Action No.: 1103-14112
E-File Name: EVQ21SAWRIDGE
Appeal No.: _____

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

IN THE MATTER OF THE TRUSTEE ACT,
R.S.A. 2OOO, c T-8, AS AMENDED

AND IN THE MATTER OF THE SAWRIDGE BAND INTER
V1VOS 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")

P R O C E E D I N G S

Edmonton, Alberta
September 27, 2021

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M.S. Sestito (remote appearance)	For Sawridge Trustees
R.M. Johnson (remote appearance)	For Sawridge Trustees
P.J. Faulds, QC (remote appearance)	For Office of the Public Guardian and Trustee
J.L. Hutchison (remote appearance)	For Office of the Public Guardian and Trustee
C. Osualdini (remote appearance)	For C. Twinn (remote appearance)
(No Counsel)	For S. Twinn (remote appearance)
E.H. Molstad, QC (remote appearance)	For Sawridge First Nation
E. Sopko (remote appearance)	For Sawridge First Nation
M. O'Sullivan	Court Clerk

THE COURT: Okay. Thank you very much. We have all of the counsel present.

MS. BONORA: I believe we do, Sir.

THE COURT: Everyone is present.

MS. BONORA: Yes, Sir. Doris Bonora speaking --

THE COURT: Okay.

MS. BONORA: -- from Dentons, representing the Sawridge Trustees. Perhaps I can just do a short rollcall for you --

THE COURT: Sure.

MS. BONORA: -- if that would be helpful.

THE COURT: Thank you very much.

MS. BONORA: So we have for the Sawridge Trustees, Doris Bonora, Michael Sestito, and we will be speaking today. We also have Rhonda Johnson

joining us. From the Office of the Public Trustee and Guardian we have John Faulds and Janet Hutchison. Representing Catherine Twinn is Crista Osualdini. Shelby Twinn is here on her own as an intervenor and self-represented. And from the Sawridge First Nation we Ed Molstad and Ellery Sopko.

THE COURT: Okay. Excellent. So just before we get underway, because there are quite a number of people on this call, I find that it goes much more smoothly and there is likely to be disruption if everyone mutes, apart from the speaker, obviously. And so, I would ask that everyone mute their microphone before they begin to -- before it is their turn to speak and, of course, access the -- the system again once you are ready to speak. So hopefully we will be able to get through these submissions without any technical glitches.

And so, with that, Ms. Bonora, over to you. I did get your schedule yesterday and I take it that that has been the subject of consultation with -- with other counsel; is that right?

MS. BONORA: Yes, Sir, and everyone has approved. So our plan today is to try and limit our submissions to 45 minutes each so that the order of speakers today would get through all of their initial submissions, and tomorrow everyone would do a reply. And so, tomorrow we'll essentially reverse the order --

THE COURT: Yeah.

MS. BONORA: -- of speakers so that Mr. Molstad and Ms. Sopko will start first with the replies and the trustees will end and finish the application --

THE COURT: Thank you.

MS. BONORA: -- tomorrow.

THE COURT: Thank you and I --

MS. BONORA: And, Sir --

THE COURT: I should also say that I have read each of the briefs that have been filed and thank you very much for those. They were extensive and very (INDISCERNIBLE) so thank you for that.

MS. BONORA: Thank you. Sir, I thought we would also tell you that we will order the transcript of the two days today and we will provide it to all of the parties and intervenors, post it to the website, and provide the Court with a copy, if that's

of assistance to you in terms of the ability of -- or the requirement to take as many notes today.

THE COURT: That would be extremely helpful. Thank you very much for that.

Submissions by Ms. Bonora

MS. BONORA: So, Sir, then I will begin with our submissions. Our submissions are going to be split with me and Mr. Sestito this morning.

Sir, just by way of then a background, we are here today to talk about the asset transfer order that was granted in 2016. In terms of bringing us with a little bit of history, we know that before 1982, the Sawridge First Nation held assets in trust for its members by having individuals hold assets because there was a concern that the First Nation couldn't own assets and in 1982, those assets were transferred into a formal trust and, of course, we'll refer to that trust as the 1982 trust today, and that trust was set up for the members of the First Nation.

In 1985, on April 15th, a new trust was created for the members of -- in the trust deeds read to a member of -- of the band, although we'll call them the First Nation, and that definition of members was tied to the *Indian Act* as it existed in 1982, and the assets were transferred from the 1982 trust to the 1985 trust and I think everyone will be referring to that trust as the 1985 trust. We know in trust law, the 1982 beneficiaries would have had beneficial ownership of those assets and those assets then were transferred into the 1985 trust, and we will discuss today whether there was a same group or a different group of beneficiaries.

In addition, there was a 1986 trust created in --

MR. CARDINAL: Cathy?

MS. BONORA: -- 1986 for --

MR. CARDINAL: Cathy?

MS. BONORA: -- the members. Mr. Cardinal, I wonder if you could turn on your mute button.

MR. CARDINAL: Okay.

MS. BONORA: So in 1986, there was another trust created into

which different assets were transferred. And so, the discussion today is really about the transfer of assets from the 1982 trust to the 1985 trust. The -- today we're going to be talking about what we are going to call the objective definition of members versus the definition of members that is in the 1985 trust, which is a definition that is said to be members but is a very different definition than what we're going to say is the objective definition, which is members who are on the membership list at Sawridge First Nation, who have the right to vote, who have certain rights by knowing that they are members because they're on the membership list.

This action was commenced for two reasons. The primary reason was to seek advice and direction on the definition of the 1985 trust definition of beneficiaries, knowing that it is discriminatory and asking the Court whether it was possible to leave that definition alone or to amend that definition. In addition, we notice that the transfer of the assets from 1982 to 1985 was not done in a conventional way and we certainly did not want to get through all this litigation only to have someone say that the transfer wasn't proper. And so we added that as an element which was -- was asking the Court to approve the transfer from 1982 to 1985, two quite distinct issues and in 2016, the order was made that says there was a transfer from 1982 to 1985.

So the assets moved, and I think in your questions to us you said that the assets did move but the question you posed to us, a strict legal question, which we're hoping to answer today, was Was there -- what -- on what terms did that transfer occur. Did the 1982 terms in fact travel with those assets and that is the question that we are going to provide you with, hopefully, some legal foundation to answer. I'm going to deal with more of the legal foundation. Mr. Sestito will concentrate on some of the solutions and legal foundation for those solutions.

The -- I think if we look at all three of the actual trust deeds, there is certainly a common tie around the fact that they all appear to be for the benefit of members. Certainly pre-1982, 1982, and 1986, I think there is a common tie, a clear definition that those are for the members, as we would say, that are on the membership list. It's only in 1985 where we have a definition that says its members but in fact is not really the members that are on the membership list.

Much has been said about fiduciary duties and we're going to submit today that we believe the primary fiduciary duty for the Sawridge trustees is to advocate for a solution so that we can, in fact, use this trust fund for the beneficiaries. And so, for sure there are many conflicting fiduciary duties for beneficiaries, for asset protection, trust administration. The -- certainly, the 1982 trustees had fiduciary duties to its beneficiaries to preserve those assets and to follow the trust deed and one could argue that in transferring the assets to another group of beneficiaries by a different definition did not fulfill its fiduciary duties. It

certainly excluded certain beneficiaries, which we're going to call the bill C-31 women, and we would suggest that perhaps the 1982 trustees had the ability in using their discretion to exclude beneficiaries. They didn't have to give money to everyone but to include beneficiaries was perhaps not following their fiduciary duty. Certainly, the 1985 trustees, who we represent, have fiduciary duties to beneficiaries and to their assets but, as we know, the -- you have to look at the totality and we're going to talk -- I'm going to talk a bit later about constructive trusts and whether the document that is 1985, is in fact a document that can be followed.

There are a group of what we'll call overlapping beneficiaries. So there are beneficiaries that are both beneficiaries in 1982 and beneficiaries in 1985 by both definitions and it is perhaps those group of beneficiaries that are the beneficiaries of 1980 -- the 1982 or 1985 trust and Mr. Sestito will follow that a bit further.

We know that the 1985 trust is discriminatory. There is an actual court order in this litigation that says it's discriminatory. In tab 5 of the OPGT's brief in November of 2019, they put in an article around the legislation history of bill C-31, which I think is very helpful in showing that there was longstanding attempts and finally success in the ridding the *Indian Act* of discrimination against women and -- and trying to deal with not discriminating against illegitimate children. And so, the purpose -- a big purpose of this litigation was to see if we could also rid the 1985 trust of that discrimination and not keep the '85 trust as it was.

A great deal of the briefs around -- from the OPGT and from Catherine Twinn involve interpretation of the asset transfer order and it is our submission that there is no reason to interpret that order beyond what it says. And, Sir, if you -- we had provided you just a small binder of materials we want to refer to and the first is under tab 1 is that asset transfer order and the asset transfer order is also found at tab I of the OPGT brief on November 15th, 2019. When we look at -- and in addition, there's also -- sorry. The -- the order and -- the order is in our first binder and also in the brief and then the application is also at tab I of the OPGT brief in November 15, 2019. And I think those two documents are very telling in terms of the idea that we were putting together an order that had anything to do with beneficiaries.

If we look at the asset transfer order, it's very clear that it deals only with the transfer of assets and the only time beneficiary is mentioned is in paragraph 2, where it talks about the fact that this order can't be relied on to prevent a beneficiary from seeking an accounting, but no other time is beneficiary mentioned. So clearly, I think, on the face of the order there was no intention to say that the transfer was for the benefit of the beneficiaries as has been suggested. In the application as well -- so one of the things that we would look at in -- in interpreting an order is the pleadings. The application does not make mention of anything

to do with the benefit of beneficiaries or the determination of beneficiaries.

At tab J of the OPGT brief, they put in the transcript from the hearing and Justice Thomas clearly says on page 9 at line 12: (as read)

> The one outstanding issue is the scope of the beneficiary group.

And so then it's clear that the asset transfer order was, as you clearly said, the assets moved from here to there and there is nothing more to that interpretation. That the definition of beneficiary, the determination of whether the beneficiary definition will change in 1985 was still very much an open question. And if we look at the cases that have been cited and particularly the *Simonelli* case, which is at tab 1 of the OPGT's brief of November 27th, 2021 (sic), it does say that the first rule is that an order must be interpreted to give effect to the intention of the parties.

Well, it was certainly our intention only to deal with the very distinct issue that the assets are being dealt with in the 1985 trust and that there was no mention of the beneficiaries and we weren't determining who the beneficiaries were at that time. And, in fact, as you know, you came into this litigation when we were about to deal with the jurisdiction application, which was very much about determining those beneficiaries. So if we look at the totality of the application on the transfer, there is no mention of beneficiaries in the order or in the application. The Court specifically reserved that issue, the applicant specifically reserved that issue and, therefore, it's not possible that it was solved.

I think it's important to also focus - and you asked us to focus - on what happened in 1985. So in 1985, when the assets actually transferred to the 1985 trust, we know that on the day that they transferred on April 15th, the beneficiary group was the same. While the parties in this litigation don't agree on many things, they do agree on that. That problem is is that the beneficiary group changed on April 17th, 1985. And so, it is our submission that *Pilkington* does apply.

The *Pilkington* case was used, as you know, to -- to say that the asset transfer was legitimate, but *Pilkington* probably only continues to work if the -- if the beneficiary group stays the same. There is nothing in *Pilkington* that says as long as it's the same on the day that you transfer, it's okay to change the beneficiaries later. I think *Pilkington* stands for the proposition that the beneficiaries need to stay the same, and certainly if you look at the *Hunter* case, which looks at *Pilkington,* it also says that the -- the terms of the new trust must be beneficial to the beneficiaries of the old trust and looks at -- and Mr. Sestito will deal with this further but, is the benefitting -- the question will be is benefitting non-members alien to the intention of the 1982 trust or adding many people who are not members or not beneficiaries of the 1982 trust and -- and specifically excluding some who

had a beneficial interest, is that -- is that proper under the *Pilkington* principle. And so, we're suggesting that it does work if you look at those overlapping beneficiaries but it doesn't work if you say it was okay the next day to include a whole new group of beneficiaries.

In any trust, intention is important and certainly when we look at who this trust was created for, the settler in this case was not some individual. It wasn't his money. It was money or assets that belonged to a community and it was not his personal intention but, in fact, a community's intention to create a trust. He was the chief of that community and he put the community's assets in that trust. So I think it is important that it wasn't his ability to give those assets away to those people who were not members of that nation.

The -- many of the briefs talk about the fact that it perhaps was beneficial to the 1982 beneficiaries to not have the dilution that would have been caused by the bill C-31 women. Those 11 women that ultimately were the subject of the Hugessen decision, but then it's difficult to reconcile that with the idea that perhaps today we're going to add 50 people of 76 people or, as Catherine Twinn suggests, perhaps 454 people. You can't say that it's beneficial to avoid dilution for 11 people but then it would be acceptable to dilute for so many others, but I think that it also shows that there wasn't a culture of inclusivity. Catherine Twinn talks about the fact that the 1985 trust was created to allow a great number of people to benefit because they had kinship ties to the Sawridge First Nation. Well, by definition then *Pilkington* would not apply because that could not be the same group of beneficiaries. So I think that it would be difficult to say that you could rely on *Pilkington* but then suggest that you would have a group of people that didn't need to be members, they only needed kinship ties.

But I think if we look at the whole history of the Sawridge First Nation and the history of these trusts and what was happening, there's actually a culture of exclusivity and the OPGT, I think, did a very good job of putting together the actions that were taking place, which is in their brief in November 2019, in paragraphs 18 to 20, and I'll just go through them. So we first had a trust that was established in 1985 to exclude the bill C-31 women, and I think that was clear that that was part of the purpose. But then they commenced constitutional challenge to bill C-31 to oppose imposition of members on their nation and, certainly, the female members who would be included in bill C-31.

Another example of exclusivity is they established their own membership code so that the government would not be controlling their membership and they would control who was a member of their nation. They very strenuously oppose the injunction brought by the government to include the bill C-31 women and in the Hugessen decision, Mr. Justice Hugessen makes reference to the fact that Catherine Twinn argued very eloquently about the exclusion of those women, but ultimately the injunction was granted to include them.

But that shows, again, their culture of exclusivity. And the submission to the house committee, which Shelby Twinn put forward, shows their opposition to bill C-31 and the further inclusion of members.

When we look at, again, you know, whether these assets should have been used for members, the OPGT in their brief in November of 2019, and at tab L, and also at tab 8 of our small binder that we provided, the letters from the Crown all ask whether the assets in these trusts are assets being used for the members, and that definition would be that objective definition. It would be not be the definition used in the 1985 trust. So clearly those assets are to be used for that. Chief Twinn, in 1993, testified that he was concerned about the reinstatement of a large group of people, again, showing his concern for keeping the First Nation member group small. And said also that he would transfer to 1986, which again only works if it's the same group of people, and that transcript is found at the OPGT brief in 2000 -- in November of 2019, at tab N.

Sir, I'm not going to take you to these. I think if you would like to look at them -- that's why I'm putting the reference on the record, but I think it's just easy to show you that that's where they are.

Moving on to the whole issue of a class gift. We believe that it's very obvious that if you look at any of the trusts, the group of beneficiaries is a class. It is not a group of individuals that are receiving these trusts and when you look at the definition of a class gift, it's a gift to a number of individuals united by a common tie, and but always when you're looking at the beneficiaries, then you're looking at the whole body of beneficiaries. And so the class here would be members, and we would suggest that perhaps you can make the conclusion that the members are by that objective definition and not by the definition in 1985. It is clear who those people are and clearly when you're looking at the three certainties of trust, you should be able to determine who your beneficiaries are and if you say it is the members, the objective definition of members, the members who are on the membership list, then you know that -- who those members are and it is very clear. It's when we refer to the 1985 definition, which takes us back into antiquated legislation that is now defunct, that it becomes more difficult.

Sir, in the *Bruderheim* case that you decided, you talked about this concept of a static entity and we would suggest that that case is very applicable here. That the members may come and go but the ownership of assets stays static from the individuals and in this case we would say that static entity is the members of the First Nation. That they had the beneficial ownership before 1982, they had beneficial ownership in 1982, and when it transferred to 1985, they retained that beneficial ownership. If you could look at the *Bruderheim* case, I would like to take you to one of the quotes in *Bruderheim* and it is at tab 3 of the trustee's brief, the November 20th, 2019, but it is also tab 6 in our small binder if that's easier for

you. And I'd like to start by looking at paragraph 70 because you talk in that decision about the three certainties and the creation of an express trust requires the presence of the three certainties, namely intention, subject matter, and object. And then at 74 you say:

> Certainty of objects requires that the persons or the class of persons who are the intended beneficiaries must be sufficiently certain so that the trust can be performed. Certainty of objects is required because the trustee cannot be sure that he is performing properly unless the objects are clearly specified.

