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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
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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	**Supplemental Reply Brief of the 1985 Trustees for Application scheduled for January 5 and 6, 2021**

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LIST OF EVIDENCE AND AUTHORITIES

I. INTRODUCTION

1. This is the fourth and hopefully final brief to be filed by the 1985 Trustees regarding this application (the **"ATO Application"**) respecting the consent order (the "**ATO**") of Mr. Justice Thomas regarding the transfer of certain assets in 1985 (the "**Asset Transfer**") pronounced on August 24, 2016. This brief is in reply to the supplemental briefs of the respondents Office of the Public Guardian and Trustee (the "**OPGT**"), Catherine Twinn, the interveners, the Sawridge First Nation (the "**SFN**"), and Shelby Twinn.

2. Notwithstanding the amount of time since the ATO Application was originally scheduled, and the number of adjournments since, the respondents continue to confuse the issue. The ATO Application is about the effect of the ATO. The ATO itself is not being challenged.

3. All of the assets of the 1982 Trust have been transferred to and are now held by the 1985 Trustees. Discussions of *res judicata*, latches and limitation periods are irrelevant to this Application.

4. This Application centers around two interconnecting questions: on what terms are the 1982 assets held? and for whom? Some of the parties have focused their attention on the ATO and the proceeding in 2016 rather than the actual transfer which is purported to have occurred in 1985. They ignore the equities of the beneficiary definition in favour of technical arguments on jurisdiction, estoppel, *res judicata* and other irrelevant considerations. Further, they attempt to conflate the intentions of the parties when negotiating the ATO with the Asset Transfer itself.

II. REPLY SUBMISSIONS

A. The Trustees propose a modified framework for reviewing the key issues in the ATO Application

5. The parties have submitted various arguments with respect to the effect of the ATO from resulting trusts to the status quo. While the 1985 Trustees do not adopt a particular position, they provide the following framework from which the Court should approach the ATO Application by posing the key questions that the Court ought to consider.

    1. *Under what authority did the 1982 Trustees Transfer the Assets and was the effect of such a transfer alien or incidental to the Intention of the Settlor in 1982*[1]*?*

6. The effect of the transfer of the 1982 assets to the 1985 Trust may be that the 1985 Trustees must abide *solely* by the terms of the 1985 Trust. This is the position of Catherine Twinn.

7. If the assets had been distributed outright to the individual beneficiaries of the 1982 Trust, the 1982 beneficiaries would have had complete legal and beneficial ownership of the 1982 assets. Those 1982 beneficiaries could then have decided to turn around and give up all legal and beneficial ownership of all 1982 assets by gifting them to a new trust, the 1985 Trust. Then the 1985 Trustees would receive the 1982 assets from individual settlors, according to the terms of the 1985 Trust. No one would need look past the terms of the 1985 Trust. However, that is not what happened.

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[1] *Hunter v Holton*, 1992 Carswell Ont 537 (ONCJ) [*Hunter*] at para 19 & 20 **[Tab 1] - [Also, Tab S of Catherine Twinn's Brief November 27, 2020]**.

8. Individual 1982 beneficiaries did *not* receive either a full advancement or payment out of their interest in the 1982 assets. Instead, the 1982 Trustees used their wide fiduciary power of advancement to transfer the 1982 assets to the 1985 Trustees, on behalf of and "for the benefit of" the 1982 beneficiaries. The 1982 Trustees could only advance or resettle as much interest in the 1982 assets as they had.

9. The 1982 Trustees did not own the 1982 assets outright. They owned them as fiduciaries, pursuant to the powers and obligations of the document that appointed them – the 1982 Trust. Hence they could not ignore the terms of the 1982 Trust.

10. The following terms of the 1982 Trust are particularly relevant:

    (a) 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".[2]

    (b) When passing trust property to the 1982 Trustees, the Settlor, in his capacity as Chief, specifically directs the 1982 Trustees to "hold the Trust Fund for the *benefit of all members, present and future, of the Band*".[3] [emphasis added]

    (c) The beneficiaries of the 1982 Trust are in essence a class, not individuals.

    (d) The 1982 Trustees are further directed that they "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] [emphasis added]

    (e) The 1982 Trustees were given a wide, discretionary power to apply "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 [*members, present and future, of the Band*]... in such manner as the Trustees in their uncontrolled discretion deem appropriate".[5]

11. Note the wording chosen for the Trustees' discretionary power in the *1985 Trust* is slightly different. The 1985 Trustees were given the discretionary power to apply "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... in such manner *and in such proportions* as the Trustees in their uncontrolled discretion deem appropriate"[6] [emphasis added].

12. In other words, the 1982 Trustees were given a wide, discretionary power of advancement, which in law, may include the power to resettle the trust property to another trust,[7] for the benefit of the

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[2] 1982 Trust, Recitals at para 1**[TAB 2]**

[3] 1982 Trust, Clause 1 at para 1**[TAB 2]**

[4] 1982 Trust, Clause 3 **[TAB 2]**

[5] 1982 Trust, Clause 6 at para 3 **[TAB 2]**

[6] 1985 Trust, Clause 6 at para 3 **[TAB 3]**

[7] James Kessler & Fiona Hunter, Drafting Trusts & Will Trusts in Canada, 5th ed. (Toronto: Lexis Nexis Canada Inc., 2020), pg. 227 **[Tab 4]**

1982 Beneficiaries. The scope of this power was limited by the Trustees' overarching fiduciary duty to act in the best interests of "all members, present and future, of the Band".[8]

13. The 1982 Trustees could not, for example, use their power to wholly transfer the assets to non-members of the Sawridge Band. That would not be in the best interests of the beneficiaries. Nor would that be in keeping with the Settlor's intentions to benefit "present and future members of the Sawridge Indian Band No. 19."[9] It would be an improper 'diversion'[10] to a purpose specifically not permitted.

14. Where a fiduciary power is used to transfer assets from one trust to another, and it is for the benefit of the first trust's beneficiary or beneficiaries, case law does allow non-beneficiaries to benefit '**incidentally**':

> "But if the disposition itself, by which I mean the whole provision made, is for her benefit, it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise."[11]

15. The Court has confirmed trustees' power to transfer assets to a new trust, which may have different wording than an original trust, and has noted that the Court need only review the new trust "to determine whether or not [the new trusts] are **alien** to the intention of the testator, or would be beyond the scope of the power of the trustees."[12] [emphasis added]

16. The Court has further stated "Nor need the terms of the new trust be the same as those in the original trust providing they are beneficial."[13]

17. If the 1985 Trustees' interpretation of the definition of 1985 Beneficiary is correct, approximately 26 non-members of the Sawridge Band, or approximately 46% of the 1985 Beneficiaries, would receive a benefit of the 1982 assets. Yet those 26 people would not qualify as 1982 beneficiaries. The Court must determine then if this result would be **'alien'** to the written intention of the 1982 Settlor, who specified that the assets were to be held for the class that is the members of the Band. The Court must also determine if granting a benefit to 26 out of 56 'new' beneficiaries is merely 'incidental' to the benefit conferred by the 1982 Trustees.

18. To say the effect of the ATO is that the 1985 Trustees hold the 1982 assets solely for the 1985 Beneficiaries may offend the terms of the 1982 Trust, including the 1982 Settlor's intention as stated in the trust deed.

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[8] 1982 Trust, Clause 1 at para 1 **[Tab 2]**

[9] 1982 Trust, Recitals at para 1 **[Tab 2]**

[10] 1982 Trust, Clause 3 **[Tab 2]**

[11] *Pilkington v Inland Revenue Commissioners*, [1962] 3 All ER 622 (HL) [*Pilkington*] at page 16 **[Tab 5] - [Also, TAB R Catherine Twinn's Brief November 27, 2020]**

[12] *Hunter, supra* at para 20 **[TAB 1]**

[13] *Ibid* at para 13, citing *McLean Estate v Stewart* (June 1, 1988), Doc. RE 822/82, Barr J. (ONHC) (unreported) **[TAB 1]**

19. To accept that the 1982 assets are governed solely by the 1985 Trust would be difficult as there is insufficient deference to the fiduciary duties attached to the 1982 assets, and which were imposed upon the 1985 Trustees when they accepted the assets.

2. Can or should the 1985 Trustees adopt the terms of the 1982 Trust in respect of the beneficiary definition into the 1985 Trust?

20. If interpreting the effect of the Consent Order to mean that the 1985 Trustees hold the 1982 assets solely for the 1985 Beneficiaries is too narrow, and disregards the fiduciary power upon which the transfer was based, another option would be to say that all of the duties and powers of the 1982 Trust including the beneficiary definition travel with the 1982 assets and therefore form part of the 1985 Trust.

21. However, it may be that the evidence before the court likely points to the conclusion that the 1982 Trustees intended to transfer the 1982 assets to the 1985 Trust, and that the 1982 Trust was not wholly incorporated by reference into the 1985 Trust.

22. It is preferable to view the transfer as an exercise of a fiduciary power, which can be reconciled because there is considerable overlap between who is a 1982 Beneficiary and who is a 1985 Beneficiary. If the overlap is to be interpreted as the intention, then such is not alien to the intentions of the Settlor and is likely incidental to the transfer of the assets. Thus, one can consider the transfer to be for the class of members which is the same in 1982 and 1985. And, we submit that all parties and interveners agree the same class existed in 1985 as in 1982 and the members of the class were identical in the 1982 and 1985 Trusts.

23. The 1982 Trustees' exercise of their power of advancement to transfer the assets to the 1985 Trust is similar to the concept of a resulting trust. Acting as fiduciaries, the 1982 Trustees gave the property to the 1985 Trustees to hold for the benefit of 'all members, present and future, of the Band'. The 1985 Trustees received the trust property upon those trusts, and could do so, because they could comply with the trust terms placed on them, along with their fiduciary duties to the 1985 Beneficiaries, by focusing on the overlapping terms of both Trusts.

24. The 1985 Trustees were given the power in the 1985 Trust to benefit "any one or more of the Beneficiaries... in such manner *and in such proportions* as the Trustees in their uncontrolled discretion deem appropriate"[14] [emphasis added]. They could therefore create a subset of beneficiaries that combined both those who qualified as beneficiaries by the 1982 terms, and those who qualified by the 1985 terms.

25. The Trustees who contributed the 1982 assets to the 1985 Trust did not own the assets outright, and therefore could not give them completely and freely to the 1985 Trustees. Instead,

> "the trustees are merely exercising a fiduciary power in arranging for the desired limitations. It is not their property that constitutes the funds...; it is the property subjected to trusts by the will of the testator and passed over into the new settlement through the instrumentality of a power".[15]

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[14] 1985 Trust, Clause 6 at para 3 **[Tab 3]**

[15] *Pilkington, supra* at 19 **[Tab 5]**

3. *Did the transfer occur so that the 1985 Trustees could hold the 1982 assets for the overlapping group of 1982 beneficiaries who were also 1985 Beneficiaries?*

26. A further challenge to the argument that some of the 1982 Trust terms continue on into the 1985 Trust is that in law, where a trustee is given a wide power of advancement and resettlement (as is the case in both the 1982 and the 1985 Trusts), and the trustee uses that power to transfer assets to a new trust, the assets are now fully held in the new trust, and subject to the terms of the new trust.[16]

27. However, the fiduciary nature of the power given to the 1982 Trustees to transfer the assets to the 1985 Trust should take priority. Where the terms of the two Trusts can be reconciled in favour of maintaining the fiduciary duty to a particular group of beneficiaries who qualify as 1982 *and* 1985 Beneficiaries, such an interpretation is favourable.

28. Because the 1985 Trust is discriminatory, the 1985 Trustees can in turn use their same wide power of advancement to further transfer the assets of the 1985 Trust into the 1986 Trust for the benefit of the 'subgroup' of approximately 30 overlapping 1982 and 1985 beneficiaries. These 30 beneficiaries also qualify as 1986 beneficiaries.

29. Contemporaneously, the 1985 Trustees can apply to the court to grandfather the approximately twenty six 1985 beneficiaries into the 1986 Trust[17]. These 26 beneficiaries would otherwise be excluded, since they would not qualify as 1982 or 1986 beneficiaries.

30. This option may be a practical, productive, non destructive solution, which results in one trust, the 1986 Trust, containing all of the assets, having no reference to any defunct discriminatory terms, and which can be managed by the Trustees with certainty for many years to come.

31. The 1985 Trustees acknowledge that the addition of beneficiaries to the 1986 Trust could dilute each beneficiary's potential interest in the Trust. However, no individual beneficiary is guaranteed a distribution. What is guaranteed is that if the uncertainty and litigation over who is a beneficiary continues, there will be less in the Trust to distribute in any manner to any beneficiaries, and it will take longer to get to any point where the Trustees can make any discretionary distributions of either income or capital to any beneficiary.

32. All parties agree that beneficiary consent to an advancement is not required.[18]

33. Where all parties have acknowledged that the 1982 Trustees had sufficient power and authority to transfer all 1982 assets to the 1985 Trust, even where some terms of the 1982 Trust and the 1985 Trust are different, and the beneficiaries are overlapping but different, it is difficult to see why it would not now be possible to allow the 1985 Trustees to resolve this litigation by transferring all assets to the 1986 Trust, using that similar discretionary power of advancement and resettlement

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[16] Mark Gillen, Lionel Smith & Donovan WM Waters, Waters' Law of Trusts in Canada, 4th ed. (Toronto: Thomson Reuters Canada, 2012), ch. 21 at s. 21.V, page 1201, footnote 135 **[TAB 6]**

[17] 1986 Trust **[Tab 7]**

[18] As noted in *Pilkington, supra* at page 12: "you cannot say that the beneficiary must consent to the course which the trustees have decided is for his benefit for that would rule out all payments where the beneficiary is under age." **[TAB 5]**

and in keeping with the 1985 Trustee fiduciary duties, to apply to the Court to grandfather those affected 1985 Trust beneficiaries who would not be beneficiaries of the 1982 or 1986 Trusts.

B. The Court has jurisdiction to determine the issues in the ATO Application

34. Some of the parties have suggested that the determination by the Court of the issues in the ATO Application lie outside of the jurisdiction of the case management judge. They view certain potential outcomes as being a "final determination" and submit that a case management judge is not capable of making such a determination. Curiously, if the Court were to find that the Asset Transfer effectively transferred the assets from the 1982 Trust to the 1985 Trust under the terms of the 1985 Trust, then they would presumably be satisfied with the Court's jurisdiction to make such a finding. In addition, one possible decision in the Jurisdiction application (which is yet to be heard), that there is no jurisdiction to amend the trust, may be a final determination of this litigation.

35. Regardless, the 1985 Trustees submit that there are no issues before the court in the ATO Application over which the court has insufficient jurisdiction. There is no reason that a case management judge cannot make a determination that would effectively end litigation. Indeed, case management judges have the jurisdiction to grant summary judgment under Rule 7.3 of the *Alberta Rules of Court.*

36. In *Attila Dogan Construction and Installation Co. v AMEC Americas Ltd.* the court said[19]:

> "Hryniak v. Mauldin refers several times to the need for a change in culture. In other words, the myth of trial should no longer govern civil procedure. *It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial". Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication.*" [emphasis added]

C. The 1985 Trustees, as Applicants, are the only party with standing to determine next steps in this proceeding

37. Both the OPGT and Catherine Twinn, in an apparent attempt to argue against the efficacy of certain options before the Court, have suggested that if the Court decides that the 1982 Trust terms apply to the assets currently held by the 1985 Trust, then substantial further litigation (or "trials") will be required.

38. This action is not an action commenced by statement of claim that requires a final determination by trial. This is an application for advice and direction brought forward by the 1985 Trustees to seek certain advice from the Court and a trial is only one possible outcome.[20] The advice and direction application proceeds based on the agenda of the moving party – the 1985 Trustees.[21]

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[19] *Attila Dogan Construction and Installation Co. v AMEC Americas Ltd.*, 2015 ABQB 120 at para 50, citing *Windsor v Canadian Pacific Railway*, 2014 ABCA 108 at paras 13 **[TAB 10]**

[20] See *Statt v SGI Canada Insurance Services Ltd.,* 2019 ABQB 828 at para 14 **[TAB 11]**

[21] *Trustee Act,* RSA 2000, c T-8 s 43 **[TAB 12]**; see also *Jones v McLeod,* 2017 BCSC 1478 at para 40 **[TAB 13]**. See also *Alberta Rules of Court,* ss 3.10(2), 4.36(1) **[TAB 14]**, which allows the moving party the ability to discontinue a claim in the same manner as a plaintiff in an action.

D. The Record before the Court is sufficient for determining the issues of the ATO Application

39. The OPGT suggests in its brief that further document production is required in order to adjudicate the issue before the Court.[22] Yet, in paragraph 100 of their brief they suggest that after the ATO, the parties are close to readiness for a trial. They suggest that positions taken by the 1985 Trustees have hampered their ability to discover a full record from which the Court can make its determination. With respect, the OPGT's position is without merit.

40. The ATO Application will be heard in January 2021: more than one year from when the ATO Application was initially scheduled to be heard. The ATO Application was originally adjourned, in part, due to the OPGT's and Catherine Twinn's confusion over the purpose and scope of the ATO Application and also for the OPGT to gather documents required to sufficiently litigate the ATO Application. Since that time, the OPGT has brought a production application[23] and conducted further examinations of Paul Bujold and Catherine Twinn. The OPGT had an opportunity to bring further interlocutory applications as to the sufficiency of the record, and chose not to bring any such applications.[24]

41. Any suggestion by the OPGT that further documentation is required to litigate the issues in the ATO Application is without merit. All parties have had enough opportunity to fully explore the documents available that relate to the subject matter of the ATO Application. To the extent that the OPGT was concerned over a position taken by the 1985 Trustees with respect to relevance or privilege, then the OPGT's remedy was to bring the appropriate interlocutory application at the appropriate time. The OPGT must now accept the sufficiency of the current record.

42. Regardless, the 1985 Trustees suggest that the record before the Court is sufficient for the purposes of determining the issues in the ATO Application. The litigation on the ATO began on the premise that there were insufficient documents to fully determine the issue. The OPGT has brought several production applications, has examined on several occasions, has had 5 affidavits of records produced, and, has had one of the litigants produce privileged material. In addition, there are numerous affidavits with exhibits and transcripts from questioning on those affidavits. In the process of questioning, further documents were produced either as exhibits or as answers to undertakings. There have also been written interrogatories. In addition, Paul Bujold gave several undertakings to canvass anyone dealing with the trust to produce records. Very little was produced from those efforts. Finally, the OPGT has made 3 applications for additional production.

43. The 1985 Trustees submit the record is sufficient. There is simply no more to produce. We must remember the transaction is 35 years old and there are very few individuals who are alive and were present at the relevant time frame.

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[22] OPGT's Brief filed November 27, 2020 at paras 73 and 98.

[23] OPGT Production Applications filed June 12, 2015 as amended July 16, 2015; Application for Production Under Rule 5.13 Filed February 1, 2016 and Application for Additional Production filed December 20, 2019 **[TAB 15]**

[24] Litigation Plan for Application May 19, 2020 by Consent of the parties and pronounced February 20, 2020 **[TAB 16]**

44. The jurisprudence is clear that it is up to the judge to determine whether there is "sufficient confidence in the state of the record."[25] A perfect or complete record is not required: "the record before the court will never be perfect or complete, even after a trial."[26] All that is required is that the judge deems the record sufficient to allow him or her to determine the answer before the Court.[27]

45. In this respect, our case management judge is ideally positioned to make such a determination. Deference is extended to the decisions of case management judges precisely because they have detailed knowledge of the file.[28] Appellate intervention in the exercise of judicial discretion is not justified unless the case management judge has clearly misdirected himself or herself on the facts or the law, has proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice.[29]

46. In general, the "sufficiency of the record will depend on the issues, the source and continuity of the evidence, and other relevant considerations."[30] Case law provides that the record is unlikely to provide sufficient confidence where there is a "dispute on material facts, or one depending on issues of credibility"[31] or alternatively that there is a realistic prospect that a better record will be created.[32] The 1985 Trustees submit that none of these conditions, in this instance, undermines confidence in the record.

47. The 2016 brief of the 1985 Trustees relied heavily on the September 2011 Affidavit of Paul Bujold,[33] which could raise the issue of credibility but we must remember that Paul Bujold is not a person with personal knowledge. He has gained knowledge through a review of documents and interviews. Regardless, any such issues would be addressed with the extensive questioning of Mr. Bujold.[34]

48. This is not a case where there is a realistic prospect of a better record down the road.[35] While admittedly there are gaps in the factual record, at this point in the litigation all parties have put their "best foot forward", meaning that gaps in the record do not necessarily preclude sufficient confidence in the record.[36] It bears reiterating that the best possible record is before the Court. All available documents related to the Transfer have been provided; there is nothing more. Mere

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[25] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49 [*Weir Jones*] at paras 30, 37, 46, and 47 **[TAB 17]**

[26] *Shefsky v California Gold Mining Inc.,* 2016 ABCA 103 at para 110 **[TAB 18]**

[27] See *Weir-Jones,* at para 47(d) **[TAB 17]**

[28] *Terrigno Investments Inc. v Farrell,* 2019 ABCA 426 at para 8; citing *Canada (Attorney General) v Fontaine*, 2017 SCC 47 at para 36 **[TAB 9]**

[29] *Ibid* **[TAB 9]**

[30] *Weir-Jones, supra* at para 36. **[TAB 17]**

[31] *Ibid,* at para 35. **[TAB 17]**

[32] *Ibid,* at para 39. **[TAB 17]**

[33] Catherine Twinn's Brief filed November 15, 2019, see her Tab M.

[34] Questioning on Affidavit of Paul Bujold occurred on the following dates: May 27 and 28, 2014 July 27, 2016. November 29, 2016, March 7, 8, 9 & 10, 2017, June 20, 2017, June 11, 2018, February 11, 2019 and March 2, 2020 & written Interrogatories March 2017.

[35] *Weir-Jones, supra* at para 39 **[TAB 17]**

[36] *North Bank Potato Farms Ltd. v The Canadian Food Inspection Agency*, 2019 ABCA 344 at para 31 **[TAB 8]**

speculation about what type of record which might be available down the road is insufficient to create a realistic prospect of a better record.[37]

49. This Court has often cited concerns regarding the delay and expense of this litigation. The question before the Court is a question of law. The Court is the expert on the law and this Court has the material facts and law required to answer the Question. All that is left is to apply the law to the facts.

E. There are no limitations issues that would hinder the Court's ability to determine the issues in the ATO Application

50. It is argued that the challenge to the transfer is outside of limitation periods. This of course was not raised by the parties when the ATO was entered. If this is correct, then the jurisdiction of Justice Thomas to provide the ATO would likely also be the subject of the same limitation arguments.

51. This argument misses the point of the ATO Application. Firstly, the reason for the ATO was an anticipated issue with respect to an eventual accounting application with respect to the 1985 Trust. In any accounting application, beneficiaries are given the ability to challenge information presented. It would be a waste of effort to have the Court determine the definition of beneficiaries in the 1985 Trust only to be challenged in an accounting application in respect of the source of funds and have all of this litigation be for not. Thus, in respect of the ability for beneficiaries to challenge issues in the accounting application, there may be no limitation on the adjudication of the issue of the transfer of assets until that issue is raised for the beneficiaries.[38]

52. The ATO specifically reserves the right to challenge issues with respect to the accounting and the ATO is not to be an impediment.

53. The 1985 Trustees agree appeal periods for the ATO have passed but this Court was clear that there is to be no challenge to the ATO itself. The issue is, and always has been, the effect of the ATO, which is a live issue in this action.

F. Interpretation of the Consent Order

54. The OPGT and Catherine Twinn devote a significant portion of their briefs to the law surrounding the interpretation of a consent order (ie that it is akin to contractual negotiation). The 1985 Trustees question the usefulness of this review to the ATO Application. The ATO simply refers to the fact that the assets were transferred from the 1982 Trust to the 1985 Trust. The 1985 Trustees do not dispute that fact.

55. Regardless, if the principles of contractual interpretation were to be applied in interpreting the plain language used in the ATO, then a plain language review of the ATO can stand for nothing more than the transfer of assets from the 1982 Trust to the 1985 Trust. There is no language within the ATO as to the determination of the beneficiaries for which the transfer was to benefit. This remains a key issue in the ATO Application – the effect of the Asset Transfer.

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[37] *Weir-Jones, supra* at para 37 **[TAB 17]**; citing *Canada (Attorney General) v Lameman,* 2008 SCC 14 at para 19.

[38] Catherine Twinn's Brief filed November 27, 2020 at paras 98,107, 126, 127, 128.

G. The Debenture is Irrelevant to the Court's Analysis

56. Much has been written about a demand debenture issued by Sawridge Enterprises Ltd. with a principal sum of twelve million dollars (the "**Debenture**").[39] The supplemental brief of the SFN goes into detail regarding the history of the Debenture, formed primarily from documents and recent searches that have been produced in this litigation by the 1985 Trustees.[40] Notably, the brief of the SFN goes into detail regarding the subsequent postponements and final **discharge** of the Debenture.[41]

57. The supplemental briefs of both Catherine Twinn and the OPGT both reference the existence of the Debenture as evidence that some of the assets of the 1985 Trust did not originate from the 1982 Trust. They attempt to suggest that there are assets which are independent of the 1982 Trust so as to render moot any argument that the 1985 Trust assets may be held pursuant to the terms of the 1982 Trust. This argument is a distraction from the core legal issues in the ATO Application.

58. With respect to the Debenture:

(a) there is no evidence as to its actual value at any point in time or that it is in fact an asset;

(b) it never appears in financial statements for the 1985 Trust;

(c) it appears to always be in the control of the SFN;

(d) it was discharged;

(e) it is 35 years old with no acknowledgment of its existence since its discharge in 2003 (and thus long past a limitation period for enforcement); and,

(f) the search for relevant documents on this Debenture has been exhausted.

59. The suggestion that Paul Bujold changed his testimony on the Debenture must be put in context of the documents to which he had access. In 2011, when he deposed his first affidavit in this action, he was aware of an assignment of a debenture and in the interests of putting all documents forward that were relevant to the 1985 Trust such documents were attached to his affidavit. Even at that time, the issue of the Debenture had minor relevance. He did not pursue any other information on the Debenture and made the assumption based on that document that the Debenture was assigned to the 1985 Trust. No evidence of its subsequent history or value was tendered. The transaction as it appeared in 1985 was tendered as evidence.

60. The parties have recently pursued whether this Debenture is an independent asset in the 1985 Trust, although this issue is still of very little relevance to the Court for the strict legal question in the ATO Application. To that end, searches were conducted in respect of the Debenture.[42] Those

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[39] Demand Debenture - $12,000,000 Signed by Chief Walter Twinn as President of Sawridge Enterprises Ltd.; Tab E of Catherine Twinn Brief filed November 27, 2020.

[40] Sawridge First Nation's Brief filed November 27, 2020 at paras 56-75.

[41] Sawridge First Nation's Brief filed November 27, 2020 at paras 61-64, which is based primarily over clarification from Paul Bujold and the provision of a title search conducted on the lands shortly before his February 2020 questioning.

[42] Sawridge First Nation's Brief filed November 27, 2020 at 14-18 and Tabs F, G, H, I, J, K, L, M and N.

searches were only done recently and then were provided to the Respondents which show that the Debenture was controlled by the Sawridge First Nation and discharged. Also, inquiries were made of the corporate officers who run the Sawridge group of companies. Those inquiries revealed and the financial statements confirmed that the Debenture was and is not an asset (if it ever was) of the 1985 Trust.[43]

61. The Trustees will not address the issue of loans to the trust or grants to the trusts. The evidence on this is weak and in any event is irrelevant. If funds were borrowed, they were repaid with trust assets or trust income or corporate assets and income. If grants were received, Catherine Twinn's hearsay evidence says they were received by a corporate entity. There is so little information and what information is provided is speculative and hearsay. If the court wishes further submission, the Trustees will provide such orally.

H. There have been no effective distributions of assets of the 1985 Trust for the benefit of its beneficiaries

62. Both Catherine Twinn[44] and the OPGT[45] appear to take issue with a central premise of this litigation – that the Trustees are unable to distribute pursuant to a discriminatory trust.[46] Both parties point to the example of past distributions as evidence that the Trustees are capable of distributing. However, relying on the previous distributions to illustrate that future distributions are possible is incorrect.

63. All previous distributions to beneficiaries of the 1985 Trust were done for technical reasons in order to take advantage of certain tax benefits for the benefit of the 1985 Trust as a whole.[47]

64. There have been no distributions to beneficiaries in order to incur a benefit to that beneficiary over the history of the 1985 Trust. This is the central reason the Trustees have brought this litigation. While this may not be necessarily relevant to the issues in the ATO Application, the Trustees thought clarification of the point was necessary.

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[43] Sawridge First Nation's Brief filed November 27, 2020 at 14-18 and Tabs F, G, H, I, J, K, L, M and N.

[44] Catherine Twinn's Brief filed November 27, 2020 at paras 29-32.

[45] OPGT's Brief filed November 27, 2020 at para 44(b).

[46] 1985 Trustees' Brief filed November 20, 2019, at para 2.

[47] Based on the scant evidence of distributions, the 1985 Trustees believe that the distributions were made to allow the trust to claim a deduction under subsection 104(6) of the *Income Tax Act*. *Inter vivos* trusts, including First Nations trusts, to which the income attribution provisions in subsection 75(2) of the *Income Tax Act* do not apply (or for income to which subsection 75(2) does not apply, such as business income or income on income), are taxable on any income they earn at the top marginal rate applicable in the trust's province or territory of residence unless that income is paid or payable to a beneficiary before the end of the trust's taxation year. If the income is paid or are payable (such that the beneficiary could demand payment before the end of the trust's taxation year) to a beneficiary, then the trust reports the income on its T3 income tax return, issues a T3 slip to the beneficiary to whom it distributed the income and claims a deduction for the distributed income under subsection 104(6). The beneficiary would be required to include the T3 slip amounts in its income, pursuant to subsection 104(13), unless the income or the beneficiary was otherwise exempt from tax.

I. There has been good and proper service of both the ATO and the ATO Application

65. The Court has asked that the parties address service regarding the ATO in the ATO Application. The 1985 Trustees have done this in previous submissions.[48]

66. The OPGT submits there has been sufficient service.[49]

67. For the reasons already outlined, service of both the ATO and the ATO Application have complied with the terms of service in the service procedural order in this action. There is no reason that the 1985 Trustees would be required to deviate from that order. Both pools of potential beneficiaries have notice of the ATO Application – the beneficiaries under the 1985 Trust definition, through the service terms in this action, and the beneficiaries under the 1982 Trust definition, through service and participation of the SFN.

J. Enfranchisement is irrelevant and there is no evidence of actual payments made

68. Catherine Twinn has suggested that the Bill C-31 women enfranchised and received Band assets when they enfranchised.[50] She has further argued that the 1985 Trust was designed to prevent them from getting more and to preserve assets for those who did not enfranchise.[51] Neither of these arguments are supported by any evidence.

69. There is no evidence before the Court about who received money or the amount they received.

70. Furthermore, the suggestion that the 1985 Trust was done partly for equity in respect of women who were forced to leave the First Nation because of their marriage, does not appear anywhere in any document and certainly there is no evidence of that from the Settlor.

71. The issue of enfranchisement and discrimination was relevant to the introduction of Bill C-31 in 1985 and Sawridge First Nation was involved in making a presentation in respect of the Bill (the "Presentation"). Such presentation is attached to the brief of Shelby Twinn.[52] The Settlor of the 1982 and 1985 Trust as Chief of the First Nation was involved in the Presentation. The Presentation says clearly that the Treaty Eight group, of which Sawridge was a member, supported the end to discrimination.[53] It is difficult to reconcile this with a submission that the Settlor intended to perpetuate discrimination in the 1985 Trust.

72. In addition, the Presentation establishes the desire to control membership and control resources for those who have a connection to the community, cultural affinity with the band, commitment to the traditions of the Band and the resources of the community.[54]

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[48] 1985 Trustee's Brief filed November 1, 2019 at para 7.

[49] OPGT's Brief filed November 15, 2019 at paras 3(a) and (b), 37-39, 84-91.

