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. 2000, c. T-8, AS AMENDED, and

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT
CREATED BY CHIEF WATER 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 28, 2021

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

THE COURT: Good morning. It looks like we have most everyone on the line. Am I right?

MS. HUTCHISON: It looks that way, My Lord, looking at the -- we're getting some feedback.

THE COURT: Right. I think that --

MR. FAULDS: There.

MS. HUTCHISON: It might be resolved.

MR. FAULDS: Yeah. I think we've (INDISCERNIBLE).

THE COURT: Okay. Good.

MS. HUTCHISON: Can you hear us clearly now, My Lord?

THE COURT: I can hear you very clearly. But once again, I would ask that everyone mute themselves until they speak, and that will ensure that (INDISCERNIBLE) as any risk of that type of interference. Okay.

MS. BONORA: Good morning, Sir. And in terms of the order of speaking today, I think we're back to our order that we had presented. And so we

would be starting with Shelby Twinn, followed by Sawridge First Nation, followed by Ms. Osualdini representing Catherine Twinn, followed by Ms. Hutchison and Jon Faulds for the OPGT, and then the trustees would speak last.

THE COURT: Okay. Excellent. So, Shelby, we will start with you then. Do you have anything to say?

Submissions by Ms. Twinn

MS. TWINN: Yes. Okay. So I don't know how this whole works. I don't know what replying really means in context of this whole thing. But from what I have heard yesterday and spent some time going through and understanding to start -- I guess start off with Justice Thomas's decision in Sawridge No. 5, I guess, where he states, I cannot foresee a circumstance in -- paragraph 37:

> I cannot foresee a circumstance where the status of Shelby Twinn as a beneficiary under the 1985 Sawridge Trust will be eliminated.

And also in paragraph 27, he also states:

> The 1985 Sawridge Trust and the assets held by the Trust for its beneficiaries whom, I have already noted, include at a minimum two of the applicants, namely Patrick and Shelby Twinn.

Again, kind of reiterate to me that this was about a year after the said transfer order and that everybody was understanding that this is -- this was how it was, that there was no appeal on this notion. Trustees were aware of it. And there have been currently and past elected Sawridge Band Council as trustees. So in theory, that should mean that they understood as well. They were aware 'cause they were also present as a trustee and knowing this information.

So at that -- also with the trustees from what I understand yesterday being that they do not represent someone like myself, being not a Band member. I feel like I have been led a little bit back and forth throughout this entire thing being told that by -- either from them notably in their factum to the Court of Appeal on October 20th, 2017, where numerous times they state that they are advocating for the interests of the adult beneficiaries. In paragraph 34 of that factum, they had stated: (as read)

> The trustee is acting in the best interests of the beneficiaries of the trust commenced an advice and direction application to deal

> with the potentially discriminary provision. The interests of the beneficiaries are properly represented by the trustees for the adult beneficiaries.

That's what with many other paragraphs in there insinuating the same thing through paragraphs, in example, 3, 30, 33, and 34 which is the one I just read. To also be told yesterday that they don't now -- because I'm not a member is a little concerning, and for again someone who doesn't understand the process and what the details to what these legal obligations are, now I don't understand how I can be a beneficiary without trustees caring for and managing my interests. I don't know how that works, but this doesn't seem to make sense, for me at least.

There -- right. And also something that I feel that I had understood from yesterday the -- that the trustees and the First Nation -- Sawridge First Nation believe that Band membership is the only way through for beneficiaries for the trust. And my one concern with that is that I, as an '85 beneficiary, understand where I fit in there.

The -- to me the rules are clear about what facts I may require to be a beneficiary of the 1985 trust, but if I had to turn to applying -- which I have about 3 and a half years ago with that; no note on how that process is going -- I don't know the -- the criteria is a little bit unknown. It leaves a lot of space for an interpretation that I don't understand. Things like judgment on -- like character, like style. I don't know how that -- something that's knowable. So to suggest that now all these beneficiaries that exist, well, you're not a beneficiary yet; you must apply for Band membership. Well, it's been very timely for me -- and I know others -- that this has taken of my membership application, and we don't really know if it's going to work out for us because it's not seemingly as factually based as being a beneficiary of the 1985 trust.

So that's also another big concern that that is something that is being looked at as the only option for us, and having no one advocating for us anymore -- it feels like because the trustees have stated that they're not beholden to beneficiaries like myself. Only Band members have beneficiaries

So the -- yeah. So that's what I have taken from yesterday, and I hope that is what was okay. Oh, I think you're muted. Sorry.

THE COURT: Sorry about that. Thank you for that. All right. Thank you very much, Shelby, for those submissions. What I am going to do is I am going to ask Ms. Bonora when it comes time for her reply to specifically address some of the concerns that you have raised, vis-à-vis the 1985 trustees not representing the

interests of the non-member beneficiaries as defined in the definition section of the 1985 trust (INDISCERNIBLE). I am just flagging for Ms. Bonora that I will be asking her to address your concerns so that we have a better understanding of exactly what the trustee's position is on that point. Okay?

MS. TWINN: Great. Thank you. Thank you.

THE COURT: Okay. Thank you very much. So it looks like with that we move to Mr. Molstad. Is that right?

Submissions by Mr. Molstad

MR. MOLSTAD: That's correct, Mister Justice Henderson, and our submissions in reply are brief. During submissions yesterday, it was asserted that the ratio of *Pilkington* is that, well, the transfer of trust property from the new trust -- even a trust that includes the beneficiaries -- is permissible so long as saying as permissible under the scope of the authority granted by the relevant power of advancement and is for the benefit of a current beneficiary.

We would encourage you, Mister Justice Henderson, to read again the decisions of *Pilkington* and *Hunter*. We would also refer you in relation to *Pilkington* to paragraphs 22 to 30 of our December 11th, 2020, brief.

In relation to the *Hunter* decision which is at tab 6 of Sarge's (phonetic) November 15th, 2019, brief. At paragraph 16, the Court adopts a portion of *Pilkington* which makes no reference to it being permissible for a trustee to perform a trust to trust transfer under a power of advancement for the beneficiaries of the new trust are not the same.

In response to the submissions related to the Berg decision, we would refer you to paragraphs 11 to 17 of our November 27, 2020, supplemental brief.

With respect to comments related to inclusion and exclusion, the Sawridge First Nation continues with its negotiations with Canada with respect to the implementation of its right to self-government. Sawridge First Nation historically was a small First Nation of members who lived together, gathered resources together, and shared those resources as families. Sawridge has always asserted their right to determine who is a member, as only members have the right to share in their resources.

We submit that Sawridge continues today as a small group of families, and no one should be forced upon them as a member of their family without their consent. On behalf of the Sawridge First Nation, we have proposed a solution to the question that you have asked

or that has been asked of this Court that, in our respectful submission, will not result in another 10 to 15 years of litigation.

Those are our submissions in reply to you.

THE COURT: Thank you, Mr. Molstad. I will say that in response to your submissions in relation to *Pilkington* and *Hunter* I am -- and this is to alert Mr. Faulds so he can be getting prepared for it comes time for him to reply -- I am going to be asking him to direct me to the specific portions of *Pilkington* and the (INDISCERNIBLE) state that support the proposition that if a trustee (INDISCERNIBLE) the trust, *Pilkington* supports that resettlement provided that some of the known beneficiaries are in the new trust and that others can be excluded.

So I am going to be asking about that so he can be sort of thinking about a response, but that is directly in response to Mr. Molstad's concerns in terms of the interpretation of *Pilkington*.

So with that, we could move on to Ms. Osualdini?

Submissions by Ms. Osualdini

MS. OSUALDINI: Thank you, My Lord. So, My Lord, my reply to submissions will be relatively brief as well. I wanted to start by reiterating to the Court the path forward that we see. We see the path forward as first an examination of the ATO order itself, and then secondly if the answer to that is it doesn't cover the issue, then we first have to understand whether the transfer was a valid exercise of power. If it wasn't, is remedy needed, and if so, against who?

And then we need to examine issues like limitations and laches, and I know that the SFN has said that these issues are non-events, but, My Lord, it's 35 years later, and in terms of laches, Mr. Molstad, as we've heard, was present at the ATO application, was involved -- or at least was aware of the negotiation of the order. So to say that -- so to not say anything until now about concerns with the order is exactly what laches is all about because the parties have carried on in reliance upon that order.

Now, My Lord, to address your comments about *Pilkington*, those are addressed in our written submissions. So I would be prepared to provide some thoughts on what the ratio in *Pilkington* is about. Now, My Lord, you will recall the circumstances in *Pilkington*. It was in a state context where a trust was established for a nephew, and upon the nephew's death, it would be divided amongst his children. And what arrangements the trustees and the nephews wanted -- and the nephew wanted to reach was for his

daughter, Miss Penelope, who was a minor at the time -- and what they wanted to do is they wanted to break out some of that trust fund into a new trust for Miss Penelope and her issue.

So some of the issues in *Pilkington* were the same because Miss Penelope's children were not included in the initial trust. They had no interest in the trust established under the will, but it was found in *Pilkington* -- that's where this concept of incidental benefit to a beneficiary comes in because the Court said, well, establishing this trust for Miss Penelope even though we're allowing her children to come into it is an incidental benefit to Miss Penelope.

So that's where that concept comes in, and I think that's where the linkage to this situation is is we transfer -- or not "we" -- the 1982 trustees transferred assets to the 1985, and at the time, all of the beneficiaries were the same. The group when we apply the definitions were the same under each, and the fact that some persons who may have not continued to qualify under the 1982, we say, is an incidental benefit because it froze and maintained the definition of beneficiaries, as (INDISCERNIBLE) understood it, when the 1982 trust was established.

Because, My Lord, you've got to remember that when the 1982 trust was established, everyone understood membership to be determined according to the 1970 *Indian Act* rules. In 1985, everything was about to change on how membership was determined. So this transfer was really to preserve the intention that existed when the trust was settled.

THE COURT: All right. But I guess the premise of your argument is that the beneficiaries as at April 1985 -- the two beneficiary groups were identical at that moment in time.

MS. OSUALDINI: Correct.

THE COURT: But is that so because the 1982 beneficiary was a class of persons consisting of members and future members. So that class is different than what we see in the 1985 beneficiary definition which speaks to a group of people at a moment in time. So --

MS. OSUALDINI: True, My Lord. But how that class was determined --

THE COURT: Yes.

MS. OSUALDINI: -- was the same at that point in time because

how you would determine a member under the '82 and how would you determine a member under the '85 at that singular moment in time was identical.

THE COURT: Right. But the 1985 beneficiary definition does not contemplate future members. 1982 definition contemplates a class consisting not just of members but future members. And what we had on April 15th, 1985, was a group of members and we had a group of future members, some of whom were known, some of whom were not known, some of whom were contingent future members in the sense that the contingency being the actual implementation of Bill C-31.

