Court of Queen's Bench of Alberta

Citation: Twinn v Trustee Act, 2022 ABQB 107

Date:
Docket: 1103 14112
Registry: Edmonton

In the Matter of the *Trustee Act*, RSA 2000, c T-8, as amended,

And in the Matter of the Sawridge Band, *Inter Vivos* Settlement, created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust")

Roland Twinn, Margaret Ward, Tracey Scarlett, Everett Justin Twinn and David Majeski, as Trustees for the 1985 Sawridge Trust ("1985 Sawridge Trustees")

Applicants

-and-

The Office of the Public Trustee and Guardian and Catherine Twinn

Respondents

-and-

Sawridge First Nation and Shelby Twinn

Intervenors

Memorandum of Decision (Sawridge #12)

of the

Honourable Mr. Justice John T. Henderson

I. Overview

[1] On August 24, 2016, Justice D. R. Thomas granted a Consent Order (the "2016 Consent Order") that provides in part as follows:

> The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.

[2] The 2016 Consent Order was consented to by the Trustees of the 1985 Trust (the 1985 Trustees), by the Office of the Public Trustee and Guardian ("OPTG") on behalf of some 1985 Beneficiaries and by Catherine Twinn. The Sawridge First Nation ("SFN") did not expressly consent to the 2016 Consent Order since it was not a party to the litigation, although counsel for SFN was present in the courtroom when the Order was presented and signed. He was aware of the contents of the 2016 Consent Order and did not express any objection.

[3] The Trustees of the 1982 Trust (the 1982 Trustees) are not a party to this litigation, and never have been. Their consent to the 2016 Consent Order was neither sought nor obtained.

[4] The beneficiaries of the 1982 Trust (the 1982 Beneficiaries) are not a party to this litigation, and never have been. Their consent to the 2016 Consent Order was neither sought nor obtained.

[5] No appeal was brought in relation to the 2016 Consent Order. Furthermore, no party or non-party has sought to set aside the 2016 Consent Order. It therefore remains a binding order of the Court.

[6] The trust assets in issue are substantial. As at December 31, 2010, the assets were valued at in excess of $70,000,000.

[7] In December 2018 I assumed responsibility as the Case Manager in relation to this litigation.

[8] On April 25, 2019, a Case Management Meeting was scheduled to deal with the issue of whether the Court had jurisdiction to approve a change to the definition of the term "beneficiaries" in the 1985 Trust Deed so as to eliminate the discriminatory nature of the definition (the "Jurisdictional Application"). That application was not an application to amend the definition of the term "beneficiary" but, instead an application for advice and direction regarding whether the Court had jurisdiction to amend the definition either through the amending

clause in the 1985 Trust Deed, or through s 42 of the *Trustee Act,* RSA 2000, c T-8, as amended ("the *Trustee Act*"), or through the common law powers of the Court.

[9] Prior to the commencement of the Jurisdictional Application, I raised with counsel concerns regarding the interpretation of the 2016 Consent Order and how that interpretation might affect any future application to change the definition of "beneficiaries". I expressed concern regarding whether "transfer of assets" approved of in the 2016 Consent Order was intended to transfer a legal interest in the assets only or whether the 2016 Consent Order should be interpreted as meaning that both the legal and beneficial interest in the trust assets was transferred. Thus, the issue was whether the 2016 Consent Order should be interpreted as meaning that the 1985 Trustees hold the assets for the "Beneficiaries" as defined in the 1985 Trust (the 1985 Beneficiaries) or whether, despite the transfer, the 1985 Trustees held the trust assets for the 1982 Beneficiaries. I noted that this issue was not expressly addressed in the 2016 Consent Order.

[10] The Trustees of the 1985 Trust now seek advice and direction in relation to the interpretation of the 2016 Consent Order. The Application was brought to address the concerns I had raised on April 25, 2019.

[11] The OPTG and Catherine Twinn forcefully argue that the 2016 Consent Order was the product of settlement negotiations with the 1985 Trustees and that it was their intention that the 2016 Consent Order was granted for the purpose of confirming the transfer of both legal and beneficial interest in the 1982 Trust assets to the 1985 Trust. Thus, they argue that the 1985 Trustees hold the trust assets for the benefit of the 1985 Beneficiaries.

[12] The 1985 Trustees take a different position. They assert that the 2016 Consent Order was only intended to confirm that legal title to the trust assets had been transferred and that the beneficial ownership of the trust assets was to be determined at a later stage. From the perspective of the 1985 Trustees, the primary purpose of the 2016 Consent Order was to confirm that they were the "entity to deal with" in relation to the trust assets. This was expressed in a "with prejudice" letter sent by counsel for the 1985 Trustees to counsel for the OPTG on June 22, 2016, which said in part:

> The1985 Trust has been operating since 1985 with assets transferred to it from the 1982 Trust. The problem for the trustees is really a dearth of information and documentation in respect of the trust to trust transfer. We simply wish to have the court agree that the transfer is approved and the 1985 trust is the entity with which to deal.
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> (emphasis added)

[13] The SFN, as Intervenor, argues that the 2016 Consent Order should be interpreted as meaning that only legal title to the trust assets was transferred in 1985 and that the beneficial interest in the trust assets remains with the 1982 Beneficiaries.

[14] These Reasons will consider the meaning and effect of the 2016 Consent Order.

[15] The interpretation of the 2016 Consent Order has real and material consequences. If the 2016 Consent Order is interpreted to mean that the 1985 Trustees hold the trust assets for the 1985 Beneficiaries, then approximately 15 current SFN members (approximately 33% of the

total current SFN members) would not be considered as members of the class who are beneficiaries in relation to the trust assets, because, despite being SFN members, they are not 1985 Beneficiaries. Included in this group of 15 SFN members are the women who were discriminated against when they lost membership in the SFN because they married non-First Nations men, but who became entitled to regain their status as SFN Band members as a result of the implementation of Bill C-31 on April 17, 1985 (the "Bill C-31 Women"). Only three Bill C-31 Women remain alive today. They are not now, and never have been, 1985 Beneficiaries.

[16] Conversely, if the 2016 Consent Order is interpreted to mean that the 1985 Trustees hold the trust assets for the 1982 Beneficiaries then a large number of persons who are 1985 Beneficiaries, but who have not gained SFN membership, would have no interest in the trust assets and would be excluded. The members of this group are difficult to precisely identify, but the group includes a minimum of 26 persons and as many as 55 persons. The OPTG represents the interests of some but not all of those persons.

[17] Thirty SFN members are both 1982 Beneficiaries and also 1985 Beneficiaries. Thus, other than dilution, the interpretation of the 2016 Consent Order has little practical impact on them. They will be beneficiaries on either interpretation.

II. OPTG and Catherine Twinn Do Not Consent to Process of Advice and Direction

[18] The OPTG and Catherine Twinn have expressed concern regarding whether the Court should provide the advice and direction sought by the 1985 Trustees. They agree that, as a Case Management Judge, I have the discretion to give advice and direction with respect to whether the 2016 Consent Order should be interpreted as meaning that the trust assets are being held for the benefit of the 1985 Beneficiaries but that if I conclude otherwise, I cannot go further and come to a conclusion as to who the 1985 Trustees hold the trust assets for. They argue that this would effectively result in the Court granting a remedy which a Case Management Judge cannot do. As a result, the OPTG and Catherine Twinn have made it clear that they do not consent to the Court providing advice and direction with respect to the issue of whether the 1985 Trustees hold the assets for the 1982 Beneficiaries.

[19] Catherine Twinn also argues that the issue of the beneficial ownership of the trust assets is simply "not germane" to the interpretation of the 2016 Consent Order. However, this submission completely ignores the fact that the Case Management Judge was asked to approve the 1985 transfer of the trust assets from the 1982 Trust to the 1985 Trust and that Ms. Twinn's current position (and that of the OPTG) is that by approving the transfer, the Court intended to approve the transfer of the beneficial ownership of the trust assets to the 1985 Beneficiaries. I conclude that beneficial ownership of the trust assets was a critical issue for consideration by the Case Management Judge and that the 2016 Consent Order can only be properly interpreted by considering the state of the beneficial ownership of the assets at the time that the Court was asked to sign the 2016 Consent Order.

[20] The position of the OPTG and Catherine Twinn is that if I do not accept the interpretation of the 2016 Consent Order which they advocate, then I must permit the litigation to continue and that I should hear one or more applications regarding:

- production of additional documentation relating to, *inter alia*,

  - records relating to the origin of the funds with which the transferred assets were acquired, and
  - records concerning the establishment of the trusts and transfers of the assets including records pertaining to the role of SFN and its leaders in those transactions, etc;

- questioning of professional advisers who assisted with the creation of the 1985 Trust and the transfer of the assets;
- an application for a ruling in relation to privilege issues to determine whether there has been a waiver of solicitor client privilege with respect to advice given by lawyers retained by SFN in 1985;
- consideration as to whether the 2016 Consent Order should be set aside and whether there are any valid grounds to do so;
- consideration of any limitation issues that might arise; and
- consideration of issues relating to laches.

[21] The *Trustee Act*, s 43(1) permits a trustee to apply to the Court for advice and direction and provides as follows:

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

[22] In ***Re Tomlinson Estate***, 2016 BCSC 1223 the Court expressed reservations regarding the use of advice and directions for questions that affect the substantive rights of the parties, saying at paras 51, 53 and 54:

> In *Re Bailey* (1982), 38 BCLR 227 (BCSC in chambers), Taylor J in following the decision of this court in *Re Royal Trust Co* (1962), 39 WWR 636 (BCSC), stated the object of s. 86 (then section 82) as:
>
> > … the section is designed to enable the court to assist trustees in "little matters of discretion" concerning "the management and investment of trust property", and it is not to be used as the basis for applications to construe an instrument, or to affect "the rights of parties to property".
>
> ... ...
>
> *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 1164 writes:
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> > The issue of "management or administration" as a limitation upon the *Trustee Act* power of the court to give its opinion, advice, or direction has been more particularly raised in connection with motions which turn out to involve a conflict as to ownership of the assets. The courts refuse to give such assistance when there is essentially a conflict between interested parties, and this is not

> merely because the court has not the necessary evidence before it, but because it is felt that a "fight", whether or not it is patent, is not a matter of management or administration."
>
> ...The focus of the section [s 86 of the *Trustee Act*] is for the court to help the trustees administer the trust by giving advice not in respect of conflicting parties, but advice regarding the obligations of a trustee...

[23] However, a Court does have broad powers under the *Judicature Act,* RSA 2000, c J-2, s 8 to grant all remedies whatsoever for the purpose of determining all matters of controversy between the parties. That section provides:

> The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

[24] Rule 4.14 of the *Alberta Rules of Court*, Alta Reg 124/2010 provides a Case Management Judge with broad powers to resolve issues in the litigation, including the power to order that parties take steps to clarify the real issues in dispute: Rule 4.14(1)(a). These powers can, in appropriate circumstances include addressing substantive issues: ***Kachur Estate v Kachur***, 2021 ABCA 343 at paras 11 – 16. The restrictions on the powers of a Case Management Judge are found in Rule 4.15 which prohibits the Case Manager from hearing an application for judgment by way of a summary trial or from acting as the trial judge, in the absence of consent from all parties. The present application is neither a summary trial, nor a trial.

[25] The 1985 Trustees bring the present Application for the purpose of obtaining advice and direction from the Court regarding an issue that is fundamental to the duties of the Trustees. It is necessary that the Trustees have a clear understanding of the 2016 Consent Order specifically regarding the beneficiaries they hold the assets for. Without having an answer to that question, they cannot fulfil their duties.

[26] The advice and direction that the 1985 Trustees seek does not involve granting a remedy to any party. However, the OPTG and Catherine Twinn raise concerns that the interpretation of the meaning and effect of the 2016 Consent Order may, for all practical purposes, determine which of two groups are the proper beneficiaries of the trust assets. Although not stated in precisely these terms, they argue that this is inconsistent with s 43 of the *Trustee Act* because the interpretation may touch on substantive rights. Thus, such advice and direction may not be properly characterized as "respecting the management or administration of the trust property".

[27] In considering whether I should exercise my jurisdiction to give advice and direction with respect to the meaning and effect of the 2016 Consent Order, I specifically take into consideration the following factors:

i. The parties, including the OPTG and Catherine Twinn, brought the "asset transfer issue" before the Court and asked the Case Manager, then Justice Thomas, to grant an order approving the transfer of the assets from the 1982 Trust to the 1985 Trust as

part of his role in providing advice and direction. When the 2016 Consent Order was presented to Justice Thomas, the OPTG and Catherine Twinn did not object and felt that this would resolve the "asset transfer issue". As a result, the OPTG and Catherine Twinn agreed to having the "asset transfer issue" determined by an application for advice and direction. It is inconsistent to now revert to some process other than advice and direction to address the interpretation of the 2016 Consent Order.

ii. The "asset transfer issue" was one that required the Court to consider the lawfulness of the transfer of the assets from the 1982 Trust to the 1985 Trust. Whether the asset transfer was lawful was necessarily a critical issue that had to be assessed in determining whether to approve the transfer *nunc pro tunc*. Because this was a consent order the Court did not provide express reasons for its conclusion regarding the lawfulness of the asset transfer. Nevertheless, the lawfulness of the asset transfer, and thus the beneficial ownership of the trust assets at the time of the August 2016 application are critical issues that must be considered when interpreting the 2016 Consent Order.

iii. The 2016 Consent Order specifically acknowledged that the 1985 Trustees had "exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust" and that the parties had been "given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have reviewed". It is hard to reconcile this with the position taken by the OPTG and Catherine Twinn regarding the need for additional document production and questioning.

iv. Counsel for the 1985 Trustees, as officers of the Court, have represented to me that they have conducted extensive searches for documents and have disclosed all relevant non-privileged documents which have been identified. I accept and rely on their representations.

v. On December 19, 2019, the OPTG filed an Application seeking the additional production of documentation in the possession or control of SFN and the 1985 Trustees. The Application was scheduled for argument on February 5, 2020. On February 4, 2020, counsel for the OPTG advised that the issues relating to the production of documents had been resolved and that they would present me with a Consent Order to confirm the resolution of the document production issue. The Consent Order has now been signed and filed.

vi. At the request of the OPTG and Catherine Twinn, the Court scheduled January 16, 2020, as a date for hearing argument with respect to privilege issues in relation to records held by the 1985 Trustees and SFN arising from the 1985 Asset Transfer. The OPTG and Catherine Twinn elected not to proceed with that Application. Instead, a Consent Order has been granted in relation to privilege issues.

vii. This litigation has been ongoing for more than 10 years at substantial expense, much of which has been paid from the trust assets. In this respect, the trust assets are being depleted.

viii. Some of the 1982 Beneficiaries are getting older and some have died. This was a concern that was summarised in ***Sawridge Band v Canada,*** 2003 FCT 347 (T Div) in

reasons that granted the interim mandatory injunction. Speaking specifically about the Bill C-31 Women, Justice Hugessen said at para 4:

> Because these women are getting on in years (a twelfth member of the group has already died and one other is seriously ill) and because the action, despite intensive case management over the past five years, still seems to be a long way from being ready to have the date of the new trial set down, the Crown alleges that it is urgent that I should provide some form of interim relief before it is too late.