And then you refer in paragraph 76 to the concept of the static entity where you say:

> Canon 14 enacted by the Synod provided that legal title to all real property held by any parish within the diocese must be registered in the name of the Synod, which held such property "in trust for the benefit of the Parish or congregation". The trial judge held that the "Parish" for which the property was held in trust is a static entity.

And we're suggesting that that applies in this case.

And specifically then, if we look at paragraph 131 of that decision, I think it's very applicable here where we say -- where you say:

> The Applicants argue that even though their members may no longer be members of the Moravian Church, they are nevertheless “of Moravian Heritage”. They argue that this should satisfy the Moravian requirement in the trust declaration. This argument entirely ignores the plain wording of the trust declaration and the institutional context. The declaration requires that the property be held in trust for the congregation of the Moravian Church. Having Moravian heritage does not make a person a member of the congregation of the Moravian Church. A past membership in the Moravian Church is insufficient to permit a beneficial interest in the trust. All beneficiaries must be current members of the Moravian Church.

And I would suggest to you that that's exactly what you could apply specifically here. That the beneficiaries must be members of the First Nation. That just being of Moravian heritage or just being of a heritage of the Sawridge First Nation or having kinship ties, as has been suggested, would not be sufficient as the trust and the trust assets have always been either

owned by the First Nation or held in beneficial ownership by the members of the First Nation.

The -- and so, we would suggest that if you look at the class gift as being for the members in 1982, that those beneficiaries held those assets. The trustees held the legal title and transferred the legal title to 1985, but there is no suggestion about why or how the beneficial ownership transferred to a whole new group of people who were not members of the First Nation, and we believe that the trustees are fulfilling their fiduciary duties by protecting the members of the class.

The origin of the assets, which I know Mr. Molstad will talk about, but I'll just say briefly I don't think it's disputed that the assets all came from the Sawridge First Nation resources and, therefore, belong to the members of the First Nation and so, therefore, how should these assets be used. Perhaps I think the answer would be that they should be used for the members just like the assets that came for the Moravian church should be used for people who are members of that Moravian church. It is difficult to understand how then those assets could be used for non-members because we know that the 1985 trust would, in fact, allow non-members to be beneficiaries.

And, Sir, we I think have been clear that, you know, ultimately there may be a grandfathering application and those non-members may be dealt with, but I think if we look at the trust and the question you asked us, it is difficult to see how those could be transferred to non-members. And it's possible that it -- it could be argued that the trustees of the 1982 trust did breach their fiduciary duties in giving those assets to people who were not members or not beneficiaries of the 1982 trust.

If we look at the whole concept of a constructive trust, you know that there are three elements for a constructive trust. There must be an enrichment, a corresponding deprivation, and no juristic reason for that deprivation or enrichment, and the classic argument is where you have a farmer and perhaps his son or his wife who contribute greatly to the farm. They clearly have enriched the farm and ultimately though they are not owners, and the Court then imposes a constructive trust so there is not the enrichment with the corresponding deprivation because no one would work on that farm to get nothing, and we would say here that the 1985 beneficiaries are being perhaps unjustly enriched at the expense of the 1982 beneficiaries who had beneficial ownership, and there is certainly a corresponding deprivation for the 1982 beneficiaries and seemingly no juristic reason for transferring that beneficial ownership to a group of beneficiaries who are not members in the objective definition.

It seems that the respondents have placed a great deal of weight on the actual document that is the 1985 trust, and they have the right to do that. It is a trust deed and it was drafted

and it was signed and there was $100 given to create that trust, but as we know in trust law, the document is not the whole answer to whether there is -- that is the whole story to the trust. And so, I've given you the farmer example where the farmer is the owner on the title -- on the land title and that is the document and under our attorn system you should be able to rely on that document, but the constructive trust says no, you don't rely on that document. That there's something more here that would say that there's another beneficiary here that is involved because of that constructive trust, and that is the same in a resulting trust.

So you can say that the 1985 trust is a document, be all end all, you don't need to look further, but if you look at a land title document in the concept of a resulting trust, you might have a parent and child registered on that title and if you just said we're looking at the document and nothing more, when the parent dies the child gets that title if they are joint owners on that title, but the resulting trust would say did the child provide any consideration to receive that title, was he actually just holding that title for the benefit of the beneficiaries of the estate of that parent, and that is the essence of a resulting trust. And so the question you would give is what consideration did the 1985 beneficiaries give to become beneficiaries of 1985? They are not -- if they are not members of the nation, they were not part of that community and what consideration did the 1982 beneficiaries receive for giving up their beneficial ownership? And so, we would suggest that there is a good argument to be made that if there is no consideration given, if there's no intention for the -- for the 1982 beneficiaries to give up their beneficial title, then there is perhaps a resulting trust for the 1985 beneficiaries to hold it in trust for what are the 1982 beneficiaries.

There has been much said about trying to identify the beneficiaries and I've already quoted you the *Bruderheim* decision that talks about the need to identify beneficiaries, but that is very trite law in trusts. Clearly, there is a duty to identify beneficiaries. The respondents have told you that it's very easy to do. That you just apply the Act and the Act has been applied by the government for years and that isn't a problem, but in fact we have a number of examples where it obviously has been problematic. So there's a reference to the *Michelle Ward* decision in Catherine Twinn's materials where it wasn't clear and a court had to decide that she was a member of the nation. We have Morris Stoney and the 13 applications that he brought to become a member of the nation and then further applications in this litigation to become a beneficiary, all of which were unsuccessful but it didn't prevent the litigation from happening.

We have the issue around Justin Twinn, which we've provided the materials in our smaller binder, but I will just say he was someone who was on the membership list in 1985, when membership was transferred to the First Nation. He had been a councillor of the First Nation. When he was proposed as a trustee, Catherine Twinn opposed his appointment because she said he was not a beneficiary, and there were two competing expert opinions given on whether he was a beneficiary. So it may be that there are times when it's not hard

and for sure the government has been doing it, but we have very concrete examples where it was difficult and it wasn't determined and litigation was required to determine who the beneficiaries were -- are.

In November -- in our brief in November 30th, 2020, we provided you with a number of lists of beneficiaries and I don't propose to go through them, but they're at tab 2 and 4 and 6, and they show you the trustees' version of how are the beneficiaries of 1985, where there's intersection in terms of whether they were beneficiaries and members, and then colour-coded with issues in terms could these people be protested because they were illegitimate. Will these people lose their status -- will these women lose their status if they marry someone who is not First Nation or not a member of the First Nation. And so, you can see that there's many, many places where litigation could ensue in terms of trying to deal with the 1985 trust definition of beneficiary and trying to apply an act that is now defunct and unconstitutional.

It is true that when we -- and I think -- sorry, in the third brief that Shelby Twinn filed, she also shows difficulties on pages 11 and 12 and paragraphs 28 and 31 in terms of identifying members of the First Nation. I think it is important as well that the public trustee has talked about the number of minors who might be impacted if in fact the 1982 definition is, in fact, upheld as the definition that should govern the 1985 trust or that the 1982 beneficiaries are holding it -- or the 1985 trust beneficiaries are holding it for the 1982 beneficiaries, but I think it's important and our lists show that there are in fact children who would also be left out if in fact the 1985 trust beneficiaries was upheld as the beneficiary definition to follow.

I just want to conclude with the concept around final relief and then I'll turn it over to Mr. Sestito. This is an advice and direction application where we're asking a legal question and I think in the cases cited in respect of this issue, it's clear that a legal question can be answered by the Court in an advice and direction application. The Court shouldn’t answer trustees when they ask discretionary questions, but they should answer legal questions. From the start of this litigation we were seeking advice on what was the proper definition and certainly it was always clear that rights of beneficiaries might be impacted.

So there have been many threats of more and more litigation that I think the Sawridge First Nation put forward the case of *Hryniak v Mauldin* from the Supreme Court of Canada that says trials are no longer the default procedure and that more procedures should be used that are proportional, timely, and affordable and, certainly, too much money has been spent on this litigation and from the trust for lawyers as opposed to providing it to the beneficiaries. So we're asking for the Court to answer this legal question that was really posed by the Court and now we are asking for this answer where the members are the class or the static entity in that objective definition of members, that the 1985 trust assets are imposed with the 1982 definition of beneficiaries.

And now I'll turn it over to Mr. Sestito to provide more of the legal foundation for the solution, unless you have any questions for me.

Submissions by Mr. Sestito

MR. SESTITO: Thank you, Ms. Bonora, for that. Am I on mute? It's not --

So, My Lord, I'm going to be focussing my submissions today on the brief of the trustees that were submitted on December 11, 2020, and filed on December 14, 2020. I don't know if you have available a physical copy of that brief but if not, I have the key references in that binder of material.

So, Sir, really our December 2020 submission can be divided into two sections. First, the trustees propose a modified framework for reviewing the key issues in the -- as we've been calling it, this asset transfer order or ATO application, and that, which is the submissions I will focus on, they're -- they're found at paragraphs 5 to 33 of that December 2020 brief.

The second portion of that brief, Sir, which I will make very brief reference to, are individual responses to various positions raised by some of the parties. And those are set out at paragraphs 34 to 76 of that brief. And, Sir, I simply want to, for that second section, is highlight a few very important counter points that the trustees have raised that I think are important for you when you're making your decision in this application. The first is with respect to jurisdiction and that can be found at paragraphs 34 to 38 of -- of the December 2020 brief. The second, Sir, is with respect to the sufficiency of the record, and that we set out at paragraphs 39 to 49 of that brief. And then finally, Sir, with respect to this debenture that has been the subject of much discussion, we discuss that at paragraphs 56 to 61 of our brief.

And, Sir, absent any burning questions that you may have, I don't propose to go into any more detail other than to say, Sir, that it is the position of the Sawridge trustees that you are well situated and well positioned to answer the issues raised in the ATO application. You have the jurisdiction. The record is of sufficient detail to assist you and there are no outstanding items that require further briefing. We believe that you will have the material before you to make the decision on the application.

So, Sir, unless there's any questions on those specific points, I'm going to turn to the modified framework that's proposed by the trustees. That's set out in section A of that December brief.

So the trustees, Sir, have proposed three fundamental questions that we believe will assist you in determining the issues that are at the heart of this matter. The first question that we pose is under what authority did the 1982 trustees transfer the assets, and was the effect of such transfer alien or incidental to the intention of the settler in 1982? The second question, Sir, that we posed is can or should the '85 trustees adopt the terms of the '82 trust in respect of the beneficiary definition into the '85 trust? And then, thirdly, Sir, the question we propose is did the transfer occur so that the '85 trustees could hold the '82 assets for the overlapping group of '82 beneficiaries and '85 beneficiaries?

And by way of summary, Sir, we submit that the first question, the answer to the first question or the discussion around the first question identifies the key issue with simply interpreting the assets as being governed solely by the four corners of the 1985 trustees. The second question, the discussion around that, will pose a potential solution to the problem, and the third question proposes an alternative solution that the Court may wish to investigate.

So, Sir, with respect to the first question, the '82 trustees, and we'll go through the deed, Sir, but they were given a wide and discretionary power of advancement, which in law may include the power to resettle the trust property to another trust as long as it was for the benefit of the '82 beneficiaries. The scope of that power is necessarily limited by the '82 trustees overarching fiduciary obligations to act in the best interests of all members, present and future, of the band. Now, Sir, the Court has acknowledged that the trustee has the power to transfer assets to a new trust, which may have different wording than the original trust, but the Court must review the new trust to determine whether or not the new trust is alien to the intention of the original testator or would be beyond the scope of power of those original trustees. And, Sir, I'm not going to take you there, but the test is set out at *Hunter Estate v Holton*, which is at tab 1 of that December 2020 brief.

So, Sir, it is the position of some of the parties that the '85 trustees need only abide by the terms of the '85 trust deed with respect to the assets in question. Now, this argument would by necessity require that the '85 terms as a whole were not alien to the intention of the '82 settler or beyond the power of the '82 trustees. So to evaluate the reasonableness of that argument, we need to look very closely at the text of the '82 trust, which it's found, Sir, helpfully at tab 2 of the December 2020 brief. It's also tab 2 of the binder that we've provided for ease of reference. So in either case, helpfully, it's at tab 2, and if -- if we can go there together, Sir, I'd like to start with the first page of tab 2 on the declaration of trust in the preamble, where we see it says: (as read)

> Whereas the settler 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.

And, Sir, that's why you'll hear me repeat many times to paraphrase the present and future members of the band.

So if we go, Sir, to page 2 of tab 2, we see again our reference in the first paragraph where it is likely that further assets will be acquired on trust for the present and future members of the band. Again, the same terminology used, Sir. If we go down, Sir, into the text of the deed itself and we look at item 3, Sir. Item 3 reads: (as read)

> 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 purposes set out herein.

Now, if you move on, Sir, to the beginning of item 6, which over the page on page 3, we see again item 6 begins with that very key statement that: (as read)

> The trustees shall hold the trust fund for the benefit of all members, present and future of the Band.

Again, using the same terminology that you'll hear many times from me, Sir.

At this point, Sir, I pause to point out, and as Ms. Bonora alluded to earlier today, that it's pretty clear from the terms in the text of the '82 deed that the beneficiaries here are a class and not necessarily individuals, and that we're dealing with a situation of a class gift.

So, Sir, if we move on then to page 4 of that same document, and I won't read the entire paragraph to you. I see that, at least in my version of the binder, the highlighting didn't show up but I'll simply direct you, Sir, if you're in the brief, in any event, page 4, the first full paragraph there. This is where we outline the discretion of the Sawridge trustees from the 1982 trust, and I just want to read a part of that, Sir, to -- to emphasize it: (as read)

> 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.

So, again, Sir, in -- in reviewing the 1982 deed where this story begins, I just wanted to

draw those very important excerpts to your attention.

Now, Sir, with the terms of the '82 deed in mind, we now move to the question of whether or not the '85 trust is alien to the '82 settler's intention or outside of the power of the '82 trustees. The '85 deed clearly departs from the written text of the '82 trust in multiple respects but the clearest and most significant that is at the heart of this matter is the definition of beneficiary. The '82 trust describes clearly the actions of the trustees and the requirements that those actions be taken in the best interests of the members, future and present, of the band. The '85 deed is much different in this regard, going beyond simply the members of the band, and as we know today, not including all of the members of the band.

So, Sir, if the trustees' numbers are accepted, and Ms. Bonora has alluded to previous briefs in which we set out the -- the different numbers of -- of beneficiaries, those who are overlapping, those who are part of the First Nation, those who apply under '85, but if we just for the moment accept the trustees' numbers - and there is some controversy behind these numbers - but if we accept our numbers, then approximately half of the '85 beneficiaries will be non-members of the band and they would not qualify as beneficiaries under the '82 definition of the band. None -- or sorry, note, Sir, that this number maybe even higher if we accept some of the other numbers that have been suggested by other parties and as Ms. Bonora alluded to earlier.

So it is this context, Sir -- from this context, that the Court must determine if this is a departure if -- or sorry, if this departure is indeed alien from the written intention of the '82 settler, and that's why, Sir, I focus so much on the text of the '82 deed, because it is from that that you must analyze what that intention was and whether the '85 deed is alien to that intention, and you must also determine, Sir, if granting the benefit for all of these new beneficiaries is merely incidental to the benefit conferred by the '82 trustees and within the power, Sir, of the '82 trustees. So, Sir, to accept that the '82 assets are governed solely by the '85 trust would be difficult as there would be insufficient deference, Sir, to the fiduciary duties attached to the '82 assets and which must have been imposed by the '85 trustees when they accepted those assets.

So, Sir, from this we turn to the second question and I know there are many people who want to speak today so I'll be brief. Sir, the second question, again, is whether the '85 trustees can or indeed must adopt the terms of the '82 trust with respect to the definition of beneficiary when dealing with the '82 assets. Now, in general terms, the transfer ought to be viewed as an exercise of fiduciary power, and I pause here, Sir, to note the nature of the assets themselves. The '82 assets -- it's trite but it -- it bears -- it bears repeating. The '82 assets were not owned by the '82 trustees. The beneficial owners were the '82 beneficiaries, and as we've discussed, it is clear that those beneficiaries were the present and future

members of the band.

So the Court must examine how the '82 trustees exercised their fiduciary power in this context, keeping front and centre who the beneficial owners were. In general terms, the '82 trustees' exercise of their power of advancement could be viewed similar to the concept of imposing a resulting or constructive trust on the '85 trustees in this context. The '82 trustees would give legal title of the '85 -- sorry, of the '82 assets to the '85 trustees to hold for the same beneficial owners as the '82 trust, being all members, present and future, of the band. The '85 trustees would receive that property on those conditions and only on those conditions, because the '82 trustees had no ability to transfer the beneficial ownership to anyone else. The Court may find that therefore any other person who is not a beneficiary of the '82 trust could be unjustly enriched, as Ms. Bonora pointed out, for no juristic reason and that there is a corresponding deprivation to those beneficiaries left behind. So the '85 trustees may, in essence, be holding the assets in a resulting trust for the '82 beneficiaries or alternatively a constructive trust.

