COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	**2203-0043AC**
TRIAL COURT FILE NUMBER:	**1103 14112**
REGISTRY OFFICE:	**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 WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985" Sawridge Trust")
APPLICANT:	**PUBLIC TRUSTEE OF ALBERTA**
STATUS ON APPEAL:	**Appellant**
RESPONDENTS:	**ROLAND TWIN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Trust ("1985 SAWRIDGE TRUSTEES"**
STATUS ON APPEAL:	**Respondents**
RESPONDENT:	**SAWRIDGE FIRST NATION and SHELBY TWINN**
STATUS ON APPEAL:	**Respondent**
RESPONDENT:	**CATHERINE TWINN**
STATUS ON APPEAL:	**Respondent**
DOCUMENT:	**FACTUM OF THE APPLICANT, THE PUBLIC TRUSTEE OF ALBERTA**

Registrar's Stamp

Appeal from the Decision of
The Honourable Mr. Justice J.T. Henderson
Dated the 4th day of February, 2022
Filed the 4th day of February, 2022

FACTUM OF THE APPELLANT

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OVERVIEW

1. This appeal concerns a decision by a new Case Management Justice (the new CMJ) purporting to interpret an order granted years earlier in the same proceedings by his predecessor (the original CMJ). That order (the Asset Transfer Order or ATO), obtained on application for advice and direction pursuant to then s. 43 of the *Trustee* Act, approved a trust-to-trust transfer: "The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*."

2. The new CMJ held this approved only the notional transfer of legal title in the transferred assets to the 1985 Trust but that beneficial interest in the assets remained with the 1982 Trust beneficiaries.[1]

3. The Appellants submit that in reaching this conclusion the new CMJ, instead of interpreting the ATO, effectively engaged in a collateral attack upon it. In doing so the new CMJ erred in law and principle, failed to properly apply the test for the interpretation of an order, palpably misconstrued the context in which the ATO had been granted, and reached an erroneous result. The trust law analysis underlying this collateral attack was also flawed.

4. The Appellants also submit the new CMJ exceeded his jurisdiction and role as case manager as he entered the fray. The meaning and effect of the ATO was not in issue between the parties until the new CMJ questioned it.[2] He suggested that despite the ATO approving the transfer of assets to the 1985 Trust, those assets might remain subject to the 1982 Trust. He directed a motion on the interpretation of the Order and ultimately delivered a decision reflecting his original suggestion.[3] This had the appearance of undermining the neutrality of the Court.[4]

5. As this Court noted in 2012 in affirming the OPGT's role in the proceedings to represent the interests of minor beneficiaries "…it is plain and obvious that the interests of the affected

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[1] Application of the Sawridge Trustees for Advice and Direction, filed August 11, 2016 [Appellant's Extracts of Key Evidence ("AEKE"), Tab 11]; Consent Order (ATO), Justice D.R.G. Thomas, dated August 24, 2016, filed December 1, 2016 [AEKE, Tab 14]; *Twinn v. Trustee Act*, 2022 ABQB 107 (*Twinn*) at para. 256 [Tab W]
[2] Transcript of Case Management Hearing, held September 4, 2019, pg. 8-9 [AEKE, Tab 27]
[3] Transcript of Case Management Hearing, held September 4, 2019, pg. 22 [AEKE, Tab 27]
[4] *R. v. Switzer*, 2014 ABCA 129 [Tab T, Appellant's Authorities]

children, potentially excluded or otherwise affected by changes proposed to the Trust, require protection." The effect of the decision under appeal is devastating to those interests. It results in their loss of beneficial interests in trust assets worth up to $70 million.

PART I FACTS

The decision under appeal arose in the context of an ongoing application for advice and direction concerning a trust established by the Sawridge First Nation in 1985.

6. The proceeding out of which this appeal arises is an ongoing application for advice and direction commenced in 2011 by 1985 Trustees. The proceeding was case managed by the original CMJ until 2018. When he stepped down, the new CMJ was assigned.

7. The main application was brought to facilitate a distribution of assets from the 1985 Trust to the 1985 Trust's beneficiaries. It sought advice and direction respecting two issues:

i. to obtain the court's confirmation that a transfer of assets into the 1985 Trust from a predecessor trust 30 years before had been properly effected such that those assets were held for the 1985 Trust's beneficiaries; and,
ii. to determine whether the 1985 Trust's beneficiary definition should be amended because it was discriminatory.

8. The ATO fully addressed the first of these issues and was relied upon by the 1985 Trustees and other parties to guide further steps in the proceeding until it was questioned by the new CMJ.

9. The background to, and purpose of these proceedings here summarized in two 2011 affidavits sworn by Paul Bujold (the Chief Executive Officer of the 1985 Trust).[5] As no originating pleading had been filed, the 1985 Trustees initially relied on these affidavits and the Procedural Order granted by the original CMJ to identify the relief sought.[6] The second affidavit described the relief regarding the asset transfer as follows: "25. The Trustees seek the Court's direction to declare that the asset transfer was proper **and that the assets in the 1985 Trust are held in trust for the beneficiaries of the 1985 Trust.** (*emphasis added*)

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[5]Affidavit of Paul Bujold, sworn August 30, 2011 [AEKE, Tab 2]; Affidavit of Paul Bujold sworn September 12, 2011 (Second Bujold Affidavit), paras 4, 5 and 22 to 25, [AEKE, Tab 5]

[6] Procedural Court Order, Justice D.R.G. Thomas, dated August 31, 2011, filed September 6, 2011 [AEKE, Tab 3]

10. Mr. Bujold further deposed that the 1985 Trustees believed the transfer to have been properly carried out and that the Trustees sought the confirmation of the Court that this was the case.[7]

11. With respect to the second issue – the 1985 Trust's beneficiary definition – Mr. Bujold explained it was based on the criteria for First Nation membership in the *Indian Act* before they were amended by Bill C-31. This had been intentional, to protect the Trust assets from an anticipated influx of new members caused by Bill C-31. However, the Trustees now considered the definition to be potentially discriminatory. The Trustees sought to amend it so that 1985 Trust beneficiaries would henceforth be defined simply as members of the SFN.[8]

12. As this would result in the loss of beneficiary status by many of the current 1985 Trust minor beneficiaries who did not qualify as SFN members, the 1985 Trustees also proposed their beneficiary status be "grandfathered".[9] The concept of grandfathering has been central to the 1985 Trustees position and was raised with the new CMJ at his first case management meeting.[10]

The creation of the 1985 Trust, and the transfer of assets to it, had been a key element of the SFN response to Bill C-31, which the SFN opposed on constitutional grounds.

13. The 1982 Trust was settled on April 15, 1982, by then Chief Walter Twinn for the benefit of the present and future members of the Sawridge First Nation. At that time, membership in the SFN was determined pursuant to rules contained in the *Indian Act* as it then existed. Three years later, the Government of Canada introduced Bill C-31 to amend those membership rules. Chief Twinn and the SFN strenuously opposed Bill C-31 as contrary to their rights of self-government. One of the effects of the Bill C-31 changes was to impose new members upon the SFN who did not qualify as members under the previous *Indian Act*.

14. The SFN response to Bill C-31 had two main elements. Prior to the bill's enactment, Chief Twinn settled the 1985 Trust for present and future SFN members as defined prior to Bill C-31.

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[7] Affidavit of Paul Bujold, sworn August 30, 2011 [AEKE, Tab 2]; Affidavit of Paul Bujold sworn September 12, 2011 (Second Bujold Affidavit), paras 4, 5 and 22 to 25, [AEKE, Tab 5]

[8] Second Bujold Affidavit, paras. 14-18, 32, 33 [AEKE, Tab 5]

[9] Brief of the Sawridge Trustees for Special Chambers Case Management Meeting on June 30, 2015, filed June 12, 2015, para 3 and Tab 3 [AEKE, Tab 6]

[10] Application by the Sawridge Trustees for Advice and Direction (returnable September 25, 2018), filed August 11, 2018, para. 23 [AEKE, Tab 20]; Annotated Agenda of the Sawridge Trustees (in respect of the Agenda for Case Management Meeting of December 18, 2018, filed December 11, 2018, Sections 2 and 5 [AEKE, Tab 21]

Then, as a trustee of both trusts, he participated in the transfer of the 1982 Trust assets to the 1985 Trust to protect them for the benefit of the pre-Bill C-31 SFN membership. The asset transfer was carried out on April 15, 1985 by resolutions of the 1982 and 1985 Trustees which referenced:

i. the anticipated passage of Bill C-31 and the fact that it could result in persons becoming beneficiaries who did not qualify under the membership rules that existed when the 1982 Trust was created on April 15, 1982;

ii. their unfettered discretion to pay or apply all of the capital or income of the 1982 Trust for the beneficiaries of the 1982 Trust;

iii. their desire to exercise that power to avoid future uncertainty concerning the identity of beneficiaries by resettling the trust assets for the benefit of those persons who qualified as SFN members under the membership rules in place on April 15, 1982; and,

iv. the fact the 1985 Trust had been established for such persons.