These concerns were expressed 18 years ago and are even more acute today. I am advised that since Justice Hugessen made those observations, eight of the then-remaining 11 Bill C-31 Women have died. Thus, there are now only three alive. If this litigation is permitted to languish much further, none of these women will be alive to participate as beneficiaries of the trust assets, if it is determined that they have an entitlement.

ix. The need to clarify the interpretation of the 2016 Consent Order was first raised in April 2019. The Application was not heard until 29 months later on September 27 and 28, 2021, in large part due to adjournments made necessary because of COVID. Multiple Case Management meetings were held in late 2019 to define the scope of the application relating to the interpretation of the 2016 Consent Order. The parties have filed extensive Briefs (17 Briefs in total) fully setting forth their respective positions on the material issues that need to be addressed to properly interpret the 2016 Consent Order. No party is caught by surprise in relation to the issues before the Court.

x. The Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87 called on Canadian courts to undergo a "culture shift" from strict formalism to embrace litigation procedures and tests that provide fair, just, but efficient and proportionate mechanisms to resolve legal issues. This strategic direction was emphasized in a criminal law context in ***R v Jordan***, 2016 SCC 27, [2016] 1 SCR 631 and ***R v Cody***, 2017 SCC 31, [2017] 1 SCR 659, where the Supreme Court of Canada stressed that all court participants must collaborate to make trial procedures more efficient and timely. These decisions instruct trial courts to adapt and develop their procedures to meet that objective. A trial is no longer the default position. This is particularly instructive in the context of attempts by the 1985 Trustees to obtain direction regarding the trust assets which have been ongoing for 10 years and in the context of related litigation that commenced almost 35 years ago.

[28] The fundamental issue which determines whether I am able to accede to the request of the 1985 Trustees to provide advice and direction regarding the 2016 Consent Order is whether the process of advice and direction is a fair, just, but efficient and proportionate mechanism to resolve the issues relating to the 2016 Consent Order. I have previously advised the parties (for example on November 27, 2019 at pages 5 to 6), that my ability to give advice and direction on the issue raised on this Application is contingent upon my being satisfied regarding the state of the record before me. I explained to the parties that if, after a more thorough review, I concluded that the record was not sufficiently complete to permit me to achieve fairness between the parties

then I reserved the right to decline to provide the advice and direction sought by the 1985 Trustees.

[29] Now that I have had an opportunity to review the state of the record that was before the Court in August 2016, I am satisfied that it contains substantial information regarding the 1985 Asset Transfer. The record is far from perfect, but the evidence and the representations of Counsel make it clear that the record will not improve with time. Furthermore, even though the settlor of both the 1982 Trust and the 1985 Trust, Chief Walter Twinn, is now deceased, the purpose of the transfer was explained by Chief Twinn when he testified in Federal Court almost 25 years ago. It is noteworthy that in the Federal Court proceedings, Chief Twinn was cross-examined by Counsel who now represents the OPTG. In addition, the April 15, 1985 Asset Transfer Resolution of the 1982 Trustees is very transparent in explaining the purpose of the asset transfer. The record that was before the Court in August 2016 contains no conflicting evidence on the critical issues that weigh on the interpretation of the 2016 Consent Order. Credibility assessments on critical issues will not be necessary to resolve the issues on which the 1985 Trustees seek advice and direction.

[30] In these circumstances I conclude that the record is sufficient to permit me to achieve fairness between the parties and, as a result, I conclude that providing advice and direction regarding the interpretation the 2016 Consent Order will provide a just, appropriate, proportionate and reasonable outcome.

[31] For these reasons I conclude that it is necessary for the Court to provide the 1985 Trustees with the advice and direction they seek.

III. Preliminary Issues

[32] Before discussing the issue on which the 1985 Trustees seek advice and direction, I will address a number of preliminary issues that have arisen in the appearances leading to this Application and in the Briefs filed by some of the parties:

a) Inconsistent Positions Taken by SFN

[33] The OPTG raise concerns about the position taken on this Application by SFN as an Intervenor. The concerns arise because the positions taken by the SFN are potentially inconsistent. The OPTG notes that in the communication between the parties leading to the 2016 Consent Order, the SFN was supportive of the terms of the 2016 Consent Order and when the parties appeared before Justice Thomas to have the Order signed, counsel for SFN did not express any concerns with respect to the Order. These observations by the OPTG are correct; however, on the present Application, SFN have never taken the position that the 2016 Consent Order is invalid or that it should be set aside. Instead, SFN simply argues for an interpretation of the Order that differs from the interpretation that the OPTG advocates.

[34] More fundamentally, the position taken by SFN in 1985 in facilitating the transfer of the 1982 Trust assets to the 1985 Trust was overtly for the purpose of denying persons who were about to regain status as SFN members the ability to participate as beneficiaries. The position of SFN on the present application is diametrically opposite. SFN now advocates a position which, if accepted, would permit all members of the SFN to participate as members of the beneficiary class, no matter how or when they gained membership status.

[35] I am alive to the fact that there is an inconsistency between the position that SFN now advocates and the position that it has previously taken. This does not mean that the current submissions should be ignored or should be dismissed solely on the basis of prior inconsistency. It simply means that I must exercise care in assessing the submissions made to me.

b) Positions Taken by 1985 Trustees

[36] Catherine Twinn and the OPTG are critical of the 1985 Trustees for failing to be more assertive in making forceful submissions to support the position that the trust assets are being held for the 1985 Beneficiaries. Catherine Twinn, the OPTG and Shelby Twinn (an Intervenor) also argue that the 1985 Trustees' position has changed over time and they question whether the 1985 Trustees are properly representing the 1985 Beneficiaries.

[37] There is nothing improper about the way in which the 1985 Trustees have presented their position on this Application. On the contrary the position taken by the 1985 Trustees very clearly recognizes that they have a duty to their beneficiaries, although in some respects those duties may be seen as being potentially conflicting.

[38] No matter how the 2016 Consent Order is interpreted, the 1985 Trustees owe fiduciary duties to the 1985 Beneficiaries. However, there is a possibility that they may also owe fiduciary duties to the 1982 Beneficiaries because one of the potential outcomes is that the 2016 Consent Order may be interpreted as meaning that the Trustees hold the trust assets for the 1982 Beneficiaries. The 1985 Trustees will not know whether those duties exist until they receive advice and direction from the Court.

[39] The 1985 Trustees recognize that they may have conflicting fiduciary duties and have taken a cautious approach that balances their obligations to those persons who are and who may be beneficiaries of the trust assets.

[40] In these circumstances the cautious position taken by the Trustees is understandable. The criticisms that have been made by Catherine Twinn, the OPTG, and Shelby Twinn are unwarranted.

[41] Furthermore, regardless of the manner in which the 1985 Trustees presented their position, the rights of the 1985 Beneficiaries were fully and effectively articulated and argued by the OPTG, Catherine Twinn and Shelby Twin.

c) Membership Rules of SFN – Post-July 8, 1985

[42] Shelby Twinn and Catherine Twinn have suggested in their written materials that the SFN membership code provides a high degree of discretion to SFN in determining who will and who will not become a member of SFN. They note that the SFN membership practices have a history of controversy. Shelby Twinn asserts that the membership is subject to significant delays and perceived bias. She asserts that, based on her experience, the process is corrupt.

[43] SFN's application of the membership rules after July 8, 1985, has created a class of persons who were eligible for membership in SFN under the pre-April 15, 1982 *Indian Act* but, for whatever reason, are not now members of the SFN. It is possible that between 26 and 55 persons may fit into this class. Shelby Twinn and the persons the OPTG represent are included in this group. Many of these persons feel that they should be members of SFN and that they should be able to participate as members of beneficiary class in relation to both the 1982 Trust and the 1985 Trust.

[44] Shelby Twinn has applied for membership in SFN; however, after three years, she has not received a response to her application.

[45] If Shelby Twinn and other 1985 Beneficiaries are able to gain status as SFN members then they would also become 1982 Beneficiaries and the controversy regarding the meaning of the 2016 Consent Order would be of much less practical significance.

[46] I make no comment on the legitimacy of the claims of any person to SFN membership. That is not an issue that is before me on this application and indeed, this Court does not have jurisdiction to rule upon the validity of the SFN membership rules or how those rules are applied.

[47] Membership issues are therefore simply not relevant to the issues I must decide and any perceived unfairness in the membership process is not relevant to the issues on the present Application. If there is an avenue for relief in relation to membership status in SFN then that remedy is available only in the Federal Court of Canada.

d) Procedural Order – Notice to Potential Beneficiaries

[48] On August 31, 2011, the Court granted a Procedural Order that required the 1985 Trustees to provide notice of the application for advice and directions to all potentially interested parties including all members of the SFN, all beneficiaries of the 1982 Trust, and all beneficiaries or potential beneficiaries of the 1985 Trust. The notice made it clear that the 1985 Trustees intended to seek advice and direction in relation to "the transfer of assets to the 1985 Trust".

[49] Apart from Catherine Twinn, no beneficiaries of the 1982 Trust have come forward seeking to participate in this litigation. Many of the 1985 Beneficiaries are represented by the OPTG and others have also come forward, including Shelby Twinn. Some other 1985 Beneficiaries or potential 1985 Beneficiaries have not sought to participate in the litigation.

[50] The Procedural Order was only intended to give interested parties notice of the litigation and to give them the opportunity seek to participate if they wished. However, the Procedural Order did not affect the rights of any persons. It did not require that any beneficiary or potential beneficiary of either the 1982 Trust or the 1985 Trust participate. Nor did the Procedural Order suggest that the rights of any potential beneficiaries would be adversely affected by any failure to come forward.

[51] The rights of the beneficiaries of the 1982 Trust and the 1985 Trust are not dependent upon them coming forward to participate in the litigation. Instead, the rights of all beneficiaries and potential beneficiaries must be considered by the Court when making any decisions in the litigation. That was true in relation to the 2016 Consent Order and it is true in relation to the present application.

e) Trusts are Discriminatory – "Grandfathering" Possible Remedy

[52] All of the parties acknowledge that the terms of the 1985 Trust are discriminatory. The 1982 Trust Deed also contains discriminatory provisions although the extent of the discrimination is somewhat less extensive than in relation to the 1985 Trust Deed. The 1985 Trustees take the position that they are not able to distribute any of the trust assets while the discrimination remains.

[53] From the outset the 1985 Trustees have sought to amend the definition of "Beneficiaries" so as to eliminate discrimination. Some of the potential amendments that have been

contemplated, if approved, would remove the entitlement of some of the current 1985 Beneficiaries or potential beneficiaries. Amendments to the 1982 Trust Deed may also impact the persons who are members of the beneficiary class.

[54] To attempt to mitigate against the adverse impact of amendments to remove discrimination, the 1985 Trustees have suggested some form of "grandfathering", although the precise nature of this and whether it is possible for the Court to approve "grandfathering" has not been the subject of argument and thus this potential outcome is presently unclear.

[55] What is clear is that both in relation to this application, and more generally throughout the litigation, there has always been the prospect that some persons would potentially be adversely affected by the outcome.

f) Limitations Issues - Laches

[56] The OPTG and Catherine Twinn have argued that potential limitations issues or laches must be addressed. However, when considering these concerns, it is important to remember that from the commencement of these proceeding in 2011, the 1985 Trustees have only been seeking advice and direction regarding their fiduciary duties, including their obligations arising from the 1985 Asset Transfer. None of the parties have commenced an action by way of Statement of Claim. Neither the 1985 Trustees nor any other party has sought any relief from any other party. Neither the 1985 Trustees nor any other party has sought a remedial order. Instead, the litigation has at all times focused on advice and direction to the 1985 Trustees regarding their duties and obligations in relation to how they can properly administer the trust assets.

[57] Furthermore, no "injury", within the meaning of that term in the *Limitations Act*, RSA 2000, c L-12, has been alleged by any of the parties. The trust assets are being held by the 1985 Trustees. At a minimum the 2016 Consent Order approved the transfer of legal title to the trust assets to the 1985 Trustees. The 1985 Trustees seek advice and direction from the Court specifically for the purpose of being insulated from liability for decisions relating to the distribution of trust assets. However, no distribution has taken place and thus no "injury" has occurred which would potentially give rise to the commencement of a limitation period.

[58] In addition, none of the members of the beneficiary class of either the 1982 Trust or the 1985 Trust have the ability to compel the distribution of the trust assets and none have attempted to do so. The trust assets are being held on trust terms. Thus no "injury" has occurred.

[59] Different considerations may apply if the 1982 Beneficiaries ever seek a remedial order against the 1982 Trustees in relation to the 1985 Asset Transfer. However, no such proceedings have been commenced and any limitations issues in relation to those hypothetical proceedings are not before me on the present application and I express no views on them.

[60] On the present application, the 1985 Trustees simply seek advice and direction as to whether the 2016 Consent Order should be interpreted as meaning that the beneficial interest in the trust assets has been transferred to the 1985 Beneficiaries.

[61] As a result, no limitations issues or concerns regarding laches arise in relation to the issues on this application.

IV. Background

[62] SFN is a First Nation situated in Northern Alberta and is a signatory to Treaty No. 8. SFN was previously known as the Sawridge Indian Band No. 19. There are currently 45 members of SFN, one of whom is a minor. All 45 members of SFN are also 1982 Beneficiaries because they meet the definition of the term "beneficiaries" in the 1982 Trust Deed: "members, present and future" of SFN.

[63] However, not all SFN members are 1985 Beneficiaries. Of the 45 members of SFN, only 30 are also 1985 Beneficiaries. Thus, a total of 15 SFN members are not 1985 Beneficiaries. The three remaining Bill C-31 Women are included in the group of 15 SFN members who are not 1985 Beneficiaries. The Bill C-31 Women are not beneficiaries of the 1985 Trust because they were not eligible for SFN Band Membership on April 15, 1982, having been excluded by the discriminatory provisions of the pre-Bill C-31 *Indian Act*.

[64] There are approximately 26 persons (but possibly as many as 55 persons) who are not members of SFN but are, or may be, beneficiaries of the 1985 Trust because they may qualify for membership under the pre-April 15, 1982 *Indian Act* membership provisions. These persons are not beneficiaries of the 1982 Trust. Some, but not all, of these persons are represented by the OPTG.

[65] Shelby Twinn is a 1985 Beneficiary but is not represented by the OPTG. She is not a member of SFN, and is therefore not a 1982 Beneficiary. This is despite having an apparent close connection to SFN and despite being the granddaughter of Chief Walter Twinn. As mentioned earlier in these reasons, she has applied for SFN membership but has had no response to the application.

a) Creation of 1982 Trust

[66] Paul Bujold, Chief Executive Officer of the Sawridge Trusts, in his affidavit sworn September 12, 2011 (at paragraphs 6 to 12) provides background information regarding the creation of the 1982 Trust. Approximately 50 years ago, under the leadership of Chief Walter Twinn, SFN began investing a portion of the oil and gas royalties derived from drilling activities on SFN lands. The investments were made to stimulate economic development and create an avenue for self-sufficiency and financial independence for SFN members.

[67] The oil and gas royalties were initially paid by the oil companies to Her Majesty in Right of Canada ("Canada") in trust for SFN in accordance with the *Indian Oil and Gas Act,* RSC 1985, c I-7, and its predecessors. Thereafter, Canada paid the amount of the royalties to SFN based upon representations from SFN that the funds would be expended for the benefit of SFN members. On receipt of the royalties, SFN made investments in various businesses under the Sawridge name and Canada had no further fiduciary obligations in relation to those funds: ***Ermineskin Indian Band and Nation v Canada***, 2009 SCC 9 at paras 104-106.

[68] Because SFN was not at the time considered a legal entity, the invested assets were held by Chief Twinn and other individuals in informal trusts for the benefit of present and future members of SFN.

[69] The 1982 Trust was settled on April 15, 1982, by Chief Twinn to create a more formal trust arrangement pursuant to which the trust assets could be held for present and future SFN members in order to provide long-term benefits for members of SFN.

[70] The 1982 Trust contains the following description of the persons for whose benefit the trust assets were being held:

> The Trustees shall hold the Trust Fund for the benefit of all members, present and future of the Band; ...
>
> (emphasis added)

[71] The language of the 1982 Trust does not specify any particular individuals as beneficiaries. Instead, it describes the beneficiaries of the trust by reference to membership and future membership in SFN. Thus, the beneficiary of the 1982 Trust is a class of persons whose composition changes over time and is not defined by any particular persons or group of persons at any particular time. This concept is sometimes referred to as a "static entity": ***Incorporated Synod of the Diocese of Huron v Delicata***, 2013 ONCA 540, 117 OR (3d) 1; leave denied [2013] SCCA No 439; ***Bruderheim Community Church v Board of Elders,*** 2018 ABQB 90; aff'd 2020 ABCA 393.