So, Sir, finally, and I'll -- I'll again be brief, the third question which -- which the trustees posed, did the transfer occur so that the '85 trustees could hold the '82 assets for the overlapping group of beneficiaries, who would qualify under '82 and '85 and also incidentally, '86. So this question, the discussion around it may pose an alternative solution. The '85 trustees may be in a position to reconcile the terms of the '85 deed and the '82 deed, where they overlap. Therefore, it's possible that the Court could find that the fiduciary nature of the power given to the '82 trustees would take priority over any conflicts between the two deeds, and at the end of the day, the assets would continue to be held in trust for the members of the band and, therefore, the '85 deed could be read as being effective for those overlapping members who are beneficiaries under '82 and '85 and, as I say, incidentally, '86 as well.

Now, the OPGT wrote to you on September 15, 2021, and proposed an alternative solution and they seemingly acknowledge in that letter the power of advancement, but instead of moving assets, Sir, from the '85 trust to the '86 trust, they propose that they would form a new trust and combine the assets from '85 and '86 into that new trust. And, Sir, the -- the trustees have responded to Your Lordship in our letter of September 22, 2021, and we set out the issues with that approach in that letter, but -- but just to summarize, Sir. First, from a practical perspective, the existing and inherently discriminatory definition of beneficiary that we're all kind of grappling with, would still need to be applied in that scenario to determine who would be a beneficiary under the '85 trust terms. So -- so the trustees submit that that solution would not deal with that discrimination, which is the very reason that we've been in this litigation for -- for -- for quite a number of years now.

Now, secondly, Sir, the proposal would also directly affect the assets of -- and the members

-- or the beneficiaries of the '86 trust, and the '86 trust is not a party specifically to this litigation. Effecting its assets by directing that the assets be moved to another trust, we -- we submit, is simply not appropriate without proper notice. But, Sir, in general terms, as I've outlined, we -- we -- we believe that there are really only two solutions that would both align with the spirit of the OPGT's proposal and dispense with discrimination.

First, that the Court finds that the '85 trustees hold the '82 assets for the benefit of the '82 beneficiaries. These is essentially a potential answer to that second question that we discussed. The Court could further deal with those '85 beneficiaries who would not otherwise qualify through a grandfathering application, though really that's not the subject of the ATO application. And second, Sir, the Court could find that the trustees have the power to transfer the assets to either '86 or to a new trust. This would essentially be a potential answer to that third question that we've posed. The -- again, any beneficiaries who currently would not qualify -- they qualified under -- under the '85 but they wouldn't qualify under the '82 or '86 definition, that could be dealt with either by way of grandfathering application or potentially, if it's a new trust, a defined list of individuals that could be added as named beneficiaries but, again, that would be the -- would be a potential answer to the third question posed by the trustees.

So, Sir, subject to any questions or any clarifications that Ms. Bonora may have, those are -- she's shaking her head no. So those are the opening submissions of the Sawridge trustees.

THE COURT: Okay. Well, thank you very much for those submissions. So at this point, we will turn to -- Mr. Faulds, do you plan to start or Ms. Hutchison?

Submissions by Mr. Faulds

MR. FAULDS: Thank you, My Lord. Ms. Hutchison is going to be addressing question number one of the Sawridge trustees' application, which is the effect of the asset transfer order which was approved by Justice Thomas back in August of 2016, and -- and our position with respect to that question is as stated in our briefs. Our -- our view is that the asset transfer order is clear and conclusive that the -- that the assets that were transferred from the 1982 to the 1985 trust are held in the 1985 trust for the benefit of the 1985 beneficiaries. I am going to be addressing question number 3. That is the possibility of a trust to trust -- a further trust-to-trust transfer and we decided that -- that perhaps it might be useful if we began with -- with that so I'm starting out here.

In -- in doing that, we -- we wanted to note that -- that the trustee -- the Sawridge trustees' original game plan with respect to this advice and direction proceeding was fairly straightforward. It brought the application in order to address two questions and those two

questions were, number one, you know, can it be confirmed that the assets are properly held by the 1985 trust and that that is the entity that we're supposed to -- that we need to be dealing with. That led to -- that question was disposed of by the asset transfer order granted by Justice Thomas, and then attention was turned to the second question and the second part of the -- of the trustees' game plan, which was to see whether or not an amendment could be made to the beneficiary definition of the 1985 trust to eliminate its discriminatory aspects, and at the time that Your Lordship assumed case management of these proceedings, we were working towards trying to address that question, but we were now 7 years into the process and -- and things were continuing to move rather slowly on that front.

It was the impression of the OPGT that when Your Lordship raised the question about the effect of the asset transfer order and what it accomplished, that you did so by way of identifying a possible different approach to the game plan that the Sawridge trustees had been following, and that's you were bringing forward a -- an approach which the parties had -- had not considered and which might provide a way forward. When Your Lordship weighs that issue, Your Lordship referred to the limitations on the Court's jurisdiction to amend the beneficiary definition of the 1985 trust, and that then led to the possibility that perhaps the 1985 trust was not in fact the operative instrument and that that -- that the difficulty on the -- and the limitation on the Court's jurisdiction might be avoided by that.

Your Lordship raised the possibility that the assets in that trust remain subject -- in the 1985 trust, in fact, remain subject to the 1982 trust terms notwithstanding granting of the asset transfer order, and that gave rise to the application which is now before the Court concerning that effect. And we've just described that background in our brief of November the 27th, 2020, at paragraphs 37 to 39.

For the reasons that the OPGT has -- has -- has stated perhaps in tiresome detail over the course of various case management meetings, it has been unable to buy into that suggestion as a way forward and that is for two main reasons. The first is that as Ms. Hutchison is going to address in her part of the submissions, the only possible interpretation of the asset transfer order is that it did in fact confirm the transfer of assets from the 1982 trust to the 1985 trust for the benefit of the 1985 beneficiaries. The second is that the effect of such -- of such an -- of -- of such a finding that -- that the -- in fact that the -- or the effect of a finding that in fact the assets remain subject to the 1982 terms would eliminate the interests of a large number of minor beneficiaries whose interests the OPGT represents. Those minors don't fall within the beneficiary definition of the 1982 trust because they're not members of the Sawridge First Nation under its membership code.

The Sawridge trustees have acknowledged that that would be the effect and to address this they have suggested that -- that they might bring forward an application to the Court to grandfather the existing beneficiaries of the 1985 trust who are not Sawridge First Nation

members into the -- the -- the trust that they would like to see, which is defined as Sawridge First Nation members. The difficulty with that approach is that any attempt to grandfather such beneficiaries into -- into such a trust would require an amendment to the trust. If we are subject to the terms of the 1982 trust, the beneficiaries are defined as members of the Sawridge First Nation. If the -- if there are 1985 beneficiaries who are not members of the Sawridge First Nation, they could only become beneficiaries by way of an amendment, and that leads us back to the problem which Your Lordship first identified, which is the limitation on the Court's jurisdiction to effect such an amendment.

And -- and -- and in such an application, that jurisdictional problem, in our view, would be even greater than in an attempt to remove discrimination from the 1985 beneficiary definition because at least in that latter case, you have the possibility of reliance on public policy to support -- to support an amendment. That wouldn't apply in the case of simply trying to add a group of individual beneficiaries by way of -- of a trust amendment to the 1982 trust. So we do not see the grandfathering proposal being put forward by the Sawridge trustees as being a viable approach to the resolution of the problem, and that then brings us to what is the third question in the trustee's application and that is the availability of a further trust-to-trust transfer that might resolve the issues that are before the Court and ultimately be acceptable to all of the parties.

In thinking about that third question, the OPGT has had regard to what it understands to be the law governing the making of such transfers and, in our submission, there are two broad requirements. The first is that the Trustees who are considering exercising such power must have sufficiently broad discretion in the trust -- under the trust document which they administer to deal with the assets in that way, and I don't hear the Sawridge trustees suggesting that that is not the case here. I think -- I think that there is general agreement that the -- that the 1982 trust and the 1985 trust and, in fact, I think the 1986 trust all contain sufficient discretion on the part -- all bestow the trustees with sufficient discretion to allow them to do that.

The second fundamental requirement is that any such transfer must be for the beneficiaries of the original trust. This requirement may be and often is satisfied by the beneficiaries of the receiving trust being the same as though of the transferred trust, however, a benefit to the original beneficiaries may be established in other ways. Two things are not required for such a transfer. The first of them is beneficiary consent. Beneficiary consent may be obtained but is not required provided that the transfer is for the benefit of the beneficiaries. The second thing is that since such as transfer does not involve an amendment to a trust and it involves the exercise of the trustee's powers, court approval is not required.

So those are -- those -- those are the basic parameters within which -- which such a -- a trust-to-trust transfer may occur, and on the -- on the opposite side, factors which will not

defeat a transfer include the dilution or elimination of interests of persons who might become beneficiaries of the trust in the future, and I believe that Ms. Osualdini has expanded upon that -- upon that in -- in her brief with -- with great clarity why that is the case. The second thing that will not defeat such a transfer is the granting of beneficial interest to persons who were not beneficiaries under the original trust provided that such additions do involve a benefit to the original beneficiaries.

Those principles, My Lord, are largely drawn from the House of Lords decision in the *Pilkington* case. That case has been adopted in Canada in a variety of cases including the *Hunter Estate* decision from Ontario, the *Chalmers* decision from British Columbia, the *McLean* decision which is referred -- which is unreported but is referred to in *Hunter Estate*, and those are all referenced at paragraph 62 to 64 of our November 27th brief. No, sorry, that's November the 27th of 2020.

And we would point out that the -- these principles were also adopted by Mr. Justice Thomas in these proceedings. *Pilkington* was cited by the Sawridge trustees in their original brief to Justice Thomas in support of the asset transfer order. You may recall from having seen that brief, which is found at tab A of the Sawridge trustees' original brief on -- brief to Your Lordship on this issue filed, I believe, it was November the 1st, 2019. The very first brief in this -- in this thing. And -- and Your Lordship may have noted that that addressed two things. First it addressed the issues that the Trustees had about whether or not they had a complete documentary record of the manner in which the transfer had -- had taken place, and they were seeking comfort on -- and, in fact, the -- that had occurred but, second, they sought comfort that the -- that the transfer was within the powers of the 1982 trustees to have carried out, and that was the subject of paragraph 20 of that brief. And I -- I draw Your Lordship's attention to paragraph 20 of that brief because it cites *Pilkington*. It --

THE COURT: Mr. -- Mr. Faulds, if you could just give me a minute.

MR. FAULDS: Yes.

THE COURT: Are you saying the November 1st trustees' brief? November 1st --

MR. FAULDS: The -- the --

THE COURT: -- of (INDISCERNIBLE).

MR. FAULDS: The very first brief filed by the trustees for this

asset transfer application, which was filed on November the 1st of 2019.

THE COURT: Right.

MR. FAULDS: And tab A to that brief is the brief that they submitted to Justice Thomas.

THE COURT: Ah, got you. Okay. Thank you very much.

MR. FAULDS: Yeah, I'm -- I'm sorry for -- for not being clear.

THE COURT: Okay. I have got you and you were taking me to paragraph 18?

MR. FAULDS: Paragraph 20 of tab A to that brief and tab A being the brief that was presented to Justice Thomas.

THE COURT: Right. Okay. I'm --

MR. FAULDS: (INDISCERNIBLE).

THE COURT: -- there now. Thank you very much.

MR. FAULDS: Yes. And -- and you'll see that that brief is a discussion of -- of the *Pilkington* decision and describes how those principles --

THE COURT: M-hm.

MR. FAULDS: -- apply to -- to what the 1982 trustees did when they effected the transfer. And -- and you'll notice that -- that that contrary to -- to what I think I heard Mr. Sestito saying today, they took the position that the transfer was to the same beneficiaries and obviously they were -- they were acting on the -- and in making that submission, they were doing so on the basis that I described, which is that it is -- that it is the existing beneficiaries that count and that people who may acquire an interest in the future can't stand in the way and -- and the fact that their interests may no longer arise is not an impediment. And it was further advocated in that paragraph that effecting that transfer was to preserve the interests of the existing 1982 beneficiaries in the -- in the trust assets, and that that preservation was, of course, against -- against the addition of people as a result of federal government legislation which would change the way the trust worked because it would change the basis for membership in the Sawridge First Nation and it would impose individuals upon the First Nation.

Now, I heard -- I -- I heard argument from my friends that you had to look at this through the lens of whether or not effecting this transfer was consistent with the intention of the settler of the -- of the 1982 trust, and was -- was changing this the way the beneficiary definition was going to operate in the future consistent with the settler's intention. Now, that is not a difficult question to answer, My Lord, because the settler of the 1982 trust was the same person who settled the 1985 trust and the trustees were the same trustees. So -- so -- so there's really no -- no basis for suggesting that -- that what occurred in 19 -- when -- when the assets were transferred was contrary to the -- to the settler's intention.

So and it was those submissions as they're outlined in paragraph 20 which led to Justice Thomas stating in granting the order that he was satisfied that the asset transfer order "was properly based in law" and the law that was cited to him was the law outlined in *Pilkington*. So -- so this is another example of the adoption of *Pilkington* into -- into Canadian law. If so -- so our view is that -- that that based upon the principles which are -- are applicable here, the -- the transfer from the 1982 to the 1985 trust was soundly based in trust law and there was no basis for -- for finding otherwise and that Justice Thomas, in fact, confirmed that was the case when he granted the asset transfer order.

Which brings us then to the question of all right, well, if you can do that can you do a subsequent trust-to-trust transfer, and in our -- in our previous briefs we've confined our attention to a transfer from the 1985 trust to the 1986 trust because we understood that was sort of what was -- what was being contemplated. And as I've indicated, the OPGT had no -- no dispute with the fact that the 1985 trust contained the same sort of broad discretionary powers which would permit such a transfer, but that a transfer of the assets into the '86 trust would not be for the benefit of the 1985 beneficiaries because it would deprive a large number of -- of their beneficial interest.

The -- and it's interesting to contrast that kind of transfer with what happened in the '82 to '85 transfer because in the '82 to '85 transfer, not only were the beneficiaries protected from people who were being -- who might be imposed into the trust by the actions of the Government of Canada, it was seeking to perpetuate the determination of who was a beneficiary on the same basis that had existed when the trust was created. That's why the references to the -- you know, to the people who would have been members under the *Indian Act* as it existed on April the 15th of 1982. That's the day the 1982 trust was created. So there -- actually, the -- the -- that transfer preserved the -- the rules which had governed beneficiary determination at the time that the '82 trust was created. In contrast, a transfer of the '85 assets to the '86 assets has no benefit to the individuals who lose -- who lose their -- their beneficiary status by virtue of the fact that they're not members of the SFN under its membership code.

So -- so our submissions initially were that's not a solution to this issue because it doesn't address -- because the transfer can't be justified as being beneficial to the beneficiaries and, in fact, that -- such a transfer would be kind of analogous to the transfer in the Berg (phonetic) decision, which I believe my friends representing the Sawridge First Nation have alluded to in their briefs. That's the Ontario case in which a trustee who held property for the benefit of himself and his wife transferred the assets into a new trust for his benefit only thereby entirely depriving his wife of her beneficial interest and, of course, the Ontario Superior Court of Justice said that a transfer of that nature can't stand. You know, there's no -- you can't effect such a transfer and take away somebody's beneficial interest, an existing beneficiary's interest, and -- and expect that the Court will -- will endorse it, and the Court, of course, did the opposite and set the transfer aside. So, for all of those kinds of reasons, '85 to '86 just doesn't work.

There was a -- then -- then my friend, Mr. Sestito, referred to the approach that was suggested in their final brief in December of 2020, involving this notion that somehow the 1982 beneficiary definition hitched a ride along with the assets and thus became the operative beneficiary definition of the 1985 trust. That the -- the -- we think that that approach is -- is problematic on a -- on a number of grounds. I was -- I had to say I was a little surprised to hear that Mr. Sestito -- or to see that advanced in -- in the brief and to hear it argued, given that in their first brief the trustees said that they couldn't advocate for that -- for such a thing. They -- if you look at paragraph 4 of their original brief, they say the trustees as fiduciaries of the 1985 trust cannot advocate that the 1982 trust applies to these assets.

Now, I mean, counsel can, of course, change -- change positions but of the -- of the two statements that -- that have been made, I tend to think that the -- that the trustees original argument was the correct one. But in any event, the notion that the '82 trust beneficiary definition travelled with the assets has really no basis in law. There's no -- there's no -- the -- there's nothing to suggest that -- that that is something which can occur in law and, of course, it's completely contrary to the intention of the settler. The intention of the -- of the settler and the intention of the 1982 trust was to get away from the 1982 trust definition and to put the assets into a trust which would not then become available to people who were being imposed on the Sawridge First Nation.