[50] Catherine Twinn's Brief filed November 27, 2020 at paras 24-27, 97.

[51] Catherine Twinn's Brief filed November 27, 2020 at paras 24-27, 97.

[52] Shelby Twinn's Brief filed November 27, 2020 at Tab 6.

[53] Shelby Twinn's Brief filed November 27, 2020 at Tab 6 at page ii, para 3 ; page iv ; page 1, para 1 ; page 2, para 5 ; page 22 para 39.

[54] Shelby Twinn's Brief filed November 27, 2020 at Tab 6 at page iii ; page iv ; page v ; page 2 para 5 ; page 3 para 6 ; page 7, para 1 ;, page 10, para 19 ; page 12, para 24 ; page 13, para 26 ; page 19 para 34.

73. The 1985 Trustees submit that this desire for control of band resources and insistence that individuals have a community connection in order to benefit from Band resources is contrary to the idea that the 1985 Trust was intended to be for the benefit of individuals who are not members and have no connection to the community. The anticipated influx in 1985 when the Presentation was tabled is not substantially different than the effect on the beneficiaries of the 1982 and 1985 trust as set out in the brief of the 1985 Trustees filed November 27, 2020.[55] Such non-members are nevertheless beneficiaries as defined in the 1985 Trust but their rights may best be dealt with in a grandfathering application.

K. The brief of Shelby Twinn has no evidentiary foundation and contains collateral attacks against the 1985 Trustees

74. The 1985 Trustees view Shelby Twinn's brief as largely irrelevant, with much of her brief referencing items not in evidence and containing collateral attacks against the motives and actions of the 1985 Trustees and on the SFN membership process.

75. Shelby Twinn would have been four years of age at her grandfather's death and therefore her first hand knowledge would be extremely limited in this case and is not in evidence.

76. The attacks on the 1985 Trustees are unjustifiable and unnecessary.

III. CONCLUSION

77. There are no significant hurdles, such as res judicata, jurisdiction, latches and limitation periods, that would prevent the Court from fully addressing the issues in the ATO Application. The 1985 Trustees have presented a framework from which the Court can analyze the effect of the ATO and respectfully request the Court to make its analysis with reference to the significant equities at play in this litigation, along with the need for a practical solution to this decade long process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11TH DAY OF DECEMBER, 2020

DENTONS CANADA LLP

PER: _____

DORIS BONORA
MICHAEL SESTITO
Solicitors for the 1985 Sawridge Trustees

[55] Shelby Twinn's Brief filed November 27, 2020 at Tab 6 at page 15; page 20 para 35; page 33 para 59.

LIST OF EVIDENCE AND AUTHORITIES

TAB	DESCRIPTION
1	*Hunter Estate v Holton*, 1992 Carswell Ont 537
2	Declaration of Trust, Sawridge Band Trust (1982 Trust Deed)
3	Sawridge Band Inter Vivos Settlement Declaration of Trust (1985 Trust Deed)
4	James Kessler & Fiona Hunter, Drafting Trusts & Will Trusts in Canada, 5th ed. (Toronto: Lexis Nexis Canada Inc., 2020), p. 227
5	*Pilkington v Inland Revenue Commissioners*, [1964] A.C. 612 (1962)
6	Mark Gillen, Lionel Smith & Donovan WM Waters, Waters' Law of Trusts in Canada, 4th ed. (Toronto: Thomson Reuters Canada, 2012), p. 1201
7	The Sawridge Trust, Declaration of Trust (1986 Trust Deed)
8	*North Bank Potato Farms Ltd. v The Canadian Food Inspection Agency*, 2019 ABCA 344
9	*Terrigno Investments Inc. v Farrell,* 2019 ABCA 426
10	*Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120
11	*Statt v SGI Canada Insurance Services Ltd.*, 2019 ABQB 828
12	S. 43, *Trustee Act,* RSA 2000, c T-8
13	*Jones v McLeod,* 2017 BCSC 1478
14	*Alberta Rules of Court,* Alta Reg 124/2010, s 3.10(2), 4.36(1)
15	OPGT Production Applications filed June 12, 2015 as amended July 16, 2015; Application for Production Under Rule 5.13 Filed February 1, 2016 and Application for Additional Production filed December 20, 2019.
16	Litigation Plan for Application May 19, 2020 by Consent of the Parties and pronounced February 20, 2020
17	*Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49
18	*Shefsky v California Gold Mining Inc.*, 2016 ABCA 103

TAB 1

Original
1992 CarswellOnt 537
Ontario Court of Justice (General Division)

Hunter Estate v. Holton

1992 CarswellOnt 537, 32 A.C.W.S. (3d) 335, 46 E.T.R. 178, 7 O.R. (3d) 372

Re the Estate of DONALD FLEMING HUNTER, late of the City of Toronto, in the Municipality of Metropolitan Toronto, deceased

JOHN MILLER HOLTON, DONALD HOLTON HUNTER and MARY MARGARET McCALLUM (Continuing Executors and Trustees of the Estate of DONALD FLEMING HUNTER, deceased) v. JOHN MILLER HOLTON, DONALD HOLTON HUNTER, MARY MARGARET McCALLUM, D. HOLTON HUNTER, JOHN HUNTER, JOHN EDWARD HUNTER, KATINA MARIE HUNTER, WENDY JEANNE HUNTER, LINDA SCHUR and OFFICIAL GUARDIAN

Steele J.

Heard: February 17-19, 1992
Judgment: March 5, 1992
Docket: Doc. Toronto RE 2282/91

Counsel: *Barbara L. Grossman*, for applicants.
Maurice C. Cullity, Q.C. and *Christina H. Medland*, for Mary Margaret McCallum.
Ronald R. Anger, for Official Guardian.

Subject: Estates and Trusts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Estates and trusts

I Estates
I.11 Powers and duties of personal representatives
I.11.n Miscellaneous

Headnote
Estates --- Personal representatives — Duties and powers

Trusts and trustees — Powers and duties of trustees — Will giving trustees power to encroach on entire estate — In circumstances trustees having power to transfer entire estate to new trusts as long as terms of new trusts not alien to testator's intention.

The testator died in 1976. By his will he set up a trust fund (the "fund")which, after his wife's death, which occurred in 1988, was to be held for the benefit of his issue until 2006, when the net income was to be divided among his issue in equal shares per stirpes. The will then stipulated that 20 years after the death of the last survivor of certain named family members, the balance of the fund was to be distributed to the testator's issue in equal shares per stirpes. The

will gave the power to the trustees to pay to such issue as they determined "such amounts out of the capital of the said Fund as my trustees in their sole discretion may from time to time determine."

The fund now represented the entire residue of the estate and was of great value. The trustees proposed to enter into certain transactions whereby the assets of the fund were to be settled on two new trusts, which were to have substantially the same terms and conditions as the will, except that the primary beneficiaries of one of the new trusts were to be the testator's daughter and her issue and those of the other new trust were to be the testator's son and his issue. The purpose of the new arrangement was to separate the interests of the two families so that decisions could be made having regard to the separate circumstances of each family.

The trustees applied under s. 60 of the *Trustee Act* (Ont.) and r. 14.05(3)(*a*) of the *Rules of Civil Procedure* (Ont.) for advice as to whether they had the power under the will to transfer all the assets of the fund to the new trusts. The Official Guardian opposed the application.

Held:

The trustees had the power to establish the new trusts and to transfer the assets of the estate to them.

Approval or advice will not normally be given to trustees regarding how they should exercise their discretion where such power is clear. However, this was a case requiring the interpretation of the will to determine whether or not there was power to do what was proposed and, on its facts, was one in which the court should give its opinion and direction.

The testator clearly gave his trustees power to encroach on the entire estate so that they could, for example, pay out all the assets, one-half to the testator's son and one-half to his daughter, thus making the balance of the will redundant. In these circumstances, it would be incongruous if it were held that the entire fund could not be paid to trustees to be held on new trusts for the same beneficiaries, as long as the terms of the new trusts were equally beneficial as those in the will. The unfettered right given by the will to the trustees to pay "for the benefit" of the testator's issue included the right to settle new trusts.

As to the particular trusts proposed, it was not for the court to approve the specific words of those trusts, as long as their terms were not alien to the intention of the testator or beyond the scope of the power of the trustees, neither of which was the case here.

Table of Authorities

Cases considered:

Dunlop v. Ellis (1917), 41 O.L.R. 303 (H.C.) — *applied*

Hampden Settlement Trusts, Re, [1977] T.R. 177 (Ch. D.) — *referred to*

Hastings-Bass, Re, [1975] Ch. 25, [1974] 2 All E.R. 193 (C.A.) — *applied*

Lohn Estate, Re (1991), 41 E.T.R. 159 (B.C. S.C.) — *distinguished*

McKay Estate v. Love, 44 E.T.R. 190, 6 O.R. (3d) 511 at 519, (sub nom. *Re McKay Estate*) 52 O.A.C. 159 [additional reasons at (November 29, 1991), Doc. CA 841/91 (Ont. C.A.)] — *referred to*

McLean Estate v. Stewart (June 1, 1988), Doc. RE 822/82, Barr J. (Ont. H.C.) — *applied*

Pilkington v. Inland Revenue Commissioners, [1964] A.C. 612, [1962] 3 All E.R. 622 (H.L.) — *applied*

Ropner's Settlement Trusts, Re, [1956] 1 W.L.R. 902, [1956] 3 All E.R. 332 (Ch. D.) — *referred to*

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 102(3)

s. 148

Perpetuities Act, R.S.O. 1990, c. P.9 —

s. 3

Trustee Act, R.S.O. 1990, c. T.23 —

s. 60

Trustee Act, 1925 (U.K.), 15 & 16 Geo. 5, c. 19.

Rules considered:

Ontario, Rules of Civil Procedure —

r. 1.04(1)

r. 9.01(2)(*aa*)

r. 14.05(3)(*a*)

Application for interpretation of will.

***Steele J.*:**

1 This is an application by the executors and trustees of the estate of Donald Fleming Hunter, deceased (the "trustees") under s. 60 of the *Trustee Act*, R.S.O. 1990, c. T.23, and r. 14.05(3)(*a*) [*Rules of Civil Procedure*], requesting the court to interpret the will of Donald Fleming Hunter (the "testator"), and for the opinion, advice and direction of the court upon the following question:

> Having regard to the provisions of the Will as a whole and the language of ClauseIII(i)(C) thereof in particular, do the Applicants have the power and is it lawful for them to transfer all of the assets of the Family Fund established pursuant to the provisions of the Will to two newly created trusts referred to as the 1992 Hunter Family Trust No. 3 and the 1992 McCallum Family Trust No. 3?

2 The applicable clause of the will is as follows:

III(i)(C)

> Until the death of my wife or the twentieth anniversary of my death, whichever event shall last occur, to pay to or for the benefit of any one or more of my wife and my issue to the exclusion of any one or more of my wife and my issue as my Trustees may determine such amounts out of the capital of the said Fund as my Trustees in their sole discretion may from time to time determine.

3 The application is supported by the children of the testator and notice has been given to all interested parties either directly or by service on the Official Guardian with a request that he be appointed to act for many of the parties. Most of the interested parties have consented to the application and others did not appear. The only party that opposes the application is the Official Guardian. The Official Guardian has been served with notice of a request to be appointed to represent the unborn issue of the testator and the unborn issue of Horace William Hunter (a brother of the deceased), and the employees of MacLean Hunter Limited. The infant grandchildren of the testator were served with notice of this application. Under r. 9.01(2)(*aa*) such infant grandchildren should have been made parties. Under s. 102(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Official Guardian must act as litigation guardian of all minors. Because I felt that there was no prejudice, I added the infant grandchildren as parties and appointed the Official Guardian to act on their behalf. I also appointed the Official Guardian to represent all unborn infant children and unborn issue. The Official Guardian was also appointed under s. 102(3) of the *Courts of Justice Act* to represent the very future contingent interest of the employees of Maclean Hunter Limited.

4 The trustees are the continuing executors and trustees of the will of the testator, who died on October 3, 1976. John Miller Holton ("Holton") is the brother-in-law of the testator and the other two are the children of the testator. The testator's wife died on January 11, 1988. At the present time, the testator has two living children (Donald Hunter and Margaret McCallum), each of whom have three living children. Only one of the grandchildren is an adult. The will provides that after the death of his wife, the Family Fund that was set up is to be held for the issue of the deceased to be dealt with as specified therein until October 3, 2006. The Family Fund now represents the entire residue of the estate and has an exceptionally large value. After October 3, 2006, the net income of the Family Fund is to be divided among the issue of the deceased, excluding his children, Donald and Margaret, in equal shares per stirpes, until the twentieth anniversary of the death of the last survivor of certain named persons who are all family members, when the balance is to be distributed to the issue of the deceased in equal shares per stirpes. If there are then no issue surviving, provision is made for division amongst the applicant, Holden, the living issue of Horace Hunter, and the employees of MacLean Hunter Limited.

5 The trustees, upon the request of Donald Hunter and Margaret McCallum, propose to enter into certain transactions whereby the assets of the Family Fund will be settled on two new trusts. The new trusts are in draft form and have been presented to the court. The new trusts will have substantially the same terms and conditions as contained in the existing will, except that the primary beneficiaries of one of the two new trusts will be Margaret McCallum and her issue, and the primary beneficiaries of the other new trust will be Donald Hunter and his issue.

6 The object of the proposed transactions is to separate the interests of Margaret McCallum's family in the Family Fund from the interests of Donald Hunter's family, so that future decisions regarding the administration of the former Family Fund may be made having regard to the separate circumstances of each family, and to have the new trusts for the McCallum Family Trust administered by different trustees than the new trusts for the Donald Hunter family, and vice versa. Holton has sworn that it is the belief of the trustees that this will have benefits and advantages, and that future decisions in each trust can be made having primary regard to the circumstances of one family separate from the circumstances of the other. Holton is one of the present trustees and initially he will be one of the trustees of both the new trusts.

7 Apart from this application for advice of the court and establishing the new trusts, complex corporate reorganizations of assets of the Family Fund have already taken place, and advance income tax rulings have been received to confirm that there will be no adverse tax consequences. The trustees have made their decision to set up the new trusts and are asking the court whether or not that decision is within their power.

8 The new trusts will have substantially the same terms as those set out in the will, because no new beneficiaries are being added and no beneficiaries are being excluded, except relating to contingent benefits to the extent necessary as a result of the separation of the two families' interests. The basic issue is whether or not the words in clause III(i)(C) of the will, read in the context of the will as a whole, permit the trustees to exercise their discretion to encroach upon the entire assets of the Family Fund and settle them in the two new trusts. If there is such a power, is the purpose stated legitimate, and, lastly, would it be an abuse of the discretion to resettle the assets into the specific two trusts?

9 The court will not normally grant approval or advice to trustees as to how they should exercise their power of discretion where such power is clear. See *Re McKay* (Court of Appeal, November 29, 1991, unreported) [now reported *(sub nom. McKay Estate v. Love)* 44 E.T.R. 190, 6 O.R. (3d) 511 at 519, *(sub nom. Re McKay Estate)* 52 O.A.C. 159 (C.A.)]. The present application is not a case concerning the exercise of a discretion, but requires the interpretation of the will to determine whether or not there is a power to do what is proposed. The proposed scheme is complex and has far-reaching ramifications to the entire estate. Although it was not expressly relied upon, it is obvious that there are tax ramifications because the trustees have obtained advance tax rulings.

10 I believe that the court should exercise its power in the present case. Section 60 of the *Trustee Act* authorizes an application for the opinion or direction of the court on any question respecting the management or administration of trust property. Rule 14.05(3)(*a*) allows an originating application to the court for such opinion. In a proper case, I do not think that the court should limit its opinion narrowly when all of the issues are before it. A trustee should not be required to face the risk of acting upon the limited opinion of the court and then face another possible action after it has acted on the same issues. I believe that s. 148 of the *Courts of Justice Act* mandates the avoidance of multiplicity of proceedings and r. 1.04(1) requires the most expeditious and least expensive determination of proceedings on their merits.

11 Cases similar to the present are common in England. Only two unreported Ontario cases were brought to the attention of the court. Both of these were considered under the same procedure and advice was given. No case was referred to that held the procedure to be improper where dealing with the establishment of new trusts. It was argued that the British Columbia case of *Re Lohn Estate* (1991), 41 E.T.R. 159 (B.C. S.C.), was authority for refusing to answer the question relating to the establishment of new trusts. In my opinion, that case was solely a tax case and no details of the requested advice were set out. I do not consider it to be a deterrent to giving advice in the present case.

12 In construing a will, the court must ascertain the intention of the testator by looking at the whole will, and the court can look to other cases only to the extent that they explain applicable rules of construction and principles of law. In looking at the present will, it is clear that the testator gave the trustees power to encroach on the entire estate which, if done, would make the balance of the will redundant.

13 It was conceded by counsel for the Official Guardian that the clause in the will would allow the trustees to exercise their power of encroachment to pay out all the assets of the Family Fund, one-half to Donald Hunter and one-half to Margaret McCallum, but he contended that there is no power given to the trustees to resettle the assets into the new trusts. *McLean Estate v. Stewart* (June 1, 1988), Doc. RE 822/82, Barr J. (Ont. H.C.) (unreported) is the only similar case for which any reasons were given. The terms of that will are not the same as the present will but I believe that the principle is the same. The reasons are brief and refer to no prior authorities, but include the following statement:

> It would be incongruous if the law were to hold that the trustees might pay to the beneficiaries their shares outright, but might not pay them to trustees to be held in trust for them. Nor need the terms of the new trust be the same as those in the original trust providing they are beneficial.

14 I agree with that statement if it is supported by authority.

15 The leading English authority is *Pilkington v. Inland Revenue Commissioners*, [1964] A.C. 612, [1962] 3 All E.R. 622 (H.L.). In that case, reliance was made upon a provision of the English *Trustee Act, 1925* [15 & 16 Geo. 5, c. 19], which permitted the application of any capital money for the "advancement or benefit" of a beneficiary. The issue before

the House was the resettlement of the funds into a new trust and most of the arguments made were the same as have been advanced by the Official Guardian in the present case. At p. 631, Viscount Radcliffe, in effect, stated that it was irrelevant as to who the trustees of the old and new trusts were. He said, "What matters is that there are new trusts, not that there are old trustees." I agree. That case relied on the interpretation of the words of a statute but it was stated, at pp. 634 and 635, that the statute merely adopted the customary common law terminology that is often included in wills. I do not believe that the decision is limited to statutory provisions.

16 I adopt the following statements in *Pilkington* at pp. 638 and 639 as being applicable to the present case:

> The commissioners' objections seem to be concentrated upon such propositions as that the proposed transaction is 'nothing less than a resettlement' and that a power of advancement cannot be used so as to alter or vary the trusts created by the settlement from which it is derived. Such a transaction, they say, amounts to using the power of advancement as a way of appointing or declaring new trusts different from those of the settlement. The reason why I do not find that these propositions have any compulsive effect upon my mind is that they seem to me merely vivid ways of describing the substantial effect of that which is proposed to be done and they do not in themselves amount to convincing arguments against doing it. Of course, whenever money is raised for advancement on terms that it is to be settled on the beneficiary, the money only passes from one settlement to be caught up in the other. It is therefore the same thing as a resettlement. But, unless one is to say that such moneys can never be applied by way of settlement, an argument which, as I have shown, has few supporters and is contrary to authority, it merely describes the inevitable effect of such an advancement to say that it is nothing less than a resettlement. Similarly, if it is part of the trusts and powers created by one settlement that the trustees of it should have power to raise money and make it available for a beneficiary upon new trusts approved by them, then they are in substance given power to free the money from one trust and to subject it to another. So be it: but, unless they cannot require a settlement of it at all, the transaction they carry out is the same thing in effect as an appointment of new trusts.
>
> In the same way I am unconvinced by the argument that the trustees would be improperly delegating their trust by allowing the money raised to pass over to new trustees under a settlement conferring new powers on the latter. In fact I think that the whole issue of delegation is here beside the mark. The law is not that trustees cannot delegate: it is that trustees cannot delegate unless they have authority to do so. If the power of advancement which they possess is so read as to allow them to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises.

I also adopt the statement at pp. 640-641 as follows:

> That would be a proper answer from a court to which trustees had referred their discretion with a request for its directions; but it does not really solve any question where, as here, they retain their discretion and merely ask whether it is impossible for them to exercise it.
>
> . . . . .
>
> ... First, I do not believe that it is wise to try to cut down an admittedly wide and discretionary power, enacted for general use, through fear of its being abused in certain hypothetical instances. ...

17 I believe that *Re Hampden Settlement Trusts*, [1977] T.R. 177 (Ch. D.), *Re Hastings-Bass*, [1975] Ch. 25, [1974] 2 All E.R. 193 (C.A.) and *Re Ropner's Settlement Trusts*, [1956] 1 W.L.R. 902, [1956] 3 All E.R. 332 (Ch. D.), and other cases, confirm this proposition. Counsel for the Official Guardian frankly conceded that he was not aware of any case anywhere in the Commonwealth that has been decided to the contrary.

18 While "advancement" may have a technical meaning, "benefit" does not. In *Pilkington*, supra, both "advancement" and "benefit" were considered and it was held that the word "benefit" was very wide in its meaning. In the present case, clause III(i)(C) gives an unfettered right to pay "for the benefit" of the testator's issue. In my opinion this includes the

settlement of new trusts. I therefore find that the trustees have the power and it is lawful for them to transfer all of the assets of the Family Fund to new trusts.

19 The next question is whether the court should approve the transfer to these specific two trusts. Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluc tant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass*, supra, at p. 41 [Ch.] as being applicable to the court's review of the exercise of such power:

> To sum up the preceding observations, in our judgment, where by the terms of a trust (as under section 32) a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account. ...

Put in the reverse wording, I also adopt the opinion of Middleton J. in *Dunlop v. Ellis* (1917), 41 O.L.R. 303 (H.C.) at 307:

> Where there is, as here, a trust coupled with a discretionary power, the Court is entitled and bound to interfere when there is no attempt to exercise the discretion for the purpose for which it was given, but an attempt to accomplish a purpose quite alien from the intention of the testatrix, the author of the power.

20 It is not the function of the court to approve the specific words of the proposed new trusts and I do not do so. However, I have reviewed the proposed new trusts to determine whether or not they are alien to the intention of the testator, or would be beyond the scope of the power of the trustees. As I have stated, subject to the approved basic division into two family trusts rather than the one, the new trusts closely mirror the provisions of the will, with certain minor modifications. Basically, they provide the interests to the children, grandchildren and issue of the testator, with the ultimate gift over to the Horace Hunter family and the employees of MacLean Hunter Limited. Counsel for the Official Guardian submits that some of the changed provisions in the new trusts are so great that the court should interfere and refuse approval. I would like to comment upon some, but not all, of these issues.

21 1. Under the will, if only one person shall be acting as an executor, then such trustee is directed to appoint a trust company to act as an additional trustee. Also, no reference is made to trustee's compensation, which presumably would be set in the normal way by the courts. Under one of the new trusts, Holton, Donald Hunter and R.G.H. McAslin are to be the trustees, and in the other, Holton, Margaret McCallum and Donald Campbell are to be trustees. In the event of a vacancy, the continuing trustees have power to appoint any person to fill the vacancy. In the event of Margaret McCallum ceasing to be a trustee, each of her children who attains the age of 30 years has the right to be appointed a trustee. Decisions shall be made by a majority of trustees and a maximum compensation to be paid to trustees is imposed. There is to be no compensation paid to any child or grandchild of the testator. In view of the size of the estate, the old trustees believe that this compensation is less than would be commonly awarded by a court. I believe that this change is within the discretion of the trustees.

22 2. There is a possibility of a violation of the rule against perpetuities under the terms of the new trusts. However, in view of s. 3 of the *Perpetuities Act*, R.S.O. 1990, c. P.9, I do not believe that this is sufficient ground for the court to say that the trustees have exceeded their discretion.

23 3. In the new trusts there is a new total exculpatory clause in favour of the new trustees for any of their acts. In my opinion this is a detail of the new trust and is within the discretion of the trustees in setting up the new trusts.

24 4. The effect of the new trusts is to divide the Family Fund into two units. Counsel for the Official Guardian submits that this deprives some beneficiaries of future potential gifts over while conceding that it may benefit them under different circumstances. I believe that this is within the general discretion of the trustees in setting up the new trusts.

25 I believe that the trustees have the power to establish new terms in the new trusts within the parameters of the overall principles that I have set out. I have reviewed the provisions of the new trusts and find that they are substantially for the benefit of the family members within the contemplation of the testator, and find that they do not go beyond the powers of the trustees.

26 For these reasons the answer to the question presented to the court is yes.

27 Costs of all parties on a solicitor-and-client basis are to be paid out of the Family Trust. The costs of the Official Guardian may be agreed upon, but otherwise are to be assessed.

Order accordingly.

Citing References (24)

Treatment	Title	Date	Type	Depth
Followed in	C 1. Yates v. Air Canada 2004 BCSC 3 (B.C. S.C.) **Judicially considered 3 times**	Jan. 15, 2004	Cases and Decisions	
Considered in	2. Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re 2010 ONSC 629 (Ont. S.C.J.)	Feb. 03, 2010	Cases and Decisions	
Considered in	H 3. Barnes v. Barnes 2008 CarswellOnt 6153 (Ont. S.C.J.)	Oct. 16, 2008	Cases and Decisions	
Considered in	4. Ryan Estate v. Boulos-Ryan 2007 NLTD 40 (N.L. T.D.)	Feb. 15, 2007	Cases and Decisions	
Considered in	5. Edell v. Sitzer 2001 CarswellOnt 5020 (Ont. S.C.J.) **Judicially considered 13 times**	July 13, 2001	Cases and Decisions	
Considered in	C 6. Hedley Estate v. Grant 1998 CarswellOnt 4876 (Ont. Gen. Div.)	Nov. 23, 1998	Cases and Decisions	
Considered in	7. Fox v. Fox Estate 1996 CarswellOnt 317 (Ont. C.A.) **Judicially considered 24 times**	Feb. 07, 1996	Cases and Decisions	
Referred to in	8. Feinstein v. Freedman 2013 ONSC 1616 (Ont. S.C.J.)	Mar. 18, 2013	Cases and Decisions	
Referred to in	C 9. Sutherland v. Hudson's Bay Co. 2009 CarswellOnt 4936 (Ont. S.C.J.)	Aug. 20, 2009	Cases and Decisions	
Referred to in	C 10. Buckingham Securities Corp. (Receiver of) v. Miller Bernstein LLP 2008 CarswellOnt 2669 (Ont. S.C.J.) **Judicially considered 2 times**	May 07, 2008	Cases and Decisions	
Referred to in	C 11. McNeil v. McNeil 2006 ABQB 636 (Alta. Q.B.) **Judicially considered 2 times**	Sep. 05, 2006	Cases and Decisions	
Referred to in	H 12. Dionisio v. O'Sullivan 2004 CarswellOnt 5799 (Ont. S.C.J.)	July 06, 2004	Cases and Decisions	
Referred to in	13. Merry Estate v. Merry Estate 2002 CarswellOnt 3993 (Ont. S.C.J.) **Judicially considered 13 times**	Nov. 21, 2002	Cases and Decisions	
—	14. Holmested & Watson, Ontario Civil Procedure R. 9§5, Interim Case Update	2007	Secondary Sources	—
—	15. Ontario -- Estate Administration; SLL-24 Disputes amongst Multiple Trustees: What Rights Does a Minority Estate Trustee Have Againstan Oppressive Majo...	2015	Secondary Sources	—
—	16. Waters' Law of Trusts in Canada; 21.V Resettlement under a Power	2007	Secondary Sources	—
—	17. Waters' Law of Trusts in Canada; 23.I Introduction	2007	Secondary Sources	—
—	18. Waters' Law of Trusts in Canada; 18.IV Liability of Trustees in the Exercise or Non-Exercise of Discretion	2007	Secondary Sources	—
—	19. Waters' Law of Trusts in Canada; 20.II Description of Statutory Powers	2007	Secondary Sources	—

Treatment	Title	Date	Type	Depth
—	20. Widdifield on Executors and Trustees, 6th Ed.; 8.2 Judicial Control of Trustee Discretion	2007	Secondary Sources	—
—	21. Widdifield on Executors and Trustees, 6th Ed.; 12.8 Alternatives to an Application for Advice	2007	Secondary Sources	—
—	22. Widdifield on Executors and Trustees, 6th Ed.; 16.8 The Proper Test to be Applied by the Court before it Gives its Consent	2007	Secondary Sources	—
—	23. CED Executors and Administrators IV.2.(d) (Ontario), IV.2.(d) §120-§135	2009	CED	—
—	24. ICLL/IDJC 48914, Creating a flexible will plan	1996	Secondary Sources	—

TAB 2

DECLARATION OF TRUST

SAWRIDGE BAND TRUST

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

BETWEEN:

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

(hereinafter called the "Settlor")

of the First Part

AND:

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

(hereinafter collectively called the "Trustees")

of the Second Part

AND WITNESSES THAT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SIGNED, SEALED AND DELIVERED
In the Presence of:

Heather York
NAME

1100 One Thornton Court
ADDRESS

Heather York
NAME

1100 One Thornton Court
ADDRESS

A. Settlor: [signature]

B. Trustees: 1. [signature]

Heather Yost
NAME

1100 One Thornton Court
ADDRESS

Heather Yost
NAME

1100 One Thornton Court
ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

2. [illegible]

3. Walter F Twin

4.

5.

6.

7.

8.

TAB 3

SAWRIDGE BAND INTER VIVOS SETTLEMENT

DECLARATION OF TRUST

THIS DEED OF SETTLEMENT is made in duplicate the 15th day of April, 1985

B E T W E E N :

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

OF THE FIRST PART,

- and -

CHIEF WALTER PATRICK TWINN,
GEORGE V. TWIN and SAMUEL G. TWIN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter collectively called
the "Trustees"),

OF THE SECOND PART.

WHEREAS the Settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution of this Deed are members of the Sawridge Indian Band No. 19 within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, as such provisions existed on the 15th day of April, 1982, and the future members of such band within the meaning of the said provisions as such provisions existed on the 15th day

of April, 1952 and for that purpose has transferred to the Trustees the property described in the Schedule hereto;

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

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

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

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

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

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

No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement; and

(b) "Trust Fund" shall mean:

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

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

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

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

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

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

5. Any Trustee may at any time resign from the office of Trustee of this Settlement on giving not less than thirty (30) days notice addressed to the other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee shall be vested in the continuing Trustees or Trustee of this Settlement and such

power shall be exercised so that at all times (except for the period pending any such appointment, including the period pending the appointment of two (2) additional Trustees after the execution of this Deed) there shall be at least five (5) Trustees of this Settlement and so that no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there is more than one (1) Trustee who is not then a Beneficiary.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the end of twenty-one (21) years after the death of the last survivor of all persons who were alive on the 15th day of April, 1982 and who, being at that time registered Indians, were descendants of the original signators of Treaty Number 8, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under section 12(2) thereunder.

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

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for Trustees' investments by the Trustees' Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Settlement for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner to any extent detracting from the generality of the foregoing, the power

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

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

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

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund,

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

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

11. The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries" under subparagraph 2(a) of this Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such

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

13. Subject to paragraph 11 of this Deed, a majority of fifty percent (50%) of the Trustees shall be required for any decision or action taken on behalf of the Trust.

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

14. This Settlement shall be governed by, and shall be construed in accordance with the laws of the Province of

Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

NAME

ADDRESS

A. Settlor

B. Trustees:

1.

NAME

ADDRESS

2.

NAME

ADDRESS

3.

NAME

ADDRESS

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

TAB 4

DRAFTING TRUSTS & WILL TRUSTS IN CANADA

Fifth Edition

JAMES KESSLER, Q.C.

FIONA HUNTER, B.A., LL.B., LL.M., T.E.P.

LexisNexis

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November 2020

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unnecessary where (as in the drafts in this book) there is a wide power of advancement.

C. POWER OF APPOINTMENT USED TO MAKE ADVANCE TO BENEFICIARY

§11.12 The power of appointment (or indeed the power of re-settlement) may be used so as to transfer trust capital to a beneficiary. But it will be easier to use the power of advancement for this purpose, since no formal deed is required. Trust money can simply be transferred by cheque.