15. The transfer was ratified and approved at a meeting of SFN membership the same day. [11]

16. After Bill C-31 was enacted on June 28, 1985,[12] the SFN and five other Alberta First Nations, led by Chief Twinn, launched a constitutional challenge to it. The claim alleged Bill C-31 infringed their constitutionally recognized and affirmed rights under s. 35 of the *Constitution Act, 1982* by imposing members upon them without their consent. The action sought a declaration the amendments imposing members were of no force and effect.[13]

17. The SFN also passed its own membership code and then, in 1986, established the Sawridge Trust (the 1986 Trust) for all members of the SFN, including members accepted under its new code. Thereafter, the SFN settled cash and other assets into the 1986 Trust. No further assets were added to the 1985 Trust.[14]

18. The effect of these various steps was to preserve the assets in existence on April 15, 1985 in the 1985 Trust for those who qualified as Sawridge members under the pre- Bill C-31 membership criteria. Assets acquired after Bill C-31 came into effect were held in the 1986 trust

[11] Affidavit of Paul Bujold sworn September 12, 2011, paras 19-21, Exhibits "H" and "I" [AEKE, Tab 5]
[12] Hartley, Gerard, *The Search for Consensus: A legislative History of Bill C-31*, *1969-1985,* 2007, Aboriginal Policy Research Consortium International (APRCi) 98, pages 21, 25 [Tab L, Appellant's Authorities]
[13] Amended Statement of Claim of Walter Patrick Twinn *et al*, filed April 15, 1986, paras.14 to 18, [AEKE, Tab 1]
[14]Affidavit of Paul Bujold sworn September 12, 2011, at para. 29-31, and Exhibit "K" [AEKE, Tab 5]

for SFN members who qualified under the post Bill C-31 rules.[15] An intention was also expressed to merge the two trusts following the conclusion of the constitutional challenge.

19. All parties were satisfied that all assets held by the 1982 Trust were transferred to the 1985 Trust on April 15, 1985.[16] Paul Bujold recognized the 1982 Trust no longer exists and that the cost of unravelling the 1985 Trust would be an "enormous detriment to the beneficiaries" because of the costs involved.[17]

These proceedings were commenced after dismissal of the constitutional challenge.

20. Following two trials and ensuing appeals, the SFN's constitutional challenge to Bill C-31 was ultimately dismissed in December 2009 when the Supreme Court of Canada refused leave to appeal from the dismissal of the claim.[18]

21. The Trustees of the 1985 and 1986 Trusts (who were the same) then commenced discussions concerning the potential merger of the two trusts with a view to enabling distributions from the 1985 Trust to its beneficiaries.[19] Those discussions resulted in their decision to bring the advice and direction proceeding.[20] Following an *ex parte* appearance, the original CMJ issued the Procedural Order directing the Trustees to bring application to address the two issues they had identified.[21]

22. The Procedural Order also directed the Trustees to give notice of the application to a wide range of parties, including all beneficiaries and potential beneficiaries of the 1985 Trust and all

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[15] Affidavit of Paul Bujold sworn September 12, 2011, at para.31 [AEKE, Tab 5], Transcript of Questioning of Paul Bujold, July 27, 2016 [AEKE, Tab 10]
[16] Affidavit of Paul Bujold sworn September 12, 2011 [AEKE, Tab 5]; Transcript of Questioning of Paul Bujold, July 27, 2016 p.25, l.1-27, p.26, l.1-8 and p.27, l.15-27 [AEKE, Tab 10]
[17]Transcript of Questioning of Paul Bujold, July 27, 2016, p.27, l.15-27 and p.28, l.1-13 [AEKE, Tab 10]
[18] *Sawridge Band v. Her Majesty the Queen, Congress of Aboriginal Peoples, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta and Native Women's Association of Canada AND BETWEEN Tsuu T'ina First Nation (formerly the Sarcee Indian Band)* v. *Her Majesty the Queen, Congress of Aboriginal Peoples, Native Council of Canada (Alberta), Non Status Indian Association of Alberta and Native Women's Association of Canada,* 2009 CanLII 69744 (SCC) [Tab U, Appellant's Authorities]
[19] Affidavit of Paul Bujold, sworn September 12, 2011, para. 34 and Exhibit "L" [AEKE, Tab 5]
[20] Minutes of meeting of Sawridge Trustees, December 21, 2010; Affidavit of Records of Catherine Twinn, filed February 1, 2019, Document #TWN003087 [AEKE, 17]
[21] Procedural Court Order, Justice D.R.G. Thomas, dated August 31, 2011, filed September 6, 2011, para. 1 [AEKE, Tab 3]

persons known to have been beneficiaries of the 1982 Trust.[22] Service was effected accordingly. The OPGT was subsequently appointed to represent the interests of minor beneficiaries and potential beneficiaries.

The 1985 Trustees applied for the ATO to confirm the transferred assets were held by the 1985 Trust for the benefit of the 1985 Trust beneficiaries. The other parties consented and the original CMJ granted the ATO.

23. After the OPGT's appointment was finalized and questioning on affidavits occurred, the 1985 Trustees began discussions to resolve the issues in the application. In June 2015, they proposed a settlement involving approval of the asset transfer, the amendment of the 1985 beneficiary definition and the grandfathering of minor beneficiaries who would otherwise lose their beneficiary status as a result of the amendment. They described this as a "complete settlement" that would fully resolve this proceeding.[23]

24. The ATO was the first substantive aspect of the proceeding to be formally resolved. The 1985 Trustees proposed an Order confirming the validity of the transfer while preserving the right to an accounting of the assets of the two trusts. This draft Order, which became the ATO, was attached to a with prejudice proposal provided to the parties and the SFN in which the 1985 Trustees described the purpose as being to confirm that "the 1985 Trust is the entity with which to deal." The 1985 Trustees urged the OPGT and Catherine Twinn to consent to the draft ATO. The SFN threatened the OPGT with cost consequences in the Rule 5.13 asset transfer production application if it did not consent to the draft ATO.[24]

25. The 1985 Trustees also filed a formal application relying on s.43 of the *Trustee Act* and on the Affidavits of Mr. Bujold.[25] In advance of the application, the SFN conducted a friendly Questioning of Mr. Bujold on his September 12, 2011 Affidavit. Mr. Bujold gave evidence that:

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[22] *Ibid*, paras. 2 and 4
[23] Transcript of Case Management Hearing held June 24, 2015, pg. 10, l. 20-38, pg. 26, l. 32-38 [AEKE, Tab 7] Brief of the Sawridge Trustees for Special Chambers Case Management meeting on June 30, 2015, filed June 12, 2015, Tab 3 [AEKE, Tab 6]
[24] Letter from counsel for 1985 Trustees dated June 22, 2016 [AEKE, Tab 8], Letter from counsel for SFN dated July 6, 2016 [AEKE, Tab 9]
[25] Application by the Sawridge Trustees for Advice and Direction (returnable September 25, 2018), filed August 11, 2018 [AEKE, Tab 20]

i. SFN had cooperated with the 1985 Trustees in providing documents relevant to the asset transfer and Mr. Bujold did not believe any additional relevant documents existed;[26]

ii. The purpose of the 1985 Trust was to protect the assets from individuals who might be "forced" on SFN as members;[27]

iii. The objective of SFN and SFN Chief and Council's in 1985 was to, inter alia, transfer the 1982 assets to the 1985 Trust;28

iv. The 1982 Trust no longer existed;29 <GH note: this is repetitive of content in para. 15>

v. Returning the assets to the 1982 Trust would be an enormous detriment to the beneficiaries.30

26. The 1985 Trustees submitted a brief for the application setting out the factual and legal basis for the Court to grant the Order.[31] The brief cited paragraphs 9 to 28 of Mr. Bujold's September 12 Affidavit, which included the paragraph describing the purpose of the Order being sought (see paragraph 7 above), and also drew heavily on the Questioning by the SFN.

