REGISTRAR
FILED
31 Oct 2025
AO
Court of Appeal of Alberta

Action No.: 1103-14112
E-File Name: EVK25SAWRIDGE
Appeal No.: 2503-0193AC

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

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

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

P R O C E E D I N G S

Edmonton, Alberta
June 16, 2025

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M. S. Sestito	For the Trustees
D. D. Risling, KC	For Sawridge First Nation
D. Schulze	For Sawridge First Nation
C. Osualdini	For Sawridge First Nation
N. Dodd (remote appearance)	For Sawridge First Nation
P. J. Faulds, KC (remote appearance)	For The Office of the Public Guardian and Trustee
J. L. Hutchison	For The Office of the Public Guardian and Trustee
(No Counsel)	For C. Twinn
N. Varevac	Court Clerk

Discussion

THE COURT: Good morning again --

MS. BONORA: Good morning, Sir.

THE COURT: -- for most of you. Please be seated. Okay. I'm Justice Little, presiding this morning. Why don't I have -- well, rather than introduce or have counsel introduce themselves, I'll sort of go left to right from my end. I see Ms. Bonora --

MS. BONORA: Yes, Sir.

THE COURT: -- for the Trustees. And Mr. Sestito?

MR. SESTITO: Yes, Sir.

THE COURT: And for the Public Guardian?

MS. HUTCHISON: Janet Hutchison, with --

THE COURT: Ms. Hutchison.

MS. HUTCHISON: -- Mr. Faulds online, I believe.

THE COURT: Okay. Thank you. And just because we're there, I see Ms. Twinn. Thank you. And then we have for the -- sorry, that's by Webex. I saw Mr. Harding (phonetic) at the back of the room, as well.

MR. HARDING: (INDISCERNIBLE) My Lord.

THE COURT: And I see Ms. Osualdini, Mr. Risling. And is it David Schulze?

MR. SCHULZE: Yes, it is, My Lord -- Mr. Justice.

THE COURT: Thank you. And is Nicholas Dodd with us, as well, online or -- okay.

THE COURT CLERK: Online.

THE COURT: And who am I missing, then? Anyone?

MS. TWINN: This young man.

MR. LANG: I'm just an associate of Ms. Osualdini's and Mr. Risling. My name is Ralph Lang.

THE COURT: Thank you.

MR. LANG: Good morning, Sir.

THE COURT: So the order that I was expecting to hear from people this morning, and just going by the style of cause, would be the Trustees, Public Guardian, Ms. Twinn, and then the First Nation. Any other agreement between or among counsel for that or --

MR. SESTITO: Yes, Sir. We -- we canvassed the order and speaking times. And there's, I believe, agreement with everyone that -- that that order works just fine.

THE COURT: Okay.

MR. SESTITO: And the Trustees may have a reply at the -- at the end.

THE COURT: At the end. Did you wish to stay on your feet or will you be tag teaming with Ms. Bonora?

MR. SESTITO: If -- if you're ready for me, I'm -- I'm prepared to begin.

THE COURT: I am, and what I can say is that I've got all of the materials. I have read all of the briefs. I will not claim to have read all of the supporting material, but I've brought with me some yellow stickies, so if you can give me pinpoint references if you're referring to material in your package, then I'll ensure that I read it later.

MR. SESTITO: Certainly, Sir. And as -- as I go on this morning, and I -- and I know some of my friends, as well, have already alluded to it, I may make reference to previous submissions that were prepared --

THE COURT: Okay.

MR. SESTITO: -- that are on the court record. What I'll do is I'll give you the filed stamped and the party's name if I refer to that, rather than handing up a bunch of paper.

THE COURT: Sure.

MR. SESTITO: And -- and we'll try to keep your -- your desk as uncluttered as possible.

THE COURT: Okay. Thank you.

MR. SESTITO: The only other housekeeping matter that we'd like to address this morning, and it was alluded to earlier this morning, is that the -- the Trustees will be amending the style of cause in short order, as there has been a change in the constitution of the trustee board.

THE COURT: Okay.

MR. SESTITO: We have provided copies to both Ms. Twinn and our friends for the Public Trustee. They're just reviewing those. I believe the Public Trustee is fine with it and Ms. Twinn (INDISCERNIBLE) --

MS. TWINN: I'm fine with it.

MR. SESTITO: Oh, fine with it, as well.

THE COURT: Okay.

MR. SESTITO: Okay. Well, what I'll do, then, Sir, is on -- perhaps during a break, I'll collect the signatures and hand up a consent order for you at some point during the day --

THE COURT: Sure.

MR. SESTITO: -- so we can deal with that while we're all here.

THE COURT: Okay.

MR. SESTITO: Okay. All right. And then also, Sir, in terms of speaking orders, we've -- we've all tried to guesstimate timing this morning. The Trustees will try to keep their opening submissions fairly focused at about 30 minutes. The Public Trustee will then go for at or around 75 minutes. Catherine Twinn, also as a party, will go then, following that, for at or around 75 minutes. The Sawridge First Nation per court order will go for at or around 60 minutes. And then any time that we may have remaining, we'll -- we'll try to address anything in reply at the end of the day. And presumably if you need to hear from anyone else, we won't be objecting to that, depending on the Court's preference.

THE COURT: Good. Thank you.

Submissions by Mr. Sestito

MR. SESTITO: Okay. So, Sir, myself and Ms. Bonora will be presenting this morning. I'll start. To begin, I am -- I hate to -- to keep rehashing over things, but I do feel in this litigation, we need a bit of focus. I just want to reiterate the threshold question that we are here today to review, and it really is a narrow question. And I really do want to situate everyone today by again just reading the question which is the relief sought, which is affirming that notwithstanding that the definition of beneficiary set out under the 1985 Sawridge Trust is discriminatory and includes certain

non-members of the Sawridge Nation, the Sawridge Trustees may proceed to make distributions to the beneficiaries of the 1985 Sawridge Trust, including to non-members of the SFN qualified as beneficiaries of the 1985 Sawridge Trust.

So in our respectful submission, Sir, we are not here today to discuss validity as a general concept. We are not here today to engage in an exercise of identifying who may or may not be a beneficiary when applying this definition. We are not here today to examine in any great detail all of the ways in which the *Indian Act*, regardless of the version of the *Indian Act*, contains discrimination. What we are here today is to seek the Court's guidance and to answer the question really is there any law that would prevent the Sawridge Trustees from making distributions under a discriminatory trust. It really is -- as you predicted in our earlier case management meeting, it really is a narrow legal question.

Now, in the Trustees' brief, we have reported to the Court that we have examined the law and cannot find any specific precedent in the setting of a private trust where the Court restricts distributions on the basis of discrimination alone, as is the case here. Furthermore, the Court -- the OPGT concurs with the finding of the Trustees that there are no authorities that would require a finding that the 1985 Trust is unable to distribute as a result of discrimination inherent in the beneficiary definition. And the OPGT concludes that the courts have made it clear, and this will be a theme that we will reiterate, that the right to dispose of private property through a private trust is to be respected. And, you know, Sir, you -- you have made it very clear in your -- in your written decision with respect to the application of the SFN for intervention that this really is a narrow question. And just to read into the record, Sir, although I'm -- I know you're very familiar with it, paragraph 32 from your decision, 2025 ABKB 276, in which you write:

> I accept the position of the Trustees that while intervention by SFN should be permitted, the Court needs to attach certain conditions to its participation in order that determination of the substantive issue not turn into a debate about the failings of the *Indian Act*.

Now, Sir, with respect, we take the position that the SFN's brief is indeed replete with an indictment about the failings of the *Indian Act*, and we will not spend too much time today to go into a historical analysis, but simply to remind the Court that this is the narrow question on application.

Now, one item that the SFN has raised that bears commentary is their position on the wide application of what they broadly define as the public policy doctrine permitting

broad court intervention. This is at paragraph 60 of their brief. I don't need to take you there, but they simply conclude that the enforceability of an individual's rights and powers are outweighed by values that society holds to be more important. And in this respect, they cite paragraphs 115 to 117 of the Supreme Court's decision in *Tercon*.

Now, Sir, the decision in *Tercon* is, of course, very well-known to the commercial bar, as it stands for the key rules when it comes specifically to interpreting exclusionary clauses in a commercial agreement, especially those clauses that purport to limit liability. And it is with that context that the Supreme Court came to their conclusions. Now, my friends are right, the Supreme Court does envision a role for public policy, generally speaking, in the context of a commercial arrangement, and the language that they used at paragraph 60 is not dissimilar to the language from Professor Waddams that is endorsed by the Supreme Court at paragraph 115 of *Tercon*, but what is really important to note about *Tercon* is the commentary that follows that paragraph. It is the truly exceptional nature of the role of public policy, and again, in that context of a private commercial arrangement, but at paragraph 117 of *Tercon*, the Court notes that freedom of contract will often, but not always, trump societal values. And they say:

> The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised.

And Chief Justice Duff, who is cited:

> Adopted the view that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds".

And so, Sir, when viewing *Tercon*, now, firstly, we have found no case applying *Tercon* in these circumstances. We will talk to you in short order about a case in which the Court declined to change or intervene with a definition that contained very similar discrimination, but when looking at *Tercon* specifically for this public policy doctrine, we must read it in the standard and the context of the decision, which really was with respect to the exclusionary clauses that purport to limit liability in a contractual relationship. And in any event, if the Court does decide to apply *Tercon* to these circumstances, the onus really is that the presumption is in favour of the commercial arrangement, and that on the grounds of public -- I'm sorry, on the grounds of certainty and stability of a contractual relationship, that will be rarely interfered, only in the clearest of circumstances.

So I do want to discuss a case that is factually not dissimilar to the case before you here, and it was the case of *Taylor v. Ginoogaming First Nation*. And there was a lot about *Taylor* that was written in the context of the jurisdiction briefs. And -- and I won't bring you to all of the -- the references. The case itself is reproduced at tab 8 of the OPGT brief, and there was commentary by the parties on the case in the context of the jurisdiction application. Now, to situate you, Sir, with respect to the jurisdiction application, the setting in that application was that the Trustees were seeking advice from the Court as to whether there existed an inherent jurisdiction, outside necessarily of the *Trustee Act*, for the Court to amend the definition of beneficiary in the trust deed on grounds of public policy or -- or otherwise. And in that context, the Trustees, in writing in their jurisdiction brief, distinguished the *Ginoogaming* case.

This was a fairly recent case by trust -- trust standards, out of the Ontario Superior Court in 2019. I can advise the Court that it was cited with approval by the Saskatchewan Court of King's Bench in the case of *Racette v Little Black Bear First Nation*. That we -- we did not make reference to that in the brief, but the citation, Sir, is 2025 SKKB 2. And I -- and I don't need to go to that case, other than to just draw your attention to that this is a live case. It is still being considered and -- and with approval.

So in -- in *Taylor*, Sir, the trust in question concerned the holding of certain settlement funds that were to be paid to members of the Ginoogaming band list. The trust in question involved individuals whose name appeared on the First Nation band list on what is defined as voting day, which was in December of 2001. So there was a few rungs that you have to go through if you read the case, but essentially you will -- you will qualify if you were on the band list on voting day, which was December of 2001. And to be on the band list, well, you have to go through the regime of the *Indian Act* which was in place at the time.

Now, the Court went on to note, and they were very specific in their reasoning to note this, that as of February of 2018, at least 118 individuals who were alive on the voting day have since become members of the band list, and some of those members were not entitled to register for Indian status and membership before voting day, solely because of discriminatory provisions in the *Indian Act* that had since, between 2001 and 2018, been struck down. And really the Court goes well out to make this point, to say, But for the discriminatory provisions in the *Indian Act*, these individuals could have been members for the purposes of determining whether they qualified under this trust that was set up, this trust that was set up for the payment of certain settlement (INDISCERNIBLE). So now the Court in its decision discussed the importance of reviewing the factual matrix surrounding the trust deed, but they note at paragraph 34 of that decision that:

> While the factual matrix may be used to clarify the parties'

> intentions as expressed in a written agreement, it cannot be used to contradict that intention or have the effect of making a new agreement. Ultimately, the words of the agreement are paramount.

And to that, they cite *Canada Trust Co. v. Browne* at paragraph 71.

So the Court goes on to note at paragraph 38 that there have been changes to the legislation and that those changes would have resulted in changes to who the ultimate beneficiaries would be. And yet -- and the Court is asked should the ultimate beneficiaries include those people who were prevented from registering because of the discriminatory and since struck-down language in the *Indian Act*. And the Court concludes that no, it is not the role of an interpreting court to change the plain meaning of a trust document and they do not apply public policy. Rather, they take the change in the legislation at face value, they note that the settlors were aware that the legislation was going to change, and they apply the settlors' intention with the plain and ordinary language of the trust deed.

Now, the Court was mindful in *Taylor* to note specifically the limitations of the question that they were being presented with. They were not asked, the Court, whether there was jurisdiction at the time to amend the definition. Really, they were simply asking a similar question to what we're asking today. The beneficiaries are determined by the use of a discriminatory -- discriminatory provisions in an Act that had since been struck down or changed, in our case amended. Does that mean that we can't distribute and who do we distribute to, right?

Now, as I said, My Lord, the application of *Taylor* was discussed previously and the Trustees do not spend much time on *Taylor* in their brief, because we had submitted to the Court at the time that it was not the situation that we were looking for at that time, which was a possible jurisdiction to amend. However, Ms. Osualdini at McLennan Ross, who at the time were counsel for Catherine Twinn, did write and address the case quite thoroughly, and wrote that not only was *Taylor* applicable, but it was quite determinative. And so, Sir, for reference, the brief of Ms. Twinn has a filed stamp of April 12, 2019, filed by David Risling and Crista Osualdini at McLennan Ross. And at paragraph 89(g), I just want to read into the record a quote from that brief, which states: (as read)

> The Court found that this definition did not offend public policy and that persons who later became band members as a result of the legislative amendments did not qualify as beneficiaries. This is factually quite similar to the matters at issue in the litigation and arguably puts an end to the public policy concern pertaining

to the 1985 Trust.

Now, My Lord, you -- you have no doubt read and will no doubt read more and hear more about the discriminatory effects of the pre-1985 *Indian Act* from both the SFN and from Catherine Twinn, and the subject of the discriminatory nature was again addressed in briefs in the jurisdiction application. And I won't -- I won't spend too much time on the previous representations, but to draw your attention to a brief that was filed with respect to the intervention application, again, with a filed stamp of April 12, 2019, filed by self-represented parties Shelby Twinn, Patrick Twinn, and Angie Ward. And in that brief, they write at paragraph 7 that they wish to bring to the Court's attention the following, and at paragraph 7(a), they write: (as read)

> It was important to Chief Walter Twinn, who was the settlor at the time, to make sure that a broad group of people who were connected to the SFN, whether through membership or not, had a legal connection to the heritage, lineage, and identity. They are part of the Sawridge lifeblood. This is why he created both the 1985 and the 1986 Trust.

Now, Sir, you might recall that the 1986 Trust is a separate trust that was developed following the -- the new *Indian Act* in 1985, and the beneficiaries of that trust are simply members of the Sawridge First Nation. And so that's what she's alluding to there.

