

Action No.: 1103-14112
E-File Name: EVQ22SAWRIDGEBAND
Appeal No.: 2203-0043AC

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



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

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

PROCEEDINGS

Edmonton, Alberta

September 27, 2021
September 28, 2021

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

2
3 September 27, 2021

Morning Session

4
5 The Honourable

Court of Queen's Bench of Alberta

6 Justice Henderson (remote appearance)

7
8 D.C. Bonora, QC (remote appearance)

For Sawridge Trustees

9 M.S. Sestito (remote appearance)

For Sawridge Trustees

10 R.M. Johnson (remote appearance)

For Sawridge Trustees

11 P.J. Faulds, QC (remote appearance)

For Office of the Public Guardian and Trustee

12 J.L. Hutchison (remote appearance)

For Office of the Public Guardian and Trustee

13 C. Osualdini (remote appearance)

For C. Twinn (remote appearance)

14 (No Counsel)

For S. Twinn (remote appearance)

15 E.H. Molstad, QC (remote appearance)

For Sawridge First Nation

16 E. Sopko (remote appearance)

For Sawridge First Nation

17 M. O'Sullivan

Court Clerk

18
19
20 THE COURT:
21 counsel present.

Okay. Thank you very much. We have all of the

22
23 MS. BONORA:

I believe we do, Sir.

24
25 THE COURT:

Everyone is present.

26
27 MS. BONORA:

Yes, Sir. Doris Bonora speaking --

28
29 THE COURT:

Okay.

30
31 MS. BONORA:

-- from Dentons, representing the Sawridge

32 Trustees. Perhaps I can just do a short rollcall for you --

33
34 THE COURT:

Sure.

35
36 MS. BONORA:

-- if that would be helpful.

37
38 THE COURT:

Thank you very much.

39
40 MS. BONORA:

So we have for the Sawridge Trustees, Doris

41 Bonora, Michael Sestito, and we will be speaking today. We also have Rhonda Johnson

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

5
6 THE COURT: Okay. Excellent. So just before we get
7 underway, because there are quite a number of people on this call, I find that it goes much
8 more smoothly and there is likely to be disruption if everyone mutes, apart from the
9 speaker, obviously. And so, I would ask that everyone mute their microphone before they
10 begin to -- before it is their turn to speak and, of course, access the -- the system again once
11 you are ready to speak. So hopefully we will be able to get through these submissions
12 without any technical glitches.

13
14 And so, with that, Ms. Bonora, over to you. I did get your schedule yesterday and I take it
15 that that has been the subject of consultation with -- with other counsel; is that right?

16
17 MS. BONORA: Yes, Sir, and everyone has approved. So our plan
18 today is to try and limit our submissions to 45 minutes each so that the order of speakers
19 today would get through all of their initial submissions, and tomorrow everyone would do
20 a reply. And so, tomorrow we'll essentially reverse the order --

21
22 THE COURT: Yeah.

23
24 MS. BONORA: -- of speakers so that Mr. Molstad and Ms. Sopko
25 will start first with the replies and the trustees will end and finish the application --

26
27 THE COURT: Thank you.

28
29 MS. BONORA: -- tomorrow.

30
31 THE COURT: Thank you and I --

32
33 MS. BONORA: And, Sir --

34
35 THE COURT: I should also say that I have read each of the
36 briefs that have been filed and thank you very much for those. They were extensive and
37 very (INDISCERNIBLE) so thank you for that.

38
39 MS. BONORA: Thank you. Sir, I thought we would also tell you
40 that we will order the transcript of the two days today and we will provide it to all of the
41 parties and intervenors, post it to the website, and provide the Court with a copy, if that's

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

3
4 THE COURT: That would be extremely helpful. Thank you
5 very much for that.

6
7 **Submissions by Ms. Bonora**

8
9 MS. BONORA: So, Sir, then I will begin with our submissions.
10 Our submissions are going to be split with me and Mr. Sestito this morning.

11
12 Sir, just by way of then a background, we are here today to talk about the asset transfer
13 order that was granted in 2016. In terms of bringing us with a little bit of history, we know
14 that before 1982, the Sawridge First Nation held assets in trust for its members by having
15 individuals hold assets because there was a concern that the First Nation couldn't own
16 assets and in 1982, those assets were transferred into a formal trust and, of course, we'll
17 refer to that trust as the 1982 trust today, and that trust was set up for the members of the
18 First Nation.

19
20 In 1985, on April 15th, a new trust was created for the members of -- in the trust deeds read
21 to a member of -- of the band, although we'll call them the First Nation, and that definition
22 of members was tied to the *Indian Act* as it existed in 1982, and the assets were transferred
23 from the 1982 trust to the 1985 trust and I think everyone will be referring to that trust as
24 the 1985 trust. We know in trust law, the 1982 beneficiaries would have had beneficial
25 ownership of those assets and those assets then were transferred into the 1985 trust, and we
26 will discuss today whether there was a same group or a different group of beneficiaries.

27
28 In addition, there was a 1986 trust created in --

29
30 MR. CARDINAL: Cathy?

31
32 MS. BONORA: -- 1986 for --

33
34 MR. CARDINAL: Cathy?

35
36 MS. BONORA: -- the members. Mr. Cardinal, I wonder if you
37 could turn on your mute button.

38
39 MR. CARDINAL: Okay.

40
41 MS. BONORA: So in 1986, there was another trust created into

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

9
10 This action was commenced for two reasons. The primary reason was to seek advice and
11 direction on the definition of the 1985 trust definition of beneficiaries, knowing that it is
12 discriminatory and asking the Court whether it was possible to leave that definition alone
13 or to amend that definition. In addition, we notice that the transfer of the assets from 1982
14 to 1985 was not done in a conventional way and we certainly did not want to get through
15 all this litigation only to have someone say that the transfer wasn't proper. And so we added
16 that as an element which was -- was asking the Court to approve the transfer from 1982 to
17 1985, two quite distinct issues and in 2016, the order was made that says there was a
18 transfer from 1982 to 1985.

19
20 So the assets moved, and I think in your questions to us you said that the assets did move
21 but the question you posed to us, a strict legal question, which we're hoping to answer
22 today, was Was there -- what -- on what terms did that transfer occur. Did the 1982 terms
23 in fact travel with those assets and that is the question that we are going to provide you
24 with, hopefully, some legal foundation to answer. I'm going to deal with more of the legal
25 foundation. Mr. Sestito will concentrate on some of the solutions and legal foundation for
26 those solutions.

27
28 The -- I think if we look at all three of the actual trust deeds, there is certainly a common
29 tie around the fact that they all appear to be for the benefit of members. Certainly pre-1982,
30 1982, and 1986, I think there is a common tie, a clear definition that those are for the
31 members, as we would say, that are on the membership list. It's only in 1985 where we
32 have a definition that says its members but in fact is not really the members that are on the
33 membership list.

34
35 Much has been said about fiduciary duties and we're going to submit today that we believe
36 the primary fiduciary duty for the Sawridge trustees is to advocate for a solution so that we
37 can, in fact, use this trust fund for the beneficiaries. And so, for sure there are many
38 conflicting fiduciary duties for beneficiaries, for asset protection, trust administration. The
39 -- certainly, the 1982 trustees had fiduciary duties to its beneficiaries to preserve those
40 assets and to follow the trust deed and one could argue that in transferring the assets to
41 another group of beneficiaries by a different definition did not fulfill its fiduciary duties. It

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

9
10 There are a group of what we'll call overlapping beneficiaries. So there are beneficiaries
11 that are both beneficiaries in 1982 and beneficiaries in 1985 by both definitions and it is
12 perhaps those group of beneficiaries that are the beneficiaries of 1980 -- the 1982 or 1985
13 trust and Mr. Sestito will follow that a bit further.

14
15 We know that the 1985 trust is discriminatory. There is an actual court order in this
16 litigation that says it's discriminatory. In tab 5 of the OPGT's brief in November of 2019,
17 they put in an article around the legislation history of bill C-31, which I think is very helpful
18 in showing that there was longstanding attempts and finally success in the ridding the
19 *Indian Act* of discrimination against women and -- and trying to deal with not
20 discriminating against illegitimate children. And so, the purpose -- a big purpose of this
21 litigation was to see if we could also rid the 1985 trust of that discrimination and not keep
22 the '85 trust as it was.

23
24 A great deal of the briefs around -- from the OPGT and from Catherine Twinn involve
25 interpretation of the asset transfer order and it is our submission that there is no reason to
26 interpret that order beyond what it says. And, Sir, if you -- we had provided you just a small
27 binder of materials we want to refer to and the first is under tab 1 is that asset transfer order
28 and the asset transfer order is also found at tab I of the OPGT brief on November 15th,
29 2019. When we look at -- and in addition, there's also -- sorry. The -- the order and -- the
30 order is in our first binder and also in the brief and then the application is also at tab I of
31 the OPGT brief in November 15, 2019. And I think those two documents are very telling
32 in terms of the idea that we were putting together an order that had anything to do with
33 beneficiaries.

34
35 If we look at the asset transfer order, it's very clear that it deals only with the transfer of
36 assets and the only time beneficiary is mentioned is in paragraph 2, where it talks about the
37 fact that this order can't be relied on to prevent a beneficiary from seeking an accounting,
38 but no other time is beneficiary mentioned. So clearly, I think, on the face of the order there
39 was no intention to say that the transfer was for the benefit of the beneficiaries as has been
40 suggested. In the application as well -- so one of the things that we would look at in -- in
41 interpreting an order is the pleadings. The application does not make mention of anything

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

2
3 At tab J of the OPGT brief, they put in the transcript from the hearing and Justice Thomas
4 clearly says on page 9 at line 12: (as read)

5
6 The one outstanding issue is the scope of the beneficiary group.

7
8 And so then it's clear that the asset transfer order was, as you clearly said, the assets moved
9 from here to there and there is nothing more to that interpretation. That the definition of
10 beneficiary, the determination of whether the beneficiary definition will change in 1985
11 was still very much an open question. And if we look at the cases that have been cited and
12 particularly the *Simonelli* case, which is at tab 1 of the OPGT's brief of November 27th,
13 2021 (sic), it does say that the first rule is that an order must be interpreted to give effect
14 to the intention of the parties.

15
16 Well, it was certainly our intention only to deal with the very distinct issue that the assets
17 are being dealt with in the 1985 trust and that there was no mention of the beneficiaries and
18 we weren't determining who the beneficiaries were at that time. And, in fact, as you know,
19 you came into this litigation when we were about to deal with the jurisdiction application,
20 which was very much about determining those beneficiaries. So if we look at the totality
21 of the application on the transfer, there is no mention of beneficiaries in the order or in the
22 application. The Court specifically reserved that issue, the applicant specifically reserved
23 that issue and, therefore, it's not possible that it was solved.

24
25 I think it's important to also focus - and you asked us to focus - on what happened in 1985.
26 So in 1985, when the assets actually transferred to the 1985 trust, we know that on the day
27 that they transferred on April 15th, the beneficiary group was the same. While the parties
28 in this litigation don't agree on many things, they do agree on that. That problem is that
29 the beneficiary group changed on April 17th, 1985. And so, it is our submission that
30 *Pilkington* does apply.

31
32 The *Pilkington* case was used, as you know, to -- to say that the asset transfer was
33 legitimate, but *Pilkington* probably only continues to work if the -- if the beneficiary group
34 stays the same. There is nothing in *Pilkington* that says as long as it's the same on the day
35 that you transfer, it's okay to change the beneficiaries later. I think *Pilkington* stands for
36 the proposition that the beneficiaries need to stay the same, and certainly if you look at the
37 *Hunter* case, which looks at *Pilkington*, it also says that the -- the terms of the new trust
38 must be beneficial to the beneficiaries of the old trust and looks at -- and Mr. Sestito will
39 deal with this further but, is the benefitting -- the question will be is benefitting non-
40 members alien to the intention of the 1982 trust or adding many people who are not
41 members or not beneficiaries of the 1982 trust and -- and specifically excluding some who

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

5
6 In any trust, intention is important and certainly when we look at who this trust was created
7 for, the settler in this case was not some individual. It wasn't his money. It was money or
8 assets that belonged to a community and it was not his personal intention but, in fact, a
9 community's intention to create a trust. He was the chief of that community and he put the
10 community's assets in that trust. So I think it is important that it wasn't his ability to give
11 those assets away to those people who were not members of that nation.

12
13 The -- many of the briefs talk about the fact that it perhaps was beneficial to the 1982
14 beneficiaries to not have the dilution that would have been caused by the bill C-31 women.
15 Those 11 women that ultimately were the subject of the Hugessen decision, but then it's
16 difficult to reconcile that with the idea that perhaps today we're going to add 50 people of
17 76 people or, as Catherine Twinn suggests, perhaps 454 people. You can't say that it's
18 beneficial to avoid dilution for 11 people but then it would be acceptable to dilute for so
19 many others, but I think that it also shows that there wasn't a culture of inclusivity.
20 Catherine Twinn talks about the fact that the 1985 trust was created to allow a great number
21 of people to benefit because they had kinship ties to the Sawridge First Nation. Well, by
22 definition then *Pilkington* would not apply because that could not be the same group of
23 beneficiaries. So I think that it would be difficult to say that you could rely on *Pilkington*
24 but then suggest that you would have a group of people that didn't need to be members,
25 they only needed kinship ties.

26
27 But I think if we look at the whole history of the Sawridge First Nation and the history of
28 these trusts and what was happening, there's actually a culture of exclusivity and the OPGT,
29 I think, did a very good job of putting together the actions that were taking place, which is
30 in their brief in November 2019, in paragraphs 18 to 20, and I'll just go through them. So
31 we first had a trust that was established in 1985 to exclude the bill C-31 women, and I think
32 that was clear that that was part of the purpose. But then they commenced constitutional
33 challenge to bill C-31 to oppose imposition of members on their nation and, certainly, the
34 female members who would be included in bill C-31.

35
36 Another example of exclusivity is they established their own membership code so that the
37 government would not be controlling their membership and they would control who was a
38 member of their nation. They very strenuously oppose the injunction brought by the
39 government to include the bill C-31 women and in the Hugessen decision, Mr. Justice
40 Hugessen makes reference to the fact that Catherine Twinn argued very eloquently about
41 the exclusion of those women, but ultimately the injunction was granted to include them.

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

4
5 When we look at, again, you know, whether these assets should have been used for
6 members, the OPGT in their brief in November of 2019, and at tab L, and also at tab 8 of
7 our small binder that we provided, the letters from the Crown all ask whether the assets in
8 these trusts are assets being used for the members, and that definition would be that
9 objective definition. It would be not be the definition used in the 1985 trust. So clearly
10 those assets are to be used for that. Chief Twinn, in 1993, testified that he was concerned
11 about the reinstatement of a large group of people, again, showing his concern for keeping
12 the First Nation member group small. And said also that he would transfer to 1986, which
13 again only works if it's the same group of people, and that transcript is found at the OPGT
14 brief in 2000 -- in November of 2019, at tab N.

15
16 Sir, I'm not going to take you to these. I think if you would like to look at them -- that's
17 why I'm putting the reference on the record, but I think it's just easy to show you that that's
18 where they are.

19
20 Moving on to the whole issue of a class gift. We believe that it's very obvious that if you
21 look at any of the trusts, the group of beneficiaries is a class. It is not a group of individuals
22 that are receiving these trusts and when you look at the definition of a class gift, it's a gift
23 to a number of individuals united by a common tie, and but always when you're looking at
24 the beneficiaries, then you're looking at the whole body of beneficiaries. And so the class
25 here would be members, and we would suggest that perhaps you can make the conclusion
26 that the members are by that objective definition and not by the definition in 1985. It is
27 clear who those people are and clearly when you're looking at the three certainties of trust,
28 you should be able to determine who your beneficiaries are and if you say it is the members,
29 the objective definition of members, the members who are on the membership list, then
30 you know that -- who those members are and it is very clear. It's when we refer to the 1985
31 definition, which takes us back into antiquated legislation that is now defunct, that it
32 becomes more difficult.

33
34 Sir, in the *Bruderheim* case that you decided, you talked about this concept of a static entity
35 and we would suggest that that case is very applicable here. That the members may come
36 and go but the ownership of assets stays static from the individuals and in this case we
37 would say that static entity is the members of the First Nation. That they had the beneficial
38 ownership before 1982, they had beneficial ownership in 1982, and when it transferred to
39 1985, they retained that beneficial ownership. If you could look at the *Bruderheim* case, I
40 would like to take you to one of the quotes in *Bruderheim* and it is at tab 3 of the trustee's
41 brief, the November 20th, 2019, but it is also tab 6 in our small binder if that's easier for

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

4
5 Certainty of objects requires that the persons or the class of
6 persons who are the intended beneficiaries must be sufficiently
7 certain so that the trust can be performed. Certainty of objects is
8 required because the trustee cannot be sure that he is performing
9 properly unless the objects are clearly specified.

10
11 And then you refer in paragraph 76 to the concept of the static entity where you say:

12
13 Canon 14 enacted by the Synod provided that legal title to all real
14 property held by any parish within the diocese must be registered
15 in the name of the Synod, which held such property "in trust for
16 the benefit of the Parish or congregation". The trial judge held that
17 the "Parish" for which the property was held in trust is a static
18 entity.

19
20 And we're suggesting that that applies in this case.

21
22 And specifically then, if we look at paragraph 131 of that decision, I think it's very
23 applicable here where we say -- where you say:

24
25 The Applicants argue that even though their members may no
26 longer be members of the Moravian Church, they are nevertheless
27 "of Moravian Heritage". They argue that this should satisfy the
28 Moravian requirement in the trust declaration. This argument
29 entirely ignores the plain wording of the trust declaration and the
30 institutional context. The declaration requires that the property be
31 held in trust for the congregation of the Moravian Church. Having
32 Moravian heritage does not make a person a member of the
33 congregation of the Moravian Church. A past membership in the
34 Moravian Church is insufficient to permit a beneficial interest in
35 the trust. All beneficiaries must be current members of the
36 Moravian Church.

37
38 And I would suggest to you that that's exactly what you could apply specifically here. That
39 the beneficiaries must be members of the First Nation. That just being of Moravian heritage
40 or just being of a heritage of the Sawridge First Nation or having kinship ties, as has been
41 suggested, would not be sufficient as the trust and the trust assets have always been either

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

3
4 The -- and so, we would suggest that if you look at the class gift as being for the members
5 in 1982, that those beneficiaries held those assets. The trustees held the legal title and
6 transferred the legal title to 1985, but there is no suggestion about why or how the beneficial
7 ownership transferred to a whole new group of people who were not members of the First
8 Nation, and we believe that the trustees are fulfilling their fiduciary duties by protecting
9 the members of the class.

10
11 The origin of the assets, which I know Mr. Molstad will talk about, but I'll just say briefly
12 I don't think it's disputed that the assets all came from the Sawridge First Nation resources
13 and, therefore, belong to the members of the First Nation and so, therefore, how should
14 these assets be used. Perhaps I think the answer would be that they should be used for the
15 members just like the assets that came for the Moravian church should be used for people
16 who are members of that Moravian church. It is difficult to understand how then those
17 assets could be used for non-members because we know that the 1985 trust would, in fact,
18 allow non-members to be beneficiaries.

19
20 And, Sir, we I think have been clear that, you know, ultimately there may be a
21 grandfathering application and those non-members may be dealt with, but I think if we
22 look at the trust and the question you asked us, it is difficult to see how those could be
23 transferred to non-members. And it's possible that it -- it could be argued that the trustees
24 of the 1982 trust did breach their fiduciary duties in giving those assets to people who were
25 not members or not beneficiaries of the 1982 trust.

26
27 If we look at the whole concept of a constructive trust, you know that there are three
28 elements for a constructive trust. There must be an enrichment, a corresponding
29 deprivation, and no juristic reason for that deprivation or enrichment, and the classic
30 argument is where you have a farmer and perhaps his son or his wife who contribute greatly
31 to the farm. They clearly have enriched the farm and ultimately though they are not owners,
32 and the Court then imposes a constructive trust so there is not the enrichment with the
33 corresponding deprivation because no one would work on that farm to get nothing, and we
34 would say here that the 1985 beneficiaries are being perhaps unjustly enriched at the
35 expense of the 1982 beneficiaries who had beneficial ownership, and there is certainly a
36 corresponding deprivation for the 1982 beneficiaries and seemingly no juristic reason for
37 transferring that beneficial ownership to a group of beneficiaries who are not members in
38 the objective definition.

39
40 It seems that the respondents have placed a great deal of weight on the actual document
41 that is the 1985 trust, and they have the right to do that. It is a trust deed and it was drafted

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

8
9 So you can say that the 1985 trust is a document, be all end all, you don't need to look
10 further, but if you look at a land title document in the concept of a resulting trust, you might
11 have a parent and child registered on that title and if you just said we're looking at the
12 document and nothing more, when the parent dies the child gets that title if they are joint
13 owners on that title, but the resulting trust would say did the child provide any consideration
14 to receive that title, was he actually just holding that title for the benefit of the beneficiaries
15 of the estate of that parent, and that is the essence of a resulting trust. And so the question
16 you would give is what consideration did the 1985 beneficiaries give to become
17 beneficiaries of 1985? They are not -- if they are not members of the nation, they were not
18 part of that community and what consideration did the 1982 beneficiaries receive for giving
19 up their beneficial ownership? And so, we would suggest that there is a good argument to
20 be made that if there is no consideration given, if there's no intention for the -- for the 1982
21 beneficiaries to give up their beneficial title, then there is perhaps a resulting trust for the
22 1985 beneficiaries to hold it in trust for what are the 1982 beneficiaries.

23
24 There has been much said about trying to identify the beneficiaries and I've already quoted
25 you the *Bruderheim* decision that talks about the need to identify beneficiaries, but that is
26 very trite law in trusts. Clearly, there is a duty to identify beneficiaries. The respondents
27 have told you that it's very easy to do. That you just apply the Act and the Act has been
28 applied by the government for years and that isn't a problem, but in fact we have a number
29 of examples where it obviously has been problematic. So there's a reference to the *Michelle*
30 *Ward* decision in Catherine Twinn's materials where it wasn't clear and a court had to
31 decide that she was a member of the nation. We have Morris Stoney and the 13 applications
32 that he brought to become a member of the nation and then further applications in this
33 litigation to become a beneficiary, all of which were unsuccessful but it didn't prevent the
34 litigation from happening.

35
36 We have the issue around Justin Twinn, which we've provided the materials in our smaller
37 binder, but I will just say he was someone who was on the membership list in 1985, when
38 membership was transferred to the First Nation. He had been a councillor of the First
39 Nation. When he was proposed as a trustee, Catherine Twinn opposed his appointment
40 because she said he was not a beneficiary, and there were two competing expert opinions
41 given on whether he was a beneficiary. So it may be that there are times when it's not hard

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

4
5 In November -- in our brief in November 30th, 2020, we provided you with a number of
6 lists of beneficiaries and I don't propose to go through them, but they're at tab 2 and 4 and
7 6, and they show you the trustees' version of how are the beneficiaries of 1985, where
8 there's intersection in terms of whether they were beneficiaries and members, and then
9 colour-coded with issues in terms could these people be protested because they were
10 illegitimate. Will these people lose their status -- will these women lose their status if they
11 marry someone who is not First Nation or not a member of the First Nation. And so, you
12 can see that there's many, many places where litigation could ensue in terms of trying to
13 deal with the 1985 trust definition of beneficiary and trying to apply an act that is now
14 defunct and unconstitutional.

15
16 It is true that when we -- and I think -- sorry, in the third brief that Shelby Twinn filed, she
17 also shows difficulties on pages 11 and 12 and paragraphs 28 and 31 in terms of identifying
18 members of the First Nation. I think it is important as well that the public trustee has talked
19 about the number of minors who might be impacted if in fact the 1982 definition is, in fact,
20 upheld as the definition that should govern the 1985 trust or that the 1982 beneficiaries are
21 holding it -- or the 1985 trust beneficiaries are holding it for the 1982 beneficiaries, but I
22 think it's important and our lists show that there are in fact children who would also be left
23 out if in fact the 1985 trust beneficiaries was upheld as the beneficiary definition to follow.

24
25 I just want to conclude with the concept around final relief and then I'll turn it over to Mr.
26 Sestito. This is an advice and direction application where we're asking a legal question and
27 I think in the cases cited in respect of this issue, it's clear that a legal question can be
28 answered by the Court in an advice and direction application. The Court shouldn't answer
29 trustees when they ask discretionary questions, but they should answer legal questions.
30 From the start of this litigation we were seeking advice on what was the proper definition
31 and certainly it was always clear that rights of beneficiaries might be impacted.

32
33 So there have been many threats of more and more litigation that I think the Sawridge First
34 Nation put forward the case of *Hryniak v Mauldin* from the Supreme Court of Canada that
35 says trials are no longer the default procedure and that more procedures should be used that
36 are proportional, timely, and affordable and, certainly, too much money has been spent on
37 this litigation and from the trust for lawyers as opposed to providing it to the beneficiaries.
38 So we're asking for the Court to answer this legal question that was really posed by the
39 Court and now we are asking for this answer where the members are the class or the static
40 entity in that objective definition of members, that the 1985 trust assets are imposed with
41 the 1982 definition of beneficiaries.

1
2 And now I'll turn it over to Mr. Sestito to provide more of the legal foundation for the
3 solution, unless you have any questions for me.
4

5 **Submissions by Mr. Sestito**
6

7 MR. SESTITO: Thank you, Ms. Bonora, for that. Am I on mute?
8 It's not --
9

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

15 So, Sir, really our December 2020 submission can be divided into two sections. First, the
16 trustees propose a modified framework for reviewing the key issues in the -- as we've been
17 calling it, this asset transfer order or ATO application, and that, which is the submissions I
18 will focus on, they're -- they're found at paragraphs 5 to 33 of that December 2020 brief.
19

20 The second portion of that brief, Sir, which I will make very brief reference to, are
21 individual responses to various positions raised by some of the parties. And those are set
22 out at paragraphs 34 to 76 of that brief. And, Sir, I simply want to, for that second section,
23 is highlight a few very important counter points that the trustees have raised that I think are
24 important for you when you're making your decision in this application. The first is with
25 respect to jurisdiction and that can be found at paragraphs 34 to 38 of -- of the December
26 2020 brief. The second, Sir, is with respect to the sufficiency of the record, and that we set
27 out at paragraphs 39 to 49 of that brief. And then finally, Sir, with respect to this debenture
28 that has been the subject of much discussion, we discuss that at paragraphs 56 to 61 of our
29 brief.
30

31 And, Sir, absent any burning questions that you may have, I don't propose to go into any
32 more detail other than to say, Sir, that it is the position of the Sawridge trustees that you
33 are well situated and well positioned to answer the issues raised in the ATO application.
34 You have the jurisdiction. The record is of sufficient detail to assist you and there are no
35 outstanding items that require further briefing. We believe that you will have the material
36 before you to make the decision on the application.
37

38 So, Sir, unless there's any questions on those specific points, I'm going to turn to the
39 modified framework that's proposed by the trustees. That's set out in section A of that
40 December brief.
41

1 So the trustees, Sir, have proposed three fundamental questions that we believe will assist
2 you in determining the issues that are at the heart of this matter. The first question that we
3 pose is under what authority did the 1982 trustees transfer the assets, and was the effect of
4 such transfer alien or incidental to the intention of the settler in 1982? The second question,
5 Sir, that we posed is can or should the '85 trustees adopt the terms of the '82 trust in respect
6 of the beneficiary definition into the '85 trust? And then, thirdly, Sir, the question we
7 propose is did the transfer occur so that the '85 trustees could hold the '82 assets for the
8 overlapping group of '82 beneficiaries and '85 beneficiaries?
9

10 And by way of summary, Sir, we submit that the first question, the answer to the first
11 question or the discussion around the first question identifies the key issue with simply
12 interpreting the assets as being governed solely by the four corners of the 1985 trustees.
13 The second question, the discussion around that, will pose a potential solution to the
14 problem, and the third question proposes an alternative solution that the Court may wish to
15 investigate.
16

17 So, Sir, with respect to the first question, the '82 trustees, and we'll go through the deed,
18 Sir, but they were given a wide and discretionary power of advancement, which in law may
19 include the power to resettle the trust property to another trust as long as it was for the
20 benefit of the '82 beneficiaries. The scope of that power is necessarily limited by the '82
21 trustees overarching fiduciary obligations to act in the best interests of all members, present
22 and future, of the band. Now, Sir, the Court has acknowledged that the trustee has the
23 power to transfer assets to a new trust, which may have different wording than the original
24 trust, but the Court must review the new trust to determine whether or not the new trust is
25 alien to the intention of the original testator or would be beyond the scope of power of
26 those original trustees. And, Sir, I'm not going to take you there, but the test is set out at
27 *Hunter Estate v Holton*, which is at tab 1 of that December 2020 brief.
28

29 So, Sir, it is the position of some of the parties that the '85 trustees need only abide by the
30 terms of the '85 trust deed with respect to the assets in question. Now, this argument would
31 by necessity require that the '85 terms as a whole were not alien to the intention of the '82
32 settler or beyond the power of the '82 trustees. So to evaluate the reasonableness of that
33 argument, we need to look very closely at the text of the '82 trust, which it's found, Sir,
34 helpfully at tab 2 of the December 2020 brief. It's also tab 2 of the binder that we've
35 provided for ease of reference. So in either case, helpfully, it's at tab 2, and if -- if we can
36 go there together, Sir, I'd like to start with the first page of tab 2 on the declaration of trust
37 in the preamble, where we see it says: (as read)
38

39 Whereas the settler is chief of the Sawridge Indian Band No. 19,
40 and in that capacity has taken title to certain properties on trust for
41 the present and future members of the Sawridge Indian Band No.

