness had complied with all examination for discovery obligations required by Alberta law, and any specific directions of the court (AB 129). Tremco and Gienow then agreed to use reasonable efforts to secure compliance with any court directions about examination for discovery of a witness (AB 112-13).

ISSUES

12 This appeal raises two issues:

1. Under R. 200(1) of the Alberta Rules of Court can a former employee of a party be examined for discovery about information which is relevant to the litigation although the knowledge was acquired after employment ended?
2. Does a case management judge appointed under Queen's Bench Practice Note 7: Practice Note on the Very Long Trial have the power to make an order imposing conditions on the ability to call a witness at trial and if so, does such an order fetter the trial judge's discretion?

SCOPE OF EXAMINATION OF A FORMER EMPLOYEE

13 Rule 200(1)[1] limits discoveries in Alberta by subject and scope. Subject determines who may be examined, while scope determines about what. The Rule contains one long, run-on sentence, very little punctuation, and other grammatical indiscretions. To make it easier to understand, I would parse it along the following lines:

WHO: Any party to an action,

any officer of a corporate party

and any person

who is or has been employed by any party

to an action, and who appears to have some

knowledge touching the question at issue,

acquired by virtue of that employment

whether the party or person is within or without the jurisdiction,

WHAT: may be orally examined on oath or affirmation before the trial of the action touching the matters in question by any person adverse in interest, without order.

14 A person is a proper subject of discovery when the "who" criteria of R. 200(1) are met. A former employee may be examined if that person has both a past employment relationship with a party to the litigation and some relevant knowledge acquired by virtue of that employment.

15 The Rule also restricts the scope of discovery. Scope is delimited by the words "touching the matters in question"[2] in the final clause. This court has on numerous occasions observed that the scope of examination for discovery is broad, with relevance or irrelevance being the primary limiting factor: Czuy v. Mitchell (1977), 1 Alta. L.R. (2d) 97 (C.A.); Drake v. Overland, [1980] 2 W.W.R. 193 (Alta. C.A.); Leeds v. Alta. (1989), 68 Alta. L.R. (2d) 322 (C.A.).

16 Tremco does not argue that Baratuci and Coppola are not proper subjects of discovery. It is clear that they are former employees of Tremco who possess some relevant knowledge acquired by virtue of their employment with Tremco, and therefore meet the "who" requirement. Tremco's disagreement relates to the scope of discovery, in particular, whether Baratuci and Coppola are required to disclose information acquired after their employment with Tremco ended. Tremco would read R. 200(1) to restrict questions asked of former employees to matters "touching the question at issue acquired by virtue of [their] employment." In other words, Tremco would read the condition in the "who" requirement as also limiting the "what" requirement.

17 Tremco's position is inconsistent with a plain reading of the Rule, and the Alberta authorities about the broad scope of discovery. While there is no case directly on point, in an analogous case, Chalmers v. Associated Cabs Ltd. and Doe (1994), 152 A.R. 306 (Q.B.), the court considered the distinction between the subject and the scope of examination for discovery. In Chalmers, an employee under discovery was obliged to answer questions about relevant information acquired both by virtue of her employment and outside her employment. McMahon J. stated at 308:

> It would [be] retrogressive to now limit Examination for Discovery to only knowledge gained by the witness in one capacity and not another. Once a person is a proper subject of an Examination for Discovery, all that person's knowledge touching the matters in issue is within the scope of the Examination for Discovery. Where the person being examined is an employee, and has knowledge gained by virtue of that employment and also knowledge acquired outside that employment, the latter may or may not bind the employer or be attributed to the employer. That is for the trial judge to decide, but the source of the person's knowledge does not alone serve to limit the scope of the discovery. [Emphasis added.]

18 In Chalmers, a current employee was compelled to disclose relevant knowledge acquired outside her

employment. In the present case, former employees are asked to disclose knowledge acquired after termination of their employment. The distinction is immaterial, however, because employment status determines who may be examined in a discovery, but does not limit what questions may be asked. Rule 200(1) contemplates that both employees and former employees "having knowledge touching the question at issue, acquired by virtue of that employment" are proper subjects of discovery. According to Chalmers, that phrase does not limit the scope of their discovery.

19 There are four arguments that might persuade me to conclude that information learned by a former employee after termination of employment is beyond the scope of an examination for discovery.

20 The first argument is that the after-acquired knowledge is irrelevant on the facts. Even Tremco concedes that the information, in the quaint words of R. 200(1), touches the matters in issue. The effectiveness of Swiggle Seal appears to be a critical issue in this litigation. Gienow says that it cannot gain this information in any other manner; its experts can establish the nature of the problem, but not the solution.

21 The second argument is that the after-acquired knowledge is not discoverable due to concerns about disclosure of proprietary information belonging to TruSeal, a corporation that is not a party to the litigation. This argument has difficulty taking flight because the parties have already taken specific steps to protect proprietary information. On January 15, 1997, long before the problems in this appeal arose, the parties asked the case management judge to sign a comprehensive confidentiality order dealing with the identification, protection, use and communication of confidential information (AB 23).

22 The third argument is that the chambers judge's interpretation permits strangers to the litigation, mere witnesses as it were, to be examined. This argument ignores the fact that R. 200(1) limits both the subject and the scope of examination for discovery. It is only when a potential witness passes through the narrow gateway that defines who may be examined, that the issue of scope even arises. The discovery of persons employed by a party is an exception to the rule that mere witnesses cannot be examined: Simons v. McKinney Machine Company Ltd. et al., [1994] A.J. No. 25 at para. 15 (C.A.).

23 Before I move on to the fourth argument, I note that Coppola was originally produced as Tremco's corporate officer under R. 214,[3] but subsequently withdrew as an officer and was replaced. Coppola was also a former employee and the parties took the position that R. 200(1) governed the scope of his discovery. Rule 200(1) permits the examination of parties to an action, officers of corporate parties, and present and past employees. The parties did not suggest that different principles might apply to an examination of an officer under R. 200(1) compared to the examination of a former employee[4]. The case management judge imposed no duty to inform, as might be done in the case of an officer, but instead limited his order to information within a witness's personal knowledge. He also made no specific order against Coppola. Finally, I note that the parties have asked that we not consider whether any of the testimony at examination for discovery would be binding upon or admissible in evidence against Tremco at trial.

24 The fourth argument is that "relevant knowledge" is limited to knowledge which might bind the corporate defendant. In other words, knowledge which appears relevant on the facts should not be seen as relevant in law, unless that information would be admissible against and binding upon Tremco. According to this argument, because information acquired after termination of employment might not be binding on Tremco, the questions are beyond the scope of examination for discovery.

25 Limiting questioning under R. 200(1) to evidence which might be admissible against a party is irreconcilable with recent Alberta jurisprudence concerning the scope and purpose of discovery under R. 200(1). The scope of discovery is wide, with relevance as the only limiting factor. The purpose of discovery is twofold: to gather information about the facts, and to gain admissions which may be used in evidence against a party to the action. See Nichols & Shephard Co. v. Skedanuk (1912), 5 Alta. L.R. 110 at 113 (C.A.); Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1993), 20 Alta. L.R. (3d) 327 (Q.B.); Leeds, supra. There is no requirement under R. 200(1) that proper questions fulfill both purposes: Cana Construction Co. v. Calgary Centre for Performing Arts (1986), 30 D.L.R. (4th) 455 (Alta. C.A.).

26 Perhaps at one time the scope of examination for discovery might have been limited to evidence which was binding upon a party: Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co., [1900] 2 Ch. 1 (C.A.); Lea v. City of Medicine Hat, [1917] 2 W.W.R. 789 (Alta. C.A.). In Lea[5] the court volunteered that information acquired outside the ordinary course of business might be beyond the function of discovery.

27 The Saskatchewan courts took a different view. In the 1928 case of Harvie v. C.P.R. et al., [1928] 1 D.L.R. 696 (Sask. C.A.), the court interpreted the phrase "touching the matters in question" under a rule similar to R. 200(1) to allow the examination of employees whose evidence may not bind the company. Examination for discovery is permitted "not only of officers whose evidence may be used at the trial against the company, but also of mere servants whose evidence may not be so used": at 696. Harvie's interpretation of "touching the matters in question" and comments about the scope of discovery were cited with approval by Haddad J.A. in his concurring judgment in Czuy, supra, at 101.

28 More recent Alberta appellate authority suggests that relevant information, although not binding on the corporate defendant, is still within the proper scope of discovery. In Cana Construction, supra, the court compared R. 200(1) and R. 214 to highlight the difference between the information gathering and binding admission gathering roles of examination for discovery. While the court did not directly discuss the scope of discovery in circumstances in which information was acquired outside of the capacity in which the person was produced,[6] the analysis of R. 200(1) is nevertheless compelling. Kerans J.A. stated at 457:

> I wish to make it clear at the outset that a distinction must be made between the use of the word "officer" in Rule 200 and in Rule 214. Rule 200 affords the party opposite an opportunity to discover in advance the evidence to be given at trial by likely witnesses. The purpose of the other rule [R. 214] is not merely to gain information but to gain formal admissions from the party opposite. [...] Those cases [concerning Rule 214] have no bearing on Rule 200.

The court in Leeds,[7] referring to Cana Construction with approval, observed that the considerations under the two sections are different. "The purpose of Rule 200 is to obtain information": at 331.

29 Both cases indicate that the purpose of R. 200(1) is to allow the discovery of information likely to be given at trial by potential witnesses, whether or not the information will be admissible against the corporate defendant. The Rule should be "given a wide application": Cana Construction at 457. As questions asked at examination for discovery must always meet the relevance threshold, it is difficult to conclude that eliciting relevant information from former employees will unnecessarily protract litigation or increase its cost. In

fact, timely disclosure of relevant information may permit each party to properly assess the case well in advance of trial, encouraging settlement.

30 The case management judge correctly decided that relevant information acquired by a former employee while employed by a company other than Tremco was a proper subject of examination for discovery. Whether this information in fact will be binding upon Tremco is not a question before this court, and will ultimately be decided by the trial judge at the appropriate time.

ORDER LIMITING WITNESSES AT TRIAL

31 The witnesses refused to comply with the case management judge's direction. The judge then ordered that only those witnesses who have satisfied all obligations for examination for discovery required by Alberta law and any specific directions of the court will be permitted to testify at trial. Tremco appealed this order, arguing that a case management judge does not have jurisdiction to fetter the discretion of a trial judge by directing who may testify at trial.

32 The case management judge in this action was appointed under Practice Note 7, which introduced mandatory case management for trials likely to take more than 25 days of trial time. Broadly speaking, the purpose of the Practice Note is to ensure that long, complicated lawsuits proceed as smoothly and efficiently as possible.

33 Under Practice Note 7, a case management judge is assigned to a case in order that a single judge might develop a comprehensive understanding of the action and be in a better position to guide the litigation. Familiarity with the facts and circumstances and continuity with pre-trial processes place the judge in a unique position to make assessments on interlocutory motions and applications.

34 Practice Note 7 was introduced on September 1, 1995. A decision was made to implement the Practice Note for a trial period. It would then be evaluated and, subject to modification, incorporated into the Rules. As that process is now under way, it would be artificial to interpret the Practice Note restrictively, attempting to cram its broad provisions into the structure of the existing Rules.

35 An interpretation of Practice Note 7, like an interpretation of the Rules of Court, is reviewable on a standard of correctness. An exercise of a case management judge's discretion is another matter. We have previously recognized the need for case management judges to be given "elbow room" to deal with interlocutory matters before trial: Korte v. Deloitte, Haskins and Sells (1995), 36 Alta. L.R. (3d) 56 (C.A.). Practice Note 7 acts as a catalyst for speedier and more efficient litigation, giving case management judges license to deal with complicated trials in an efficient, flexible and innovative way. Generally speaking, the Court of Appeal should be slow to intervene: Madill v. Alexander Consulting Group Ltd. (1999), 237 A.R. 307 (C.A.). Kerans J.A. in Canadian Engineering and Surveys (Yukon) Ltd. v. Banque Nationale de Paris (Canada) (1996), 196 A.R. 1 (C.A.) noted that the Court of Appeal should not interfere with pre-trial orders or directions of case management judges unless a decision is palpably wrong. He stated at 2-3:

> Appeals are not the way to resolve these problems. The purpose of the case management system was to expedite the pre-trial process, not delay it. In this case, it has now been a year since the matter was before the chambers judge and it was before the master for months before that. Therefore, the appeal process has simply delayed rather than resolved everything. This is contrary

> to the idea of case management, and that is why this court is being increasingly reluctant to entertain appeals based on case management orders.

36 The Practice Note specifically grants a case management judge discretion to define the nature and scope of an examination for discovery (para. 18(d)). It also grants the ability and discretion to make orders or give directions that are necessary to carry out the purpose of the Practice Note. See, for example, paras. 21, 23, 28.

37 If the parties fail to comply with a requirement of the Practice Note, which presumably would include an order issued pursuant to the Practice Note, the case management judge has the discretion to "order that the party be precluded from raising certain issues or relying on certain types of evidence at trial" (para. 21(c)) or "make any other order that is just" (para. 21(g)). The Practice Note also grants a broad discretion to make orders, impose terms and give directions necessary to carry out its purpose (para. 28).

38 Finally, para. 29 clarifies the manner in which a case management order fits into the general litigation scheme: "... such order shall control the subsequent course of the action unless modified by a subsequent order." It also sets out an important equitable limitation: "Any order may be modified at the trial to prevent injustice."

39 The case management judge's order limiting who might testify at trial was authorized by para. 21 of Practice Note 7. But a case management judge cannot fetter a trial judge's discretion to admit evidence. "What evidence is proper often depends on the course of the trial, and what evidence has preceded. No one can foresee all the twists and turns of a long trial": Ellis-Don Management Services et. al. v. Rae-Dawn Const. Ltd. (1992), 131 A.R. 190 at 192 (C.A.).

40 This principle is recognized in para. 29 of Practice Note 7, which permits the trial judge to revisit and modify pre-trial orders to prevent injustice. The trial judge's discretion, therefore, is not fettered.

41 The case management judge's order serves the important purpose of alerting the parties to the case they may have to make or meet at trial. Either party may ask the trial judge to reconsider. No doubt the order was intended as a form of sanction, but whether it will in fact have that effect will depend upon the trial judge's view of its fairness as the trial unfolds. If the parties do not want to take a chance on the trial judge's decision, they are free to agree to another procedure, then ask the case management judge to modify his earlier position by a new order.

42 Tremco has not alleged that it has been prejudiced by the order. In fact Tremco has not indicated that it proposes to call Baratuci or Coppola as witnesses at the trial. The order may be reconsidered by the trial judge at the appropriate time. At this stage there is no need for the Court of Appeal to intervene.

SUMMARY

43 A former employee of a party who is a proper subject of discovery under R. 200(1) may be examined on all knowledge touching the matters in issue even though the information was acquired after employment ended. The case management judge properly interpreted R. 200(1).

44 Practice Note 7 permits a case management judge to limit the witnesses who will be permitted to testify

at trial. The case management judge properly exercised his discretion in making the order in this case. The trial judge's discretion is not fettered, as a case management order may be modified at trial to prevent injustice.

45 The case management judge's orders should not be disturbed. I would dismiss the appeal.

FRUMAN J.A.
PICARD J.A.: I concur.

The following is the judgment of:

O'LEARY J.A. (dissenting)

Introduction

46 The defendant corporations appeal two related interlocutory Orders. The first rules that two former employees must answer questions on examination for discovery about information within their personal knowledge, but not within the knowledge of the defendant corporations, acquired from independent sources after their employment ceased. The second Order disqualifies the witnesses from testifying at trial if they fail to re-attend and answer questions in accordance with the first Order.

47 I would allow the appeals and set aside the Orders.

Background

48 The respondent, Gienow Building Products Ltd. ("Gienow"), is suing the appellants, Tremco Incorporated (a United States corporation) and Tremco Ltd. (its Canadian affiliate) (collectively "Tremco") alleging that over a period of time Tremco manufactured and sold to Gienow a defective spacer bar and sealant system (the "System") used in the manufacture of insulating glass which was, in turn, used by Gienow to make windows for residential and commercial use. Gienow purchased the System from 1985 until June, 1995. Since then Gienow has used a different spacer bar and sealant system. Gienow commenced this action on December 12, 1995 seeking damages for breach of contract and negligence. The statement of claim alleges that Tremco investigated the cause of the problem experienced by Gienow and made modifications and improvements to correct it.

49 On February 1, 1997, all of the shares of Tremco were sold in an arm's length transaction to a chemical company known as RPM. RPM was not in the business of making products such as the System and decided to sell Tremco's North American insulating glass operations. A group of former Tremco employees created a new corporation, TruSeal Technologies Incorporated ("TruSeal"), and on June 23, 1997 TruSeal acquired, by way of an asset purchase, all assets formerly owned and used by Tremco in connection with the manufacture and sale in North America of insulating glass sealants, including the System. This was two years after Gienow stopped buying the System from Tremco because of the alleged defects and one and one-half years after this action was commenced. Neither transaction had anything to do with this lawsuit or any other defective product claims. The result of these transactions is that since June 23, 1997 the insulating

glass operation formerly part of Tremco's North American operations has been carried on by TruSeal. There is no relationship between Tremco and TruSeal.

50 August Coppola and James Baratuci were employed by Tremco in its insulating glass division until the sale to TruSeal. Baratuci started as a process engineer in the insulating glass division in 1988, and was the manager of North American research and development when the business was sold to TruSeal. Coppola was employed by Tremco in an executive capacity in the insulating glass sealant division. Both left the employment of Tremco and became employees of TruSeal in June, 1997. Baratuci occupies a position similar to that held with Tremco. Coppola is the President and Chief Executive Officer of TruSeal. They are citizens of the United States and reside in the State of Ohio.

51 Examinations for discovery commenced after June 23, 1997. With the acquiescence of Gienow, Tremco produced Coppola for discovery as its corporate representative pursuant to Rule 214 and as a former employee pursuant to Rule 200(1). Baratuci was produced for examination for discovery as a former employee. They were both employed by Tremco during the period Gienow purchased the System and for two years after Gienow stopped buying it because of the alleged defect. Apparently the parties considered them to be the individuals best able to disclose the relevant knowledge of Tremco, even though neither was employed by or under the control of Tremco when the examinations took place.

52 On Baratuci's examination for discovery in September, 1998, he declined to answer questions about his personal knowledge of testing and product development of the System by TruSeal after June, 1997. Coppola was examined in November, 1998. He declined to answer similar questions about his after-acquired personal knowledge, and also refused to undertake to inform himself concerning testing and product development of the System by TruSeal since it acquired Tremco's North American insulating glass business. Tremco maintains that the information is not relevant as it is not within its knowledge and is proprietary to TruSeal. It is TruSeal's knowledge that is sought and TruSeal is not a party. Coppola has since withdrawn as Tremco's designated officer and a new officer has been selected, apparently without complaint by Gienow.

53 It is not disputed that any knowledge relevant to the issues pleaded possessed by Tremco, from whatever source and whenever acquired, must be disclosed through its employees, former employees and selected representative. The information sought here does not come within that description. Tremco does not possess any of the knowledge about the System acquired by the witnesses personally or by TruSeal after June 25, 1997.

54 The chambers judge found the objections improper and ruled with respect to Baratuci and, by implication, Coppola, that as former employees they:

> .... shall answer questions arising from issues defined by the pleadings if the witness has personal knowledge that would respond to the question(s) regardless of the source of that knowledge or the corporation employing the witness when the knowledge was learned.

That is the first Order appealed by Tremco.

55 Independent Canadian counsel consulted by Coppola and Baratuci advised Gienow's counsel that the two would not appear in Alberta for any further discovery but would honour an order that they appear to

give commission evidence in Ohio as contemplated by Rule 200(5). They would, however, seek assurances from the Ohio courts that any testimony they might be required to give would not include trade secrets belonging to TruSeal. Tremco has no control over these individuals and they are not amenable to the personal jurisdiction of the courts of Alberta.

56 The chambers judge subsequently made an Order prohibiting Coppola and Baratuci from testifying at the trial if they refuse to disclose on discovery their personal knowledge acquired through employment with TruSeal. He ordered that:

> A party proposing to present at the trial any viva voce evidence of any person who has been examined for discovery, shall be permitted to do so only if that witness has complied with all Examination for Discovery obligations required by Alberta law and any specific direction of this Court regarding their Examination for Discovery.
>
> [emphasis in original]

Tremco also appeals that Order.

Issues

57 The first issue concerns the scope of examination for discovery of a former employee of a corporate party permitted by Rule 200(1). Tremco submits the first Order allows examination beyond what is contemplated by the Rule. A former employee may be examined for discovery only on knowledge and information possessed during the period of employment. It says Coppola and Baratuci cannot be compelled to disclose information acquired from independent sources after their employment ceased which is not shared by the former employer, no matter how germane the information may be to the issues raised in the pleadings.

58 Gienow argues that a proper interpretation of Rule 200(1) compels a former employee to disclose his personal knowledge relevant to the issues pleaded even though the knowledge was acquired after the period of employment and is not within the knowledge of the corporate party. That is, if an individual is subject to examination as a former employee under Rule 200(1), the witness must disclose all information he or she possesses relevant to the issues raised in the pleadings even if the information is not and has never been within the knowledge of the corporation.

59 With respect to the second Order, Tremco submits that the chambers judge erred in purporting to fetter the discretion of the trial judge with respect to the evidence Tremco may adduce at trial. It says a chambers judge, even when acting as case manager, has no jurisdiction to make orders affecting the substantive rights of the parties, in particular, to decide who may or may not testify at the trial or what evidence may be received or excluded at trial. Those are matters exclusively within the jurisdiction of the trial judge.

60 Gienow maintains the chambers judge, as case manager of a long trial matter, had power to make the Order to ensure full pre-trial disclosure and a fair trial.

Summary Decision

61 Aside from securing admissions, the purpose of pre-trial examination for discovery of a corporate party pursuant to Rules 200(1) and 214 is to obtain information about the knowledge of the corporation relevant to the issues described in the pleadings. In my view, that objective defines the scope of examination for discovery of employees and former employees under Rule 200(1). The examination of a representative selected under Rule 214 is similarly limited to information within the knowledge of the corporate party, and the representative's duty to inform himself or herself extends only to such knowledge. Information that is clearly not within the knowledge of the corporate party, and which has been acquired by a former employee after the period of employment from an independent and unrelated source, is not an appropriate subject of questioning on examination of the former employee.

62 The examining party is entitled to disclosure of the corporation's knowledge whenever acquired and whatever the source. A former employee may be examined with respect to the corporation's knowledge. But an adverse party is not entitled to the after-acquired personal knowledge of an individual who happens to be compellable to discovery as a former employee, even though that information may be relevant to the issues pleaded. That would countenance the deposition of mere witnesses (in his case potential witnesses), a practice that is not permitted under our Rules: Simons v. McKinney Machine Co. Ltd. et al, [1994] A.U.D. 1417 (C.A.), Kesler v. Pighin et al (1993), 141 A.R. 246 (C.A.).

63 There are sound policy reasons for not allowing what amounts to the deposition of former employees of a corporate party. To allow the scope of examination permitted by the chambers judge risks the interminable protraction of litigation with a corresponding increase in cost. The courts, the legal profession, litigants and society in general are justifiably concerned about the pace and prohibitively high cost of litigation. In addition, it would result in a haphazard and unfair discovery process. One party may be entitled to more extensive discovery than another based solely on the coincidence that one has former employees with personal knowledge or expertise relating to the matters raised in the pleadings and the other is not in that position. Further, if one party is permitted to depose some witnesses and potential witnesses, it would have a significant advantage at trial over a party without that right.

64 Whether or not my conclusion on the first issue is correct, it is my view that the disqualification of potential trial witnesses, and the consequent exclusion of their testimony, was beyond the jurisdiction of the chambers judge. It has the effect of improperly fettering the trial judge's right to apply his or her discretion to control the admission and exclusion of evidence in the interest of ensuring a fair trial.

Analysis

Scope of Examination for Discovery

65 My reasons are confined to the precise issue raised, namely the scope of examination for discovery of former employees of a corporate party pursuant to Rule 200(1). Different considerations may apply to the examination for discovery of present employees, be they officers or ordinary employees. In some cases the knowledge of a present employee is or may be the knowledge of the corporation. That may depend on factors such as the size of the corporation, the status of the employee under examination, the information sought on the examination and the nature of the dispute between the parties. For example, a small

corporation's most senior technical employee being examined as a present employee could hardly decline to answer questions relevant to the issues pleaded that call for his specialized personal knowledge, regardless of the source of the information or how it was acquired. Chalmers v. Associated Cabs Ltd. (1994), 25 C.P.C. (3d) 101 (Alta. Q.B.), relied on by the chambers judge, falls into that category. Neither do these reasons deal directly with the scope of examination of a corporate representative selected pursuant to Rule 214.

66 This issue has nothing directly to do with whether the answers to the disputed questions would, without more, be admissible against Tremco at trial. This point was not raised in argument and, in my view, is irrelevant to this issue. Admissibility of discovery answers at trial has never been taken as the measure of the scope of pre-trial examination for discovery under Rule 200(1). I might observe in passing, however, that I know of no Alberta case where the unadopted discovery evidence of a former employee about knowledge acquired after employment ceased has been admitted at trial as evidence against the former employer.

67 In an action by or against a corporation it is the knowledge of the corporation relating to the matters in issue that is relevant and subject to pre-trial inquiry. Information acquired by a former employee independently and outside the period of his or her employment is not within the knowledge of the corporation: Indalex v. R. (1983), 40 C.P.C. 28 (Fed. T.D.), aff'd. (1984), 60 N.R. 109 (Fed. C.A.).

68 A purposive interpretation of Rule 200(1) must limit the scope of examination of a former employee of a corporate party to relevant knowledge possessed or acquired by the witness during the period of employment. At the material time the Rule said:

> Any party to an action, any officer of a corporate party and any person who is or has been employed by any party to an action, and <u>who appears to have some knowledge touching the question at issue, acquired by virtue of that employment</u> whether the party is within or without the jurisdiction, may be orally examined on oath or affirmation before the trial of the action touching the matters in question by any person adverse in interest, without order.
>
> [emphasis added]

69 It is not logical to limit the former employees who may be examined on behalf of a corporate party to those who appear "to have some knowledge touching the matters in issue, acquired by virtue of that employment", and at the same time permit an examination that goes beyond that knowledge. To compel a former employee to disclose after-acquired information that is not within the knowledge of the corporation is inconsistent with the principle that only a corporation's knowledge is discoverable. An interpretation that allows examination of former employees on after-acquired information not within the knowledge of the corporation, as ordered by the chambers judge and advocated by Gienow, would sanction the deposition of witnesses, a procedure that, as I have already pointed out, our Rules do not permit: see Simons v. McKinney Machine Co. Ltd. et al and Kesler v. Pighin et al, supra. Where the information sought is not within the knowledge of the corporate party, as in the case at Bar, such a broad examination serves no other purpose. The corporation's selected representative cannot be compelled to accept or reject the evidence, and the

answers cannot otherwise be used at trial against the interest of the former employer: MacGregor v. C.P.R., [1938] 2 W.W.R. 426, 3 D.L.R. 687 (Alta. C.A.).

70 In my view, it would be a step backward to interpret Rule 200(1) as permitting what amounts to the deposition of certain witnesses and potential witnesses. It will inevitably protract litigation and increase its cost while, at the same time, increasing the potential for unfairness. If witness deposition is to be approved, I suggest the Rules be amended to make the procedure clear and available to all litigants.

71 Restricting the scope of discovery of former employees to relevant knowledge acquired during the witness's period of employment does not violate the accepted principle that the scope of examination for discovery is wide. It is not unlimited. The parameters of examination of former employees are relevance to the issues in the litigation, on one hand, and when the knowledge became known to the witness, on the other.

72 The principle that a present employee, and by logical extension an ex-employee, may only be examined for discovery in respect of knowledge acquired, or at least possessed, during the course of employment by the corporate party was accepted by the Appellate Division of the Supreme Court of Alberta in Lea v. City of Medicine Hat, [1917] 2 W.W.R. 789. There, the plaintiff sued the City for payment of an account and examined one Pyper as a current employee of the City pursuant to the equivalent of Rule 200(1). Pyper had at a critical time been employed by the plaintiff. The issue was whether Pyper could be examined with respect to his knowledge of the relevant events acquired prior to his employment by the City, specifically during his employment with the plaintiff. The plaintiff applied to a local judge for an order to compel Pyper to answer questions about his pre-employment knowledge and also to substitute Pyper as the City's representative officer pursuant to the equivalent of present Rule 214. The local judge refused to compel Pyper to divulge information obtained during his employment with the plaintiff and before his employment with the City, but granted the plaintiff's application to substitute Pyper as the City's representative officer.

73 The first part of the ruling was not appealed. The City's appeal of the order substituting Pyper as its representative was dismissed by a judge of the Trial Division, but allowed on further appeal to the Appellate Division. The latter Court observed that the representative of a corporate party was not under a duty to inform himself of or to disclose information within the personal knowledge of employees that was not acquired by virtue of their employment with the corporate party. It was accepted that an employee examined under an earlier version of Rule 200(1) could not be compelled to answer questions about personal knowledge obtained outside the employment with the corporate party. Harvey C.J.A., speaking for the Court, said at 794:

> In Weisbach Incandescent Gaslight Co. v. New Sunlight Incandescent Co., 69 L.J. Ch. 546; [1900] 2 Ch. 1; 83 L.T. 58, it was held that an officer of a company answering for the company would not be compelled to answer as to knowledge obtained outside the company's employment. That principle appears to be implied in our rule 234 [now, with modifications that are irrelevant, Rule 200] which permits examination of employees who have information acquired by virtue of their employment. There is a present judgment against the plaintiff [the ruling of the local judge] that he cannot get the information he desires against Pyper as a simple employee of the defendant by reason of the fact that the information was not acquired by virtue of his employment by the defendant. It seems clear that under the authority of the case cited no officer of the defendant could be required to inform himself from Pyper and communicate such information. It would seem to

> follow necessarily and certainly it is clear from the dicta in the cases cited, which are very instructive, that Pyper on being examined as the mouthpiece of the defendant could not be compelled to give information acquired by him outside of his employment by the defendant.

74 Neither the Court nor the parties disagreed with the ruling of the local judge that Pyper, as an employee, was not obliged to disclose information which was not acquired by virtue of his employment with the City and was not within the knowledge of the City. Lea v. City of Medicine Hat is consistent with the wording of Rules 200(1) and 214, and supports the interpretation I have attributed to the former. The fact the English case referred to by the Court involved interrogatories and not oral examination does not detract from the force of the proposition for which it was cited. The principles recognized in Lea have been applied in many cases in this Province, including: McGregor v. C.P.R., supra, Act Oils Ltd. v. Pacific Petroleums Ltd. et al (1965), 50 D.L.R. (2d) 532 (S.C.T.D., Trizec Equities Ltd. v. Ellis Don Management Services Ltd. (1994), 19 Alta. L.R. (3d) 433 (Q.B.), Simons v. McKinney Machine Co. Ltd. et al, supra, and Kesler v. Pighin et al, supra.

75 Counsel have not referred us to any authority in this Province that holds that a former employee may be examined for discovery under Rule 200(1) in respect of personal knowledge acquired after his or her employment ceased where that information is not shared by the corporate party.

76 The chambers judge relied on a statement by McMahon J. in Chalmers v. Associated Cabs Ltd., supra. There, the plaintiff was injured in an accident and claimed damages for loss of income. His wife was the bookkeeper for his unincorporated business. The defendant sought to examine her as the plaintiff's employee about her knowledge of the economic effects of the accident on the plaintiff. McMahon J. adopted the reasoning of the British Columbia Court of Appeal in Wallace Neon Ltd. v. Tilden Corp. (1964), 47 W.W.R. 61. He said at 104:

> It would be retrogressive to now limit examination to only knowledge gained by the witness in one capacity and not another. Once a person is a proper subject of an examination for discovery, all that person's knowledge touching the matters in issue is within the scope of the examination for discovery. Where the person being examined is an employee, and has knowledge gained by virtue of that employment and also knowledge acquired outside that employment, the latter may or may not bind the employer or be attributed to the employer. That is for the trial judge to decide, but the source of the person's knowledge does not alone serve to limit the scope of the discovery.

77 Both Chalmers and Wallace Neon involved the examination of present employees who acquired the information during the course of their employment. There was no doubt the employees possessed the knowledge during the period of employment; the issue was the source of the information. The evidence had potential for adoption by the employer as his or its knowledge. Here, the information sought from Coppola and Baratuci lacks that character.

78 My view of this matter is not affected by the November 1, 1999 amendments to Rule 200. The amendments do no more than move the words about and add a sub-rule about relevancy. Except with respect to issues of relevancy, they do not change the scope of examination for discovery of individuals examined on behalf of a corporate party.

79 In my opinion, the former employees, Coppola and Baratuci, cannot be compelled to answer questions

directed to disclosure of their personal knowledge acquired from an independent source after termination of their employment where that information is not within the knowledge of Tremco. That is so regardless of the fact it may be relevant to the issues raised in the pleadings. Accordingly, I would allow the appeal and set aside the first Order.

Jurisdiction of the Chambers Judge to Exclude Evidence

80 The Order appealed was made by the chambers judge acting as case manager pursuant to Queen's Bench Practice Note No. 7 entitled "The Very Long Trial". The Practice Note has not been adopted as a rule and therefore does not have the force of a Rule of Court. In my opinion, the power of a case management judge is limited to procedural matters and the judge has no jurisdiction to make decisions affecting the substantive rights of the parties. That is reserved exclusively to the trial judge. I believe this Order seriously impacts the substantive rights of Tremco and exceeded the jurisdiction of the chambers judge.

81 The purpose of case management is set out at the beginning of the Practice Note:

> This new procedure is aimed at ensuring that maximum benefit is gained from each trial day, thereby making more efficient use of Court resources. It also aims at ensuring adequate and accurate amounts of time are reserved for trial.

82 One of the central features of case management is described in the Practice Note as follows:

> - each case is assigned early in the proceedings to a case management judge who hears all aspects of the case down to trial; that judge may raise matters on his or her own initiative to facilitate efficient pretrial management and make resulting orders, after hearing from each party.
>
> [emphasis added]

The Practice Note is replete with references to procedural steps and matters of scheduling, all designed to prepare a case for trial as efficiently and inexpensively as possible, consistent with fairness to the parties and transparency of the process. I see nothing in the Practice Note expressly or impliedly giving a case management judge the power to make orders controlling the admission or exclusion of evidence that may be tendered at trial. That would usurp the function of the trial judge.

83 This Court has recognized that case management judges must be allowed the flexibility:

> . . . to resolve endless interlocutory matters and move these cases on to trial. In some cases the case management judge will have to be innovative to avoid having the case bog down in a morass of technical matters. Only in the clearest cases of misuse of judicial discretion will we interfere.
>
> (Korte v. Deloitte, Haskins & Sells (1995), 36 Alta. L.R. (3d) 56 at 59 (C.A.))

84 In my opinion, the chambers judge clearly exceeded his jurisdiction in these circumstances by making an Order potentially limiting the witnesses and the evidence that may be called by Tremco at trial. As this

Court said in Ellis-Don Management Services et al v. Rae-Dawn Construction Ltd. et al (1992), 131 A.R. 190 at 192:

> [It] is most unusual to tell a trial judge in advance what evidence he can and cannot admit. What evidence is proper often depends on the course of trial, and what evidence has preceded. No one can foresee all the twists and turns of a long trial. Ever since the Judicature Acts, civil trials have been before one judge who decides all the issues, factual, procedural and legal, and decides those issues in whatever order to him seems most fit.

85 I would set aside the second Order.

O'LEARY J.A.

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1 At the time this appeal was argued, R. 200(1) read as follows:

200(1) Any party to an action, any officer of a corporate party and any person who is or has been employed by any other party to an action, and who appears to have some knowledge touching the question at issue, acquired by virtue of that employment whether the party or person is within or without the jurisdiction, may be orally examined on oath or affirmation before the trial of the action touching the matters in question by any person adverse in interest, without order.

On November 1, 1999, several months after this appeal was argued, new discovery rules were implemented and R. 200(1) was amended. The revised rule, which is reproduced below, follows the same format as the previous rule, but, encouragingly, incorporates the parsing that I favour.

200(1) Before trial, a party to proceedings may orally examine under oath, without an order of the Court,

(a) any other party to the proceedings who is adverse in interest,

(b) if the other adverse party is a corporation, one or more officers of the corporation, and

(c) one or more other persons who

(i) are or were employed by the other party, and

(ii) have or appear to have knowledge of a matter raised in the pleadings that was acquired by virtue of that employment.

(1.1) Subrule (1) applies whether the person sought to be examined is inside or outside the jurisdiction of the Court.

(1.2) During the oral examination under subrule (1), a person is required to answer only relevant and material questions.

2 The amended discovery rules limit examination on discovery to "relevant and material questions." Rule 186.1 provides a new definition of "relevant and material" which is reproduced below.

186.1 For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

3 Rule 214 contains a procedure for selecting an officer of a corporate defendant to submit to an examination for discovery. In some circumstances, the evidence of the officer may be used at trial against the corporate party.

4 Authorities from other provinces suggest that the scope of an officer's discovery is broad, and not limited by the capacity in which the information was obtained. According to Kennedy v. Suydam (1915), 8 O.W.N. 65 (H.C.), on discovery an officer must disclose all facts in his personal knowledge, regardless of the capacity in which those facts were acquired. Kennedy was approved in Wallace Neon Ltd. v. Tilden Corp. et al. (1964), 47 W.W.R. 61 (B.C. C.A.), although the court reserved on the question whether knowledge acquired while not employed by the party must be disclosed. Wallace Neon has been extended to require an officer under discovery to answer all relevant questions on matters within his personal knowledge regardless of how or when the knowledge was acquired: British Columbia Lightweight Aggregate Ltd. v. Canada Cement Lafarge Ltd. et al. (#3) (1978), 93 D.L.R. (3d) 758 (B.C. S.C.); Mobil Oil Corp. et al. v. Project 200 Investments Ltd. et al. (1975), 59 D.L.R. (3d) 759 (B.C. S.C.). See also Willory Mines Ltd. v. New Cinch Uranium Ltd.(1983), 34 C.P.C. 13 (Ont. S.C.), aff'd., ibid. at 13n.; Young-Warren Foods Brokerage Ltd. v. Uniline Corp. et al. (1978), 19 O.R. (2d) 332 (S.C.). For contrary authority, see Fisher v. Pain et al., [1938] O.W.N. 74 (H.C.); Kay v. Posluns, [1993] O.J. No. 188 (Gen. Div.).

5 The lower court judgment in Lea decided several issues, including the scope of a particular employee's examination for discovery. That ruling was not appealed. The only issue on appeal was whether the plaintiff could compel that employee to be substituted as the corporate officer, whose examination would then bind the defendant. In Lea, the appeal court acknowledged the two purposes of discovery: "for information of fact and for admissions to be used against the opposite party" at 792. Focussing on the plaintiff's desire to obtain admissions, the court indicated an officer "is not bound to answer as to what he learned accidentally and not in the ordinary course of business" if the information is to bind the corporate defendant: at 794 (citing Bolckow, Vaughhem & Co. v. Fisher, 10 Q.B.D. 169). Lea has been followed once in this province in respect of the scope of an officer's discovery: Alberta (Inspector of Land Titles Office) v. Tri-Fort Financial Ltd., [1991] A.J. No. 480 (Masters).

6 In Cana Construction, the issue was whether a volunteer could be brought forward as a subject of discovery.

7 In Leeds, the issue was whether a minister of the Crown might be produced as a subject of discovery.

End of Document

TAB 10

Johansson v. Fevang, [2009] A.J. No. 1063

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Peace River

V.O. Ouellette J.

Heard: August 7, 2009.

Judgment: September 30, 2009.

Docket: 0809 00193

Registry: Peace River

[2009] A.J. No. 1063 | 2009 ABQB 573 | 80 C.P.C. (6th) 27 | 181 A.C.W.S. (3d) 316 | 2009 CarswellAlta 1542

Between Donna Erin Johansson, Respondent/Plaintiff, and Gordon Donald Fevang, Applicant/Defendant

(23 paras.)

Case Summary

Civil litigation — Limitation of actions — Time — When time begins to run — Application for summary judgment striking respondent's constructive trust claim dismissed — Parties cohabited 2000 until 2006 — Respondent filed this constructive trust action in August 2008, so applicant argued it was time barred — Respondent claimed cohabitation ended August 2006, but had been deemed to admit March 2006 as end date since she filed to reply the applicant's materials on time — Triable issues existed as to whether deemed admissions could be withdrawn, when time began to run, whether Adult Interdependent Relationship Act applied and whether this action was new or simply an added claim to earlier family law action.

Family law — Marital property — Equalization or division — Constructive and resulting trusts — Practice and procedure — Limitation periods — Application for summary judgment striking respondent's constructive trust claim dismissed — Parties cohabited 2000 until 2006 — Respondent filed this constructive trust action in August 2008, so applicant argued it was time barred — Respondent claimed cohabitation ended August 2006, but had been deemed to admit March 2006 as end date since she filed to reply the applicant's materials on time — Triable issues existed as to whether deemed admissions could be withdrawn, when time began to run, whether Adult Interdependent Relationship Act applied and whether this action was new or simply an added claim to earlier family law action.

Application for summary judgment striking the respondent's constructive trust claim. The parties had cohabited from 2000 until 2006. The applicant claimed the relationship ended in March 2006; the respondent claimed the relationship ended in

August 2006. However, the respondent had not replied to materials filed by the applicant in time and had been deemed to admit that the relationship ended in March 2006. In December 2007, the respondent had filed a family law claim for spousal support, exclusive possession and constructive trust. The spousal support and exclusive possession issues had been resolved. The respondent filed this constructive trust claim in the Court of Queen's Bench in August 2008. The applicant argued the claim was time barred as it was commenced more than two years since the parties' relationship ended. The applicant argued that the Adult Interdependent Relationship Act stated that the time did not begin to run until one year after the relationship ended.

HELD: Application dismissed.

The Limitations Act clearly mandated a two-year limitations period. However, when the time began to run was a triable issue. Whether or not the Adult Interdependent Relationship Act applied and took precedence was also a triable issue. Other triable issues were whether the deemed admissions could be withdrawn and whether this claim was actually a new cause of action or simply an added issue to the family law claim originally filed.

Statutes, Regulations and Rules Cited:

Adult Interdependent Relationship Act, R.SA 2002, c. A-4.5, s. 10

Alberta Rules of Court, Alta. Reg. 390/1968, Rule 88(1)(e), Rule 159, Rule 230(1.1), Rule 230(2), Rule 230(5), Rule 561, Rule 561.01(2)

Family Law Act, R.SA 2003, c. F-4,

Limitations Act, RSA 2000, c. L-12, s. 3, s. 6

Counsel

M. Pelletier, for the Respondent/Plaintiff for oral submissions.

W.S. Schlosser, Q.C., for the Respondent/Plaintiff and for the preparation of brief of facts and law.

Brook Mishna, for the Applicant/Defendant.

Reasons for Judgment

V.O. OUELLETTE J.

Introduction

1 The applicant, Gordon Fevang, brought an application for a summary Judgment pursuant to Rule 159 of the *Alberta Rules of Court,* Alta. Reg. 390/1968 [*Rules of Court*] seeking to strike out the Statement of Claim of Donna Johansson on the basis that her claim for a constructive trust remedy was statute barred pursuant to the *Limitations Act*, R.S.A. 2000, c. L-12.

Facts

2 Mr. Fevang and Ms. Johansson began cohabitating in the year 2000. They resided in a home which was registered solely to Mr. Fevang. In March 2006, Mr. Fevang moved out of the home where he had been residing with Ms. Johansson and moved in with his father. He left his belongings in the home.

3 On December 14, 2007 Ms. Johansson filed a claim in the Court of Queen's Bench pursuant to the *Family Law Act*, R.S.A.2003, c. F-4.5. Ms. Johansson's claim was for spousal/partner support, exclusive possession of home/goods and under the category "Other", an equitable division of matrimonial property pursuant to the equitable doctrine of constructive trust.

4 In support of Ms. Johansson's claim for exclusive possession of the home/goods she swore an affidavit December 14, 2007. Paragraph 6 of this affidavit states, in part, the following: "We moved in together when the Respondent took possession of the property, and we lived there together until he moved out in August of 2006. Since that time, I have been residing here with my two children while he has lived elsewhere and worked around Northern British Columbia as a helicopter pilot. The Respondent had indicated that when he would return from work in November, he would help me work out an arrangement to get my own home, but instead he gave me an eviction notice". In addition to the affidavit sworn in support of the exclusive possession claim, Ms. Johansson also swore an affidavit in support of her claim for a spousal/partner support. This affidavit was also sworn on December 14, 2007. It should be noted that in para. 3, Ms. Johansson's claim for support in the sum of $2000 per month was to commence on August 1, 2006. Further, at para. 17 of this same affidavit, Ms. Johansson swore the following: "The home I have been living in with my children for the past 7 years was bought by the Respondent, and we lived together in that house from the date he took possession in March 2000, until he left in August 2006."

5 Ms. Johansson then obtained an *ex parte* exclusive possession order on February 17, 2008. In March 2008, Mr. Fevang filed a reply to the *Family Law Act* claim made by Ms. Johansson.