[72] The 1982 Trustees held the trust assets for the class of persons who were 1982 Beneficiaries - present and future SFN members. The 1982 Trustees were aware of the identity of some of the persons who fit within the class. For example, at any point in time the 1982 Trustees were aware of the persons who were members of SFN. They were also potentially aware of some of the future members of SFN (e.g. the Bill C-31 Women who were about to become SFN members in April 1985). Moreover, the 1982 Trustees were aware that many persons, the identities of whom they had no ability to determine, would become SFN members in the future. Nevertheless, the 1982 Trustees held the trust assets for the benefit of "all members, present and future". It was that class to whom the 1982 Trustees owed their fiduciary duties.

[73] The Trustees of the 1982 Trust were the Sawridge Chief and Council.

[74] In June 1982, at a meeting of the 1982 Trustees, it was resolved that the necessary documentation be prepared to transfer all trust property then being held by Chief Walter Twinn, George Twin and Walter Felix Twin, to the 1982 Trust for the present and future members of SFN.

[75] All of the evidence available makes it clear that the assets placed in the 1982 Trust were to be held exclusively for the benefit of all members, present and future, of SFN. There is no evidence to the contrary.

b) Discriminatory Aspects of the *Indian Act*

[76] The operation of the *Indian Act*, as it existed prior to 1985, was discriminatory toward First Nations women.

[77] The discrimination was particularly blatant in relation to the Band membership provisions of the *Indian Act* which, prior to July 1985, were administered by Canada. These membership provisions had long operated to grant membership rights preferentially to the male line. The discrimination arose because an Indian[1] woman's status was dependent upon the status of her father or her husband. Therefore, Indian women who married Indian men retained their

[1] The term "Indian" is used in parts of this decision to reflect the language used in the *Indian Act*.

legal status, whereas Indian women who married non-Indian men lost their legal status and also lost the ability to transmit status to their children. Conversely, Indian men who married non-Indian women not only retained their status but also transmitted it to their wives and children.

[78] The rationale put forward by some First Nations groups who supported these discriminatory aspects of the *Indian Act* was that banishing Indian women who had married non-Indian men was a practice that simply followed First Nations customs in which women traditionally go to live with the men they marry. The *Indian Act* provisions were nevertheless discriminatory.

[79] Many attempts were made between 1970 and 1985 to resolve the discriminatory aspects of the *Indian Act*; however, no consensus was obtained among the First Nations communities as to how to achieve this. See Gerard Hartley, *The Search for Consensus: A Legislative History of Bill C- 31, 1969 – 1985*, (2007) Aboriginal Policy Research Consortium International (APRCi).

c) Equality Rights in the *Charter*

[80] In April 1982, the same month in which the 1982 Trust was settled, the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("the *Charter*") was coming into force. The "equality" provisions of the *Charter* are contained in s 15(1) and provide as follows:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[81] The discriminatory aspects of the *Indian Act* and some provisions of other legislation were non-compliant with the equality provisions found in s 15 of the *Charter*. For this reason, the implementation date for the equality provisions was deferred for three years until April 17, 1985. The deferral of implementation gave Parliament sufficient time to make the necessary legislative changes so that the *Indian Act* and other legislation became *Charter* compliant.

[82] Without consensus among First Nations groups as to how to amend the *Indian Act*, Parliament proceeded unilaterally with Bill C-31. In relation to the issues raised in this litigation, Bill C-31 had two significant aspects:

1) Control of Band Membership - A formal separation was created between (a) legal status as an Indian; and (b) membership in an Indian Band.

   Bill C-31 provided that Canada would continue to control the legal status of a person as an Indian but that Indian Bands would have the right to control their membership going forward, if they elected to assume this responsibility. SFN took the necessary steps to assume control of its membership list effective July 8, 1985.

2) Reinstatement - The discriminatory provisions of the *Indian Act* were removed and women affected by past discrimination became entitled to reinstatement to both Indian Status and Band membership. This aspect of the new legislation required SFN to add the Bill C-31 Women to the Band membership list.

[83] Bill C-31 received Royal Assent and came into force on June 28, 1985, but the relevant provisions were made retroactive to April 17, 1985.

[84] Following passage of Bill C-31, SFN brought proceedings in Federal Court arguing that reinstatement provisions of Bill C-31 (requiring SFN to add the Bill C-31 Women to the Band membership list) breached its rights under s 35 of the *Constitution Act*, *1982* because it was an invalid attempt to deprive SFN of the right to determine the membership of its own Band. The litigation continued for many years before the action was ultimately dismissed in March 2008: ***Sawridge Band v Canada,*** 2008 FC 322. An appeal to the Federal Court of Appeal was unsuccessful: ***Sawridge Band v Canada,*** 2009 FCA 123. An application for leave to appeal to the Supreme Court of Canada was dismissed on December 10, 2009: ***Sawridge Band v Canada,*** [2009] SCCA 248.

[85] Despite Bill C-31 coming into force effective April 17, 1985, SFN refused to reinstate the Bill C-31 Women who had earlier lost their SFN membership status. This refusal resulted in a series of motions in Federal Court commencing in January 1986. The motions ultimately resulted in the Federal Court granting a mandatory interlocutory injunction requiring SFN to enter or register on the Sawridge Band List the names of the Bill C-31 Women. At that time, the injunction affected a total of 11 Bill C-31 Women who were then alive: ***Sawridge Band v Canada,*** 2003 FCT 347. An appeal to the Federal Court of Appeal was unsuccessful: ***Sawridge Band v Canada,*** 2004 FCA 16.

[86] It is apparent that SFN willingly embraced those provisions of Bill C-31 that permitted SFN to assume control over its Band membership list.

[87] However, it is also apparent from their actions that SFN were highly resistant to those portions of Bill C-31 that legislatively required that the Bill C-31 Women be reinstated to SFN Band membership.

d) Creation of the 1985 Trust

[88] In addition to commencing litigation to challenge some portions of Bill C-31, SFN also took proactive steps to attempt to avoid what the SFN perceived to be the negative consequences of Bill C-31, specifically with respect to the 1982 Trust assets. These proactive steps were designed and implemented for the sole purpose of attempting to prevent the Bill C-31 Women from becoming members of the beneficiary class in relation to the 1982 Trust assets.

[89] On April 15, 1985, two days prior to the effective date of Bill C-31, Chief Walter Twinn settled the 1985 Trust. There are some similarities between the terms of the 1982 Trust and the terms of the 1985 Trust. However, the most significant difference between the two trusts is the definition of "beneficiary". In the 1985 Trust the term Beneficiaries is defined as:

> "**Beneficiaries**" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No.19 pursuant to the provisions of the *Indian Act* R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions as such existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of such Settlement whether or not such persons become or are at any time considered to

> be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the *Indian Act* R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 under the *Indian Act* R.S.C. 1970, Chapter I-6 as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement.
>
> (emphasis added)

[90] The 1985 Trust assets, as described in a Schedule to the 1985 Trust Deed, consisted of $100.00. However, immediately after the 1985 Trust Deed was settled, the Trustees of the 1982 Trust, the Trustees of the 1985 Trust, and SFN took the following additional steps which resulted in the 1982 Trust assets being transferred into the 1985 Trust. Those steps included the following:

- On April 15, 1985, the 1982 Trustees passed a resolution authorizing the transfer of all of the 1982 Trust assets to themselves as the 1985 Trustees (the "Asset Transfer Resolution").
- On April 15, 1985, the 1985 Trustees accepted the transfer of the 1982 Trust assets and undertook to hold the assets for the benefit of the 1985 Beneficiaries.
- On April 15, 1985, the Sawridge Band passed a resolution in which it "approved and ratified" the transfer of the 1982 Trust assets to the 1985 Trust.

[91] The assets in the 1985 Trust at the conclusion of the April 15, 1985 transactions were the following:

a. The $100 described in the Schedule to the 1985 Trust; and
b. The 1982 Trust assets that were transferred to the 1985 Trust as a result of the Asset Transfer Resolution.

[92] In addition, the 1985 Trust assets may have included a $12 Million Demand Debenture issued by Sawridge Enterprises Ltd. as security for advances received from Chief Walter Twinn, as Trustee for SFN. The evidence and the submissions demonstrate that there is an outstanding issue as to whether the Debenture was actually transferred into the 1985 Trust. Furthermore, it is unclear as to whether the Debenture has any value today. However, the issues relating to the Debenture are irrelevant to the present application and do not affect the interpretation of the 2016 Consent Order.

[93] No additional assets have been placed in the 1985 Trust since April 15, 1985. Instead, all new assets were placed in the 1986 Trust, as discussed later in these reasons.

[94] From the affidavit evidence of Paul Bujold (September 12, 2011, at para 15), and from the trial testimony of Chief Walter Twinn in the Federal Court proceedings, it is very clear, and I conclude, that the sole purpose of the 1985 Trust was to attempt to preserve the 1982 Trust assets by preventing the Bill C-31 Women from sharing in any portion of those assets. This is illustrated by the evidence given before Justice F. Muldoon in Federal Court on October 26, 1993, when during cross-examination Chief Twinn said:

> Q. Mr. Faulds: This is a declaration of trust that is dated the 15th day of April, 1985, correct?
>
> A. That's right.
>
> Q. And, as I think you're aware, that would be two days before the effective date of Bill C-31. Bill C-31 became effective as of April the 17, 1985. Correct?
>
> A. That's right.
>
> Q. Do you recall that this declaration of trust document was created in anticipation of the passage of Bill C-31 and its coming into effect?
>
> A. That's right.
>
> .....
>
> Q. Sure. But, in any event, what is meant was that the people who would be beneficiaries would be people who would be considered members of the band before the passage of Bill C-31?
>
> A. That's right.
>
> .....
>
> Q. But I just want to know, when this agreement was being prepared, what your objective was. And your first objective was that people who might be band members under Bill C-31 wouldn't be beneficiaries?
>
> A. Mm-mmm
>
> Q. That's correct? That was Objective Number 1?
>
> A. Right.
>
> (emphasis added)

[95] Therefore, from the perspective of Chief Twinn, the purpose of the 1985 Trust was to preserve the trust assets and to avoid those assets being shared with the Bill C-31 Women because it had never been intended that those specific women would ever share in the assets. In this way he perceived that the asset transfer to the 1985 Trust was designed to preserve the beneficial entitlement that had been contemplated before the unanticipated legislative changes that were to take effect through Bill C-31. Chief Twinn therefore sought to continue the discriminatory aspects of the pre-1982 *Indian Act* in a way that was consistent with the history and traditions of SFN.

[96] All of the available evidence is completely consistent. No other purpose for the 1985 Trust was disclosed. The transfer of the 1982 Trust assets to the 1985 Trust was specifically targeted and designed to exclude the Bill C-31 Women from benefitting from the 1982 Trust

assets. This step was taken only because the Bill C-31 Women were to about to become SFN members. This perpetuated the discrimination that the Bill C-31 Women had faced since their marriages to non-First Nations men, an outcome that was precisely the opposite of what Bill C-31 was passed to remedy.

[97] It was for this reason that the Asset Transfer Resolution was passed just two days prior to Bill C-31 coming into force.

e) Creation of the 1986 Trust

[98] A further trust was settled by Chief Twinn in 1986 (the 1986 Trust). The beneficiaries of this trust were those persons who "qualify as members of the Sawridge Indian Band". The definition of beneficiaries in the 1986 Trust Deed is somewhat similar to the definition in the 1982 Trust Deed in that the beneficiaries are defined by reference to membership in SFN. However, the 1986 beneficiaries are defined by reference to those persons who qualify as current members of SFN. The definition of beneficiaries in the 1986 Trust does not include future SFN members.

[99] The purpose of the 1986 Trust was to hold assets generated by SFN after April 15, 1985, for the benefit of those persons who qualified as SFN Band members in the post-Bill C-31 era.

[100] The original plan of SFN was to merge the 1985 Trust and the 1986 Trust once the litigation relating to the constitutional challenge had concluded. Unfortunately, that constitutional challenge took more than 20 years to resolve and did not come to an end until the Supreme Court of Canada denied leave to appeal on December 10, 2009. Furthermore, the litigation did not conclude in a favourable manner from the perspective of SFN. As a result, the 1985 Trust and the 1986 Trust have not been merged. This is an issue that remains unresolved.

f) Application for Advice and Direction

[101] In 2011 the Trustees of the 1985 Trust were developing plans to deal with the trust assets. However, as Paul Bujold deposed to in his August 30, 2011 Affidavit, at para 6: "concerns have been raised by the Trustees". As a result, the Trustees brought an application to the court seeking advice and direction in relation to the following:

a. Direction with respect to the definition of "Beneficiaries" in the 1985 Trust and if necessary, to vary the terms of the Trust to clarify the definition; and

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

[102] I conclude that it was obvious to the 1985 Trustees as early as 2011 that there were concerns regarding the legitimacy or lawfulness of the 1985 Asset Transfer. That is one of the primary reasons they sought the advice and direction of the Court.

[103] Numerous applications, decisions, and appeals have been heard over the last 10 years as the 1985 Trustees have sought to find a way to lawfully distribute the trust assets. As the Trustees lamented in their Reply Brief:

> The protracted litigation has continually searched for a pragmatic solution that would cure discrimination and at the same time permit the discretionary distribution of assets to those in need. Until this happens, the assets of the 1985 Trust will

> continue to be held without the ability to benefit any person in need and will continue to be spent on litigation costs instead of funding those in need.

[104] One step in the litigation was the application to the Case Management Judge on August 24, 2016 that resulted in the granting of 2016 Consent Order which "approved *nunc pro tunc"* the 1985 transfer of assets from the 1982 Trust to the 1985 Trust.

[105] It is that Order that is the subject of the present application.

V. Issue to Be Decided

[106] The only issue on this Application is the meaning and effect of the 2016 Consent Order.

[107] More specifically, the issue is whether, when he approved the transfer of the 1982 Trust assets to the 1985 Trust, Justice Thomas also ordered that the beneficial interest in the trust assets be transferred so that the trust assets would be held subject to the terms of the 1985 Trust for the 1985 Beneficiaries, or whether the Order confirmed that the 1985 Trustees lawfully held the trust assets but that the beneficial interest in the assets did not change.

[108] The 2016 Consent Order is a valid Order granted by the Court. It has not been subject to appeal and no party or non-party has applied to set aside the Order. As a result, the Order must be enforced. Furthermore, the Order cannot be the subject of a collateral attack.

[109] I must determine the meaning and effect of the 2016 Consent Order.

VI. Interpretation of Court Orders

[110] The approach to the interpretation of Court Orders was recently explained by the British Columbia Court of Appeal and the Saskatchewan Court of Appeal: ***Sutherland v Reeves***, 2014 BCCA 222; ***Yu v Jordan***, 2012 BCCA 367 (***Yu***); ***Campbell v Campbell,*** 2016 SKCA 39.

[111] A Court Order must not be interpreted in a vacuum. Instead the Order must be interpreted in the context of all of the surrounding circumstances. This was as explained in ***Yu*** at para 53:

> ... the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

[112] In some circumstances, consent orders may represent agreements between the parties that have been presented to the court. In these circumstances, when signing the consent order, the intention of the court may be to approve the settlement. Thus, the rules regarding contractual interpretation may become relevant, including the mutual and objective intentions of the parties: ***Simonelli v Ayron Developments Inc***, 2010 ABQB 565 at para 74; ***Sattva Capital Corporation v Creston Moly Corporation***, 2014 SCC 53. The OPTG and Catherine Twinn argue that those principles should apply here.

[113] In the present case the intentions of the parties at the time of the 2016 Consent Order do not appear to have been consistent. The OPTG and Catherine Twinn clearly intended that the

2016 Consent Order would convey both legal and beneficial ownership of the trust assets which would then be held for the 1985 Beneficiaries. That intention was not shared by the 1985 Trustees who intended that beneficial ownership of the trust assets would be determined at a later date. SFN had still a different view.

