

## SUMMARY OF ANTICIPATED OPGT SUBMISSION

1. This submission on the part of the OPGT concerns the remedy sought at paragraph 3 of the Trustees Application filed September 13, 2019, namely:

*“3. Alternatively, the determination of the ability to perform a subsequent trust to trust transfer, similar to what was approved by the 2016 Order.”*

2. One aspect of this is addressed in prior OPGT briefs, namely the feasibility of a transfer of assets from the 1985 Trust to the 1986 Trust. In those briefs the OPGT has submitted that such a transfer could not be carried out, primarily because of the lack of a common identity between the beneficiaries of the 1985 Trust and the governing beneficiary definition found in the 1986 Trusts. Such a transfer would also result in the elimination of some of those beneficial interests the Court has appointed the OPGT to represent.

3. However, the submissions made in the second portion of the December 20, 2020 Supplemental Reply Brief of the Trustees<sup>1</sup> and the option put forward of viewing the 1985 Trust as having “overlapping trust terms”, brought to mind the possibility of another trust to trust transfer option with the potential to resolve the various concerns of the parties raised in these proceedings.

4. In that brief the Trustees put forward the idea that the 1982 Trust’s beneficiary definition “travelled” with the 1982 Trust assets into the 1985 Trust, resulting in “overlapping trust terms”.<sup>2</sup> While the OPGT does not see the “travelling” concept as being supported by a principled trust analysis or the facts, the idea of a single trust including “overlapping trust terms” suggested the possibility of another approach.

5. This approach would entail a transfer of assets from both the 1985 and 1986 Trusts to a new trust -- the beneficiaries of which would be the beneficiaries of the two existing trusts, with both transfers taking place in accordance with the principles in the *Pilkington* case. Under the new trust the “overlapped” beneficiaries would be: (i) the members of the Sawridge First Nation (“SFN”); and, (ii) the current existing beneficiaries of the 1985 Trust who are not members of the SFN. The whole of the assets of each of the 1985 and 1986 Trusts would then be transferred into the new trust.

6. Each of the asset transfers would rely upon the Trustees’ existing power of advancement under each of the 1985 and 1986 Trusts<sup>3</sup>, and aspects of the jurisprudence reflected in *Pilkington* (and subsequent case law) which do not appear to be in dispute. In particular, it appears to be common ground that the Trustees’ powers permit resettlement of trust assets into a new trust if they are for the same beneficiaries.

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<sup>1</sup> Under the heading “*Can or should the 1985 Trustees adopt the terms of the 1982 Trust in respect of the beneficiary definition in the 1985 Trust*”.

<sup>2</sup> See paragraphs 20 and 23.

<sup>3</sup> Such transfers reflecting, without impugning, the same legal foundation that existed with the 1982 to 1985 trust to trust transfer-

7. Such a transfer would address the specific concern of the OPGT that a transfer of the 1985 Trust assets to the 1986 Trust would exclude the current non-SFN beneficiaries of the 1985 Trust as they would not qualify under the 1986 Trust's beneficiary definition. Instead, a transfer to a new trust could effectively accomplish the "grandfathering" of the interests of the existing non-SFN beneficiaries of the 1985 Trust. The Trustees have indicated general support for "grandfathering" the interests of those beneficiaries; albeit without providing a legal foundation for accomplishing the same.

8. The OPGT notes that "grandfathering" the non-SFN beneficiaries into an existing Trust such as the 1986 Trust (or for that matter the 1982 Trust) would, without more, require a variation of that Trust. This would necessitate an application to the Court; consideration by the Court of whether it has jurisdiction to grandfather; and consideration by the Court of whether any such jurisdiction should be exercised. The difficulties in establishing jurisdiction have previously been alluded to by the Court, including the fact that jurisdiction to approve a variation under the *Trustee Act* requires the consent of all beneficiaries.

9. In contrast, the concept being put forward by the OPGT requires neither the consent of the beneficiaries, nor the exercise of any jurisdiction on the part of the Court (although the advice and direction of the Court could be sought). As set out in the paragraph 32 of the December 20, 2020 Supplemental Reply Brief of the Trustees "*[a]ll parties agree that beneficiary consent to an advancement is not required.*" In other words, the power of advancement found in each of the 1985 and 1986 Trusts can be appropriately exercised by the Trustees without the need for the consent of the beneficiaries of either Trust.

