In the Court of Appeal of Alberta

Citation: Twinn v Alberta (Office of the Public Trustee), 2022 ABCA 368

Date: 20221114
Docket: 2203-0043AC
2203-0045AC
Registry: Edmonton

2203-0043AC

Between:

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

Respondents

- and –

The Office of the Public Trustee of Alberta

Appellant

- and -

Sawridge First Nation and Shelby Twinn

Intervenors

2203-0045AC

Between:

Roland Twinn, Margaret Ward, Tracey Scarlett, Everett Justin Twinn and David Majeski, as Trustees for the 1985 Sawridge Trust, and The Office of the Public Trustee of Alberta

Respondents

- and -

Catherine Twinn

Appellant

- and -

Sawridge First Nation and Shelby Twinn

Intervenors

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Frederica Schutz
The Honourable Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice J.T. Henderson
Dated on the 4th day of February, 2022
Filed on the 13th day of May, 2022
(2022 ABQB 107, Docket: 1103 14112)

Memorandum of Judgment

The Court:

[1] These appeals concern the 1985 transfer of assets from one trust (the 1982 Sawridge Band Trust) to another trust (the 1985 Sawridge Band Inter Vivos Settlement). This transfer was executed in 1985 and "approved" in a 2016 Consent Order. In the decision under appeal, the case management judge determined that the 2016 Consent Order "should be interpreted as meaning that it approved transfer of legal title in the 1982 Trust assets to the 1985 Trustees but that it did not approve transfer of the beneficial interest in those trust assets to the 1985 Beneficiaries": ***Twinn v Trustee Act (Sawridge #12)***, 2022 ABQB 107 at para. 285, 40 Alta LR (7th) 340. The result is that notwithstanding the definition of "Beneficiaries" in the 1985 Trust, the 1985 Trustees are now said to hold the assets in trust under the 1985 Trust but for the 1982 "beneficiaries".

Facts

[2] The late Chief Walter Twinn decided that the Sawridge First Nation should invest some of its oil and gas revenues in income producing assets for the long-term benefit of the Band members. Prior to 1982 there was some uncertainty as to whether or how First Nations could hold business assets. As a result, some individual Band members held assets in their own names in trust for the First Nation.

[3] In 1982 it was resolved that ownership of these assets should be consolidated under one trust. Chief Walter Twinn therefore established the 1982 Sawridge Band Trust. The trustees were to be the Chief and Councillors of the Band. The beneficiaries were "all members, present and future, of the Band". The Trustees were given "complete and unfettered discretion" to distribute the income and capital of the Trust "for the benefit of the beneficiaries". The assets that had previously been held in trust by individual Band members were subsequently transferred to the 1982 Trust.

[4] On April 17, 1985 s. 15 of the *Canadian Charter of Rights and Freedoms* came into effect. In anticipation, the federal government had introduced Bill C-31, which would restore band membership to women who had married non-First Nations men and their children. That could potentially increase the number of members of the Sawridge First Nation, and thereby dilute the expectations of any existing members of sharing in the income and capital of the 1982 Trust.

[5] The Sawridge Band therefore resolved to create a new trust under which the beneficiaries would be limited to those Band members who qualified as members of the Sawridge Band prior to the enactment of Bill C-31. In other words, whereas the beneficiaries under the 1982 Trust were "all members, present and future, of the Band", under the 1985 Trust the beneficiaries would only

be "all those who qualified as members in accordance with the *Indian Act* two days prior to Bill C-31". In furtherance of this objective, Chief Walter Twinn established the 1985 Sawridge Band Inter Vivos Settlement Trust. There were to be five trustees of the 1985 Trust, at least two of whom must be beneficiaries of that trust.

[6] By Resolution dated April 15, 1985, the Trustees of the 1982 Trust transferred all the 1982 trust assets to the 1985 Sawridge Band Inter Vivos Settlement Trust. As of the date of the Resolution the same persons were beneficiaries under both the 1982 Trust and the 1985 Trust.

[7] The transfer Resolution recited that under paragraph 6 of the 1982 Trust instrument the 1982 Trustees had a "complete and unfettered discretion" to distribute the income and capital of the 1982 Trust as they in their unfettered discretion deemed appropriate for the benefit of the 1982 beneficiaries. It continued:

> NOW THEREFORE BE IT RESOLVED THAT
>
> > 1. the power conferred upon the undersigned in their capacities as Trustees of the Trust pursuant to paragraph 6 of the [1982] Trust Instrument be and the same is hereby exercised by transferring all of the assets of the Trust to the undersigned in their capacities as Trustees of the Sawridge Band Inter Vivos Settlement. . . .
>
> ACCEPTANCE BY TRUSTEES
>
> > The undersigned in their capacities as Trustees of the Sawridge Band Inter Vivos Settlement hereby declare that they accept the transfer of all of the assets of the [1982] Trust and that they will hold the said assets and deal with the same hereafter for the benefit of the [1985] Beneficiaries in all respects in accordance with the terms and provisions of the Sawridge Band Inter Vivos Settlement.

The clear intention of this Resolution was to transfer all the legal and beneficial interest in the trust assets from the 1982 Trust to the 1985 Trust. The transfer was ratified at a meeting of the members of the Sawridge First Nation.