1 19.

2
3 And, Sir, that's why you'll hear me repeat many times to paraphrase the present and future
4 members of the band.

5
6 So if we go, Sir, to page 2 of tab 2, we see again our reference in the first paragraph where
7 it is likely that further assets will be acquired on trust for the present and future members
8 of the band. Again, the same terminology used, Sir. If we go down, Sir, into the text of the
9 deed itself and we look at item 3, Sir. Item 3 reads: (as read)

10
11 The trustees shall hold the trust fund in trust and shall deal with it
12 in accordance with the terms and conditions of this agreement. No
13 part of the trust fund shall be used for or diverted to purposes other
14 than purposes set out herein.

15
16 Now, if you move on, Sir, to the beginning of item 6, which over the page on page 3, we
17 see again item 6 begins with that very key statement that: (as read)

18
19 The trustees shall hold the trust fund for the benefit of all members,
20 present and future of the Band.

21
22 Again, using the same terminology that you'll hear many times from me, Sir.

23
24 At this point, Sir, I pause to point out, and as Ms. Bonora alluded to earlier today, that it's
25 pretty clear from the terms in the text of the '82 deed that the beneficiaries here are a class
26 and not necessarily individuals, and that we're dealing with a situation of a class gift.

27
28 So, Sir, if we move on then to page 4 of that same document, and I won't read the entire
29 paragraph to you. I see that, at least in my version of the binder, the highlighting didn't
30 show up but I'll simply direct you, Sir, if you're in the brief, in any event, page 4, the first
31 full paragraph there. This is where we outline the discretion of the Sawridge trustees from
32 the 1982 trust, and I just want to read a part of that, Sir, to -- to emphasize it: (as read)

33
34 The trustees shall have complete and unfettered discretion to pay
35 or apply all or so much of the net income of the trust fund, if any,
36 or to accumulate the same or any portion thereof and all or so much
37 of the capital of the trust fund as they, in their unfettered discretion
38 from time to time deem appropriate, for the beneficiaries set out
39 above.

40
41 So, again, Sir, in -- in reviewing the 1982 deed where this story begins, I just wanted to

1 draw those very important excerpts to your attention.

2
3 Now, Sir, with the terms of the '82 deed in mind, we now move to the question of whether
4 or not the '85 trust is alien to the '82 settler's intention or outside of the power of the '82
5 trustees. The '85 deed clearly departs from the written text of the '82 trust in multiple
6 respects but the clearest and most significant that is at the heart of this matter is the
7 definition of beneficiary. The '82 trust describes clearly the actions of the trustees and the
8 requirements that those actions be taken in the best interests of the members, future and
9 present, of the band. The '85 deed is much different in this regard, going beyond simply
10 the members of the band, and as we know today, not including all of the members of the
11 band.

12
13 So, Sir, if the trustees' numbers are accepted, and Ms. Bonora has alluded to previous briefs
14 in which we set out the -- the different numbers of -- of beneficiaries, those who are
15 overlapping, those who are part of the First Nation, those who apply under '85, but if we
16 just for the moment accept the trustees' numbers - and there is some controversy behind
17 these numbers - but if we accept our numbers, then approximately half of the '85
18 beneficiaries will be non-members of the band and they would not qualify as beneficiaries
19 under the '82 definition of the band. None -- or sorry, note, Sir, that this number maybe
20 even higher if we accept some of the other numbers that have been suggested by other
21 parties and as Ms. Bonora alluded to earlier.

22
23 So it is this context, Sir -- from this context, that the Court must determine if this is a
24 departure if -- or sorry, if this departure is indeed alien from the written intention of the '82
25 settler, and that's why, Sir, I focus so much on the text of the '82 deed, because it is from
26 that that you must analyze what that intention was and whether the '85 deed is alien to that
27 intention, and you must also determine, Sir, if granting the benefit for all of these new
28 beneficiaries is merely incidental to the benefit conferred by the '82 trustees and within the
29 power, Sir, of the '82 trustees. So, Sir, to accept that the '82 assets are governed solely by
30 the '85 trust would be difficult as there would be insufficient deference, Sir, to the fiduciary
31 duties attached to the '82 assets and which must have been imposed by the '85 trustees
32 when they accepted those assets.

33
34 So, Sir, from this we turn to the second question and I know there are many people who
35 want to speak today so I'll be brief. Sir, the second question, again, is whether the '85
36 trustees can or indeed must adopt the terms of the '82 trust with respect to the definition of
37 beneficiary when dealing with the '82 assets. Now, in general terms, the transfer ought to
38 be viewed as an exercise of fiduciary power, and I pause here, Sir, to note the nature of the
39 assets themselves. The '82 assets -- it's trite but it -- it bears -- it bears repeating. The '82
40 assets were not owned by the '82 trustees. The beneficial owners were the '82 beneficiaries,
41 and as we've discussed, it is clear that those beneficiaries were the present and future

1 members of the band.
2

3 So the Court must examine how the '82 trustees exercised their fiduciary power in this
4 context, keeping front and centre who the beneficial owners were. In general terms, the '82
5 trustees' exercise of their power of advancement could be viewed similar to the concept of
6 imposing a resulting or constructive trust on the '85 trustees in this context. The '82 trustees
7 would give legal title of the '85 -- sorry, of the '82 assets to the '85 trustees to hold for the
8 same beneficial owners as the '82 trust, being all members, present and future, of the band.
9 The '85 trustees would receive that property on those conditions and only on those
10 conditions, because the '82 trustees had no ability to transfer the beneficial ownership to
11 anyone else. The Court may find that therefore any other person who is not a beneficiary
12 of the '82 trust could be unjustly enriched, as Ms. Bonora pointed out, for no juristic reason
13 and that there is a corresponding deprivation to those beneficiaries left behind. So the '85
14 trustees may, in essence, be holding the assets in a resulting trust for the '82 beneficiaries
15 or alternatively a constructive trust.
16

17 So, Sir, finally, and I'll -- I'll again be brief, the third question which -- which the trustees
18 posed, did the transfer occur so that the '85 trustees could hold the '82 assets for the
19 overlapping group of beneficiaries, who would qualify under '82 and '85 and also
20 incidentally, '86. So this question, the discussion around it may pose an alternative solution.
21 The '85 trustees may be in a position to reconcile the terms of the '85 deed and the '82 deed,
22 where they overlap. Therefore, it's possible that the Court could find that the fiduciary
23 nature of the power given to the '82 trustees would take priority over any conflicts between
24 the two deeds, and at the end of the day, the assets would continue to be held in trust for
25 the members of the band and, therefore, the '85 deed could be read as being effective for
26 those overlapping members who are beneficiaries under '82 and '85 and, as I say,
27 incidentally, '86 as well.
28

29 Now, the OPGT wrote to you on September 15, 2021, and proposed an alternative solution
30 and they seemingly acknowledge in that letter the power of advancement, but instead of
31 moving assets, Sir, from the '85 trust to the '86 trust, they propose that they would form a
32 new trust and combine the assets from '85 and '86 into that new trust. And, Sir, the -- the
33 trustees have responded to Your Lordship in our letter of September 22, 2021, and we set
34 out the issues with that approach in that letter, but -- but just to summarize, Sir. First, from
35 a practical perspective, the existing and inherently discriminatory definition of beneficiary
36 that we're all kind of grappling with, would still need to be applied in that scenario to
37 determine who would be a beneficiary under the '85 trust terms. So -- so the trustees submit
38 that that solution would not deal with that discrimination, which is the very reason that
39 we've been in this litigation for -- for -- for quite a number of years now.
40

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

1 -- or the beneficiaries of the '86 trust, and the '86 trust is not a party specifically to this
2 litigation. Effecting its assets by directing that the assets be moved to another trust, we --
3 we submit, is simply not appropriate without proper notice. But, Sir, in general terms, as
4 I've outlined, we -- we -- we believe that there are really only two solutions that would both
5 align with the spirit of the OPGT's proposal and dispense with discrimination.
6

7 First, that the Court finds that the '85 trustees hold the '82 assets for the benefit of the '82
8 beneficiaries. These is essentially a potential answer to that second question that we
9 discussed. The Court could further deal with those '85 beneficiaries who would not
10 otherwise qualify through a grandfathering application, though really that's not the subject
11 of the ATO application. And second, Sir, the Court could find that the trustees have the
12 power to transfer the assets to either '86 or to a new trust. This would essentially be a
13 potential answer to that third question that we've posed. The -- again, any beneficiaries who
14 currently would not qualify -- they qualified under -- under the '85 but they wouldn't qualify
15 under the '82 or '86 definition, that could be dealt with either by way of grandfathering
16 application or potentially, if it's a new trust, a defined list of individuals that could be added
17 as named beneficiaries but, again, that would be the -- would be a potential answer to the
18 third question posed by the trustees.
19

20 So, Sir, subject to any questions or any clarifications that Ms. Bonora may have, those are
21 -- she's shaking her head no. So those are the opening submissions of the Sawridge trustees.
22

23 THE COURT: Okay. Well, thank you very much for those
24 submissions. So at this point, we will turn to -- Mr. Faulds, do you plan to start or Ms.
25 Hutchison?
26

27 **Submissions by Mr. Faulds**

28

29 MR. FAULDS: Thank you, My Lord. Ms. Hutchison is going to
30 be addressing question number one of the Sawridge trustees' application, which is the effect
31 of the asset transfer order which was approved by Justice Thomas back in August of 2016,
32 and -- and our position with respect to that question is as stated in our briefs. Our -- our
33 view is that the asset transfer order is clear and conclusive that the -- that the assets that
34 were transferred from the 1982 to the 1985 trust are held in the 1985 trust for the benefit
35 of the 1985 beneficiaries. I am going to be addressing question number 3. That is the
36 possibility of a trust to trust -- a further trust-to-trust transfer and we decided that -- that
37 perhaps it might be useful if we began with -- with that so I'm starting out here.
38

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

1 questions were, number one, you know, can it be confirmed that the assets are properly
2 held by the 1985 trust and that that is the entity that we're supposed to -- that we need to be
3 dealing with. That led to -- that question was disposed of by the asset transfer order granted
4 by Justice Thomas, and then attention was turned to the second question and the second
5 part of the -- of the trustees' game plan, which was to see whether or not an amendment
6 could be made to the beneficiary definition of the 1985 trust to eliminate its discriminatory
7 aspects, and at the time that Your Lordship assumed case management of these
8 proceedings, we were working towards trying to address that question, but we were now 7
9 years into the process and -- and things were continuing to move rather slowly on that front.
10

11 It was the impression of the OPGT that when Your Lordship raised the question about the
12 effect of the asset transfer order and what it accomplished, that you did so by way of
13 identifying a possible different approach to the game plan that the Sawridge trustees had
14 been following, and that's you were bringing forward a -- an approach which the parties
15 had -- had not considered and which might provide a way forward. When Your Lordship
16 weighs that issue, Your Lordship referred to the limitations on the Court's jurisdiction to
17 amend the beneficiary definition of the 1985 trust, and that then led to the possibility that
18 perhaps the 1985 trust was not in fact the operative instrument and that that -- that the
19 difficulty on the -- and the limitation on the Court's jurisdiction might be avoided by that.
20

21 Your Lordship raised the possibility that the assets in that trust remain subject -- in the
22 1985 trust, in fact, remain subject to the 1982 trust terms notwithstanding granting of the
23 asset transfer order, and that gave rise to the application which is now before the Court
24 concerning that effect. And we've just described that background in our brief of November
25 the 27th, 2020, at paragraphs 37 to 39.
26

27 For the reasons that the OPGT has -- has -- has stated perhaps in tiresome detail over the
28 course of various case management meetings, it has been unable to buy into that suggestion
29 as a way forward and that is for two main reasons. The first is that as Ms. Hutchison is
30 going to address in her part of the submissions, the only possible interpretation of the asset
31 transfer order is that it did in fact confirm the transfer of assets from the 1982 trust to the
32 1985 trust for the benefit of the 1985 beneficiaries. The second is that the effect of such --
33 of such an -- of -- of such a finding that -- that the -- in fact that the -- or the effect of a
34 finding that in fact the assets remain subject to the 1982 terms would eliminate the interests
35 of a large number of minor beneficiaries whose interests the OPGT represents. Those
36 minors don't fall within the beneficiary definition of the 1982 trust because they're not
37 members of the Sawridge First Nation under its membership code.
38

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

1 members into the -- the -- the trust that they would like to see, which is defined as Sawridge
2 First Nation members. The difficulty with that approach is that any attempt to grandfather
3 such beneficiaries into -- into such a trust would require an amendment to the trust. If we
4 are subject to the terms of the 1982 trust, the beneficiaries are defined as members of the
5 Sawridge First Nation. If the -- if there are 1985 beneficiaries who are not members of the
6 Sawridge First Nation, they could only become beneficiaries by way of an amendment, and
7 that leads us back to the problem which Your Lordship first identified, which is the
8 limitation on the Court's jurisdiction to effect such an amendment.
9

10 And -- and -- and in such an application, that jurisdictional problem, in our view, would be
11 even greater than in an attempt to remove discrimination from the 1985 beneficiary
12 definition because at least in that latter case, you have the possibility of reliance on public
13 policy to support -- to support an amendment. That wouldn't apply in the case of simply
14 trying to add a group of individual beneficiaries by way of -- of a trust amendment to the
15 1982 trust. So we do not see the grandfathering proposal being put forward by the Sawridge
16 trustees as being a viable approach to the resolution of the problem, and that then brings us
17 to what is the third question in the trustee's application and that is the availability of a
18 further trust-to-trust transfer that might resolve the issues that are before the Court and
19 ultimately be acceptable to all of the parties.
20

21 In thinking about that third question, the OPGT has had regard to what it understands to be
22 the law governing the making of such transfers and, in our submission, there are two broad
23 requirements. The first is that the Trustees who are considering exercising such power must
24 have sufficiently broad discretion in the trust -- under the trust document which they
25 administer to deal with the assets in that way, and I don't hear the Sawridge trustees
26 suggesting that that is not the case here. I think -- I think that there is general agreement
27 that the -- that the 1982 trust and the 1985 trust and, in fact, I think the 1986 trust all contain
28 sufficient discretion on the part -- all bestow the trustees with sufficient discretion to allow
29 them to do that.
30

31 The second fundamental requirement is that any such transfer must be for the beneficiaries
32 of the original trust. This requirement may be and often is satisfied by the beneficiaries of
33 the receiving trust being the same as though of the transferred trust, however, a benefit to
34 the original beneficiaries may be established in other ways. Two things are not required for
35 such a transfer. The first of them is beneficiary consent. Beneficiary consent may be
36 obtained but is not required provided that the transfer is for the benefit of the beneficiaries.
37 The second thing is that since such as transfer does not involve an amendment to a trust
38 and it involves the exercise of the trustee's powers, court approval is not required.
39

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

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

7
8 Those principles, My Lord, are largely drawn from the House of Lords decision in the
9 *Pilkington* case. That case has been adopted in Canada in a variety of cases including the
10 *Hunter Estate* decision from Ontario, the *Chalmers* decision from British Columbia, the
11 *McLean* decision which is referred -- which is unreported but is referred to in *Hunter*
12 *Estate*, and those are all referenced at paragraph 62 to 64 of our November 27th brief. No,
13 sorry, that's November the 27th of 2020.

14
15 And we would point out that the -- these principles were also adopted by Mr. Justice
16 Thomas in these proceedings. *Pilkington* was cited by the Sawridge trustees in their
17 original brief to Justice Thomas in support of the asset transfer order. You may recall from
18 having seen that brief, which is found at tab A of the Sawridge trustees' original brief on -
19 - brief to Your Lordship on this issue filed, I believe, it was November the 1st, 2019. The
20 very first brief in this -- in this thing. And -- and Your Lordship may have noted that that
21 addressed two things. First it addressed the issues that the Trustees had about whether or
22 not they had a complete documentary record of the manner in which the transfer had -- had
23 taken place, and they were seeking comfort on -- and, in fact, the -- that had occurred but,
24 second, they sought comfort that the -- that the transfer was within the powers of the 1982
25 trustees to have carried out, and that was the subject of paragraph 20 of that brief. And I -
26 - I draw Your Lordship's attention to paragraph 20 of that brief because it cites *Pilkington*.
27 It --

28
29 THE COURT: Mr. -- Mr. Faulds, if you could just give me a
30 minute.

31
32 MR. FAULDS: Yes.

33
34 THE COURT: Are you saying the November 1st trustees' brief?
35 November 1st --

36
37 MR. FAULDS: The -- the --

38
39 THE COURT: -- of (INDISCERNIBLE).

40
41 MR. FAULDS: The very first brief filed by the trustees for this

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

2
3 THE COURT: Right.

4
5 MR. FAULDS: And tab A to that brief is the brief that they
6 submitted to Justice Thomas.

7
8 THE COURT: Ah, got you. Okay. Thank you very much.

9
10 MR. FAULDS: Yeah, I'm -- I'm sorry for -- for not being clear.

11
12 THE COURT: Okay. I have got you and you were taking me to
13 paragraph 18?

14
15 MR. FAULDS: Paragraph 20 of tab A to that brief and tab A
16 being the brief that was presented to Justice Thomas.

17
18 THE COURT: Right. Okay. I'm --

19
20 MR. FAULDS: (INDISCERNIBLE).

21
22 THE COURT: -- there now. Thank you very much.

23
24 MR. FAULDS: Yes. And -- and you'll see that that brief is a
25 discussion of -- of the *Pilkington* decision and describes how those principles --

26
27 THE COURT: M-hm.

28
29 MR. FAULDS: -- apply to -- to what the 1982 trustees did when
30 they effected the transfer. And -- and you'll notice that -- that that contrary to -- to what I
31 think I heard Mr. Sestito saying today, they took the position that the transfer was to the
32 same beneficiaries and obviously they were -- they were acting on the -- and in making that
33 submission, they were doing so on the basis that I described, which is that it is -- that it is
34 the existing beneficiaries that count and that people who may acquire an interest in the
35 future can't stand in the way and -- and the fact that their interests may no longer arise is
36 not an impediment. And it was further advocated in that paragraph that effecting that
37 transfer was to preserve the interests of the existing 1982 beneficiaries in the -- in the trust
38 assets, and that that preservation was, of course, against -- against the addition of people
39 as a result of federal government legislation which would change the way the trust worked
40 because it would change the basis for membership in the Sawridge First Nation and it
41 would impose individuals upon the First Nation.

1
2 Now, I heard -- I -- I heard argument from my friends that you had to look at this through
3 the lens of whether or not effecting this transfer was consistent with the intention of the
4 settler of the -- of the 1982 trust, and was -- was changing this the way the beneficiary
5 definition was going to operate in the future consistent with the settler's intention. Now,
6 that is not a difficult question to answer, My Lord, because the settler of the 1982 trust was
7 the same person who settled the 1985 trust and the trustees were the same trustees. So -- so
8 -- so there's really no -- no basis for suggesting that -- that what occurred in 19 -- when --
9 when the assets were transferred was contrary to the -- to the settler's intention.

10
11 So and it was those submissions as they're outlined in paragraph 20 which led to Justice
12 Thomas stating in granting the order that he was satisfied that the asset transfer order "was
13 properly based in law" and the law that was cited to him was the law outlined in *Pilkington*.
14 So -- so this is another example of the adoption of *Pilkington* into -- into Canadian law. If
15 so -- so our view is that -- that that based upon the principles which are -- are applicable
16 here, the -- the transfer from the 1982 to the 1985 trust was soundly based in trust law and
17 there was no basis for -- for finding otherwise and that Justice Thomas, in fact, confirmed
18 that was the case when he granted the asset transfer order.

19
20 Which brings us then to the question of all right, well, if you can do that can you do a
21 subsequent trust-to-trust transfer, and in our -- in our previous briefs we've confined our
22 attention to a transfer from the 1985 trust to the 1986 trust because we understood that was
23 sort of what was -- what was being contemplated. And as I've indicated, the OPGT had no
24 -- no dispute with the fact that the 1985 trust contained the same sort of broad discretionary
25 powers which would permit such a transfer, but that a transfer of the assets into the '86 trust
26 would not be for the benefit of the 1985 beneficiaries because it would deprive a large
27 number of -- of their beneficial interest.

28
29 The -- and it's interesting to contrast that kind of transfer with what happened in the '82 to
30 '85 transfer because in the '82 to '85 transfer, not only were the beneficiaries protected from
31 people who were being -- who might be imposed into the trust by the actions of the
32 Government of Canada, it was seeking to perpetuate the determination of who was a
33 beneficiary on the same basis that had existed when the trust was created. That's why the
34 references to the -- you know, to the people who would have been members under the
35 *Indian Act* as it existed on April the 15th of 1982. That's the day the 1982 trust was created.
36 So there -- actually, the -- the -- that transfer preserved the -- the rules which had governed
37 beneficiary determination at the time that the '82 trust was created. In contrast, a transfer
38 of the '85 assets to the '86 assets has no benefit to the individuals who lose -- who lose their
39 -- their beneficiary status by virtue of the fact that they're not members of the SFN under
40 its membership code.
41

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

13
14 There was a -- then -- then my friend, Mr. Sestito, referred to the approach that was
15 suggested in their final brief in December of 2020, involving this notion that somehow the
16 1982 beneficiary definition hitched a ride along with the assets and thus became the
17 operative beneficiary definition of the 1985 trust. That the -- the -- we think that that
18 approach is -- is problematic on a -- on a number of grounds. I was -- I had to say I was a
19 little surprised to hear that Mr. Sestito -- or to see that advanced in -- in the brief and to
20 hear it argued, given that in their first brief the trustees said that they couldn't advocate for
21 that -- for such a thing. They -- if you look at paragraph 4 of their original brief, they say
22 the trustees as fiduciaries of the 1985 trust cannot advocate that the 1982 trust applies to
23 these assets.

24
25 Now, I mean, counsel can, of course, change -- change positions but of the -- of the two
26 statements that -- that have been made, I tend to think that the -- that the trustees original
27 argument was the correct one. But in any event, the notion that the '82 trust beneficiary
28 definition travelled with the assets has really no basis in law. There's no -- there's no -- the
29 -- there's nothing to suggest that -- that that is something which can occur in law and, of
30 course, it's completely contrary to the intention of the settler. The intention of the -- of the
31 settler and the intention of the 1982 trust was to get away from the 1982 trust definition
32 and to put the assets into a trust which would not then become available to people who
33 were being imposed on the Sawridge First Nation.

34
35 So our submission is that there -- that -- that there really isn't any -- any principle basis,
36 you know, for -- for and -- and certainly no law to support, you know, the notion that the
37 definition travelled and that that's more wishful thinking than -- than really a viable
38 alternative. And, again, as Mr. Sestito indicated that the trustees' proposal involves, again,
39 the concept of an application to grandfather, which runs into difficulties we've already
40 discussed.

41

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

12
13 The first element is it's based on the authority of the asset transfer order itself confirming
14 that the assets have been transferred to the 1985 benefit for the benefit of the 1985
15 beneficiaries. It's based upon the principles established by *Pilkington*, which we submit are
16 now well established and received by the courts in Canada, including this Court. It's based
17 upon the broad discretionary authority vested in the trustees of the 1985 and '86 trusts
18 which is sufficient to allow them to deal with the assets under their administration in this
19 way. It's based upon the fact that the trustees of both trusts are the same - that is, of the
20 1985 and 1986 trust - and that they have expressed their wish to merge the trusts.

21
22 In that vein, My Lord, I would refer you to appendix M - 'M' as in mother - to the November
23 15th, 2019 brief of the OPGT. That appendix M is a copy of minutes of the Sawridge
24 trustees from 2010, prior to the commencement of these proceedings, and if you look in
25 particular under item number 4.1 of those minutes, you will see a discussion relating to the
26 merger of the trusts and the fact that these advice and direction proceedings are a first step
27 towards that objective.

28
29 Its date --
30

31 THE COURT:

Mr. Faulds, could I -- Mr. Faulds, could I just
32 interrupt you for -- for a moment? This -- you know, I did -- I did get your materials on
33 September 15th and I appreciate that it was the subject of discussion amongst counsel for
34 several months but, I mean, just assume for the moment that I agree with absolutely
35 everything you have said. Am I in a position now to give a direction that there -- this
36 resolution scheme, if I can call it that, be implemented? Like, create a -- or just, like, where
37 -- where do I get the -- where's the application to permit me to consider that as a -- as an
38 option?
39

40 MR. FAULDS:

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

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

3
4 THE COURT: So presumably there would be a subsequent
5 application that would be brought to perhaps provide some -- some more detail with respect
6 to the plan and I would either approve or -- or give advice to either approve or advice to
7 not approve.

8
9 MR. FAULDS: I think that would be -- I think that would be the
10 likely course. I mean, the -- I think it's -- it's correct to say that assuming that it is within
11 the powers of the -- of the -- of the Sawridge trustees to effect this that they could do so
12 without, you know, further endorsement from the Court with the comfort --

13
14 THE COURT: Well --

15
16 MR. FAULDS: -- it lies within their powers, but -- but --

17
18 THE COURT: They -- they never have to get advice if they don't
19 want to. If they are -- if they are comfortable proceeding, they should just proceed.
20 Absolutely.

21
22 MR. FAULDS: Yeah. Exactly. But -- but my -- but my
23 expectation is that, you know, they're -- that -- that I'm -- I'm sketching this out in -- in --
24 in broad terms and our proposal is then there -- you know, there devil is always in the
25 details and -- and indeed there might very well be a requirement for further court assistance
26 in providing advice in relation to some of those details. Perhaps in resolving some issues
27 as to whether or not (a) or (b) or (c) is an existing beneficiary under -- under the trust and
28 so forth. So I -- I think it's highly unlikely that if -- if this were -- if Your Lordship were to
29 find this was in the powers of the trustees, highly unlikely that would be the end of it and
30 -- and further advice and direction would -- would almost certainly be required.

31
32 THE COURT: Okay. Sorry to have interrupted you.

33
34 MR. FAULDS: Yeah. No, not -- I appreciate that 'cause I -- I
35 should have thought that in making that point before you asked. The -- the -- some -- a
36 couple of the other factors and -- and I -- I want to mention them all just because I think
37 they -- they deal with the various different aspects of the -- of the principles that apply.
38 We've already talked about the limited ability of the Court to amend the trust and this, of
39 course, doesn't require that.