And then at paragraph (d), the interveners at the time wrote the following: (as read)

> While we are aware that the version of the *Indian Act* the 1985 Trust relies on as its beneficiary definition has provisions that discriminate between men and women, this is but a piece of a larger picture. Today, the total number of Bill C-31 Sawridge women reinstated under Bill C-31 is five. All are elderly. They receive benefits through their band membership and through the 1986 Trust, including the $2,500 per month under the seniors benefit. The larger picture that must be looked at is that there are two trusts. Between these two trusts, a larger and more inclusive segment of those with Sawridge identity, heritage, and relationship are captured. Those left out by discrimination ought to be included in the 1986 Trust if its beneficiary definition is working as intended. In the case of Shelby and others, at least they have beneficiary status under the 1985 Trust. Pre-Bill C-31, women avoided their individual "enfranchisement" from their marriage to non-Indians by refusing to submit enfranchisement

> forms and marriage evidence to Indian Affairs and not accepting their per capita share of band monies. All persons who enfranchised prior to 1985 were paid their per capita shares of band monies. One family received close to 1.2 million. For Shelby and others, having beneficiary status and choices is better than being stripped of beneficiary status.

And then one last quick quote, Sir, at paragraph (f) -- subparagraph (f), again of paragraph 7. They write: (as read)

> At the very least, the 1985 Trust rules ensures the inclusion of children and wives without the uncertainty of band membership rules, band membership applications, and Indian status registration, plus beneficiary status is irrevocable, unlike band membership.

Now, My Lord, the Trustees concede that the landscape certainly has changed since these briefs were written. For one thing, there is a new chief of the Sawridge First Nation and different members. We simply draw these submissions to your attention, and they're on the court file, Sir, to highlight that this is complicated. This is not a simple case in which there is universally opposed, abhorrent discrimination to which everyone acknowledges and agrees and does not want to engage (INDISCERNIBLE). Indeed, this is -- that seems more in line with the case in *Taylor*, and even in that case, everyone was onside to say, We're just asking the Court the question as to whether discrimination changes anything. As Shelby Twinn writes in her brief and the -- and others, those who are left out are covered by the 1986 Trust in this case in the event that they are made members of the First Nation. And so the Court is left with this complexity and the precedent of the *Taylor* case endorsing the changes in legislation when deciding whether or not to create this new law to state that on public policy grounds, the Trustees will be restricted in their ability to distribute in the face of what is clear language and clear intention.

So, Sir, subject to any questions, my colleague will be going into some more detail on some of the more specific points.

THE COURT: Okay. Thank you, Mr. Sestito.

Submissions by Ms. Bonora

MS. BONORA: Thank you, Sir. I just want to pick up where Mr. Sestito left off in terms of discussing more of the trust aspect of the arguments being made by the Trustees. So we do see this as a simple trust question. We have a valid

trust. The -- we believe that much of the argument put forward by the Intervener and by Catherine Twinn is irrelevant to the question, and, quite frankly, we believe they have avoided the question. We believe there is ample evidence from all of the parties of an intention to create a trust by the settlor. The OPGT has put forward the constitutional litigation where Sawridge First Nation clearly went back and said their traditional ways of woman following man was something they wanted to uphold, and it again shows that intention. We go back to the -- the actual trust. It was settled. It had a hundred dollars to be settled with. It's been in existence for 40 years. It owns property. It's filed a tax return and it's not been challenged in terms of its validity and that -- of course, that question is not before you today.

The Trustees that we -- we know from this morning's application, where you sat, that the Chief and his two brothers wish to become trustees of this trust. Clearly, they are acknowledging that this is a valid trust that they wish to replace the trustees in. No one questions the legitimacy of the trust deed. We all agree there's property. In respect of beneficiaries, we all know there are beneficiaries, and those beneficiaries are individuals. The courts recognized two beneficiaries. The -- Catherine Twinn and the OPGT have all acknowledged that the beneficiaries are ascertainable. It might cause difficulties, but I don't think this Court has ever shied away from complex problems and certainly can solve complex problems in the event that we can't determine or there's an issue around determining a beneficiary.

One of the issues that the Intervener has put before you is the fact that there's no longer a system of protest for illegitimate children and that perhaps make -- makes that issue impossible. We actually see that as a way to solve a large issue of discrimination in the sense that if there is no system of protest, then likely all illegitimate children will be beneficiaries.

We also need to be mindful of the fact that there are many beneficiaries who are not affected by discrimination. They are not discriminated against, and those beneficiaries who hold beneficial title in this trust, as beneficiaries do, would also suffer if this -- if this ability not to distribute to them -- or the ability to -- to distribute is said, We don't have that. The Trustees should have the ability under a valid trust to distribute. This trust has its three certainties, and whether the discriminatory elements in the trust beneficiary definition would disentitle trustees from carrying that out is against one of their most fundamental fiduciary duties, which is to follow the trust and to benefit their beneficiaries.

There's a well-known adage in constitutional litigation where courts, in considering a remedy, when they find that legislation violates the *Charter*, there's -- there's said -- it's said that courts should use a scalpel, not an axe. And this adage -- adage I think we have

seen in all of the trust cases that have been put before you in this litigation. The Court finds its scalpel, sometimes it makes small cuts, but never has the Court used an axe to strike down a trust. And as my colleague, Mr. Sestito, said, we said in the intervener application we had found no law that -- where discriminatory elements struck down a trust. That is, again, not the question before you, but I thought that was perhaps a warning sign to our friends to say, You should find those cases if they exist. And those cases have not been found. Our friends chastised us for not addressing *McCorkill*, but we see *McCorkill* as such a unique case. And in fact the judge -- judges in *McCorkill* said, This is a unique case, it is not a watershed kind of case. In that case, a criminal entity was being given money. I don't think there's any suggestion that these beneficiaries in this trust should not be given their proper due based on being criminals like in *McCorkill*.

The -- the Sawridge Trustees throughout this litigation have always put forward the proposition that we wish to cure the definition, cure the discrimination, and potentially grandfather people who would be left out. So we were always of the view that we needed to enforce the trust and bring those people in. We never wanted to leave anyone out. It's not been a secret that we didn't -- we thought the discrimination should perhaps be amended in some way. We've met with -- been met with 14 years of resistance on that and we are now at the stage where we're saying, after 40 years, these beneficiaries deserve to receive the benefits to which they're entitled, as the trust deed says.

The -- there are people who may be left out, but it is true that with the 1986 Trust, the First Nation has the ability to cure that. And I don't say that lightly. I know that Sawridge First Nation is a sovereign nation. They have the right to determine their membership, but they are here today saying this discrimination is terrible. And they have the ability to fix that. I think when we look at the *Leonard* case, which is at tab 12, the -- the Court said that the Court would fix the discrimination, but they also found that Mr. Leonard was a philanthropist and was promoting leadership and education, and thus the trust was saved. Again, the scalpel, not the axe. And I think that's true in this case. Chief Twinn established a trust in 1985 for a very specific group of people and there is discrimination in that trust, but the Bill C-31 women are beneficiaries of the 1986 Trust. And so in many ways, that discrimination is in fact cured.

Sir, I'm going to save for the most part my discussions around the whole issue of the noncharitable purpose trust, which I do not think and I submit is not applicable in this case, but just for reference as you listen to those arguments, the law on a noncharitable purpose trust is that it is not a trust for individuals, it's -- there's no human beneficiary. It is a trust with a purpose. It might benefit some land, but it would not be for individuals. And if you look at tab D of our brief, where we have the 1985 Trust, the first line of that trust says: (as read)

> Whereas the settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution of this deed are members of the Sawridge First Nation.

And then it goes on to talk about the future members of the band. And then if we go on to look at the definition of beneficiaries on page 2, it describes members as persons, and mentions persons many, many times as you go through page 2 and page 3. And so I would submit to you that the law with respect to noncharitable purpose trusts is not applicable in this case. And I'll save more comments for my reply. It is also -- but I would say that it is also not akin to a government. This was a trust created by an individual settlor for individuals and it is not at this time when -- and, for sure, the Sawridge First Nation in and of itself as an entity is not a beneficiary of this trust, although that was an option for the settlor at the time, but he chose the individuals and therefore the noncharitable trust -- purpose trust doesn't apply in this case.

In respect of fiduciary duties, and you'll see we said that in our -- in our brief, we believe that the Trustees have a fundamental duty to carry out the terms of the trust deed. My friend, Mr. Sestito, referred you to the *Tercon* case, but I also ask that you look at the *Merrill Petroleum* case at tab 4 and 5, where the Court talks about the trust deed being paramount and the trustees should follow it. And at tab 6, where it's cited by Donovan Waters that unless there's something in law or by direction of the Court, we must follow the trust deed. The -- and all -- this is also said at tab 7, in the *Martin v. Banting* case.

If we look at the trust deed, again, it's at tab D, and then page 7, it clearly directs the Trustees that they have direction to pay all of the -- or so much of the income of the trust deed or the capital to any one or more of the beneficiaries. So clearly this isn't a trust that is meant for one entity or one government, it's meant for a multitude of people who can benefit in many ways, and that is the trust deed that the Trustees are seeking to follow. They hold legal title and they should be paying out to those who hold beneficial title. Without any law that prohibits distribution, we believe the Trustees are legally bound to follow the trust deed and to make those payments.

We've also cited for you the *Trustee Act*, which has significant legal obligations on trustees, and we believe that that statute and that law should also be followed. I won't repeat our arguments on laches or limitations. That's clear in our brief.

And so thus we have a valid trust. The Trustees have fiduciary duties. The Trustees -- the trust deed itself directs them to do that. The Court says we should follow -- the courts and the law have said we should follow the trust deed. And there's nothing in law which prevents distribution in this private law context. The Court was asked one question. There's no law that suggests the Trustees cannot distribute when there's discrimination

and we saw from the *Taylor* case as -- and then confirmed again in the *Racette* case that it is possible to distribute in the face of discrimination. And of course we have not -- would not be happy and have said over and over again that we would not be happy with the discrimination, but the point is that in this question, we can distribute under this trust deed. And so the answer that the Court should give is yes, the Trustees can distribute, they should follow the trust deed, that's what they're bound by, and that that should be the only question that's answered today.

Subject to any questions you have, Sir --

THE COURT: Okay.

MS. BONORA: -- I will -- those are my submissions.

THE COURT: Good. Thank you, Ms. Bonora. Ms. Hutchison, did you wish to come up front or are you good there?

MS. HUTCHISON: I'm -- I am indifferent, My Lord. Which would you prefer?

THE COURT: It's your case.

Submissions by Ms. Hutchison

MS. HUTCHISON: I'll -- I'll come up and see you in person. I always feel a little bit like I'm giving a speech at a wedding whenever I come up to the podium.

My Lord, I actually have more limited submissions than I believed I would. My friends have covered a great deal of the ground that I intended to cover, so I will try not to be too repetitive. A very, very brief introduction to the Court about the OPGT's role. The OPGT was appointed to represent all minors, and that's something that we haven't discussed much lately, but we represent minor beneficiaries, we represent minor SFN members, and we represent minor candidate children or children of individuals attempting to become Sawridge First Nation members. Our focus in this particular application, however, is on minor beneficiaries, because we're talking about distribution.

Over the long course of this litigation, our role has been refocused. Sawridge three was the Court's guidance to the OPGT on its four remaining tasks. I'm happy to say one -- one, I believe, has been accomplished, with the asset transfer order put to bed. One is very relevant to our role today, which is to represent the interests of the minor

beneficiaries and potential beneficiaries so that they receive fair treatment in any distribution. We see that as -- as quite relevant to our role today.

On this threshold application, My Lord, the OPGT supports the finding that the 1985 Trust is a private trust and that the discrimination that is acknowledged to exist in the beneficiary definition is not a barrier to distribution. Different -- different matter and different day on what fair distribution will look like, My Lord, but not a barrier to distribution per se.

In the intervention submissions, My Lord, the OPGT raised a concern with you about the possibility that the SFN would go beyond the scope of the issues raised by the Trustees, and -- and with the greatest of respect to our friends' very eloquent submissions, we do feel that that concern has been borne out in their written submissions. We've got extensive submissions that go far beyond the issues raised by the Trustees in their application. The -- the submissions are directed at asking the Court really to find that the trust is invalid on the grounds of the public policy doctrine. We submit that that's beyond the scope of this application. We've also drawn to the Court's attention that those issues are long statute barred, My Lord, and -- and I won't drag you through that again. Our intervention brief filed on March 14th, 2025, at paragraph 50 to 51 does cover that in quite a bit of detail. We're not -- we're not here to decide whether or not the trust is invalid on the basis of discrimination. We certainly can discuss whether there is such abhorrent discrimination as to prevent distribution. Our position is that there is not, My Lord. And you flagged those very issues in paragraph 17 and 28 of your own intervention decision.

My friends have covered this for the most part. We did just want to emphasize it from the OPG's point of view. It's critical to look at the 1985 Trust as part of a larger overall scheme or program for the SFN community. First, the 1985 Trust was very connected to the Sawridge First Nation's overall strategy on how to deal with Bill C-31. It was connected to their constitutional litigation. In that litigation, there is extensive evidence, and I refer the Court to our authorities at tab 2, which is the Justice Muldoon decision in the Federal Court, Trial Division matter, from page 46 or page 177 of the PDF, and then page 92 to 94, being page 223 to 225 of the PDF. Sawridge gave extensive evidence in that proceeding about the fact that the -- the tradition of woman follows man is not an *Indian Act* construct. That is in fact their custom, and so that at least that aspect of the 1975 registration and membership provisions was identified by Sawridge First Nation as supportive of their traditional customs around membership.

SFN then created the 1986 Trust, and so we have two trusts that essentially cover everyone. 1985 was intended to look after anybody who would have qualified as a Sawridge First Nation member prior to 1985. The 1986 Trust is intended to cover anyone

who qualifies as a member of Sawridge First Nation post-1985. My friends with the SFN have made, again, eloquent submissions about what's happened since Bill C-31. We have Bill C-3, we have Bill S-3, we have continued to identify that -- that the historical regime under the *Indian Act* was offensive and discriminatory, but it's not the Trustees of the '85 Trust that control whether the individuals such as Bill C-3 or S-3 individuals can benefit. It is in fact Sawridge First Nation. If they grant those individuals membership, they will immediately become beneficiaries of the 1986 Trust and then will be looked after in this dual-prong benefit program that was established by the SFN to look after both phases of their membership, My Lord.

A few comments. There were submissions in the SFN's brief -- paragraph 4 is just one example. The suggestion is that the '85 Trust seeks to perpetuate or validate and somehow, you know, essentially enshrine the overall regime of discrimination under the 1970 Act. And I'd just like to speak to that, My Lord, and not in any way to under -- undermine or suggest that the discrimination in the 1970 Act isn't a serious matter, but the 1970 Act applied across Canada. The 1970 Act applied to hundreds of thousands of registered Indians and First Nations peoples across Canada. They caused a loss of membership in their nation, a loss of registered Indian status and associated benefits, a loss of treaty status, and often their very connection to their communities, family, loss of language and culture.

The 1985 Trust definition is not national in scope. It is not even provincial in scope. It deals with a very small group of individuals, as private trusts often do. It will not take away a First Nations person's membership. It will not take away their registered Indian status or their treaty rights. It will not take away their identity or connection to community. And further, My Lord, if they are disentitled under the 1985 definition, their nation or the nation they're affiliated with, being Sawridge, has full ability to entitle them under the 1986 Trust.

I'm -- I'm not sure I can add much to my friend's submissions on what -- what type of trust we're dealing with. Clearly the OPGT takes the position this is a private trust, a classic private trust, frankly, My Lord, if you look at the deed. The deed itself really is the answer to the majority of the SFN's submissions on this point. It is not written as a purpose trust. There is nothing in the provisions of the trust that limits or directs the Trustees' distribution abilities towards a particular purpose for the community. It is a classic private trust in that it identifies a class of individuals and beneficiaries who are to benefit, unlike some of the cases before you, My Lord, where we're dealing with a First Nation itself as a beneficiary. It's not the First Nation here that is identified as the beneficiary, it is a specific class of individuals who must meet criteria under a now repealed statute.