So our submission is that there -- that -- that there really isn't any -- any principle basis, you know, for -- for and -- and certainly no law to support, you know, the notion that the definition travelled and that that's more wishful thinking than -- than really a viable alternative. And, again, as Mr. Sestito indicated that the trustees' proposal involves, again, the concept of an application to grandfather, which runs into difficulties we've already discussed.

So it's with all of that in mind that the OPGT then began to consider okay, well, is there some other way that this might be accomplished and is there some way that utilizing the trustees' acknowledged authority to effect the trust-to-trust transfer, provided the necessary preconditions are met, could be utilized to craft a solution to the problem before the Court, and that is what gave rise to the proposal which we provided to Your Lordship in written form on the 15th of September. As indicated in our correspondence to the Court in sending you that submission, that same document with one very minor amendment requested by one of the other participants in the proceeding was circulated to the parties back in May. So it's -- it's been available for consideration for longer than -- than September the 15th. It's been -- it's been in the parties' hands for several months, and it is based upon the following elements.

The first element is it's based on the authority of the asset transfer order itself confirming that the assets have been transferred to the 1985 benefit for the benefit of the 1985 beneficiaries. It's based upon the principles established by *Pilkington*, which we submit are now well established and received by the courts in Canada, including this Court. It's based upon the broad discretionary authority vested in the trustees of the 1985 and '86 trusts which is sufficient to allow them to deal with the assets under their administration in this way. It's based upon the fact that the trustees of both trusts are the same - that is, of the 1985 and 1986 trust - and that they have expressed their wish to merge the trusts.

In that vein, My Lord, I would refer you to appendix M - 'M' as in mother - to the November 15th, 2019 brief of the OPGT. That appendix M is a copy of minutes of the Sawridge trustees from 2010, prior to the commencement of these proceedings, and if you look in particular under item number 4.1 of those minutes, you will see a discussion relating to the merger of the trusts and the fact that these advice and direction proceedings are a first step towards that objective.

Its date --

THE COURT: Mr. Faulds, could I -- Mr. Faulds, could I just interrupt you for -- for a moment? This -- you know, I did -- I did get your materials on September 15th and I appreciate that it was the subject of discussion amongst counsel for several months but, I mean, just assume for the moment that I agree with absolutely everything you have said. Am I in a position now to give a direction that there -- this resolution scheme, if I can call it that, be implemented? Like, create a -- or just, like, where -- where do I get the -- where's the application to permit me to consider that as a -- as an option?

MR. FAULDS: I -- I -- My Lord, that's -- that's a great question. I would -- I would say, My Lord, that you do not have the authority to direct that outcome,

but you do have the jurisdiction to advise the trustees that such an approach would be within their powers.

THE COURT: So presumably there would be a subsequent application that would be brought to perhaps provide some -- some more detail with respect to the plan and I would either approve or -- or give advice to either approve or advice to not approve.

MR. FAULDS: I think that would be -- I think that would be the likely course. I mean, the -- I think it's -- it's correct to say that assuming that it is within the powers of the -- of the -- of the Sawridge trustees to effect this that they could do so without, you know, further endorsement from the Court with the comfort --

THE COURT: Well --

MR. FAULDS: -- it lies within their powers, but -- but --

THE COURT: They -- they never have to get advice if they don't want to. If they are -- if they are comfortable proceeding, they should just proceed. Absolutely.

MR. FAULDS: Yeah. Exactly. But -- but my -- but my expectation is that, you know, they're -- that -- that I'm -- I'm sketching this out in -- in -- in broad terms and our proposal is then there -- you know, there devil is always in the details and -- and indeed there might very well be a requirement for further court assistance in providing advice in relation to some of those details. Perhaps in resolving some issues as to whether or not (a) or (b) or (c) is an existing beneficiary under -- under the trust and so forth. So I -- I think it's highly unlikely that if -- if this were -- if Your Lordship were to find this was in the powers of the trustees, highly unlikely that would be the end of it and -- and further advice and direction would -- would almost certainly be required.

THE COURT: Okay. Sorry to have interrupted you.

MR. FAULDS: Yeah. No, not -- I appreciate that 'cause I -- I should have thought that in making that point before you asked. The -- the -- some -- a couple of the other factors and -- and I -- I want to mention them all just because I think they -- they deal with the various different aspects of the -- of the principles that apply. We've already talked about the limited ability of the Court to amend the trust and this, of course, doesn't require that.

Another factor that we've taken into account is the risk to the non-SFN beneficiaries of the

(INDISCERNIBLE) proceedings and the fact that -- that they would benefit -- from this -- from this approach by virtue of it confirming their beneficiary status and -- and putting it -- and putting that question to rest. The benefit to everybody is that the end result would be a trust whose beneficiary definition contained no discriminatory element whatsoever. All of the beneficiary -- the definition as we've set it out in our -- in our proposal is basically the beneficiaries would be the members of the Sawridge First Nation as they exist from time to time and the existing beneficiaries of the 1985 trust who are not SFN members, and there is nothing about that definition that -- that involves any element of discrimination and we would anticipate that the trust document created by this would also eliminate the other discriminatory provision in both the 1982 and the 1985 trust relating to illegitimate children. That could simply be written out of the -- of the -- of the new trust, which I kind of refer to as the merged trust.

The -- that -- that -- the other -- the other benefit to the Sawridge First Nation beneficiaries from this proposal is that this only concerns the existing members of the -- the existing 1985 beneficiaries who are not SFN members. If this approach were adopted, that class, for lack of a better word, would cease to grow because it would only be the existing 1985 beneficiaries who are not members of the SFN, who -- who would become beneficiaries of the merged trust. And that -- that is -- and -- and the -- the principle basis upon which that is reached is the principle that I refer to before that -- that the trust-to-trust transfers take into account the interests of the existing members not the people who might become members at some -- at some point in the future and, therefore, that's -- that is an appropriate way to define the persons in the new trust.

And the -- the -- as we outlined in our submissions, there would be a variety of difficulties that would be entailed in -- in setting up and administering that trust as we discussed a few minutes ago. You know, the -- the 1985 beneficiaries may say, Look, our interest in the 1985 assets is being diluted by the addition of the -- of the SFN members who are not currently 1985 beneficiaries becoming -- becoming beneficiaries to those assets but that's more than justified in -- in our view by the -- by the removal of the uncertainty relating to the status of the non-SFN beneficiaries themselves.

The 1986 beneficiaries might raise a similar objection that the inclusion of the 1985 beneficiaries who are not SFN members dilute their interest in the 1986 assets. One way that that might be addressed would be by provisions that restrict the participation of the non-SFN members of the trust to the 1985 assets and thereby avoiding that dilution. And that's -- and that, of course would then give rise to -- to -- that might be something on which -- on, for example, on which the Court's assistance might be -- might be sought in whether or not that's appropriate and -- and whether and how that can be -- can be effected.

So I -- that's -- that's our proposal. We would put that forward in the context of the third

question because it is a trust-to-trust transfer which might be effected, which might address the -- the issues that the parties are concerned with.

I do want to just very briefly address my friend's comments about the *Bruderheim* case. In our submission, *Bruderheim* simply has no application to the facts before Your Lordship here. In *Bruderheim*, what you had was a group of people, who by their own actions had placed themselves outside the definition -- the beneficiary definition of the trust in which they -- in which they claimed an interest. They left the church but they still wanted to say, you know, we get -- we're beneficiaries. That's the exact opposite of -- of what we have here. Here, we have beneficiaries who clearly fall within the -- the definition established in a trust by the settler and the trustees are seeking various ways to -- to perhaps curtail the beneficial interests that they enjoy under the document. So we just don't see the reasoning in *Bruderheim* as having -- as having an application to this case.

So those are -- those are my submissions, My Lord, and subject to any questions you have, I'm going to turn it over to Ms. Hutchison to address question number one.

THE COURT: Thank you.

Ms. Hutchison.

Submissions by Ms. Hutchison

MS. HUTCHISON: Thank you, My Lord.

As Mr. Faulds has, I think, has made clear to the Court, we -- we've done this in opposite order but important to bear in mind, My Lord, that the submissions the OPGT has made about a possible solution are very much subject to the OPGT's position that we should never have returned to ground zero in this exercise. As you will have gathered from all four of our submissions, My Lord, the OPGT takes the position that to engage in this exercise of returning to ground zero effectively reargues the ATO and that is not something that is permissible in this matter. There is no remaining judicial scope to reargue the ATO. Specifically, it is the OPGT's position that the ATO resolved beneficial ownership and that the attempt to revisit the ATO in this manner is a -- a collateral attack.

And frankly, My Lord, if there's any doubt that we -- by going back to ground zero we are rehearing argument that should have been made in the course of the ATO or raised to the Court in the course of the ATO, I think we -- we need only to reference back to our friends, particularly their oral submissions this morning, but also their last brief in the -- in the exchange of written submissions, My Lord.

Turning to the -- the law that is operative on interpretation and application of an un-appealed, unchallenged order, My Lord, the majority of the OPGT's submissions on the law are contained in our first brief, which was filed with the Court on November 15th of 2019, and we start with the -- the legal elements or principles on page 17 paragraph 59. I don't believe I've heard from any of my friends, My Lord, that they dispute the principles that apply in the interpretation and application of a valid court order that has not been appealed. My friend, Ms. Osualdini, I believe, supports the legal principles the OPGT is relying upon and I -- I don't believe I have seen submissions from the SFN or the trustees that raise an alternate line of case law in this regard.

Turning then to a number of the cases we've cited, My Lord, *Campbell v Campbell* being one of the primary ones which is found at our authorities from the November 15th, 2019 submission, tab 2. When considering how to interpret an order the Court must consider the pleadings filed in the action, the language of the order itself, and the circumstances in which the order was granted. And while the pleadings are certainly highly relevant to your analysis, My Lord, the circumstances in which the order was granted will also be of paramount consideration for the Court, we would submit. And one of the critical factors in the circumstances, My Lord, is to try to understand what Justice Thomas understood he was resolving when he issued the ATO, and for that, My Lord, really the Court has to consider the entire history of this proceeding right up until the point that the ATO was issued.

The ATO was not a minor or a technical order in any way, shape, or form, My Lord. It dealt with one arm of the final relief that the trustees had been seeking in their application from the outset and, as the Court will be aware, the trustees didn't file an originating document in the normal course in this matter. They relied instead on a procedural order and the affidavits of Paul Bujold in the early stages of this proceeding to outline what exactly it was they were seeking, and you will have noted I'm sure, My Lord, that we refer you back to the affidavit of Paul Bujold dated September 12th, 2011, particularly paragraph 9 and 25 repeatedly throughout our submissions. That affidavit is found at appendix C and in a number of other places, I believe, but appendix C of our November 15th, 2019 submission.

Because, in that affidavit Mr. Bujold clearly and explicitly stated what it was that the trustees were seeking or at least one arm of it, and I quote: (as read)

> It was to declare that the asset transfer was proper and that the assets in the 1985 trust are held for the beneficiaries of the 1985 trust.

And frankly, My Lord, that is a fact and a piece of evidence that this Court cannot ignore

in that the suggestion that beneficial ownership was not in the mind of Justice Thomas. The suggestion that that was not on the Court's radar on August 24th of 2016, simply cannot be supported when one refers to just that that fundamental originating part of the entire proceeding.

There's also as another -- by way of another example in the trustees' ATO brief which Mr. -- Mr. Faulds has taken you to and we refer to this in paragraph 28 of our November 27th, 2020 submissions, the trustees submitted that the asset transfer order was in the best interests of the 1985 beneficiaries. How can we reconcile that statement with the concept that beneficial ownership wasn't being considered, My Lord? It -- it just doesn't jive, with the greatest of respect.

It's -- it's very clear from the cases we've cited to you, My Lord, that one thing that cannot be allowed in evaluating and interpreting a court order after the fact is to accept a subjective or after the fact revisionist view of the -- of the facts, and I'd refer the Court in that regard to, I believe it's the (INDISCERNIBLE) case and our brief -- our brief at paragraph 61 and 62. This is the November 15th, 2019 brief. While I completely appreciate why our friends have asked the Court to go back to ground zero and -- and to revisit this entire issue, that is not what the Court was being asked to do August 24th of 2016, and when you take a look at some of the factors considered by the Court in *Yu v Jordan*, which is at our authorities tab 13, it's even more striking that when a participant has had input into the order, was present in the court when the order was made, failed to raise objections to the order, and failed to appeal the order.

My Lord, we cited those factors initially primarily in relation to the submissions being raised by Sawridge First Nation, who -- which relies heavily on the concept that they were not a party to the ATO, but you've now heard from my friends on behalf of the trustees, frankly, the same arguments that the SFN is raising and perhaps they've gone even a bit further in their final round of submissions and the SFN was going -- they were the authors of the ATO and in their first round of submissions, they recognized they couldn't make the submissions they've made to you today because of the limitations of their fiduciary duty and obligations to the 1985 trustees.

We would submit to the Court that that has to be weighed very carefully in the kind of weight that this Court gives to submissions today to suggest that the ATO left that huge gap, that huge gap of beneficial ownership, My Lord, and it's very critical that the Court also look at the -- when we get into circumstances as a relevant consideration in interpretation of the order, the Court has to look at what the trustees did subsequent to and around the time of the asset transfer order. For one, they've brought forward a distribution proposal right in the same timeframe, which was very clearly framed as a distribution proposal to benefit the 1985 beneficiaries. So to suggest that at the conclusion of the ATO

we had left this massive area of real estate of beneficial ownership undecided and undetermined, with the greatest of respect, My Lord, does not coincide with the documentation before you and it stretches -- stretches that -- that revisionist approach to the facts somewhat, My Lord.

The other thing that must be considered is that quite some time after the ATO, the trustees were directed by the Court of Appeal of Alberta to file their originating document, and we -- we've included that in our submissions, My Lord. It's in our materials. Please take a look at that document again. It is clear beneficial ownership has been dealt with. It's no longer being raised as an issue in this proceeding. It's -- it's assumed to have been dealt with. We also have the discrimination order in which the trustees committed to preserve the 1985 trust, and I'd ask the Court to compare that position to the positions being taken by the trustees today. It has a significant impact on whether or not they felt they still had the ability to address this issue of beneficial ownership coming out of the ATO process, My Lord.

And I just -- rather than taking you through it, My Lord, I would just refer the Court also to our November 15th, 2019 brief at paragraph 64 to 67, and also take you to paragraph 71. Again, that was the reference to the -- to the trustees advising Justice Thomas that the ATO was being sought to protect the assets for the benefit -- the assets of the '85 trust for the benefit of the beneficiaries and that it was in the best interests of the 1985 trust to approve that transfer. Again, how -- how -- how can we accept those propositions if we also now accept that there was room left to argue the proposals the trustees put forward today, My Lord.

In terms -- still on circumstances, My Lord, as a critical element to examining how to interpret an order, I'd just like to call on some of the concepts that my friends were putting forward about the -- I think the term was the protectionist intention of the '85 trust, and -- and, again, tying that into the fact that the trustees committed to preserving the '85 trust post-ATO, not the beneficiary definition - obviously that's a separate issue - but preserving the '85 trust. How can one suggest that we -- we were back in '82 and -- and we were -- in fact, didn't even need to worry about the protectionist impact of the '85 trust anymore because the '85 trust was really for the benefit of the '82 beneficiaries. My Lord, if those arguments were available, if they were intended to be -- to be dealt with, if it was a part of the scope of this proceeding, they would have been raised in the course of the ATO. The ATO was intended to put those arguments to bed. It was intended to finalize who we were dealing with for beneficial ownership, My Lord.

In terms of -- you'll have read a great deal in our submissions, My Lord, about the positions of the SFN and the weight that they can be given in the course of the analysis of the ATO, and I don't -- I don't wish to take the Court through every one of those points, but it is critical to remember that the SFN, while they've clearly said they were not a party, was

very much involved in the ATO process. So the arguments they've now raised before this Court about the beneficial ownership not being addressed or the -- or the problems with the ATO were never raised in the course of the ATO being argued or considered or debated back and forth between counsel, and that leads us to a conclusion, My Lord, either that the SFN was fully satisfied with the terms of the ATO at the time or that they were aware of all of these arguments that they now raise and chose not to put them before the OPGT or the Court in a time period when they were also encouraging the OPGT to accept the ATO, in fact on -- on threat of cost consequences if the OPGT did not accept it, and at a time when they stood up before the Court to talk about how the ATO had solved problems, admittedly not on the ATO order itself. They then had over 3 years in which they could have appealed the ATO, could have challenged the ATO in some manner, failed to do so, My Lord, and -- and the submissions from SFN have to be weighed in that context in terms of what weight this Court is entitled to put on them, My Lord.