6 On August 22, 2008, counsel for Mr. Fevang informed Ms. Johansson's then lawyer that the limitation period had expired as it related to the claim for a constructive trust. Ms. Johansson's counsel filed a Statement of Claim in the Court of Queen's Bench on August 27, 2008 claiming an equitable distribution of property according to the equitable doctrine of constructive trust.

7 On October 28, 2008, the *Family Law Act* action was discontinued. There was a Without Prejudice Consent Order allowing Ms. Johansson to continue to live in the property for a further period of 6 weeks from October 21, 2008. Also, on October 28, 2008, Mr. Fevang filed a Statement of Defence to the Statement of Claim action filed by Ms. Johansson on August 27, 2008, and defended on the basis of the expiry of time under the *Limitations Act*.

8 Ms. Johansson's first lawyer ceased acting for her in May 2009. On June 4, 2009, Mr. Fevang filed a notice of motion for a summary Judgment dismissal which was eventually heard before myself in August, in Peace River. On June 15, 2009 Mr. Fevang served a notice to admit on Ms. Johansson. On July 7, 2009 a new lawyer became counsel of record for Ms. Johansson.

9 At no time did Ms. Johansson deny the notice to admit and pursuant to Rule 230 (1.1) the admissions were deemed to be admitted on July 15, 2009. As a result, Ms. Johansson is deemed to have admitted the following facts: that Mr. Fevang and Ms. Johansson stopped residing together as a couple on or before August 26, 2006 and that their relationship ended on or before August 26, 2006. Further, that the relationship between Mr. Fevang and Ms. Johansson actually ended in March of 2006.

Analysis

1. Does the *Limitations Act* apply?

10 The first question to be considered in determining whether there are any genuine issues to be tried is whether the *Limitations Act* applies to a constructive trust claim.

11 With respect to this preliminary question, both Ms. Johansson and Mr. Fevang have agreed that the *Limitations Act* applies to a constructive trust claim. I agree with counsel for both parties that the *Limitations Act* does apply based on the reasoning in decisions such as ***Becker v. Pettkus***, [1980] 2 S.C.R. 834 as well as Alberta Court of Queen's Bench decisions including ***Angeletakis v. Thymaras*** (1989), 95 A.R. 81 (Q.B.) and ***Vreim v. Vreim***, 2000 ABQB 291. As a result, pursuant to s. 3 of the *Limitations Act*, there exists a 2 year time period in which a claim for constructive trust must be commenced.

2. When does the Limitation Period Begin to Run?

12 The next issue to be considered is when the limitation period commences. Again, both parties appear to agree that the date of separation is the relevant date in determining when the limitation period begins to run. The applicant relies on the Alberta Court of Appeal's comment in ***Mustard v. Brache*** 2006 ABCA 265 at para. 15. The Court stated the following:

> The remedy for unjust enrichment may be a monetary award. However, depending upon the equities and the fact-specific circumstances of the case, a constructive trust may be imposed. In that event, even though declared after the date of separation of the parties, a constructive trust can be deemed to have arisen when the duty to make restitution arose. The property, or share thereof, will therefore be considered to be owned by the beneficiary at the time of separation: ***Rawluk v. Rawluk***, [1990] 1 S.C.R. 70 at para. 42.

Relying on the above citation from the Alberta Court of Appeal, counsel for Mr. Fevang argues that the relevant date is the date of separation, that is, March 2006 and that there is no Alberta authority which allows for an extension of the limitation provisions.

13 Counsel for Ms. Johansson argues that Ms. Johansson and Mr. Fevang are adult interdependent partners

pursuant to the *Adult Interdependent Relationship Act*, R.S.A. 2002, c. A-4.5 [*AIRA*]. As a result, the remedy of constructive trust does not arise until the parties become former adult interdependent partners as defined in s.10. Under s.10, one of the ways parties become former adult interdependent partners is to live separate and apart for more than one year, with the intention that the relationship not continue. Ms. Johansson's position is that it is not until this point in time that the "injury" for the purposes of s. 3 of the *Limitations Act* occurred. As such, even if the parties are said to have separated in March of 2006, they would not become former adult interdependent partners until March of 2007. The two year limitation period would therefore run from March of 2007 and as a result, the Statement of Claim filed in August 2008 would be within the 2 year limit.

14 There is very little, if any, case law which specifically sets out the point at which a limitation period begins to run in a constructive trust action. As a result, I am of the opinion that there is a triable issue as it relates to the meaning of the date of separation and also whether the provisions of the *AIRA* take precedence and impose a date of separation other than when the facts may disclose an actual physical separation occurred.

3. Can Deemed Admissions be Withdrawn?

15 The next question to be looked at is whether or not the admissions pursuant to the notice to admit can be withdrawn. It would appear that although the *Rules of Court* expressly provide that the 30 day response period cannot be abridged (R. 230 (2)), the rules authorize the court at any time, to allow any party to amend or withdraw any admission on such terms as may be just (R. 230 (5)).

16 The test to determine whether the court will allow any party to amend or withdraw admissions was set out by the Alberta Court of Appeal in ***Dwyer v. Fox*** (1996), 181 A.R. 223 (C.A.). The Court of Appeal in ***Dwyer*** accepted the test established in ***Davies v. Edmonton (City)*** (1991), 126 A.R. 109 (Q.B.). In general, the test can be summarized as follows: (1) has it been shown that in the interest of justice the issue between the parties ought to be resolved by a trial? (2) would withdrawal cause a substantial prejudice to the opposite party which could not be compensated by costs? Based on this test, after hearing Ms. Johansson's evidence, the trial judge could allow a withdrawal of the admissions. As a result, this in my opinion is another triable issue which can only be determined by the trial judge. It should also be noted that, in addition to the facts I outlined earlier, Ms. Johansson's affidavit in response to this application now states that the date of separation was actually September 2006.Therefore, if the notice to admit is set aside, there could even be a triable issue as to the actual date of physical separation.

4. Can the Constructive Trust Action be said to have been Commenced on December 14, 2007 under the *Family Law Act*?

17 Although neither Mr. Fevang or Ms. Johansson addressed this issue, I am satisfied that there is a triable issue as to whether or not the claim was actually commenced on December 14, 2007 or only on August 27, 2008. A review of the *Family Law Act* provides for the types of claims and orders which can be granted by the Court of Queen's Bench under that Act. It does not appear that a claim for equitable division of

matrimonial property pursuant to a constructive trust is one of the options permitted or available under the *Family Law Act*.

18 However, the *Family Law Act* forms were intended to be commencing documents for actions governed by the legislation itself. In considering the requirements of a Statement of Claim under the *Rules of Court*, it is clear that the forms under the *Family Law Act* do not comply with all of the formal requirements expected of a Statement of Claim. Particularly, with respect to the form used by Ms. Johansson, the notice to defendant required by Rule 88 (1)(e) has not been completed. The issue here is two fold. First, whether a technical defect in the form of the commencing document is sufficient to invalidate the claim in its entirety. Second, whether the fact that the claim was brought improperly under the *Family Law Act* will be sufficient to invalidate the claim.

19 Rule 561 of the *Rules of Court* provides that no pleading or other proceedings shall be defeated on the ground of an alleged defect of form. The Rule goes on to provide that where there is a defect or deviation in the form, it will not invalidate the former document so long as it was not intended to mislead (561.01(2)).

20 Even if the defect in form regarding the *Family Law Act* claim is said to be a bar to finding that the constructive trust claim was validly commenced, s. 6 of the *Limitations Act* could be applicable. The relevant portion of s. 6 provides the following:

> 6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.
>
> (2) When the added claim
>
> (a) is made by a defendant in the proceeding against a claimant in the proceeding, or
>
> (b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,
>
> the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

As a result, it is arguable and triable as to whether the Statement of Claim filed on August 27, 2008 could be adding a claim of constructive trust to the Court of Queen's Bench action filed under the *Family Law Act* in December 2007, as opposed to commencing a new action.

21 For all of the reasons stated above, Mr. Fevang's application is dismissed as there are genuine issues to be tried.

Costs

22 Although costs are usually awarded to the successful party, costs do remain a discretionary award by the judge. In this case, although Ms. Johansson was successful in having the application dismissed, she will not be awarded costs. Despite having dismissed Mr. Fevang's application, I find that the application was not frivolous or brought to embarrass Ms. Johansson. Much of the dispute regarding the date of separation

has been caused by Ms. Johansson in her own affidavits as outlined in the facts above. She first deposed in one affidavit that the separation was in August 2006 and subsequently changed her evidence stating that the separation was in September 2006. Further, she claimed spousal support effective August 1, 2006. Ms. Johansson also made a claim in the Court of Queen's Bench under the *Family Law Act* for a remedy which is not available under that Act. Further, Ms. Johansson did not provide any suitable explanation as to why she did not deal with the notice to admit within the required time frame, or even why she did not seek to have the notice to admit withdrawn pursuant to the *Rules of Court*. Lastly, Ms. Johansson never brought an application pursuant to s. 6 of the *Limitations Act* to have the constructive trust claim, commenced by way of Statement of Claim in August 2008, added to the *Family Law Act* claim filed in December 2007.

23 As a result, I am satisfied that the appropriate discretion to be exercised in the particular circumstances of this case is that each party bare their own costs in relation to this application.

V.O. OUELLETTE J.

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TAB 11

McConnell v. Huxtable, 118 O.R. (3d) 561

Ontario Reports

Court of Appeal for Ontario,

Laskin, Rosenberg and Goudge JJ.A.

January 31, 2014

118 O.R. (3d) 561 | 2014 ONCA 86

Case Summary

Limitations — Real property — Claim for unjust enrichment in which claimant asks court to impose constructive trust upon respondent's real property constituting "action to recover any land" within meaning of s. 4 of Real Property Limitations Act — Claim subject to ten-year limitation period — Alternative claim for monetary award sheltering under s. 4 — No legislative gap existing if s. 4 of Real Property Limitations Act does not apply — Limitations Act, 2002 applying to equitable claims — Limitations Act, 2002, S.O. 2002, c. 24, Sch. B — Real Property Limitations Act, R.S.O. 1990, c. L.15.

The applicant brought an action for unjust enrichment seeking a remedial constructive trust in real property owned by the respondent. Alternatively, she sought a monetary award. The parties agreed that the applicant was aware that she had claims or potential claims against the respondent in June 2007. The action was commenced in February 2012. The respondent brought a motion for summary judgment dismissing the action as statute-barred as it was not brought within the two-year limitation period in the *Limitations Act, 2002*. The motion judge found that the ten-year limitation period in the *Real Property Limitations Act* applied. Alternatively, he found that there was a legislative gap and there was no limitation period for the action. The respondent appealed.

Held, the appeal should be dismissed.

A claim for unjust enrichment in which the claimant seeks a remedial constructive trust in another's property is "an action to recover any land" within the meaning of s. 4 of the *Real Property Limitations Act*. "Recover" in s. 4 does not have its ordinary meaning, which implies the return of something that the person previously held. Rather, it means to obtain land by judgment of the court. The plain meaning of "recover any land" includes seeking an equitable interest in land through imposition of a constructive trust. The ten-year limitation period in s. 4 of the *Real Property Limitations Act* applied. The plaintiff's alternative claim for a monetary award sheltered under s. 4.

The motion judge erred in finding that if s. 4 of the *Real Property Limitations Act* did not apply to the applicant's claim, there was a legislative gap and no limitation period applied. The *Limitations Act, 2002* applies to equitable claims.

Equitable Trust Co. v. Marsig (2012), 109 O.R. (3d) 561, [2012] O.J. No. 1605, 2012 ONCA 235, 16 R.P.R. (5th) 173, 289 O.A.C. 345, 348 D.L.R. (4th) 733, 214 A.C.W.S. (3d) 266; *Hartman Estate v. Hartfam Holdings Ltd.*, [2006] O.J. No. 69, 263 D.L.R. (4th) 640, 205 O.A.C. 369, 22 E.T.R. (3d) 161, 23 R.F.L. (6th) 201, 145 A.C.W.S. (3d) 52 (C.A.); *Kerr v. Baranow*, [2011] 1 S.C.R. 269, [2011] S.C.J. No. 10, 2011 SCC 10, 274 O.A.C. 1, 328 D.L.R. (4th) 577, 2011EXP-624, 411 N.R. 200, J.E. 2011-333, [2011] 3 W.W.R. 575, 64 E.T.R. (3d) 1, 14 B.C.L.R. (5th) 203, 300 B.C.A.C. 1, 93 R.F.L. (6th) 1, EYB 2011-186472, **consd**

Other cases referred to

Bouchan v. Slipacoff, [2010] O.J. No. 2592, 2010 ONSC 2693 (S.C.J.); *Peter v. Beblow*, [1993] 1 S.C.R. 980, [1993] S.C.J. No. 36, 101 D.L.R. (4th) 621, 150 N.R. 1, [1993] 3 W.W.R. 337, J.E. 93-660, 23 B.C.A.C. 81, 77 B.C.L.R. (2d) 1, [1993] R.D.F. 369, 48 E.T.R. 1, 44 R.F.L. (3d) 329, EYB 1993-67100, 39 A.C.W.S. (3d) 646; [page562] *Pettkus v. Becker*, [1980] 2 S.C.R. 834, [1980] S.C.J. No. 103, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 6 A.C.W.S. (2d) 263; *Placzek v. Green*, [2009] O.J. No. 326, 2009 ONCA 83, 307 D.L.R. (4th) 441, 69 C.P.C. (6th) 42, 245 O.A.C. 220; *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC Â210-006, 76 A.C.W.S. (3d) 894; *Schneider v. State Farm Mutual Automobile Insurance Co.*, [2010] O.J. No. 3850, 2010 ONSC 4734 (S.C.J.); *Wilson v. Fotsch*, [2010] B.C.J. No. 850, 2010 BCCA 226, 286 B.C.A.C. 276, [2010] 11 W.W.R. 29, 319 D.L.R. (4th) 26, 81 R.F.L. (6th) 241, 57 E.T.R. (3d) 159

Statutes referred to

Family Law Act, R.S.O. 1990, c. F.3, s. 7(3)

Limitations Act, R.S.O. 1990, c. L.15, Part I, s. 4, Part II, ss. 42, 43, (2), Part III

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B [as am.], ss. 1, 2(1)(*a*), (*f*), 4, 5 [as am.], (1) (*a*), (i), (iii), 13, (7), 15 [as am.], (2), 19

Real Property Limitations Act, R.S.O. 1990, c. L.15 [as am.], ss. 1, 4, 15, 42 [as am.]

Rules and regulations referred to

Family Law Rules, O. Reg. 114/99, Rule 16 [as am.]

Authorities referred to

Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Ministry of the Attorney General, 1991)

Maddaugh, Peter D., and John D. McCamus, *The Law of Restitution*, looseleaf, release no. 11 (Toronto: Canada Law Book, 2013)

Ontario Law Reform Commission, *Report on Limitation of Actions* (Toronto: Department of the Attorney General, 1969)

APPEAL from the order of Perkins J. (2013), 113 O.R. (3d) 727, [2013] O.J. No. 612, 2013 ONSC 948 (S.C.J.) dismissing a motion for summary judgment.

Bryan R.G. Smith and *Lindsey Love-Forester*, for appellant.

Bill Rogers, for respondent.

The judgment of the court was delivered by

[1] **ROSENBERG J.A.**: — This appeal concerns the relationship between the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B and the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 in the context of a family law dispute. It is a matter of first impression in this court. The respondent, Judith McConnell, brings an action for unjust enrichment seeking a remedial constructive trust in a property owned by the appellant, Brian Huxtable. In the alternative, she seeks a monetary award. By June 2007, the respondent was aware that she had claims or potential claims against the appellant including a claim for unjust enrichment and a remedy of constructive trust. Since she did not start this action [page563] until February 2012, her action may be out of time if the general two-year limitation period in the *Limitations Act, 2002* applies, but not if the ten-year limitation period in s. 4 of the *Real Property Limitations Act* applies. Thus, the issues in this appeal are (1) which, if either, of these two limitation periods applies; or (2) whether neither Act applies, leaving a legislative gap such that there is no statutory limitation period.

[2] The appellant brought a motion for summary judgment under Rule 16 of the *Family Law Rules*, O. Reg. 114/99. The motion judge, Perkins J., found that the *Real Property Limitations Act* applied. Alternatively, he found that there was a legislative gap and there was no limitation period for this action. I agree with the motion judge that the *Real Property Limitations Act* applies. I do not agree with the motion judge's alternative conclusion that there is a legislative gap. Accordingly, I would dismiss the appeal.

The Facts

[3] As indicated, this appeal arises out of a motion for summary judgment brought by the appellant. There are significant factual disputes between the parties as to the nature of their relationship and what if any contribution the respondent made to the properties owned by the appellant. The respondent claims that she made significant contributions to improving the properties, particularly the most recent property on Royal York Road. The appellant alleges that she made minimal contributions, perhaps as little as 20 hours of work, and that her contributions were of little value. The factual dispute is not germane to this motion. The facts relating to the limitation period issue are not disputed.

[4] The parties had a relationship from 1993 or 1994 to 2007. They did not marry and they did not have children. During their relationship, the appellant bought and sold two houses and owned a third at the time the parties' relationship ended. All properties were in the appellant's name. All funds to acquire the properties were provided by the appellant. The parties' relationship ended in June 2007, when the police removed the respondent from the home and charged her with attempting to extort the appellant. She did not live at the property after that time. The respondent does not admit the attempted extortion. She does admit that the parties' relationship ended in June 2007. The parties have not shared a residence, had any relationship, shared any financial responsibilities or had any financial obligations to one another since June 2007. [page564]

[5] Following the end of the parties' relationship in June 2007, the respondent retained a lawyer who wrote to the appellant seeking an amicable settlement of issues "arising from your joint ownership of property, cohabitation and separation". There was an exchange of correspondence but no settlement was reached. Nothing else occurred until February 2012, when the respondent learned that the appellant was selling his home. On February 28, 2012, the appellant was served with the material in this proceeding including an *ex parte* order that granted the respondent a certificate of pending litigation ("CPL") on the appellant's home. The relevant parts of the respondent's claim for the purposes of the appeal are the following:

> (a) A declaration that pursuant to the doctrines of resulting trust, constructive trust, or as a proprietary award for unjust enrichment, the Applicant has a 50% interest (traceable to any proceeds) in the house at [Royal York Road property], which is registered solely in the name of the Respondent;
>
> (b) A Certificate of Pending Litigation with respect to the abovementioned house, and an Order that it cannot be sold without the written consent of the Applicant;
>
> (c) In the alternative, an award to the Applicant of monetary damages for unjust enrichment in an amount to be determined[.]

[6] The appellant brought the motion for summary judgment to have the action dismissed because it was out of time and to have the CPL removed. Correspondence between counsel on the motion for summary judgment confirmed discovery was not an issue. The parties included the following in an agreed statement of facts:

> On June 27, 2007, the Applicant Judith June Barry McConnell was aware that she had claims, or potential claims, against the Respondent Brian Wesley Scott Huxtable, in the nature of relief as against Mr. Huxtable's property, including but not limited to claims for unjust enrichment, and the remedies of constructive trust and/or damages flowing therefrom.

The Reasons of the Motion Judge

[7] In lengthy and compelling reasons, the motion judge found that the *Real Property Limitations Act* governed the respondent's claim. While the *Limitations Act, 2002* seeks to enact a comprehensive scheme for limitation periods, s. 2(1)(*a*) expressly exempts "proceedings to which the *Real Property Limitations Act* applies". The motion judge found that the respondent's claim came within s. 4 of the *Real Property Limitations Act*, which provides as follows:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some [page565] person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

[8] The motion judge held that a claim for unjust enrichment in which the claimant seeks a remedial constructive trust in another party's property is "an action to recover any land" within the meaning of s. 4. In reaching this conclusion, the motion judge conducted a thorough review of the authorities and engaged in the statutory interpretation exercise mandated by the Supreme Court of Canada in decisions such as

Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2. He considered the statutory history and the scheme and object of the *Real Property Limitations Act* and the *Limitations Act, 2002*.

[9] The motion judge also noted an apparent anomaly that would occur if the two-year limitation period under the *Limitations Act, 2002* applied. In family law cases involving a married couple, an unjust enrichment claim seeking a remedial constructive trust is often paired with a claim for equalization under the *Family Law Act*, R.S.O. 1990, c. F.3. The two claims typically cover, in part, the same property and subject matter, and the equalization claim ordinarily has a six-year limitation period by virtue of s. 7(3) of the *Family Law Act*. Section 19 of the *Limitations Act, 2002* preserves those limitation periods set out in the Schedule to that Act, including s. 7(3) of the *Family Law Act*.

[10] The motion judge also concluded that the respondent's alternative claim for monetary compensation sheltered under her claim for recovery of land. Since the ten-year limitation period in s. 4 of the *Real Property Limitations Act* applied to the claim, the motion for summary judgment was dismissed.

[11] Supposing in the alternative that the *Real Property Limitations Act* did not apply by virtue of the exemption in s. 2(1)(*a*) of the *Limitations Act, 2002*, the motion judge went on to consider whether the *Limitations Act, 2002* applied at all or whether there was instead a legislative gap. Again in comprehensive reasons in which he drew on his long experience conducting family law cases, the motion judge found that the *Limitations Act, 2002* could not apply to the respondent's claim and thus there was a legislative gap. In the result, there was no statutory limitation period. The motion judge left open the question of whether the equitable doctrine of *laches* could apply. That issue could only be determined on a full record and would not be suitable for resolution on the motion for summary judgment in the form it was brought in this case. [page566]

The Issues

[12] The motion judge articulated the issues with clarity as follows [at para. 1]:

1. Is a claim in a family law case in which the claimant pleads facts to establish a constructive trust and asks the court to award an ownership interest in land, with an alternative claim for monetary compensation, governed by the ten year limitation period set out in section 4 of the *Real Property Limitations Act* or by the two year limitation period set out in section 4 of the *Limitations Act, 2002*?
2. Is there a gap in the limitations legislation such that there is no applicable statutory limitation period for a constructive trust claim in a family law case, leaving scope for the court to devise a time limit using its equitable jurisdiction?

I will deal with the issues in the same order. As I agree with the motion judge's resolution of the first issue, in these reasons I will rely extensively upon his reasons.

Analysis

Application of the Real Property Limitations Act

[13] The most relevant parts of the *Real Property Limitations Act* are the following:

1. In this Act,

"action" includes an information on behalf of the Crown and any civil proceeding;

. . . . .

"land" includes messuages and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties or any of them, any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interest or any of them, are in possession, reversion, remainder or contingency[.]

. . . . .

4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

[14] Other parts of the Act are also of some assistance in interpreting the legislation and I will refer to those provisions [page567] later in these reasons. The *Real Property Limitations Act* is, with some modifications, what used to be Part I of the *Limitations Act*, R.S.O. 1990, c. L.15. I will usually refer to this latter legislation as the old *Limitations Act.* When the legislature decided to overhaul the law of limitations in this province, it decided to leave the law as applied to real property largely untouched; hence the archaic and difficult language in the *Real Property Limitations Act.* For example, the key definition in s. 1 of "land" uses the archaic term "messuages", which, as I understand it, means a dwelling house, its outbuildings, the area immediately surrounding the dwelling, and the adjacent land appropriate to its use.

[15] To understand the application of s. 4, it will be helpful to remove those parts that do not directly apply to this case:

4. No person shall . . . bring an action to recover any land . . . , but within ten years next after the time at which the right to . . . bring such action first accrued to the person bringing it.

Thus, s. 4 creates a ten-year limitation period for an action to recover land. The central question raised by this appeal is whether a claim for unjust enrichment in which the claimant asks the court to impose a constructive trust upon the respondent's real property is an action to recover any land. The motion judge broke the issue down into three parts: (1) is the respondent's claim an "action", (2) is the action to "recover" and (3) is the action to recover "land"? There is no dispute that the respondent's claim is an action within the meaning of s. 4. I therefore turn to the other questions.

Meaning of "recover"

[16] The appellant challenges the motion judge's approach to defining "recover" and, of course, his decision. The motion judge considered both the ordinary meaning of the term as well as its meaning as used in legal contexts and this court's decision in *Hartman Estate v. Hartfam Holdings Ltd.*, [2006] O.J. No. 69, 263 D.L.R. (4th) 640 (C.A.). The appellant submits that the motion judge did not go far enough and subject the term to the full *Rizzo & Rizzo* interpretive analysis. I do not accept the appellant's submissions on this issue, for the following reasons.

[17] As the motion judge noted, the term "recover" in ordinary language implies the return of something that the person previously held. A claim for a constructive trust does not fit comfortably within that definition since the applicant does not have any interest in the property until the court makes a declaration to that effect. However, legal dictionaries refer to a different usage [page568] of the term as that of gaining through a judgment or order. This was the definition adopted by this court in *Hartman Estate*, at para. 57:

> On a plain reading of s. 43(2), the word "recover" appears to mean "to obtain" the trust property. Such an interpretation accords with the meaning given to "recover" in s. 4 of the Act. In *Williams v. Thomas*, [1909] 1 Ch. 713 (C.A.) at p. 730, the English Court of Appeal held that the expression "to recover any land" in comparable legislation is not limited to obtaining possession of the land nor does it mean to regain something that the plaintiff had and lost. Rather, "recover" means to "obtain any land by judgment of the Court". See also *OAS Management Group Inc. v. Chirico* (1990), 9 O.R. (3d) 171 (Dist. Ct.) at 175 to the same effect.

[18] The court in *Hartman Estate* was concerned with s. 43(2) of the old *Limitations Act*, which has no exact equivalent in the *Real Property Limitations Act*, although there is some vestige of the provision in s. 42 of the *Real Property Limitations Act*, which I will discuss later. Section 43 was found in Part II of the old *Limitations Act*, which was repealed when the *Limitations Act, 2002* came into force. Part II dealt with limitations in cases involving trusts and trustees where the trust was created by an instrument or an Act of the legislature (s. 42). Section 43 allowed a trustee the benefit of any statutory limitation period, with some exceptions. One of those exceptions was to "recover trust property" still retained by the trustee. Having found that the exception applied, this court did not have to decide whether the limitation period in s. 4 (identical under the *Real Property Limitations Act* and the old *Limitations Act*) applied.

[19] It is therefore true, strictly speaking, that the *Hartman Estate* court's discussion of the meaning of "recover" in s. 4 was *obiter*, since the court was concerned with the exception in s. 43. However, while the court's consideration of s. 4 was *obiter*, its holding on the meaning of the term "recover" in s. 43 was not. That determination was a step towards finding that the trustees in that case could not rely upon a statutory limitation period, such as the limitation period in s. 4. It would be an odd result if "recover" had one meaning in s. 43 of the Act and a different meaning in s. 4, particularly given that s. 43 references s. 4, albeit in general terms ("any statute of limitations"). *Hartman Estate* was a considered decision of this court and I see no reason to depart from the determination of the term "recover" in that case.

[20] The appellant places considerable emphasis on other parts of the *Real Property Limitations Act* that he says provide context for interpreting s. 4 and which should lead to a different result. In particular, he relies upon s. 15, which provides as follows: [page569]

> 15. At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the *right and title of such person to the land or rent*, for the recovery whereof

> such entry, distress or action, respectively, might have been made or brought within such period, is extinguished.

(Emphasis added)

The appellant submits that s. 15 presumes that the claimant had right and title that were extinguished once the limitation period expired. He submits that a person with nothing more than a claim for a constructive trust had no right or title to be extinguished. The difficulty with this submission is that it gives a very narrow reading to s. 15. Once the limitation period expires, the applicant's right to recover the land through an action is extinguished. Section 15 does not depend upon the claimant being the former legal owner of the land. While it is true that the claimant's title cannot be extinguished since the claimant never had title, the effect of s. 15 is also to extinguish the right to the land. A claim for a constructive trust as a remedy for unjust enrichment is a claim for a right to the land. I see no inconsistency between s. 15 and the *Hartman Estate* definition of "recover". I agree with the motion judge's resolution of this issue.

Recovery of land

[21] This brings us to the central question at issue in this appeal: whether the respondent's claim for a constructive trust based on unjust enrichment is an action for recovery of land. The appellant's broad submission is that, as developed in Canada, a constructive trust is "merely" a remedy, not an independent claim. Therefore, the claim in this case is for unjust enrichment and not an action for recovery of land.

[22] *Hartman Estate* provides some guidance on this issue but there are material differences between s. 43 of the old *Limitations Act* and s. 4 of the *Real Property Limitations Act*. Section 43 speaks of recovery of "trust property". Section 4 refers to recovery of "any land". It is therefore necessary, as did the motion judge, to delve more deeply into the interpretation exercise in accordance with the *Rizzo & Rizzo* principles. Fortunately, I have the advantage of the motion judge's reasons on this matter, with which I agree.

[23] The motion judge held that the plain meaning of recover any land includes seeking an equitable interest in land through imposition of a constructive trust. As he said, at para. 59, "a case in which someone asks the court to award them ownership of part or all of a piece of land held by somebody else is an action to recover land". The motion judge then considered the entire [page570] context of s. 4 of the *Real Property Limitations Act*, the scheme and object of the Act, and the intention of the legislature. This context included the *Limitations Act, 2002*, and the historical context of limitations law in the province. The motion judge reviewed at some length the historical context beginning with a 1969 *Report on Limitation of Actions* by the Ontario Law Reform Commission (Toronto: Department of the Attorney General, 1969) through various reports and iterations of proposed bills that resulted in the 2002 legislation that came into force in 2004. The conclusion of his analysis is found in paras. 74-80. For present purposes, it is sufficient to set out para. 77:

> A party seeking an ownership interest by way of constructive trust must plead and then prove facts establishing entitlement to it. The fact that a claimant must prove enrichment of the other party and a corresponding deprivation of the claimant, with no juristic reason for the enrichment in order to establish a constructive trust, and must also show that damages alone are insufficient and only a proprietary remedy is adequate, does not alter the fact that the claimant has asked the court from the beginning to award an interest in land. To me, all this means is that the claimant has to plead and

> prove those key elements, usually called "material facts" in litigation, to justify the order sought. It should not matter how many material facts there are or whether the entitlement to land requires a two step analysis, so long as the application makes a claim of entitlement to ownership of land.

[24] The appellant argues that the motion judge erred in his treatment of the context in which s. 4 is found and the history of the *Real Property Limitations Act*. He makes two important points. First, s. 4, when it was found in Part I of the old *Limitations Act*, tended to be used for adverse possession cases. Second, other parts of the *Real Property Limitations Act* suggest that Act was not intended to apply to constructive trusts.

[25] I begin with the adverse possession point. Resolution of that issue requires a discussion of the legislature's intent when it revised the limitation period scheme in this province. As the motion judge noted, originally the intent was to deal with limitation periods for all claims. However, this approach was abandoned apparently as a result of consultations that resulted in the March 1991, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Ministry of the Attorney General, 1991). The group reported that it did not have the necessary expertise to deal with actions to recover land. Thus, language in earlier drafts of the new limitation legislation dealing with limitations of actions to recover real property was stripped out of what eventually became the *Limitations Act, 2002*. This history strongly suggests that actions to recover land are outside the *Limitations Act, 2002*. [page571]

[26] The legislature's inability to deal with real property claims unfortunately detracts from the clarity that was a paramount objective of the new approach to limitation periods as represented by the *Limitations Act, 2002*. However, the fact that the legislature did retain Part I of the old *Limitations Act* demonstrates that the legislature has not wholly abandoned the field of claims for recovery of real property. And, in my view, the objective of clarity should not be abandoned by a narrow reading of s. 4 to place artificial limits on its scope when the plain words of the section cannot fairly bear that interpretation. There is nothing in s. 4 to suggest it is limited to claims for adverse possession. The fact that the section itself refers to recovery of rent, not just land, tells against a narrow interpretation of the provision to adverse possession claims.

[27] The appellant also relies upon other parts of the *Real Property Limitations Act*, particularly s. 42, which is as follows:

> 42. Where land or rent is vested in a trustee upon an express trust, the right of the beneficiary of the trust or a person claiming through the beneficiary to bring an action against the trustee or a person claiming through the trustee to recover the land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which the land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through the purchaser.

[28] The appellant argues that since the legislation only refers to express trusts, the legislature could not have intended the Act to apply to other types of trusts, particularly constructive trusts. I do not accept this submission, primarily because of the legislative history. The old *Limitations Act* dealt in Part II with trusts created by instrument and by legislation. When the new legislation repealed Part II (and Part III) of the old *Limitations Act*, it left no express provision for real property held by trustees. The legislature apparently believed that in the case of express trusts there was the need for some clarification. At this point, it is impossible to know why the legislature did not deal more broadly with all kinds of trust. One

can only guess that given the consultation group's lack of expertise and the constant, indeed, rapid evolution of equitable trusts, the legislature was of the view that the area was not ripe for codification. I see nothing in the *Real Property Limitations Act* that suggests that the legislature intended to exhaustively deal with trust cases involving land. To the contrary, the legislative history suggests that the legislature intended to leave the area largely as it was. Thus, if s. 4 can fairly bear the interpretation of applying to recovery of real property through a constructive trust then I see no reason [page572] to impose an artificial and narrow interpretation on the section's very broad language.

[29] In *Hartman Estate*, in dealing with s. 43 of the old *Limitations Act*, Gillese J.A., speaking for the court, did hold that the term "trust property" not only applies to express trusts but includes constructive trusts granted as a remedy for unjust enrichment as discussed in cases such as *Pettkus v. Becker*, [1980] 2 S.C.R. 834, [1980] S.C.J. No. 103, which was the genesis of the modern principle of unjust enrichment discussed in *Kerr v. Baranow*, [2011] 1 S.C.R. 269, [2001] S.C.J. No. 10, 2011 SCC 10, which I will discuss more fully below. In doing so, she adopted a plain reading of the section. She left open the broader question of application of statutory limitation periods for claims to land based on resulting or constructive trusts, at para. 85:

> It is apparent that there is no clear, general answer to the question of whether claims to land based on resulting or constructive trust are subject to a statutory limitation period and, if so, whether the exceptions in s. 43(2) apply to all trustees who hold property by way of resulting or constructive trust. In the case at bar, however, if the statutory limitation period does apply to such claims, for the reasons already given, I am not bound to apply *Taylor v. Davies*. I would give a plain reading to s. 43(2) with the result that the proposed trust claims fall within the second exception.

[30] I adopt a similar approach to the interpretation of s. 4. Its plain language is broad enough to encompass an equitable claim for property based on the remedy of constructive trust. Thus, I agree with the motion judge's conclusion on this point, at para. 79:

> It seems odd, more than a century after the abolition of the common law forms of action and the merger of common law and equitable jurisdiction, more than 40 years after the debate on limitations reform began in Ontario and more than a decade since the enactment of a new limitations scheme, that we would be constrained to adopt the "traditional" approach of limiting section 4 of the *Real Property Limitations Act* to adverse possession claims. The plain words of the section, "action to recover any land", seem to apply comfortably to the applicant's claim in this case. The rest of the *Real Property Limitations Act* talks about various kinds of claims other than trust claims but does not indicate any intention that constructive trust claims are not properly within the meaning of section 4. The repeal of the former Parts II and III of the old *Limitations Act*, RSO 1990, c L.15, does not shed light on the meaning of section 4. A ten year period for constructive trust claims seeking ownership of land is not inconsistent with the rest of the *Real Property Limitations Act* or with the general scheme of the *Limitations Act, 2002*, which expressly defers to the *Real Property Limitations Act.*

[31] The appellant also relies heavily on the judicial history of the treatment of constructive trust in Canadian courts and particularly on the most recent Supreme Court decision on the issue, *Kerr*, which emphasizes the nature of the constructive [page573] trust as a remedy and the preference for a monetary award for all unjust enrichment claims, even those where the claimant is seeking a constructive trust in identified property.

[32] *Kerr* was decided after this court's decision in *Hartman Estate*. It deals with some issues that are not germane to this appeal, such as the common intention resulting trust. The court held, at para. 24, that the common intention resulting trust no longer has a role in resolving domestic cases. The respondent originally brought a claim based on resulting trust. The parties agreed that the respondent did not have the evidence to support a claim for resulting trust and that claim was dismissed.

[33] In *Kerr*, the court dealt at length with unjust enrichment. At para. 33, Cromwell J. held that there is no separate line of authority for family cases developed within the law of unjust enrichment and reaffirmed the statement in *Peter v. Beblow*, [1993] 1 S.C.R. 980, [1993] S.C.J. No. 36, at p. 997 S.C.R., that "the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases". I refer to this point because, although this is a family law case, the determination of the limitation period issue will have ramifications beyond family law. The resolution of the limitation period issue cannot turn on the fact that this is a family law case. Thus, in my view, the fact that the *Family Law Act* prescribes a limitation period for claims under that Act cannot be determinative of the limitation period issue.

[34] I recognize that Cromwell J. went on to hold, at para. 34, again referring to *Peter*, at p. 997 S.C.R., that the courts must "exercise flexibility and common sense applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases". Indeed, the family law context was front and centre when considering the remedy for unjust enrichment in such cases. But, in my view, the resolution of the strictly legal question as to the application of the *Limitations Act, 2002* and the *Real Property Limitations Act* turns on the interpretation of the relevant provisions of those Acts. The issue of whether the *Real Property Limitations Act* applies to a claim for a constructive trust will be the same whether the equitable claim for an interest in land arises out of a domestic relationship or a purely business transaction.

[35] In *Kerr*, at para. 32, the court reiterated the by now well-known elements of a claim for unjust enrichment as developed in Canadian law: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff and the absence of a juristic reason for the enrichment. At this stage of the proceeding, those elements are not in issue. The motion judge was asked [page574] to deal with the legal issue on the assumption that the respondent could make out those elements: see para. 13 of the motion judge's reasons. This case turns rather on the remedy for the unjust enrichment and how the remedies should be characterized.

[36] Remedies for unjust enrichment are restitutionary and the court in *Kerr* affirmed that proprietary and monetary remedies are available for unjust enrichment. At para. 46, Cromwell J. described the two available remedies in these terms:

> A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 669, *per* La Forest J.).

Further, Cromwell J. also noted that the court should first consider whether a monetary award is sufficient; in most cases it is: para. 47. Most of *Kerr* is concerned with calculating the monetary award. The case does, however, refer to the proprietary award in several contexts. The first context is where the plaintiff, like this respondent, seeks a constructive trust. Justice Cromwell explains as follows, at para. 50:

> The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). *Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour* (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trusts rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).

(Emphasis added)

[37] *Kerr* also makes the point that there must be a significant link between the plaintiff's contribution and the property that she seeks to have impressed with the trust. As Cromwell J. said, at para. 51:

> As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution [page575] will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

[38] With that background, I return to the interpretive issue and specifically to the question of whether an application for the equitable remedy of a constructive trust in real property is an application for recovery of any land. In my view, the respondent is making a claim for recovery of land in the sense that she seeks to obtain land by judgment of the court. That the court might provide her with the alternative remedy of a monetary award does not take away from the fact that her claim is for a share of the property. The repeated references to constructive trust as a remedy for unjust enrichment in *Kerr* demonstrate that a proprietary remedy is a viable remedy for unjust enrichment where there is a link or causal connection between her contributions and the acquisition, preservation, maintenance or improvement of the property.

[39] In sum, I agree with the motion judge's conclusion, at para. 80 of his reasons:

> From the plain meaning of the words "action to recover any land" in section 4 of the *Real Property Limitations Act*, in their "entire context" as described above, I find that the applicant's claim in this case for an ownership interest in the house in question is an "action to recover any land" within the meaning of section 4 of the *Real Property Limitations Act.* It is subject to a ten year limitation period. Based on the record before me, it is not possible for me to conclude that the applicant's claim in this case is barred by the ten year limitation. Accordingly, this part of her claim is entitled to proceed.

[40] I also agree with the motion judge that her alternative claim for a monetary award can shelter under s. 4 for the reasons he gave at para. 88:

> My analysis of the question begins with the words of the section: ". . . bring an action to recover any land . . .". In contrast to the *Limitations Act, 2002*, which deals with individual "claims", this provision deals with an "action" (extended by section 1 of the *Real Property Limitations Act* to include "any civil proceeding"). An action or application can and frequently does include a principal claim with an alternative claim, as in this case. Here the damages claim is an alternative or fallback position to the first claim advanced by the applicant, which is for an ownership interest. The statute does not say "action to recover *only* land". Further, it would not make sense to interpret section 4 of the *Real Property Limitations Act* as a sort of all or nothing proposition, forcing the court either to award a proprietary interest on what it finds to be a meritorious claim, when a monetary award would otherwise [page576] be an adequate and appropriate remedy, or to award nothing at all, because a shorter limitation period for a damage award bars that kind of remedy. To interpret the section as not protecting an alternative damage award would mean that a claimant would never be able to rely on the section in determining when to launch a court case involving land and would always have to meet the limitation period for a damages claim, for fear of being locked out at the end of the case.

[Emphasis is original]

[41] The appellant also submits that the motion judge's interpretation of s. 4 will result in absurdity because there will be a different limitation period for unjust enrichment claims depending on the remedy sought. For example, the claimant may be seeking an interest in a pension or a business to which s. 4 does not apply. The decision of this court in *Equitable Trust Co. v. Marsig* (2012), 109 O.R. (3d) 561, [2012] O.J. No. 1605, 2012 ONCA 235 is instructive in resolving that issue. In that case, the plaintiff brought an action against the guarantors of a mortgage loan. The loan was given in respect of real property and the guarantee was included in the mortgage document. One of the defendants sought summary judgment on the basis that the limitation period under the *Limitations Act, 2002* had expired because of s. 2(5) of the Act, which provides that the day on which the loss occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation. The defendant argued that the demand obligation was made when the plaintiff issued a notice of sale under the mortgage in December 2007. The action to recover the deficiency from the guarantors was not commenced until September 2010, more than two years after demand. This court agreed with the motion judge that, despite the broad language in the *Limitations Act, 2002*, the limitation period under s. 43 of the *Real Property Limitations Act* applied. That section provides for a ten-year limitation period for actions on a covenant contained in a mortgage. Speaking for the court, Perell J. (*ad hoc*) dismissed the argument that all guarantees should be treated the same. As he said, at para. 30:

> It is true that it may not always be easy to determine whether a particular guarantee, like the guarantee in *Bank of Nova Scotia v. Williamson*, is subject to the *Limitations Act, 2002* or, like the guarantee in the case at bar, is subject to the *Real Property Limitations Act*. However, it does not follow that all guarantees should be treated the same way. *It has been the case historically that guarantees associated with land transactions have different limitation periods from guarantees associated with contract claims.* Moreover, as already noted, it is my view that the legislature intended that all limitation periods affecting land be governed by the *Real Property Limitations Act*.

(Emphasis added) [page577]

[42] Despite the advances in the application of constructive trust claims and unjust enrichment generally, it is open to the legislature to prescribe different limitation periods for unjust enrichment actions where the claim is for a proprietary remedy. I would not give effect to the appellant's arguments. Accordingly, I would dismiss the appeal.

Is there a legislative gap?
The motion judge's reasons

[43] Given my conclusion on the application of s. 4 of the *Real Property Limitations Act*, it is not strictly necessary to deal with the legislative gap argument. However, the matter was dealt with fully by the motion judge and his decision has potential application to other claims that may not be covered by the *Real Property Limitations Act*. In my view, it would be helpful to deal with that issue.

[44] In short, the motion judge held that if s. 4 of the *Real Property Limitations Act* did not apply to the respondent's claim, there was no statutory limitation period because the *Limitations Act, 2002* could not apply to an unjust enrichment case in the family law context. The motion judge reached this conclusion because of the difficulty of applying ss. 4 and 5 of the *Limitations Act, 2002* to an unjust enrichment claim in the family law context. The motion judge dealt with this issue at length but I have reluctantly concluded that I cannot agree with his decision.

[45] To appreciate the issue, it is necessary to consider the wording of ss. 4 and 5, especially the latter:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> 5(1)A claim is discovered on the earlier of,
>
> *(a)* the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and [page578]
>
> *(b)* the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (*a*).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(*a*) on the day the act or omission on which the claim is based took place, unless the contrary is proved.
> (3) For the purposes of subclause (1)(*a*)(i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

[46] The motion judge's concern was with the exhaustive statutory definition of discoverability in s. 5(1)(*a*). He found that it was problematic as to when the injury, loss or damage occurred within the

meaning of s. 5(1)(*a*)(i). He appears to have rejected the suggestion that in a family law case, ordinarily the separation date would be the date when the loss occurred. He was also concerned that the plaintiff would not know that the act or omission was that of the person against whom the claim was made. In his view, in many family law cases the defendant has done nothing more than be passively enriched by the plaintiff's actions. As he said, at paras. 122-23:

> On the third element, as set out in section 5(1)(a)(iii), I find that there will often, in fact usually, be constructive trust claims in family law where there is no act or omission of the respondent that caused or contributed to the claimant's loss. This could be true even where the claimant has made a request (direct or indirect) for a change in title or for compensation, which the respondent has neither accepted nor rejected. There is no duty to say yes.
> With no act or omission of the respondent, the claimant could not reasonably have knowledge of suffering a loss caused or contributed to by an "act or omission" of the respondent. Without that knowledge, the third element is not satisfied, the claim has not been "discovered" and the limitation period never starts to run. I conclude that section 5(1)(a)(iii) simply does not work for family law constructive trust claims.

[47] Finally, the motion judge considered the fourth element [at para. 125], "that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy". As I read his reasons, although he had some concerns, the motion judge found that, even in a family law case, a claimant would know whether the nature of an injury, loss or damage was such that a proceeding would be appropriate.