So I need you to explain to me how there was the identity in place there.

MS. OSUALDINI: My, My Lord, I think *Pilkington* is informative on this issue as well --

THE COURT: Okay.

MS. OSUALDINI: -- because at the time of this arrangement in *Pilkington* -- so we're dealing with a family which is more simplistic. So we have the dad and all of his kids. It was contemplated at the time that the father could have had more children. So by carving off an interest for Miss Penelope --

THE COURT: M-hm.

MS. OSUALDINI: -- and her children in a separate trust, they were potentially diluting the trust fund for any further children that the nephew may have had. So the *Pilkington* principle does contemplate that there could be dilution to members -- or to members of the class that don't yet exist.

THE COURT: M-hm.

MS. OSUALDINI: And I remind My Lordship that what happened in 1985 was that effectively it was a beneficial distribution under the power of advancement because I would dare say that if we had just paid cash in hand to every beneficiary that existed that day --

THE COURT: M-hm.

MS. OSUALDINI: -- we wouldn't be here right now.

THE COURT: That is right.

MS. OSUALDINI: And I don't think that legally there is a difference between putting a few million dollars in everyone's hand versus establishing a new trust for them. It a form of beneficial distribution.

THE COURT: M-hm.

MS. OSUALDINI: It's just the format that was chosen.

THE COURT: When I look at the leading texts in Canada, I don't see that concept discussed. I don't see support for that, for example, in *Waters*. Am I missing something in *Waters*?

MS. OSUALDINI: In terms of?

THE COURT: The concept that you described as being the *Pilkington* principle. Firstly, *Waters* doesn't even cite *Pilkington*, as far as I can tell, nor does it talk about a concept similar to what you are describing.

MS. OSUALDINI: Well, My Lord, I am aware that Dr. Waters was an adviser to the trustees at the start of this application. So I would --

THE COURT: I don't --

MS. OSUALDINI: -- I would dare say that he supports this concept.

THE COURT: -- I don't know what he supports. I am trying to determine what the law is.

MS. OSUALDINI: Well, *Pilkington*, My Lord, is accepted law into Canada. I'm not aware of any decision in Canada that suggests that this is not accepted law.

THE COURT: Sure. But it is a question of determining what *Pilkington* really stands for. That is the question, and Mr. Molstad seems to have a much, much different view of *Pilkington* that you do and (INDISCERNIBLE) as well who supports your position obviously.

MS. OSUALDINI: Right. Well, my understanding of the SFN's position on this is that somehow these concepts are restricted to the

statutory provision that was found in Britain. So I think what we have to uncouple here is the format of the distribution because this is a --

THE COURT: You say that, because a discretion would have permitted a distribution essentially of all -- or substantially of the assets by way of the cash distribution, what we really have here is not much different.

MS. OSUALDINI: That's exactly it, My Lord.

THE COURT: Instead of the cheques going to the individual members who existed at that time, they went to a trustee to hold for the benefit of those people and a bunch of others.

MS. OSUALDINI: Exactly. And in that argument, we're saying that that was an incidental benefit to the beneficiaries because it maintained the format in which their beneficial status was established under the '82, and that was the incidental benefit to them as we kept calculating it the same way --

THE COURT: M-hm. Is there --

MS. OSUALDINI: -- rather than changing it on them.

THE COURT: -- is there a particular paragraph or passage in *Pilkington* or *Hunter* that speaks to -- that you can point me to directly to permit me to zero in on the principle that you are describing when I need to look at it holistically as I --

MS. OSUALDINI: Well, in my --

THE COURT: -- sort of extrapolate --

MS. OSUALDINI: -- in my written submissions started at paragraph 61 through -- saw it for quite a while -- about to paragraph 90, I go through *Pilkington* and pinpoint references there.

THE COURT: Okay. I will go through --

MS. OSUALDINI: So perhaps that's the most efficient, Sir.

THE COURT: -- I will go through that again. Thank you very much.

MS. OSUALDINI: Okay. But really, My Lord, you know, I think we've zeroed in on potentially what the issue is here is that it's -- I would say that it's substance over form.

And I highlight to the Court that the 1982 trustee in its dispositive provisions expressly contemplated the fact that a distribution need not take simply cash in hand form because the dispositive provision contemplated the format of the distribution being (INDISCERNIBLE) the correct language. But essentially in any (INDISCERNIBLE) four of the trustees found acceptable. So it's very discretionary as to how the trustee could make the distribution which makes sense because a trustee might, you know, commonly in trust pay your creditor or pay a university or do something like that. They don't have -- the distribution doesn't have to be cash in your hand.

And I would argue that that's what was done, and it's important for the Court to remember that it was done on notice to all SFN members. You have in evidence the resolution of the meeting of the SFN members where this was flagged for them, and no one raised any concerns with it. So I would extrapolate from that where the SFN members did see this as being a benefit to them.

Did you have any further questions about *Pilkington*, My Lord?

THE COURT: No. No. That is very helpful. Thank you very much. And I am sure that Mr. Faulds will want to further elaborate on it, but I do need *Pilkington* very carefully and try to determine precisely what it stands for.

MS. OSUALDINI: Okay. And I guess I have just finished the *Pilkington* concept, My Lord, but the fact that *Pilkington* was presented to Justice Thomas in support of the ATO, and it was accepted by him. So that -- we have that -- a very on point example of the Alberta Courts accepting *Pilkington* as authority on this issue.

THE COURT: Yes. The pitfalls of having a consent order is that you don't get fulsome reasons, and so it is not totally clear what Justice Thomas was thinking at the time because he didn't elaborate. I will do my best to try to understand what he was thinking and what he had in mind.

MS. OSUALDINI: Thank you, My Lord. And so I just wanted to turn and briefly discuss the concepts of resulting trust and the constructive trust which were raised by both the trustees and the SFN in support of their positions. And I just reiterate to the Court that resulting trusts are about intention. Resulting trusts arise from the moment of the transfer because there's intention for a trust to exist.

That is not the case here because the 1982 trustees had no intention, as we can see on the evidentiary record, to create that relationship. They wanted the asset. They were doing a beneficial distribution out of the trust. And my friend Mr. Molstad cited *Waters* for the proposition that when an express trust fails a resulting trust arises. That's not the case here because the 1985 trust hasn't failed. So an express -- that concept is inapplicable here.

Now in terms of a constructive trust, it's well-established law, as the Supreme Court has told us from the seminal decision of *Peter v. Beblow*, that a constructive trust is a proprietary remedy imposed by the Court. It does not exist independently. It has to arise from a Court direction.

So because of that, we cannot say that these assets are being held in a constructive trust for the 1982. A Court would have to direct that. And what we know about constructive trusts is that they're proprietary remedy meant to address a just enrichment when damages are found to be inappropriate. So it requires an entire independent legal analysis. We can't just say that it independently exists.

And in addition to that, the trustees referenced the concept of consideration in support of this theory that a constructive trust exists. The concept of consideration is a contractual concept. It is not a concept in trust law, because when beneficial distributions happen, nobody has paid any consideration for that. So we extrapolated what they're saying. No beneficial distribution could be enforceable because nobody paid a consideration for it.

So I would submit, My Lord, that the idea of consideration is a red herring. The fact that the 1985 trust didn't pay consideration for the transfer is not relevant because it was a beneficial distribution to this new entity. When a settler settles a trust, there's no consideration for that either, but that doesn't mean that the trust isn't valid. And so effectively, this argument falls apart because we're trying to import contract terms into trust law, and the two just are separate matters.

Now, My Lord, during yesterday's submissions and as highlighted by Shelby, a fairly surprising turn of events occurred where the trustees admitted or stated for the first time that they see their 5-year share of duty as only extending to the members -- the member beneficiaries of the 1985 trust. And, you know, I think Shelby did a really nice job highlighting the concerns about that because I share those concerns listening to this because I have been involved in this litigation for quite a while, and that's the first time that I have ever heard the trustees say that. And as Shelby elaborated Sawridge No. 5 -- Justice Thomas already commented on the facts that Shelby and

Patrick and -- there are beneficiaries of the 1985 trust. And in terms of Shelby, he commented that he couldn't even imagine her losing her beneficial interest.

And further -- and I just highlight this to the Court as examples of inconsistency in this position -- this new position that they only represent the Band member beneficiaries -- is in the infancy of this litigation there was an application before Justice Thomas to determine whether the OPGT would be appointed as a lip wrap for the minor beneficiaries. The trustees opposed that appointment.

In opposition to that appointment, the trustees filed submissions in these proceedings. On March 8th, 2012, it's stated in paragraph 69 -- and I'm going to quote from paragraph 69 that: (as read)

> The trustees will place all relevant information in their possession before the Court. Further, the trustees acknowledge that they have a duty to all beneficiaries and that they must address the issues raised by them in an objective and dispassionate manner.

I would submit, My Lord, that this new position is inconsistent with that statement.

Next, Your Lordship may recall that Shelby Twinn along with other impacted persons sought party status in these proceedings and an indemnity from the trust for that participation. That application was heard in the fall of 2016 and was denied by Justice Thomas. This order was appealed to the Court of Appeal. And as Shelby referenced in their factum -- not in "their" but meaning the trustee's factum -- to the Court of Appeal in opposition to the appeal, they stated at paragraph 34 that:

> Paragraphs 27 through 35 of the appellant's factum referred to a conflict of interest between the interests of the trustees and the beneficiaries. This was never addressed before the CM judge and is a red herring now. The trustees acting in the best interests of the beneficiaries of the trust commenced an advice and direction application to deal with a potentially discriminatory provision. The interests of the beneficiaries are properly represented by the trustees for the adult beneficiaries and by the OPGT for the minor beneficiaries and those minors who have become adults.

So here we have the trustees telling the Court of Appeal that they represent the interests of all adult beneficiaries of this trust.

And then Your Lordship -- transitioning into a time were Your Lordship was involved in this file, you may recall Shelby Twinn's application for intervenor status in these matters. And in response to this application, the trustees filed written submission on October 25th, 2019, and at paragraph 9, they stated, and I quote: (as read)

> Shelby is the step-granddaughter of Catherine Twinn. Shelby's status as a beneficiary is recognized by the trustees and by order of this Court. Shelby and her sister Kaitlynn (phonetic) Twinn have identical interests in the trust, and Shelby's sister is represented by the OPGT. The representation of Shelby's sister by the OPGT is subject to existing indemnity and cost exemption orders. As Shelby is a beneficiary, her interests are also represented by the trustees.