Other relevant circumstances, My Lord, no -- we've referenced the fact nobody appealed the ATO. At the time that the discrimination order was being dealt with the Court identified that there was only one remaining issue to be dealt with, which was the discriminatory nature of the beneficiary definition. To suggest that Justice Thomas would indicate to the parties there was only one remaining issue to be addressed when the entire question of beneficial ownership had been left unaddressed, frankly, is -- is beyond comprehension, My Lord. Clearly, Justice Thomas had granted the ATO within the entire context of the proceeding to that point in time. That quote, My Lord, and that cite is found at paragraph 70 of our November 15th, 2019 brief, and also referenced at paragraph 32 of the November 27th, 2020 brief.

Without belabouring these points, My Lord, we -- we have not resiled -- the OPGT is not resiled from its concerns about the nature of the relief being sought by the SFN and now by the trustees, both in terms of the scope of this Court to grant it within a case management context but also within the scope of limitations, laches, and estoppel, and we -- we refer to our submissions in our November 27th, 2020 brief in that regard, My Lord. Obviously, as you'll have gathered, we maintain the position that this exercise constitutes a collateral attack on the ATO and is impermissible in that regard as well.

Although not a matter, I expect, that will resolve today, My Lord, the OPGT has given you some considerable input and I'll just give you the pinpoints cites in its December 11th, 2020 brief at paragraph 12 and its November 27th, 2020 brief from paragraph 14 to 18 that the Court cannot conclude without a trial or some other process that the assets that are in the 1985 trust solely originated from the 1982 trust. We realize that the parties have a different take on the evidence before you on the $12 million debenture, My Lord, but that is not a small issue. It is not an issue that has been run to ground and we cannot proceed on the basis that that $12 million has no beneficiaries that have an interest in it. We -- at this point,

not being able to ascertain whether or not it may, in fact, still be a debt owing to the 1985 trust. So I -- I refer you to the documentary references in those paragraphs, My Lord. That is a significant barrier to returning to ground zero in the manner in which my friends have advocated.

My Lord, I think that really -- that addresses our key points about -- with the greatest of respect to the -- the ink that's being spilled on other solutions as to why we shouldn't be going back over ground that was already covered by the ATO and -- and Mr. Faulds has done an eloquent job of explaining to you what the OPGT would consider as a solution if those submissions are not accepted, but all of our submissions on that point are subject to the -- to the position that the ATO resolved this problem. Beneficial ownership was dealt with in 2016, and we need to get back to dealing with the jurisdictional application, My Lord.

Thank you.

THE COURT: Okay. Thank you very much.

So, Ms. Osualdini, do you want to start or do you need a break or what -- what would you like to do?

MS. OSUALDINI: My Lord, I'm in your hands. I do notice that it's the noon hour right now so perhaps it might make sense to take a small break and then recommence.

THE COURT: It seems to me that this is a good place for a relatively short break in the sense that we have had a number of submissions that I think roughly represent half of what we planned to hear today more or less. So if we took half an hour, would that be sufficient or 45 minutes? What -- what would be your pleasure?

MS. OSUALDINI: Oh, half an hour is fine with me, My Lord.

THE COURT: Is that suitable to everyone else?

MS. S. TWINN: Yes, Sir.

MS. BONORA: Acceptable to us, My Lord.

MR. FAULDS: That's agreeable, Sir.

THE COURT: Okay. So let's take -- let's take half an hour. I

would ask that you not turn off your machines. That you just leave it playing. You can stop the video and mute if you like but to reconnect again might cause problems. It has gone reasonably well this morning so I wouldn't want to invite any problems. So please don't -- please don't disconnect and we will just resume in half an hour. Okay?

MS. BONORA: Very good, My Lord. Thank you.

THE COURT: We will adjourn at that. Thank you.

PROCEEDINGS ADJOURNED UNTIL 12:30 PM

Certificate of Record

I, Morag O'Sullivan, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench held in courtroom 416 in Edmonton, Alberta on the 27th day of September 2021, and I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Marcey Lepka, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Marcey Lepka, Transcriber
Order Number: AL21827
Dated: October 1, 2021

Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Edmonton, Alberta

September 27, 2021	Afternoon Session
The Honourable Justice Henderson (remote appearance)	Court of Queen's Bench of Alberta
D.C. Bonora, QC (remote appearance)	For Sawridge Trustees
M.S. Sestito (remote appearance)	For Sawridge Trustees
R.M. Johnson (remote appearance)	For Sawridge Trustees
P.J. Faulds, QC (remote appearance)	For Office of the Public Guardian and Trustee
J.L. Hutchison (remote appearance)	For Office of the Public Guardian and Trustee
C. Osualdini (remote appearance)	For C. Twinn (remote appearance)
(No Counsel)	For S. Twinn (remote appearance)
E.H. Molstad, QC (remote appearance)	For Sawridge First Nation
E. Sopko (remote appearance)	For Sawridge First Nation
M. O'Sullivan	Court Clerk

THE COURT: Thank you very much.

MR. SESTITO: We are all accounted for on the Sawridge Trustee team.

MR. MOLSTAD: Okay. We are also in attendance, Mr. Justice Henderson. Ed Molstad and Ms. Sopko.

THE COURT: Excellent. Thank you very much. So I think we are now ready to proceed. Shelby Twinn is there as well I see. Okay.

MS. S. TWINN: Yes, I'm here.

THE COURT: Excellent. Okay. So, Ms. Osualdini, carry on.

Submissions by Ms. Osualdini

MS. OSUALDINI: Okay. Thank you, My Lord.

So, My Lord, you have directed the parties to provide you with submissions on a fundamental question, namely whether the 1985 trust is possessed of the assets that were transferred to it in 1985, by the 1982 trust. Now, unlike the process that the trustees have

proposed, we see this application --

THE COURT: Sorry. Sorry, Ms. Osualdini, we are still having difficulty hearing you. Sorry to interrupt but is -- is there some way you can turn up the volume?

MS. OSUALDINI: Is anyone else having that issue? Everyone else can hear me?

MS. HUTCHISON: Just very faint.

MS. C. TWINN: I have no issue. This is Catherine Twinn.

THE COURT CLERK: Justice Henderson, are you able to hear her fine?

MS. OSUALDINI: 'Cause then I'm wondering if you are able to turn up the volume on your end.

THE COURT CLERK: Yeah, ours is up all the way.

THE COURT: I think --

THE COURT CLERK: (INDISCERNIBLE).

THE COURT: We have it turned up as high as it will go.

MS. OSUALDINI: Okay. I'll try -- I'll try speaking a little bit louder even though this feels a little bit like shouting right now.

THE COURT: All right.

MS. OSUALDINI: Okay. Thank you. So unlike the trustees, we see this process as requiring two steps. Now, firstly, Your Lordship has inquired into the meaning and effect of the ATO and implicit in this question is whether the ATO had the effect of ratifying the transfer of both legal and beneficial ownership or, conversely, whether the transfer of only legal title was ratified. If the answer to this question is that both legal and beneficial title were ratified, the inquiry is fully satisfied and there is no need to progress to step two, because as my -- my friend, Ms. Bonora, drew your attention to, the wording in the ATO is about ratification of the transfer. So I would submit that the question before this Court is what did that mean, the transfer.

Now, My Lord, if and only if the answer to this question is the ATO only addressed legal title, then the second stage of the inquiry becomes relevant. As Your Lordship will have seen from our submissions, is that our -- it is the client's respectful position that this query constitutes final relief and is not properly before you in case management. And further --

THE COURT: Ms. Osualdini, I -- I do need to interrupt you. I am sorry for that but can you possibly get closer to the microphone? I am having a hard time hearing you.

MS. OSUALDINI: Okay. Is it possible to take a brief 10-minute break and I can see if our IT people can sort this out, because there's not -- the microphone is attached to the television.

THE COURT: Okay.

MS. OSUALDINI: So it's not as easy for me --

THE COURT: I would rather --

MS. OSUALDINI: -- (INDISCERNIBLE).

THE COURT: -- take a break and make sure that I can clearly understand what you are saying.

MS. OSUALDINI: Okay. Thank you.

THE COURT: So why don't why take 10 minutes and we will -- we will see -- see what we can do. Okay.

MS. OSUALDINI: Okay. Thank you, My Lord. I'm sorry about that.

THE COURT: Thank you very much.

(ADJOURNMENT)

THE COURT: When everyone else is back we can start.

MR. SESTITO: The trustees are all present and accounted for, the legal team, Sir.

THE COURT: Okay. Excellent. Thank you.

MS. HUTCHISON: Mr. Faulds and I also back, My Lord. Thank you.

THE COURT: Thank you.

MR. MOLSTAD: Mr. Molstad and Sawridge counsel are back as well.

THE COURT: Good. Okay. So I think we are -- and Shelby is here so we can -- we can resume.

MS. OSUALDINI: Okay. Very good. Thank you, My Lord. Thank you for the Court's indulgence in allowing me to fix our -- our technical issue.

So I just want to step back for a second because when the -- when the volume issue happened I was in the midst of describing what we saw as step two of this process. So to repeat, from our perspective, it's only if the answer to the question on the ATO results in being that only legal title was transferred, that is only when the second stage of the inquiry becomes relevant and, as Your Lordship would have seen from our submissions, it's our client's respectful position that this would constitute final relief and would not be properly before you in case management.

It also appears that the intervenor, the Sawridge First Nation on this application is seeking remedial or proprietary relief and after hearing the submissions of my -- of my friend, Ms. Bonora, for the trustees and Mr. Sestito, I have also gathered the impression that they are as well. And to that, I would say that on an application for advice and direction, proprietary or remedial relief cannot be granted. This is not traditional litigation. And even if the Court would find that the transfer by the 1982 trustees to the 1985 trust was ultra vires the trustees' powers. The relief for that breach should be left to traditional litigation.

Now, that being said, My Lord, I'm going to be making submissions about part two of the -- of the question, however, this is, of course, on a without prejudice basis to our position that this is beyond the Court's jurisdiction at this stage of the game. However, we're doing so in order to assist you with arriving at a just and equitable resolution to this application.

Now, firstly turning to the issue of the interpretation of the ATO. My friend, Ms. Hutchison, went through this issue quite thoroughly so I intend to be fairly brief and not repetitive of her comments, but we certainly support everything that she said. Now, it is our client's position that when you review the ATO in conjunction with the record and the proceedings before Justice Thomas, it is abundantly clear that the meaning and effect of the ATO was to confirm that the assets transferred form part of the 1985 trust and were to

be managed for its beneficiaries as at the time of transfer. Now, My Lord, from a practical perspective, this conclusion is logical because there was never any doubt that the legal title of these assets had transferred to the 1985 trust.

Now, we note, as Ms. Hutchison did, that the SFN's submissions do not at all touch upon the interpretation of the ATO and it was only in the trustees' final set of submissions did they touch upon this issue very briefly, and what I understand them to be saying today, despite their position on the ATO application, is that the ATO did not cover the issue of beneficial ownership. So my submissions will be aimed at these points.

Now, I highlight to the Court as did Ms. Hutchison that the ATO was not appealed and is unchallenged. Its findings are res judicata. These -- and as such, its directions cannot be disturbed on this application. As outlined by Ms. Hutchison, there's a well-established body of case law on how an order is to be interpreted that I do not believe is in dispute before Your Lordship, and this analysis follows a contextual analysis of the pleadings, the evidence, and the submissions to the Court, and what it does not involve is making findings or submitting evidence that was not before the Court as at the time of the order. And, respectfully, Sir, your request to know who owned the assets immediately prior to the order is not permitted in the interpretative exercise, and the reason for that is when interpreting the ATO, we are restricted to the record that was before Justice Thomas.

And, my friend, Ms. Hutchison, went through the *Campbell v Campbell* decision from the Saskatchewan Court of Appeal on interpretative analysis, and I highlight a passage from paragraph 16 of that decision that cites the *Sans Souci Limited v VRL Services Limited* case that cogently summarizes the interpretative exercise and that being -- and I'm quoting from the decision:

> In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which the order was supposed to resolve.

Now, My Lord, the issue to be resolved, in my respectful submission, could not have been any more clear. It was -- it was to confirm that the assets were being administered for the benefit of the 1985 beneficiaries. This is stated in the affidavit of Paul Bujold, filed in support of the ATO and, more particularly, at paragraph 25, which states:

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

Quite -- quite clear to me.

And I reiterate, My Lord, that the legal ownership of these assets was never in question. To find that the ATO did not resolve beneficial interest would be to wholly disregard the issue Justice Thomas thought he was addressing and, further, it would effectively mean that the ATO resolved nothing and the parties, particularly, the trustees expended substantial sums of money and effort on the negotiation of the order and all steps arising thereafter and reliance on the interpretation of that order for no benefit. So, sir, we respectfully submit that the proper interpretation is clear and the order resolves the issue of for whom the assets are being held.

Turning to the second issue, the second stage of the analysis, My Lord, if you find that the word transfer in the ATO did not connote that official ownership as well, we turn to the issue Your Lordship has sought submissions and that is for whom immediately prior to the ATO being granted were the assets at issue being held, and our response, My Lord, to that query is, of course, the 1985 beneficiaries. It is clear that the OPGT supports this interpretation and prior to hearing my friend's submissions today on behalf of the trustees, I -- I thought the trustees did as well, however, it -- it appears that they don't. Surprisingly, they -- they don't share that interpretation.

So delve into this issue and to understand for whose benefit these assets were being held, I think we first need to examine the circumstances that the trustees found themselves in in 1985, and these circumstances are certainly set forth in the record and set forth in the -- the written submissions of the parties. Now, as the Court has heard, prior to the introduction of bill C-31, membership in First Nations was determined by a legislated set of criteria found in the *Indian Act*, and at this time, Indian status and membership in a First Nation were determined by the registrar and were synonymous. Under this -- under this legislation -- or sorry. It was possible under this legislation for a person to lose their status and their membership if certain criteria were met such as if an Indigenous woman married a non-Indigenous man, and as my friend Ms. Bonora said, these have become what we know as the bill C-31 woman.

Now, if this happened, My Lord, as it happened to the bill C-31 women, this would be known as involuntary enfranchisement where you lose your status and your membership as a result of this operation of law. Now, when someone is involuntarily enfranchised, they would be entitled to financial compensation and this compensation would typically be a percentage or per capita payment of what their band would have received from the government and this is outlined in paragraph 25 of my client's original written submissions on this application.

Now, also as outlined in my client's written submissions, prior to the introduction of bill C-31, the SFN had experienced a high rate of enfranchisement. Our client, who you'll recall

is the widow of the late Chief Twinn, was aware that around this time a family unit received approximately $1.2 million and that the average -- or that it wasn't unusual in the early 1980s for someone who enfranchised either voluntarily or involuntarily to receive a payment in the amount of 300 to $400,000 per person. Now, the effect of bill C-31 is the bill C-31 women who had lost their status as a result of that operation of law had an absolute right to be reinstated into membership, and this reinstatement was irrespective of the fact that they likely had already received an enfranchisement payment that other members of the SFN would not have received, and the SFN was concerned that there would be a high influx of membership following the introduction of bill C-31 and, as a consequence, they wanted to protect the assets of the 1982 trust which comprised the wealth of the nation at the time from this eventuality.

So in order to do this, and it's undisputed on the record that this was the purpose of what was trying to be done in 1985. As my friend Ms. Hutchison said, we're hearing a bit of revisionist history on what was happening here, but the reality is is the -- the SFN was trying to protect his assets from the influx -- or the anticipated influx. So what did they do? The 1985 trust was established. It was settled with $100. So what this means is that the 1985 trust is a distinct and separate legal entity from the 1985 -- sorry, the 1982 trust. The two are not to be conflated. It doesn't matter whether the 1985 trust was settled with a hundred dollars or a million dollars. Its legal status remains the same as a distinct and separate entity, and the beneficiaries of the 1985 trust are not in dispute. They are defined in the 1985 trust deed, all with the careful advice of sophisticated legal and accounting advisors.

Now, following the creation of the 1985 trust, the transfer at issue occurred. Now, why this is important and why I highlight this to the Court is the assets that are the subject of this application were after acquired property of the 1985 trust. These assets did not settle this trust. They did not create this trust. They were received by the 1985 trustees according to their authority under the deed to accept after acquired property.

Now, another consequence of bill C-31 that you would have heard about in these proceedings is that First Nations could choose to enact their own membership code and thus start controlling the membership process and take that responsibility away from the registrar. The SFN did this immediately and, as a consequence of that, it became possible for someone to qualify as a status Indian under the *Indian Act* but be -- but have no membership in any particular First Nation because now the Sawridge First Nation controlled its list and did not have to admit this person and, of course, My Lord, as you know, Shelby Twinn is a modern example of such an individual and an example of what the issue is before the Court today and the divergence of views.

So what we know from this is that the Sawridge First Nation elected to use a beneficiary

definition in the 1985 trust when they knew that they were going to be taking control of their membership code and this could possibly foreseeably lead to the circumstance that we're arguing about today. That those on the membership list and those that qualified under the legislated criteria could be different and, frankly, that's exactly the issue that they were trying to avoid in the transfer is they knew that there was going to be people added to their membership list. So it's not that this was an unforeseen consequence of the transfer, an unforeseen consequence of the 1985 trust deed. The SFN and Chief Twinn fully understood this when they were settling the trust.