Analysis

[48] I take a different approach to the application and interpretation of the *Limitations Act, 2002*. In my view, the starting [page579] point must be whether the Act was intended to apply to equitable claims. To resolve this issue, it is necessary to consider the various sections of the legislation and, in my view, they point unequivocally to the legislature's intent to apply the Act to such claims, unless the claim falls within one of the exceptions. For example, s. 2(1) not only excludes proceedings to which the *Real Property Limitations Act* applies (2(1)(*a*)), but "proceedings based on *equitable* claims by aboriginal peoples against the Crown" (2(1)(*f*)) (emphasis added). Section 13 of the Act, which deals with acknowledgments states in 13(7):

> 13(7) An acknowledgment of liability in respect of a claim to recover or enforce *an equitable interest* in personal property by a person in possession of it is an acknowledgment by any other person who later comes into possession of it.

(Emphasis added)

[49] These references to equitable claims show that the Act was intended to be comprehensive and to apply to equitable claims, at least to claims other than for land that may be covered by the *Real Property Limitations Act* or other claims expressly exempted from application by the Act. The few cases that have considered the issue have held that equitable claims were intended to be covered by the *Limitations Act, 2002*. See, for example, *Bouchan v. Slipacoff*, [2010] O.J. No. 2592, 2010 ONSC 2693 (S.C.J.) and *Schneider v. State Farm Mutual Automobile Insurance Co.*, [2010] O.J. No. 3850, 2010 ONSC 4734

(S.C.J.). This court's decision in *Placzek v. Green*, [2009] O.J. No. 326, 2009 ONCA 83, 307 D.L.R. (4th) 441 would also seem to support the view that the Act was intended to cover equitable claims.

[50] A claim for equitable relief, including a claim based on unjust enrichment, fits within the broad definition of "claim" in s. 1 of the *Limitations Act, 2002* as a "claim to remedy an injury, loss or damage that occurred as a result of an act or omission". Since equitable claims are covered by the Act, there is no statutory gap. Thus, s. 4 of the Act applies and a proceeding "shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered".

[51] The motion judge did find, at para. 109 of his reasons, that the definition of "claim" in s. 1 of the *Limitations Act, 2002* "fits comfortably enough in a family law constructive trust case". However, he also found, in the same paragraph (and again in para. 122), that ordinarily the only act or omission giving rise to a family law constructive trust claim is an act by the claimant, namely, "the claimant's contributions directly or indirectly to the property of another person". As the motion judge spelled out in [page580] his analysis, this latter finding raises a problem for the application of the s. 1 definition of "claim" to family law constructive trust claims, because the "act or omission" referred to in that definition must be that of the person against whom the claim is brought. This is made clear, for instance, in s. 5(1)(*a*)(iii), quoted above, which states that a claim is not discovered until, among other things, the claimant knows that the act or omission giving rise to injury, loss or damage is "the act or omission . . . of the person against whom the claim is made".

[52] I do not agree with the motion judge that a remedial constructive trust claim does not require any act or omission by the person against whom the claim is brought. Generally speaking, a claim of unjust enrichment requires that the defendant retain a benefit without juristic reason in circumstances where the claimant suffers a corresponding deprivation. In other words, the relevant act of the defendant is simply the act of keeping the enrichment (or the omission to pay it back) once the elements of the unjust enrichment claim have crystallized. In the family law context, this may typically occur on the date of separation, when shared assets, including real property, are divided and the possibility therefore arises of one party holding onto more than a fair share.

[53] I agree with the motion judge that in some cases it may be difficult to apply the s. 5 definition of discoverability to equitable claims, including claims for unjust enrichment. But, that does not mean that the Act does not apply. It may well mean that the claim has not been discovered within the meaning of s. 5 and so the two-year limitation period does not run. This does not mean there is a gap in the legislation and there is no limitation period. Rather, the plaintiff will be able to pursue his or her claim until the ultimate limitation period in s. 15 applies, in most cases the period established by s. 15(2):

> 15(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

[54] That said, I would think that ordinarily the claim should be taken not to have been discovered until the parties have separated and there is no prospect of resumption of cohabitation: see Maddaugh and McCamus, *The Law of Restitution*, looseleaf, release no. 11 (Toronto: Canada Law Book, 2013), at 3:500.30; and *Wilson v. Fotsch*, [2010] B.C.J. No. 850, 2010 BCCA 226, at para. 10. [page581]

Disposition

[55] Accordingly, I would dismiss the appeal. The respondent is entitled to her costs, which I would fix at $15,000, inclusive of taxes and disbursements.

Appeal dismissed.

End of Document

TAB 12

Yellowbird v. Samson Cree Nation No. 444, [2008] A.J. No. 818

Alberta Judgments

Alberta Court of Appeal

Edmonton, Alberta

C.M. Conrad, K.G. Ritter and J. Watson JJ.A.

Heard: June 3, 2008.

Judgment: July 31, 2008.

Dockets: 0703-0184-AC and 0703-0196-AC

Registry: Edmonton

[2008] A.J. No. 818 | 2008 ABCA 270 | 56 C.P.C. (6th) 24 | 433 A.R. 350 | 92 Alta. L.R. (4th) 235 | 2008 CarswellAlta 998 | 169 A.C.W.S. (3d) 925

Between Shinnez-Lee Yellowbird, also known as Shinnez-Lee Bearhead, Appellant/Cross-Respondent (Plaintiff), and Chief and Council of the Samson Cree Nation No. 444 and Samson Cree Nation No. 444, Respondents/Cross-Appellants (Defendants), and Billie Jean Yellowbird, a minor, and Jillian Ann Yellowbird, a minor, both by their next friend, Shirley Marie Yellowbird, Not a Party to the Appeal or Cross Appeal (Plaintiffs), and Chief and Council of the Samson Cree Nation No. 444 and Samson Cree Nation No. 444, Not a Party to the Appeal or Cross Appeal (Defendants) And between Billie Jean Yellowbird, a minor, and Jillian Ann Yellowbird, a minor, both by their next friend, Shirley Marie Yellowbird, Respondents (Plaintiffs), and Chief and Council of the Samson Cree Nation No. 444, and Samson Cree Nation No. 444, Appellants (Defendants), and Her Majesty the Queen in Right of Canada as represented by the Minister of Indian and Northern Affairs, Not a Party to the Appeal (Defendant)

(56 paras.)

Case Summary

Aboriginal law — Aboriginal status and rights — Aboriginal status — Entitlement to status — Aboriginal descent or ancestry — Aboriginal rights — Types of rights — Practice and procedure — Appeals and judicial review — Appeals by the defendants, Chief and Council of the Samson Cree Nation No. 444 and the Samson Cree Nation, from a decision finding that the plaintiffs' entitlement to per capita distributions extended to the date their names were added on the membership lists, dismissed — Appeal also by the individual plaintiff from a finding that her claim was limited by operation of the Limitations Act, dismissed — The trial judge made no error — Indian Act, s. 14.

Appeal by the defendants, the Chief and Council of the Samson Cree Nation No. 444 and the Samson Cree Nation No. 444. One of the appellants in the main action, Shinnez-Lee Yellowbird, also appealed claiming band status and monies payable flowing from that status. An agreed statement of facts established that Shinnez-Lee Yellowbird, Billie Jean Yellowbird, and Jillian Ann Yellowbird were the daughters of Shirley Marie Yellowbird, each of whom lived with their mother until sometime after their 17th birthdays but before turning 18. Shirley Marie Yellowbird was the illegitimate daughter of Mary

Yellowbird, who was member of the band until she married Spence, a non-Indian, in December 1941. Under the provisions of the Indian Act, then in force, that marriage automatically caused Mary Yellowbird to lose her membership status. In June 1985, Shirley Marie Yellowbird applied on her behalf and on behalf of the plaintiffs Billie Jean Yellowbird and Shinnez-Lee Yellowbird, for restoration of their Indian status under the Indian Act. Shirley Yellowbird also applied for status on behalf of Jillian Ann Yellowbird shortly after Jillian's birth. Although the Chief and Council of the band submitted documentation to Indian and Northern Affairs Canada in order to assume control of band membership, and to establish their regulations for membership inclusion, the responsible Minister never approved the Membership Code submitted. The Registrar of Indian and Northern Affairs Canada added Shinnez-Lee Yellowbird, Billie Jean Yellowbird and Jillian Ann Yellowbird to the band's membership list. The defendants never protested the inclusion of the plaintiffs' names pursuant to s. 14 of the Indian Act. In 1993, Shirley Marie Yellowbird commenced an action in the Federal Court of Canada against the Chief and Council of the band for a declaration of her band status. The court granted a declaration that Shirley Marie Yellowbird had been a member of the band since at least June 29, 1987, and directed that Shirley Marie Yellowbird be paid her share of capital or revenue distributions made after June 18, 2002. On November 1, 1999, the Chief and Council of the band passed a motion "that all descendants' members, who are currently registered on the Samson Band List, be acknowledged as Samson Cree Nation Members, effective immediately". The trial judge held that all plaintiffs' membership began on the respective dates on which their names were added to the membership list. HELD: Appeals and cross-appeal dismissed. The trial judge recognized that the evidence regarding a trust and the manner of per capita distribution was incomplete and directed an accounting, should the parties be unable to agree on exact amounts. Nevertheless, he considered that the trusts were understood to exist and was entitled to do so. Further, the trial judge's finding that because the per capita distributions were paid into trust and were not payable out of trust until after the plaintiffs each attained the age of 18, their causes of action for the entire amount of the per capita distributions began on their respective 18th birthdays, was not in error. The trial judge correctly enunciated and applied the law respecting limitation for remedial orders.

Appeal From:

On appeal from the Judgment by The Honourable Mr. Justice F.F. Slatter. Dated the 19th day of June, 2007. Filed on the 22nd day of June, 2007 (2006 ABQB 434 Docket: 0203 10724; 0203 22358).

Counsel

R.E. Johnson: for the Appellant/Cross-Respondent on 0703-0184-AC, Respondents on 0703-0196-AC.

M.S. Poretti: for the Respondents/Cross-Appellants on 0703-0184-AC, Appellants on 0703-0196-AC.

Memorandum of Judgment

The following judgment was delivered by

THE COURT

1 These reasons relate to two appeals and a cross-appeal. The first appeal is brought by the defendants in

the main action, the Chief and Council of the Samson Cree Nation No. 444 ("Chief and Council of the band") and the Samson Cree Nation No. 444 (the "band"). The second appeal is brought by one of the plaintiffs in the main action, Shinnez-Lee Yellowbird, claiming band status and monies payable flowing from that status. The cross-appeal (in the Shinnez-Lee Yellowbird appeal) repeats arguments contained in the band's main appeal. Issues relating to the law of trusts and interpretation of limitations statutes are advanced by the parties, together with an issue relating to interest payable on a disputed debt/trust.

Facts

2 Most of the factual background relating to this appeal comes from an agreed statement of facts, filed at the trial and also read into the record at the beginning of the trial. The facts found by the trial judge are set out in detail in his reasons: ***Yellowbird v. Samson Cree Nation No. 444***, 2006 ABQB 434, 405 A.R. 333 at paras. 2-18. Included in those facts, at para. 12, is a summarized chronology of key dates. That chronology is as follows:

15 March 1978	Shinnez-Lee born
17 April 1985	Bill C-31 in force
27 June 1985	Billie Jean born
10 June 1986	Letter from Registrar re Shinnez-Lee and Billie Jean
5 February 1988	Jillian Ann born
13 August 1985	Letter from Registrar re Jillian Ann
8 September 1993	Federal Court action commenced

March 1995	Shinnez-Lee leaves home (age 17)
15 March 1996	Shinnez-Lee turns 18
1 March 1999	New Limitations Act
1 March 2001	transitional period in new Limitations Act expires
14 February 2002	First Federal Court decision
Spring 2002	Billie Jean leaves home (age 17)
31 May 2002	Shinnez-Lee Statement of Claim issued
18 June 2002	Second Federal Court decision
22 November 2002	Billie Jean/Jillian Ann Statement of Claim issued
27 June 2003	Billie Jean turns 18

Spring 2005	Jillian Ann leaves home (age 17)
5 February 2006	Jillian Ann turns 18

3 The agreed statement of facts establishes that Shinnez-Lee Yellowbird, Billie Jean Yellowbird, and Jillian Ann Yellowbird (collectively referred to as the "plaintiffs"), are the daughters of Shirley Marie Yellowbird, each of whom lived with their mother until sometime after their 17th birthdays but before turning 18.

4 Shirley Marie Yellowbird is the illegitimate daughter of Mary Yellowbird, who was a member of the band until she married Joseph Spence, a non-Indian, on December 23, 1941. Under the provisions of the ***Indian Act*** then in force, this marriage automatically caused Mary Yellowbird to lose her membership status.

5 On July 11, 1985, Shirley Marie Yellowbird applied, on her behalf and on behalf of the plaintiffs Billie Jean Yellowbird and Shinnez-Lee Yellowbird, for restoration of their Indian status under the ***Indian Act***, R.S.C. 1985, c. I-5, as amended. Shirley Yellowbird also applied for status on behalf of Jillian Ann Yellowbird shortly after Jillian's birth.

6 Although the Chief and Council of the band submitted documentation to Indian and Northern Affairs Canada in order to assume control of band membership, and to establish their own regulations for membership inclusion, the responsible Minister never approved the Membership Code submitted.

7 The Registrar of Indian and Northern Affairs Canada added Shinnez-Lee Yellowbird to the band's membership list on or about July 10, 1987, and also added the names of Billie Jean Yellowbird and Jillian Ann Yellowbird to the list on June 29, 1987 and August 13, 1988, respectively. The defendants never protested the inclusion of the plaintiffs' names pursuant to s. 14 of the ***Indian Act***.

8 During 1993, Shirley Marie Yellowbird commenced an action in the Federal Court of Canada against the Chief and Council of the band for a declaration of her band status. By judgment dated February 14, 2002, Hugessen J. granted a declaration that Shirley Marie Yellowbird had been a member of the band since at least June 29, 1987, and by order dated June 18, 2002, Hugessen J. directed that Shirley Marie Yellowbird was entitled to be paid her share of capital or revenue distributions made after that date.

9 The parties agreed that the principle amount of the per capita distributions ("PCDs"), after June 1987 until the date of the trial, was approximately $80,000.00, and undertook to determine the exact amount of the PCDs if required for the purposes of the trial. Following trial (in December 2006), the parties filed a payment history relating to the PCDs from June 1, 1987 until August 30, 2006. The PCDs described in the payment history show various total payments, some of which have portions allocated to a minor's parents, with the balance being held "in trust".

10 On November 1, 1999 the Chief and Council of the band passed a motion "that all descendants members, who are currently registered on the Samson Band List, be acknowledged as Samson Cree Nation Members, effective immediately". At that time, each of the plaintiffs was shown as a band member on that list. On May 17, 2006 (just before the trial), the Chief and Council of the band passed a further motion recognizing each of the plaintiffs as band members. That motion did not specify the date on which the plaintiffs became band members, but at the commencement of the trial, the defendants conceded that each of the plaintiffs had been members of the band since their names were placed on the membership list.

11 In each of counsel's opening statements at trial, the highlighted issues related to timing and limitations. The defendants did not indicate that the trusts alleged by the plaintiffs failed because of non-compliance with the certainties required in trusts law. Passing reference to this issue is made in their statement of defence.

Trial Decision

12 The trial judge held that Billie Jean Yellowbird was a member of the band since June 29, 1987; that Shinnez-Lee Yellowbird was a member since July 10, 1987; and that Jillian Ann Yellowbird was a member since August 13, 1988, those being the respective dates on which their names were added to the membership list.

13 In terms of legal issues, the trial judge first considered whether the relief sought by the plaintiffs regarding their entitlement to receive benefits from the band was solely declaratory or was also a remedial order under s. 1(i) of the ***Limitations Act***, R.S.A. 2000, c. L-12. After a thorough review of case law regarding this issue, he determined that because there was no way in which the respondents "could enjoy the fruits of the declaration without further legal process", the declarations sought by the plaintiffs were remedial in nature and therefore subject to the *Limitations Act*. (Para. 39).

14 Next, the trial judge considered whether the plaintiffs suffered from a disability that prevented them from commencing the actions for the purpose of limitations, since for much of the time after attaining band status and prior to commencing their actions, the plaintiffs were minors. He reviewed the legislation pertaining to this issue that was in force at various times after the plaintiffs attained band status, and determined that the limitation clock started running for Shinnez-Lee Yellowbird when she turned 18, on March 15, 1996. He held that the limitation period would have, at the latest, expired 6 years after her 18th birthday, which occurred two months before her statement of claim was filed. In light of her age at that time, her claim was limited to what was discoverable by her in the two years prior to her statement of claim being filed.

15 The trial judge rejected the argument that until her mother obtained the Federal Court declaration as to her status, Shinnez-Lee Yellowbird would not have known that which was necessary to "warrant" proceedings. She had been aware, since at least her 18th birthday when she made an inquiry with the band, of her potential eligibility for trust monies. She was told there was "no paperwork" on her and no trust.

16 With respect to Billie Jean and Jillian Ann Yellowbird's claim, filed November 22, 2002, the trial judge concluded that both plaintiffs were affected by the suspensions applicable to minors under the ***Limitations***

Act. Billie Jean could assert any claim that became discoverable within two years prior to her leaving home at age 17 in the spring of 2002. Any limitation period was suspended from that time until the statement of claim was filed. Since Jillian Ann had not yet left home when the statement of claim was filed, she could assert any claim which first became discoverable two years before November 22, 2002.

17 Finally, the trial judge dealt with the issue of when proceedings were warranted. Since there was no evidence before him as to when the PCDs were payable to minors, he provided two alternatives, leaving it open to the parties to return for further direction. He held that if the PCDs were paid to minors as they were declared, they would have been discoverable shortly after each payment and could only be claimed within two years of that time. However, if the PCDs were paid into a trust, to be paid over to minors as they attained the age of majority, the plaintiffs would only have had entitlement upon turning 18.

18 He concluded that Shinnez-Lee Yellowbird was entitled to a declaration that she be paid all benefits payable after May 31, 2000; that Billie Jean Yellowbird was entitled to a declaration that she be paid all benefits payable after Spring 2000 (March 31); and that Jillian Ann Yellowbird was entitled to a declaration that she be paid all benefits payable after November 22, 2000.

Issues and Standard of Review

19 On appeal, the defendants argued the trial judge erred in:

1. Finding evidence establishing a cause of action (the trust certainties argument);
2. His interpretation of s. 3(1) of the ***Limitations Act*** respecting the claims of Billie Jean Yellowbird and Jillian Ann Yellowbird; and
3. Awarding interest on the "parents share" of historical PCD payments at rates of interest reflecting "Minor's Trust Account" interest.

20 The first issue involves a review of the trial judge's fact finding to determine whether the facts support the existence of a trust. It is reviewable on the palpable and overriding error standard: ***Housen v. Nikolaisen***, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 10, 25. The second and third grounds involve issues of law, to be reviewed on the correctness standard: *Housen* at para. 8.

21 In her appeal, Shinnez-Lee Yellowbird argues the trial judge erred in:

1. His interpretation of s. 1(i) of the ***Limitations Act***; and
2. His interpretation of s. 3(1)(a)(iii) of the ***Limitations Act***, by failing to appreciate that the her commencement of proceedings was not warranted until her mother's action in the Federal Court of Canada was concluded.

22 Shinnez-Lee Yellowbird's first ground is an issue of law, reviewable on the correctness standard. The second is a question of mixed fact and law, which, to the extent it involves reviewing the trial judge's findings of fact, will not be interfered with absent palpable and overriding error.

Analysis

1. Defendants' Appeal and Cross-Appeal

23 We will first consider the defendants' appeal, the outcome of which will dictate the outcome of their cross-appeal in the Shinnez-Lee Yellowbird appeal.

(a) Evidence Establishing the Existence of Trusts

24 This issue was advanced for the first time on appeal. As already noted, when counsel for both parties indicated the issues for the trial judge's determination in their opening statements, neither mentioned the issue of whether there was sufficient evidence to show that the PCDs constituted trust funds payable to band members. During his closing argument, counsel for the defendants stated that there was no evidence to show the band was obligated to any of the plaintiffs. He did not refer to trust certainties.

25 The question of new issues on appeal was thoroughly discussed in this Court's decision in ***Alberta (Minister of Public Works, Supply & Services) v. Nilsson***, 2002 ABCA 283, 320 A.R. 88 at paras. 169-174. The general rule is that a new issue on appeal may be advanced if "all the material necessary for the full examination of the point is before the court and the respondent has not been prejudiced by the course taken by the appellant" ***Canadian Pacific Railway v. Kerr*** (1913), 49 S.C.R. 33 at 40. When the issue is pleaded, but not pursued at trial, it can only be raised on appeal if there is enough relevant evidence to determine the issue without prejudicing the respondent: ***Shaver Hospital for Chest Diseases v. Slesar*** (1979), 27 O.R. (2d) 383, 106 D.L.R. (3d) 377 (C.A.).

26 The trial judge noted that the evidence as to whether PCDs were paid to minors or held in trust was sparse, and properly refused to take judicial notice of the same. However, in the correspondence that proceeded the trial judge's initial reasons, counsel, by consent, provided a history of PCD payments that included amounts paid into trust. This, along with the evidence in the agreed facts and in what the trial judge found, is enough to found a conclusion that the defendants had an established obligation to pay PCDs to all band members equally, or to build a comparable minor's trust for such PCDs (subject to a power of partial parental disbursement on behalf of each minor). Moreover, it provided a basis on which to conclude that the defendants breached that obligation respecting the plaintiffs. It is not open to the defendants to assert on appeal that they had "a discretion to resolve to distribute moneys on the basis of diverse criteria". Moreover, raising this for the first time on appeal prevents the plaintiffs from having an opportunity to produce further evidence.

27 The limited evidence discloses that the PCDs constitute trust monies. The agreed facts state that the amount of the PCD payments made by the band to its members after June 29, 1987 to date of trial was approximately $80,000.00, and that the parties would determine the exact amount if required to do so by the court. The judgment appealed from states exact amounts payable to each of the plaintiffs. Therefore, intention, subject matter and objects of the trust were sufficiently certain, and the amount owing was quantifiable in each case by an accounting. Moreover, the documents filed by the parties include a payment history relating to the PCDs. That history indicates, for each distribution made, what amount was paid to parents and what amount was paid "In Trust". This document was submitted on agreement from both parties.

If a party to litigation agrees that money forms a trust, as is apparent from the payment history, the opposing party need not prove the elements of that trust. The admission is enough.

28 The trial judge recognized that the evidence regarding the trust was incomplete and directed an accounting, should the parties be unable to agree on exact amounts. Nevertheless, he considered that the trusts were understood to exist and, on the record of admissions, was entitled to do so. All parties agreed to submit to a summary trial process on focused questions; it would defeat the purpose of such agreement, and deter resort to the efficiency of such trials generally if this Court were to allow a party on appeal to step outside the focused questions to assert claims not given life at trial.

29 This ground of appeal is dismissed.

(b) Interpretation of S. 3(1) of the ***Limitations Act***

30 Section 3(1) of the ***Limitations Act*** provides:

> 3(1) Subject to section 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.

31 The trial judge reasoned that because the PCDs were paid into trust and were not payable out of trust until after the plaintiffs each attained the age of 18, their causes of action for the entire amount of the PCDs began on their respective 18th birthdays. Consequently, the trial judge held that Billie Jean and Jillian Ann Yellowbird's claims to PCD entitlements reaching back to their respective dates of birth were not statute-barred. By contrast, Shinnez-Lee Yellowbird's claim was statute-barred insofar as it related to PCD payments made more than two years prior to her statement of claim being filed.

32 The defendants argue that the cause of action should have been characterized as a trustee breach, based on their failure to establish a trust account for each of the plaintiffs, not their failure to pay out of trust. We regard this argument as circular and question whether it can be expected that child band members would ever be aware that the band failed to create the relevant trust and keep it in good standing. It is more reasonable to suppose that children would only be aware of such a failure soon after they reach the age of majority, when payment out would be expected. We conclude that even if the defendants' breach is properly characterized as a failure to create trusts for the plaintiffs, proceedings were not warranted until after each plaintiff turned 18.

33 Moreover, although there may be a cause of action for failing to create a trust, that does not preclude there also being a cause of action for failing to pay out of a trust that should have been created. The defendants are guilty of both. This conclusion is based in part on the principle that Equity treats that which ought to have been done as actually done. Equity thus views the trusts as having been created, even if in fact they were not, thus allowing a beneficiary to sue for payment out of the trust when payment ought to have been made under the terms of the trust. For each of the plaintiffs in this case, that date is the day each of them attained the age of 18: Donovan W.M. Waters, Q.C., ed., *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) at 1277. The other basis for this conclusion is ss. 34 and 35 of the ***Trustee Act***, R.S.A. 2000, C. T-8 and its predecessor, obligating the defendants to not only create a trust, but to "hold the accumulations" until the beneficiary was entitled to payment thereof.

34 The defendants' suggestion that in order for them to be entitled to PCDs that ought to have been paid into trust more than two years prior to their statement of claim being filed, remedial orders ought to have been sought for Billie Jean and Jillian Ann throughout their lives, distorts the nature of the trust obligation owed by the defendants and undermines the principles of limitations law.

35 We therefore reject this ground of appeal also.

(c) Interest Awarded

36 The third ground of appeal advanced by the defendants is that the trial judge erred in law by awarding interest to Billie Jean Yellowbird and Jillian Ann Yellowbird for the portions of the PCDs that would have been paid to their mother, had they been recognized as band members during their infancy and been receiving payments. The defendants argue that under equitable principles, the trusts need only be restored to the condition they would have been in had the defendants followed through with each element of the trust. One of those elements is that a substantial portion of the money payable would have been paid out to their mother over the years before each of them turned 18, and no interest would have been earned. The defendants argue, on that basis, that no interest is payable at this time on the parents' portions.

37 This argument ignores two factors. First, s. 35(1) of the ***Trustee Act***, R.S.A. 2000, c. T-8 provides:

> 35(1) The trustee shall accumulate the income by way of compound interest by investing it and the resulting income of it from time to time in authorized investments.

This requirement places an obligation on a trustee to 1) keep money that is not paid to a beneficiary in an interest-bearing account, and 2) to account for that interest. The parents' portions were never paid to the plaintiffs' mother and therefore should have been invested.

38 Second, this position ignores the fact that money paid out to parents was to be for the benefit of the children to whom it related. It can be expected that the plaintiffs would have received benefit from money paid to their mother at the time it was paid. Delayed payment means delayed benefit. It is fair and equitable for delayed benefit to be compensated by interest.

39 The defendants' third ground is also dismissed.

40 Since the cross-appeal is based on the same grounds argued in the defendants' main appeal, it is dismissed as well.

2. Shinnez-Lee Yellowbird's Appeal

41 Shinnez-Lee Yellowbird advances two grounds of appeal. First, she says that the trial judge erred in interpreting s. 1(i) of the ***Limitations Act*** by finding that her claim for ancillary or consequential relief was statute-barred. Second, she argues that the trial judge erred by determining that proceedings were warranted before the Federal Court decision was released granting her mother a declaration of band status.

(a) Section 1(i) of the ***Limitations Act***

42 Section 1(i) of the ***Limitations Act*** provides:

> 1 In this Act,
>
> ...
>
> (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;

43 Shinnez-Lee argues that because s. 3(1)(a)(iii) of the ***Limitations Act*** only applies to remedial orders and not declarations, the 2 year limitation established by it does not apply, and she is therefore not restricted to damages reflecting only 2 years of PCDs. She contends that once provided with a positive declaration as to her band membership status, she will be entitled to any remedy flowing from that right. In her submission, any limitation affecting the remedy would only begin to toll from the date of declaration. She also argues that any monetary remedy is merely ancillary to the declaratory remedy.

44 Although what Shinnez-Lee Yellowbird asked for was couched in terms of a declaration, the trial judge reasoned that a declaration by itself would be hollow without enforcement. He determined that any enforcement procedure would be remedial under the terms of s. 1(i).

45 The trial judge extensively reviewed the case law with respect to this issue and also considered the wording of the legislation and reports of the Alberta Law Reform Institute, which were prepared in anticipation of the ***Limitations Act***. He considered and rejected the "basic thrust" method of determining whether a remedy was remedial or declaratory as too vague to be helpful. Rather, he held that "[t]he coercive nature of a remedial order is captured in the words requiring a defendant to comply'", and concluded that a

helpful test for determining whether a remedy was declaratory or remedial would be to ask:

> If the Court granted the declaration, and the defendant resisted the implementation of the declaration, could the plaintiff "leave the court in peace" and enjoy the benefits of the declaration "without further resort to the judicial process"? (para. 35)

46 The trial judge also held, at para. 36, that "[i]f the relief is executory or coercive, it is not declaratory". Finally, he concluded that describing remedial relief as being "ancillary" to a declaration does not change its character as a remedial order: at para. 38.

47 We conclude that the trial judge correctly enunciated and applied the law respecting limitations for remedial orders.

48 The current mandatory rule is that statutes are interpreted using their ordinary grammatical meaning, where it is in keeping with the statutory scheme and produces a workable result: see Pierre-André Côté, *Interpretation of Legislation in Canada*, 3d ed. (Scarborough: Thomson Canada Limited, 2000) at 308-09; Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87, cited with approval in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 36 O.R. (3d) 418; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 at para. 9; *Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, [2006] 1 S.C.R. 865 at para. 36. The trial judge's interpretation of s. 1(i) of the *Limitations Act* fully complies with this rule of interpretation. It gives meaning to the restrictive wording of the section and ensures that appropriate limitations are not avoided by the technique of attaching remedial claims to claims for declarations.

49 In this case, Shinnez-Lee Yellowbird sought declarations of status and declarations that she was entitled to all benefits flowing from that status. Without an order directing the defendants to pay her what was declared owing to her, the latter declaration would be hollow. Whenever coercive orders are granted, they will be remedial and subject to limitations. Had Shinnez-Lee initiated her claim within two years of her 18th birthday, her position would be comparable to that of her sisters, because that day constituted the event that gave rise to her remedy and she was aware of the potential remedy at that time. However, she did not do so and consequently is limited, under s. 3(1) of the ***Limitation Act***, to PCDs payable to her within the two years prior to her statement of claim being filed.

50 This ground of appeal is dismissed.

(b) Section 3(1) of the ***Limitations Act***

51 For convenience, we will quote s. 3(1) of the ***Limitations Act*** again. It provides:

> 3(1) Subject to section 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. [Emphasis added.]

52 Shinnez-Lee Yellowbird argues that since her mother had commenced proceedings for a declaration of status in the Federal Court and since Shinnez-Lee's status depended, in part, on her mother's status, proceedings by her against the defendants for her share of the PCDs were not warranted until after her mother received her declaration of band status. She argues that any court would have refused to give her a remedy on the basis of *lis pendens*: see Lazar Sarna, *The Law of Declaratory Judgments*, 3d ed. (Toronto: Thomson Canada Limited, 2007) at 33.

53 The interpretation of s. 3(1) of the ***Limitations Act*** is an exercise of statutory interpretation. Equitable or common law principles do not really assist. In fact, statutes are often enacted to circumscribe equitable or common law principles. Rather, statutes are to be interpreted in accordance with the mandatory rule set forth in para. 46 of these reasons.

54 In dealing with this issue, the trial judge held that the plaintiffs became band members when the Registrar placed their names on the band list. He also noted that courts often grant remedies that implicitly declare rights. At para. 48 of his reasons, the trial judge concluded that because the plaintiffs' names were placed on the band's membership list in 1987 and 1988, from that time they had a sufficient claim to membership that warranted commencing a proceeding for any benefits that might arise.

55 This analysis is entirely in keeping with the mandatory rule regarding statutory interpretation. What Shinnez-Lee Yellowbird disagrees with is the trial judge's conclusion. However, in reaching that conclusion, the trial judge applied the correct legal test to the facts as he found them and consequently arrived at a result that restricts Shinnez-Lee Yellowbird's claim to 2 years of PCDs. Absent a legal error, the applicable standard of review is palpable and overriding error. On that standard and this record, we cannot say that the trial judge erred in his conclusion.

56 We therefore dismiss this ground of appeal as well.

C.M. CONRAD J.A.
K.G. RITTER J.A.
J. WATSON J.A.

End of Document

TAB 13

Sattva Capital Corp. v. Creston Moly Corp., [2014] 2 S.C.R. 633

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

Heard: December 12, 2013;

Judgment: August 1, 2014.

File No.: 35026.

[2014] 2 S.C.R. 633 | [2014] 2 R.C.S. 633 | [2014] S.C.J. No. 53 | [2014] A.C.S. no 53 | 2014 SCC 53

Sattva Capital Corporation (formerly Sattva Capital Inc.) Appellant; v. Creston Moly Corporation (formerly Georgia Ventures Inc.) Respondent, and Attorney General of British Columbia and BCICAC Foundation Interveners.

(125 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Arbitration — Appeals — Commercial arbitration awards — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price shares for payment of finder's fee and entering into arbitration — Leave to appeal arbitral award sought pursuant to s. 31(2) of the Arbitration Act — Leave to appeal denied but granted on appeal to Court of Appeal — Appeal of award dismissed but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in granting leave to appeal — What is appropriate standard of review to be applied to commercial arbitral decisions made under Arbitration Act — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31(2).

Contracts — Interpretation — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price the shares for payment of finder's fee and entering into arbitration — Whether arbitrator reasonably construed contract [page634] as a whole — Whether contractual interpretation is question of law or of mixed fact and law.

Summary:

S and C entered into an agreement that required C to pay S a finder's fee in relation to the acquisition of a molybdenum mining property by C. The parties agreed that under this agreement, S was entitled to a finder's fee of US$1.5 million and was entitled to be paid this fee in shares of C. However, they disagreed on which date should be used to price the shares and therefore the number of shares to which S was entitled. S argued that the share price was dictated by the date set out in the Market Price definition in the agreement and therefore that it should receive approximately 11,460,000 shares priced at $0.15. C claimed that the agreement's "maximum amount" proviso prevented S from receiving shares valued at more than US$1.5 million on the date the fee was payable, and therefore that S should receive approximately 2,454,000 shares priced at $0.70. The parties entered into arbitration pursuant to the B.C. *Arbitration Act* and the arbitrator found in favour of S. C sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *Arbitration Act*, but leave was denied on the basis that the question on appeal was not a question of law. The Court of Appeal reversed the decision and granted C's application for leave to appeal, finding that the arbitrator's failure to address the meaning of the agreement's "maximum amount" proviso raised a question of law. The superior court judge on appeal dismissed C's appeal, holding that the arbitrator's interpretation of the agreement was correct. The Court of Appeal allowed C's appeal, finding that the arbitrator reached an absurd result. S appeals the decisions of the Court of Appeal that granted leave and that allowed the appeal.

Held: The appeal should be allowed and the arbitrator's award reinstated.

Appeals from commercial arbitration decisions are narrowly circumscribed under the *Arbitration Act*. Under s. 31(1), they are limited to questions of law, and leave to appeal is required if the parties do not consent to the appeal. Section 31(2)(a) sets out the requirements for leave at issue in the present case: the court may grant leave if it determines that the result is important to the parties and [page635] the determination of the point of law may prevent a miscarriage of justice.

In the case at bar, the Court of Appeal erred in finding that the construction of the finder's fee agreement constituted a question of law. Such an exercise raises a question of mixed fact and law, and therefore, the Court of Appeal erred in granting leave to appeal.

The historical approach according to which determining the legal rights and obligations of the parties under a written contract was considered a question of law should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix of the contract.

It may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law; however, the close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. The goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. Accordingly, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Legal errors made in the course of contractual interpretation include the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. Concluding that C's application for leave to appeal raised no question of law is sufficient to dispose of this appeal; however, the Court found it salutary to continue with its analysis.

In order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a), an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

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At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law by the leave court is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case. The appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit, meaning that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law.

Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the standard of review. The leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal.

The words "may grant leave" in s. 31(2) of the *Arbitration Act* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met. Discretionary factors to consider in a leave application under s. 31(2)(a) include: conduct of the parties, existence of alternative remedies, undue delay and the urgent need for a final answer. These considerations could be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria have been met. However, courts should exercise such discretion with caution.

Appellate review of commercial arbitration awards is different from judicial review of a decision of a statutory tribunal, thus the standard of review framework developed for judicial review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. As a result, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

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In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise. The question at issue here does not fall into one of those categories and thus the standard of review in this case is reasonableness.

In the present case, the arbitrator reasonably construed the contract as a whole in determining that S is entitled to be paid its finder's fee in shares priced at $0.15. The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both that definition and the "maximum amount" proviso and reconciles them in a manner that cannot be said to be unreasonable. The arbitrator's reasoning meets the reasonableness threshold of justifiability, transparency and intelligibility.

A court considering whether leave should be granted is not adjudicating the merits of the case. It decides only whether the matter warrants granting leave, not whether the appeal will be successful, even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. For this reason, comments by a leave court regarding the merits cannot bind or limit the powers of the court hearing the actual appeal.

Cases Cited

Referred to: *British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122; *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945; *Prenn v. Simmonds*, [1971] 3 All E.R. 237; *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570; *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (CanLII); *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221; *Minister of National Revenue v. Costco Wholesale Canada Ltd.*, 2012 FCA 160, 431 N.R. 78; *WCI Waste Conversion Inc. v. ADI International Inc.*, [page638] 2011 PECA 14, 309 Nfld. & P.E.I.R. 1; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81; *Canada*

(Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300; *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98; *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63; *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262; *R. v. Fedossenko*, 2013 ABCA 164 (CanLII); *Enns v. Hansey*, 2013 MBCA 23 (CanLII); *R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174; *R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Homex Realty and Development Co. v. Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, leave to appeal refused, [2013] 3 S.C.R. viii; *Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566.

Statutes and Regulations Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, ss. 58, 59.

Arbitration Act, R.S.B.C. 1996, c. 55 [formerly *Commercial Arbitration Act*], s. 31.

Civil Code of Québec.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Low and Levine JJ.A.), 2010 BCCA 239, 7 B.C.L.R. (5th) 227, 319 D.L.R. (4th) 219, [2010] B.C.J. No. 891 (QL), 2010 CarswellBC 1210, setting aside a decision of Greyell J., 2009 BCSC 1079, [2009] B.C.J. No. 1597 (QL), 2009 CarswellBC 2096, and from a subsequent judgment of the British Columbia Court of Appeal (Kirkpatrick, Neilson and Bennett JJ.A.), 2012 BCCA 329, 36 B.C.L.R. (5th) 71, 326 B.C.A.C. 114, 554 W.A.C. 114, 2 B.L.R. (5th) 1, [2012] B.C.J. No. 1631 (QL), 2012 CarswellBC 2327, setting aside a decision of Armstrong J., 2011 BCSC 597, 84 B.L.R. (4th) 102, [2011] B.C.J. No. 861 (QL), 2011 CarswellBC 1124. Appeal allowed.

Counsel

Michael A. Feder and *Tammy Shoranick*, for the appellant.

Darrell W. Roberts, Q.C., and *David Mitchell*, for the respondent.

Jonathan Eades and *Micah Weintraub*, for the intervener the Attorney General of British Columbia.

David Wotherspoon and *Gavin R. Cameron*, for the intervener the BCICAC Foundation.

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APPENDIX I

Relevant Provisions of the Sattva-Creston Finder's Fee Agreement

A PPENDIX II

Section 3.3 of TSX Venture Exchange Policy 5.1: Loans, Bonuses, Finder's Fees and Commissions

APPENDIX III

Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as it read on January 12, 2007) (now the *Arbitration Act*)

The judgment of the Court was delivered by

ROTHSTEIN J.

1 When is contractual interpretation to be treated as a question of mixed fact and law and when should it be treated as a question of law? How is the balance between reviewability and finality of commercial arbitration awards under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*, hereinafter the "*AA*"), to be determined? Can findings made by a court granting leave to appeal with respect to the merits of an appeal bind the court that ultimately decides the appeal? These are three of the issues that arise in this appeal.

I. Facts

2 The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital [page643] Corporation (formerly Sattva Capital Inc.). The parties agree that Sattva is entitled to a finder's fee of US$1.5 million and is entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagree on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled.

3 Mr. Hai Van Le, a principal of Sattva, introduced Creston to the opportunity to acquire a molybdenum mining property in Mexico. On January 12, 2007, the parties entered into an agreement (the "Agreement") that required Creston to pay Sattva a finder's fee in relation to the acquisition of this property. The relevant provisions of the Agreement are set out in Appendix I.

4 On January 30, 2007, Creston entered into an agreement to purchase the property for US$30 million. On January 31, 2007, at the request of Creston, trading of Creston's shares on the TSX Venture Exchange ("TSXV") was halted to prevent speculation while Creston completed due diligence in relation to the

purchase. On March 26, 2007, Creston announced it intended to complete the purchase and trading resumed the following day.

5 The Agreement provides that Sattva was to be paid a finder's fee equal to the maximum amount that could be paid pursuant to s. 3.3 of Policy 5.1 in the TSXV Policy Manual. Section 3.3 of Policy 5.1 is incorporated by reference into the Agreement at s. 3.1 and is set out in Appendix II of these reasons. The maximum amount pursuant to s. 3.3 of Policy 5.1 in this case is US$1.5 million.

6 According to the Agreement, by default, the fee would be paid in Creston shares. The fee would only be paid in cash or a combination of shares and cash if Sattva made such an election. Sattva made no such election and was therefore entitled to be paid the fee in shares. The finder's fee was to be paid no later than five working days after the closing of the transaction purchasing the molybdenum mining property.

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7 The dispute between the parties concerns which date should be used to determine the price of Creston shares and thus the number of shares to which Sattva is entitled. Sattva argues that the share price is dictated by the Market Price definition at s. 2 of the Agreement, i.e. the price of the shares "as calculated on close of business day before the issuance of the press release announcing the Acquisition". The press release announcing the acquisition was released on March 26, 2007. Prior to the halt in trading on January 31, 2007, the last closing price of Creston shares was $0.15. On this interpretation, Sattva would receive approximately 11,460,000 shares (based on the finder's fee of US$1.5 million).

8 Creston claims that the Agreement's "maximum amount" proviso means that Sattva cannot receive cash or shares valued at more than US$1.5 million on the date the fee is payable. The shares were payable no later than five days after May 17, 2007, the closing date of the transaction. At that time, the shares were priced at $0.70 per share. This valuation is based on the price an investment banking firm valued Creston at as part of underwriting a private placement of shares on April 17, 2007. On this interpretation, Sattva would receive approximately 2,454,000 shares, some 9 million fewer shares than if the shares were priced at $0.15 per share.

9 The parties entered into arbitration pursuant to the *AA*. The arbitrator found in favour of Sattva. Creston sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *AA*. Leave was denied by the British Columbia Supreme Court (2009 BCSC 1079 (CanLII) ("SC Leave Court")). Creston successfully appealed this decision and was granted leave to appeal the arbitrator's decision by the British Columbia Court of Appeal (2010 BCCA 239, 7 B.C.L.R. (5th) 227 ("CA Leave Court")).

10 The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC 597, [page645] 84 B.L.R. (4th) 102 ("SC Appeal Court")) upheld the arbitrator's award. Creston appealed that decision to the British Columbia Court of Appeal (2012 BCCA 329, 36 B.C.L.R. (5th) 71 ("CA Appeal Court")). That court overturned the SC Appeal Court and found in favour of Creston. Sattva appeals the decisions of the CA Leave Court and CA Appeal Court to this Court.

II. Arbitral Award

11 The arbitrator, Leon Getz, Q.C., found in favour of Sattva, holding that it was entitled to receive its US$1.5 million finder's fee in shares priced at $0.15 per share.

12 The arbitrator based his decision on the Market Price definition in the Agreement:

> What, then, was the "Market Price" within the meaning of the Agreement? The relevant press release is that issued on March 26 ... . Although there was no closing price on March 25 (the shares being on that date halted), the "last closing price" within the meaning of the definition was the $0.15 at which the [Creston] shares closed on January 30, the day before trading was halted "pending news" ... . This conclusion requires no stretching of the words of the contractual definition; on the contrary, it falls literally within those words. [para. 22]

13 Both the Agreement and the finder's fee had to be approved by the TSXV. Creston was responsible for securing this approval. The arbitrator found that it was either an implied or an express term of the Agreement that Creston would use its best efforts to secure the TSXV's approval and that Creston did not apply its best efforts to this end.

14 As previously noted, by default, the finder's fee would be paid in shares unless Sattva made an election otherwise. The arbitrator found that [page646] Sattva never made such an election. Despite this, Creston represented to the TSXV that the finder's fee was to be paid in cash. The TSXV conditionally approved a finder's fee of US$1.5 million to be paid in cash. Sattva first learned that the fee had been approved as a cash payment in early June 2007. When Sattva raised this matter with Creston, Creston responded by saying that Sattva had the choice of taking the finder's fee in cash or in shares priced at $0.70.

15 Sattva maintained that it was entitled to have the finder's fee paid in shares priced at $0.15. Creston asked its lawyer to contact the TSXV to clarify the minimum share price it would approve for payment of the finder's fee. The TSXV confirmed on June 7, 2007 over the phone and August 9, 2007 via email that the minimum share price that could be used to pay the finder's fee was $0.70 per share. The arbitrator found that Creston "consistently misrepresented or at the very least failed to disclose fully the nature of the obligation it had undertaken to Sattva" (para. 56(k)) and "that in the absence of an election otherwise, Sattva is entitled under that Agreement to have that fee paid in shares at $0.15" (para. 56(g)). The arbitrator found that the first time Sattva's position was squarely put before the TSXV was in a letter from Sattva's solicitor on October 9, 2007.