27. The brief included the following submissions:

> 17. The Trustees have advised all parties that **the approval of the transfer of the assets from the 1982 Trust to the 1985 Trust is sought for certainty and to protect the assets of the 1985 Trust for the benefit of the beneficiaries**. To unravel the assets of the 1985 Trust after 30 years would create undue costs and would have the potential of destroying the trust…
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> 18. There is evidence that the 1985 Trust was created to **preserve the assets of the 1982 Trust for the members of the Sawridge First Nation…that existed in 1985 before Bill C-31 was enacted**. **The 1985 Trust was not a beneficiary of the 1982 Trust and thus should not have been able to receive assets directly**…Given the high level of advice that the Trustees received, it is believed that the transaction was carried out properly…
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> 20. In Pilkington v. Inland Revenue Commissioners HL 8 Oct 1962 **Tab 3** the House of Lords approved as appropriate a transfer of part of one trust for the benefit of one beneficiary…. Admittedly Pilkington dealt with a payment for the benefit of one beneficiary to a trust for the benefit of the beneficiary and in the Sawridge trusts, the transfer was of the whole trust fund of one trust to another trust. **However, it is submitted**

[26] Transcript of Questioning of Paul Bujold, July 27, 2016, p.18, l.24-27, p.19, l. 1-5, p.24, l.24-27, p. 27, l.1-14, p.31, l. 26-27, and p.32, l. 1-27 [AEKE, Tab 10]
[27] *Ibid*, p. 23, l.3-8 [AEKE, Tab 10]
[28] *Ibid*, p. 23, l.16-27 and pg. 24, l.1-17 [AEKE, Tab 10]
[29] *Ibid*, p. 27, l.23-24 [AEKE, Tab 10]
[30] *Ibid*, p. 28, l.5-13 [AEKE, Tab 10]
[31] Brief of the Sawridge Trustees on Transfer of Assets, filed August 17, 2016 [AEKE, Tab 12]

> **that the same principle is applicable as the transfer from the 1982 Trust to the 1985 Trust was for the benefit of the same beneficiaries and preserved their interest in the trust assets. … It is in the best interests of the beneficiaries of the 1985 Trust that the transfer of assets be approved *nunc pro tunc.*** (emphasis added)[32]

28. The correspondence, pleadings, written submissions and case management transcript for the appearance when the ATO was granted shows neither the 1985 Trustees, the other parties, nor for that matter the SFN, suggested the ATO was dealing with a notional transfer or somehow only partially addressing the asset transfer by dealing with legal title only.

29. The ATO was approved by the original CMJ at the August 24, 2016 case management meeting. The original CMJ referred to the 1985 Trustees' brief, based on which he stated: "And thank you very much for the brief, because it makes it pretty clear -- [interjection omitted] – well, what the basis for it is, and I'm satisfied the consent order is appropriate **and properly based in law**." (*emphasis added*)[33]

30. He then granted the ATO as follows: "All right. The consent order being sent to me with the brief, as I – just so it's clear on the record, I did review that brief and **it was very helpful to me in terms of providing a legal basis for the consent order**. Plus, the Summary of Facts helped put me in the picture again. So the consent order is granted, and there it is." (*emphasis added*)[34]

31. Counsel for the SFN declined the Court's invitation to speak to the ATO. However, in the course of submissions on another issue, SFN counsel endorsed it as follows:

> "I think that my friend, Ms. Bonora, made mention of this in her brief. The purpose of the transfer in '82, '85, in terms of transfer from trust, **was to avoid any claim that others might make in relation to these assets after the enactment of Bill C-31**. **So Sawridge First Nation would be highly motivated to ensure that those that were acting as trustees made the transfer of all assets from the 82 Trust to the 85 Trust. That was the reason.** The reason clearly was one where it was in everyone's best interests to make sure the transfer took place. I would point out that the resolution of this matter in accordance with this order [the ATO] is similar to the resolution that was

[32] Brief of the Sawridge Trustees on Transfer of Assets, filed August 17, 2016 [AEKE, Tab 12]
[33] Transcript of Case Management Hearing, held August 24, 2016, p. 3, l. 21-35 [AEKE, Tab 13]
[34] Transcript of Case Management Hearing, held August 24, 2016, p. 6, l. 18-23 [AEKE, Tab 13]

proposed by the Sawridge Trustees to the Public Trustee on May 13, 2016."[35] (*emphasis added)*

32. The SFN was fully aware of the previous discussions relating to the asset transfer and had aggressively encouraged the OPGT to consent to the ATO. The SFN was present in Court for the ATO and given full opportunity to comment or make submissions. At no point in the process did the SFN submit, or even suggest, the 1982 beneficiaries had any remaining interest in the assets being held in the 1985 Trust.

The proceedings thereafter continued on the basis the remaining issue was whether the 1985 Trust beneficiary definition could be amended, and to confirm a distribution plan.

33. After the ATO, the proceeding became focused for a time on applications to add parties, such as Maurice Stoney, Shelby Twinn, Patrick Twinn, and Deborah Serafinchon.[36]

34. In 2018, and in accordance with a direction of this Court to rectify the absence of an originating pleading, the 1985 Trustees filed an application titled "Application (Statement of Issues and Relief Sought)" (the Originating Application).[37] The Originating Application contains no reference to the relief the 1985 Trustees originally sought in relation to the asset transfer. It was predicated upon the basis the asset transfer issue, including confirmation of the transfer of the beneficial interest in the assets to the 1985 beneficiaries, had been fully resolved by the ATO.

35. The sole issue identified as remaining for determination was whether the 1985 Trust Beneficiary definition was discriminatory. If so, then it sought direction from the Court regarding the appropriate remedy to address that discrimination. If not, the 1985 Trustees did not seek any other relief and acknowledged this proceeding would be concluded.[38]

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[35] Transcript of Case Management Hearing, held June 24, 2015, p.3, lines 29-35, p. 6 lines 16-23 and page 39, lines 1-11 [AEKE, Tab 7]; Brief of the Sawridge Trustees for Special Chambers Case Management meeting on June 30, 2015, filed June 12, 2015, Tab 3 [AEKE, Tab 6]

[36] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 377 [Tab C, Appellant's Authorities]; *Twinn v. Twinn*, 2017 ABCA 419 [Tab X, Appellant's Authorities]; *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 436 [Tab D, Appellant's Authorities]; *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 [Tab E, Appellant's Authorities]; *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 548 [Tab F, Appellant's Authorities]

[37] *Twinn v. Twinn*, 2017 ABCA 419, para. 21 [Tab X, Appellant's Authorities]

[38] Application of the Sawridge Trustees (Statement of Issues and Relief Sought), filed January 9, 2018 [AEKE, Tab 15]

36. Other steps after the ATO were also uniformly directed at resolving that sole remaining issue, and if so, how to proceed:

i. To advance the determination of whether the 1985 beneficiary definition was discriminatory, the 1985 Trustees proposed a consent Order that the definition was discriminatory due to its continued reliance on the membership provisions of the *Indian Act* existing prior to Bill C-31. The order's preamble recited that the availability of any remedy to address such discrimination remained to be determined, and that "the Parties remain committed to finding a remedy that will protect the existence of the 1985 Trust and the interests of the beneficiaries." The OPGT and Catherine Twinn consented to the Order on that basis and it was approved by the original CMJ. [39]

ii. The 1985 Trustees then asked the original CMJ to direct a hearing to consider the jurisdiction of the Court to amend the beneficiary definition of the 1985 Trust. The Trustees noted that if the Court found it had no jurisdiction to amend (despite its discriminatory nature) such a finding would dispose of the proceedings. They described the issue as one of law that could be resolved quickly.[40]

37. One of the ways the 1985 beneficiary definition could be amended was under s 42 of the *Trustee Act*, which required consent of all beneficiaries. Accordingly, the 1985 Trustees attempted to conduct a vote of the 1985 Trust beneficiaries on amending the beneficiary definition. An Information Sheet and ballot were mailed out. The 1985 beneficiaries were asked to indicate their support for either the 1985 Trustees' proposed amendment limiting beneficiaries to SFN members, or a draft amendment suggested by the OPGT that would include the existing beneficiary definition but add to it persons who were SFN members under its membership code.

38. The introduction to the Information Sheet said: "Court Action 1103 14112 to review the definition of "Beneficiaries" in the 1985 Trust is reaching the final steps in seeking direction about a change in the definition of "Beneficiaries" in this Trust and to seek remedies for those who may be affected by the change to the current definition." (*emphasis added*)

39. The notice went on to advise recipients that they were receiving the notice because it appeared based on an analysis of the *Indian Act* as it read prior to Bill C-31 they may be a beneficiary of the 1985 Trust and were being asked to vote on whether they would accept either

[39] Consent Order (Issue of Discrimination), Justice D.R.G. Thomas, dated January 19, 2018, filed January 22, 2018 [AEKE, Tab 16]
[40] Application by the Sawridge Trustees for Advice and Direction (returnable September 25, 2018), filed August 11, 2018 para.5 and 23, and Schedule G [AEKE, Tab 20]

of the two proposed definitions. However, the vote was unsuccessful – only 8 ballots were returned.[41]

40. In the fall of 2018, the original CMJ stepped down and the new CMJ was appointed. In the interim, the parties reached agreement on an Order establishing a process to address the jurisdictional question. It provided that the 1985 Trustees "seek direction respecting the source and nature of the jurisdiction of this Court to make changes to the definition of 'Beneficiary' as set out in the 1985 Trust", as a preliminary to a hearing to decide if and how the 1985 Trust's beneficiary definition should be amended.