[114] More importantly, I conclude that the application of contract principles is inappropriate in relation to the interpretation of the 2016 Consent Order because, while the 1985 Trustees, the OPTG and Catherine Twinn may have been parties to the alleged contract, neither the 1982 Beneficiaries nor the 1982 Trustees were parties to the contract and did not provide their consent to the 2016 Consent Order. Contract principles are not applicable where not all parties to the alleged contract have consented to the order.

[115] As explained by the British Columbia Court of Appeal in ***Yu***, the 2016 Consent Order is a decision of the Court and it is the Court and not the parties that determines the meaning of the order.

[116] The language of the 2016 Consent Order does not expressly address the issue of whether the Court intended to direct that beneficial ownership of the trust assets be transferred. Nor does the Order expressly confirm that the trust assets are held for the 1985 Beneficiaries. Nor does the Order expressly confirm that the trust assets are held for the 1982 Beneficiaries. The Order is ambiguous on these points. Because the Order was consented to, the reasons of Justice Thomas are extremely brief and do not expressly deal with these fundamental issues. It is therefore necessary to conduct a more though review to determine the true meaning of the 2016 Consent Order.

a) Circumstances in Which the Order was Granted

[117] I will begin by considering the context in which the 2016 Consent Order was granted. The purpose of this review is to consider the *status quo* as it existed prior to the 2016 Consent Order which necessarily involves a consideration of the lawfulness of the 1985 Asset Transfer. As I earlier explained, this was a critical issue that the Court was required to consider when reaching a decision as to whether the Court could approve the transfer of the assets from the 1982 Trust to the 1985 Trust. This will have a bearing on the manner in which the Order should be interpreted.

[118] If, for example, the pre-2016 Consent Order *status quo* was that the trust assets had been properly transferred to the 1985 Trust on April 15, 1985, and at all times thereafter the trust assets were held for the 1985 Beneficiaries, then it might be reasonable to infer that the 2016 Consent Order simply confirmed the *status quo* and that the trust assets continued to be held for the 1985 Beneficiaries. In this scenario the 2016 Consent Order may not have been entirely necessary, but it would be useful simply for the purpose of resolving any doubt regarding the beneficial ownership of the trust assets.

[119] Alternatively, if the transfer of the 1982 Trust assets to the 1985 Trust was done unlawfully or in breach of s 42 of the *Trustee Act* or in breach of the fiduciary duties of the 1982 Trustees, then the 1982 Trust assets may have been held by the 1985 Trustees but not in their capacity as trustees for the 1985 Beneficiaries and instead as trustees with duties to hold the trust property for the 1982 Beneficiaries. If this was the case then it would be necessary to consider whether, when granting the 2016 Consent Order, the Court intended to alter the *status quo* by directing that the assets be held for the 1985 Beneficiaries or, alternatively, whether the Court

intended to maintain the *status quo* and have the 1985 Trustees hold the assets for the 1982 Beneficiaries.

[120] The OPTG and Catherine Twinn assert that undertaking an analysis of the 1985 Asset Transfer amounts to a collateral attack on the 2016 Consent Order which has not been appealed or challenged in any other way. Properly understood, this analysis is not a collateral attack. Instead, it is merely an attempt to determine what the legal status of the trust assets was at the time that Justice Thomas was asked to sign the 2016 Consent Order. This is critical to an understanding of what the Court intended when granting the 2016 Consent Order. Furthermore, because the interests of competing groups of beneficiaries is at stake, it is important that the analysis not be superficial. OPTG objects to any assessment of the circumstances going to "ground zero". I conclude that it must.

i. Duties of the 1982 Trustees

[121] The starting point for this analysis must be a consideration of the duties of the 1982 Trustees and the power that the Trustees had to deal with the trust assets. Three clauses of the 1982 Trust Deed are particularly relevant to this analysis:

- Clause 1 establishes a Trust Fund which the "Trustees shall administer in accordance with the terms of this Agreement" (emphasis added)
- Clause 3 requires that the Trustees shall deal with the trust funds in accordance with the terms and conditions of the 1982 Trust Deed. It specifically provides that: "No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein" (emphasis added)
- Clause 6 requires that the "Trustees shall hold the Trust Fund for the benefit of all members, present and future of the Band" ... Clause 6 also provided the Trustees with "unfettered discretion" which is described in the following way:

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

[122] The ability of the 1982 Trustees to deal with the trust assets is prescribed by the terms of the 1982 Trust Deed and by the fiduciary duties that they owed to the 1982 Beneficiaries, present and future members of SFN.

ii. 1985 Asset Transfer

[123] The April 15, 1985 Asset Transfer Resolution which authorized the transfer of the assets to the 1985 Trust relied upon the "unfettered discretion" contained in Clause 6 of the 1982 Trust Deed. The preamble to the Resolution provides in part as follows:

> AND WHEREAS the beneficiaries of the Sawridge Band Trust are the members, present and future, of the Sawridge Indian Band (the "Band"), a band for the purposes of the *Indian Act* R.S.C., Chapter 149;
>
> AND WHEREAS amendments introduced into the House of Commons on the 28th day of February, 1985 may, if enacted, extend membership in the Band to certain classes of persons who did not qualify for such membership on the 15th day of April 1982;
>
> AND WHEREAS pursuant to paragraph 6 of the instrument (the "Trust Instrument") establishing the Trust the undersigned have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for the beneficiaries of the Trust;
>
> AND WHEREAS for the purpose of precluding future uncertainty as to the identity of the beneficiaries of the Trust the Trustees desire to exercise the said power by resettling the assets of the Trust for the benefit of only those persons (the "Beneficiaries") who qualify, or would in the future qualify, for membership in the Band under the provisions of the Act in force on the 15th day of April 1982**;**
>
> AND WHEREAS by deed executed the 15th day of April, 1985 between Chief Walter Patrick Twinn, as Settlor, and the undersigned as Trustees, an inter vivos settlement (the Sawridge Band Inter Vivos Settlement") has been constituted for the benefit of the Beneficiaries;
>
> (emphasis added)

[124] Therefore, by the terms of the Asset Transfer Resolution, the 1982 Trustees (Chief Walter Twinn, Samuel G. Twin and George V. Twin) purported to exercise the power conferred by Clause 6 of the 1982 Trust Deed and transferred "all of the assets of the Trust to the undersigned in their capacities as Trustees" of the 1985 Trust.

[125] Chief Walter Twinn, Samuel G. Twin and George V. Twin were on April 15, 1985, also trustees of the 1985 Trust and, as part of the Asset Transfer Resolution, they accepted the transfer of the assets and declared that they would hold the assets and deal with them for the benefit of the 1985 Beneficiaries.

[126] A Sawridge Band Resolution, also dated April 15, 1985, approved and ratified the transfer of the 1982 Trust assets to the 1985 Trust.

[127] It is therefore clear, and I conclude, that the 1982 Trustees intended to transfer the 1982 Trust assets to themselves as 1985 Trustees and to hold the trust assets for the 1985 Beneficiaries.

iii. Sophisticated Legal Advice Obtained

[128] In the Supplementary Brief filed November 27, 2020, the OPTG seeks to support the legitimacy of the 1985 Asset Transfer by reference to the eminent counsel engaged to advise on the transition. At para 16 the OPTG says:

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

[129] I fully recognize the stature and excellent reputation of The Honourable Maurice Cullity as an academic, practitioner, and jurist. I also recognize his substantial expertise in trust and estate law. As will be seen later in these reasons, Justice Cullity has written several authoritative decisions in relation to the specific issues before the Court. He is also the author of academic papers which are relevant to the present case.

[130] Mr. Cullity's advice in relation to these transactions was no doubt highly sophisticated and very helpful to his clients. Despite this, his reputation and involvement do not permit me to infer that the transactions lawfully achieved the results that his clients sought. Lawyers give advice to clients. The advice can be qualified or unqualified. The advice can include cautions with respect to risks associated with decisions. The advice can be accepted and acted upon by clients or the advice can be rejected in whole or in part by clients who ultimately make decisions as to what, if any, action they will take. The advice provided by Mr. Cullity is protected by solicitor client privilege and is therefore not available to the Court.

[131] In these circumstances, I am not prepared to infer, simply on the basis of Mr. Cullity's involvement, that the Asset Transfer Resolution was effective in transferring beneficial ownership of the trust assets to the 1985 Beneficiaries. Instead, it is necessary to examine the circumstances that existed at the time, and to specifically consider whether the powers granted to the 1982 Trustees included the power to resettle or transfer beneficial ownership of the 1982 Trust assets to the 1985 Trust.

iv. Unfettered Discretion in a Trust Deed

[132] When trustees act on "unfettered discretion" provided to them in a trust deed, the Court will have a very limited role in supervising the exercise of that discretion. This was explained in ***Fox v Fox Estate*** (1996), 28 OR (3d) 496, 10 ETR (2d) 229 (***Fox***) where the Ontario Court of Appeal said, at para 11:

> The entire question of the degree of control which the courts can and should exercise over a trustee who holds an absolute discretion is filled with difficulty. The leading case, or at least the case to which reference is almost always made, is *Gisborne v Gisborne* (1877), 2 App Cas 300 (HL). It stands for the proposition that so long as there is no "*mala fides*" on the part of a trustee the exercise of an absolute discretion is to be without any check or control by the courts.

[133] However, even where a trustee acts in the "absolute and uncontrolled discretion of the trustee", this does not mean that "this discretion is beyond all power of review by the Court": ***Dunlop v Ellis*** (1917), 41 OLR 303 at p 307 (ON Sup Ct).

[134] In ***McNeil v McNeil***, 2006 ABQB 636 at para 84, Romaine J also explained the limited circumstances in which a Court may intervene in the exercise of a trustee's absolute discretion:

> When … the discretion afforded to the trustees is broad and relatively unfettered, the Court should be reluctant to intervene unless it can be shown that the trustees acted in bad faith, are guilty of obvious misconduct, were not authorized to act in the manner they did … or took into account irrelevant considerations...

[135] See also ***Hoffman v Hoffman Estate***, 2019 ABQB 473 at para 20; ***Hunter Estate v Holton*** (1992), 7 OR (3d) 372 (ON CJ) (***Hunter Estate***).

[136] Donovan W.M. Waters, *Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters Canada Ltd, 2021) (Waters) at 1054 identifies three categories of cases in which a court may intervene in the exercise of a trustee's unfettered discretion:

1) The decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision;

2) The trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make;

3) The trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.

[137] In ***Edell v Sitzer*** (2001), 55 OR (3d) 198 (ONSC), aff'd (2004), 187 OAC 189 (ONCA) (***Edell***), Justice Cullity provided a summary of the current law in relation to the exercise of unfettered discretion. At para 159 he said:

> The grounds on which the court will strike down an attempt by a trustee to exercise discretionary powers - even where, as here, the discretion is intended (sic) be as unfettered as possible - have been described in different terms over the years. The old approach that limited the court's intervention to cases of "*mala fides*" has been reformulated in the more recent cases in terms of a concept of abuse of discretion that is similar to the criteria applied in other areas of the law concerning the exercise of discretionary powers by administrative bodies and officials - including judges. Non-interference is still the general rule. The court is not to substitute an exercise of its discretion for that of the trustee; it is not exercising a *parens patriae* jurisdiction. In *Fox Estate* - the leading case in this jurisdiction - Galligan JA quoted with approval the following statements of the governing principles by Steele J in *Hunter Estate* (at page 186):
>
> > Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluctant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass*, [1974] 2 All ER 193, ... p 41 Ch, [p 203 All ER] as being applicable to the court's review of the exercise of such power:
> >
> > > To sum up the preceding observations, in our judgment, where by the terms of a trust ... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere

> with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.

[138] Some cases illustrate situations in which the Court will intervene in the exercise of a trustee's discretion. For example, in ***Butler, Re***, [1951] 4 DLR 281, [1951] OWN 670 (ON HCJ) the trustees were given "sole and absolute discretion" to pay such amount semiannually for the proper maintenance of the testator's niece. The trustees exercised their discretion by giving the niece one cheque in the amount of $25. The Court concluded when the trustees made this single payment, they failed to properly discharge their duty because they failed to make the necessary inquiries to determine the amount that was required for the proper maintenance of the niece. As a result, the discretion, while "sole and absolute", was not exercised properly.

[139] ***Fox*** is an example of a situation where the trustees' "absolute discretion" did not permit them to apply irrelevant considerations when exercising the discretion. In that case the trustee mother exercised her discretionary power of appointment over the capital of the trust in favour of her grandchildren, depriving her son of any benefit as a 25% life beneficiary. The Ontario Court of Appeal set aside that exercise of discretion because the mother was motivated, at least in part, by her disapproval of the son's marriage to a woman outside of her faith. Leave to appeal to the Supreme Court of Canada was denied: [1996] SCCA No 241.

[140] As a general rule, the Court may also intervene in the exercise of a discretion where the trustees have acted in the absence of good faith or where they improperly gave preference as between beneficiaries. As Waters notes at 1054, an improper preference of one class of beneficiaries over another in a trustees' discretionary decision may warrant court intervention.

[141] The general rule requiring impartiality is not applicable where the settlor has specifically granted the trustees the power to disburse the trust funds in a way that is not impartial. For example, in ***Martin v Banting*** (2002), 46 ETR (2d) 93, 2002 CarswellOnt 318 (CA) the settlor gave broad discretion to distribute the trust assets among the named beneficiaries. The Plaintiff, who was one of the named beneficiaries, had a "serious falling out" with the settlor and the trustees. When the assets were distributed the Plaintiff received nothing. The Ontario Court of Appeal concluded that the trust deed gave the trustees sufficiently broad discretion to permit the Plaintiff to be excluded from the distribution and therefore the trustees had not committed any breach of trust.

[142] In ***Edell,*** at para 158, Justice Cullity explained the principle in the following way:

> ... this not uncommon form of a power of encroachment has some of the important attributes of a power of appointment as well as those of a power of advancement. It is, however, exercisable by the trustees and for that reason is subject to fiduciary standards, and the supervision of the court, to an extent that would not be applicable to powers vested in individuals in their personal

> capacities: Maclean, *Trusts and Powers* (Sweet & Maxwell, 1989), at page 88. The application and extent of fiduciary standards - such as the duties to avoid conflicts of interest, to act with reasonable prudence and to observe impartiality or, in other words, to maintain an even hand - may, of course, be limited by the provisions of the trust instrument that indicate both the scope of a power and the purposes for which it may be exercised: *Ballard Estate v Ballard Estate* (1991), 41 ETR 113 (Ont CA); *Armitage v Nurse*, [1997] 2 All ER 705 (CA); *Edge v Pensions Ombudsman*, [2000] Ch 602 (CA), at pages 621 and 627-630.
>
> (emphasis added)

[143] The "even hand principle", as part of the obligation of impartiality, was further explained by Maurice Cullity, "Judicial Control of Trustees' Discretions" (Spring 1975), 25 U Toronto LJ 99 at 118 to 119:

> Although, by the grant of an appropriately worded discretion, a trustee may be authorized to give more weight to the interests of one or more beneficiaries than to the interests of others, it is probably not possible to empower a trustee to refuse to consider the interests of a particular beneficiary. An attempt to do this would appear to be inconsistent with the fiduciary relation which exists between the trustee and the beneficiaries. In some cases, of course, it may not be possible to identify all the beneficiaries of discretionary trusts but it is one thing to accept the inevitability that the trustee will not be able to consider the claims of all beneficiaries and quite another to say that he may refuse to consider the interest of a beneficiary who is known to him.