I cannot improve on Mr. Sestito's explanation of the *Taylor* decision, although I originally intended to take you through that, My Lord. Our submissions are at paragraph 22 of our brief. We do consider it a very critical decision. It's very, very applicable to the case before you today and supports a finding that the discrimination inherent in the 1985 Trust definition does not require court intervention.

Our friends, the SFN, rely fairly extensively in -- in ways on the *Keewatin* decision. That's found at footnote 76 of their brief, but I believe is also part of the footnote we see quite a bit through their submissions, being page 386 of Waters on -- Waters' brief -- sorry, book on trusts. The OPGT would suggest to you, My Lord, *Keewatin* is completely distinguishable from this case. In -- in that case, the First Nation was the beneficiary, and so the Court properly found that that was a purpose trust. This is not a purpose trust and there is not a comparable approach for the -- in relation to the two deeds. I'll just quote, if I may, My Lord, from *Keewatin*, and I'm sorry, I don't have the page reference on my notes, but the Court, near the end of the case, says:

> I do not believe that the gift can be interpreted as being in favour of the individual members of the bands, either for the present or for the present and future. For one thing, the trust deed just did not say that. The gift was to the bands.

So *Keewatin* is completely different in terms of what the trust deed says, My Lord. In this case, it's very clear that it's individuals who are to benefit.

I think the last comment I would like to leave the Court with before I hand over to my very learned friend on scope of discrimination and -- and more on the public policy doctrine, SFN is asking this Court to take a very significant leap in trust law, My Lord, to create new law that would fundamentally change the landscape for all private trusts in Canada potentially, but more -- more than that, potentially disrupt trust law for First Nations across Canada, and certainly in Alberta, that have created their trusts on the understanding that a private trust is not subject to the public policy doctrine. They're asking the Court to do this without a single case that supports that approach. It's -- it's a beautifully crafted argument. It's beautifully written. It lacks supporting authority, My Lord, and we would ask the Court to -- to grant the application that the Trustees have before you today.

Subject to your questions, My Lord, I will hand over to Mr. Faulds onscreen.

THE COURT: Okay. Thank you.

MS. HUTCHISON: Thank you.

MS. TWINN: Where is the screen?

THE COURT: So, madam clerk, I don't have him on my screen. I can see him on yours, quite smally.

THE COURT CLERK: As soon as we hear him. I think, Mr. (INDISCERNIBLE), you are -- you are muted.

THE COURT: We're looking for Mr. Faulds.

THE COURT CLERK: Oh, sorry. (INDISCERNIBLE) picture be on the screen.

THE COURT: Mr. Faulds, I can see you. Can you hear me?

MR. FAULDS: Yes, I can, Justice Little.

THE COURT CLERK: Okay. So now you can see --

THE COURT: Oh, there we go. And you can see me, as well, now?

MR. FAULDS: Yes, I can -- I can see you fine. Am I coming through clear?

THE COURT: Loud and clear, sir. Carry on.

Submissions by Mr. Faulds

MR. FAULDS: Thank you. Thank you, Justice Little. First of -- first of all, I'd just like to confirm the fact that, as the Trustees and Ms. Hutchison have made clear in their submissions, the suggestion that the 1985 Trust should be viewed as some kind of noncharitable purpose trust so as to make it amenable to public policy restrictions and considerations simply isn't a viable argument. And I would point out to the Court that in addition to the argument which Ms. Hutchison and the Trustees have referred to, Alberta's new *Trustee Act* also contains provisions which make it clear that -- that the 1985 Trust could not possibly be a purpose trust of any kind. Section 77(1)(b) of the *Trustee Act*, which my friends from the Sawridge First Nation have very fairly repeated in full at paragraph 56 of their brief, makes it clear that in order to qualify as a purpose trust under that section, the trust must not create an equitable interest in any

person. In other words, it must not define any beneficiaries. And that, of course, is -- is consistent with the general understanding of a -- of what a purpose trust requires. And obviously that's not the 1985 Trust. You know, the 1985 Trust is all about defining exactly who the beneficiaries are who have equitable interest in the trust.

And so that leaves the SFN's submission that the discrimination in the 1985 Trust is of such a nature and extent that even though it is a private trust and even though public policy considerations, generally speaking, will not prevent private dispositions, this case should be an exception. And the OPGT's respectful submission is that the law does not support that position.

Before talking about -- about that law, I'd like to make a few points regarding the characterization of the discrimination in the 1985 Trust as put forward by the SFN in their brief. The -- the first point is that, as Ms. Hutchison pointed out in her submissions, the SFN brief argues that the 1985 Trust perpetuates and validates the discriminatory *Indian Act* regime that existed before 1985. And with -- with respect to my friends, the OPGT submits that is inaccurate and it's overblown. The 1985 Trust and its beneficiary definition does not and does not purport to have any effect whatsoever on Indian status or membership. The beneficiary definition simply defines that group of people and likely it's no more than 100 or 200 people who have an interest in a specified group of assets. So we don't think that there's any -- any legs to the notion that the beneficiary definition perpetuates or validates what the *Indian Act* was trying to do pre-1985.

The second point I'd like to look at is the suggestion by the SFN that the beneficiary definition perpetuates the pre-1985 system of enfranchisement. That was a provision under the old *Indian Act* whereby an individual who was a status Indian and a member of a First Nation in accordance with the provisions (INDISCERNIBLE) that old Act could lose that status and membership in a variety of different circumstances, including by choosing themselves to cease to be a status Indian or band member.

With the passage of the Bill C-31 amendments, the concept of enfranchisement ceased to exist in law. Since April 17th of 1985, no one can be enfranchised, so no one can or will lose their status or First membership on that basis. And the 1985 Trust beneficiary definition does not change that. If it were possible for a person to enfranchise, then the 1985 Trust would not recognize them as a beneficiary. The beneficiary definition is clear about that. But it's impossible for anybody to enfranchise now. (INDISCERNIBLE) therefore, the -- that part of the beneficiary definition no longer has any practical effect.

The -- the SFN goes on then to say that the 1985 Trust definition perpetuates the concept of protesting out illegitimate children who -- whose parentage is -- is not exclusively First Nation. That again was -- that provision again was eliminated by the Bill C-31

amendments and the same situation pertains to those protest (INDISCERNIBLE). If a protest were possible and if somebody was successfully protested out of membership in the Sawridge First Nation, then the trust would not recognize that person as a beneficiary of the 1985 Trust, but again, that can no longer -- since -- since that concept no longer is -- exists in law or is possible.

My friends at the SFN refer to the illegitimacy provision in the body of the trust itself and suggest that that also provides -- is -- is unacceptable in a discriminatory way. What that provision actually states is the Trustees shall be specifically entitled not to grant any benefit during the duration of the trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the *Indian Act* and their status may not have been protested under section 12.2 thereunder. That's clearly a discretionary provision. That gives the Trustees the power to not grant benefits to children in those circumstances, but it certainly doesn't require them to do so. And certainly we haven't seen anything from the Trustees to suggest that they have any interest in -- in exercising that discretion or enforcing that discretion so as to disentitle an illegitimate child.

Finally, I'd like to draw the Court's attention to the charts which our friends at the SFN placed at the end of their written submissions, and those charts illustrate various circumstances in which -- which they say illustrates discriminatory aspects of the -- the operation of the trust's beneficiary definition. I think it should be made clear that those charts are charts of post-Bill C-31 discrimination, that is discrimination that continued to exist in the *Indian Act* after the amendments which Bill C-31 effected, and those discriminatory circumstances are circumstances which were addressed in subsequent legislation by the Government of Canada.

In effect, those are examples of the discrimination which the Court was talking about in the *Taylor* case. Those charts illustrate the -- illustrate the circumstances in which people lost their status as First members post-Bill C-31 due to residual, if I may call it that, discrimination in the *Indian Act*, and those therefore are the scenarios which the *Taylor* -- which the *Taylor* case said do not present a problem to distribution of assets in a First Nations trust. Those are -- those are the scenarios which -- which -- under which people were not members of the First Nation in *Taylor* at the time of the vote and at the time that the trust was created and who subsequently became that by virtue of legislation which corrected those discriminatory (WEBEX AUDIO INTERRUPTED). But as Ms. -- Ms. Bonora and as Ms. Hutchison pointed out, the effect of *Taylor* was that such discrimination did not act as a bar to -- to the distribution of a First Nations trust. So -- so our -- our submission is that one should take some of the submissions by the Sawridge First Nation about discrimination in the trust with a grain of salt.

Our overall position in respect of that discrimination is summed up in paragraph 18 of our brief, in which we submit that discrimination in a private trust without more does not render the execution of that trust and the distribution of its assets by the trustees as impermissible. There must be something more. And if we -- and if we look at -- if we look at the -- the key cases, we get a bit of an idea of what that something more needs to be.

So beginning with the *Canada Trust Company* case or, as it's referred to in our brief, the Leonard's Foundation case, that was a charitable purpose trust. And it was a trust which established a scholarship which the donor directed be granted on a race -- on a racist and sexist basis. This requirement required the trustees themselves to engage in discriminatory conduct, because they were required to select the recipients of the scholarship, and in order to select recipients of the scholarship, they had to engage in discriminatory conduct. And on that basis, the Court in that case found, first, the trust in question was a charitable purpose trust; second, that as a charitable purpose trust, it was open to consideration of the extent to which it might violate public policy, and that the requirement that the trustees engage in discriminatory conduct themselves in order to select the recipients of the scholarship was offensive to public policy. And the Court then used its sepray (phonetic) jurisdiction to maintain the creation of the scholarship, but to alter the purpose by removing the discriminatory provisions that it contained.

So there were two -- two aspects of -- of that case which distinguish itself from our situation here involving the 1985 Trust. One of them is that the *Canada Trust* case involved a charitable purpose trust and that it required the trustees themselves to engage in discriminatory conduct.

There was a -- there was a qualification -- and there was a reference to what effect, if any, does this have on private trusts in that decision. And in his concurring decision, Justice Tarnopolsky noted the decision does not affect private family trusts. It is this public nature of charitable trusts which attracts the requirement that they conform to public policy against discrimination. Only if the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void. Unfortunately, the *Canada Trust* case, which is a decision of the Ontario Court of Appeal, comes from an era when -- when the paragraphs in the judgment weren't numbered, so I can't give you a paragraph for that, but it's towards the end of Justice Tarnopolsky's concurring decision. And it's also -- the passage I read to you is also quoted in full at -- in the *Spence* decision, which is in the materials before you, at paragraph 45. So you can conveniently find it at paragraph 45 of *Spence*.

Then we have the *McCorkill* case, which is the decision out of the New Brunswick court in 2014, involving a bequest in a will to a white supremacist organization in the United

States. And the *McCorkill* case -- I'm sorry, My Lord, I'm just trying to pull up the -- the cite. I'm looking for it here. The *McCorkill* case ultimately turned on the concept of the unworthy heir. Canadian law has recognized that there will be some circumstances in which a person is not deserving of receiving a bequest under a will or a -- or a beneficial interest under a trust. And the two categories of situations where that prevailed prior to *McCorkill* were, you know, the person who murders the testator in order to collect under the will and members of organizations that have been affirmed by Canada to be terrorist organizations. Those are the two categories of unworthy heirs that Canadian law had recognized, and *McCorkill* added, in effect, a third category of unworthy heir, that is an organization which promotes illegal activity in Canada, in particular hate speech and -- and illegal activities of -- of that nature.

And so in *McCorkill*, that characteristic of the -- of the beneficiary of the estate disentitled them to receive any benefit under -- to receive the -- the benefit that was provided under the will. And -- and we submit that that concept can't have any possible application to the circumstances that we're dealing with here. There's nothing about the beneficiaries of the 1985 Trust that disentitles them, either individually or as a group, to receiving the -- the benefits that the trust bestows upon them. They are all individuals who have a connection to the Sawridge First Nation. That connection may be recognized by way of membership currently or not, but they all in some sense have a -- have a connection to the Sawridge First Nation and nothing more. There's nothing about that circumstance that -- that disentitles them to receive the -- to receive the benefits the trust provides.

And the third case that I'd like the Court to consider is the *Spence* decision, which I had referred to and which, amongst other places, is found in -- at tab 7 of the OPGT's -- OPGT's brief. And I would urge the Court to read in particular paragraphs 67 to 86 of the *Spence* decision. And in that section of the decision, the Court in *Spence*, the Ontario Court of Appeal, does the following. First, it distinguishes the -- well, perhaps I should -- I should refer briefly to the facts of the *Spence* decision to understand how it has significance here.

Spence was a case in which a -- in which a testament -- a decision to exclude a person from a will by a testator was challenged on the grounds that it was discriminatory. And the basis for that discrimination was not apparent on the face of the will. The basis was found in extrinsic evidence and that created a -- and that created an issue over whether or not discrimination that was not apparent on its face had any bearing, but the Court -- the Court ultimately in that case decided that doesn't -- it doesn't make any difference, we're going to decide this case as if the discrimination was apparent on -- on its face. And there's a bit of a parallel there between the -- between the -- the definition in the 1985 Trust and -- and this case, because, of course, you can't find that the 1985 Trust

beneficiary definition is discriminatory without going beyond the terms of the trust itself and then delving into the *Indian Act* and, you know, all kinds of -- and -- and needing to look at all kinds of -- of additional information. But -- but *Spence* decided the situation on the -- on -- on the basis that let's assume that it was apparent on the face of the record.

And so what -- what did the Court do in -- in that section that I referred you to? First of all, they distinguished the *McCorkill* decision, pointed out that that was a decision based on an unworthy heir, and that -- that that situation didn't prevail in -- in the *Spence* case, just as it doesn't -- just as it doesn't prevail here. It distinguished the *Canada Trust* and *Leonard* case on the basis that the -- in that case, as -- as we discussed, the trustees had to engage in discriminatory conduct themselves in order to give effect to the -- the bequest in the will. That discriminatory conduct involved themselves selecting somebody on a discriminatory basis. And that didn't apply in the *Spence* case and that, as I've said, doesn't apply here.

And I think that's an -- that's an important finding in -- in *Spence*. What it's really doing is drawing a distinction between discrimination which exists in the trust document itself or -- and -- and are discriminatory, perhaps, intent, if you will, on the part of the person who created the trust or, in the case of a will, the -- the testator, and the actions of the trustees. Trustees who merely identify and distribute assets in accordance with a gift that has been prescribed by whoever created the will or the trust are not engaging in discriminatory conduct themselves. It's only when they have to go the extra step and select a beneficiary themselves, that is the beneficiary only is a beneficiary by virtue of their determinations, which they have made in accordance with the requirements of the will, that -- that a problem arises. Simply executing the trust does not involve a problem. Executing the trust and -- and performing a discriminatory act delves -- does create a problem.

So that's -- and -- and *Spence* is -- is quite clear on that distinction, and I'd draw your attention to paragraphs 68 and 71 of the *Spence* decision.

Spence also stands for the proposition that private trusts are not subject to review on grounds of discrimination absent some kind of legislated limit that has been placed on them. And you'll see that at paragraphs 74 and 85 of the *Spence* decision.

And again, although it's not -- it's not directly -- it -- this -- this relates somewhat to the -- whether or not the trustees are -- are required to act in a discriminatory fashion. There is also a line of authority that gifts that are made subject to a condition subsequent may be problematic if that condition subsequent is -- is offensive to (WEBEX AUDIO INTERRUPTED) policy consideration. And examples of that are, you know, I leave this to -- I leave this to my nephew, but if he marries so-and-so -- or if he marries somebody

who is not of his religion or something like that, then the gift does not operate. That's the kind of condition subsequent that -- that can create a problem, but there is nothing of that sort -- nothing of that sort in -- in the 1985 beneficiary definition.