41. The Order was presented to and signed by the new CMJ at his initial case management meeting. At that meeting the new CMJ described the jurisdictional issue as "fundamental to everything. Either the Court has the jurisdiction to approve an amendment of this Trustee (sic) or it does not, and that is a question of law."[42]

42. Each of these steps, proceedings and submissions taken or made by the 1985 Trustees since the granting of the ATO were predicated upon the ATO having confirmed the transfer of assets to the 1985 Trust for the benefit of the 1985 Trust's beneficiaries. The entire focus of the proceeding had become consideration of amending the 1985 beneficiary definition. No one suggested there was any issue remaining to be resolved with respect to the asset transfer.

The jurisdiction briefs raised doubt about the Court's jurisdiction to amend the beneficiary definition. The new CMJ then suggested the assets in the 1985 Trust were not held for the 1985 beneficiaries.

43. The new CMJ received extensive briefs from the parties respecting the Court's jurisdiction to amend the 1985 Trust beneficiary definition. All the briefs identified three potential sources of jurisdiction: the trust deed; s. 42 of the *Trustee Act*[43]; and common law jurisdiction arising from public policy considerations. Although the briefs reached no definite conclusions, collectively they raised doubts about the availability of each of them.

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[41] Affidavit of Paul Bujold, sworn January 9, 2019, para. 3, Exhibits "A", "B", and "C" [AEKE, Tab 24]
[42] Transcript of Case Management Hearing, held December 18, 2018 page 3, lines 38-40 [AEKE, Tab 22]
[43] *Trustee Act,* SA 2022, c T-8.1 [Tab B, Appellant's Authorities]

44. The day the jurisdictional application was to be heard, the new CMJ emailed counsel for the Parties. He said he was considering the possibility the assets in the 1985 Trust were not held for its beneficiaries, as follows: "The Consent Order [the ATO] says that the transfer of assets is approved '*nunc pro tunc'.* But the Order does not address the issue of the terms under which the assets are being held." He raised the possibility there was "…an ongoing requirement for the 1985 Trust to account to the 1982 Trust with respect to the trust assets."[44]

45. When the parties appeared before him, the new CMJ said: "I question the legitimacy of the 1985 trust declaration at all."[45] He noted the uncertainty about his jurisdiction to amend the 1985 Trust beneficiary definition. The only route practically available was the Court's common law or inherent jurisdiction. However, exercising that jurisdiction meant "I would have to go probably further…than the law has gone to date, which means I would have to proceed cautiously."[46]

46. The new CMJ then said "One of the options here that is easily available is this 1985 trust doesn't have anything to do with anything we're talking about here today. The assets, while they may be situated in the 1985 trust –because Justice Thomas said that they were – are still subject to the 1982 trust terms…. So the easiest thing to do here is just to say you haven't satisfied me that this 1985 trust is relevant. I'm not going to exercise my discretion to modify the definition of beneficiaries in the 1985 trust. 1982 is where we're going, that where we are… I see you tried to clean it up in 2016 but to me that isn't the answer. So that's where we are.[47]"

47. Counsel for the 1985 Trustees responded that they thought the issue of the asset transfer had been solved "…but we obviously need to satisfy you better that that is in fact solved…" The jurisdiction application was then adjourned for the parties to consider next steps.[48]

48. Application of the 1982 Trust's beneficiary definition would result in almost all the minor beneficiaries of the 1985 Trust losing their beneficial interest in the trust because they were not

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[44] April 25, 2019 email from

J. Jarvis on behalf of Justice Henderson to all counsel [AEKE, Tab 25]
[45] Transcript of Case Management Hearing, held April 25, 2019, page 3, lines 12-19 [AEKE, Tab 26]
[46] Transcript of Case Management Hearing, held April 25, 2019, pg. 4, l. 2-3 [AEKE, Tab 26]
[47] Transcript of Case Management Hearing, held April 25, 2019, pg. 4, lines 16-27 [AEKE, Tab 26]
[48] Transcript of Case Management Hearing, held April 25, 2019, pg. 5, lines 38 to pg. 6, line 1 [AEKE, Tab 26]

SFN members under its membership code. When counsel for the OPGT advised the new CMJ of this at the next case management meeting, he initially expressed doubt and said he was not sure he accepted that would be the case. Further submissions, including by counsel for the 1985 Trustees, confirmed it was so.[49]

49. In addressing the issue he had raised, the new CMJ acknowledged the ATO was a factor: "The Order is there and there's nothing I can do about it other than look at the Order and try and determine what consequences flow from it…. On what terms are those assets being held?"[50]

50. Counsel for the Trustees advised the new CMJ the ATO "wasn't just a simple order saying the transfer is done."[51] Regardless, the new CMJ invited the 1985 Trustees file a motion "…to have the issue of the meaning and consequences that flow from Justice Thomas's order of August 24, 2016, specifically with respect to whether or not after the transfer of assets to the 1985 Trust, those assets are being held subject to the terms of the 1985 Trust, or whether they're being held subject to the terms of the 1982 Trust."[52]

51. The resulting application led to the decision now under appeal.[53] The new CMJ said his approach to interpreting the ATO would involve determining who held the beneficial interest in the transferred assets immediately before the granting of the ATO – the 1982 beneficiaries or the 1985 beneficiaries – so that he could "determine what Justice Thomas was trying to do" in granting the ATO.[54] Counsel for the OPGT and Catherine Twinn repeatedly objected to the new CMJ embarking on this inquiry.[55] They expressed concerns that this approach involved revisiting the ATO rather than interpreting it and could result in the new CMJ effectively granting final relief or a remedy in the proceedings without the consent of all parties.[56]

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[49] Transcript of Case Management Hearing, held September 4, 2019, page 5 line 1 to page 6 line 6; page 16 line 13 to page 17 line 9; page 17 line 24 to 33 [AEKE, Tab 27]
[50] Transcript of Case Management Hearing, held September 4, 2019, pg. 20, l. 23 to 28 [AEKE, Tab 27]
[51] Transcript of Case Management Hearing, held September 4, 2019, pg. 20, l. 4-10 [AEKE, Tab 27]
[52] Transcript of Case Management Hearing, held September 4, 2019, pg. 22, l. 28-31 [AEKE, Tab 27]
[53] Transcript of Case Management Hearing, held September 4, 2019, pg. 20, l. 23 to 28; pg. 22, l. 27 to 35 [AEKE, Tab 27]
[54] Transcript of Case Management Hearing, held November 22, 2019, pg. 8 l. 22 to pg. 9, l. 7; pg. 22, l. 15 to 26 [AEKE, Tab 32]
[55] Transcript of Case Management Hearing, held November 22, 2019, pg. 7, l. 34-41; pg. 8, l. 15-20; pg. 9, l. 21-24; pg. 10, l. 22-27; pg. 11, l. 1-27, 35-40; pg. 16 [AEKE, Tab 32]
[56] Transcript of Case Management Hearing, held November 22, 2019, pg. 6, l. 39 to pg. 8, line 4; pg. 10, l. 19-26; pg. 22, l. 33 to pg. 23 l. 4 [AEKE, Tab 32]

52. Initially, the 1985 Trustees re-submitted to the new CMJ the brief they had relied upon to obtain the original ATO and said they had "nothing material to add" to that brief. The 1985 Trustees also submitted that they "as fiduciaries of the 1985 Trust cannot advocate that the 1982 Trust applies to the Assets."[57]

53. Although it had elected not to make submissions to the original CMJ on the original application for the ATO, the SFN applied for (and was granted) intervenor status in the application concerning its interpretation. The SFN submitted it should be granted intervenor status because, amongst other reasons, it represented the members of the SFN, who were the 1982 Trust beneficiaries, and SFN Chief and Council were the Trustees of the 1982 Trust.

54. At the time of the SFN intervention application, the new CMJ confirmed no one other than the SFN took the position the assets in the 1985 Trust were held for the benefit of the 1985 beneficiaries.[58]

The new CMJ's decision followed the approach to interpreting the ATO he had described and reached the conclusion he had suggested – that the 1982 beneficiaries retained beneficial ownership of the assets.

55. The new CMJ's decision followed the approach he said he would take. His primary conclusions were:

i. Unlike the OPGT and Catherine Twinn, the 1985 Trustees did not intend that the ATO confirm transfer of the beneficial ownership of the assets to the 1985 beneficiaries;

ii. The 1982 Trustees did not have authority to transfer the assets in the 1982 Trust to the 1985 Trust. Specifically:

   a. The principle in the *Pilkington* case did not authorize the transfer because the beneficiaries of the 1985 Trust were not the same as the beneficiaries of the 1982 Trust;
   b. The 1982 Trustees did not seek or obtain court approval under the *Trustee Act*, to vary the 1982 Trust;

iii. As a result, the asset transfer was void. Beneficial ownership of the assets remained with the 1982 beneficiaries immediately prior to the granting of the ATO;

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[57] Brief of the Sawridge Trustees (Application on Transfer of Assets), filed November 1, 2019, paras. 3 and 4 [AEKE, Tab 31]
[58] Transcript of Case Management Hearing, held October 31, 2019, pg. 5, l. 27-29 [AEKE, Tab 30]

iv. The ATO did not approve a transfer of the beneficial interest to the 1985 beneficiaries. It only confirmed the 1985 Trust had legal title to the assets.