D. POWER OF ADVANCEMENT USED TO CREATE NEW TRUSTS

§11.13 There is English authority permitting the power of advancement in a trust to be used:

(1) to transfer trust property to a new trust where it may be held on terms wholly[44] or partly[45] different from the original trust;

(2) to alter the terms of the existing trust so as to create new beneficial interests which may wholly or partly replace the existing beneficial interests; or[46]

(3) to alter administrative provisions.[47]

Ontario courts have followed the English authority,[48] and the generally accepted practice is that the power of advancement may be used broadly to the same effect as powers of appointment or re-settlement. This is particularly important where a trust is drafted badly, or inflexibly, because even badly drafted trusts generally contain a full power of advancement, which should allow matters to be put right.

The following example highlights such use of a power of advancement. In the discussion:

(1) It is assumed that under a trust ("the Original Settlement") trustees have

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the benefit of'. Of course, the context may show that an extended sense is meant.

[44] As in *Re Clore*, [1966] 1 W.L.R. 955 (transfer to charity). In the leading English case of *Pilkington v. I.R.C.* (1962), 40 T.C. 416, the new trusts were nearly, but not quite, exhaustive.

[45] In *Re Hastings-Bass*, the trustees transferred trust property to a new trust but created only a limited beneficial interest in income and no exhaustive beneficial trust of capital of the funds advanced. The new trustees held on the terms of the old trusts, which remained in effect to the extent that the new trusts were not comprehensive. See [1975] Ch. 25 at 42.

[46] In *Re Hampden*, the new trusts were nearly but not quite exhaustive. This important case is reported in [1977] T.R. 177 and also belatedly reported in [2001] W.T.L.R. 195 and accessible online: <http://www.kessler.co.uk/wp-content/uploads/2012/04/Hampden.pdf>.

[47] *Howell v. Rozenbroek* (U.K., December 14, 1999, unreported).

[48] *Hunter Estate v. Holton*, [1992] O.J. No. 401, 46 E.T.R. 178 (Ont. Gen. Div.).

TAB 5

ICLR

***612 Pilkington and Another Appellants; v. Inland Revenue Commissioners and Others Respondents.**

Image 1 within document in PDF format.

House of Lords
8 October 1962

[1962] 3 W.L.R. 1051

[1964] A.C. 612

Lord Reid , Viscount Radcliffe , Lord Jenkins , Lord Hodson and Lord Devlin .
1962 July 9, 10, 11; Oct. 8.

Analysis

[On Appeal from In Re Pilkington's Will Trusts.]

Trusts—Power of advancement—Exercise of power—Statutory power—Fund held on trust for beneficiary for life and after his death for such of his children or remoter issue as he should appoint—Settlement for the benefit of infant child of beneficiary—Advancement of moiety of infant's expectant share on trusts of new settlement Avoidance of death duties —Whether advancement for benefit of object of power—Whether rule against perpetuities infringed— ***613** Whether valid exercise of power of advancement— Trustee Act, 1925 (15 Geo. 5, c. 19)

Perpetuity Rule—Power of advancement—Power used for resettlement—Application of perpetuity rule.

Power of Appointment—Power of advancement—Distinction—Perpetuity rule.

By his will dated December 14, 1934, a testator directed his trustees to hold the income of his residuary estate upon protective trusts in equal shares for all his nephews and nieces living at his death with a provision that their consent to any exercise of any applicable power of advancement should not cause a forfeiture of their interests; and after the death of a nephew or niece to hold the capital and income of such beneficiary's share for his or her children or remoter issue as he or she should appoint and in default of appointment for his or her children at 21. The will contained no provision replacing or excluding the power of advancement contained in section 32 of the Trustee Act, 1925 . [1] The testator died on February 8, 1935. One of his nephews was married and had three infant children. The second child, a daughter, was born on December 29, 1956, and the trustees, for the purpose of avoiding death duties, desired to exercise the statutory power of advancement in her favour by applying up to one moiety of her expectant share in the testator's trust fund by adding it to a fund, which it was proposed should be subject to the trusts of a new settlement, under which the income of the fund was to be applied for her maintenance until she attained 21, and from then and until she attained 30 was to be paid to her, when the capital was to be held on trust for her absolutely. If she should die under that age the trust fund was to be held upon trust for her children who should attain the age of 21 years and, subject as aforesaid, upon trust for the nephew's other children.

On a summons to determine whether the trustees might lawfully so exercise the power of advancement:-

Held:

(1) that there was nothing in the language of section 32 of the Trustee Act, 1925 , which in terms or by implication restricted the width of the manner or purpose of advancement. In particular, if the whole provision made for the object of the power was for his or her benefit, it was no objection to the exercise of the power that (as might happen here) other persons benefited incidentally as a result of the exercise, nor was it bad merely because moneys were to be tied up in a proposed settlement. Accordingly, there was no maintainable reason for introducing into the statutory power of ***614** advancement a qualification that would exclude its exercise in the manner proposed by the trustees (post, pp. 636, 640). Lowther v. Bentinck (1874) L.R. 19 Eq. 166 ; In re Joicey [1915] 2 Ch. 115, C.A. ; In re Halsted's Will Trusts [1937] 2 All E.R. 570 ; In re Ropner's Settlement Trusts [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332 ; and In re Collard's Will Trusts [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 considered .
(2) But that the exercise of the statutory power of advancement which took the form of a settlement was a special power akin to a special power of appointment and, as such, must be exercised within the period permitted by the rule against remoteness, and its exercise must, for the purpose of the rule, be written into the instrument creating, the power, and that since the new settlement was only effected lay the operation of a fiduciary power which itself "belonged" to the old settlement, the trusts of the settlement proposed by the trustees must be treated as if they had been made by the testator's will, ailed so treated they infringed the rule (post, pp. 641-642).
Decision of the Court of Appeal [1961] Ch. 466; [1961] 2 W.L.R. 776; [1961] 2 All E.R. 330, C.A. reversed .

APPEAL from the Court of Appeal (Lord Evershed M.R., Upjohn and Pearson L.JJ. [2] .

This was an appeal from an order of the Court of Appeal dated March 24, 1961, discharging (save so far as it related to costs) an order of the Chancery Division of the High Court of Justice (Danckwerts J.) dated May 14, 1959. The said orders were made in a cause or matter commenced by originating summons wherein the respondents, Guy Reginald Pilkington, Leonard Norman Winder, David Frost Pilkington and Clifford Pearson, trustees of the will of William Norman Pilkington, were the plaintiffs; and the appellants, Richard Godfrey Pilkington and Penelope Margaret Pilkington, were originally the only defendants, the respondents the Commissioners of Inland Revenue being added as defendants by order of the Court of Appeal dated July 18, 1960.

The question at issue in this appeal was whether the trustees could lawfully exercise the powers conferred on them by the will of William Norman Pilkington (hereinafter called "the testator") and section 32 of the Trustee Act, 1925 , by making part of the expectant interest of the appellant Penelope Margaret Pilkington in the testator's residuary trust fund subject to the trusts, powers and provisions of a new settlement to be executed by the respondent, Guy Reginald Pilkington.

By his will dated December 14, 1934, the testator, William ***615** Norman Pilkington, directed his trustees to invest his residuary estate and to hold the fund upon trust in equal shares for all his nephews and nieces, therein defined as "the beneficiaries," being children of his brothers Lionel Edward Pilkington, Charles Raymond Pilkington and Guy Reginald Pilkington, living at his death who should attain the age of 21 years or being female marry under that age. The share of each beneficiary was, so far as is here material, settled upon express protective trusts for the benefit of the beneficiary during his or her life, with a provision that his or her consent to any exercise of any applicable power of advancement should not cause a forfeiture of the interest. After the death of a beneficiary the capital and future income of the share of such beneficiary was to be held in trust for the children or remoter issue of such beneficiary as he should appoint with a trust in default of appointment for the beneficiary's children on attaining the age of 21 years or marriage. If the trusts

of the share of a beneficiary should fail then it was to accrue to the other shares in the trust fund. The will contained no provision replacing or excluding the power of advancement conferred upon trustees by section 32 of the Trustee Act, 1925 . The testator died on February 8, 1935, and his will was duly proved by his executors.

The first appellant, Richard Godfrey Pilkington, a son of Guy Reginald Pilkington, was married with three children. His father, who was also a trustee of the will, was desirous of making a settlement in favour of the second appellant, Penelope Margaret Pilkington, the second child of Richard Godfrey Pilkington, who was born on December 29, 1956, and he proposed to his co-trustees that he should execute a settlement for the benefit of Penelope and that the trustees of the will should then exercise the power given by section 32 of the Trustee Act, 1925 , by applying part of Penelope's expectant share in the testator's trust fund by adding it to the fund subject to the trusts of the proposed new settlement. Accordingly he paid £10 in cash to the trustees of the proposed settlement under which the trustees were directed to hold this sum, together with any further moneys (the intended total sum being £7,600) which were to be paid to them upon the following trusts: Until Penelope attained 21 years, or died under that age, the trustees were to have power at their discretion to apply the whole or any part of the income of the trust fund for the maintenance, education or benefit of Penelope as they thought fit and were to accumulate the residue of income as an addition to the capital of the trust fund, with power to apply all or part of the accumulations as if they were income of the current year; if she ***616** should attain 21 years then until she attained 30 years, or died under that age, the trustees were to pay the income of the trust fund to her. The capital of the fund to be held upon trust for her upon attaining 30 years absolutely; if Penelope died under the age of 30 leaving children or a child living at her death the trustees were to hold the fund and the income thereof in trust for all or any her children or child who should attain the age of 21 years, if more than one in equal shares, and in such event the trusts applicable until Penelope attained 21 were to apply to the children and the income of their expectant shares of the fund. Subject to these provisions the trustees were to hold the fund in trust for all or any the children or child of Richard Godfrey Pilkington (other than Penelope) who being male attained 21 years or being female attained that age or married if more than one in equal shares. In the event of the failure of the trusts the fund was to be held upon the trusts of the will of the testator applicable to the share of Richard Godfrey Pilkington as though he had died without being married. The power of advancement contained in section 32 of the Trustee Act, 1925 , was expressly made applicable.

The trustees of the will took out a summons to determine whether they could lawfully exercise the powers conferred upon them by section 32 of the Trustee Act, 1925 , in relation to Penelope's expectant interest in the testator's trust fund by applying (with the consent of Richard Godfrey Pilkington) up to one moiety of the capital of such interest so as to make it subject to the new proposed settlement, or whether such an application of the capital would be improper and unauthorised because: (a) Penelope's interest under the proposed settlement would vest at a date later than the date on which she attained a vested interest in her expectant share under the will of the testator; or (b) the trusts of the new settlement, if contained in the will of the testator, would be void for perpetuity.

Danckwerts J. held that the power of advancement might be legitimately exercised by paying some part of the capital of Penelope's share (not exceeding one moiety) to the trustees of the proposed settlement and so as to make it subject to the trusts, powers and provisions of such settlement and, since the power of advancement took the property advanced out of the original settlement, the relevant period for the purposes of the rule against perpetuities was to be determined by reference to the proposed settlement and the power could accordingly be exercised in the manner proposed.

On July 18, 1960, the Court of Appeal, on the motion of the ***617** respondent trustees, ordered that the Commissioners of Inland Revenue might be added as parties and further that (not withstanding that the time for appealing had expired) the trustees or the commissioners might be at liberty to appeal from the order of Danckwerts J.

The Commissioners of Inland Revenue appealed. The grounds of their appeal were that the order was wrong in law:

(1) Because the proposed transaction was nothing less than a resettlement of the capital over which it extended upon trusts and with and subject to powers and discretions not contained in or contemplated by the testator's will and not authorised by the power of advancement contained in section 32 and because it was irrelevant that the trustees thought that it was for the benefit of Penelope that it should be so resettled.

(2) Because to resettle any part of the capital of the share of a beneficiary was not within the meaning of the phrase "to pay or apply any capital money" subject to a trust.

(3) Because upon the true construction of the section the power of advancement thereby conferred upon trustees to pay or apply any capital money subject to a trust for the advancement or benefit of any person entitled to the capital of the trust property or of any share therein did not extend to enable such trustees to deprive such person of the interest in property conferred upon him by the trust instrument or to declare new or other trusts affecting such capital or share or to do any act or thing in relation to the trust property which would operate to deprive such person of such interest or to subject such capital or share to such new or other trusts.

(4) Because the power of advancement might only be exercised to accelerate and, if necessary, enlarge the interest of the person sought to be advanced and not to postpone or reduce it.

(5) Because the effect of the proposed transaction would be to deprive Penelope of her existing contingent interest in the capital sought to be subjected to the trusts of the proposed new settlement and to subject such capital to trusts which differed from those declared by the will and to postpone and reduce Penelope's interest in such capital.

(6) Because In re Fox [3] and In re Joicey [4] are authority for the proposition that a power of advancement did not enable the trustees to alter the devaluation of the estate or to destroy the contingent interest of the person sought to be advanced.
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(7) Because the authorities upon which Danckwerts J. relied, properly understood, did not decide the contrary or, if they did, were wrongly decided.

(8) Because, if contrary to the contention of the Commissioners of Inland Revenue the said power of advancement extended to enable the trustees to subject the capital to new or other trusts, and thereby to postpone or reduce the interest of Penelope, the validity or otherwise of any such new or other trusts in relation to the rule against perpetuities fell to be tested by considering whether they would have been within the rule if they had been declared by the testator's will.

(9) Because the trusts in favour of Penelope and her children declared by the proposed new settlement would have been void for remoteness if contained in the testator's will.

(10) Because the subjection of any part of the capital of the expectant share of Penelope to the trusts, powers and provisions of the proposed new settlement would be an unlawful delegation of the trusts, powers and provisions of the will.

(11) Because under the trusts of the proposed new settlement persons who were not objects of the power of advancement (and in particular Penelope's children) were beneficiaries, and the proposed transaction was accordingly a transaction in excess of the said power.

The Court of Appeal allowed the appeal.

Sir Milner Holland Q.C. and *Eric Griffith* for the appellants. The trustees of the testator's will take the view that it is for the benefit of Penelope that part of her contingent reversionary interest in the testator's residuary trust fund should be raised now and made subject to the trusts, powers and provisions of a new settlement to be executed by the respondent Guy Reginald Pilkington. This raises the questions (1) whether the trustees have power to do this under section 32 of the Trustee Act, 1925 , if in their absolute discretion they consider that it is for the benefit of the infant Penelope. (2) The subsidiary question whether the terms of the proposed settlement would infringe the rule against remoteness of vesting.

(1) There is no express reference in the will to a power of advancement, and, accordingly, the trustees have the powers of advancement conferred on them by section 32 of the Trustee Act, 1925 . It is not disputed that the trustees' proposed exercise of the power is bona fide. The proposed exercise of the ***619** power can only be ineffective in law if in any circumstances it cannot be for Penelope's benefit. The only view to the contrary Which would appear to have cogency is that held by the Court of Appeal, namely, that the proposed exercise is not within the purview of section 32 at all.

Attention is drawn to the very wide language of section 32. The words are "advancement or benefit." The words "or benefit" are not a mere trifling addition but cover any application of money for the benefit of the object of the power which may not be advancement as such. In Roper-Curzon v. Roper-Curzon [5] it was held that even a bare power of advancement justified the payment of money into the trusts of a post-nuptial settlement of the person for whose benefit the power was exercised. As to "benefit": see Lowther v. Bentinck [6] and In re Kershaw's Trusts. [7] "Benefit" is not to be construed in this context ejusdem generis with "advancement" but is a word of very wide import: see In re Halsted's Will Trusts, [8] where Farwell J. adopted the observations of Jessel M.R. in Lowther v. Bentinck [9] and held that a power to benefit A included power to benefit other persons for whom A was under some obligation.

In the Court of Appeal [10] it was pointed out that in Roper-Curzon [11] and Halsted [12] the power was exercised for the benefit of an adult beneficiary. It is to be observed (a) that in both cases the payments were in fact made to the trustees of a new settlement; (b) if it is not within a power of this kind to pay money to the trusts of an existing settlement it could not be a proper exercise of the power to pay it to an adult to apply it to the trusts of a new settlement, for that would amount to a fraud on the power.

In In re Ropner's Settlement Trusts [13] Harman J. considered that it had been rightly conceded in argument that it was a proper exercise of the power of advancement there for the trustees of the original settlement to hand money to the

trustees of a new settlement provided that they were satisfied after a proper consideration of all the circumstances that such exercise was for the benefit of the objects of the power.

As to the judgment of Lord Evershed M.R., [14] it is conceded ***620** that if the trustees are concerned only with the advancement in life of a beneficiary then any advancement must relate to the personal circumstances or personal needs of that beneficiary, but under section 32 one is considering not only the payment of money for advancement but also the application of capital moneys "subject to a trust, for the advancement or benefit,... of any person entitled to the capital of the trust property." These words cannot be confined here to the personal needs of Penelope. Further, it is not disputed that the trustees must consider the circumstances at the time they exercise the power, but the exercise of the power conferred by section 32 cannot be limited to those circumstances which the situation of the object of the power demand to be done.

As to the ambit of a power of advancement "for benefit and advancement": see In re Brittlebank [15] which shows that the effect of the insertion of the word "benefit" is to enlarge the power and give it a wider extension than "advancement" alone would give, and that in the absence of mala fides on the part of the trustees, once they have reached the conclusion that a given exercise of the power is for the benefit of the object of the power the court will not interfere with the exercise of it.

The fact that the Court of Appeal have held that the power of advancement contemplated in section 32 is one to be exercised in special circumstances, for example, setting up the object of the power in a profession, or making some provision on marriage, is inconsistent with the view that the avoidance of death duties justifies trustees in exercising this power, for that is not a special circumstance but an ever present situation; nevertheless, the court approved In re Collard's Will Trusts [16] where the sole purpose for exercising the power was to avoid death duties.

The Court of Appeal placed reliance on In re Joicey, [17] but the power in question there was an arbitrary power and not a power of advancement under which the trustees have to consider whether in the circumstances its proposed exercise is for the benefit of the beneficiary.

A limitation on the scope of this power cannot properly be derived from the cross-heading "Maintenance, Advancement and Protective Trusts" which precedes section 31 of the Trustee Act, 1925 . It by no means follows that because an advancement ***621** requires special circumstances therefore the object of the power can only receive a benefit under section 32 in special circumstances. Further, where trustees have exercised the power bona fide it is not within the province of the court to overrule them.

(2) If the rule against perpetuities as contended for by the Crown is applicable then the relevant date for the purposes of the rule is the death of the testator in library, 1938. It is submitted, however, that the exercise by the trustees of the power of advancement takes the sum in question out of the will entirely. Accordingly, it is irrelevant to consider whether interests created by Guy Reginald Pilkington's settlement vest within 21 years after lives in being under interests created by the will of the testator. For the purposes of the rule, therefore, the relevant interests are those contained in the proposed settlement. If this view be wrong it is surprising that it was not adverted to in Roper-Curzon v. Roper-Curzon [18] since it follows from the Crown's contention that what the court authorised there plainly offended the rule.

In re Gosset's Settlement, [19] Lawrie v. Buncos [20] and In re Fox [21] show that once trustees decide to exercise a power of advancement the sum advanced is taken right out of the settlement for all purposes and thus any trust created in respect of such sum is not read back into the original instrument.

Upjohn L.J. [22] described the power here as a special power, but there is no such interest known to the law as a *special* power of *advancement.* The addition of the word "special" adds nothing to the concept of a power of advancement. Those authorities, therefore, such as In re Fane, [23] which lay down that for the purposes of the rule against perpetuities all limitations made in pursuance of a special power shall be such only as would have been valid if inserted in the original will or settlement, are inapplicable.

[Reference was also made to Morris and Leach, The Rule Against Perpetuities, 1st. ed., p. 50 and to In re Legh's Settlement Trusts. [24]]

B. L. Bathurst Q.C. (Viscount Bledisloe) and *James Cunliffe* for the trustees. The argument on behalf of the appellants is ***622** adopted. For the following reasons the trustees consider that their proposed exercise of the power of advancement conferred on them by section 32 of the Trustee Act, 1925 , is a proper exercise thereof: (i) Penelope's advanced share could not thereafter be divested by the subsequent exercise of her father's special power of appointment over his share of the trust fund. (ii) If her father survived the advance for more than two years, estate duty would be reduced and after five years no estate duty would be payable in respect of it on his death. (iii) The income from the advanced share would be used wholly for Penelope's maintenance, or, accumulated. (iv) That income would be (a) free from surtax and (b) qualify for personal allowances for Penelope. (v) On attaining 21, Penelope would be absolutely entitled to the income. (vi) Penelope's children would be provided for if she died between the ages of 21 and 30. (vii) Penelope obtains the capital on attaining 30. (viii) Penelope would be protected from extravagance on attaining 21.

The Court of Appeal have held in allowing the Crown's appeal (1) that the proposed settlement is nothing more than a resettlement; (2) that an advancement must relate to some special circumstance arising.

As to (1), advancements by way of settlement have a long history: see Roper-Curzon v. Roper-Curzon. [25] If an advancement by way of a settlement of this kind can be said in certain circumstances to be a benefit for an adult it would be very surprising if such a benefit were to be denied to an infant.

As to (2), whether there must exist a particular need, the language of section 32 could hardly be wider, and it has nowhere been suggested that there is anything improper in what the trustees propose to do. In re Moxon's Will Trusts [26] is an example of the court refusing to interfere with a bona fide and reasonable exercise by trustees of a discretion vested in them.

As regards the perpetuity question, the short answer is that when a power of advancement is exercised the fund advanced is taken right out of the original settlement: see *per* Danckwerts J, [27] To call this a special power is meaningless. The word "special" in relation to powers has always been linked with powers of appointment and it is only in relation to a limited or special power of appointment that the power must be read back for this purpose ***623** into the original will

or settlement. Thus, in relation to a power of advancement once the fund is taken out there is no vested interest left under the original settlement.

Peter Foster Q.C. and *E. B. Stamp* for the Commissioners of Inland Revenue. Reliance is placed on the following propositions: (1) The statutory power contained in section 32 of the Trustee Act, 1925 , can only be used to enlarge or accelerate the beneficiary's interest and not to postpone or reduce it. (2) The proposed exercise of the power in this case will offend the rule delegates non potest delegare. That doctrine applies to all powers and applies to section 32. (3) The proposed exercise of the power is void as being an excessive execution since non-objects are included. (4) The proposed exercise is nothing less than a resettlement and cannot come within section 32 however wide a meaning is given to the words "pay or apply." (5) The proposed exercise of the power will offend the rule against perpetuities in any event.

1. The position under the will is that Penelope has a vested interest at 21 or earlier marriage. Under the proposed settlement she is given a contingent interest until she attains 30. The effect of the exercise of the power is not to advance her interest but to postpone its vesting from 21 to 30. This power does not enable trustees to alter the devaluation of or destroy the contingent interest of the beneficiary advanced. There must be an out and out payment and there cannot be a settlement without the advancee so asks and it is then the advancee who is the settler. The power of advancement given by section 32 follows the old form of advancement used by convincers and is similar to that to be found in the precedent books for many years before 1925. Reliance is placed on the definition of advancement propounded by Cotton L.J. in In re Aldridge [28] : "it is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy, before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled."

If a power of advancement were as wide as has been contended for by the appellants In re Morris's Settlement Trusts [29] would have been decided differently. "A power of advancement is a purely ancillary power, enabling the trustees to anticipate by means of an advance under it the date of actual enjoyment ***624** by a beneficiary selected by the appoint or of the interest appointed to him or her, and it can only affect the destination of the fund indirectly in the event of the person advanced failing to attain a vested interest": *per* Jenkins L.J. [30]

The purpose of exercising a power of advancement is to accelerate the vesting in interest of capital and not to postpone such vesting. The power of advancement contained in section 32 is a very limited power in that it is limited to the payment of an application of capital and capital moneys to a person interested in capital and to no one else. It is emphasised that although the language of section 32 may appear quite wide the nature of the power is such as to accelerate and not to vary, reduce or postpone the nature of the interest. Ex hypothesi it does not enable a resettlement which alters, varies and postpones the interest in question.

The House is invited to consider the cross-heading which precedes section 31 as an aid to the construction of section 32: Qualter, Hall & Co. v. Board of Trade. [31] It is "Maintenance, Advancement and Protective Trust." There are only three sections under this heading. Section 32 is the second of them and therefore it must refer to advancement. Powers of advancement are used to advance capital to a particular person for a particular purpose, for example, the purchase of a commission. The word "benefit" extends the purposes for which the payment may be made, such as, for example, the payment of debts. "Apply" is limited to the expending of money on behalf of the beneficiary for his benefit in contradistinction to a payment to the beneficiary direct. "Benefit" is anything which accrues to the beneficiary as a result of the immediate spending of money by the trustees. "Apply" in the context of section 31 (1) and (2) and section

33 (1) (ii) clearly means "expend" and it is plain that an application of income under section 31 (1) cannot be by way of a resettlement for section 31 as a whole is concerned with maintenance during the beneficiary's minority.

The power of advancement conferred by section 32 admits of a payment but not of a settlement. The cases show that the power of advancement has never been exercised so as to enable *the trustees* to resettle the sum advanced; it is the person ***625** advanced who effects the settlement: In re Gosset's Settlement [32] ; Roper-Curzon v. Roper-Curzon [33] ; In re Halsted's Will Trusts. [34] Ex concessis this cannot be done by an infant.

The following authorities show very clearly what has hitherto been considered to be the true nature of a power of advancement: In re Joicey [35] shows that an advancement is an acceleration of the beneficiary's interest. If the appellants' contention be correct then that case should have been decided differently, as also should In re Mewburn's Settlement, [36] for there the power of advancement contained in the power of appointment would have been a delegation of the power and the exercise of the power of appointment would have been bad as an excessive execution. Similar observations apply to In re May's Settlement. [37]

The rule of construction is that the words of section 32 are to be assumed to bear their technical meaning as hitherto understood by convincers and are not to be given a wider meaning: see Craies on Statute Law, 5th ed., p. 158; Mason v. Bolton's Library Ltd., *per* Farwell L.J. [38]

2. Delegates non potest delegare. The proposed exercise of the power offends this rule. In the resettlement there is a power of advancement. This amounts to a pure delegation. If the proposed settlement is made the power contained in the will by virtue of section 32 Will be exercised by another set of trustees, that is, those of the settlement and that plainly infringes the rule.

Every settlement confers powers of management, the proposed settlement, however, includes the wide power of investment allowed by the Trustee Investments Act, 1961 , whilst the testator's will contains a much more restricted power of investment, the power of advancement is therefore being used to widen the powers of investment and that plainly offends the rule against delegation. It is pertinent to observe, moreover, that it would be strange to find in a power of advancement power to delegate powers of management to other persons. further, under this power of advancement it would be possible for Penelope to circumvent the prohibition against a Roman Catholic taking a benefit under the will and that would appear also to be a very strange result to flow from a power of advancement.

3. The proposed exercise of the power will bring in non-objects, ***626** for under the will Penelope's children are only objects under the power of appointment and have no interest until that power is exercised in their favour, but under the proposed settlement her children take vested interests at 21 in the event of Penelope dying before the age of 30. The proposed exercise of the power of advancement is therefore void as being an excessive execution of the power.

4. However wide a meaning be given to the language of section 32 it cannot embrace a resettlement. A resettlement cannot come within the words "pay or apply." This argument depends on the width to be given to the word "apply." In In re Peel [39] it was held that under a trust to apply an annuity for the maintenance, education, or benefit of an infant,

the trustees had no power to accumulate any part of the income for the benefit of the infant until he should attain 21. In other words, the trustees could not retain the income but must apply it, that is, expend it. The "application" in the present case is not an expending of the capital moneys in question but is a retention of it in the proposed settlement. [Reference was made to In re Vestey's Settlement. [40]]

5. The proposed exercise of the power plainly offends the rule against perpetuities. The object of the power being an infant the trustees can only justify the making of a settlement provided it is within the powers conferred on them by section 32. That cannot be a general power but it is a special power and as such it must be read back into the testator's will: In re Churston Settled Estates. [41]

In conclusion, it is submitted that In re Ropner's Settlement Trusts [42] was wrongly decided. [Reference was also made to Lowther v. Bentinck [43] ; In re Kershaw's Trusts. [44]]

E. B. Stamp following. The House may derive some assistance by considering what is the result sought to be achieved by the trustees and the nature of the legal steps or process by which it is proposed to achieve it. The intended result is to force the property over which the power of advancement extends from the trusts of the testator's will and subject it to the trusts of a new settlement. There is no difficulty under ***627** section 32 ofthe Trustee Act, 1925 in freeing the property by paying or applying it for the benefit of Penelope, but there is nothing in section 32 which enables trustees to subject property to the trusts of another settlement.

Leaving on one side section 32, it is submitted that (1) If trustees of a settlement transfer the money or interests which they hold thereunder to trustees of another settlement the effect of that transfer on the beneficial interests is nil. The only effect of such a transfer is simply to make the new trustees hold the property on the trusts of the old settlement. The transferors could only interfere with the beneficial interests if they were empowered so to do by the beneficiaries or if the old settlement contained a power to create new trusts. (2) To describe trustees as settling or resettling trust property is a misnomer. The only persons who can settle or resettle the trust property are the beneficiaries, the persons entitled to it. Trustees can therefore only settle or resettle by authority of the beneficiaries.

The question is, by what process in the present case is it proposed that the property over which the power of advancement extends is to be made subject to the trusts of the new settlement? If the trustees were the beneficial owners of the trust property they could transfer it directly to the trustees of the new settlement to hold it on the trusts of that settlement. The only other way whereby the trustees could achieve that object would be if the testator's will contained a power to create new or other trusts in respect of the property over which the power of advancement extends. This is in effect what the trustees wish to do but they have no power to do so.

It is necessary to ascertain whether the proposed transaction is effected by one or two steps. The power in so far as it enables trustees to terminate a settlement made in favour of a beneficiary can be done over the head of the beneficiary, but trustees have no power to *resettle* property over the head of the beneficiary.

The argument for the appellants inevitably depends on construing the power of advancement as a power of appointing new or other trusts. But nothing resembling such a power is to be filmed in section 32. Indeed, in the view of the

Variation of Trusts Act, 1958 , it would be most extraordinary if in 1962 it were to be found that the Trustee Act, 1925 , contained a power enabling trustees to appoint new or other trusts. [Reference was made to Wolstenholme and Cherry's Conveyancing Statutes, 12th ed.. Vol. 2, p. 1320, side note "Maintenance."] Under the ***628** power of advancement trustees can make an infant owner of trust property but they cannot set up new trusts in favour of a person absolutely apart from the infant beneficiary.

Sir Milner Holland Q.C. in reply. What the trustees propose to do was not challenged on the ground that it is not for Penelope's benefit but on the ground that some limitation must be placed on the ambit of section 32. But where is that limitation to be found, for what is proposed is plainly an application of capital moneys. In In re Halsted's Will Trusts [45] Farwell J. expressly decided that half the trust fund could be raised and settled for the benefit of the plaintiff, his wife and children. If it be said that there is no trace in the reports of an application of this kind for the benefit of an infant it is to be remembered that the reason for such an application is of recent origin. In re Ropner's Settlement Trusts [46] supports the appellants' contention. As to In re Aldridge, [47] it is to be observed that the infants whom it was proposed to advance never had an interest in capital under the trusts of the will.

As regards perpetuity, the present question is not covered by authority. If this is a proper exercise of the power of advancement, the fund advanced is taken right out of the trusts and the trusts of the proposed settlement have not to be read back into the will. This is a power given by statute and not by the testator's will.

Their Lordships took time for consideration.

1962. October 8.

LORD REID.

