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COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	2203 0043AC - and - 2203 0045AC
TRIAL COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND *INTER VIVOS* SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("1985 SAWRIDGE TRUSTEES")
STATUS ON APPEAL:	Respondents
RESPONDENT:	THE OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA (the "OPGT")
STATUS ON APPEAL:	Appellant
RESPONDENT:	CATHERINE TWINN
STATUS ON APPEAL:	Appellant
INTERVENORS:	SAWRIDGE FIRST NATION and SHELBY TWINN
STATUS ON APPEAL:	Intervenors
DOCUMENT	**FACTUM**

Appeal from the Order of the Honourable Justice John T. Henderson (Sawridge #12)
Dated the 4th day of February, 2022
Filed the 13th day of May, 2022

FACTUM OF THE INTERVENOR,
SAWRIDGE FIRST NATION

Field LLP 2500 Enbridge Centre 10175 – 101 Street NW Edmonton, AB T5H 0H3 Telephone: 780-423-7625 Fax: 780-428-9329 Email: jfaulds@fieldlaw.com **Attn: P. Jonathan Faulds, QC** **Counsel for the Appellant,** **the OPGT**	Hutchison Law #190 Broadway Business Sq. 130 Broadway Boulevard Sherwood Park, AB T8H 2A3 Telephone: 780-417-7871 Fax: 780-417-7872 Email: jhutchison@jlhlaw.ca **Attn: Janet L. Hutchison** **Counsel for the Appellant,** **the OPGT**	McLennan Ross LLP 600 McLennan Ross Building 12220 Stony Plain Road NW Edmonton, AB T5N 3Y4 Telephone: 780-482-9114 Fax: 780-733-9706 Email: david.risling@mross.com & crista.osualdini@mross.com **Attn: David Risling &** **Crista Osualdini** **Counsel for the Appellant,** **Catherine Twinn**
Dentons Canada LLP 2500 Stantec Tower 10220 – 103 Avenue NW Edmonton, AB T5J 0K4 Telephone: (780) 423-7300 Email: doris.bonora@dentons.com & michael.sestito@dentons.com **Attn: Doris Bonora, QC &** **Michael Sestito** **Counsel for the Respondents,** **The 1985 Sawridge Trustees**	Parlee McLaws LLP 1700 Enbridge Centre 10175 – 101 Street NW Edmonton, AB T5H 0H3 Telephone: (780) 423-8500 Fax: (780) 423-2870 Email: emolstad@parlee.com & esopko@parlee.com **Attn: Edward H. Molstad, QC &** **Ellery Sopko** **Counsel for the Intervenor,** **Sawridge First Nation**	Shelby Twinn 9918 – 115 Street Edmonton, AB T5K 1S7 Phone: 780-264-4822 Email: s.twinn@live.ca **Self-Represented Intervenor**

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OVERVIEW

1. These Appeals arise in the context of an Advice and Direction Application by the 1985 Trustees that has been under case management for over a decade, during which time the trust assets at issue, which were originally settled in 1982 for the use and benefit of only Sawridge First Nation ("SFN") members, have not been available for distribution to beneficiaries.

2. The crux of these Appeals is whether the trustees of the 1982 Sawridge Band Trust (the "1982 Trust") had the power on April 15, 1985 to resettle all trust assets into a new trust for a different class of beneficiaries and on different terms, in circumstances where they did not obtain the consent of beneficiaries and court approval for a variation or resettlement as required by section 42 of the *Trustee Act*.[1]

3. In Sawridge #12, the decision under appeal, the Honourable Justice J.T. Henderson (the "CMJ") correctly determined that the effect of the 2016 Consent Order in the underlying Advice and Direction Application relating to the April 15, 1985 transfer of all assets from the 1982 Trust to the 1985 Sawridge Band *Inter Vivos* Settlement (the "1985 Trust") was to approve only the transfer of legal title to those assets to the 1985 Trustees and that beneficial title remained with the class of beneficiaries defined in the 1982 Trust deed, being the present and future members of SFN.[2] This Court should uphold the CMJ's decision.