So those are -- that -- that helps to illustrate what more is required for discrimination to act as a problem in the distribution of a -- of a trust or a testamentary gift, and our submission is that there is nothing here which exists in the 1985 Trust which would interfere with the Trustees' ability to distribute. And accordingly, there is no basis to find here that the Trustees cannot distribute in accordance with the terms of the will.

I echo the submissions of Ms. Hutchison that the SFN's submissions as an intervener here come close to really seeking a remedy from the Court to achieve the result that they would prefer and that, in our submission, it's inappropriate for an intervener to -- to make submissions of that -- of that nature.

So subject to -- subject to your questions, Justice Little, it's the position of the OPGT that the advice that should be provided to the Trustees is that they may distribute in accordance with the terms of the trust.

THE COURT: Thank you, Mr. Faulds. No questions at this time. Thanks.

MR. FAULDS: Thank you.

THE COURT: Ms. Twinn, what are your thought -- we should take at least a short break now. What are your thoughts on -- I mean, are we going to have to interrupt you for a lunch break during your submissions or how would you like to --

MS. TWINN: I would prefer not to be interrupted. I would suggest we take the break now. Is it --

THE COURT: So --

MS. TWINN: -- too early?

THE COURT: Well, no, it's never too early for lunch, in my view, but do we want to start again at 12:30 or 12:45 or 1?

MS. TWINN: I'm in your hands. As you see fit.

THE COURT CLERK: I'm okay, Sir. (INDISCERNIBLE).

THE COURT: You're good. What if we said 12:45? I hate to sort of lose some time and momentum, but I, too, don't really want to interrupt you during your submissions.

MS. TWINN: Thank you.

THE COURT: So does that give time for everyone to grab a bite to eat, if it's 12:45? Okay, then. Thank you.

PROCEEDINGS ADJOURNED UNTIL 12:45 PM

Certificate of Record

I, Natalija Varevac, certify that this recording is the record made of the evidence in proceedings, in Court of King's Bench, held in courtroom 516, at Edmonton, Alberta, on the 16th day of -- of June, 2025, and I was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Victoria Winning, certify that

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

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

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Order Number: TDS-1088360
Dated: July 11, 2025

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

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June 16, 2025	Afternoon Session
The Honourable Justice J. S. Little	Court of King's Bench of Alberta
D. C. Bonora, KC	For the Trustees
M. S. Sestito	For the Trustees
D. D. Risling, KC	For Sawridge First Nation
D. Schulze	For Sawridge First Nation
C. Osualdini	For Sawridge First Nation
N. Dodd (remote appearance)	For Sawridge First Nation
P. J. Faulds, KC (remote appearance)	For The Office of the Public Guardian and Trustee
J. L. Hutchison	For The Office of the Public Guardian and Trustee
(No Counsel)	For C. Twinn
N. Varevac	Court Clerk

THE COURT: Good afternoon.

MR. SESTITO: Good afternoon.

THE COURT: Please be seated.

MR. SESTITO: Sir, just before we carry on, there's one housekeeping matter (INDISCERNIBLE) hopes to address quickly in front of you. I have the order as signed --

THE COURT: Okay.

MR. SESTITO: -- by the parties to amend the style of cause. If it's acceptable to you, I can hand it up, have you sign it and then attend to filing it in due course.

THE COURT: Thank you. Good. I've signed, Mr. Sestito.

MR. SESTITO: Thank you, Sir.

THE COURT: Thank you. Ms. Twinn, the floor is yours. Did you, again, wish to come up?

MS. TWINN: I shall.

THE COURT: Yeah.

Submissions by Ms. Twinn

MS. TWINN: Good afternoon.

THE COURT: When you're ready.

MS. TWINN: I'm a little overwhelmed by things I've heard and the words -- the three words that come to my mind are gaslighting, colonizing mistrust and distortion, distortion of custom in particular, that -- and I'll start with that one, that the Sawridge First Nation custom is today that the woman follows the man, therefore, 1985 Trust is reflective. That's a distortion. That's a distortion of the evidence that was in the Bill C-31 trial. Both Janet Hutchison and Jon Faulds were involved. They were representing intervenors, that's discussed in my brief. And the list in that case was the -- where is the constitutional authority? Is it with Parliament or the First Nation, as part of its inherent right of self-government, to determine membership in accordance with its laws, customs, practices and traditions? There was extensive evidence in that trial about what the Cree call nature's laws.

There was an expert, Dr. Earl (INDISCERNIBLE), whose report was filed. There was testimony that, in the second trial, was objected to by Canada and its four federally-funded intervenors, who were supporting Canada's position, that Parliament, not First Nations, had the right to determine membership through the *Indian Act;* that the First Nation had extinguished whatever right it may have had some time in the historical mists of time.

J. J. Robinette - some of you will be familiar with that name - represented the plaintiffs in the first trial on a motion to strike the claim as disclosing no reasonable cause of action. Canada was represented by Dogan Ackman, who argued extinguishing. J. J. Robinette pointed to legal evidence to show that the right had not been extinguished. It may have been interfered with, but it wasn't extinguished. Crown's motion failed, the action proceeded.

This idea also, this inference that custom is frozen in some long ago period of time, is wrong. Read the *Sparrow* case, look at the Supreme Court decisions. Look at the

Campbell decision where he led -- later became -- was it Premier Campbell -- brought an action, I believe, against the Michigan Treaty, trying to stop it, and there was extensive discussion about how custom is alive, it's changing, it's evolving, it's responding.

That leads me to the second comment about the colonization of the 1985 Trust and decapitating the First Nation as though it doesn't exist, that this is just some rich man's -- rich, privileged man's will and the Court should treat it within that framework. That's wrong. We all know that's not reality and that's not truth and I resent it. You know, it wasn't that long ago the trustees, on the jurisdiction application, in their brief were saying the opposite of what they're telling you today. Then it was, This is a quasi-community trust, and they worked and hand in glove with the First Nation to blow it up. And it's galling to me today to listen to these representations that we must perform our fiduciary duty and -- and distribute according to this trust.

(INDISCERNIBLE) is run out of this trust as a trustee by the majority of the trustees. My position hasn't changed. Identify the beneficiaries in accordance with the terms of the deed and deal with the issue of whether or not -- what is the characterization of this trust? And I can tell you, I read Bruce Ziff's book on the Leonard Foundation Legacy. I brought Bruce Ziff in to meet with the trustees because I didn't know how to characterize these trusts. I'm not a trust lawyer and I am before you today self-represented and it will be very clear that I'm not a trust lawyer. But one thing led to another and after the Bruce Ziff conversations with -- is this trust, this '85 Trust, with its discriminatory provisions workable? Is it valid?

That led us to two different law firms and the trustees know this, Trustees' counsel knows this. It was Tim Youdan from Davies, Ward, Phillips & Vineberg - prior to that, Davies, Ward & Beck - top trust lawyer in Toronto and on the other side of the country, Donovan Waters. And I can tell you this idea of a private trust was not -- was not taken up and it's shocking today to hear these submissions that this is a private trust that was settled by a private individual, my husband, the chief of the Sawridge First Nation.

If that is so, then maybe I need to bring an application as the administrator of his estate to dissolve this trust. I'm tired of the gaslighting. I'm tired of the colonization and I'm really tired of the distortions that have gone on. Why didn't these trustees bring this application back in 2011? Forty years, and the beneficiaries of this trust have not been identified? I don't even know who the OPGT represents. To get into this case, Ms. Hutchison filed close to 30 affidavits. Only one of those was from a Sawridge First Nation member, Liz Potris (phonetic), and she was a 12(1)(b) woman. She was not a beneficiary of the '85 Trust. And when I spoke about those rules and what -- what their application meant in any particular situation -- individual situation, I was crucified, that I was promoting the exclusion of those people. The politics and the money made for very

strange bedfellows and this case is absolutely testimony to that.

Jon Faulds made this distinction, without a difference, that, Oh, the trustees, if they engage in discriminatory conduct, then that could be a violation of the public policy. I can tell you, these trustees are engaging in discriminatory conduct in real time. In real time. 12(1)(b) women are excluded, double mother clause people are excluded and then there's a selective application of the illegitimacy rules depending on who it is. Unacceptable, and it has not been done in a transparent way with procedural fairness. There's been no rule of law.

The trustees are not a king and in this set of facts, they have not just fiduciary duties, they also have a duty of honour because, if that's binding on Canada and it's binding on courts, it's certainly binding on trustees dealing with First Nations. And make no mistake, the facts are the facts, they can't be dispelled or vanished by these abstract legalese arguments.

At paragraph 264 of my brief -- and I notice that the trustees really did not comment much on my brief, other than my jurisdiction brief filed in 2019, which they had 6 years ago. I was the one who raised the case that they're now relying on. Why didn't they raise it then? Why didn't this application come then, if not in 2011? But I say, in light of the facts pertaining to this Trust, there is merit for the Court taking into account all the facts. The roots of the Trust, the history of community governments and I should add, legal capacity, or not, because First Nations were not recognized as having legal capacity. First Nations weren't allowed to invest off the reservation. First Nations, even in the late 1980s, were being blocked from economic development by the Department of Indian Affairs.

The First Nation, as a community, has an interest in the development of its members who, in turn, can contribute to the First Nation. And we have a lot of healing to do, a lot of decolonizing to do and there's been a lot of trauma. That's been a lot of trauma and that gets transmitted intergenerationally.

The -- the source of the funds, the trustees argued - and there's no dispute on this - was the First Nations' wealth, its property. It wasn't Walter Twinn's personal property. What a bizarre suggestion. And the purpose of those funds was to help benefit the Band by lifting up its members. Back when these trusts were established, there was significant doubt in law whether the First Nation was a legal entity.

Now, in this trust, up until 2023, elected officials of the First Nation were trustees and, yes, whoever it was - was it Mr. Sestito, I don't know - said that there's a changing landscape. There is a very changing landscape because in February 2023, Roland Twinn

was voted out as chief and in my brief I talk about how in late 2022, beginning and into 2023, the establishment of Sawridge First Nation membership reform committee. That's underway. And it's not easy to balance section 15 individual rights with section 35 and section 25 collective rights. And I talk about that in my brief and how recently the law, the Supreme Court, is coming to grips with section 25 vis-à-vis section 15.

And there's no doubt either, factually, what was driving the settlor, Chief Twinn, not Walter Twinn personally. And it was Bill C-31 amendments to the *Indian Act* and what the impact would be on Sawridge First Nation membership because the prior year, John Munro, minister, Liberal, had introduced Bill C-47. Peter Lougheed would have been a band member and an Indian. One did not know where everything would end up landing, but that high impact band brief that I gave you on April the 4th, along with the book, And Still the Waters Run, by Angie Debo, showed -- profiled 11 First Nations from our Treaty 8, including Sawridge.

They were looking at increases of 100 to 400 percent, only looking at three out of the 63 legal categories being created by Bill C-31. And Walter, even though he only had a grade 8 education and went to residential school, was a very smart man and a good man and he saw that C-31 and *Charter* challenges to the *Indian Act* were just beginning. And you know what, my brief shows you that he was right. He was right. And I say that justice requires this Court to have regard to the factual and legal matrix that led into the '85 Trust, the role of the Sawridge First Nation and what its purpose was.

Now, the *Guerin* decision I mentioned in my brief -- and I want to tell you a little bit about that case because I knew the Guerin family. Back in the '50s, the Musqueam, their land, Vancouver adjacent, was already very valuable. The Indian agent and his buddies wanted a golf course. Oh, this Indian land, it's not being used. Let's just get them to surrender. So they connived, they conspired, they went to the First Nation. The First Nation said, Well, we'll -- we'll do it, but there's some conditions. And there were a lot of conditions. They weren't dummies. But what was papered up dropped all those conditions. When Mr. Guerin discovered this a few years later, he was furious and he wanted to challenge it, and Jim Reynolds, lawyer, BC - some of you may know of him - he's the one who developed the trust argument, even though Mr. Storrow took credit.

Guerin lost. Canada said, This isn't a trust relationship, this is just a political relationship, and maybe what we did was unethical, but it's not illegal. Well, I say ethics and law need to go hand in hand and if they don't, we create tremendous harm and ruptures in society, just like this trust.

Supreme Court heard it, they heard the *Guerin* case and in 1984, they agreed with Mr. Guerin. They found the relationship was marked by dependency, vulnerability,

knowledge, control on the part of Canada, just like trustees here. And they said, You know, maybe it's not pure Western trust law concepts, but this is a sui generis trust-like relationship. And I say to you, Sir, that concept of sui generis applies here and don't let it be colonized.

When Mr. Faulds said that the trustees -- even if the trustee is discriminatory in its definition, if the trustees themselves are not engaging in discriminatory conduct, then, you know, it's not a violation of public policy. That's what I heard. I don't buy it and I'll tell you why. Trustees are necessarily engaging in discriminatory conduct and I suspect that is why we've spent 14 years in this torturous 2011 action trying to get some kind of court permission. Why the trustees didn't bring this action -- this application in 2011, I don't know, they should have, and they were certainly aware of the case that I brought forward in 2019, 6 years ago.

And as for this statement that this is a private trust, as this -- as though this is some established legal fact, excuse me, did I miss an application and an order? There's been no court declaration as to the characterization of this trust. I say it's a sui generis trust, like everything to do with Indigenous peoples, and its property came from the Sawridge First Nation. That's what these trustees argued on the asset transfer application in collusion with the Sawridge First Nation, then led by Chief Twinn, who was also trustee, Roland Twinn.

The evidence that was put forward by then-councillor, Darcy Twin, and it's at page -- sorry, give me a moment here, paragraph 234 of my brief. I just want to go through it. It's important.

Paragraph 7 of Darcy Twin's affidavit filed September 26, 2019, under the heading, Source of Funds to Purchase the Trust Assets and Purpose of the Trust, states, paragraph 7: (as read)

> I am informed by our counsel, Edward Molstad, and by my review of certain portions of the transcript of the testimony of Chief Walter Patrick Twinn in the first trial of Sawridge's constitutional challenge to Bill C-31, copies of which are attached hereto as Exhibit B to this my affidavit and do verily believe the following:
>
> (a) When Walter Patrick Twinn became chief of Sawridge in 1966, Sawridge did not have any businesses.
>
> (b) Sawridge's goal was to save as much as possible and use the

> capital and revenue funds to become totally self-supporting one day.
>
> (c) Sawridge was concerned that Bill C-31 would result in automatic reinstatement of a large group to membership in Sawridge.

And I'm going to stop there for a minute, Sir, because you have to understand that that legal status interplays with the *Indian Act* as a whole, with other permissions (phonetic) of the Act, including who can surrender the reserve lands 50 percent plus 1. If you have an 800 percent increase in membership, you've just seen a transfer of power and control to new people who do not live in the community and, if they control your necessities, you are not safe, no community is safe and every community has the right to protect itself and to establish itself and it needs resources to do so.

This is not rocket science. This is just real, this is reality: (as read)

> (d) The 1985 Trust was created 2 days before Bill C-31 was enacted, in anticipation of the passage of Bill C-31 and with the objectives that the beneficiaries of the 1985 Trust would be people who were considered Sawridge members before the passage of Bill C-31, that the people who might become Sawridge members under Bill C-31 would be excluded as beneficiaries for a short time, until Sawridge could see what Bill C-31 would bring about. The people who might become Sawridge members under Bill C-31 would be excluded as beneficiaries.
>
> (e) Ultimately, the intention was that the assets from the 1985 Trust would be placed in the 1986 Trust.
>
> (f) The primary source of income for Sawridge originated with the discovery of oil on the Sawridge Reserve Lands.

This is tribal property. It's not Walter's property.