My Lords, I have had the advantage of reading the speech about to be delivered by my noble and learned friend Viscount Radcliffe. I entirely agree with what he says about the application of the rule against perpetuities; but I am only reluctantly persuaded by his reasoning to agree that section 32 of the Trustee Act, 1925 , can be applied to the present case. I do not think that it is disputed that the main purpose of the appellants' scheme and its main benefit to the infant Penelope is avoidance of death duties and surtax. This is to be achieved by taking funds out of the testator's estate and resettling them on Penelope and any family she may have by means of a new trust with trust purposes different from those provided by the testator. ***629** It may be that one is driven step by step to hold that the power conferred by section 32 to "pay or apply any capital money subject to a trust, for the advancement or benefit ... of any person entitled to the capital of the trust property or of any share thereof whether absolutely or contingently ..." must be interpreted as including power to resettle such money on an infant in such a way as will probably confer considerable financial benefit on her many years hence if she survives. But that certainly seems to me far removed from the apparent purpose of the section and considerably beyond anything which it has hitherto been held to cover.

Nevertheless I am compelled to recognise that there is no logical stopping place short of that result. You cannot say that financial benefit from avoidance of taxation is not a benefit within the meaning of the section. Nor can you say that the section only authorises payments for some particular or immediate purpose or that the benefit must be immediate and

certain and not future or problematical. and again you cannot say that the beneficiary must consent to the course which the trustees have decided is for his benefit for that would rule out all payments where the beneficiary is under age.

I have more difficulty about the resettlement. My difficulty does not arise from the rule delegates non potest delegare for if the section authorises the creation of a new trust it must do so by writing into the testator's will authority to his trustees to do this: and new trust purposes almost inevitably mean that in certain events certain persons will take benefit who were not beneficiaries under the testator's will. But I think that the cases show that it is too late now to say that this power can never authorise trustees to convey funds to new trustees to hold for new trust purposes: to say that might endanger past transactions done on the faith of these authorities.

If that be so, then I must hold that, if trustees genuinely and reasonably believe that it is for the benefit of a beneficiary contingently entitled to a share of capital to resettle a sum not exceeding half of his prospective share, they are empowered to do so in ways which do not infringe the rule against perpetuities. To draw a line between one class of case and another would be legislating and not proceeding on an interpretation of the existing statutory power.

I realise that this case opens a wide door and that many other trustees may seek to take advantage of it. But if it is thought that the power which Parliament has conferred is likely to be used ***630** in ways of which Parliament does not approve then it is for Parliament to devise appropriate restrictions of the power.

I agree that this appeal must be allowed.

LORD HODSON.

My Lords, the opinion which I am about to read is that of my noble and learned friend Viscount Radcliffe who is unable to be present today.

VISCOUNT RADCLIFFE.

My Lords, this is a difficult case, and at first impression I would not have expected to find it so hard to return a certain answer to a question concerned with the time-honoured and much used power of advancement, long inserted in settlements of personality and now applied to all such settlements made since 1925 by virtue of section 32 of the Trustee Act of that year.

Fortunately, the facts themselves are of contrasting simplicity. Here we have one of the two appellants, Miss Penelope Pilkington, spinster and an infant still only of some 5½ years of age, who belongs evidently to a family of some substance and is entitled to a contingent reversionary interest in a trust fund set up by the will of her father's uncle, William Norman Pilkington. Her father, Richard Godfrey Pilkington, the other appellant, is entitled during his life to the income of a share of that trust fund (the share is said to be worth some £90,000) and after his death, subject to the possible exercise of certain powers to which I will refer in a moment, his share is to be held in trust for his children attaining 21 or, if female, marrying under that age and, if more than one, in equal shares. The father is, I believe, now about 43 years of

age and is married, and Miss Penelope has at present a small sister and a small brother, both presumptively entitled to a portion of his share when it falls into possession and, of course, other children may come into existence to add to the number of possible inheritors.

It is obvious, I think, that as things stand today and are likely to stand for some time to come, Miss Penelope is very far from having any certain or assured rights to any part of this trust fund. If she were to die under 21 unmarried she would take nothing, except in the contingency of her father having previously exercised his special power of appointment in her favour. On the other hand, since this power of appointment extends to all the children or issue of his marriage, an exercise of it by him at any time might exclude her from any interest in his share of the fund or alternatively might reduce her interest to any extent. ***631** Powers of appointment apart, her presumptive one-third of his share is variable according to the number of her brothers and sisters, existing or born hereafter, who may ultimately become entitled to divide her father's share with her. There is a separate contingency that this share may never descend to his children at all, because under a special clause of the testator's will (clause 13 (J)) his trustees have power to revoke the trusts affecting the share and transfer it outright to the father for his own absolute use. This would cut out Miss Penelope altogether. Her title to any capital in the trust fund is therefore both contingent and diffusible. So far as concerns rights to derive any income from it, nothing can come to her so long as her father is alive (unless he forfeits his interest and so brings into operation a discretionary trust, under which she might receive some payments) and even after his death her right to income may be further deferred if he appoints a life interest, as he has power to do, to a surviving wife.

Now what the trustees of the testator's will, the second respondents, are proposing to do, if they lawfully can, is to take a sum of about £7,600 or investments of equivalent value out of Miss Penelope's expectant share (I do not think that it can make any difference whether they actually realise the sum or merely appropriate existing investments) and set it apart for her upon the trusts of a new settlement for her benefit which is to be brought into existence for the purpose by her great-uncle, the respondent Guy Reginald Pilkington. The first trustees of this proposed new settlement are intended to be the same persons as the will trustees, but again I do not think that anything turns on this, nor has anyone suggested that it does. What matters is that there are new trusts, not that there are old trustees.

The trusts of the new settlement can be sufficiently stated as follows. Until Miss Penelope is 21, the trustees are to apply the income of her trust fund for her maintenance, education or benefit and to accumulate any unexpended balance. When she attains 21, the income is to be held on protective trusts for her until she is 30, and if she attains 30 the capital and income are to be hers absolutely. If she dies before that age leaving children surviving her, those children take her share: but if she does not leave any such children, her share is to go over to such of her brothers and sisters as attain 21 or being female marry, with an ultimate gift over back to the testator's residuary trust fund. Under this new settlement, therefore, Miss Penelope could not take a capital share unless and until she attained the age of 30.

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The trustees are satisfied that if money were thus raised out of her expectant share and settled on these trusts its disposition would be for her benefit. They are able to analyse under various heads the ways in which her situation in life would be improved by having part of her prospective share withdrawn from the shadow of the contingencies or defeasances that might defeat it and secured as provision for herself and, it may be, her children. When one compares her situation under the proposed arrangement with her existing situation it is very natural to conclude that the give and take results to her advantage: but, apart from the actual variation of interests, the trustees have also to take into account the incidence of death duties, a very present matter of consideration for all who have interests in settled property. If she must wait to come into her share until it passes on her father's death, it will be reduced by the payment of duty on its capital value and, under our eccentric system of determining the rate on separate funds by aggregating the values of all properties passing on death in any form, that rate may well be a heavy one. On the other hand, if this settlement is made,

her fund will, it is thought, become free from duty on her father's death if he survives the making by five years. There are, too, more sophisticated calculations, derived from tax experts, which show that the net income resulting from the investments that are to form her fund will be considerably larger if it accrues to her trustees on her behalf than if it came to her father and he had to maintain her.

I am not sure how much independent weight I should give to the last consideration, but that does not matter, because the fact is that from beginning to end of these proceedings it has not been in dispute that the proposed arrangement can properly be described as being for the benefit of Miss Penelope or, more accurately, since the trustees have not surrendered their discretion to the court but merely wish to know whether they have power to exercise it in the way outlined, that it is open to them honestly to entertain this view. What she herself thinks about it all is, of course, at present unascertainable, since she has other concerns with which to occupy herself, but it is at any rate permissible to expect that, when she brings her mind to bear on these matters in more mature years, she will regard the provision now being planned for her and her possible offspring as having been on the whole to her advantage and will be grateful for the forethought that has established her so early in life as a lady of independent means.

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Why, then, would it not be lawful for the trustees to exercise their statutory power of advancement in the manner proposed? Danckwerts J., who heard their originating summons in the High Court, seems to have felt no doubt that they had the necessary authority. The first respondents, the Commissioners of Inland Revenue, refused however to accept that his conclusion was correct and, with their consent, they were made parties to the proceedings for the purposes of an appeal. The Court of Appeal unanimously upheld their objection and reversed the order of Danckwerts J. I must notice later the reason for the Court of Appeal's decision: but it does not, I think, coincide with the general position adopted by the commissioners on the legal question, nor was any active attempt made to support it in argument before this House.

The commissioners' main propositions (there is a subsidiary point about the application of the rule against perpetuities which I will deal with later) centre round the construction which, they say, must be given to the words of section 32 of the Trustee Act, 1925 . In fact, to me it seems that their several propositions are little more than different ways of illustrating the inherent limitation which they find in or extract from the words of the section. It is necessary, therefore, to begin by saying something about the form and nature of what is known as the power of advancement.

No one doubts that such a power was frequently conferred upon trustees under settlements of personality and that its general purpose was to enable them in a proper case to anticipate the vesting in possession of an intended beneficiary's contingent or reversionary interest by raising money on account of his interest and paying or applying it immediately for his benefit. By so doing they released it from the trusts of the settlement and accelerated the enjoyment of his interest (though normally only with the consent of a prior tenant for life); and, where the contingency upon which the vesting of the beneficiary's title depended failed to mature or there was a later diffuseness or, in some cases, a great shrinkage in the value of the remaining trust funds, the trusts as declared by the settlement were materially varied through the operation of the power of advancement. This possibility was recognised and accepted as an incidental risk attendant upon the exercise of such a power, whose presence was felt on the whole to be advantageous in a system in which the possession of property interests was often deferred long beyond adult years.

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No one disputes either that, when section 32 was framed and inserted in the Trustee Act of 1925 as a general enabling provision applying to trusts coming into existence after that date, it was expressed in terms that corresponded closely with the previous common form recommended in books of convincing precedents and adopted in practice. I do not see

any particular importance in this circumstance apart from the fact that it makes it the more natural to refer to what had been said in earlier reported decisions that bear upon the meaning and range of a power of advancement.

The word "advancement" itself meant in this context the establishment in life of the beneficiary who was the object of the power or at any rate some step that would contribute to the furtherance of his establishment. Thus it was found in such phrases as "preferment or advancement" (Lowther v. Bentinck [48] , "business, profession, or employment or ... advancement or preferment in the world" (Roper-Curzon v. Roper-Curzon [49] and "placing out or advancement in life" (In re Breeds' Will [50] . Typical instances of expenditure for such purposes under the social conditions of the nineteenth century were an apprenticeship or the purchase of a commission in the army or of an interest in business. In the case of a girl there could be advancement on marriage (Lloyd v. Cocker [51] . Advancement had, however, to some extent a limited range of meaning, since it was thought to convey the idea of some step in life of permanent significance, and accordingly, to prevent uncertainties about the permitted range of objects for which moneys could be raised and made available, such words as "or otherwise for his or her benefit" were often added to the word "advancement." It was always recognised that these added words were "large words" (see Jessel M.R. in In re Breeds' Will [52] and indeed in another case (Lowther v. Bentinck [53] the same judge spoke of preferment and advancement as being "both large words" but of "benefit" as being the "largest of all." So, too, Kay J. in In re Brittlebank. [54] Recent judges have spoken in the same terms - see Farwell J. in In re Halsted's Will Trusts [55] and Danckwerts J. in In re Moxon's Will Trusts. [56] This wide construction of the range of the power, which evidently did not stand upon niceties of distinction provided that the proposed application could fairly be regarded as for the benefit ***635** of the beneficiary who was the object of the power, must have been carried into the statutory power created by section 32, since it adopts without qualification the accustomed wording "for the advancement or benefit in such manner as they may in their absolute discretion think fit."

So much for "advancement," which I now use for brevity to cover the combined phrase "advancement or benefit." It means any use of the money which will improve the material situation of the beneficiary. It is important, however, not to confuse the idea of "advancement" with the idea of advancing the money out of the beneficiary's expectant interest. The two things have only a casual connection with each other. The one refers to the operation of finding money by way of anticipation of an interest not yet absolutely vested in possession or, if so vested, belonging to an infant: the other refers to the status of the beneficiary and the improvement of his situation. The power to carry out the operation of anticipating an interest is not conferred by the word "advancement" but by those other words of the section which expressly authorise the payment or application of capital money for the benefit of a person entitled "whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion," etc.

I think, with all respect to the commissioners, a good deal of their argument is infected with some of this confusion. To say, for instance, that there cannot be a valid exercise of a power of advancement that results in a deferment of the vesting of the beneficiary's absolute title (Miss Penelope, it will be remembered, is to take at 30 under the proposed settlement instead of at 21 under the will) is in my opinion to play upon words. The element of anticipation consists in the raising of money for her now before she has any right to receive anything under the existing trusts: the advancement consists in the application of that money to form a trust fund, the provisions of which are thought to be for her benefit. I have not forgotten, of course, the references to powers of advancement which are found in such cases as In re Joicey, [57] In re May's Settlement [58] and In re Mewburn's Settlement, [59] to which our attention was called, or the answer supplied ***636** by Cotton L.J. in In re Aldridge [60] to his own question "What is advancement?"; but I think that it will be apparent from what I have already said that the description that he gives (it cannot be a definition) is confined entirely to the

aspect of anticipation or acceleration which renders the money available and not to any description or limitation of the purposes for which it can then be applied.

I have not been able to find in the words of section 32, to which I have now referred, anything which in terms or by implication restricts the width of the manner or purpose of advancement. It is true that, if this settlement is made, Miss Penelope's children, who are not objects of the power, are given a possible interest in the event of her dying under 30 leaving surviving issue. But if the disposition itself, by which I mean the whole provision made, is for her benefit, it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise. Thus a man's creditors may in certain cases get the most immediate advantage from an advancement made for the purpose of paying them off, as in Lowther v. Bentinck [61] ; and a power to raise money for the advancement of a wife may cover a payment made direct to her husband in order to set him up in business (In re Kershaw's Trusts [62] , The exercise will not be bad therefore on this ground.

Nor in my opinion will it be bad merely because the moneys are to be tied up in the proposed settlement. If it could be said that the payment or application permitted by section 32 cannot take the form of a settlement in any form but must somehow pass direct into or through the hands of the object of the power, I could appreciate the principle upon which the commissioners' objection was founded. But can that principle be asserted? Anyone can see, I think, that there can be circumstances in which, while it is very desirable that some money should be raised at once for the benefit of an owner of an expectant or contingent interest, it would be very undesirable that the money should not be secured to him under some arrangement that will prevent him having the absolute disposition of it. I find it very difficult to think that there is something at the back of section 32 which makes such an advancement impossible. Certainly neither *637 Danckwerts J. nor the members of the Court of Appeal in this case took that view. Both Lord Evershed M.R. and Upjohn L.J. [63] explicitly accept the possibility of a settlement being made in exercise of a power of advancement. Farwell J. authorised one in In re Halsted's Will Trusts, [64] a case in which the trustees had left their discretion to the court. The trustees should raise the money and "have" it "settled," he said. So too, Harman J. in In re Ropner's Settlement Trusts [65] authorised the settlement of an advance provided for an infant, saying that the child could not "consent or request the trustees to make the advance, but the transfer of a part of his contingent share to the trustees of a settlement for him must advance his interest and thus be for his benefit ..." All this must be wrong in principle if a power of advancement cannot cover an application of the moneys by way of settlement.

The truth is, I think, that the propriety of requiring a Settlement of moneys found for advancement was recognised as long ago as 1871 in Roper-Curzon v. Roper-Curzon [66] and, so far as I know, it has not been impugned since. Lord Romilly M.R.'s decision passed into the textbooks and it must have formed the basis of a good deal of subsequent practice. True enough, as counsel for the commissioners has reminded us, the beneficiary in that case was an adult who was offering to execute the post-nuptial settlement required: but I find it impossible to read Lord Romilly's words as amounting to anything less than a decision that he would permit an advancement under the power only on the terms that the money was to be secured by settlement. That was what the case was about. If, then, it is a proper exercise of a power of advancement for trustees to stipulate that the money shall be settled, I cannot see any difference between having it settled that way and having it settled by themselves paying it to trustees of a settlement which is in the desired form.

It is not as if anyone were contending for a principle that a power of advancement cannot be exercised "over the head" of a beneficiary, that is, unless he actually asks for the money to be raised and consents to its application. From some points of view that might be a satisfactory limitation, and no doubt it is the way in which an advancement takes place in the great majority of cases. But, if application and consent were necessary requisites of advancement, that would cut out the

possibility of making *638 any advancement for the benefit of a person under age, at any rate without the institution of court proceedings and formal representation of the infant: and it would mean, moreover, that the trustees of an adult could not in any Circumstances insist on raising money to pay his debts, however much the operation might be to his benefit, unless he agreed to that course. Counsel for the commissioners did not contend before us that the power of advancement was inherently limited in this way: and I do not think that such a limitation would accord with the general understanding. Indeed its "paternal" nature is well shown by the fact that it is often treated as being peculiarly for the assistance of an infant.

The commissioners' objections seem to be concentrated upon such propositions as that the proposed transaction is "nothing less than a resettlement" and that a power of advancement cannot be used so as to alter or vary the trusts created by the settlement from which it is derived. Such a transaction, they say, amounts to using the power of advancement as a way of appointing or declaring new trusts different from those of the settlement. The reason why I do not find that these propositions have any compulsive effect upon my mind is that they seem to me merely vivid ways of describing the substantial effect of that which is proposed to be done and they do not in themselves amount to convincing arguments against doing it. Of course, whenever money is raised for advancement on terms that it is to be settled on the beneficiary, the money only passes from one settlement to be caught up in the other. It is therefore the same thing as a resettlement. But, unless one is to say that such moneys can never be applied by way of settlement, an argument which, as I have shown, has few supporters and is contrary to authority, it merely describes the inevitable effect of such an advancement to say that it is nothing less than a resettlement. Similarly, if it is part of the trusts and powers created by one settlement that the trustees of it should have power to raise money and make it available for a beneficiary upon new trusts approved by them, then they are in substance given power to free the money from one trust and to subject it to another. So be it: but, unless they cannot require a settlement of it at all, the transaction they carry out is the same thing in effect as an appointment of new trusts.

In the same way I am unconvinced by the argument that the trustees would be improperly delegating their trust by allowing the money raised to pass over to new trustees under a settlement *639 conferring new powers on the latter. In fact I think that the whole issue of delegation is here beside the mark. The law is not that trustees cannot delegate: it is that trustees cannot delegate unless they have authority to do so. If the power of advancement which they possess is so read as to allow them to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises. If, on the other hand, their power of advancement is read so as to exclude settled advances, cadit quaestio.

I ought to note for the record (1) that the transaction envisaged does not actually involve the raising of money, since the trustees propose to appropriate a block of shares in the family's private limited company as the trust investment, and (2) there will not be any actual transfer, since the trustees of the proposed settlement and the will trustees are the same persons. As I have already said, I do not attach any importance to these factors nor, I think, do the commissioners. To transfer or appropriate outright is only to do by short cut what could be done in a more roundabout way by selling the shares to a consenting party, paying the money over to the new settlement with appropriate instructions and arranging for it to be used in buying back the shares as the trust investment. It cannot make any difference to follow the course taken in In re Collard's Will Trusts [67] and deal with the property direct. On the other point, so long as there are separate trusts, the property effectually passes out of the old settlement into the new one, and it is of no relevance that, at any rate for the time being, the persons administering the new trust are the same individuals.

I have not yet referred to the ground which was taken by the Court of Appeal as their reason for saying that the proposed settlement was not permissible. To put it shortly, they held that the statutory power of advancement could not be

exercised unless the benefit to be conferred hays "personal to the person concerned, in the sense of being related to his or her own real or personal needs." [68] Or, to use other words of the learned Master of the Rolls, [69] the exercise of the power "must be an exercise done to meet the circumstances as they present themselves in regard to a person within the scope of the section, whose circumstances ***640** call for that to be done which the trustees think fit to do." Upjohn L.J. [70] expressed himself in virtually the same terms.

My Lords, I differ with reluctance from the views of judges so learned and experienced in matters of this sort: but I do not find it possible to import such restrictions into the words of the statutory power which itself does not contain them. First, the suggested qualification, that the considerations or circumstances must be "personal" to the beneficiary, seems to me uncontrollably vague as a guide to general administration. What distinguishes a personal need from any other need to which the trustees in their discretion think it right to attend in the beneficiary's interest? And, if the advantage of preserving the funds of a beneficiary from the incidence of death duty is not an advantage personal to that beneficiary, I do not see what is. Death duty is a present risk that attaches to the settled property in which Miss Penelope has her expectant interest, and even accepting the validity of the supposed limitation, I would not have supposed that there was anything either impersonal or unduly remote in the advantage to be conferred upon her of some exemption from that risk. I do not think, therefore, that I can support the interpretation of the power of advancement that has commended itself to the Court of Appeal, and, with great respect, I think that the judgments really amount to little more than a decision that in the opinion of the members of that court this was not a case in which there was any occasion to exercise the power. That would be a proper answer from a court to which trustees had referred their discretion with a request for its directions; but it does not really solve any question where, as here, they retain their discretion and merely ask whether it is impossible for them to exercise it.

To conclude, therefore, on this issue, I am of opinion that there is no maintainable reason for introducing into the statutory power of advancement a qualification that would exclude the exercise in the case now before us. It would not be candid to omit to say that, though I think that that is what the law requires, I am uneasy at some of the possible applications of this liberty, when advancements are made for the purposes of settlement or on terms that there is to be a settlement. It is quite true, as the ***641** commissioners have pointed out, that you might have really extravagant cases of resettlements being forced on beneficiaries in the name of advancement, even a few months before an absolute vesting in possession would have destroyed the power. I have tried to give due weight to such possibilities, but when all is said I do not think that they ought to compel us to introduce a limitation of which no one, with all respect, can produce a satisfactory definition. First, I do not believe that it is wise to try to cut down an admittedly wide and discretionary power, enacted for general use, through fear of its being abused in certain hypothetical instances. and moreover, as regards this fear, I think that it must be remembered that we are speaking of a power intended to be in the hands of trustees chosen by a settler because of his confidence in their discretion and good sense and subject to the external check that no exercise can take place without the consent of a prior life-tenant; and that there does remain at all times a residual power in the court to restrain or correct any purported exercise than can be shown to be merely wanton or capricious and not to be attributable to a geunine discretion. I think, therefore, that, although extravagant possibilities exist, they may be more menacing in argument than in real life.

The other issue on which this case depends, that relating to the application of the rule against perpetuities, does not seem to me to present much difficulty. It is not in dispute that, if the limitations of the proposed settlement are to be treated as if they had been made by the testator's will and as coming into operation at the date of his death, there are trusts in it which would be void ab initio as violating the perpetuity rule. They postpone final vesting by too long a date. It is also a familiar rule of law in this field that, whereas appointments made under a general power of appointment conferred by will or deed are read as taking effect from the date of the exercise of the power, trusts declared by a special power of appointment, the distinguishing feature of which is that it can allocate property among a limited class of persons only,

are treated as coming into operation at the date of the instrument that creates the power. The question therefore resolves itself into asking whether the exercise of a power of advancement which takes the form of a settlement should be looked upon as more closely analogous to a general or to a special power of appointment.

On this issue I am in full agreement with the views of Upjohn ***642** L.J. in the Court of Appeal. [71] Indeed, much of the reasoning that has led me to my conclusion on the first issue that I have been considering leads me to think that for this purpose there is an effective analogy between powers of advancement and special powers of appointment. When one asks what person can be regarded as the settler of Miss Penelope's proposed settlement, I do not see how it is possible to say that she is herself or that the trustees are. She is the passive recipient of the benefit extracted for her from the original trusts; the trustees are merely exercising a fiduciary power in arranging for the desired limitations. It is not their property that constitutes the funds of Miss Penelope's settlement; it is the property subjected to trusts by the will of the testator and passed over into the new settlement through the instrumentality of a power which by statute is made append ant to those trusts. I do not think, therefore, that it is important to this issue that money raised under a power of advancement passes entirely out of the reach of the existing trusts and makes, as it were, a new start under fresh limitations, the kind of thing that happened under the old form of family resettlement when the tenant in tail in remainder barred the entail with the consent of the protector of the settlement. I think that the important point for the purpose of the rule against perpetuities is that the new settlement is only effected by the operation of a fiduciary power which itself "belongs" to the old settlement.

In the conclusion, therefore, there are legal objections to the proposed settlement which the trustees have placed before the court. Again I agree with Upjohn L.J. that these objections go to the root of what is proposed and I do not think that it would be satisfactory that the court should try to frame a qualified answer to the question that they have propounded, which would express the general view that the power to advance by way of a settlement of this sort does exist and the special view that the power to make this particular settlement does not. Norm I think, is such a course desired either by the appellants or the trustees. They will, I hope, know where they stand for the future, and so will the commissioners, and that is enough.

LORD HODSON.

My Lords, my noble and learned friends who are also unable to be present today, Lord Jenkins and Lord ***643** Devlin, are in full agreement with the opinion which I have just read and I am also in the same agreement.

Representation

Solicitors: Alsop, Stevens, Beck & Co. ; Solicitor of Inland Revenue .

Order of the Court of Appeal in part complained of discharged except as to costs. Declared that the application of the capital proposed by the respondents, the trustees of the will of William Norman Pilkington, deceased, would be improper and unauthorised because the trusts of the new settlement if contained in the said will would be void for perpetuity. Further ordered that the respondents the Commissioners of Inland Revenue do pay, or cause to be paid, to the appellants the costs incurred by them in respect of the said appeal to this House, such costs to be taxed as between solicitor and client. Further ordered that the costs incurred by the respondents [the trustees of the will] in respect of the said appeal to this House be paid out of the estate of the said testator William Norman Pilkington, deceased, such costs to be taxed as between solicitor and client. (J. A. G.)

Footnotes

1 Trustee Act, 1925, s. 32: "(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property ... Provided that - (a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property ..."

2 [1961] Ch. 466; [1961] 2 W.L.R. 776; [1961] 2 All E.R. 330 , C.A.

3 [1904] 1 Ch. 480 .

4 [1915] 2 Ch. 115, C.A.

5 (1871) L.R. 11 Eq. 452 .

6 (1874) L.R. 19 Eq. 166 .

7 (1868) L.R. 6 Eq. 322 .

8 [1937] 2 All E.R. 570 .

9 L.R. 19 Eq. 166 .

10 [1961] Ch. 466 , 486.

11 L.R. 11 Eq. 452 .

12 [1937] 2 All E.R. 570 .

13 [1956] 1 W.L.R. 902, 904, 905; [1956] 3 All E.R. 332 .

14 [1961] Ch. 466 , 480, 481, 484.

15 (1881) 30 W.R. 99 .

16 [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 .

17 [1915] 2 Ch. 115 , C.A.

18 L.R. 11 Eq. 452 .

19 (1854) 19 Beav. 529 , 534, 535.

20 (1858) 4 K. & J. 142 .

21 [1904] 1 Ch. 480 .

22 [1961] Ch. 466 , 488, 489.

23 [1913] 1 Ch. 404, 413; 29 T.L.R. 306, C.A.

24 [1938] Ch. 39; 53 T.L.R. 1036; [1937] 3 All E.R. 823 , C.A.

25 L.R. 11 Eq. 452 .

26 [1958] 1 W.L.R. 165; [1958] 1 All E.R. 386 .

27 [1959] Ch. 699 , 705, 706.

28 (1886) 55 L.T. 554, 556, C.A.

29 [1951] 2 All E.R. 528 , C.A.

30 [1951] 2 All E.R. 528 , 532.

31 [1962] Ch. 273, 275, 287; [1961] 3 W.L.R. 825; [1961] 3 All E.B. 389, C.A.

32 19 Beav. 529 , 535, 536.

33 11 Eq. 452.

34 [1937] 2 All E.R. 570 .

35 [1915] 2 Ch. 115, 120, C.A.

36 [1934] Ch. 112 .

37 [1926] Ch. 136 .

38 [1913] 1 K.B. 83, 90, C.A.

39 [1936] Ch. 161 .

40 [1951] Ch. 209; [1950] 2 All E.R. 891 , C.A.

41 [1954] Ch. 334, 340, 341; [1954] 2 W.L.R. 386; [1954] 1 All E.R. 725 .

42 [1956] 1 W.L.R. 902 .

43 L.R. 19 Eq. 166 .

44 L.R. 6 Eq. 322 .

45 [1937] 2 All E.R. 570 , 572.

46 [1956] 1 W.L.R. 902 .

47 55 L.T. 554 .

48 (1874) L.R. 19 Eq. 166 .

49 (1871) L.R. 11 Eq. 452 .

50 (1875) 1 Ch.D. 226 .

51 (1860) 27 Beav. 645 .
52 1 Ch.D. 226 , 228.
53 L.R. 19 Eq. 166 , 169.
54 (1881) 30 W.R. 99 , 100.
55 [1937] 2 All E.R. 570 , 671.
56 [1958] 1 W.L.R. 165, 168; [1958] 1 All E.R. 386 .
57 [1915] 2 Ch. 115, C.A.
58 [1926] Ch. 136 .
59 [1934] Ch. 112 .
60 (1886) 55 L.T. 554, 556, C.A. : "It is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy, before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled."
61 L.R. 19 Eq. 166 .
62 (1868) L.R. 6 Eq. 322 .
63 [1961] Ch. 466 , 481, 486.
64 [1937] 2 All E.R. 570 , 572.
65 [1956] 1 W.L.R. 902 , 906.
66 L.R. 11 Eq. 452 .
67 [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 .
68 [1961] Ch 466 , 481.
69 Ibid. 484.
70 [1961] Ch 466 , 487.
71 [1961] Ch. 466 . 488 et seq.

[1964] A.C. 612

End of Document

Citing References (19)

Treatment	Title	Date	Type	Depth	Headnote(s)
Applied by	1. Ballantyne v Ballantyne 2010 WL 3458186 , SASC	Sep. 03, 2010	Case	—	—
Followed in	2. Hunter Estate v. Holton 1992 WL 1324547 , Ont. Gen. Div.	Mar. 05, 1992	Case	—	—
Considered in	3. Edell v. Sitzer 2001 WL 453931 , Ont. S.C.J.	July 13, 2001	Case	—	—
Referred to in	4. Buckingham Securities Corp. (Receiver of) v. Miller Bernstein LLP 2008 WL 2043842 , Ont. S.C.J.	May 07, 2008	Case	—	—
Considered by	5. Kain v Hutton [2008] 3 NZLR 589 , SCNZ	Aug. 07, 2008	Case	—	—
Referred to by	6. Kain v Hutton [2005] BCL 200 , HC	Dec. 03, 2004	Case	—	—
Distinguished by NEGATIVE	7. Yara Australia Pty Ltd v Oswal (No 2) 2013 WL 4541654 , WACA	Aug. 16, 2013	Case	—	—
Applied by	8. Re Will and Estate of Anita Gertrude Steiner 2013 WL 2145509 , VSC	May 15, 2013	Case	—	—
Applied by	9. Nemesis Australia Pty Ltd v Federal Commissioner of Taxation 2005 WL 2236158 , FCA In part, s 208(1) of the Property Law Act 1974 (Qld) provided: "For the purposes of the rule against perpetuities a power of appointment shall be treated as a special power...	Sep. 14, 2005	Case	—	—
Considered by	10. Benson v Doloraine Pty Ltd 2015 WL 5123355 , TASSC	Aug. 31, 2015	Case	—	—
Considered by	11. Fischer v Nemeske Pty Ltd 2014 WL 907257 , NSWSC	Mar. 10, 2014	Case	—	—
Considered by	12. Ramsden v Federal Commissioner of Taxation 2004 WL 1166495 , FCA	May 21, 2004	Case	—	—
Considered by	13. Stiles v Joseph 1996 WL 34578877 , NSWSC	Dec. 16, 1996	Case	—	—
Considered by	14. Turner v TR Nominees Pty Ltd 1995 WL 1690476 , NSWSC In 1974 a discretionary trust (the trust) was established. The first defendant was the trustee and the plaintiff and the second defendant (amongst others) were beneficiaries of the...	Nov. 03, 1995	Case	—	—
Explained by	15. Fischer v Nemeske Pty Ltd 2016 WL 1317527 , HCA	Apr. 06, 2016	Case	—	—
Considered by	16. Re Gerbich [2002] 2 NZLR 791 , HC	Nov. 29, 2001	Case	—	—

Treatment	Title	Date	Type	Depth	Headnote(s)
—	17. comm.j) Excerpt from Canadian Forms of Wills, 4th ed. — By Terence Sheard, Rodney Hull and Michael M. K. Fitzpatrick Histrop, Estate Planning Precedents	2010	Other Secondary Source	—	—
—	18. 21.III Power of Advancement Waters' Law of Trusts in Canada, 3rd Ed.	2007	Other Secondary Source	—	—
—	19. 9.2 Modifications to Common Law Widdifield on Executors and Trustees, 6th Ed.	2007	Other Secondary Source	—	—

TAB 6

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

By

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this traditional sense, a power of appointment is sometimes defined as a power to create new trusts for the beneficiaries.[132] Still another sense is that it refers to the power of selection that a trustee has in the context of a discretionary trust: to choose which beneficiaries shall receive property, and how much.