This was only 2019, My Lord, that Shelby's being told this. And I think these submissions are quite important, because before Your Lordship's involvement, she was denied party status and indemnity in part on the basis that these trustees already represented her interest. So I think that's important for the Court to be aware of when considering the trustee's submissions on this application is that we're here today on the basis that they represent all -- all adults, not just Band member adults, and this creates a lot of issues in the litigation because there's been no notice to anyone that they were about to change their position on these matters. The first time we hear about it is in submissions yesterday.

So why does this matter? I mean, it matters in terms of notice of these proceedings to affected individuals. Up to this point, all affected individuals thought they were being advocated for by them. And secondly in terms of substantive submissions on this application, Your Lordship cannot view -- or cannot anymore view the submissions of the trustees as neutral trustees, but rather, they're advocates for Band members. So that impacts how Your Lordship should consider their submissions.

Now, the trustees in arriving at this conclusion that they only owe duties to Band member beneficiaries argued and what I understood of their argument is that the transfer from '82 to '85 was only a class gift to members, and therefore, you can ignore the definition in the 1985 trust deed. And with respect, My Lord, it can't look beyond who the beneficiaries in the 1985 trust deed are. It's very clearly defined at how we interpret that class, and there's nothing in the document to suggest or that would support the interpretation being put forward by the trustees.

Now, the trustees raised the concept of a static entity from the *Bruderheim* decision of

Your Lordship. However, in the *Bruderheim* decision, the issue at play was determining for whom the assets were being held because there wasn't a clear written document that we could refer to. And more particularly whether they are being held for individual members of the congregation and thus could move fluidly as members disassociated from the main church or whether they're being held for the main church, in other words the static entity.

This is not comparable to the current situation because we know who the beneficiary class is and how it is to be determined because it says so in the 1985 trust deed. And our class is a fluid class of beneficiaries because we have to apply a legislative set of criteria to determine whether someone qualifies, and the qualification could change, because in Shelby's circumstances if she was to marry a non-Indigenous man, she would lose her beneficial status. She would be a modern Bill C-31 woman. So the persons who qualify can change over time and have to be evaluated.

Now, there's been some suggestion by both the trustees and the SFN that we can't determine who the beneficiaries are, but, with respect, I would say that that just simply isn't true. I recognize that looking at a list created by the SFN is certainly much similar -- or easier than having to apply facts about someone's lineage to determine if they qualify. Definitely much easier, but I am not aware of any principles in trust law that say, just because we have to put a bit of effort into the determination, it means that the beneficiary class is uncertain or inappropriate.

And we can see that it is possible to make these determinations because the trustees in conjunction with work with the other parties -- we've come up with a pretty robust list of who the beneficiaries of the '85 trust are, and certainly, we can always point to examples where there may be some dispute over someone's lineage or their facts, but this is really just a factual debate that there are processes that can be used to resolve it. There is a clear list, and it is capable of being applied. The registrar did it for years.

Now turning to the SFN's submissions regarding Indigenous law generally and their ability to use capital and revenue funds and any restrictions that may exist on the use of them, I would first point out to the Court that the SFN has not established that all of the funds in the 1982 trust were derived from the capital and revenue accounts. There is evidence before the Court that these funds in addition to cap and revenue arose from third-party financing and other sources. So I would submit that there's not an evidentiary record that supports this notion that this is all capital and revenue money.

And further even if we put that aside for a second and accepted that all of the funds came from the capital and revenue accounts, the Sawridge First Nation elected to take those monies and settle the 1982 trust with them. They elected to allow -- well, I shouldn't say

that. They transferred those funds from a prior trust, but the bottom line is they elected to put these monies into the 1982 trust. So by doing that, that money no longer belongs to the SFN. Once again, I think this is a foreign and substance issue, because by putting assets into a trust, you don't own them anymore. They're spent and gone just as if they had spent them on something else.

So to say that they have a residual interest in how the money is spent is incorrect because the settler relinquishes that right once they put money into trust. What they had control over is the terms of the trust, but once the money's in there, the trustees are obliged to comply with the terms of the trust, and that's the end of the road. So to argue about how -- that it's a violation of statutory law how the trustees utilized those funds, I would submit, is not an accurate statement of law because the issue solely becomes, did the trustees operate within their scope of authority?

And I would note, My Lord -- and this is in evidence in our client's Statement of Facts and affidavit -- that a while ago, the Minister of the Crown questioned the Sawridge First Nation about this trust, the trust transfer, and how they utilized those funds. And at the time, the Sawridge First Nation very aggressively responded to the Minister telling them that it was appropriate and the Minister had no place involving themselves in what they did. So now what we're hearing from the Nation is a very different pitch to the Court about the propriety of this transfer. So I would submit that there's some evidence of the Nation playing a bit fast and loose about how they see or how appropriate they see this transfer being.

And my final section of submissions ties back to initially how I led off about *Pilkington* and reminding the Court about how the Nation and how beneficiaries and the trustees would have understood membership in 1982 and how -- and frankly, how they would have understood membership where the bare trusts were set up. They understood it according to these legislated criteria. So in effect by transferring it to a new trust that utilized the same system for determining membership, they were just creating continuity. They weren't really changing any understandings. The change in understanding was coming from outside forces.

And, Sir, we must remember that the SFN intentionally settled the 1985 trust which utilized the 1970 *Indian Act* definition for membership. They intentionally transferred the 1982 trust -- or sorry -- 1982 assets into that trust, and they intentionally at the -- right around the same time created a membership code that utilized a different formula for determining membership. So in other words, the SFN voluntarily created a situation where membership and the SFN could diverge from that legislated list and thus the beneficiary pool of the 1985 trust.

So the fact that a gap -- 35 years later -- has in fact arisen as to who is a member and who is a beneficiary is really not surprising, and I would submit to you, Sir, that whether such a transaction was alien to the intention of the settler must be evaluated in the context of the circumstances in 1985 and not those of 2021.

So, Sir, there is a real danger in reviewing such a transaction 35-plus years later because our perception of what happened is now informed by 35 years of history, and I would submit to you, My Lord, that it's not appropriate to take all that history and apply it in these circumstances. And the SFN should not be able to use the benefit of hindsight to say that, you know what, we made a bad decision in 1985; this transfer didn't really work out the way that we had hoped it would work out, so let's now, 35 years later, utilize this Court process in order to undo what we intentionally did in 1985, which I would submit is what effectively they're trying to do.

So in sum, My Lord, those are the -- that's the body of my reply submissions, and I just want to say to the Court even listening to Shelby Twinn that, you know, frankly, this is a very sad set of circumstances we have. We've got people like Shelby with all the lineage, all the tie to Sawridge First Nation, but unable to get membership in the First Nation, and I encourage the Court to remember those people when making your decision.

THE COURT: And in that context, there is a remedy for that, right?

MS. OSUALDINI: There is?

THE COURT: Well, the decisions of the Sawridge First Nation with respect to membership were made by them, but (INDISCERNIBLE) that's subject to judicial review, isn't it?

MS. OSUALDINI: Some things are easier said than done, My Lord.

THE COURT: I am not suggesting that it would be simple, but it is not like there is no avenue for Shelby to participate no matter what (INDISCERNIBLE) we take.

MS. OSUALDINI: That's a very, very expensive (INDISCERNIBLE) that presumes that Shelby has the money to do that.

THE COURT: Right. I appreciate that. Okay.

MS. OSUALDINI: Thank you, My Lord. Unless there's any

questions, those are all my submissions.

THE COURT: All right. So Ms. Hutchison, Mr. Faulds? I think you are up. You have the (INDISCERNIBLE) off.

Submissions by Mr. Faulds

MR. FAULDS: Thank you, My Lord. We're going to go in reverse order to the first time around --

THE COURT: Okay.

MR. FAULDS: -- and I'll speak first. And one of the points of which I had intended to offer submissions by way of reply concern Mr. Molstad's submissions on this definition of the beneficiaries in the 1982 trust as being both present and future members of the SFN.

And the first point that I had wanted to make about that was that I think that that was -- at that particular term was a way of conveying that the beneficiaries were not restricted to the members of the SFN at the time that the trust was created. If the intention was that as the membership changed, the beneficiaries status -- the beneficiaries would change along with that. That could be some language to convey that idea, and the language that was used to convey that idea was the present and future members.

I do not take that to mean that the trustees were unable to deal with the trust property for the benefit of the beneficiaries as they existed at any particular time. If they were required to take into account the people who might become beneficiaries up until the time perpetuities kicked in, they wouldn't be able to deal with the assets at all.

And I think it's clear from the powers that were vested in the trustees that that's the case. If you look to the powers of the trustees under the 1982 trust to deal with the assets, those powers are expressed in very broad -- in very broad terms. That's paragraph 6 of the 1982 trust, and it's the last section of number -- paragraph 6 which is relevant: (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.

Now if "the beneficiaries set out above" means everybody who's ever going to become a member of Sawridge First Nation until a rule against perpetuities kick in, the trustees really cannot exercise those powers which have just been vested in them. I think it's clear that the real meaning of that term "present and future members" is simply to denote that the membership -- the beneficiary group is not static and confined to the group at the time the trust was created.

And in the 1985 trust, that particular cap was skimmed in a slightly different way. The beneficiaries were defined as beneficiaries at any particular time shall mean all persons who at that time qualify, and I think that those two beneficiary definitions have the same fundamental meaning.

The power -- that very, very broad discretionary power of advancement with respect to both income and capital is, as Ms. Osualdini pointed out, at the heart of the principle which was established in *Pilkington*. And in *Pilkington*, Your Lordship may recall that the power of advancement in question was a statutory power, and therefore, it was looking at terms of the statue which allowed the trustees to advance trust assets to the beneficiaries.

The issue was kind of interesting in the sense that the main opponent to what the trustees were proposing was the tax man. If the trust assets were advanced to the beneficiary directly, the tax man would get a cut. If, however, they would resettle into another trust, the tax man wouldn't, and therefore, the issue of the scope of the power of advancement and its (INDISCERNIBLE) was very vigorously argued, and the position of the tax man was that the power of advancement did not include the power of resettlement.

And the position of the (INDISCERNIBLE) awards in that decision is summarized -- really, there's a very lengthy discussion about that argument. It begins on page 15 of the version of that decision which is found at tab A of the trustee's original brief filed on November the 1st of 2019. So there's a lengthy, lengthy discussion about that. But if Your Lordship turns to page 18 of the decision, the Court sums up the ruling at the beginning of the paragraph in the middle of the page to say --

THE COURT: Yes. Mr. Faulds, can you just give me a minute so I can just pull that up.

MR. FAULDS: Yes. Certainly, My Lord.

THE COURT: I would like to follow along with you if I could. So you say the trustee's materials and (INDISCERNIBLE) --

MR. FAULDS: The trustee's materials -- the very first brief.