16 The arbitrator found that had Creston used its best efforts, the TSXV could have approved the payment of the finder's fee in shares priced at $0.15 and such a decision would have been consistent with its policies. He determined that there was "a substantial probability that [TSXV] approval would have been given" (para. 81). He assessed that probability at 85 percent.

17 The arbitrator found that Sattva could have sold its Creston shares after a four-month holding period at between $0.40 and $0.44 per share, netting proceeds of between $4,583,914 and $5,156,934. [page647] The arbitrator took the average of those two amounts, which came to $4,870,424, and then assessed damages at 85 percent of that number, which came to $4,139,860, and rounded it to $4,140,000 plus costs.

18 After this award was made, Creston made a cash payment of US$1.5 million (or the equivalent in Canadian dollars) to Sattva. The balance of the damages awarded by the arbitrator was placed in the trust account of Sattva's solicitors.

III. Judicial History

A. *British Columbia Supreme Court - Leave to Appeal Decision, 2009 BCSC 1079*

19 The SC Leave Court denied leave to appeal because it found the question on appeal was not a question of law as required under s. 31 of the *AA*. In the judge's view, the issue was one of mixed fact and law because the arbitrator relied on the "factual matrix" in coming to his conclusion. Specifically, determining how the finder's fee was to be paid involved examining "the TSX's policies concerning the maximum amount of the finder's fee payable, as well as the discretionary powers granted to the Exchange in determining that amount" (para. 35).

20 The judge found that even had he found a question of law was at issue he would have exercised his discretion against granting leave because of Creston's conduct in misrepresenting the status of the finder's fee to the TSXV and Sattva, and "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41).

[page648]

B. *British Columbia Court of Appeal - Leave to Appeal Decision, 2010 BCCA 239*

21 The CA Leave Court reversed the SC Leave Court and granted Creston's application for leave to appeal the arbitral award. It found the SC Leave Court "err[ed] in failing to find that the arbitrator's failure to address the meaning of s. 3.1 of the Agreement (and in particular the 'maximum amount' provision) raised a question of law" (para. 23). The CA Leave Court decided that the construction of s. 3.1 of the Agreement, and in particular the "maximum amount" proviso, was a question of law because it did not involve reference to the facts of what the TSXV was told or what it decided.

22 The CA Leave Court acknowledged that Creston was "less than forthcoming in its dealings with Mr. Le and the [TSXV]" but said that "these facts are not directly relevant to the question of law it advances on the appeal" (para. 27). With respect to the SC leave judge's reference to the preservation of the integrity of the arbitration system, the CA Leave Court said that the parties would have known when they chose to enter arbitration under the *AA* that an appeal on a question of law was possible. Additionally, while the finality of arbitration is an important factor in exercising discretion, when "a question of law arises on a matter of importance and a miscarriage of justice might be perpetrated if an appeal were not available, the integrity of the process requires, at least in the circumstances of this case, that the right of appeal granted by the legislation also be respected" (para. 29).

C. *British Columbia Supreme Court - Appeal Decision, 2011 BCSC 597*

23 Armstrong J. reviewed the arbitrator's decision on a correctness standard. He dismissed the [page649] appeal, holding the arbitrator's interpretation of the Agreement was correct.

24 Armstrong J. found that the plain and ordinary meaning of the Agreement required that the US$1.5 million fee be paid in shares priced at $0.15. He did not find the meaning to be absurd simply because the price of the shares at the date the fee became payable had increased in relation to the price determined according to the Market Price definition. He was of the view that changes in the price of shares over time are inevitable, and that the parties, as sophisticated business persons, would have reasonably understood a fluctuation in share price to be a reality when providing for a fee payable in shares. According to Armstrong J., it is indeed because of market fluctuations that it is necessary to choose a specific date to price the shares in advance of payment. He found that this was done by defining "Market Price" in the Agreement, and that the fee remained US$1.5 million in $0.15 shares as determined by the Market Price definition regardless of the price of the shares at the date that the fee was payable.

25 According to Armstrong J., that the price of the shares may be more than the Market Price definition price when they became payable was foreseeable as a "natural consequence of the fee agreement" (para. 62). He was of the view that the risk was borne by Sattva, since the price of the shares could increase, but it could also decrease such that Sattva would have received shares valued at less than the agreed upon fee of US$1.5 million.

26 Armstrong J. held that the arbitrator's interpretation which gave effect to both the Market Price definition and the "maximum amount" proviso should be preferred to Creston's interpretation of the agreement which ignored the Market Price definition.

27 In response to Creston's argument that the arbitrator did not consider s. 3.1 of the Agreement [page650] which contains the "maximum amount" proviso, Armstrong J. noted that the arbitrator explicitly addressed the "maximum amount" proviso at para. 23 of his decision.

D. *British Columbia Court of Appeal - Appeal Decision, 2012 BCCA 329*

28 The CA Appeal Court allowed Creston's appeal, ordering that the payment of US$1.5 million that had been made by Creston to Sattva on account of the arbitrator's award constituted payment in full of the finder's fee. The court reviewed the arbitrator's decision on a standard of correctness.

29 The CA Appeal Court found that both it and the SC Appeal Court were bound by the findings made by the CA Leave Court. There were two findings that were binding: (1) it would be anomalous if the Agreement allowed Sattva to receive US$1.5 million if it received its fee in cash, but shares valued at approximately $8 million if Sattva took its fee in shares; and (2) the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement.

30 The Court of Appeal found that it was an absurd result to find that Sattva is entitled to an $8 million finder's fee in light of the fact that the "maximum amount" proviso in the Agreement limits the finder's fee to US$1.5 million. The court was of the view that the proviso limiting the fee to US$1.5 million "when paid" should be given paramount effect (para. 47). In its opinion, giving effect to the Market Price

definition could not have been the intention of the parties, nor could it have been in accordance with good business sense.

IV. Issues

31 The following issues arise in this appeal:

[page651]

(a) Is the issue of whether the CA Leave Court erred in granting leave under s. 31(2) of the *AA* properly before this Court?

(b) Did the CA Leave Court err in granting leave under s. 31(2) of the *AA*?

(c) If leave was properly granted, what is the appropriate standard of review to be applied to commercial arbitral decisions made under the *AA*?

(d) Did the arbitrator reasonably construe the Agreement as a whole?

(e) Did the CA Appeal Court err in holding that it was bound by comments regarding the merits of the appeal made by the CA Leave Court?

V. Analysis

A. *The Leave Issue Is Properly Before This Court*

32 Sattva argues, in part, that the CA Leave Court erred in granting leave to appeal from the arbitrator's decision. In Sattva's view, the CA Leave Court did not identify a question of law, a requirement to obtain leave pursuant to s. 31(2) of the *AA*. Creston argues that this issue is not properly before this Court. Creston makes two arguments in support of this point.

33 First, Creston argues that this issue was not advanced in Sattva's application for leave to appeal to this Court. This argument must fail. Unless this Court places restrictions in the order granting leave, the order granting leave is "at large". Accordingly, appellants may raise issues on appeal that were not set out in the leave application. However, the Court may exercise its discretion to refuse to deal with issues that were not addressed in the courts below, if there is prejudice to the respondent, or if for any other reason the Court considers it appropriate not to deal with a question.

[page652]

34 Here, this Court's order granting leave to appeal from both the CA Leave Court decision and the CA Appeal Court decision contained no restrictions (2013 CanLII 11315). The issue - whether the proposed appeal was on a question of law - was expressly argued before, and was dealt with in the judgments of, the SC Leave Court and the CA Leave Court. There is no reason Sattva should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to this Court.

35 Second, Creston argues that the issue of whether the CA Leave Court identified a question of law is not properly before this Court because Sattva did not contest this decision before all of the lower courts.

Specifically, Creston states that Sattva did not argue that the question on appeal was one of mixed fact and law before the SC Appeal Court and that it conceded the issue on appeal was a question of law before the CA Appeal Court. This argument must also fail. At the SC Appeal Court, it was not open to Sattva to reargue the question of whether leave should have been granted. The SC Appeal Court was bound by the CA Leave Court's finding that leave should have been granted, including the determination that a question of law had been identified. Accordingly, Sattva could hardly be expected to reargue before the SC Appeal Court a question that had been determined by the CA Leave Court. There is nothing in the *AA* to indicate that Sattva could have appealed the leave decision made by a panel of the Court of Appeal to another panel of the same court. The fact that Sattva did not reargue the issue before the SC Appeal Court or CA Appeal Court does not prevent it from raising the issue before this Court, particularly since Sattva was also granted leave to appeal the CA Leave Court decision by this Court.

[page653]

36 While this Court may decline to grant leave where an issue sought to be argued before it was not argued in the courts appealed from, that is not this case. Here, whether leave from the arbitrator's decision had been sought by Creston on a question of law or a question of mixed fact and law had been argued in the lower leave courts.

37 Accordingly, the issue of whether the CA Leave Court erred in finding a question of law for the purposes of granting leave to appeal is properly before this Court.

B. *The CA Leave Court Erred in Granting Leave Under Section 31(2) of the AA*

(1) Considerations Relevant to Granting or Denying Leave to Appeal Under the *AA*

38 Appeals from commercial arbitration decisions are narrowly circumscribed under the *AA*. Under s. 31(1), appeals are limited to either questions of law where the parties consent to the appeal or to questions of law where the parties do not consent but where leave to appeal is granted. Section 31(2) of the *AA*, reproduced in its entirety in Appendix III, sets out the requirements for leave:

> (2) In an application for leave under subsection (1)(b), the court may grant leave if it determines that
>
> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.

[page654]

39 The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* give the courts judicial discretion to deny leave even where the statutory requirements have been met (*British Columbia*

Institute of Technology (Student Assn.) v. British Columbia Institute of Technology, 2000 BCCA 496, 192 D.L.R. (4th) 122 ("*BCIT*"), at paras. 25-26). Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) are met and where the leave court does not exercise its residual discretion to nonetheless deny leave.

40 Although Creston's application to the SC Leave Court sought leave pursuant to s. 31(2)(a), (b) and (c), it appears the arguments before that court and throughout focused on s. 31(2)(a). The SC Leave Court's decision quotes a lengthy passage from *BCIT* that focuses on the requirements of s. 31(2)(a). The SC Leave Court judge noted that both parties conceded the first requirement of s. 31(2)(a): that the issue be of importance to the parties. The CA Leave Court decision expressed concern that denying leave might give rise to a miscarriage of justice - a criterion only found in s. 31(2)(a). Finally, neither the lower courts' leave decisions nor the arguments before this Court reflected arguments about the question of law being important to some class or body of persons of which the applicant is a member (s. 31(2)(b)) or being a point of law of general or public importance (s. 31(2)(c)). Accordingly, the following analysis will focus on s. 31(2)(a).

(2) The Result Is Important to the Parties

41 In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether [page655] the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be "sufficiently important", in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

(3) The Question Under Appeal Is Not a Question of Law

(4) *When Is Contractual Interpretation a Question of Law?*

42 Under s. 31 of the *AA*, the issue upon which leave is sought must be a question of law. For the purpose of identifying the appropriate standard of review or, as is the case here, determining whether the requirements for leave to appeal are met, reviewing courts are regularly required to determine whether an issue decided at first instance is a question of law, fact, or mixed fact and law.

43 Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law (*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 20, *per* Steel J.A.; K. Lewison, *The Interpretation of Contracts* (5th ed. 2011 & Supp. 2013), at pp. 173-76; and G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 125-26). This rule originated in England at a time when there were frequent civil jury trials and widespread illiteracy. Under those circumstances, the interpretation of written documents

had to be considered questions of law because only the judge could be [page656] assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

44 This historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law (*Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, at paras. 58 and 82-83; and Lewison, at pp. 173-77). They do this despite the fact that U.K. courts consider the surrounding circumstances, a concept addressed further below, when interpreting a written contract (*Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.); and *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

45 In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, at paras. 11-12; and *Minister of National Revenue v. Costco Wholesale Canada Ltd.*, 2012 FCA 160, 431 N.R. 78, at para. 34. However, some Canadian courts have abandoned the historical approach and now treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. See for example *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, at para. 44; *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, at paras. 22-23 (majority reasons, *per* Blair J.A.) and paras. 133-35 (*per* Gillese J.A., in dissent, but not on this point); and *King*, at paras. 20-23.

46 The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract [page657] - often referred to as the factual matrix - when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26 and 31-36.

47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed... . In a commercial contract it is certainly right that the court should know the commercial purpose of

> the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. [page658] v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

49 As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam*. Questions of law "are questions about what the correct legal test is" (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties - a fact-specific goal - through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

50 With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

51 The purpose of the distinction between questions of law and those of mixed fact and law further [page659] supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course,

> it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

52 Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

[page660]

53 Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

54 However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" ... . [para. 36]

55 Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of [page661] contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

(b) *The Role and Nature of the "Surrounding Circumstances"*

56 I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, [page662] at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) *Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule*

59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 341-42, *per* Sopinka J.).

60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts [page663] that

reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

61 Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

(d) *Application to the Present Case*

62 In this case, the CA Leave Court granted leave on the following issue: "Whether the Arbitrator erred in law in failing to construe the whole of the Finder's Fee Agreement ..." (A.R., vol. I, at p. 62).

63 As will be explained below, while the requirement to construe a contract as a whole is a question of law that could - if extricable - satisfy the threshold requirement under s. 31 of the *AA*, I do not think this question was properly extricated in this case.

64 I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15). If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

65 However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed, [page664] the CA Leave Court acknowledges that the arbitrator had considered that proviso, since it notes that he turned his mind to the US$1.5 million maximum amount, an amount that can only be calculated by referring to the TSXV policy referenced in the "maximum amount" proviso in s. 3.1 of the Agreement. As I read its reasons, rather than being concerned with whether the arbitrator ignored the maximum amount proviso, which is what Creston alleges in this Court, the CA Leave Court decision focused on how the arbitrator construed s. 3.1 of the Agreement, which included the maximum amount proviso (paras. 25-26). For example, the CA Leave Court expressed concern that the arbitrator did not address the "incongruity" in the fact that the value of the fee would vary "hugely" depending on whether it was taken in cash or shares (para. 25).

66 With respect, the CA Leave Court erred in finding that the construction of s. 3.1 of the Agreement constituted a question of law. As explained by Justice Armstrong in the SC Appeal Court decision, construing s. 3.1 and taking account of the proviso required relying on the relevant surrounding circumstances, including the sophistication of the parties, the fluctuation in share prices, and the nature of the risk a party assumes when deciding to accept a fee in shares as opposed to cash. Such an exercise raises a question of mixed fact and law. There being no question of law extricable from the mixed fact and law question of how s. 3.1 and the proviso should be interpreted, the CA Leave Court erred in granting leave to appeal.

67 The conclusion that Creston's application for leave to appeal raised no question of law would be

sufficient to dispose of this appeal. However, as this Court rarely has the opportunity to address appeals of arbitral awards, it is, in my view, useful to explain that, even had the CA Leave Court been correct in finding that construction of s. 3.1 of the Agreement constituted a question of law, it should have nonetheless denied leave to appeal as the [page665] application also failed the miscarriage of justice and residual discretion stages of the leave analysis set out in s. 31(2)(a) of the *AA*.

(4) May Prevent a Miscarriage of Justice

(a) *Miscarriage of Justice for the Purposes of Section 31(2)(a) of the AA*

68 Once a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal "may prevent a miscarriage of justice" in order for it to grant leave to appeal pursuant to s. 31(2)(a) of the *AA*. The first step in this analysis is defining miscarriage of justice for the purposes of s. 31(2)(a).

69 In *BCIT*, Justice Saunders discussed the miscarriage of justice requirement under s. 31(2)(a). She affirmed the definition set out in *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (C.A.), which required the error of law in question to be a material issue that, if decided differently, would lead to a different result: "... if the point of law were decided differently, the arbitrator would have been led to a different result. In other words, was the alleged error of law material to the decision; does it go to its heart?" (*BCIT*, at para. 28). See also *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, which discusses the test of whether "some substantial wrong or miscarriage of justice has occurred" in the context of a civil jury trial (para. 43).

70 Having regard to *BCIT* and *Quan*, I am of the opinion that in order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a) of the *AA*, an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case.

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71 According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

72 At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case.

73 *BCIT* sets the threshold for this preliminary assessment of the appeal as "more than an arguable point" (para. 30). With respect, once an arguable point has been made out, it is not apparent what more is required to meet the "more than an arguable point" standard. Presumably, the leave judge would have to delve more deeply into the arguments around the question of law on appeal than would be appropriate at the leave stage to find *more* than an arguable point. Requiring this closer examination of the point of law,

in my respectful view, blurs the line between the function of the court considering the leave application and the court hearing the appeal.

74 In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, at para. 11); and "credible [page667] argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270, at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

75 Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the applicable standard of review. As I will later explain, reasonableness will almost always apply to commercial arbitrations conducted pursuant to the *AA*, except in the rare circumstances where the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise. Therefore, the leave inquiry will ordinarily ask whether there is any arguable merit to the position that the arbitrator's decision on the question at issue is unreasonable, keeping in mind that the decision-maker is not required to refer to all the arguments, provisions or jurisprudence or to make specific findings on each constituent element, for the decision to be reasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16). Of course, the leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal. As such, this should not be taken as an invitation to engage in extensive arguments or analysis about the standard of review at the leave stage.

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76 In *BCIT*, Saunders J.A. considered the stage of s. 31(2)(a) of the *AA* at which an examination of the merits of the appeal should occur. At the behest of one of the parties, she considered examining the merits under the miscarriage of justice criterion. However, she decided that a consideration of the merits was best done at the residual discretion stage. Her reasons indicate that this decision was motivated by the desire to take a consistent approach across s. 31(2)(a), (b) and (c):

> Where, then, if anywhere, does consideration of the merits of the appeal belong? Mr. Roberts for the Student Association contends that any consideration of the merits of the appeal belongs in the determination of whether a miscarriage of justice may occur; that is, under the second criterion. I do not agree. In my view, the apparent merit or lack of merit of an appeal is part of the exercise of the residual discretion, and applies equally to all three subsections, (*a*) through (*c*). Just as an

> appeal woefully lacking in merit should not attract leave under (*b*) (of importance to a class of people including the applicant) or (*c*) (of general or public importance), so too it should not attract leave under (*a*). Consideration of the merits, for consistency in the section as a whole, should be made as part of the exercise of residual discretion. [para. 29]

77 I acknowledge the consistency rationale. However, in my respectful opinion, the desire for a consistent approach to s. 31(2)(a), (b) and (c) cannot override the text of the legislation. Unlike s. 31(2)(b) and (c), s. 31(2)(a) requires an assessment to determine whether allowing leave to appeal "may prevent a miscarriage of justice". It is my opinion that a preliminary assessment of the question of law is an implicit component in a determination of whether allowing leave "may prevent a miscarriage of justice".

78 However, in an application for leave to appeal pursuant to s. 31(2)(b) or (c), neither of which contain a miscarriage of justice requirement, I agree with Justice Saunders in *BCIT* that a preliminary [page669] examination of the merits of the question of law should be assessed at the residual discretion stage of the analysis as considering the merits of the proposed appeal will always be relevant when deciding whether to grant leave to appeal under s. 31.

79 In sum, in order to establish that "the intervention of the court and the determination of the point of law may prevent a miscarriage of justice" for the purposes of s. 31(2)(a) of the *AA*, an applicant must demonstrate that the point of law on appeal is material to the final result and has arguable merit.

(b) *Application to the Present Case*

80 The CA Leave Court found that the arbitrator may have erred in law by not interpreting the Agreement as a whole, specifically in ignoring the "maximum amount" proviso. Accepting that this is a question of law for these purposes only, a determination of the question would be material because it could change the ultimate result arrived at by the arbitrator. The arbitrator awarded $4.14 million in damages on the basis that there was an 85 percent chance the TSXV would approve a finder's fee paid in $0.15 shares. If Creston's argument is correct and the $0.15 share price is foreclosed by the "maximum amount" proviso, damages would be reduced to US$1.5 million, a significant reduction from the arbitrator's award of damages.

81 As s. 31(2)(a) of the *AA* is the relevant provision in this case, a preliminary assessment of the question of law will be conducted in order to determine if a miscarriage of justice could have occurred had Creston been denied leave to appeal. Creston argues that the fact that the arbitrator's conclusion results in Sattva receiving shares valued at considerably more than the US$1.5 million maximum dictated by the "maximum amount" proviso is [page670] evidence of the arbitrator's failure to consider that proviso.

82 However, the arbitrator did refer to s. 3.1, the "maximum amount" proviso, at two points in his decision: paras. 18 and 23(a). For example, at para. 23 he stated:

> In summary, then, as of March 27, 2007 it was clear and beyond argument that under the Agreement:

(a) Sattva was entitled to a fee equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange - section 3.1. It is common ground that the quantum of this fee is US$1,500,000.

(b) The fee was payable in shares based on the Market Price, as defined in the Agreement, unless Sattva elected to take it in cash or a combination of cash and shares.

(c) The Market Price, as defined in the Agreement, was $0.15. [Emphasis added.]

83 Although the arbitrator provided no express indication that he considered how the "maximum amount" proviso interacted with the Market Price definition, such consideration is implicit in his decision. The only place in the contract that specifies that the amount of the fee is calculated as US$1.5 million is the "maximum amount" proviso's reference to s. 3.3 of the TSXV Policy 5.1. The arbitrator acknowledged that the quantum of the fee is US$1.5 million and awarded Sattva US$1.5 million in shares priced at $0.15. Contrary to Creston's argument that the arbitrator failed to consider the proviso in construing the Agreement, it is apparent on a preliminary examination of the question that the arbitrator did in fact consider the "maximum amount" proviso.

84 Accordingly, even had the CA Leave Court properly identified a question of law, leave to appeal should have been denied. The requirement that there be arguable merit that the arbitrator's decision was unreasonable is not met and the miscarriage of justice threshold was not satisfied.

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(5) Residual Discretion to Deny Leave

(a) *Considerations in Exercising Residual Discretion in a Section 31(2)(a) Leave Application*

85 The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met (*BCIT*, at paras. 9 and 26). In *BCIT*, Saunders J.A. sets out a non-exhaustive list of considerations that would be applicable to the exercise of discretion (para. 31):

1. "the apparent merits of the appeal";
2. "the degree of significance of the issue to the parties, to third parties and to the community at large";
3. "the circumstances surrounding the dispute and adjudication including the urgency of a final answer";
4. "other temporal considerations including the opportunity for either party to address the result through other avenues";
5. "the conduct of the parties";
6. "the stage of the process at which the appealed decision was made";
7. "respect for the forum of arbitration, chosen by the parties as their means of resolving disputes"; and

8. "recognition that arbitration is often intended to provide a speedy and final dispute mechanism, tailor-made for the issues which may face the parties to the arbitration agreement".

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86 I agree with Justice Saunders that it is not appropriate to create what she refers to as an "immutable checklist" of factors to consider in exercising discretion under s. 31(2) (*BCIT*, at para. 32). However, I am unable to agree that all the listed considerations are applicable at this stage of the analysis.

87 In exercising its statutorily conferred discretion to deny leave to appeal pursuant to s. 31(2)(a), a court should have regard to the traditional bases for refusing discretionary relief: the parties' conduct, the existence of alternative remedies, and any undue delay (*Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 52). This would include the urgent need for a final answer.

88 With respect to the other listed considerations and addressed in turn below, it is my opinion that they have already been considered elsewhere in the s. 31(2)(a) analysis or are more appropriately considered elsewhere under s. 31(2). Once considered, these matters should not be assessed again under the court's residual discretion.

89 As discussed above, in s. 31(2)(a), a preliminary assessment of the merits of the question of law at issue in the leave application is to be considered in determining the miscarriage of justice question. The degree of significance of the issue to the parties is covered by the "importance of the result of the arbitration to the parties" criterion in s. 31(2)(a). The degree of significance of the issue to third parties and to the community at large should not be considered under s. 31(2)(a) as the *AA* sets these out as separate grounds for granting leave to appeal under s. 31(2)(b) and (c). Furthermore, respect for the forum of arbitration chosen by the parties is a consideration that animates the legislation itself and [page673] can be seen in the high threshold to obtain leave under s. 31(2)(a). Recognition that arbitration is often chosen as a means to obtain a fast and final resolution tailor-made for the issues is already reflected in the urgent need for a final answer.

90 As for the stage of the process at which the decision sought to be appealed was made, it is not a consideration relevant to the exercise of the court's residual discretion to deny leave under s. 31(2)(a). This factor seeks to address the concern that granting leave to appeal an interlocutory decision may be premature and result in unnecessary fragmentation and delay of the legal process (D. J. M. Brown and J. M. Evans, with the assistance of C. E. Deacon, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 3-67 to 3-76). However, any such concern will have been previously addressed by the leave court in its analysis of whether a miscarriage of justice may arise; more specifically, whether the interlocutory issue has the potential to affect the final result. As such, the above-mentioned concerns should not be considered anew.

91 In sum, a non-exhaustive list of discretionary factors to consider in a leave application under s.

31(2)(a) of the *AA* would include:

* conduct of the parties;
* existence of alternative remedies;
* undue delay; and
* the urgent need for a final answer.

92 These considerations could, where applicable, be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria of s. 31(2)(a) have been met. However, courts should [page674] exercise such discretion with caution. Having found an error of law and, at least with respect to s. 31(2)(a), a potential miscarriage of justice, these discretionary factors must be weighed carefully before an otherwise eligible appeal is rejected on discretionary grounds.

(b) *Application to the Present Case*

93 The SC Leave Court judge denied leave on the basis that there was no question of law. Even had he found a question of law, the SC Leave Court judge stated that he would have exercised his residual discretion to deny leave for two reasons: first, because of Creston's conduct in misrepresenting the status of the finder's fee issue to the TSXV and Sattva; and second, "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41). The CA Leave Court overruled the SC Leave Court on both of these discretionary grounds.

94 For the reasons discussed above, fostering and preserving the integrity of the arbitral system should not be a discrete discretionary consideration under s. 31(2)(a). While the scheme of s. 31(2) recognizes this objective, the exercise of discretion must pertain to the facts and circumstances of a particular case. This general objective is not a discretionary matter for the purposes of denying leave.

95 However, conduct of the parties is a valid consideration in the exercise of the court's residual discretion under s. 31(2)(a). A discretionary decision to deny leave is to be reviewed with deference by an appellate court. A discretionary decision should not be interfered with merely because an appellate court would have exercised the discretion differently (*R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, [page675] at paras. 18 and 30). An appellate court is only justified in interfering with a lower court judge's exercise of discretion if that judge misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117).

96 Here, the SC Leave Court relied upon a well-accepted consideration in deciding to deny discretionary relief: the misconduct of Creston. The CA Leave Court overturned this decision on the grounds that Creston's conduct was "not directly relevant to the question of law" advanced on appeal (at para. 27).

97 The CA Leave Court did not explain why misconduct need be directly relevant to a question of law for the purpose of denying leave. I see nothing in s. 31(2) of the *AA* that would limit a leave judge's exercise

of discretion in the manner suggested by the CA Leave Court. My reading of the jurisprudence does not support the view that misconduct must be directly relevant to the question to be decided by the court.

98 In *Homex Realty and Development Co. v. Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011, at pp. 1037-38, misconduct by a party not directly relevant to the question at issue before the court resulted in denial of a remedy. The litigation in *Homex* arose out of a disagreement regarding whether the purchaser of lots in a subdivision, Homex, had assumed the obligations of the vendor under a subdivision agreement to provide "all the requirements, financial and otherwise" for the installation of municipal services on a parcel of land that had been subdivided (pp. 1015-16). This Court determined that Homex had not been accorded procedural fairness when the municipality passed a by-law related to the dispute (p. 1032). Nevertheless, discretionary relief to quash the by-law was denied because, among other things, Homex had sought "throughout all these proceedings to [page676] avoid the burden associated with the subdivision of the lands" that it owned (p. 1037), even though the Court held that Homex knew this obligation was its responsibility (pp. 1017-19). This conduct was related to the dispute that gave rise to the litigation, but not to the question of whether the by-law was enacted in a procedurally fair manner. Accordingly, I read *Homex* as authority for the proposition that misconduct related to the dispute that gave rise to the proceedings may justify the exercise of discretion to refuse the relief sought, in this case refusing to grant leave to appeal.

99 Here, the arbitrator found as a fact that Creston misled the TSXV and Sattva regarding "the nature of the obligation it had undertaken to Sattva by representing that the finder's fee was payable in cash" (para. 56(k)). While this conduct is not tied to the question of law found by the CA Leave Court, it is tied to the arbitration proceeding convened to determine which share price should be used to pay Sattva's finder's fee. The SC Leave Court was entitled to rely upon such conduct as a basis for denying leave pursuant to its residual discretion.

100 In the result, in my respectful opinion, even if the CA Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the SC Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion.

101 Although the CA Leave Court erred in granting leave, these protracted proceedings have nonetheless now reached this Court. In light of the fact that the true concern between the parties is the merits of the appeal - that is, how much the Agreement requires Creston to pay Sattva - and that the courts below differed significantly in their interpretation of the Agreement, it would be [page677] unsatisfactory not to address the very dispute that has given rise to these proceedings. I will therefore proceed to consider the three remaining questions on appeal as if leave to appeal had been properly granted.

C. *Standard of Review Under the AA*

102 I now turn to consideration of the decisions of the appeal courts. It is first necessary to determine the standard of review of the arbitrator's decision in respect of the question on which the CA Leave Court granted leave: whether the arbitrator construed the finder's fee provision in light of the Agreement as a whole, particularly, whether the finder's fee provision was interpreted having regard for the "maximum amount" proviso.

103 At the outset, it is important to note that the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which sets out standards of review of the decisions of many statutory tribunals in British Columbia (see ss. 58 and 59), does not apply in the case of arbitrations under the *AA*.

104 Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. For example, the *AA* forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the [page678] *Dunsmuir* judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

105 Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

106 *Dunsmuir* and the post-*Dunsmuir* jurisprudence confirm that it will often be possible to determine the standard of review by focusing on the nature of the question at issue (see for example *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 44). In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*Alberta Teachers' Association*, at para. 30). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.

[page679]

D. *The Arbitrator Reasonably Construed the Agreement as a Whole*

107 For largely the reasons outlined by Justice Armstrong in paras. 57-75 of the SC Appeal Court decision, in my respectful opinion, in determining that Sattva is entitled to be paid its finder's fee in shares priced at $0.15 per share, the arbitrator reasonably construed the Agreement as a whole. Although Justice Armstrong conducted a correctness review of the arbitrator's decision, his reasons amply demonstrate the reasonableness of that decision. The following analysis is largely based upon his reasoning.

108 The question that the arbitrator had to decide was which date should be used to determine the price of the shares used to pay the finder's fee: the date specified in the Market Price definition in the Agreement or the date the finder's fee was to be paid?

109 The arbitrator concluded that the price determined by the Market Price definition prevailed, i.e. $0.15 per share. In his view, this conclusion followed from the words of the Agreement and was "clear and beyond argument" (para. 23). Apparently, because he considered this issue clear, he did not offer extensive reasons in support of his conclusion.

110 In *Newfoundland and Labrador Nurses' Union*, Abella J. cites Professor David Dyzenhaus to explain that, when conducting a reasonableness review, it is permissible for reviewing courts to supplement the reasons of the original decision-maker as part of the reasonableness analysis:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in [page680] some respects defective. [Emphasis added by Abella J.; para. 12.]

(Quotation from D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

Accordingly, Justice Armstrong's explanation of the interaction between the Market Price definition and the "maximum amount" proviso can be considered a supplement to the arbitrator's reasons.

111 The two provisions at issue here are the Market Price definition and the "maximum amount" proviso:

> **2. DEFINITIONS**
>
> **"Market Price"** for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

And:

> **3. FINDER'S FEE**
>
> 3.1 ... the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee is to be paid in shares of the Company based on Market

> Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations. [Emphasis added.]

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112 Section 3.1 entitles Sattva to be paid a finder's fee in shares based on the "Market Price". Section 2 of the Agreement states that Market Price for companies listed on the TSXV should be "calculated on close of business day before the issuance of the press release announcing the Acquisition". In this case, shares priced on the basis of the Market Price definition would be $0.15 per share. The words "provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations" in s. 3.1 of the Agreement constitute the "maximum amount" proviso. This proviso limits the amount of the finder's fee. The maximum finder's fee in this case is US$1.5 million (see s. 3.3 of the TSXV Policy 5.1 in Appendix II).

113 While the "maximum amount" proviso limits the amount of the finder's fee, it does not affect the Market Price definition. As Justice Armstrong explained, the Market Price definition acts to fix the date at which one medium of payment (US$) is transferred into another (shares):

> The medium for payment of the finder's fee is clearly established by the fee agreement. The market value of those shares at the time that the parties entered into the fee agreement was unknown. The respondent analogizes between payment of the $1.5 million US finder's fee in shares and a hypothetical agreement permitting payment of $1.5 million US in Canadian dollars. Both agreements would contemplate a fee paid in different currencies. The exchange rate of the US and Canadian dollar would be fixed to a particulate date, as is the value of the shares by way of the Market Price in the fee agreement. That exchange rate would determine the number of Canadian dollars paid in order to satisfy the $1.5 million US fee, as the Market Price does for the number of shares paid in relation to the fee. The Canadian dollar is the form of the fee payment, as are the shares. Whether the Canadian dollar increased or decreased in value after the date on which the exchange rate is based is irrelevant. The amount of the fee paid remains $1.5 million US, payable in the number of Canadian dollars (or shares) equal to the [page682] amount of the fee based on the value of that currency on the date that the value is determined.

(SC Appeal Court decision, at para. 71)

114 Justice Armstrong explained that Creston's position requires the Market Price definition to be ignored and for the shares to be priced based on the valuation done in anticipation of a private placement.

115 However, nothing in the Agreement expresses or implies that compliance with the "maximum amount" proviso should be reassessed at a date closer to the payment of the finder's fee. Nor is the basis for the new valuation, in this case a private placement, mentioned or implied in the Agreement. To accept Creston's interpretation would be to ignore the words of the Agreement which provide that the "finder's fee is to be paid in shares of the Company based on Market Price".

116 The arbitrator's decision that the shares should be priced according to the Market Price definition

gives effect to both the Market Price definition and the "maximum amount" proviso. The arbitrator's interpretation of the Agreement, as explained by Justice Armstrong, achieves this goal by reconciling the Market Price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

117 As Justice Armstrong explained, setting the share price in advance creates a risk that makes selecting payment in shares qualitatively different from choosing payment in cash. There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient [page683] of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.

118 By accepting payment in shares, Sattva was accepting that it was subject to the volatility of the market. If Creston's share price had fallen, Sattva would still have been bound by the share price determined according to the Market Price definition resulting in it receiving a fee paid in shares with a market value of less than the maximum amount of US$1.5 million. It would make little sense to accept the risk of the share price decreasing without the possibility of benefitting from the share price increasing. As Justice Armstrong stated:

> It would be inconsistent with sound commercial principles to insulate the appellant from a rise in share prices that benefitted the respondent at the date that the fee became payable, when such a rise was foreseeable and ought to have been addressed by the appellant, just as it would be inconsistent with sound commercial principles, and the terms of the fee agreement, to increase the number of shares allocated to the respondent had their value decreased relative to the Market Price by the date that the fee became payable. Both parties accepted the possibility of a change in the value of the shares after the Market Price was determined when entering into the fee agreement.

(SC Appeal Court decision, at para. 70)

119 For these reasons, the arbitrator did not ignore the "maximum amount" proviso. The arbitrator's reasoning, as explained by Justice Armstrong, meets the reasonableness threshold of justifiability, transparency and intelligibility (*Dunsmuir*, at para. 47).

[page684]

E. *Appeal Courts Are Not Bound by Comments on the Merits of the Appeal Made by Leave Courts*

120 The CA Appeal Court held that it and the SC Appeal Court were bound by the findings made by the CA Leave Court regarding not simply the decision to grant leave to appeal, but also the merits of the

appeal. In other words, it found that the SC Appeal Court erred in law by ignoring the findings of the CA Leave Court regarding the merits of the appeal.

121 The CA Appeal Court noted two specific findings regarding the merits of the appeal that it held were binding on it and the SC Appeal Court: (1) it would be anomalous if the Agreement allowed Sattva to receive US$1.5 million if it received its fee in cash, but allowed it to receive shares valued at approximately $8 million if Sattva received its fee in shares; and (2) that the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement:

> The [SC Appeal Court] judge found the arbitrator had expressly addressed the maximum amount payable under paragraph 3.1 of the Agreement and that he was correct.
>
> This finding is contrary to the remarks of Madam Justice Newbury in the earlier appeal that, if Sattva took its fee in shares valued at $0.15, it would receive a fee having a value at the time the fee became payable of over $8 million. If the fee were taken in cash, the amount payable would be $1.5 million US. Newbury J.A. specifically held that the arbitrator did not note this anomaly and did not address the meaning of paragraph 3.1 of the Agreement.
>
> The [SC Appeal Court] judge was bound to accept those findings. Similarly, absent a five-judge division in this appeal, we must also accept those findings. [paras. 42-44]

[page685]

122 With respect, the CA Appeal Court erred in holding that the CA Leave Court's comments on the merits of the appeal were binding on it and on the SC Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 88). A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful (*Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii). This is true even where the determination of whether to grant leave involves, as in this case, a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal (*Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), at para. 32).

123 Creston concedes this point but argues that the CA Appeal Court's finding that it was bound by the CA Leave Court was inconsequential because the CA Appeal Court came to the same conclusion on the merits as the CA Leave Court based on separate and independent reasoning.

124 The fact that the CA Appeal Court provided its own reasoning as to why it came to the same conclusion as the CA Leave Court does not vitiate the error. Once the CA Appeal Court treated the CA Leave Court's reasons on the merits as binding, it could hardly have come to any other decision. As counsel for Sattva pointed out, treating the leave decision as binding would render an appeal futile.

[page686]

VI. Conclusion

125 The CA Leave Court erred in granting leave to appeal in this case. In any event, the arbitrator's decision was reasonable. The appeal from the judgments of the Court of Appeal for British Columbia dated May 14, 2010 and August 7, 2012 is allowed with costs throughout and the arbitrator's award is reinstated.

* * * * *

APPENDIX I

Relevant Provisions of the Sattva-Creston Finder's Fee Agreement

(a) "Market Price" definition:

2. DEFINITIONS

"Market Price" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

(b) Finder's fee provision (which contains the "maximum amount" proviso):

3. FINDER'S FEE

3.1 ... the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee [page687] is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

APPENDIX II

Section 3.3 of TSX Venture Exchange Policy 5.1: Loans, Bonuses, Finder's Fees and Commissions

3.3 Finder's Fee Limitations

The finder's fee limitations apply if the benefit to the Issuer is an asset purchase or sale, joint venture agreement, or if the benefit to the Issuer is not a specific financing. The consideration should be stated both in dollars and as a percentage of the value of the benefit received. Unless there are unusual circumstances, the finder's fee should not exceed the following percentages:

Benefit	Finder's Fee

On the first $300,000	Up to 10%
From $300,000 to $1,000,000	Up to 7.5%
From $1,000,000 and over	Up to 5%

As the dollar value of the benefit increases, the fee or commission, as a percentage of that dollar value should generally decrease.

APPENDIX III

Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as it read on January 12, 2007) (now the *Arbitration Act*)

Appeal to the court

31 (1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

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(a) all of the parties to the arbitration consent, or

(b) the court grants leave to appeal.

(c) In an application for leave under subsection (1) (b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

(3) If the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.

(4) On an appeal to the court, the court may

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

Appeal allowed with costs throughout.

Solicitors:

Solicitors for the appellant: McCarthy Tétrault, Vancouver.

Solicitors for the respondent: Miller Thomson, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the BCICAC Foundation: Fasken Martineau DuMoulin, Vancouver.

TAB 14

IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing, [2017] A.J. No. 666

Alberta Judgments

Alberta Court of Appeal

C.A. Fraser C.J.A., J. Watson and P.A. Rowbotham JJ.A.

Heard: October 16 and November 10, 2015.

Judgment: May 26, 2017.

Docket: 1401-0235-AC

Registry: Calgary

[2017] A.J. No. 666 | 2017 ABCA 157 | 280 A.C.W.S. (3d) 752 | 53 Alta. L.R. (6th) 96 | [2017] 12 W.W.R. 261 | 2017 CarswellAlta 1133 | 70 B.L.R. (5th) 173

Between IFP Technologies (Canada) Inc., Appellant, and EnCana Midstream and Marketing, PanCanadian Resources, EnCana Corporation, EnCana Oil & Gas Developments Ltd., Canadian Forest Oil Ltd. and The Wiser Oil Company, Respondents

(363 paras.)

Case Summary

Natural resources law — Oil and gas — Lease or licence for production — Working interest — Participation agreement — Overriding royalties — Appeal by plaintiff from dismissal of action allowed — At issue was scope of working interest granted by defendants to plaintiff in consideration of termination of other overriding royalties — Trial judge erred in failing to recognized legal meaning ascribed to term "working interest" and thus reached erroneous conclusion plaintiff's interest was limited to oil and gas derived from thermal and other enhanced recovery methods — Plaintiff owned 20 per cent interests in oil and gas leases and other assets at project site — Plaintiff entitled to accounting of its proportionate share of net proceeds from primary production.

Appeal by the plaintiff, IFP Technologies, from the dismissal of its action against the defendants for damages for breach of contract. The parties were multinational companies who entered a contract in respect of a Canadian oil and gas partnership at an Alberta property known as Eyehill Creek. The defendants included PCR and its corporate predecessors and successors. The plaintiff and PCR entered an agreement whereby PCR granted the plaintiff a 20 per cent working interest in Eyehill Creek in consideration of the plaintiff terminating other overriding royalties arising from other PCR-controlled leases. Following the collapse of oil and gas prices and the intended sale of certain PCR operations, litigation commenced over the scope of the working interest conveyed. The defendants' position that the plaintiff's interest was limited to an undivided 20 per cent interest in oil and gas produced only through thermal and other enhanced recovery methods was accepted by the trial judge. The plaintiff's position that the working interest encompassed all of the assets held by PCR at Eyehill Creek was rejected. At issue on appeal was the interpretation of the term "working interest" in the context of oil and gas leases, and what was conveyed by the transfer of a working interest in such leases.

HELD: Appeal allowed.

The trial judge erred in failing to recognize the legal meaning ascribed to the legal term of art "working interest", and in disregarding clear, compelling textual wording of the substantive provisions in the parties' agreements. The judge's conclusion the plaintiff's interest was limited to oil and gas derived from thermal and other enhanced recovery methods was erroneous. Having regard to commercial reasonableness and the intent of the parties, the plaintiff did not contractually agree to forego a future stream of royalty income valued at $14.8 million in exchange for nothing more than the mere possibility of a thermal project at Eyehill Creek that was never guaranteed to proceed and that could be rendered economically impracticable through the defendants' unilateral actions. The trial judge further erred in concluding the plaintiff acted unreasonably in withholding consent to PCR's proposed disposition of its interests. The plaintiff owned and continued to own a 20 per cent working interest in all of the oil and gas leases and other assets held by PCR in Eyehill Creek. The plaintiff was entitled to an accounting for its proportionate share of the net proceeds from primary production at Eyehill Creek, with calculation of such proceeds to be remitted to the Court of Queen's Bench for determination.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, AR 124/2010, Rule 13.1

Petroleum and Natural Gas Tenure Regulation, Alta Reg. 263/97, s. 14, s. 15, s. 16, s. 17

Appeal From:

On appeal from the Decision by the Honourable Chief Justice Neil Wittmann, acting in place of the Trial Judge, Justice R.G. Stevens, pursuant to Rule 13.1 Dated the 30th day of July, 2014, Filed on the 8th day of September, 2014 (2014 ABQB 470, Docket: 0301-3520).

Counsel

P. Edwards and R. de Waal, for the Appellant.

G.N. Stapon, Q.C. and L.M. Gill, for the Respondents.

Table of Contents

Reasons for Judgment

Reasons for judgment were delivered by C.A. Fraser C.J.A., concurred in by P.A. Rowbotham J.A. Separate concurring reasons were delivered by J. Watson J.A.

C.A. FRASER C.J.A.

I. Introduction

1 Even large multi-national companies are entitled to expect that the contracts they make in Canada will be honoured - and that they will not be subject to the "gotcha" approach to contractual dealings. This appeal involves a decades-long dispute over the interpretation of a contract. A French-owned research and development company, IFP Technologies (Canada) Inc. (IFP), insists that the contract conveyed to it an undivided 20% working interest in oil and gas leases for a property in Alberta known as "Eyehill Creek".[1] The respondents, including PanCanadian Resources (PCR),[2] a Canadian oil and gas partnership, insist that IFP's interest is limited to an undivided 20% interest in oil and gas produced only through thermal and other enhanced recovery methods at Eyehill Creek. A fundamental point is whether the term "working interest" with respect to oil and gas leases has any meaning in Canadian oil and gas law. In my view, it most assuredly does. This phrase is a legal term of art with a specific meaning in the oil and gas industry, a meaning which this Court should uphold in keeping with what were undoubtedly the parties' mutual intentions when the subject contract was concluded.