> The royalty monies resulting from the sale of oil and gas were received and held in Sawridge's capital account in accordance with the *Indian Act*. The Sawridge capital monies were expended with the authority and direction of the minister and the consent of the council of Sawridge. The Sawridge capital monies

> were used for economic development, specifically to invest in various companies carrying on business under the Sawridge name and were placed in the Sawridge trust.

That wasn't evidence that I tendered. That was evidence tendered in cooperation with the trustees. Because, as I've told this Court many times, the Sawridge Trustees, when Roland Twinn was chief -- while Roland Twinn was chief, the Sawridge trustees were funding the Sawridge First Nation to participate in this litigation. Now, I'm not -- I'm not talking -- not just tens of thousands, I'm talking hundreds of thousands of dollars. We've never had an accounting.

So let's go back to the importance of trustees fulfilling their fiduciary duties. Do we cherry pick those? Oh, now -- now we're going to support and seek to administer this trust -- this discriminatory trust? But where -- we still haven't identified the beneficiaries in a proper way, it's all very secretive and I talk about that in my brief. I can give you the paragraph. Well, it might take a little while to find it, but it was -- we were told just recently that the trustees hired some expert in the 1970 *Indian Act* rules, but, no, we weren't allowed to even know the name of that so-called expert. Why? Privilege. We cited privilege. Bizarre.

And there had been many demands for an accounting and that's in my brief. I've made demands. The trustees have refused. Forty years. The 2023 amendments took effect February 1st, still no accounting. I want to know what was the value of the monies that -- or the funds or the assets that were settled into the trusts, when they were settled. I want a year-by-year explanation, accounting, for the management of those assets. I want to know their value today because I can tell you, in 2015, in my affidavit, and this is in my brief, I was told -- I was informed by a director of the Sawridge group of companies that the value was, I believe, around 230 million. Now, I am hearing different numbers, much lower, 70 million. I have a right to know and I want to know and I'm demanding to know.

Now, this threshold application that no one can talk about validity of the trust because this is just a question of distribution of -- of -- being able to distribute from a discriminatory trust. Let me make this simple and real as it is for me. You're my dad, I've had my car in the garage for repairs for 14 years and I say, Hey, dad can I drive the car? And you say, Is it workable? Has it been repaired? I don't buy this -- these legal machinations to evaporate what is a prerequisite to being able to administer from a discriminatory trust.

I think that this trustee application is deceptive. Can we distribute presupposes the validity of the trust, something the trustees spent millions of trust money dollars putting

into issue and then, coitus interruptus, suddenly it's no longer an issue? Why is that? Is that because Roland Twinn is no longer the chief? Is this a revenge application? Seventy-five percent plus of Sawridge members are not beneficiaries of the '85 Trust? I didn't know that until an affidavit was filed in this application because the trustees have kept it all secret. That's why I say this application puts the cart before the horse and to pretend validity is not a prerequisite issue that precedes distribution is nonsense.

Now, I was allotted 75 minutes, correct? Clock me. What am I at? I'm at 34 minutes?

MS. BONORA: You're at about 45.

MS. TWINN: So how -- I have --

THE COURT: Close to 45.

MS. TWINN: -- how much time remaining?

THE COURT: About a half hour.

MS. TWINN: I yield my time to the Sawridge First Nation.

THE COURT: Very generous.

MS. TWINN: Sorry about that. I didn't mean to put you on the spot.

MS. OSUALDINI: That's okay.

MS. TWINN: I have nothing more to say.

MS. OSUALDINI: That's my job, to be put on the spot.

THE COURT: Are you okay to start or do you need 5, or you're ...

MR. SCHULZE: If I may. Maybe --

MS. OSUALDINI: Thank you.

MR. SCHULZE: -- my friend could start on -- she has one issue she'll address.

THE COURT: Yeah.

MR. SCHULZE: -- and then we can perhaps just take a quick break so that --

THE COURT: Sure. Yeah.

MR. SCHULZE: Thank you.

Submissions by Ms. Osualdini

MS. OSUALDINI: Good afternoon, Sir.

THE COURT: Good afternoon.

MS. OSUALDINI: Osualdini, first initial C., for the record, for the Sawridge First Nation. And, Sir, my submissions are going to be brief. You have a unique trust before you. You have a unique trust that was created in a very unique set of circumstances that engage both historical law, factual realities for the Sawridge First Nation and some of which today, in 2025, are hard to imagine what the circumstances must have been like in 1985 for these people. I know I can't personally relate.

Now, the trustee's question, what's been the called the threshold question on this application, in a nutshell, it's asking the Court to determine whether the trustees are able to distribute the corpus of what is a known discriminatory trust. Now, Sir, our position is that you can't answer that question without calling out the elephant in the room, and the elephant in the room is, does public policy attach to this trust and does this trust offend public policy? And without addressing that elephant, you're not answering the real question and that, we submit, that that is what the threshold question is asking.

So by way of introduction, one of the key issues in this case is how you understand what the 1985 Trust is. Is it purely a discretionary private trust as the trustees and the OPGT have described it, or is it something else, something not as easily quantifiable, but that is categorically different from the situation where a private individual puts their own wealth into a trust for their family members? And we're going to be arguing today, Sir, that it absolutely is because I would point out that one somewhat absurdity that could be created if this was not the case is that as a government, the Sawridge First Nation clearly cannot discriminate. I don't think I -- anyone in the room would -- would argue that the *Charter* applies and that discrimination on protected grounds is not okay.

Well, why should it be okay within a trust that's clearly been set up to administer the wealth of a nation, that had that wealth just remained in the nation, you could never do this, but just because it's been put into a trust and we made a private individual the settlor, now all of a sudden it's okay to administer assets that way? I say that it's not.

And we will also submit that it is fundamentally misleading to characterize the 1985 Trust as a discretionary private trust. This is because the 1980 Trust -- 1985 Trust is a singular hybrid of public law and private law, a trust that is largely defined and driven by public law imperatives and is inseparable from them. To say that public policy should -- consideration should not apply to the 1985 Trust is to deny the factual, legal imperatives that led to this trust in the first place.

And, Sir, the -- there will be generally three things that my friends will be arguing before you today. First, we're going to explain why this trust is different from any other trust that you would see in the case law that has been presented to you today and why those differences justify the scrutiny of the trust on public policy grounds.

Second, we will demonstrate that even if you do not want to go down this road of looking at the trust for what it actually is and even if we say that this is a discretionary private trust, there is still ample authority existing in the current body of case law to apply public policy standards to the 1985 Trust.

And finally, we're going to address the timing of this application because while it's -- if this application is for advice and direction and, based on the spirited submissions today, sometimes it's easy to lose focus of that fact, and on an application for advice and direction, the Court has a broad range of remedy before it. You can decline to give advice and direction, you can give advice and direction, and you can also give advice and direction with certain restrictions or directions attached to it. And our concern, Sir, as Ms. Twinn pointed out, is the mischief that can happen if we start talking about distribution in the absence of addressing very underlying and fundamental issues, such as validity, because I would remind the Court that the issue of, Is this a valid trust, is on the full application. It is not a fact that this is a valid trust, as the trustees argue in their submissions, it's a live issue.

And until the issues of public policy and any remedy that needs to be applied, for breaches of it, are addressed, this trust cannot distribute. And we would urge the Court to consider that in any directions that it gives, is that the -- any directions in regards to distribution must be suspended until these very important issues are addressed.

And in support of that, Sir, I would point out, as my friend said, this is a discretionary trust. You can distribute the whole entire thing at -- as -- as you see fit. No individual

beneficiary has a proprietary interest in the trust property, wholly discretionary, which can lead to a lot of mischief and that's mischief that we wish to avoid.

Now, Sir, just before I turn things over to my friend, I just kind of want to go -- I want to go back to basics here. What -- what are we doing? So what we've heard today is there is a few different types of trusts out there. The first type is a private trust. A private trust is created for a class of persons or named individuals and most of the case law that you're -- you've been pointed to today, Sir, concerns people's wills, concerns private trusts, but it -- the word private truly is emphasized there because we're talking about individuals and their own personal wealth for the most part.

The second type of trust that we have is a public trust. Now, a public trust is created for the benefit of the public at large or a significantly large segment of the public. In Canada, a public trust has to be charitable in order for it to receive that designation. The heads of charity are very clearly defined and for -- for which this trust would not fit within those categories.

We also have what we've referred to in our submissions is the non-charitable purpose trust and the reason I included that in the submissions is not because -- I recognize that a non-charitable purpose trust has to have a purpose as the beneficiary and not identifiable individuals, not that I'm conceding validity in that comment, but I put it in there to say I think this trust is a heck of a lot more -- more closely related to a non-charitable purpose trust than it is to some individual's will, which is what most of these cases about private trusts are referring to.

The purpose of this trust is it was created for the members of the Sawridge First Nation, that's the purpose, and the fact that we can say that, Okay, we know we can point to individual persons, in my mind, is a bit of an arbitrary distinction, while technically correct. And I take you, Sir, to paragraph 58 of our submissions where the problem that I'm highlighting for the Court was also highlighted by the late Dr. Waters in his text (phonetic).

THE COURT: Sorry, can you give me your paragraph reference?

MS. OSUALDINI: It's paragraph 58, Sir.

THE COURT: Okay.

MS. OSUALDINI: And I'm, of course, quoting from Waters on trusts. This particular quote comes from page 356 and I encourage the Court to read this

section of Dr. Water's text because he talks exactly about the problem that we're having here today, that First Nations trusts don't neatly fit within the existing body of case law about what trusts are and in his text he wrote that -- he notes the fact that Courts have considered First Nations trusts to be non-charitable purpose trusts. And I think the important point that Dr. Waters is highlighting is we need to think about these trusts differently and not within the parameters, necessarily, that have arisen to interpret someone's personal family trust. They're fundamentally different in concept.

Now, Sir, I wanted to remind the Court and take us back to, you know, what -- what is public policy? And as my friend, Mr. Sestito, referred to in paragraph 60 of our submissions, we talk about, in Canadian law, what -- you know, what is public policy? And public policy is really referring to the fact that there's certain principles that we hold as a society that are deemed to be against the public interest or detrimental to the wellbeing of society such that courts need to intervene in order to ensure that public policy violations do not occur.

And as my friend and as we point out in our submissions, I think we're all ad idem on this, is that it needs to be serious. As my friend quoted from one of the decisions, that it -- this cannot be the concept of the few idiosyncratic judicial minds, it's a really, really serious matter. And I've always sort of thought of public policy as one of those things that's often hard to define, but you know it when you see it. And, Sir, I'd submit that we have that here.

Now, how does public policy matter in the context of trusts? Well, we know from Leonard Foundation and prior case law that in terms of a public trust, absolutely, a public trust cannot violate public -- or -- public policy and a non-charitable purpose trust can also not violate public policy. And I include a cite to a decision at paragraph 78 of our submissions that confirms that proposition, which is the *Angus v The Corporation of the Municipality of Port Hope,* a 2016 Ontario Court decision that confirms this proposition about public policies interaction with non-charitable purpose trusts.

Now, private trust is where we kind of get into a little bit of a pickle about how does public policy work with private trusts. Now, it's true that the application has been more restrictive than we've seen in terms of public or non-charitable purpose trusts, but the Supreme Court of Canada in a 1938 decision of the *Estate of Charles Millar, Deceased,* which is cited at footnote 81 of our submissions, it confirms that the doctrine of public policy applies to trusts, including private trusts, because, and I'm quoting:

> ... there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and

> what otherwise would be the rights and powers of the individual.

So I think, even in terms of a private trust, we have to start with this umbrella proposition that it can apply to them.

Now, how has it applied to them to date? We've talked about the *McCorkill* decision today and in that decision, the Court of Appeal was willing to examine the worthiness of the heir, and in that decision they did. The Court made a finding that this heir was unworthy, even though - and I think this is important - the test -- the deceased could have donated to them when he was alive. There was nothing illegal about making that donation. It was the court intervening in his will saying that in life, he could have given to this organization, but in death, you can't because we don't approve of the organization's purposes and actions.

In the *Spence Estate*, we've talked about that at length today. And, Sir, I take you to paragraph 71 of our submissions where I go through some important principles that I think *Spence* reveals to us.

THE COURT: I'm there.

MS. OSUALDINI: So paragraph 71(a), this is found at -- at paragraph 56 of the *Spence* decision, is that they reaffirm that we know that courts will intervene in a private trust to avoid offending conditions on public policy grounds. And the case law has enumerated the type of situations and the type of conditions that will get struck down, such as restraints against marriage, interference with the parent-child relationship and whatnot. So we know from the case law that conditional gifts that are against public policy are not permissible in a private trust.

Turning to paragraph (b), which is quoting from paragraph 58 of the *Spence* decision, is that while the Court of Appeal in *Spence* did not follow *McCorkill,* because they did not want to start examining and leading extrinsic evidence on the nature of a beneficiary and whether they're deserving or not, they did say that they found:

> ... no support in the established jurisprudence for the acceptance of such an open-ended invitation to enlarge the scope of the public policy doctrine in ...

And this is where I think it's important, I emphasize:

> ... estates cases.

And what I submit, I think the Court was referencing there is *Spence* is about a -- about an individual's estate and I don't think that *Spence* stands for as broad of a proposition as the parties are suggesting to you it does because, and I'll leave this more to my friend for further submissions, this is not Walter Twinn's estate. These are the funds that Sawridge managed for a community, so I would submit that -- that *Spence* is not as overarching here as you -- as you've been told.

The next paragraph I'm quoting from, so I'm going to (c) of my submissions, paragraph 70 from the decision is: (as read)

> ... that Canadian courts will not hesitate to intervene on the grounds of public policy or the implementation of a testator's wishes requires the executors or trustees or a named beneficiary to act in the way that collides with public policy.

Now, Mr. Faulds made submissions about the trustees aren't being required -- actively required to do anything against public policy, which we disagree with and my friend will address in detail, but my point is that I think that's overstating what *Spence* says because the key words, to me, is that it's requiring someone to act in a way that collides with public policy. I think the collision with public policy is a lot more generic than Mr. Faulds argued it was and we submit that by continuing one of the, you know, as -- as we've said, historically most discriminatory regimes in Canadian history, the 1970 *Indian Act* definition, that's exactly what you're doing. You're colliding, you're making people collide with the public policy issue.

And then, finally, and I think this might be the most interesting and perhaps of a lot of use to you, Sir, given how unique this trust is, is at paragraph 73 of the *Spence* decision, this is very interesting:

> It must be remembered that the bequest at issue is of a private, rather than a public or ...

I emphasize: (as read)

> ... quasi-public, nature. Recall Judge's caution in *Canada Trust,* at page 515, that it was the "public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination".

So two really important points arising from this, Sir. One, this case is confirming that public policy requires you not to act in a discriminatory way. Discrimination is a public

policy problem. And secondly, this concept of a quasi-public trust is raised in this decision and I think everyone here collectively, this, What is a quasi-public trust in legal parameters and legal definition, I'm not aware of that being explored in Canadian law, what that specifically means. But I'd submit to you, Sir, that's -- I think that's what we've got here is something of a quasi-public nature because this is definitely not private funds that we're dealing with.

And so I think the decision in *Spence* provides the root of -- of opening up what is this quasi-public type of trust, which de-emphasizes the need and the importance of whether this is or is not a non-charitable purpose trust. And I would submit to you, Sir, that the principles of public policy and the requirements against discrimination apply because of the public nature.

And finally, Sir, given that we're -- we're all quoting each other's historical positions, I would draw your attention to the trustees' submissions of March 29th, 2019, that's the file date and that, of course, is on that infamous jurisdiction application that you've been hearing about today. And I draw your attention to paragraph 39 of those submissions, which I'm going to read. Oh. Sir, would it be helpful to pass a copy to you?

THE COURT: Sure.