THE COURT: Yes.

MR. FAULDS: November 1st, 2019.

THE COURT: (INDISCERNIBLE) you say. Yes.

MR. FAULDS: Tab A -- it begins with the asset transfer order brief.

THE COURT: Okay. I have got A in front of me. Yes.

MR. FAULDS: And then behind that is the decision in *Pilkington*.

THE COURT: Yes. Got it. Okay.

MR. FAULDS: And I'm looking at page 18 of the decision.

THE COURT: Okay. Let me get there. Okay. I am at page 18.

MR. FAULDS: And this is the conclusion of the discussion about whether or not our advancement permits resettlement --

THE COURT: Yes.

MR. FAULDS: -- and the Court concludes with the following sentence:

> To conclude, therefore, on this issue, I am of the opinion that there is no maintainable reason for introducing into the statutory power of advancement a qualification that would exclude the exercise in the case now before us.

And the exercise was reliance on the power of advancement to resettle in a new trust. That is the gist the decision. If I could then --

THE COURT: So, Mr. Faulds, this is important for me, so I need --

MR. FAULDS: Okay.

THE COURT: -- I need just to understand what you are saying. So I am looking from the stance for the proposition of the power of advancement which was statutory in that case, but in the trustee here -- you say in the 1982 trustee, there's essentially a somewhat (INDISCERNIBLE) power of advancement. You say that then permits the trustees to resettle the trust because *Pilkington* says they can do that --

MR. FAULDS: Yes.

THE COURT: -- provided that the resettlement is for the benefit of the beneficiaries which are then a group of people who are members at that time, but it can include other people as well.

MR. FAULDS: *Pilkington* does stand for that proposition as well.

THE COURT: Because Penelope was not a beneficiary under the original will, or she's a new entry into this. So you extrapolate in that fashion. Is that (INDISCERNIBLE)?

MR. FAULDS: My Lord, I believe the circumstance was that Penelope was a beneficiary, but her offspring were not, and it was the inclusion of them that resulted in that idea that you could add additional beneficiaries provided it was in the interest of the original beneficiary to do so.

THE COURT: I thought Penelope's father was a beneficiary, and she had, I guess, a sort of reversion of interest and --

MR. FAULDS: I see Ms. Osualdini is leaning forward, and perhaps she would like to chime in.

MS. OSUALDINI: My Lord, you're correct that the trust was initially established from the nephew but with a gift over to his children, and so his children included Miss Penelope. So he was consenting even though he hadn't died yet. He was consenting to the idea that the contingent beneficiaries could receive an interest now, and the persons were not contemplated under the original trust were Miss Penelope's children.

THE COURT: Okay. Okay. Good. Good. All right.

Thank you. That is what I was looking for.

MR. FAULDS: Okay. Thank you, Ms. Osualdini. Your Lordship then asked about what *Waters* had to say --

THE COURT: Yes.

MR. FAULDS: -- about this.

THE COURT: Yes.

MR. FAULDS: I don't have the most recent version of *Waters* before me. It's the fifth edition which was just published this year. And so I read the passage addressing this in the recent edition, and I do have right now the third edition of *Waters* which says pretty much exactly the same thing.

THE COURT: M-hm.

MR. FAULDS: What you will find in *Waters* chapter on the dispositive powers and discretions of trustees there is a section entitled "resettlement under a power." And that section begins off with a reference to the fact that the leading authority on the case in England is *Pilkington*, and then further down, it addresses the reception of that principle in Canadian law.

THE COURT: In the volume that you are looking at which is the third edition -- what page is that? I thought I had read that actually.

MR. FAULDS: Yes. It's in the third edition. It's at page 1144. In the fifth edition, I have the sense that it was something like page 1238, but that's just my -- the Court (INDISCERNIBLE) the sanction there but --

THE COURT: Mr. Faulds, could you -- at your leisure, could you just have your assistant photocopy a few of those pages and send them off to me --

MR. FAULDS: I'd be happy to.

THE COURT: -- so I can zero in on my version of the --

MR. FAULDS: Sure. I'd be happy to provide that. What *Waters* says in the edition in front of me -- and, as I said, I don't have the corresponding page number directly from the fifth -- but if a dispositive discretion is

sufficiently widely drafted, then a Court is likely to conclude that if the trustees have the power to transfer property outright to a beneficiary --

THE COURT: M-hm.

MR. FAULDS: -- it should be possible to settle property on a new trust for that beneficiary. And then *Waters* refers to --

THE COURT: For a new beneficiary and others.

MR. FAULDS: He doesn't -- he has a very brief discussion. He doesn't delve into that aspect of it in this, but yes, you're -- so there's no direct comment on that. And he refers to the Canadian authorities on that point. And in that connection, I'd like to refer Your Lordship to our brief -- it's got the filed stamp of December 1st, 2020, on it.

THE COURT: Okay.

MR. FAULDS: And if Your Lordship looks at paragraphs --

THE COURT: Okay. Just a minute. Just a minute. Okay. That is the November 27th --

MR. FAULDS: That's right. It's dated November 27th at the filed stamp.

THE COURT: Okay. Do you want me to look at paragraph what?

MR. FAULDS: If you could go to page 21, paragraph 61 -- and My Lord, if I could just stop here for a second because I think this point may also be important. We do not rely and it's not necessary to rely upon the availability of the option to include new beneficiaries in the new trust to support the correctness of the asset transfer order.

THE COURT: M-hm.

MR. FAULDS: If we're talking about the correctness of the asset transfer order, we're talking about resettlement on a trust all of whose beneficiaries are beneficiaries of the original trust. The trust transfer which occurred in 1985 was, as Your Lordship noted, between the same group of people -- differently defined but the

same group of people. So the notion that you can in addition add new beneficiaries does not have any role to play in assessing the asset transfer order and the approval of the asset transfer order. That principle --

THE COURT: That is because the divergence between the criteria for membership didn't take place until July of 1985, 3 months after --

MR. FAULDS: That's --

THE COURT: -- the transfer.

MR. FAULDS: -- that's correct, My Lord.

THE COURT: So for a period of time, there are the April 1985 transfer -- it was identical and only 3 months later does it change in (INDISCERNIBLE) rules, and that created the divergence, not the trust transfer.

MR. FAULDS: That's correct, My Lord. That's --

THE COURT: M-hm.

MR. FAULDS: -- that's correct.

THE COURT: Yes.

MR. FAULDS: And on the date of the transfer, it was within the trustee's power to advance the entire assets of the trust to that group of beneficiaries, and instead, they resettled. So that notion of augmenting the beneficiaries is only relevant to the submission that we made about the availability of a further trust to trust transfer which might address the thorny problem that we have before us. It's only in that context that that issue becomes of significance.

THE COURT: But it isn't a hurdle that I need to get over to assess the propriety of the 1985 transfer --

MR. FAULDS: Yes.

THE COURT: -- because it is -- members were the same and only started to diverge 3 months later.

MR. FAULDS: That's correct.

THE COURT: And that was not because of anything the trustees did but rather something that Sawridge First Nation did.

MR. FAULDS: Exactly. That's exactly correct, My Lord.

THE COURT: I think I understand it.

MR. FAULDS: And I'm --

THE COURT: I would appreciate those pages of *Waters*, and I would take that and get the most current version and make sure --

MR. FAULDS: Yes. I'll arrange to have that --

THE COURT: -- looking at those.

MR. FAULDS: -- I'll arrange to have that forwarded to Your Lordship following the conclusion of this hearing.

THE COURT: Okay. Thank you.

MR. FAULDS: And I will just then briefly refer Your Lordship to the paragraphs in our November 27th, 2020, brief where we cite the Canadian cases which have interpreted and applied the principle arising in *Pilkington*, and the leading case is the one that *Waters* refers to in the text -- the (INDISCERNIBLE) case.

THE COURT: M-hm.

MR. FAULDS: And that case cited an earlier unreported decision saying it would be incongruous if the law would hold the trustees might pay to the beneficiaries their shares outright but might not pay them to trustees to be held in trust for them. That's the segment of the principle in a nutshell.

THE COURT: Right. Right.

MR. FAULDS: And so -- and if Your Lordship turns to paragraph 64 of that brief --

THE COURT: M-hm.

MR. FAULDS: -- we've also cited the *Chalmers* decision out of the BC Supreme Court, and by that time, the principle was sufficiently well established that counsel agreed that, you know, that was how the law worked in this area.

So those are my submissions in relation to that unless Your Lordship has any additional questions on that.

THE COURT: No. Thank you. That was very helpful.

MR. FAULDS: My Lord, I had also intended to touch on a point which Your Lordship has already commented on. The divergence between the Sawridge First Nation membership and the beneficiaries of the 1985 trust arises from the fact that when it established its membership code, Sawridge First Nation chose to implement the code which was not the same as the one that had been chosen to find the beneficiaries, and that's the reason that we now have people who are not Sawridge First Nation members under their membership code but who are beneficiaries. That arises from those decisions.

I wanted to speak briefly to the point made by my friend Mr. Molstad about the use of funds and his suggestion that -- allowing them to be a trust which included some beneficiaries who were not SFN members in some way offended the legislation governing the use of those monies. As Ms. Osualdini noted, that is the precise opposite position to that take and why Sawridge First Nation back in 1994 when the government of Canada raised that question, and on that point, I'd like to take Your Lordship briefly to the original brief which was filed on behalf of the OPGT on November the 15th of 2019.

THE COURT: Okay. Volume 1?

MR. FAULDS: Volume 2, My Lord.

THE COURT: Volume 2. Okay.

MR. FAULDS: And I'm hoping that it was bookmarked. What I'm -- I'm asking Your Lordship to find appendix L.

MR. FAULDS: Just a minute. Okay.

MR. FAULDS: And is Your Lordship able to turn that up?

THE COURT: November 9th, 1994?

MR. FAULDS: That's right. And if you could actually -- that's the last letter in the chain of correspondence. I'd ask you to turn the page to the letter of October 20th, 1994.

THE COURT: Okay. I have got it. Yes.

MR. FAULDS: That's the letter from Mr. Cullidy (phonetic) on behalf of Sawridge First Nation --

THE COURT: M-hm.

MR. FAULDS: -- back to the council at Indian Affairs and Northern Development, and I just ask you to look at the last paragraph of that letter on the second page --

THE COURT: M-hm. Yes.

MR. FAULDS: -- in which Mr. Cullidy said: (as read)

> As I have indicated to you on a number of occasions, we do not agree that the Department is entitled to demand details of expenditures made by the Band in the past or with respect to the assets that it now holds.