If a power of appointment is given to a trustee, the law governing the exercise of it is identical with that governing other donees of a power of appointment, except that certain obligations are imposed upon trustees because they are trustees. We have seen that a power to be exercised by a trustee may be a pure power or a trust power. When it is a trust power, the person who is the donee of the power must exercise it, whether or not he has already been constituted a trustee for other purposes. As a trust power there is an obligation to be performed, and if the donee does not exercise it, the court will. In respect of a pure power a distinction can be drawn between the position of a donee of the power who is a trustee and one who is not. The court cannot compel either donee to exercise a pure power, and a donee who is not a trustee may release the power. It is irrelevant what is his intention in doing this, whether it is to confer absolute title on those entitled in default of appointment, to enable himself to wind up the trust in his own favour because he takes in default of appointment, or because there are tax savings to be made by such a release. However, a trustee who is given the power *virtute officii* cannot release it, since it was given to him as a fiduciary. When a person is named as the donee of the power, it is often a difficult point of construction as to whether or not he was appointed *virtute officii*, and, if so, whether the trust instrument authorizes him to release the power.[133]

V. RESETTLEMENT UNDER A POWER

There is an important question whether new trusts may be created in the exercise of a power, whether it be a power of maintenance, advancement or appointment.[134] For instance, a beneficiary and his immediate family, in favour of all of whom the trustees have an express power of maintenance, move to England from Ontario. The trustees are resident in Toronto where the remainder of the trust beneficiaries also

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[132] See Kessler and Hunter, *Drafting Trusts and Will Trusts in Canada*, 3rd ed. (2011), at xli, 185. This book is based on an English text. Because the authors recommend a widely drafted power of advancement, that goes beyond advancement in the strict sense and includes benefit, they define a power of advancement as a power to give capital to an object, or apply it for his or her benefit (at xli, 186). This is usually what Canadian lawyers have in mind when they refer to a power of appointment. The terminology used in Kessler and Hunter explains why their precedents require that a power of appointment be exercised by deed, but a power of advancement need not be.

[133] See further, *Re Wills' Trust Deeds* (1958), [1964] Ch. 219, [1958] 2 All E.R. 472; *Muir v. I.R.C.*, [1966] 1 W.L.R. 251, [1966] 1 All E.R. 295; reversed and *Re Wills' Trust Deeds* distinguished, [1966] 1 W.L.R. 1269, [1966] 3 All E.R. 38 (Eng. C.A.); *Hanbury and Martin* at 193-96; *Sheard, Hull and Fitzpatrick* at 236-43; and L. Smith, "Understanding the Power" in Swadling, ed., *The Quistclose Trust: Critical Essays* (2004).

[134] The leading English authority is *Pilkington v. Inland Revenue Commissioners*, *supra*, note 100; see Donovan W.M. Waters "The Creation of Sub-Trusts under a Power of Advancement" (1959) 23 Conv. 27; and a comment on *Pilkington v. Inland Revenue Commissioners* after trial hearing, *ibid.*, at 423 (same author). See also, *supra*, note 100 and note 36.

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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[135] 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.

[136] [1961] O.R. 108, 26 D.L.R. (2d) 369 (Ont. H.C.).

[137] (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.).

[138] 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."

TAB 7

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], 12729 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 TWINN

3.
GEORGE TWIN

SCHEDULE

One Hundred Dollars ($100.00) in Canadian Currency.

TAB 8

2019 ABCA 344
Alberta Court of Appeal

North Bank Potato Farms Ltd v. The Canadian Food Inspection Agency

2019 CarswellAlta 1954, 2019 ABCA 344, [2019] A.W.L.D. 3643, [2019] A.W.L.D. 3712, [2019] A.W.L.D. 3757, 310 A.C.W.S. (3d) 303, 62 Admin. L.R. (6th) 276, 92 Alta. L.R. (6th) 66

North Bank Potato Farms Ltd. and Haarsma Farms Ltd. (Appellants / Respondents) and The Canadian Food Inspection Agency and Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada (Respondents / Appellants) and ABC Laboratory (Not a Party to this Appeal) and Flying E Ranche Ltd. (Intervener)

J.D. Bruce McDonald, Michelle Crighton, Jolaine Antonio JJ.A.

Heard: September 6, 2019
Judgment: September 17, 2019
Docket: Edmonton Appeal 1803-0202-AC

Proceedings: affirming *North Bank Potato Farms Ltd v. The Canadian Food Inspection Agency* (2018), 75 Alta. L.R. (6th) 152, 42 Admin. L.R. (6th) 320, 2018 ABQB 505, 2018 CarswellAlta 1276, J.A. Fagnan J. (Alta. Q.B.); reversing *North Bank Potato Farms Ltd. v. Canadian Food Inspection Agency* (2015), 2015 CarswellAlta 1937, 2015 ABQB 653, S.L. Schulz, In Chambers Master (Alta. Q.B.)

Counsel: K.L. Hurlburt, Q.C., for Appellants
M.J. Miller, for Respondents
M.N. Ruby, D.C. Boswell, for Intervener

Subject: Civil Practice and Procedure; Public

Headnote

Public law --- Crown — Miscellaneous factors affecting civil rights of Crown — Availability of statutory defences to Crown Canadian Food Inspection Agency (CFIA), after discovery of pest in plaintiff agricultural companies' fields, imposed restrictions on their potato production and sale and notified other countries of discovery, which led to closure of international border — Losses of all seed potato farmers, including plaintiffs, were partially redressed by federal and provincial assistance program — Plaintiffs brought action against lab, CFIA, and federal Crown, for negligence — Application by Crown defendants, being CFIA and Crown, for summary dismissal was dismissed — Crown defendants' appeal was allowed, and action was dismissed — Plaintiffs appealed — Appeal dismissed — As found by chambers judge, action against federal Crown was barred by s. 9 of Crown Liability and Proceedings Act — Payments received under assistance programs were compensation to address expenses and losses directly and indirectly related to CFIA's actions and subsequent border closures — Chambers judge made no reviewable error in concluding that compensation and alleged negligence arose from same events or that federal funds were sourced from Consolidated Revenue Fund on basis that, it was source and not vehicle for distributing funds that was relevant for s. 9 of Act — While s. 9 of Act had not previously been applied to this specific assistance program, there were numerous authorities on which chambers judge could draw such that issue could only be considered "novel" in narrowest sense — It was well within chambers judge's ability to apply law to straightforward record in fair and just manner and she did not err in doing so.
Civil practice and procedure --- Pleadings — Statement of claim — Striking out for absence of reasonable cause of action — Need for clearly unsustainable claim

25 The federal Crown had filed an affidavit describing the funding arrangements behind the assistance payments. The chambers judge summarized that affidavit at paragraphs 22-27 of her reasons. Her factual conclusions were supported on the evidence before her and cannot be defeated by *ex post facto* speculation. We find no error in her fact-finding, nor in her conclusion that for purposes of section 9 it is the source of the compensation that matters, not the vehicle through which it is distributed.

26 The appellants have not demonstrated that the chambers judge erred in her interpretation or application of section 9.

The chambers judge did not err in entertaining the summary judgment application

27 The appellants submit that summary dismissal was inappropriate because the application of section 9 to this circumstance was novel and raised policy implications, and because the record was incomplete.

28 Summary judgment is an appropriate procedure where there is no genuine issue requiring a trial. This will be the case when the process (a) allows the judge to make the necessary findings of fact, (b) allows the judge to apply the law to the facts, and (c) is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para 49, [2014] 1 S.C.R. 87 (S.C.C.) ; *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) at para 13, (2014), 572 A.R. 317 (Alta. C.A.) .

29 The summary judgment applications concerned statutory interpretation and its application to a non-contentious factual record.

30 The appellants assert that the application of section 9 in these circumstances raised a novel question of law unsuited to determination by summary judgment. Though section 9 had not previously been applied to the Alberta Seed Potato Assistance Program, there were numerous authorities on which the chambers judge could draw. Only in the narrowest sense could this issue be considered "novel", and in any event, legal novelty is not an automatic bar to summary judgment.

31 The appellants raise new policy concerns and assert that there were gaps in the factual record that could have been filled, rendering summary judgment inappropriate. We give no effect to this argument. Parties to a summary disposition application are expected to put their "best foot forward", meaning that gaps in the record do not necessarily prevent summary disposition: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.) at para 11, [2008] 1 S.C.R. 372 (S.C.C.) . "[T]he *Hryniak v Mauldin* test is to be applied based on the record actually before the summary disposition judge": *Weir-Jones* at para 37.

32 The record below was not complex; it included contractual and application records, which identified the purpose and intent of the programs and financial information identifying the source of the funds. Credibility was not in issue. It was well within the chambers judge's ability to apply the law to this record in a fair and just manner, and she did not err in doing so.

Conclusion

33 The appeal is dismissed.

34 We confirmed at the oral hearing that the defendants, now respondents, in this matter are the CFIA and Her Majesty the Queen in Right of Canada. At some stage, an error crept into various documents, including the civil notice of appeal, identifying the Crown respondent as Her Majesty the Queen in Right of Alberta. This judgment bears the correct style of cause, and we authorize such amendments to other appeal documents as may be necessary.

Appeal dismissed.

TAB 9

2019 ABCA 426
Alberta Court of Appeal

Terrigno Investments Inc v. Farrell

2019 CarswellAlta 2367, 2019 ABCA 426, [2019] A.W.L.D. 4340, [2019] A.J. No. 1489, 312 A.C.W.S. (3d) 56

Terrigno Investments Inc. and Rocco Terrigno, Antonietta Terrigno and Maurizio Terrigno (Appellants / Plaintiffs) and Druh Farrell (Respondent / Defendant) and Mike Terrigno (Not a Party to the Appeal / Plaintiff)

Jack Watson J.A., Frans Slatter J.A., and Elizabeth Hughes J.A.

Heard: November 4, 2019
Judgment: November 6, 2019
Docket: Calgary Appeal 1901-0250-AC

Counsel: C.M.A Souster, for Appellants
C.N. Sinclair, for Respondent

Subject: Civil Practice and Procedure; Public; Torts; Municipal

Headnote

Civil practice and procedure --- Pre-trial procedures — Severance — Of issues

Action against defendant city councillor had two components — Action alleged that defendant voted on resolutions in council in which she had pecuniary interest and should be disqualified, and second component was action for abuse of public office and defamation — Case management judge directed that pecuniary interest issue be severed and resolved through three-day special chambers application — Plaintiffs appealed — Appeal dismissed — Decision to bifurcate was reasonable exercise of discretion — First component of action was public law matter, leading primarily to remedies of public nature — Action for defamation or abuse of public office was private action which would result in personal remedy for plaintiffs if successful — Challenges to ability of officeholder should be decided expeditiously — Earlier decision of previous case management judge was not sufficiently definitive ruling on bifurcation question to raise issue estoppel — If any party was prejudiced by summary procedure it was likely to be defendant — Plaintiffs had not established that there was any reviewable error in directions of case management judge.

APPEAL by plaintiffs from order of case management judge that pecuniary interest issue be severed.

Per curiam:

1 The appellants appeal the order of a case management judge directing that a portion of this action be decided by a "three day special chambers application" based on affidavit evidence.

2 This action against the respondent City councilor has two components. First of all, it alleges that the respondent voted on resolutions in City Council in which she had a pecuniary interest, and that she should be disqualified under the *Municipal Government Act*, RSA 2000, c. M-26, s. 174(1)(g). The second component is an action for abuse of public office and defamation. At various stages of these proceedings, the appellants have proposed that the pecuniary interest portion of the action be decided without a full trial, and that the other portions of the action be decided by a jury. That would necessitate a bifurcation of the issues. The parties have been preparing affidavits and other materials on that assumption.

3 In July, 2019 the present case management judge directed that the pecuniary interest issue be severed and resolved through a "three day special chambers application" based on affidavit evidence. That is the order now under appeal. The appellants challenge the decision to decide the pecuniary interest issue without a full trial, separately from the rest of the action. The

appellants categorize the order as directing a "summary judgment" application, but it is unclear whether the order actually contemplates a summary trial, or some form of hybrid procedure.

4 The decision to bifurcate was, in any event, a reasonable exercise of discretion, because the first component of the action (the pecuniary interest issue) is a public law matter, leading primarily to remedies of a public nature under Divisions 7 and 8 of Part 5 of the *Municipal Government Act*. The action for defamation or abuse of public office is a private action which, if successful, would result in a personal remedy for the appellants. Even though the facts are said to overlap, the legal issues are distinct. It is also important that challenges to the ability of an officeholder to continue in office should be decided expeditiously. The presumption is that trials should not be bifurcated, but there are exceptional circumstances. The statement of claim acknowledged that the public law and private law components would have to be tried separately. The decision to bifurcate was reasonable, whatever mode of trial is eventually used.

5 The appellants argue that an earlier decision of a previous case management judge created an issue estoppel, and that the second case management judge could not direct "summary judgment" as he did. The issue of bifurcating the trial was raised before the previous case management judge in May 2018. The appellants argue that she directed that the action *not* be bifurcated, but that is not clear. The case management judge said that: "I'm prepared to conclude that it makes sense to determine *at least the statutory question* of the pecuniary interest issue . . . " in advance, subject to whether damages might flow from that statutory breach. She continued:

> So what I'm going to suggest for now, and tell me if this will not work, so what I would suggest is that we work towards the idea of a summary trial . . . that would, at minimum, address the pecuniary interest, *per se*. (Emphasis added)
>
> A formal order was never taken out. This is not a sufficiently definitive ruling on the bifurcation question to raise an issue estoppel. The previous case management judge clearly thought that the procedure to be followed was a "work in progress". In any event, case management judges are given wide powers under R. 1.4(2) and 6.14, and holding that interlocutory procedural orders create an insurmountable issue estoppel would undermine their role.

6 The appellants also argue that a summary procedure, without *viva voce* evidence, is inappropriate, because the judge hearing the issue would have to determine if the respondent acted *mala fides*, and that cannot be done based on affidavit evidence. The issue of *mala fides* might arise in the defamation action. During oral argument, counsel for the appellants acknowledged that evidence from other (perhaps reluctant) witnesses could be obtained by questioning under R. 6.8 or by interrogatories. With respect to the pecuniary interest matter, it would appear that the facts are not seriously in dispute. There is no dispute on whether the respondent voted, and what was the subject matter of the resolutions. In the pecuniary interest part of the action, the intentions of the councilor are primarily relevant if it is argued that the court should exercise its discretion and allow the councilor to remain in office: s. 177. Thus, if any party is prejudiced by the summary procedure, it is likely to be the respondent.

7 Further, the presiding judge has an ability to ensure that a miscarriage of justice does not result, even if the directed procedure is characterized as a "summary judgment". That judge will obviously make best efforts to resolve the dispute on the affidavits in a proportionate and efficient way: *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.) at para. 44, (2019), 86 Alta. L.R. (6th) 240 (Alta. C.A.). However, if it appears that there are aspects of the evidence that preclude a fair adjudication, it would be open to that judge to permit oral evidence, to adjourn the matter, or to take other procedural remedial steps: R. 6.11(1)(g); *Weir-Jones* at para. 46. The chambers application could, if necessary, be converted to and continue as a summary trial: *Weir-Jones* at para. 49.

8 Deference is extended to the decisions of case management judges, because they have detailed knowledge of the file. Appellate intervention in the exercise of judicial discretion is not justified unless the judge has clearly misdirected himself or herself on the facts or the law, has proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice: *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 (S.C.C.) at para. 36, [2017] 2 S.C.R. 205 (S.C.C.). On this record, the appellants have not established that there is any reviewable error in the directions of the case management judge, and the appeal is dismissed.

9 The successful respondent is entitled to costs: R. 14.88(1). The respondent argues that she is entitled to double costs under R. 14.59 because after she filed her factum she offered to allow the appellants to abandon the appeal without costs. Offers of settlement can result in double costs, if they represent genuine attempts to compromise the dispute. Formalistic offers merely designed to double costs are discouraged. There is no real prospect of this type of "think again" offer being accepted, and they would rarely result in double costs.

10 The presumption under R. 14.88(3) is that appeal costs are on the same scale as the trial costs, which are primarily set based on the amounts in dispute. A dispute over a procedural order such as this, however, does not necessarily justify a substantial scale of costs. In ordinary circumstances, Column 1 would be in order, but this appeal had little prospect of resulting in anything other than delay and wasted expense. Accordingly, Column 2 is appropriate.

11 The respondent is accordingly entitled to the assessed costs of the appeal on Column 2, plus reasonable disbursements and GST.

Appeal dismissed.

End of Document

TAB 10

2015 ABQB 120
Alberta Court of Queen's Bench

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.

2015 CarswellAlta 287, 2015 ABQB 120, [2015] A.W.L.D. 1833, [2015] A.W.L.D. 1835, [2015] A.W.L.D. 1838, [2015] A.W.L.D. 1839, [2015] A.W.L.D. 1842, [2015] A.W.L.D. 1851, [2015] A.J. No. 200, 250 A.C.W.S. (3d) 242, 40 C.L.R. (4th) 187, 605 A.R. 303

Attila Dogan Construction and Installation Co. Inc., Applicant and AMEC Americas Limited, formerly AMEC E&C Services Limited and AGRA Monenco Inc., Respondent

Neil Wittmann C.J.Q.B.

Heard: September 10-11, 2014
Judgment: February 18, 2015
Docket: Calgary 0701-09436

Counsel: Matthew Diskin, Salim Dharssi, Zarya Cynader, for Attila Dogan Construction and Installation Co. Inc.
David Tupper, Chris Petrucci, for AMEC Americas Limited, Formerly AMEC E&C Services Limited and Agra Monenco Inc.

Subject: Civil Practice and Procedure; Contracts; Evidence

Headnote

Civil practice and procedure --- Trials — Time of trial — Adjournment — Discretion of trial judge

In 1998, plaintiff AD and defendant AMEC entered into joint venture agreement to bid on contract to design and build plant in Jordan for JD — Bid was accepted and in 1999, joint venture entered into design-build contract with JD — In 2000, AD and AMEC entered into joint venture amending agreement to obtain external financing from EDC to resolve cash flow problems — Due to several delays, JD terminated project in 2002 — AD and AMEC entered agreement on procedures concerning claims (claims agreement) that provided for suspension of claims between AD and AMEC until dispute between joint venture and JD was resolved — Claims agreement provided AMEC would be responsible for retaining and instructing outside legal counsel and experts on behalf of joint venture and AMEC would pay AD's share of all third-party expenses to prosecute or defend claim, which was to be arbitrated — Arbitration did not go well but dispute with JD was settled in 2006 — AD brought action against AMEC claiming damages for negligence and breaches of joint venture agreement — AMEC counterclaimed alleging AD failed to pay its proper share of expenses associated with JD arbitration — AMEC sought summary dismissal of claims and sought summary judgment on its counterclaim against AD — AD applied for adjournment of hearings of summary applications asserting that newly retained counsel lacked access to necessary materials and sufficient time to prepare adequate responses to summary applications — Application dismissed — History of proceedings weighed heavily against granting adjournment — Court could not condone continual delay — AD's explanation for delay sought was not satisfactory and AD did little to mitigate its situation — AD delayed rather than aggressively pursue resolution of fee dispute — By failing to retain counsel AD ensured that counsel would have very little time to obtain documentation — AD did not take steps to obtain documents from AMEC — There was no realistic expectation that adjournment would remedy problem in short-term and prejudice caused by another delay was clear.

Construction law --- Contracts — Breach of terms of contract — Negligence

In 1998, plaintiff AD and defendant AMEC entered into joint venture agreement to bid on contract to design and build plant in Jordan for JD — Bid was accepted and in 1999, joint venture entered into design-build contract with JD — In 2000, AD and AMEC entered into joint venture amending agreement to obtain external financing from EDC to resolve cash flow problems — Due to several delays, JD terminated project in 2002 — AD and AMEC entered agreement on procedures concerning claims ("claims agreement") that provided for suspension of claims between AD and AMEC until dispute between joint venture and JD was resolved — Claims agreement provided AMEC would be responsible for retaining and instructing outside legal counsel

and experts on behalf of joint venture and AMEC would pay AD's share of all third-party expenses to prosecute or defend claim, which was to be arbitrated — Arbitration did not go well but dispute with JD was settled in 2006 — AD brought action against AMEC claiming damages for negligence and breaches of joint venture agreement on grounds that amending agreement did not constitute mutual release and relied on misrepresentations made by AMEC when it entered into amending agreement — AMEC applied for summary dismissal of claims — Application granted — Amending agreement barred claims by either party for losses arising out of delay — Under amending agreement, AD promised AMEC that AD would indemnify AMEC for losses suffered by AD arising from any delay in performance of work — In holding one another harmless for all losses, damages, costs or expenses to extent arising from any delay in performance of work, AD and AMEC agreed to absolve one another for all claims arising out of delay, which was mutual release — AD did not rely on representations made by AMEC to JD in entering into amending agreement and in any event representations were demonstrably false.

Construction law --- Contracts — Building contracts — Miscellaneous

In 1998, plaintiff AD and defendant AMEC entered into joint venture agreement to bid on contract to design and build plant in Jordan for JD — Bid was accepted and in 1999, joint venture entered into design-build contract with JD — In 2000, AD and AMEC entered into joint venture amending agreement to obtain external financing from EDC to resolve cash flow problems — Due to several delays, JD terminated project in 2002 — AD and AMEC entered agreement on procedures concerning claims ("claims agreement") that provided for suspension of claims between AD and AMEC until dispute between joint venture and JD was resolved — Claims agreement provided AMEC would be responsible for retaining and instructing outside legal counsel and experts on behalf of joint venture and AMEC would pay AD's share of all third-party expenses to prosecute or defend claim, which was to be arbitrated — Arbitration did not go well but dispute with JD was settled in 2006 — AD brought action against AMEC claiming damages for negligence and breaches of joint venture agreement on grounds that amending agreement did not constitute mutual release and relied on misrepresentations made by AMEC when it entered into amending agreement — AMEC applied for summary dismissal of claims — Application granted — Amending agreement barred claims by either party for losses arising out of delay — Under amending agreement, AD promised AMEC that AD would indemnify AMEC for losses suffered by AD arising from any delay in performance of work — In holding one another harmless for all losses, damages, costs or expenses to extent arising from any delay in performance of work, AD and AMEC agreed to absolve one another for all claims arising out of delay, which was mutual release — AD did not rely on representations made by AMEC to JD in entering into amending agreement and in any event representations were demonstrably false.

Contracts --- Performance or breach — Breach — General principles

In 1998, plaintiff AD and defendant AMEC entered into joint venture agreement to bid on contract to design and build plant in Jordan for JD — Bid was accepted and in 1999, joint venture entered into design-build contract with JD — In 2000, AD and AMEC entered into joint venture amending agreement to obtain external financing from EDC to resolve cash flow problems — Due to several delays, JD terminated project in 2002 — AD and AMEC entered agreement on procedures concerning claims ("claims agreement") that provided for suspension of claims between AD and AMEC until dispute between joint venture and JD was resolved — Claims agreement provided AMEC would be responsible for retaining and instructing outside legal counsel and experts on behalf of joint venture and AMEC would pay AD's share of all third-party expenses to prosecute or defend claim, which was to be arbitrated — Arbitration did not go well but dispute with JD was settled in 2006 — AD brought action against AMEC claiming damages for negligence and breaches of joint venture agreement on grounds that amending agreement did not constitute mutual release and relied on misrepresentations made by AMEC when it entered into amending agreement — AMEC applied for summary dismissal of claims — Application granted — Amending agreement barred claims by either party for losses arising out of delay — Under amending agreement, AD promised AMEC that AD would indemnify AMEC for losses suffered by AD arising from any delay in performance of work — In holding one another harmless for all losses, damages, costs or expenses to extent arising from any delay in performance of work, AD and AMEC agreed to absolve one another for all claims arising out of delay, which was mutual release — AD did not rely on representations made by AMEC to JD in entering into amending agreement and in any event representations were demonstrably false.

Evidence --- Affidavits — As evidence at trial

In 1998, plaintiff AD and defendant AMEC entered into joint venture agreement to bid on contract to design and build plant in Jordan for JD — Bid was accepted and in 1999, joint venture entered into design-build contract with JD — In 2000, AD and AMEC entered into joint venture amending agreement to obtain external financing from EDC to resolve cash flow problems — Due to several delays, JD terminated project in 2002 — AD and AMEC entered agreement on procedures concerning claims

("claims agreement") that provided for suspension of claims between AD and AMEC until dispute between joint venture and JD was resolved — Claims agreement provided AMEC would be responsible for retaining and instructing outside legal counsel and experts on behalf of joint venture and AMEC would pay AD's share of all third-party expenses to prosecute or defend claim, which was to be arbitrated — Arbitration did not go well but dispute with JD was settled in 2006 — AD brought action against AMEC claiming damages for negligence and breaches of joint venture agreement — AMEC counterclaimed alleging AD failed to pay its proper share of expenses associated with JD arbitration — AMEC sought summary dismissal of claims and sought summary judgment on its counterclaim against AD — AMEC filed affidavit of L in support of its application for summary judgment — AD contended that L affidavit attached correspondence to which L was not party and other documents of which L did not have personal knowledge of — Application for summary dismissal of claims granted; application for summary judgment granted in part — AMEC was entitled to summary judgment in respect of 50 per cent costs incurred — Affiant had personal knowledge of general course of JD arbitration given his position in company and personal involvement in JD dispute — Some of documents attached to affidavit to which affiant was not party and to which affiant did not assert personal knowledge were inadmissible for truth of their contents.

Civil practice and procedure --- Practice on interlocutory motions and applications — Evidence on motions and applications — Use of affidavit evidence — Miscellaneous

In 1998, plaintiff AD and defendant AMEC entered into joint venture agreement to bid on contract to design and build plant in Jordan for JD — Bid was accepted and in 1999, joint venture entered into design-build contract with JD — In 2000, AD and AMEC entered into joint venture amending agreement to obtain external financing from EDC to resolve cash flow problems — Due to several delays, JD terminated project in 2002 — AD and AMEC entered agreement on procedures concerning claims ("claims agreement") that provided for suspension of claims between AD and AMEC until dispute between joint venture and JD was resolved — Claims agreement provided AMEC would be responsible for retaining and instructing outside legal counsel and experts on behalf of joint venture and AMEC would pay AD's share of all third-party expenses to prosecute or defend claim, which was to be arbitrated — Arbitration did not go well but dispute with JD was settled in 2006 — AD brought action against AMEC claiming damages for negligence and breaches of joint venture agreement — AMEC counterclaimed alleging AD failed to pay its proper share of expenses associated with JD arbitration — AMEC sought summary dismissal of claims and sought summary judgment on its counterclaim against AD — AMEC filed affidavit of L in support of its application for summary judgment — AD contended that L affidavit attached correspondence to which L was not party and other documents of which L did not have personal knowledge of — Application for summary dismissal of claims granted; application for summary judgment granted in part — AMEC was entitled to summary judgment in respect of 50 per cent costs incurred — Affiant had personal knowledge of general course of JD arbitration given his position in company and personal involvement in JD dispute — Some of documents attached to affidavit to which affiant was not party and to which affiant did not assert personal knowledge were inadmissible for truth of their contents.

APPLICATIONS by defendant seeking summary dismissal of claims of plaintiff against defendant for alleged delays in defendant's performance in joint venture and summary judgment on its counterclaim against plaintiff for expenses to pursue and defend claim against third party on behalf of both; APPLICATION by plaintiff for adjournment of hearings.

Neil Wittmann C.J.Q.B.:

Introduction

1 These Reasons for Judgment address three applications:

(a) AMEC Americas Limited ("AMEC") seeks summary dismissal of the claims of Plaintiff Attila Dogan Construction and Installation Co. Inc. ("AD") against AMEC for alleged delays in AMEC's performance in a joint venture for the design and construction of a magnesium oxide plant (the "Summary Dismissal Application").

(b) AMEC seeks Summary Judgment on its counterclaim against AD for expenses to pursue and defend claims against a third party on behalf of both AMEC and AD (the "Summary Judgment Application"; together with the Summary Dismissal Application, the "Summary Applications").

(c) AD sought adjournment of the hearings of the above-noted Summary Applications (the "Adjournment Application").

Background

2 In October 1998, AD and AMEC entered into a Joint Venture Agreement ("the Joint Venture Agreement"). The Joint Venture was to bid on a contract to design and build a magnesium oxide plant in Jordan ("the Project") for the Jordan Magnesia Company Limited ("JorMag" or "JD"). AMEC was to do the engineering work for the Project, and AD was to complete the construction work. The Joint Venture's bid was accepted and in March, 1999 the Joint Venture entered into an agreement "the Design-Build Contract") with JorMag. On April 26, 2000, AMEC and AD entered into a Joint Venture Amending Agreement ("the Amending Agreement") whereby the parties agreed, *inter alia*, to obtain external financing from Export Development Canada to resolve cash flow problems encountered by the Joint Venture.

3 The Project was plagued by delays and was ultimately terminated by JorMag on July 7, 2002. On November 17, 2003, AMEC and AD entered into an Agreement on Procedures Concerning Claims ("the Claims Agreement"), which provided for a suspension of claims between AMEC and AD until the dispute between the Joint Venture and JorMag was resolved. It further provided that, with regard to the dispute with JorMag, AMEC would be responsible for retaining and instructing outside legal counsel and any experts for and on behalf of the Joint Venture and that AMEC would, in the first instance, pay AD's share of all third party expenses required to prosecute or defend the claim which was to be arbitrated. Pursuant to the Claims Agreement, AMEC would not be responsible for AD's share of any judgment, award or cost award against the Joint Venture, the responsibility for which would be determined in accordance with the terms of the Joint Venture Agreement.

4 The Joint Venture initiated arbitration proceedings with JorMag in February, 2004 ("the JorMag Arbitration"). The JorMag Arbitration did not go well, and the Joint Venture resolved the dispute with JorMag pursuant to a settlement agreement dated April 24, 2007, under which the Joint Venture agreed to pay $41 million to JorMag and to release it from all claims. On July 30, 2007, AD brought this action against AMEC, claiming damages from AMEC for negligence and a variety of alleged breaches of the Joint Venture Agreement. AMEC counterclaimed, alleging that AD failed to pay its proper share of expenses associated with the JorMag Arbitration. I have been the Case Management judge of this action since 2010.

The Adjournment Application

5 AD filed the Adjournment Application on September 4, 2014, arguing that newly retained counsel Gilbert's LLP ("Gilbert's) lacked access to the necessary materials and sufficient time to prepare adequate responses to the Summary Applications scheduled to be heard September 10 th and 11 th, 2014. AMEC protested that any further adjournment would unfairly draw out the already lengthy proceedings. I refused to adjourn the Summary Applications on September 10, 2014, with reasons to follow.

Background to Adjournment Application

6 When AD filed its Statement of Claim on September 18, 2007 it was represented by Faber Bickman. AMEC, through Bryan & Company, its counsel at the time, filed a Statement of Defence and Counterclaim on February 27, 2009. On June 10, 2009 Bennett Jones took over conduct of the action for AD, and on May 4, 2010, Blake Cassels & Graydon took over as counsel for AMEC.