40
41 Another factor that we've taken into account is the risk to the non-SFN beneficiaries of the

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

13
14 The -- that -- that -- the other -- the other benefit to the Sawridge First Nation beneficiaries
15 from this proposal is that this only concerns the existing members of the -- the existing
16 1985 beneficiaries who are not SFN members. If this approach were adopted, that class,
17 for lack of a better word, would cease to grow because it would only be the existing 1985
18 beneficiaries who are not members of the SFN, who -- who would become beneficiaries of
19 the merged trust. And that -- that is -- and -- and the -- the principle basis upon which that
20 is reached is the principle that I refer to before that -- that the trust-to-trust transfers take
21 into account the interests of the existing members not the people who might become
22 members at some -- at some point in the future and, therefore, that's -- that is an appropriate
23 way to define the persons in the new trust.

24
25 And the -- the -- as we outlined in our submissions, there would be a variety of difficulties
26 that would be entailed in -- in setting up and administering that trust as we discussed a few
27 minutes ago. You know, the -- the 1985 beneficiaries may say, Look, our interest in the
28 1985 assets is being diluted by the addition of the -- of the SFN members who are not
29 currently 1985 beneficiaries becoming -- becoming beneficiaries to those assets but that's
30 more than justified in -- in our view by the -- by the removal of the uncertainty relating to
31 the status of the non-SFN beneficiaries themselves.

32
33 The 1986 beneficiaries might raise a similar objection that the inclusion of the 1985
34 beneficiaries who are not SFN members dilute their interest in the 1986 assets. One way
35 that that might be addressed would be by provisions that restrict the participation of the
36 non-SFN members of the trust to the 1985 assets and thereby avoiding that dilution. And
37 that's -- and that, of course would then give rise to -- to -- that might be something on which
38 -- on, for example, on which the Court's assistance might be -- might be sought in whether
39 or not that's appropriate and -- and whether and how that can be -- can be effected.

40
41 So I -- that's -- that's our proposal. We would put that forward in the context of the third

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

3
4 I do want to just very briefly address my friend's comments about the *Bruderheim* case. In
5 our submission, *Bruderheim* simply has no application to the facts before Your Lordship
6 here. In *Bruderheim*, what you had was a group of people, who by their own actions had
7 placed themselves outside the definition -- the beneficiary definition of the trust in which
8 they -- in which they claimed an interest. They left the church but they still wanted to say,
9 you know, we get -- we're beneficiaries. That's the exact opposite of -- of what we have
10 here. Here, we have beneficiaries who clearly fall within the -- the definition established
11 in a trust by the settler and the trustees are seeking various ways to -- to perhaps curtail the
12 beneficial interests that they enjoy under the document. So we just don't see the reasoning
13 in *Bruderheim* as having -- as having an application to this case.

14
15 So those are -- those are my submissions, My Lord, and subject to any questions you have,
16 I'm going to turn it over to Ms. Hutchison to address question number one.

17
18 THE COURT: Thank you.

19
20 Ms. Hutchison.

21
22 **Submissions by Ms. Hutchison**

23
24 MS. HUTCHISON: Thank you, My Lord.

25
26 As Mr. Faulds has, I think, has made clear to the Court, we -- we've done this in opposite
27 order but important to bear in mind, My Lord, that the submissions the OPGT has made
28 about a possible solution are very much subject to the OPGT's position that we should
29 never have returned to ground zero in this exercise. As you will have gathered from all four
30 of our submissions, My Lord, the OPGT takes the position that to engage in this exercise
31 of returning to ground zero effectively reargues the ATO and that is not something that is
32 permissible in this matter. There is no remaining judicial scope to reargue the ATO.
33 Specifically, it is the OPGT's position that the ATO resolved beneficial ownership and that
34 the attempt to revisit the ATO in this manner is a -- a collateral attack.

35
36 And frankly, My Lord, if there's any doubt that we -- by going back to ground zero we are
37 rehearing argument that should have been made in the course of the ATO or raised to the
38 Court in the course of the ATO, I think we -- we need only to reference back to our friends,
39 particularly their oral submissions this morning, but also their last brief in the -- in the
40 exchange of written submissions, My Lord.

41

1 Turning to the -- the law that is operative on interpretation and application of an un-
2 appealed, unchallenged order, My Lord, the majority of the OPGT's submissions on the
3 law are contained in our first brief, which was filed with the Court on November 15th of
4 2019, and we start with the -- the legal elements or principles on page 17 paragraph 59. I
5 don't believe I've heard from any of my friends, My Lord, that they dispute the principles
6 that apply in the interpretation and application of a valid court order that has not been
7 appealed. My friend, Ms. Osualdini, I believe, supports the legal principles the OPGT is
8 relying upon and I -- I don't believe I have seen submissions from the SFN or the trustees
9 that raise an alternate line of case law in this regard.

10
11 Turning then to a number of the cases we've cited, My Lord, *Campbell v Campbell* being
12 one of the primary ones which is found at our authorities from the November 15th, 2019
13 submission, tab 2. When considering how to interpret an order the Court must consider the
14 pleadings filed in the action, the language of the order itself, and the circumstances in which
15 the order was granted. And while the pleadings are certainly highly relevant to your
16 analysis, My Lord, the circumstances in which the order was granted will also be of
17 paramount consideration for the Court, we would submit. And one of the critical factors in
18 the circumstances, My Lord, is to try to understand what Justice Thomas understood he
19 was resolving when he issued the ATO, and for that, My Lord, really the Court has to
20 consider the entire history of this proceeding right up until the point that the ATO was
21 issued.

22
23 The ATO was not a minor or a technical order in any way, shape, or form, My Lord. It
24 dealt with one arm of the final relief that the trustees had been seeking in their application
25 from the outset and, as the Court will be aware, the trustees didn't file an originating
26 document in the normal course in this matter. They relied instead on a procedural order
27 and the affidavits of Paul Bujold in the early stages of this proceeding to outline what
28 exactly it was they were seeking, and you will have noted I'm sure, My Lord, that we refer
29 you back to the affidavit of Paul Bujold dated September 12th, 2011, particularly paragraph
30 9 and 25 repeatedly throughout our submissions. That affidavit is found at appendix C and
31 in a number of other places, I believe, but appendix C of our November 15th, 2019
32 submission.

33
34 Because, in that affidavit Mr. Bujold clearly and explicitly stated what it was that the
35 trustees were seeking or at least one arm of it, and I quote: (as read)

36
37 It was to declare that the asset transfer was proper and that the
38 assets in the 1985 trust are held for the beneficiaries of the 1985
39 trust.

40
41 And frankly, My Lord, that is a fact and a piece of evidence that this Court cannot ignore

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

5
6 There's also as another -- by way of another example in the trustees' ATO brief which Mr.
7 -- Mr. Faulds has taken you to and we refer to this in paragraph 28 of our November 27th,
8 2020 submissions, the trustees submitted that the asset transfer order was in the best
9 interests of the 1985 beneficiaries. How can we reconcile that statement with the concept
10 that beneficial ownership wasn't being considered, My Lord? It -- it just doesn't jive, with
11 the greatest of respect.

12
13 It's -- it's very clear from the cases we've cited to you, My Lord, that one thing that cannot
14 be allowed in evaluating and interpreting a court order after the fact is to accept a subjective
15 or after the fact revisionist view of the -- of the facts, and I'd refer the Court in that regard
16 to, I believe it's the (INDISCERNIBLE) case and our brief -- our brief at paragraph 61 and
17 62. This is the November 15th, 2019 brief. While I completely appreciate why our friends
18 have asked the Court to go back to ground zero and -- and to revisit this entire issue, that
19 is not what the Court was being asked to do August 24th of 2016, and when you take a
20 look at some of the factors considered by the Court in *Yu v Jordan*, which is at our
21 authorities tab 13, it's even more striking that when a participant has had input into the
22 order, was present in the court when the order was made, failed to raise objections to the
23 order, and failed to appeal the order.

24
25 My Lord, we cited those factors initially primarily in relation to the submissions being
26 raised by Sawridge First Nation, who -- which relies heavily on the concept that they were
27 not a party to the ATO, but you've now heard from my friends on behalf of the trustees,
28 frankly, the same arguments that the SFN is raising and perhaps they've gone even a bit
29 further in their final round of submissions and the SFN was going -- they were the authors
30 of the ATO and in their first round of submissions, they recognized they couldn't make the
31 submissions they've made to you today because of the limitations of their fiduciary duty
32 and obligations to the 1985 trustees.

33
34 We would submit to the Court that that has to be weighed very carefully in the kind of
35 weight that this Court gives to submissions today to suggest that the ATO left that huge
36 gap, that huge gap of beneficial ownership, My Lord, and it's very critical that the Court
37 also look at the -- when we get into circumstances as a relevant consideration in
38 interpretation of the order, the Court has to look at what the trustees did subsequent to and
39 around the time of the asset transfer order. For one, they've brought forward a distribution
40 proposal right in the same timeframe, which was very clearly framed as a distribution
41 proposal to benefit the 1985 beneficiaries. So to suggest that at the conclusion of the ATO

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

5
6 The other thing that must be considered is that quite some time after the ATO, the trustees
7 were directed by the Court of Appeal of Alberta to file their originating document, and we
8 -- we've included that in our submissions, My Lord. It's in our materials. Please take a look
9 at that document again. It is clear beneficial ownership has been dealt with. It's no longer
10 being raised as an issue in this proceeding. It's -- it's assumed to have been dealt with. We
11 also have the discrimination order in which the trustees committed to preserve the 1985
12 trust, and I'd ask the Court to compare that position to the positions being taken by the
13 trustees today. It has a significant impact on whether or not they felt they still had the ability
14 to address this issue of beneficial ownership coming out of the ATO process, My Lord.

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

24
25 In terms -- still on circumstances, My Lord, as a critical element to examining how to
26 interpret an order, I'd just like to call on some of the concepts that my friends were putting
27 forward about the -- I think the term was the protectionist intention of the '85 trust, and --
28 and, again, tying that into the fact that the trustees committed to preserving the '85 trust
29 post-ATO, not the beneficiary definition - obviously that's a separate issue - but preserving
30 the '85 trust. How can one suggest that we -- we were back in '82 and -- and we were -- in
31 fact, didn't even need to worry about the protectionist impact of the '85 trust anymore
32 because the '85 trust was really for the benefit of the '82 beneficiaries. My Lord, if those
33 arguments were available, if they were intended to be -- to be dealt with, if it was a part of
34 the scope of this proceeding, they would have been raised in the course of the ATO. The
35 ATO was intended to put those arguments to bed. It was intended to finalize who we were
36 dealing with for beneficial ownership, My Lord.

37
38 In terms of -- you'll have read a great deal in our submissions, My Lord, about the positions
39 of the SFN and the weight that they can be given in the course of the analysis of the ATO,
40 and I don't -- I don't wish to take the Court through every one of those points, but it is
41 critical to remember that the SFN, while they've clearly said they were not a party, was

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

14
15 Other relevant circumstances, My Lord, no -- we've referenced the fact nobody appealed
16 the ATO. At the time that the discrimination order was being dealt with the Court identified
17 that there was only one remaining issue to be dealt with, which was the discriminatory
18 nature of the beneficiary definition. To suggest that Justice Thomas would indicate to the
19 parties there was only one remaining issue to be addressed when the entire question of
20 beneficial ownership had been left unaddressed, frankly, is -- is beyond comprehension,
21 My Lord. Clearly, Justice Thomas had granted the ATO within the entire context of the
22 proceeding to that point in time. That quote, My Lord, and that cite is found at paragraph
23 70 of our November 15th, 2019 brief, and also referenced at paragraph 32 of the November
24 27th, 2020 brief.

25
26 Without belabouring these points, My Lord, we -- we have not resiled -- the OPGT is not
27 resiled from its concerns about the nature of the relief being sought by the SFN and now
28 by the trustees, both in terms of the scope of this Court to grant it within a case management
29 context but also within the scope of limitations, laches, and estoppel, and we -- we refer to
30 our submissions in our November 27th, 2020 brief in that regard, My Lord. Obviously, as
31 you'll have gathered, we maintain the position that this exercise constitutes a collateral
32 attack on the ATO and is impermissible in that regard as well.

33
34 Although not a matter, I expect, that will resolve today, My Lord, the OPGT has given you
35 some considerable input and I'll just give you the pinpoint cites in its December 11th, 2020
36 brief at paragraph 12 and its November 27th, 2020 brief from paragraph 14 to 18 that the
37 Court cannot conclude without a trial or some other process that the assets that are in the
38 1985 trust solely originated from the 1982 trust. We realize that the parties have a different
39 take on the evidence before you on the \$12 million debenture, My Lord, but that is not a
40 small issue. It is not an issue that has been run to ground and we cannot proceed on the
41 basis that that \$12 million has no beneficiaries that have an interest in it. We -- at this point,

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

5
6 My Lord, I think that really -- that addresses our key points about -- with the greatest of
7 respect to the -- the ink that's being spilled on other solutions as to why we shouldn't be
8 going back over ground that was already covered by the ATO and -- and Mr. Faulds has
9 done an eloquent job of explaining to you what the OPGT would consider as a solution if
10 those submissions are not accepted, but all of our submissions on that point are subject to
11 the -- to the position that the ATO resolved this problem. Beneficial ownership was dealt
12 with in 2016, and we need to get back to dealing with the jurisdictional application, My
13 Lord.

14
15 Thank you.

16
17 THE COURT: Okay. Thank you very much.

18
19 So, Ms. Osualdini, do you want to start or do you need a break or what -- what would you
20 like to do?

21
22 MS. OSUALDINI: My Lord, I'm in your hands. I do notice that it's
23 the noon hour right now so perhaps it might make sense to take a small break and then
24 recommence.

25
26 THE COURT: It seems to me that this is a good place for a
27 relatively short break in the sense that we have had a number of submissions that I think
28 roughly represent half of what we planned to hear today more or less. So if we took half an
29 hour, would that be sufficient or 45 minutes? What -- what would be your pleasure?

30
31 MS. OSUALDINI: Oh, half an hour is fine with me, My Lord.

32
33 THE COURT: Is that suitable to everyone else?

34
35 MS. S. TWINN: Yes, Sir.

36
37 MS. BONORA: Acceptable to us, My Lord.

38
39 MR. FAULDS: That's agreeable, Sir.

40
41 THE COURT: Okay. So let's take -- let's take half an hour. I

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

5
6 MS. BONORA: Very good, My Lord. Thank you.

7
8 THE COURT: We will adjourn at that. Thank you.

9
10 _____
11
12 PROCEEDINGS ADJOURNED UNTIL 12:30 PM
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14 _____
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1 Certificate of Record

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3 I, Morag O'Sullivan, certify that this recording is the record made of the evidence in the
4 proceedings in Court of Queen's Bench held in courtroom 416 in Edmonton, Alberta on the
5 27th day of September 2021, and I was the court official in charge of the sound-recording
6 machine during the proceedings.
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1 **Certificate of Transcript**

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3 I, Marcey Lepka, certify that

4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript
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10 transcribed in this transcript.

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12 Marcey Lepka, Transcriber

13 Order Number: AL21827

14 Dated: October 1, 2021

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

2
3 September 27, 2021

Afternoon Session

4
5 The Honourable

Court of Queen's Bench of Alberta

6 Justice Henderson (remote appearance)

7
8 D.C. Bonora, QC (remote appearance)

For Sawridge Trustees

9 M.S. Sestito (remote appearance)

For Sawridge Trustees

10 R.M. Johnson (remote appearance)

For Sawridge Trustees

11 P.J. Faulds, QC (remote appearance)

For Office of the Public Guardian and Trustee

12 J.L. Hutchison (remote appearance)

For Office of the Public Guardian and Trustee

13 C. Osualdini (remote appearance)

For C. Twinn (remote appearance)

14 (No Counsel)

For S. Twinn (remote appearance)

15 E.H. Molstad, QC (remote appearance)

For Sawridge First Nation

16 E. Sopko (remote appearance)

For Sawridge First Nation

17 M. O'Sullivan

Court Clerk

18
19
20 THE COURT:

Thank you very much.

21
22 MR. SESTITO:

We are all accounted for on the Sawridge Trustee

23 team.

24
25 MR. MOLSTAD:

Okay. We are also in attendance, Mr. Justice

26 Henderson. Ed Molstad and Ms. Sopko.

27
28 THE COURT:

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

30
31 MS. S. TWINN:

Yes, I'm here.

32
33 THE COURT:

Excellent. Okay. So, Ms. Osualdini, carry on.

34
35 **Submissions by Ms. Osualdini**

36
37 MS. OSUALDINI:

Okay. Thank you, My Lord.

38
39 So, My Lord, you have directed the parties to provide you with submissions on a
40 fundamental question, namely whether the 1985 trust is possessed of the assets that were
41 transferred to it in 1985, by the 1982 trust. Now, unlike the process that the trustees have

1 proposed, we see this application --

2

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

6

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

9

10 MS. HUTCHISON: Just very faint.

11

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

13

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

15

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

18

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

20

21 THE COURT: I think --

22

23 THE COURT CLERK: (INDISCERNIBLE).

24

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

26

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

29

30 THE COURT: All right.

31

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

41

1 Now, My Lord, if and only if the answer to this question is the ATO only addressed legal
2 title, then the second stage of the inquiry becomes relevant. As Your Lordship will have
3 seen from our submissions, is that our -- it is the client's respectful position that this query
4 constitutes final relief and is not properly before you in case management. And further --
5

6 THE COURT: Ms. Osualdini, I -- I do need to interrupt you. I
7 am sorry for that but can you possibly get closer to the microphone? I am having a hard
8 time hearing you.
9

10 MS. OSUALDINI: Okay. Is it possible to take a brief 10-minute
11 break and I can see if our IT people can sort this out, because there's not -- the microphone
12 is attached to the television.
13

14 THE COURT: Okay.
15

16 MS. OSUALDINI: So it's not as easy for me --
17

18 THE COURT: I would rather --
19

20 MS. OSUALDINI: -- (INDISCERNIBLE).
21

22 THE COURT: -- take a break and make sure that I can clearly
23 understand what you are saying.
24

25 MS. OSUALDINI: Okay. Thank you.
26

27 THE COURT: So why don't why take 10 minutes and we will -
28 - we will see -- see what we can do. Okay.
29

30 MS. OSUALDINI: Okay. Thank you, My Lord. I'm sorry about that.
31

32 THE COURT: Thank you very much.
33

34 (ADJOURNMENT)
35

36 THE COURT: When everyone else is back we can start.
37

38 MR. SESTITO: The trustees are all present and accounted for, the
39 legal team, Sir.
40

41 THE COURT: Okay. Excellent. Thank you.

1
2 MS. HUTCHISON: Mr. Faulds and I also back, My Lord. Thank you.

3
4 THE COURT: Thank you.

5
6 MR. MOLSTAD: Mr. Molstad and Sawridge counsel are back as
7 well.

8
9 THE COURT: Good. Okay. So I think we are -- and Shelby is
10 here so we can -- we can resume.

11
12 MS. OSUALDINI: Okay. Very good. Thank you, My Lord. Thank
13 you for the Court's indulgence in allowing me to fix our -- our technical issue.

14
15 So I just want to step back for a second because when the -- when the volume issue
16 happened I was in the midst of describing what we saw as step two of this process. So to
17 repeat, from our perspective, it's only if the answer to the question on the ATO results in
18 being that only legal title was transferred, that is only when the second stage of the inquiry
19 becomes relevant and, as Your Lordship would have seen from our submissions, it's our
20 client's respectful position that this would constitute final relief and would not be properly
21 before you in case management.

22
23 It also appears that the intervenor, the Sawridge First Nation on this application is seeking
24 remedial or proprietary relief and after hearing the submissions of my -- of my friend, Ms.
25 Bonora, for the trustees and Mr. Sestito, I have also gathered the impression that they are
26 as well. And to that, I would say that on an application for advice and direction, proprietary
27 or remedial relief cannot be granted. This is not traditional litigation. And even if the Court
28 would find that the transfer by the 1982 trustees to the 1985 trust was ultra vires the trustees'
29 powers. The relief for that breach should be left to traditional litigation.

30
31 Now, that being said, My Lord, I'm going to be making submissions about part two of the
32 -- of the question, however, this is, of course, on a without prejudice basis to our position
33 that this is beyond the Court's jurisdiction at this stage of the game. However, we're doing
34 so in order to assist you with arriving at a just and equitable resolution to this application.

35
36 Now, firstly turning to the issue of the interpretation of the ATO. My friend, Ms.
37 Hutchison, went through this issue quite thoroughly so I intend to be fairly brief and not
38 repetitive of her comments, but we certainly support everything that she said. Now, it is
39 our client's position that when you review the ATO in conjunction with the record and the
40 proceedings before Justice Thomas, it is abundantly clear that the meaning and effect of
41 the ATO was to confirm that the assets transferred form part of the 1985 trust and were to

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

4
5 Now, we note, as Ms. Hutchison did, that the SFN's submissions do not at all touch upon
6 the interpretation of the ATO and it was only in the trustees' final set of submissions did
7 they touch upon this issue very briefly, and what I understand them to be saying today,
8 despite their position on the ATO application, is that the ATO did not cover the issue of
9 beneficial ownership. So my submissions will be aimed at these points.

10
11 Now, I highlight to the Court as did Ms. Hutchison that the ATO was not appealed and is
12 unchallenged. Its findings are *res judicata*. These -- and as such, its directions cannot be
13 disturbed on this application. As outlined by Ms. Hutchison, there's a well-established body
14 of case law on how an order is to be interpreted that I do not believe is in dispute before
15 Your Lordship, and this analysis follows a contextual analysis of the pleadings, the
16 evidence, and the submissions to the Court, and what it does not involve is making findings
17 or submitting evidence that was not before the Court as at the time of the order. And,
18 respectfully, Sir, your request to know who owned the assets immediately prior to the order
19 is not permitted in the interpretative exercise, and the reason for that is when interpreting
20 the ATO, we are restricted to the record that was before Justice Thomas.

21
22 And, my friend, Ms. Hutchison, went through the *Campbell v Campbell* decision from the
23 Saskatchewan Court of Appeal on interpretative analysis, and I highlight a passage from
24 paragraph 16 of that decision that cites the *Sans Souci Limited v VRL Services Limited* case
25 that cogently summarizes the interpretative exercise and that being -- and I'm quoting from
26 the decision:

27
28 In particular, the interpretation of an order may be critically
29 affected by knowing what the Court considered to be the issue
30 which the order was supposed to resolve.

31
32 Now, My Lord, the issue to be resolved, in my respectful submission, could not have been
33 any more clear. It was -- it was to confirm that the assets were being administered for the
34 benefit of the 1985 beneficiaries. This is stated in the affidavit of Paul Bujold, filed in
35 support of the ATO and, more particularly, at paragraph 25, which states:

36
37 The Trustees seek the Court's direction to declare that the asset
38 transfer was proper and that the assets in the 1985 Trust are held
39 in trust for the benefit of the beneficiaries of the 1985 Trust.

40
41 Quite -- quite clear to me.

1
2 And I reiterate, My Lord, that the legal ownership of these assets was never in question.
3 To find that the ATO did not resolve beneficial interest would be to wholly disregard the
4 issue Justice Thomas thought he was addressing and, further, it would effectively mean
5 that the ATO resolved nothing and the parties, particularly, the trustees expended
6 substantial sums of money and effort on the negotiation of the order and all steps arising
7 thereafter and reliance on the interpretation of that order for no benefit. So, sir, we
8 respectfully submit that the proper interpretation is clear and the order resolves the issue of
9 for whom the assets are being held.
10

11 Turning to the second issue, the second stage of the analysis, My Lord, if you find that the
12 word transfer in the ATO did not connote that official ownership as well, we turn to the
13 issue Your Lordship has sought submissions and that is for whom immediately prior to the
14 ATO being granted were the assets at issue being held, and our response, My Lord, to that
15 query is, of course, the 1985 beneficiaries. It is clear that the OPGT supports this
16 interpretation and prior to hearing my friend's submissions today on behalf of the trustees,
17 I -- I thought the trustees did as well, however, it -- it appears that they don't. Surprisingly,
18 they -- they don't share that interpretation.
19

20 So delve into this issue and to understand for whose benefit these assets were being held, I
21 think we first need to examine the circumstances that the trustees found themselves in in
22 1985, and these circumstances are certainly set forth in the record and set forth in the -- the
23 written submissions of the parties. Now, as the Court has heard, prior to the introduction
24 of bill C-31, membership in First Nations was determined by a legislated set of criteria
25 found in the *Indian Act*, and at this time, Indian status and membership in a First Nation
26 were determined by the registrar and were synonymous. Under this -- under this legislation
27 -- or sorry. It was possible under this legislation for a person to lose their status and their
28 membership if certain criteria were met such as if an Indigenous woman married a non-
29 Indigenous man, and as my friend Ms. Bonora said, these have become what we know as
30 the bill C-31 woman.
31

32 Now, if this happened, My Lord, as it happened to the bill C-31 women, this would be
33 known as involuntary enfranchisement where you lose your status and your membership
34 as a result of this operation of law. Now, when someone is involuntarily enfranchised, they
35 would be entitled to financial compensation and this compensation would typically be a
36 percentage or per capita payment of what their band would have received from the
37 government and this is outlined in paragraph 25 of my client's original written submissions
38 on this application.
39

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

1 is the widow of the late Chief Twinn, was aware that around this time a family unit received
2 approximately \$1.2 million and that the average -- or that it wasn't unusual in the early
3 1980s for someone who enfranchised either voluntarily or involuntarily to receive a
4 payment in the amount of 300 to \$400,000 per person. Now, the effect of bill C-31 is the
5 bill C-31 women who had lost their status as a result of that operation of law had an absolute
6 right to be reinstated into membership, and this reinstatement was irrespective of the fact
7 that they likely had already received an enfranchisement payment that other members of
8 the SFN would not have received, and the SFN was concerned that there would be a high
9 influx of membership following the introduction of bill C-31 and, as a consequence, they
10 wanted to protect the assets of the 1982 trust which comprised the wealth of the nation at
11 the time from this eventuality.

12
13 So in order to do this, and it's undisputed on the record that this was the purpose of what
14 was trying to be done in 1985. As my friend Ms. Hutchison said, we're hearing a bit of
15 revisionist history on what was happening here, but the reality is is the -- the SFN was
16 trying to protect his assets from the influx -- or the anticipated influx. So what did they do?
17 The 1985 trust was established. It was settled with \$100. So what this means is that the
18 1985 trust is a distinct and separate legal entity from the 1985 -- sorry, the 1982 trust. The
19 two are not to be conflated. It doesn't matter whether the 1985 trust was settled with a
20 hundred dollars or a million dollars. Its legal status remains the same as a distinct and
21 separate entity, and the beneficiaries of the 1985 trust are not in dispute. They are defined
22 in the 1985 trust deed, all with the careful advice of sophisticated legal and accounting
23 advisors.

24
25 Now, following the creation of the 1985 trust, the transfer at issue occurred. Now, why this
26 is important and why I highlight this to the Court is the assets that are the subject of this
27 application were after acquired property of the 1985 trust. These assets did not settle this
28 trust. They did not create this trust. They were received by the 1985 trustees according to
29 their authority under the deed to accept after acquired property.

30
31 Now, another consequence of bill C-31 that you would have heard about in these
32 proceedings is that First Nations could choose to enact their own membership code and
33 thus start controlling the membership process and take that responsibility away from the
34 registrar. The SFN did this immediately and, as a consequence of that, it became possible
35 for someone to qualify as a status Indian under the *Indian Act* but be -- but have no
36 membership in any particular First Nation because now the Sawridge First Nation
37 controlled its list and did not have to admit this person and, of course, My Lord, as you
38 know, Shelby Twinn is a modern example of such an individual and an example of what
39 the issue is before the Court today and the divergence of views.