That position articulated by Mr. Cullidy many years later was endorsed by the Supreme Court of Canada in the *Ermineskin Band v. Canada* decision in 2009. That decision is at tab 3 of the same brief of our authorities, and the relevant passage of that decision is at paragraphs 104 to 106. And in that passage, the Supreme Court of Canada states that under section 64 of the *Indian Act* which is the section my friend suggests, it imposes some kind of (INDISCERNIBLE) on the assets. The Supreme Court of Canada ruled:

> Under section 64(1) once the 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.

And then at the end of paragraph 106, the Court went on to say:

> One marker of those expenditures is that the expenses incurred or assets acquired are such that the Crown no longer has control

> over them and for which it has no responsibility to manage.

So the fetter that Mr. Molstad suggests arises out of the legislation does not exist at law. And just to kind of close the loop on that, that was actually represented to the Court in these proceedings by counsel on behalf of Canada. If you look to the same brief but volume 1 now at tab D, this is an extract from a transcript of a hearing in these proceedings on April the 5th of 2012 at which Mr. Kindrake who was counsel for Canada in various litigation with Sawridge First Nation said -- and it's at page 59 of the transcript: (as read)

> Mr. Kindrake, our view is these are not Indian lands. These are the Band's lands.

The trust is out there. It's in the public domain. It's dealt with according to those (INDISCERNIBLE). Essentially, all he was doing was confirming what the Supreme Court of Canada has said the case was 3 years earlier. So our submission is that legislative fetter simply doesn't exist.

My Lord, our submission is that the positions advanced by Sawridge First Nation in an attempt to persuade Your Lordship that the transfer of the assets in 1982 was not proper, was not within the trustee's authority. It was contrary to law in some fashion and had no proper foundation. They're also late. This is, in our submission, really an attempt to relitigate the asset transfer order. The proper time to make these submissions would have been in November -- or in August of 2016 when the asset transfer order was spoken to. For the reasons I've just set out, they wouldn't have made any difference, but the result -- when Justice Thomas said, I'm satisfied the consent order is properly based on law, our submission is that he was entirely correct in that conclusion, and that would have been a conclusion whether -- if Mr. Molstad had attempted to advance these submissions at the time, but he chose not to do that, and as a result, we're dealing with them today.

I would also remind Your Lordship that when the Sawridge First Nation sought intervenor status in this particular application the OPGT opposed it in large measure based upon the previous positions that had been taken by the Sawridge First Nation which seemed to contradict the positions they wanted to take in these proceedings. Your Lordship allowed the Sawridge First Nation's intervention application, but in your decision, you said: (as read)

> The position put forward by the public trustee in terms of pointing out inconsistencies in weighing what the Sawridge First Nation dealt with firstly the agreement of the 2000 consent order or the 1985 trust transfer may well be entirely

> valid, and may well be properly founded, and may well have a significant impact on the outcome of the asset transfer issue or the jurisdictional issue.

But Your Lordship said that's the time for those comments. And taking what Your Lordship said in (INDISCERNIBLE), we would just invite the Court to look at the submissions that we made at that time which gave rise to our concerns about the inconsistencies and the position of the Sawridge First Nation. Those are to be found in the brief which we filed on the asset transfer -- or sorry -- on the intervention application of the Sawridge First Nation on October 25th of 2009, and they're found at paragraphs 33 to 37.

And unless there's any further questions from the Court, I'll turn it over to Ms. Hutchison.

THE COURT: Okay. Ms. Hutchison.

Submissions by Ms. Hutchison

MS. HUTCHISON: Good morning, My Lord. I'll try to be brief. I do want to touch on a few areas that my friends have referenced but from a slightly different point of view, the first being in response to the trustee's position that they no longer represent the interests of non-member 1985 beneficiaries.

We would just ask the Court to make note of the striking evolution of the trustee's position in this regard. They began a process in this particular application taking the position that they were neutral and that in fact they could not advocate for the very result they now advocate for, My Lord.

My friends have taken you to a number of references and citations where the trustees represented to the Court and to the beneficiaries that they acted in their interest. Quite pertinent for the Court to also consider that the Court of Appeal made that finding, and I take the Court to our November 27th brief at tab 2 of our authorities. And I'll just read the cite -- or read the quote, My Lord, but hopefully, you'll be able to get to that tab. It's paragraph 18 where the Court states: (as read)

> The Court finds as a matter of law the trustees represent the interests of the beneficiaries who include Patrick and Shelby Twinn.

That was a ruling of the Court of Appeal, and prior to the very recent submissions of the trustees, it appeared that the trustees were operating on that ruling. I refer the Court to

the September 4th, 2019, case management proceeding. The transcript is found in Catherine Twinn's November 27th brief at tab B, and on page 17 starting at line 31, Ms. Bonora submits: (as read)

> So there's a group of people who would not be members, and that's, as we read it, potentially not beneficiaries under the '82 trust. In terms of who represents them or who speaks on their behalf, we've always taken the position that as trustees of the 1985 trust we represent those people and are speaking on their behalf.

Mr. Sestito confirms that position in the October 30th case management meeting which you can find in our November 27th brief at tab I, and I refer the Court to page 73 of that transcript, starting at line 19 where Mr. Sestito submits: (as read)

> And that is with respect to the fact that the beneficiary that Ms. Twinn is --

This is referring to Shelby Twinn, My Lord: (as read)

> -- is represented by the trustees in this matter. It is a matter of law that she is represented by the trustees in this matter.

Our point, My Lord, is our friends have departed from that role rather significantly, certainly in the course of the last 2 days and arguably in their final submission. It's not at all clear that the 1985 beneficiaries who are not members of SFN were put on notice of that position, and we would ask the Court to treat the submissions by the trustees that depart from and are inconsistent with the '85 beneficiaries' interests with a great deal of caution, My Lord. We'll leave that point with you. I think Ms. Twinn was extremely eloquent in her characterizations of how that's affecting her as an individual, and of course, the OPGT represents minors who are in exactly the same position, including Shelby's sister.

Our second point, My Lord, touching somewhat on a point that Mr. Faulds had referred to is to talk about the SFN's role as an intervenor in this matter, and Mr. Faulds reminded you that we oppose the Sawridge First Nation's intervention. One of the significant risks we highlighted for the Court was the risk that we would end up rearguing the asset transfer order and that despite everyone's best intentions we would engage in a collateral attack of that order. And, My Lord, we would submit to you that is exactly what this process has evolved into. It is a re-argument of the asset transfer order, and when one looks at the extensive submissions on *Pilkington* and how it is to be interpreted

and applied, I think that becomes very clear, and I'll take the Court in my final point to the original ATO brief and just highlight some of those points for you.

The SFN has now made extensive submissions that, in our submission, do constitute re-argument of the ATO. They have done so arguably 30-plus years after the fact. Certainly 3 years after the fact. And when the Court is weighing those submissions, My Lord, we'd ask the Court to take note of the fact that SFN has never explained its delay to you. They told you they weren't -- they didn't consider themselves a party in August of 2016, although they had full opportunity to address the Court, and I'll take you to that transcript reference shortly, but they've never explained their delay, My Lord. And we submit that has significant relevance to the kind of weight you can place on their submissions, and it very much confirms, in our submission, that we are dealing with a collateral attack and re-argument of an order that they previously had an opportunity to speak to.

On that point, My Lord, we'd like to leave you with two key references, the first being the July 6th, 2016, letter from counsel for the Sawridge First Nation to our offices, and you'll find that in the OPGT's first brief, My Lord, November 15th of 2019, tab P. And I'll just read the passage that's relevant. It's the second paragraph, My Lord. So this is an exchange between counsel about the trustee's settlement offer in the form of the asset transfer order, and the Sawridge First Nation states this: (as read)

> It is the positon of the Sawridge First Nation that this settlement offer is reasonable and resolves all possible concerns with respect to the approval of the transfer of the assets from the 1982 trust to the 1985 trust.

My Lord, an unqualified endorsement of the impact of the ATO and its resolution of all issues. When the Court compares that statement to the submissions that the SFN has put before you -- the lengthy submissions that are effectively arguing that Justice Thomas had no legal authority to grant the ATO, you cannot reasonably arrive at any conclusion other the fact that the SFN is now rearguing its position.

And, My Lord, the second key reference we'd like to draw the Court's attention on that point is found again at our first brief, November 15th of 2019, tab J, and it is an excerpt of the transcript of that fateful day on August 24th, 2016, page 6, starting at line 10. The Court says: "All right. Mr. Molstad, you don't have anything to say." Mr. Molstad responds: "I don't have anything to say." The Court cannot ignore, regardless of my friend's arguments about party status or lack thereof -- they were recognized by the Court. They had every opportunity to raise these issues, and they chose not to. And if we're going to maintain some finality around court orders, we've got

to recognize the impact that has on the Court's ability to hear the arguments from SFN that are before you today.

It's also pertinent from that same day, My Lord -- and looking at page 39 of the same transcript -- that although Mr. Molstad didn't make submissions on the ATO itself, he then endorsed the ATO, and I read from page 39 of that transcript: (as read)

> I think that my friend has already made mention of this in her brief. The purpose of the transfer in '82, '85 in terms of the transfer from trust was to avoid any claim that others might make in relation to these assets after the enactment of Bill C-31.

So Sawridge First Nation would be highly motivated to ensure that those -- that we're acting as trustees, made the transfer of all assets from the 1982 trust to the 1985 trust. That was the reason. The reason clearly was one that was in everyone's best interests to make sure the transfer took place.

My Lord, if we were talking about a mechanical transfer of legal interest, what possible protective effect could that have? We were talking about the transfer of beneficial ownership. Without the transfer of beneficial ownership, the goal of the protective effect -- the benefit of the transfer to provide that protective effect with the assets wouldn't have existed. And, My Lord, regardless of how one might read its history and recharacterize submissions, we would suggest to the Court that there is no other conclusion available to you but that that ATO dealt with the beneficial transfer -- or the transfer of beneficial ownership.

THE COURT: Well, why didn't the order say that then?

MS. HUTCHISON: Well, My Lord, with the greatest of respect to the Court on this fact if we overturned every consent order that didn't have robust reasons associated with it, lawyers wouldn't use consent order. Neither would the Courts. They'd be absolutely inherently unreliable. Justice Thomas --

THE COURT: But that requires that if you are going to the Court with a consent order knowing that the Court isn't going to give fulsome reasons because it is a consent order, surely there is an obligation to have a very reliable -- a clarity in the terms of the order so that everyone knows (INDISCERNIBLE).

MS. HUTCHISON: My Lord, you have taken me to my last point, and so I will answer your question as I go through that last point.

THE COURT: Okay. Good. Thank you.