[144] ***Edell*** is an illustration of a case in which the trust deed granted appropriately worded discretion to permit the trustees to act in a way that was not impartial. In that case, a husband and wife executed wills in 1984. The wills contained similar terms; on the death of one, the other would be the beneficiary of a life income interest in the assets of the other. Both wills provided that the capital interest in each estate was to be divided equally between their son and their daughter and held in separate trusts for the children. Two trusts were settled, one for the son and one for the daughter. The husband and wife were the trustees of both trusts. The two trusts were essentially identical and contained a "absolute discretionary power of the trustees to terminate the trust". The trustees also had an "unfettered" discretion to divide the income and capital among any one or more of their children and more remote issue to the exclusion of any others. As part of a corporate reorganization in relation to the family business, substantial assets consisting of shares of the corporations were transferred into each of the two trusts.

[145] In 1996, after the death of his wife and a falling out between the husband and his daughter, the husband executed a new will that excluded his daughter as a beneficiary. Thereafter he purported to exercise a power of encroachment in relation to the daughter's trust by transferring the assets in that trust to his son. The daughter brought proceedings to challenge the actions of her father. In dismissing the daughter's claim, Justice Cullity explained that the discretionary powers granted to the trustees in the trust deed were sufficiently broad to justify the encroachment. In arriving at this conclusion Justice Cullity concluded that the express terms of the discretionary powers in the trust deed permitted the trustees to divide the income and capital among any one or more of their children and more remote issue to the exclusion of any others.

Thus, when transferring the assets from the daughter's trust to the son's trust, the trustee was simply doing what the trust deed authorized him to do.

[146] Therefore, these principles must be considered when determining whether the "unfettered discretion" contained in the 1982 Trust Deed permitted the transfer of all of the trust assets to the 1985 Trust to be held for the benefit of the 1985 Beneficiaries on the terms described in the 1985 Trust Deed.

v. ***Pilkington*** – Trust to Trust Transfer

[147] The hallmark of a trust is the fiduciary duty which the trust creates between the trustee and the beneficiaries. The fundamental role of the 1982 Trustees was to administer the trust property on behalf of, and to hold the trust assets exclusively for, the 1982 Beneficiaries, the class of persons consisting of the present and future members of SFN. The 1982 Trustees were not permitted to do anything which was not directed solely towards the best interests of the 1982 Beneficiaries: Waters at 42-43.

[148] The 1985 Trust was not a beneficiary of the 1982 Trust and, at least on the surface, a direct transfer of the 1982 Trust assets to the 1985 Trust would seem not to have been within the discretion given to the 1982 Trustees in the 1982 Trust Deed.

[149] However, the OPTG and Catherine Twinn argue that the resettlement, or the transfer of the assets to the 1985 Trust, was a proper exercise of the unfettered discretion of the 1982 Trustees contained in Clause 6 and was therefore lawful. They argue that the 1982 Trustees had the power to distribute all of the 1982 Trust assets to the 1982 Beneficiaries at any time prior to the 1985 Asset Transfer. By extension they argue that a trust to trust transfer was equally lawful provided that the transfer of the 1982 Trust assets to another trust was for the benefit of the same beneficiaries.

[150] This position is succinctly summarized in ***McLean Estate v Stewart***, (June 1, 1988), Doc RE 822/82 (Ont HC) (unreported) (***McLean Estate***), as quoted at para 13 of ***Hunter Estate***. In ***McLean Estate***, the Court said:

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

[151] More specifically, the OPTG and Catherine Twinn argue that the exercise of discretion by the 1982 Trustees was permissible because on the date of the transfer, April 15, 1985, the beneficiaries of the 1982 Trust were identical to the beneficiaries of the 1985 Trust. At paragraph 20(c) of their Reply Brief the OPTG assert:

> As of the date of the asset transfer, both the existing and future beneficiaries of the two Trusts were exactly the same.

[152] On this basis the OPTG and Catherine Twinn argue that the 1985 Asset Transfer was lawful and that legal and beneficial interest in the 1982 Trust assets were conveyed to the 1985 Trust in April 1985. They argue that the 2016 Consent Order did nothing other than simply confirm that which had been properly transacted in April 1985.

[153] In support of their position, the OPTG and Catherine Twinn cite the decision of the House of Lords in ***Pilkington v Inland Revenue Commissioners*** (1962), [1964] AC 614 (HL)

(***Pilkington***), which is a leading English case in relation to the proper exercise of a trustee's discretion to resettle trust assets. The focus of ***Pilkington*** was consideration of the appropriateness of the transfer of trust assets from one trust to another trust (a "trust to trust transfer") where the second trust was not a beneficiary of the first trust.

[154] ***Pilkington*** confirms that a resettlement undertaken by way of a trust to trust transfer can, in appropriate circumstances, be a proper exercise of a trustee's discretion. Such a transfer may be permissible:

- even though the trust into which the assets are transferred is not directly a beneficiary of the original trust (at 636 - 637);
- even though the new trust terms are not identical to the original trust provided that they are beneficial (at 635); and
- even though non-beneficiaries under the original trust may benefit from the new trust, provided that this occur only "incidentally" (at 636).

For a further discussion see: James Kessler & Fiona Hunter, *Drafting Trusts & Wills in Canada*, 5th ed (Toronto: Lexis Nexis Canada Inc, 2020) at 227.

[155] In ***Pilkington***, the terms of a will left the residue of the testator's estate to trustees to be held in trust in equal shares for the benefit of his nieces and nephews alive at the time of his death. Each beneficiary was to receive their share on reaching the age of 21 (earlier for females who married). If any beneficiary died before receiving his or her share, it would pass to their descendants on essentially the same terms, but in the absence of any descendants, that portion of the trust would be shared by the surviving beneficiaries of the original trust. One of the nephews, Richard, had three children and sought to have the trustees settle a portion of his share of the trust assets to the benefit of his daughter, Penelope who was then 5 ½ years old. To accomplish this, the trustees sought to exercise their discretion to resettle the trust under a statutory power of advancement contained in s 32 of the *Trustee Act, 1925* (15 GEO 5 c 19) (the "English Trustee Act"). This legislation permitted trustees to apply any capital money for the "advancement or benefit" of a beneficiary. The transaction was proposed as part of a tax planning exercise and was beneficial because it avoided the estate taxes that would have been payable on Richard's death. The reduced obligation to pay estate taxes preserved the assets of the trust for the beneficiaries. None of the beneficiaries objected to the terms of the resettlement and it was approved by the Court. However, the tax authorities objected to the resettlement and brought a successful appeal.

[156] On further appeal to the House of Lords, the Court concluded that the resettlement by way of a trust to trust transfer was permissible within the statutory discretion, even though:

- the resettlement was on different terms than contained in the will because the new trust terms deferred Penelope's entitlement to age 30 whereas the will would have given her entitlement at age 21 (or earlier if she married); and
- the resettlement resulted in a benefit or potential benefit being conferred on persons who were not identified as beneficiaries under the will because under the new trust terms, Penelope's children, if she had any, were given a possible interest in the event of her dying before age 30.

[157] The decision in ***Pilkington*** is based upon the House of Lord's interpretation of power of advancement that is contained in s 32 of the English Trustee Act. No similar statutory power of advancement is found the Alberta Legislation. Despite this, ***Pilkington*** can, in appropriate circumstances, still be important authority in Alberta because it provides guidance as to how to properly interpret the discretionary powers of trustees that are prescribed by terms of a will or a trust deed. This is because, as ***Pilkington*** noted at 634, the provisions of s 32 of the English Trustee Act essentially codified the common terms of trust deeds that were recommended in texts and precedents at that time. This was further explained in ***Hunter Estate*** at para 15 where Justice Steele concluded that the English Trustee Act, "... merely adopted the customary common law terminology that is often included in wills". Thus, the Court in ***Hunter Estate*** concluded that the principles described in ***Pilkington*** are applicable when interpreting discretionary powers in a will or trust deed in circumstances where those terms are similar to the power of advancement contained in the English Trustee Act.

[158] While ***Pilkington*** expands the interpretation of the discretionary powers of trustees in some circumstances, it does not alter the fiduciary duties of trustees to always act in the best interests of the beneficiaries. This was emphasised in the concurring opinion of Lord Reid at 629 where he said:

> ... if trustees genuinely and reasonably believe that it is for the benefit of a beneficiary contingently entitled to a share of capital to resettle a sum not exceeding half of his prospective share, they are empowered to do so in ways which do not infringe the rule against perpetuities.

[159] ***Pilkington*** was decided almost 60 years ago. Yet, despite the passage of time, it has received very little judicial consideration in Canada. ***Pilkington*** has been cited in four reported Canadian decisions: ***Hunter Estate***; ***Edell***; ***Chalmers v Chalmers Alter Ego Trust***, 2017 BCSC 2646 (***Chalmers***); and ***BDO Dunwoody Limited (Buckingham Securities Corporation) v Miller Bernstein LLP*** (2008), 91 OR (3d) 207 (ONSC) (***BDO Dunwoody***).

[160] ***Pilkington*** also appears to have been referred to in ***McLean Estate*** (unreported), as quoted at para 13 of ***Hunter Estate***. In addition, ***Pilkington*** was cited to Justice Thomas in counsel's brief in relation to the 2016 Consent Order, but the case was not specifically referred to in his reasons.

[161] I will briefly discuss each of the Canadian cases that have cited ***Pilkington***.

[162] ***Hunter Estate*** is the leading Canadian case to apply ***Pilkington***. In that case the testator left the residue of his estate to a Family Trust for the benefit of his two adult children and their issue, with a gift over should there be no surviving issue. The two children sought to have the trust resettled so that there would be two trusts, one for each of the two adult children. The purpose of the resettlement was to permit the trustees to administer each adult child's half-interest in a manner suited to their specific circumstances. It was proposed that the new trusts would have essentially the same terms as the original trust. The trustees applied to the Court for advice and direction as to whether they had the power to undertake the proposed transaction. All of the testator's children consented and most of the interested parties also consented or did not appear at the application. However, the Official Guardian objected on behalf of the unborn issue of the testator and the future contingent interests of certain employees (who were granted similar,

but not identical, contingent interests in the two new trusts). The Court examined the discretionary powers in the will which provided as follows, at para 2:

> ... to pay to or for the benefit of any one or more of my wife and my issue to the exclusion of any one or more of my wife and my issue as my Trustees may determine such amounts out of the capital of the said Fund as my Trustees in their sole discretion may from time to time determine. (emphasis added)

[163] The Court concluded that the will provided a wide and discretionary power to the trustees which could be exercised properly in the circumstances of that case. At para 8 the Court explained that the new trusts were to have substantially the same terms as those set out in the will, because no new beneficiaries were being added and no beneficiaries were being excluded, except relating to contingent benefits to the extent necessary as a result of the separation of the two families' interests. At para 20 the Court concluded that the division of the trust into two new trusts was not "alien" to the intention of the testator and the resettlement was appropriate because "... subject to the approved basic division into two family trusts rather than the one, the new trusts closely mirror the provisions of the will, with certain minor modifications." Thus, the Court gave advice and direction confirming that the trustees had the power to proceed with the transaction.

[164] ***Chalmers*** was an oral decision of Tammen J of the British Columbia Supreme Court. The issue before the Court was which of two alter ego trusts was operative. The first trust was settled in 2007 and provided that the settlor was the sole beneficiary of the trust during her lifetime and that on the settlor's death her three sons would receive an equal beneficial interest in the trust assets. The trust deed also made provision for the settlor's husband by granting him the right to reside at a residence on the trust property until his death or until such time as he no longer wanted to do so. The 2007 trust deed contained a specific provision permitting resettlement of the trust assets to a new trust provided that the beneficiaries under the new trust were substantially the same as in the original trust and that the terms of the new trust were substantially the same as the terms of the old trust.

[165] In 2014 a new trust was created in relation to the same trust assets that had been described in the 2007 trust deed. As with the 2007 trust, the assets of the new trust were to be held for the benefit of the settlor until her death and then for her three sons. The settlor's husband was excluded as a beneficiary of the new trust but the Court considered that this was not relevant since he had vacated the property by the time that the 2014 trust deed was executed and was no longer alive at the time of the application. The 2014 trust deed also contained new administrative provisions relating to permission to subdivide a property and the mechanism for the payment of the fees of the trustees.

[166] Justice Tammen concluded that the 2014 trust was operative because the beneficiaries under the 2014 trust were substantially the same as in the 2007 trust and the terms of the 2014 trust were substantially the same as the terms of 2007 trust. Thus, the resettlement was expressly permitted by the terms of the 2007 trust. At para 32, Justice Tammen briefly referred to ***Hunter Estate*** and ***Pilkington*** but these cases did not form the basis of his decision. Nevertheless, ***Chalmers*** is consistent with ***Pilkington*** because the resettlement was essentially a trust to trust transfer, from the 2007 trust to the 2014 trust.

[167] In ***Edell*** at para 101, Justice Cullity referred to ***Pilkington*** but only with respect to the question of whether the trustee had the power to transfer corporate securities from the trust rather than simply transferring money. That is not an issue that was raised in the present case. ***Pilkington*** is also referred to at para 108 as an illustration of a case in which "different forms of resettlement have been permitted". ***Edell*** is also consistent with ***Pilkington*** because the asset transfer was from one trust (the daughter's trust) to a second trust (the son's trust). However, as Justice Cullity noted, the preference of one beneficiary over another was expressly authorized in the trust deeds.

[168] ***BDO Dunwoody*** is not relevant to the present analysis. In that decision Justice Cullity cited ***Hunter Estate*** and ***Pilkington*** but only for the proposition that under the Ontario Rules of Practice, judges routinely decide questions of law when asked to advise as to the legality or the legal consequences of the proposed acts of trustees and their beneficiaries.

[169] Therefore, ***Pilkington*** has only ever been applied in Canada in a substantive way in one reported decision, ***Hunter Estate***. It has been cited in two other Canadian decisions where trust to trust transfers took place but where the trust deeds expressly permitted the transfers to the beneficiaries of the new trusts.

[170] The extent to which ***Pilkington*** can be applicable to a case in Alberta can only be determined after considering the extent to which the discretionary power in an Alberta trust deed or a will is similar to the power of advancement contained in the English Trustee Act. Moreover, the lawfulness of a trust to trust transfer, as described by ***Pilkington***, is dependent upon the transfer being in the best interests of the beneficiaries of the original trust, and not beyond the scope of the power of the original trustees.

vi. **"**Unfettered Discretion" of 1982 Trustees was Qualified

[171] It is fundamentally necessary to consider whether the discretion held by the 1982 Trustees was sufficiently broad to permit them to transfer the trust assets to the 1985 Trust. Because this was a trust to trust transfer, it will be useful to consider whether the law described by the House of Lords in ***Pilkington*** offers any assistance in understanding the scope of the discretion held by the 1982 Trustees.

[172] While Clause 6 of the 1982 Trust Deed gave the Trustees "unfettered discretion", that discretion is not completely "unfettered". Instead, the discretion was qualified by the express words of Clause 6 - the discretion could only be exercised for the beneficiaries of the 1982 Trust:

> ... as they in their <u>unfettered discretion</u> from time to time deem appropriate <u>for the beneficiaries set out above</u> (emphasis added)

[173] The beneficiaries were the class defined in the 1982 Trust Deed: "… all members, present and future" of SFN. Thus the 1982 Trustees could only exercise their "unfettered discretion" if it was for the benefit of present and future members of SFN.

[174] Other portions of Clause 6 of the 1982 Trust Deed permitted the Trustees to exercise their discretion in a way that benefited one group of beneficiaries to the detriment of other groups of beneficiaries. But the discretion to not act impartially was applicable only in the following two specific situations (neither of which are relevant to the issue before the Court):

- The Trustees were given a discretion to treat illegitimate children of Indian Women in a way that was not impartial; and
- The Trustees were permitted to distribute all of the trust assets to the SFN members living at the end of 21 years after the death of the last descendant of the original signators of Treaty Number 8 who, on April 15, 1982, were registered Indians. The Trustees had the specific power to ignore the interests of future beneficiaries of the trust only in this very limited situation.