40
41 So what we know from this is that the Sawridge First Nation elected to use a beneficiary

1 definition in the 1985 trust when they knew that they were going to be taking control of
2 their membership code and this could possibly foreseeably lead to the circumstance that
3 we're arguing about today. That those on the membership list and those that qualified under
4 the legislated criteria could be different and, frankly, that's exactly the issue that they were
5 trying to avoid in the transfer is they knew that there was going to be people added to their
6 membership list. So it's not that this was an unforeseen consequence of the transfer, an
7 unforeseen consequence of the 1985 trust deed. The SFN and Chief Twinn fully understood
8 this when they were settling the trust.
9

10 So, My Lord, with that historical context in mind and putting ourselves in the position of
11 the 1982 and 1985 trustees in April of 1985, we can look at the transactional documents
12 that effected this transfer and when we review the transactional documents, the intention
13 of the parties at the time of transfer, frankly, My Lord, could not be any more clear about
14 what they were trying to do. And more particularly, the 1982 trustees, who were the chief
15 and council of the SFN, intended to and did, in fact, transfer the assets to the 1985 trust for
16 the purpose of holding those assets for the -- for the persons defined under the 1985 trust
17 deed and it was done - and it says this right in the transactional documents - in order to
18 avoid the impending changes from bill C-31, and I won't take Your Lordship to these
19 documents but I'll just identify them for the record.
20

21 When we look at the resolution of the 1982 trustees dated April 15th, 1985, and found at
22 tab M of our written submissions, it's stated right in that document that the 1985 trustees
23 are receiving these assets to be held for the 1985 beneficiaries. We can see similar language
24 and a declaration of trust signed by Chief Twinn on April 16th, 1985, and found at tab O
25 that says the same thing. And it appears, My Lord, from the record before the Court that
26 all of the relevant parties and their professional advisors shared this understanding as the
27 1985 trust administered these assets, reorganized their composition, and made beneficial
28 distributions to the 1985 trust beneficiaries in order to achieve preferable income tax
29 treatment from Canada Revenue Agency. And it's notable, My Lord, that the administration
30 of the 1982 trust following the transfer appears to have ended as there is no evidence at this
31 stage of the game showing any trustee meetings, financial statements, income tax filings,
32 anything of the sort occurring after the transfer. So as such, the 1982 trust has shown no
33 signs of life since 1985.
34

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

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

3
4 Now, Sir, as you will have gathered, it's our submission that there is no question that the
5 transfer was intended to convey legal and beneficial title to the 1985 trust, and from our
6 perspective the issue in trust law is whether that transfer was lawful. Now, our written
7 submissions go through the law of the propriety of the transfer in detail and to summarize,
8 the 1982 trust contained a power of advancement. This power is found in paragraph 6 of
9 the 1982 trust deed and granted the trustees broad authority to make full income and capital
10 distributions to beneficiaries, and this is significant, My Lord, because the 1982 trust
11 contemplated the idea that there could be a full distribution of assets prior to its winding
12 up. So the idea was embedded in the document that future beneficiaries may not benefit
13 from this trust if that power is exercised.

14
15 Now, the trustees were using this power of advancement in order to make the transfer and
16 we can see this from the resolution of the 1982 trustees that I previously referred as it talks
17 about the fact that they're using this power of advancement. So the question then becomes
18 whether this power of advancement was exercised appropriately and within the trustees'
19 scope of authority. Now, a court may not interfere in a trustee's good faith exercise of a
20 discretionary power unless what he has achieved is unauthorized by the power conferred
21 on them or it is clear that he would not have acted as he did had he not taken into account
22 considerations which he should not have taken into account or, alternatively, had he not
23 taken into account or failed to take into account considerations which he ought to have
24 taken into account and, My Lord, I'm quoting from paragraph 19 of the *Hunter Estate*
25 decision, which the parties have referred to already on this application in making that
26 statement of the law.

27
28 Now, when analysing this portion of the test on when a Court can intervene in a good faith
29 exercise of discretion, the Court in *Hunter* said the Court should consider whether the
30 purpose for which the discretion was exercised was to accomplish a purpose quite alien
31 from the intention of the settler, and you've heard that bit of case law today that that's the -
32 - the baseline that we apply to see if improper considerations were made.

33
34 Now, in addition, the *Pilkington* decision that you've heard a great deal about today and in
35 all the parties' written submissions, I would submit, confirms the beneficial distributions
36 which take the form of -- or take the form of transfers to new trusts, even trusts that include
37 new beneficiaries are permissible so long as they comply with the scope of the power
38 granted to the trustees and it's for the benefit of a current beneficiary. Now, like the OPGT
39 went through, as the transfer was made from and to the same group of persons, we submit
40 that this was done for the benefit of then existing beneficiary class and was within the
41 trustees' scope of -- scope of discretion and as such, there is no basis for the Court to

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

2
3 Now, My Lord, even if the Court was to find that that transfer was outside the scope of the
4 trustees' authority, whether ultra vires or undertaken in bad faith, whatever you may have,
5 I believe Ms. Bonora made a suggestion that it may have been a breach of fiduciary duty.
6 Now, regardless of how we get there, we submit that that is not the end of the inquiry to
7 the Court, the fact that a breach of the trust deed may have occurred.

8
9 Now, we submit that the next stage of questions the Court has to ask, assuming there was
10 a breach, is whether any relief need be granted because of that breach and that opens up
11 questions such as limitations, laches, you know, whether proprietary relief such as a
12 constructive trust that my friend -- I believe that it was Ms. Bonora argued in favour of,
13 that opens up all these questions because it's not in an automatic result that relief will be
14 granted for that breach, particularly a breach that occurred over 35 years ago, and in that
15 we remind the Court that what the trustees have brought before you is an application for
16 advice and direction. While the Court may be able to provide advice to the trustees on the
17 propriety of their actions, this is not a process in which remedial or proprietary relief should
18 be granted.

19
20 And in addition to the previous concerns I raise such as limitations, laches, which I
21 certainly don't expect to be resolved on this application, we just flag them for the Court
22 that they're out there and there's a live dispute about them. In addition to all that, the
23 trustees of the 1982 trust were its chief and council. So liability for the fact that a breach
24 of the trust deed occurred, it needs to be all parties who could be liable for that breach need
25 to be at the table and proportionate liability examined because, My Lord, it's not surprising
26 that the intervenor, the SFN, is trying to push all liability for this onto the beneficiaries of
27 the 1985 trust because the chief and counsel of the SFN are potentially at risk if they're
28 found to have breached their fiduciary duties.

29
30 And I would also point out to the Court as was briefly mentioned this morning is that all
31 of the assets of the 1982 trust came from their trust -- their trusts held by other individuals.
32 So, My Lord, if we start examining those transfers, it's possible that the 1982 trust is not
33 possessed of any assets because we -- then we have to go back and there's really no
34 evidence before the Court at this time, or at least it's very scant about what happened there.
35 So, My Lord, to find that that transfer was invalid and requires remedy is to be opening the
36 proverbial Pandora's box, and if this Court is going open Pandora's box, we submit that
37 these issues are better left to traditional litigation and can't occur on an application for
38 advice and direction.

39
40 Now, My Lord, the final portion of my submissions are going to focus on some of the
41 arguments that largely the SFN has put forward in their written submissions and which we

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

8
9 Now, Sir, with the greatest of respect to these submissions, they are a bit of a melting pot
10 of trust principles that you must be careful with because most of them are generally not on
11 point with -- with this application before you and what factually occurred on this transfer
12 because, My Lord, in these circumstances, the 1982 trust had a power of advancement that
13 formed the basis for the authority to make that transfer. Examining outcomes of other cases
14 that did not have a similar or any power of advancement such as the Berg decision that
15 dominates the SFN's third set of submission is not informative to the matters on this
16 application because, Sir, at tab Q of our November 27th, 2020 submissions you'll find the
17 *Trustee Act* and I just wanted to put to rest this argument about section 42.

18
19 THE COURT: So, sorry, which -- which brief are you referring
20 to?

21
22 MS. OSUALDINI: It's November --

23
24 THE COURT: November --

25
26 MS. OSUALDINI: -- 27th.

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

30
31 MS. OSUALDINI: Yeah, it's just the *Trustee Act* that I'm referring
32 to at section 42, because section 42 is where this -- this concept comes from that court
33 approval needs to be sought for any variation or resettlement of the trust, and that comes
34 from 42(2). But when we read the entirety of that provision, it says subject to any trust
35 terms reserving a power to any person or persons to revoke or in any way vary the trust or
36 trusts, and then -- and then it goes on to talk about court approval. So when there is a power
37 of advancement that allows for these types of occurrences, we don't need to look at section
38 42. Section 42 is only there when the trustee does not confer that authority upon the
39 trustees.

40
41 And as we know, in the power of advancement in the '82 trust, it conferred the ability to

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

6
7 And then, Sir, I briefly mentioned the Berg decision that we've heard a bit about today. All
8 of those trusts were held in a bare trust without a power of advancement. *Pilkington* wasn't
9 even considered in that decision. I would submit, Sir, that this case is not analogous to the
10 issues that you have before you, and I would note that the second transfer spoken about or
11 -- or referred to in the Berg decision was found invalid because (a) there wasn't a power of
12 advancement and (b) the transfer was to a non-beneficiary that only benefited the husband
13 and not both of the beneficiaries. So this -- this case is just simply not analogous to the
14 issue that you have before you.

15
16 Now, turning to the SFN's arguments about the existence of the 1982 trust, now, My Lord,
17 as you'll know, basic trust law, the three certainties of a trust, one of them is certainty of
18 subject matter. A trust has to have property in order for it to be in existence. So the
19 consequence of divesting itself of all of its assets, which there is no question on the record
20 that that's what the trustees were trying to do. The consequence of that is the 1982 trust lost
21 its subject matter and therefore can no longer exist according to basic trust principles.

22
23 Now, the SFN and -- and I think the trustees as well now are arguing that the 1982 trust
24 retained assets based on some sort of resulting trust argument and, My Lord, I'd submit that
25 when we look at what intention was, this -- this argument falls apart because there was no
26 intention to retain assets. And then, My Lord, I'd turn to this argument that the SFN and
27 particularly the trustees in their four sets of submissions they've made regarding how
28 somehow the terms of the 1982 trust were imported onto the 1985 trust. Now, from what
29 I've heard today, in order to reach that conclusion we have to fully divorce ourselves from
30 the accepted reasons why the transfer took place and what factually occurred in 1985, and
31 I would say that the trustees offer no cogent trust principles or authorities for how trust
32 terms can be imported from one trust to another and I'd submit to you, Sir, that they just
33 simply can't. The 1985 trust is a freestanding trust that has beneficiaries according to its
34 deed. We don't need to look anywhere else for them. You cannot bootstrap trustees into a
35 new trust.

36
37 And as my -- my friends with the OPGT said, this concept of the transfer being alien to the
38 settler, we -- we kind of have the benefit in this situation that the transfer was affected by
39 the settler who was one of the trustees. So to say that this was alien to him, I don't know
40 how you get to that conclusion because he obviously thought this was a good idea and
41 something appropriate for -- for the members and for the beneficiaries. I would also just

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

4
5 Now, Sir, the final point that I wanted to touch on is found in the SFN's written submissions
6 at paragraph 22, and in those submissions there's a suggestion that the *Pilkington* decision
7 is inapplicable to these circumstances because it only applies to the British statutory power
8 of advancement or a similar power of advancement. 'Cause you'll recall, My Lord, that in
9 *Pilkington*, the House of Lords was considering allege -- the British legislated power of
10 advancement that applied to all trusts in that country and whether that allowed for this trust-
11 to-trust transfer that happened.

12
13 So the SFN is suggesting that this authority is restricted to what we find in that legislation
14 and respectfully, My Lord, we would disagree with that argument and the reason is that to
15 date in Canada *Pilkington* is accepted law to all powers of advancement not just the British
16 statutory power. And when we review the decision of *Hunter Estate*, which I think all
17 parties up to know have referred to and you'll find in everybody's written submissions, at
18 paragraph 15, the Court is considering the *Pilkington* decision and the Court in *Hunter*
19 expressly rejected the idea that it was only applicable to statutory provisions. And I'll just
20 take you there, My Lord. It's tab S of our client's written submissions, paragraph 15.

21
22 THE COURT: I'm sorry, did you say tab S?

23
24 MS. OSUALDINI: Tab S of our November 27th, 2020 written
25 submissions.

26
27 THE COURT: Okay. Well, let me just --

28
29 MS. OSUALDINI: (INDISCERNIBLE) the attachment, Sir.

30
31 THE COURT: Let me get that. Yeah, that's not bookmarked but
32 let me just try to get down there. It's a lot easier when these are bookmarked, I'll tell you.

33
34 Okay. I'm at tab S. I've got it. Thanks.

35
36 MS. OSUALDINI: Okay. Thank you, My Lord. And it's paragraph
37 15 of that decision and, in particular, the -- the latter portion of the paragraph.

38
39 THE COURT: Yeah.

40
41 MS. OSUALDINI: Just let me know when you're there, My Lord.

1
2 THE COURT: Yeah, I am just reading it now. Thanks.
3
4 MS. OSUALDINI: Okay.
5
6 THE COURT: Yeah. Okay.
7
8 MS. OSUALDINI: Thank you, My Lord. So you'll see in the -- in the
9 final sentences of the paragraph and in this paragraph is the Court is considering the
10 *Pilkington* decision and its application within Canadian law, and the Court states: (as read)
11
12 That case relied --
13
14 And that case being *Pilkington*.
15
16 -- relied on the interpretation of the words of a statute but it was
17 stated at pages 634 and 35 that the statute merely adopted the
18 customary common law terminology that is often included in
19 wills. I do not believe that the decision is limited to statutory
20 powers.
21
22 So I'd submit to you, Sir, that *Pilkington* is -- has much broader application than what the
23 SFN is suggesting and citing the -- the authority of *Hunter* for that proposition.
24
25 I'm unaware of there being any other finding in Canadian law on this issue and the SFN
26 does not point us to any, and I would submit, Sir, that this finding is logical because in
27 order for the principles of *Pilkington* to apply, it is implicit that the trustees must comply
28 with the terms of the subject power of advancement at issue on that application. The
29 *Pilkington* decision is not suggesting that the terms or the subject terms of the power of
30 advancement can be overruled or altered simply because of this case law.
31
32 And, Sir, the SFN further argues that the power of advancement at issue on this application
33 can't be used to dispossess future beneficiaries and, as I've alluded to and stated before, that
34 just factually is not true because the power of advancement expressly contemplates that
35 possibility that future beneficiaries may be dispossessed. And I would note that the
36 *Pilkington* decision is really not offering commentary on whether future beneficiaries can
37 be excluded. I would submit to you, Sir, that the ratio from this decision is that new
38 beneficiaries -- or sorry, that the transfer of trust property to a new trust, even a trust that
39 includes new beneficiaries, is permissible so long as same is permissible under the scope
40 of authority granted by the relevant power of advancement and it's for the benefit of that
41 beneficiary. That that's what we take away from the *Pilkington* decision and that -- and that

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

2
3 Now, in conclusion, My Lord, we submit that on a careful review of the scope of the powers
4 conferred upon the trustees in the 1982 trust deed, it becomes clear that the transaction was
5 within their discretion and that respectfully, My Lord, there's no basis over 35 years later
6 to interfere with that transfer.

7
8 And, My Lord, I know that my friends spent a good deal of time in their submissions talking
9 about possible resolution which we think is fantastic and -- and great that the parties are
10 looking towards how -- how this issue can be resolved and we can say that we are certainly
11 very supportive in principle of what the OPGT is proposing and we say that because what
12 they're proposing is grounded in trust law. It complies with the *Pilkington* principles. You
13 know, as mentioned, we're concerned with what the -- the trustees are proposing 'cause we
14 don't see beneficiary definitions being imported or transferred. We just aren't aware of any
15 case law that would support such a theory.

16
17 And, secondly, what we like about what the OPGT is proposing is it doesn't leave those
18 persons who currently have an interest in the 1985 trust, such as Shelby Twinn, out in the
19 cold. Because with what the trustees are proposing, they're proposing to grandfather people
20 like Shelby but without -- but when we all know that the Court really doesn't have any
21 jurisdiction to allow that grandfathering to happen and, particularly, given that the trustees
22 - what I heard this morning - are now saying that their fiduciary duty only extends to band
23 members, I think that that's very concerning and we need to be mindful of people like
24 Shelby and others in her circumstances that they're taken care of because they are
25 beneficiaries, existing b
26 eneficiaries of this trust.

27
28 So unless Your Lord -- Your Lordship had any questions for me, those are my submissions.

29
30 THE COURT: Thank you very much.

31
32 Mr. Molstad, are you next?

33
34 MR. MOLSTAD: (INDISCERNIBLE) some time, Sir.

35
36 THE COURT: Oh, I'm sorry. Sorry, Shelby. I didn't mean to
37 skip over you. Sorry about that.

38
39 **Submissions by Ms. S. Twinn**

40
41 MS. S. TWINN: Sorry. No, that's okay. So good afternoon, Sir.

1
2 THE COURT: Good afternoon.
3
4 MS. S. TWINN: I'm again going to have to ask you to bear with
5 me. I don't public speak and tend to avoid confrontation at all costs. So I'll tend to lose
6 words when in these situations.
7
8 THE COURT: You just -- you just take your time and just tell -
9 - tell me exactly what you are thinking and why your position is sound and you'll -- we will
10 work our way through this for sure.
11
12 MS. S. TWINN: Great. Thank you. Thank you. So --
13
14 THE COURT: And, of course, Ms. Osualdini can step and if you
15 are stumbling on something, she can maybe give you some sort of guidance to head you
16 back on the path. I am sure she would be prepared to do that for you.
17
18 MS. OSUALDINI: Absolutely, My Lord.
19
20 MS. S. TWINN: Thank you. Thank you.
21
22 MS. OSUALDINI: (INDISCERNIBLE).
23
24 THE COURT: We do need to hear exactly what you think
25 should be done here. Okay.
26
27 MS. S. TWINN: Yeah. Yeah. Excellent. Okay. So I guess simply
28 because, again, I'm not educated in this. I'm fairly young so I wasn't around for a lot of
29 these decision making moments, but what I do understand is that from -- with respect to
30 the trust transfer, that from settler -- initial settler and trustees that it was understood and
31 everybody was functioning from a point of understanding that the trust transfer went over
32 to benefit beneficiaries of 1985 as well as the other one for 1986, but and then continuing
33 through to current trustees and employees of the trust that they were all functioning under
34 the understanding that it was 1985 beneficiaries that were being -- to benefit from that trust
35 property in there.
36
37 So I find it -- confusing, again, for someone like myself that somehow along the way that
38 there's been a change of heart for the trustees on this matter and a little concerning for
39 myself also on that idea that throughout this whole process from a few years ago when I
40 was seeking party status to right now, I was made to believe in decisions and other
41 conversations, documentation that the trustees in their fiduciary duty were looking out for

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

11
12 I guess another point of the discrimination aspect that it was kind of insinuated that I am
13 for the exclusion of the current discrimination in the 1985 trust deed and an example of
14 that, C-31 women, which is not true. It's just that their example right now is using -- is
15 being used to try and take the trust away from current beneficiaries instead of -- again, I
16 don't know how this works but instead of trying to add people who have been discriminated
17 against, why is it being used to take away from current beneficiaries instead. So it's not that
18 I want to exclude in example, C-31 women, I just think that the example is being used in a
19 way that I don't agree with right now.

20
21 And also I guess the ascertaining who these beneficiaries are being overly complicated, I
22 don't agree with that as well. In example, the Michelle Ward situation where she was
23 appointed by the registrar of Canadian Indigenous Affairs or whatever their name was back
24 then, that she fell in line with the rules that they were following and there was discussion
25 and litigation about the validity of that because the Sawridge First Nation, for whatever
26 their reasoning was back then, was that she didn't belong in there and so they protested that
27 unsuccessfully, proving that these rules are followable. That you can take an individual's
28 facts about who they are and have them applied. This doesn't prove that it's complicated. It
29 proves that you can use them. And that maybe proving also that they may need to be, you
30 know, inclusion when deciding who is a beneficiary or -- and so on and so forth. That may
31 be an impartial and, you know, possibly educated or understanding of the situation may
32 need to be involved to keep these misunderstandings at bay.

33
34 Yeah, that's my thoughts on it, I guess.

35
36 THE COURT: Okay. Well, thank you very much. You did very
37 well in explaining that position. Thank you very much for that.

38
39 Mr. Molstad.

40
41 **Submissions by Mr. Molstad**

1
2 MR. MOLSTAD: Thank you, Mr. Justice Henderson. During my
3 submissions I will be referring to the brief of Sawridge November 15th, 2019, and the book
4 of documents dated the same date --
5

6 THE COURT: Okay.
7

8 MR. MOLSTAD: -- the reply brief of Sawridge November 20th,
9 2019, and the supplemental brief of Sawridge, November 27th, 2020. During my
10 submissions I will refer to the Sawridge First Nation as Sawridge.
11

12 By way of a brief factual background, Sawridge adhered to treaty number 8 which provided
13 in part that Her Majesty the Queen set aside reserves for Sawridge, and a copy of the written
14 text of treaty is at tab 1 of our November 15th, 2019 brief. Treaty 8 further provided that if
15 the reserve set aside for Sawridge or any interest therein is sold or otherwise disposed of,
16 it would be for the "use and benefit of the said Indians entitled thereto with their consent
17 first had and obtained." The oil and gas underlying the Sawridge reserves constituted an
18 interest in their land. Pursuant to the *Indian Act*, the regulations under the *Indian Act* and
19 the *Indian Oil and Gas Act and Regulations*, Canada granted oil and gas leases to third
20 parties with respect to Sawridge reserve lands.
21

22 When oil and gas was produced from the Sawridge reserve lands, the royalties from this
23 production that was due was paid to Canada in trust for Sawridge. Pursuant to section 4 of
24 the *Indian Oil and Gas Act and Regulations*, the royalty money was paid to Canada in trust
25 only for the benefit of Sawridge as the "Indian band concerned". Section 4 of the *Indian
26 Oil and Gas Act* is reprinted in paragraph 8 of our November 15th, 2019 submissions and
27 states as follows:
28

29 Despite the provisions of any contract but subject to subsection
30 (2), whenever oil or gas is recovered from first nation lands, there
31 is reserved to Her Majesty in right of Canada in trust for the first
32 nation concerned a royalty consisting of the share of the oil or gas
33 determined under the regulations, which the contract holder shall
34 pay to Her Majesty in right of Canada in trust for the first nation
35 in accordance with the regulations.
36

37 Just below that in our same brief, we quote paragraph 61(1) of the *Indian Act*
38 which states as follows:
39

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

1 are received or held, and subject to this Act and to the terms of any
2 treaty or surrender, the Governor in Council may determine
3 whether any purpose for which Indian moneys are used or are to
4 be used is for the use and benefit of the band.
5

6 We submit that section 61(1) of the *Indian Act* mandates that Indian money must only be
7 expended for the use and benefit of Sawridge.
8

9 In the *Ermineskin* decision, which is at tab 4 of our November 15th, 2019 brief, the
10 Supreme Court of Canada commented that statements made in Parliament were made to
11 ensure "that equitable benefits from oil and gas production on Indian lands go to the Indian
12 people" and that "the greatest possible return must flow to the band when the oil is taken
13 from the ground and is lost to them forever".
14

15 In paragraph 100 of that same decision, the Court further commented that section 61(1) of
16 the *Indian Act* when read as a whole mandates that Indian moneys are only to be expended
17 for the use and benefit of the bands. The Court also stated in paragraph 104 that under
18 section 64(1), once funds are expended with the consent of the band, the Crown no longer
19 has control over the funds nor does it hold or manage the assets that may have been
20 acquired. The Court also stated in that decision that (a) absence of control or management
21 responsibility would also apply to expenditures for expenses or assets under section
22 64(1)(k).
23

24 Further, the Crown cannot simply transfer funds. Under section 64(1)(k) in accordance
25 with its fiduciary obligations, they must be satisfied that any transfer is in the best interests
26 of the bands. Once the transfer is effected, the Crown's fiduciary obligation with regard to
27 the funds in questions must cease as it no longer has control of the funds and is not
28 responsible for their management. And (c) requiring a band to satisfy the Crown that a
29 transfer was in their interests is consistent not only with the provisions of the *Indian Act*
30 but with the Crown's obligation as a fiduciary with respect to the royalties. We submit that
31 the *Indian Act* provides that Sawridge was and continues to be the legal owner of the royalty
32 money paid in trust to Canada and pursuant to section 62 of the *Indian Act*, the royalty
33 money is deemed to be capital moneys of Sawridge. 62 of the *Indian Act* is found in
34 paragraph 11 of our November 15th, 2019 brief.
35

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

1
2 With the consent of the council of a band, the Minister may
3 authorize and direct the expenditure of capital moneys of the band
4

5 (k) for any other purpose that in the opinion of the Minister
6 is for the benefit of the band.
7

8 In accordance with the *Ermineskin* decision of the Supreme Court of Canada, section
9 64(1)(k) of the *Indian Act* provides authority for the transfer of capital moneys from the
10 Crown to either Sawridge or an independent trust for Sawridge. The letter from the assistant
11 deputy minister dated December 23rd, 1993, confirmed that the trust held substantial sums
12 which to a large extent have been derived from Sawridge capital and revenue moneys
13 previously released by the minister and these moneys were expended pursuant to section
14 64 and section 66 of the *Indian Act* for the benefit of the members of Sawridge, and we
15 would refer you to the affidavit of Mr. Darcy Twinn paragraph 8 and tab L and tab O of
16 the Sawridge book of documents.
17

18 The evidence demonstrates that the funds were released to Sawridge, where on the basis of
19 its representation to the Crown, that the funds would be used for the benefit of its members
20 in accordance with the applicable legislation. The purpose of the 1982 trust was to settle
21 assets that were at that time held in trust by Chief Twinn and other individuals for present
22 and future members of Sawridge. Chief Twinn testified in October of 1993, at the bill C-
23 31 trial, that the reason for establishing the Sawridge trust were that at that time Sawridge
24 was not considered to be a legal entity.
25

26 The 1982 trust, which is found at tab M of our -- that's 'M' as in mother -- book of authorities
27 contains a number of very significant provisions. Mr. Sestito has taken you to that and I
28 will not repeat what he has read out to you, but I would refer you to the very first paragraph
29 in the preamble on page 2, the top paragraph at the top of the page, in paragraph number 1
30 - and I'm not sure you read this - it provides that the settler and trustees hereby establish a
31 trust fund which the trustees shall administer in accordance with the terms of this
32 agreement. I believe Mr. Sestito read to you paragraph 3 on the second page. Go over to
33 the third page, he did read part of paragraph 6 but it's important that you hear all of the first
34 paragraph which stated: (as read)
35

36 The trustees shall hold the trust fund for the benefit of all members
37 present and future of the band provided, however, that at the end
38 of 21 years after the death of the last descendant now living of the
39 original signatories of treaty number 8, who at the date hereof are
40 registered Indians, all of the trust fund then remaining in the hands
41 of the trustees shall be divided equally among all members of the

1 band then living.

2
3 And over on the next page, the last paragraph of paragraph 6 reads as follows: (as read)

4
5 The trustees shall have complete and unfettered discretion to pay
6 or apply all or so much of the net income of the trust fund, if any,
7 or to accumulate the same or any portion thereof and all or so much
8 of the capital of the trust fund as they, in their unfettered discretion,
9 from time to time deem appropriate for --

10
11 And I emphasize these words: (as read)

12
13 -- the beneficiaries set out above --

14
15 The beneficiaries set out above. (as read)

16
17 -- and the trustees may make such payments at such time and from
18 time to time and in such manner as the trustees in their
19 uncontrolled discretion deem appropriate.

20
21 We submit, Sir, that the terms of the 1982 trust are unambiguous and provide that the assets
22 held by the '82 trust were to be used only for the use and benefit of members present and
23 future of Sawridge.

24
25 In 1985, when Sawridge assumed control of its membership, they received a list of the
26 members from the minister. That was in July 1985. These were the members in 1985. I'm
27 advised that the number of members today has grown slightly and is 47. The powers of the
28 1982 trustees were and are circumscribed by the terms and conditions of the '82 trust, which
29 included "no part of the trust fund shall be used for or diverted to purposes other than those
30 purposes set out herein".