2 Ensuring that contractual obligations are discharged in good faith and in accordance with the reasonable expectations of the parties is essential to the economic well-being of this country. This is especially so in Alberta where the magnitude of projects in the oil and gas sector requires heavy financial commitments. The reality is that many companies prefer to spread the risks involved in oil and gas mega-projects by entering into contracts with other well-capitalized companies. Hence, development in this sector is often contingent on multi-party investment.

3 If companies, and that includes sophisticated corporations, cannot rely on other companies with whom

they contract to conduct themselves in a manner faithful to the parties' contractual intentions, then that is not only hurtful to the company left with the problem. It is also harmful to the citizens of this country. Business craves certainty; it is understandably risk averse. Canadians lose if companies have to look over their shoulder to ensure that they are not being stabbed in the contractual back, especially where investments are measured in millions, if not billions, of dollars. Who would choose to invest under these circumstances? If this were truly the contractual regime in Canada - and I do not agree it is - then companies would need to account for this contingency in assessing whether to invest with others in a proposed project. That would materially increase both risk and cost and weigh against investment. This is contrary to society's enlightened collective self-interest.

4 Companies are entitled to expect that the parties with whom they contract will be honest, reasonable, candid and forthright in their contractual dealings: ***Potter v New Brunswick Legal Aid Services Commission***, 2015 SCC 10 at para 99, [2015] 1 SCR 500. As a corollary to this, they are also entitled to expect that contractual terms intended to protect one contracting party from future liability will not then be turned on their head and used to gut the purpose of the contract. Consequently, courts should be slow - indeed I suggest, unwilling - to permit companies to ignore their contractual obligations on the basis that, after problems start, someone can think of another term that might have been included to put what turns out to be a contentious issue beyond doubt. Interpreting contracts is a civil law exercise; it is not necessary to prove anything beyond a reasonable doubt.

5 The road to this appeal has been long and twisting. Back in early 2011, the parties were involved in a six-week trial. At the start of the trial, the parties filed a statement of agreed facts along with more than 500 agreed exhibits. The trial involved over 600 exhibits in total and 25 witnesses. Tragically, the initial trial judge who oversaw the proceedings passed away some time after the trial had concluded but without ever rendering a decision. The parties elected to have the Chief Justice of the Queen's Bench (Trial Judge) decide the case based on the written record and materials submitted rather than proceeding with a new trial: ***IFP Technologies (Canada) v Encana Midstream and Marketing***, 2014 ABQB 470, 591 AR 202 (QB Reasons).

6 IFP submits that the Trial Judge made a number of errors of law and palpable and overriding errors of fact in his interpretation of the contract. PCR and the other respondents submit that deference to the Trial Judge's findings should rule the day. Given the complex nature of the appeal, oral arguments took an unusually long time, that is two full days in this Court. For the reasons explained below, I have concluded that the Trial Judge's interpretation of the contract is fatally flawed and cannot stand. In fairness to the Trial Judge, his decision predated two groundbreaking decisions of the Supreme Court on contractual interpretation: ***Sattva Capital Corp. v Creston Moly Corp.***, 2014 SCC 53, [2014] 2 SCR 633 [***Sattva***] and ***Bhasin v Hrynew***, 2014 SCC 71, [2014] 3 SCR 494 [***Bhasin***].

7 This tangled contractual web raises issues of law fundamental to the effective operation of the oil and gas industry in this country. What is meant by a "working interest" in oil and gas leases? What does the transfer of a "working interest" in oil and gas leases convey to the recipient? And does an "entire agreement" clause preclude consideration of the factual matrix, including the commercial context of the contract? It also raises policy issues relating to the efficacy of the law on contractual interpretation and what this means for corporations seeking redress in the courts.

8 In the end, the many legal, policy and factual issues raised come down to this. Did IFP contractually agree to give up a future stream of income valued at $14,800,000 in exchange for nothing more than the mere possibility of a thermal project at Eyehill Creek that was never guaranteed to proceed and that could be rendered economically impracticable through PCR's unilateral actions? The answer is no. IFP did not enter into any such contract. The relevant contractual documentation here points to an inescapable truth. IFP owns, and has owned throughout the period of this dispute, a 20% working interest in all of the oil and gas leases and other assets held by PCR in Eyehill Creek.

9 Therefore, I do not agree with the conclusion in the QB Reasons that IFP's interest in Eyehill Creek is limited to 20% of the oil and gas produced only from thermal and other enhanced recovery methods. For the reasons that follow, this appeal must be allowed.

10 I begin by setting out certain background facts (Part II). I next identify certain key issues (Part III). I then discuss the standard of review with respect to contractual interpretation and explain why the standard of review, as it relates to both the meaning and application of the term "working interest", is correctness (Part IV). I next briefly review certain principles of contractual interpretation relevant to this appeal (Part V). This is followed by an analysis of the QB Reasons. I explain why the Trial Judge erred in concluding that IFP's interest is limited only to an interest in oil and gas derived from thermal and other enhanced recovery methods at Eyehill Creek and confirm that IFP is entitled to an accounting for its proportionate share of the net proceeds from primary production at Eyehill Creek. I also explain why IFP acted reasonably in refusing to consent to PCR's disposition to Wiser (Part VI). I then address the damages issue and outline why calculation of the net proceeds from primary production must be remitted to the Queen's Bench for determination (Part VII). The conclusion follows (Part VIII).

II. Factual Background

A. Setting the Scene

11 The roots of the relationship between IFP and PCR pre-date the disputed contract.

12 In the late 1980s and early 1990s, PCR's predecessor, CS Resources Limited (CS Resources) was a pioneer in exploiting heavy oil using horizontal wells. During this period, it had a business relationship with IFP's parent organization, IFP Energies Nouvelles, formerly known as the Institut Français du Pétrole (IFP France) which had technological expertise in petroleum research and development.

13 In February, 1988, Société Nationale ELF Aquitaine Production (SNEAP), IFP France and CS Resources entered into a Technology Licensing Agreement (TLA) under which SNEAP and IFP France granted CS Resources a licence to use certain expertise and technical information relating to horizontal wells for the enhanced production of oil and gas (the "Technology") in return for a 3% gross overriding royalty on all lands held or acquired by CS Resources on which the Technology was used. CS Resources could terminate the TLA on 60 days written notice. SNEAP later assigned its rights to IFP France on April 3, 1990 and then on March 16, 1993, IFP France in turn assigned the rights to IFP.

14 In addition, at the same time in 1993, IFP France and CS Resources entered into a Cooperation

Agreement under which they agreed to extend their joint collaboration to other technologies linked to the Technology. They agreed that any production of oil and gas by CS Resources using such other technologies would also be subject to the 3% gross overriding royalty in favour of IFP.

15 By 1997, CS Resources was using the Technology and other technologies to produce oil and gas from certain properties and paying IFP the agreed upon 3% royalty. In July 1997, PCR acquired CS Resources and created the PCR Van Horne business unit to operate the merged heavy oil assets of PCR and CS Resources. At that time, PCR held a number of Crown oil and gas leases for Eyehill Creek. Two partners in PCR were EnCana Oil & Gas Developments Ltd. (formerly known as 592284 Alberta Ltd.) and PanCanadian Petroleum Limited (PCP). At the time the causes of action accrued, PCP was the managing partner of PCR. PCP was later succeeded by EnCana Corporation and the name of the PCR partnership was changed to EnCana Midstream and Marketing whose assets were later divided between EnCana Heritage Lands and EnCana Corporation. EnCana Heritage Lands was then itself wound up into EnCana Corporation which in 2009 was split into two companies, namely EnCana Corporation and Cenovus Energy. For convenience, I refer to PCR (the name of the original partnership) in these Reasons. This reference necessarily includes the relevant surviving partners.

16 After taking control of CS Resources, PCR indicated to IFP a desire to terminate the TLA and redefine their relationship with the intention of jointly developing and implementing new technologies.

17 One of PCR's heavy oil properties was Eyehill Creek (then sometimes referred to as the "North Bodo" property), located in Township 38, Range 1 W4M, Alberta. This lies just to the west of the border between Alberta and Saskatchewan. At one time, Eyehill Creek had been the site of primary production operations for extraction of oil. By the late 1990s, PCR no longer considered this conventional oil drilling economically viable and most of the 222 wells in the area had been shut-in. While PCR recognized that this was so, in January, 1998, its Van Horne business unit had identified a number of sections in Eyehill Creek as an attractive candidate for what was then a relatively new method of recovery for heavy oil. In particular, PCR believed that Eyehill Creek was well-suited for piloting an enhanced thermal recovery process known as steam-assisted gravity drainage (SAGD).

18 SAGD is one of a number of thermal processes designed to achieve enhanced oil recovery (EOR). Its purpose is to recover oil which would otherwise not be recoverable through conventional methods such as primary production. In a traditional SAGD project, two horizontal wells are paired. One is drilled above the other. Steam is injected into the upper well. The steam makes the oil less viscous and the oil flows down towards the lower, producing well.

19 In April, 1998, PCR proposed to IFP that it grant IFP a working interest in Eyehill Creek in consideration of IFP's terminating the royalty it received under the TLA.

20 In May, 1998, at the joint request of PCR and IFP, Dobson Resource Management Ltd. (Dobson) carried out an independent economic evaluation of Eyehill Creek on which PCR and IFP could rely in their forthcoming negotiations. Dobson's evaluation assumed that oil would be extracted from Eyehill Creek through a SAGD project.

B. Making the Deal

21 Negotiations then took place between PCR and IFP. The evidence is incontrovertible that both parties came to the table with the desire to jointly pursue a SAGD project at Eyehill Creek. IFP's parent organization, IFP France, which has been in the oil and gas technology industry since 1944, brought a level of technological expertise and innovation that was matched by the level of PCR's expertise as an oil and gas site operator. IFP would have the opportunity to field test its thermal technologies, and PCR would be able to extract a far higher percentage of the oil from what PCR then considered a "dead" site. According to PCR's own senior reservoir and production engineer, Simon Gittins (Gittins), by that point PCR believed primary production was finished in Eyehill Creek and the field should be considered abandoned if production was limited to primary only: Appeal Record (AR) 1490/23-1491/8.

22 The negotiations began with PCR's proposing that IFP be given a working interest in thermal development only at Eyehill Creek and ended with IFP's agreeing to a 20% working interest in all development at Eyehill Creek. By July 13, 1998, PCR and IFP had concluded a Memorandum of Understanding (MOU). As the Trial Judge found, the MOU redefined the relationship between PCR and IFP following termination of the TLA: QB Reasons at para 29. Under the MOU, PCR and IFP agreed to an asset swap. IFP would give up its 3% gross overriding royalty in exchange for PCR's granting IFP the "right" to "a 20% (twenty percent) working interest related to the development and production of oil and gas resources within all formations of the North Bodo area [Eyehill Creek], whether such development and production is of a primary, assisted or enhanced nature" [Emphasis added] (Extracts of Key Evidence (EKE), R45).

23 Following conclusion of the MOU, the parties turned their attention to its implementation as they had agreed to do under Clause 4 of the MOU. That Clause provided that the parties would confirm the terms and conditions of the MOU in a "formal agreement" to be executed at October 31, 1998 at the latest "setting forth in detail the terms, provisions and conditions for the transactions" outlined in the MOU. This led to further negotiations to document in a formal agreement the terms and conditions in the MOU.

24 In August, 1998, the month after execution of the MOU, PCR shared with IFP its preliminary plan for a thermal project at Eyehill Creek. It divided the project into two areas. An undepleted area was to be exploited first (south 1/2 of section 16, north 1/2 of section 9 and west 1/2 of section 20). The depleted area (referred to as depleted because this is where primary production had been undertaken) would be exploited later (north 1/2 of section 16, southwest 1/4 of section 21, southeast 1/4 of section 20 and northeast 1/4 of section 17). Sections 9, 17 and 21 were owned by PCR; sections 16 and 20 were Crown land. There were an estimated 29,000,000 barrels of original oil in place (OOIP) in the undepleted area and an estimated 32,000,000 barrels of OOIP in the depleted area (after roughly 3,000,000 barrels had been produced by primary production).

25 PCR and IFP subsequently entered into a contract, effective as of October 26, 1998, implementing the terms of the MOU. IFP agreed to give up the 3% gross overriding royalty it held on a number of PCR-operated wells through the TLA. PCR and IFP agreed that, in exchange for IFP's giving up its gross overriding royalty - which IFP and PCR valued at $16,000,000, $14,800,000 of which IFP allocated to Eyehill Creek - IFP would be assigned, among other things, 20% of PCR's working interest in the petroleum and natural gas rights in Eyehill Creek.[3]

26 The deal (Deal) made between PCR and IFP involves a number of agreements, four of which are critically significant. The first is the MOU.

27 The second is a formal Asset Exchange Agreement (AEA), effective as of October 26, 1998. This master agreement sets out the business terms of the Deal under which IFP gave up its gross overriding royalty under the TLA in exchange for receiving a prescribed percentage of PCR's working interests in Eyehill Creek and another area called Pelican Lake, along with a royalty in one of the formations of Pelican Lake.

28 Attached to the AEA as schedules are a number of agreements, one of which is the third agreement, a Joint Operating Agreement (JO A). The JO A, also effective as of October 26, 1998, is Schedule F to the AEA. The JO A details the operational rights and responsibilities of the parties with respect to the thermal project that PCR and IFP intended to pursue at Eyehill Creek. Two related terms of the JO A are important to highlight here. These are set out in the modified 1990 Canadian Association of Petroleum Landmen Operating Procedure (Operating Procedure) attached as Schedule B to the JO A.

29 First, under Article 2401 of the Operating Procedure, if either PCR or IFP chose to sell their respective working interest to a third party, it was required to offer its co-owner a right of first refusal (ROFR) to buy out that interest before offering it to another potential buyer. Second, even if the co-owner to whom the interest was offered chose not to exercise its ROFR, the co-owner intent on disposing of its working interest to the third party could not do so without its co-owner's consent, which was not to be unreasonably withheld.

30 The fourth agreement is a Technology Development Agreement (TDA), also effective as of October 26, 1998, under which the parties agreed to work together in the future to develop new oil and gas technologies.

31 For convenience, I refer to the AEA, the JO A, the TDA and all other schedules to these agreements collectively as the "Contract".

C. PCR's Disposition of Its Working Interest in Eyehill Creek and Resulting Fallout

32 Within half a year of the Deal, heavy oil prices had fallen dramatically. Gas prices had risen. As time passed, the economics of a thermal recovery project at Eyehill Creek began to look poor to PCR. In addition, PCR was facing resource competition and leasing issues with a number of its other properties. This last point was unknown to IFP since PCR did not share this information with it.

33 Also unknown to IFP was the fact that PCR had let a lease in Eyehill Creek lapse as of April 13, 2000. The Crown lease involved part of the lands in Eyehill Creek, the west half of section 20 (W20). This was one of the half sections in the undepleted area that PCR had identified as the first for a thermal project. A landman with PCR, Greg Sinclair (Sinclair), then attempted to salvage PCR's rights to W20 by filing a continuation application with Alberta Resource Development. But Alberta Resource Development advised on July 11, 2000 that the late application would not be accepted since the lease did not qualify for continuation under its late application rules. Had PCR applied prior to the lease having expired, there

would have been less difficulty in having it renewed. Under the relevant regulation in force at the time, Petroleum and Natural Gas Tenure Regulation, Alta Reg 263/97, ss 14-17 (amended 11/2000), additional requirements apply where the application for continuation of a lease is not made until after the expiration of its term.

34 As noted, PCR failed to notify IFP of its failure to renew the lease on a timely basis. PCR's failure to renew the lease triggered a chain of events that led to the Alberta Energy and Utilities Board's issuing abandonment notices to PCR for each of the 29 shut-in wells on the W20. Throughout this cascading series of events, PCR failed to comply with the requirement in the Operating Procedure to keep IFP informed of all matters relating to lease maintenance: see Article 309(b) of the Operating Procedure (EKE, A80). Thus, PCR did not give IFP copies of any of these notices. This was so despite the fact that PCR had previously complied with this obligation with respect to other more routine lease issues: see, for example, letter from Sinclair to IFP's general manager, Eric Delamaide (Delamaide), dated December 16, 1999 (EKE, A97). And it was so even though PCR was holding IFP's share of the Eyehill Creek Petroleum and Natural Gas Leases in trust: see JO A, clause 6 (EKE, A71).

35 The abandonment notices required PCR to prove its right to produce from each well within 30 days, failing which PCR would have to abandon the wells. PCR did not prove any right to produce. This led in turn to the Crown's posting the W20 lease for sale. PCR bid only $1800. The Wiser Oil Company of Canada bid more than $1 million and it acquired the W20 lease in November, 2000. (A related company, The Wiser Oil Company, is a body corporate incorporated under the laws of Delaware and extra-provincially registered in Alberta. In these Reasons, I refer to The Wiser Oil Company of Canada and The Wiser Oil Company collectively as "Wiser"). IFP knew nothing about any of these developments either, including the Crown's posting of the W20 lease for sale or the fact that PCR intended to bid only $1800 for the W20 lease.

36 In the meantime, on August 31, 2000, Alberta Resource Development had issued further notices to PCR that two of its Crown leases within Eyehill Creek were no longer eligible for continuation. The first lease related to part of section 16 and the second to part of section 20. These notices informed PCR that it had one year from the date of the notices to provide evidence satisfying Alberta Resource Development that the lands in question were capable of producing petroleum or natural gas in paying quantities. Failing this, the rights subject to the notices would expire and the leases would be amended accordingly. These notices required PCR to have one economically producing well per spacing unit within the one year period. IFP was unaware that Alberta Resource Development had issued these notices because, yet again, PCR, in breach of its contractual obligations, failed to inform IFP of this development.

37 By December, 2000, the month following the Crown's sale of the W20 lease to Wiser and just over two years following completion of the Deal, PCR had entered into talks to farmout its 80% working interest in Eyehill Creek to Wiser. This too was unknown to IFP. In fact, it was not until February, 2001 that IFP received informal notice that PCR was planning on entering into a farmout agreement with Wiser. This occurred when PCR gave IFP's Delamaide a draft copy of the proposed letter agreement between PCR and Wiser.

38 In March, 2001, PCR and Wiser executed a letter agreement (Letter Agreement) setting out the terms under which Wiser would "earn" PCR's working interest in Eyehill Creek. Unlike most farmout

agreements, Wiser was not required to drill wells to earn PCR's interest. Instead, it was to assume responsibility for the abandonment and reclamation costs of existing primary wells in Eyehill Creek. The Letter Agreement expressly stated that PCR was acting on behalf of all working interest owners, including IFP.

39 Wiser planned to reactivate some existing wells and drill new ones on the site to exploit Eyehill Creek using primary production methods. It was particularly interested in targeting sections 9 and 16 - the very sections (the north 1/2 of 9 and the south 1/2 of 16) that PCR had identified as ideal for a SAGD thermal project. At this point, it is important to stress that primary production and SAGD cannot practically be physically undertaken on a site at the same time, a point which would have been well known to both PCR and IFP throughout.

40 Finally, on April 19, 2001, in accordance with the JO A, PCR formally sent IFP a ROFR Notice confirming that PCR and Wiser had concluded the Letter Agreement and were in the process of finalizing a formal Abandonment Reclamation Option Agreement (ARO) to be effective as of January 1, 2001. The ARO was eventually entered into on May 18, 2001.

41 On May 4, 2001, PCR (through Sinclair) sent a letter to the attention of Delamaide at IFP, purportedly on behalf of Wiser, seeking clarification of IFP's interest in Eyehill Creek. In the letter, Sinclair invited IFP to confirm that it owned nothing more than a 20% interest in "petroleum substances produced by means of thermal or enhanced recovery schemes or mechanisms and operations in relation thereto". In fact, Sinclair went so far as to request that IFP acknowledge that it would have "no right ... to receive information" about Wiser's operations: EKE, A127-128. Delamaide referred to this communication as the "ugly letter": AR 107/12-14.

42 As a research and technology company, IFP was apparently in no position to take on the operations at Eyehill Creek on its own. Nor could it reasonably locate another thermal project partner within the ROFR's 30 day deadline. More fundamentally, IFP was concerned that the primary production Wiser planned would render any future SAGD project on the lands economically impracticable. As the evidence at trial confirmed, conducting primary production on a site negatively impacts the practical and economic viability of thermal extraction for various reasons. Therefore, on May 9, 2001, IFP notified PCR that it waived the ROFR in favour of IFP and it also confirmed that it refused to consent to PCR's disposition to Wiser.

43 Despite IFP's refusal to consent, PCR and Wiser entered into the formal ARO on May 18, 2001. As the Trial Judge found, under the terms of the ARO, PCR no longer purported to act on IFP's behalf. Since IFP had refused to consent to PCR's disposition to Wiser, PCR agreed in the ARO to indemnify Wiser from any liability of Wiser to IFP. This being so, PCR is responsible for any liability imposed on Wiser, whether to account for the net revenue Wiser has realized from primary production at Eyehill Creek or otherwise.

44 Wiser completed its abandonment and reclamation program at the end of 2003. In the meantime, PCR formally assigned its petroleum a nd natural gas rights and surface rights to Wiser effective January 1, 2003.

45 Wiser extracted petroleum and natural gas from Eyehill Creek using only primary production methods. Wiser d id not keep IFP notified of any steps taken with respect to any of the leases at Eyehill Creek or otherwise. Wiser's stated excuse fo r not doing so: it was not asked to keep IFP informed of the steps taken at Eyehill Creek: see evidence of Wiser employee, Robert Pankiw (Pankiw), at AR 1789/23-41.

46 On March 4, 2003, after IFP was unsuccessful in its attempts to resolve this matter with PCR, IFP filed a statement of claim for breach of contract. IFP sought $45 million in damages for breach of contract and lost opportunity, or alternatively, an accounting fo r 20% of the net revenue from primary production conducted at Eyehill Creek by Wiser and Wiser's successor, Canadian Forest Oil Ltd. (Canadian Forest).[4]

47 Canadian Forest acquired Wiser's interests in November, 2004 and has continued to produce petroleum and natural gas from Eyehill Creek using only primary production methods. And like Wiser, Canadian Forest did not keep IFP informed of its operations, pending lease expiries or related matters. Canadian Forest's stated excuse: it understood that IFP was not a working interest owner in primary production operations: see evidence of Canadian Forest employee, Craig Seal, at AR 1726/8-11, 36-40; 1728/38-1729/5. Wiser employee Pankiw seemed to have the same understanding: AR 1765/39-1766/6; 1770/11-14.

D. The Trial Decision

48 The original trial judge, who heard the 33-day trial between January and June, 2011 passed away in the spring of 2014 before rendering judgment. Under Rule 13.1 of the Alberta Rules of Court, Alta Reg 124/2010, the Trial Judge took conduct of the case. The parties agreed that the matter could be decided based on the written record rather than proceeding with a new trial.

49 In the QB Reasons, the Trial Judge provided a detailed analysis of the complex evidence in this case. The Trial Judge ultimately held that IFP's 20% working interest was limited to thermal and other enhanced recovery methods at Eyehill Creek. This was based on the conclusion that the AEA lacked a definition of working interest that the JO A and Operating Procedure provided.

50 The reasoning path to this conclusion may be summarized as follows. The parties did not define in the AEA what was meant by "working interest". The preamble to the AEA referred to the parties' working interests being subject to the terms of the JO A, incorporated by reference into the AEA. The JOA's definition of working interest, taken from the Operating Procedure, is "... the percentage of undivided interest held by a party in a production facility on the joint lands, ... which percentage is as provided in the [JOA]..." The JOA set out at Clauses 4(c) and 5 that the parties' respective working interests (IFP - 20%; PCR - 80%) relate to thermal and enhanced recovery operations only. Thus, IFP's working interest in Eyehill Creek was limited to thermal and other enhanced recovery methods only. This being so, there was no inconsistency between the terms and conditions of the AEA and the JOA. As a consequence, IFP had no entitlement under the Contract to any of the proceeds of primary production at Eyehill Creek.

51 The Trial Judge also determined that it was unreasonable for IFP to object to PCR's farmout agreement with Wiser. The proffered rationale - Wiser was proposing to do no more than PCR was

already entitled to do under the Contract. That is because of the findings that neither the AEA nor the JOA imposed any obligations on PCR to (1) initiate a SAGD operation at Eyehill Creek; or (2) refrain from primary production at Eyehill Creek. Accordingly, on this reasoning, PCR's transfer to Wiser did not change the status quo. By restarting primary production, Wiser was doing no more than PCR already had a right to do under the Contract.

52 The Trial Judge went on to find that even if there had been a contractual breach, IFP suffered no loss of opportunity because PCR's and Wiser's actions did not render a thermal or enhanced recovery operation "impossible" at Eyehill Creek. The Trial Judge acknowledged that the benefits of IFP's working interest may be more expensive to realize and that there was now less oil in the ground. However, improved technologies meant that the site's SAGD potential was not "destroyed". The Trial Judge then determined that a potential damages award could not be properly calculated due to what was viewed as limited evidence and a flawed damages model as to the incremental costs of any future thermal development. Therefore, no award was made.

53 The Trial Judge also held that, even if a damages award were made, the amount should be discounted by 100%. He reasoned that after IFP received news of PCR's agreement with Wiser, IFP did not try to stop the sale. Nor did it undertake any internal processes to advance a thermal project, turn to its French parent for funding for a thermal project, or seek out another operational partner. All of this led to his finding that there was zero likelihood of a thermal development at Eyehill Creek within the time frame considered determinative, that is "within a reasonable time" of the alleged breach of contract.

54 The Trial Judge concluded that since IFP had unreasonably refused its consent to the Wiser disposition, PCR did not breach the consent requirement found in the JOA and Operating Procedure. Therefore, PCR was entitled to proceed with the farmout and Wiser was novated into the original agreements between IFP and PCR. As for IFP, it retained its 20% working interest only in thermal and other enhanced recovery operations at Eyehill Creek.

55 In the result, the Trial Judge determined that the Contract was at odds with what he considered to be IFP's unilateral expectations with respect to (1) the nature of its working interest in Eyehill Creek; and (2) PCR's obligations not to engage in primary production. He declined to award any damages on the basis that this would be giving IFP "a better set of contracts conferring rights" than IFP had negotiated: QB Reasons at para 407. Therefore, IFP's claim was dismissed in its entirety.

III. Grounds of Appeal

56 IFP advanced six broad grounds of appeal, which I would reduce to four. IFP contended that the Trial Judge erred in concluding that:

1. The Contract gave IFP a 20% working interest in oil and gas produced only from thermal and other enhanced recovery methods at Eyehill Creek;
2. IFP is not entitled to an accounting for the net revenue realized from primary production at Eyehill Creek;
3. IFP unreasonably refused to consent to PCR's disposition to Wiser; and

4. Even if it was reasonable for IFP to withhold its consent, IFP suffered no loss and even if it did, that loss should be discounted by 100%.

IV. Standard of Review

A. Governing Law

57 At issue on this appeal is the Trial Judge's interpretation of the Contract between PCR and IFP. The current law on contractual interpretation requires that appellate courts accord a high degree of deference to a trial judge's particular interpretation of a contract. Because this usually involves findings of fact or mixed fact and law, the interpretation is reviewed for reasonableness: ***Sattva***, supra at paras 50-52; ***Heritage Capital Corp. v Equitable Trust Co***. , 2016 SCC 19 at paras 21, 24, [2016] 1 SCR 306 [***Heritage***]. However, if a contractual interpretation issue involves an extricable question of law, it will be reviewed for correctness: ***Sattva***, supra at para 53; ***Heritage***, supra at para 22.

58 One error of law reviewed for correctness is where the trial judge fails to consider the "surrounding circumstances" or "factual matrix" of a contract. A trial judge must consider the factual matrix in interpreting a contract regardless of whether the contract is ambiguous. Therefore, it is an error for a trial judge to discount the factual matrix on the basis that the contract itself is not ambiguous: ***British Columbia (Minister of Technology Innovation and Citizens' Services) v Columbus Real Estate Inc.***, 2016 BCCA 283 at paras 40, 51, 402 DLR (4th) 117; ***Starrcoll Inc. v 2281927 Ontario Ltd.***, 2016 ONCA 275 at paras 16-17, 68 RPR (5th) 173.

59 Providing that the trial judge has not erred in law in the approach to the factual matrix, whether a contract is ambiguous is reviewed for palpable and overriding error: ***Bighorn (Municipal District No. 8) v Bow Valley Waste Management Commission***, 2015 ABCA 127 at para 9, 599 AR 395 [***Bighorn***].

60 Where a standard form contract is involved, the standard of review that applies to its interpretation is usually correctness: ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co.***, 2016 SCC 37 at paras 4, 24, 46, 48, [2016] 2 SCR 23 [***Ledcor***]. As the Supreme Court noted, these are highly specialized contracts typically sold widely to customers without negotiation of their terms and their interpretation could affect a large number of people. As a result, it would be undesirable for courts to interpret identical standard form provisions inconsistently.

61 By analogy, this reasoning applies with equal force to legal terms of art which have a common meaning to participants in a given industry. In such event, there is no identified need to define what such terms mean. Participants in the oil and gas industry rely on the commonly accepted usage of many terms: see, for example, the Glossary of Land Terms published by the Canadian Association of Petroleum Land Administration (CAPLA): CAP LA, "Glossary of Land Terms 2016", NEXUS (September 2016) 9 at 15.[5] "Working interest" is one of them. Since this term has an accepted meaning and usage in this sector, and its interpretation has precedential value, it must therefore be interpreted consistently. Thus, where the issue involves the meaning of a legal term of art - in this case, "working interest" as used in the oil and gas industry - the standard of review with respect to the meaning of that term is correctness.

62 While a legal term of art may be modified by the parties to an agreement, that does not permit a trial

judge to ignore the meaning attributable to it in the absence of such modification. To do so is tantamount to failing to take into account a key term of a contract or relevant factor or ignoring applicable principles and governing authorities. That, in turn, is a question of law reviewable for correctness: ***Sattva***, supra at para 53; ***Deslaurier Custom Cabinets Inc. v 1728106 Ontario Inc.***, 2017 ONCA 293 at paras 65-68. Accordingly, a trial judge's failure to recognize that a legal term of art has a certain meaning is, by itself, an error of law reviewable for correctness. That is what happened here.

63 Admittedly, not all errors of law are created equal. The legal error must relate to a material issue in the dispute which, if decided differently, would have affected the result of the case. However, there is no doubt that the error of law here - failing to recognize that the term "working interest" has a specific meaning in the oil and gas industry - adversely compromised the analysis of the nature and extent of the interest that IFP acquired from PCR in Eyehill Creek.

64 Moreover, even where reasonableness is the standard of review, the law does not countenance a free-for-all in contractual interpretation where anything goes and everything slides easily under the deference bar. The objective application of established principles of contractual construction may well lead to a situation where there is, as with an administrative tribunal's interpretation of a statute, only one reasonable interpretation: ***McLean v British Columbia (Securities Commission)***, 2013 SCC 67 at para 38, [2013] 3 SCR 895.

65 In deciding what the parties to a contract intended, a practical, common-sense approach is called for: ***Sattva***, supra at para 47. Courts should not sanction interpretations disconnected from economic reality, much less from a contracting party's obligation to act honestly and in good faith. Not only are these legitimate considerations in their own right, but if not followed, companies will be highly motivated to take their disputes out of the courts and into the private sector for resolution. Admittedly, this is already occurring in Canada. But the standard of review ought not be the catalyst for pushing more contractual disputes out of the public domain. When companies vote with their feet, this is ultimately hurtful to the evolution of the common law. And how ironic too were this to occur because of a standard of review designed to ensure that courts are not unduly overburdened.

B. Why Standard of Review Should Not Be Correctness for All Issues

66 Despite the established law on standards of review, IFP has invited this Court to apply a correctness standard of review to all the issues on appeal. It has done so based on the unusual circumstances of the trial proceedings. In its view, the Trial Judge's decision was the result of a flawed process, exacerbated by delay. Thus, it argues that the three policy reasons justifying a "reasonableness" standard of review, as set out by the Supreme Court in ***Housen v Nikolaisen***, [2002] 2 SCR 235, 2002 SCC 33 [***Housen***], do not apply here.

67 In particular, IFP submits that (1) there is no concern that applying the correctness standard will result in an increased number of appeals due to this case's unusual circumstances; (2) there is no need to preserve the integrity of the trial proceedings here as they have already been compromised by delay; indeed, the only way to preserve confidence in the judicial system is for a reconsideration of the issues; and (3) the Trial Judge enjoyed no advantageous position compared to this Court since his decision was made only on the basis of a written record.

68 IFP's argument cannot succeed. I offer five reasons for this conclusion.

1. Recognizing the Purpose of Appellate Review

69 By advocating a correctness standard of review, IFP is essentially asking for a re-trial, again on the record, but this time by this Court. However, appellate review is not meant to be a duplication of effort by judicial actors with little, if any, improvement in the quality of justice delivered: ***Housen***, supra at para 16; Roger P Kerans & Kim M Willey, Standards of Review Employed by Appellate Courts, 2nd ed (Edmonton: Juriliber, 2006) at 24 [Kerans & Willey].

70 The trial itself was long and complex. It took approximately six weeks and included an information session at the Alberta Energy Research Core Laboratory. Twenty-five witnesses were called (including 12 experts), and over 600 exhibits were entered (including many highly technical reports). If a correctness standard of review were followed for all issues, this Court would be duplicating the Trial Judge's work entirely by re-examining the numerous volumes of transcribed testimony a nd documentary evidence. There is no basis to believe this would actually result in any net enhancement to the administration of justice.

2. Recognizing the Jurisdiction of Appellate Courts

71 Restrictions on appellate review are not simply matters of polite deference but of jurisdiction. Deference to fact findings is a rule of law: ***Hodgkinson v Simms***, [1994] 3 SCR 377 at 426, 117 DLR (4th) 161. The role of appellate courts is to ensure the consistency of the law: ***Sattva***, supra at para 51. Not all issues in this appeal fall into this category.

3. Recognizing the Expertise of Trial Judges and Their Advantageous Position

72 Trial judges are often better situated to make factual findings d ue to their extensive exposure to the evidence, their advantage of hearing testimony viva voce, and their overall familiarity with a case: ***Housen***, supra at para 18. IFP argues that this Court is in the same position to make findings as the Trial Judge since the decisions of both courts will be based on a written record. The implication is that the Trial Judge enjoyed no advantageous position with respect to fact-finding that justifies deference. However, deference is based on more than simply situational advantage. A trial judge's primary role is to weigh a nd assess the often-lengthy volumes of testimony and exhibits in a case. A trial judge's considerable expertise in the art of judicial gold-panning should be respected.

73 Moreover, the process the parties all agreed to here is analogous to a summary proceeding. And deference applies in summary proceedings even where decisions may be based only on documentary evidence and the trial judge heard no evidence: ***Housen***, supra at paras 19, 24-25; ***Attila Dogan Construction and Installation Co. Inc. v AMEC Americas Limited***, 2015 ABCA 406 at para 9, 609 AR 313; ***1216808 Alberta Ltd. (Prairie Bailiff Services) v Devtex Ltd.***, 2014 ABCA 386 at para 24, 247 ACWS (3d) 348; ***FL Receivables Trust 2002-A v Cobrand Foods Ltd.***, 2007 ONCA 425 (CanLII) at paras 44-46, 85 OR (3d) 561. Therefore, the process followed does not, by itself, justify a correctness

standard of review for all issues.

4. Promoting the Autonomy and Integrity of Trial Proceedings

74 A key presumption underlying our judicial system is that a just and fair outcome will result from the trial process: ***Housen***, supra at para 17. IFP argues that this presumption of fairness does not apply in this case. It contends that excessive delay and the original trial judge's inability to make a decision have compromised these proceedings to the point that a comprehensive hearing and reconsideration of the issues is required to preserve confidence in the judicial system.

75 But this overlooks the fact that IFP, knowing what had transpired with the original trial judge, nevertheless made a calculated decision, along with the other parties, to let the Trial Judge take conduct of this case under Rule 13.1. The existence of Rule 13.1 is itself an acknowledgement that trial proceedings may not always go as planned, and that courts of first instance are still competent to decide the cases before them even if there is a change in judges. Otherwise, such situations would lead to an automatic appeal or retrial. As events unfolded in this case, the parties were provided with a process akin to a retrial but without having to repeat the considerable investment of time and resources already expended. It was their decision to make whether to opt for this process. All did, including IFP. This should not be taken as a criticism; it is perfectly understandable why all parties agreed to this process.

76 Further, IFP's procedural objections about delay and a flawed process have not displaced the presumption that the Trial Judge followed and respected his obligation to decide issues independently and impartially. No one has alleged that the Trial Judge was anything but fair and impartial in the way he conducted the proceedings. Thus, while delay was a legitimate concern in this case, it did not render the Trial Judge's decision unjust. Nor did it void the integrity of the trial process.

5. Limiting the Number, Length and Cost of Appeals

77 A key concern of our judicial system is to encourage the fair and just resolution of claims in a timely and cost-effective way. In many respects, standards of review are an effective "case-management device" that appellate courts use to regulate workloads and ensure the efficacy of the courts: Kerans & Willey, supra at 32. IFP argues that applying a correctness standard in this case is not likely to increase the overall number of appeals to this Court given the specific fact scenario involved. But this argument fails to recognize that inconsistent application of standards of review encourages parties to file more appeals questioning the appropriate standard. This frustrates the efficacy of the appeal process and diverts the focus from the merits of a case.

78 Therefore, for all these reasons, despite the unexpected and undesirable course of these proceedings, there is no principled justification to apply a correctness standard of review to all issues before this Court. The existing law on standards of review governs.

V. Principles of Contractual Interpretation

A. Goal of Contractual Interpretation

79 I now turn to a brief overview of the applicable principles of contractual interpretation. The goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was made through the application of legal principles of interpretation: ***Sattva***, supra at para 49. To this end, "the exercise is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix": Geoff R. Hall, Canadian Contractual Interpretation Law, 2nd ed (Markham: LexisNexis, 2012) at 33 [Hall]. Accordingly, disputed contractual terms must be interpreted, not in isolation, but in light of the contract as a whole: ***Tercon Contractors Ltd v British Columbia (Transportation and Highways)***, 2010 SCC 4 at para 64, [2010] 1 SCR 69.

1. Requirement to Consider Factual Matrix

80 One aspect of the current law on contractual interpretation engaged by this appeal relates to the relevance of the factual matrix. In ***Sattva***, the Supreme Court finally clarified that courts ought to "have regard for the surrounding circumstances of the contract - often referred to as the factual matrix - when interpreting a written contract" (para 46). Why? As the Supreme Court noted, "ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning" (para 47).

81 Considering the surrounding circumstances of a contract does not offend the parol evidence rule. That rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract. However, evidence of surrounding circumstances is not used for this purpose but rather as an objective interpretive aid to determine the meaning of the words the parties used: ***Sattva***, supra at paras 59-61. Therefore, while the factual matrix cannot be used to craft a new agreement, a trial judge must consider it to ensure the written words of the contract are not looked at in isolation or divorced from the background context against which the words were chosen. The goal is to deepen the trial judge's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. This approach is in keeping with Lord Steyn's famous admonition in ***Regina v Secretary of State for the Home Department, Ex Parte Daly***, [2001] UKHL 26 at para 28 that "[i]n law context is everything".

82 Thus, in interpreting a contract, a trial judge must consider the relevant surrounding circumstances even in the absence of ambiguity: Hall, supra at 24-25; John D. McCamus, The Law of Contracts, 2nd ed (Toronto: Irwin Law, 2012) at 751 [McCamus]; ***Bighorn***, supra at para 10; ***Directcash Management Inc. v Seven Oaks Inn Partnership***, 2014 SKCA 106 at para 13, 446 Sask R 89; ***Nexxtep Resources Ltd v Talisman Energy Inc***, 2013 ABCA 40 at para 31, 542 AR 212 [***Nexxtep***], citing ***Dumbrell v The Regional Group of Companies Inc***, 2007 ONCA 59 at para 54, 85 OR (3d) 616; ***Hi-Tech Group Inc. v Sears Canada Inc***, 2001 CanLII 24049 at para 23, 52 OR (3d) 97 (CA) [***Hi-Tech***]; ***Eco-Zone Engineering Ltd v Grand Falls-Windsor (Town)***, 2000 NFCA 21 at para 10, 5 CLR (3d) 55.

83 Determining what constitute properly surrounding circumstances is a question of fact. As to what is meant by surrounding circumstances, this consists of "objective evidence of the background facts at the time of the execution of the contract ... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": ***Sattva***, supra at para 58.

Examples of relevant background facts include: (1) the genesis, aim or purpose of the contract; (2) the nature of the relationship created by the contract; and (3) the nature or custom of the market or industry in which the contract was executed: ***Sattva***, supra at paras 47-48; ***Geoffrey L. Moore Realty Inc. v The Manitoba Motor League***, 2003 MBCA 71 at para 15, 173 Man R (2d) 300; ***King v Operating Engineers Training Institute of Manitoba Inc.***, 2011 MBCA 80 at para 72, 270 Man R (2d) 63; ***Ledcor***, supra at paras 30, 106. Ultimately, the surrounding circumstances can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": ***Sattva***, supra at para 58, citing Lord Hoffman in ***Investors Compensation Scheme Ltd. v West Bromwich Building Society***, [1998] 1 WLR 896 at 913 (UKHL).

84 All this being so, it will be obvious why the factual matrix, that is surrounding circumstances, of a contract can be critical to understanding the objective intentions of the parties. That is certainly so in interpreting the Contract between PCR and IFP. Of particular relevance on this appeal are the genesis and purpose of the Contract and the relevant background, including the MOU. An antecedent agreement like the MOU, which has been agreed to in writing by both PCR and IFP, falls within the category of objective evidence of background facts.

85 Negotiations preceding the conclusion of the MOU are also relevant to the extent that they shed light on the factual matrix. It is true that evidence of negotiations is not itself admissible as part of the factual matrix: Hall, supra at 29; ***Keephills Aggregate Company Limited v Riverview Properties Inc.***, 2011 ABCA 101 at para 13, 44 Alta LR (5th) 264 [***Keephills***]. Nor generally are prior drafts of an agreement: ***Wesbell Networks Inc. v Bell Canada***, 2015 ONCA 33 at para 13, 248 ACWS (3d) 820. However, evidence of negotiations is relevant insofar as that evidence shows the factual matrix, for example by helping to explain the genesis and aim of the contract: Hall, supra at 30, 80; ***Nexxtep***, supra at para 32. Moreover, written evidence of those negotiations is far more objective evidence of the parties' intentions than after-the-fact evidence from opposing parties about oral statements made during negotiations.

2. Admissibility of Parol Evidence to Resolve Ambiguity

86 Further, where a contract itself is ambiguous, extrinsic evidence, that is parol evidence, may be admitted to resolve the ambiguity: Hall, supra at 59; McCamus, supra at 205; ***Paddon Hughes Development v Pancontinental Oil***, 1998 ABCA 333 at para 28, 223 AR 180 [***Paddon Hughes***]; ***Guaranty Properties Limited v Edmonton (City of)***, 2000 ABCA 215 at para 23, 261 AR 376; ***Nexxtep***, supra at para 20. In the face of ambiguity, the interpretation promoting business efficacy is to be preferred so long as it is supported by the text: ***Keephills***, supra at para 12; Hall, supra at 38-47.

87 Mere difficulty in interpreting a contract is not the same as ambiguity: ***Paddon Hughes***, supra at para 29. A contract is ambiguous when the words are "reasonably susceptible of more than one meaning": ***Hi-Tech***, supra at para 18. An ambiguity in the contract also allows courts to consider evidence of the parties' subsequent conduct post-contract: ***Shewchuk v Blackmont Capital Inc.***, 2016 ONCA 912 at paras 46, 56, 404 DLR (4th) 512; Hall, supra at 83-85. But it must be understood that even under this ambiguity exception to the parol evidence rule, there are limitations as to what parol evidence is admissible. In this regard, evidence as to the parties' subjective intentions is generally inadmissible.

3. Interpreting Commercial Contracts

88 Also of particular importance on this appeal, commercial contracts should be interpreted in accordance with sound commercial principles and good business sense: McCamus, supra at 763-766. In the absence of evidence of a bad bargain, courts should not interpret a contract in a way that yields an unrealistic or absurd result.

B. Conclusion

89 In the end, contractual interpretation is not an exercise in second guessing what could have been included in a contract while discounting or dismissing relevant terms of a contract and uncontradicted contextual information. It is instead an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context.

VI. Analysis

A. Overview of IFP's Interest in Eye hill Creek

90 Following a careful and comprehensive review of the QB Reasons and all relevant documentation, I have concluded that the Trial Judge erred in concluding that the Contract gave IFP a 20% interest in thermal and enhanced recovery methods only at Eyehill Creek. In my view, the Contract reveals that PCR agreed to transfer, and did transfer, to IFP 20% of PCR's working interest in all the assets held by PCR in Eyehill Creek, including both Crown oil and gas leases and leases that PCR held freehold. I have further concluded that the JOA did not reduce or limit IFP's working interest. Accordingly, IFP is entitled to an accounting for 20% of the net revenue realized by Wiser through primary production at Eyehill Creek.

91 The conclusions in the QB Reasons to the contrary stem from a number of errors of law and mixed fact and law which, individually and collectively, took the Trial Judge down an indefensible path never intended by the parties. Untangling these several errors is difficult in part because of the overlap amongst them and because one error then led to other errors, and eventually, the tangled thicket looks impenetrable.