So, My Lord, with that historical context in mind and putting ourselves in the position of the 1982 and 1985 trustees in April of 1985, we can look at the transactional documents that effected this transfer and when we review the transactional documents, the intention of the parties at the time of transfer, frankly, My Lord, could not be any more clear about what they were trying to do. And more particularly, the 1982 trustees, who were the chief and council of the SFN, intended to and did, in fact, transfer the assets to the 1985 trust for the purpose of holding those assets for the -- for the persons defined under the 1985 trust deed and it was done - and it says this right in the transactional documents - in order to avoid the impending changes from bill C-31, and I won't take Your Lordship to these documents but I'll just identify them for the record.

When we look at the resolution of the 1982 trustees dated April 15th, 1985, and found at tab M of our written submissions, it's stated right in that document that the 1985 trustees are receiving these assets to be held for the 1985 beneficiaries. We can see similar language and a declaration of trust signed by Chief Twinn on April 16th, 1985, and found at tab O that says the same thing. And it appears, My Lord, from the record before the Court that all of the relevant parties and their professional advisors shared this understanding as the 1985 trust administered these assets, reorganized their composition, and made beneficial distributions to the 1985 trust beneficiaries in order to achieve preferable income tax treatment from Canada Revenue Agency. And it's notable, My Lord, that the administration of the 1982 trust following the transfer appears to have ended as there is no evidence at this stage of the game showing any trustee meetings, financial statements, income tax filings, anything of the sort occurring after the transfer. So as such, the 1982 trust has shown no signs of life since 1985.

Now, in light of these historical records and on the record before the Court, there is no doubt that the purpose of this transfer was to hold these assets for the 1985 beneficiaries because you'll have heard on this application, My Lord, submissions that somehow they were being held in the resulting trust for the 1982 beneficiaries and that was the intention. No, that is not what the record before the Court says. We don't need to guess about what the intention was. We can see it from the transactional documents. There was no intention to hold these assets for 1982. And, Sir, this is logical because the 1982 trustees would not

have wanted to reserve any rights to the 1982 trust as this would have made the assets subject to the anticipated influx in membership.

Now, Sir, as you will have gathered, it's our submission that there is no question that the transfer was intended to convey legal and beneficial title to the 1985 trust, and from our perspective the issue in trust law is whether that transfer was lawful. Now, our written submissions go through the law of the propriety of the transfer in detail and to summarize, the 1982 trust contained a power of advancement. This power is found in paragraph 6 of the 1982 trust deed and granted the trustees broad authority to make full income and capital distributions to beneficiaries, and this is significant, My Lord, because the 1982 trust contemplated the idea that there could be a full distribution of assets prior to its winding up. So the idea was embedded in the document that future beneficiaries may not benefit from this trust if that power is exercised.

Now, the trustees were using this power of advancement in order to make the transfer and we can see this from the resolution of the 1982 trustees that I previously referred as it talks about the fact that they're using this power of advancement. So the question then becomes whether this power of advancement was exercised appropriately and within the trustees' scope of authority. Now, a court may not interfere in a trustee's good faith exercise of a discretionary power unless what he has achieved is unauthorized by the power conferred on them or it is clear that he would not have acted as he did had he not taken into account considerations which he should not have taken into account or, alternatively, had he not taken into account or failed to take into account considerations which he ought to have taken into account and, My Lord, I'm quoting from paragraph 19 of the *Hunter Estate* decision, which the parties have referred to already on this application in making that statement of the law.

Now, when analysing this portion of the test on when a Court can intervene in a good faith exercise of discretion, the Court in *Hunter* said the Court should consider whether the purpose for which the discretion was exercised was to accomplish a purpose quite alien from the intention of the settler, and you've heard that bit of case law today that that's the -- the baseline that we apply to see if improper considerations were made.

Now, in addition, the *Pilkington* decision that you've heard a great deal about today and in all the parties' written submissions, I would submit, confirms the beneficial distributions which take the form of -- or take the form of transfers to new trusts, even trusts that include new beneficiaries are permissible so long as they comply with the scope of the power granted to the trustees and it's for the benefit of a current beneficiary. Now, like the OPGT went through, as the transfer was made from and to the same group of persons, we submit that this was done for the benefit of then existing beneficiary class and was within the trustees' scope of -- scope of discretion and as such, there is no basis for the Court to

interfere with that scope of discretion or with that exercise of discretionary power.

Now, My Lord, even if the Court was to find that that transfer was outside the scope of the trustees' authority, whether ultra vires or undertaken in bad faith, whatever you may have, I believe Ms. Bonora made a suggestion that it may have been a breach of fiduciary duty. Now, regardless of how we get there, we submit that that is not the end of the inquiry to the Court, the fact that a breach of the trust deed may have occurred.

Now, we submit that the next stage of questions the Court has to ask, assuming there was a breach, is whether any relief need be granted because of that breach and that opens up questions such as limitations, laches, you know, whether proprietary relief such as a constructive trust that my friend -- I believe that it was Ms. Bonora argued in favour of, that opens up all these questions because it's not in an automatic result that relief will be granted for that breach, particularly a breach that occurred over 35 years ago, and in that we remind the Court that what the trustees have brought before you is an application for advice and direction. While the Court may be able to provide advice to the trustees on the propriety of their actions, this is not a process in which remedial or proprietary relief should be granted.

And in addition to the previous concerns I raise such as limitations, laches, which I certainly don't expect to be resolved on this application, we just flag them for the Court that they're out there and there's a live dispute about them. In additional to all that, the trustees of the 1982 trust were its chief and council. So liability for the fact that a breach of the trust deed occurred, it needs to be all parties who could be liable for that breach need to be at the table and proportionate liability examined because, My Lord, it's not surprising that the intervenor, the SFN, is trying to push all liability for this onto the beneficiaries of the 1985 trust because the chief and counsel of the SFN are potentially at risk if they're found to have breached their fiduciary duties.

And I would also point out to the Court as was briefly mentioned this morning is that all of the assets of the 1982 trust came from their trust -- their trusts held by other individuals. So, My Lord, if we start examining those transfers, it's possible that the 1982 trust is not possessed of any assets because we -- then we have to go back and there's really no evidence before the Court at this time, or at least it's very scant about what happened there. So, My Lord, to find that that transfer was invalid and requires remedy is to be opening the proverbial Pandora's box, and if this Court is going open Pandora's box, we submit that these issues are better left to traditional litigation and can't occur on an application for advice and direction.

Now, My Lord, the final portion of my submissions are going to focus on some of the arguments that largely the SFN has put forward in their written submissions and which we

did not respond to in -- in subsequent iterations of our briefs and to a certain degree the arguments the trustees have put forward in an attempt to -- to vacate the assets of the 1985 trust. Now, Sir, to say that the common denominator of the majority of the SFN submissions across all four of their briefs is that section 42 of the *Trustee Act* was not complied with and thus for that reason made the transfer unlawful. The SFN also points to case law where transfers were found to be invalid and then makes the big jump that therefore this transfer must be invalid too.

Now, Sir, with the greatest of respect to these submissions, they are a bit of a melting pot of trust principles that you must be careful with because most of them are generally not on point with -- with this application before you and what factually occurred on this transfer because, My Lord, in these circumstances, the 1982 trust had a power of advancement that formed the basis for the authority to make that transfer. Examining outcomes of other cases that did not have a similar or any power of advancement such as the Berg decision that dominates the SFN's third set of submission is not informative to the matters on this application because, Sir, at tab Q of our November 27th, 2020 submissions you'll find the *Trustee Act* and I just wanted to put to rest this argument about section 42.

THE COURT: So, sorry, which -- which brief are you referring to?

MS. OSUALDINI: It's November --

THE COURT: November --

MS. OSUALDINI: -- 27th.

THE COURT: November 27th. Okay. Got you. Thank you very much.

MS. OSUALDINI: Yeah, it's just the *Trustee Act* that I'm referring to at section 42, because section 42 is where this -- this concept comes from that court approval needs to be sought for any variation or resettlement of the trust, and that comes from 42(2). But when we read the entirety of that provision, it says subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, and then -- and then it goes on to talk about court approval. So when there is a power of advancement that allows for these types of occurrences, we don't need to look at section 42. Section 42 is only there when the trustee does not confer that authority upon the trustees.

And as we know, in the power of advancement in the '82 trust, it conferred the ability to

make full income and capital distributions at any time subject to the trustees' discretion and it also contemplated that those distributions could be in any form that the trustees desired, which imports this concept of transferring them to another trust. It didn't have to be the traditional concept of cash in hand to the beneficiaries. So it's really a wide reaching power of advancement that they were given.

And then, Sir, I briefly mentioned the Berg decision that we've heard a bit about today. All of those trusts were held in a bare trust without a power of advancement. *Pilkington* wasn't even considered in that decision. I would submit, Sir, that this case is not analogous to the issues that you have before you, and I would note that the second transfer spoken about or -- or referred to in the Berg decision was found invalid because (a) there wasn't a power of advancement and (b) the transfer was to a non-beneficiary that only benefited the husband and not both of the beneficiaries. So this -- this case is just simply not analogous to the issue that you have before you.

Now, turning to the SFN's arguments about the existence of the 1982 trust, now, My Lord, as you'll know, basic trust law, the three certainties of a trust, one of them is certainty of subject matter. A trust has to have property in order for it to be in existence. So the consequence of divesting itself of all of its assets, which there is no question on the record that that's what the trustees were trying to do. The consequence of that is the 1982 trust lost its subject matter and therefore can no longer exist according to basic trust principles.

Now, the SFN and -- and I think the trustees as well now are arguing that the 1982 trust retained assets based on some sort of resulting trust argument and, My Lord, I'd submit that when we look at what intention was, this -- this argument falls apart because there was no intention to retain assets. And then, My Lord, I'd turn to this argument that the SFN and particularly the trustees in their four sets of submissions they've made regarding how somehow the terms of the 1982 trust were imported onto the1985 trust. Now, from what I've heard today, in order to reach that conclusion we have to fully divorce ourselves from the accepted reasons why the transfer took place and what factually occurred in 1985, and I would say that the trustees offer no cogent trust principles or authorities for how trust terms can be imported from one trust to another and I'd submit to you, Sir, that they just simply can't. The 1985 trust is a freestanding trust that has beneficiaries according to its deed. We don't need to look anywhere else for them. You cannot bootstrap trustees into a new trust.

And as my -- my friends with the OPGT said, this concept of the transfer being alien to the settler, we -- we kind of have the benefit in this situation that the transfer was affected by the settler who was one of the trustees. So to say that this was alien to him, I don't know how you get to that conclusion because he obviously thought this was a good idea and something appropriate for -- for the members and for the beneficiaries. I would also just

highlight to the Court that what Chief Twinn was effectively doing in being the architect of this transaction was trying to preserve these assets for how membership had been determined, rightly or wrongly, up until that point.

Now, Sir, the final point that I wanted to touch on is found in the SFN's written submissions at paragraph 22, and in those submissions there's a suggestion that the *Pilkington* decision is inapplicable to these circumstances because it only applies to the British statutory power of advancement or a similar power of advancement. 'Cause you'll recall, My Lord, that in *Pilkington*, the House of Lords was considering allege -- the British legislated power of advancement that applied to all trusts in that country and whether that allowed for this trust-to-trust transfer that happened.

So the SFN is suggesting that this authority is restricted to what we find in that legislation and respectfully, My Lord, we would disagree with that argument and the reason is that to date in Canada *Pilkington* is accepted law to all powers of advancement not just the British statutory power. And when we review the decision of *Hunter Estate*, which I think all parties up to know have referred to and you'll find in everybody's written submissions, at paragraph 15, the Court is considering the *Pilkington* decision and the Court in *Hunter* expressly rejected the idea that it was only applicable to statutory provisions. And I'll just take you there, My Lord. It's tab S of our client's written submissions, paragraph 15.

THE COURT: I'm sorry, did you say tab S?

MS. OSUALDINI: Tab S of our November 27th, 2020 written submissions.

THE COURT: Okay. Well, let me just --

MS. OSUALDINI: (INDISCERNIBLE) the attachment, Sir.

THE COURT: Let me get that. Yeah, that's not bookmarked but let me just try to get down there. It's a lot easier when these are bookmarked, I'll tell you.

Okay. I'm at tab S. I've got it. Thanks.

MS. OSUALDINI: Okay. Thank you, My Lord. And it's paragraph 15 of that decision and, in particular, the -- the latter portion of the paragraph.

THE COURT: Yeah.

MS. OSUALDINI: Just let me know when you're there, My Lord.

THE COURT: Yeah, I am just reading it now. Thanks.

MS. OSUALDINI: Okay.

THE COURT: Yeah. Okay.

MS. OSUALDINI: Thank you, My Lord. So you'll see in the -- in the final sentences of the paragraph and in this paragraph is the Court is considering the *Pilkington* decision and its application within Canadian law, and the Court states: (as read)

> That case relied --

And that case being *Pilkington*.

> -- relied on the interpretation of the words of a statute but it was stated at pages 634 and 35 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 powers.

So I'd submit to you, Sir, that *Pilkington* is -- has much broader application than what the SFN is suggesting and citing the -- the authority of *Hunter* for that proposition.

I'm unaware of there being any other finding in Canadian law on this issue and the SFN does not point us to any, and I would submit, Sir, that this finding is logical because in order for the principles of *Pilkington* to apply, it is implicit that the trustees must comply with the terms of the subject power of advancement at issue on that application. The *Pilkington* decision is not suggesting that the terms or the subject terms of the power of advancement can be overruled or altered simply because of this case law.

And, Sir, the SFN further argues that the power of advancement at issue on this application can't be used to dispossess future beneficiaries and, as I've alluded to and stated before, that just factually is not true because the power of advancement expressly contemplates that possibility that future beneficiaries may be dispossessed. And I would note that the *Pilkington* decision is really not offering commentary on whether future beneficiaries can be excluded. I would submit to you, Sir, that the ratio from this decision is that new beneficiaries -- or sorry, that the transfer of trust property to a new trust, even a trust that includes new beneficiaries, is permissible so long as same is permissible under the scope of authority granted by the relevant power of advancement and it's for the benefit of that beneficiary. That that's what we take away from the *Pilkington* decision and that -- and that

Pilkington is very well accepted authority on this topic in Canada.

Now, in conclusion, My Lord, we submit that on a careful review of the scope of the powers conferred upon the trustees in the 1982 trust deed, it becomes clear that the transaction was within their discretion and that respectfully, My Lord, there's no basis over 35 years later to interfere with that transfer.

And, My Lord, I know that my friends spent a good deal of time in their submissions talking about possible resolution which we think is fantastic and -- and great that the parties are looking towards how -- how this issue can be resolved and we can say that we are certainly very supportive in principle of what the OPGT is proposing and we say that because what they're proposing is grounded in trust law. It complies with the *Pilkington* principles. You know, as mentioned, we're concerned with what the -- the trustees are proposing 'cause we don't see beneficiary definitions being imported or transferred. We just aren't aware of any case law that would support such a theory.

And, secondly, what we like about what the OPGT is proposing is it doesn't leave those persons who currently have an interest in the 1985 trust, such as Shelby Twinn, out in the cold. Because with what the trustees are proposing, they're proposing to grandfather people like Shelby but without -- but when we all know that the Court really doesn't have any jurisdiction to allow that grandfathering to happen and, particularly, given that the trustees - what I heard this morning - are now saying that their fiduciary duty only extends to band members, I think that that's very concerning and we need to be mindful of people like Shelby and others in her circumstances that they're taken care of because they are beneficiaries, existing b
eneficiaries of this trust.

So unless Your Lord -- Your Lordship had any questions for me, those are my submissions.

THE COURT: Thank you very much.

Mr. Molstad, are you next?

MR. MOLSTAD: (INDISCERNIBLE) some time, Sir.

THE COURT: Oh, I'm sorry. Sorry, Shelby. I didn't mean to skip over you. Sorry about that.

Submissions by Ms. S. Twinn

MS. S. TWINN: Sorry. No, that's okay. So good afternoon, Sir.

THE COURT: Good afternoon.

MS. S. TWINN: I'm again going to have to ask you to bear with me. I don't public speak and tend to avoid confrontation at all costs. So I'll tend to lose words when in these situations.

THE COURT: You just -- you just take your time and just tell -- tell me exactly what you are thinking and why your position is sound and you'll -- we will work our way through this for sure.

MS. S. TWINN: Great. Thank you. Thank you. So --

THE COURT: And, of course, Ms. Osualdini can step and if you are stumbling on something, she can maybe give you some sort of guidance to head you back on the path. I am sure she would be prepared to do that for you.

MS. OSUALDINI: Absolutely, My Lord.

MS. S. TWINN: Thank you. Thank you.

MS. OSUALDINI: (INDISCERNIBLE).

THE COURT: We do need to hear exactly what you think should be done here. Okay.