MS. OSUALDINI: Thank you. I think my friend will be referring to these too, so keep them handy.

THE COURT: Okay.

MS. OSUALDINI: So I'm taking you to paragraph 39.

THE COURT: I'm there.

MS. OSUALDINI: So I quote: (as read)

> In short, the kind of discrimination contemplated in the 1985 Trust is abhorrent in our modern society. It runs directly contrary to the prohibitions on discrimination in trying in both our constitutional (the *Charter*) and legislative (the various Human Rights Acts) protections. As such, the trustees submit the definition is contrary to public policy.

So in 2019, the trustees took the position that this definition is against public policy and, as we know, not only from my submissions, but also the trustees' submissions, violating

public policy is a really serious matter and today the trustees are here telling you that it doesn't matter that this trust violates public policy, from their perspective.

And to conclude, Sir, from the perspective of the First Nation, it does matter. So with that, I'm closing and I think my friend -- we're going to take a brief break before my friend begins, unless the Court had any questions for me.

THE COURT: No. I may have after I hear from your friend.

MS. OSUALDINI: Okay.

THE COURT: Ten minutes? Do you need until ...

MR. RISLING: Yeah. That would be fine. Yeah. I'm in your hands for the (INDISCERNIBLE).

THE COURT: Let's go to 2:00.

MR. RISLING: Thank you for the extra 3 minutes.

THE COURT: Thank you.

(ADJOURNMENT)

THE COURT: Thank you. Please be seated.

Submissions by Mr. Schulze

MR. SCHULZE: Mr. Justice Little, I'm going to continue our submissions. My friends have given me a lot to deal with. So I think the way I'm going to go through this is I'm going to do a bit of reply to what we heard this morning and then that will allow me to clear that out of the way. And then I'll go into our submissions in roughly the -- in roughly the manner that is (INDISCERNIBLE) being talked about, why the stress is different, why public policies gives the Court sufficient authority than if it were a private trust and some remarks on the Court's discretion. But I want to go through, as we heard from -- my gosh, from four -- four lawyers before Ms. Twinn, so there's a lot here to -- to get through.

So -- so this morning, right off the bat, you were -- the Court was told by the counsel of the Trustees that we're not here to discuss validity, which is absolutely true because for -- in their wisdom, the trustees have decided that validity is issue 1(a), but we'll start with

1(b), which is discrimination. But then he said, Or to say who may or may not be included, nor ways that the *Indian Act* discriminates. Well, our submission is -- well, first of all, that -- that can't be true. The exact issue before the Court is after a recognition that the beneficiary rules discriminate can the trustees nevertheless distribute.

I'm not sure how the Court -- decide anything if it didn't look at the ways that that discrimination operates. And, of course, the way that discrimination operates is by borrowing the now repealed *Indian Act* definition and making it worse. So I strain to follow the logic, but if we go back to what we're here about today is about that question, can the Trust distribute, notwithstanding the fact that there is a consent order saying that it does discriminate. And remember that that consent order says expressly that this Court can look at -- it says -- and I won't take you to the order, but it's paragraph 3 of the discrimination order is: (as read)

> The justice who hears and determines the remaining issues within this application may consider all forms of discrimination in determining the appropriate relief.

So I don't agree with my friend that once we say we're not here about validity, we -- we can start narrowing -- or narrowing and narrowing the debate. Now, my friend talked about -- he said, Public policy should only be invoked where the issue is incontestable. The presumption is in favour of the commercial arrangement. Now, that is -- and then strangely, he went on to say, Well, here is a factually similar case, *Taylor*. Well, *Taylor* is not remotely a commercial arrangement. *Taylor* has also many differences from this case, but first of all, *Taylor's* not a commercial arrangement and we submit to you, of course, neither is this trust at all a commercial arrangement. It is -- it is something sui generis. So if we look at this, I agree *Tercon* -- I believe that is -- is about, you know, sophisticated commercial parties contracting out of liability. But the Court still says: (as read)

> Nevertheless, freedom to contract is not unlimited. Public policy erects a boundary.

We are here to talk about whether we're -- we've passed the boundary. Then we heard that *Taylor* and -- and *Ginoogaming* sought to modify the terms of the trust. That is exactly wrong. The judgment says explicitly it is about interpreting the terms of the trust. There was no application for amendment there. We were told that -- well, *Taylor* applies and look, it's about the band list as of 2001 and the fact that in 2018, there were new members and the Court said that this was okay. Well, that's not -- in passing, sorry, I want to mention one thing. My friend also said, Well, in 2001, *Ginoogaming* was already thinking about the effects of the *McIvor* judgment. I'm not sure how because the *McIvor*

judgment didn't come out until 2009. I can tell you that nobody working in this field in 2001 had any reason to think the *McIvor* judgment was going to come and overturn whole chunks of the registration rules.

But be that as it may, we're in a totally different situation here because in -- in *Taylor,* the effect -- once we got to 2018, '19, the effect of the 2001 definition, which was simply the band list, was discriminatory. But in our case, the intention was discriminatory. It's -- they're -- it's -- we're not at all in the same context. But then my friend said that it's -- this is complicated. It's not universally acknowledged that this is abhorrent discrimination. The Court is left with this complexity. I honestly don't understand what that's supposed to mean.

First of all, my friend said this is abhorrent discrimination. I mean, that didn't come from me. That was -- that was the signed submissions of the trustees represented by the same counsel 6 years ago. So maybe that's universal, but it's pretty much everybody here in the room so far and there's been ample case law, which we cited in our brief. And I'll come back to this later, but the *Alberta Human Rights Act* could not be clearer that gender discrimination is contrary to public policy. So this -- this -- you know, it's easy in any given to case to say, Oh, it's very complicated, with the implicit invitation of the Court to like throw up his hands and do nothing. But I don't actually think this is complicated.

The -- the -- let's -- let's go back to basics. The beneficiary rules of this trust say if a man of a -- if a male member of Sawridge marries a non-Indian woman, that's a-okay and their kids are beneficiaries. And if his sister marries not even a non-Indian man, but maybe just a man from another band, that's bad and there are -- and so are their kids. I don't think that -- that we have to work incredibly hard to ask ourselves whether that's discriminatory. It's pure gender discrimination. I can multiply the examples. If the man has a son out of wedlock, the son's in, but if he has a daughter out of wedlock, the daughter's out. Why? Because she's his daughter, not his son and on and on it goes.

So to say, Oh, my gosh, this is so complex, well, yeah, it is complicated. I mean -- you know, I think this is a matter of record. I argued (INDISCERNIBLE). It took a while to take the Court through how it all works. It's not -- it's complicated, but is it -- so some kind of complexity that we can throw up our hands and say, Gosh, I don't know if discriminating against women just because they're women is abhorrent. I mean, how can we -- how is that a serious proposition in 2025? On -- okay.

Then we were told, Well, the trust was settled with $100 and its validity is not questioned. Well, I'm sorry, I read an application filed by the trustees that asked for an order declaring the trust to be valid. I'd like to -- I'm -- I don't understand that. I

genuinely don't understand. If the trustees say the validity is not questioned, why on earth are you asking this course -- this Court to order that it's -- the trust is valid? It -- it's -- they're -- they're -- one of many submissions that simply leave you perplexed. No one questions the validity of the trustee's office. I was here this morning. I thought -- I thought there was an application before this Court to question exactly that.

The -- then -- then we started going off into complete speculation to try and reassure the Court. For instance, we were told, Well, the beneficiaries are ascertainable because sure, there might be some difficulties, but can -- this Court can solve the problems. We weren't told how. Our submissions explain in detail that, in fact, the definition of beneficiaries for the trust borrows and entire system that no longer exists, where neither the registrar nor the government counsel are available anymore to make the relevant decisions. The trustees assure us that somehow you, Mr. Justice, will deal with that. I don't know how, but then they -- they further reassured us.

They said, Well, it's likely that illegitimate children can be included because it's incontestable there's discrimination here against illegitimate children. I'm -- I'm sorry. I'm even more perplexed by that. Is my -- is my friend here for the trustees today to make an undertaking that there will be no discrimination against illegitimate children, notwithstanding that that's the effect of the trust, or is she just saying, It's likely my clients will be nice? Because that not reassuring -- shouldn't be reassuring to anyone. And then she says, Well, anyway, many discriminations, many -- or excuse me, many beneficiaries will be entitled anyway without discrimination.

I'm just going to remind the Court, we don't know who they are, how many of them they are because there is no beneficiary list. So that's the sort of assertion in the air. That's -- there's no -- there's no factual basis for that. My friend may be right. She may be completely wrong. We don't know because her clients have never actually made the list. Then she told -- we were told, for instance, *McCorkill* is a unique case because a criminal entity was being given money. Well, that seems to me to amount to be saying, you know, it's okay. We're just sexist. We're not criminals. I don't find that particularly reassuring, but it's also, as I told the Court, directly contrary to what the legislature has told us about public policy in *Alberta Human Rights Act.*

And then we -- we went even further. We -- and this is sort of the -- the hallmark of the arguments of this morning is that we constantly retreated further and further from what we know the facts to be into realms of law or sort of tangential facts to always take us away from what is really happening. And -- and here's a perfect example of this. When my friend said, Well -- on behalf of the trustees, she said, Well, Sawridge First Nation can sure the discrimination that is suffered by, for instance, the C-31 women. The women who lost status by marrying out before '85 and went back on the band list, but

cannot be beneficiary to the ’85 Trust.

And what does my friend tell us why that’s okay? Well, because Sawridge can cure that by giving them the benefits of a 1986 Trust, to which I can only say did the style of cause change? Because I -- so as far as I know, we’re hearing the application on the 1985 Trust. What happens under the 1986 Trust is, frankly, irrelevant. It is as if -- Mr. Justice Little, it is if -- as if my friend said, Well, sure, your father’s -- your grandmother on your father’s side disowned you for marrying -- for marrying a woman of the wrong colour, but don’t worry because your mother’s father will give -- will still leave you something in his will. They’re two different instruments. The fact that -- that it’s absolutely true that -- that when Sawridge First Nation admits people to membership, they become beneficiaries of the 1986 Trust. But what has that got to do with what we’re talking about? They’re still excluded from the 1985 Trust, which is -- which is what this application is about.

And -- and so it goes, right? Then we were told, Well, it’s not the trustees of the 1985 Trust who control membership. Absolutely true, but it is the -- the trustees of the 1985 Trust who control beneficiary status and the revere is also true. Chief Twinn and his council can make -- can undue discrimination, as they did for Shelby (phonetic) Twinn and make her a member, but only the trustees can make -- can make her -- can agree that she’s a beneficiary. And moreover, if she doesn’t meet the criteria of the -- of the 1985 Trust, there’s nothing that Sawridge First Nation can do about it. And, in fact, I don’t think there’s anything that the trustees can do about it and let’s go further with that example. Okay?

If under the terms of the trust, if a beneficiary of the trust, like Shelby Twinn, marries a non-Indian man, they’re out. That woman is out. So the entire discussion of memberships, Sawridge’s role, that doesn’t take us to the point here. It’s a distraction and my fear is it’s a deliberate distraction. And -- and then, you know -- and then we were -- we -- by the end of -- of the trustee’s submissions, we were going further and further into the realm of utter speculation. We were told Sawridge First Nation is asking the Court to create new law and potentially disrupt First Nation trust. Which one? Because, in fact, as we were told, and this is absolutely true, most First Nations trusts have the First Nation itself as the beneficiary. This one is different. The ’86 Trust -- the ’82 and ’86 Trusts were all the members and the ‘85 Trust is all the members, if only the old discriminatory rules still apply. So my friends for both the trustees and the OPGT admit those are purpose trusts, those are okay. We’re not -- that’s -- so there’s nothing to let this Court assume that we’re disrupting anything with what we’re suggesting here. And in -- it’s honestly a classic flood gates argument.

Mr. Fauld said -- I mean, this was fascinating. He said, There’s no legs, that was his

phrase, to the argument that the definition perpetuates discrimination. Now, I have to apologize because the version I think the Court may have is a bit hard to read. But you'll have seen that in the affidavit -- this came up, as I recall, in the -- already in the intervention here. There is an exhibit to the affidavit of Darcy Twin. It's an examination of the late Chief Walter Twinn. I just have to open my laptop because I have trouble reading our -- the version we've produced in court. And Walter Twinn is asked, What's the purpose of the trust? And he says, The purpose of the trust -- he's asking on cross-examination: (as read)

> Q Isn't it true the purpose of the trust is to exclude, among others, the beneficiaries of Bill C-31, such as the women who lost their status?

And -- and Chief Walter Twinn says, That's -- yes, that's correct. Who does he say that to on cross-examination? To my friend, Mr. Faulds. I mean, that -- this is remarkable and Mr. Faulds said, Enfranchisement is irrelevant. It's -- it's not at all irrelevant. It's not in our brief. Ms. Twinn touches on it. It's somewhat complicated and I can tell you there's a government bill that was introduced before the senate 2 weeks ago to address the exact point that there are discriminatory effects, and I mean discriminatory in the sense of violating the *Charter,* discriminatory effects of enfranchisement.

When Mr. Faulds says, Well, that's repealed, it's okay, he's wrong. He's just wrong. It's not okay because it's repealed. And, you know, it's the same when he responds to us by saying -- he says, Well, you know, we -- we submitted to you that this -- the definitionary -- the definitionary -- the -- the -- excuse me, the beneficiary definition, oh that was tricky, depends on this system of protest when we -- comes to illegitimate children, right? You could -- a woman could have a child out of wedlock and then (INDISCERNIBLE) could say, No, I know the dad is non-Indian, and -- and the child could be protested out. And Mr. Faulds says, Well, that -- that's okay. Protests are gone. Well, yeah, they are gone, but the beneficiary rules aren't gone. So he wants to assure -- he's assuring the Court it's okay because there won't be a protest. I never heard from the trustees how they -- how they propose to administer this. I mean, suddenly it was suggested to you, Don't worry, perhaps the trustees won't look at illegitimacy. Why not? We were told their duty is to enforce the trustee -- I mean, we're -- we're -- we've left -- we've left the facts far behind, is my point.

The -- there's -- and then Mr. Faulds said, Well, anyway, the legitimacy, that's a -- that's a discretionary provision. But then he also says, Well, Leonard Foundation is different because it required the trustees to engage in discriminatory conduct. So are we supposed to understand that here, the discrimination by the trustees was discretionary? They might to choose to be bigots and that's okay because it's different from Leonard Foundation,

where they absolutely required to be bigots? I -- again, I strain to understand what -- what we're being told here, other than that there's discrimination, but the Court shouldn't worry about it.

A brief moment on the charts that are attached to the -- our submissions, just because they're -- I made them. Mr. Faulds said they're about -- only about post 1985 discrimination. That's -- that's just legally not true. And it's -- it's actually -- but it's perhaps actually useful to really emphasize to the Court. All of this complex litigation since '85, the *McIvor*, DeJaneau (phonetic), to some extent, the -- the -- to a lesser extent, the Heel (phonetic) case, they are about the transition from pre '85 discriminatory rules to what was supposed to be a post '85 non-discriminatory regime. But they're not just about post '85 discrimination. They're about how post '85 rules perpetuated pre '85 discrimination. That's why they're irrelevant to a discussion of a trust that imports the 1970 Act as its -- as its set of rules.

And then -- and then Mr. Faulds, again, reassures us by saying, You -- you -- and I wrote this down, You can't find the definition discriminatory without delving into the terms of the *Indian Act.* And that was his way of telling the Court, It's okay, we're not like Leonard Foundation, right? Leonard foundation says, you know, no -- no women, no blacks. Here, he says, It's not like that because you have to delve into the *Indian Act.* Well, I literally can't follow that. The -- it's the 1970 *Indian Act,* universally acknowledged to be discriminatory. So how much -- at what point -- you know, how much do you have to delve before it becomes a problem?