[8] At the time of the 1985 transfer Resolution the 1982 Trustees held the legal title to the trust assets. The 1982 Trustees and the 1985 Trustees were the same persons, so there was no point in the 1982 Trustees transferring the legal title to themselves as 1985 Trustees. Accordingly on April 16, 1985 the trustees declared ". . . that as new [1985] trustees they now hold and will continue to hold legal title to the assets described in Schedule "A" for the benefit of the [1985] settlement, in accordance with the terms thereof". The "terms of the 1985 settlement" included the revised

definition of Beneficiaries found in the 1985 Trust. Contrary to the respondents' argument, this instrument confirms the Trustees' intention that the beneficial interest in the trust assets had been transferred by the 1985 transfer Resolution.

[9] In 1986 the Sawridge First Nation created another trust. Few if any post-1985 assets were placed into the 1985 Trust, rather, they were all placed into the 1986 Trust. The definition of "beneficiaries" in the 1986 Trust was "all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time". In other words, new members, including the Bill C-31 women and their children, were beneficiaries of the 1986 Trust.

[10] As noted, the effect of the transfer of assets from the 1982 Trust to the 1985 Trust was that some members of the Sawridge First Nation, specifically the C-31 women and their descendants, would not be beneficiaries under the 1985 Trust: reasons at paras. 63-64. In 2011 the question arose as to whether the definition of "Beneficiaries" in the 1985 Trust was discriminatory. The Trustees applied for advice and directions, and on August 31, 2011 the first case management judge issued a procedural order directing that an Advice and Direction Application be brought:

> (a) To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".
> (b) To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.

The procedural order provided for service of the application on interested parties. Litigation followed respecting who would be entitled to participate. Those issues were resolved by ***Twinn v Twinn***, 2017 ABCA 419.

[11] Once the constitutional litigation was over (see *infra*, para. 24), the 1985 Trustees proposed a global settlement that would confirm the validity of the 1985 asset transfer, and provide for the amendment of the 1985 Beneficiary definition to eliminate its discriminatory effect, while grandfathering minor beneficiaries who might lose their beneficiary status as a result. This would enable an eventual merger of the 1985 Trust with the 1986 Trust. The first step of implementing the settlement was seen as being a confirmation that the 1985 transfer was valid, and that the 1985 Trust was what had to be addressed. This confirmation was sought to provide certainty, both to protect the assets of the 1985 Trust, and because attempting to unravel the transfer would involve costs, potential adverse tax implications, and possibly prejudice actual or potential beneficiaries. All of the stakeholders were pressed to accept this as the foundation for the settlement.

[12] In 2016 it also became apparent to the Trustees that the records of the trusts did not permit a proper accounting of what assets were in the 1982 Trust as of the date of the transfer Resolution, and accordingly exactly which assets had been received by the 1985 Trustees.

[13] The 1985 Trustees applied to the first case management judge for a ratification order. The resulting 2016 Consent Order recited that insufficient information was available to do a proper accounting:

> UPON HEARING representations from counsel for the [1985] Sawridge Trustees that the Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust; AND that the parties to this Consent Order have been given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have reviewed; AND that the Trustees are not seeking an accounting of the assets transferred into the 1982 Trust; AND that the Trustees are not seeking an accounting of the assets transferred into the 1985 Trust; AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust; AND UPON noting that little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust;

The 2016 Consent Order then provided:

> 1. The transfer of assets that occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.

This order was consented to by the 1985 Sawridge Trustees, Catherine Twinn, and the Office of the Public Guardian and Trustee (representing minor beneficiaries). The first case management judge who granted it referred to the extensive briefs that had been filed setting out the background and the law, including references to the leading case of ***Pilkington v Inland Revenue Commissioners***, [1964] AC 612. The first case management judge concluded that based on those briefs: "I am satisfied the consent order is appropriate and properly based in law".

[14] The focus of the 1985 Trustees then turned to the prospect of amending the definition of Beneficiaries. A number of procedural steps were taken, all founded on the assumption that the trust assets had been effectively transferred to the 1985 Trust. Briefs were filed identifying possible sources of jurisdiction to amend the definition of Beneficiary: the trust deed itself, the *Trustee Act*, RSA 2000, c. T-8, or common law powers. None of the stakeholders identified any issue with respect to the validity of the 1985 transfer of the trust assets. In paras. 21-22 of ***Twinn v Twinn***, 2017 ABCA 419 this Court outlined some of the issues that remained outstanding, and the procedure that should be followed to resolve them. There was no suggestion that there was any doubt about the effectiveness of the 2016 Consent Order, or the validity of the transfer Resolution.

[15] On January 9, 2018 the 1985 Trustees filed an "Application (Statement of Issues and Relief Sought)". It recited the background of the 1985 Trust, and continued:

> Remedy sought:
>
> > 8. If the definition of "Beneficiaries" [in the 1985 Trust] is found not to be discriminatory, then the Applicants do not expect to seek any other relief.
> >
> > 9. If the definition of "Beneficiary" is discriminatory, the Applicants seek direction from this Court as to the appropriate remedy, and particularly whether the appropriate remedy is:
> >
> > > (a) To modify the definition by striking out language that has a discriminatory effect such that the definition of "Beneficiary" in the 1985 Trust will be reduced to members of the Sawridge First Nation?
> > >
> > > (b) If the remedy in paragraph 9(a) is not granted to determine if the 1985 Trust can be amended pursuant to,
> > >
> > > > (i) the amending provisions of the Trust Deed, or
> > > >
> > > > (ii) Section 42 of the *Trustee Act*? . . .

Significantly, this Application did not call into question or request any ruling on the validity of the 1985 transfer from the 1982 Trust to the 1985 Trust. It stated as a fact: "The 1985 Trust was settled on April 15, 1985".