56. The new CMJ described the position of the 1985 Trustees on the application before him as: "They assert that the 2016 Consent Order was only intended to confirm that legal title to the trust assets had been transferred and that the beneficial ownership of the trust assets was to be determined at a later stage."[59]

57. Because of this the CMJ concluded there had been no common intention among the parties as to the purpose of the ATO and principles of contractual interpretation that might otherwise apply to the ATO did not do so.[60]

58. The new CMJ reached this conclusion notwithstanding his finding that "the pleadings clearly demonstrate that the 1985 Trustees were seeking a direction that the asset transfer was proper and that they held the trust assets for the 1985 Beneficiaries". His reasons did not resolve this conflict nor did they refer to the steps taken by the 1985 Trustees in reliance on the ATO having confirmed that the 1985 beneficiaries held the beneficial interest in the assets.[61]

59. The new CMJ engaged in a lengthy analysis of the 1982 Trustees' authority to carry out the asset transfer, including pursuant to the principle in *Pilkington*. He held that principle was inapplicable, that the transfer was void, that the 1985 beneficiaries did not acquire any interest in the assets as a result of the transfer, and that the assets continued to be held for the 1982 beneficiaries. The new CMJ ruled this was the situation which existed immediately before the ATO was granted and which had to form the basis of his interpretation of what the original CMJ had intended the ATO to do.[62]

60. In reaching his conclusion, he rejected the submissions of the OPGT and Catherine Twinn that at the time of the asset transfer the beneficiaries under the 1982 Trust and the 1985 Trust were the same, that the asset transfer had therefore been proper in accordance with the *Pilkington* principle, and that the *Pilkington* principle had been properly relied upon by the original CMJ in

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[59] *Twinn v. Trustee Act*, 2022 ABQB 107, para 12 and 113 [Tab W, Appellant's Authorities]
[60] *Ibid*, at paras. 112-113 [Tab W, Appellant's Authorities]
[61] *Ibid*, at paras 243, 245, and 251 [Tab W, Appellant's Authorities]
[62] *Ibid*, para. 208-215 AND 236-241 [Tab W, Appellant's Authorities]

granting the ATO as indicated by his comments in granting the order. [63]

61. The new CMJ acknowledged that the 1985 Trustees' 2016 brief in support of the ATO, the 1985 Trustees had made the same argument. They asserted that at the time of the asset transfer the beneficiaries in the two trusts were the same, such that the *Pilkington* principle could be relied upon. However, the new CMJ held that based on his analysis and reasons, that submission by the 1985 Trustees had been wrong. By implication he held the original CMJ had not relied on the submissions of the 1985 Trustees in granting the ATO.[64]

62. Because the new CMJ found the 1982 Trustees lacked the authority to carry out the asset transfer themselves, he held that the only way it could properly be accomplished was by way of an application for court approval under s. 42 of the *Trustee Act* supported by the consent of all beneficiaries. He held that since no such approval was sought or obtained, the transfer was void.[65]

63. The new CMJ also held that because the 1985 Trust excluded the SFN members imposed by Bill C-31, the creation of the 1985 Trust and the transfer to it of the 1982 Trust assets was "alien to the intention of the settlor of the 1982 Trust". He did not address the fact that the settlor of the 1982 Trust was also the settlor of the 1985 Trust, was a staunch opponent of Bill C-31, and had approved the transfer of assets as a trustee of both the trusts.[66]

64. Given his conclusion that immediately prior to the ATO the assets were held for the 1982 beneficiaries, the new CMJ found the only way the 1985 beneficiaries would have become beneficial owners of the assets was if the ATO itself had effected a transfer of that beneficial interest to them. The new CMJ appears to have thought that was the OPGT's position, which was not the case.[67] The OPGT's position was, and always had been the asset transfer had been a valid exercise of the 1982's Trustees discretionary authority and that the ATO had confirmed this by way of advice and direction, pursuant to s.43 of the *Trustee Act*.

65. In the result, the new CMJ concluded that the ATO did not transfer the beneficial interest

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[63] *Ibid*, paras. 182-190 [Tab W, Appellant's Authorities]
[64] *Ibid,* at para. 248 [Tab W, Appellant's Authorities]
[65] *Ibid*, at paras 234-235 [Tab W, Appellant's Authorities]
[66] *Ibid*, para. 203 [Tab W, Appellant's Authorities]
[67] *Ibid*, at para. 252 [Tab W, Appellant's Authorities]

in the assets to the 1985 beneficiaries. He advised the 1985 Trustees that the ATO should be interpreted as having approved transfer of legal title in the trust assets to the 1985 Trustees but not any beneficial interest to the 1985 beneficiaries.[68]

66. The new CMJ concluded his reasons with a list of further steps that would need to be taken or considered in continuing the proceedings on the basis of his decision.[69]

PART II GROUNDS OF APPEAL

67. The Appellants submit:

A.) The new CMJ's finding that the 1985 Trustees had intended the ATO only confirm the transfer of legal title to the 1985 Trust was a palpable and over-riding error;

B.) The new CMJ's analysis of the meaning of the ATO constituted a collateral attack on an issue already decided by the original CMJ – namely, that the 1982 Trustees had the authority pursuant to the principle in the Pilkington's case to transfer the assets in the 1982 Trust to the 1985 Trust for the benefit of the 1985 beneficiaries;

C.) The new CMJ failed to properly apply the established principles for the interpretation of an order;

D.) The new CMJ erred by misinterpreting and misapplying the applicable law governing the authority of the 1982 Trustees to transfer beneficial title to trust assets to the 1985 Trust;

E.) The new CMJ exceeded his authority as CMJ by entering the fray. He proposed his interpretation of the ATO, invited an application to interpret the ATO, and then rendering a decision reflecting his original proposal which amounted to final relief.

PART III STANDARD OF REVIEW

68. The applicable standard of review for a Case Management Justice's decision is:

i. Correctness for questions of law;
ii. Palpable and overriding error on findings of fact, with a higher standard of review for questions of mixed fact and law.[70]

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[68] *Ibid,* at paras. 275 to 280 and 2854-285 [Tab W, Appellant's Authorities]
[69] *Ibid*, at paras. 289-291 [Tab W, Appellant's Authorities]
[70] *Piikani Nation v. McMullen*, 2020 ABCA 366, para. 26 [Tab S, Appellant's Authorities]

69. A higher degree of deference can apply to discretionary or case flow decisions. Deference on substantive decisions is more limited.[71]

70. Appellate intervention is required where a case management judge has:

i. Clearly misdirected themselves on the facts or the law;
ii. Failed to give sufficient weight to relevant factors;
iii. Committed an error in principle or an erroneous view of the facts;
iv. Proceeded arbitrarily; or
v. The decision is so clearly wrong as to amount to an injustice.[72]

71. The "elbow room" this Court allows case management justices does not extend to reframing an entire piece of litigation, raising issues no party had previously raised, revisiting advice and direction previously given and relied upon, and dealing with substantive rights, in face of objection from the majority of the parties.[73]

72. The OPGT also notes this was not a decision of a case management justice with an ongoing, long-term involvement in directing the case. At the time the new CMJ redirected all the parties from the Jurisdiction Application in April 2019, he was new to the file. As such, the factors giving rise to additional deference do not apply here.[74]

PART IV ARGUMENT

A. The new CMJ committed a palpable and overriding error in finding the 1985 Trustees had not intended the ATO to confirm the transfer of the beneficial interest in the assets to the 1985 beneficiaries.

73. The new CMJ's finding that the 1985 Trustees had not intended the ATO to confirm the transfer of the beneficial interest in the transferred assets to the 1985 Trustees was central to his decision. Based upon this finding, the new CMJ held there had been no common intention among the parties as to the purpose of the ATO. The Appellants submit this finding is impossible to reconcile with the record.

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[71] *Ibid*, para. 23 and 27 [Tab S, Appellant's Authorities]
[72] *Ibid*, para. 24-25 [Tab S, Appellant's Authorities
[73] *Ibid*, para. 23 [Tab S, Appellant's Authorities
[74] *Lameman v. Alberta,* 2013 ABCA 148, para. 13 [Tab Q, Appellant's Authorities]

74. The pleadings, the evidence filed on behalf of the Trustees, their brief in support of the ATO, and the subsequent steps they took based upon it, all show the 1985 Trustees sought the ATO to confirm that the beneficial interest in the assets had been properly transferred to the 1985 beneficiaries. It was the first step in their two-part game plan – first to remove any doubt that the assets were held in the 1985 Trust for its beneficiaries, then seek amendment of the 1985 beneficiary definition to address its discriminatory aspects.