PART 1 – STATEMENT OF FACTS

A. Sawridge First Nation Trusts and Bill C-31 Amendments to the *Indian Act*

i. Source of Funds Used to Purchase Assets Placed in the SFN Trusts

4. In 1966, Chief Walter Patrick Twinn became the Chief of SFN, and he remained in that position until his death on October 30, 1997.[3] When Walter Patrick Twinn became Chief in 1966, SFN did not have any businesses. SFN's goal was to save as much as possible and use its capital

[1] *Trustee Act*, RSA 2000, c T-8, s 42
[2] *Twinn v Trustee Act*, 2022 ABQB 107 [Sawridge #12] at paras 62, 69, 70-75, 285-286
[3] Affidavit of Paul Bujold sworn September 12, 2011 and filed September 13, 2011 ("Bujold September 12, 2011 Affidavit") at para 6 (OPGT's Extracts of Key Evidence ("OPGT EKE") Tab 5 at A44)

and revenue funds to become totally self-supporting one day.[4] Chief Walter Twinn believed that the lives of SFN members could be improved by creating businesses that gave rise to employment opportunities. He believed that investing a portion of SFN's oil and gas royalties would stimulate economic development and create an avenue for self-sufficiency, self-assurance, confidence and financial independence for SFN's members.[5]

5. As such, SFN began to invest some of its oil and gas royalties in land, hotels and other business assets in the early 1970s, and such assets were held on trust for SFN by individuals because it was unclear at that time whether SFN had ownership powers.[6]

6. The primary source of income of SFN originated with the discovery of oil on the SFN reserve lands. The royalty monies resulting from the sale of oil and gas were received and held in SFN's capital account in accordance with the *Indian Act*, and SFN capital moneys were expended with the authority and direction of the Minister and the consent of the Council of SFN. The SFN capital moneys were used for economic development, specifically to invest in various companies carrying on business under the Sawridge name, and were placed in the SFN Trusts.[7]

7. SFN adhered to Treaty No. 8, the written text of which provides, in part, that the SFN "reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained."[8]

8. The oil and gas underlying the SFN reserves constitutes an interest in their land. Pursuant to the terms of Treaty No. 8, the *Indian Act* and regulations and the *Indian Oil and Gas Act* and regulations, Canada granted oil and gas leases to third parties with respect to SFN reserve lands.

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[4] Affidavit of Darcy Twin sworn September 24, 2019 and filed September 26, 2019 ("Twin 2019 Affidavit") at para 7 and Exhibit B (SFN Extracts of Key Evidence ("SFN EKE") at I5, I11, I13-I15)
[5] Bujold September 12, 2011 Affidavit at para 7 (OPGT EKE Tab 5 at A45)
[6] Bujold September 12, 2011 Affidavit at para 8 (OPGT EKE Tab 5 at A45)
[7] Twin 2019 Affidavit at para 7 and Exhibit B (SFN EKE at I5-I6, I21-I26)
[8] "Treaty No. 8 – Indian and Northern Affairs", Woodward, *Consolidated Native Law Statutes, Regulations and Treaties 2019* (Thomson Reuters: Toronto, 2018) at 1086 **[Tab 1]**

Oil and gas was produced from SFN reserve lands and the royalties from this production were paid to Canada in trust for SFN.

9. Pursuant to section 4 of the *Indian Oil and Gas Act*, and regulations, the royalty money was paid to Canada in trust only for the benefit of SFN as the "Indian Band concerned".[9] This money could only to be expended for the "use and benefit" of SFN,[10] and could only be paid out in accordance with the *Indian Act*.[11] The *Indian Act* provides that SFN was, and continues to be, the legal owner of the royalty money paid in trust to Canada, which is deemed to be capital moneys of SFN.[12] The money received by Canada for surface rent and the interest paid on capital moneys was, and continues to, be revenue moneys of SFN.[13] Pursuant to section 64 of the *Indian Act*, the expenditure of capital moneys requires the consent of the Council of a band and the authorization and direction of the Minister.[14] Unless an investment by SFN fell within s. 64(1)(a) to (j) of the *Indian Act*, the capital moneys of SFN were expended pursuant to s. 64(1)(k) of the *Indian Act*, for the benefit of SFN.[15]