I mean, the -- the comparison that came to my mind was what if we had a trust instrument that said, Well, nobody with a melanin content of their -- level of their pigmentation above 'X' level can be a beneficiary. So we would have to delve a bit into physiology to know that black people have a certain level of melanin, so would that make the rule okay? Because that's essentially what we're being told. The entire 1970s structure is discriminatory, deeply discriminatory, especially against women. But we're -- the OPGT says, That's okay because you don't see that on the face of the trust, since you need to delve into the -- the 1970 Act. Well, the 1970 Act is part of the Trust definition.

I don't think that's a lot -- I don't think that's a gigantic leap and it's also kind of a strange notion of discrimination that I had understood Canadian law had left behind several decades ago, which is it's about what really happens, not, you know -- I mean there's the famous case of *Brooks v. Canada Safeway,* right, which is pre-*Charter* where they said, Well, it's not discrimination because it's -- it's only pregnant -- people who become pregnant. It's not sex discrimination because the -- the benefits don't cover pregnancy. That -- that's gone, right? Now, if we say it's women who will become pregnant, so if you exclude pregnancy, it's sex discrimination.

I guess the only other thing I'd say in response to OPGT is -- quickly is that we were told that as an intervener, Sawridge First Nation can't come and seek a remedy to produce its preferred result, that that's inappropriate for an intervener. That is absolutely the case when one is intervening before the Supreme Court of Canada. That is not -- that is not the law of intervention. At first instance, generally, it's not the law of intervention under *Alberta Rules of Court.*

So now I want to talk a bit about some of the more basic facts. Why is this trust different from -- from the others in the case law that justify the scrutiny under -- under public policy? Ms. Osualdini took you through some of the points that you will have already seen in our brief. You know, there were -- there were serious issues. In the 1980s, there was rather serious questions about the capacity of an *Indian Act* band. And so we get this -- for that reason and for others, we get this trust that is for all the members, but not for the band. That much is absolutely uncontested.

But where we go into -- again, where we start floating away from the facts is when we're told things like, Well, it's just $100 that Walter Twinn gave and that created a defined class of beneficiaries. What -- first of all, the trust has a lot more than $100 in it or we wouldn't be here today. But more importantly, where those -- where -- what really happened? We know there was a resolution of chief and council. For that matter, there was a meeting of the -- there was a general meeting of band members and they voted on it. That is -- by the way, I just want to tell you, The Court, that would be -- the band council resolution is Exhibit I to the Bujold affidavit of September 12th, 2011.

MS. OSUALDINI: Exhibit J.

MR. SCHULZE: Oh, excuse me, Exhibit J. Thank you.

MS. OSUALDINI: No worries.

MR. SCHULZE: And then the next exhibit is this -- the -- the declaration of trust itself mentions the general meeting of the band to ratify. So first of all, if this was just Walter Twinn handing $100, what are chief and council doing there adopting resolutions to approve it? Why is there a general meeting of members? But more important, if we ask ourselves, where did all this money come from? We go through this in the brief in detail. It comes from the -- the oil and gas on the reserve. The oil and gas, that money is governed by public statute, the *Indian Act,* the *Indian Oil and Gas Act,* the *Financial Administration Act*. It gets into this -- that's how it gets to this trust.

To talk about a purely private trust with, as my friend said, it's just legal title and a designated class of beneficiaries, maybe in some other trust in some other case, that's all fine, but we all know what's not what really happened here. And -- and, of course, Ms. Twinn referred to the reductio ad absurdum that takes this to, which is that if the trust fails, it goes back to the settlor. The settlor is Walter Twinn. Ms. Twinn is his widow and executor. Is anyone here seriously maintaining that if this Court were to conclude that the trust fails that Ms. Twinn should get all those -- those millions? I mean, that's not -- literally not anybody's position here today, not even Ms. Twinn.

So let's -- let's be real about what this trust is. It -- maybe it's -- maybe it's a quasi -- maybe it's quasi-public, maybe it's a non (INDISCERNIBLE) purpose trust. What it is is the reflection of the reality of that community at that time. And it's community assets that were being put to use for community purposes. But unfortunately with a beneficiary, that's a definition that with hindsight, it has deep, deep problems and we can't walk away from them by just pulling out the word private trust and -- and being content with that.

THE COURT: Sorry. Sorry to interrupt, but --

MR. SCHULZE: No, no, please.

THE COURT: I heard you say that the trust reflects the value of that community at that time, so isn't that what Chief Walter Twinn was doing in 1985? He was saying that the value that I, as the chief, attribute or embrace for my people is the value -- are the values that are confirmed in the old, admittedly discriminatory, *Indian Act.*

MR. SCHULZE: Okay. Yes. And I have two answers to that to -- to what I think is the Court's concern. And my first answer is -- is a point is as well being made, which is would we -- can -- this is the public body, all right? The chief and council is a public body. Do we accept that public bodies can contract out of their public law duties by handing big pieces -- big amounts of property, big pieces of assets -- significant assets over to private actors? Are they allowed to do through the back door what they're not allowed to do with the front door? And our submission is no. But either -- and -- and maybe it's not a second submission, so much as support for this because I'd -- I'd actually like to take the Court to it, if I can?

Could help me find the -- do you know where the *Alberta Human Rights Act* is in -- in our authorities?

MR. RISLING: I have an electronic copy open here.

MR. SCHULZE: No. So do I, but I want to take the Court to it.

Does the Court have our authorities?

THE COURT: If you give me it -- I've got yours here, yeah.

MR. SCHULZE: Sir, if you can just tell me which -- which tab that is?

MS. OSUALDINI: It's just hyperlinked. I think it's just hyperlinked.

MR. SCHULZE: Oh, it's just hyperlinked in the -- okay. So sorry, this is the hazards of spreading the -- the paperwork between two offices. I didn't realize it was only hyperlinked. But let me -- the second -- the -- here's the -- here's the preamble from the *Alberta Human Rights Act* -- which, by the way, reproduces with some new ground -- new -- new grounds of forbidden -- prohibited discrimination. It reproduces the old *Individual Rights Protection Act* that had been the law since Peter Lougheed brought it in in about 1971.

> Whereas recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world;
>
> Whereas it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation.

My answer, I think, Mr. Justice Little, is sure, Chief Walter Twinn had to give an exemption. He decided to execute it -- we are in -- I think it is uncontested if he had just continued to do it through the vehicle of chief and council, the *Charter* would have stopped him from the discriminatory act -- aspects of that that would -- carrying out that -- that intention.

THE COURT: Because it's a public body, you're arguing?

MR. SCHULZE: Right.

THE COURT: Okay.

MR. SCHULZE: Right. So is there some escape hatch for public bodies to discriminate by doing it through a trust? And our submission is no.

THE COURT: You've covered that point already, so, yes.

MR. SCHULZE: And it's all about public policy. And maybe I'll just mention too, you know, I -- it's in our brief, but the case law is also pretty clear now that, you know, there are forms of discrimination that because they're prohibited by customary international law are prohibited by -- are contrary to the common law in Canada. That's what the Nebson (phonetic) judgment is about. So it's not -- yes, that was his intention, but lots of government intentions bump up against the limits of it -- our authority.

THE COURT: Your friend is standing.

MR. SCHULZE: Thank you.

MS. OSUALDINI: I think that's also (INDISCERNIBLE).

MR. SCHULZE: And -- and that's -- that's also why we don't think it's as simple, by the way, that the history of the trust is also why we don't think it's as simple as saying -- as I was -- there's a legal title -- there's the legal title under the trustees and -- and there's just a proprietary interest for these existing members because in fact -- and maybe that'll allow me also to clear up something important. There's in many of the -- in some of the submissions, especially I noticed in the written submissions of the OPGT, there's a kind of slippage. We kind of -- we end up being very fuzzy. Who's -- who's benefitting from this discrimination? And there is a real risk that -- that we can read all of the documents quickly and we can say, Okay, well, there was the -- the band list as of -- as of April '85 and then there's the new band list with the corrections of C-31. And so '85 is for the old -- the band as -- as it was before and '86 is for the band as it will be in the -- after that. But that's not true. That's not how the '85 Trust works.

The '85 Trust says, We're going to create this sort of zombie band, or -- or rather, We're going to create this band with zombie rules. People will keep being born who will keep benefitting from this discrimination because they're in the male line, while those -- their siblings, their cousins, the female line are excluded. It doesn't stop. It -- it's -- and that's, by the way, one of the very important ways, one of the many ways, this case is actually nothing like *Taylor.*

Taylor -- *Taylor* has a band list that -- that was frozen in time. We have a beneficiary definition that's frozen in time, frozen from a discriminatory time, but it keeps -- it keeps having its effect and it will keep having an effect. And -- and maybe this is also one of the more puzzling aspects of the OPGT's role -- participation is. I think I understand that one of the OPGT's concerns here is there is this class of '85 Trust beneficiaries who may be entitled under the -- the '85 rules to be beneficiaries, but are not entitled to be band members. Because remember that, subject to the requirement of taking the C-31 women, the women who lost their status by marriage, and the band list as it was, Sawridge from '85 on controlled its own band list, makes its own decisions about band.

So I understand and I'm sympathetic to the OPGT's concern that they represent a certain group of people who have rights under the '85 definition that they would not have under the '86 definition, all right? Which is why there was a lot of opposition to the application by my friends on behalf of the trustees back when they said this was discriminatory and was contrary to public policy. There solution was, so let's just make it the band list. So I understand the OPGT that far.

Where I'm a bit shocked, to be honest, is the OPGT seems remarkably untroubled by all the negative effects the '85 Trust rules can have. Because remember, they're not even just -- I was almost understating the case when I said it has -- it's a trust -- the beneficiary definition has these zombie rules because they're -- they're the 1970 rules, but maybe just a little bit worse. Because under the 1970 rules, for instance, the illegitimate children of a female band member, if there was no protest, they were in and that was that. The '85 rule -- rule -- definition actually says, Actually, no, but in our case, the trustees can take them out again anyway. And -- and when I say I'm a bit surprised by the OPGT's position, they may have a -- they have some people who are a bit better off -- might be better off this way than is -- with the band list, but they have -- they live with this sort of Damocles about them if they are, for instance, born out of wedlock.

There -- there -- on the topic of *Taylor*, there -- there is several -- a lot of things to say about it, but one of them is the -- some of them I've already mentioned. It's -- it's about a fixed band list, not a definition. It's -- it's about fixed list and a list from 2001 that all the decisions had been made in 2001. The question was does the fact the law has changed since then do anything here, change anything here? And -- and incidentally, you know, my friend said, Oh, this complexity here is astounding, and yet, kind of disregarded that when she took us through *Taylor.*

I mean, in *Taylor,* they were confronted with the fact that you had had two judgments that had declared the entire system of determining Indian status to be invalid, but had suspended the declaration to let Parliament cure this issue, cure the problem and -- and

Ginoogaming, as the band was stuck in this in between period. That's completely different from this situation here. No one was in any doubt when this trust was created that this would be discriminatory.

Ginoogaming just said, Okay, we got all this money to hand out. This isn't 2001. This can be everybody on the band list on day 'X' in 2001. And come 2018, '19, you've had *McIvor*, you've had DeJaneau, that band list was looking discriminatory, but the list was clear. That's not our situation remotely. We don't even know that the list is. We're using criteria that we didn't have to wait for any judge to tell us it was discriminatory. I mean, Walter Twinn said that to Jon Faulds on cross-examination because yes, the point was to exclude these women.

They had -- those members as of 2001 had a proprietary interest in these payments. That's not the situation here. This is a totally discretionary trust. It's open to the trustees to award everything, nothing, to all beneficiaries, none of the beneficiaries, beneficiaries with green eyes. It's -- they're not the same and also, very crucially important, when you read *Taylor,* you'll see that the Ontario Superior Court says, Well, we've actually -- these parties have been before a different Court before. And they've been before the Court before in a decision we cite in our brief. And I apologize because I think when we drafted the brief, I don't think it -- the penny dropped that it was the same band. That other decision is called *Medeiros v. Echum,* it's in our authorities.

And there the issue was different. There, the issue was the band had decided -- remember, the band acts as trustee of the band monies. Okay. So the band -- in the *Ginoogaming* litigation, the band is as the trustees are here. And the band had said, We've decided we're going to make a payment to elders, but it's only going to be elders who live on reserve. And a decision had by then -- the -- the -- just recently come down from the -- or was about to come down from the Supreme Court of Canada. By the time that the litigation -- the decision had come by, by the time of the band council resolution, then this would be decided in the Court of -- federal Court of Appeal and this is then subsequently upheld by the Supreme Court of Canada. It's a case called *Corbiere.* I don't know if the Court's familiar with it. It's one of rare decisions of the Supreme Court of Canada on what are analogous grounds under section 15 of the *Charter.* And the Court decided that non-resident band members, they said that constitutes the analogous grounds of aboriginality of residence.

They said, Given the history of exclusion -- exactly the same stuff we're talking about today, all the people who lost status, enfranchisement, marrying out. The Supreme Court said, That created a population for many, many bands of non-resident members. Mr. Corbiere was challenging the fact that as a non-resident member, he couldn't vote in his band council elections. And the Supreme Court of Canada agreed with him, vindicated

him and said, That's analogous grounds, it's to protect against discrimination under section 15 of the *Charter*. You can vote.

Then *Ginoogaming* was -- the federal Court was confronted with the situation that the band council in *Ginoogaming* had said, We're only going to pay -- we're going to pay the elders, but only to resident elders, and the federal Court strike it down as unreasonable and discriminatory. That's the case that's like ours because the trustees are the deliberately engaging in a selection of beneficiaries that they know is -- constitutes prohibited discrimination under section 15 of the *Charter*. *Taylor* -- this -- this constant relying on *Taylor* for our purposes today risks deeply, deeply confusing the issue.

So I'd said -- sorry, I've drifted away from my -- my rough outline. I said that I would talk about how even as a private trust, there's ample authority to say this is contrary to public policy. And, you know, it's -- it's -- I -- you never get to use -- you don't get to use this phrase very often. It's trite law that is contrary to public policy to discourage people from marrying. Well, the trust says to women, Marry the wrong guy and (UNREPORTABLE SOUND), you're out. You're not a beneficiary anymore. I mean, that sounds like the classic definition of -- of discouraging -- you know, interfering with the free -- with -- with the institution of marriage.

It's the -- it also -- and -- and this, you'll see, is pretty clear from the whole sort of debate about customary international law and it's -- it's not -- I will be very honest, it turns out, not to my surprise, not to be at -- settled that it is contrary to the international law to engage in sex discrimination. It is, however, settled that it is contrary to customary interlaw -- international law to be -- to engage in racial discrimination. That comes out of the -- the litigation about the Southwest Africa apartheid.

What -- what are these rules telling women? Not men, by the way, just women. Marry a man of the wrong race -- which could, by the way, include an Indigenous man of the wrong Nation. Marry a man of the wrong race, your children will be judged as part of his race. They are out as beneficiaries. That -- that's the classic -- even if we just see this as a private trust, how is that different -- how is that different from saying, All my kids inherit, but not if they marry Chinese people. And -- and does anyone seriously -- is anyone here today seriously arguing that would be a valid testamentary disposition?

I mean, I know there's has been lots of talk about *Spence*, but in *Spence*, the condition didn't disinherit the daughter. And my reading of the judgements is the facts leave some confusion. Yes, it's clear her father didn't agree with her -- her marrying a man of a different race, but there were other things happening. He didn't -- he didn't write a will saying, If my children marry people of the wrong race, they will no longer inherit, but isn't that exactly what this trust instrument does? How does it do anything different?