B. Relationship Between AEA and Subsidiary Agreements

92 Before explaining the various errors, a critical point must be stressed. While it is a given that a contract must be interpreted as a whole, the AEA is nevertheless the dominant agreement concluded between PCR and IFP. Article 1.5 of the AEA expressly provides:

> There are appended to this Agreement the following schedules ... [Schedule "F" is the JOA] Such schedules are incorporated herein by reference as though contained in the body hereof. Wherever any term or condition of such schedules conflicts or is at variance with any term or condition in the body of this Agreement, such term or condition in the body of this Agreement shall prevail. [Emphasis added]

93 It is easy to understand why there was a felt need by the parties to include this mandatory requirement in the Contract. The complexity of the Contract was such that it would have been obvious to all that, in

proceeding to implement the MOU, a number of subsidiary agreements would be required in addition to a master agreement, some of which would be standard form contracts of general application only.

94 In the end, the Contract included the AEA and five subsidiary agreements attached as Schedules. In addition, a number of the Schedules themselves had more agreements attached, making for a total of 17 agreements in the Contract.[6] All this being so, it is self-evident why the parties took steps to ensure that the AEA as the master agreement contained an express provision that if there was any conflict or variance between the AEA and subsidiary agreements, the AEA would prevail. Prudence dictated the inclusion of this provision in the AEA - and for good reason.

95 Against this backdrop, I now turn to the errors in the QB Reasons.

C. Reviewable Errors in the QB Reasons

1. Failure to Take into Account Relevant Terms in the AEA

(a) Failure to Recognize the Legal Meaning of "Working Interest"

96 The problems with the contractual analysis began right from the start. If the starting point is wrong, it is easy to understand why the end point likely will be too. The AEA refers to PCR's conveying to IFP 20% of PCR's "working interest" in the PCR Eyehill Creek Assets. "Working interest", as that term is used in the AEA, has a specific legal meaning. Unfortunately, the Trial Judge failed to recognize this. By itself, this constitutes a reviewable error of law. The Trial Judge then compounded this error by wrongly using the fact that the parties had not expressly defined the meaning of "working interest" in the AEA to disregard, in their entirety, the textually explicit conveyance articles in the AEA.

97 Article 1.1(t) of the AEA defines the "PCR Eyehill Creek Assets" that PCR transferred to IFP as "an undivided interest equal to 20% of the working interest of PCR... in and to: (i) the PCR Eyehill Creek Petroleum and Natural Gas Rights; and (ii) the PCR Eyehill Creek Miscellaneous Interests." Yet the Trial Judge went on to conclude as follows at para 97 of the QB Reasons:

> I find that IFP's working interest pursuant to these agreements has always been limited to thermal and other enhanced recovery methods. I find the AEA did not grant broad rights that were subsequently reduced or modified by the JOA, as assumed by both the Plaintiff and the Defendants. The AEA does not define the term working interest. [Emphasis added]

98 It is true that the AEA does not expressly define the term "working interest". But that is unnecessary, indeed irrelevant, in the circumstances here since "working interest" is a legal term of art. On this point, the law is clear that a "working interest" in relation to mineral substances in situ is a particular kind of property right or interest in land. When the owner of minerals in situ (the Crown in this case) leases the right to extract these minerals (here to PCR), the right to extract is known as a "working interest": see ***Bank of Montreal v Dynex Petroleum Ltd.***, [2002] 1 SCR 146, 2002 SCC 7 at para 2 [***Dynex***]. This particular kind of interest in land is also commonly called a "profit à prendre", which allows a party to enter land and take a resource for profit: ***Dynex***, supra at para 9; ***Alberta Energy Company Ltd. v Goodwell Petroleum Corporation Ltd***, 2003 ABCA 277 at para 63, 339 AR 201; John Ballem, The Oil and Gas Lease in Canada, 4th ed (Toronto: University of Toronto Press, 2008) at 15; see also ***Orphan***

Well Association v Grant Thornton Limited, 2017 ABCA 124 at paras 32, 131. Therefore, simply stated, "working interest" constitutes the percentage of ownership that an owner has to explore, drill and produce minerals from the lands in question.

99 This meaning also happens to be consistent with the American definition of "working interest" as "the exclusive right to exploit the minerals on the land": see Howard Williams & Charles Meyers, Manual of Oil and Gas Terms, 8th ed (New York: Matthew Bender & Company, 1991) at 1377.

100 When PCR signed leases with the Crown to extract petroleum substances from the lands included in Eyehill Creek, it obtained a 100% working interest in those oil and gas leases with the sole right to extract the resources therein.[7] Therefore, when PCR in turn agreed to dispose of 20% of its working interest in Eyehill Creek to IFP, that "working interest" constituted a proportionate share of PCR's right to extract the minerals under the oil and gas leases, whether Crown or freehold, that it held in Eyehill Creek, irrespective of the method of extraction.

101 While a working interest may be limited to a specific zone or mineral, a "working interest" in minerals does not contemplate the right to profit from resource extraction being limited to, or dependent upon, a specific method of extraction. Accordingly, where contracting parties limit recovery of minerals conveyed to a particular method of extraction only, the party receiving that truncated right would not receive a true "working interest" in the minerals.

102 It takes but a moment of re flection to realize the difficulties a contrary view would entail. It is important to understand these difficulties because they explain and underscore why a true working interest in oil and gas cannot be limited to a specific method of extraction. If a working interest were contingent on the method of extraction, that would mean that where one party had the right to extract oil on certain lands through thermal production and another through primary production, two different parties would then be claiming rights to the same barrels of oil. This makes no sense practically or economically.

103 While more oil can be extracted through thermal production, the reality is that both methods involve extracting some of the same barrels of oil. Therefore, were two parties to be given rights to oil in the same property based on the method of extraction, the level of complexity this would necessarily engender, including how to handle competing claims to the same barrels of oil, would all need to be addressed. Many issues would require resolution, beginning with the most obvious. Who gets to extract the oil first - the party using primary production or the one using thermal production? After all, the answer cannot be based on who wins a footrace to the lands. If it were, the party doing primary production would invariably win given the lesser costs that this entails. Moreover, it is unclear how a right limited to receiving proceeds from a certain method of extraction only could possibly qualify as a property right in minerals when there is no "property" to which the right to share in proceeds of production might ever attach.

104 Nevertheless, even assuming for the sake of argument that contracting parties could in theory restrict a "working interest" in minerals to a particular method of extraction, PCR and IFP did not do so in the AEA. While parties to a contract are free to deviate from a legal term of art, there is nothing in the AEA that indicates any intention by the parties to depart from the legal meaning of a "working interest". To the contrary. To be absolutely precise, the AEA does not purport to limit the working interest that PCR conveys to IFP to oil and gas produced from thermal and other enhanced recovery methods. The word

"thermal" is not even mentioned in the AEA, not once, not ever. Nor are the words "enhanced recovery methods". Finally, and tellingly, the working interest conveyed to IFP is defined as "20% of the working interest of PCR". No one has ever suggested that PCR's working interest in Eyehill Creek was limited to oil and gas produced only through thermal and other enhanced recovery methods.

105 Thus, when PCR and IFP concluded the AEA, both would have understood - and intended - that the term "working interest" means what that term is understood to mean at law when they agreed that PCR would convey to IFP 20% of PCR's working interest in Eyehill Creek. In failing to recognize the legal meaning of "working interest", the Trial Judge erred in law.

(b) Disregarding the Substantive Provisions in the AEA

106 The Trial Judge also disregarded the clear, compelling textual wording of the substantive provisions in the AEA. That textual wording explicitly confirms the parties' understanding and intention - and in no uncertain terms. It expressly provides that PCR transferred to IFP 20% of PCR's working interest in all the assets defined therein. The key Article, Article 2.1 of the AEA, provides as follows:

> PCR hereby agrees to sell, assign, transfer, convey and set over to IFP, and IFP hereby agrees to purchase from PCR, all of the right, title, estate and interest of PCR (whether absolute or contingent, legal or beneficial) in and to the PCR Assets ..., all subject to and in accordance with the terms of this Agreement. [Emphasis added]

107 "PCR Assets" are defined in turn under Article 1.1(s) of the AEA, as meaning, amongst other things, the "PCR Eyehill Creek Assets". Article 1.1(t) defines "PCR Eyehill Creek Assets" as follows:

> "PCR Eyehill Creek Assets" means an undivided interest equal to 20% of the working interest of PCR, as and at the date hereof as more particularly described in [a land schedule], in and to:
>
> (i) the PCR Eyehill Creek Petroleum and Natural Gas Rights; and
>
> (ii) the PCR Eyehill Creek Miscellaneous Interests." [Emphasis added]

108 Following these definitions through to the end, "PCR Eyehill Creek Petroleum and Natural Gas Rights" is defined in Article 1.1 (x) to mean: "the interests set out in Exhibit 2 to Schedule "B-4" under the heading "Petroleum and Natural Gas Rights." Exhibit 2 attached to Schedule "B-4" lists title documents, including both petroleum and natural gas rights, and the joint lands to which they pertain. Hence, PCR's intention to convey to IFP 20% of PCR's working interest in all of these oil and gas rights is straightforward and explicit. The same holds true for the PCR Eyehill Creek Miscellaneous Interests. These Interests are defined in Article 1.1(w) to mean "all property, assets, interests and rights pertaining to the PCR Eyehill Creek Petroleum and Natural Gas Rights". This includes contracts and agreements relating to those rights, such as "gas purchase contracts" or "processing agreements".

109 The wording and meaning of these comprehensive and unequivocal provisions could not be more clear-cut. PCR sold and transferred to IFP a recognizable interest under property law - an undivided interest as a tenant in common equal to 20% of PCR's working interest in the PCR Eyehill Creek Petroleum and Natural Gas Rights (which included Crown leases) and in the PCR Eyehill Creek Miscellaneous Interests (which included other assets that PCR held in Eyehill Creek), as both terms are

defined in the AEA. In other words, when PCR conveyed to IFP 20% of PCR's working interest in the PCR Eyehill Creek Assets, PCR transferred the right to recover 20% of PCR's entire interest in the PCR Eyehill Creek Petroleum and Natural Gas Rights, irrespective of the method of extraction used for recovery. This is a case in which the textual wording of the AEA admits of no other reasonable conclusion. And yet, the Trial Judge disregarded the key conveyance provisions in the AEA. This too was a fatal error.

(c) Improper Reliance on Preamble Clause in the AEA

110 Nor does anything in the preamble clauses in the AEA change the meaning of "working interest" in the AEA. But the Trial Judge relied on the second preamble to the AEA in deciding that the meaning of the "working interest" is defined only in the JOA. That preamble reads as follows:

> AND WHEREAS following Closing IFP and PCR shall each own working interests in and to the PCR Lands, which shall be operated by PCR for and on behalf of PCR and IFP, all subject to and in accordance with the terms and conditions of the Joint Operating Agreements described in section 2.9 hereof; [Emphasis added]

111 To rely on this provision to justify looking only to the JOA for a definition of "working interest" also constitutes reviewable error. The subject preamble has nothing to do with the respective ownership interests of PCR and IFP. It addresses the fact the parties agreed that the operation of the PCR Lands, not their ownership, was to be "subject to and in accordance with" the JOA (and two other joint operating agreements attached as schedules to the AEA). Moreover, in any event, for reasons detailed below, the JOA does not modify or vary the meaning of "working interest" in the AEA.

112 In summary, the Trial Judge erred in law in (1) failing to recognize that "working interest" is a legal term of art with a specific meaning in the oil and gas industry; (2) disregarding in their entirety the clear, compelling substantive provisions in the AEA relating to the 20% of PCR's working interest that PCR conveyed to IFP; and (3) wrongly relying on a preamble provision in the AEA to trump its substantive textual provisions. This led the Trial Judge into further errors discussed below and in the end, it led him to an interpretation of the Contract that would give IFP not only an interest incompatible with the parties' objective intentions but one incompatible with the law on working interests in the oil and gas industry.

2. Failure to Consider Factual Matrix

113 The Trial Judge found that the JOA, and in particular Clause 4(c), was determinative of the nature and extent of IFP's working interest in Eyehill Creek. In so finding, however, the Trial Judge failed to consider surrounding circumstances on the basis the Contract was not ambiguous. This interpretive approach constitutes a reviewable error of law. Regardless of whether any such ambiguity existed, the surrounding circumstances ought to have been taken into account. Had they been, it would have been apparent that the JOA was not intended to - and did not - limit IFP's working interest in Eyehill Creek.

(a) Admissible Facts Relating to Surrounding Circumstances

114 Evidence of the negotiations between the parties and the MOU leading up to the conclusion of the

AEA and related documentation are critical to understanding the genesis and aim of the Contract, including the JOA in particular. But the Trial Judge failed to put these on the interpretive scale. Indeed, the MOU was expressly taken off it.

115 The incontrovertible facts, as revealed in the supporting documentary evidence, confirm that PCR and IFP agreed, following negotiations between the parties, that IFP would receive 20% of PCR's working interest in all development in Eyehill Creek. That agreement, documented in the MOU, did not limit IFP's interest in Eyehill Creek to thermal or enhanced production only. Indeed, the exact opposite is so. This is patently clear from the MOU.

116 The unchallenged background facts are these.

> April, 1998 PCR proposed Eyehill Creek to IFP as a property in which IFP might be granted a working interest in exchange for its gross overriding royalty.
>
> May 29, 1998 An internal PCR memo recommended assigning IFP a 6% working interest in Eyehill Creek "thermal development". The memo added: "The intent would not be to burden IFP with any of the ongoing liability or production due to primary operations."[8]
>
> June 15, 1998 PCR sent a fax to IFP offering to convey to IFP as of July 1, 1998 a "15% working interest in all thermal development" at Eyehill Creek. Of particular note, it added that IFP will have "[n]o abandonment obligation of existing infrastructure".[9] The fax also referenced a June 4, 1998 meeting in which PCR had proposed to IFP a range of working interest for IFP from 6% to 25% in Eyehill Creek.[10]
>
> June 16, 1998 IFP replied proposing that it receive a 20% working interest in Eyehill Creek on "all development (including thermal development)" with no abandonment obligations for existing infrastructure.[11]
>
> June 18, 1998 Mark Montemurro (Montemurro), head of the Van Horne business unit at PCR, sent a fax to IFP confirming that Montemurro was prepared to recommend that PCR agree to IFP's proposal dated June 16, 1998 and inviting IFP to forward to him a memorandum of understanding.
>
> June 19, 1998 Séverin Saden (Saden), head of the legal department of IFP France, faxed Montemurro confirming that IFP would send a draft memorandum of understanding the following week and attaching a chart that confirmed that IFP would receive 20% of PCR's 100% working interest in Eyehill Creek[12]
>
> June 23, 1998 IFP faxed PCR and enclosed the draft memorandum of understanding, with Saden adding: "The document has been prepared by Erik Verbraeken who is working with me on this project; he has tried to keep the text as simple as possible."[13]
>
> June 30, 1998 An internal PCR memo stressed that Eyehill Creek is the "BEST SAGD (technically and economically) opportunity that PanCanadian has and we believe that the project should be advanced." (EKE, A62)

117 These negotiations culminated in the MOU which PCR signed July 13, 1998. The MOU (at page 2, paragraph 2) expressly granted IFP

> a 20% (twenty percent) working interest related to the development and production of oil and gas resources within all formations of the North Bodo [Eyehill Creek] area, whether such development and production is of a primary, assisted or enhanced nature. [Emphasis added]

118 In addition, the MOU contained another noteworthy provision which speaks directly - and in compelling terms - to the purpose of the Contract and, especially, the JOA. Article 3 of the MOU provides:

> IFP and Pancanadian will define and carry out joint technology development programmes that will contribute to the optimised development of the abovementioned formations [in Eyehill Creek]; ... [I] n particular, IFP and Pancanadian will define a joint technology development programme related to the application of thermal recovery technologies on the formations. [Emphasis added]

(b) Significance of Surrounding Circumstances

119 Four aspects of these surrounding circumstances warrant special mention. First, evidence of the negotiations prior to conclusion of the MOU establishes that the parties understood very well the difference between conveying to IFP a working interest in all the oil and gas rights in Eyehill Creek irrespective of the method of extraction versus conveying to IFP some lesser interest.

120 Second, there is no doubt that as part of the Deal, PCR and IFP intended, and agreed, as documented in the MOU, that PCR would convey to IFP 20% of PCR's working interest in all oil and gas formations within Eyehill Creek, regardless of whether the development was of a primary, assisted or enhanced nature. And equally, there is no doubt that this agreement in the MOU is entirely consistent with the AEA and PCR's unqualified conveyance thereunder to IFP of 20% of PCR's working interest in Eyehill Creek.

121 Third, Article 3 of the MOU reflects the joint intention of PCR and IFP to pursue a thermal project at Eyehill Creek. The surrounding circumstances make clear that both parties, not just IFP, entered the Contract, and in particular the JOA, with the intention of doing so.

122 Fourth, it is equally clear that it was the common understanding and agreement between PCR and IFP from the very beginning of the negotiations that IFP would have no abandonment obligations whatever with respect to existing infrastructure at Eyehill Creek. This was never in dispute. PCR proposed this term and IFP accepted it. Abandonment costs for existing infrastructure (including the 222 existing wells) were to be for PCR's account.

(c) Consequential Reviewable Errors

123 As noted, all of these surrounding circumstances ought to have been put on the scale in interpreting the Contract and, especially, the JOA. But they were not. In ignoring this factual matrix, the Trial Judge also relied on Article 7.3 of the AEA, an entire agreement clause. It provided, as many contracts documenting commercial transactions typically do, that the AEA "supercedes all other agreements, documents, writings, and verbal understandings among the Parties relating to the subject matter hereof and expresses the entire understanding of the Parties with respect to the subject matter hereof" On this basis, the Trial Judge effectively dismissed the MOU and other surrounding circumstances as irrelevant to the interpretive exercise. In so doing, he erred.

124 The mere existence of an "entire agreement" provision does not mean that the words chosen beyond that entire agreement provision admit of one interpretation only. The purpose of considering the surrounding circumstances is not to add to, contradict or vary the terms of the agreement but rather use them as an interpretive aid to determine the meaning of the words in dispute. Where parties have concluded an agreement and a court is left to sort out the parties' objective intentions, it cannot be prevented from considering the surrounding circumstances by a provision that is itself based on the assumption that the agreement is clear - when it is not.

125 There was, and is, a serious dispute about the parties' objective intentions with respect to the nature and extent of the interest in the oil and gas leases that PCR conveyed to IFP under the Contract. As the Trial Judge himself put it, "... there is uncertainty whether the 'right, title, estate and interest' purchased by IFP from PCR was limited to thermal and other enhanced recovery working interests or whether IFP received something more": QB Reasons at para 68. Therefore, given this dispute, it was incumbent on the Trial Judge to put on the scale as an interpretive aid the relevant factual matrix in assessing the parties' objective intentions. That included the historical relationship between the parties, the background facts leading up to the MOU and the MOU.

126 This documentary evidence, which is unchallenged, points in one direction and one direction only - PCR was to convey to IFP 20% of PCR's working interest in Eyehill Creek. Of particular import is the uncontradicted documentary evidence that IFP negotiated for, and secured, PCR's agreement to transfer to IFP 20% of PCR's working interest in all of the oil and gas assets held by PCR, without limitation. And to be clear, IFP was to have no contingent liability for the abandonment costs associated with the existing 222 wells at Eyehill Creek.

127 The Trial Judge did take into account oral evidence given by a number of witnesses, including PCR's Sinclair, Wayne Sampson (Sampson) and Montemurro as to PCR's and IFP's respective subjective intentions at the time the Contract was concluded. These witnesses sought to explain and justify why certain terms and conditions were included in the JOA. It is evident that the Trial Judge treated this parol evidence as providing a persuasive context and explanation as to why certain terms were included in the JOA. This is ironic since he concluded there was no ambiguity in the Contract. In fact, even if the Trial Judge had found an ambiguity in the Contract, none of this parol evidence on subjective intention was admissible in the circumstances here. Not only did the evidence of PCR's witnesses go to PCR's subjective intentions, but worse yet, those PCR witnesses purported to explain what IFP 's subjective intentions were. That included the claim by certain PCR witnesses that IFP supposedly gave up its right to 20% interest in all development in exchange for being relieved of any liability for abandonment costs of existing wells. The Trial Judge relied on this evidence in interpreting the JOA. As stated at QB Reasons, para 33 : "The JOA relieves IFP of any liability for abandonment obligations related to primary operations. The evidence at trial indicated that it was important to IFP to limit its liability in this regard."

128 Leaving aside the fact that (1) evidence about subjective intentions was inadmissible in the circumstances here; and (2) PCR and IFP had agreed from the start that IFP would have no liability for abandonment costs, the critical error the Trial Judge made was in failing to consider admissible evidence about the factual matrix. As a consequence, the way in which the evidence was handled was the reverse of how the subject evidence should have been handled. In the result, while the evidence that could properly

have been considered absent ambiguity - namely the MOU and relevant background factual information - was ignored as irrelevant, parol evidence about subjective intentions that did not qualify as relevant background information or as an exception to the parol evidence rule was nevertheless admitted and placed on the interpretive scale.

129 In short, the MOU and related background information were admissible in their own right as part of the factual matrix regardless of whether an ambiguity was found in the Contract. Hence, that uncontradicted background documentary evidence, including the MOU, ought to have been taken into account in the interpretive exercise. That did not happen. To adopt an interpretation of the Contract without placing this relevant factual background on the interpretive scale is not only erroneous in law, it is also disconnected from commercial reality.

3. Misinterpreting the JOA

130 I now turn to why the Trial Judge erred in his essential conclusion that the JOA limited IFP's interest in Eyehill Creek to oil and gas produced only through thermal and enhanced recovery methods. Understanding the factual matrix relating to the conclusion of the JOA, including its purpose, is key to unpacking the errors in this mixed up, muddled morass.

(a) Failure to Consider the Purpose of the JOA

131 As noted, the primary purpose of contractual interpretation is to give effect to the parties' objective intentions in concluding the subject contract. In this interpretive exercise, the purpose sought to be achieved by the contract is a relevant and useful analytical tool. Why? As explained by Sébastien Grammond in "Reasonable Expectations and the Interpretation of Contracts Across Legal Traditions" (2009) 48:3 Can Bus LJ 345 at 354-355, citing F. Gendron, L 'interprétation des contrats (Montreal: Wilson & Lafleur, 2002):

> To paraphrase Gendron, what the parties wanted to do helps us understand what they wanted to say. In terms of intent, purposive interpretation mandates an inquiry into the parties' "meta-intention," or intention concerning the transaction as a whole, and then uses that general purpose as a tool to deduce a "micro-intention," an intention regarding specific clauses. In many cases, the process of purposive interpretation can be reframed on the basis of reasonable expectations. Thus, a party to a contract reasonably expects that the interpretation of the contract will advance his or her "purpose" in entering into the contract. Parties also reasonably expect that the contract will not be given a meaning that "defeats its purpose."

132 Accordingly, to understand the rationale for the inclusion of certain clauses in the JOA, it is first necessary to understand its purpose. Unfortunately, the Trial Judge never turned his attention to this critical issue. As a consequence, he failed to recognize that the AEA and the JOA serve fundamentally different objectives. The AEA dealt with the transfer of assets in the asset swap, in other words, ownership of the assets. The JOA (and the other joint operating agreements which were part of the Contract) outlined the terms under which the parties would operate to exploit those assets; hence the name joint operating agreements. The preamble to the JOA makes this clear:

> AND WHEREAS the parties wish to provide for the exploration, operation, maintenance and development of the Joint Lands and Title Documents ... [Emphasis added]

133 This preamble says nothing about ownership of assets. As a document based on a standard form operating contract, the JOA was not intended to define the nature of the parties' respective ownership interests in Eyehill Creek. What, then, was its primary purpose? Just this - to set out the terms and conditions under which PCR and IFP would pursue a thermal project at Eyehill Creek.

134 There is, on this record, an overwhelming sea of evidence that PCR and IFP entered into the JOA for this purpose. The following incontrovertible facts on this point speak for themselves.

1. It was PCR, not IFP, that initially proposed a thermal project at Eyehill Creek as part of the asset swap and shared those plans with IFP. Indeed, it was PCR, not IFP, that identified Eyehill Creek as the best candidate for a thermal project: see paras 23-24 of QB Reasons.
2. It was PCR, not IFP, that confirmed to both IFP and the Alberta government that primary production was finished at Eyehill Creek.
3. It was PCR, not IFP, that identified the number of barrels of oil that could be recovered at Eyehill Creek through a thermal project: EKE, A64.
4. It was PCR, not IFP, that sought approval from the Alberta government to change the royalty regime for Eyehill Creek to the generic oil sands royalty regime for EOR: EKE, R43.
5. It was PCR, not IFP, that issued Authorization for Expenditures for what PCR itself referred to as the "Eyehill Creek Thermal Project": EKE, A88.

135 All of this is highly relevant to the genesis, aim and purpose of the JOA. But again, none of this was put on the interpretive scale in determining the parties' objective intentions under the JOA. It all should have been. This factual matrix convincingly establishes that when the Contract, including the JOA, was concluded, both PCR and IFP intended to pursue a thermal project at Eyehill Creek to exploit the minerals at that location. In other words, a thermal project at Eyehill Creek was not merely a glimmer in IFP's eyes; that glimmer was shared by PCR. Indeed, PCR was instrumental in conceiving and advancing the pursuit of a thermal project at Eyehill Creek.

136 However, rather than consider the purpose of the JOA, the Trial Judge focussed - wrongly - on whether PCR was required to initiate a thermal project under the agreement between the parties. It was not. Given commercial realities, there was no written commitment by either PCR or IFP that a thermal project would ultimately be implemented at Eyehill Creek. Both parties would have recognized that this was so. That undoubtedly is one of the reasons why IFP was unwilling to give up its 3% gross overriding royalty for an interest in oil and gas produced only from a thermal project. But this does not alter the fact that when the JOA was concluded, the fundamental purpose of the JOA was to outline the terms and conditions under which PCR and IFP would proceed with their shared intention to pursue a thermal project at Eyehill Creek.

137 This purpose informs not only the reasons for the parties including various terms and conditions in

the JOA but also what they intended by their inclusion. Consequently, by not considering this purpose when analyzing the various Clauses in the JOA, the Trial Judge erred in law.

(b) Ignoring Factual Matrix Relating to Primary Production

138 In interpreting the JOA, the Trial Judge also erred in his approach to the issue of primary production at Eyehill Creek. Unfortunately, here too, he asked himself the wrong question, that is whether the JOA prohibited primary production. It is an improper leap for a court to conclude that because something has not been expressly forbidden under a contract, it follows that it is permitted. That is not necessarily so. There are many things parties to a contract cannot do even if they are not expressly prohibited. As the Supreme Court noted in ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69 at para 71, [2008] 3 SCR 560, reasonable expectations "looks beyond legality to what is fair, given all of the interests at play" to address conduct that is "wrongful, even if it is not actually unlawful." The mere fact the JOA did not explicitly prohibit PCR from undertaking primary production does not mean that the JOA was intended to address, or addressed, the terms under which PCR, as operator, could engage in new primary production, and still less unconstrained primary production.

139 On the issue of primary production at Eyehill Creek, again the evidentiary record of the surrounding circumstances is compelling and unchallenged. When the Contract was concluded, both PCR and IFP were operating on the shared assumption that primary production at Eyehill Creek was finished and all that remained was to phase out existing production. This shared assumption was a foundational basis on which the JOA was concluded. And it underscores why the purpose of the JOA was to pursue a thermal project. It also helps place the purpose of Clauses 4(c) and 5(c) in context, speaking as it does to the intended limited scope of both Clauses. And what it says is that these Clauses were not directed to the possibility of new primary production at Eyehill Creek, whether through reactivating old wells or drilling new ones.

140 This record is replete with evidence that both PCR and IFP considered primary production to be finished at Eyehill Creek. All of it falls within the scope of admissible objective evidence of background facts that were within the knowledge of both parties before conclusion of the JOA. What then was that evidence?

141 Dealing first with PCR's understanding, in an internal memo dated July 22, 1998 from Montemurro to fellow employees, Richard Ameli and Gittins, instructing them on how to respond to inquiries from the Alberta government, Montemurro stated: "I think any discussion around primary should be in the direction of "primary is finished", the field is depleted on primary. If EOR is not implemented, the field is abandoned, period" (EKE, A63).

142 PCR certainly represented to the Alberta government that primary production was done at Eyehill Creek as evidenced by its memo to Alberta Energy dated August 5, 1998. The subject was the "Proposed Eyehill Creek Thermal Project (Bodo)." In its memo, PCR answered a question posed by Alberta Energy this way: "Our response to your question as to what proportion of the costs (operating and capital) are incremental to primary production, is that none are as the fields have already been exploited conventionally... Primary recovery cannot economically recover any more oil beyond the roughly 4,000,000 bbl already recovered" [Emphasis added] (EKE, A64).

143 When Gittins was examined on PCR's position in its dealings with the Alberta government, he was asked how PCR was hoping to convince the Alberta government to grant PCR, as Gittins put it, a "more favourable royalty regime": AR 1423/10. His answer: "Well, essentially, the field was shut in on primary production. So the only project that we had going forward was the thermal development for Eyehill Creek, and so that was the case being made to the government": AR 1423/13-15. Pressed on whether this was merely a "tactical position" with the government or whether it was a real position, that primary was finished, he answered: "And - and that's my understanding, is we had no intention of moving ahead with any primary development": AR 1491/2-3. To be clear, the point here is not just that PCR had no intention of proceeding with primary development. It is that PCR had no intention of doing so because, in its view, primary production was finished since it was no longer considered economically viable.

144 IFP was well aware that all this was so. Erik Verbraeken (Verbraeken), legal counsel for IFP France, testified that Sampson, a senior landman at PCR intimately involved in negotiating the JOA for PCR, had said that "primary was dead": AR 302/1-7. And Verbraeken confirmed in cross-examination that IFP understood that PCR "would only phase out existing primary production, and that's it": AR 302/35-36.

145 In fact, Sampson admitted as much in his testimony. When pressed on whether he had represented to Verbraeken and Delamaide that there would be no more primary production, he said he would not have presumed to speak for PCR before adding that PCR would have followed Montemurro's recommendation: AR 1583/34-1584/3. As noted, Montemurro's view was that "primary was finished". Sampson was then asked whether, had he made a representation, it would have been in the agreement. In his answer, he makes it clear that it was the view of PCR management that there would be no more primary production other than what was being phased out. Why? As he admitted:

> ... the consensus view was that other than whatever was petering out, there would be no more primary production. It was going to be a thermal project : AR 1584/9-11, Emphasis added.

146 Indeed, when IFP's counsel pressed Sampson about what he meant by stating that primary was "petering out", Sampson answered:

> Yeah. I believe that the production was minimal, and we may even have shut in what was left. I don't specifically recall that. But it was [minimal] if it existed: AR 1592/ 3-4.

147 This evidentiary record of the surrounding circumstances establishes the *shared* state of mind of both PCR and IFP when they concluded the JOA: primary production at Eyehill Creek was finished; all that remained was for PCR to phase out existing primary production.

148 Therefore, the JOA did not address the terms and conditions under which primary production could be restarted or initiated without IFP's agreement. Consequently, the Trial Judge erred in concluding that because primary production was not expressly prohibited, it followed that reactivating primary production (including through new wells) was permitted without limitation and in further concluding that Wiser did no more than PCR was entitled to do when it reactivated primary production at Eyehill Creek.

(c) Misconstruing Clauses 4 and 5 of the JOA

149 This then takes me to the terms of the JOA. The Trial Judge essentially concluded that Clauses 4(c) and 5 in the JOA were determinative of IFP's *ownership* interest in Eyehill Creek. I have already explained why the Trial Judge erred in disregarding entirely the articles in the AEA under which PCR transferred to IFP 20% of PCR's working interest in the PCR Eyehill Creek Assets. The Trial Judge then compounded this error by zeroing in on these two Clauses in the JOA and determining that they, and they alone, were decisive in prescribing the scope of IFP's "working interest" and limiting IFP's working interest in Eyehill Creek to oil and gas produced through thermal and enhanced production methods.

150 Two further critical errors are imbedded in this conclusion. First, the JOA and Clauses 4(c) and 5 in particular do not limit IFP's working interest to thermal methods and enhanced production methods only. And second, even if they did, they would not, in any event, be decisive on this point given the express conflict provision in the AEA.

151 These Clauses provide as follows. Clause 4(a) is included as it helps place Clause 4(c) in context:

> 4. Operations
>
> (a) All operations conducted by the parties pursuant to this Agreement shall be at each party 's sole risk and expense unless the contrary is specifically stated *and always in accordance with Clause 5 hereof.*
>
> ...
>
> (c) It is specifically agreed and understood by the parties that the working interests of the parties *as described in Clause 5 of this Agreement* relate exclusively to thermal or other enhanced recovery schemes and projects which may be applicable in respect of the petroleum substances found within or under the Joint Lands and the Title Documents. Unless specifically agreed to in writing, IFP will have no interest and will bear no cost and will derive no benefit from the recovery of petroleum substances by primary recovery methods from any of the rights otherwise described as part of the Joint Lands or the Title Documents.
>
> 5. Participating Interests
>
> Except as otherwise provided in this Agreement, as and from the Effective Date hereof, the parties hereto shall bear all royalties, costs, risks and expenses paid or incurred under this Agreement and the Operating Procedure and shall own the Title Documents, the Joint Lands, the petroleum substances and the operations to be carried out pursuant to this Agreement as follows:
>
> (a) That portion of the Joint Lands described in Schedule "A1":
>
> PCR - an undivided 80% working interest
>
> IFP - an undivided 20% working interest
>
> (b) That portion of the Joint Lands described in Schedule "A2":

PCR - as described in Schedule "A2"

IFP - as described in Schedule "A2"

(i) In any event and at all times, unless otherwise specifically agreed in writing, the working interests of the parties will be in the proportions PCR 80%, IFP 20%; ...

(c) For greater clarity, there exist, in conjunction with the Joint Lands, numerous wells, flowlines, processing facilities and other similar and related surface and underground installations which have been or are being used in the primary production of petroleum substances and which are owned, at least partially, by PCR. The parties do not intend that IFP will, pursuant to this Agreement, acquire any interest in such wells, flowlines, facilities or installations. Unless otherwise specifically agreed in writing, the only circumstance in which IFP will come into possession of a proportionate 20% working interest share in any of the aforementioned wells, flowlines, facilities or installations is in the event such wells, flowlines, facilities, or installations are included within the definition of a thermal or other enhanced recovery project. At such time as the parties agree to the inclusion of any such well, flowline, facility or installation in a thermal or other enhanced recovery scheme or project, IFP will forthwith become the owner of a proportionate 20% working interest in any such well, flowline, facility or installation without further consideration paid by IFP to PCR. In such circumstance, IFP will assume its proportionate share of all future costs, liabilities and benefits derived from or associated with its ownership of such well, flowline, facility or installation. Any interest so acquired will become subject to the Operating Procedure without further action by the parties. [Emphasis added]

152 Before explaining the reviewable errors in the analysis of these Clauses, I recognize that the JOA contains some careless wording which confuses "participating interests" with "working interests". The term "participating interest" is defined in the Operating Procedure as follows: "the percentage share of the costs of an operation conducted hereunder (or any respective segment thereof) which a party has agreed to pay or is required to pay pursuant to this Operating Procedure". The heading of Clause 5 is "Participating Interests", not "Working Interests". And Clause 1(e) also defines "participating interest", this time as meaning "the percentage of undivided interest of each party as set forth in Clause 5 of this Agreement". Finally, Clause 6 of the JOA states:

> PCR has agreed to hold the participating interest stated in Clause 5, covering the Joint Lands ... in trust, for IFP subject always to the terms and conditions of the Agreement. [Emphasis added]

But in my view, nothing turns on the use of this mixed up terminology for purposes of this appeal and so no more will be said about it.

153 The Trial Judge relied on Clause 4(c) to limit IFP's working interest in Eyehill Creek to thermal and enhanced production only. As he put it, "[t]he JOA then provides at Clause 4(c) that the parties' 80% and 20% working interests relate to thermal and enhanced recovery operations only": para 98 of QB Reasons.

154 This interpretation of Clause 4 (c) cannot stand. The first sentence of Clause 4(c) refers to the "working interests of the parties as described in Clause 5 being limited to thermal or other enhanced

recovery schemes and projects". Clauses 5(a) and (b) in turn refer to PCR having an undivided 80% working interest and IFP having a 20% working interest in the Joint Lands referred to in Schedules "A1" and "A2" respectively. There is no reference whatever in Clauses 5(a) or (b) to the working interest of PCR or IFP being limited to thermal or enhanced recovery operations. The key point is this. If Clause 4(c) were interpreted as limiting IFP's 20% working interest in Eyehill Creek to thermal or enhanced production only, it would necessarily have the same limiting effect on PCR's working interest too. This interpretation is unreasonable. The parties did not agree under the JOA to limit their own ownership interests to thermal or enhanced production only. This would lead to the absurd result that neither IFP nor PCR had any interest in Eyehill Creek beyond oil and gas produced through thermal or enhanced recovery methods. This cannot be.

155 This interpretation is rooted in the failure to understand that Clause 4 is directed not to "ownership" but to a different purpose, "operations". That is why Clause 4 is entitled "Operations". Its purpose is to address PCR's and IFP's intended joint operations in pursuit of a thermal project at Eyehill Creek. In other words, Clause 4 speaks of each of their working interests as described in Clause 5 being limited to an 80%-20% split in thermal or other enhanced recovery schemes and projects because that is what they intended to pursue - a thermal project. Clause 4 must be interpreted having regard to the purpose of the JOA and the relevant surrounding circumstances.

156 Similarly, if Clause 5 were interpreted to mean that it limited IFP's rights to thermal production only, then it would also mean that PCR's rights at Eyehill Creek were equally limited to the same extent. Again, this makes no sense. The parties did not agree that the JOA would somehow constrain or limit their respective working interests in Eyehill Creek. An interpretation that would have this effect highlights the unreasonableness of using this wording, designed for an entirely different purpose, to limit the ownership rights of either PCR or IFP at Eyehill Creek.

157 I now turn to the last sentence in Clause 4(c), which the Trial Judge also relied on to strip IFP of the full interest in the oil and gas rights in Eyehill Creek conveyed to it under the AEA. I repeat it for ease of reference:

> Unless specifically agreed to in writing, IFP will have no interest and will bear no cost and will derive no benefit from the recovery of petroleum substances by primary recovery methods from any of the rights otherwise described as part of the Joint Lands or the Title Documents. [Emphasis added]

158 What was intended by this provision? To properly interpret this sentence, its wording must be placed in the context of the JOA as a whole and, equally important, the surrounding circumstances of the Contract. Four points warrant mention, all of which are relevant to what was objectively intended by this last sentence in Clause 4.

159 First, the purpose of the JOA was to set out the terms and conditions under which the parties would pursue a thermal project at Eyehill Creek. Sampson did not propose the inclusion of Clause 4(c) in a vacuum. When he did so, he understood that Eyehill Creek was going to be a thermal project: AR 1584/9-11. He acknowledged this at least twice more in his evidence: AR 1584/35-37; AR 1590/27-31.

160 Second, both PCR a nd IFP considered primary production to be finished except for phasing out of existing wells. This was the commercial context in which the JOA was concluded.

161 Third, the last sentence of Clause 4(c) cannot be separated from the rest of the Clause of which it forms a part. The first sentence in Clause 4 reveals that this Clause describes the parties' working interests only in the thermal project they intended to pursue, not their working interests in all the Eyehill Creek Assets.

162 Fourth, the surrounding circumstances confirm that, in keeping with what had been understood a nd agreed between the parties from the time PCR first proposed an asset swap, IFP would not be responsible for any of the abandonment costs associated with the then existing infrastructure, which included 222 wells at Eyehill Creek, most of which had been shut in. PCR recognized that it would be unfair to burden IFP with those costs. After all, when IFP agreed to transfer to PCR assets valued at $14,800,000, it was buying assets, not liabilities. The corollary of this is that IFP was prepared to accept that with respect to existing infrastructure, it would have no interest in that infrastructure unless and until it agreed to pay its 20% share of costs associated therewith.

163 As for the argument that the MOU d id not contain an express provision to this effect, this is so. But the MOU was intended to outline the key contentious terms agreed to by the parties following negotiations. Abandonment costs of existing infrastructure was not one of them. Both parties had agreed from the start that IFP would have no liability fo r these costs. Thus, the fact the MOU d id not expressly address this non-contentious agreement is unsurprising. The crucial point is this. There is not a shred of evidence on this record that following conclusion of the MOU, PCR and IFP ever agreed to vary, much less reverse, the agreement in place from the start - IFP would not be responsible for abandonment costs of existing infrastructure. Therefore, I do not accept the argument that IFP bargained away the rights it had under the MOU to a working interest in all development at Eyehill Creek in exchange for no liability for abandonment costs for existing infrastructure.

164 What does all this add up to? Just this. The purpose of Clause 4(c) was to implement the agreement made from the start and protect IFP from liability for abandonment costs of existing infrastructure. This was part of the Deal; IFP did not give up rights to primary production or limit its working interest in Eyehill Creek in exchange fo r this protection. The parties provided for two exceptions, one in Clause 4(c) and the other in Clause 5(c).

165 Under Clause 4(c), IFP would not be required to assume its proportionate share of costs associated with the existing infrastructure unless and until IFP agreed otherwise. That included costs associated with the existing primary production facilities (and their phasing out). However, IFP was given the right, at its option, to opt in to the existing infrastructure in which event IFP would be entitled, under the JOA, to the full benefits of primary production flowing from its proportionate interest.

166 That this was to be at IFP's option is clear from Clause 4(c). It provides that "Unless specifically agreed to in writing, IFP will have no interest and will bear no cost" for primary production. Notably, Clause 4 does not require the agreement of both parties. Thus, the decision whether to exercise IFP's participation right under Clause 4(c) was intended to be IFP's and IFP's alone. And understandably so.

After all, this Clause was intended to protect IFP, not benefit PCR. Therefore, whether to exercise the option to participate in the phasing out of primary production in existing infrastructure was at IFP's option, not PCR's. Of course, unless IFP agreed to assume responsibility for costs relating to existing infrastructure, it was only fair that IFP would likewise have no interest in and derive no benefit from it or primary production derived therefrom. It is this, and only this, which the last sentence in Clause 4(c) seeks to convey.

167 Similarly, under Clause 5(c), if any of the existing infrastructure was incorporated into a thermal or other enhanced recovery project, IFP would be required to pay its 20% share of costs, but in this case, future costs only. Clause 5(c) recognizes this and is intended to address this very point.

168 Moreover, in any event, neither C lause 4 nor C lause 5 of the JOA say s anything at all about new wells for primary production or the minerals produced therefrom. Nowhere in the JOA did IFP ever agree to give up its rights to primary production from new wells.

169 Finally, it is noteworthy that the Operating Procedure, a standard form contract, was not amended to address the obvious problems that would arise if two parties had competing claims to the same barrels of oil. The fact the parties did not amend the Operating Procedure to address the myriad of issues that would need to be addressed and resolved in that case belies any claim that the parties intended to limit IFP's working interest at Eyehill Creek to thermal and other enhanced recovery methods only.

170 This is quite apart from the obligations that the Operating Procedure imposed on PCR as Operator. Under Clause 9(a) of the JOA, the Operating Procedure applied to all operations conducted in respect of the exploration, development and maintenance of the Joint Lands for the production of petroleum substances. In turn, the Operating Procedure made it clear that PCR, as Operator, did not have carte blanche to do whatever it wished in exploiting the minerals at Eyehill Creek. In this regard, Article 301(a) imposed on PCR an obligation to "consult with [IFP] from time to time with respect to decisions to be made for the exploration, development and operation of the joint lands and the construction, installation and operation of any production facilities..." Again, there is nothing in the Operating Procedure that relieved PCR of any of its obligations thereunder on the basis that IFP's interest in Eyehill Creek was limited to thermal and other enhanced recovery methods only. Nor is there anything in the Operating Procedure that restricted IFP's working interest in Eyehill Creek.

171 A Clause intended to protect IFP cannot now be turned on its head and used for another purpose entirely. And yet, that is what PCR is trying to do. It is attempting to use Clause 4(c), designed to protect IFP from liability for abandonment costs of existing infrastructure unless and until IFP agreed otherwise, to support its claimed rights to (1) engage in unrestricted new primary production at Eyehill Creek, rather than simply phasing out primary production; and (2) cut IFP out of any benefits from primary production. This unreasonable interpretation, which is inconsistent with both the commercial context and factual matrix, is without merit. A Clause designed as a shield to protect IFP cannot be used as a sword to benefit PCR.

172 For these reasons, the Trial Judge's conclusion that the JOA restricted IFP's working interest in Eyehill Creek to oil and gas produced only through thermal or other enhanced recovery methods cannot

be sustained.