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

39
40 Pursuant to section 10 of the *Indian Act*, as amended by bill C-31, Sawridge assumed
41 control of its member process on July 8th, 1985. When Sawridge assumed control of its

1 membership, the Department of Indian Affairs and Northern Development's membership
2 list included 37 members, several of whom were minors. Chief Twinn testified at the bill
3 C-31 trial that Sawridge was concerned that bill C-31 would result in a large number of
4 persons being forced upon them as members. The 1985 trust was created on April 15th,
5 1985, two days before bill C-31 came into force. We submit that the objective of the 1985
6 trust was to ensure that the beneficiaries would be the people who were considered
7 Sawridge members before the passage of bill C-31 and that people who might be declared
8 to be Sawridge members after bill C-31 was enacted would be excluded for a short time
9 until Sawridge could see what bill C-31 would bring about, and we refer you to paragraph
10 30 of our November 15th, 2019 brief.

11
12 Ultimately, it was the intention that the assets from the 1985 trust would be placed in a
13 1986 trust for the beneficiaries who were defined as the members of Sawridge. On April
14 15th, 1985, the trustees of the '82 trust passed a resolution to transfer all assets of the '82
15 trust to the 1985 trustees pursuant to paragraph 6 of the '82 trust. Sawridge passed a
16 resolution signed by nine members to approve the transfer of the assets from the '82 trust
17 to the 1985 trust. This did not constitute all members of Sawridge at the time. The intention
18 of the trustees was clear and unequivocal in that they made every effort to protect the assets
19 for only members of Sawridge and future members of Sawridge.

20
21 Sawridge challenged the constitutionality of bill C-31. In their pleadings they stated that
22 Parliament unilaterally required Sawridge to admit certain members to membership and
23 granted individual membership rights without the consent of the First Nation and over the
24 First Nation's objection. Sawridge alleged that the membership rights were granted to
25 individuals by virtue of bill C-31 without regard to their actual connection to or interest in
26 the Sawridge and regardless of their individual desire or that of the First Nation.

27
28 This matter went through two trials and the relief sought included a declaration that the
29 amendments contained in bill C-31 were inconsistent with the provisions of section 35 of
30 the *Constitution Act* to the extent that they infringed or denied the right of Sawridge to its
31 self-government, its right to determine its own band membership and, therefore, to that
32 extent they were of no force or effect. After the second trial, a decision was made which
33 we submit did not include a decision on the merit of that position. We submit, Sir, that this
34 is clearly evidence that Sawridge has historically taken the position that prior to the
35 enactment of bill C-31, they had and continued to have an Aboriginal and treaty right to
36 govern themselves with respect to their membership. Following the enactment of bill C-
37 31, they took control of their membership pursuant to that legislation.

38
39 The assets of the 1982 trust were transferred to the '85 trust and the approximate net value
40 of those assets in December of 2010 was \$70 million. After April 15th, 1985, no further
41 funds or assets were transferred into the 1985 trust with a possible exception of this

1 debenture which, in fact, was held in trust for Sawridge by Chief Walter Patrick Twinn.
2 We submit that the debenture has no value. However, should it have value, it was an asset
3 that was held in trust for Sawridge and must be held for the benefit of the members of
4 Sawridge. Our submissions in relation to the 12 million debenture are set out paragraphs
5 56 to 75 of our supplemental brief dated November 27 of 2020.
6

7 We submit that the argument on behalf of the public trustee and Ms. Twinn that the
8 debenture issued by Sawridge Enterprises Ltd. was part of the '85 trust is not supported by
9 the evidence of Mr. Bujold, who testified and clarified his position that the debenture never
10 became a 1985 trust asset. The evidence demonstrates that the debenture was never a 1985
11 trust asset and even if it were, it was held by Chief Twinn as a trustee for the Sawridge
12 First Nation - that is, the members of Sawridge.
13

14 The definition of beneficiaries of the 1985 trust is reprinted in paragraph 34 of Sawridge's
15 November 15th, 2019 brief. There has been, in our submission, no distribution of the assets
16 to the beneficiaries which are held in trust or to anyone. All benefits and programs and
17 services have been paid out to -- to or for members from the '86 trust. I'm also advised at
18 this time there are 28 minors who are children of members of Sawridge. These 28 children
19 who are children of members are themselves not members, however, it should be noted
20 that these children receive the benefits of the 1986 trust either through their parents directly
21 or indirectly. The only distributions from the 1985 trust were immediately recontributed
22 and made for tax reasons, and I refer you to paragraph 34 of our December 11th, 2020 reply
23 brief.
24

25 The 1986 trust was settled on August 15th, 1986, after Sawridge took control of its
26 membership list and it defines beneficiaries as members of Sawridge. Chief Walter Patrick
27 Twinn testified during the bill C-31 trial that it was the intention that the assets from the
28 '85 trust would ultimately be placed in the '86 trust for the benefit of the members of
29 Sawridge. Mr. Bujold, on behalf of the trustees also testified that his investigation showed
30 that the goal of the settler of the 1985 trust was to switch back to the members of Sawridge
31 as beneficiaries and combine the '85 and '86 trust once the result of bill C-31 was known.
32

33 As you know, on August 24th, 2016, legal counsels for the Sawridge trustees, Catherine
34 Twinn, and the Office of the Public Guardian and Trustee consented to an order which was
35 granted by Mr. Justice Thomas approving the transfer of assets from the 1982 trust to the
36 1985 trust nunc pro tunc on the basis that the transfer shall not be deemed to be an
37 accounting of the assets of the 1982 trust that were transferred and shall not be deemed to
38 be an accounting of the assets of the 1985 trust that existed upon the settlement of the 1985
39 trust.
40

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

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

8
9 This Court identified the question of the effect of the August 24th, 2016 consent order as a
10 foundational and pivotal issue. One possibility is that the trust asset transferred from the
11 '82 trust to the '85 trust remains subject to the terms of the '82 trust. This Court noted that
12 the consent order does not address the issue of the terms under which these assets are being
13 held and that this is a foundational issue which needs to be addressed. The Court directed
14 the filing of an application to have the issue as to the meaning and consequences that flow
15 from the consent specifically with respect to whether or not regarding the transfer of assets
16 to the 1985 trust, those assets are being held subject to the terms of the '85 trust or whether
17 they are being held subject to the '82 trust. On September 13th, 2019, the '85 trustees filed
18 an application as directed by this Court seeking a determination of the effect of the August
19 24th, 2016 consent order.

20
21 That is a brief summary of the facts that we submit are relevant. Our submissions in
22 response to the arguments advanced by the parties are first, the consent order does not
23 address the terms pursuant to which the transferred assets are held. The 1982 trust is
24 unequivocal as to who the beneficiaries are - all members present and future of Sawridge.
25 The 1985 trust was not a named beneficiary of the 1982 trust.

26
27 We submit that the *Pilkington* decision about a trustee in possession of a power of
28 advancement or discretion to encroach on capital -- capital to advance or encourage and
29 resettle a new trust on different terms provided the beneficiaries were not deprived of their
30 interest without approval. *Pilkington* does not stand for the position that a Court may permit
31 a trustee to encourage on capital to the benefit of one beneficiary and to the detriment of
32 another unless the trustee is given that power by the settler or by statute.

33
34 We submit that the 1982 trustees did not have the authority or discretion to re-characterize
35 funds held in trust for "current and future members" as effectively being held in trust for
36 persons who were not members of Sawridge. In the *Hunter Estate* decision, the Court held
37 that the trustees could effect the resettlement as a result of a wide and discretionary power
38 to advance, encroach or otherwise appoint funds to a beneficiary directly and in such case,
39 the trustee also has the power or discretion to advance, encourage, or otherwise appoint
40 those funds into a trust for the benefit of the beneficiary. We say, Sir, this difference from
41 the 1982 trust to the 1985 trust transfer where the entire objective of the alleged

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

3
4 The public trustee takes the position that non-members of Sawridge are beneficiaries of the
5 1985 trust and the 1985 trust excluded any person added to the Sawridge membership by
6 virtue of bill C-31. We submit that this is contrary to the express terms of the 1982 trust,
7 which was for present and future members of Sawridge. This would eliminate the ability
8 to carry out the terms of the '82 trust to ultimately distribute the trust funds equally among
9 all members of Sawridge in accordance with paragraph 6 of the '82 trust. We also say, Sir,
10 this is not consistent with *Pilkington* or *Hunter Estate* as this interpretation would dilute
11 the interest of members of Sawridge by permitting non-members to be considered
12 beneficiaries and it would extinguish the interest of those who would become members
13 under bill C-31.

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

22
23 The fact is that from beginning to end of these proceedings, it has
24 not been in dispute that the proposed arrangement can properly be
25 described as being for the benefit of Ms. Penelope.

26
27 This is the crux of the case and the basis upon which Sawridge submits that the principle
28 in *Pilkington* does not apply to the facts in this case.

29
30 Sawridge submits that the subject transfer of property from the '82 trust to the '85 trust
31 clearly was not for the benefit of the class of beneficiaries defined in the '82 trust - that is,
32 all present and future members of Sawridge. It cannot be argued that the resettlement of
33 the entire purpose of the '82 trust into the '85 trust was to the benefit of all present and
34 future members of Sawridge when the effect of such a transfer was to change the class of
35 beneficiaries to include non-members of Sawridge.

36
37 We submit that the jurisprudence supports the position that a properly empowered trustee
38 may advance and encroach on or pay or apply capital by settling into a new trust on terms
39 provided that it is for the benefit of the same beneficiary. The trustee may not use such
40 power to the detriment or exclusion of another beneficiary unless the trust deed expressly
41 provides the trustee with that power or the beneficiary approves. Nothing in the 1982 trust

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

5
6 No part of the trust fund shall be used for or diverted to purposes
7 other than those purposes set out in herein.
8

9 In the *Bruderheim* decision, this Court construed a trust which defined its beneficiaries as
10 "static entity persons". The facts in the *Bruderheim* decision are as summarized in
11 paragraphs 22 to 26 of our November 20th, 2019 reply brief. We submit that based on
12 *Bruderheim* that a trust settled for the object of benefitting an ascertainable static entity is
13 constrained by the four corners of its deed to benefit that object and no other individuals.
14 A resettled trust must be defined in the same manner as the original trust.
15

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

17
18 The trustees shall have complete and unfettered discretion to pay
19 or apply all or so much of the net income of the trust fund, if any,
20 or to accumulate the same or any portion thereof and all or so much
21 of the capital of the trust fund as they, in their unfettered discretion,
22 from time to time deem appropriate for the beneficiaries set out
23 above.
24

25 The beneficiaries set out above are the members of Sawridge.
26

27 The trustees of the 1982 trust were not permitted to resettle the '82 trust fund into the '85
28 trust unless it was for the benefit of only the beneficiaries under the '82 trust as this would
29 dilute the interests of the members of Sawridge by adding non-members as beneficiaries
30 and extinguish the interests of those who would become members and therefore
31 beneficiaries in the '82 trust under bill C-31.
32

33 We submit that the primary duty of the trustee is to carry out the terms of the trust and at
34 common law, the trustees may only vary a trust if the settler expressly grants them such
35 power. And we refer you to the quote of Waters in paragraph 92 of our -- of our November
36 15th, 2019, brief. We say that there is not power of amendment conferred on the trustees
37 by the terms of the '82 trust. We submit that a trust in Alberta can only be varied or
38 terminated by a court order or if the variation is permitted by the trustee. The variation or
39 termination by court order of the 1982 trust is governed by section 42 of the *Trustee Act*
40 and, of course, section 42 of the *Trustee Act* creates onerous requirements for any person
41 seeking to vary a trust. There's no evidence suggesting that the '82 trustees met these

1 statutory requirements when transferring the '82 trust assets or that they could. We refer
2 you to section 42(6) and 42(5) which deal with the limitations and terms of the variation
3 of a trust.
4

5 We submit that there is no evidence that all beneficiaries to the '82 trust who were capable
6 of consenting consented in writing nor is there evidence that the Court consented on behalf
7 of individuals who were otherwise unable to consent. As we stated earlier, paragraph 6 of
8 the '82 trust authorizes payments for beneficiaries and this contrasts with paragraph 6 of
9 the '85 trust, which provides for payment to "anyone or more of the beneficiaries". There
10 is nothing in the '82 trust which suggests that the '82 trustees have the authority to vary
11 their own power.
12

13 The expansion of the trustees' discretion, we submit, is contrary to the concept of a trust
14 and, in particular, the 1982 trust. We submit, Sir, that this court should direct that the assets
15 transferred to the '85 trust are held on trust for the beneficiaries of the 1982 trust. We submit
16 that the trust property remains trust property, and we refer you to Mr. Waters comments
17 that are reprinted in paragraph 103 of our November 15th, 2019 brief, and also in paragraph
18 104 of our November 15th, 2019 brief.
19

20 The 1985 trust did not see the assets for value and we submit it should be found that the
21 '82 trust property, which was purportedly settled into the 1985 trust, remains 1982 trust
22 property. This finding is consistent with the position of the '85 trustees who have, in the
23 past, put forth proposals that would see the definition of the beneficiary in the 1985 trust
24 be amended to be defined as a member of Sawridge. We submit it's consistent with the
25 intent and purpose of the Sawridge trust.
26

27 Our submissions in relation to Ms. Twinn's January 2020 affidavit are found in paragraphs
28 22 to 40 of our November 27th, 2020 supplemental brief. Generally, our submissions are
29 that this affidavit consisted of hearsay, double hearsay, and legal opinions and as a result
30 should be given little, if any, weight. We also submit that that the questioning evidence of
31 March 12th, 2020 of Ms. Twinn should be given little weight on grounds which are
32 described in paragraph 47 of our November 27th, 2020 supplemental brief.
33

34 With respect to Ms. Twinn's assertion in paragraph 12 of her brief that registration for
35 Indian status and membership in a First Nation are one and the same, we submit that this
36 is not correct, and we refer you to paragraph 41 of our November 20th, 2019 brief. The
37 provisions of the *Indian Act* in 1970 provided -- and we will only summarize a few of these
38 provisions.
39

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

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

10 We submit, Sir, that this legislation makes it clear that the definition contained in the 1985
11 trust is not sufficiently certain so the trust can be performed, and I want to take you to the
12 *Bruderheim* decision, which is at tab 2 of our November 20, 2019 reply brief. At paragraph
13 121 of that decision, it was stated:

14
15 The intention of the settlor must be determined based upon the
16 plain and ordinary meaning of the words which were used in the
17 declaration of trust and must be assessed in the context of the
18 circumstances which existed immediately prior to the declaration
19 of the trust.
20

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

22
23 Certainty of objects requires that the persons or the class of
24 persons who are the intended beneficiaries must be sufficiently
25 certain so that the trust can be performed. Certainty of objects is
26 required because the trustee cannot be sure that he is performing
27 properly unless the objects are clearly specified.
28
29

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

32
33 The appellants challenge the chambers judge's interpretation of
34 the objects of the 1897 trust. Creation of an express trust requires
35 the presence of three certainties, namely intention, subject matter,
36 and object: *Century Services Inc v Canada*. Certainty of objects
37 requires that the persons or the class of persons who are the
38 intended beneficiaries must be sufficiently certain so that the trust
39 can be performed.
40

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

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

10
11 Our response to the proposal of the public trustee in their letter of September 15th, 2021,
12 is that this proposal is not a solution. In this proposal, they describe "current existing
13 beneficiaries" of the 1985 trust who are not members of SFN as if they are a definable
14 group and as if they are beneficiaries. The position of Sawridge is that the only beneficiaries
15 of the '82, '85, and '86 trusts are members of Sawridge. To suggest that the members of
16 Sawridge who are beneficiaries of the trust should be compelled to have their interests as
17 beneficiaries diluted by adding as many as 559 persons as beneficiaries because Canada
18 says they're affiliated with Sawridge is, in our respectful submission, ridiculous.

19
20 We invite the Court to ask the question, Who are the beneficiaries of the 1985 trust who
21 are not members of Sawridge. We submit no one can answer that question. The only person
22 who can answer the question as to who the beneficiaries are are Sawridge because they are
23 the members of Sawridge.

24
25 We submit that Sawridge submissions are based on the evidence that has been filed in this
26 court including the extensive questioning and document production and, as a result, we
27 submit that this Court should have confidence in the sufficiency of the record to make a
28 determination on the asset transfer issue.

29
30 With respect to the jurisdiction of the Court, the 1985 trustees advice and direction
31 application in which both the public trustee and Ms. Catherine Twinn participated and
32 which they participated in for many years has been to (a) seek direction with respect to the
33 definition of beneficiaries in the 1985 trust including varying the 1985 trust to clarify that
34 definition and (b) to seek direction with respect to the transfer of assets to the 1985 trust.
35 We refer you to paragraph 11 of our December 11th, 2020 reply brief.

36
37 This Court has already ordered by a consent order dated January 19th, 2018, that the
38 definition of beneficiary in the '85 trust is discriminatory in that it prohibits persons who
39 are members of the Sawridge Indian Band No. 19 pursuant to amendments to the *Indian*
40 *Act* dated after April 15th, 1982 from beneficiaries of the '85 trust. The issues raised by the
41 Sawridge trustees since the inception of the advice and direction application in 2011, along

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

5
6 Rule 4.14(2) provides that the case management judge must hear every application filed
7 with respect to the action for which the case management judge is appointed. The language
8 is imperative. The case management judge must hear every application. The foundational
9 rules referred to in tab 1 of our December 11th, 2020 brief describe the purpose as to
10 provide a means by which claims can be fairly and justly resolved in or by a court process
11 in a timely and cost-effective way. The authority of the Court includes granting a remedy
12 whether or not it's claimed or sought in an action in rule 1.3(2). We submit that unless the
13 chief justice or case management judge otherwise directs or the Rules otherwise provide,
14 the case management judge must hear every application filed with respect to the action for
15 which the judge has been appointed.

16
17 Unless every party and the judge agree, the case management judge must not hear an
18 application for judgment by way of summary trial or preside at the trial of an action for
19 which the case management judgment was appointed, there is nothing in the Rules that
20 precludes a case management judge from hearing an application that would have the effect
21 of granting final relief. In fact, it's not uncommon for a case management judge to hear and
22 decide summary judgment or summary dismissal applications. The jurisprudence supports
23 the position that trial should no longer be the default procedure for deciding disputes and
24 more proportionate, timely, and affordable procedures should be used.

25
26 With respect to limitations, we submit that neither the *Limitations Act* nor the equitable
27 doctrine of laches act as a bar to block this Court from providing the relief sought in the
28 application of the Sawridge trustees. With respect to limitations, a remedial order is defined
29 in the Act as not including an order seeking a declaration of rights, duties, legal relations,
30 or personal status. The relief sought in the application before you is clearly a declaration
31 of the 1985 trustees' duties and beneficiaries' right which flow from the transfer order. We
32 also submit that the doctrine of laches has no application to the facts in this situation.
33 There's been no damage suffered or substantial change on the part of any party as there
34 have been no distributions from the '85 trust since the trust was settled other than
35 distributions that were immediately recontributed and made for tax reasons.

36
37 We submit that the 1982 trust assets are currently held by the '85 trustees on a resulting
38 trust for the benefit of the '82 trust beneficiaries. This can be the only legal effect of the
39 consent order. We submit a resulting trust will arise when an express trust fails and the
40 trustees are left holding the property. In conclusion, Mr. Justice Henderson, we submit that
41 the 1982 trustees did not have the power to change the beneficial ownership of the '82 trust

1 assets. These assets must be held by the '85 trust on a resulting trust subject to the terms of
2 the '82 trust and for the beneficiaries as defined in the '82 trust, being all present and future
3 members of Sawridge.
4

5 We also submit that based upon the evidence that is before you that this Court should find
6 that the assets currently held in the '85 trust remain '82 trust property subject to the terms
7 of the '82 trust and, further, they are presently being held for the benefit of the beneficiaries
8 of the '82 trust who are the present and future members of Sawridge. We submit that this
9 is the lawful and practical resolution of this matter.
10

11 Those are our submissions, Sir.
12

13 THE COURT: Thank you, Mr. Molstad. Okay. So I gather that
14 you would like to take the rest of the day and evening to reflect, come back tomorrow and
15 have your replies. Is that -- is that the plan?
16

17 MR. SESTITO: Well, My Lord, we're -- we're sort of in your
18 hands in that regard. We have the benefit of time, which is fortunate, and we could either
19 begin with the replies now or -- and I'm fairly confident, given how things went today, we'll
20 be okay tomorrow for everyone to get through their replies but, certainly, we could adjourn
21 for the day and then pick up tomorrow at 10 AM, subject to any strong preferences by the
22 parties. I think we're in your hands in that regard.
23

24 MR. MOLSTAD: If I could speak briefly, it would be my respectful
25 request that we adjourn for replies for tomorrow. I believe and would submit it'll be far
26 more efficient if we have the time to review these submissions that have been already and
27 make --
28

29 THE COURT: Well, I think that -- I think it would be much
30 more efficient to simply adjourn and come back. We could reflect on what -- what has been
31 argued today and give me a chance as well to reflect on what has been said so that I could
32 perhaps understand your replies a little more clearly. So -- and my guess is it would shorten
33 up the replies a fair bit if we -- we let you sort of pare it down to replying to only those
34 things that you think it's necessary to reply to. So I think probably it is preferable simply
35 to -- to adjourn and start tomorrow at 10:00 or -- or whatever time you want to start at. Or
36 9:00, that's fine. 10:00 is good. Whatever is good for you.
37

38 MS. HUTCHISON: That's agreeable to the OPGT, My Lord.
39

40 MR. SESTITO: Yes, certainly --
41

1 MS. OSUALDINI: That's fine.
2

3 MR. SESTITO: -- For -- for the trustees, commencing tomorrow
4 is -- is fine, adjourning for the day. If -- if the parties are okay to sit at 9 that would be great.
5 Then we can have, you know, a better chance of making sure that everyone has an
6 opportunity to speak tomorrow.
7

8 THE COURT: Well, everyone is going to have an opportunity
9 to speak tomorrow. That will be certain. 9 or 10. We won't be concerned about that. So I'm
10 -- I'm fine with --
11

12 Mr. Faulds, do you have a preference one way of another?
13

14 MR. FAULDS: I was -- I was going to suggest -- apologies, My
15 Lord. I was going to suggest 9:00. It would -- we'll have plenty of time to be ready for 9
16 AM.
17

18 THE COURT: Ms. Osualdini, do you have any issues with
19 9:00?
20

21 MS. OSUALDINI: No, that works for our office, My Lord.
22

23 THE COURT: Shelby, are you okay with that?
24

25 MS. S. TWINN: Yeah, 9 works great.
26

27 THE COURT: Good. Okay. And, Mr. Molstad?
28

29 MR. MOLSTAD: That's agreeable, Sir.
30

31 THE COURT: Good. So we are going to adjourn now until 9:00
32 tomorrow morning, and we'll hear replies at that time. Okay.
33

34 MS. BONORA: Thank you, My Lord.
35

36 MS. HUTCHISON: Thank you, My Lord.
37

38 THE COURT: Thank you very much. Okay.
39

40 MR. SESTITO: Thank you.
41

1 THE COURT:

Bye now.

2

3

4

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

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1 Certificate of Record

2
3 I, Morag O'Sullivan, certify that this recording is the record made of the evidence in the
4 proceedings in Court of Queen's Bench held in courtroom 416 in Edmonton, Alberta on the
5 27th day of September 2021, and I was the court official in charge of the sound-recording
6 machine during the proceedings.
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1 **Certificate of Transcript**

2
3 I, Marcey Lepka, certify that

4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

8
9 (b) the Certificate of Record for these proceedings was included orally on the record and is
10 transcribed in this transcript.

11
12 Marcey Lepka, Transcriber

13 Order Number: AL21827

14 Dated: October 3, 2021

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Edmonton, Alberta
2

3 September 28, 2021 Morning Session
4

5 The Honourable Justice Henderson Court of Queen's Bench of Alberta
6 (remote appearance)
7

8 D.C. Bonora, QC (remote appearance) For the Sawridge Trustees
9 M.S. Sestito (remote appearance) For the Sawridge Trustees
10 J.L. Hutchison (remote appearance) For the Public Trustee
11 P.J. Faulds, QC (remote appearance) For the Public Trustee
12 E.H. Molstad, QC (remote appearance) For Sawridge First Nation
13 C. Osualdini (remote appearance) For C. Twinn
14 (No Counsel) For S. Twinn
15 M. O'Sullivan Court Clerk

16
17

18 THE COURT: Good morning. It looks like we have most
19 everyone on the line. Am I right?
20

21 MS. HUTCHISON: It looks that way, My Lord, looking at the --
22 we're getting some feedback.
23

24 THE COURT: Right. I think that --
25

26 MR. FAULDS: There.
27

28 MS. HUTCHISON: It might be resolved.
29

30 MR. FAULDS: Yeah. I think we've (INDISCERNIBLE).
31

32 THE COURT: Okay. Good.
33

34 MS. HUTCHISON: Can you hear us clearly now, My Lord?
35

36 THE COURT: I can hear you very clearly. But once again,
37 I would ask that everyone mute themselves until they speak, and that will ensure that
38 (INDISCERNIBLE) as any risk of that type of interference. Okay.
39

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

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

4
5 THE COURT: Okay. Excellent. So, Shelby, we will start with
6 you then. Do you have anything to say?

7
8 **Submissions by Ms. Twinn**

9
10 MS. TWINN: Yes. Okay. So I don't know how this whole
11 works. I don't know what replying really means in context of this whole thing. But from
12 what I have heard yesterday and spent some time going through and understanding to
13 start -- I guess start off with Justice Thomas's decision in Sawridge No. 5, I guess, where
14 he states, I cannot foresee a circumstance in -- paragraph 37:

15
16 I cannot foresee a circumstance where the status of
17 Shelby Twinn as a beneficiary under the 1985 Sawridge Trust
18 will be eliminated.

19
20 And also in paragraph 27, he also states:

21
22 The 1985 Sawridge Trust and the assets held by the Trust for its
23 beneficiaries whom, I have already noted, include at a minimum
24 two of the applicants, namely Patrick and Shelby Twinn.

25
26 Again, kind of reiterate to me that this was about a year after the said transfer order and
27 that everybody was understanding that this is -- this was how it was, that there was no
28 appeal on this notion. Trustees were aware of it. And there have been currently and
29 past elected Sawridge Band Council as trustees. So in theory, that should mean that they
30 understood as well. They were aware 'cause they were also present as a trustee and
31 knowing this information.

32
33 So at that -- also with the trustees from what I understand yesterday being that they do
34 not represent someone like myself, being not a Band member. I feel like I have been led
35 a little bit back and forth throughout this entire thing being told that by -- either from
36 them notably in their factum to the Court of Appeal on October 20th, 2017, where
37 numerous times they state that they are advocating for the interests of the
38 adult beneficiaries. In paragraph 34 of that factum, they had stated: (as read)

39
40 The trustee is acting in the best interests of the beneficiaries of
41 the trust commenced an advice and direction application to deal

1 with the potentially discriminatory provision. The interests of the
2 beneficiaries are properly represented by the trustees for the
3 adult beneficiaries.
4

5 That's what with many other paragraphs in there insinuating the same thing through
6 paragraphs, in example, 3, 30, 33, and 34 which is the one I just read. To also be told
7 yesterday that they don't now -- because I'm not a member is a little concerning, and for
8 again someone who doesn't understand the process and what the details to what these
9 legal obligations are, now I don't understand how I can be a beneficiary without trustees
10 caring for and managing my interests. I don't know how that works, but this doesn't seem
11 to make sense, for me at least.
12

13 There -- right. And also something that I feel that I had understood from yesterday the --
14 that the trustees and the First Nation -- Sawridge First Nation believe that
15 Band membership is the only way through for beneficiaries for the trust.
16 And my one concern with that is that I, as an '85 beneficiary, understand where I fit in
17 there.
18

19 The -- to me the rules are clear about what facts I may require to be a beneficiary of the
20 1985 trust, but if I had to turn to applying -- which I have about 3 and a half years ago
21 with that; no note on how that process is going -- I don't know the -- the criteria is a little
22 bit unknown. It leaves a lot of space for an interpretation that I don't understand.
23 Things like judgment on -- like character, like style. I don't know how that --
24 something that's knowable. So to suggest that now all these beneficiaries that exist,
25 well, you're not a beneficiary yet; you must apply for Band membership. Well, it's been
26 very timely for me -- and I know others -- that this has taken of my membership
27 application, and we don't really know if it's going to work out for us because it's not
28 seemingly as factually based as being a beneficiary of the 1985 trust.
29

30 So that's also another big concern that that is something that is being looked at as the only
31 option for us, and having no one advocating for us anymore -- it feels like because
32 the trustees have stated that they're not beholden to beneficiaries like myself.
33 Only Band members have beneficiaries
34

35 So the -- yeah. So that's what I have taken from yesterday, and I hope that is what was
36 okay. Oh, I think you're muted. Sorry.
37

38 THE COURT:

Sorry about that. Thank you for that. All right.