75. This purpose was explicitly stated at paragraph 25 of Mr. Bujold's affidavit.[75] That purpose never changed as is clear from the steps taken by the 1985 Trustees after the ATO, implementing the second step of their game plan. Mr. Bujold's affidavit, including paragraph 25, was specifically relied upon in the 1985 Trustee's brief in support of the ATO to the original CMJ.[76]

76. The 1985 Trustees' brief explicitly set out the foundation for the finding the asset transfer had been carried out properly so as to convey the beneficial interest in the assets to the 1985 beneficiaries.[77] The Trustees even explicitly flagged the issue that: "The 1985 Trust was not a beneficiary of the 1982 Trust and thus should not have been able to receive the assets directly."[78]

77. The 1985 Trustees relied upon the principle in *Pilkington* and submitted that it applied because the beneficiaries of the 1982 Trust and the 1985 Trust were the same when the transfer occurred. Those submissions were accepted in their entirety by the original CMJ. Nothing in the brief indicated an intention that the ATO be limited to the transfer of legal title only.

78. All steps taken by the 1985 Trustees following the granting of the ATO were predicated upon the assets being held for the 1985 beneficiaries. The Originating Application described the remaining issue in the proceeding as whether the 1985 beneficiary definition was discriminatory and if so whether it could be amended. The 1985 Trustees proposed, and this Appellant consented to, orders that the 1985 definition was discriminatory and that hearing should be held to determine the court's jurisdiction to amend it. The 1985 Trustees went so far as to poll the 1985 beneficiaries themselves on whether they would support amending the 1985 beneficiary definition. None of

[75] Affidavit of Paul Bujold sworn September 12, 2011 [AEKE, Tab 5]
[76] Brief of the Sawridge Trustees on Transfer of Assets, filed August 17, 2016 [AEKE, Tab 12]
[77] Brief of the Sawridge Trustees on Transfer of Assets, filed August 17, 2016 [AEKE, Tab 12]
[78] Brief of the Sawridge Trustees on Transfer of Assets, filed August 17, 2016, para. 11 [AEKE, Tab 12]

these steps would have made sense if the 1985 Trustees had intended the ATO to convey legal title only.

79. It is unclear on what basis the new CMJ reached his conclusion that the 1985 Trustees had only intended the ATO to confirm the transfer of legal title in the assets. It appears he understood this to be the submission of the 1985 Trustees themselves, but the 1985 Trustees did not and cannot have said this. What the 1985 Trustees did reasonably say was that after the ATO there were many issues respecting the identification of beneficiaries to be resolved. These included whether the 1985 beneficiary definition could and should be amended, whether in the event of any amendment some people might lose their beneficiary status and ought to be "grandfathered" as beneficiaries, and the identification of all persons who met the 1985 beneficiary definition. However, these all arose from the 1985 beneficiary definition.

80. However the new CMJ reached his understanding, he did not test it against the evidence and record before him. He did not reconcile it with the sworn testimony of Mr. Bujold of what the 1985 Trustees intended, the contents of their submissions in support of the ATO, or the post ATO steps they took before both the original CMJ and himself.

81. The OPGT submits the finding the 1985 Trustees intended the ATO only confirm the transfer of legal title is contrary to the weight, if not the entirety, of the record. The parties to the ATO all intended it confirm the transfer of the beneficial interest in the assets to the 1985 beneficiaries, as did the original CMJ in approving it. The parties continued the proceedings for the next three years, both before the original and the new CMJ, on that basis.

82. The Supreme Court of Canada has defined palpable and overriding error as an error that is obvious and goes to the very core of the outcome of the case.[79] The new CMJ's finding to the contrary was such a palpable and overriding error which undermines his decision as a whole.

B. The new CMJ's approach to the ATO amounted to a collateral attack on the issue the ATO had decided. Instead of interpreting the ATO, the new CMJ reversed it.

[79] *Benhaim v. St-Germain*, 2016 SCC 48 (CanLII), at para. 38 [Tab I, Appellant's Authorities]

83. The new CMJ's approach to the interpretation of the ATO was unusual, and with respect, result driven. He did not begin with the pleadings, or the evidence of the ATO's purpose, the litigation context in which it was granted, the submissions made to the Court it, or what the Court itself said. Instead, he chose to "go to ground zero" and conduct a fresh analysis of the law and facts immediately prior to the granting of the ATO.[80] This, he said, was necessary in order for him to properly understand what the original CMJ had been trying to do in approving the ATO.

84. That analysis primarily involved an assessment of whether the 1982 Trustees had enjoyed the authority under the 1982 Trust to carry out the asset transfer to the 1985 Trust for the 1985 beneficiaries. The new CMJ concluded they did not and that as a result the asset transfer was void. This in turn led him to find that whatever the intentions of the parties to the ATO, the original CMJ himself must have only intended the Order to confirm legal title had passed to the 1985 Trust.

85. The OPGT submits in doing so the new CMJ revisited the very question the original CMJ had decided in granting the ATO. The original CMJ had been asked to confirm, that the asset transfer had been properly carried out and had transferred beneficial interest in the assets to the 1985 beneficiaries. He was provided with legal submissions to support that finding which he accepted and relied upon to approve the ATO. The new CMJ's ruling challenged the basis on which the original CMJ had approved the ATO.

86. That is the definition of a collateral attack. As this Court recently said in *Hiles v. Hiles*:

> [14] We repeat what was said in *The Queen v. Wilson*: [1983 CanLII 35 (SCC)]
> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally-and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.[81]

87. What the new CMJ did here was also barred by the related principle of issue estoppel.[82]

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[80] Transcript of Case Management Hearing, held November 22, 2019, p. 15, l. 33-39 [AEKE, Tab 32]
[81] *Hiles v. Hiles,* 2021 ABCA 57 at para 14 [Tab N, Appellant's Authorities]
[82] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), at para. 23 [Tab V, Appellant's Authorities]

88. The new CMJ characterized his approach to the interpretation of the ATO as being to ascertain what the original CMJ had been trying to do in granting the ATO. The OPGT submits that while the original CMJ's comments on the ATO were brief it is quite clear what he was doing. He was confirming he had satisfied himself, based on the Trustees' brief, that the 1982 Trustees had properly carried out the asset transfer and was confirming that by approving the ATO.

89. The 1985 Trustees' brief in support of the ATO was manifestly clear in its submissions that the 1982 Trustees had enjoyed the authority to transfer beneficial interest in the assets to the 1985 beneficiaries. That is why those submissions flagged the issue, referred to the *Pilkington's* case and submitted that the beneficiaries of the 1982 and 1985 Trusts were the same. The original CMJ accepted those submissions and granted the ATO in reliance upon them. The new CMJ's finding that those submissions were wrong, and that the 1982 Trustees had not enjoyed such authority, was an unequivocal attack on the original CMJ's acceptance of them.

90. The new CMJ went on to find that, based on his own analysis, the original CMJ could not have meant to approve the transfer of any beneficial interest in the assets and therefore must have meant to approve the transfer of legal title only. He did not explain on what basis the original CMJ might have approved a void transfer, even if only of legal title. Nothing in the 1985 Trustees submissions sought, or provided authority for, such an outcome.

91. Nor did the new CMJ explain the contradiction between his finding that the 1985 Trustees submissions had been wrong, and the original CMJ's statements that he was relying on those submissions to find that the consent order was "properly based in law". In any event, as set out below, the OPGT submits the 1985 Trustees' submissions were not wrong, the new CMJ was.

C. The new CMJ erred in his interpretation of the nature, purpose and effect of the ATO and failed to properly apply the relevant interpretive principles.

92. The accepted approach to interpretation of a Court order, whether a consent order or otherwise, is well accepted. It requires the Justice interpreting the existing Order to consider:

i. The pleadings in the action to which the order relates;
ii. The language of the order itself;

iii. The circumstances in which the order was granted.[83]

93. An interpreting Court should regard submissions of a participant that undermine an existing Order with great caution when the participant:

i. had input into the order; was present in Court when the order was made;
ii. failed to raise objections to the order or identify irregularities with the Order to the Court; and
iii. failed to appeal the order.84 The failure to advance a particular interpretation at the time the application is heard is also relevant to whether an Order can bear the interpretation offered after the fact.[85]

94. Despite these clear principles, the new CMJ ultimately relies heavily on the SFN's submissions which were uniformly directed at identifying flaws in, and otherwise undermining and challenging the ATO. The new CMJ also makes findings on the 1985 Trustees' positions to support his interpretation of the ATO which are not supported by the record.