[16] The first case management judge retired, and a new case management judge was appointed. The new case management judge on his own motion expressed some concerns about the 1985 transfer of assets, and the consequences of the 2016 Consent Order. He emailed counsel on the day of the scheduled hearing to determine the Court's jurisdiction to amend the Trust, suggesting that the 2016 Consent Order did not address the terms under which the trust assets were being held.

[17] At the next appearance, the new case management judge noted that there was uncertainty over whether the Court had the jurisdiction to amend the definition of Beneficiary. He stated:

> THE COURT: Let me start by saying I've approached this case with a fresh set of eyes. So the way I view it may not be the way you view it or the way other parties have viewed it or the way other judges have viewed it. So I've approached it from a fresh perspective with a view to ensuring that I have sufficient information available to come to a correct decision with respect to the jurisdictional issue that you've properly raised. . . .
>
> So I questioned -- and I could totally be wrong about this and I'm more than happy to hear all of you out -- I question the legitimacy of the 1985 trust declaration at all. . . .

The case management judge then proposed what he saw as a solution to the limited jurisdiction he appeared to have with respect to amending the trust:

> 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. The definition of beneficiaries is members or future members of the band, that's the end of it. There still is some discrimination in the 1982 trust, which we would need to deal with because it -- it does contain identical language to the 1985 trust which deals with illegitimate children. So we would still have that hurdle but I see that as a much smaller hurdle than sort of the broader picture.
>
> 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's where we are. . . .

Counsel for the 1985 Trustees responded that all the parties thought that any issue about the validity of the 1985 transfer had been resolved. It was subsequently pointed out that this approach would result in most of the minor beneficiaries losing any interest in the trust.

[18] The issue came up at the next case management meeting, where the new case management judge summarized:

> THE COURT: Well, it seems to me that [the scope of the 2016 Consent Order] is the foundation of what we are going to be doing with these assets, these Trust assets. That's a foundational issue. You need to get that dealt with immediately. You may all agree that it's adequately dealt with and you -- I -- but I need to hear from you on that. I -- as I tried to explain last time, I just look at that 2016 Order

> and to me it doesn't do it, but I'm totally happy to hear from you. And you may persuade me that that was a stamp of approval of the transfer of the assets and a change of beneficiaries from 1982 to 1985. Maybe you can persuade me of that, and as I tried to indicate last time, every one of you knows much, much more about this than I do. I'm just coming in expressing concerns that I saw when I initially looked at it.
>
> If it was as easy to change the terms of the Trust as to go ahead and do what was done between [1982] and 1985, why don't you just go ahead and do that very same thing again and see how far it gets you. I – it's -- it strikes me as being a pivotal issue, and we need get that sorted out. Is -- does the -- does the 2016 Order mean that the monies or the assets are transferred from 1982 to 1985 and that those assets are then to be administered under the terms of the 1985 Trust for the benefit of those beneficiaries as described in the 1985, or are the 1985 Trustees holding the assets in some form, and I use the term loosely, so I -- without meaning to ascribe any legal definition to it, are they holding it by way of constructive trust for the beneficiaries as defined in the 1982 Trust? It may be -- it may be that it's completely clear. . . . (Transcript, Sept. 4, 2019, p. 13, l. 2-22)
>
> . . . in the interim, we will then deal on November 27th with the single narrow issue and that is what flows from the [2016 Consent Order] of Justice Thomas on August 24th, 2016, and whether, as a result of that order, the Trust assets are held subject to the terms of the 1985 Trust, whether the beneficiaries as described in the 1985 Trust are actually the beneficiaries of these Trust assets, and whether that took away the Trust obligation that existed in the 1982 Trust.

These comments made by the case management judge diverted the proceedings from an examination of the stated issue of whether the definition of "Beneficiaries" was discriminatory, and if so the Court's jurisdiction to amend it, to an examination of the effect of the 2016 Consent Order.

[19] As a result of these directions, on September 13, 2019 the 1985 Trustees filed an Application seeking:

1. Determination and direction of the affect of the consent order made by Mr. Justice D.R.G. Thomas pronounced on August 24, 2016 (the "2016 Order") respecting the transfer of assets from the Sawridge Band Trust dated April 15, 1982 (the "1982 Trust") to the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "1985 Trust"), more particularly described below.
2. Determination of the sufficiency of service of the 2016 Order.

3. Alternatively, the determination of the ability to perform a subsequent trust to trust transfer, similar to what was approved by the 2016 Order.

The order that resulted from this Application is the subject of these appeals.

The Reasons for Decision

[20] The reasons for decision commenced by concluding that a case management judge has the authority to give relief to the parties, even if that relief can be described as substantive or final, and that the record was sufficient to decide the outstanding issues: reasons at paras. 28, 30-31. The reasons then observed how the positions of the parties had evolved over time: reasons at paras. 32-41. The reasons reviewed the historical controversy over membership in the Sawridge First Nation: reasons at paras. 42-47.

[21] The procedural order of August 31, 2011 was designed to give notice to all potential stakeholders, whose interests must be considered even if they did not appear on the application: reasons at paras. 48-51. All parties now acknowledged that the definition of "Beneficiaries" in the 1985 Trust was discriminatory. Attempts had been made to remedy this problem: reasons at paras. 52-55. One impediment to amending the definition of "Beneficiaries" was the requirement in s. 42(6) of the *Trustee Act*, that unanimous consent of the potential beneficiaries would be required.[1]

[22] The reasons concluded that limitations issues and laches did not need to be considered, because no party had applied for a "remedial order" against any other party, and no "injury" had resulted. This was only an application by the Trustees for advice and directions on how they should discharge their fiduciary obligations: reasons at paras. 56-61.