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

1 interests of the non-member beneficiaries as defined in the definition section of the
2 1985 trust (INDISCERNIBLE). I am just flagging for Ms. Bonora that I will be asking
3 her to address your concerns so that we have a better understanding of exactly what the
4 trustee's position is on that point. Okay?

5
6 MS. TWINN: Great. Thank you. Thank you.

7
8 THE COURT: Okay. Thank you very much. So it looks like
9 with that we move to Mr. Molstad. Is that right?

10
11 **Submissions by Mr. Molstad**

12
13 MR. MOLSTAD: That's correct, Mister Justice Henderson, and
14 our submissions in reply are brief. During submissions yesterday, it was asserted that the
15 ratio of *Pilkington* is that, well, the transfer of trust property from the new trust --
16 even a trust that includes the beneficiaries -- is permissible so long as saying as
17 permissible under the scope of the authority granted by the relevant power of
18 advancement and is for the benefit of a current beneficiary.

19
20 We would encourage you, Mister Justice Henderson, to read again the decisions of
21 *Pilkington* and *Hunter*. We would also refer you in relation to *Pilkington* to
22 paragraphs 22 to 30 of our December 11th, 2020, brief.

23
24 In relation to the *Hunter* decision which is at tab 6 of Sarge's (phonetic) November 15th,
25 2019, brief. At paragraph 16, the Court adopts a portion of *Pilkington* which makes
26 no reference to it being permissible for a trustee to perform a trust to trust transfer under a
27 power of advancement for the beneficiaries of the new trust are not the same.

28
29 In response to the submissions related to the Berg decision, we would refer you to
30 paragraphs 11 to 17 of our November 27, 2020, supplemental brief.

31
32 With respect to comments related to inclusion and exclusion, the Sawridge First Nation
33 continues with its negotiations with Canada with respect to the implementation of its
34 right to self-government. Sawridge First Nation historically was a small First Nation of
35 members who lived together, gathered resources together, and shared those resources
36 as families. Sawridge has always asserted their right to determine who is a member,
37 as only members have the right to share in their resources.

38
39 We submit that Sawridge continues today as a small group of families, and no one should
40 be forced upon them as a member of their family without their consent. On behalf of the
41 Sawridge First Nation, we have proposed a solution to the question that you have asked

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

3
4 Those are our submissions in reply to you.

5
6 THE COURT: Thank you, Mr. Molstad. I will say that in
7 response to your submissions in relation to *Pilkington* and *Hunter* I am -- and this is to
8 alert Mr. Faulds so he can be getting prepared for it comes time for him to reply --
9 I am going to be asking him to direct me to the specific portions of *Pilkington* and the
10 (INDISCERNIBLE) state that support the proposition that if a trustee
11 (INDISCERNIBLE) the trust, *Pilkington* supports that resettlement provided that some of
12 the known beneficiaries are in the new trust and that others can be excluded.

13
14 So I am going to be asking about that so he can be sort of thinking about a response,
15 but that is directly in response to Mr. Molstad's concerns in terms of the interpretation
16 of *Pilkington*.

17
18 So with that, we could move on to Ms. Osualdini?

19
20 **Submissions by Ms. Osualdini**

21
22 MS. OSUALDINI: Thank you, My Lord. So, My Lord, my reply to
23 submissions will be relatively brief as well. I wanted to start by reiterating to the Court
24 the path forward that we see. We see the path forward as first an examination of the
25 ATO order itself, and then secondly if the answer to that is it doesn't cover the issue,
26 then we first have to understand whether the transfer was a valid exercise of power. If it
27 wasn't, is remedy needed, and if so, against who?

28
29 And then we need to examine issues like limitations and laches, and I know that
30 the SFN has said that these issues are non-events, but, My Lord, it's 35 years later,
31 and in terms of laches, Mr. Molstad, as we've heard, was present at the ATO application,
32 was involved -- or at least was aware of the negotiation of the order. So to say that --
33 so to not say anything until now about concerns with the order is exactly what laches is
34 all about because the parties have carried on in reliance upon that order.

35
36 Now, My Lord, to address your comments about *Pilkington*, those are addressed in
37 our written submissions. So I would be prepared to provide some thoughts on what the
38 ratio in *Pilkington* is about. Now, My Lord, you will recall the circumstances in
39 *Pilkington*. It was in a state context where a trust was established for a nephew, and upon
40 the nephew's death, it would be divided amongst his children. And what arrangements
41 the trustees and the nephews wanted -- and the nephew wanted to reach was for his

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

4
5 So some of the issues in *Pilkington* were the same because Miss Penelope's children were
6 not included in the initial trust. They had no interest in the trust established under the
7 will, but it was found in *Pilkington* -- that's where this concept of incidental benefit to a
8 beneficiary comes in because the Court said, well, establishing this trust for
9 Miss Penelope even though we're allowing her children to come into it is an
10 incidental benefit to Miss Penelope.

11
12 So that's where that concept comes in, and I think that's where the linkage to this
13 situation is is we transfer -- or not "we" -- the 1982 trustees transferred assets to the 1985,
14 and at the time, all of the beneficiaries were the same. The group when we apply the
15 definitions were the same under each, and the fact that some persons who may have not
16 continued to qualify under the 1982, we say, is an incidental benefit because it froze and
17 maintained the definition of beneficiaries, as (INDISCERNIBLE) understood it, when the
18 1982 trust was established.

19
20 Because, My Lord, you've got to remember that when the 1982 trust was established,
21 everyone understood membership to be determined according to the 1970 *Indian Act*
22 rules. In 1985, everything was about to change on how membership was determined.
23 So this transfer was really to preserve the intention that existed when the trust was settled.

24
25 THE COURT: All right. But I guess the premise of your
26 argument is that the beneficiaries as at April 1985 -- the two beneficiary groups were
27 identical at that moment in time.

28
29 MS. OSUALDINI: Correct.

30
31 THE COURT: But is that so because the 1982 beneficiary was
32 a class of persons consisting of members and future members. So that class is different
33 than what we see in the 1985 beneficiary definition which speaks to a group of people at
34 a moment in time. So --

35
36 MS. OSUALDINI: True, My Lord. But how that class was
37 determined --

38
39 THE COURT: Yes.

40
41 MS. OSUALDINI: -- was the same at that point in time because

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

3
4 THE COURT: Right. But the 1985 beneficiary definition does
5 not contemplate future members. 1982 definition contemplates a class consisting not just
6 of members but future members. And what we had on April 15th, 1985, was a group of
7 members and we had a group of future members, some of whom were known, some of
8 whom were not known, some of whom were contingent future members in the sense that
9 the contingency being the actual implementation of Bill C-31.

10
11 So I need you to explain to me how there was the identity in place there.

12
13 MS. OSUALDINI: My, My Lord, I think *Pilkington* is informative
14 on this issue as well --

15
16 THE COURT: Okay.

17
18 MS. OSUALDINI: -- because at the time of this arrangement in
19 *Pilkington* -- so we're dealing with a family which is more simplistic. So we have the dad
20 and all of his kids. It was contemplated at the time that the father could have had more
21 children. So by carving off an interest for Miss Penelope --

22
23 THE COURT: M-hm.

24
25 MS. OSUALDINI: -- and her children in a separate trust, they were
26 potentially diluting the trust fund for any further children that the nephew may have had.
27 So the *Pilkington* principle does contemplate that there could be dilution to members --
28 or to members of the class that don't yet exist.

29
30 THE COURT: M-hm.

31
32 MS. OSUALDINI: And I remind My Lordship that what happened
33 in 1985 was that effectively it was a beneficial distribution under the power of
34 advancement because I would dare say that if we had just paid cash in hand to every
35 beneficiary that existed that day --

36
37 THE COURT: M-hm.

38
39 MS. OSUALDINI: -- we wouldn't be here right now.

40
41 THE COURT: That is right.

- 1
2 MS. OSUALDINI: And I don't think that legally there is a
3 difference between putting a few million dollars in everyone's hand versus establishing a
4 new trust for them. It a form of beneficial distribution.
5
- 6 THE COURT: M-hm.
7
- 8 MS. OSUALDINI: It's just the format that was chosen.
9
- 10 THE COURT: When I look at the leading texts in Canada,
11 I don't see that concept discussed. I don't see support for that, for example, in *Waters*.
12 Am I missing something in *Waters*?
13
- 14 MS. OSUALDINI: In terms of?
15
- 16 THE COURT: The concept that you described as being the
17 *Pilkington* principle. Firstly, *Waters* doesn't even cite *Pilkington*, as far as I can tell,
18 nor does it talk about a concept similar to what you are describing.
19
- 20 MS. OSUALDINI: Well, My Lord, I am aware that Dr. Waters was
21 an adviser to the trustees at the start of this application. So I would --
22
- 23 THE COURT: I don't --
24
- 25 MS. OSUALDINI: -- I would dare say that he supports this
26 concept.
27
- 28 THE COURT: -- I don't know what he supports. I am trying to
29 determine what the law is.
30
- 31 MS. OSUALDINI: Well, *Pilkington*, My Lord, is accepted law into
32 Canada. I'm not aware of any decision in Canada that suggests that this is not accepted
33 law.
34
- 35 THE COURT: Sure. But it is a question of determining what
36 *Pilkington* really stands for. That is the question, and Mr. Molstad seems to have a
37 much, much different view of *Pilkington* that you do and (INDISCERNIBLE) as well
38 who supports your position obviously.
39
- 40 MS. OSUALDINI: Right. Well, my understanding of the
41 SFN's position on this is that somehow these concepts are restricted to the

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

3
4 THE COURT: You say that, because a discretion would have
5 permitted a distribution essentially of all -- or substantially of the assets by way of the
6 cash distribution, what we really have here is not much different.

7
8 MS. OSUALDINI: That's exactly it, My Lord.

9
10 THE COURT: Instead of the cheques going to the
11 individual members who existed at that time, they went to a trustee to hold for the benefit
12 of those people and a bunch of others.

13
14 MS. OSUALDINI: Exactly. And in that argument, we're saying
15 that that was an incidental benefit to the beneficiaries because it maintained the format in
16 which their beneficial status was established under the '82, and that was the incidental
17 benefit to them as we kept calculating it the same way --

18
19 THE COURT: M-hm. Is there --

20
21 MS. OSUALDINI: -- rather than changing it on them.

22
23 THE COURT: -- is there a particular paragraph or passage in
24 *Pilkington* or *Hunter* that speaks to -- that you can point me to directly to permit me to
25 zero in on the principle that you are describing when I need to look at it holistically as I --

26
27 MS. OSUALDINI: Well, in my --

28
29 THE COURT: -- sort of extrapolate --

30
31 MS. OSUALDINI: -- in my written submissions started at
32 paragraph 61 through -- saw it for quite a while -- about to paragraph 90, I go through
33 *Pilkington* and pinpoint references there.

34
35 THE COURT: Okay. I will go through --

36
37 MS. OSUALDINI: So perhaps that's the most efficient, Sir.

38
39 THE COURT: -- I will go through that again. Thank you very
40 much.

41

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

4
5 And I highlight to the Court that the 1982 trustee in its dispositive provisions expressly
6 contemplated the fact that a distribution need not take simply cash in hand form because
7 the dispositive provision contemplated the format of the distribution being
8 (INDISCERNIBLE) the correct language. But essentially in any (INDISCERNIBLE)
9 four of the trustees found acceptable. So it's very discretionary as to how the trustee
10 could make the distribution which makes sense because a trustee might, you know,
11 commonly in trust pay your creditor or pay a university or do something like that.
12 They don't have -- the distribution doesn't have to be cash in your hand.

13
14 And I would argue that that's what was done, and it's important for the Court to remember
15 that it was done on notice to all SFN members. You have in evidence the resolution of
16 the meeting of the SFN members where this was flagged for them, and no one raised
17 any concerns with it. So I would extrapolate from that where the SFN members did see
18 this as being a benefit to them.

19
20 Did you have any further questions about *Pilkington*, My Lord?

21
22 THE COURT: No. No. That is very helpful. Thank you very
23 much. And I am sure that Mr. Faulds will want to further elaborate on it, but I do need
24 *Pilkington* very carefully and try to determine precisely what it stands for.

25
26 MS. OSUALDINI: Okay. And I guess I have just finished the
27 *Pilkington* concept, My Lord, but the fact that *Pilkington* was presented to
28 Justice Thomas in support of the ATO, and it was accepted by him. So that -- we have
29 that -- a very on point example of the Alberta Courts accepting *Pilkington* as authority on
30 this issue.

31
32 THE COURT: Yes. The pitfalls of having a consent order is
33 that you don't get fulsome reasons, and so it is not totally clear what Justice Thomas was
34 thinking at the time because he didn't elaborate. I will do my best to try to understand
35 what he was thinking and what he had in mind.

36
37 MS. OSUALDINI: Thank you, My Lord. And so I just wanted to
38 turn and briefly discuss the concepts of resulting trust and the constructive trust which
39 were raised by both the trustees and the SFN in support of their positions. And I just
40 reiterate to the Court that resulting trusts are about intention. Resulting trusts arise from
41 the moment of the transfer because there's intention for a trust to exist.

1
2 That is not the case here because the 1982 trustees had no intention, as we can see on the
3 evidentiary record, to create that relationship. They wanted the asset. They were doing a
4 beneficial distribution out of the trust. And my friend Mr. Molstad cited *Waters* for the
5 proposition that when an express trust fails a resulting trust arises. That's not the case
6 here because the 1985 trust hasn't failed. So an express -- that concept is inapplicable
7 here.

8
9 Now in terms of a constructive trust, it's well-established law, as the Supreme Court has
10 told us from the seminal decision of *Peter v. Beblow*, that a constructive trust is a
11 proprietary remedy imposed by the Court. It does not exist independently. It has to arise
12 from a Court direction.

13
14 So because of that, we cannot say that these assets are being held in a constructive trust
15 for the 1982. A Court would have to direct that. And what we know about
16 constructive trusts is that they're proprietary remedy meant to address a just enrichment
17 when damages are found to be inappropriate. So it requires an entire independent
18 legal analysis. We can't just say that it independently exists.

19
20 And in addition to that, the trustees referenced the concept of consideration in support of
21 this theory that a constructive trust exists. The concept of consideration is a
22 contractual concept. It is not a concept in trust law, because when beneficial distributions
23 happen, nobody has paid any consideration for that. So we extrapolated what they're
24 saying. No beneficial distribution could be enforceable because nobody paid a
25 consideration for it.

26
27 So I would submit, My Lord, that the idea of consideration is a red herring. The fact that
28 the 1985 trust didn't pay consideration for the transfer is not relevant because it was a
29 beneficial distribution to this new entity. When a settler settles a trust, there's no
30 consideration for that either, but that doesn't mean that the trust isn't valid.
31 And so effectively, this argument falls apart because we're trying to import contract terms
32 into trust law, and the two just are separate matters.

33
34 Now, My Lord, during yesterday's submissions and as highlighted by Shelby,
35 a fairly surprising turn of events occurred where the trustees admitted or stated for the
36 first time that they see their 5-year share of duty as only extending to the members --
37 the member beneficiaries of the 1985 trust. And, you know, I think Shelby did a really
38 nice job highlighting the concerns about that because I share those concerns listening to
39 this because I have been involved in this litigation for quite a while, and that's the
40 first time that I have ever heard the trustees say that. And as Shelby elaborated
41 Sawridge No. 5 -- Justice Thomas already commented on the facts that Shelby and

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

3
4 And further -- and I just highlight this to the Court as examples of inconsistency in this
5 position -- this new position that they only represent the Band member beneficiaries --
6 is in the infancy of this litigation there was an application before Justice Thomas to
7 determine whether the OPGT would be appointed as a lip wrap for the
8 minor beneficiaries. The trustees opposed that appointment.

9
10 In opposition to that appointment, the trustees filed submissions in these proceedings.
11 On March 8th, 2012, it's stated in paragraph 69 -- and I'm going to quote from
12 paragraph 69 that: (as read)

13
14 The trustees will place all relevant information in their
15 possession before the Court. Further, the trustees acknowledge
16 that they have a duty to all beneficiaries and that they must
17 address the issues raised by them in an objective and
18 dispassionate manner.

19
20 I would submit, My Lord, that this new position is inconsistent with that statement.

21
22 Next, Your Lordship may recall that Shelby Twinn along with other impacted persons
23 sought party status in these proceedings and an indemnity from the trust for that
24 participation. That application was heard in the fall of 2016 and was denied by
25 Justice Thomas. This order was appealed to the Court of Appeal. And as Shelby
26 referenced in their factum -- not in "their" but meaning the trustee's factum -- to the
27 Court of Appeal in opposition to the appeal, they stated at paragraph 34 that:

28
29 Paragraphs 27 through 35 of the appellant's factum referred to a
30 conflict of interest between the interests of the trustees and the
31 beneficiaries. This was never addressed before the CM judge
32 and is a red herring now. The trustees acting in the best interests
33 of the beneficiaries of the trust commenced an advice and
34 direction application to deal with a potentially discriminatory
35 provision. The interests of the beneficiaries are properly
36 represented by the trustees for the adult beneficiaries and by the
37 OPGT for the minor beneficiaries and those minors who have
38 become adults.

39
40 So here we have the trustees telling the Court of Appeal that they represent the interests
41 of all adult beneficiaries of this trust.

1
2 And then Your Lordship -- transitioning into a time were Your Lordship was involved in
3 this file, you may recall Shelby Twinn's application for intervenor status in these matters.
4 And in response to this application, the trustees filed written submission on October 25th,
5 2019, and at paragraph 9, they stated, and I quote: (as read)

6
7 Shelby is the step-granddaughter of Catherine Twinn. Shelby's
8 status as a beneficiary is recognized by the trustees and by order
9 of this Court. Shelby and her sister Kaitlynn (phonetic) Twinn
10 have identical interests in the trust, and Shelby's sister is
11 represented by the OPGT. The representation of Shelby's sister
12 by the OPGT is subject to existing indemnity and cost
13 exemption orders. As Shelby is a beneficiary, her interests are
14 also represented by the trustees.
15

16 This was only 2019, My Lord, that Shelby's being told this. And I think these
17 submissions are quite important, because before Your Lordship's involvement, she was
18 denied party status and indemnity in part on the basis that these trustees already
19 represented her interest. So I think that's important for the Court to be aware of when
20 considering the trustee's submissions on this application is that we're here today on the
21 basis that they represent all -- all adults, not just Band member adults, and this creates a
22 lot of issues in the litigation because there's been no notice to anyone that they were about
23 to change their position on these matters. The first time we hear about it is in
24 submissions yesterday.
25

26 So why does this matter? I mean, it matters in terms of notice of these proceedings to
27 affected individuals. Up to this point, all affected individuals thought they were being
28 advocated for by them. And secondly in terms of substantive submissions on this
29 application, Your Lordship cannot view -- or cannot anymore view the submissions of the
30 trustees as neutral trustees, but rather, they're advocates for Band members.
31 So that impacts how Your Lordship should consider their submissions.
32

33 Now, the trustees in arriving at this conclusion that they only owe duties to Band member
34 beneficiaries argued and what I understood of their argument is that the transfer
35 from '82 to '85 was only a class gift to members, and therefore, you can ignore the
36 definition in the 1985 trust deed. And with respect, My Lord, it can't look beyond who
37 the beneficiaries in the 1985 trust deed are. It's very clearly defined at how we interpret
38 that class, and there's nothing in the document to suggest or that would support the
39 interpretation being put forward by the trustees.
40

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

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

7
8 This is not comparable to the current situation because we know who the beneficiary
9 class is and how it is to be determined because it says so in the 1985 trust deed. And our
10 class is a fluid class of beneficiaries because we have to apply a legislative set of criteria
11 to determine whether someone qualifies, and the qualification could change, because in
12 Shelby's circumstances if she was to marry a non-Indigenous man, she would lose her
13 beneficial status. She would be a modern Bill C-31 woman. So the persons who qualify
14 can change over time and have to be evaluated.

15
16 Now, there's been some suggestion by both the trustees and the SFN that we can't
17 determine who the beneficiaries are, but, with respect, I would say that that just simply
18 isn't true. I recognize that looking at a list created by the SFN is certainly much similar --
19 or easier than having to apply facts about someone's lineage to determine if they qualify.
20 Definitely much easier, but I am not aware of any principles in trust law that say,
21 just because we have to put a bit of effort into the determination, it means that the
22 beneficiary class is uncertain or inappropriate.

23
24 And we can see that it is possible to make these determinations because the trustees in
25 conjunction with work with the other parties -- we've come up with a pretty robust list of
26 who the beneficiaries of the '85 trust are, and certainly, we can always point to examples
27 where there may be some dispute over someone's lineage or their facts, but this is really
28 just a factual debate that there are processes that can be used to resolve it. There is a
29 clear list, and it is capable of being applied. The registrar did it for years.

30
31 Now turning to the SFN's submissions regarding Indigenous law generally and their
32 ability to use capital and revenue funds and any restrictions that may exist on the use of
33 them, I would first point out to the Court that the SFN has not established that all of the
34 funds in the 1982 trust were derived from the capital and revenue accounts. There is
35 evidence before the Court that these funds in addition to cap and revenue arose from
36 third-party financing and other sources. So I would submit that there's not an
37 evidentiary record that supports this notion that this is all capital and revenue money.

38
39 And further even if we put that aside for a second and accepted that all of the funds came
40 from the capital and revenue accounts, the Sawridge First Nation elected to take those
41 monies and settle the 1982 trust with them. They elected to allow -- well, I shouldn't say

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

6
7 So to say that they have a residual interest in how the money is spent is incorrect because
8 the settler relinquishes that right once they put money into trust. What they had control
9 over is the terms of the trust, but once the money's in there, the trustees are obliged to
10 comply with the terms of the trust, and that's the end of the road. So to argue about
11 how -- that it's a violation of statutory law how the trustees utilized those funds, I would
12 submit, is not an accurate statement of law because the issue solely becomes, did the
13 trustees operate within their scope of authority?

14
15 And I would note, My Lord -- and this is in evidence in our client's Statement of Facts
16 and affidavit -- that a while ago, the Minister of the Crown questioned the
17 Sawridge First Nation about this trust, the trust transfer, and how they utilized those
18 funds. And at the time, the Sawridge First Nation very aggressively responded to the
19 Minister telling them that it was appropriate and the Minister had no place involving
20 themselves in what they did. So now what we're hearing from the Nation is a very
21 different pitch to the Court about the propriety of this transfer. So I would submit that
22 there's some evidence of the Nation playing a bit fast and loose about how they see or
23 how appropriate they see this transfer being.

24
25 And my final section of submissions ties back to initially how I led off about *Pilkington*
26 and reminding the Court about how the Nation and how beneficiaries and the trustees
27 would have understood membership in 1982 and how -- and frankly, how they would
28 have understood membership where the bare trusts were set up. They understood it
29 according to these legislated criteria. So in effect by transferring it to a new trust that
30 utilized the same system for determining membership, they were just creating continuity.
31 They weren't really changing any understandings. The change in understanding was
32 coming from outside forces.

33
34 And, Sir, we must remember that the SFN intentionally settled the 1985 trust which
35 utilized the 1970 *Indian Act* definition for membership. They intentionally transferred
36 the 1982 trust -- or sorry -- 1982 assets into that trust, and they intentionally at the --
37 right around the same time created a membership code that utilized a different formula
38 for determining membership. So in other words, the SFN voluntarily created a situation
39 where membership and the SFN could diverge from that legislated list and thus the
40 beneficiary pool of the 1985 trust.

41

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

5
6 So, Sir, there is a real danger in reviewing such a transaction 35-plus years later because
7 our perception of what happened is now informed by 35 years of history, and I would
8 submit to you, My Lord, that it's not appropriate to take all that history and apply it in
9 these circumstances. And the SFN should not be able to use the benefit of hindsight to
10 say that, you know what, we made a bad decision in 1985; this transfer didn't really work
11 out the way that we had hoped it would work out, so let's now, 35 years later, utilize this
12 Court process in order to undo what we intentionally did in 1985, which I would submit
13 is what effectively they're trying to do.

14
15 So in sum, My Lord, those are the -- that's the body of my reply submissions, and I just
16 want to say to the Court even listening to Shelby Twinn that, you know, frankly, this is a
17 very sad set of circumstances we have. We've got people like Shelby with all the lineage,
18 all the tie to Sawridge First Nation, but unable to get membership in the First Nation, and
19 I encourage the Court to remember those people when making your decision.

20
21 THE COURT: And in that context, there is a remedy for that,
22 right?

23
24 MS. OSUALDINI: There is?

25
26 THE COURT: Well, the decisions of the Sawridge First Nation
27 with respect to membership were made by them, but (INDISCERNIBLE) that's subject to
28 judicial review, isn't it?

29
30 MS. OSUALDINI: Some things are easier said than done, My Lord.

31
32 THE COURT: I am not suggesting that it would be simple, but
33 it is not like there is no avenue for Shelby to participate no matter what
34 (INDISCERNIBLE) we take.

35
36 MS. OSUALDINI: That's a very, very expensive
37 (INDISCERNIBLE) that presumes that Shelby has the money to do that.

38
39 THE COURT: Right. I appreciate that. Okay.

40
41 MS. OSUALDINI: Thank you, My Lord. Unless there's any

1 questions, those are all my submissions.

2
3 THE COURT: All right. So Ms. Hutchison, Mr. Faulds?
4 I think you are up. You have the (INDISCERNIBLE) off.

5
6 **Submissions by Mr. Faulds**

7
8 MR. FAULDS: Thank you, My Lord. We're going to go in
9 reverse order to the first time around --

10
11 THE COURT: Okay.

12
13 MR. FAULDS: -- and I'll speak first. And one of the points of
14 which I had intended to offer submissions by way of reply concern Mr. Molstad's
15 submissions on this definition of the beneficiaries in the 1982 trust as being both present
16 and future members of the SFN.

17
18 And the first point that I had wanted to make about that was that I think that that was --
19 at that particular term was a way of conveying that the beneficiaries were not restricted to
20 the members of the SFN at the time that the trust was created. If the intention was that as
21 the membership changed, the beneficiaries status -- the beneficiaries would change along
22 with that. That could be some language to convey that idea, and the language that was
23 used to convey that idea was the present and future members.

24
25 I do not take that to mean that the trustees were unable to deal with the trust property for
26 the benefit of the beneficiaries as they existed at any particular time. If they were
27 required to take into account the people who might become beneficiaries up until the time
28 perpetuities kicked in, they wouldn't be able to deal with the assets at all.

29
30 And I think it's clear from the powers that were vested in the trustees that that's the case.
31 If you look to the powers of the trustees under the 1982 trust to deal with the assets, those
32 powers are expressed in very broad -- in very broad terms. That's paragraph 6 of the
33 1982 trust, and it's the last section of number -- paragraph 6 which is relevant: (as read)

34
35 The trustees shall have complete and unfettered discretion to pay
36 or apply all or so much of the net income of the trust fund, if any,
37 or to accumulate the same or any portion thereof and all or
38 so much of the capital of the trust fund as they, in their unfettered
39 discretion from time to time, deem appropriate for the
40 beneficiaries set out above.