MS. HUTCHISON: It is the OPGT's position, as you are aware, that the ATO dealt with beneficial ownership of the assets. We have tried, in our submissions and the voluminous material we put before you, My Lord, to capture for the Court the essence of the 5-year history that Justice Thomas had experienced. And I'm not sure frankly that we've fully capture it, but the Court has that documentation available to it. The Court should be aware of the history.

Justice Thomas was steeped in this issue by the time he dealt with the ATO. The Sawridge 3 hearing by itself was enough to very -- in a very detailed manner educate Justice Thomas with the entire history and background of this matter, and we can't reasonably interpret an ATO without looking at that full background and that full context.

The other context that Justice Thomas had was the context created by the trustees at the very outset of this matter, and I take the Court back to this document because it is critical. The (INDISCERNIBLE) affidavit that we produced at tab C of our November 15th, 2019, submissions, paragraph 25 -- and I realize I've taken the Court to this before, but this is the lens through which Justice Thomas handled everything up to the point of the ATO, and that is the trustee's position and evidence that their application was -- and I quote: (as read)

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

My Lord, we are talking about beneficial ownership. To suggest and affirm with the background and knowledge that Dentons has didn't intend to deal with that issue is -- I mean, frankly, disrespectful to Ms. Bonora's years of experience and knowledge. I mean, clearly -- clearly, they were seeking to obtain a global -- if you want to call it rubberstamp or endorsement of what was done in 1985, and that was the first document that Justice Thomas had before him and had before him at the time of the ATO.

And, Jon, I just need the November 1st brief back. I apologize, My Lord. I loaned Mr. Faulds my copy.

So the other document, My Lord -- you've asked isn't there some obligation to obtain clarity and make sure everybody's on the same page. Well, we would submit to you, My Lord, that the parties did that. The parties had been dealing with these issues for 5 years, had been hammering out the first arm, as it were, of the relief that was being sought by the trustees. The OPGT was being put under considerable pressure by the SFN to accept the settlement put forward by the trustee and withdraw its application

on asset document production, and in that context, we then have a brief that is put forward by the trustees. It's shared with the other parties in advance, and I believe that's before you in evidence.

Let's look at that brief, My Lord. It's really -- I don't think we've given it enough attention, and I would take you to the November 1st, 2019, brief of the 1985 trustees. It's tab A. And in particular, I take you to paragraph 20 of that brief, My Lord. The role that Justice Thomas had in this consent order in this application was to decide if he had legal authority to grant the order sought. I would ask the Court why the parties would put *Pilkington* before Justice Thomas if all we cared about was the mechanical transfer of legal ownership of essentially possession and cared not about beneficial ownership.

Pilkington, My Lord, as you have heard from my friends in great detail is about beneficial ownership. That authority was before Justice Thomas, and I ask the Court to read in detail paragraph 20 of the submissions that the trustees made to the Court on that point, and I take the Court to the last sentence: (as read)

> It is submitted that it is in the best interest of the beneficiaries of the 1985 trust that the transfer of assets be approved nunc pro tunc.

How could it possibly be in the best interests of the '85 beneficiaries to approve the transfer, My Lord, if it wasn't dealing with their beneficial ownership of those assets? And in fact what we've heard today is the disentitlement that might result. Please, My Lord, go back to that brief. It, in our submission, leaves very little doubt as to what we were dealing with. We would never have had the dialogue about *Pilkington* with Justice Thomas if we weren't talking about beneficial ownership.

I would also remind the Court of the authorities we've cited to you about consent orders as contract, My Lord. This was a deal between the parties, and despite Mr. Molstad's position on this, I would strongly suggest to you this -- submit to you this was a deal between the OPGT and the Sawridge First Nation. We withdrew a production application on strength of Mr. Molstad's July letter and resounding support for this consent order. That's a contract. Why would the OPGT enter into that contract, My Lord, and exclude the very essence of the relief that was being sought by the trustees? The first arm of it.

So you have to look at the entire context, My Lord, and the suggestion that with the number of lawyers and legal minds and individuals at the table that we all just forgot about beneficial interests, with respect, My Lord, doesn't -- it does a disservice to the judge that dealt with that order, and it doesn't recognize the time, energy, and resources

that the parties had poured into this process to that point in time.

If we could (INDISCERNIBLE) consent orders because of lack of reasons, as I said, My Lord, the judicial system would be in quite a bit of disarray. I referred you in that respect to the 5-year history Justice Thomas had before him, but I would also remind the Court to look at what happened after the ATO, and I have given you substantial number of evidentiary references there. It's critical for the Court to look at things like the litigation plans, the discrimination consent order, Justice Thomas's comments in the case management meetings about there being after the ATO being only one question remaining -- one question, My Lord -- which was how to remedy the discrimination in the beneficiary definition.

When you put that in the context of what the trustees started out seeking in this process, there is no available conclusion other than the ATO regularize all aspects of the '85 transfer including beneficial ownership. And with respect, My Lord, any other path involves reliance on the sort of after-the-fact revisionist history that we heard from our friends, and it is a collateral attack on that ATO. It's a very fraught road to go down, My Lord.

Those are our submission in reply, My Lord, unless you have any additional questions.

THE COURT: No. That is fine. Thank you very much.

MS. HUTCHISON: Thank you, My Lord.

THE COURT: So we will then go to Ms. Bonora or --

MS. BONORA: Sir, I wonder if we might just take a break here. We have heard lots this morning, and we'd like an opportunity to just gather our thoughts in respect of --

THE COURT: Of course.

MS. BONORA: -- in responding to this morning. I wonder if it would be appropriate to take 30 minutes.

THE COURT: I certainly see no problem with that. We have got lots of time. In fact if you needed more time -- there is a number of issues that have been raised that I think you need to address. So if you needed more time, we could give you more time. My guess is we will still be done this morning no matter what.

MS. BONORA: Sir, perhaps if we could come back at 11:30. We would be -- that would be helpful to us.

THE COURT: Sure. Is that suitable to everyone else?

MS. HUTCHISON: Absolutely, My Lord. It works for the OPGT.

MR. MOLSTAD: That is acceptable to the Sawridge First Nation as well.

THE COURT: Thank you very much. Okay.

MS. OSUALDINI: And agreeable as well --

THE COURT: Don't turn off your computers. We will stay connected so we don't lose anyone. Okay? Thank you.

(ADJOURNMENT)

(PROCEEDINGS TO FOLLOW)

PROCEEDINGS ADJOURNED UNTIL 11:30 AM

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, at Edmonton, Alberta on the 28th day of September 2021, and that I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Konnie Schreiner, 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.

Exceldo Projects Ltd.
Order Number: AL21828
Dated: September 30, 2021

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

P R O C E E D I N G S

Edmonton, Alberta
September 28, 2021

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

THE COURT: Okay. Are we back?

MS. BONORA: We are back, Sir, for the Sawridge Trustees.

MR. MOLSTAD: We're here on behalf of the Sawridge First Nation, Sir.

THE COURT: Thank you.

UNIDENTIFIED SPEAKER: And we're here on behalf of the OPGT, Sir.

THE COURT: Good. So I think we have everyone here, and we can proceed.

Submissions by Ms. Bonora

MS. BONORA: Thank you, Sir, I'll speak first and Mr. Sestito will speak after me. Sir, a number of issues were raised this morning and yesterday, and in no particular order I'll address the issues that we think are important for us to answer in reply.

Perhaps I could start by saying that in the 1985 trust there are many groups of beneficiaries in that trust. They are not just the beneficiaries who may be left out if the definition of beneficiary was consistent with 1982 or we changed the beneficiary

definition so it was consistent with 1986 or eliminated the discrimination. There are a number of groups of beneficiaries in the trust, and we recognize our obligations as trustees to all of those beneficiaries.

We do not believe that during the course of our submissions we've taken any contrary position. We absolutely endorse every statement that was read by the OPT or by Crista Osualdini on behalf of Catherine Twinn, or by Shelby Twinn. We absolutely recognize that we have fiduciary duties to all of the beneficiaries, and we continue to have those fiduciary duties and we continue to represent them, and we have obligations as trustees.

We have addressed in the past the issue around our conflicting fiduciary duties, and we started yesterday by telling the Court and all of the parties that we felt one of the most important duties we had was to finding a solution to this problem so that the trust could start to make distributions to the beneficiaries as they are determined by this Court through this litigation.

In terms of Shelby Twinn, we believe that we -- we have not been contradictory in terms of saying that we don't represent her in terms of being a beneficiary of the trust, and the many things we've said in our previous briefs that have been read out we endorse again. We represent her and others like her where -- and we have been consistently saying that we wish to potentially bring the grandfathering application to deal with the beneficiaries who may be left out if the definition changed either to eliminate discrimination, changed because the law would dictate that it would change in some certain way.

And so we understood that we had competing fiduciary duties, and that was one of our ways of dealing with those competing fiduciary duties that the trustees have to this large group of beneficiaries, and trying to sort how we might be able to ultimately determine who those beneficiaries are, and provide benefits to those beneficiaries.

We have started this litigation with saying we wanted to examine and ensure that we were dealing with the correct group of beneficiaries. We wanted to know who those beneficiaries were, and one of the issues we put forward was that the beneficiary definition needed a determination. The -- in the course of this litigation -- and you have asked us in -- before we did the jurisdiction application, that we needed to look at some other issues.

And certainly, Sir, as officers of the court we feel we had an absolute duty to bring forward all areas of law that are important. We have those duties as lawyers. We have those duties as officers of the court. We certainly have those duties when the Court presents us with questions.

So when you asked us questions about is there another way to solve this problem perhaps because there is a constructive trust or a resulting trust, we put that law before the Court. We, as I said, have a duty to find a solution, and try not to continue with the litigation. And I would submit, Sir, that if in fact the law bears out that there is a constructive trust or the law bears out that there is a resulting trust, that's not showing that the trustees have not fulfilled their fiduciary duties. That is showing that the law in fact imposed a solution on this trust.

The submissions certainly were in our briefs. It's not as though we changed our position yesterday in our oral submissions. The issues around constructive trust and resulting trust were in our briefs, and -- but more importantly over the course of all of this litigation we have consistently maintained that we'd like to try and find a solution that rids the trust of the discrimination.

When the trustees started, I -- no one anticipated that there would be so much opposition to riding this trust of the discrimination against women and the discrimination against illegitimate children. And I'm not suggesting anything should have been -- been done differently. It was just a surprise because we thought that that would be a theme that most people would embrace.

And we -- if you look -- in terms of suggesting that we were looking for a solution that involved the 1986 definition of beneficiaries, throughout this litigation we have been saying that. Certainly, in -- many years ago we put forward a settlement application asking the Court to invoke its parens patriae jurisdiction to put all of the children, not just the 1985 beneficiaries but all 31 children that we've identified that the public trustee might potentially represent, regardless of their status in the '85 trust, into the trust for their lifetime, not if they got married they would be -- lose their status, for their lifetime, and then change the definition to the 1986 definition.