4. Failure to Recognize the Conflict Between the AEA and the JOA

173 Finally, in the end, it comes down to this. Even if I were wrong and the JOA limited IFP's working interest in Eyehill Creek to oil and gas produced only through thermal or other enhanced recovery methods as concluded by the Trial Judge, the unequivocal wording of the AEA would nevertheless trump any provisions to this effect in the JOA. As noted, the AEA is the dominant agreement concluded between PCR and IFP. To repeat, Article 1.5 of the AEA expressly provides:

> There are appended to this Agreement the following schedules ... [Schedule "F" is the JOA] Such schedules are incorporated herein by reference as though contained in the body hereof. Wherever any term or condition of such schedules conflicts or is at variance with any term or condition in the body of this Agreement, such term or condition in the body of this Agreement shall prevail. [Emphasis added]

174 The Trial Judge justified not applying this Article on the basis there was no conflict between the AEA and the JOA. His reasoning on this point is summarized at para 99 of the QB Reasons:

> The AEA and JOA are contemporaneous documents. Article 1.5 of the AEA incorporates the Schedules and makes them part of the body of the AEA. This is not a case of inconsistency between the terms and conditions of the AEA and the JOA; rather, the AEA lacks a definition that the JOA and Operating Procedure provide. I conclude IFP's working interests under these Agreements is in respect of thermal and other enhanced recovery operations only.

175 This reasoning suffers from two pivotal flaws.

176 First, I have already explained why the Trial Judge erred in concluding that the AEA lacked a definition of "working interest" and in thereby failing to recognize that the AEA conveyed to IFP 20% of PCR's working interest in Eyehill Creek.

177 Second, while Article 1.5 of the AEA incorporated the schedules (including the JOA) into the AEA, the AEA was nonetheless granted predominance in the event of a conflict between it and any terms or conditions in the schedules. Consequently, any interpretation of the JOA that limited IFP's working interest in Eyehill Creek to less than what was conveyed to IFP under the AEA would necessarily constitute a "conflict" or "variance" from the text in the AEA. In that event, there can be no debate about the interpretation of Article 1.5 of the AEA. The AEA would trump any limitation on IFP's working interest in the JOA. Therefore, even if I were wrong in concluding that the Trial Judge erred in his interpretation of the JOA, the provisions in the AEA conveying to IFP 20% of PCR's working interest in Eyehill Creek would nevertheless govern.

178 For these reasons, IFP's working interest in Eyehill Creek is, and remains, an undivided interest as a tenant in common equal to 20% of PCR's working interest in the PCR Eyehill Creek Petroleum and Natural Gas Rights (which included Crown leases) and in the PCR Eyehill Creek Miscellaneous Interests, as both terms are defined in the AEA.

179 Accordingly, IFP is entitled to an accounting for its proportionate share of the net revenue realized from primary production at Eyehill Creek.

5. Misinterpretation of Article 2401 of the Operating Procedure

180 I have also concluded that the Trial Judge erred in finding that IFP acted unreasonably in withholding its consent to the farmout to Wiser. IFP's withholding of consent was reasonable in the circumstances of this case. Accordingly, PCR breached the Contract by proceeding as it did. While the Trial Judge erred in failing to find that IFP's withholding of consent was reasonable, my conclusion would apply with added force were IFP's interest in Eyehill Creek limited, as found by the Trial Judge, to oil and gas produced only through thermal and enhanced recovery production methods. I now turn to my reasons for these conclusions.

181 When PCR decided to farm out its interest to Wiser, Article 2401 of the Operating Procedure required that PCR give IFP a ROFR. Even though IFP waived that right, under the Contract PCR could not dispose of its working interest to Wiser without IFP's consent. In this regard, Article 2401B(e) of the Operating Procedure provided that:

> Such consent shall not be unreasonably withheld, and it shall be reasonable for an offeree to withhold its consent to the disposition if it reasonably believes that the disposition would be likely to have a material adverse effect on it, its working interest or operations to be conducted hereunder ...[Emphasis added] (EKE, A82)

182 IFP was an "offeree" under this provision, and as noted, on May 9, 2001 it sent a letter to PCR declining to consent to the disposition of PCR's interest to Wiser: EKE, A129-130. In doing so, IFP determined that the disposition would "have a material adverse effect on IFP's working interests and operations" given that Wiser's intent to develop the Eyehill Creek lands through primary methods of production only would "effectively prevent or severely affect future thermal or enhanced recovery schemes".

183 The Trial Judge found that it was not objectively reasonable for IFP to believe the disposition would have a material adverse effect on its working interest or future operations. For this, he relied on the concept of the status quo. In his view, Wiser would not be doing anything that PCR was itself not allowed to do under the Contract. As the Trial Judge put it, "[t]he agreement neither prohibited PCR from undertaking primary production, nor obliged it to carry out thermal operations": para 194 of QB Reasons. He added that while "IFP had the unilateral expectation that PCR would initiate a SAGD operation and would refrain from primary production", the agreements provided "no basis for this expectation" and so it was unreasonable to object "on the grounds Wiser would undertake something [primary production] PCR was entitled to do": para 198 of QB Reasons. He then went on to find that "the reasonable expectations of the parties" did not assist IFP since there was no reasonable expectation that PCR would not pursue primary production at Eyehill Creek: para 211 of QB Reasons.

184 In reaching these conclusions, the Trial Judge rejected the applicability of this Court's decision in ***Mesa Operating Limited Partnership v Amoco Canada Resources Ltd*** (1994), 149 AR 187 (CA) [***Mesa***].

In ***Mesa***, this Court held that a "contract should be performed in accordance with the reasonable expectations created by it": para 19. The Trial Judge noted that a reasonable expectation must be held by both parties and that "[o]ne party's expectation cannot create an obligation on another party if that obligation is not shared": para 208 of QB Reasons. He then concluded that while IFP may have had an expectation that PCR would only engage in thermal production, that expectation was not shared by PCR.

185 I have already explained why the JOA was premised on the shared assumption that there would be no new primary production but only a phasing out of existing primary production. However, even if I were wrong on this point too, the Trial Judge's approach to Article 2401 would still be erroneous. This is so even accepting for the sake of argument his conclusion that there was no reasonable expectation that PCR would not pursue primary production at Eyehill Creek.

186 I agree that the JOA did not obligate PCR to implement a thermal project. After all, an "intention" to pursue a thermal project is just that - an intention. Nothing is ever certain in any industry, and especially not in oil and gas. Corporate priorities change; financial circumstances change; the economy changes; and intentions change. But that does not end the analysis. What the Trial Judge failed to consider is whether there was nevertheless, at a minimum, a reasonable expectation that PCR would not engage in primary production in a manner which substantially nullified the contractual objectives or caused significant harm : ***Mesa***, supra at para 22. Having regard to the entirety of the Contract and the factual matrix, I conclude that such an expectation was a reasonable one.

187 In ***Mesa***, this Court dealt with a discretionary decision under an oil and gas contract relating to the type of pooling to be used for a shared area of land. The trial judge found that Amoco had breached its contractual relationship by choosing to use areal pooling rather than reserves pooling. While a discretion existed under the contract, the trial judge determined that it had to be exercised in "good faith", which the trial judge said was breached when a party acts in a manner which "substantially nullifies the contractual objectives or causes significant harm to the other contrary to the original purposes or expectations of the parties": (1992), 129 AR 177 (QB) at 218. This Court upheld the trial decision but on the basis that Amoco had breached a term implied in fact based on the reasonable expectations of the parties. Rejecting the idea that the law itself imposed a general obligation of good faith, this Court instead grounded the rule in the agreement of the parties, concluding in ***Mesa***, supra at para 22 as follows:

> The rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith. As the trial judge said, a party cannot exercise a power granted in a contract in a way that "substantially nullifies the contractual objectives or causes significant harm to the other contrary to the original purposes or expectations of the parties".

188 Since ***Mesa***, the concept of the duty of good faith in contract law has evolved. Most recently, in ***Bhasin***, the Supreme Court recognized good faith contractual performance as a "general organizing principle" which underlies the existing case law. Rather than being a separate rule, the organizing principle "manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance": para 66.

189 What is this organizing principle? It is exemplified in "the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner": para 65, Emphasis added. Accordingly, parties to a contract have a common law duty to act honestly in the performance of contractual obligations: ***Bhasin***, supra at para 33. This duty requires that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": para 73.

190 One situation where this principle applies is "where one party exercises a discretionary power under the contract": ***Bhasin***, supra at para 47; McCamus, supra at 839, 844-849. In such cases of contractual discretion (and McCamus includes ***Mesa*** in this category), limitations are implied on the exercise of discretion in order to give effect to the reasonable expectations of the parties: McCamus, supra at 865-866; ***Bhasin***, supra at para 48. ***Mesa*** falls under the organizing principle of good faith contractual performance, it being an implied term that contractual discretion should be exercised according to certain parameters: Joseph T Robertson, "Good Faith as an Organizing Principle in Contract Law: Bhasin v Hrynew - Two Steps Forward and One Look Back" (2015) 93 Can Bar Rev 809 [Robertson] at 835. Decisions like ***Mesa***, notes Robertson, supra at 839:

> ... support the understanding that the implied obligation of good faith contractual performance has a gap-filling role. The implied obligation does not create new obligations outside the scope of the contract. Like any implied term, the obligation aims to implement the parties' unstated intentions thereby protecting their reasonable expectations.

191 This organizing principle of good faith contractual performance requires that, in carrying out the performance of a contract, "appropriate regard" is given to the other party. This does not compel a party to put the interests of others above its own, but it does require "that a party not seek to undermine those interests": ***Bhasin***, supra at para 65, Emphasis added. That is something that both parties to a contract would reasonably expect.

192 Whether expectations are reasonable can be informed by the commercial context of a contract: ***Mesa***, supra at para 20. Reasonable expectations of contracting parties are to be found in the contract itself rather than the court's abstract perception of what is "fair". While "reasonable expectations" does not operate as a stand-alone principle divorced from the contract actually agreed to between the parties, this does not diminish its role in informing the duty of "good faith" in contractual performance. In doing so, the reasonable expectations of the parties operate so as to imply a term limiting one party's ability to perform a contact in a manner which undermines the interests of the other party.

193 As detailed earlier in these Reasons, the purpose of the Contract between IFP and PCR was to pursue a thermal project. In other words, whatever the ultimate result may have been, the primary objective of the Contract, and in particular, the JOA, was to exploit the minerals at Eyehill Creek using thermal production. Given that reality, neither IFP nor PCR would reasonably expect the other to operate in such a manner so as to substantially nullify the ability to pursue that objective.

194 All this being so, in keeping with ***Mesa*** and ***Bhasin***, PCR was, at a minimum, under a duty of good faith not to engage in primary production in a manner which would undermine or substantially nullify

IFP's ability to pursue a thermal project. This obligation necessarily precluded farming out its interest to a third party who would do the same. This good faith requirement is not inconsistent with the Contract. While there was no guarantee in the Contract that a thermal project would ever proceed at Eyehill Creek, even if PCR had the "right" to engage in new primary production using existing or new wells - which I have rejected for reasons explained earlier - it did not in any event have the right to engage in unconstrained primary production. The contrary is so. In keeping with the parties' reasonable expectations, PCR had a minimum good faith obligation under the Contract not to engage in primary production at Eyehill Creek in a manner which would substantially harm IFP's interests in pursuing a thermal project contrary to the original objective of the Contract.

195 It follows as a corollary that the Trial Judge erred in concluding that Wiser was simply acting as PCR was entitled to act under the Contract. The duty to perform a contract in good faith placed limits on how PCR could affect IFP's interests in Eyehill Creek. And those limits in turn informed why it was reasonable for IFP to believe that the disposition of PCR's interest to Wiser would have a material adverse effect on IFP's interests.

196 This reality is particularly striking if, as the Trial Judge determined, IFP's working interest were in fact limited to proceeds from thermal and other enhanced production methods at Eyehill Creek. I have concluded the converse, namely that IFP retained an unqualified 20% working interest in PCR Eyehill Creek Assets regardless of whether production was thermal or primary in nature. Even in that case, IFP's interest would be substantially harmed by primary production since it intended, as did PCR when it concluded the Contract, to pursue a thermal project at Eyehill Creek. However, if IFP's working interest were limited to thermal or enhanced recovery methods only, then any action to conduct primary production in a manner which significantly undermined the ability to pursue a thermal project would be destructive of IFP's interest in Eyehill Creek. Not only would the objective behind the Contract be thwarted, IFP's very ability to receive any real benefit from the gross overriding royalty it gave up as part of the asset swap would be negated as well.

197 Had PCR desired the right, if it should decide it no longer wished to pursue a thermal project at Eyehill Creek, to engage in primary production in a manner which substantially compromised a future thermal project without securing IFP's agreement, then it should have bargained for that. It did not.

198 A good faith contractual performance obligation precludes a co-owner of oil and gas rights from acting unilaterally without consulting another co-owner when the objective of a joint operating agreement comes to an end. And properly so.

199 This does no t mean that once PCR (or for that matter, IFP) decided it no longer wished to pursue a thermal project at Eyehill Creek, the parties would have been at an impasse. Co-owners of mineral rights intent on pursuing a specific objective - to pursue a particular project - do change their minds. This is not unusual in the oil and gas sector. But when that happens, it is then incumbent on the co-owners to decide what they wish to do to exploit the minerals. And when they do, that may well lead, in turn, to amendment of an existing joint operating agreement and operating procedure or the conclusion of a new joint operating agreement and operating procedure to reflect the new reality. Or if the existing agreements are comprehensive enough to address this possibility, that would then call for agreement as to how to proceed.

And if nothing were resolved, then the parties would be left with their respective rights at common law as co-owners.[14]

200 Against this background, I return to why it was reasonable for IFP to refuse to consent to PCR's disposition to Wiser. IFP was rightly concerned that the manner in which Wiser would exploit the lands at Eyehill Creek through primary production would severely affect IFP's ability to pursue a thermal project from a practical and economic perspective. From what IFP knew at the time, Wiser was a company uninterested in thermal production and whose extraction methods consisted solely of primary production. What is more, because Wiser had no interest in thermal potential, IFP was understandably concerned that Wiser would not use any precautions or mitigation techniques in recovering petroleum through primary means.

201 It was common knowledge at the time of conclusion of the Contract that primary production ran the likelihood of compromising the viability of thermal projects. PCR certainly knew this, as evidenced by internal emails. For example, PCR's Gittins noted in an e-mail from February 2000 that any re-commissioning of primary production at Eyehill Creek had to be wary of sand being produced, which would create wormholes and in turn make thermal drilling very difficult:

> ... The problems arise if sand is produced along with the oil, to the extent that wormholes are propagated over a significant area of the reservoir. This makes precision drilling (as required to drill the injection well of a SAGD project) in the future a very difficult proposition. Hence I do not have a problem with the primary production of the oil from these wells but if sand production is required to accomplish this then it could prevent future SAGD production and we could wind up with a 10,000,000 bbl oil reserve write down in the future for the sake of a few hundred bbl/day of production. IFP also have a 20% WI in this area and my understanding is that they are only interested in thermal development [Emphasis added] (EKE, A98).

202 Moreover, it is beyond question that PCR had shared this information about wormholes with IFP prior to its decision to deny consent: para 173 of QB Reasons; see also Delamaide testimony at 21/13-26; 39/31-40/35. Accordingly, IFP was well aware when it refused its consent that Wiser's activities at Eyehill Creek were sure to adversely affect its ability to pursue a thermal project. On top of this, IFP had good reason to believe that Wiser, unlike PCR, was not concerned about developing the lands at Eyehill Creek in a manner compatible with their pursuit of a thermal project. For example, PCR had in the past made certain recommendations to IFP in order to avoid actions which would "have too large an impact on any thermal operation": EKE, A97.

203 The Trial Judge attempted to skirt these realities by falling back on the idea that, whatever the past history between the parties, PCR was nonetheless allowed under the Contract to engage in the kind of unbridled primary production which Wiser sought to practice and ultimately did practice. I have explained why I reject this "status quo" reasoning. PCR did not have the right to engage in new primary production and certainly not in any manner it saw fit. At a minimum, PCR was under a duty of good faith not to engage in primary production in a manner which would undermine or substantially nullify IFP's ability to pursue a thermal project. Moreover, such a duty also extended to not farming out its interest to a third party who would likely do the same. Accordingly, IFP acted reasonably in refusing to consent to PCR's disposition to Wiser.

204 Thus, for these reasons, the Trial Judge erred in concluding that IFP had acted unreasonably in withholding its consent to PCR's disposition of its interest to Wiser. As a further consequence, Wiser was not novated into the JOA.

VII. Damages

205 Based on my finding that it was reasonab le for IFP to refuse to consent to the disposition to Wiser, PCR breached the Contract in proceeding as it did. Unfortunately, the Trial Judge's analysis of what the damages might be were he wrong in concluding that IFP had acted unreasonably in refusing to consent to PCR's disposition to Wiser contains reviewable errors.

206 First, the Trial Judge's assessment of damages was premised on an improper starting point, namely his finding that PCR had the right to engage in unrestricted primary production at Eyehill Creek. This was not so.

207 Second, his assessment of damages was also premised on the assumption that despite the nature and extent of primary production by Wiser, IFP's pursuit of a thermal project at Eyehill Creek had not been rendered "impossible" or "destroyed": QB Reasons at paras 240, 409. Neither is the appropriate test for breach of contract. It is enough that a thermal project would be rendered practically uneconomical.

208 Third, the Trial Judge also concluded that the damages would need to be established with "reasonable certainty": QB Reasons at para 356. This is not the standard used for assessing damages for breach of contract. Proof of damages is based on probability, not reasonable certainty. Moreover, difficulty in determining damages is not a justification for awarding no damages at all: ***Penvidic v International Nickel*** (1975), [1976] 1 SCR 267 at 279-80; ***Webb & Knapp (Canada) Ltd v Edmonton (City)***, [1970] SCR 588 at 599-601; ***Dallin v Montgomery***, 2011 ABCA 189 at para 47, 513 AR 87.

209 Nevertheless, I have concluded that there are no grounds for interfering with certain conclusions the Trial Judge reached on damages, not because the reasons offered are free from error, but because the conclusions are justified on other grounds.

210 To explain why requires a consideration of the implications of PCR having breached the Contract in the manner it did. What damages properly flow from that breach? On this initial point, while considerable time was spent on quantum of damages in the factums and in oral argument, I do not find it necessary to explore and resolve alleged errors by the Trial Judge in calculating the amount of damages based on the premise of a thermal project actually proceeding at Eyehill Creek. Why? Because no matter which permutation and combination is considered, the Trial Judge did not err in his ultimate conclusion that whatever the amount of the damages, there was zero chance that a thermal project would ha ve proceeded at Eyehill Creek. Thus, there is no reviewable error in his conclusion that any damages attributable to the loss of a thermal project should be discounted "by 100% to reflect the 'chance of non-occurrence'": QB Reasons at para 383.

211 Despite the breach of Contract, what exactly d id IFP lose when PCR transferred it s interest to Wiser? IFP lost an opportunity to convince PCR - or any successor in interest likewise interested in

pursuing a thermal project - that a thermal project should be a "go". It also lost an opportunity to agree with PCR on other methods to exploit the minerals at Eyehill Creek whether under the JOA and Operating Procedure or otherwise. But realistically, having regard to all relevant considerations and factors, what chance would there be that a thermal project would have been implemented? In my view, the Trial Judge's conclusion that there was none is not only reasonable, it is correct.

212 Once PCR signalled its intention to transfer its working interest to Wiser, IFP had two opportunities to proceed with a thermal project. One was when it received the ROFR. But IFP declined to exercise its rights under the ROFR, buy PCR out, and take over PCR's remaining working interest in Eyehill Creek. The second opportunity was after PCR disposed of its interest to Wiser. I am not discounting the obvious practical hurdles that arose as Wiser proceeded to initiate new primary production at Eyehill Creek. But as the Trial Judge found, at no time after Wiser acquired PCR's working interest in Eyehill Creek did IFP make any move to stop the primary production,[15] convince Wiser to proceed with a thermal project, or initiate one on its own, whether by bringing in a new co-owner or otherwise.[16]

213 As fo r the lost opportunity as a co-owner to agree on new methods to exploit the minerals at Eyehill Creek once the purpose of the JOA had ended, that too would inevitably have led to the same result. Some time after concluding the Contract, PCR abandoned the idea of a thermal project at Eyehill Creek. I realize that this was in part because it chose to proceed with a thermal project elsewhere at its own property at Christina Lake. And I also realize that PCR was not forthcoming in discussing its change of plans with IFP. But that does not diminish the reality that there would have been only five options available to PCR and IFP as co-owners to exploit the minerals at Eyehill Creek: (1) proceed with a thermal project jointly; (2) proceed with a thermal project individually under the independent operations option in Article X of the Operating Procedure; (3) proceed with primary production; (4) wait to see what the future held; or (5) a combination of one or more of these options given the extent of, and area covered by, the Eyehill Creek Assets.

214 On this record, there was no realistic chance that PCR would ever have agreed to proceed with the first option, a thermal project at Eyehill Creek. Nor was IFP in a position to proceed with the second option, an independent operation, as the Trial Judge himself concluded: see QB Reasons at para 197. And IFP never did. With respect to the fourth option, the Trial Judge found that PCR would have had to engage in primary production "to preserve its leases": QB Reasons at para 381. Despite my reservations about the extent to which some of this reasoning borders on speculative - since it is in Alberta's interest to permit leases to be extended where doing so would result in the maximum benefit being realized by Albertans from extracting oil and gas -nevertheless, this record is lacking as to likely options on this front. Accordingly, there is no basis to interfere with this finding by the Trial Judge. This necessarily affects the fifth option too. That effectively left only the second option: proceed with primary production.

215 Thus, for these reasons, the Trial Judge made no reviewable error in concluding that any award of damages should be discounted by 100% to reflect the chance of non-occurrence of a thermal project.

216 Therefore, in the result, IFP is entitled to an accounting for its proportionate share of all net revenue realized to date from primary production at Eyehill Creek on both existing and new wells.

217 However, two issues remain unresolved which this Court is not in a position to settle. The first

relates to the effect of the contractual limitation on liability contained in Article 7.9 of the AEA. The Trial Judge found that any damages award would have been limited, in any event, to $16,000,000 based on this Article. However, he did not consider the potential application of this limitation, if any, in the context of IFP's continued ownership of a working interest in the Eyehill Creek Assets. Consequently, whether that Article limits in some way IFP's ownership interests or its ability to require Wiser to account to IFP for IFP's proportionate share of the net proceeds of primary production to date remains an open issue. In other words, does the $16,000,000 limitation apply to restrict either IFP' s ownership interest or the amount of net revenue it is entitled to receive from primary production to date at Eyehill Creek? We received no argument on this point.

218 The second issue relates to how to calculate the net revenue. In addition to the obvious, there is a question of whether and to what extent, if any, IFP should be responsible for abandonment costs of existing infrastructure. To take a few examples only, there may be wells that were not reactivated at all and have now been formally abandoned. Whether IFP is responsible for what would otherwise be its proportionate share of those costs remains another open issue. Also, there might be certain abandonment costs that were already required to be paid when existing wells were reactivated. In other words, those costs might have been baked in, with or without reactivating them for primary production. Again, is IFP responsible for those costs or only the incremental costs of abandoning the wells associated with their reactivation for primary production? And is it, in any event, open to IFP to opt in to existing wells on an individual basis? Again, we heard no argument on these or related points dealing with how to determine the "net revenue" realized from primary production at Eyehill Creek.

219 Since this Court is unable to address and resolve these issues, they must be remitted to the Queen's Bench for determination and I so order. If, in the course of dealing with these issues, the parties raise other related issues which need to be resolved in order to properly dispose of this matter, the Queen's Bench will be able to adjudicate these as well as it sees fit.

VIII. Conclusion

220 For these reasons, I allow the appeal. As noted, IFP' s working interest in Eyehill Creek is, and remains, an undivided interest as a tenant in common equal to 20% of PCR's working interest in the PCR Eyehill Creek Petroleum and Natural Gas Rights and in the PCR Eyehill Creek Miscellaneous Interests, as both terms are defined in the AEA.

221 Accordingly, IFP is entitled to an accounting for its proportionate share of the net revenue realized from primary production at Eyehill Creek.

222 The outstanding issues relating to the disputed cap on liability and calculation of net revenue of primary production at Eyehill Creek are remitted to the Queen's Bench for determination.

C.A. FRASER C.J.A.
P.A. ROWBOTHAM J.A.:— I concur

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Paragraph

Dissenting Reasons for Judgment

J. WATSON J.A. (dissenting)

I. Summary

223 IFP Technologies (Canada) Inc ("IFP") and PanCanadian Resources Ltd ("PanCanadian" or "PCR") entered into four agreements in 1998: a Memorandum of Understanding, an Asset Exchange Agreement, a Joint Operating Agreement, and a Technology Development Agreement. For simplicity we refer to them as the "Deal", although acknowledging that the parties were not entirely ad idem on appeal as to whether the four agreements can be taken as a harmonious whole.

224 Pursuant to the Deal, IFP exchanged a 3% gross overriding royalty that it already held on a number of PanCanadian-operated wells for a 20% working interest in resource development in the Eyehill Creek area where there had been, in the 1990s, primary oil production. This was a heavy oil area in the Mannville formation.

225 By 1998, primary production had become uneconomical in the Eyehill Creek area and around two hundred wells were shut in. PanCanadian lost several leases and was receiving Crown notices to move on other shut-in wells.

226 PanCanadian became EnCana Corporation as this dispute unfolded (collectively, PanCanadian). Wiser Oil Company, later Canadian Forest O il Ltd ("Wiser") came into the picture when it acquired PanCanadian's interests via a farm-out agreement, a nd later, the Abandonment Reclamation and Option Agreement or ARO (collectively, "farm-out agreement").

227 IFP contended at the 33-day complex trial that, after having worked harmoniously and profitably with PanCanadian on other projects, it was deprived of the interests it acquired in the Deal; in short, PanCanadian was in breach of contract.

228 The Deal was interpreted by Wittmann CJ in IFP Technologies (Canada) v Encana Midstream and Marketing, 2014 ABQB 470, 591 AR 202 ("QB Reasons"). The QB Reasons carefully surveyed the Deal and the relevant circumstances, and the appellant largely accepts the recital of evidence. The QB Reasons essentially found that IFP go t what it bargained for even though that bargain did not give IFP what it hoped for. As is often the case in the economic-shock-sensitive resource industry, the Deal was not a guaranteed endeavour.

229 This Court has closely examined the record and the QB Reasons and we are not unanimous. In dissent, I respectfully am not persuaded to to interfere. Even if I might be inclined to a somewhat different view on some matters from the view of the QB Reasons, I am not persuaded that there are material errors of fact or law about the conclusion that there had been no breach of contract.

230 The appeal should therefore, in my view, be dismissed. My reasons follow.

II. Overview of the Dispute

231 In light of the clear a nd comprehensive QB Reasons, an aerial view of the circumstances is sufficient. We do not discuss every point raised.

232 The QB Reasons found that the scope and nature of IFP's interest as reflected by the July 1998 Memorandum of Understanding (MOU in the QB Reasons) was significantly revised by the October 1998 Joint Operating Agreement and Asset Exchange Agreement. More specifically, the QB Reasons explained:

> 33 A key issue in this dispute is the nature of IFP's working interest. While the [Memorandum of Understanding] set out the intention that IFP's 20% working interest would relate to all development and production, whether primary, assisted or enhanced, the [Joint Operating Agreement] purports to limit the parties' working interests to thermal and other enhanced recovery. The [Joint Operating Agreement] relieves IFP of any liability fo r abandonment obligations related to primary operations. The evidence at trial indicated that it was important to IFP to limit its liability in this regard. ...

233 The QB Reasons concluded that the text of the Joint Operating Agreement (JOA in the QB Reasons) and Asset Exchange Agreement (AEA in the QB Reasons), corresponding to evidence about negotiations, reflected that IFP did not want to be linked to existing primary production by PanCanadian at Eyehill Creek, then shut in. During negotiations and later in the text of the Deal, IFP was concerned with liability fo r the significant cost of abandonment of those wells, among other things. The Deal reflected that.

234 The QB Reasons also concluded that IFP effectively traded away its interest in primary production at Eyehill Creek to avoid potential liability related to primary production. They found IFP focused its aspirations only on production by thermal methods (subject to limitations in the Deal) and at the start, PanCanadian shared the thermal production vision. The Chief Justice held that any right by IFP to refuse to consent to PanCanadian's farm-out agreement with Wiser depended on the extent of its working interest under the Joint Operating Agreement and Asset Exchange Agreement. Those agreements d id not make IFP's refusal to consent to the farm-out reasonable. As a result, the farm-out agreement was not a breach of the Deal, and PanCanadian and Wiser d id not owe IFP anything, even if that left IFP with only a conceptual residual interest in the Deal.

235 The Chief Justice was satisfied that this outcome was not unfair to IFP as it had received no guarantee under the Deal that there would ever be thermal production at Eyehill Creek. We observe, in passing, that the principal witness for IFP, Delamaide, conceded that PanCanadian was not required to proceed with thermal production (Transcript 226/35-36). But Delamaide also asserted that "[w]e didn't give up our royalty for hope [of a thermal project]. We gave it for something far stronger than that." (Transcript 206/4-5). Of course, parol evidence cannot supplant, or even explain, the wording of the Deal in a manner that is inconsistent with its interpretation in the QB Reasons.

236 IFP's position is that it retained a broader property interest in the resources at Eyehill Creek regardless of any agreement to focus the Joint Operating Agreement on thermal production to avoid liability on the existing primary production facilities and abandonment (referred to by Delamaide as ring-fencing). On closer examination, it is more like a veto.

237 IFP contended that even if PanCanadian was not required to carry on thermal production at Eyehill Creek, a proper reading of the Deal was that PanCanadian could no t prejudice thermal production on it, let alone permit Wiser to do so. Despite the suggestion that PanCanadian had a trust obligation to IFP, the trial and appeal do not turn on the concept of a trust.

238 IFP distinguishes the specific working interest under t he Joint Operating Agreement from what it characterizes as a property right in production recognized under the Asset Exchange Agreement. Put another way, IFP contended that the Deal gave them two forms of interest, not only the Joint Operating Agreement structured working interest which the QB Reasons characterized as their only remaining interest. Although IFP's position is complex, the spine of its submission appears to be IFP's residual interest to veto resource development of the Eyehill Creek property until PanCanadian either commenced thermal production as per the Joint Operating Agreement (with IFP's right to participate) or, presumably, until PanCanadian acquired IFP's working interest.

239 Significantly, however, the veto d id not prevent PanCanadian fro m any primary production, since the Deal and events thereafter had PanCanadian doing so without attack by IFP. The veto appears to have been against large-scale primary production which, in IFP's view, would leave it with nothing to make thermal production viable. As argued, this is a unique form of right or interest a nd since it does not bear clear definition, it is not surprising that IFP should apply the term "reasonable expectations" to identify it. The "reasonable expectations" veto asserted draws breath from Article 2401B(e), which refers to withholding consent from efforts "likely to have a material effect" on IFP's interest.

240 IFP contends that its reasonable expectations as to the meaning of the Deal were known to and accepted by PanCanadian. Those reasonable expectations and its residual property interest (as a matter of interpretation of the Deal) justified IFP's refusal to consent to PanCanadian's farm-out agreement with Wiser especially when coupled with the scale of primary production Wiser intended (and did). The actions of PanCanadian and Wiser in that regard were said to be a breach of the Deal for which IFP was entitled to damages.

III. Summary of the Events Leading to the Dispute

241 Between January and June, 1998, PanCanadian appears to have concluded that some or all of the Eyehill Creek property would be well-suited for piloting an enhanced thermal recovery process known as steam-assisted gravity drainage. It concluded that IFP's parent organization, the Institut Français du Pétrole could bring technological expertise about thermal production that would complement PanCanadian's experience as an oil and gas site operator. The Memorandum of Understanding dated June 23, 1998, was the outcome of discussions between representatives of IFP and PanCanadian in June 1998.

242 The QB Reasons held that by the terms of the Deal, their interests were separate. "Nothing contained

herein shall be construed as creating a partnership, joint venture or association of any kind or as imposing upon any party, any partnership duty, obligation or liability to any other party.": Article 1501 of the Operating Procedure being Schedule B to the Joint Operating Agreement. While the Joint Operating Agreement superseded the Operating Procedure in the event of discrepancy, this acknowledgment was considered significant.

243 The 1990 Operating Procedure is a standard form agreement that is a product of the Canadian Association of Petroleum Landmen. We can assume that this document embodied industry consensus on various typical contract terms - at least when this version was in use.

244 The QB Reasons found that the Memorandum of Understanding contemplated a 20% working interest in all forms of production, albeit that the parties were focused on thermal production. However, the QB Reasons concluded that, after detailed negotiations by the sophisticated corporate parties with legal advice, IFP agreed to give up its share in primary production (for which it did not want to share risk and costs).

245 The effective date of the Joint Operating Agreement was the same as the asset swap Asset Exchange Agreement. On appeal, IFP asserts that the definitions of "PCR Assets" in Clause 1.1 of the Asset Exchange Agreement, including "PCR Eyehill Creek Assets" under Clause 1.1(t), should be linked to "PCR Eyehill Creek Petroleum and Natural Gas Rights" and "PCR Eyehill Creek Miscellaneous Rights" which, when combined, give IFP a 20% property interest in the PanCanadian Eyehill Creek Petroleum and Natural Gas Rights. But Clause 2.9(d) of the Asset Exchange Agreement provided:

> Upon the execution of the [Joint Operating Agreements] referred to in subclause 2.9(A) subclause 2.9(c) shall be terminated and the **relationship** of the parties with respect to the PCR Lands shall be governed solely by the terms and provisions of said [Joint Operating Agreements].
>
> [Emphasis added]

246 IFP effectively contends that the new "relationship" is to be distinguished from any property right it had under the Asset Exchange Agreement, and all this meant was that the operational aspects of IFP's working interest was governed by the Joint Operating Agreement. The QB Reasons at para 80 appear to accept that the word "relationship" had limited effect.

247 Nonetheless, the QB Reasons read the Asset Exchange Agreement together with the relevant Joint Operating Agreement as giving IFP a 20% share of any thermal production only. The Joint Operating Agreement contains several features in Clause 4 as described by the QB Reasons thus:

> [91] Clauses 4(a) and 4(b) of the [Joint Operating Agreement] set out the structure of the parties' joint operations:
>
> 4(a) All operations conducted by the parties pursuant to this Agreement shall be at each party's sole risk and expense unless the contrary is specifically stated and always in accordance with Clause 5 hereof.
>
> (b) All operations conducted by the parties pursuant to this Agreement shall be conducted in a lawful manner and in accordance with good oilfield practice.

92 Clause 4(c) limits the working interests of the parties to thermal or other enhanced recovery schemes and projects:

> 4(c) It is specifically agreed and understood by the parties that the working interests of the parties as described in Clause 5 of this Agreement relate exclusively to thermal or other enhanced recovery schemes and projects which may be applicable in respect of the petroleum substances found within or under the Joint Lands and the Title Documents. Unless specifically agreed to in writing, IFP will have no interest and will bear no cost and will derive no benefit from the recovery of petroleum substances by primary recovery methods from any of the rights otherwise described as part of the Joint Lands or the Title Documents.

93 The Defendants argue this is a very significant clause. They rely on it to argue that IFP's working interest was reduced from the provisions of the AEA which conveyed a percentage of all of PCR's interest in the Title Documents and the Joint Lands to a working interest relating exclusively to thermal or other enhanced recovery schemes. They submit IFP has no interest in any other production from the lands and the JOA applies only to production from thermal or other enhanced recovery methods. [Emphasis added in QB Reasons]

248 The QB Reasons went on to note that Clause 5(c) of the Joint Operating Agreement was also directed to what sort of production work would be subject to the 80:20 split:

> 5(c) For greater clarity, there exist, in conjunction with the Joint Lands, numerous wells, flowlines, processing facilities a nd other similar and related surface and underground installations which have been or are being used in the primary production of petroleum substances and which are owned, at least partially, by PCR. The parties do not intend that IFP will, pursuant to this Agreement, acquire any interest in such wells, flowlines, facilities or installations. Unless otherwise specifically agreed in writing, the only circumstance in which IFP will come into possession of a proportionate 20% working interest share in any of the aforementioned wells, flowlines, facilities or installations is in the event such wells, flowlines, facilities, or installations are included within the definition of a thermal or other enhanced recovery project. At such time as the parties agree to the inclusion of any such well, flowline, facility or installation in a thermal or other enhanced recovery scheme or project, IFP will forthwith become the owner of a proportionate 20% working interest in any such well, flowline, facility or installation without further consideration paid by IFP to PCR. In such c ircumstance, IFP will a ssume its proportionate share of all future costs, liabilities and benefits derived from or associated with its ownership of such well, flowlin e, facility or installation. Any interest so acquired will become subject to the Operating Procedure without further action by the parties. [Emphasis added]

249 In effect, the QB Reasons find that, even if individuals negotiating on behalf of IFP ma y not have been inclined to surrender the working interest in other potential forms of production at Eyehill Creek under the Memorandum of Understanding, the objective meaning of the Deal as reflected in the Joint Operating Agreement and Asset Exchange Agreement, resulted in that trade-off. The QB Reasons supported this reading of the Joint Operating Agreement by reference to the contemporaneous Asset Exchange Agreement which contained acknowledgments and an entire agreement clause described in the QB Reasons as follows:

> 81 Article 3 of the AEA sets out representations a nd warranties. In Articles 3.1 and 3.2, IFP and PCR each acknowledge they are purchasing one another's interests a nd assets on an "a s is, where is" basis, without representation and warranty and without reliance on any information provided to or on behalf of IFP by PCR or vice versa or by any third party. The Defendants note there are no representations or warranties with respect to any promise to commence a thermal project or to refrain from primary production.
>
> 82 Articles 4 and 5 relate to Indemnities and Article 6 to Operating Adjustments. Article 7 contains some general provisions, including "Further Assurances" by each party.
>
> 83 Article 7.3 contains an entire agreement clause:
>
> > The provisions contained in any and all documents and agreements collateral hereto shall at all times be read subject to the provisions of this Agreement and, in the event of conflict, the provisions of this Agreement shall prevail. No amendments shall be made to this Agreement unless in writing, executed by the Parties. This Agreement supersedes all other agreements, documents, writings, and verbal understandings among the Parties relating to the subject matter hereof a nd expresses the entire agreement of the Parties with respect to the subject matter hereof.
>
> 84 This article makes clear the parties intended to have the AEA and attached schedules govern their relationship, without reference to any prior agreement or verbal understandings. The AEA takes precedence over any collateral agreements in the event of conflict. This includes the MOU signed by the parties prior to the AEA that, as discussed above, contained slightly different language on key terms. [Emphasis in QB Reasons]

250 Based on this analysis, the QB Reasons found that IFP got what it bargained fo r and had no reasonable expectations of any more than what the Deal said in October, 1998, as interpreted by the QB Reasons. In this respect, another crucial fact finding of the QB Reasons should also be noted here:

> 198 I can appreciate why IFP believed the disposition to Wiser would be likely to have a material adverse effect on its working interest or future operations. The problem is that such belief must be objectively reasonable. IFP had the unilateral expectation that PCR would initiate a [steam-assisted gravity drainage] operation and would refrain from primary production, but the agreements provide no basis for this expectation. Furthermore, in the context of an industry mandating development rather than sitting on rights, an agreement in which each party could make decisions based on its own interests, and tenants-in-common ownership, I find it was unreasonable for IFP to object to the disposition to Wiser on the grounds Wiser would undertake something PCR was entitled to do and in fact was doing. It is not objective ly reasonable to withhold consent and prohibit the alienation of PCR's interests on that basis.

251 No one suggests on appeal that there was any sort of collateral agreement entitling IFP to anything more than what the Deal actually gave IFP. The 'whole agreement clause" (Article 7.3) has also been noted. On this topic see ***Lindley v Lacey***, (1864) 17 CB (NS) 578, 144 ER 232; ***Erskine v Adeane***, (1873) 8 Ch App 756; ***Hawrish v Bank of Montreal***, [1969] SCR 515 at 520-51, 2 DLR (3d) 600; ***Carman Construction v Canadian Pacific Railway Co***, [1982] 1 SCR 958; ***Heilbut, Symons & Co v Buckleton***, [1913] AC 30 at p 47 (UKHL); G.H.L. Fridman, The Law of Contract in Canada 6th ed, (Thomson Professional Publishing 2011) at pp. 440-51.

252 Rather, IFP largely presses its case on what it calls 'reasonable expectations' reflected within the Deal and not extrinsic to it. Those expectations are said to support IFP's decision to refuse to consent to the farm-out agreement, and made PanCanadian's decision to farm-out to Wiser a breach of the Deal. At risk of repetition: the basis of those reasonable expectations proposed by IFP was a form of residual interest in the Eyehill Creek property's leased resources; the effect of those reasonable expectations was an ability to veto primary production by Wiser (and logically by PanCanadian) because that would undermine the viability of thermal production.

253 Seen in that light, the judicial task at trial was still to objectively interpret the Deal as it was written and signed, while making its parts work as harmoniously as possible.

254 The QB Reasons inter-related the Asset Exchange Agreement and the Joint Operating Agreement according to the language of each, a nd effectively found that they operated harmoniously and did not need to 'amend' each other in the sense argued at trial:

> 97 I find that IFP's working interest pursuant to these agreements has always been limited to thermal and other enhanced recovery methods. I find the AEA did not grant broad rights that were subsequently reduced or modified by the JOA, as assumed by both the Plaintiff and the Defendants. The AEA does not define the term working interest. The Preamble to the AEA states, however, that the ownership of working interests is subject to and in accordance with the terms and conditions of the JOA. Furthermore, the JOA is incorporated by reference into the AEA as though it were contained in the body of the AEA. As such, the definition of working interest in the JOA is incorporated by reference into the AEA.
>
> 98 Turning to the JOA, it adopts the definition of working interest set out in the Operating Procedure: "... the percentage of undivided interest held by a party in a production facility on the joint lands, ... which percentage is as provided in the Agreement..." The JOA then provides at Clause 4(c) that the parties' 80% and 20% working interests relate to thermal and enhanced recovery operations only.
>
> 99 The AEA and JOA are contemporaneous documents. Article 1.5 of the AEA incorporates the Schedules and makes them part of the body of the AEA. This is not a case of inconsistency between the terms and conditions of the AEA and the JOA; rather, the AEA lacks a definition that the JOA and Operating Procedure provide. I conclude IFP's working interests under these Agreements is in respect of thermal and other enhanced recovery operations only.

255 Therefore, the context of the Memorandum of Understanding was that IFP would have the opportunity to field test its thermal technologies and PanCanadian would be able to extract a significantly higher percentage of oil than traditional primary production could achieve. We must defer to specific fact findings in the QB Reasons as to the history of events absent palpable a nd overriding error of fact or clear unreasonableness in the reasoning.

256 The Joint Operating Agreement, Schedule B Operating Procedure, had two separate clauses which gave IFP two different rights in response to PanCanadian seeking to dispose of its interest: a right of first refusal (Article 2401B(d)) and a right to withhold consent to any dealings by PanCanadian that IFP could reasonably believe would negatively affect its interest in the property (Article 2401B(e)). The two rights

clauses would arise if IFP was given a "disposition notice" by PanCanadian. These clauses also applied to the farm-out agreement.

257 The right of first refusal clause in Article 2401B(d) referred to an election by the party receiving the disposition notice to itself give notice of "acceptance to purchase, for the applicable price, all of the working interest included in such disposition notice on the terms and conditions set forth in the disposition notice". As elaborated below, IFP did not exercise this clause.

258 The QB Reasons at para 112 concluded that the consent clause, Article 2401B(e), was at the "core of this case" because IFP d id purport to exercise it (and, as noted below, to rely on it for a considerable time) after an Abandonment, Reclamation and Option Letter Agreement and an Extension and Interim Operation Agreement was reached between PanCanadian and Wiser in March, 2001. Article 2401B(e) of the Operating Procedure provides as follows (emphasis in QB Reasons):

> In the event that the working interest described in the disposition notice is not disposed of to one or more of the offerees pursuant to the preceding Subclause, the disposition to the proposed assignee shall be subject to the consent of the offerees. Such consent shall not be unreasonably withheld, and it shall be reasonable for an offeree to withhold its consent to the disposition if it reasonably believes that the disposition would be likely to have a material adverse effect on it, its work ing interest or operations to be conducted hereunder, including, without limiting the generality of all or any part of the foregoing, a reasonable belief that the proposed assignee does not have the financial capability to meet prospective obligations arising out of this Operating Procedure. ...

259 Further context and detail are needed at this point.

260 Although the Deal was concluded in October 1998, it was clear by July 27, 1999 (if not by late 1998) that economic problems led to a virtual standstill at the Eyehill Creek property. There was evidence that by December 15, 1998, PanCanadian already knew that thermal production would not be economical. There was also evidence that in February and March 1999 PanCanadian was not optimistic about Eyehill Creek production.

261 An internal PanCanadian memo dated July 27, 1999, following a site visit to Eyehill Creek proposed three options for thermal production: construct a new facility; move an existing facility from Senlac to Eyehill Creek; or abandon the idea of thermal operations. Already by November, 1998, increases in the price of gas made the thermal project at Eyehill Creek uneconomical. By comparison, PanCanadian's Senlac facility appears to have been available as a steam-assisted gravity drainage testing ground even if profitability there might have been marginal.

262 It appears that PanCanadian lost interest in thermal production at Eyehill Creek in or before August 2000. Internal documents of October 5, 1999 and October 8, 1999, suggest that IFP was also aware that lo w prices for oil and elevated prices for gas were affecting any start-up of thermal production at Eyehill Creek. On December 2, 1999, PanCanadian was informed that PNG Lease No 0485010072 had expired.

263 Wiser had picked up the PNG Lease No 0495040095 when it outbid PanCanadian. The Crown had

also been pressing PanCanadian about the other wells in the area. The window was closing with Notices to Prove the Right to Produce issued to PanCanadian on June 23, 2000 for some 25 wells. PanCanadian appears to have faced abandonment liabilities.