[23] The reasons reviewed the historical origins of the 1982 Trust. The membership in the class of beneficiaries would vary over time as the membership in the Sawridge First Nation evolved. The Trustees of the 1982 Trust owed their fiduciary duties to this class: reasons at para. 72.

[24] The reasons reviewed the effect of the adoption of the *Charter*, which highlighted the discriminatory aspects of band membership under the existing *Indian Act*, RSC 1985, c. I-5: reasons at paras. 76-87. The federal government introduced Bill C-31 in an attempt to remedy this problem. A challenge to the constitutionality of Bill C-31 failed: ***Sawridge Band v Canada***, 2009

[1] The *Trustee Act*, RSA 2000, c. T-8 is to be repealed and replaced by the *Trustee Act*, SA 2022, c. T-8.1. Section 67(4)(e) and (h) of the new statute will allow the Court to dispense with the consent of "any person . . . who refuses to consent to the variation", or "any other person, organization or trust from whom the court considers it to be impractical to obtain consent". By Order in Council 339/222 the new *Act* was proclaimed in force as of February 1, 2023.

FCA 123, 391 NR 375 leave to appeal refused [2009] 3 SCR ix. The Sawridge First Nation was ordered to grant membership to the Bill C-31 women: ***Sawridge Band v Canada***, 2004 FCA 16. However, the Sawridge First Nation transferred the 1982 Trust assets to the 1985 Trust which had the effect of excluding the C-31 women from the benefits of the Trust assets even though they became members in the Sawridge First Nation: reasons at paras. 88-97.

[25] The reasons state at para. 106: "The only issue on this Application is the meaning and effect of the 2016 Consent Order". The 2016 Consent Order was ambiguous:

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

Court orders must be interpreted in the context of the pleadings, the language of the order itself, and the circumstances in which the order was granted: ***Yu v Jordan***, 2012 BCCA 367 at para. 53, 354 DLR (4th) 8. Consent orders should be interpreted having regard to the intention of the consenting parties, although that intent does not override other considerations. reasons at paras. 110-116.

[26] The reasons conclude that the context behind the 2016 Consent Order was the "lawfulness of the 1985 Asset Transfer": reasons at paras. 117-119. The Court by granting the 2016 Consent Order could not have intended to approve a transfer that was unlawful or a breach of fiduciary duties. This was not a collateral attack on that order, but merely an attempt to determine the legal status of the trust assets at the time the 2016 Consent Order was granted: reasons at para. 120.

[27] The reasons conclude that even though the 1982 Trust gave the 1982 Trustees an "unfettered discretion" to deal with the trust assets, that did not authorize the transfer of all the trust assets to the 1985 Trust: reasons at paras. 147-48, 181, 209. Trust-to-trust transfers are permissible so long as they are consistent with the terms of the transferring trust and the fiduciary duties of the trustees. The transfer from the 1982 Trust to the 1985 Trust exceeded the discretionary jurisdiction given to the 1982 Trustees: reasons at paras. 181, 203, 208, 215, 236.

[28] To the extent that the 1985 transfer of the trust assets was a variation of the 1982 Trust, it had not been approved by the court pursuant to the *Trustee Act*: reasons at paras. 216-19. For all these reasons the 1985 asset transfer was "void":

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

It was in this context that the first case management judge must have granted the 2016 Consent Order. At that time the trustees themselves had some concerns about the efficacy of the 1985 transfer: reasons at paras. 243-48. However, unwinding the transfer of the trust assets to the 1985 Trust after 30 years could trigger taxes and costs that would damage the trust: reasons at paras. 247-49.

[29] Accordingly, it followed that when the first case management judge granted the 2016 Consent Order he could not have intended to extinguish the interests of the 1982 Beneficiaries, and in particular the Bill C-31 women and their children: reasons at para. 254. Further, the 2016 Consent Order did not answer the question "who the beneficiaries are": reasons at para. 266.

[30] The reasons conclude by giving "advice and directions" to the trustees. While the 2016 Consent Order resulted from extensive negotiations, the intentions of the parties did not govern the interpretation of a court order. While the courts encourage settlement, not all interested parties consented. As a result the 2016 Consent Order did not attempt to disturb the *status quo* that existed immediately before it was granted. Since the 1985 asset transfer was void, that *status quo* was that the 1985 Beneficiaries had no beneficial interest in the trust assets. The 2016 Consent Order should accordingly be interpreted as recognizing the reality that the 1985 Trustees had been administering the trust assets, that the legal title to the trust assets had been transferred, but the beneficial title to the trust assets had not: reasons at paras. 284-85.

[31] Going forward, any application to determine who the beneficiaries were, or to vary the definition of the beneficiaries in the 1982 Trust, would have to be brought on proper notice: reasons at paras. 289-91.

Grounds of Appeal

[32] Appeals were launched by the Office of the Public Guardian and Trustee (#2203-0043AC) and by Catherine Twinn, a former trustee and current beneficiary of the 1985 Trust (#2203-0045AC).

[33] The grounds of appeal stated by the Office of the Public Guardian and Trustee are:

(a) The new case management judge's finding that the 1985 Trustees had intended the 2016 Consent Order only confirm the transfer of legal title to the 1985 Trust was a palpable and overriding error;

(b) The new case management judge's analysis of the meaning of the 2016 Consent Order constituted a collateral attack on an issue already decided by the original case management judge – 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 case management judge failed to properly apply the established principles for the interpretation of an order;
(d) The new case management judge 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 case management judge exceeded his authority as new case management judge by entering the fray. He proposed his interpretation of the 2016 Consent Order, invited an application to interpret the 2016 Consent Order, and then rendered a decision reflecting his original proposal which amounted to final relief.