10. As this concept melds the beneficiaries of the 1985 Trust and 1986 Trust into the new trust it might be seen as diluting the interests of the both sets of beneficiaries. However, as the Trustees have previously submitted, dilution is permissible given the "discretionary" nature of each of the trusts.<sup>4</sup>

11. In short, the concept safeguards the interests of those beneficiaries of the 1985 trust who are not SFN members (including such beneficiaries who are minors and whose interests the OPGT represents) while giving effect to the submissions which have been made as to the ongoing interests of SFN band members in band member assets placed into trust.

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<sup>4</sup> At para. 20 the Trustees (under the "travelling beneficiary" idea) effectively put forward there being no cause for complaint for the 1985 Trust beneficiaries to have added into the 1985 Trust the beneficial interests of SFN band members (i.e. 1982 Trust beneficiaries) who do not meet the 1985 Trust definition of beneficiary. And at para. 31, when speaking to the a dilution of the interest in the context of the 1986 Trust beneficiaries were 1985 Trust beneficiaries to be grandfathered into the 1986 Trust, the Trustees put the matter this way: "*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.*" The same would hold true for the respective beneficiaries of the 1985 and 1986 Trust upon their finding themselves in the enlarged group of beneficiaries of the new trust as proposed by the OPGT. See also paras. 13-15 of the Trustees's brief.

12. This concept also:

- Renders moot the jurisdictional question of whether the discriminatory aspects of the 1985 Trust beneficiary definition call and allow for the intervention of the Court. After the trust to trust transfer the 1985 Trust would be no more.
- Provides an opportunity, in the crafting of the new trust, to address and avoid other discriminatory aspects of the existing 1985 and 1986 Trusts, such as the discriminatory treatment of illegitimate children which exists in both trusts.

13. Further, the Court could give direction approving the existence and exercise of the power of advancement by the Trustees to create, and transfer assets to, the new trust. While it is not the Court's role to exercise such a discretion for trustees, it is within the court's role to approve such exercise as was done in by the Asset Transfer Order in 2016. Such approval would not involve calling upon the Court to engage in the application of any inherent jurisdiction that it may or may not have in the matter.

14. It would be important to ensure the new trust's terms properly reflected the legal obligations of the trustees of the new trust, in the exercise of their discretion, to not act in disregard of or unreasonably towards the interests of the non-SFN beneficiaries. Such beneficiaries would stand on an equal footing with SFN beneficiaries and their interests must be treated accordingly in any scheme of distribution. The OPGT says this having regard to its court-assigned role to work towards "*a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not.*"<sup>5</sup>

15. The concept described herein is seen by the OPGT as being protective of the interests of the currently existing minor non-SFN beneficiaries of the 1985 Trust that the OPGT has been appointed by the Court to represent. To be noted, this would leave to the Trustees and the Court the matter of whether the beneficiary class under the new Trust need or ought to extend to the interests of future, contingent non-SFN beneficiaries of the 1985 Trust – i.e. beyond currently existing beneficiaries.

16. The concept would also entail a number of technical details that would need to be worked out to ensure the new trust was equitable and workable for all the interests concerned. An example would be arriving at agreement with the Trustees on a specific list of non-SFN individuals who currently qualify, under the 1985 Trust beneficiary definition. However, the OPGT submits such details to be resolvable, including with the assistance of the Court.

17. In conclusion:

- The December 20, 2020 Supplemental Reply Brief of the Trustees calls out for a solution to the issues that have arisen in the course of these proceedings.
- The OPGT submits the concept described above, which draws upon common ground to be found in submissions made on behalf of the Trustees meets such call with "*a practical, productive, non-destructive solution*" one which "*could be managed by the Trustees with certainty for many years to come*"<sup>6</sup>.

<sup>5</sup> *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 (CanLII), (Sawridge #3) at para. 40

<sup>6</sup> December 20, 2020 Supplemental Reply Brief of the Trustees at para. 30