Ms. Hutchison yesterday said in the distribution proposal that we put before the Court, we said that this was for the 1985 trust. But in fact our distribution proposal was very clear in terms of saying we'd like to follow the policies that the trustees have put forward for the 1986 trust, and we'd like to change the definition of beneficiary to the 1986 trust to eliminate the discrimination, and then potentially deal with grandfathering. That has been our position in that settlement application, in the distribution proposal, and then in the jurisdiction application where the briefs are filed. If that application goes ahead, we've also been consistent.

So this is not something that is new in terms of what our position has been in terms of trying to fulfill our fiduciary duties to the large group of beneficiaries that are in the 1985 trust. We feel we have many competing fiduciary duties but we represent not just the

group that might be left out but in fact the whole group of those beneficiaries and trying to find solutions for that whole group of beneficiaries.

As I said, we endorse every single brief that has been read to you today. We did not intend -- certainly we don't believe we said anything different yesterday. If we did, we didn't intend to say it yesterday. Our intention was to put forward the law, which of course could lead to certain solutions. The -- I -- we do not believe that we have departed from our role in any way.

As I said, the Court presented some questions to us. We went away and considered those questions, and we felt obligated to put that law before the Court. And so as we said it's possible that the Court -- the -- that the law will lead to solutions. That doesn't mean that the trustees have abandoned their fiduciary duties to a group of people.

The -- we're sure the -- no, we don't believe there's any beneficiaries that have been left behind in terms of our arguments. We would like to get to a position where benefits can be conferred on those beneficiaries.

Sir, in the event that it appeared yesterday that we are arguing stronger for some solutions than others, we would suggest it's possible because -- it's possible that that was the appearance because the law was stronger in those solutions, and not because we were advocating for any particular solution. And as Mr. Sestito will tell you, we certainly have continued to maintain that we would try as much as we could to find benefits for everyone.

That may not be possible in law. It's -- as the parties have said, grandfathering may not be a solution in law. But as trustees we have consistently said that we would try it, and try to benefit as many people as possible because that is what we see as our fiduciary duty with this trust that has difficulties, and has problems.

The -- I think in terms of our fiduciary duties with respect to finding a solution, it is important to look at proportionality, and I referred you to the *Hrynyk* case yesterday saying proportionality of the litigation is important to -- in terms of looking for a solution. And certainly in this case, we -- the trustees never expected there to be ten years of litigation, and of course it's not over yet, and certainly the litigation has been overwhelming for the trust. So we have been trying to advocate for a resolution and a solution that gets us out of the litigation.

We thought that the asset transfer issue was settled. We are not arguing the asset transfer order again, but there were two distinct issues. The first question that was put before the Court in this litigation was: How do we deal with the definition and the discrimination?

The second question was the transfer. We thought the transfer was an easy question to get through, and we asked the parties to engage with us and put together a consent order for that.

When the OBGT says that it's clear from the asset transfer from all of the materials filed around it that this was for the benefit of the 1985 beneficiaries and it could be nothing else, our question of course rhetorical is, well, what does that mean? Are we finished the litigation then? Have we decided that it's this definition, move forward, you're done?

We did not intend that. It's not in the asset transfer order, and certainly we have no idea what that means to say that it's for the benefit of these 1985 beneficiaries. So perhaps we're wrong on constructive trust. Perhaps we're wrong on resulting trust or how *Pilkington* applies, or *Hunter*. We believe we put forward what we thought was the law on those issues according to what we believed was our fiduciary duties.

In respect of the asset transfer order, you challenged Ms. Hutchison about, well, why aren't those words in the asset transfer order, and I would suggest they're not there because we would not have put them there deliberately. Those are words -- are not there because that was the seminal question in -- in terms of who the beneficiaries were that was to be answered in the very next piece of litigation in this litigation -- or next step of litigation. And I think Ms. Hutchison is right; let's look at what the next step was.

The next step was to do the jurisdiction application to determine could you eliminate the -- the discriminatory portions. So clearly the beneficiary definition was not settled by the asset transfer order. The asset transfer order was just to determine that we were looking that the assets had actually been transferred. And as I said yesterday, to avoid a challenge in the future from 1982 beneficiaries saying: No, bring this back. You never had any right to transfer it to 1985.

And I -- I encourage you, and I think you noticed already, that the order says nothing about for the benefit of the beneficiaries. Neither -- neither does the originating application. It simply dealt with the transfer. And certainly we didn't intend to give up all of our rights around determining the beneficiary definition and trying to eliminate discrimination in many different ways, such as we presented by doing the asset transfer order. The two issues were not combined.

The -- I think that if we look at the cases that were presented by the parties there's one consistent them, and that is that in every case they had a provision in the order that they needed to interpret. So you -- the -- in the *Campbell* decision there were two possibilities in terms of changing a parenting plan, and the Court had to decide was it really just one, you know, really just a change in circumstances or was it two distinct possibilities that

the -- these people could come back to court on, but that was in the order.

The -- and that is true in the Manso v. Peron (phonetic) case. The order directed the filing of a statement of claim and then the question was did that actually apply? Did they have to file their statement of claim but that was in the order. The -- certainly in *Yu v. Jordan* the court says that you have to examine the pleadings. In this case, the pleadings say nothing about the benefit of the beneficiaries. The language of the order, it says nothing.

And in the circumstances, the -- the order was drafted where we knew the second question was going to be asked and answered in a different proceeding. It is true that in the *Simonelli* case they talk about when you're interpreting a consent order you use a contractual interpretation, and you look at a reasonable and objective intent of the parties. The intent is determined by considering both the expressed terms of the contract and the surrounding circumstances.

But in our case, we have no express terms of the contract that speak to beneficiaries, and our suggestion is that you can't insert those terms by the surrounding circumstances. The surrounding circumstances can interpret those terms, but they can't insert them. And certainly if it -- you're asking about our intent, our intent was that that order was drafted absolutely intentionally not to include those terms.

The -- I -- I've already spoken about the distribution proposal. I'll just tell that at tab H -- it's in tab H of the November 15th, 2019, brief of the OPGT, and Ms. Hutchison made reference to it yesterday suggesting that we said it was for the 1985 beneficiaries but I do ask you to look at page 5 of that distribution proposal where it's very clear that the -- we were still advocating for a change to the beneficiary definition.

I -- I think we have examined *Pilkington* so much, and I think the only other issue that we would like to raise is in terms of the facts around *Pilkington* it's -- I think it's important to know that it was a nephew who was an income beneficiary. The niece who got this trust was actually a beneficiary. She would have been a capital beneficiary, and when the Court talks about the incidental beneficiaries it is our interpretation of *Pilkington* that those incidental beneficiaries were her children, so it was her children who would not have benefited under the original trust, and will only benefit in the *Pilkington* trust if she dies, and those were the incidental beneficiaries.

There's nothing in *Pilkington* that suggests that you can add a beneficiary that had no rights before as a prime -- I'll call it a primary beneficiary, so in that role of Penelope (phonetic) in the *Pilkington* case, and certainly nothing in *Pilkington* or *Hunter* or *Chalmers* to say that you can leave people out or you can add people in. Those are not

principles of *Pilkington*. *Pilkington* was that the beneficiaries can transfer to a trust for their benefit.

And as we said, and I think we all agree, there was a common set of beneficiaries in 1985 on April 15th, 1985. And you're right that, you know, in -- two days later on April 17th it changes because now we leave out the Bill C-31s by that definition, and there months later when the membership code is instituted we have for sure a change of beneficiaries, so I think that timeframe is important in terms of looking at it.

When Ms. Osualdini says that the same -- the definition in '82 is the same as the definition in '85 because you were operating under the same legislative scheme, it would seem that -- that that couldn't have made sense because why then did you need to change the trust. If it was going to be the same, you could have left it. So clearly there was an intent to change that trust.

Ms. Osualdini yesterday said that the power of advancement is equivalent to section 42 of the *Trustee Act*, and you could use the power of advancement to amend the trust, and we would suggest that that is not the law. That you can use the power of advancement in the many ways we've talked about, which I won't repeat, but you can't amend a trust by using the power of advancement, or section 42 of our *Trustee Act* would have no impact.

I think much has been made of the fact that we're now here 35 years later and, you know, why -- why are they, and is there some limitation but I would suggest to you that trusts are a continuing relationship and continuing obligations. And every day and every year trustees might have issues they need to bring to this court, and they're certainly not foreclosed because of what happened when the trust was settled 35 years ago, or 20 years ago or whenever it was.

The very nature of section 42 of the *Trustee Act*, or drafting provisions in a trust to allow variation is because we know that there will be changes in tax laws, there will be change in other laws, changes in families that necessitate the trust to be reviewed by the court and to see direction of the court. So I think the limitation argument in a trust concept is not valid, and that in fact trustees when they come to court to seek advice and direction will look at the intention of the settler when the trust was drafted, will look at what happened in the history of the trust because those are all relevant considerations to asking or answering a question in a trust deed as it continues through its history.

And perhaps, Sir, I'll just close by saying again I think in this litigation and in this particular application we were asked to look at issues, and as fiduciaries we agreed to bring that application to put these issues before the Court. We haven't changed our position. We are still representing the beneficiaries.

We felt the need to put the law forward to see if there could be a solution, and in fulfilling those fiduciary duties by finding a solution whether that is through the many areas of law that we've explored, or through what we might have coming for us in the jurisdiction application and grandfathering. And I'll just turn it over to Mr. Sestito to complete our arguments.

Submissions by Mr. Sestito

MR. SESTITO: Thank you, Ms. Bonora. So, My Lord, I -- I do feel obliged, and I'll do my -- do my level best not to repeat the submissions by my colleague but I do feel obliged to again clarify the position on fiduciary duties as I did lead Your Lordship through our argument in our December 2020 brief yesterday.

So, Sir, the -- the sovereign trustees never argued that they do not owe a fiduciary duty to the 1985 beneficiaries who are not members of the First Nation. And -- and to clarify, Sir, similarly we never argued -- and -- and I'll be looking at that transcript in great detail but to the extent I did it was an error, that the only fiduciary duties owed by the -- by the sovereign trustees was to the members of the SFN.

One -- one thing thought that is certain, Sir, there are many competing fiduciary duties at play in this case, and as the litigation is ongoing no benefits are being conferred to any potential beneficiaries. This is really why the trustees are doing their best to seek out a solution.

We have as I say competing duties, and we also have competing documents, Sir. And as the Court has alerted us to these key differences, we have done our best to reconcile the differences between these very different documents within the context of the basis in law. My presentation yesterday, Sir, was consistent with our presentation in our December 2020 brief in that we proposed a modified framework, questions that the Court can ask themselves as taking a look at the transfer, and a discussion as to the potential solutions that flow from those questions.