7 The action proceeded in an orderly, if not particularly timely, way for nearly three years. Approximately 500,000 documents were produced, and 85 days of questioning occurred. A number of applications were heard, some of which resulted in reported decisions. On February 6, 2013, in the course of a case management hearing, I was advised by AMEC that it would be bringing the Summary Applications in respect of AD's claim and AMEC's counterclaim. A schedule was set by order dated February 6, 2013. The Summary Judgment Application in respect of the counterclaim was scheduled to be heard on May 15, 2013 and the Summary Dismissal Application in respect of AMEC's claim was set to be heard June 24, 2013.

8 On March 25, 2013, AMEC filed the Summary Judgment Application and provided Bennett Jones with the supporting Affidavit of David Leonard ("the Leonard Affidavit"), which was filed on April 11, 2013.

> This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice.
>
> Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.
>
> A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

50 In *Windsor*, the Alberta Court of Appeal held that the principles set out in *Hryniak* are consistent with Alberta summary judgment practice, and held at paras 13 - 15:

> The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record.
>
> ... Ontario R. 20 and Alberta R. 7.3 are both procedures for resolving disputes without a trial (as compared with Alberta's summary trial procedure which is a form of trial). As in Ontario, viva voce evidence may exceptionally be allowed in chambers applications: R. 6.11(1)(g). New R. 7.3 calls for a more holistic analysis of whether the claim has "merit", and is not confined to the test of "a genuine issue for trial" found in the previous rules...
>
> ... ***Hryniak v. Mauldin*** refers several times to the need for a change in culture. In other words, the myth of trial should no longer govern civil procedure. It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial". Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication...

51 More recently, in *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280 (Alta. C.A.), the Alberta Court of Appeal summarized the principles governing summary judgment in Alberta, adopting the reasoning of Wakeling J. (as he then was) in *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), at para 61:

> Rule 7.3 of the new Alberta Rules of Court allows a court to grant summary judgment to a moving party if the nonmoving party's position is without merit. A party's position is without merit if the facts and law make the moving party's position unassailable and entitle it to the relief it seeks. A party's position is unassailable if it is so compelling that the likelihood of success is very high.

And, at paras 63 - 70:

> First, the moving party is entitled to summary judgment if, as a plaintiff, it presents uncontroverted facts and law which entitle it to judgment against the nonmoving party. The court must be satisfied that the plaintiff has presented uncontested facts which establish all the essential elements of the action
>
> Second, the moving party is entitled to summary judgment if, as a defendant, it presents uncontroverted facts and law, which makes it highly unlikely the plaintiff will succeed. Again, the court must conclude that the uncontested facts before it do not establish an essential element of the plaintiff's action or do establish all the essential elements of a defence.
>
> There are a number of relevant principles which underly the fundamental norm that claims or defences that are so compelling the likelihood they will succeed is very high should be dealt with summarily.

> First, the legal or persuasive burden rests on the moving party... The moving party must present the facts which, in combination with the applicable law, make its position unassailable if the nonmoving party does not contest the facts and the law...
>
> Second, the nonmoving party has no legal or persuasive burden to discharge.... In some circumstances the nonmoving party may be at risk of losing the summary judgment application if it fails to present a version of the facts which is inconsistent with that relied on by the moving party...
>
> Third, the motions court may not make findings of credibility and resolve contested fact issues... That a controversy over nonmaterial facts exists is irrelevant.
>
> Fourth, if the law is unclear, either because the moving party is seeking to extend the scope of a well established proposition or to make new law, a chambers judge may decline to resolve the dispute. This is so even though the trial judge is, arguably, in no better position to decide this challenging legal issue than the chambers judge. The chambers judge may legitimately conclude that her proper role is to identify unassailable positions, which assumes the law on the issue is settled, not develop the law in the course of a summary judgment chambers application.
>
> Fifth, a nonmoving party's argument that questioning or trial may produce evidence which assists the nonmoving party is without merit.

52 To this set of principles I would add some further points of direct application to the Summary Applications sought here. It is important to understand that the principle of proportionality and what has been described as the less stringent test for summary judgment in Alberta does not affect the evidentiary requirements for such applications. As discussed in further detail below, affidavit evidence sworn in support of summary judgment must comply with the provisions of the *ARC* and these are unaffected by *Hryniak* and *Windsor*. Furthermore, a self-serving affidavit in and of itself is not sufficient to create a triable issue in the absence of detailed facts and supporting evidence: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), at para 31. Finally, the principle of proportionality will require that the procedure used to adjudicate the dispute should fit the nature of the claim, but proportionality has more than one aspect. The magnitude of the claim in terms of monetary value may have some place in this analysis, but the nature of the claim will as well. It has been recognized, for example, that disputes over the interpretation of an instrument, such as a contract, may lend themselves particularly well to summary judgment: *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380 (Alta. C.A.).

Summary Judgment on the AMEC Counterclaim

The Leonard Affidavit

53 In support of its application for Summary Judgment on the AMEC counterclaim, AMEC filed the Leonard Affidavit in April, 2013. AD contends the Leonard Affidavit attaches correspondence to which he was not party, and other documents of which he does not assert personal knowledge. Specifically, AD contends that the documents attached at Exhibits "E", "G", "I", "J", "K", "M", "N", "O", "R", "S", "T", "W", "X", "II" and "JJ" fall into these categories and are inadmissible on this application. AD further contends that paragraphs 14 through 17 of the Leonard Affidavit are inadmissible because they refer to meetings that Mr. Leonard himself does not mention having attended.

54 *ARC* 6.11 provides:

> 6.11(1) When making a decision about an application the Court may consider only the following evidence:
>
> (a) affidavit evidence, including an affidavit by an expert;
>
> (b) a transcript of questioning under this Part;
>
> (c) the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31;

TAB 11

2019 ABQB 828
Alberta Court of Queen's Bench

Statt v. SGI Canada Insurance Services Ltd

2019 CarswellAlta 2300, 2019 ABQB 828, [2019] A.W.L.D. 4168, [2019] A.W.L.D. 4214, 311 A.C.W.S. (3d) 830, 98 C.C.L.I. (5th) 279

James Statt and Juliette Statt (Applicants) and SGI Canada Insurance Services Ltd. (Respondent)

Master J.R. Farrington, In Chambers

Heard: October 9, 2019
Judgment: October 28, 2019
Docket: Calgary 1701-17378

Counsel: Keith D. Marlowe, Amanda G. Manasterski, for Applicants
Nabeel Peermohamed, for Respondent

Subject: Civil Practice and Procedure; Contracts; Insurance

Headnote

Insurance --- Claims — General principles

Fire occurred in home owned by applicants (insureds), and respondent was fire insurer for home — Differences arose regarding settlement of insurance claim — Parties participated in umpire procedure which determined whether any amount was owed for damage to kitchen cabinets and for lost rentals and utilities — Insureds brought originating application seeking compensation for disputed amounts, as well as extension of limitation period for commencing proceeding if necessary under s. 5.3 of Fair Practices Regulation — Application granted in part — Insurer made no application for judicial review in relation to umpire's awards, and umpire arbitration awards were owing as awarded — Insureds were not entitled to damages for wrongful denial of renewal of insurance coverage as insurer was free to contract with parties as it wished, there was no analysis or evidence to compare features of replacement policy obtained by insureds and features of old policy, and no industry evidence as to practices on renewals and claims histories — If this were truly case for punitive or exemplary damages, they could not be determined summarily — Insureds chose summary process in electing to proceed by way of originating application, and it would not be appropriate to bifurcate issues by dealing with matter summarily on some issues and directing trial on other issues after matter had been pursued as originating application for some time — Punitive damages award likely would not have been appropriate in any event as parties had disagreement over loss adjustment process, and existence of disagreement between parties was not, in itself, sufficient basis for punitive or exemplary damages — This was not case where allegations of criminal conduct of arson were improperly made by insurer or where party directly profited from highhanded conduct — Trial was not ordered on issue of punitive or exemplary damages — Insureds were awarded judgment of $127,241 for remaining repairs to property, and they were entitled to amounts awarded in umpire proceedings.

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Actions on insurance policies — Miscellaneous

Fire occurred in home owned by applicants (insureds), and respondent was fire insurer for home — Differences arose regarding settlement of insurance claim — Parties participated in umpire procedure which determined whether any amount was owed for damage to kitchen cabinets and for lost rentals and utilities — Insureds brought originating application seeking compensation for disputed amounts, as well as extension of limitation period for commencing proceeding if necessary under s. 5.3 of Fair Practices Regulation — Application granted in part — Insurers had right to rely on limitations defence — Purpose of s. 5.3 of Regulation was to make certain that clear notice was given to insured regarding limitation periods — Giving purposive interpretation to s. 5.3 of Regulation, notice mandated by s. 5.3 should at least inform as to what needed to be done, by when, and under which legislation — Ideally notice should refer to specific provision of legislation, and it should also be given in

way such that timing related to one of triggering events in s. 5.3(2) of Regulation — Form notice issued almost immediately upon making of claim did not meet requirements of s. 5.3 of Regulations — All of triggering events in s. 5.3(2) of Regulations were qualified by and measured using word "within", which suggested that time period began at happening of event and not before — There was no defining moment of compliance with Regulation — Section 5.3(7) of Regulation applied, and court had discretion to extend limitation period on these facts — In circumstances, given that there was ongoing adjustment process where it was reasonable for insureds to believe that settlement remained possible, and that amounts were clearly owing under policy which had not yet been paid, this was appropriate case in which to give effect to s. 5.3 of Regulation and extend limitation period if necessary — There was insufficient compliance with notice requirement, and it was appropriate case for extension of limitation period for seeking remedial order.

APPLICATION by insureds seeking compensation for disputed amounts, as well as extension of limitation period for commencing proceeding if necessary.

***Master J.R. Farrington, In Chambers*:**

Introductory Background

1 This originating application is brought by the applicants James Statt and Juliette Statt (the "Statts") against their respondent insurer SGI Canada Insurance Services Ltd. ("SGI"). I note that the parties have also used the name "SGI Insurance Services Ltd." for the respondent on some Court documents. If anything turns on the distinction I can provide any necessary adjustments, clarifications or rulings as necessary.

2 The matter arises from a fire at a home owned by the Statts which occurred on November 12, 2014. SGI was the fire insurer for the home. Differences arose regarding settlement of the insurance claim. The Statts eventually brought an Originating Application on December 22, 2017 seeking compensation for disputed amounts, as well as an extension of the limitation period for commencing this proceeding, if necessary, by virtue of the authority to grant an extension under section 5.3 of the *Fair Practices Regulation* AR 128/2001. For the reasons which follow, the Originating Application is partially allowed.

3 Of course, the default way to seek a remedial order is to commence a proceeding with a Statement of Claim, but in some circumstances an Originating Application can be used. The primary criterion under Rule 3.2(2)(a) for use of an Originating Application is that there be no material facts in dispute.

4 While there was substantial disagreement during the loss adjustment phase as to the overall approved amount for the scope of work arising from the loss claim, as a result of the initial approved scope, and subsequent approved change orders, the total approved scope became $201,844.00. The contractor that was engaged to do the repair work was paid $72,000 for the work that it completed. As such, the shortfall is $129,844.00. There is little or no dispute on those numbers. The figure is corroborated somewhat by an estimate obtained by the Statts which provides for a similar figure for completion of work on the home. While the estimate as tendered cannot be relied upon in any significant way for the truth of its contents for the reasons set out in *Sobeys Capital Incorporated v. Whitecourt Shopping Centre (GP) Ltd*, 2019 ABCA 367 (Alta. C.A.), it is at least indicative that the figures which emerged from the adjustment process are consistent with what the Statts would otherwise seek based upon their own research.

The Umpire Process

5 During the adjustment of the loss process the parties also participated in an umpire procedure pursuant to section 519 of the *Insurance Act*, RSA 2000, c I-3 (and its corresponding Statutory Conditions) in relation to two issues. The first issue was whether any amount was owed for damage to kitchen cabinets and the second was whether any amount was owed for lost rentals and utilities.

6 The parties do not agree on the scope and purpose of the umpire arbitration process. The insurer says that it pertained to quantum only, not coverage issues, and that the insurer has consistently denied coverage. The Statts say that the issues in dispute in the umpire process were whether amounts were owed for the claimed items and the umpires reached conclusions

13 Notwithstanding that the renewal denial was communicated only very shortly before the expiry and the insurer's assertion that it did not renew the coverage on the basis of the Statts "claims history" despite the fact that there was little or no claims history on other matters, I deny the claim for the "failure to renew" aspect for two reasons. One reason is that I agree in a general sense with the insurer's submission that it is free to contract with parties as it wishes. It would be exceptional for the Court to foist a renewal on a party if it did not wish to extend. The second concern arising is that I have no real analysis or evidence before me to compare the features of the replacement policy obtained by the Statts and the features of the old policy and no industry evidence as to practices on renewals and claims histories. As presented, it is difficult to allow the claim on this record, particularly in the context of an Originating Application. I dismiss that aspect of the claim.

The Law and Originating Applications

14 The Court has various options as to how it can deal with an Originating Application ranging from allowing the application, to denying the application, to directing the trial of an issue or issues. On the central dispute, I have found little conflict in the evidence on the essential facts. Since the Court is being asked to determine this matter summarily, summary judgement jurisprudence is of some assistance. In *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.), the Court of Appeal held at paragraph 47:

> The proper approach to summary dispositions, based on the ***Hryniak v Mauldin*** test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
>
> b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
>
> d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.
>
> To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

15 Using those principles, on the issues that I have discussed so far, no issues of merit for trial have been demonstrated. A fair and just resolution can be made on this record on those issues.

Remaining Issues

16 I have intentionally left two issues to the end of my analysis. The first issue is the consideration of the Statts' punitive or exemplary damages claim. The second issue is the limitations issue raised by the insurer.

and made awards on those issues. On January 26, 2017 an umpire found that $6,512.78 was owed for kitchen cabinets. On February 22, 2017 an umpire found that $35,700.00 was owed for lost rent and utilities. The insurer maintains that there was no coverage for those items. The applicants argue that the amounts were found to be owing, and that no judicial review was sought from those awards and they are binding.

7 Statutory Condition 11 under the relevant portion of the *Insurance Act* provides:

> IN CASE OF DISAGREEMENT
>
> 11(1) In the event of disagreement as to the value of the insured property, the value of the property saved, the nature and extent of the repairs or replacements required or, if made, their adequacy, or the amount of the loss or damage, those questions must be determined using the applicable dispute resolution process set out in the Insurance Act whether or not the insured's right to recover under the contract is disputed, and independently of all other questions.
>
> (2) There is no right to a dispute resolution process under this condition until
>
> (a) a specific demand is made for it in writing, and
>
> (b) the proof of loss has been delivered to the insurer.

8 Arguably, Statutory Condition 11 is broad enough to encompass more than a determination as to mere quantum. It includes " . . . the nature and extent of the repairs or replacements required..." which in many cases would require consideration of the policy and that arguably extends to a determination of what an insurer is or is not obliged to do under the policy on the facts of a particular case. The issues in this case were not basic coverage issues in any event. "Coverage" issues typically involve matters such as whether or not there is a policy, and the nature of an insured peril or type of loss. On the cabinets, the issue was causation and whether the fire damaged them, and on the rent claim, the issue was whether SGI could impose its own deadline for the completion of repairs in order to terminate further loss of rent coverage.

9 The parties proceeded to arbitration before the umpires and they received a ruling. The insurer made no application for judicial review in relation to the awards calling for it to pay money. Even if the issues were not decided, there is little, if any, evidence from the insurer to support its assertions that there ought to be no coverage for the items. On its assertion that the cabinets were not damaged as a direct result of the fire, there is no real evidence on the point other than general assertions by the insurer. On its assertion that rental coverage should be cut off as of a date certain, the insurer was clearly in default of payout of the approved scope of the reclamation work. There is no dispute that the Statts did not have sufficient financial resources to complete the work themselves, nor should they be expected to do so. The umpire arbitration awards are owing as awarded, subject only to the possible limitations defence that I will consider later.

10 The Statts also make a claim for rent and utilities subsequent to the umpire proceedings. In my view, that is also appropriate. Fundamentally, the insurer did not pay what became the undisputed scope of work amount that was determined by the change order process. It was SGI's obligation to pay what it owed under the policy. Not doing so put the Statts in a position where they were left with incomplete renovations and the property was unrentable.

11 Part of the evidence that was presented was a letter from the previous tenants confirming their willingness to rent the property but for the fire. That letter was not submitted in an admissible non-hearsay way for a final application such as this one, but regardless of that, the Statts had shown an ability to rent the property earlier and there is no reason to expect that they would not have been able to rent a newly repaired property. They are entitled to lost rent and utilities (subject to any policy maximums) on the same basis and rates as the previous tenancy arrangement from the conclusion of the umpire proceedings to the date this matter was heard being October 9, 2019, subject to my consideration of limitations issues.

Non-renewal of the Policy

12 The Statts also claim $2,195.00 for what they say was a wrongful denial of renewal of their insurance coverage.

TAB 12

R.S.A. 2000, c. T-8, s. 43

s 43. Application to court for advice

Currency

43.Application to court for advice

43(1) Any trustee may apply in court or in chambers in the manner prescribed by the rules of court for the opinion, advice or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property.

43(2) The trustee acting on the opinion, advice or direction given by the Court is deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in respect of the subject-matter of the opinion, advice or direction.

43(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or direction of the Court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

Currency

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End of Document

TAB 13

2017 BCSC 1478
British Columbia Supreme Court

Jones v. McLeod

2017 CarswellBC 2285, 2017 BCSC 1478, [2017] B.C.W.L.D. 5615, 283 A.C.W.S. (3d) 445

Philip James Jones, as Trustee of the McLeod III Trust, and Philip James Jones, as Trustee of the McLeod IV Trust (Petitioners) and Sheila Elizabeth McLeod, William Ronald Thomas McLeod and Malcolm Roy James McLeod (Respondents)

Pearlman J., In Chambers

Heard: August 2, 2017
Judgment: August 4, 2017
Docket: Vancouver S170650

Counsel: R.R.E. DeFilippi, for Petitioners
H. Shapray, Q.C., for Respondents

Subject: Civil Practice and Procedure; Estates and Trusts

Headnote

Estates and trusts --- Trustees — Powers and duties of trustees — Supervision by court — Miscellaneous

Deceased was wealthy businessman who created several trusts for estate planning purposes — Trustee of trust in issue agreed under seal to be bound by trust indenture — Deceased's will made no provision for his two children from his first marriage — Trustee added children as beneficiaries of trust, but deceased's second wife claimed she was only beneficiary of trust and that trustee acted in breach of his fiduciary duties by appointing children as beneficiaries — Trustee claimed that appointments of children as beneficiaries were part of plan to roughly equalize distribution of deceased's assets — When parties were not able to resolve wife's claim to all of assets of trust, trustee brought petition seeking court's opinion, advice or directions on questions concerning management and administration of trust — Trustee applied to amend petition — Application granted — Trustee could seek advice, opinion or directions of court on legal question and then act on that advice — Court's opinion, advice or directions would be sought on question of whether trustee owed any duty to wife, rather than whether he acted in breach of any fiduciary or other duty — Amendments sought by trustee should be granted, as they would not prejudice wife, trustee had right to frame questions on which he sought court's advice, and there was no impending distribution of estate.

APPLICATION by trustee to amend petition seeking opinion, advice or directions of court on certain questions concerning management or administration of trust.

***Pearlman J., In Chambers* (Oral):**

1 The petitioner, Philip James Jones, as trustee of the McLeod IV Trust, applies to amend his petition filed January 20, 2017. By his petition brought pursuant to s. 86 of the *Trustee Act*, R.S.B.C. 1996. c. 464, Mr. Jones seeks the opinion, advice or directions of the court on certain questions concerning the management or administration of the McLeod IV Trust.

2 The McLeod IV Trust is one of several trusts created for estate planning purposes by the late Ross John McLeod, a wealthy businessman who I will refer to in these reasons as "Ross McLeod".

3 The respondent, Sheila Elizabeth McLeod, who I will refer to as "Mrs. McLeod", is the second wife and widow of Ross McLeod. She opposes one of the amendments sought by the petitioner. As I will discuss later in these reasons, Mrs. McLeod contends Mr. Jones has breached fiduciary duties he owed to her. She submits that the petitioner should not be permitted to

36 While on the hearing of an application for directions under s. 86(1) the court may have to make some findings of fact in order to provide its opinion or directions on a legal question put to it, a petition proceeding is not suitable for the determination of contested issues of fact on questions relating to the trustee's liability.

37 In my view the amendments sought by the petitioner should be granted unless there would be prejudice to Mrs. McLeod. Here, the amendments sought will not prejudice Mrs. McLeod. There is no impending distribution of the estate.

38 Mrs. McLeod intends to counter-petition for Mr. Jones' removal. It is possible that counter-petition, if brought, may be heard at the same time as Mr. Jones' petition.

39 Further, Mrs. McLeod will have the full opportunity to make submissions on the question of whether the petitioner owed her a fiduciary or other duty.

40 Taking into account my finding that there will be no prejudice to Mrs. McLeod, and the right of the trustee to frame the questions on which he seeks the court's advice, I conclude that the amendments should be granted as sought.

41 Costs of this application will be costs in the cause.

Application granted.

TAB 14

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 3 — Court Actions
Division 2 — Actions Started by Originating Application
Subdivision 1 — General Rules

Alta. Reg. 124/2010, s. 3.10

s 3.10 Application of Part 4 and Part 5

Currency

3.10Application of Part 4 and Part 5

3.10(1) Subject to subrule (2), Part 4 and Part 5 do not apply to an action started by originating application unless the parties otherwise agree or the Court otherwise orders.

3.10(2) The rules in Divisions 2, 4, 5 and 6 of Part 4 and rules 4.1, 4.2(a) and (d) and 4.36 apply, with all necessary modifications, to actions started by originating application unless the Court otherwise orders.

Amendment History
Alta. Reg. 122/2012, s. 3

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Concordance References
Rules Concordance 167, Judicial review in civil matters

End of Document

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 4 — Managing Litigation
Division 8 — Discontinuance

Alta. Reg. 124/2010, s. 4.36

s 4.36 Discontinuance of claim

Currency

4.36Discontinuance of claim

4.36(1) Before a date is set for trial, a plaintiff may discontinue all or any part of an action against one or more defendants.

4.36(2) After a trial date has been set but before a trial starts, a plaintiff may discontinue all or part of an action against one or more defendants only

(a) with the written agreement of every party, or

(b) with the Court's permission.

4.36(3) After the trial starts, a plaintiff may discontinue all or part of an action only with the Court's permission.

4.36(4) A discontinuance under this rule must be in Form 23 and must be filed and served on each of the other parties and, after the plaintiff serves notice of discontinuance, the defendant is entitled to a costs award against the plaintiff for having defended against the discontinued claim.

4.36(5) The discontinuance of the action may not be raised as a defence to any subsequent action for the same or substantially the same claim.

Currency
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Concordance References
Rules Concordance 58, Discontinuance

TAB 15

Clerk's Stamp:

COURT FILE NUMBER: 1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA EDMONTON
JUDICIAL CENTRE

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

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

APPLICANTS

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

DOCUMENT

APPLICATION BY THE OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

HUTCHISON LAW
#155, 10403 – 122 Street
Edmonton, AB T5N 4C1

Attention: **Janet L. Hutchison**
Telephone: (780) 423-3661 ext.225
Fax: (780) 426-1293
File: 51433 JLH

NOTICE TO RESPONDENTS

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

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

Doc #15670830

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

Date: June 30, 2015
Time: 2:00PM

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

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

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

Remedy claimed or sought:

I. Production of Records

1. An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Trustees and the Sawridge Band to file Affidavits of Records, in accordance with the provisions of Part 5 of the *Alberta Rules of Court* and provide all records in their power and possession that are relevant and material to the issues in the within proceeding, including, but not limited to:

    i.) The Sawridge Band membership application and decision process from 1985-present, including:

        a.) All inquiries received about Sawridge Band membership or the process to apply for Sawridge Band membership and the responses to said inquiries;

        b.) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge Band membership, whether or not the inquiry was treated by Sawridge Band as an actual membership application;

        c.) Complete and incomplete Sawridge Band membership applications;

        d.) Sawridge Band membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all information considered by the Membership Review Committee, Chief and Council or the Membership Appeal Committee in relation to membership applications;

        e.) Any information that would assist in identification of the minor dependants of individuals who have attempted to apply, are in the process of applying or have applied for Sawridge Band membership;

        f.) Documents produced in Federal Court Action T-66-86;

g.) Documents produced in Federal Court Action T-2655-89, including the entire document collection Sawridge Band made available to the Sawridge Trustees;

ii.) The issues set out as E.1, E.3, E.4 or E.6, in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014, and filed in Court of QB Action No. 1403 04885, including Catherine Twinn's sworn but unfiled affidavit, if it references said issues;

iii.) Any other relevant and material records available to counsel for the Sawridge Trustees as a result of Court of QB Action No. 1403 04885;

iv.) The Sawridge Trustee's previous proposal to establish a tribunal to determine beneficiary status, including information regarding any concerns around the Sawridge Band membership process affecting the Trust's beneficiary identification process;

v.) Conflict of interest issues arising from the multiple roles of Sawridge Trustees, including their roles as beneficiaries, within Sawridge Band government and in the Sawridge membership process;

vi.) The details and listing of any assets held in trust by individuals for Sawridge Band prior to 1982; the details and listing of any assets transferred from individuals to the 1982 Trust; and the details and listing of the assets transferred into the 1985 Trust;

2. An Order confirming that bare assertions of confidentiality and privacy over Band membership information and Band membership application documentation does not supercede the Court's June 12, 2012 Order, absent application by the Sawridge Band or the Sawridge Trustees to establish the documents are subject to a recognized ground of legal privilege.

3. In the alternative, should the Court conclude this issue is beyond the scope of the June 12, 2012 order, and if the parties cannot arrive at agreement on further and better production within 30 days, the matter should be set down for a special chambers hearing.

4. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraphs 1-3.

II. Queen's Bench Action No. 1403 04885,

5. An order requiring the parties in the within proceeding and Queen's Bench Action No. 1403 04885 to provide the Court with a mutually agreeable written update, or if

agreement on said update is not possible, to schedule a further case management conference within 60 days of the production requested in paragraphs 1 and 2.

6. Specifically, the parties will update the Court on matters including:

    i.) The merits of consolidation of the two actions, or alternatives such as concurrent or consecutive hearings.

    ii.) The merits of a further order under Part 5 to permit questioning of individual Trustees, members of the Membership Review Committee or members of Sawridge Band government on matters relevant and material to the within action.

7. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraph 5 and 6.

III. Advice and Direction

8. An Order providing the Court's advice and directions on the following matters:

    i.) Confirmation of the ability of counsel in the within proceeding to communicate with any or all counsel in Queen's Bench Action No. 1403 04885 whether individually or as a group on any matters related to:

        a.) The evidence produced pursuant to the order requested in paragraph 1 (ii) and (iii);
        b.) The real issues in dispute in either proceeding;
        c.) The merits of consolidation, or concurrent hearings, of the two proceedings;
        d.) The most efficient way to resolve the issues that overlap as between the two proceedings; or
        e.) Any other matter consistent with the purposes of the *Alberta Rules of Court.*

    ii.) Confirmation that the Court's costs order of June 12, 2012 (as upheld by the Court of Appeal), includes indemnification of the Public Trustee for costs associated with legal agency services that may be incurred from time to time.

Grounds for making this application:

I. Production of Records

9. The June 12, 2012 Reasons for judgment acknowledge the relevance and materiality of information that permit assessment of the Sawridge Band membership process. The need for information to assist the Public Trustee in identifying potential minor beneficiaries was also acknowledged.

10. The parties in the within proceeding are not currently subject to a general obligation to produce all relevant and material evidence. This has created the potential for selective production that does not support the purposes of the *Alberta Rules of Court* or serve the interests of the administration of justice.

11. The existence of actual, or potential, conflicts of interest around the Sawridge Band membership process requires more extensive production than normally applied to originating applications.

12. The Public Trustee cannot effectively represent, or protect the interests of, minor beneficiaries without full disclosure of relevant and material evidence. In particular, the Public Trustee cannot adequately identify the potential minor beneficiaries without full disclosure.

13. Currently, the Public Trustee does not have access to the same relevant and material evidence that is available to the Sawridge Trustees and Sawridge Band regarding that proceeding. Full and objective disclosure is required to remedy that imbalance.

14. Only full and fair pre-hearing disclosure will permit the parties to do the work required to effectively narrow the issues for hearing.

15. The Court has the discretion to apply all, or part, of the rules of production in Part 5 of the *Alberta Rules of Court* to applications, where appropriate. Requiring the Sawridge Trustees and Sawridge Band to file Affidavits of Records would remedy the production issues that are arising in the within proceedings.

16. In relation to relevance and materiality of evidence regarding the Sawridge Band membership process, the Court's June 12, 2012 Reasons for Judgement found those matters were relevant and that the Public Trustee could explore those matters, including, information that would assist in identifying potential minor beneficiaries.

17. The Sawridge Band, through answers to undertakings from the Sawridge Trustees, has refused to produce membership files and documents relevant to the membership decision-making process. The refusal is based on a bare assertion of confidentiality and privacy, without substantive grounds to demonstrate a recognized legal privilege.

18. If this issue goes beyond the scope of the June 12, 2012 order, and absent agreement amongst the parties, an application for further and better production will be required.

II. Queen's Bench Action No. 1403 04885,

19. The Public Trustee was previously unaware of the December 17, 2014 court appearance in QB Action No. 1403 04885. The Public Trustee has not had an opportunity to address the Court in relation to the overlap of the legal and factual issues raised in proceedings.

20. While more information is required, the pleadings indicate demonstrable overlaps on key issues:

SIMILARITIES	
Issue #1: Who qualifies as Band Member/ Beneficiary-identification	
QB 1103 14112:	**QB 1403 04885:**
• "The Public Trustee seeks to investigate these issues... to reassure itself (and the Court) that the beneficiary class can and has been adequately defined. [para 46, Justice D.R.G. Thomas, June 12, 2012 Reasons for Judgment ("Reasons") • "... it would be peculiar if, in varying the definition of "Beneficiaries" in the trust documents, that the Court did not make some sort of inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway" [para 48, Reasons] • "This Court has an obligation to make inquiries as to the procedure and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be "ascertained" [para 49, Reasons] • "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" [para 14(a), Affidavit of Paul Bujold, August 30, 2011]	• "Examination of and ensuring that the system for ascertaining beneficiaries of the Trusts is fair, reasonable, timely, unbiased and in accordance with *Charter* principles and natural justice;" [Exhibit J, para E(3), Affidavit of Ms. Twinn, December 8, 2014]
Issue #2: Existence of Conflicts of Interest affecting Membership process, Trustees, or both	
QB 1103 14112:	**QB 1403 04885:**
• "...the Sawridge Trustees are personally affected by the assignment of persons inside and outside the Trust." [para 23, Reasons] • "...the key players in both the administration of the Sawridge Trust and of the Sawridge	• "Seeks advice and direction regarding the proper composition of the Board of trustees, including elimination or reduction of the number of elected officials of the Sawridge Indian Band." [Application for Advice and

Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust." [para 25, Reasons] • "I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances." [para 26, Reasons] • "The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries" [para 28, Reasons] • "The Public Trustee's role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation." [para 42, Reasons]	Direction, September 26, 2014] • "Trustee selection and succession, including issues of conflict of interest now and in the future, including examination of a separated model to remove conflict of interest, be it actual, structural or of the appearance of conflict of interest;" [Exhibit J, para E(1), Affidavit of Ms. Twinn, December 8, 2014]
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as the "Advice and Direction Application")." [para 1, Order by Justice D.R.G. Thomas, September 6, 2011] • The Public Trustee of Alberta must protect the interests of any minor beneficiaries or potential beneficiaries in relation to the 1985 Trust. [*Public Trustee Act*, s.21 and s.22]	hearing of this application so that the confidentiality of the subject matter of my Affidavit can be maintained pending further direction from this Honourable Court on how to proceed in this regard."[para 16, Affidavit of Ms. Twinn, December 8, 2014] • "...I have raised the issues of trustee succession, accountability, beneficiary determination, undue influence and conflict of interest on numerous occasions, including putting forward a proposal in writing shortly after the June 12, 2012 decision issued by Justice Thomas in QB Action No. 1103-14112, but have been unable to obtain any results. A recent example of this is in May 2014 when I provided a Binding Issue Resolution Process Agreement to the other trustees for their review and comment in order to set out a process in which to discuss and resolve the issues that are the subject matter of the Application. The other trustees refused and/or willfully failed to engage in this or any process. I believe that I have exhausted my ability to address these matters internally and that adjudication by the Courts has become the only avenue available to address and resolve these matters. Attached as Exhibit "J" to my Affidavit is a copy of the Binding Issue Process Agreement I circulated." [para 23, Affidavit of Ms. Twinn, December 8, 2014]
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• "To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries"." [para 1(a), Order by Justice D.R.G. Thomas, September 6, 2011]	• Not in issue
• Not in issue	• Approval of appointment of individual Trustees

21. Once all parties are on an even playing field in relation to relevant and material evidence, consolidation must be considered to assess whether it would best serve the interests of the administration of justice, save time and resources, and reduce the combined time for hearing the applications, without creating undue prejudice to any party.