MS. S. TWINN: Yeah. Yeah. Excellent. Okay. So I guess simply because, again, I'm not educated in this. I'm fairly young so I wasn't around for a lot of these decision making moments, but what I do understand is that from -- with respect to the trust transfer, that from settler -- initial settler and trustees that it was understood and everybody was functioning from a point of understanding that the trust transfer went over to benefit beneficiaries of 1985 as well as the other one for 1986, but and then continuing through to current trustees and employees of the trust that they were all functioning under the understanding that it was 1985 beneficiaries that were being -- to benefit from that trust property in there.

So I find it -- confusing, again, for someone like myself that somehow along the way that there's been a change of heart for the trustees on this matter and a little concerning for myself also on that idea that throughout this whole process from a few years ago when I was seeking party status to right now, I was made to believe in decisions and other conversations, documentation that the trustees in their fiduciary duty were looking out for

the beneficiaries and their interest and it's always been a concern of mine, which is why I've tried to be involved as much as I could that that might not entirely be the case and then continuing to more conversations and what I've heard today is that that -- my concern is valid because I'm not a band member so all the other beneficiaries like myself that are singularly a beneficiary of this 1985 trust that apparently there is no fiduciary duty for us from the current trustees. From what I understand that I heard, which is scary that no one is looking out for us because generally speaking everyone like myself, we're not educated. We don't know where we're supposed to talk, what we're supposed to say, how we're supposed to say it, and this is all happening without us being able to understand and feeling that there is no one to advocate for ourselves except for us.

I guess another point of the discrimination aspect that it was kind of insinuated that I am for the exclusion of the current discrimination in the 1985 trust deed and an example of that, C-31 women, which is not true. It's just that their example right now is using -- is being used to try and take the trust away from current beneficiaries instead of -- again, I don't know how this works but instead of trying to add people who have been discriminated against, why is it being used to take away from current beneficiaries instead. So it's not that I want to exclude in example, C-31 women, I just think that the example is being used in a way that I don't agree with right now.

And also I guess the ascertaining who these beneficiaries are being overly complicated, I don't agree with that as well. In example, the Michelle Ward situation where she was appointed by the registrar of Canadian Indigenous Affairs or whatever their name was back then, that she fell in line with the rules that they were following and there was discussion and litigation about the validity of that because the Sawridge First Nation, for whatever their reasoning was back then, was that she didn't belong in there and so they protested that unsuccessfully, proving that these rules are followable. That you can take an individual's facts about who they are and have them applied. This doesn't prove that it's complicated. It proves that you can use them. And that maybe proving also that they may need to be, you know, inclusion when deciding who is a beneficiary or -- and so on and so forth. That may be an impartial and, you know, possibly educated or understanding of the situation may need to be involved to keep these misunderstandings at bay.

Yeah, that's my thoughts on it, I guess.

THE COURT: Okay. Well, thank you very much. You did very well in explaining that position. Thank you very much for that.

Mr. Molstad.

Submissions by Mr. Molstad

MR. MOLSTAD: Thank you, Mr. Justice Henderson. During my submissions I will be referring to the brief of Sawridge November 15th, 2019, and the book of documents dated the same date --

THE COURT: Okay.

MR. MOLSTAD: -- the reply brief of Sawridge November 20th, 2019, and the supplemental brief of Sawridge, November 27th, 2020. During my submissions I will refer to the Sawridge First Nation as Sawridge.

By way of a brief factual background, Sawridge adhered to treaty number 8 which provided in part that Her Majesty the Queen set aside reserves for Sawridge, and a copy of the written text of treaty is at tab 1 of our November 15th, 2019 brief. Treaty 8 further provided that if the reserve set aside for Sawridge or any interest therein is sold or otherwise disposed of, it would be for the "use and benefit of the said Indians entitled thereto with their consent first had and obtained." The oil and gas underlying the Sawridge reserves constituted an interest in their land. Pursuant to the *Indian Act*, the regulations under the *Indian Act* and the *Indian Oil and Gas Act and Regulations,* Canada granted oil and gas leases to third parties with respect to Sawridge reserve lands.

When oil and gas was produced from the Sawridge reserve lands, the royalties from this production that was due was paid to Canada in trust for Sawridge. Pursuant to section 4 of the *Indian Oil and Gas Act and Regulations,* the royalty money was paid to Canada in trust only for the benefit of Sawridge as the "Indian band concerned". Section 4 of the *Indian Oil and Gas Act* is reprinted in paragraph 8 of our November 15th, 2019 submissions and states as follows:

> Despite the provisions of any contract but subject to subsection (2), whenever oil or gas is recovered from first nation lands, there is reserved to Her Majesty in right of Canada in trust for the first nation concerned a royalty consisting of the share of the oil or gas determined under the regulations, which the contract holder shall pay to Her Majesty in right of Canada in trust for the first nation in accordance with the regulations.

Just below that in our same brief, we quote paragraph 61(1) of the *Indian Act* which states as follows:

> Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys

> are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

We submit that section 61(1) of the *Indian Act* mandates that Indian money must only be expended for the use and benefit of Sawridge.

In the *Ermineskin* decision, which is at tab 4 of our November 15th, 2019 brief, the Supreme Court of Canada commented that statements made in Parliament were made to ensure "that equitable benefits from oil and gas production on Indian lands go to the Indian people" and that "the greatest possible return must flow to the band when the oil is taken from the ground and is lost to them forever".

In paragraph 100 of that same decision, the Court further commented that section 61(1) of the *Indian Act* when read as a whole mandates that Indian moneys are only to be expended for the use and benefit of the bands. The Court also stated in paragraph 104 that under section 64(1), once funds are expended with the consent of the band, the Crown no longer has control over the funds nor does it hold or manage the assets that may have been acquired. The Court also stated in that decision that (a) absence of control or management responsibility would also apply to expenditures for expenses or assets under section 64(1)(k).

Further, the Crown cannot simply transfer funds. Under section 64(1)(k) in accordance with its fiduciary obligations, they must be satisfied that any transfer is in the best interests of the bands. Once the transfer is effected, the Crown's fiduciary obligation with regard to the funds in questions must cease as it no longer has control of the funds and is not responsible for their management. And (c) requiring a band to satisfy the Crown that a transfer was in their interests is consistent not only with the provisions of the *Indian Act* but with the Crown's obligation as a fiduciary with respect to the royalties. We submit that the *Indian Act* provides that Sawridge was and continues to be the legal owner of the royalty money paid in trust to Canada and pursuant to section 62 of the *Indian Act*, the royalty money is deemed to be capital moneys of Sawridge. 62 of the *Indian Act* is found in paragraph 11 of our November 15th, 2019 brief.

Pursuant to section 64 of the *Indian Act*, the expenditure of capital moneys requires the consent of the council of a band and the authorization and direction of the minister. Unless the investment by a band falls within section 64(1)(a) to (j) of the *Indian Act*, the capital moneys of Sawridge were expended pursuant to section 64(1)(k) of the *Indian Act*, which states, and I would refer you to paragraph 13 of our brief. 64(1)(k) of the *Indian Act* provides:

> With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band
>
> (k) for any other purpose that in the opinion of the Minister is for the benefit of the band.

In accordance with the *Ermineskin* decision of the Supreme Court of Canada, section 64(1)(k) of the *Indian Act* provides authority for the transfer of capital moneys from the Crown to either Sawridge or an independent trust for Sawridge. The letter from the assistant deputy minister dated December 23rd, 1993, confirmed that the trust held substantial sums which to a large extent have been derived from Sawridge capital and revenue moneys previously released by the minister and these moneys were expended pursuant to section 64 and section 66 of the *Indian Act* for the benefit of the members of Sawridge, and we would refer you to the affidavit of Mr. Darcy Twinn paragraph 8 and tab L and tab O of the Sawridge book of documents.

The evidence demonstrates that the funds were released to Sawridge, where on the basis of its representation to the Crown, that the funds would be used for the benefit of its members in accordance with the applicable legislation. The purpose of the 1982 trust was to settle assets that were at that time held in trust by Chief Twinn and other individuals for present and future members of Sawridge. Chief Twinn testified in October of 1993, at the bill C-31 trial, that the reason for establishing the Sawridge trust were that at that time Sawridge was not considered to be a legal entity.

The 1982 trust, which is found at tab M of our -- that's 'M' as in mother -- book of authorities contains a number of very significant provisions. Mr. Sestito has taken you to that and I will not repeat what he has read out to you, but I would refer you to the very first paragraph in the preamble on page 2, the top paragraph at the top of the page, in paragraph number 1 - and I'm not sure you read this - it provides that the settler and trustees hereby establish a trust fund which the trustees shall administer in accordance with the terms of this agreement. I believe Mr. Sestito read to you paragraph 3 on the second page. Go over to the third page, he did read part of paragraph 6 but it's important that you hear all of the first paragraph which stated: (as read)

> 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 21 years after the death of the last descendant now living of the original signatories 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.

And over on the next page, the last paragraph of paragraph 6 reads as follows: (as read)

> 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 --

And I emphasize these words: (as read)

> -- the beneficiaries set out above --

The beneficiaries set out above. (as read)

> -- 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.

We submit, Sir, that the terms of the 1982 trust are unambiguous and provide that the assets held by the '82 trust were to be used only for the use and benefit of members present and future of Sawridge.

In 1985, when Sawridge assumed control of its membership, they received a list of the members from the minister. That was in July 1985. These were the members in 1985. I'm advised that the number of members today has grown slightly and is 47. The powers of the 1982 trustees were and are circumscribed by the terms and conditions of the '82 trust, which included "no part of the trust fund shall be used for or diverted to purposes other than those purposes set out herein".

The only beneficiaries of the 1982 trust are the members of Sawridge. The only persons who become beneficiaries are the members of Sawridge. Now, on April 17th, 1982, the *Constitution Act* of 1982, including the *Canadian Charter of Rights and Freedoms* came into force, but section 15 did not come into effect until April 17th, 1985. The federal government introduced bill C-31, an Act to amend the *Indian Act* to address certain discriminatory provisions relating to both Indian status and membership. Bill C-31 also provided a mechanism to provide bands control of their own membership if desired.

Pursuant to section 10 of the *Indian Act*, as amended by bill C-31, Sawridge assumed control of its member process on July 8th, 1985. When Sawridge assumed control of its

membership, the Department of Indian Affairs and Northern Development's membership list included 37 members, several of whom were minors. Chief Twinn testified at the bill C-31 trial that Sawridge was concerned that bill C-31 would result in a large number of persons being forced upon them as members. The 1985 trust was created on April 15th, 1985, two days before bill C-31 came into force. We submit that the objective of the 1985 trust was to ensure that the beneficiaries would be the people who were considered Sawridge members before the passage of bill C-31 and that people who might be declared to be Sawridge members after bill C-31 was enacted would be excluded for a short time until Sawridge could see what bill C-31 would bring about, and we refer you to paragraph 30 of our November 15th, 2019 brief.

Ultimately, it was the intention that the assets from the 1985 trust would be placed in a 1986 trust for the beneficiaries who were defined as the members of Sawridge. On April 15th, 1985, the trustees of the '82 trust passed a resolution to transfer all assets of the '82 trust to the 1985 trustees pursuant to paragraph 6 of the '82 trust. Sawridge passed a resolution signed by nine members to approve the transfer of the assets from the '82 trust to the 1985 trust. This did not constitute all members of Sawridge at the time. The intention of the trustees was clear and unequivocal in that they made every effort to protect the assets for only members of Sawridge and future members of Sawridge.

Sawridge challenged the constitutionality of bill C-31. In their pleadings they stated that Parliament unilaterally required Sawridge to admit certain members to membership and granted individual membership rights without the consent of the First Nation and over the First Nation's objection. Sawridge alleged that the membership rights were granted to individuals by virtue of bill C-31 without regard to their actual connection to or interest in the Sawridge and regardless of their individual desire or that of the First Nation.

This matter went through two trials and the relief sought included a declaration that the amendments contained in bill C-31 were inconsistent with the provisions of section 35 of the *Constitution Act* to the extent that they infringed or denied the right of Sawridge to its self-government, it's right to determine its own band membership and, therefore, to that extent they were of no force or effect. After the second trial, a decision was made which we submit did not include a decision on the merit of that position. We submit, Sir, that this is clearly evidence that Sawridge has historically taken the position that prior to the enactment of bill C-31, they had and continued to have an Aboriginal and treaty right to govern themselves with respect to their membership. Following the enactment of bill C-31, they took control of their membership pursuant to that legislation.

The assets of the 1982 trust were transferred to the '85 trust and the approximate net value of those assets in December of 2010 was $70 million. After April 15th, 1985, no further funds or assets were transferred into the 1985 trust with a possible exception of this

debenture which, in fact, was held in trust for Sawridge by Chief Walter Patrick Twinn. We submit that the debenture has no value. However, should it have value, it was an asset that was held in trust for Sawridge and must be held for the benefit of the members of Sawridge. Our submissions in relation to the 12 million debenture are set out paragraphs 56 to 75 of our supplemental brief dated November 27 of 2020.

We submit that the argument on behalf of the public trustee and Ms. Twinn that the debenture issued by Sawridge Enterprises Ltd. was part of the '85 trust is not supported by the evidence of Mr. Bujold, who testified and clarified his position that the debenture never became a 1985 trust asset. The evidence demonstrates that the debenture was never a 1985 trust asset and even if it were, it was held by Chief Twinn as a trustee for the Sawridge First Nation - that is, the members of Sawridge.

The definition of beneficiaries of the 1985 trust is reprinted in paragraph 34 of Sawridge's November 15th, 2019 brief. There has been, in our submission, no distribution of the assets to the beneficiaries which are held in trust or to anyone. All benefits and programs and services have been paid out to -- to or for members from the '86 trust. I'm also advised at this time there are 28 minors who are children of members of Sawridge. These 28 children who are children of members are themselves not members, however, it should be noted that these children receive the benefits of the 1986 trust either through their parents directly or indirectly. The only distributions from the 1985 trust were immediately recontributed and made for tax reasons, and I refer you to paragraph 34 of our December 11th, 2020 reply brief.

The 1986 trust was settled on August 15th, 1986, after Sawridge took control of its membership list and it defines beneficiaries as members of Sawridge. Chief Walter Patrick Twinn testified during the bill C-31 trial that it was the intention that the assets from the '85 trust would ultimately be placed in the '86 trust for the benefit of the members of Sawridge. Mr. Bujold, on behalf of the trustees also testified that his investigation showed that the goal of the settler of the 1985 trust was to switch back to the members of Sawridge as beneficiaries and combine the '85 and '86 trust once the result of bill C-31 was known.

As you know, on August 24th, 2016, legal counsels for the Sawridge trustees, Catherine Twinn, and the Office of the Public Guardian and Trustee consented to an order which was granted by Mr. Justice Thomas approving the transfer of assets from the 1982 trust to the 1985 trust nunc pro tunc on the basis that the transfer shall not be deemed to be an accounting of the assets of the 1982 trust that were transferred and shall not be deemed to be an accounting of the assets of the 1985 trust that existed upon the settlement of the 1985 trust.

Sawridge's presence in the courtroom on that date was to respond to two applications of

the public trustee pursuant to rule 5.13 to compel Sawridge, who was not a party, to produce records. The particulars of Sawridge's appearance on August 24th, 2016, is described in paragraph 7 to 15 of our November 20, 2019 reply brief. Sawridge did not consent to this consent order. It was not a party to the consent order. The position of Sawridge has been and continues to be that the trust property of the 1982 trust and the 1985 trust is held for the benefit of the members of Sawridge and not for persons who are registered as Indians but who are not members of Sawridge.

This Court identified the question of the effect of the August 24th, 2016 consent order as a foundational and pivotal issue. One possibility is that the trust asset transferred from the '82 trust to the '85 trust remains subject to the terms of the '82 trust. This Court noted that the consent order does not address the issue of the terms under which these assets are being held and that this is a foundational issue which needs to be addressed. The Court directed the filing of an application to have the issue as to the meaning and consequences that flow from the consent specifically with respect to whether or not regarding the transfer of assets to the 1985 trust, those assets are being held subject to the terms of the '85 trust or whether they are being held subject to the '82 trust. On September 13th, 2019, the '85 trustees filed an application as directed by this Court seeking a determination of the effect of the August 24th, 2016 consent order.

That is a brief summary of the facts that we submit are relevant. Our submissions in response to the arguments advanced by the parties are first, the consent order does not address the terms pursuant to which the transferred assets are held. The 1982 trust is unequivocal as to who the beneficiaries are - all members present and future of Sawridge. The 1985 trust was not a named beneficiary of the 1982 trust.

We submit that the *Pilkington* decision about a trustee in possession of a power of advancement or discretion to encroach on capital -- capital to advance or encourage and resettle a new trust on different terms provided the beneficiaries were not deprived of their interest without approval. *Pilkington* does not stand for the position that a Court may permit a trustee to encourage on capital to the benefit of one beneficiary and to the detriment of another unless the trustee is given that power by the settler or by statute.