41

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

7
8 And in the 1985 trust, that particular cap was skimmed in a slightly different way.
9 The beneficiaries were defined as beneficiaries at any particular time shall mean
10 all persons who at that time qualify, and I think that those two beneficiary definitions
11 have the same fundamental meaning.

12
13 The power -- that very, very broad discretionary power of advancement with respect to
14 both income and capital is, as Ms. Osualdini pointed out, at the heart of the principle
15 which was established in *Pilkington*. And in *Pilkington*, Your Lordship may recall that
16 the power of advancement in question was a statutory power, and therefore, it was
17 looking at terms of the statute which allowed the trustees to advance trust assets to the
18 beneficiaries.

19
20 The issue was kind of interesting in the sense that the main opponent to what the trustees
21 were proposing was the tax man. If the trust assets were advanced to the beneficiary
22 directly, the tax man would get a cut. If, however, they would resettle into another trust,
23 the tax man wouldn't, and therefore, the issue of the scope of the power of advancement
24 and its (INDISCERNIBLE) was very vigorously argued, and the position of the tax man
25 was that the power of advancement did not include the power of resettlement.

26
27 And the position of the (INDISCERNIBLE) awards in that decision is summarized --
28 really, there's a very lengthy discussion about that argument. It begins on page 15 of the
29 version of that decision which is found at tab A of the trustee's original brief filed on
30 November the 1st of 2019. So there's a lengthy, lengthy discussion about that. But if
31 Your Lordship turns to page 18 of the decision, the Court sums up the ruling at the
32 beginning of the paragraph in the middle of the page to say --

33
34 THE COURT: Yes. Mr. Faulds, can you just give me a minute
35 so I can just pull that up.

36
37 MR. FAULDS: Yes. Certainly, My Lord.

38
39 THE COURT: I would like to follow along with you if I could.
40 So you say the trustee's materials and (INDISCERNIBLE) --

41

1 MR. FAULDS: The trustee's materials -- the very first brief.
2
3 THE COURT: Yes.
4
5 MR. FAULDS: November 1st, 2019.
6
7 THE COURT: (INDISCERNIBLE) you say. Yes.
8
9 MR. FAULDS: Tab A -- it begins with the asset transfer order
10 brief.
11
12 THE COURT: Okay. I have got A in front of me. Yes.
13
14 MR. FAULDS: And then behind that is the decision in
15 *Pilkington*.
16
17 THE COURT: Yes. Got it. Okay.
18
19 MR. FAULDS: And I'm looking at page 18 of the decision.
20
21 THE COURT: Okay. Let me get there. Okay. I am at
22 page 18.
23
24 MR. FAULDS: And this is the conclusion of the discussion
25 about whether or not our advancement permits resettlement --
26
27 THE COURT: Yes.
28
29 MR. FAULDS: -- and the Court concludes with the following
30 sentence:
31
32 To conclude, therefore, on this issue, I am of the opinion that
33 there is no maintainable reason for introducing into the statutory
34 power of advancement a qualification that would exclude the
35 exercise in the case now before us.
36
37 And the exercise was reliance on the power of advancement to resettle in a new trust.
38 That is the gist the decision. If I could then --
39
40 THE COURT: So, Mr. Faulds, this is important for me, so
41 I need --

- 1
2 MR. FAULDS: Okay.
3
- 4 THE COURT: -- I need just to understand what you are saying.
5 So I am looking from the stance for the proposition of the power of advancement which
6 was statutory in that case, but in the trustee here -- you say in the 1982 trustee, there's
7 essentially a somewhat (INDISCERNIBLE) power of advancement. You say that then
8 permits the trustees to resettle the trust because *Pilkington* says they can do that --
9
- 10 MR. FAULDS: Yes.
11
- 12 THE COURT: -- provided that the resettlement is for the
13 benefit of the beneficiaries which are then a group of people who are members at that
14 time, but it can include other people as well.
15
- 16 MR. FAULDS: *Pilkington* does stand for that proposition as
17 well.
18
- 19 THE COURT: Because Penelope was not a beneficiary under
20 the original will, or she's a new entry into this. So you extrapolate in that fashion.
21 Is that (INDISCERNIBLE)?
22
- 23 MR. FAULDS: My Lord, I believe the circumstance was that
24 Penelope was a beneficiary, but her offspring were not, and it was the inclusion of them
25 that resulted in that idea that you could add additional beneficiaries provided it was in the
26 interest of the original beneficiary to do so.
27
- 28 THE COURT: I thought Penelope's father was a beneficiary,
29 and she had, I guess, a sort of reversion of interest and --
30
- 31 MR. FAULDS: I see Ms. Osualdini is leaning forward, and
32 perhaps she would like to chime in.
33
- 34 MS. OSUALDINI: My Lord, you're correct that the trust was
35 initially established from the nephew but with a gift over to his children, and so his
36 children included Miss Penelope. So he was consenting even though he hadn't died yet.
37 He was consenting to the idea that the contingent beneficiaries could receive an interest
38 now, and the persons were not contemplated under the original trust were
39 Miss Penelope's children.
40
- 41 THE COURT: Okay. Okay. Good. Good. All right.

1 Thank you. That is what I was looking for.

2

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

5

6 THE COURT: Yes.

7

8 MR. FAULDS: -- about this.

9

10 THE COURT: Yes.

11

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

16

17 THE COURT: M-hm.

18

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

24

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

27

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

31

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

34

35 MR. FAULDS: I'd be happy to.

36

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

38

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

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

3
4 THE COURT: M-hm.

5
6 MR. FAULDS: -- it should be possible to settle property on a
7 new trust for that beneficiary. And then *Waters* refers to --

8
9 THE COURT: For a new beneficiary and others.

10
11 MR. FAULDS: He doesn't -- he has a very brief discussion.
12 He doesn't delve into that aspect of it in this, but yes, you're -- so there's no direct
13 comment on that. And he refers to the Canadian authorities on that point. And in that
14 connection, I'd like to refer Your Lordship to our brief -- it's got the filed stamp of
15 December 1st, 2020, on it.

16
17 THE COURT: Okay.

18
19 MR. FAULDS: And if Your Lordship looks at paragraphs --

20
21 THE COURT: Okay. Just a minute. Just a minute. Okay.
22 That is the November 27th --

23
24 MR. FAULDS: That's right. It's dated November 27th at the
25 filed stamp.

26
27 THE COURT: Okay. Do you want me to look at paragraph
28 what?

29
30 MR. FAULDS: If you could go to page 21, paragraph 61 -- and
31 My Lord, if I could just stop here for a second because I think this point may also be
32 important. We do not rely and it's not necessary to rely upon the availability of the option
33 to include new beneficiaries in the new trust to support the correctness of the asset
34 transfer order.

35
36 THE COURT: M-hm.

37
38 MR. FAULDS: If we're talking about the correctness of the
39 asset transfer order, we're talking about resettlement on a trust all of whose beneficiaries
40 are beneficiaries of the original trust. The trust transfer which occurred in 1985 was,
41 as Your Lordship noted, between the same group of people -- differently defined but the

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

4
5 THE COURT: That is because the divergence between the
6 criteria for membership didn't take place until July of 1985, 3 months after --

7
8 MR. FAULDS: That's --

9
10 THE COURT: -- the transfer.

11
12 MR. FAULDS: -- that's correct, My Lord.

13
14 THE COURT: So for a period of time, there are the April 1985
15 transfer -- it was identical and only 3 months later does it change in (INDISCERNIBLE)
16 rules, and that created the divergence, not the trust transfer.

17
18 MR. FAULDS: That's correct, My Lord. That's --

19
20 THE COURT: M-hm.

21
22 MR. FAULDS: -- that's correct.

23
24 THE COURT: Yes.

25
26 MR. FAULDS: And on the date of the transfer, it was within the
27 trustee's power to advance the entire assets of the trust to that group of beneficiaries, and
28 instead, they resettled. So that notion of augmenting the beneficiaries is only relevant to
29 the submission that we made about the availability of a further trust to trust transfer
30 which might address the thorny problem that we have before us. It's only in that context
31 that that issue becomes of significance.

32
33 THE COURT: But it isn't a hurdle that I need to get over to
34 assess the propriety of the 1985 transfer --

35
36 MR. FAULDS: Yes.

37
38 THE COURT: -- because it is -- members were the same and
39 only started to diverge 3 months later.

40
41 MR. FAULDS: That's correct.

- 1
2 THE COURT: And that was not because of anything the
3 trustees did but rather something that Sawridge First Nation did.
4
- 5 MR. FAULDS: Exactly. That's exactly correct, My Lord.
6
- 7 THE COURT: I think I understand it.
8
- 9 MR. FAULDS: And I'm --
10
- 11 THE COURT: I would appreciate those pages of *Waters*, and
12 I would take that and get the most current version and make sure --
13
- 14 MR. FAULDS: Yes. I'll arrange to have that --
15
- 16 THE COURT: -- looking at those.
17
- 18 MR. FAULDS: -- I'll arrange to have that forwarded to
19 Your Lordship following the conclusion of this hearing.
20
- 21 THE COURT: Okay. Thank you.
22
- 23 MR. FAULDS: And I will just then briefly refer Your Lordship
24 to the paragraphs in our November 27th, 2020, brief where we cite the Canadian cases
25 which have interpreted and applied the principle arising in *Pilkington*, and the
26 leading case is the one that *Waters* refers to in the text -- the (INDISCERNIBLE) case.
27
- 28 THE COURT: M-hm.
29
- 30 MR. FAULDS: And that case cited an earlier unreported
31 decision saying it would be incongruous if the law would hold the trustees might pay to
32 the beneficiaries their shares outright but might not pay them to trustees to be held in trust
33 for them. That's the segment of the principle in a nutshell.
34
- 35 THE COURT: Right. Right.
36
- 37 MR. FAULDS: And so -- and if Your Lordship turns to
38 paragraph 64 of that brief --
39
- 40 THE COURT: M-hm.
41

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

4
5 So those are my submissions in relation to that unless Your Lordship has any additional
6 questions on that.

7
8 THE COURT: No. Thank you. That was very helpful.

9
10 MR. FAULDS: My Lord, I had also intended to touch on a
11 point which Your Lordship has already commented on. The divergence between the
12 Sawridge First Nation membership and the beneficiaries of the 1985 trust arises from the
13 fact that when it established its membership code, Sawridge First Nation chose to
14 implement the code which was not the same as the one that had been chosen to find
15 the beneficiaries, and that's the reason that we now have people who are not
16 Sawridge First Nation members under their membership code but who are beneficiaries.
17 That arises from those decisions.

18
19 I wanted to speak briefly to the point made by my friend Mr. Molstad about the use of
20 funds and his suggestion that -- allowing them to be a trust which included some
21 beneficiaries who were not SFN members in some way offended the legislation
22 governing the use of those monies. As Ms. Osualdini noted, that is the precise opposite
23 position to that take and why Sawridge First Nation back in 1994 when the government
24 of Canada raised that question, and on that point, I'd like to take Your Lordship briefly to
25 the original brief which was filed on behalf of the OPGT on November the 15th of 2019.

26
27 THE COURT: Okay. Volume 1?

28
29 MR. FAULDS: Volume 2, My Lord.

30
31 THE COURT: Volume 2. Okay.

32
33 MR. FAULDS: And I'm hoping that it was bookmarked.
34 What I'm -- I'm asking Your Lordship to find appendix L.

35
36 MR. FAULDS: Just a minute. Okay.

37
38 MR. FAULDS: And is Your Lordship able to turn that up?

39
40 THE COURT: November 9th, 1994?

41

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

4
5 THE COURT: Okay. I have got it. Yes.

6
7 MR. FAULDS: That's the letter from Mr. Cullidy (phonetic) on
8 behalf of Sawridge First Nation --

9
10 THE COURT: M-hm.

11
12 MR. FAULDS: -- back to the council at Indian Affairs and
13 Northern Development, and I just ask you to look at the last paragraph of that letter on
14 the second page --

15
16 THE COURT: M-hm. Yes.

17
18 MR. FAULDS: -- in which Mr. Cullidy said: (as read)

19
20 As I have indicated to you on a number of occasions, we do not
21 agree that the Department is entitled to demand details of
22 expenditures made by the Band in the past or with respect to the
23 assets that it now holds.

24
25 That position articulated by Mr. Cullidy many years later was endorsed by the
26 Supreme Court of Canada in the *Ermineskin Band v. Canada* decision in 2009.
27 That decision is at tab 3 of the same brief of our authorities, and the relevant passage of
28 that decision is at paragraphs 104 to 106. And in that passage, the Supreme Court of
29 Canada states that under section 64 of the *Indian Act* which is the section my friend
30 suggests, it imposes some kind of (INDISCERNIBLE) on the assets. The Supreme Court
31 of Canada ruled:

32
33 Under section 64(1) once the funds are expended with the
34 consent of the Band, the Crown no longer has control over the
35 funds nor does it hold or manage the assets that may have been
36 acquired.

37
38 And then at the end of paragraph 106, the Court went on to say:

39
40 One marker of those expenditures is that the expenses incurred or
41 assets acquired are such that the Crown no longer has control

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

2
3 So the fetter that Mr. Molstad suggests arises out of the legislation does not exist at law.
4 And just to kind of close the loop on that, that was actually represented to the Court in
5 these proceedings by counsel on behalf of Canada. If you look to the same brief but
6 volume 1 now at tab D, this is an extract from a transcript of a hearing in these
7 proceedings on April the 5th of 2012 at which Mr. Kindrake who was counsel for Canada
8 in various litigation with Sawridge First Nation said -- and it's at page 59 of the transcript:
9 (as read)

10
11 Mr. Kindrake, our view is these are not Indian lands. These are
12 the Band's lands.

13
14 The trust is out there. It's in the public domain. It's dealt with according to those
15 (INDISCERNIBLE). Essentially, all he was doing was confirming what the
16 Supreme Court of Canada has said the case was 3 years earlier. So our submission is that
17 legislative fetter simply doesn't exist.

18
19 My Lord, our submission is that the positions advanced by Sawridge First Nation in an
20 attempt to persuade Your Lordship that the transfer of the assets in 1982 was not proper,
21 was not within the trustee's authority. It was contrary to law in some fashion and had
22 no proper foundation. They're also late. This is, in our submission, really an attempt to
23 relitigate the asset transfer order. The proper time to make these submissions would have
24 been in November -- or in August of 2016 when the asset transfer order was spoken to.
25 For the reasons I've just set out, they wouldn't have made any difference, but the result --
26 when Justice Thomas said, I'm satisfied the consent order is properly based on law,
27 our submission is that he was entirely correct in that conclusion, and that would have
28 been a conclusion whether -- if Mr. Molstad had attempted to advance these submissions
29 at the time, but he chose not to do that, and as a result, we're dealing with them today.

30
31 I would also remind Your Lordship that when the Sawridge First Nation sought
32 intervenor status in this particular application the OPGT opposed it in large measure
33 based upon the previous positions that had been taken by the Sawridge First Nation
34 which seemed to contradict the positions they wanted to take in these proceedings.
35 Your Lordship allowed the Sawridge First Nation's intervention application, but in your
36 decision, you said: (as read)

37
38 The position put forward by the public trustee in terms of
39 pointing out inconsistencies in weighing what the
40 Sawridge First Nation dealt with firstly the agreement of the
41 2000 consent order or the 1985 trust transfer may well be entirely

1 valid, and may well be properly founded, and may well have a
2 significant impact on the outcome of the asset transfer issue or
3 the jurisdictional issue.
4

5 But Your Lordship said that's the time for those comments. And taking what
6 Your Lordship said in (INDISCERNIBLE), we would just invite the Court to look at the
7 submissions that we made at that time which gave rise to our concerns about the
8 inconsistencies and the position of the Sawridge First Nation. Those are to be found in
9 the brief which we filed on the asset transfer -- or sorry -- on the intervention application
10 of the Sawridge First Nation on October 25th of 2009, and they're found at
11 paragraphs 33 to 37.
12

13 And unless there's any further questions from the Court, I'll turn it over to Ms. Hutchison.
14

15 THE COURT: Okay. Ms. Hutchison.
16

17 **Submissions by Ms. Hutchison**
18

19 MS. HUTCHISON: Good morning, My Lord. I'll try to be brief.
20 I do want to touch on a few areas that my friends have referenced but from a slightly
21 different point of view, the first being in response to the trustee's position that they
22 no longer represent the interests of non-member 1985 beneficiaries.
23

24 We would just ask the Court to make note of the striking evolution of the
25 trustee's position in this regard. They began a process in this particular application taking
26 the position that they were neutral and that in fact they could not advocate for the
27 very result they now advocate for, My Lord.
28

29 My friends have taken you to a number of references and citations where the trustees
30 represented to the Court and to the beneficiaries that they acted in their interest.
31 Quite pertinent for the Court to also consider that the Court of Appeal made that finding,
32 and I take the Court to our November 27th brief at tab 2 of our authorities. And I'll just
33 read the cite -- or read the quote, My Lord, but hopefully, you'll be able to get to that tab.
34 It's paragraph 18 where the Court states: (as read)
35

36 The Court finds as a matter of law the trustees represent the
37 interests of the beneficiaries who include Patrick and
38 Shelby Twinn.
39

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

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

4
5 So there's a group of people who would not be members,
6 and that's, as we read it, potentially not beneficiaries under
7 the '82 trust. In terms of who represents them or who speaks on
8 their behalf, we've always taken the position that as trustees of
9 the 1985 trust we represent those people and are speaking on
10 their behalf.

11
12 Mr. Sestito confirms that position in the October 30th case management meeting which
13 you can find in our November 27th brief at tab I, and I refer the Court to page 73 of that
14 transcript, starting at line 19 where Mr. Sestito submits: (as read)

15
16 And that is with respect to the fact that the beneficiary that
17 Ms. Twinn is --

18
19 This is referring to Shelby Twinn, My Lord: (as read)

20
21 -- is represented by the trustees in this matter. It is a matter of
22 law that she is represented by the trustees in this matter.

23
24 Our point, My Lord, is our friends have departed from that role rather significantly,
25 certainly in the course of the last 2 days and arguably in their final submission. It's not at
26 all clear that the 1985 beneficiaries who are not members of SFN were put on notice of
27 that position, and we would ask the Court to treat the submissions by the trustees that
28 depart from and are inconsistent with the '85 beneficiaries' interests with a great deal of
29 caution, My Lord. We'll leave that point with you. I think Ms. Twinn was extremely
30 eloquent in her characterizations of how that's affecting her as an individual,
31 and of course, the OPGT represents minors who are in exactly the same position,
32 including Shelby's sister.

33
34 Our second point, My Lord, touching somewhat on a point that Mr. Faulds had referred
35 to is to talk about the SFN's role as an intervenor in this matter, and Mr. Faulds reminded
36 you that we oppose the Sawridge First Nation's intervention. One of the significant risks
37 we highlighted for the Court was the risk that we would end up rearguing the
38 asset transfer order and that despite everyone's best intentions we would engage in a
39 collateral attack of that order. And, My Lord, we would submit to you that is exactly
40 what this process has evolved into. It is a re-argument of the asset transfer order, and
41 when one looks at the extensive submissions on *Pilkington* and how it is to be interpreted

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

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

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

22
23 It is the position of the Sawridge First Nation that this settlement
24 offer is reasonable and resolves all possible concerns with respect
25 to the approval of the transfer of the assets from the 1982 trust to
26 the 1985 trust.

27
28 My Lord, an unqualified endorsement of the impact of the ATO and its resolution of all
29 issues. When the Court compares that statement to the submissions that the SFN has put
30 before you -- the lengthy submissions that are effectively arguing that Justice Thomas had
31 no legal authority to grant the ATO, you cannot reasonably arrive at any conclusion other
32 the fact that the SFN is now rearguing its position.

33
34 And, My Lord, the second key reference we'd like to draw the Court's attention on that
35 point is found again at our first brief, November 15th of 2019, tab J, and it is an excerpt
36 of the transcript of that fateful day on August 24th, 2016, page 6, starting at line 10.
37 The Court says: "All right. Mr. Molstad, you don't have anything to say."
38 Mr. Molstad responds: "I don't have anything to say." The Court cannot ignore,
39 regardless of my friend's arguments about party status or lack thereof -- they were
40 recognized by the Court. They had every opportunity to raise these issues, and they
41 chose not to. And if we're going to maintain some finality around court orders, we've got

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

3
4 It's also pertinent from that same day, My Lord -- and looking at page 39 of the same
5 transcript -- that although Mr. Molstad didn't make submissions on the ATO itself,
6 he then endorsed the ATO, and I read from page 39 of that transcript: (as read)

7
8 I think that my friend has already made mention of this in her
9 brief. The purpose of the transfer in '82, '85 in terms of the
10 transfer from trust was to avoid any claim that others might make
11 in relation to these assets after the enactment of Bill C-31.

12
13 So Sawridge First Nation would be highly motivated to ensure that those -- that we're
14 acting as trustees, made the transfer of all assets from the 1982 trust to the 1985 trust.
15 That was the reason. The reason clearly was one that was in everyone's best interests to
16 make sure the transfer took place.

17
18 My Lord, if we were talking about a mechanical transfer of legal interest, what possible
19 protective effect could that have? We were talking about the transfer of
20 beneficial ownership. Without the transfer of beneficial ownership, the goal of the
21 protective effect -- the benefit of the transfer to provide that protective effect with the
22 assets wouldn't have existed. And, My Lord, regardless of how one might read its history
23 and recharacterize submissions, we would suggest to the Court that there is no other
24 conclusion available to you but that that ATO dealt with the beneficial transfer --
25 or the transfer of beneficial ownership.

26
27 THE COURT: Well, why didn't the order say that then?

28
29 MS. HUTCHISON: Well, My Lord, with the greatest of respect to
30 the Court on this fact if we overturned every consent order that didn't have robust reasons
31 associated with it, lawyers wouldn't use consent order. Neither would the Courts.
32 They'd be absolutely inherently unreliable. Justice Thomas --

33
34 THE COURT: But that requires that if you are going to the
35 Court with a consent order knowing that the Court isn't going to give fulsome reasons
36 because it is a consent order, surely there is an obligation to have a very reliable --
37 a clarity in the terms of the order so that everyone knows (INDISCERNIBLE).

38
39 MS. HUTCHISON: My Lord, you have taken me to my last point,
40 and so I will answer your question as I go through that last point.

41

1 THE COURT: Okay. Good. Thank you.

2

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

9

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

14

15 The other context that Justice Thomas had was the context created by the trustees at the
16 very outset of this matter, and I take the Court back to this document because it is critical.
17 The (INDISCERNIBLE) affidavit that we produced at tab C of our November 15th,
18 2019, submissions, paragraph 25 -- and I realize I've taken the Court to this before, but
19 this is the lens through which Justice Thomas handled everything up to the point of the
20 ATO, and that is the trustee's position and evidence that their application was --
21 and I quote: (as read)

22

23 To declare the asset transfer was proper and that the assets in the
24 1985 trust are held for the beneficiaries of the 1985 trust.

25

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

32

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

35

36 So the other document, My Lord -- you've asked isn't there some obligation to obtain
37 clarity and make sure everybody's on the same page. Well, we would submit to you,
38 My Lord, that the parties did that. The parties had been dealing with these issues for
39 5 years, had been hammering out the first arm, as it were, of the relief that was being
40 sought by the trustees. The OPGT was being put under considerable pressure by
41 the SFN to accept the settlement put forward by the trustee and withdraw its application

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

4
5 Let's look at that brief, My Lord. It's really -- I don't think we've given it enough
6 attention, and I would take you to the November 1st, 2019, brief of the 1985 trustees.
7 It's tab A. And in particular, I take you to paragraph 20 of that brief, My Lord. The role
8 that Justice Thomas had in this consent order in this application was to decide if he had
9 legal authority to grant the order sought. I would ask the Court why the parties would put
10 *Pilkington* before Justice Thomas if all we cared about was the mechanical transfer of
11 legal ownership of essentially possession and cared not about beneficial ownership.

12
13 *Pilkington*, My Lord, as you have heard from my friends in great detail is about
14 beneficial ownership. That authority was before Justice Thomas, and I ask the Court to
15 read in detail paragraph 20 of the submissions that the trustees made to the Court on that
16 point, and I take the Court to the last sentence: (as read)

17
18 It is submitted that it is in the best interest of the beneficiaries of
19 the 1985 trust that the transfer of assets be approved
20 nunc pro tunc.

21
22 How could it possibly be in the best interests of the '85 beneficiaries to approve the
23 transfer, My Lord, if it wasn't dealing with their beneficial ownership of those assets?
24 And in fact what we've heard today is the disentitlement that might result.
25 Please, My Lord, go back to that brief. It, in our submission, leaves very little doubt as to
26 what we were dealing with. We would never have had the dialogue about
27 *Pilkington* with Justice Thomas if we weren't talking about beneficial ownership.

28
29 I would also remind the Court of the authorities we've cited to you about consent orders
30 as contract, My Lord. This was a deal between the parties, and despite Mr. Molstad's
31 position on this, I would strongly suggest to you this -- submit to you this was a deal
32 between the OPGT and the Sawridge First Nation. We withdrew a production
33 application on strength of Mr. Molstad's July letter and resounding support for this
34 consent order. That's a contract. Why would the OPGT enter into that contract,
35 My Lord, and exclude the very essence of the relief that was being sought by the trustees?
36 The first arm of it.

37
38 So you have to look at the entire context, My Lord, and the suggestion that with the
39 number of lawyers and legal minds and individuals at the table that we all just forgot
40 about beneficial interests, with respect, My Lord, doesn't -- it does a disservice to the
41 judge that dealt with that order, and it doesn't recognize the time, energy, and resources

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

2
3 If we could (INDISCERNIBLE) consent orders because of lack of reasons, as I said,
4 My Lord, the judicial system would be in quite a bit of disarray. I referred you in that
5 respect to the 5-year history Justice Thomas had before him, but I would also remind the
6 Court to look at what happened after the ATO, and I have given you substantial number
7 of evidentiary references there. It's critical for the Court to look at things like the
8 litigation plans, the discrimination consent order, Justice Thomas's comments in the
9 case management meetings about there being after the ATO being only one question
10 remaining -- one question, My Lord -- which was how to remedy the discrimination in
11 the beneficiary definition.

12
13 When you put that in the context of what the trustees started out seeking in this process,
14 there is no available conclusion other than the ATO regularize all aspects of
15 the '85 transfer including beneficial ownership. And with respect, My Lord, any other
16 path involves reliance on the sort of after-the-fact revisionist history that we heard from
17 our friends, and it is a collateral attack on that ATO. It's a very fraught road to go down,
18 My Lord.

19
20 Those are our submission in reply, My Lord, unless you have any additional questions.

21
22 THE COURT: No. That is fine. Thank you very much.

23
24 MS. HUTCHISON: Thank you, My Lord.

25
26 THE COURT: So we will then go to Ms. Bonora or --

27
28 MS. BONORA: Sir, I wonder if we might just take a break here.
29 We have heard lots this morning, and we'd like an opportunity to just gather our thoughts
30 in respect of --

31
32 THE COURT: Of course.

33
34 MS. BONORA: -- in responding to this morning. I wonder if it
35 would be appropriate to take 30 minutes.

36
37 THE COURT: I certainly see no problem with that. We have
38 got lots of time. In fact if you needed more time -- there is a number of issues that have
39 been raised that I think you need to address. So if you needed more time, we could give
40 you more time. My guess is we will still be done this morning no matter what.

41

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

3
4 THE COURT: Sure. Is that suitable to everyone else?

5
6 MS. HUTCHISON: Absolutely, My Lord. It works for the OPGT.

7
8 MR. MOLSTAD: That is acceptable to the Sawridge First Nation
9 as well.

10
11 THE COURT: Thank you very much. Okay.