[34] The grounds of appeal stated by Catherine Twinn are:

(a) The new case management judge failed to correctly apply the accepted legal test for interpretation of a Court Order, including by failing to interpret the 2016 Consent Order on an objective basis grounded in the context, facts and circumstances of the proceedings and record that were before the Court at the time the 2016 Consent Order was granted;
(b) The new case management judge effected a collateral attack on the 2016 Consent Order by substituting the new case management judge's legal interpretation for that of the Court that granted the 2016 Consent Order in order to reach the new case management judge's desired result in relation to the subject transfer;
(c) The new case management judge misinterpreted and misapplied the applicable law governing the authority of the trustees of the 1982 Trust to transfer the subject trust assets to the 1985 Trust;
(d) The new case management judge exceeded his authority by making an order affecting substantive rights, which was effectively a final order, without the consent of all parties and without jurisdiction.

[35] The appeals are responded to by the 1985 Sawridge Trustees, who support the decision of the case management judge.

[36] Intervention was allowed by the Sawridge First Nation, which supports the position of the respondents. Intervention was also allowed by Shelby Twinn, who is a granddaughter of Walter Twinn and a beneficiary of the 1985 Trust, but not a member of the Sawridge First Nation or a beneficiary of the 1982 Trust. Shelby Twinn (and others) were denied standing in 2017 on the

basis that their interests would be represented by the 1985 Trustees, but the 1985 Trustees have now taken a position that appears to be adverse to this group. She argues that the appeal should be allowed, the 1985 transfer of trust assets affirmed, and appropriate steps be taken to protect persons like herself.

[37] The various grounds of appeal can conveniently be considered under the following general headings:

(a) Procedural Issues
(b) The Status and Interpretation of the 2016 Consent Order
(c) Collateral Attack of the 1985 Transfer Resolution and the 2016 Consent Order
(d) Other Issues

Procedural Issues

[38] The appellants argue that it was not open to the case management judge to grant substantive and final relief on an application for advice and directions. They also argue that the case management judge exceeded his mandate by "entering the fray" and raising issues that had not been raised by the parties to reach his "desired result".

[39] Case management judges have all the powers of other judges of the court. They can decide discrete issues under R. 7.1, and hear applications for summary judgment for some of all of the issues under R. 7.3. Those powers are further illustrated by R. 4.14, which confirms their mandate of "adjudicating any issues that can be decided before commencement of the trial". Case management judges routinely resolve substantive issues during the case management process. They cannot, however, preside at the trial of the action unless the parties consent: R. 4.15.

[40] The form of the application is not determinative. The lack of an originating application is not fatal to the litigation: ***Twinn v Twinn***, 2017 ABCA 419 at para. 21. It does not matter if the proceeding is styled an "Application", a "Request for Advice and Directions", or an "Application (Statement of Issues and Relief Sought)". What is necessary is that (a) the parties have fair notice of the issues to be decided, (b) each party is given a fair opportunity to present its evidence and arguments, and (c) the record is sufficient to fairly decide the issue in question on a summary basis. The case management judge did not exceed his procedural mandate in proceeding as he did.

[41] A case management judge must, of course, resolve any substantive issues within the four corners of the pleadings, and in accordance with the applicable law and rules of procedure. In the context of these appeals, that includes the law of limitations, issue estoppel, and *res judicata*.

[42] However, the appellants correctly argue that the case management judge overstepped his mandate by raising issues about the validity of the 1985 transfer of trust assets 34 years after that

transfer occurred. This was not an issue that had been raised by the parties, and it was not a part of the Application (Statement of Issues and Relief Sought) that had been filed (*supra*, para. 15). Litigation is to be initiated and the disputed issues identified by the parties. The court is to remain neutral and should not become a protagonist in the litigation: ***R. v Mian***, 2014 SCC 54 at paras. 38-39, [2014] 2 SCR 689; ***Jonsson v Lymer***, 2020 ABCA 167 at para. 44, 7 Alta LR (7th) 146. As the Public Trustee points out, one of the first acts of the new case management judge was to question the validity of a transaction that had occurred 34 years earlier, and that all the parties assumed was valid and binding. As noted in ***Mian*** at para. 39, this can create the impression that the judge is predisposed to a particular outcome.

The Status and Interpretation of the 2016 Consent Order

[43] The reasons under appeal state at para. 106: "The only issue on this Application is the meaning and effect of the 2016 Consent Order". The order under appeal, however, extends far beyond that issue. It declared the 1985 transfer of assets from the 1982 Trust to the 1985 Trust to be "void".

[44] On this record the "meaning and effect of the 2016 Consent Order" is largely a distraction. Firstly, the meaning of that Order is clear and it requires no interpretation. Secondly, its effect was to "approve", in 2016, a transaction that had closed 31 years earlier. Given the passage of time and the expiry of the limitation period, that "approval" was largely redundant: see *infra*, paras. 57-60. Thirdly, as to its effectiveness, as pointed out in the next section of these reasons it was not open to any party to collaterally attack that Order or the underlying transfer of assets that had occurred in 1985.

[45] It is worth repeating a part of the preamble, and the operating words of the 2016 Consent Order:

> . . . AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust; . . .
>
> The transfer of assets that occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. . . .