And, you know, I could multiple the example, you know? As I said, man who has a male beneficiary has children out of wedlock. His male kids are in. His female kids are out, you know? His sister has her kids out of wedlock. She decides later to marry the -- the husband -- the father, it becomes clear that he's not a member of the band they're in -- that they were in, they're out. None of this looks much like *Taylor.*

And then there was -- there was also the conditional -- you know, the conditional nature of the -- of the request. Mr. Faulds said there is authority that conditional -- conditional requests, conditional grants can -- can be looked -- challenged under public policy. How is this not conditional? Lots of people are in under these beneficiary rules, until they marry the wrong person or the trustees decide they've conceived with the wrong father and then they're out. How is that not exactly what we're looking at here? So I wanted to go --

THE COURT: Yeah. I'll have you --

MR. SCHULZE: I want to be a bit mindful of the time.

THE COURT: I'll see if you could wrap up by 3.

MR. SCHULZE: I -- that's -- that's what I was kind of aiming for. The -- the final issue is what's the Court's discretion here? I mean, as Ms. Osualdini said in our submissions, the Court's discretion goes from granting everything, refusing -- to refusing everything, to granting some things with -- with the same conditions -- some of it the same conditions, different conditions. The -- the Court's discretion is very broad here and I think that I'm not telling -- I'm sure I'm not telling the Court -- you -- you anything you -- that -- Mr. Justice, that you don't already know. Our submission is all -- is more focused, I hope. The -- you're being asked for a series of -- the Court's being asked for a series of orders here. As I said, the first order that the Court's being asked for is not the order that we're talking about today and that's an order that the -- the trust is valid.

Then the second order is that the distribution can occur, notwithstanding the fact that the -- the beneficiary rules are discriminatory. And then other -- other proposed orders would follow, like a distribution plan. But it's -- it's honestly not clear to me if that distribution plan is still the trustee's distribution plan or not. Our point is the Court's discretion should not be exercised to -- to issue this kind of declaration, so to speak, in the air. How -- and -- and this is a point is it's in our submissions, Ms. Twinn talked about it, this issue of the cart being before the horse. The -- I'm -- I'm absolutely in agreement. I agree certainty is not the -- the issue today, but my friends, as I said, did write in their brief in

this application the certainty is a fact. Well, it's not a fact. It can't be a fact if they're asking for it to be approved.

But our -- in our submission, the discrimination and the lack of certainty overlap the -- the mechanics. The instruments of the discrimination are also these antiquated statutory mechanisms that have ceased to exist. And so our submission is that they are intimately, inextricably bound together, the -- the trust's lack of certainty and the -- the -- and the discriminatory nature of the beneficiary roles. So that we would submit if we -- we -- the Court should exercise discretion not to grant this order that the trustees are seeking because until -- it should be -- it can't be disassociated from the issue of certainty.

That being said, if the Court does in it -- decide that it -- it can untangle them and it rule on this issue, I want to also use the discretion -- the declaratory, rather, nature of the relief sought to loop us back to the submissions that both the trustees and the OPGT made that somehow the issues that Sawridge is bringing before this Court today are out of time, statute barred. One of the -- the case we cited in our brief is -- I want to make sure I get the name right. I believe it's Shoots With a Gun. It's one of those typically Blackfoot names and they -- *Shot Both Sides*, excuse me. And that's the Supreme Court of Canada from 2024.

And what was the case about? Roughly, it's this. The Blood Tribe loses a tremendous amount of land in the 19th century and eventually, they sue and they have various reasons why they're not statute barred. And the Supreme Court of Canada says, Well, no, actually, you are. You -- your time for suing for damages or restitution of the land, if that were possible, is passed. We agree with the -- we agree with the federal Court of Appeal. But they say, Nevertheless, we're going to exercise our discretion to issue a declaratory judgment and the declaratory judgment will be to the effect that Canada did violate its treaty obligations to the Blood Tribe. And it's honestly not in the judgment, but a settlement, eventually, to my understanding, took place. But -- but they -- in any case, the Supreme Court is clear. They say that -- that will be the basis for -- for this -- a process of reconciliation, discussions between the First Nation and the Crown. And so your damages are -- are time barred, but not -- but not this declaration.

So our submission to you would be the -- the fact of the discrimination that occurs in this trust through its -- its beneficiary definition, the -- the violation of the *Chater* and therefore, of the rules of public policy, the Court's power to -- to make that declaration is not -- is not inhibited by laches or -- or any rule of limitations.

THE COURT: So where does that take us then? I say that they can distribute, notwithstanding that it is discriminatory, which is already acknowledged. So what does that declaration look like?

MR. SCHULZE: Well, the -- I'm sorry, I was trying to respond to a narrower point and -- and I understood my friends to be saying it's too late to -- it's too late to go back to a lot of issues raised by the way this trust is structured because the trust has been around for 40 years. And I'm saying, no, it's not too late. The Court can declare that the trust is not -- does not meet the three certainties. The Court can declare that the beneficiary definition is discriminatory, contrary to public policy. And then, honestly, after that, it will be up to my -- this isn't our application and we're an intervener, not a party. It will be up to the trustees to say what they make of that. All I'm trying to say is it's not laches and limitations that should be stopping this Court from -- from naming what is before it.

THE COURT: Okay. I suspect that your friends will argue that it's not your role to sort of seek that kind of relief. But I'm just trying to think that if it were and if I said, Well you can distribute, but had they brought this application in a more timely fashion, I would have declared it 'X', 'Y', or 'Z'. You're saying that that -- doesn't that just give rise to further litigation?

MR. SCHULZE: Well, I'll just note as an aside that when you bring an application that seeks, what, five or six orders and decide to skip the 1(b) and leave all the rest for another day, you're kind of ill placed to complain about further litigation. But on the more substantive question, I'll say I guess my submission is that this Court can say -- just as it could grant me -- my friends say they -- you -- they can grant the declaratory order they seek, I say the Court can decline to grant it and can, in fact, replace it with a declaration that the discrimination makes the distribution contrary to public policy. And I'm -- I hope I'm answering your questions. I feel like I'm not doing --

THE COURT: Well, no. I --

MR. SCHULZE: But it -- but no limit -- no laches or limitations should stop the Court from doing that.

THE COURT: Okay. But I think that's Ms. Twinn's position. I'm not putting words in her mouth, but it seems to me that that would be her position, is just don't grant it. Okay. I can't see if she's nodding or --

MS. TWINN: You're correct.

THE COURT: Okay. Thank you.

MR. SCHULZE: Is there -- boom, 3:00.

THE COURT: Oh, there you go. Thank you very much.

MR. SCHULZE: Thank you, My Lord.

THE COURT: Unless you think we need a bio break or something, do you want to just go ahead? Do you want to debrief your client or --

MS. BONORA: Could we have just like 5 to 10 minutes to just confer --

THE COURT: Sure.

MS. BONORA: -- and then -- yeah.

THE COURT: Well, let's take 3:15.

MS. BONORA: Okay.

THE COURT: I'd like to go and --

MS. BONORA: Perfect. Thank you so much, Sir.

THE COURT: -- use the (INDISCERNIBLE).

(ADJOURNMENT)

THE COURT: Thank you. Please be seated.

MS. HUTCHISON: My Lord, if it's acceptable to the Court, my friends have allowed the OPGT to steal a few brief minutes of their reply.

THE COURT: Sure.

Submissions by Ms. Hutchison (Reply)

MS. HUTCHISON: Thank you very much. First, My Lord, and with the greatest of deference to my friend, Mr. Schultze, he is new to the file, but to suggest that the 1986 Trust is irrelevant to the application before you is simply incorrect. The evidence about the 1986 Trust and how it interacts with the 1985 Trust and the

importance of that relationship has been in the record in this matter, I believe, since the first Paul Bujold affidavit. If not the first one, certainly the second. And it is an integral and rather important part of the structure before you.

Secondly, in response to my friend's suggestion that in Alberta, interveners can -- can seek a remedy, the OPGT doesn't agree with that position, but furthermore, the Court of Appeal in the appeal from Justice Henderson's decision made it rather clear what the law was on that point. And your own decision on this intervention application, Justice Little, was rather clear that the SFN does not have scope or leave to seek a remedy in this matter and I think that's complete answer to that particular point.

My friend relies extensively on the *Charter* and the *Alberta Human Rights Act.* The problem, My Lord, is that neither one of those pieces of legislation applies to this trust and that is a legal reality. Even if you could somehow establish that they did apply to this trust, none of the arguments before you deal with the justification issues that would come up under section 25 of the *Charter* and section 11 of the *Alberta Human Rights* legislation.

I'd like to end my comments it the Court with the fallacy of the escape hatch argument, My Lord, on a couple of fronts. First, it would not have mattered if SFM was a settlor rather than Chief Twinn in this particular matter. The nature of this trust as a private trust isn't arising from the identity of the settlor. It arises from the fact that there are individual beneficiaries identified and there is a lack of any directed purpose for Nation purposes for distributions. That's -- so my friend's submissions are eloquent and lovely and utterly irrelevant to what the deed actually says and that's what has to guide this Court, is the deed.

An escape hatch that SFN has tried to do indirectly what it cannot do directly, I think it's imperative the Court remember that should chief and council or Chief Twinn have decided that in order to protect the -- the resources of the Nation at that time, they would simply distribute these funds to all of the existing members that were members of -- recognized member to SFN just prior to Bill C-31. There would have been absolutely nothing illegal or objectional about -- about that. Instead, they chose to create the 1985 Trust. And to be very clear, they chose that route not by imposing it on the SFN members, but with the SFN membership approval. There was no legal obligation to keep it for the future and they did not use an escape hatch, My Lord. Subject to any questions, those are the comments of the OPGT.

THE COURT: Thank you, Ms. Hutchison.

Submissions by Mr. Sestito (Reply)

MR. SESTITO: In stealing a few minutes of our time, my friend has also addressed a few of the matters I wanted to address, so I'll be even more brief and then my colleague will have just a few points. First of all, My Lord, with respect to the application of limitations in this case, I would encourage you to take a look at the Alberta Court of Appeal decision on *Sawridge* from 2022. The citation, for your reference, is 2022 ABCA 368 and the Court does discuss, albeit in the context of the -- as a transfer issue, but it -- it's good background for how limitations and laches does apply in the case.

Secondly, my friend queried my reference to *McIvor* in the context of the *Taylor* decision. I don't remember using the word *McIvor* in discussing the *Taylor* decision. If I did, I misspoke. He's absolutely right, they would not have known about that decision or about the legislative changes that were coming up. All I meant it clarify was that the intention of the settlor was very clear that those were the -- the band list members at point in time that were to be the beneficiaries. So if I brought up *McIvor*, I misspoke.

My friend referenced my discussion at the outcome -- at the outset about this not being an opportunity to discuss beneficiaries. What I mean to say and to situate that is that we are not here today to identify who is or is not a beneficiary. That is -- that is simply that. And then I was a bit puzzled that my friend was a bit puzzled over my discussion of *Tercon*. They cite *Tercon* in their brief and I was simply, in my discussion over *Tercon,* trying to contextualize and limit its application. Those are the points that I wish to address. I think my colleague has a few.

Submissions by Ms. Bonora (Reply)

MS. BONORA: Just quickly, Sir, I think, again, our friend doesn't have the benefit of the -- being involved in the litigation, but, certainly, there have been many lists of beneficiaries exchanged and, certainly, the trustees have been working on that. It is not as though they have ignored that fiduciary duty. And all the parties here today have met and talked about lists and exchanged lists, so that's not something that hasn't been done.

In respect of the -- these assets, they didn't just come directly from the First Nation. They were held in trust by the government and then they were transferred to individuals who held them in trust and then they were transferred to the '82 trust, put -- they were consolidated from all the individuals who held them because, of course, we know that First Nation didn't think they could hold assets, and then they were transferred to '85 -- the '85 Trust. So these assets, in many ways, were never in Sawridge First Nation's hands because they didn't think they could, in fact, own them. And, again, in looking at the Court of Appeal decision with respect to the transfer issue, I think the Court of

Appeal has now said, They are in ’85 and you will deal with ’85.

I also think my friend has misunderstood the whole issue of a trust and the idea that once the assets are in a trust, you can’t just decide that, Oh, well, here’s where they came from, we should give them back. You have -- they’ve made a decision. It’s in the trust. Now trustees have legal ownership. The beneficiaries have beneficial ownership and you can’t just ignore those facts and take them away. And while my friends have focused on, you know, a woman who might marry and then might not be a beneficiary under the trust, I wonder if we should also focus on the fact that while she’s -- before she gets married, with the decision in our favour, she would get benefits under the trust. And there’s many people who are not impacted by this discrimination who are beneficiaries of this trust and we would suggest should have the benefit of their beneficial title and have the benefit of a distribution under this trust.

Much has been said about our application. I think it’s important for us to say that we have never thought that we would be putting the validity of the trust in issue. And once we -- as we’ve said to you before, this -- and as you’ve seen, our litigation has taken many baby sets to get some progress. The -- we had actually hoped that this issue, the ability to distribute under the trust, given the briefs that were filed and the jurisdiction application, which all, basically, came to the conclusion that there had to only be the creation of new law -- new law to eve amend the trust. There certainly was no ability in the current law to deal with this trust that we’d hoped that perhaps this issue would go by consent. Of course, as we can see, it has not, but I think the -- you know, obviously we will consider our application and consider what the next steps will be, but want to make it clear that these -- that the trustees believe there is a valid trust and they are not putting the validity of the trust in issue. Thank you very much for listening to us today. Those are the ends of our submissions.

THE COURT: Okay. Thank you, Ms. Bonora.

MR. SCHULZE: May I say one thing in -- in surreply?

THE COURT: Yeah. Okay.

Submissions by Mr. Schulze (Reply)

MR. SCHULZE: I’m a little surprised to hear my friends say you can’t take the money and give it back because Exhibit H to the affidavit in the application before you is an email from Ms. Bonora where she proposed to do exactly that. Email of December 4th, 2017, Ed Molstad: (as read)

> Ed, I'm attaching the settlement meeting agenda. You will see that ask about discriminations further down the list. Given how the meetings have gone in the past, I thought we would run through everyone is at on settlements, so that SFN can call a halt and tell them that SFN is dissolving the trust. I think that a declaration to the trust is discriminatory is helpful to any application you might bring to dissolve the trust, so we likely want to push for that.

MS. BONORA: Sir, can I just put that in context? Certainly, we had a very good relationship with the Sawridge First Nation and that was in the context of settlement discussions about how could we come to an end in this litigation? We've been exploring so many options in terms of looking to come to an end. That was one email in a much bigger conversation about how to ultimately preserve the trust assets. There was never an idea that the money would simply go back to Sawridge First Nation. But -- but these -- this discussion was -- should never have been before the Court because it was settlement discussions between the trustees and Sawridge First Nation. But I can tell you that the context of that was not that the money would go back to Sawridge First Nation, so.

THE COURT: Okay. Well, just to repeat what the Court of Appeal has said, and I think I said it in my last judgment, I'm not likely to take a step in this litigation that none of the parties are seeking, so, okay. Thank you all.

MS. BONORA: Thank you, Sir.

Decision Reserved

THE COURT: Oh, I should just tell you, you won't get a decision on this on quickly as you did -- well, on the other one you got a decision the same day with brief reasons to follow. And they will neither be as brief nor as timely this time, I'm afraid. So thank you very much.

MS. OSUALDINI: Thank you.

MR. SCHULZE: Thank you, My Lord.

MR. SESTITO: Yes, Sir.

MS. TWINN: Thank you, My Lord.

THE COURT: Thank you, madam clerk.

PROCEEDINGS ADJOURNED

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