[175] As a result, while the 1982 Trustees had an "unfettered discretion" it could only be exercised within a limited way and could not be detrimental to the beneficiaries. Furthermore, the 1982 Trustees were required to act in an impartial way with an "even hand".

[176] The "unfettered discretion" contained in Clause 6 of the 1982 Trust Deed must be contrasted with the "unfettered discretion" contained in Clause 6 of the 1985 Trust Deed which granted a much broader discretion and which does permit the 1985 Trustees to proceed in a way that is not impartial. In the 1985 Trust Deed the Trustees were granted the power to pay income or capital from the fund:

> ... as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries ... (emphasis added)

[177] Thus the 1985 Trustees were entitled to exercise their unfettered discretion (which was later described in Clause 6 as "uncontrolled discretion") to pay funds to one or more beneficiaries or groups of beneficiaries as they saw fit. Thus, the 1985 Trust Deed permitted the trustees to pay amounts from the 1985 Trust assets in a way that was not impartial. They were entitled to exclude some beneficiaries or groups of beneficiaries from distributions. The 1982 Trustees did not have this power.

[178] The unfettered discretion in the 1982 Trust Deed must also be contrasted with ***Hunter Estate*** where the trustees had a broad discretion that permitted them to act in a way that was not impartial because the trust deed permitted payments to one or more beneficiaries "to the exclusion" of other beneficiaries.

[179] The same is true in relation to ***Edell*** where the trustees were granted the power in the trust deed to divide the income and capital among any one or more of their children and more remote issue "to the exclusion" of any others.

[180] The "unfettered discretion" in the 1982 Trust Deed is of a different character than the discretion that the trustees were granted in ***Hunter Estate*** and ***Edell***.

[181] The 1982 Trustees had an unfettered discretion. But this was a qualified unfettered discretion. The 1982 Trustees continued to be bound by their fiduciary duties. They were required to act with an "even hand". They were required to act in an impartial way for the benefit of the class of person consisting of the present and future SFN members.

vii. Were the 1982 Beneficiaries the same as the 1985 Beneficiaries?

[182] The foundation of the position of the OPTG and Catherine Twinn is that as at the date of the 1985 Asset Transfer, the beneficiaries of the 1982 Trust were identical to the beneficiaries of the 1985 Trust. At paragraph 20(c) of their Reply Brief the OPTG assert:

> As of the date of the asset transfer, both the existing and future beneficiaries of the two Trusts were exactly the same.

[183] The 1985 Asset Transfer took place on April 15, 1985, just two days before Bill C-31 was to come into force.

[184] The definition of "Beneficiaries" in the 1985 Trust Deed was based upon the membership criteria established by the *Indian Act* as it existed in April 1982. Therefore, on the date of the 1985 Asset Transfer and for two days thereafter, all of those persons who were present SFN Band members, and thus members of the class of 1982 Beneficiaries, were also 1985 Beneficiaries because all of the then-present SFN members satisfied the membership criteria set out in the *Indian Act* as it existed in April 1982. It is on this basis that the OPTG and Catherine Twinn argue that there was an identity of beneficiaries as between the 1985 Trust and the 1982 Trust.

[185] I conclude that it is simply not correct to say that on April 15, 1985, the beneficiaries of the 1982 Trust were identical to the beneficiaries of the 1985 Trust.

[186] The only reason that the 1985 Trust came into existence was to ensure that the definition of "Beneficiaries" was different in the 1985 Trust Deed than it was in the 1982 Trust Deed. This change was made to achieve "Objective Number 1" as Chief Twinn described it. That objective was to prevent the Bill C-31 Women from participating as beneficiaries of the 1982 Trust. Thus, it is perfectly clear that Objective Number 1 was to create different beneficiary classes.

[187] On April 15, 1985, all of the present members of SFN were known and identifiable. Not all of the future members of SFN were identifiable but many were clearly identifiable. The Bill C-31 Women who were about to become eligible for SFN membership two days later on April 17, 1985, were clearly identifiable. Furthermore, the Bill C-31 Women had been identified as future SFN members by the 1982 Trustees themselves. This is clear from the preamble to the 1985 Asset Transfer Resolution:

> AND WHEREAS amendments introduced into the House of Commons on the 28th day of February, 1985 may, if enacted, extend membership in the Band to certain classes of persons who did not qualify for such membership on the 15th day of April 1982;

[188] The 1982 Trustees owed fiduciary duties to the class of persons who were present and future members of SFN, including the 15 persons who are now SFN members, all of whom gained their membership after April 15, 1985 and are not 1985 Beneficiaries. Those 15 people were future SFN members and were thus included within the definition of "beneficiaries" in the 1982 Trust Deed. The 1982 Trustees owed fiduciary duties to the class.

[189] The recitals to the 1985 Trust Deed suggests that the trust was to be for the benefit of current and future members of SFN within the April 1982 *Indian Act* criteria. However, the definition of Beneficiaries in the 1985 Trust Deed does not include future members. Instead the class is defined as "Beneficiaries at any particular time shall mean all persons who at that time qualify as members ..." in accordance with the April 1982 *Indian Act* criteria. This does not contemplate future members being part of the 1985 Beneficiary class.

[190] In any event, even if the 1985 Trust Deed were to be construed as including future members as a part of the beneficiary class, the future members in the 1985 Trust Deed were much different than the future members in the 1982 Beneficiary class. The 1985 Beneficiaries

did not include the 15 current SFN members who gained their status after April 15, 1985, whereas the1982 Beneficiaries included these persons as beneficiaries because they were future SFN members. This distinction is crucial.

[191] Viewed from another perspective, the significant differences between the 1982 Beneficiaries and the 1985 Beneficiaries are illustrated by the current composition of the two beneficiary groups. Of the current 45 members of SFN, who are all 1982 Beneficiaries, only 30 are also 1985 Beneficiaries. Thus 15 of the current SFN members are not 1985 Beneficiaries. Conversely, there are at least 26 (and perhaps as many as 55) persons who are not SFN members (and thus not 1982 Beneficiaries) but who are 1985 Beneficiaries.

[192] The position of the OPTG and Catherine Twinn requires that I look only at the individuals who were then present members of SFN as at April 15, 1985 (and thus 1982 Beneficiaries) and the actual persons who qualified as members under the April 1982 *Indian Act* criteria, also as at April 15, 1985 (and thus 1985 Beneficiaries). They argue that the two groups consisted of the same people on April 15, 1985, and therefore the asset transfer was permissible. I conclude that is not the correct way to assess the beneficiaries of the two trusts. The 1982 Beneficiaries were not the individuals who were SFN Band members on April 15, 1985. The 1982 Beneficiaries were the class of persons consisting of present and future members of SFN. It is the class of persons that need to be considered when comparing the two beneficiary groups and it is the class of persons to whom the fiduciary duties are owed. At the time of the 1985 Asset Transfer, and at all times thereafter, the 1982 Beneficiary class was much different than the 1985 Beneficiary class.

[193] As then Prof. Cullity said in his 1975 article, "Judicial Control of Trustees' Discretions", cited earlier in these reasons:

> … In some cases, of course, it may not be possible to identify all the beneficiaries of discretionary trusts but it is one thing to accept the inevitability that the trustee will not be able to consider the claims of all beneficiaries and quite another to say that he may refuse to consider the interest of a beneficiary who is known to him.

[194] Thus, there are and were glaring differences between the 1982 Beneficiaries and the 1985 Beneficiaries. This is not unexpected. In fact, this was the goal that was both intended and achieved by the 1985 Trust.

viii. Was the 1985 Asset Transfer "Alien" to the Settlor of the 1982 Trust?

[195] As was explained by ***Hunter Estate*** at para 20, a Court reviewing a trust to trust transfer must examine new trust terms to determine whether they are "alien" to the intention of the original settlor or whether they were beyond the scope of the powers of the trustees.

[196] The intention of the settlor of the 1982 Trust was that the trust assets could only be used for the benefit of members, present and future, of SFN. This intention is expressed clearly in the 1982 Trust Deed. Clause 3 specifically directs that no part of the trust fund shall be used for or diverted to purposes other than those set out in the 1982 Trust Deed.

[197] The 1982 Trustees had no power to transfer assets for the benefit of persons who were not SFN members or future SFN members. If the position of the OPTG and Catherine Twinn is accepted, and if the 1982 Trust assets were transferred to the 1985 Trust for the benefit of the 1985 Beneficiaries then a very large number of people who are not SFN members will benefit

from the 1982 Trust assets. None of the persons the OPTG represent are SFN members. This is not what was intended by the settlor of the 1982 Trust.

[198] The transfer or resettlement for the benefit of persons who were not present or future members of SFN was specifically prohibited by the 1982 Trust Deed.

[199] Furthermore, one of the consequences of the 1985 Asset Transfer was to dilute the interests of the 1982 Beneficiaries by adding persons who were not, and might never become SFN members. This was not authorized by the 1982 Trust Deed.

[200] I have considered an argument that the present differences between the two beneficiary groups does not arise from the creation of the 1985 Trust or from any action that was taken by the 1985 Trustees or the 1982 Trustees. Instead, the marked difference between the two beneficiary groups is fully explained by the actions of SFN when it assumed control over its own membership list on July 8, 1985, almost three months after the 1985 Asset Transfer. It is arguable that the divergence arises because of the very restrictive manner in which SFN has controlled the persons entitled to become SFN members.

[201] It is certainly correct that since July 8, 1985, SFN has had control over its membership list. But as I explained earlier in these reasons, the manner in which SFN discharges its duties in relation to the membership list is not before me and it is not my function to comment on that process.

[202] The 1985 Trust was created in response to Bill C-31. One of the important elements of the Bill was to give First Nations the ability to control their own membership lists. I am satisfied that at the time the 1985 Trust was created, the 1982 Trustees, the 1985 Trustees, and the SFN Council (all of whom were the same persons) were fully aware of the changes that Bill C-31 brought and were also aware that SFN would assume control of its membership list at the earliest opportunity. The creation of the 1985 Trust with a definition of beneficiaries different than that contained in the 1982 Trust created the environment in which the divergence between the two beneficiary groups could and did develop. Thus, the divergence between the beneficiary groups was contemplated at the time.

[203] The settlor of the 1982 Trust directed that the trust assets would be held only for present and future members of SFN. The definition of beneficiaries in the 1985 Trust created a much different beneficiary class which has led to significant differences between those persons who are members of the classes of the two trusts. For these reasons, I conclude that the 1985 Asset Transfer was alien to the intention of the settlor of the 1982 Trust.

ix. Was the Addition of Non-SFN Beneficiaries Incidental?

[204] ***Pilkington***, at 636, explains that if trustees transfer assets to a second trust then "it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise". Under the terms of that trust deed Penelope's children obtained a vested interest in the trust assets at age 21 in the event that Penelope died before the age of 30. This was not the case in the will where Penelope's children had no interest unless that power was exercised in their favour. Lord Radcliffe concluded that the benefit accruing to the children was only incidental and was not objectionable provided that the whole of the trust to trust transfer was beneficial.

[205] The other examples of an incidental benefit as described in ***Pilkington*** were situations in which creditors ultimately benefited when funds were advanced from a trust to a debtor and where a husband benefited from an advance made from a trust to his wife.

[206] In the present case, the benefits conferred on those 1985 Beneficiaries who are not SFN members is not incidental. This is so even though the settlor of the 1985 Trust may not have contemplated the specific non-SFN members who would obtain a benefit, or that he may not have contemplated the large number of persons who would come to be included in this subclass of 1985 Beneficiaries. Nevertheless, the direct consequence of settling the 1985 Trust created a situation in which persons who are not SFN members can be 1985 Beneficiaries. This is not incidental.

[207] This is a factor which must be considered in determining whether the 1982 Trustees had the discretionary power to resettle the trust assets via the 1985 Asset Transfer.

x. Did the 1982 Trustees have Discretion to Make the 1985 Asset Transfer?

[208] I conclude that the 1982 Trustees, despite having an "unfettered discretion" did not have a sufficiently broad discretion to transfer all of the trust assets to the 1985 Trust. The discretion that the 1982 Trustees had was limited by the requirement that the power could only be used for the benefit of the 1982 Beneficiaries, the present and future SFN members.

[209] The 1982 Trustees were clearly given the "unfettered discretion" to make advances or distributions to existing SFN members. In appropriate circumstances that "unfettered discretion" may have extended to distributing all or substantially all of the assets 1982 Trust Assets. However, to exercise the "unfettered discretion" in this way, they were required to fulfil their fiduciary duties; they were required to act in a way that was not an abuse of their discretion; they were required to act with an "even hand". Before making a distribution from the 1982 Trust assets, particularly a distribution of all of the trust assets, the 1982 Trustees were, at a minimum, required to consider the interests of future SFN members. In this case, not only did the 1982 Trustees not consider the interests of the future SFN members, they took specific targeted action to transfer all of the 1982 Trust assets in such a way so as to ensure that one subclass of future SFN members could not benefit from the trust assets. This was beyond the discretionary power of the 1982 Trustees.

[210] Even more importantly, the 1982 Trustees did not have the discretionary power to transfer the trust assets to the 1985 Trust, on terms that would permit a large number of non-SFN members to become beneficiaries of the trust assets. This was alien to the intention of the settlor of the 1982 Trust. The 1982 Trust Deed specifically restricted the use of the trust assets in a way that they could only be used for the benefit of present or future SFN members. The result of the 1985 Asset Transfer accomplished something that was foreign to this express intention.

[211] ***Pilkington*** did not give the 1982 Trustees the power to proceed with the 1985 Asset Transfer. ***Pilkington*** and ***Hunter Estate*** demonstrate a principle that permits a trust to trust transfer that is applicable in very narrow circumstances. This is made clear from the unique facts of those two cases.

- In ***Pilkington*** the transfer of the assets was not objected to by any of the parties and was done for the purpose of reducing the tax exposure of the trust assets. In this way the transfer was of benefit to the beneficiaries. The only party to object to the transfer of assets was the taxing authority, not any of the beneficiaries or potential beneficiaries. The resettlement was permissible by way of a trust to trust transfer even though the second trust was not a beneficiary under the first trust.

None of the beneficiaries were deprived of their interest in the trust without their approval.

- Similarly, in ***Hunter Estate***, the transfer of the assets from a single trust to two separate trusts was done with the consent of the beneficiaries. No beneficiaries were added and none deleted. The terms of the new trusts closely mirrored the terms of the new trust. The terms of the new trusts were not "alien" to the intentions of the testator.

[212] Thus, in ***Pilkington*** and ***Hunter Estate*** none of the beneficiaries or contingent beneficiaries were prejudiced by the trust to trust transfers. To the contrary, the transactions were *bona fide* and to the benefit of all parties (other than the taxing authorities in ***Pilkington***). Therefore, ***Pilkington*** and ***Hunter Estate*** are unique cases in which the outcomes were dependent upon the peculiar circumstances of the cases.

[213] ***Chalmers*** and ***Edell***, both of which cite ***Pilkington***, involve situations where the trust deed expressly gave the trustees the discretionary power to transfer assets to the new beneficiaries.

[214] ***Pilkington*** does not stand for the proposition that a trust to trust transfer can be justified in all circumstances. The case can only have potential application where the resettlement by way of trust to trust transfer is within the discretionary powers of the trustees, and where the transfer is consistent with the fiduciary obligations of the trustees. Furthermore, the transfer must be for the benefit of the beneficiaries.

[215] For all of these reasons, I conclude that the 1985 Asset Transfer was not the proper exercise of the discretion of the 1982 Trustees. The 1982 Trust Deed did not give the 1982 Trustees sufficient discretionary power to resettle the trust in the manner contemplated by the 1985 Asset Transfer.

xi. *Trustee Act* – Requirement for Court Approval

[216] The Court of Appeal has considered several issues in relation to the Sawridge litigation. On one of those occasions, in ***Twinn v Twinn***, 2017 ABCA 419, the Court noted at para 22 that one of the issues that the Case Manager was required to consider was the applicability of the statutory requirement for Court approval of the variation of trusts. That was in the context of a proposed amendment to the 1985 Trust, which contains provisions giving the 1985 Trustees much broader powers than the 1982 Trustees possessed. The comments of the Court of Appeal are equally applicable to the 1982 Trust.