The appellants define this Order in their factums as the "Asset Transfer Order"[2]. On the face of it, this Order did not and did not purport to transfer any assets. It merely approved the transfer that had occurred 31 years earlier by Resolution of the 1982 Trustees.

[46] The reasons under appeal found ambiguity in the 2016 Consent Order. For example:

> 116. The language of the 2016 Consent Order does not expressly address the issue of whether the Court intended to direct that beneficial ownership of the trust assets be transferred. Nor does the Order expressly confirm that the trust assets are held for the 1985 Beneficiaries. Nor does the Order expressly confirm that the trust assets are held for the 1982 Beneficiaries. The Order is ambiguous on these points. Because the Order was consented to, the reasons of Justice Thomas are extremely brief and do not expressly deal with these fundamental issues. It is therefore necessary to conduct a more though review to determine the true meaning of the 2016 Consent Order. . . .
>
> 253. When I consider the 2016 Brief, it is important to assess not only what is in the Brief but also what is not in the Brief. I observe that the 2016 Brief does not refer to the potential interest the 1982 Beneficiaries had in the trust assets. The 2016 Brief does not disclose in a direct and transparent way that the parties before Court were seeking approval of the transfer of the beneficial ownership of the trust assets by extinguishing the interests of the 1982 Beneficiaries and granting beneficial ownership to the 1985 Beneficiaries. On the contrary the 2016 Brief expressly said that the "transfer from the 1982 Trust to the 1985 Trust was for the benefit of the same beneficiaries and preserved their interest in the trust assets". The implication from this statement was that the Court was not being asked to extinguish the interests of any person in the trust assets.

The threshold problem with this analysis is that, as just outlined, the 2016 Consent Order did not "intend to direct" that any assets, or any legal or beneficial interest in any assets, be transferred or not transferred. The transfer occurred in 1985 by Resolution of the 1982 Trustees. Nothing was transferred in 2016.

[47] Firstly, the reasons misstate the issue by asking whether the 2016 Consent Order "intended to direct that beneficial ownership of the trust assets be transferred', whether it confirmed "that the trust assets are held for the 1985 Beneficiaries", or whether it confirmed "that the trust assets are held for the 1982 Beneficiaries". The 2016 Consent Order did not do any of that, because that was

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[2] Which term is then referred to by the opaque idiosyncratic acronym "ATO".

not its purpose. It merely "approved" what had been done in fact by the 1985 Resolution that transferred the assets. As noted it recited: "AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust". The 2016 Consent Order did not purport to "direct" that anything be done or not done with the trust assets, which had been transferred 31 years earlier.

[48] Secondly, para. 116 of the reasons under appeal concluded that the 2016 Consent Order was unclear, because it did not specify whether it was purporting to approve the transfer of both the legal title and the beneficial interest in the trust assets. An examination of the 2016 Consent Order (*supra*, para. 13) confirms that there is only one operative word in it: "approved". That word requires no interpretation. It cannot mean "partly approved" or "approved subject to (unstated) provisos and conditions", or "not approved". The only reasonable interpretation of the 2016 Consent Order is that it approved in whole and unconditionally the 1985 Resolution transferring the trust assets.

[49] The 2016 Consent Order is a formal order of the court, not a casual social or commercial communication. It must be interpreted according to its words and with regard to its conclusive legal effect. The respondents argue that it is ambiguous because it does not specifically state whether it approved the transfer of both the beneficial and legal titles. However, when a legal instrument contains an operative provision in general terms, the presumption is that there are no provisos or conditions to it. Rather, if there are to be provisos or conditions, the expectation is that they will be expressly stated: see ***Goodswimmer v Canada (Attorney General)***, 2017 ABCA 365 at paras. 57-58, 60 Alta LR (6th) 226. It is also significant that the 2016 Consent Order does contain one express proviso; it is "not to be deemed to be an accounting of the assets". When one proviso is specifically stated in the order, that undermines any argument that there are other implied but unstated provisos.

[50] In any event, the fundamental issue was not the meaning and effect of the 2016 Consent Order. The issue was what had been transferred 31 years earlier by the 1985 Resolution. What was "approved" by the 2016 Consent Order was that 1985 Resolution transferring the trust assets. That Resolution (quoted *supra*, para. 7) clearly transferred both the legal and beneficial ownership of the 1982 trust assets to the 1985 trust. As the reasons note:

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

This interpretation of the 1985 Resolution is clearly correct. The intention of the 1982 Trustees to transfer both the beneficial and legal title to the trust assets was accomplished by the plain wording of the 1985 Resolution.

[51] After the 2016 Consent Order was signed, the first case management judge noted that the remaining issue was "who the beneficiaries are". In context, this was clearly a reference to the need to confront the discriminatory aspects of the definition of "Beneficiaries" in the 1985 Trust. In a literal sense "who the beneficiaries are" was clearly defined in that 1985 Trust. As all were aware, the issue was actually "who should the beneficiaries be". This involved giving effect to the legitimate expectations of some groups, like the Bill C-31 women and their children, while grandfathering the rights of other groups.