We submit that the 1982 trustees did not have the authority or discretion to re-characterize funds held in trust for "current and future members" as effectively being held in trust for persons who were not members of Sawridge. In the *Hunter Estate* decision, the Court held that the trustees could effect the resettlement as a result of a wide and discretionary power to advance, encroach or otherwise appoint funds to a beneficiary directly and in such case, the trustee also has the power or discretion to advance, encourage, or otherwise appoint those funds into a trust for the benefit of the beneficiary. We say, Sir, this difference from the 1982 trust to the 1985 trust transfer where the entire objective of the alleged

resettlement was to cut out persons who were forced to be accepted as Sawridge members by virtue of the legislation.

The public trustee takes the position that non-members of Sawridge are beneficiaries of the 1985 trust and the 1985 trust excluded any person added to the Sawridge membership by virtue of bill C-31. We submit that this is contrary to the express terms of the 1982 trust, which was for present and future members of Sawridge. This would eliminate the ability to carry out the terms of the '82 trust to ultimately distribute the trust funds equally among all members of Sawridge in accordance with paragraph 6 of the '82 trust. We also say, Sir, this is not consistent with *Pilkington* or *Hunter Estate* as this interpretation would dilute the interest of members of Sawridge by permitting non-members to be considered beneficiaries and it would extinguish the interest of those who would become members under bill C-31.

We submit that the main principle which *Pilkington* stands for is that pursuant to the power of advancement contained in section 32 of their *Trustee Act* that applied to that trust, the trustees were permitted to resettle property into a new trust, that is, do a trust-to-trust transfer where it is for the benefit of the beneficiary. In *Pilkington*, Lord Reid commented that there was no dispute in that case that the resettlement on behalf of Penelope's or Penelope's contingent interest into a new trust was for her benefit. We refer you to page 14 where he states in the first sentence of the second paragraph: (as read)

> 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 Ms. Penelope.

This is the crux of the case and the basis upon which Sawridge submits that the principle in *Pilkington* does not apply to the facts in this case.

Sawridge submits that the subject transfer of property from the '82 trust to the '85 trust clearly was not for the benefit of the class of beneficiaries defined in the '82 trust - that is, all present and future members of Sawridge. It cannot be argued that the resettlement of the entire purpose of the '82 trust into the '85 trust was to the benefit of all present and future members of Sawridge when the effect of such a transfer was to change the class of beneficiaries to include non-members of Sawridge.

We submit that the jurisprudence supports the position that a properly empowered trustee may advance and encroach on or pay or apply capital by settling into a new trust on terms provided that it is for the benefit of the same beneficiary. The trustee may not use such power to the detriment or exclusion of another beneficiary unless the trust deed expressly provides the trustee with that power or the beneficiary approves. Nothing in the 1982 trust

allowed an advance or encroachment which would be to the detriment of the members of Sawridge. Powers of the 1982 trustees were circumscribed by their duty to treat the beneficiaries, members present and future of Sawridge, fairly and by the terms and conditions of the trust declaration, which included the following: (as read)

> No part of the trust fund shall be used for or diverted to purposes other than those purposes set out in herein.

In the *Bruderheim* decision, this Court construed a trust which defined its beneficiaries as "static entity persons". The facts in the *Bruderheim* decision are as summarized in paragraphs 22 to 26 of our November 20th, 2019 reply brief. We submit that based on *Bruderheim* that a trust settled for the object of benefitting an ascertainable static entity is constrained by the four corners of its deed to benefit that object and no other individuals. A resettled trust must be defined in the same manner as the original trust.

As we stated before, paragraph 6 of the '82 trust provides in part as follows: (as read)

> 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.

The beneficiaries set out above are the members of Sawridge.

The trustees of the 1982 trust were not permitted to resettle the '82 trust fund into the '85 trust unless it was for the benefit of only the beneficiaries under the '82 trust as this would dilute the interests of the members of Sawridge by adding non-members as beneficiaries and extinguish the interests of those who would become members and therefore beneficiaries in the '82 trust under bill C-31.

We submit that the primary duty of the trustee is to carry out the terms of the trust and at common law, the trustees may only vary a trust if the settler expressly grants them such power. And we refer you to the quote of Waters in paragraph 92 of our -- of our November 15th, 2019, brief. We say that there is not power of amendment conferred on the trustees by the terms of the '82 trust. We submit that a trust in Alberta can only be varied or terminated by a court order or if the variation is permitted by the trustee. The variation or termination by court order of the 1982 trust is governed by section 42 of the *Trustee Act* and, of course, section 42 of the *Trustee Act* creates onerous requirements for any person seeking to vary a trust. There's no evidence suggesting that the '82 trustees met these

statutory requirements when transferring the '82 trust assets or that they could. We refer you to section 42(6) and 42(5) which deal with the limitations and terms of the variation of a trust.

We submit that there is no evidence that all beneficiaries to the '82 trust who were capable of consenting consented in writing nor is there evidence that the Court consented on behalf of individuals who were otherwise unable to consent. As we stated earlier, paragraph 6 of the '82 trust authorizes payments for beneficiaries and this contrasts with paragraph 6 of the '85 trust, which provides for payment to "anyone or more of the beneficiaries". There is nothing in the '82 trust which suggests that the '82 trustees have the authority to vary their own power.

The expansion of the trustees' discretion, we submit, is contrary to the concept of a trust and, in particular, the 1982 trust. We submit, Sir, that this court should direct that the assets transferred to the '85 trust are held on trust for the beneficiaries of the 1982 trust. We submit that the trust property remains trust property, and we refer you to Mr. Waters comments that are reprinted in paragraph 103 of our November 15th, 2019 brief, and also in paragraph 104 of our November 15th, 2019 brief.

The 1985 trust did not see the assets for value and we submit it should be found that the '82 trust property, which was purportedly settled into the 1985 trust, remains 1982 trust property. This finding is consistent with the position of the '85 trustees who have, in the past, put forth proposals that would see the definition of the beneficiary in the 1985 trust be amended to be defined as a member of Sawridge. We submit it's consistent with the intent and purpose of the Sawridge trust.

Our submissions in relation to Ms. Twinn's January 2020 affidavit are found in paragraphs 22 to 40 of our November 27th, 2020 supplemental brief. Generally, our submissions are that this affidavit consisted of hearsay, double hearsay, and legal opinions and as a result should be given little, if any, weight. We also submit that that the questioning evidence of March 12th, 2020 of Ms. Twinn should be given little weight on grounds which are described in paragraph 47 of our November 27th, 2020 supplemental brief.

With respect to Ms. Twinn's assertion in paragraph 12 of her brief that registration for Indian status and membership in a First Nation are one and the same, we submit that this is not correct, and we refer you to paragraph 41 of our November 20th, 2019 brief. The provisions of the *Indian Act* in 1970 provided -- and we will only summarize a few of these provisions.

First of all, a person could be registered as an Indian on the general list while not a member of any band, and reference there is to section 6 of the 1970 Act. Secondly, a band council

or any electors of a band could protest the addition of any person to that band list to the registrar. That's found in section 9(1) of the '70 Act. Third, if there was a protest pursuant to section 9(1) of the Act, it required the registrar to investigate whether the person should have been added to the band list. That's found in section 9(2) of the 1970 Act. Four, the decision of the registrar was subject to a referral of the matter to a district county court for judicial review, and that's found in section 9(3) of the 1970 Act. And, five, the admission to a band of a person registered on the general list required the consent of the council of the band, and that is found in section 13(a) of the 1970 Act.

We submit, Sir, that this legislation makes it clear that the definition contained in the 1985 trust is not sufficiently certain so the trust can be performed, and I want to take you to the *Bruderheim* decision, which is at tab 2 of our November 20, 2019 reply brief. At paragraph 121 of that decision, it was stated:

> The intention of the settlor must be determined based upon the plain and ordinary meaning of the words which were used in the declaration of trust and must be assessed in the context of the circumstances which existed immediately prior to the declaration of the trust.

Also in paragraph 74 of your decision you stated as follows:

> Certainty of objects requires that the persons or the class of persons who are the intended beneficiaries must be sufficiently certain so that the trust can be performed. Certainty of objects is required because the trustee cannot be sure that he is performing properly unless the objects are clearly specified.

And the Court of Appeal decision, which is found at tab 1 of our November 27th, 2020 submissions, in paragraph 16 the Court of Appeal stated:

> The appellants challenge the chambers judge’s interpretation of the objects of the 1897 trust. Creation of an express trust requires the presence of three certainties, namely intention, subject matter, and object: *Century Services Inc v Canada*. Certainty of objects requires that the persons or the class of persons who are the intended beneficiaries must be sufficiently certain so that the trust can be performed.

We know, Sir, that the beneficiaries of the 1982 are the members of Sawridge. We submit

that no one knows who the beneficiaries of the 1985 trust are, unless they're members of Sawridge. The public trustee repeatedly refers to the 1985 beneficiaries as though there was some certainly as to who they are. In paragraph 18 of the November 15th, 2019 brief filed on behalf of Ms. Twinn it is stated that as at August 12th, 2016, there were approximately 493 persons associated with Sawridge according to the Department of Indian Affairs, but only 45 persons on the Sawridge membership list. We're advised that as of August 2021, Canada chose 559 persons affiliated with Sawridge. Sawridge has no idea as to how the Department of Indian Affairs decides if a person is associated or affiliated with Sawridge.

Our response to the proposal of the public trustee in their letter of September 15th, 2021, is that this proposal is not a solution. In this proposal, they describe "current existing beneficiaries" of the 1985 trust who are not members of SFN as if they are a definable group and as if they are beneficiaries. The position of Sawridge is that the only beneficiaries of the '82, '85, and '86 trusts are members of Sawridge. To suggest that the members of Sawridge who are beneficiaries of the trust should be compelled to have their interests as beneficiaries diluted by adding as many as 559 persons as beneficiaries because Canada says they're affiliated with Sawridge is, in our respectful submission, ridiculous.

We invite the Court to ask the question, Who are the beneficiaries of the 1985 trust who are not members of Sawridge. We submit no one can answer that question. The only person who can answer the question as to who the beneficiaries are are Sawridge because they are the members of Sawridge.

We submit that Sawridge submissions are based on the evidence that has been filed in this court including the extensive questioning and document production and, as a result, we submit that this Court should have confidence in the sufficiency of the record to make a determination on the asset transfer issue.

With respect to the jurisdiction of the Court, the 1985 trustees advice and direction application in which both the public trustee and Ms. Catherine Twinn participated and which they participated in for many years has been to (a) seek direction with respect to the definition of beneficiaries in the 1985 trust including varying the 1985 trust to clarify that definition and (b) to seek direction with respect to the transfer of assets to the 1985 trust. We refer you to paragraph 11 of our December 11th, 2020 reply brief.

This Court has already ordered by a consent order dated January 19th, 2018, that the definition of beneficiary in the '85 trust is discriminatory in that it prohibits persons who are members of the Sawridge Indian Band No. 19 pursuant to amendments to the *Indian Act* dated after April 15th, 1982 from beneficiaries of the '85 trust. The issues raised by the Sawridge trustees since the inception of the advice and direction application in 2011, along

with the asset transfer issues set out in the Sawridge trustees' further application filed September 13th, 2019, are clearly, in our submission, legal issues affecting the obligations of the '85 trustees and are appropriate subject matters for an application for advice and direction.

Rule 4.14(2) provides that the case management judge must hear every application filed with respect to the action for which the case management judge is appointed. The language is imperative. The case management judge must hear every application. The foundational rules referred to in tab 1 of our December 11th, 2020 brief describe the purpose as to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way. The authority of the Court includes granting a remedy whether or not it's claimed or sought in an action in rule 1.3(2). We submit that unless the chief justice or case management judge otherwise directs or the Rules otherwise provide, the case management judge must hear every application filed with respect to the action for which the judge has been appointed.

Unless every party and the judge agree, the case management judge must not hear an application for judgment by way of summary trial or preside at the trial of an action for which the case management judgment was appointed, there is nothing in the Rules that precludes a case management judge from hearing an application that would have the effect of granting final relief. In fact, it's not uncommon for a case management judge to hear and decide summary judgment or summary dismissal applications. The jurisprudence supports the position that trial should no longer be the default procedure for deciding disputes and more proportionate, timely, and affordable procedures should be used.

With respect to limitations, we submit that neither the *Limitations Act* nor the equitable doctrine of laches act as a bar to block this Court from providing the relief sought in the application of the Sawridge trustees. With respect to limitations, a remedial order is defined in the Act as not including an order seeking a declaration of rights, duties, legal relations, or personal status. The relief sought in the application before you is clearly a declaration of the 1985 trustees' duties and beneficiaries' right which flow from the transfer order. We also submit that the doctrine of laches has no application to the facts in this situation. There's been no damage suffered or substantial change on the part of any party as there have been no distributions from the '85 trust since the trust was settled other than distributions that were immediately recontributed and made for tax reasons.

We submit that the 1982 trust assets are currently held by the '85 trustees on a resulting trust for the benefit of the '82 trust beneficiaries. This can be the only legal effect of the consent order. We submit a resulting trust will arise when an express trust fails and the trustees are left holding the property. In conclusion, Mr. Justice Henderson, we submit that the 1982 trustees did not have the power to change the beneficial ownership of the '82 trust

assets. These assets must be held by the '85 trust on a resulting trust subject to the terms of the '82 trust and for the beneficiaries as defined in the '82 trust, being all present and future members of Sawridge.

We also submit that based upon the evidence that is before you that this Court should find that the assets currently held in the '85 trust remain '82 trust property subject to the terms of the '82 trust and, further, they are presently being held for the benefit of the beneficiaries of the '82 trust who are the present and future members of Sawridge. We submit that this is the lawful and practical resolution of this matter.

Those are our submissions, Sir.

THE COURT: Thank you, Mr. Molstad. Okay. So I gather that you would like to take the rest of the day and evening to reflect, come back tomorrow and have your replies. Is that -- is that the plan?

MR. SESTITO: Well, My Lord, we're -- we're sort of in your hands in that regard. We have the benefit of time, which is fortunate, and we could either begin with the replies now or -- and I'm fairly confident, given how things went today, we'll be okay tomorrow for everyone to get through their replies but, certainly, we could adjourn for the day and then pick up tomorrow at 10 AM, subject to any strong preferences by the parties. I think we're in your hands in that regard.

MR. MOLSTAD: If I could speak briefly, it would be my respectful request that we adjourn for replies for tomorrow. I believe and would submit it'll be far more efficient if we have the time to review these submissions that have been already and make --

THE COURT: Well, I think that -- I think it would be much more efficient to simply adjourn and come back. We could reflect on what -- what has been argued today and give me a chance as well to reflect on what has been said so that I could perhaps understand your replies a little more clearly. So -- and my guess is it would shorten up the replies a fair bit if we -- we let you sort of pare it down to replying to only those things that you think it's necessary to reply to. So I think probably it is preferable simply to -- to adjourn and start tomorrow at 10:00 or -- or whatever time you want to start at. Or 9:00, that's fine. 10:00 is good. Whatever is good for you.

MS. HUTCHISON: That's agreeable to the OPGT, My Lord.

MR. SESTITO: Yes, certainly --

MS. OSUALDINI: That's fine.

MR. SESTITO: -- For -- for the trustees, commencing tomorrow is -- is fine, adjourning for the day. If -- if the parties are okay to sit at 9 that would be great. Then we can have, you know, a better chance of making sure that everyone has an opportunity to speak tomorrow.

THE COURT: Well, everyone is going to have an opportunity to speak tomorrow. That will be certain. 9 or 10. We won't be concerned about that. So I'm -- I'm fine with --

Mr. Faulds, do you have a preference one way of another?

MR. FAULDS: I was -- I was going to suggest -- apologies, My Lord. I was going to suggest 9:00. It would -- we'll have plenty of time to be ready for 9 AM.

THE COURT: Ms. Osualdini, do you have any issues with 9:00?

MS. OSUALDINI: No, that works for our office, My Lord.

THE COURT: Shelby, are you okay with that?

MS. S. TWINN: Yeah, 9 works great.

THE COURT: Good. Okay. And, Mr. Molstad?

MR. MOLSTAD: That's agreeable, Sir.

THE COURT: Good. So we are going to adjourn now until 9:00 tomorrow morning, and we'll hear replies at that time. Okay.

MS. BONORA: Thank you, My Lord.

MS. HUTCHISON: Thank you, My Lord.

THE COURT: Thank you very much. Okay.

MR. SESTITO: Thank you.

THE COURT: Bye now.

PROCEEDINGS ADJOURNED UNTIL 9:00 AM, SEPTEMBER 28, 2021

Certificate of Record

I, Morag O'Sullivan, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench held in courtroom 416 in Edmonton, Alberta on the 27th day of September 2021, and I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Marcey Lepka, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

Marcey Lepka, Transcriber
Order Number: AL21827
Dated: October 3, 2021