95. The analysis of an Order has consistently been recognized to be an objective exercise. [86] The analysis of an Order should not be governed by the subjective, after-the-fact views of one or more of the parties, or indeed of the Court.[87] As set out in ground A, above, the new CMJ based his findings on a subjective, and selective overview of the pleadings and context relevant to the ATO.

96. Further, the circumstances in which the Order was granted obviously do not include the new CMJ's independent, and contrary, analysis of the question already decided by the judge who granted the original order. The new CMJ erred in principle in seeking to substitute his judgment for that of the original CMJ who granted the ATO.

The new CMJ Misconstrued the Nature and Context of the ATO Application

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[83] *Manseau & Perron Inc.* v. *ThyssenKrupp 2018* A.J. No. 1382 (Q.B.) para. 16-17, 24, 31, 34, 73 [Tab R, Appellant's Authorities]; *Campbell* v. *Campbell,* 2016 SKCA 39 para. 15-17 [Tab J, Appellant's Authorities]
[84] *Manseau & Perron Inc. v. ThyssenKrupp*, 2018 A.J. No. 1382 (Q.B.) para 24, 34 and 73 [Tab R, Appellant's Authorities
[85] *Hartson* v. *Park Paving* 2021 ABQB para. 40 [Tab M, Appellant's Authorities]
[86] *Yu* v. *Jordan,* 2012 BCCA 367 para 53 [Tab Y, Appellant's Authorities]
[87] *Ibid*, para.53 [Tab Y, Appellant's Authorities]

97. The new CMJ approached the interpretation of the ATO on the basis that it was sought as a remedial order that effected the transfer of the interest in the 1982 Trust assets from the 1982 beneficiaries to the 1985 beneficiaries. He described the issue before him as: "…**whether, when he approved the transfer of the 1982 Trust assets to the 1985 Trust, Justice Thomas also ordered that the beneficial interest in the trust assets be transferred so that the trust assets would be held subject to the terms of the 1985 Trust for the 1985 Beneficiaries**, or whether the Order confirmed that the 1985 Trustees lawfully held the trust assets but that the beneficial interest in the assets did not change." (*emphasis added*)[88] This characterization misconstrued the nature and purpose of the ATO.

98. The ATO was never sought as a remedial order but as a matter of advice and direction pursuant to s. 43 of the *Trustee Act.*[89] In seeking the ATO, the 1985 Trustees asked the Court "…declare that the asset transfer was proper and that the assets in the 1985 Trust are held in trust for the beneficiaries of the 1985 Trust." The application filed in support of the ATO cited only s. 43 of the *Trustee Act*. It did not invoke any of the Court's remedial powers under the *Trustee Act* or from any other source.

99. The key question posed by the Trustees' original application seeking the ATO was whether the 1982 Trustees had properly exercised their discretionary authority under the 1982 Trust Deed to effectively transfer the assets to the 1985 Trust for its beneficiaries. In their 2016 brief, the 1985 Trustees set out their argument that the 1982 Trustees had done so. The original CMJ accepted those submissions and granted the ATO confirming the transfer.

100. The only question before the new CMJ was how the original CMJ had ruled on the question before him, as reflected in the ATO. A proper answer to this question required an accurate characterization of the issue which the original CMJ was addressing. By treating the ATO as if it has been sought as a remedial order, the new CMJ fundamentally misunderstood and misinterpreted what the original CMJ had been trying to do in granting it.

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[88] *Twinn v. Trustee Act*, 2022 ABQB 107, para 107 [Tab W, Appellant's Authorities]

[89] Application by the Sawridge Trustees for Advice and Direction (returnable September 25, 2018), filed August 11, 2018 [AEKE, Tab 20]

101. This mischaracterization arose from the new CMJ's approach. If the ATO was to be questioned by the new CMJ, the proper question was what the original CMJ had thought of the 1982 Trustees' authority to properly make the transfer, not what he – the new CMJ – thought. By carrying out his own independent review of the law respecting that authority, which was the central issue in the granting of the ATO to begin with, and arriving at a different conclusion than the original CMJ on that question, the new CMJ failed to properly interpret the ATO or apply the appropriate principles for such interpretation.

The new CMJ failed to consider the full context and relied on a selective overview of the proceeding before and after the ATO

102. The OPGT submits the new CMJ was selective in his interpretations of the pleadings and the facts relevant to the circumstances in which the order was granted. He made findings inconsistent with the positions, filings and actions of the parties in the proceeding, failed to consider relevant matters and failed to grapple with key questions that were inconsistent with his express theory of the case, including the fact that:

i). The 1985 Trustees had dropped any mention relief regarding the asset transfer from their pleadings after the ATO was granted;[90]

ii). After the ATO, the 1985 Trustees focused entirely on amending the 1985 beneficiary definition, which made no sense if the 1985 beneficiaries were not beneficial owners of the assets;[91]

iii). The 1985 Trustees took the explicit position the relief later set out in the ATO was part of a "complete" solution and in the course of the ATO proceedings never suggested the ATO was anything but a complete solution to the asset transfer issues, including transfer of beneficial interest;[92]

iv). Until the new CMJ suggested it, the SFN never took the position the asset transfer had not been proper and had not raised any doubt or objection to the transfer, either with the parties or the Court;

[90] Application of the Sawridge Trustees, filed January 9, 2018 [AEKE, Tab 15]
[91] Application of the Sawridge Trustees, filed January 9, 2018 [AEKE, Tab 15]
[92] Transcript of Case Management Hearing held June 24, 2015 [AEKE, Tab 7]; Brief of the Sawridge Trustees for Special Chambers Case Management meeting on June 30, 2015, filed June 12, 2015, Tab 3 [AEKE, Tab 6]

v). In support of the ATO, and initially in this application, the Trustees' advised the Court the ATO did more than confirm the fact of the transfer and filed a brief citing the *Pilkington* principle which provided the legal basis for the authority of the 1982 Trustees to effect the transfer to the 1985 beneficiaries, all of which Justice Thomas accepted;[93]

vi). If any party or participant to the ATO had intended to leave open the question of beneficial interest despite the terms of the ATO, they did not disclose that to the original CMJ or the other parties;

D. The new CMJ's conclusion that the 1982 Trustees had lacked the authority to make the asset transfer in 1985 was erroneous.

103. The new CMJ's conclusion that the 1982 Trustees had lacked the authority to carry out the asset transfer in 1985 rested on two main conclusions: first, that the beneficiaries of the 1982 and 1985 Trusts were not the same, and that such a transfer was alien to the intention of the settler of the 1982 Trust. Neither of these conclusions was correct.

104. His finding that the beneficiaries of the two trusts were different was based on his view that the 1982 beneficiary definition extended to include the persons who would be added to SFN membership by Bill C-31, while the 1985 beneficiary definition did not.[94]

105. This is clearly wrong. At the time of the asset transfer on April 15, 1985, Bill C-31 was in Committee in Parliament. It would not be enacted until June 28, 1985 (with retroactive effect to April 17, 1985) and its exact terms and date of implementation could not be known until it was passed. As of April 15, 1985, persons who might become members of the SFN under the terms of the Bill if it were passed were just that – persons who might become members of the SFN if Bill C-31 passed. They were not future members of the SFN to whom the 1982 Trustees owed any fiduciary duty.

106. In reality, at the time of the asset transfer, the present and future members of the SFN to whom the 1982 Trustees owed fiduciary obligations were the SFN members in accordance with the membership provisions of the *Indian Act* as they read on April 15, 1982 when the 1982 Trust

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[93] Transcript of Case Management Hearing, held September 4, 2019, p. 20, l. 4-10 [AEKE, Tab 27]; Brief of the Sawridge Trustees on Transfer of Assets, filed August 17, 2016 [AEKE, Tab 12]; Brief of the Sawridge Trustees (Application on Transfer of Assets), filed November 1, 2019 [AEKE, Tab 31]

[94] *Twinn v. Trustee Act*, 2022 ABQB 107, at paras 190 to 194 [Tab W, Appellant's Authorities]

was established. That is precisely the same group of persons, present and future, comprising the beneficiaries of the 1985 Trust.

107. The new CMJ's erroneous finding that there was a difference between the two beneficiary groups also led him to incorrectly conclude that the asset transfer was in bad faith and alien to the intentions of the settlor of the 1982 Trust. The new CMJ did not attempt to reconcile these findings with the fact that in reality the settlor of the 1982 Trust was Chief Walter Twinn and Chief Twinn also settled the 1985 Trust and approved the asset transfer as a Trustee of both Trusts.