22. The parties should update the case management judge on this issue within a reasonable time after the additional document production contemplated by paragraph 1 is received.

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i.) Communication Between Counsel

23. Communications as between counsel in a proceeding and in related proceedings is a normal occurrence. Such communications can serve to narrow issues in dispute and avoid duplication of effort. Such communications increase the opportunities for settlement and pre-trial resolution and focus all parties on issues that actually require the assistance of the Court.

24. Communication between counsel acting in the within proceeding and counsel acting in QB Action No. 1403 04885, particularly given the overlapping issues, should be encouraged rather than circumscribed.

ii.) Costs

25. The Court ordered the Sawridge Trustees to provide the Public Trustee for "full and advance indemnification" for its costs to participate in the within proceeding. The plain meaning of indemnification applies and should include all reasonable costs incurred by the Public Trustee.

26. The Sawridge Trustees object to the Public Trustees incurring costs related to the use of agent counsel who may work with existing counsel from time to time to move this proceeding forward.

27. The Public Trustee has taken care to propose agent counsel who is already highly experienced in the relevant areas of law and has specific experience on matters related to Sawridge Band membership issues. As such, agent counsel that have been proposed are in a position to provide more cost effective services than agent counsel lacking this background.

28. The Public Trustee's requests for resources in order to fulfill its role in this proceeding have been, and remain, reasonable and certainly less extensive than the resources available to the Applicants.

Material or evidence to be relied upon:

1. Excerpts from the transcript from the Questioning of Paul Bujold, held May 27 & 28, 2014;

2. Excerpts from the transcripts from the Questioning of Elizabeth Poitras, held May 29, 2014 and April 9, 2015;

3. Exhibits from the Questioning of Paul Bujold;

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6. Affidavit of Roman Bombak, dated June 12, 2015

7. Pleadings filed in Queen's Bench Action No. 1403 04885

8. Pleadings filed in Queen's Bench Action No. 1103 14112

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

Applicable rules:

10. *Alberta Rules of Court* 1.2, 1.4, 3.10, 3.14, 3,72, 4.11, 5.1, 5.2 , 6.3, and 6.11

Applicable Acts and regulation:

11. *Public* Trustee *Act*, S.A. 2004, c. P-44.1 s. 5, 21 and 22

Any irregularity complained of or objection relied on:

12. The Sawridge Band, through the Sawridge Trustees, has refused to produce relevant and material evidence regarding the Sawridge Band membership process. This is impeding the Public Trustee's ability to effectively represent the interests of minor beneficiaries, and potential minor beneficiaries.

How the application is proposed to be heard or considered:

13. The application is to be heard in Chambers before the Justice D.R.G. Thomas on June 30, 2015, at 2:00PM.

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.

Clerk's Stamp:

COURT FILE NUMBER: 1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA EDMONTON
JUDICIAL CENTRE

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
(RESPONDENTS, in this Application)

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

(APPLICANT in this Application) OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA

(Additional RESPONDENT in this Application) THE SAWRIDGE BAND

DOCUMENT **AMENDED APPLICATION BY THE OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

HUTCHISON LAW
#155, 10403 – 122 Street
Edmonton, AB T5N 4C1

Attention: **Janet L. Hutchison**
Telephone: (780) 423-3661 ext.225
Fax: (780) 426-1293
File: 51433 JLH

NOTICE TO RESPONDENTS

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: June 30, 2015 (adjourned to September 2 and 3, 2015)
Time: 2:00PM (10:00AM on September 2 and 3, 2015)

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

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

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

Remedy claimed or sought:

I. Production of Records

1. An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Trustees to file an Affidavit of Records, in accordance with the provisions of Part 5 of the *Alberta Rules of Court* and provide all records in their power and possession, or which the Sawridge Trustees have reviewed or otherwise accessed, and that are relevant and material to the issues in the within proceeding, including, but not limited to:

    i.) The Sawridge Band membership criteria, membership application process and membership decision-making processes from 1985-present, including:

        a.) All inquiries received about Sawridge Band membership or the process to apply for Sawridge Band membership and the responses to said inquiries;

        b.) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge Band membership, whether or not the inquiry was treated by Sawridge Band as an actual membership application;

        c.) Complete and incomplete Sawridge Band membership applications;

        d.) Sawridge Band membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all information considered by the Membership Review Committee, Chief and

Council or the Membership Appeal Committee in relation to membership applications;

e.) Any information that would assist in identification of the minor dependants of individuals who have attempted to apply, are in the process of applying or have applied for Sawridge Band membership;

f.) Records from Federal Court Action T-66-86A or T-66-86B that are in the power or possession of the Sawridge Trustees, or which the Trustees have reviewed or otherwise accessed, and which are relevant and material to the Sawridge Band membership criteria, membership applications, or membership decision-making processes;

g.) Records from Federal Court Action T-2655-89 that are in the power or possession of the Sawridge Trustees, or which the Trustees have reviewed or otherwise accessed, which are relevant and material to the Sawridge Band membership criteria, membership applications, or membership decision-making processes, including the entire document collection the Sawridge Band made available to the Sawridge Trustees;

h.) Any other records that would assist in assessing whether or not the Sawridge Band membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice.

ii.) Records relevant and material to the issues set out as E.1, E.3, E.4 or E.6, in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014, and filed in Court of QB Action No. 1403 04885, including Catherine Twinn's sworn but unfiled affidavit, if it references said issues;

iii.) Any other relevant and material records available to counsel for the Sawridge Trustees as a result of Court of QB Action No. 1403 04885;

iv.) Records relevant to the Sawridge Trustee's proposals to establish a tribunal to determine beneficiary status, including information regarding any concerns around the Sawridge Band's the Sawridge Band membership criteria, membership applications, or membership decision-making processes as they affect the Trust's beneficiary identification process;

v.) Records relevant to conflict of interest issues arising from the multiple roles of Sawridge Trustees, including their roles as Band members, beneficiaries, within the Sawridge Band government and as decision makers within in the Sawridge Band membership process;

vi.) Records providing the details and listing of any assets held in trust by individuals for the Sawridge Band prior to 1982; the details and listing of any assets

transferred from individuals to the 1982 Trust; and the details and listing of the assets transferred into the 1985 Trust;

2. An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Band to file Affidavits of Records in accordance with the provisions of Part 5 of the *Alberta Rules of Court*, or in the alternative, an Order pursuant to Rule 5.13 of the *Alberta Rules of Court*, requiring Sawridge Band to provide all records in their power and possession that are relevant and material to the issues in the within proceeding, including, but not limited to:

   i.) The Sawridge Band membership criteria, membership application process and membership decision-making processes from 1985-present, including:

      a.) All inquiries received about Sawridge Band membership or the process to apply for Sawridge Band membership and the responses to said inquiries;

      b.) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge Band membership, whether or not the inquiry was treated by Sawridge Band as an actual membership application;

      c.) Complete and incomplete Sawridge Band membership applications;

      d.) Sawridge Band membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all information considered by the Membership Review Committee, Chief and Council or the Membership Appeal Committee in relation to membership applications;

      e.) Any information that would assist in identification of the minor dependants of individuals who have attempted to apply, are in the process of applying or have applied for Sawridge Band membership;

      f.) Any other records that would assist in assessing whether or not the Sawridge Band membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice.

   ii.) Records from Federal Court Action T-66-86A or T-66-86B, which are relevant and material to the Sawridge Band membership criteria, membership application process and membership decision-making processes

   iii.) Records from Federal Court Action T-2655-89 which are relevant and material to the Sawridge Band membership criteria, membership application process and membership decision-making processes, including the entire document collection the Sawridge Band made available to the Sawridge Trustees;

iv.) Records in the power and possession of the Sawridge Band relevant and material to the issues set out as E.1, E.3, E.4 or E.6, in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014, and filed in Court of QB Action No. 1403 04885, including Catherine Twinn's sworn but unfiled affidavit, if it references said issues;

v.) Records in the possession or control of the Sawridge Band, and relevant or material to the Sawridge Trustee's proposals to establish a tribunal to determine beneficiary status, including information regarding any concerns around the Sawridge Band membership process affecting the Trust's beneficiary identification process;

vi.) Records in the possession or control of the Sawridge Band and relevant or material to conflict of interest issues arising from the multiple roles of Sawridge Trustees, including their roles as Band members, beneficiaries, within Sawridge Band government and in the Sawridge membership process;

vii.) Records relevant and material to the details and listing of any assets held in trust by individuals for Sawridge Band prior to 1982; the details and listing of any assets transferred from individuals to the 1982 Trust; and the details and listing of the assets transferred into the 1985 Trust;

3. An Order, directed to the Sawridge Trustees and the Sawridge Band, confirming that bare assertions of confidentiality and privacy over Sawridge Band membership information and Sawridge Band membership application documentation does not supercede the Court's June 12, 2012 Order, absent application by the Sawridge Band or the Sawridge Trustees to establish the documents are subject to a recognized ground of legal privilege.

4. In the alternative, should the Court conclude this issue is beyond the scope of the June 12, 2012 order, and if the parties cannot arrive at agreement on further and better production within 30 days, the matter should be set down for a special chambers hearing.

5. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraphs 1-34.

II. Queen's Bench Action No. 1403 04885,

6. An order requiring the parties in the within proceeding and Queen's Bench Action No. 1403 04885 to provide the Court with a mutually agreeable written update, or if agreement on said update is not possible, to schedule a further case management conference within 60 days of the production requested in paragraphs 1 and 2.

7. Specifically, the parties will update the Court on matters including:

i.) The merits of consolidation of the two actions, or alternatives such as concurrent or consecutive hearings.

ii.) The merits of a further order under Part 5 to permit questioning of individual Trustees, members of the Membership Review Committee or members of Sawridge Band government on matters relevant and material to the within action.

8. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraph 5 and 6.

III. Advice and Direction

9. An Order providing the Court's advice and directions on the following matters:

i.) Confirmation of the ability of counsel in the within proceeding to communicate with any or all counsel in Queen's Bench Action No. 1403 04885 whether individually or as a group on any matters related to:

a.) The evidence produced pursuant to the order requested in paragraph 1 (ii) and (iii);
b.) The real issues in dispute in either proceeding;
c.) The merits of consolidation, or concurrent hearings, of the two proceedings;
d.) The most efficient way to resolve the issues that overlap as between the two proceedings; or
e.) Any other matter consistent with the purposes of the *Alberta Rules of Court*.

ii.) Confirmation that the Court's costs order of June 12, 2012 (as upheld by the Court of Appeal), includes indemnification of the Public Trustee for costs associated with legal agency services that may be incurred from time to time.

Grounds for making this application:

I. Production of Records

10. The June 12, 2012 Reasons for judgment acknowledge the relevance and materiality of information that permit assessment of the Sawridge Band membership process. The need for information to assist the Public Trustee in identifying potential minor beneficiaries was also acknowledged.

11. Neither the Sawridge Trustees nor the Sawridge Band are currently subject to a general obligation to produce all relevant and material evidence. This has created the potential for selective production that does not support the purposes of the *Alberta Rules of Court* or serve the interests of the administration of justice.

12. The existence of actual, or potential, conflicts of interest around the Sawridge Band membership process requires more extensive production than normally applied to originating applications.

13. The Public Trustee cannot effectively represent, or protect the interests of, minor beneficiaries without full disclosure of relevant and material evidence. In particular, the Public Trustee cannot adequately identify the potential minor beneficiaries without full disclosure.

14. Currently, the Public Trustee does not have access to the same relevant and material evidence that is available to the Sawridge Trustees and Sawridge Band regarding that proceeding. Full and objective disclosure is required to remedy that imbalance.

15. Only full and fair pre-hearing disclosure will permit the parties to do the work required to effectively narrow the issues for hearing.

16. The Court has the discretion to apply all, or part, of the rules of production in Part 5 of the *Alberta Rules of Court* to applications, where appropriate. Requiring the Sawridge Trustees and Sawridge Band to file Affidavits of Records would remedy the production issues that are arising in the within proceedings.

17. In relation to relevance and materiality of evidence regarding the Sawridge Band membership process, the Court's June 12, 2012 Reasons for Judgement found those matters were relevant and that the Public Trustee could explore those matters, including, information that would assist in identifying potential minor beneficiaries.

18. The Court has discretion to compel production of relevant and material Records from Sawridge Band whether it is a party in the within proceeding or not, pursuant to Rule 5.13.

19. The Sawridge Band, through answers to undertakings from the Sawridge Trustees, has refused to produce membership files and documents relevant to the membership decision-making process. The refusal is based on a bare assertion of confidentiality and privacy, without substantive grounds to demonstrate a recognized legal privilege.

20. If this issue goes beyond the scope of the June 12, 2012 order, and absent agreement amongst the parties, an application for further and better production will be required.

II. Queen's Bench Action No. 1403 04885,

21. The Public Trustee was previously unaware of the December 17, 2014 court appearance in QB Action No. 1403 04885. The Public Trustee has not had an opportunity to address the Court in relation to the overlap of the legal and factual issues raised in proceedings.

22. While more information is required, the pleadings indicate demonstrable overlaps on key issues:

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

Applicable rules:

10. *Alberta Rules of Court* 1.2, 1.4, 3.10, 3.14, 3,72, 4.11, 5.1, 5.2 , 6.3, and 6.11

Applicable Acts and regulation:

11. *Public Trustee Act*, S.A. 2004, c. P-44.1 s. 5, 21 and 22

Any irregularity complained of or objection relied on:

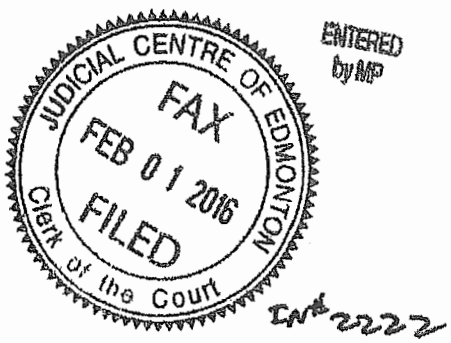
12. The Sawridge Band, through the Sawridge Trustees, has refused to produce relevant and material evidence regarding the Sawridge Band membership process. This is impeding the Public Trustee's ability to effectively represent the interests of minor beneficiaries, and potential minor beneficiaries.

How the application is proposed to be heard or considered:

13. The application is to be heard in Chambers before the Justice D.R.G. Thomas on June 30, 2015, at 2:00PM. (now adjourned to September 2 and 3, 2015)

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.



Clerk's Stamp:

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

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

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

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

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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

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

NOTICE TO THE RESPONDENT, SAWRIDGE FIRST NATION

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

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

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

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

Time: To be set by the Case Management Justice

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

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

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

Remedy claimed or sought includes:

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

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

Grounds for making this application:

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

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

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

Material or evidence to be relied upon:

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

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

Applicable rules:

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

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

Applicable Acts and regulation:

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

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

Any irregularity complained of or objection relied on:

N/A

How the application is proposed to be heard or considered:

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

WARNING

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.

HUTCHISON LAW

Our File: 51433 JLH

SENT BY EMAIL ONLY

February 5, 2016

Court of Queen's Bench of Alberta
6th Floor Law Courts Building
1A Sir Winston Churchill Square
Edmonton, AB T5J OR2

ATTENTION: DENISE SUTTON

Dear Madam:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112 / CA Action No. 1603-0029AC

In relation to the above noted matter, we are writing to confirm that the two Applications, attached, were fax filed with the Court of Queen's Bench on January 29, 2016. We attach our firm's "Transmission Report" to the Court showing the applications were received at the Courthouse at 2:53pm (which should read 3:53pm, as our copier settings did not adjust for daylight savings time) on January 29, 2016.

Unfiled copies of the applications were delivered to all counsel in this matter by email at 4:22pm, and also by fax, between 3:59pm and 4:18pm (as per the fax "Transmission Report", attached, for each law firm).

On February 1st, we received the Applications back from Court of Queen's Bench with February 1, 2016 filed stamps. We have discussed this matter with a Clerk at the Court of Queen's Bench as well the Chambers filing desk office. We were advised that due to being extremely busy they were unable to process the filing until February 1, 2016. They do not disagree that our confirmation correctly indicates they received it January 29, 2016.

Given the above, and the fact that all counsel in this matter had consented to an extension of this

#190 Broadway Business Square, 130 Broadway Boulevard, Sherwood Park, Alberta, T8H 2A3
Telephone: (780) 417-7871, Fax: (780) 417-7872
Email: jhutchison@jlhlaw.ca Website: www.jlhlaw.ca

filing deadline, we are writing to request the Court issue a fiat to deem these applications filed on January 29, 2016.

We also advise that all counsel, with the exception of Nancy Cumming, have emailed to confirm their consent to the request for a fiat.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
JLH/cm
Enclosures

cc: The Office of the Public Trustee

cc: E. Meehan, Q.C., Supreme Advocacy LLP

cc: D. Bonora, Dentons LLP

cc: M. Poretti, RMRF LLP

cc: E. Molstad, Q.C., Parlee McLaws LLP

cc: K. Platten, Q.C., McLennan Ross LLP

cc: P. Kennedy, DLA Piper LLP

cc: N. Cumming, Q.C., Bryan & Co.

Transmission Report

Date/Time	01-29-2016	02:53:31 p.m.	Transmit Header Text	
Local ID 1	780-426-1293		Local Name 1	Chamberlain Hutchison

This document : Confirmed
(reduced sample and details below)
Document size : A4

Government of Alberta

Fax Document Filing Request

Court Services

Please submit only one Document Filing Request per Court File

Submitted by Hutchison Law Account No. [redacted]

City/Town Sherwood Park Your File No. 51413

Office Phone 780-417-7871 No. of Pages 9 Fax Number 780-417-7872

Action No. 1103 14112

Style of Cause

Plaintiff(s) Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha Littlechilde and Clara Midbo, As Trustees for the 1985 Schuldige Trust

Respondents

vs

Defendant(s) Public Trustee of Alberta

Applicant

Instructions

Please file the two attached Applications by the Public Trustee of Alberta.

Thank you

Signature

Court Office Use Only

Invoice No.

Filing Fee

Certified Copies @10.00

Fax Fee pages @ $1.00 per page

Total Fees Charged To Account

Completed by

Clerk

Judicial Centre

Document Title

☐ Has been filed by the Clerks' Office, but we suggest you amend your document for the following reasons:

☐ Has not been filed by the Clerks' Office for the following reasons:

☐ Other Instructions:

CTS1717 (2011/11)

Total Pages Scanned : 9 Total Pages Confirmed : 9

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Abbreviations:

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HR: Host receive	PR: Polled remote	RP: Report	FA: Fail	G3: Group 3
MS: Waiting send	MS: Mailbox save	FF: Fax Forward	TU: Terminated by user	EC: Error Correct

Transmission Report

Date/Time	01-29-2016	03:18:35 p.m.	Transmit Header Text	
D 1	780-426-1293		Local Name 1	Chamberlain Hutchison

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PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Priscilla Kennedy

FIRM: DLA Piper

TELECOPIER NUMBER: 780-428-1066

FROM: JANET HUTCHISON

DATE: January 29, 2016

NUMBER OF PAGES: 12 INCLUDING COVER PAGE
(If you do not receive all pages, please call 417-7871 as soon as possible)

RE: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

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A. .viations:

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HR: Host receive	PR: Polled remote	RP: Report	FA: Fail	G3: Group 3
WS: Waiting send	MS: Mailbox save	FF: Fax Forward	TU: Terminated by user	EC: Error Correct

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Date/Time	01-29-2016	03:06:54 p.m.	Transmit Header Text	
D 1	780-426-1293		Local Name 1	Chamberlain Hutchison

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PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Edward Molstad

FIRM: Parlee McLaws LLP

TELECOPIER NUMBER: 780-423-2870

FROM: JANET HUTCHISON

DATE: January 29, 2016

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RE: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

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HR: Host receive	PR: Polled remote	RP: Report	FA: Fail	G3: Group 3
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Transmission Report

Date/Time	01-29-2016	03:13:59 p.m.	Transmit Header Text	
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NAME: Nancy Cumming

FIRM: Bryan and Co.

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FROM: JANET HUTCHISON

DATE: January 29, 2016

NUMBER OF PAGES: 12 INCLUDING COVER PAGE
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RE: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

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HR: Host receive	PR: Polled remote	RP: Report	FA: Fail	G3: Group 3
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Transmission Report

Date/Time	01-29-2016	03:11:27 p.m.	Transmit Header Text	
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NAME: Karen Platten

FIRM: McLennan Ross

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FROM: JANET HUTCHISON

DATE: January 29, 2016

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RE: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

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No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
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A. viations:

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HR: Host receive	PR: Polled remote	RP: Report	FA: Fail	G3: Group 3
WS: Waiting send	MS: Mailbox save	FF: Fax Forward	TU: Terminated by user	EC: Error Correct

Transmission Report

Date/Time	01-29-2016	03:03:40 p.m.	Transmit Header Text	
D 1	780-426-1293		Local Name 1	Chamberlain Hutchison

This document : Confirmed
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PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Doris Bonora

FIRM: Dentons LLP

TELECOPIER NUMBER: 780-423-7276

FROM: JANET HUTCHISON

DATE: January 29, 2016

NUMBER OF PAGES: 12 INCLUDING COVER PAGE
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RE: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

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No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
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A. ..iations:

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HR: Host receive	PR: Polled remote	RP: Report	FA: Fail	G3: Group 3
WS: Waiting send	MS: Mailbox save	FF: Fax Forward	TU: Terminated by user	EC: Error Correct

Transmission Report

Date/Time	01-29-2016	02:59:25 p.m.	Transmit Header Text	
ID 1	780-426-1293		Local Name 1	Chamberlain Hutchison

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PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Marco Poretti

FIRM: RMRF LLP

TELECOPIER NUMBER: 780-429-3044

FROM: JANET HUTCHISON

DATE: January 29, 2016

NUMBER OF PAGES: 12 INCLUDING COVER PAGE
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RE: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

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No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
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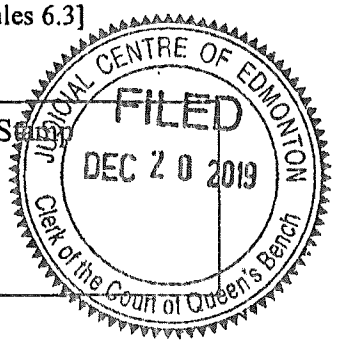
Abbreviations:

HS: Host send	PL: Polled local	MP: Mailbox print	CP: Completed	TS: Terminated by system
HR: Host receive	PR: Polled remote	RP: Report	FA: Fail	G3: Group 3
WS: Waiting send	MS: Mailbox save	FF: Fax Forward	TU: Terminated by user	EC: Error Correct

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.

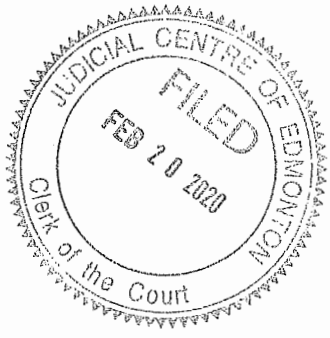
20. The SFN's filed submission includes assertions that are unsupported by evidence. The SFN should be required to provided evidence on relevant and material matters or their submissions should be struck.

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 16

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 17

2019 ABCA 49
Alberta Court of Appeal

Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.

2019 CarswellAlta 204, 2019 ABCA 49, [2019] 6 W.W.R. 567, [2019] A.W.L.D. 1078, [2019] A.W.L.D. 1084, [2019] A.J. No. 144, 301 A.C.W.S. (3d) 643, 32 C.P.C. (8th) 247, 442 D.L.R. (4th) 9, 86 Alta. L.R. (6th) 240

Weir-Jones Technical Services Incorporated (Appellant / Respondent / Plaintiff) and Purolator Courier Ltd., Purolator Inc. and Purolator Freight (Respondents / Applicants / Defendants)

Catherine Fraser C.J.A., Jack Watson, Frans Slatter, Thomas W. Wakeling, Jo'Anne Strekaf JJ.A.

Heard: September 7, 2018
Judgment: February 6, 2019
Docket: Edmonton Appeal 1703-0218-AC

Proceedings: affirming *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.* (2017), 2017 CarswellAlta 1437, 2017 ABQB 491, D.L. Shelley J. (Alta. Q.B.)

Counsel: T.J. Byron, for Appellant
T.V.G. Duke, N.J. Willis, for Respondents

Subject: Civil Practice and Procedure; Contracts

Headnote

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — When statute commences to run — Miscellaneous

In January 2008, defendant courier began providing services to plaintiff company pursuant to agreement comprised of collective agreement, owner/operator contract, and standards of performance contract — General manager and employee of company filed grievances in January 2009 related to claims for compensation for services rendered, unpaid invoices of company, termination of agreement, and other matters — Courier terminated agreement in August 2009 — Company commenced action for damages for breach of agreement — Grievances were settled by agreement in 2015 — Courier successfully brought application for summary dismissal of company's action as statute-barred — Evidence established company communicated concerns about breaches of agreement to courier in November 2008 and February 2009 — Limitation period for breach of contract commenced on date of breach — Company appealed — Appeal dismissed — Emergence of case law rift respecting summary judgment test in Alberta and standard of proof, and resort must be had to principles behind modern law of summary judgment, standard of proof, type of record to be used in summary dispositions, and fairness — There was no policy reason to cling to old, strict rules for summary judgment, and summary judgment should be used when it was proportionate, more expeditious and less expensive procedure — To obtain summary dismissal of claim based on expiration of limitation period, courier had to show from record that injury alleged by company arising from alleged breaches of contract was reasonably known, attributable to courier, and sufficiently serious to warrant proceeding no later than July 22, 2009 — Chambers judge proceeded on erroneous assumption that limitation period started to run at time of breach, but she made necessary findings of fact as to when company discovered and could reasonably have commenced action, and error did not affect result — There was no doubt that company was aware of claim before July 22, 2009 — Record did not disclose any circumstances that would extend commencement of limitation period — Chambers judge did not make reviewable error in concluding that there was no standstill agreement or any representation that limitation period would not be relied on.

Civil practice and procedure --- Summary judgment — Practice and procedure — Miscellaneous

The parties had a contractual relationship under which the company would transport packages on behalf of the courier. The company terminated the contractual arrangement in August 2009. In November 2008 and January 2009, the union filed

grievances on behalf of the principals of the company, which were arbitrated in September 2015 and settled in October 2015. The company took the position that some of its allegations of breach of contract were not covered by the collective agreement or the arbitration. On January 22, 2011 the company commenced an action seeking damages for breach of contract.

The courier successfully applied for the dismissal of the company's action based on the expiration of the limitation period pursuant to the Limitations Act (Act). The chambers judge concluded that the company was aware of the facts on which it based its action against the courier and that the injury warranted bringing a proceeding more than two years before it commenced an action against the courier. The chambers judge found that there was no standstill agreement in place. The chambers judge found that nothing that was done amounted to an express or implied representation that the limitation period would not be relied upon. The company appealed.

Held: The appeal was dismissed.

Per Slatter J.A. (Fraser C.J.A, Watson, Strekaf JJ.A. concurring): The threshold burden on the moving party with respect to establishing the factual basis of a summary judgment application is proof on a balance of probabilities. Balance of probabilities applied in the context of summary judgment does not mean that summary judgment will always be appropriate when the standard is met — it is not the case that "51 percent carries the day".

The balance of probabilities standard only applies to proof of the facts and is but one of the steps in determining whether it is possible to decide the case on a summary basis. Establishing the facts on a balance of probabilities is not a proxy for summary judgment. Consistent with the modern principles of summary judgment set out in Hryniak, whether summary judgment is appropriate and fair involves an element of judicial discretion, but making the underlying findings of fact is an exercise in weighing the evidence. Where there were "difficult factual questions, requiring a tough call on contested facts", there may well be a "genuine issue requiring a trial", even if the moving party has met the balance of probabilities threshold burden of proof.

Based on the Hryniak test, the proper approach should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The key considerations were: a) Having regard to the record and the issues, was it possible to fairly resolve the dispute on a summary basis, or did uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial? b) Had the moving party met the burden on it to show that there was either "no merit" or "no defence" and that there was no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication. c) If the moving party met its burden, the resisting party must put its best foot forward and demonstrate that there was a genuine issue requiring a trial. d) In any event, the judge must be left with sufficient confidence in the state of the record such that they were prepared to exercise the judicial discretion to summarily resolve the dispute. The analysis does not have to proceed sequentially, or in any order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial. There was no policy reason to cling to the old, strict rules for summary judgment. This can only serve to undermine the shift in culture called for by Hryniak. Summary judgment should be used when it is the proportionate, more expeditious and less expensive procedure. It frequently will be. Its usefulness should not be undermined by attaching conclusory and exaggerated criteria like "obvious" or "high likelihood" to it.

The chambers judge erred in holding the former Limitations Act applied under the current Limitations Act. The present Act contains no separate rule for limitation periods for breaches of contract. In order to obtain summary dismissal based on the expiration of the limitation period, the courier had to show from the record that the injury alleged by the company arising from the alleged breaches of contract was reasonably known, attributable to the courier, and sufficiently serious to warrant a proceeding no later than July 2009.

The chambers judge proceeded under the erroneous assumption that the limitation period started to run at the time of breach, but made the necessary findings of fact as to when the company discovered and could reasonably have commenced the action, and the error did not affect the result. The chambers judge found that the alleged breaches, the injury that resulted, and the knowledge that the injuries warranted a proceeding were known more than two years before the action was commenced, which was a finding of fact that deserved deference. There company was aware of the claim before July 22, 2009 and communications amply supported the chambers judge's conclusion.

The record did not disclose any circumstances that would extend the commencement of the limitation period. There was dispute about whether the company and its allegations of breach of contract were covered by the collective agreement, but uncertainty about which claims were covered by the arbitration process did not delay commencement of the limitation period. If a party failed

to seek a remedial order within the limitation period because of a mistaken view of the availability of an alternative procedure, the claim would be barred. Discoverability did not require perfect knowledge or certainty that the claim would succeed.

There were various communications between the parties about the alleged breaches of the contract, which expressed a willingness to resolve the outstanding issues. The correspondence did not use the word "standstill", and there was no mention of the Act. The clear recognition in the correspondence that legal proceedings would follow if negotiations were unsuccessful was inconsistent with any inference that legal rights were being waived. The chambers judge did not make a reviewable error in concluding that there was no standstill agreement or any representation that the limitation period would not be relied on. The allegation of a standstill agreement did not raise any issue requiring a trial, and there was no prospect of a significantly better record emerging from a trial. The company's hope that the dispute could be settled by negotiation did not have the effect of extending the limitation period. The company failed to show any reviewable error in the fact findings made by the chambers judge or the inferences she drew from the record.

Per Wakeling J.A. (concurring in the result): There were two conflicting summary judgment tests, and the difference between the different standards was the degree of disparate strength necessary. One approach insisted that that the responding party's position be completely without merit so that it could not possibly succeed. Using that measure increased the degree of disparity to the maximum point and reduced considerably the utility of the summary judgment process. The other approach granted summary judgment even though the responding party's position had some merit. Summary judgment would be granted if the moving party's position was established on a balance of probabilities, and it was fair and just to deny the responding party access to the full trial process. That test reduced the requisite degree of disparity and increased the utility of the summary judgment process. That approach was preferred.