[52] The reasons under appeal suggest at para. 203 that the asset transfer from the 1982 Trust to the 1985 Trust was "alien to the intention of the settlor of the 1982 Trust". The settlor of both trusts, however, was the same person (Chief Walter Twinn) who was firmly opposed to the provisions of Bill C-31. Further, the suggestion at para. 116 that the 2016 Consent Order did not expressly address whether the beneficial interest in the trust assets was transferred, to the benefit of the new definition of Beneficiaries in the 1985 Trust, was contrary to the clear intention of the parties. As noted, the whole point of the 2016 Consent Order was to confirm the validity of the 1985 transfer so as to create a stable platform for settlement and resolution of the discriminatory aspects of the 1985 Trust. As the Public Trustee points out, none of the steps taken by the 1985 Trustees to address the discriminatory aspects of the definition of Beneficiaries made any sense if the 1985 Resolution had not transferred the beneficial interest in the trust assets to the 1985 Trust.

[53] In summary, the 2016 Consent Order required no interpretation. It says that the 1985 transfer of the trust assets is "approved". On this record the word "approved" is only capable of one meaning. There was no ambiguity to resolve. The terms of the 1985 Resolution transferring the assets could not be undermined or varied under the guise of "interpreting" the terms of the 2016 Consent Order.

Collateral Attack of the 1985 Transfer Resolution and the 2016 Consent Order

[54] As the appellants correctly argue, the order under appeal in effect amounts to a collateral attack on the 1985 Resolution that transferred the trust assets, through an indirect collateral attack on the 2016 Consent Order.

[55] The analytical flaw in the reasons under appeal is that they reverse engineer the interpretation of the Resolution and the 2016 Consent Order. They conclude that the 1985 transfer of the trust assets was unlawful, and therefore reason that the 2016 Consent Order "could not have been intended" to approve that unlawful transaction. The word "approved" in the 2016 Consent Order was effectively interpreted to mean "not approved". There was no mandate to collaterally challenge the validity of the 1985 transfer of the trust assets in this way by suggesting, 31 years after the transfer, that the 1985 Resolution was only "approved" in part or approved subject to conditions and provisos that appear nowhere in the 1985 Resolution or the 2016 Consent Order.

[56] The 1985 transfer of the 1982 Trust assets to the 1985 Trust is a historical fact. The 1985 Resolution was implemented by the Trustees, and the transfer occurred. The terms of the Resolution make it clear that both the legal and beneficial interest in the trust assets was being transferred. At this stage it is open to the parties to question whether the definition of "Beneficiaries" in the 1985 Trust is discriminatory, and what should be done about that, but that analysis must be done on the basis that the 1985 transfer of the trust assets occurred and is final.

[57] Limitations issues overshadow these appeals. The 2018 Application (Statement of Issues and Relief Sought), which was aimed at any discriminatory effect of the definition of "Beneficiaries" in the 1985 Trust, was turned into a challenge to the validity of an asset transfer that had occurred 34 years earlier in 1985. This is exactly the kind of instability of transactions that the *Limitations Act*, RSA 2000, c. L-12 is designed to prevent. One of the main purposes of statutes of limitation is to provide repose by ensuring that transactions can only be challenged in a timely way, not many years after they have been concluded.

[58] The case management judge determined that no limitations issues arose because no party had applied for a "remedial order" against any other party. The *Limitation Act* provides immunity from "remedial orders", but not from merely declaratory orders. As a result, many attempts are made to describe the relief requested as being merely declaratory: see ***Champagne v Sidorsky,*** 2018 ABCA 394 at paras. 16-18, 78 Alta LR (6th) 1. In these appeals it is said that all that was requested was "advice and directions" not a remedial order. The substance of the relief, not the way it is labelled, must be examined to determine whether the relief requested is remedial or not.

[59] The 2019 application, filed at the direction of the case management judge, requested "Determination and direction of the effect of the consent order". Given the interpretation placed on the issues, that amounted to a request for a remedial order setting aside the 1985 asset transfer. The reasons at para. 239 demonstrate that relief was being granted well after the limitation period had expired when they state that "the 1985 Beneficiaries did not acquire an interest in the 1982 Trust assets on April 15, 1985". A remedial order was clearly being granted, even if it was not requested.

[60] The "injury" alleged was the unlawful transfer of trust assets. The ultimate effect of the order under appeal was to grant a remedial order in favour of the 1982 Beneficiaries to remedy that injury, to the detriment of the 1985 Beneficiaries. If any party had brought an application in 2016 or 2019 to challenge or set aside the 1985 transfer, they would immediately have been met with a limitations defence. It was neither possible nor appropriate for the respondents to collaterally challenge the validity of that 1985 transfer over 34 years after it occurred under the guise of seeking an interpretation of the 2016 Consent Order or "advice and directions".

[61] Further, the reasons under appeal declared the 1985 transfer of assets from the 1982 Trust to the 1985 Trust to be "void". It transferred the beneficial entitlement to the trust assets from the

1985 beneficiaries to the 1982 beneficiaries. The Public Trustee argues that the order had a "devastating effect" on the beneficial interests of the minors it represents. This can only be categorized as a "remedial order". It goes far beyond providing "advice and directions" to the trustees as to how they should discharge their fiduciary duties. A case management judge cannot sidestep the provisions of the *Limitations Act* by the expedient of granting a remedial order on his own motion. This is another consequence of the principle of party presentation under which litigation should be driven by the parties, not the presiding judge: ***Mian*** at para. 38.

[62] As noted, the respondents argue that the 2016 Consent Order only "approved" the transfer of the legal title to the trust assets, not the beneficial interest. As previously discussed, the wording of the Resolution and the 2016 Consent Order are contrary to that interpretation. However, even if the respondents are correct in placing that narrow interpretation on the 2016 Consent Order it was too late in 2016 (or 2019) to challenge the transfer of the beneficial interest in the trust assets that clearly took place in 1985. The transfer of the beneficial interest was effective in 1985 and immune from challenge as soon as the limitation period expired, regardless of whether it was "approved" in 2016.