[217] Section 42 of the *Trustee Act*, RSA 1980, c T-10 was in force on April 15, 1985. For all practical purposes the wording of the section remains essentially the same in the current legislation. That section requires Court approval for any variation or revocation of a trust unless the trust deed gives the trustees the power to make the variation or revocation. For the reasons given earlier, I conclude that the 1982 Trust Deed did not reserve to the 1982 Trustees the power to revoke or vary the trust so as to achieve the resettlement described in the April 15, 1985 Asset Transfer Resolution. As a result, the 1982 Trustees were required to comply with s 42 of the *Trustee Act* before implementing the resettlement.

[218] I also note that the 1982 Trustees were fully aware of their obligation to seek Court approval pursuant to s 42 because on June 15, 1983, they appeared in Court to seek approval in relation to a very modest variation of the 1982 Trust Deed.

[219] The 1982 Trustees did not seek or obtain the necessary Court approval. Furthermore, they did not obtain the consent in writing of the beneficiaries of the 1982 Trust. As a result, I conclude that s 42 of the *Trustee Act* was not complied with in relation to the 1985 Asset Transfer.

[220] What, if anything, should flow from the failure to comply with s 42 of the *Trustee Act*? The legislation does not contain any provision that specifically describes the consequences of a failure to comply. There is no provision for a penalty for non-compliance. There is no specific provision that declares a variation or resettlement to be void in the absence of compliance.

[221] It is important to note that s 42(3) uses the word "prohibition" to describe the approval requirement found in s 42(2). That is, the variation arrangement is prohibited unless there is compliance with s 42. At common law, the doctrine of illegality provides that a contract that is prohibited by statute will be declared void even if the contract otherwise satisfies all other requirements of a valid transaction: ***Cope v Rowlands***, [1836] 2 M & W 149, 150 ER 707 at 710; ***Bank of Toronto v Perkins*** (1883), 8 SCR 603 at 610, 613.

[222] The doctrine of illegality and its current application was thoroughly discussed by Robertson JA in ***Still v Minister of National Revenue***, [1998] 1 FC 549 (CA) (***Still***). The Court described the development of the rule beginning with the classical model as it existed in the 19th century. The Court then described how the classical model evolved into the modern rule which is much less rigid and which requires the exercise of judicial discretion in the assessment of the purpose and object of the statutory prohibition. At para 37 of ***Still***, Robertson JA noted that the modern approach to the doctrine of illegality rejects the understanding that simply because a contract is prohibited by statute it is illegal and, therefore, *void ab initio*. Instead, the purpose and object of a statutory prohibition is relevant when deciding whether the contract is void or whether it is enforceable.

[223] ***Transport North American Express Inc v New Solutions Financial Corp***, [2004] 1 SCR 249 also explains the modern approach to the application of the doctrine of illegality. The majority, at para 40, described the appropriate approach to be used in assessing the consequences of the illegality. The majority explained that courts of first instance must be vested with the greatest possible amount of remedial discretion to permit an assessment of a spectrum of available remedies ranging from holding the contracts *void ab initio* in the most egregious and abusive cases to notional severance in appropriate cases at the other end of the spectrum. To determine where along the spectrum a particular case lies, and thus whether public policy ought to allow an otherwise illegal agreement to be partially enforced rather than being declared void, requires a consideration of the purpose or policy of the legislative prohibition and the context within which the impugned transaction took place.

[224] Both the majority of the Supreme Court in ***Transport North American Express*** and the Federal Court of Appeal in ***Still*** emphasized that the consequences flowing from the failure to comply with a statutory prohibition must be assessed by considering the context of the illegality and, most importantly, the purpose and object of the legislation because this provides insight into the intention of the Legislature when passing the statute in question. This is strikingly similar to the modern approach to statutory interpretation as outlined in ***Rizzo & Rizzo Shoes Ltd, (Re***),

[1998] 1 SCR 27 - the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[225] To determine what, if any, consequences flow from a failure to comply with s 42 of the *Trustee Act* it is necessary to consider where on a spectrum the statutory breach is situated. This necessarily involves a consideration of the context, the purpose, and the objectives of s 42 of the *Trustee Act*.

[226] In Alberta, the requirement for Court approval of trust variation arrangements was first introduced in 1973 through a Bill to amend to the *Trustee Act*. As Waters notes at 1344, the objects of the legislation may best be seen in the words accompanying the Alberta Bill:

> The amendment will replace the rule to the extent of giving the court power to decide whether to permit termination or variation of the trust so that cognizance may be taken of the donor's intent, ignored in the application of the rule, and also of the interest of the donee.

[227] The rule referred to in this passage and which the Legislature sought to replace was the rule in *Saunders v Vautier*, which comes from the English case of ***Saunders v Vautier*** (1841), 4 Beav 115, 49 ER 282 (Eng Rolls Ct); aff'd (1841), 1 Cr & Ph 240, 41 ER 482 (Eng Ch Div). This common law rule permitted the beneficiaries of a trust, who were adults of full mental capacity and whose beneficial interest accounted for the whole of the trust property, to call on the trustees to make an immediate distribution and to terminate the trust prematurely without any court assistance. The rule in *Saunders v Vautier* was criticized because it failed to give sufficient weight to the wishes of the settlor by, for example, permitting the termination of trusts in situation where enjoyment of trust property was postponed to a particular age or a future date: Eileen E Gillese, *The Law of Trusts*, 3rd ed (Toronto: Irwin Law, 2014) at 85-86 (Gillese).

[228] Therefore the 1973 amendment to the *Trustee Act* effectively eliminated the rule in *Saunders v Vautier* in Alberta. The Legislation replaced this common law rule with a specific mechanism for the variation of trusts that contained a number of mandatory requirements. The first requirement is that the applicant, before submitting the application, must have the consent in writing of all persons beneficially interested in the trust who are capable of consenting to it. The second requirement is that the Court must consider the variation arrangement and, if appropriate, provide consent on behalf of those beneficiaries who are not capable of consenting. The third requirement is that the Court must conclude that the arrangement is of "justifiable character" and if it is the Court may approve the variation arrangement.

[229] It is significant that both the rule in *Saunders v Vautier* and s 42 of the *Trustee Act* require the unanimous consent of all of the beneficiaries. However, whereas under the common law no court approval was required for the termination of a trust where all of the beneficiaries consented, under the statute, the Court is required to assess whether the arrangement is of "justifiable character" before granting approval. This assessment is done not only for the benefit of those persons on whose behalf the Court is asked to consent to the arrangement but also on behalf of those adult beneficiaries who have provided their written consent: ***Kinnee v Alberta (Public Trustee)*** (1977), 3 Alta LR (2nd) 59 (Sup Ct).

[230] The intention and object of the Legislature is very clear. The integrity of trusts must be maintained and variation arrangements are only permitted where all beneficiaries have consented

in writing and only where the Court has approved the variation arrangement. The use of the word "prohibited" in s 42(3) signals the intention of the Legislature that non-compliant variation arrangements will be ineffective.

[231] An important part of the context that must be considered is that when resettling the 1982 Trust assets, the specific intention of the 1982 Trustees was to protect the trust assets and to prevent the Bill C-31 Women from gaining a beneficial interest. The 1982 Trustees knew that the Bill C-31 Women were about to regain SFN Band membership. As Chief Twinn testified to in 1993, excluding the Bill C-31 Women from participation in the trust assets was "Objective Number 1".

[232] At a minimum, the Bill C-31 Women had a contingent beneficial interest in the trust assets. The contingency would be satisfied on Parliament passing the amendments to the *Indian Act*. One of the specific purposes of seeking Court approval under s 42 is to permit the Court to consider the interests of contingent beneficiaries and to consider whether consent to the variation arrangement should be provided – see ss 42(5)(a) and (b). By pursuing "Objective Number 1" the 1982 Trustees denied the Court the opportunity to consider whether the resettlement should be consented to on their behalf. This was expressly contrary to the intentions of the Legislature.

[233] The Court was also denied the opportunity to consider whether it would approve of the variation on behalf of future SFN members who were at that time unknown. We now know that there were 15 such future SFN members, who are now SFN members and thus became 1982 Beneficiaries but who have never been 1985 Beneficiaries.

[234] The specific variation arrangement described in the 1985 Asset Transfer resolution was described as a "resettlement" which would necessarily result in a termination of the trust because after the variation the trust would be left with no assets, thus bringing the trust to an end: Gillese at 89. The Legislature intended that this type of variation and termination arrangement be subject to the Court approval requirements – see s 42(3)(b).

[235] When I consider the nature of the Court approval requirements contained in s 42 along with the intention of the Legislature and the nature of the resettlement contemplated by the 1985 Asset Transfer which resulted in the complete disposition of all of the assets of the 1982 Trust, I conclude that the failure to comply with s 42 of the *Trustee Act* was at the most serious end of the spectrum. In these circumstances I conclude that the failure to comply with s 42 rendered the April 1985 Asset Transfer void.

xii. Conclusion – *Status Quo* Prior to 2016 Consent Order

[236] By the terms of the April 15, 1985 Asset Transfer Resolution, the 1982 Trustees purported to transfer the 1982 Trust assets to themselves with the intention that they hold the assets as 1985 Trustees for the 1985 Beneficiaries. This amounted to nothing more than the 1982 Trustees simply saying to themselves, without any authority, that they would prefer to hold the assets for the benefit of a class of persons other than the class of beneficiaries to whom they owed fiduciary duties. This is not similar to the *bona fide* transactions that were seen in ***Pilkington*** and ***Hunter Estate***. Nor is this similar to ***Chalmers*** and ***Edell*** where the trust deeds gave much broader discretionary powers that expressly permitted the transfer of assets to the new beneficiaries.

[237] The Trustees of the 1982 Trust were also the Trustees of the 1985 Trust on April 15, 1985. As a result, the knowledge of the 1985 Trustees on April 15, 1985, was identical to the knowledge of the 1982 Trustees. As such, the 1985 Trustees had complete knowledge of the obligations imposed by the 1982 Trust Deed.

[238] I conclude that the 1985 Asset Transfer was void and that 1985 Beneficiaries did not acquire an interest in the 1982 Trust assets on April 15, 1985.

[239] I conclude that the *status quo* that existed immediately prior to the granting of the 2016 Consent Order was that the trust assets continued to be held for the 1982 Beneficiaries.

[240] This *status quo* is an important part of the factual matrix that was in place when Justice Thomas granted the 2016 Consent Order. It must be considered when interpreting the Order.

[241] It therefore becomes necessary to consider the other circumstances surrounding the granting of the 2016 Consent Order for the purpose of determining whether the Court intended to alter the *status quo* by approving a change in the beneficial ownership of the trust assets.

b) The Pleadings

[242] An important factor that must be considered when interpreting the 2016 Consent Order is the pleadings that gave rise to the litigation. In this case no Statement of Claim was issued. No party has sought any specific relief against any other party. Instead, the proceedings in which the 2016 Consent Order was granted began in 2011 when the 1985 Trustees filed an application seeking advice and direction. The application specifically sought advice and direction in relation to the following:

a. Direction with respect to the definition of "Beneficiaries" in the 1985 Trust and if necessary, to vary the terms of the trust to clarify the definition; and

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

[243] The Affidavit of Paul Bujold, sworn September 12, 2011, deposes that the 1985 Trustees were seeking a "declaration that the asset transfer was proper and that the assets in the 1985 Trust are held for the benefit of the beneficiaries of the 1985 Trust" (emphasis added). Mr. Bujold deposed that the documentation regarding the transfer of the assets was not complete but that the Trustees were "operating on the assumption that they were properly guided by their advisors and the asset transfer to the 1985 Trust was done properly". For the reasons given earlier, and notwithstanding the very sophisticated legal advice that was no doubt provided, I would not be prepared to assume on this basis that the transfer of the assets was properly effected.

[244] The evidence discloses that the Trustees had some concerns regarding the legitimacy of the 1985 Asset Transfer. They quite properly sought advice and direction. For the reasons previously stated, the concerns of the 1985 Trustees were very well founded.

[245] Nevertheless, the pleadings clearly demonstrate that the 1985 Trustees were seeking a direction that the asset transfer was proper and that they held the trust assets for the 1985 Beneficiaries. This demonstrates that the issue was before the Court and is a significant factor in the interpretation of the 2016 Consent Order.

c) The 2016 Brief of the 1985 Trustees

[246] On August 17, 2016, the 1985 Trustees filed a "Brief of the Trustees for Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust" ("the 2016 Brief") to assist the Court and to provide background information and legal arguments in support of the 2016 Consent Order.

[247] The 2016 Brief explained that all of the evidence available at that time made it clear that the assets had been transferred from the 1982 Trust to the 1985 Trust. The 2016 Brief further explained that an extensive search had been undertaken but that documentation regarding the actual transactions to accomplish the transfer had not been located. Importantly, the Trustees explained in para 17 of the Brief:

> The Trustees have advised all parties that the approval of the transfer of the assets from the 1982 Trust to the 1985 Trust is sought for certainty and to protect the assets of the 1985 Trust for the benefit of the beneficiaries. To unravel the assets of the 1985 Trust after 30 years would have the potential impact of destroying the trust. Assets would have to be sold to pay the costs and to pay the taxes associated with the reversal of the transfer of assets. (emphasis added)

[248] The 2016 Brief acknowledged that the 1985 Trustees were not beneficiaries of the 1982 Trust and should not have been able to receive the assets directly. The 2016 Brief also acknowledged that there was no record of the transactions that were undertaken to carry out the transfer of the assets. To support the granting of the 2016 Consent Order, the 2016 Brief referred the Court to ***Pilkington***, discussed above, as authority for the proposition that if a transfer could have been done from one trust to another trust through a series of transactions then it cannot be held to be inappropriate where the same result is achieved directly. The Trustees submitted that the "same principle is applicable as the transfer from the 1982 Trust to the 1985 Trust was for the benefit of the same beneficiaries and preserved their interest in the trust assets" (emphasis added). For the reasons given earlier, I conclude that the beneficiaries of the 1982 Trust are not the same as the beneficiaries of the 1985 Trust. On the contrary they are very different.

[249] The 2016 Brief concluded at paragraph 20 by saying: "It is submitted that it is in the best interests of the beneficiaries of the 1985 Trust the transfer of the assets be approved, *nunc pro tunc"*.

[250] Significantly, the 2016 Brief submitted that, despite extensive searches, documentation regarding the 1985 Asset Transfer could not be located and that returning the trust assets to the 1982 Trust would have significant negative tax and other implications that could erode the value of the trust assets.

[251] Some portions of the 2016 Brief can be interpreted as meaning that the Trustees were seeking an order to confirm that the trust assets were being transferred to the 1985 Trust for the benefit of the 1985 Beneficiaries. The two clearest statements in the Brief on this issue are as follows:

- In para 17 (quoted above) the Brief refers to the need for certainty and the need to protect the assets of the 1985 Trust for "the benefit of the beneficiaries" (emphasis added). However, this portion of the Brief does not make it clear which beneficiaries were being referred to.

- The concluding sentence of paragraph 20 of the Brief is clearer when it states that the transfer would be in the best interests of the 1985 Beneficiaries.

[252] The OPTG and Catherine Twinn seek to have me confirm that these portions of the 2016 Brief were intended to mean that the Court was asked to confirm that the trust assets be transferred to the 1985 Trust for the 1985 Beneficiaries. When viewed in isolation, this is clearly one possible inference that can be drawn from the Brief.