The Hryniak decision was important as it expressly declared the value of summary judgment procedures. It confirmed that summary judgment was not an inferior dispute resolution device that sacrificed procedural fairness in the pursuit of economical and expeditious resolution of disputes. However, Hryniak's importance in Alberta must not be overstated, as it did not alter the text of R. 7.3 of the Alberta Rules of Court. There was no valid reason post-Hryniak to interpret R. 7.3 of the Rules in a manner different from that favoured pre-Hryniak. The court must give the text of R. 7.3 its plain and ordinary meaning, and may grant summary judgment only if it concluded that the disparity between the strength of the parties' positions was so marked that the ultimate outcome of the dispute was obvious.

The courier's argument that the company's action was barred by the two-year limitation period in the Act was much more compelling than the company's argument that its claim was not barred by the Act that the likelihood the courier would ultimately succeed was very high. The company had no chance of succeeding, and the outcome of the trial was obvious.

APPEAL by plaintiff company from judgment reported at *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.* (2017), 2017 ABQB 491, 2017 CarswellAlta 1437 (Alta. Q.B.), granting defendant courier`s application for summary judgment on basis plaintiff`s claim was statute-barred.

***Frans Slatter J.A.*:**

1 The appellant appeals the summary dismissal of its claim because it was not brought within the limitation period: *Weir-Jones Technical Services Inc. v. Purolator Courier Ltd.*, 2017 ABQB 491 (Alta. Q.B.).

Facts

2 The appellant and the respondents had a contractual relationship under which the appellant would transport packages on behalf of the respondents. The contractual arrangement was comprised of a Collective Agreement, an Owner/Operator Contract, and a Standards of Performance Contract. The appellant argues that these written contracts were supplemented by a verbal contract including other matters such as the provision of a trailer that would be used to transport packages. The contractual arrangement was terminated by the appellant in August, 2009.

3 In November 2008 and January 2009 the Union filed grievances on behalf of the principals of the appellant relating to claims for compensation, unpaid invoices, and other matters. Those grievances went to arbitration in September 2015, following proceedings before the Canada Industrial Relations Board. The grievances were settled on October 2, 2015.

23 The result is that it is now possible to find a quote in the case law to support virtually any view of the test to be used in summary judgment. The issue cannot be resolved by seeing which "school of thought" has the most support in the case law. Historical analyses are not determinative given the call for a "shift in culture". Decisions of the Supreme Court of Canada prevail.

24 The solution must be to go back to first principles: the principles behind the modern law of summary judgment, the principles behind the modern law of proof, the principles behind the type of record to be used in summary dispositions, and principles of fairness.

I. Principles of Summary Judgment

25 The procedures underlying summary judgment are established by *Hryniak v. Mauldin*, and have already been set out, *supra* paras. 14-16, 20-21. It comes down to whether summary disposition is possible, considering the record, the evidence, the facts, and the law that must be applied to them. If the record allows the judge to make the necessary findings of fact and apply the law, then the summary procedure should be used unless there is a substantive reason to conclude that summary disposition would not "achieve a just result". Presuming that summary disposition will always be "unjust" unless it meets some high standard of irrefutability defeats the whole concept of the "culture shift" mandated by *Hryniak v. Mauldin*.

26 The *Hryniak v. Mauldin* approach is not in any way anomalous, because it is consistent with the overriding goal of "proportionality" in civil procedure recognized by R. 1.2 of the Alberta *Rules of Court*: *Burns Bog Conservation Society v. Canada (Attorney General)*, 2014 FCA 170 (F.C.A.) at para. 42, (2014), 83 C.E.L.R. (3d) 1 (F.C.A.). All procedures for resolving civil disputes, including summary dispositions, should be timely, cost-effective, and proportionate to the importance and complexity of the issues.

II. Principles of Proof

27 The principal difference in the approaches taken by *Can* and *Stefanyk* (which are summarized *supra*, para. 12) relates to the test to be met by the moving party in a summary judgment application. *Can* suggested the moving party's position must be "unassailable" or so compelling that the likelihood of success was "very high". *Stefanyk* proposed proof on a balance of probabilities. Neither "test" can simply be read in isolation, detached from the summary judgment context. As noted (*supra*, paras. 17-9) there are fundamental differences between summary judgment, summary trials, and standard trials. Meeting the test for proof of the underlying facts is not a proxy for summary judgment.

28 There was a time when there were numerous standards of proof used in civil law. The uncertainty and complications created were eliminated by the decision in *C. (R.) v. McDougall*, 2008 SCC 53 (S.C.C.) at para. 40, [2008] 3 S.C.R. 41 (S.C.C.) which held that there is only one standard of proof in civil law: proof on a balance of probabilities. That standard was confirmed in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 (S.C.C.) at paras. 35-7, [2016] 2 S.C.R. 720 (S.C.C.). Specifically, "obvious", "unassailable" and "very high likelihood" are no longer recognized standards of proof in Alberta civil proceedings.

29 The standard of proof applies only to findings of *fact*. It does not apply to whether, at the end of the day, it is possible to achieve a fair and just adjudication on a summary basis. As pointed out in *Hryniak v. Mauldin* at paras. 81-4, whether summary judgment is appropriate and fair involves an element of judicial discretion, but making the underlying findings of fact is an exercise in weighing the evidence.

30 Addressing the "standard of proof" is not therefore a stand-alone test for whether summary judgment is possible or appropriate. Proving the factual basis of the application on a balance of probabilities is not in itself sufficient for summary adjudication, but merely one of the steps in determining if there is a genuine issue requiring a trial. Even if the factual record is proven on a balance of probabilities, the presiding judge must still be sufficiently satisfied and comfortable with the record to conclude that there is no genuine issue requiring a trial. *Hryniak v. Mauldin* does not contemplate summary adjudication on difficult factual questions, requiring a tough call on contested facts, on the basis that "51% carries the day": see *Hryniak v.*

Mauldin at para. 51. Those are cases where the summary disposition judge would usually determine that there is a "genuine issue requiring a trial", even if the moving party had met the threshold burden of proof.

31 In Alberta, *Hryniak v. Mauldin* must be applied having regard to the specific wording of the Alberta *Rules of Court*. Rule 7.3 uses the expressions "no merit", "no defence" and "the only real issue is the amount". The word "no" can in some contexts be taken to mean "a complete absence", but if that standard of proof was required for summary judgment, summary judgment would never be possible. That standard would appear to be even higher than "incontrovertible" or "unassailable", and would amount to proof to a certainty, a standard that is rejected even in the criminal law as "unrealistically high": *R. v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.) at para. 31. The search for a shift in culture would become illusory. The word "no" cannot be severed from the phrases "no merit" or "no defence", and should be viewed not in absolute terms but in the context of there being "no real issue".

32 A notable aspect of summary judgment applications is that there is no symmetry of burdens. The party moving for summary judgment must, at the threshold stage, prove the *factual* elements of its case on a balance of probabilities, and that there is no genuine issue requiring a trial. If the plaintiff is the moving party, it must prove "no defence". If the defendant is the moving party, it must prove "no merit". The resisting party need not prove the opposite in order to send the matter to trial. The party resisting summary judgment need only demonstrate that the record, the facts, or the law preclude a fair disposition, or, in other words, that the moving party has failed to establish there is no genuine issue requiring a trial: see para. 35, *infra*.

33 The threshold burden on the moving party with respect to the factual basis of a summary judgment application is therefore proof on a balance of probabilities. If the moving party cannot meet that standard, summary judgment is simply not available. On the other hand, merely establishing the *factual record* on a balance of probabilities is not sufficient to obtain summary judgment, because proof of the *facts* does not determine whether the moving party has also proven that there is no "genuine issue requiring a trial". Imposing standards like "high likelihood of success", "obvious", or "unassailable" is, however, unjustified. A disposition does not have to be "obvious", "beyond doubt" or "highly likely" to be fair.

34 The suggestion that there is some intermediate standard of proof that applies to summary dispositions is inconsistent with *Hryniak v. Mauldin*, *McDougall* and *Fairmont Hotels*. However, as a part of the overall assessment of whether summary disposition is a suitable "means to achieve a just result", the presiding judge can consider whether the quality of the evidence is such that it is fair to conclusively adjudicate the action summarily. Proof of the factual basis of the claim or defence by the moving party at the stage of the *Hryniak v. Mauldin* test during which the "judge makes the necessary findings of fact", does not displace issues of fairness. The chambers judge's ultimate determination on whether summary resolution is appropriate, or whether there is a genuine issue requiring a trial, must still have regard to the summary nature of the proceedings.

35 Related to the issue of the "standard of proof", is the "burden of proof" in summary dispositions, the test for which was confirmed in *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69 (Alta. C.A.) at para. 25, (2006), 55 Alta. L.R. (4th) 1, 384 A.R. 251 (Alta. C.A.). The moving party has the burden of establishing that, considering the facts, the record, and the law, it is entitled to summary judgment on the merits of the case, and that there is no genuine issue for trial. The resisting party then has an evidentiary burden of persuading the court that there is a genuine issue requiring a trial, or in other words that the moving party has not met that aspect of its burden. The ultimate burden remains on the moving party to establish that there is no genuine issue requiring a trial, and that a fair and just adjudication is possible on a summary basis. The resisting party can meet its evidentiary burden by challenging the moving party's entitlement to summary judgment (based on gaps or uncertainties in the facts, the record, or the law, etc.), or by raising a positive defence (such as a limitations defence). A dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial. As noted, *infra* para. 37, the resistance to summary judgment must be grounded in the record, not mere speculation. Sometimes the resisting party can succeed by demonstrating that the complexity of the issues makes the case unsuitable for summary disposition, or in other words that there are genuine issues requiring a trial.

III. Principles Relating to the Record in Summary Dispositions

36 As noted (*supra*, para. 21(a)), where possible findings of fact can and should be made on a summary disposition application. The law is now clear that the mere presence of some conflicting evidence on the record does not preclude summary disposition. As pointed out in *Hryniak v. Mauldin* at para. 48, summary judgment is not limited to cases based on documentary evidence, or where the facts are essentially admitted. It observed at para. 57: "On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is *confident* that she can fairly resolve the dispute" (emphasis added). The sufficiency of the record will depend on the issues, the source and continuity of the evidence, and other relevant considerations.

37 Even before *Hryniak v. Mauldin* it was established that the parties to a summary disposition application must "put their best foot forward": *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.) at para. 11, [2008] 1 S.C.R. 372 (S.C.C.). One could not resist summary disposition, or create a "genuine issue requiring a trial" by speculation about what might turn up in the future. *Lameman* stated the principle at para. 19:

> 19 We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others. (emphasis added)

From this it is clear that the *Hryniak v. Mauldin* test is to be applied based on the record actually before the summary disposition judge.

38 Summary dismissal was resisted in *Goodswimmer v. Canada (Attorney General)*, 2017 ABCA 365 (Alta. C.A.) at paras. 38-45, (2017), 60 Alta. L.R. (6th) 226 (Alta. C.A.), leave to appeal refused SCC #37899 (July 5, 2018) [2018 CarswellAlta 1331 (S.C.C.)], based on affidavits containing opinions, hearsay, irrelevant facts said to be in dispute, and statements that were clearly contradicted by the rest of the record. That decision noted:

> 39 ... Not every conflict in the evidence precludes the chambers judge from drawing inferences from the admitted facts, the undisputed evidence, the conduct of the parties, and the corroborating evidence (such as documents with objective reliability) ...
>
> 40 The mere fact that there might be some conflicting evidence on the record does not mean that a "fair and just adjudication" is not possible ...

The chambers judge can make findings of fact if, viewed overall, the record permits that to be done: *Shefsky v. California Gold Mining Inc.*, 2016 ABCA 103 (Alta. C.A.) at para. 113, (2016), 31 Alta. L.R. (6th) 1, 616 A.R. 290 (Alta. C.A.); *Arndt v. Banerji*, 2018 ABCA 176 (Alta. C.A.) at para. 42. There are some issues of fact (such as issues of credibility, or conflicts in the evidence on material issues) that are not amenable to summary adjudication, and that are markers of genuine issues requiring a trial. There are also cases where summary disposition is possible because even if the facts asserted by the resisting party were true, they would not support that party's claim: *Arndt v. Banerji* at para. 36(b).

39 Whether it is possible for "the judge to make the necessary findings of fact" is tested based on the actual record, and not on speculation about what type of record might be available at trial. In those cases where there is a "genuine issue requiring a trial", it will be because there is a realistic prospect that a trial will create a *better* record, but that conclusion must be reached based on the evidence before the summary disposition judge, not speculation. In this respect, the traditional test of whether there is a "genuine issue requiring a trial" still has utility.

40 Again, having regard to overall considerations of fairness and the ability "to achieve a just result", there can be occasions when the "best foot forward" approach is not strictly applied. That may happen, for example, where one party effectively controls

all of the records and evidence with respect to the claim: e.g. *P. Burns Resources Ltd. v. Patrick Burns Memorial Trust (Trustee of)*, 2015 ABCA 390 (Alta. C.A.) at para. 11, (2015), 26 Alta. L.R. (6th) 1, 612 A.R. 63 (Alta. C.A.). In those circumstances, the application for summary determination can be adjourned to permit some pre-trial discovery.

IV. Principles of Fairness

41 The final principle is a need to ensure an appropriate level of fairness in the procedures used to resolve disputes. Considerations of "fairness" are built into the *Hryniak v. Mauldin* test, which specifies that summary disposition must be a suitable "means to achieve a just result".

42 Restrictions on summary disposition are sometimes justified on the basis that summary disposition deprives the plaintiff of "the right to go to trial", or "full access to the civil procedure spectrum". This is essentially a procedural argument about fairness. There is, however, no right to take an unmeritorious claim to trial, a process described in *Hryniak v. Mauldin* at para 28 as "the most painstaking procedure". All claims are subject to screening at various stages. Claims must disclose a cause of action, or they will be struck: R. 3.68. Plaintiffs must be able to demonstrate sufficient "merit" to avoid summary disposition: R. 7.3. There is no "right" to use the most expensive modality of dispute resolution (i.e., the trial) if these hurdles cannot be overcome: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 324 (B.C. C.A.) at paras. 21, 56, (2017), [2018] 2 W.W.R. 480 (B.C. C.A.), leave to appeal refused SCC #37843 (July 26, 2018) [2018 CarswellBC 2029 (S.C.C.)].

43 In any event, any "right of the plaintiff to have a trial" is equally offset by the "right of the defendant *not* to have a trial on an unmeritorious claim". Fairness is a two-way street. Litigation is expensive and distracting, and the costs awarded to the successful party seldom amount to full indemnity. Cost, delay and inequality of arms may mean that the right to adjudicative fairness, justice, and reliability can actually be hindered by a full trial. A defendant who can show that a claim has "no merit" on a summary disposition application should not have to suffer a trial. As noted, *supra* para. 32, the resisting party does not have to prove its own case at this stage, but only demonstrate that the moving party has failed to show there is no genuine issue requiring a trial.

44 All of the parties and the court must make efficient use of limited resources:

> ... the problem of systemic delay is exacerbated by cases like this where a summary judgment motion has been properly brought and a judge refuses to adjudicate it on its merits. On a summary judgment motion, a judge has the duty to take "a hard look" at the merits of a claim: *Knee v. Knee*, 2018 MBCA 20 (Man. C.A.) at para. 33.

As the Court noted in *Hryniak v. Mauldin* at paras. 27-8, a fair and just summary dismissal procedure is "... illusory unless it is also accessible - proportionate, timely and affordable", and that summary procedures are "no less legitimate" than trials.

45 While the law does not have to be beyond doubt before summary judgment can be granted, there are occasions when the law is so unsettled or complex that it is not possible to apply the law to the facts without the benefit of a full trial record: e.g. *Tottrup v. Clearwater (Municipal District) No. 99* at para. 11; *Cardinal v. Alberta Motor Association Insurance Company*, 2018 ABCA 69 (Alta. C.A.) at para. 10, (2018), 66 Alta. L.R. (6th) 15 (Alta. C.A.); *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46 (Alta. C.A.) at para. 29, (2016), 33 Alta. L.R. (6th) 209, 612 A.R. 284 (Alta. C.A.); *Axcess Mortgage Fund Ltd. v. 1177620 Alberta Ltd.*, 2018 ABQB 626 (Alta. Q.B.) at para. 49. Where the case presents complex factual issues, such as those based on highly technical scientific and medical evidence, summary disposition will often be inappropriate. There are other occasions where there will be a genuine issue requiring a trial.

46 Procedural and substantive fairness must always be a part of the summary disposition process. Considerations of fairness need not be a threshold requirement, nor should they only arise at the conclusion of the application. The chambers judge is entitled to take into consideration the fairness of the process, and its ability to achieve a just result, at all stages. Thus considerations of fairness will always be in the background, including during the fact-finding process, in determining whether the moving party has proven its case on a balance of probabilities, in deciding if there is a genuine issue requiring a trial, and in deciding if, considered overall, summary disposition is a "suitable means to achieve a just result". The ultimate determination

of whether summary disposition is appropriate is up to the chambers judge: *Hryniak v. Mauldin* at para. 83. As stated in *Hryniak v. Mauldin* at para. 50 and *Nelson v. Grande Prairie (City)*, 2018 ABQB 537 (Alta. Q.B.) at para. 47, (2018), 75 Alta. L.R. (6th) 36 (Alta. Q.B.), whether a summary disposition will be fair and just will often come down to whether the chambers judge has a sufficient measure of confidence in the factual record before the court. In practical terms, that level of confidence will not often be reached in close cases.

V. Summary of the Application of the Principles

47 The proper approach to summary dispositions, based on the *Hryniak v. Mauldin* test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:

a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the *facts* of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

48 There is no policy reason to cling to the old, strict rules for summary judgment. This can only serve to undermine the shift in culture called for by *Hryniak v. Mauldin*. Summary judgment should be used when it is the proportionate, more expeditious and less expensive procedure. It frequently will be. Its usefulness should not be undermined by attaching conclusory and exaggerated criteria like "obvious" or "high likelihood" to it.

49 In closing, it is helpful to note that the judge who dismisses an application for summary adjudication may still be in a position to advance the litigation. The judge may be able to isolate and identify issues that can be tried separately under R. 7.1. The summary judgment materials may form a suitable platform for a summary trial, as happened in *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141, 41 C.L.R. (4th) 51 (Alta. Q.B.). While serial applications for summary judgment are not to be encouraged, a second application for summary judgment may be appropriate later in the proceedings when the record is clarified and the issues are perhaps narrowed: *Milne v. Alberta (Workers' Compensation Board)*, 2013 ABCA 379 (Alta. C.A.) at para. 6, (2013), 561 A.R. 313 (Alta. C.A.).

The Limitation Period

50 The *Limitations Act* provides:

3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

TAB 18

2016 ABCA 103
Alberta Court of Appeal

Shefsky v. California Gold Mining Inc.

2016 CarswellAlta 649, 2016 ABCA 103, [2016] 7 W.W.R. 423, [2016] A.W.L.D. 1920, [2016] A.W.L.D. 1921, 264 A.C.W.S. (3d) 935, 31 Alta. L.R. (6th) 1, 399 D.L.R. (4th) 290, 55 B.L.R. (5th) 198, 616 A.R. 290, 672 W.A.C. 290

Martin Shefsky and 2350183 Ontario Inc., Appellants (Applicants) and California Gold Mining Inc., Michael Churchill, Kevin Cinq-Mars, Patrick Cronin, R.W. Tomlinson Limited, John Doe #1-50, and ABC Corporation #1-50, Respondents (Respondents)

Peter Costigan, Frans Slatter, Frederica Schutz JJ.A.

Heard: February 5, 2016
Judgment: April 14, 2016
Docket: Edmonton Appeal 1503-0001-AC

Proceedings: reversing *Shefsky v. California Gold Mining Inc.* (2014), 2014 CarswellAlta 2173, 2014 ABQB 730, D.R.G. Thomas J. (Alta. Q.B.); additional reasons to *Shefsky v. California Gold Mining Inc.* (2015), 2015 CarswellAlta 1857, 2015 ABQB 525, D.R.G. Thomas J. (Alta. Q.B.)

Counsel: A.G. Formosa, for Appellants
S.M. Robinson, M.J. Diskin, for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial

Headnote

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Miscellaneous

CGM Inc. was public mineral exploration corporation — Appellants, MS and holding company, alleged respondents breached MS's reasonable expectations he would control CGM Inc. if he raised $5M — MS and holding company claimed respondents engaged in oppressive conduct including secret placement of shares that diluted MS's voting power and refusing to allow MS to appoint third member to board when initial nominee refused position — Chambers judge determined MS had reasonable expectation Term Sheet would be honoured but not reasonable expectation he had sufficient shareholder support for control — He dismissed oppression motion — MS and holding company appealed — Appeal dismissed — Chambers judge did not err in failing to find that loss of opportunity to gain control of CGMI was reasonable expectation violated by secret private placement — Expectation based on loss of opportunity, without proof that opportunity more than merely speculative, insufficient to ground oppression — MS failed to identify personal interest that was violated — Not sufficient to allege shareholders generally have expectation that directors generally will not act oppressively — In any event, chambers judge did not find that secret private placement was below market value nor was there any evidentiary foundation for that assertion — Chambers judge accepted evidence that CGM Inc. had to raise additional funds — Timing, source and pricing of financing was solely matter of business judgment entitled to substantial deference — There was no evidence directors did not act in best interests of corporation, despite that so acting may not have coincided with MS's personal interests — Chambers judge found MS had not attempted to exercise his right to appoint third director — Any expectation to control composition of board past date of annual meeting was inconsistent with corporation's public statements, statutory disclosure obligations and basic rights of shareholders to choose board of publicly-traded company — MS's reasonable expectation to appoint third director arose not out of MS's capacity as shareholder but rather as potential financier — MS possessed legal entitlement to acquire shares but did not have right to enjoin further share placements — MS and holding company's claims were contractual in nature and fell outside legal and jurisdictional boundaries of oppression remedy — Chambers judge found MS and holding company did not meet burden of showing they

suffered oppression, unfair prejudice or unfair disregard — No evidence MS's expectation he could appoint third director was violated in manner that was oppressive, unfairly prejudicial or that unfairly disregarded protected interests.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Oppressive conduct — Dealings with shares

Appellants, MS and holding company, alleged respondents breached MS's reasonable expectations he would control public company if he raised $5M and engaged in oppressive conduct including secret placement of shares that diluted MS's voting power and refusing to allow MS to appoint third member to five-member board when initial nominee refused position — Chambers judge determining MS had reasonable expectation Term Sheet would be honoured but not reasonable expectation he had sufficient shareholder support for control and dismissing appellants' oppression motion — MS and holding company appealed — Appeal dismissed — Expectation based on loss of opportunity to gain control of CGM Inc., without proof that opportunity more than merely speculative, insufficient to ground oppression — MS failing to identify personal interest that was violated; not sufficient to allege shareholders generally have expectation directors will not act oppressively — Timing, source and pricing of additional financing was solely matter of business judgment entitled to substantial deference and no evidence directors did not act in best interests of corporation, despite that so acting may not have coincided with MS's personal interests — Any expectation to control composition of board past date of annual meeting was inconsistent with corporation's public statements, statutory disclosure obligations and basic rights of shareholders to choose board of publicly-traded company — MS's reasonable expectation to appoint third director arising out of MS's capacity as potential financier rather than shareholder — MS and holding company's claims were contractual in nature, falling outside legal and jurisdictional boundaries of oppression remedy — MS and holding company not met burden of showing they suffered oppression, unfair prejudice or unfair disregard.

CGM Inc. was a public corporation involved in mineral exploration. The appellants, MS and his solely owned holding company, alleged the respondents breached MS' reasonable expectations that he would control CGM Inc. if he raised at least $5M in investments. In particular, MS claimed he was entitled to name three of five directors on the board and would retain control through the shares owned by him and the investors he introduced to CGM Inc. The appellants claimed the respondents engaged in oppressive conduct including a secret placement of shares that diluted MS's voting power and refusing to allow MS to appoint a third member to the board when his initial nominee refused to accept the position.

The chambers judge determined that even though MS did not raise $5M by the deadline specified in the Term Sheet, he had a reasonable expectation that the Term Sheet would be extended and honoured. He held that MS had a reasonable expectation that he would be permitted to appoint a director when his initial nominee refused to accept the position but declined to find that MS had an ongoing right to name a new director because he never took steps to appoint a new third director. The chambers judge found as a fact that MS did not have a reasonable expectation that he had sufficient shareholder support to control CGM Inc. at any time.

He dismissed motion for oppression.

MS and holding company appealed.

Held: The appeal was dismissed.

Per Costigan and Schutz JJ.A.: The chambers judge did not err in failing to find that the loss of an opportunity to gain control of CGM Inc. was a reasonable expectation violated by the secret private placement. An expectation based on a loss of opportunity, without proof that such opportunity was more than merely speculative, was insufficient to ground an oppression claim because causation and compensable injury have not been established.

MS and holding company failed to identify any specific expectation, apart from the expectation of control, which was violated. MS was required to identify a personal interest that was violated. It was not sufficient to allege that shareholders generally have an expectation that directors generally will not act oppressively. In any event, the chambers judge did not find that the secret private placement was below market value nor was there any evidentiary foundation for that assertion. The chambers judge accepted evidence that CGM Inc. had to raise additional funds in order to redo geological reports and other work the directors determined had been done improperly. The timing, source and pricing of this financing was solely a matter of business judgment entitled to substantial deference. There was no evidence the directors did not act in the best interests of the corporation, despite that so acting may not have coincided with MS's personal interests.

The chambers judge found that MS had not attempted to exercise his right to appoint a third members of the board of CGM Inc. Any expectation to control the composition of the board past the date of the annual meeting was inconsistent with the

corporation's public statements, its statutory disclosure obligations and the basic rights of its shareholders as a whole to choose the board of directors of their publicly-traded company.

MS's reasonable expectation to appoint a third director were not made by, or to, MS in his capacity as a shareholder but rather in his capacity as a potential financier, promoter or underwriter. MS possessed a legal entitlement to acquire shares at the relevant time but he did not have a right to enjoin any further share placements. In addition, MS and holding company's claims were contractual in nature and fell outside the legal and jurisdictional boundaries of an oppression remedy.

The chambers judge found that MS and holding company did not meet the burden of showing they suffered oppression, unfair prejudice or unfair disregard but there was not sufficient evidence to controvert the finding that MS took no steps to appoint a third director. Nor was there evidence that MS's expectation that he could appoint a third director was violated in a manner that was oppressive, unfairly prejudicial or that unfairly disregarded his protected interests.

Per Slatter J.A. (dissenting): The appeal should be allowed. Given the factual context, MS and holding company were properly regarded as complainants and the allegations they made were properly characterized as complaints about oppressive corporate conduct. It was difficult to regard the Term Sheet as being merely a contract. It was equally important in creating reasonable expectations that could be relied on by MS and holding company once they became shareholders and MS became a director and officer. Nor was MS merely an underwriter or financier. He was to become the CEO, a board member, and was also to have control of the appointment of the board.

The chambers judge's description of MS and holding company's expectation as centering around whether they could maintain control artificially characterized what was alleged, focusing on narrow legalities rather than business realities. He also set an unreasonably high evidentiary standard. MS and holding company demonstrated palpable and overriding error with respect to the expectation of control. The finding that MS never nominated a third director reflected a reviewable error of fact.

The secret private placement unfairly disregarded MS and holding company's interests and was prejudicial to them, making it oppressive. It was in direct breach of the Term Sheet. The chambers judge committed reviewable error by overlooking these breaches and overlooking the point that oppression remedies are concerned as much with fairness as they are with strict legal rights. It would be appropriate to refer the issue of remedy back to the chambers judge.

APPEAL by appellants MS and holding company from decision reported at *Shefsky v. California Gold Mining Inc.* (2014), 2014 ABQB 730, 2014 CarswellAlta 2173 (Alta. Q.B.), which dismissed oppression motion.

***Peter Costigan, Frederica Schutz JJ.A.*:**

Overview

1 This is an appeal from the dismissal of the appellants' oppression application. This appeal engages the analytical framework applied to oppression claims and remedies stipulated by the Supreme Court of Canada in *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.).

2 Not all unfair conduct rises to the level of oppression for which a court may grant a remedy; what may be oppressive in one factual context may not be oppressive in a slightly different factual context. Fact findings are the crucial foundation for the legal analysis that must follow, because within such fact findings the hearing court identifies the interests that merit relief, and within such fact findings the court assesses the nature of the impugned conduct and its effect. "The evidence is also critical to the court's determination of the appropriate remedy in the event that oppression is found": David S. Morritt, Sonia L. Bjorkquist & Allan D. Coleman, *The Oppression Remedy* [Toronto: Canada Law Book, 2015] at 1-10-1-11.

3 Although this reviewing Court may have assessed the evidence differently, we have identified no juridically permissible basis upon which to interfere with the chambers judge's decision. Fact findings are entitled to a high degree of deference. The parties were well aware of the limitations of the summary procedure they chose and we are satisfied from our review of the entire record that the chambers judge was entitled to find the facts and apply the law as he did; accordingly, the appeal is dismissed, for the reasons that follow.

Background

The standard of review for findings of fact and of inferences drawn from the facts is the same, even when the judge heard no oral evidence: *Housen* at paras. 19, 24-25; *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 406 (Alta. C.A.) at para. 9.

106 The appellants allege a number of errors. Firstly they argue that the chambers judge mischaracterized the third complaint as being limited to "a reasonable expectation of control". They argue that in the whole context, they had a reasonable expectation that the Incumbent Group would not proceed with the Secret Private Placement, which itself was an oppressive act that unfairly disregarded their interests. This issue engages a mixed question of fact and law. The facts surrounding the Secret Private Placement are not materially in dispute; the remaining issue is whether they can reasonably amount in law to oppressive conduct.

107 Secondly, error is alleged in the finding that any question about the reasonable expectation of nominating three directors out of five was moot. This is essentially a finding of fact.

108 Thirdly, it is alleged that the chambers judge erred in requiring that the appellants bring forth direct evidence from shareholders that they would support Shefsky by voting their shares as he recommended. This is primarily a question of the weight of the evidence, which is only reviewable for palpable and overriding error.

The State of the Record

109 The chambers judge unfortunately declined to make key findings of fact on some issues. He concluded that the law prevents a chambers judge from making findings on disputed evidence. He thus decided at para. 6 to resolve contested factual issues only "on reasonable inferences which can be drawn from uncontested facts, objective evidence, and the conduct of the parties." The reluctance of the chambers judge to draw inferences from the evidence before him leaves gaps in the record that require the necessary inferences to be drawn on appeal.

110 There are admittedly cases that point out the dangers of attempting to resolve disputed issues, especially those that rely on findings of credibility, based on conflicting affidavits and documents that would support either party's position. An example is *Charles v. Young*, 2014 ABCA 200 (Alta. C.A.) at para. 4, in which the chambers judge attempted to decide whether the respondent was the adult interdependent partner of the deceased. But the record before the court will never be perfect or complete, even after a trial. Not every conflict in the evidence precludes the chambers judge from drawing inferences from the admitted facts, the disputed evidence, the conduct of the parties, and the corroborating evidence (such as documents with objective reliability).

111 *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), a summary judgment case, pointed out the need to make greater use of summary procedures for deciding disputes. Rules that saw the trial as a default method of proving disputed facts should be moderated:

> 4 In interpreting these [new summary judgment] provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

The mere fact that there might be some conflicting evidence on the record did not mean that a "fair and just adjudication" was not possible.

112 The cases where it was impossible to resolve disputed factual issues in chambers tend to be more extreme. One category is cases that depend almost entirely on credibility, without any collateral documentation to support either side: *Nieuwesteeg v. Barron*, 2009 ABCA 235 (Alta. C.A.) at paras. 9-10, (2009), 460 A.R. 329 (Alta. C.A.); *Haluschak v. Stokowski* (1990), 104 A.R. 10 (Alta. Master) at paras. 23-25, (1990), 39 C.P.C. (2d) 8 (Alta. Master). In these cases, sometimes there has not even been cross-examination on the affidavits: *Montgomery v. Riviere*, [1989] A.J. No. 958 (Alta. C.A.); *Guimond v. Sornberger*