So, Sir, apologies if I repeated a bit of Ms. Bonora's submissions there, but I did -- I did feel obliged to correct the interpretation that has been made by my friends of my presentation yesterday.

Moving now, Sir, briefly to a few other points. With respect to settler intention, some of the parties seem to have interpreted the *Hunter Estate* decision as inviting the Court to in effect ignore the stated intention in a given trust deed simply because the same person would be involved in the creation of a new trust deed.

We -- we strongly disagree with that reading of *Hunter Estate* and -- and believe, Sir, in our -- our submissions are set out in that December brief again, but we believe that the Court really must view the stated intention of the settler, and the powers of the trustees, by taking a very, very close look at the trust deed.

And it is only in that close comparison of the trust deed, the original trust deed, and then comparing that with the new trust deed that the Court must undertake its analysis as to whether or not the new deed is in fact alien to the original intention. And that's why, Sir, I spent so much time yesterday bringing Your Lordship through the specific references from the 1982 trust deed because really it -- it ought to -- it -- it is critical to evaluating powers of the '82 trustees, and the intention of the '82 settler.

Now, Sir, there's been some discussion as well of so-called transactional documents. Much -- much attention has been paid to the wording, and an example would be then counsel resolutions. Now, Sir, in our submission this -- this misdirects what I think the Court's analytical approach must be, and -- and it's -- it's a simple proposition, Sir, but it bears repeating.

The '85 trustees could only receive what was within the power of the '82 trustees to give, and -- and we really believe, Sir, that that ought to be the focus of the Court, not necessarily the transitional documents, what they say of intention after the fact but taking a look at what was within the power of the '82 trustees to advance and was given to them through the settler but through the text of the '82 trust deed.

The -- the same, Sir, can be said about the use of the word 'transfer' in the ATO itself. I'll defer to my colleagues' submissions though in that regard on the interpretation of the order. And again, I note Ms. Osualdini draws a distinction between funds that are settled and -- and funds that were provided after settlement. I don't necessarily disagree with the distinction but again the '85 trustees could only receive what was within the power of the '82 trustees to give. That's -- that's really central to the analysis, we -- we believe.

Sir, the -- with -- with respect to the notion of a travelling definition as my -- as my friends have characterized it, they -- they appear to take exception to the notion that the '82 beneficiary definition could somehow travel to the '85 trust but they -- they suggest, Sir, that this is a novel approach.

But with respect, Sir, there's -- there's nothing novel about this argument. It's -- it's really the very essence of -- of the notion of a resulting or constructing -- a constructive trust, which is derived by the settler conferring certain powers on those original trustees, and -- and the Court then interpreting the scope of that power. So I just -- I just wanted to say I

don't -- I don't believe that there's anything terribly novel with that concept. It's fundamental to the concept of a resulting trust or, as we argue in the alternative, a constructive trust may -- may apply when -- you know, those are the two options that really, Sir, are -- are possible there to answer those questions that we proposed in our modified framework.

So, Sir, I'll -- I'll conclude with what the trustees view as the -- the sort of suite of options that are before Your Lordship, and again this is just as we -- as we view it, Sir. So first you could conclude, Sir, that the assets that are currently being held by the '85 trustees are being held for the benefit of the '85 beneficiaries, and we're all very familiar with these defined terms so I won't -- I won't belabour them.

So in this scenario the trustees would accept the Court's advice, and we would proceed to the jurisdictional application that we were sort of on our -- on our way to doing when -- when the Court posed these very critical questions. We would -- we would pursue whether the Court had the inherent jurisdiction to alter the definitions that are found in the '85 trust deed to cure the discrimination. We would continue on the path we were on.

The second option, Sir, that we view as being possibly before you as a solution, you could conclude, Sir, that the assets are being held by the '85 trustees for the '82 beneficiaries, and as -- as we lay it out in our December submissions that could take the form of a resulting or a constructive trust. Pragmatically speaking, in this scenario the trustees would accept the Court's advice and the discrimination, at least in the definition, would be cured. We'll -- we'll talk a little bit about other steps that we might have to take in a minute.

So -- so thirdly, Sir, what we view as the -- the sort of third option before you is the Court could conclude, as we've set out in our December brief, that the assets are being held by the '85 trustees for the overlapping '82 and '85 beneficiaries, and that the '85 trustees would be able to transfer those assets to the '86 trust, and I won't belabour the argument there.

I -- I set you through the -- the potential analysis that the Court could undertake in our -- in our December brief, and this is the answer to the third question that we posed. Again, pragmatically speaking, in this scenario the trustees would again accept the Court's advice and would likely affect that transfer.

Now, Sir, the -- the issue though of the current beneficiaries who could lose their beneficial status looking at options 2 and 3, we -- we do believe that that issue can be addressed through grandfathering or -- or other solutions that we would need to investigate. The sovereign trustees have always been committed to finding solutions for

those individuals, and as -- as our friends have shown you in the arguments before Your Lordship, and others, we have consistently taken the position that we have an obligation to the -- to the group that might be left behind, and that we represent their interests.

The -- the options, Sir, that we have put forward in our analysis of the question before you and the potential solutions, there really are attempts -- the trustees attempts to meet the many fiduciary duties that -- that the sovereign trustees have. To be clear, Sir, the sovereign trustees fully embrace all of the fiduciary duties that they owe to all of the beneficiaries when seeking out these potential solutions.

So with that, unless -- no, we -- I -- I see a shaking of a head by my colleague. Unless you have any questions, Sir, those are our submissions in reply.

THE COURT: Mr. Sestito, I want to take you back to some of the discussion that I had with Mr. Faulds, and get your take on it.

Is it the case that the '82 trustees who owe duties to the present and future members of the Sawridge First Nation, is it true that in April of 2015 -- April of 1985 they simply could have distributed the whole of the fund by way of a cash advance, and that would have brought the trust to an end --

MR. SESTITO: Yeah --

THE COURT: -- (PORTION OF PROCEEDINGS NOT RECORDED) the existing band members at that time? Is that true?

MR. SESTITO: Yes, Sir. And in -- in fact if you take a look at our December brief, I -- I will likely not be able to find the pinpoint but we do pose that as when -- when evaluating that first question of what authority -- under what authority the transfer happened -- oh, paragraph 7.

We do discuss the potential that the assets could be distributed outright to the individual beneficiaries, and what consequences would flow from that course of action. And then we note, Sir, that that's specifically what did not happen which is why we're engaging in this analysis.

THE COURT: What -- what flows from that then is the next question that Mr. Faulds provided by way of answer, and I put it to you for your comment.

If -- if the 1982 trustees could simply distribute the whole of the fund through a cash

disbursement, why couldn't they equally distribute (PORTION OF PROCEEDINGS NOT RECORDED) trust for the benefit of the same people? Why couldn't they do that?

MR. SESTITO: I -- I think, Sir, because the -- the distribution itself would need to be consistent in the event that it was done in a trust transfer. You -- we need to look at the power that would have invested in the '82 trustees. In fact, it would need to respect -- if you're going to continue on a trust obligation, it would need to respect that class definition, which is found within the four corners of the '82 trust itself.

That, I think, would be the -- the distinction there. We do mention though, Sir, that, you know, the -- sorry, I've accidentally muted myself.

We -- we do mention, Sir, that in the event that there had been an individual distribution and then a peer resettlement, it would have been a completely legal analysis. The fact of the matter is we are dealing with a transfer from one trust to the other, and we've done our best to outline the legal framework which we must view that transfer.

Submissions by Ms. Bonora (Reply)

MS. BONORA: Sir, perhaps I'll just add to the argument. In modern day trust drafting, you would actually give authority to a trustee to distribute to a trust in which the beneficiaries of the trust -- the new trust are the same, or one or more of them are the same.

The point behind the -- the reason you need to use *Pilkington* is because that power did not exist in the 1982 trust to transfer it to a new trust. The powers in the 1982 trust were to transfer it to the individual beneficiaries of the 1982 trust. And so I think in looking at the questions that you have asked, if you can transfer to those individuals who were beneficiaries in 1982 I think it stands to reason, according to *Pilkington*, just like Penelope, you could transfer to a trust with those people.

I don't think there's any problem in that logic. I think the logic that is problematic is once you hit April 17th, then -- and you are now adding potentially a number of beneficiaries who were not beneficiaries in 1982, can the same principles apply.

And just even in dealing with the Bill C-31 women, if we look at your questions around and focus on the Bill C-31s, I think that the trustees had the ability to make a distribution from the 1982 trust to exclude those women. They could have chosen which beneficiaries were going to get money. There was no -- necessarily any reason that there had to be an equal distribution among the beneficiaries. Short of an even-hand argument applying, they could have done that.

So the exclusion of those Bill C-31 women, if they chose to make a distribution, was potentially aloud. The problem is that as soon as you hit April 17th, 1985, or once the membership code comes in, you definitely have a whole new set of beneficiaries. And of course we've explored the extent of the number of people that might be added and we would, you know, have said that we're not sure that *Pilkington* allows you to do that.

THE COURT: Okay. Thank you very much. All right. So we have now heard from everyone, and I will get the transcripts so I can review some of these submissions again to -- so give me (PORTION OF PROCEEDINGS NOT RECORDED) as soon as reasonably possible.

And Mr. Faulds, you're going to get me a copy of the various pages from (PORTION OF PROCEEDINGS NOT RECORDED) that are relevant to -- to re-settlement?

MR. FAULDS: I will, My Lord.

THE COURT: My guess is it's going to take me a bit of time to work my way through this, so I -- I won't give you a promised time for the decision but it -- it will likely take me quite a while, I'm thinking, to get through this. I'll try to do it as quickly as I can but it will take -- it will take some time. It's not -- it's not an easy answer for sure, so I will do it as quickly as I can.

But I did want to thank you all for your submissions, and your thoughtful written briefs. And I wanted to thank Shelby, as well, for the excellent presentation that she made.

MS. TWINN: Thank you.

THE COURT: Thank you. Okay. So unless there's anything else, we'll just adjourn and I'll get back to you as soon as I can.

MS. BONORA: Thank you, Sir.

UNIDENTIFIED SPEAKER: Thank you, My Lord.

UNIDENTIFIED SPEAKER: Thank you, My Lord.

THE COURT: (PORTION OF PROCEEDINGS NOT RECORDED) thank you very much.

PROCEEDINGS ADJOURNED

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, at Edmonton, Alberta, on the 28th day of September, 2021, and I was the court official in charge of the sound recording machine during the proceedings.

Certificate of Transcript

I, Monica Kazar-McKenna, certify that

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

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