[63] In summary, at this late stage it was not open to the parties or the case management judge to second guess the "lawfulness of the 1985 Asset Transfer": reasons at para. 117. One can speculate at this late stage whether the transfer from the 1982 Trust to the 1985 Trust was "authorized" or "lawful", and whether it could have been successfully challenged in 1985. Perhaps the 1982 Trustees exceeded their authority. Perhaps the 1985 Trustees were in knowing receipt of trust property in breach of trust. Tracing remedies may have been available until the limitation period expired. The reasons under appeal discuss at great length the scope of the "unfettered discretion" enjoyed by the 1982 Trustees, and the limitations on trust-to-trust transfers. However, 34 years after the 1985 transfer it was too late to do so.

[64] Describing this approach as merely being the provision of advice and directions to the trustees as to how they should discharge their fiduciary duties was also an ineffective way of avoiding the rules against collateral attack and the expiry of limitation periods. The 1985 Trustees must discharge their fiduciary duties on the basis that the 1985 transfer of trust assets was valid and binding. The Trustees cannot discharge their fiduciary duties under the 1985 Trust on the assumption that the true beneficiaries of the 1985 Trust are the beneficiaries under the 1982 Trust. They cannot discharge their duties on the assumption that the beneficial rights to the trust assets were never transferred.

[65] It was therefore impermissible for the case management judge to declare in 2022 that the 1985 asset transfer was void. It was too late in 2016 or 2022 to challenge the validity of the 1985 Resolution of the 1982 Trustees.

[66] It was also too late to challenge the 2016 Consent Order, either directly or indirectly by interpreting it in a way that its wording could not support.

[67] First of all, it is worth observing again that the 2016 Consent Order was to some extent redundant. It was obtained to provide certainty to a transaction that all the parties assumed was final. The certainty desired by the 1985 Trustees was provided to them by the expiry of the limitation period. As noted, the limitation period for challenging the 1985 transfer expired, at the very latest, two years after the 1999 enactment of the *Limitations Act*.[3] As noted, if someone had brought an application in 2016 to challenge the validity of the 1985 asset transfer, they would clearly have been met by a successful limitations defence. Because of the expiration of the limitation period, no one could have appeared in 2016 to successfully oppose the "approval" contained in the 2016 Consent Order. The case management judge in 2016 therefore had little choice, in law, but to grant the order acknowledging that it was too late to challenge the 1985 transfer. The 1985 transfer Resolution was "approved" in the sense that it was deemed effective even though the inadequacy of the trust records made an exact accounting of the assets in the trust impossible. Its stated objective was to provide "certainty" with respect to a historic transaction in order to provide the foundation for a complete settlement of outstanding issues.

[68] With respect to those who were parties to the 2016 Consent Order the validity of the 1985 Resolution is *res judicata*. That includes the appellants and the respondent, the 1985 Trustees. With respect to the 1985 Trustees, not only is the validity of the 1985 transfer *res judicata*, its validity is consistent with the position that they took at the time of the 2016 Consent Order. As the reasons confirm:

> 245. Nevertheless, the pleadings clearly demonstrate that the 1985 Trustees were seeking a direction that the asset transfer was proper and that they held the trust assets for the 1985 Beneficiaries. . . .

The issue estoppel created by the 2016 Consent Order precludes the complete change in position by the 1985 Trustees in these appeals.

[69] With respect to those who were not parties to the 2016 Consent Order and disagreed with it, the time to appeal it or apply to set it aside has long since passed. That would apply to the Sawridge First Nation whose counsel was present in court when the 2016 Consent Order was

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[3] The evolution of limitation provisions respecting claims against trust assets was summarized in ***Papaschase Indian Band No 136 v Canada (Attorney General)***, 2004 ABQB 655 at paras. 116-28, 43 Alta LR (4th) 41, 365 AR 1. That decision was reversed on other grounds by ***Lameman v Canada (Attorney General)***, 2006 ABCA 392, 66 Alta LR (4th) 243, 404 AR 349, but subsequently affirmed on other grounds by ***Canada (Attorney General) v Lameman***, 2008 SCC 14, [2008] 1 SCR 372.

granted: ***Goodswimmer*** at para. 53. The alternative of collaterally challenging the 2016 Consent Order by attempting to interpret it in a way that is contrary to its clear wording is also not available to any of the parties to these appeals.

Other Issues

[70] The reasons under appeal discuss at length other issues. For example, they discuss the scope of the "unfettered discretion" enjoyed by the 1982 Trustees, and the legal limitations on trust-to-trust transfers. These issues became irrelevant after the limitation period for challenging the 1985 transfer expired.

[71] The detailed discussion of the principles for interpreting court orders also need not be reviewed. First of all, as noted there is no ambiguity in the word "approved". Secondly, there is no authority that supports interpreting an order according to what it "ought to have said", compared to what it actually said. That amounts to a collateral attack of the order, not merely its interpretation. The interpreting court is not entitled to essentially sit on appeal of the original court that granted the order, even if the second court disagrees with the content of the order.

[72] It is therefore not necessary to further consider these issues in order to resolve these appeals.

Conclusion

[73] In conclusion, the appeals are allowed, and the order under appeal is set aside.

Appeal heard on November 3, 2022

Memorandum filed at Edmonton, Alberta
this 14th day of November, 2022

Slatter J.A.

Authorized to sign for: Schutz J.A.

Feehan J.A.

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