12
13 MS. OSUALDINI: And agreeable as well --

14
15 THE COURT: Don't turn off your computers. We will stay
16 connected so we don't lose anyone. Okay? Thank you.

17
18 (ADJOURNMENT)

19
20 (PROCEEDINGS TO FOLLOW)

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22 _____
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24 PROCEEDINGS ADJOURNED UNTIL 11:30 AM
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Certificate of Record

I, Morag O'Sullivan, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench, held in courtroom 416, at Edmonton, Alberta on the 28th day of September 2021, and that I was the court official in charge of the sound-recording machine during the proceedings.

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1 **Certificate of Transcript**

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3 I, Konnie Schreiner, certify that

4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

8
9 (b) the Certificate of Record for these proceedings was included orally on the record and
10 is transcribed in this transcript.

11
12 Exceldo Projects Ltd.

13 Order Number: AL21828

14 Dated: September 30, 2021

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

2
3 September 28, 2021

Morning Session

4
5 The Honourable Justice Henderson
6 (remote appearance)

Provincial Court of Alberta

7
8 D.C. Bonora, QC (remote appearance)

For the Sawridge Trustees

9 M.S. Sestito (remote appearance)

For the Sawridge Trustees

10 P.J. Faulds, QC (remote appearance)

For the Public Trustee

11 J.L. Hutchison (remote appearance)

For the Public Trustee

12 E.H. Molstad, QC (remote appearance)

For Sawridge First Nation

13 C. Osualdini (remote appearance)

For C. Twinn

14 (No Counsel)

For S. Twinn (remote appearance)

15 M. O'Sullivan

Court Clerk

16
17
18 THE COURT:

Okay. Are we back?

19
20 MS. BONORA:

We are back, Sir, for the Sawridge Trustees.

21
22 MR. MOLSTAD:

We're here on behalf of the Sawridge First

23 Nation, Sir.

24
25 THE COURT:

Thank you.

26
27 UNIDENTIFIED SPEAKER:

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

28
29 THE COURT:

Good. So I think we have everyone here, and

30 we can proceed.

31
32 **Submissions by Ms. Bonora**

33
34 MS. BONORA:

Thank you, Sir, I'll speak first and Mr. Sestito

35 will speak after me. Sir, a number of issues were raised this morning and yesterday, and
36 in no particular order I'll address the issues that we think are important for us to answer in
37 reply.

38
39 Perhaps I could start by saying that in the 1985 trust there are many groups of
40 beneficiaries in that trust. They are not just the beneficiaries who may be left out if the
41 definition of beneficiary was consistent with 1982 or we changed the beneficiary

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

4
5 We do not believe that during the course of our submissions we've taken any contrary
6 position. We absolutely endorse every statement that was read by the OPT or by Crista
7 Osualdini on behalf of Catherine Twinn, or by Shelby Twinn. We absolutely recognize
8 that we have fiduciary duties to all of the beneficiaries, and we continue to have those
9 fiduciary duties and we continue to represent them, and we have obligations as trustees.

10
11 We have addressed in the past the issue around our conflicting fiduciary duties, and we
12 started yesterday by telling the Court and all of the parties that we felt one of the most
13 important duties we had was to finding a solution to this problem so that the trust could
14 start to make distributions to the beneficiaries as they are determined by this Court
15 through this litigation.

16
17 In terms of Shelby Twinn, we believe that we -- we have not been contradictory in terms
18 of saying that we don't represent her in terms of being a beneficiary of the trust, and the
19 many things we've said in our previous briefs that have been read out we endorse again.
20 We represent her and others like her where -- and we have been consistently saying that
21 we wish to potentially bring the grandfathering application to deal with the beneficiaries
22 who may be left out if the definition changed either to eliminate discrimination, changed
23 because the law would dictate that it would change in some certain way.

24
25 And so we understood that we had competing fiduciary duties, and that was one of our
26 ways of dealing with those competing fiduciary duties that the trustees have to this large
27 group of beneficiaries, and trying to sort how we might be able to ultimately determine
28 who those beneficiaries are, and provide benefits to those beneficiaries.

29
30 We have started this litigation with saying we wanted to examine and ensure that we were
31 dealing with the correct group of beneficiaries. We wanted to know who those
32 beneficiaries were, and one of the issues we put forward was that the beneficiary
33 definition needed a determination. The -- in the course of this litigation -- and you have
34 asked us in -- before we did the jurisdiction application, that we needed to look at some
35 other issues.

36
37 And certainly, Sir, as officers of the court we feel we had an absolute duty to bring
38 forward all areas of law that are important. We have those duties as lawyers. We have
39 those duties as officers of the court. We certainly have those duties when the Court
40 presents us with questions.

41

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

8
9 The submissions certainly were in our briefs. It's not as though we changed our position
10 yesterday in our oral submissions. The issues around constructive trust and resulting trust
11 were in our briefs, and -- but more importantly over the course of all of this litigation we
12 have consistently maintained that we'd like to try and find a solution that rids the trust of
13 the discrimination.

14
15 When the trustees started, I -- no one anticipated that there would be so much opposition
16 to riding this trust of the discrimination against women and the discrimination against
17 illegitimate children. And I'm not suggesting anything should have been -- been done
18 differently. It was just a surprise because we thought that that would be a theme that
19 most people would embrace.

20
21 And we -- if you look -- in terms of suggesting that we were looking for a solution that
22 involved the 1986 definition of beneficiaries, throughout this litigation we have been
23 saying that. Certainly, in -- many years ago we put forward a settlement application
24 asking the Court to invoke its parens patriae jurisdiction to put all of the children, not just
25 the 1985 beneficiaries but all 31 children that we've identified that the public trustee
26 might potentially represent, regardless of their status in the '85 trust, into the trust for
27 their lifetime, not if they got married they would be -- lose their status, for their lifetime,
28 and then change the definition to the 1986 definition.

29
30 Ms. Hutchison yesterday said in the distribution proposal that we put before the Court,
31 we said that this was for the 1985 trust. But in fact our distribution proposal was very
32 clear in terms of saying we'd like to follow the policies that the trustees have put forward
33 for the 1986 trust, and we'd like to change the definition of beneficiary to the 1986 trust
34 to eliminate the discrimination, and then potentially deal with grandfathering. That has
35 been our position in that settlement application, in the distribution proposal, and then in
36 the jurisdiction application where the briefs are filed. If that application goes ahead,
37 we've also been consistent.

38
39 So this is not something that is new in terms of what our position has been in terms of
40 trying to fulfill our fiduciary duties to the large group of beneficiaries that are in the 1985
41 trust. We feel we have many competing fiduciary duties but we represent not just the

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

3
4 As I said, we endorse every single brief that has been read to you today. We did not
5 intend -- certainly we don't believe we said anything different yesterday. If we did, we
6 didn't intend to say it yesterday. Our intention was to put forward the law, which of
7 course could lead to certain solutions. The -- I -- we do not believe that we have departed
8 from our role in any way.

9
10 As I said, the Court presented some questions to us. We went away and considered those
11 questions, and we felt obligated to put that law before the Court. And so as we said it's
12 possible that the Court -- the -- that the law will lead to solutions. That doesn't mean that
13 the trustees have abandoned their fiduciary duties to a group of people.

14
15 The -- we're sure the -- no, we don't believe there's any beneficiaries that have been left
16 behind in terms of our arguments. We would like to get to a position where benefits can
17 be conferred on those beneficiaries.

18
19 Sir, in the event that it appeared yesterday that we are arguing stronger for some solutions
20 than others, we would suggest it's possible because -- it's possible that that was the
21 appearance because the law was stronger in those solutions, and not because we were
22 advocating for any particular solution. And as Mr. Sestito will tell you, we certainly have
23 continued to maintain that we would try as much as we could to find benefits for
24 everyone.

25
26 That may not be possible in law. It's -- as the parties have said, grandfathering may not
27 be a solution in law. But as trustees we have consistently said that we would try it, and
28 try to benefit as many people as possible because that is what we see as our fiduciary duty
29 with this trust that has difficulties, and has problems.

30
31 The -- I think in terms of our fiduciary duties with respect to finding a solution, it is
32 important to look at proportionality, and I referred you to the *Hrynyk* case yesterday
33 saying proportionality of the litigation is important to -- in terms of looking for a solution.
34 And certainly in this case, we -- the trustees never expected there to be ten years of
35 litigation, and of course it's not over yet, and certainly the litigation has been
36 overwhelming for the trust. So we have been trying to advocate for a resolution and a
37 solution that gets us out of the litigation.

38
39 We thought that the asset transfer issue was settled. We are not arguing the asset transfer
40 order again, but there were two distinct issues. The first question that was put before the
41 Court in this litigation was: How do we deal with the definition and the discrimination?

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

4
5 When the OBG says that it's clear from the asset transfer from all of the materials filed
6 around it that this was for the benefit of the 1985 beneficiaries and it could be nothing
7 else, our question of course rhetorical is, well, what does that mean? Are we finished the
8 litigation then? Have we decided that it's this definition, move forward, you're done?
9

10 We did not intend that. It's not in the asset transfer order, and certainly we have no idea
11 what that means to say that it's for the benefit of these 1985 beneficiaries. So perhaps
12 we're wrong on constructive trust. Perhaps we're wrong on resulting trust or how
13 *Pilkington* applies, or *Hunter*. We believe we put forward what we thought was the law
14 on those issues according to what we believed was our fiduciary duties.
15

16 In respect of the asset transfer order, you challenged Ms. Hutchison about, well, why
17 aren't those words in the asset transfer order, and I would suggest they're not there
18 because we would not have put them there deliberately. Those are words -- are not there
19 because that was the seminal question in -- in terms of who the beneficiaries were that
20 was to be answered in the very next piece of litigation in this litigation -- or next step of
21 litigation. And I think Ms. Hutchison is right; let's look at what the next step was.
22

23 The next step was to do the jurisdiction application to determine could you eliminate the -
24 - the discriminatory portions. So clearly the beneficiary definition was not settled by the
25 asset transfer order. The asset transfer order was just to determine that we were looking
26 that the assets had actually been transferred. And as I said yesterday, to avoid a challenge
27 in the future from 1982 beneficiaries saying: No, bring this back. You never had any
28 right to transfer it to 1985.
29

30 And I -- I encourage you, and I think you noticed already, that the order says nothing
31 about for the benefit of the beneficiaries. Neither -- neither does the originating
32 application. It simply dealt with the transfer. And certainly we didn't intend to give up
33 all of our rights around determining the beneficiary definition and trying to eliminate
34 discrimination in many different ways, such as we presented by doing the asset transfer
35 order. The two issues were not combined.
36

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

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

2
3 The -- and that is true in the Manso v. Peron (phonetic) case. The order directed the
4 filing of a statement of claim and then the question was did that actually apply? Did they
5 have to file their statement of claim but that was in the order. The -- certainly in *Yu v.*
6 *Jordan* the court says that you have to examine the pleadings. In this case, the pleadings
7 say nothing about the benefit of the beneficiaries. The language of the order, it says
8 nothing.

9
10 And in the circumstances, the -- the order was drafted where we knew the second
11 question was going to be asked and answered in a different proceeding. It is true that in
12 the *Simonelli* case they talk about when you're interpreting a consent order you use a
13 contractual interpretation, and you look at a reasonable and objective intent of the parties.
14 The intent is determined by considering both the expressed terms of the contract and the
15 surrounding circumstances.

16
17 But in our case, we have no express terms of the contract that speak to beneficiaries, and
18 our suggestion is that you can't insert those terms by the surrounding circumstances. The
19 surrounding circumstances can interpret those terms, but they can't insert them. And
20 certainly if it -- you're asking about our intent, our intent was that that order was drafted
21 absolutely intentionally not to include those terms.

22
23 The -- I -- I've already spoken about the distribution proposal. I'll just tell that at tab H --
24 it's in tab H of the November 15th, 2019, brief of the OPGT, and Ms. Hutchison made
25 reference to it yesterday suggesting that we said it was for the 1985 beneficiaries but I do
26 ask you to look at page 5 of that distribution proposal where it's very clear that the -- we
27 were still advocating for a change to the beneficiary definition.

28
29 I -- I think we have examined *Pilkington* so much, and I think the only other issue that we
30 would like to raise is in terms of the facts around *Pilkington* it's -- I think it's important to
31 know that it was a nephew who was an income beneficiary. The niece who got this trust
32 was actually a beneficiary. She would have been a capital beneficiary, and when the
33 Court talks about the incidental beneficiaries it is our interpretation of *Pilkington* that
34 those incidental beneficiaries were her children, so it was her children who would not
35 have benefited under the original trust, and will only benefit in the *Pilkington* trust if she
36 dies, and those were the incidental beneficiaries.

37
38 There's nothing in *Pilkington* that suggests that you can add a beneficiary that had no
39 rights before as a prime -- I'll call it a primary beneficiary, so in that role of Penelope
40 (phonetic) in the *Pilkington* case, and certainly nothing in *Pilkington* or *Hunter* or
41 *Chalmers* to say that you can leave people out or you can add people in. Those are not

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

3
4 And as we said, and I think we all agree, there was a common set of beneficiaries in 1985
5 on April 15th, 1985. And you're right that, you know, in -- two days later on April 17th it
6 changes because now we leave out the Bill C-31s by that definition, and there months
7 later when the membership code is instituted we have for sure a change of beneficiaries,
8 so I think that timeframe is important in terms of looking at it.

9
10 When Ms. Osualdini says that the same -- the definition in '82 is the same as the
11 definition in '85 because you were operating under the same legislative scheme, it would
12 seem that -- that that couldn't have made sense because why then did you need to change
13 the trust. If it was going to be the same, you could have left it. So clearly there was an
14 intent to change that trust.

15
16 Ms. Osualdini yesterday said that the power of advancement is equivalent to section 42 of
17 the *Trustee Act*, and you could use the power of advancement to amend the trust, and we
18 would suggest that that is not the law. That you can use the power of advancement in the
19 many ways we've talked about, which I won't repeat, but you can't amend a trust by using
20 the power of advancement, or section 42 of our *Trustee Act* would have no impact.

21
22 I think much has been made of the fact that we're now here 35 years later and, you know,
23 why -- why are they, and is there some limitation but I would suggest to you that trusts
24 are a continuing relationship and continuing obligations. And every day and every year
25 trustees might have issues they need to bring to this court, and they're certainly not
26 foreclosed because of what happened when the trust was settled 35 years ago, or 20 years
27 ago or whenever it was.

28
29 The very nature of section 42 of the *Trustee Act*, or drafting provisions in a trust to allow
30 variation is because we know that there will be changes in tax laws, there will be change
31 in other laws, changes in families that necessitate the trust to be reviewed by the court
32 and to see direction of the court. So I think the limitation argument in a trust concept is
33 not valid, and that in fact trustees when they come to court to seek advice and direction
34 will look at the intention of the settler when the trust was drafted, will look at what
35 happened in the history of the trust because those are all relevant considerations to asking
36 or answering a question in a trust deed as it continues through its history.

37
38 And perhaps, Sir, I'll just close by saying again I think in this litigation and in this
39 particular application we were asked to look at issues, and as fiduciaries we agreed to
40 bring that application to put these issues before the Court. We haven't changed our
41 position. We are still representing the beneficiaries.

1
2 We felt the need to put the law forward to see if there could be a solution, and in fulfilling
3 those fiduciary duties by finding a solution whether that is through the many areas of law
4 that we've explored, or through what we might have coming for us in the jurisdiction
5 application and grandfathering. And I'll just turn it over to Mr. Sestito to complete our
6 arguments.

7
8 **Submissions by Mr. Sestito**

9
10 MR. SESTITO: Thank you, Ms. Bonora. So, My Lord, I -- I do
11 feel obliged, and I'll do my -- do my level best not to repeat the submissions by my
12 colleague but I do feel obliged to again clarify the position on fiduciary duties as I did
13 lead Your Lordship through our argument in our December 2020 brief yesterday.

14
15 So, Sir, the -- the sovereign trustees never argued that they do not owe a fiduciary duty to
16 the 1985 beneficiaries who are not members of the First Nation. And -- and to clarify,
17 Sir, similarly we never argued -- and -- and I'll be looking at that transcript in great detail
18 but to the extent I did it was an error, that the only fiduciary duties owed by the -- by the
19 sovereign trustees was to the members of the SFN.

20
21 One -- one thing thought that is certain, Sir, there are many competing fiduciary duties at
22 play in this case, and as the litigation is ongoing no benefits are being conferred to any
23 potential beneficiaries. This is really why the trustees are doing their best to seek out a
24 solution.

25
26 We have as I say competing duties, and we also have competing documents, Sir. And as
27 the Court has alerted us to these key differences, we have done our best to reconcile the
28 differences between these very different documents within the context of the basis in law.
29 My presentation yesterday, Sir, was consistent with our presentation in our December
30 2020 brief in that we proposed a modified framework, questions that the Court can ask
31 themselves as taking a look at the transfer, and a discussion as to the potential solutions
32 that flow from those questions.

33
34 So, Sir, apologies if I repeated a bit of Ms. Bonora's submissions there, but I did -- I did
35 feel obliged to correct the interpretation that has been made by my friends of my
36 presentation yesterday.

37
38 Moving now, Sir, briefly to a few other points. With respect to settler intention, some of
39 the parties seem to have interpreted the *Hunter Estate* decision as inviting the Court to in
40 effect ignore the stated intention in a given trust deed simply because the same person
41 would be involved in the creation of a new trust deed.

1
2 We -- we strongly disagree with that reading of *Hunter Estate* and -- and believe, Sir, in
3 our -- our submissions are set out in that December brief again, but we believe that the
4 Court really must view the stated intention of the settler, and the powers of the trustees,
5 by taking a very, very close look at the trust deed.

6
7 And it is only in that close comparison of the trust deed, the original trust deed, and then
8 comparing that with the new trust deed that the Court must undertake its analysis as to
9 whether or not the new deed is in fact alien to the original intention. And that's why, Sir,
10 I spent so much time yesterday bringing Your Lordship through the specific references
11 from the 1982 trust deed because really it -- it ought to -- it -- it is critical to evaluating
12 powers of the '82 trustees, and the intention of the '82 settler.

13
14 Now, Sir, there's been some discussion as well of so-called transactional documents.
15 Much -- much attention has been paid to the wording, and an example would be then
16 counsel resolutions. Now, Sir, in our submission this -- this misdirects what I think the
17 Court's analytical approach must be, and -- and it's -- it's a simple proposition, Sir, but it
18 bears repeating.

19
20 The '85 trustees could only receive what was within the power of the '82 trustees to give,
21 and -- and we really believe, Sir, that that ought to be the focus of the Court, not
22 necessarily the transitional documents, what they say of intention after the fact but taking
23 a look at what was within the power of the '82 trustees to advance and was given to them
24 through the settler but through the text of the '82 trust deed.

25
26 The -- the same, Sir, can be said about the use of the word 'transfer' in the ATO itself. I'll
27 defer to my colleagues' submissions though in that regard on the interpretation of the
28 order. And again, I note Ms. Osualdini draws a distinction between funds that are settled
29 and -- and funds that were provided after settlement. I don't necessarily disagree with the
30 distinction but again the '85 trustees could only receive what was within the power of the
31 '82 trustees to give. That's -- that's really central to the analysis, we -- we believe.

32
33 Sir, the -- with -- with respect to the notion of a travelling definition as my -- as my
34 friends have characterized it, they -- they appear to take exception to the notion that the
35 '82 beneficiary definition could somehow travel to the '85 trust but they -- they suggest,
36 Sir, that this is a novel approach.

37
38 But with respect, Sir, there's -- there's nothing novel about this argument. It's -- it's really
39 the very essence of -- of the notion of a resulting or constructing -- a constructive trust,
40 which is derived by the settler conferring certain powers on those original trustees, and --
41 and the Court then interpreting the scope of that power. So I just -- I just wanted to say I

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

6
7 So, Sir, I'll -- I'll conclude with what the trustees view as the -- the sort of suite of options
8 that are before Your Lordship, and again this is just as we -- as we view it, Sir. So first
9 you could conclude, Sir, that the assets that are currently being held by the '85 trustees are
10 being held for the benefit of the '85 beneficiaries, and we're all very familiar with these
11 defined terms so I won't -- I won't belabour them.

12
13 So in this scenario the trustees would accept the Court's advice, and we would proceed to
14 the jurisdictional application that we were sort of on our -- on our way to doing when --
15 when the Court posed these very critical questions. We would -- we would pursue
16 whether the Court had the inherent jurisdiction to alter the definitions that are found in
17 the '85 trust deed to cure the discrimination. We would continue on the path we were on.

18
19 The second option, Sir, that we view as being possibly before you as a solution, you
20 could conclude, Sir, that the assets are being held by the '85 trustees for the '82
21 beneficiaries, and as -- as we lay it out in our December submissions that could take the
22 form of a resulting or a constructive trust. Pragmatically speaking, in this scenario the
23 trustees would accept the Court's advice and the discrimination, at least in the definition,
24 would be cured. We'll -- we'll talk a little bit about other steps that we might have to take
25 in a minute.

26
27 So -- so thirdly, Sir, what we view as the -- the sort of third option before you is the Court
28 could conclude, as we've set out in our December brief, that the assets are being held by
29 the '85 trustees for the overlapping '82 and '85 beneficiaries, and that the '85 trustees
30 would be able to transfer those assets to the '86 trust, and I won't belabour the argument
31 there.

32
33 I -- I set you through the -- the potential analysis that the Court could undertake in our --
34 in our December brief, and this is the answer to the third question that we posed. Again,
35 pragmatically speaking, in this scenario the trustees would again accept the Court's
36 advice and would likely affect that transfer.

37
38 Now, Sir, the -- the issue though of the current beneficiaries who could lose their
39 beneficial status looking at options 2 and 3, we -- we do believe that that issue can be
40 addressed through grandfathering or -- or other solutions that we would need to
41 investigate. The sovereign trustees have always been committed to finding solutions for

1 those individuals, and as -- as our friends have shown you in the arguments before Your
2 Lordship, and others, we have consistently taken the position that we have an obligation
3 to the -- to the group that might be left behind, and that we represent their interests.
4

5 The -- the options, Sir, that we have put forward in our analysis of the question before
6 you and the potential solutions, there really are attempts -- the trustees attempts to meet
7 the many fiduciary duties that -- that the sovereign trustees have. To be clear, Sir, the
8 sovereign trustees fully embrace all of the fiduciary duties that they owe to all of the
9 beneficiaries when seeking out these potential solutions.
10

11 So with that, unless -- no, we -- I -- I see a shaking of a head by my colleague. Unless
12 you have any questions, Sir, those are our submissions in reply.
13

14 THE COURT: Mr. Sestito, I want to take you back to some of
15 the discussion that I had with Mr. Faulds, and get your take on it.
16

17 Is it the case that the '82 trustees who owe duties to the present and future members of the
18 Sawridge First Nation, is it true that in April of 2015 -- April of 1985 they simply could
19 have distributed the whole of the fund by way of a cash advance, and that would have
20 brought the trust to an end --
21

22 MR. SESTITO: Yeah --
23

24 THE COURT: -- (PORTION OF PROCEEDINGS NOT
25 RECORDED) the existing band members at that time? Is that true?
26

27 MR. SESTITO: Yes, Sir. And in -- in fact if you take a look at
28 our December brief, I -- I will likely not be able to find the pinpoint but we do pose that
29 as when -- when evaluating that first question of what authority -- under what authority
30 the transfer happened -- oh, paragraph 7.
31

32 We do discuss the potential that the assets could be distributed outright to the individual
33 beneficiaries, and what consequences would flow from that course of action. And then
34 we note, Sir, that that's specifically what did not happen which is why we're engaging in
35 this analysis.
36

37 THE COURT: What -- what flows from that then is the next
38 question that Mr. Faulds provided by way of answer, and I put it to you for your
39 comment.
40

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

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

3
4 MR. SESTITO: I -- I think, Sir, because the -- the distribution
5 itself would need to be consistent in the event that it was done in a trust transfer. You --
6 we need to look at the power that would have invested in the '82 trustees. In fact, it
7 would need to respect -- if you're going to continue on a trust obligation, it would need to
8 respect that class definition, which is found within the four corners of the '82 trust itself.

9
10 That, I think, would be the -- the distinction there. We do mention though, Sir, that, you
11 know, the -- sorry, I've accidentally muted myself.

12
13 We -- we do mention, Sir, that in the event that there had been an individual distribution
14 and then a peer resettlement, it would have been a completely legal analysis. The fact of
15 the matter is we are dealing with a transfer from one trust to the other, and we've done
16 our best to outline the legal framework which we must view that transfer.

17
18 **Submissions by Ms. Bonora (Reply)**

19
20 MS. BONORA: Sir, perhaps I'll just add to the argument. In
21 modern day trust drafting, you would actually give authority to a trustee to distribute to a
22 trust in which the beneficiaries of the trust -- the new trust are the same, or one or more of
23 them are the same.

24
25 The point behind the -- the reason you need to use *Pilkington* is because that power did
26 not exist in the 1982 trust to transfer it to a new trust. The powers in the 1982 trust were
27 to transfer it to the individual beneficiaries of the 1982 trust. And so I think in looking at
28 the questions that you have asked, if you can transfer to those individuals who were
29 beneficiaries in 1982 I think it stands to reason, according to *Pilkington*, just like
30 Penelope, you could transfer to a trust with those people.

31
32 I don't think there's any problem in that logic. I think the logic that is problematic is once
33 you hit April 17th, then -- and you are now adding potentially a number of beneficiaries
34 who were not beneficiaries in 1982, can the same principles apply.

35
36 And just even in dealing with the Bill C-31 women, if we look at your questions around
37 and focus on the Bill C-31s, I think that the trustees had the ability to make a distribution
38 from the 1982 trust to exclude those women. They could have chosen which
39 beneficiaries were going to get money. There was no -- necessarily any reason that there
40 had to be an equal distribution among the beneficiaries. Short of an even-hand argument
41 applying, they could have done that.

1
2 So the exclusion of those Bill C-31 women, if they chose to make a distribution, was
3 potentially aloud. The problem is that as soon as you hit April 17th, 1985, or once the
4 membership code comes in, you definitely have a whole new set of beneficiaries. And of
5 course we've explored the extent of the number of people that might be added and we
6 would, you know, have said that we're not sure that *Pilkington* allows you to do that.
7

8 THE COURT: Okay. Thank you very much. All right. So we
9 have now heard from everyone, and I will get the transcripts so I can review some of
10 these submissions again to -- so give me (PORTION OF PROCEEDINGS NOT
11 RECORDED) as soon as reasonably possible.
12

13 And Mr. Faulds, you're going to get me a copy of the various pages from (PORTION OF
14 PROCEEDINGS NOT RECORDED) that are relevant to -- to re-settlement?
15

16 MR. FAULDS: I will, My Lord.
17

18 THE COURT: My guess is it's going to take me a bit of time to
19 work my way through this, so I -- I won't give you a promised time for the decision but it
20 -- it will likely take me quite a while, I'm thinking, to get through this. I'll try to do it as
21 quickly as I can but it will take -- it will take some time. It's not -- it's not an easy answer
22 for sure, so I will do it as quickly as I can.
23

24 But I did want to thank you all for your submissions, and your thoughtful written briefs.
25 And I wanted to thank Shelby, as well, for the excellent presentation that she made.
26

27 MS. TWINN: Thank you.
28

29 THE COURT: Thank you. Okay. So unless there's anything
30 else, we'll just adjourn and I'll get back to you as soon as I can.
31

32 MS. BONORA: Thank you, Sir.
33

34 UNIDENTIFIED SPEAKER: Thank you, My Lord.
35

36 UNIDENTIFIED SPEAKER: Thank you, My Lord.
37

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

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I, Morag O'Sullivan, certify that this recording is the record made of the evidence in the proceedings in Court of Queen's Bench, held in courtroom 416, at Edmonton, Alberta, on the 28th day of September, 2021, and I was the court official in charge of the sound recording machine during the proceedings.

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1 **Certificate of Transcript**

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3 I, Monica Kazar-McKenna, certify that

4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

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

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