108. There was no inconsistency in Chief Twinn's position between 1982 and 1985. The 1982 Trust was about to have the operation of its beneficiary definition drastically changed by the unilateral action of a third party – the Government of Canada. Bill C-31, if passed, would impose new members upon the SFN against its will with the effect they would also become beneficiaries who had not been contemplated when the 1982 Trust was created. The creation of the 1985 Trust and the asset transfer to it was completely consistent with the intention of the 1982 settlor, who was also in the process of launching a constitutional challenge to Canada's unilateral action. It was Bill C-31 that was alien to the intention of the 1982 settlor.

E. The new CMJ granted a form of final relief by reversing the ATO. This was beyond the proper scope of his role as CMJ.

109. The ATO decided one arm of the original relief the 1985 Trustees sought in this proceeding.[95] All parties consented to Justice Thomas hearing the Trustee's ATO application and consented to the order he granted. The ATO was a form of final relief, essentially a trial of an issue, in the context of this proceeding.

110. When it became clear the new CMJ was intent on revisiting rather than simply interpreting the ATO, the OPGT was very direct in expressing its objections to the new CMJ doing so.[96] The new CMJ rejected any suggestion he was exceeding his role and jurisdiction. [97] The new CMJ

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[95] Affidavit of Paul Bujold, sworn August 30, 2011 [AEKE, Tab 2]; Affidavit of Paul Bujold, sworn September 12, 2011 [AEKE, Tab 5]

[96] Transcript of Case Management Hearing, held November 22, 2019, pg. 7, l. 34-41; pg. 8, l. 15-20; pg. 9, l. 21-24; pg. 10, l. 22-27; pg. 11, l. 1-27, 35-40; pg. 16 [AEKE, Tab 32]

[97] *Twinn v. Trustee Act*, 2022 ABQB 107, para. 22 [Tab W, Appellant's Authorities]

went on to find he had jurisdiction because: i.) the authority granted under Rule 4.14(1)(a) can extend to addressing substantive issues; [98]; the application he directed the Trustees to bring is not a summary trial or trial that would fall under Rule 4.15; iii.) the advice and direction application does not involve the granting of a remedy to any party; [99] and section 8 of the *Judicature Act* to supported his jurisdiction.[100]

111. Section 8 of the *Judicature Act* cannot override legislation or the finality of an unchallenged order- indeed that is foreign to its purpose. [101] Further, caution should be exercised when relying on residual authority over express Rules of Court.[102]

112. The new CMJ's scope and jurisdiction on this application was limited by Rule 4.13-4.15.[103] Rule 4.15 requires a case management justice to refrain deciding final relief or "the ultimate issue" unless the party's consent.[104]

113. The new CMJ appears to rely on the OPGT's consent to Justice Thomas dealing with the original ATO, despite the OPGT's explicit submissions that it did not consent to the CMJ revisiting the ATO.[105] Such consent to jurisdiction cannot be implied, particularly not in the face of explicit objections.[106]

114. The cases the new CMJ relies on for jurisdiction to deal with substantive relief are distinguishable as the parties had no objection to the exercise of jurisdiction in those cases.[107]

115. The OPGT submits the new CMJ erred in law and exceeded his jurisdiction. The order the new CMJ granted was exactly what was characterized throughout by the SFN as a "remedy" and

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[98] *Ibid,* para. 24 [Tab W, Appellant's Authorities]
[99] *Ibid*, para. 26 [Tab W, Appellant's Authorities
[100] *Ibid*, para. 23 [Tab W, Appellant's Authorities]
[101] *Allard v. Shaw Communications Inc.* 2010 ABCA 316, para. 9 [Tab H, Appellant's Authorities]; *Decore* v. *Decore* 2016 ABQB 246, para. 86 [Tab K, Appellant's Authorities]
[102] *Jonsson v. Lymer,* 2020 ABCA 167, para. 33 [Tab O, Appellant's Authorities]
[103] *Alberta Rules of Court*, Rule 4.13-4.15 [Authorities, Tab A]
[104] *Alberta Rules of Court*, Rule 4.15 [Tab A, Appellant's Authorities]; *Al- Ghamdi* v. *Alberta*, 2016 ABQB 424, para. 93 [Tab G, Appellant's Authorities]
[105] *Twinn v. Trustee Act*, 2022 ABQB 107, para. 27 (i) [Tab W, Appellant's Authorities]
[106] Transcript of Case Management Hearing, held November 22, 2019, pg. 7, l. 34-41; pg. 8, l. 15-20; pg. 9, l. 21-24; pg. 10, l. 22-27; pg. 11, l. 1-27, 35-40; pg. 16 [AEKE, Tab 32]
[107] *Ibid*, para. 24 [Tab W, Appellant's Authorities]; *Kachur Estate v. Kachur,* 2021 ABCA 343, para. 11-18 [Tab P, Appellant's Authorities]

revisited a final order of the original CMJ. Neither the legislative provisions nor the case law cited by the new CMJ avoid the problems arising from granting a final remedy in the face of the explicit objections of the OPGT and Catherine Twinn.

F. The new CMJ entered the fray. He proposed an interpretation of the ATO, directed an application to interpret the ATO which he heard, and rendered a decision reflecting his original proposal.

116. The OPGT submits that the new CMJ's decision was a result-oriented finding intended to circumvent what he saw as an impediment to the resolution of the case before him – the ATO.

117. In one of his first decisions on the case, the new CMJ granted the consent Order regarding the preliminary application on his jurisdiction to amend the 1985 Trust's beneficiary definition. The record before him was clear that the parties were all proceeding on the common understanding that the ATO had been intended to, and had, confirmed the transfer of legal and beneficial title in the transferred assets to the 1985 Trust. The remaining issue before the new CMJ was whether the 1985 Trust's beneficiary definition could be amended to address its discriminatory aspects. The him was jurisdiction application was to determine whether the Court had jurisdiction to make such an amendment.

118. After review of the Jurisdiction briefs, the new CMJ expressed doubts about his jurisdiction to make such an amendment. As he looked for other ways to address the issue, he focused on circumventing the ATO. He first suggested the ATO had not been properly granted because it had not been made on proper notice to all interested parties. However, all parties advised him service had complied with the requirements of the Procedural Order. The new CMJ then shifted his approach. He suggested the ATO's interpretation was uncertain and invited an application on the interpretation and effect of the ATO. It was apparent that in doing so he was seeking a way to conclude that the 1985 beneficiaries had no beneficial interest in the assets, the ATO notwithstanding.

119. The OPGT is of the view that when he first commented on the ATO, the new CMJ believed he was suggesting a way forward to assist the parties. This impression is reinforced by the fact that when The OPGT advised him his suggestion would eliminate the beneficial interest of the minor beneficiaries they represented, the new CMJ was initially skeptical. But whatever the intention,

The OPGT submits that the new CMJ injected himself too deeply into the proceedings, even for a case management justice.

120. As this Court recently stated, in *Jonsson v. Lymer*: "It is important that the judges and the court remain neutral and impartial. Judges should not routinely become protagonists in the litigation…. A primarily court-initiated process risks undermining the neutrality of the court." [108]

121. The Court went on to cite both Supreme Court of Canada and its own authority for the importance of allowing the parties to frame the issue for decision by the court as a neutral arbiter, and the importance that judges not "descend into the arena". This Court pointed out:

> The judge must not enter the fray. That which governs is the necessity of ensuring a fair trial and one that is perceived by all concerned to have been conducted fairly and impartially.[109]

The OPGT respectfully submits the new CMJ overstepped that bound.

G. Conclusion

122. In his decision, the new CMJ did not follow the established approach to the interpretation of an Order. Instead, he engaged in a collateral attack on it by revisiting the central issue it had decided – the authority of the 1982 Trustees to carry out the transfer. In doing so the new CMJ misconstrued the 1985 Trustees intention in seeking the ATO, finding they had not intended it to confirm the transfer of beneficial title when it was clear that they had. He rejected the 1985 Trustees' original submissions in support of the ATO as wrong in law, even though the original CMJ had explicitly accepted those submissions in their entirety. He failed to properly consider the context in which the ATO had been granted and rendered a decision on the application he had invited which achieved the outcome he had suggested in the first place. In doing so he also made an order which amounted to final relief without the consent of all the parties. The OPGT respectfully submits the new CMJ's advice and direction regarding the proper interpretation of the ATO was wrong and should be set aside.

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[108] *Jonsson v. Lymer*, 2020 ABCA 167, at para 44 [Tab O, Appellant's Authorities]
[109] *Ibid* [Tab O, Appellant's Authorities]

PART V RELIEF SOUGHT

123. The OPGT respectfully prays that the within appeal be allowed, the 1985 Trustees be advised that the ATO confirms the 1985 transfer of assets was proper and that the transferred assets are held for the benefit of the 1985 beneficiaries, and the matter be remitted back to the new CMJ for further proceedings in accordance with the judgment of this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of June, 2022

Estimated time for oral submissions: 45 minutes

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LIST OF AUTHORITIES