[253] When I consider the 2016 Brief, it is important to assess not only what is in the Brief but also what is not in the Brief. I observe that the 2016 Brief does not refer to the potential interest the 1982 Beneficiaries had in the trust assets. The 2016 Brief does not disclose in a direct and transparent way that the parties before Court were seeking approval of the transfer of the beneficial ownership of the trust assets by extinguishing the interests of the 1982 Beneficiaries and granting beneficial ownership to the 1985 Beneficiaries. On the contrary the 2016 Brief expressly said that the "transfer from the 1982 Trust to the 1985 Trust was for the benefit of the same beneficiaries and preserved their interest in the trust assets". The implication from this statement was that the Court was not being asked to extinguish the interests of any person in the trust assets.

[254] I therefore conclude that when he granted the 2016 Consent Order, Justice Thomas did not intend to extinguish the interests of the 1982 Beneficiaries. Specifically, he did not intend to extinguish the beneficial interests the 15 SFN members who are 1982 Beneficiaries but who are not 1985 Beneficiaries, including the three remaining Bill C-31 Women.

d) Proceedings in Court on August 24, 2016

[255] The 2016 Consent Order was presented to the Court for approval on August 24, 2016. The proceedings were brief. The most important portions of the transcript are as follows:

[256] At page 3, lines 21 to 35:

> Ms. Bonora: Sir, you'll recall that in this application, there were basically two issues. One was the beneficiary designation and the second was to confirm that the transfer of assets from the 1982 Trust to the 1985 Trust were – was appropriate, and that we've put that issue behind us. And through the work of counsel, we've been able to reach agreement on the issue of the transfer of assets.
>
> I believe, Sir, you received a brief from us and a copy of the consent order.
>
> The Court: I did. And thank you very much for the brief, because it makes it pretty clear –
>
> Ms. Bonora Yeah. So –
>
> The Court: -- well, what the basis for it is, and I'm certainly satisfied that the consent order is appropriate and properly based in law.

[257] At page 6, lines 18 to 28:

> The Court: All right. The consent order being sent to me with the brief, as I – just so it's clear on the record, I did review that brief and it was very helpful to me in terms of providing a legal basis for the consent order. Plus, the Summary of Facts helped me put in the picture again.

So the consent order is granted, and there it is.

Ms. Bonora Thank you, Sir.

The Court: Madam Clerk, if you wouldn't mind handing that to Ms. Bonora.

[258] After granting the 2016 Consent Order, further discussion took place on the record regarding the need to identify the beneficiaries. Counsel referred to a distribution proposal that had been submitted in December 2015 for review by the Court and also to the fact that other persons were seeking standing to argue the issue of beneficiary status. In light of this issue, an adjournment was sought. In response to that request the Court made the following comments at page 7, lines 18 to 19:

The Court: So both the distribution plan, I'll call it, plus the issue of – the outstanding issue of who the beneficiaries are? (emphasis added)

[259] At page 9, lines 5 to 17, the Court returned to discuss the issue of distribution:

The Court: That's – well, I think – my goal here has been to try to get this litigation focussed, or refocussed in some cases, and it does seem that the issues are narrowing, which is sort of the function of a case manager. We're down to the – well, the distribution plan, I'll call it, appears to be generally acceptable, subject to some latecomers having a look at it. Whether they'll have anything to say is yet to be decided, but my thinking is that the distribution plan looks like it's – I mean, I've read it. It seems quite reasonable. It looks like that issue is going to get swept off the table. The – so the one outstanding issue is the - - scope of the beneficiary group.

Ms. Bonora: Thank you, Sir.

The Court: So your request for an adjournment on the distribution proposal application and – is adjourned *sine die*.

[260] The inference from the statements made by the Court is that no decision had been made as to "who the beneficiaries are". This strongly suggests that the Court did not intend to alter the *status quo* and that the issue of potential changes to the beneficial ownership would be addressed in later applications.

[261] The proposed distribution plan that the Court referred to provides multiple references to the 1985 Trust and the beneficiaries of that trust. It also contains specific reference to the "fair treatment of minors" whom the OPTG represent. These references clearly suggest that the distribution was contemplated to be to be based on the definition of Beneficiaries in the 1985 Trust Deed and not based on the definition of Beneficiaries in the 1982 Trust Deed because the OPTG does not represent any 1982 Beneficiaries.

[262] The OPTG and Catherine Twinn argue that the Court's reference to the proposed distribution which included the 1985 Beneficiaries provides a clear indication of an intention that the beneficial interest in the trust assets was being transferred to the 1985 Beneficiaries.

[263] I agree that one potential inference from the words used by the Court after granting the 2016 Consent Order was that the Court intended that the beneficial interest in the trust assets was also being transferred, otherwise there would be no basis on which some of the 1985 Beneficiaries could participate. But that is not the only inference that can be made when the

totality of the circumstances is considered. This is because other references in the proposed distribution plan suggest a distribution in accordance with the 1982 Trust. For example, in Section B. Intentions of the Settlor, the proposed distribution says:

> In the trust deed, the opening paragraph says that the Settlor desires to create an inter vivos settlement for the benefit of individuals who at the date of the execution are members of Sawridge Indian Band No. 19 ... and future members of such band ...

[264] This implies that members and future members of SFN will participate in the distribution, including the 15 persons who are not 1985 Beneficiaries. The quoted passage refers to the Trust Deed at Tab "B" which is the 1985 Trust Deed. However, the passage quoted does not properly describe the Beneficiaries of the 1985 Trust, which would not include the 15 SFN members who are not 1985 Beneficiaries, including the Bill C-31 Women.

[265] While the transcript makes it clear that the Court was approving the transfer of the assets to the 1985 Trust it is equally clear that the Court was not making any ruling with respect to the beneficiaries of the trust assets. More specifically, the decision does not say that the trust assets are being held for the 1985 Beneficiaries. On the contrary the Court expressly said that:

> "So both the distribution plan, I'll call it, plus the issue of – the outstanding issue of who the beneficiaries are?" (emphasis added)

[266] From this statement it is clear that the Court required further argument on the issue of "who the beneficiaries are". What is most significant is that on August 24, 2016, the Court did not give any clear indication that there was an intention to alter the *status quo* in terms of beneficial ownership of the trust assets. More importantly the Court did not clearly say that the intention was to extinguish the rights of the 1982 Beneficiaries, including the Bill C-31 Women.

VII. Summary and Conclusion

[267] This application requires that I give advice to the 1985 Trustees regarding the interpretation of the 2016 Consent Order that approved *nunc pro tunc* "the transfer of assets" which occurred in 1985 from the 1982 Trust to the 1985 Trust.

[268] The OPTG and Catherine Twinn make compelling arguments that the 2016 Consent Order should be interpreted as approving not only the transfer of the legal title to the trust assets but also the beneficial interest in the assets. Their argument is premised upon the history of the litigation, the pleadings, the Brief submitted by the 1985 Trustees in advance of the appearance to have the 2016 Consent Order signed, the representations made to the Court at that appearance, as well as the comments of the Court when signing the 2016 Consent Order.

[269] The submissions of the OPTG and Catherine Twinn are consistent with the intention of the 1982 Trustees at the time of the transfer of assets. For the reasons given earlier, I am satisfied that the 1982 Trustees (who were also the 1985 Trustees) intended to convey the beneficial ownership in the trust assets to the 1985 Beneficiaries when the original transfer took place in 1985.

[270] The OPTG also submits, and I accept, that the 2016 Consent Order was the product of extensive negotiation among counsel for the 1985 Trustees, the SFN, the OPTG and Catherine Twinn, and that the terms of the 2016 Consent Order were agreed upon. I am also satisfied that

when counsel appeared before Justice Thomas on August 24, 2016, the OPTG and Catherine Twinn intended that the order would approve the transfer of not just legal title to the trust assets but also the transfer the beneficial interest in the trust assets to the 1985 Beneficiaries.

[271] However, the intention of the parties does not determine the proper interpretation of an Order of a court. As the British Columbia Court of Appeal said in ***Yu*** at para 53: "... the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made... it is the court, not the parties, that determines the meaning of its order."

[272] Furthermore, even if the parties to the litigation may have negotiated a settlement that was acceptable to them, the 1982 Trustees and the 1982 Beneficiaries were not party to the litigation or to the settlement negotiations. The 2016 Consent Order approved the transfer of trust assets from the 1982 Trust to the 1985 Trust. Thus, the interests of the 1982 Beneficiaries were at stake, yet they were not represented and did not give their consent to the transfer.

[273] In addition, while Courts encourage settlements among parties to civil litigation there are serious limitations that, in some cases, constrain negotiated settlements involving trusts. The provisions of the *Trustee Act* prevent settlements that involve the variation, resettlement or termination of a trust unless there has been compliance with s 42 of the *Act*.

[274] The factors raised by the OPTG and Catherine Twinn are all legitimate and important elements that must be considered when interpreting the 2016 Consent Order. However, these factors are not the only factors to be considered and they cannot be viewed in isolation. Instead, they must be viewed in the context of all of the background circumstances that existed prior to the granting of the 2016 Consent Order as disclosed on the record before the Court at that time.

[275] I conclude that the starting point for this analysis must be the *status quo* as it existed immediately prior to the 2016 Consent Order. That was an issue that the Court was required to consider when approving the 1985 Asset Transfer. But because this was a consent Order, the reasons for granting the Order did not specifically address this issue. However, when I examine the record that was before the Court on August 24, 2016, and for the reasons given earlier, I conclude that the 1985 Asset Transfer was void and did not have the effect of transferring any beneficial interest in the trust assets. Specifically, the 1985 Beneficiaries did not gain any beneficial interest in the trust assets as a result of the Asset Transfer Resolution. I conclude that despite the Asset Transfer Resolution, the trust assets continued to be held for the 1982 Beneficiaries.

[276] The evidence discloses that the 1985 Trustees did take physical control over the trust assets in 1985 and have managed those assets since that time and continue to do so today. There is no evidence that the trust assets have been mis-managed in any way.

[277] All of the evidence suggests that returning the trust assets to the 1982 Trustees would have significant negative consequences and could financially impair the trust assets, thus leaving much less for the beneficiaries.

[278] To accept the interpretation put forward by the OPTG it would be necessary to conclude that the Court, when signing the 2016 Consent Order intended to both:

- alter the *status quo* regarding the beneficial ownership of the trust assets and in this way extinguish the rights of the 1982 Beneficiaries, including the Bill C-31 Women, and

- expand the scope of the beneficiaries of the trust assets to include those who are not "members or future members" of SFN.

[279] These issues were never addressed in the Brief of the 1985 Trustees nor were they the subject of any submissions to the Court on August 24, 2016. It seems highly unlikely that the Court would knowingly grant an Order extinguishing the rights of the 1982 Beneficiaries, including the Bill C-31 Women without first obtaining their consent, or hearing from them directly, or appointing counsel to advocate on their behalf.

[280] Furthermore, an Order transferring beneficial interest in the trust assets to the 1985 Beneficiaries could only have been accomplished if the Court completely disregarded s 42 of the *Trustee Act*. It seems highly improbable that the Court intended to disregard this important legislative provision.

[281] The Court has an overriding obligation to ensure that the interests of the beneficiaries of a trust are not impaired unless there has been compliance with the *Trustee Act* and unless those affected have had a meaningful opportunity to be heard. This is particularly true when the rights affected belong to First Nations women who have been subject to ongoing systemic discrimination for decades, some of it legislative discrimination. It is no answer to suggest that the Procedural Order, dated August 31, 2011, provided notice of the proceedings to these individuals and that they did not seek to become parties or intervenors. Compliance with the Procedural Order was necessary but not sufficient. The 1982 Beneficiaries did not give up their rights simply because they did not come forward in response to the Procedural Order. The Court was still required to consider their rights when granting the 2016 Consent Order.

[282] I conclude that the 2016 Consent Order must be interpreted in such a way that is most consistent with the law and most consistent with the facts.

[283] I conclude that much clearer language would have been included in the 2016 Consent Order if it was the intention of the Court to transfer beneficial interest in trust assets to the 1985 Beneficiaries, and in this way exclude the 1982 Beneficiaries and at the same time to significantly expand the scope of the beneficiary class to include those who are not SFN members or future members. The Order does not clearly indicate that a change of beneficial ownership was being approved.

[284] I conclude that the intention of the Court when granting the 2016 Consent Order was to simply recognize the reality that had existed since 1985, that the trust assets were being held and administered by the 1985 Trustees. I conclude that the Order was granted for two important purposes:

1. To avoid the serious financial consequences that would arise if the trust assets were required to be returned to the 1982 Trust – as was represented in the Trustees' Brief presented to Justice Thomas:

> To unravel the assets of the 1985 Trust after 30 years would have the potential impact of destroying the trust. Assets would have to

be sold to pay the costs and to pay the taxes associated with the reversal of the transfer of assets.

2. To ensure that persons having an interest in the trust assets would "know who to deal with".

[285] For all of these reasons, the advice I give to the 1985 Trustees is that the 2016 Consent Order should be interpreted as meaning that it approved transfer of legal title in the trust assets to the 1985 Trustees but that it did not approve transfer of the beneficial interest in the trust assets to the 1985 Beneficiaries.

[286] The assets were only notionally transferred in 1985. At the time, the 1982 Trustees were exactly the same persons as the 1985 Trustees. Thus, no tracing issues arise. The assets continued to be held in trust for the 1982 Beneficiaries by the very persons who held the assets previously: see ***Wood's Homes Society v Selock***, 2021 ABCA 431 at para 21. Over the years, successor trustees have assumed control over the assets but they took legal title to the assets on the same terms as their predecessors. Therefore, the advice I give to the 1985 Trustees is that the beneficial interest in the trust assets has not changed since 1982 and remains with the 1982 Beneficiaries on terms described in the 1982 Trust Deed. This is however subject to the further direction given by Justice Thomas that the scope of the beneficiary class is yet to be finally determined and could potentially be expanded as a result of future applications specifically in relation to the need to modify the definition of Beneficiary so as to eliminate discrimination and also to determine whether "grandfathering" is possible. In addition, although not specified by Justice Thomas, there remains the possibility that the transfer of the beneficial interest in the trust assets to the 1985 Beneficiaries in whole or in part may be accomplished by a variation application made pursuant to s 42 of the *Trustee Act*.

[287] Of course, the 1985 Trustees also hold the remaining 1985 Trust assets for the 1985 Beneficiaries. Precisely what those assets are and whether they include the Debenture and if so whether the Debenture has any value, is unclear on the evidence before me. In any event, the 1982 Beneficiaries have an interest in only the 1982 Trust assets and do not have any interest in other assets that may have been placed in the 1985 Trust.

[288] The 1985 Trustees have also sought advice and direction to permit the 1982 Trust to be merged with the 1986 Trust. I conclude it is premature to provide any advice or direction on this point until after other issues are properly decided, as discussed in the following section of these reasons.

VIII. Steps Going Forward

[289] In order to finalize the issues in relation to the trust assets and, as Justice Thomas described, to finally determine "who the beneficiaries are", a number of steps may be required. However, the starting point for any further applications is that the trust assets are held for the 1982 Beneficiaries. This beneficiary class will only be modified if one or more applications permit a change to the class. The steps that may be required include:

a. A potential application by the 1985 Beneficiaries, or one or more of them, including those persons represented by the OPTG to seek approval for the transfer of beneficial ownership of the trust assets, in whole or in part, from the 1982 Beneficiaries to the 1985 Beneficiaries.

b. A potential application to vary the definition of the term "beneficiaries" in the 1982 Trust, or the 1985 Trust, as may be applicable, to eliminate discrimination;

c. A potential application to achieve what counsel for the 1985 Trustees describes as "grandfathering";

d. A potential application to merge the 1982 Trust, or the 1985 Trust, as the case may be, with the 1986 Trust; and,

e. Approval of a Distribution Plan in relation to the trust assets.

[290] One or more of these applications will require compliance with s 42 of the *Trustee Act*;

[291] A litigation plan should be developed to proceed with those steps that the parties seek to advance.

Heard on the 27th and 28th days of September, 2021
Dated at the City of Edmonton, Alberta this 4th day of February, 2022.

John T. Henderson
J.C.Q.B.A.

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