264 IFP contended to this Court that it was not told about these events, a nd particularly not to ld of the expiry of the PNG Lease No 0495040095 and the pressure by the Crown. IFP characterizes the PanCanadian's silence as lacking good faith. IFP was found to have learned about Wiser in February, 2001. PanCanadian's staff evidently d id not think some of this information concerned IFP since IFP's interest, in the staff member's understanding, was in thermal production only.

265 In December, 2000, PanCanadian and Wiser entered into discussions for a farm-out. The QB Reasons found that PanCanadian gave IFP informal notice of the draft letter agreement with Wiser in February, 2001, and that IFP did not react to that informal notification.

266 By March 7, 2001, Wiser and PanCanadian had entered into the farm-out agreement and, by March 31, 2001, an Extension and Interim Operation Agreement. By April 9, 2001, PanCanadian and Wiser were seeking extensions of time from the Crown as to threatened abandonments for 27 wells. PanCanadian gave IFP notice of the farm-out agreement on April 19, 2001 with the comment that the notice "does no t constitute any acknowledgment of your interest to the transactions contemplated by" the farm-out agreement.

267 PanCanadian followed up with a proposed letter agreement on May 4, 2001. On May 9, 2001, IFP replied that it chose not to exercise the right of first refusal, but refused consent of the disposition to Wiser. IFP explained that in its view, the 20% interest it possessed included all forms of development, not just thermal production. The IFP letter included this:

> We remind you that Pan Canadian's commitment to the initiation and subsequent implementation of such technology development programs was a major reason that IFP agreed, pursuant to the terms of [the Memorandum of Understanding] and [the Asset Exchange Agreement] to exchange its royalty interests in the former CS Resources lands for working interests in the lands covered by the [Asset Exchange Agreement]. It was also one of the reasons that IFP agreed, in derogation of the terms of the [Memorandum of Understanding] and the [Asset Exchange Agreement] to limit the scope of the [Joint Operating Agreement] to thermal or other enhanced recovery schemes and projects on Eyehill Creek."
>
> [Emphasis added]

268 PanCanadian and Wiser proceeded with the farm-out agreement. PanCanadian was of the view that IFP's objection was unreasonable and the farm-out agreement was a legally effective novation consistent with the Deal. Nonetheless, IFP and PanCanadian continued to be in contact under the Deal. IFP was told by a July 18, 2001 letter from PanCanadian that under the farm-out agreement Wiser had until December 31, 2003 to "earn PanCanadian's working interest in the captioned lands".

269 By December, 2001, Wiser had done 105 abandonments, 42 reactivations and 23 new wells, of 220 wells on the suspended list for Eyehill Creek. By June 13, 2002, IFP was objecting in writing to Wiser's

drilling operations. That letter included these statements:

> Recently it came to our attention that Wiser has commenced drilling operations on the lands utilizing primary methods only. These operations undermine and potentially render impossible the agreed intention to develop the area using enhanced recovery techniques. Consequences, these agreements ... will have the effect of defeating the reasonable expectation that IFP ... had at the time of contract the [AEA]. Wiser clearly has neither the intention nor even the technological ability to fulfill the undertakings of PCR ...
>
> [Emphasis added]

270 By letter of July 31, 2002, PanCanadian replied to IFP, denying that IFP had any covenant to develop the Eyehill Creek lands and asserting that IFP's refusal to consent was no t legally valid.

271 On March 4, 2003, IFP filed its Statement of Claim suing PanCanadian (and its successor, EnCana) on a variety of bases, largely centred on breach of contract. IFP also sued Wiser as a party to the breach and alternatively as a form of trespasser against IFP's interests in the Deal.

IV. Reasons Under Appeal

272 The Chief Justice dismissed IFP's claim fo r breach of contract. He found that IFP unreasonably withheld consent to the farm-out agreement. These findings also defeated IFP's claim that Wiser was a party to PanCanadian's breach a nd a trespasser on property in which IFP had a legally enforceable interest.

273 The QB Reasons ended with a synopsis on the breach of contract claim as follows:

> 407 The contractual matrix entered into is at odds with the unilateral expectations of IFP. Were it to be granted the remedy asked for, the Court would, of necessity, acknowledge a better set of contracts conferring rights on IFP that IFP d id not negotiate in the first instance. IFP cannot attain a remedy which it could no t have obtained from PCR. IFP d id not bargain for a joint venture, notwithstanding its unilateral expectations in this regard. It provided technology in exchange fo r a working interest. IFP's working interest was restricted to EOR. It had no interest in primary production. Yet, primary production was contemplated in the contractual matrix.

274 In his view, the Deal did not justify IFP's contention as to its reasonable expectations under the Deal or withholding of consent to the farm-out agreement. The QB Reasons summarized: "I find IFP was unreasonable in withholding its consent to the farm-out agreement between PCR and Wiser. Wiser was novated into the JOA and IFP retains its 20% working interest in thermal and other enhanced recovery at Eyehill Creek": para 408.

275 The Chief Justice found, in the alternative, that if he was in error as to the breach of contract claim, IFP had not made out a proven loss of opportunity. In light of our reasons on liability, we do not need to burrow into the topic of damages.

276 As elaborated below, I agree that unilateral subjective hopes of the persons who acted on behalf of

IFP could not change the meaning of the Deal. Its terms must be read objectively in light of the commercial context by an informed and impartial observer; the objective interpretation of the Deal is crucial.

277 The issue as to whether it was reasonable for IFP to withhold consent to the farm-out agreement depended in part on what reasonable expectations IFP was entitled to have (on an objective interpretation of the Deal) and the circumstances in which the question of consent was called for by PanCanadian's notice of disposition.

278 The QB Reasons reveal that whether the farm-out agreement effectively deprived IFP of its interest in the original Deal was considered. They also considered whether deprivation, if any, was inconsistent with the Deal. We are no t persuaded that IFP's decision to not exercise the buyout clause in the Joint Operating Agreement's Operating Procedure Article 2401B(d) would automatically deprive IFP of the right to exercise the consent clause under Article 2401B(e). However, nothing turns on that subsidiary topic.

279 I am not persuaded that there was fundamental error in the QB Reasons that the reality was that IFP was not in a position to cross-develop the Eyehill Creek property using thermal production when Wiser was doing primary production on scores of wells, nor was it otherwise viable.

280 Turning to standard of review and hereafter to the analysis of the live issues, the procedural history of the litigation at the Court of Queen's Bench is relevant.

V. Queen's Bench Procedural History

281 The Chief Justice of the Court of Queen's Bench replaced the deceased judge who had heard the complex 33-day trial. The Chief Justice replaced him pursuant to rule 13.1 of the A lberta Rules of Court, AR 124/2010.

282 As reported in the QB Reasons, he "contacted counsel fo r the parties and they confirmed that this matter could be fairly decided on the record. I agreed to proceed accordingly": para 5.

283 As a result, the Chief Justice's findings were necessarily based upon a close review of the testimonial a nd documentary evidence. The respondents contended that a standard of correctness is warranted because of the action's unusual procedural history.

VI. Grounds of Appeal

284 The issues on appeal, somewhat restated, are whether:

i. IFP unreasonably refused to consent to the farm-out agreement;

ii. IFP reasonably believed that the farm-out agreement would have a material adverse effect on it and its working interest;

iii. PanCanadian acted contrary to the reasonable expectations of the parties to the Asset Exchange Agreement pursuant to which IFP had acquired its interest;

iv. PanCanadian owed a duty of good faith to IFP and, if so, did it breach that duty;

v. IFP is entitled to an accounting from Wiser; and

vi. IFP is entitled to damages

285 Given my conclusions on Grounds o ne through four it would be unnecessary for me to comment on Grounds five a nd six. To clarify, however, I might say that I largely would accept the analysis of the majority about damages were I to commence from the tipping point which the majority has found.

286 IFP also generalizes its criticism of the QB Reasons as reflecting error of this sort: "the court repeatedly referred to and rejected arguments which IFP d id not make, and failed to consider arguments that IFP did in fact make".

287 Speaking generally, it is hard to discern what harm would be done if a trial judge discussed arguments the party might have made but which would not have succeeded. So covering issues that IFP d id not formulate does not seem a reversible error. That said, the grounds raised by IFP can be construed as saying only that the QB Reasons misconceived IFP's submissions and failed to accurately consider and address arguments that IFP did make.

VII. Standard of Review

288 Despite the unusual fact that the Chief Justice was, in essence, sitting in a record review situation analogous to the position ordinarily occupied by this Court, we are satisfied that the customary standards of review apply.

Standard of Review for Findings Based Solely on the Record

289 All factual determinations, whether related to credibility, primary a nd inferred facts, or the global assessments of the evidence, are measured on a reasonableness standard: ***HL v Canada (Attorney General)***, 2005 SCC 25, [2005] 1 SCR 401 at paras 53-54. An appellate court may not interfere absent a palpable and overriding error that renders a finding unreasonable: ***Housen*** at para 24.

290 The Honourable Roger P Kerans & Kim M Willey in Standards of Review Employed by Appellate Courts, 2nd ed (Edmonton: Juriliber, 2006) at 50-52 point to the functional justifications fo r deference that exist regardless of the form that the evidence at trial takes. These include the rationale arising from the appropriate division of labour between trial and appeal courts. A de novo appeal is no more beneficial to the autonomy, integrity and expertise of a trial process, whatever form the trial process takes.

291 The justifications for deference exist beyond the usual advantages possessed by triers of fact, and many trials involve testimonial exhibits like audio and video interviews, recordings, charts, expert reports, photographs and other documents. The increase in summary trials is also a movement towards adjudication based less on viva voce evidence and more on what might be characterized as a composite

record: see generally ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87, the Alberta Rules of Court and many judgments of this Court.

292 This does not change the level of deference. ***Attila Dogan Construction and Installation Co v AMEC Americas Ltd***, 2015 ABCA 406 at para 9, 609 AR 313, held "[t]he standard of review fo r findings of fact and of inferences drawn from the facts is the same, even when the judge heard no oral evidence". "Nor is deference to factual findings reduced simply because they are based entirely on a written record": ***FL Receivables Trust 2002-A v Cobrand Foods Ltd***, 2007 ONCA 425 at para 46, 85 OR (3d) 561.

Standard of Review Governing the Issues in this Appeal

293 ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at paras 51 and 53, [2014] 2 SCR 633 notes that judicial decisions in contract disputes are not likely to have much value beyond the specific litigation. As explained in ***Sattva***, there is little to be gained and much to be lost by re-litigating such questions at an appellate level.

294 An exception to the reasonableness approach arises when the terms of the contract at issue being interpreted are standard terms of a standard-form contract a nd where consistency and predictability of interpretation are important: ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37, [2016] 2 SCR 23. Different clauses in the same overall agreement may be either standard form clauses, and correctness applies, or they may be homespun, in which instance reasonableness applies. Either way, however, the test remains an objective one and, to my mind, should be a rather a clinical exercise. That is so even though, as the majority correctly observes, context is still important: see eg ***Wood v Capita Insurance Services Ltd*** [2017] UKSC 24 at paras 10 to 15 where Lord Hodge contended that "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation."

295 Objective interpretation of standardized terms adapted to the contractual arrangements between these parties may give rise to extricable issues of law. If so they are reviewable for correctness: ***Ledco r***. The Operating Procedure document arguably is a standardized document for which a multiplicity of reasonable interpretations of the same terms would not be helpful. However, while some aspects of the contract terms are drawn from industry, the decisive parts of the agreements were drafted for or adapted to the Deal by the parties. We note as well that this standardized agreement usually applies in very different circumstances, the actual production of the oil and gas, not the mode of production. So once again deference will apply to the question of what the contract actually consists o f. In my view, interference with the ultimate conclusion would be justified only if the factual aspects of the interpretation of the Deal in the QB Reasons were unreasonable or afflicted with palpable and overriding error. The majority finds such.

296 The approach of the QB Reasons was to apply general principles of contractual interpretation to the words of the written contract, considered in light of the factual matrix: see ***Sattva*** at para 50.

297 The Supreme Court has also made the following observation in ***Heritage Capital Corp v Equitable Trust Co***, 2016 SCC 19 at para 22, [2016] 1 SCR 306: "where an extricable question of law can be

identified, the standard of correctness applies. Extricable questions of law include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'".

298 Significant principles of contractual interpretation (such as referred to in the passage from ***Heritage Capital***) are engaged here. So "a practical, common-sense approach not dominated by technical rules of construction" applies: ***Sattva*** at para 47. The approach should be objective, and should not isolate and focus on a specific aspect of a collection of agreements, or fix on the language of that aspect and call the result on that basis. An examination of surrounding circumstances does no more than "deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text a nd read in light of the entire contract: ***Sattva*** at para 57 (with emphasis added).

299 Prof. Fridman, in The Law of Contract in Canada, 6th ed (Toronto: Thomson Canada Limited, 2011) wrote: "The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood...": at 15 with footnotes omitted. Prof. Fridman quotes from ***Ron Ghitter Property Consultants Ltd v Beaver Lumber Co***, 2003 ABCA 221 at para 9, 17 Alta LR 4th 243 at para 9 which reads in part (with emphasis added):

> The common thread ... is that the parties will be found to have reached a meeting of the minds, in other words be ad idem, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essentia l terms of that contract can be determined with a reasonable degree of certainty ...This requires the court to decide whether "a sensible third party would take the a greement to mean what a understood it to mean or what B understood it to mean, or whether indeed any meaning can be attributed to it at all... Otherwise, ... "the consensus ad idem would be a matter of mere conjecture."

300 To move beyond the determination of objective intent potentially involves the insinuation into the contract of court-inspired implied terms thought to make the contract more like the parties should have intended. This is not the role of the court.

301 The distinction between implying a term a nd interpreting what is there already has a blurry boundary despite that crucial distinction: see ***Ontario Electricity Financial Corporation v Iroquois Falls Power Corporation et al***, 2016 ONCA 271 at paras 111-13, 398 D.L.R. (4th) 652 leave denied (January 19, 2017) [2016] SCCA No 279 (QL) (SCC No 37083).

302 In sum, the specific findings of fact and the inferences of fact or mixed fact and law in the QB Reasons deserve deference and are assessed for reasonableness. Extricable questions of law are assessed for correctness. In the end, even on a reasonableness standard of review, the required application of objectivity to the question of interpretation a nd the necessity of consistent application of established principles of contractual construction, can lead to a situation where there is, on the crucial issues, only a single interpretation that fits the Deal and the entire context. This brings me to the submissions on appeal.

VIII. Analysis

303 To set the stage for the various arguments made by IFP, it is useful to look at what IFP invested in the Deal and what it hoped to receive under it. Plainly, what IFP traded in the Asset Exchange Agreement (its 3% gross overriding royalty) had significant value. The QB Reasons found that the parties agreed to a valuation figure of $16 million; IFP internally allocated $14.8 million of this amount to Eyehill Creek: para 32.

304 This figure of $16 million is significant to another aspect of the Deal as noted in the QB Reasons:

> 85 Article 7.9 purports to limit liability of either party with respect to claims arising out of or in connection with the AEA to the value of assets set out in Article 2.7, namely $16 million:
>
> > In no event shall the liability of PCR to IFP in respect of claims of IFP arising out of or in connection with this Agreement exceed, in the aggregate, the value fo r the PCR Assets as set o ut in section 2.7, taking into account any and all increases or decreases to such value that occur by virtue of the terms of this Agreement. In no event shall the liability of IFP to PCR in respect of claims of PCR arising out of or in connection with this Agreement exceed, in the aggregate, the value fo r the IFP Assets as set out in section 2.7, taking into account any and all increases or decreases to such value that occur by virtue of the terms of this Agreement. [Emphasis added in QB Reasons]

305 The QB Reasons found that IFP knowingly traded assets of significant value to PanCanadian in return for the Joint Operating Agreement. That agreement gave PanCanadian discretion as to whether and how to commence thermal production. It does appear that IFP was relatively deferential to PanCanadian about commencement of thermal production and also patient with PanCanadian's limited primary production work. IFP does no t dispute that PanCanadian was not required to do thermal production at a particular time.

306 Steam-assisted gravity drainage was contemplated to be a substitute for unprofitable primary well production under the Memorandum of Understanding. But soon after the Deal, thermal production was not looking propitious either. That change was not a result of PanCanadian acting unilaterally, even if it did act rather unilaterally as a consequence of those developments. There is no dispute that costs a nd resource prices can change over time, even greatly. Further, while the 3% gross overriding royalty had value, it was not traded fo r a 20% gross overriding royalty on the Eyehill Creek property. The 20% working interest was an interest of a different sort, and had a different potential profit and risk.

307 Further, while IFP suggests that the Deal created almost a perverse incentive for PanCanadian to not turn to thermal production, the QB Reasons were aware of this, calling the Deal unusual since elements of it "create competing working interests": para 194. As much as it might seem, ex post facto, to have been improvident for IFP to have agreed to a Deal containing those terms, there is no suggestion of IFP being vulnerable or being taken advantage o f, let alone cheated. I turn to the first two grounds of appeal.

Grounds 1 and 2 - Did IFP Act Reasonably in Refusing Consent to the Farm-out Agreement?

308 I combine IFP's first two grounds of appeal.

309 IFP emphasizes the language in Article 2401B(e) of the Operating Procedure whereby it says that consent could be refused if it "reasonably believes that the disposition would be likely to have a material effect on it, its working interest or operations to be conducted thereunder". IFP suggests that the QB Reasons at para 198 paraphrased this language although it was quoted in full at para 111.

310 The QB Reasons properly accepted that the onus was on PanCanadian to prove consent was unreasonably withheld: ***Sundance Investment Corporation Ltd v Richfield Properties Ltd*** (1983), 41 AR 231 at para 23, 24 Alta LR (2d) 1. The party refusing consent is entitled to base its refusal on self-interest: QB Reasons at paras 153-58.

311 The QB Reasons rejected a contention by PanCanadian that all elements of IFP's rationale fo r refusing to consent had to exist and be known to IFP at the time of the refusal of consent, and after-the-fact justification could not supplement the reasonableness of refusal to consent. The QB Reasons did not say that the grounds fo r refusal always had to exist before the refusal. The QB Reasons stated that there were not "new grounds for withholding consent": paras 183-87. They also held that the basis of IFP's refusal remained the same throughout: it had concluded that Wiser was going to deplete the resources at Eyehill Creek making thermal production unviable. This was part of the original rationale even though further information became available.

312 IFP also refers to ***Community Drug Marts P & S Inc Estate v William Schwartz Construction Co Ltd*** (1980), 31 AR 466, 116 DLR (3d) 450, affirmed [1981] AJ No 537 (QL) for the proposition that it was entitled to serve its own interests by refusing to consent. Although the QB Reasons acknowledge this (see paras 154 and 155), they also say that the circumstances of whether the refusal to consent is reasonable include "the commercial realities of the marketplace and the economic impact of an assignment": para 162. The latter is crucial because the QB Reasons accepted the respondents' submission that "if a party to an agreement will receive as much under the proposed disposition as it would have had under the original agreement then a refusal to consent must be unreasonable. [The respondents] submit Wiser was doing no more than what PCR was entitled to do; the status quo was unchanged and IFP's justification for withholding consent was plainly untenable and unreasonable": para 192.

313 The identity and character of a party proposed to substitute fo r an existing party (here Wiser for PanCanadian) might be a factor in refusing consent if an undertaking is personal or there is a distinct difference between the substitute and the original party: see e.g. ***Ford Motor Company of Canada, Limited v Welcome Ford Sales Ltd***, 2011 ABCA 158 at paras 46, 54 to 59, 505 AR 146. Indeed, wording in Article 2401B(e) mentions "financial capability" as a potential difference between the substitute party and original party. That is not an issue here.

314 IFP's concern over the lack of competence of Wiser in thermal production was offered as a basis to differentiate PanCanadian. But PanCanadian would also have needed IFP's help. So the change of identity on competence grounds does not appear to be a dispositive consideration on the reasonableness of consent. Indeed, IFP emphasizes attitude not competence: para 21 of its factum.

315 IFP urges that an important identity differential arises from the difference between "an operator who is experienced in thermal production and who cares about preserving the field's thermal potential [as]

entirely different from primary production by an operator with no knowledge of thermal and no reason to care about the impact of what it is doing on future thermal operations." (emphasis added). Although IFP asserts that the QB Reasons overlooked important evidence (which IFP described at paras 22 to 34 of its factum), those submissions come down to a dispute about the ultimate fact findings.

316 A trial judge does not have to itemize every element of the facts in the reasons: co mpare ***Pivotal Capital Advisory Group Ltd v NorAmera BioEnergy Corp***, 2010 ABCA 199 at para 22, 487 AR 313. A swathe of the evidence which IFP says was ignored related to the previous reliability of PanCanadian generally and its research about whether steam-assisted gravity drainage development of Eyehill Creek would be profitable. Arguably, that evidence tends to support the inference that PanCanadian made its decision to remove itself from the Deal on the basis of informed economic practicality which would have presumably governed PanCanadian had Wiser not stepped in.

317 There is no suggestion that Wiser called on IFP to contribute to expenses necessary to rehabilitate or abandon primary production wells. It stuck with that part of the Deal. PanCanadian also monitored what Wiser was doing and told IFP about it. In the end, we are not persuaded that the QB Reasons fall short of reasonable because they d id not find the change of identity from PanCanadian to Wiser provided IFP with grounds to refuse consent.

318 Identity aside, IFP emphasizes that the anticipated work by Wiser would adversely affect IFP's working interest in the Eyehill Creek area. This returns to the point discussed above about the circular position of IFP: it had a reasonable expectation-based form of veto to prevent primary production that could materially and adversely affect its interest.

319 IFP says that the QB Reasons wrongly re-cast the question that IFP posed in relation to consent and therefore missed the essence of its submission. We disagree. The QB Reasons simply noted that, even if the Wiser work would deplete the resource, it would only be in a manner that PanCanadian could have done. As noted, the QB Reasons point out that the Deal was unusual in the sense that it created competing interests as well as terms of how the parties might be able to work together.

320 That said, the QB Reasons pointed out: "[i]t is equally clear that IFP was in no position to undertake [steam-assisted gravity drainage] operation on its own. It had neither the operational know-how nor the financial backing to do so. It could not take advantage of the ROFR clause or initiate independent operations": para 197 with emphasis. The reference to financial backing refers to the fact that the Deal contemplated that IFP might be required to turn to others for financing, and to grant rights under those circumstances: QB Reasons at para 75. IFP's part of the Deal acknowledged limitations on IFP's obligations, capacity and rights in the Joint Operating Agreement. The respondents' position is that IFP retained a residual ability to commence thermal operations on its own. I am not persuaded by the respondents' argument that IFP's decision not to exercise the right of first refusal clause defeated IFP's ability to withhold consent. A party with two contractual rights is entitled to exercise either of them.

321 I have also concluded that it was not a palpable error for the QB Reasons to find that IFP's rationale for refusing consent was unreasonable because it had the effect of overriding legitimate rights of another party to the same Deal. Said another way, IFP contended that PanCanadian could not injure its contractual rights but the converse is also true. That said, I concede that the majority view that IFP, seeing things from

its point of view, is that IFP could reasonably refuse to consent. The consent related to alienation, and the key problem fo r IFP was more to do with how to utilize the lands.

322 The QB Reasons in effect related IFP's refusal to consent to the fact that IFP was dissatisfied because the respondents could proceed without its consent with primary (not thermal) production. But the negative effect on IFP is the same no matter which of them did it.

323 As quoted above, "it was unreasonable for IFP to object to the disposition to Wise r on the grounds Wiser would undertake something PCR was entitled to do and in fact was doing. It is not objectively reasonable to withhold consent and prohibit the alienation of PCR's interests on that basis.": para 198 of the QB Reasons. Against this factual background, that was a reasonable finding and cannot be disturbed.

324 In the end, I agree with the QB Reasons that there was no reasonable refusal under the terms of the Deal. As a matter of la w IFP was in no worse position after the farm-out to Wiser than it was before. PanCanadian was under no obligation to develop the thermal a nd enhanced recovery potential of Eyehill. IFP d id not contract fo r that obligation. Absent some other legally effective reason to impugn the farm-out agreement, these first two grounds of appeal must fail.

325 A premise of IFP on related grounds is that IFP had a right under the Deal to prevent both PanCanadian and Wiser from primary production without compensating IFP. That leads to the third ground of appeal as to reasonable expectations a nd substantially to the fourth ground of appeal, which relates to good faith.

Grounds 3 and 4 - Good Faith Dealings and Reasonable Expectations

326 The scope on appeal of the topic of good faith execution of the Deal by PanCanadian must be clarified. Although there was a pleading about misrepresentation in the original statement of claim, misrepresentation was not pursued at trial or on appeal. To the extent that IFP makes submission about good faith on appeal, it is only in the context of PanCanadian entering into the farm-out agreement as against what it should be taken to know about the reasonable expectations of IFP. IFP's arguments about good faith are linked to whether the farm-out agreement effectively eliminated IFP's entitlements under the Deal. As the bad faith submission is related to the reasonable expectations submission, we analyze them together.

327 IFP's position commences with the contention that both PanCanadian and IFP were of the opinion in 1998 that primary production at Eyehill Creek was uneconomical a nd thermal production was the only way to proceed. Thermal production would use the special skills of IFP and the practical knowhow and capacity of PanCanadian. IFP said that PanCanadian represented this aspiration internally, to IFP and to the Alberta government. IFP also invokes the Memorandum of Understanding.

328 It is important to emphasize that the rest of the Deal (the Joint Operating Agreement, Asset Exchange Agreement and Technology Development Agreement) came months later and reflected IFP's position after considerable discussion (especially concerning primary production liabilities).

Good Faith in Contractual Dealings

329 I start the analysis of the third and fourth grounds of appeal with the principle that a party can reasonably expect that the other party will not act dishonestly. "At a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright: ***Bhasin v Hrynew***, 2014 SCC 71, at para 66": ***Potter v New Brunswick Legal Aid Services Commi ssion***, 2015 SCC 10 at para 99, [2015] 1 SCR 500 (with emphasis). In my view, the word "reasonable" in that package is part of a cumulative concept of executory 'good faith', and it is not a free standing entitlement of reasonableness of the part of the other party when it exercises rights it possesses under the contract.

330 IFP's submissions on Ground four center on whether PanCanadian wrongly, that is, in bad faith, farmed-out the leased property to Wiser. It contends that it d id so secretively, within months of the Deal and in a manner that rendered IFP's residual interest in the Deal worthless. The QB Reasons did no t find that PanCanadian's conduct wrongly overrode any reasonable expectations of IFP: paras 205-207.

331 There is nothing that I see in ***Bhasin*** to suggest that IFP's expectations -- however reasonable a nd even if considered together with principles relating to implying terms in a contextual way for business good sense -- that make it reversible error fo r the QB Reasons no t to find justification fo r "repairing" the Deal so as to enforce an obligation of good faith performance by PanCanadian.

332 The law will not amend this sort of a contract merely because the interests of IFP d id not turn out to be beneficial, advantageous or profitable, le t alone because the Deal turned out to be improvident: compare ***Jedfro Investments (USA) Ltd v Jacyk***, [2007] 3 SCR 679, 2007 SCC 55 at para 34 citing ***Pacific National Investments Ltd v Victoria (City)***, [2004] 3 SCR 575, 2004 SCC 75, para 31. As discussed more fully below, one-sided expectations about what contracts promise are not what the la w means by reasonable expectations. Reasonable expectations in a contract are only those which the manifested intentions in the contract, properly interpreted, reveal.

333 In light of the record, I am not persuaded that the "organizing principle of good faith" discussed in ***Bhasi n*** should be treated as creating a specific term of the Deal or as influencing the meaning of any terms of the Deal. To be fair, my colleagues place emphasis on that organizing principle in relation to the execution rather than the interpretation of the contract saying at para 188 that PanCanadian was obliged to have "appropriate regard to the legitimate contractual interests of the contracting power". The distinction is important so I do not wish to be thought of side-swiping the majority reasoning in this respect on the way by. I merely differ with the majority on what IFP was entitled by the terms of the agreement to claim as legitimate contractual interests.

334 IFP contended that actions by Sinclair for PanCanadian (Sinclair having been held responsible fo r the loss by expiry of the second of two PNG Leases) were colourable. The allegedly colourable nature of those actions does no t provide an independent basis of a claim by IFP. Those assertions are merely adjectival to IFP's complaint about PanCanadian's ultimate decision to enter into the farm-out agreement. As noted above, it is crucial to IFP's position that it retained a form of quasi-property interest in the resources of the Eyehill Creek even if it only had a 20% working interest in resources developed by thermal methods. My colleagues agree with IFP and find that the working interest was larger than that.

335 Assuming that premise to be correct, IFP's position is therefore that PanCanadian had no right to

unilaterally do primary production on the Eyehill Creek property to the exclusion of IFP's residual interests, le t alone to transfer such a right to Wiser. If so, it would not make any difference if Sinclair acted in a clandestine way. IFP's emphasis on the actions of Sinclair calls into question the premise asserted by IFP that neither PanCanadian nor Wiser could do primary production without the IFP's agreement. ***Bhasin*** recognized a duty of honest contractual performance, b ut d id not otherwise supplement the existing areas of law which recognize good faith, such as in insurance or employment law, as discussed more fully below. ***Bhasi n*** held:

> [70] The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another -- even intentionally -- in the legitimate pursuit of economic self-interest ... Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency The development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

336 As said, the duty of honest contractual performance does not re-cast the parties' rights as set out in the Deal. Further, the basis of a finding as to honesty in the performance of a contract seems to be axiomatically a question of mixed fact and law, if not a question of fact. Although IFP argues, in effect, that the actions of Sinclair approached skulduggery, the QB Reasons do not find dishonesty by PanCanadian and there does not appear to be a basis for such a finding.

337 A commercial interpretation of a contract does not require that the contract be profitable fo r every party to it. Failure of a party to disclose a plan to exercise a contractual right until it is considered opportune is not automatically a breach of good faith, let alone a breach of the contract. That said, I do not disagree with the majority that there can be cases where in the performance of a contract one party might act in a manner leading the other party not to appreciate their interests were being thrown under the bus, and that such manner of acting may breach the contract. To me this is an issue of fact or mixed fact and law. This leads me to the discussion of reasonable expectations.

338 As I am not persuaded that reasonable expectations are a free-standing judicial contract evaluation tool, IFP needed to identify a way in which its reasonable expectations arose in this case such as to assist IFP here. The claimant party is not obliged to show this with some sort of geometric logic, to paraphrase Captain Queeg. But if a reasonable reading of the Deal does not support the sort of veto that IFP asserts can be based on it s reasonable expectations, a veto cannot be grounded in reasonable expectations in law. As discussed below, I am not persuaded that there are internal or external forces lending support to the reasonable expectations of IFP.

339 There are specialized areas of law where reasonable expectations have been discussed in connection with private la w contract interpretation or execution. At the outset I contrast reasonable expectations from the public or administrative la w doctrine of legitimate expectations which only inform the duty of procedural fairness and grant no substantive rights: ***Black v Canada (Prime Minister)***, (2001) 54 OR (3d)

215 at para 62, 199 DLR (4th) 228.

Public Expectations

340 First, reasonable expectations by members of society generally (public expectations) ma y have a role in implying terms into specialized types of contracts. These expectations are of a public or general nature, invoking public policy, and are no t influenced by what a particular party's perspective ma y be. For example, an implied term of reasonable notice of termination is imported if an employment contract is silent on notice. Contracts of insurance import an implied term of utmost good faith (see also industry expectations, below). Contract language a nd legislation ma y expressly displace public expectations.

341 As to public policy, recently in ***Ferme Vi-Ber Inc v Financière agricole du Québec***, 2016 SCC 34, [2016] 1 SCR 1032 the Supreme Court recognized a form of private law contract involving individuals and the state that was not governed by public law. The Supreme Court said the private la w contract at issue was not a contract of insurance or a true social insurance program but its social objectives created requirements of good faith and contractual fairness in the execution of the contract by the state. The Supreme Court said that the concept of reasonable expectations of an insured person under an insurance contract d id not apply because it was not a contract of insurance. But it added:

> [63] The scope of the rule [of interpretation based on the reasonable expectations of the insured] ... was applied in the United States in three ways: (1) to resolve any ambiguity in the terms of the contract in favour of the insured in order to satisfy his or her reasonable expectation; (2) to give the insured a right to all the coverage he or s he was entitled to expect, unless there was an "unequivocal plain and clear manifestation of the company's intent to exclude coverage"; or (3) to give the insured such coverage even in cases in which "painstaking study of the policy provisions would have negated those expectations" (p. 103). The first a nd third of these scenarios correspond, respectively, to what some authors have called the "minimum" and "maximum" dimensions of the doctrine ... However, none of them allows the meaning of a clear provision to be disregarded in favour of the expectations of the insured, except, in the third case, insofar as the interpretation of the provision requires "painstaking study" to determine its true meaning." [Emphasis added]

342 The Supreme Court also said that, in Québec law, the reasonable expectations rule must apply solely in its minimum dimension, that is, only when there is ambiguity. This brought into play the Civil Code of Québec. Accordingly, there is nothing in the public policy discussion in ***Ferme Vi-Ber*** which assists IFP.

343 An application of reasonable expectations of a public nature arises in the tendering contract situation which, as Lord Bingham pointed o ut in ***Blackpool and Fylde Aero Club Ltd***, [1990] 3 All ER 25 (CA) is "heavily weighted in favour of the invitor" (cited in ***MJB Enterprises Ltd. v. Defence Construction (1951) Ltd***, [1999] 1 SCR 619 at para 41). See also ***Marine Atlantic Inc v Topsail Shipping Company Limited***, 2014 NLCA 41, 379 DLR (4th) 442, suggesting that the content of fairness in tendering ma y be defined by the parties' reasonable expectations. But the Deal is not such a contract.

344 Public policy may also touch on expectations in contract law concerning restrictive covenants: see

e.g., ***MEDIchair LP v DME Medequip Inc***, 2016 ONCA 168, 397 DLR (4th) 224. There is nothing of that here.

345 Reasonable expectations supportable by external policy considerations ma y also arise in franchise agreements because usually the franchisor has a substantial advantage over the franchisee: see ***Addison Chevrolet Buick GMC Limited v General Motors of Canada Limited***, 2016 ONCA 324 at para 64, 130 OR (3d) 161, leave denied (February 2, 2017) [2016] SCCA No 317 (QL) (SCC No. 37115). But, once again, those sorts of expectations will ultimately be linked to and identified from the content of the franchise agreements. In other words, the reasonableness reference arises in that context, not subjectively. That is also not this case.

346 General public expectations were called in a id of the interpretation of a contract in relation to the gaming business, but that was a case where there were understandings regarded as constituting part of the activity involved. The contract was not entirely in writing, so one can understand how reasonable expectations might figure in deciding what the unwritten aspects were: see e.g., ***Moreira v Ontario Lottery and Gaming Corporation***, 2013 ONCA 121, 296 CCC (3d) 245, leave denied (2013) [2013] SCCA No. 192 (QL) (SCC Nos. 35344, 35346). Also, a general consensus of what an ordinary consumer might expect entering into a contract may figure in whether a contract was reached at all: ***Girouard v Druet***, 2012 NBCA 40 at para 4, 349 DLR (4th) 116.

347 None of the foregoing forms of reasonable expectations apply in this case in my case.

Industry Expectations

348 Second, reasonable expectations of persons involved in a specific industry (industry expectations) may also have a role in assessing whether an ambiguous clause or term of a contract should be given a specific meaning. Again, such expectations are not subjective: compare ***Black v Canada (Prime Minister)***. In a sense, reasonable expectations grounded in the practice of the relevant industry ma y be circumstantial evidence of what would be the likely objective meaning of the clause or term a nd therefore its case-specific meaning. Once again, however, these expectations are general and not drawn from a particular party's perspective of what it considers reasonable. And once again, contract language and legislation ma y expressly displace such expectations.

349 An application of reasonable expectations in the industry-specific category (and to an extent also in the public policy category) arises in insurance contracts, where ambiguous terms are assessed in light of general reasonable expectations: see ***Reid Crowther & Partners Ltd v Simcoe & Erie General Insurance Co***, [1993] 1 SCR 252 at p 269; ***Canadian National Railway Company v Royal and Sun Alliance Insurance Company of Canada***, 2008 SCC 66 at para 30, [2008] 3 SCR 453; ***Lloyds Syndicate 1221 (Millenium Syndicate) v Coventree Inc***, 2012 ONCA 341 at para 15, 291 OAC 178, leave denied (2012) [2012] S.C.C.A. No. 276 (QL) (SCC No 34876); and ***Progressive Homes Ltd v. Lombard General Insurance Company***, 2010 SCC 33 at paras 23, 51-57, [2010] 2 SCR 245.

350 This application of reasonable expectations having some relevance in the face of ambiguity has been occasionally seen in other situations when such expectations are linked to industry practices and business efficacy such as exemplified in ***Keephills Aggregate Co v Riverview Properties Inc***, 2011 ABCA 101 at

para12, 44 Alta LR (5th) 264:

> [12] There is, of course, a general rule that it is not the function of the court to rewrite a contract fo r the parties. Nor is it their role to relieve one of the parties against the consequences of an improvident contract: ... However, courts should prefer interpretations that are consistent with the reasonable expectations of the parties, including compelling notions of business efficacy in such a context, so long as such an interpretation can be supported by the text: ... [Emphasis added]

See also ***Swan Group Inc v Bishop***, 2013 ABCA 29 para 20, 78 Alta LR 5th 217.

351 But in those cases, the reasonable expectations are once again keyed to ambiguity of a contract term on the one hand, and general notions of business efficacy on the other. Once again subjective expectations have no role.

Expectations in Fiduciary Relationships or in Unjust Enrichment Cases

352 Third, reasonable expectations ma y arise in fiduciary relationships and cases of unjust enrichment. But despite the sentiments of IFP's witness, the la w of fiduciary relationships and unjust enrichment do not apply here. As pointed out in ***Bhasi n*** at para 86:

> The duty of honest performance ... should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (uberrimae fidei) such as an insurance contract, which among other things obliges the parties to disclose material facts: Whiten. But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

353 IFP has not cited any authority to suggest that its expectations--of what it was entitled to under the Deal, and what PanCanadian owed it in terms of respecting IFP's interests (however reasonable those expectations might have been) -- could modify what, on objective interpretation, the Deal can be reasonably read to say. It is the Deal, not IFP's expectations, which define what would be a breach of the contract.

354 Although I concede that the majority has set out a compelling argument that the terms of the Deal between the parties, read in light of business concepts, should be read otherwise, I am of the view that it was a matter of ordinary and objective contract construction for the QB Reasons to decide what the Deal involved. The position of IFP as to the legal scope of 'reasonable expectations' is no t entirely clear but its claimed expectations are, in my respectful view, not clearly expressed in how the Deal was articulated. Reasonable expectations in this context should not be external concept of law that would displace any content of the Deal.

355 As exemplified by the decision of the Quebec Court of Appeal in ***Churchill Falls (Labrador)***

Corporation Limited v Hydro-Québec, 2016 QCCA 1229, leave granted (April 20, 2017) [2016] SCCA No 431 (QL) (SCC No 37238), albeit in the context of principles of the Civil Code of Quebec, the Courts must be wary of rescuing parties from deals which turn out to be unfavourable in how the parties accepted to be their wording.

356 IFP's position is that its reasonable expectations were grounded in the Deal; that is, they were based primarily on the aspirations and terms of the Memorandum of Understanding; an interpretation of the Asset Exchange Agreement a nd Joint Operating Agreement, and a veto over what PanCanadian could do with the Eyehill Creek resources.

357 So recognized, the contention of IFP comes back to its reading of the Deal and its claim that its residual interest (supporting a right to object to primary production at a certain level), should prevail. I do not find this persuasive as a matter of fact as well as a matter of principle in construction of the Deal and would defer to the QB Reasons on this issue.

358 IFP also criticizes the QB Reasons at para 212 for referring to the failure of IPF to point to "any specific provision of the contract or industry practice that would indicate it s expectations were reasonable". IFP submits that this statement was "inconsistent with the case law and the very reason the court developed the 'reasonable expectations doctrine'." As discussed above, I am unable to discern the scope of the "doctrine" that IFP is talking about. To my mind, there is no error in the QB Reasons.

359 Finally, IFP suggests that one sort of reasonable expectation that any contractor would have is that it will not be deprived by the actions of the other party of "substantially the whole benefit of the contract": see e.g. ***Shelanu Inc v Print Three Franchising Corporation*** (2003), 64 OR (3d) 533 at paras 113-14. But that line of authority falls into the category mentioned above of reasonable expectations that the contract will not be breached by the other party. It also repeats the position of IFP about the residual interest claimed by IFP.

360 Although there may be debate about concepts like "fundamental breach" of contract, the notion proposed by IFP should not be allowed to spill over into a matter of reasonable expectations in some sort of good faith sense. This lawsuit is grounded in submissions related to breach of contract. It hinges on what the objective reading of the contract is, and it is that process that defines the "whole benefit of the contract" in my view. This is not a subjective matter. Nor does it turn on the attitude of PanCanadian as reflected in its conduct.

361 I would reject this ground of appeal about reasonable expectations.

IX. Conclusion

362 In light of the foregoing, the finding of the QB Reasons that there was no breach of the Deal is in my view reasonable. The position of IFP that it was entitled to something more from the Deal-- based on the premise that the Deal gave IFP a working interest sufficient to permit it to veto the farm-out agreement -- could be reasonably rejected. Given this conclusion, I might refrain from discussing the Grounds related to damages. But if I were with the majority, I would concur in how the majority deals with the issue of damages.

363 In my respectful view, the appeal must be dismissed.

Reasons filed at Calgary, Alberta this 26th day of May, 2017

J. WATSON J.A.

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1 The parties sometimes refer to Eyehill Creek as the "North Bodo" property.

2 All of the named respondents, except for The Wiser Oil Company and Canadian Forest Oil Ltd., were or are partners, or successors in interest, in PCR.

3 Though nothing turns on this in terms of the dispute between PCR and IFP, another company, Enermark, held a working interest ranging from 3.625% to 7.25% on approximately two sections of land at Eyehill Creek.

4 Canadian Forest Oil Ltd., a body corporate incorporated under the laws of Alberta, is a corporate successor to The Wiser Oil Company of Canada.

5 See online: <http://caplacanada.org/wp-content/uploads /2016/09/2016_Sept_NEXUS.pdf>.

6 Some were duplicates. Excluding the duplicates which still required attention paid to relevant details, the total number was 11.

7 This would of course be subject to the proviso that PCR was not a joint lessee of the subject leases. It must also be noted that PCR did dispose of a small part of its working interest to Enermark.

8 Mark Montemurro, "IFP Heavy Oil Royalty Recommendation" (May 29, 1998), Agreed Exhibit 84 at 2.

9 Montemurro, "IFP Royalty" (June 15, 1998), Agreed Exhibit 93 at 1. This fax also included a proposal that IFP receive a gross overriding royalty for other lands called Pelican Lake.

10 Subsequent to June 4th, PCR evaluated the May 26, 1998 analysis entitled "Reserves and Economic Evaluation of Certain Interests of Institut Français du Pétrole as of January 1, 1998" by third party engineering consultant, Dobson.

11 Séverin Saden, "No title" (June 16, 1998), Agreed Exhibit 95 at 1. The fax also included a proposal with respect to the gross overriding royalty for Pelican Lake.

12 Saden, "No title" (June 19, 1998), Agreed Exhibit 101 at 2.

13 Saden, "No title" (June 23, 1998), Agreed Exhibit 103 at 1.

14 Even if a co-tenant at common law is allowed to unilaterally extract petroleum substances without the consent of the other tenant in common, and there remains some uncertainty whether this is so, there is nonetheless a duty to account to the co-owner for that co-owner's proportionate share: see Nigel Bankes, "Pooling Agreements in Canadian Oil and Gas Law" (1995) 33 Alta L Rev 493 at 502; Rob Desbarats, Jay Todesco & Kate Royer, "Sole Risk Provisions in Joint Operating Agreements For Unconventional Oil and Gas Development" (2016) 54:2 Alta L Rev 417 at 431; Jan Bagh, Dan McAffee & Ed ie Gillespie, "Recent Judicial Developments of Interest to Oil and Gas Lawyers" (2008) 45:3 Alta L Rev 817 at 857; and J. Jay Park, "Marketing Production from Joint Property: The Past, The Present and the Future" (1990) 28:1 Alta L Rev 34 at 36.

15 There is no evidence on this record that IFP sought any optimal recovery inquiry from what was then the Energy Resources Conservation Board under s 21 of the Energy Resources Conservation Act, RSA 2000, c E-10. Such inquiries were held from time to time since at least 1971. Nor is there any evidence that IFP took any steps to seek a review of any existing order or well license or otherwise oppose the recommissioning of any o ld wells. Nor is there any evidence on this record that it took any steps to oppose the granting of well licenses for any new wells.

16 IFP had the right to propose and conduct an independent operation under Article X of the Operating Procedure. Whether this right existed after the disposition to Wiser remains an open issue. That would turn on the implications of Wiser not being novated into the JOA. Nevertheless, even if IFP could no longer propose an independent operation contractually, it retained its rights as co-owner to exploit the minerals at Eyehill Creek with all the consequences flowing fro m that. Given the Trial Judge's finding that IFP took no steps to move forward independently with a thermal project, all of this is academic.

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