10. Section 64(1)(k) of the *Indian Act* provided authority for the transfer of capital money from the Crown to either SFN or an independent trust for SFN.[16] In a letter from the Assistant Deputy Minister, Lands and Trust Services, Indian & Northern Affairs Canada dated December 23, 1993, it was confirmed that the trusts held substantial sums which, to a large extent, had been derived from SFN capital and revenue moneys previously released by the Minister and such moneys were expended pursuant to sections 64 and 66 for the benefit of the members of SFN.[17]

11. SFN relies on this letter and the other evidence concerning the source of the funds used to invest in assets that have been settled into SFN's Trusts, to highlight that such funds were

[9] *Indian Oil and Gas Act*, RSC 1985, c I-7, s 4
[10] *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 [*Ermineskin*] at para 100
[11] *Ermineskin* at para 94
[12] *Indian Act*, RSC 1985, c I-5, s 62 [*Indian Act*]
[13] *Indian Act*, s 62
[14] *Indian Act*, s 64
[15] *Indian Act*, s 64(1)(k)
[16] *Ermineskin* at para 151
[17] Twin 2019 Affidavit at para 8 and Exhibit C (SFN EKE at I6 and I27)

released to SFN on its representation to the Crown and with the intention that such funds would be used for the benefit of its members, in accordance with the applicable legislation.

ii. The 1982 Trust

12. The 1982 Trust was settled on April 15, 1982 by Walter Patrick Twinn, in his capacity as Chief of SFN.[18] The purpose of the 1982 Trust was to settle assets that were at the time held in trust by him and other individuals for present and future members of SFN into a formal trust to which any further assets acquired on trust for the present and future members of SFN could be added, in order to provide long-term benefits for members of SFN.[19]

13. A resolution was passed directing all necessary documentation be prepared to transfer all such property into the 1982 Trust, and those assets were ultimately transferred into the 1982 Trust.[20] In October 1993, during the Bill C-31 trial, Chief Walter Twinn testified the reason for establishing the SFN trusts was that, at that time, SFN was not considered to be a legal entity.[21]

14. On June 17, 1983, the 1982 Trust deed was varied by Court Order, pursuant to section 42 of the *Trustee Act*, RSA 1980, c T-10, in order to provide for staggered terms for the Trustees.[22]

15. The 1982 Trust contains the following provisions which are relevant to these Appeals:

> 1. The Settlor and the Trustees hereby establish a Trust Fund, which the Trustees shall administer in accordance with the terms of this Agreement.
>
> …
>
> 3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Agreement. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein.
>
> …

[18] Twin 2019 Affidavit at paras 1, 5-6 (SFN EKE at I5); Bujold September 12, 2011 Affidavit at Exhibit A (OPGT EKE Tab 5 at A52)
[19] Bujold September 12, 2011 Affidavit at para 9 and Exhibit A (OPGT EKE Tab 5 at A45, A52-53)
[20] Bujold September 12, 2011 Affidavit at paras 10, 12 and Exhibits B, D, and E (OPGT EKE Tab 5 at A45-A46, A59, A62-A85); Excerpts of Transcript from the Questioning on Affidavit of Paul Bujold on May 27 & 28, 2014 at 45:19-27; 53:7-13; 54:19-27 (SFN EKE at I28-I29, I35-I36)
[21] Twin 2019 Affidavit at para 7 and Exhibit B at 3957 (SFN EKE at I5 and I23-I24)
[22] Bujold September 12, 2011 Affidavit at para 11 and Exhibit C (OPGT EKE Tab 5 at A46, A60-A61); Excerpts of Transcript from the Questioning on Affidavit of Paul Bujold on May 27 & 28, 2014 at 74:1-14 (SFN EKE at I37)

> 5. The Trustees of the Trust shall be the Chief and Councillors of the Band … it being the intention that the Chief and all Councillors should be Trustees. In the event there are no Trustees able to act, any person interested in the Trust may apply to a Judge of the Court of Queen's Bench of Alberta who is hereby empowered to appoint one or more Trustees, who shall be a member of the band.
>
> 6. The Trustees shall hold the Trust Fund for the benefit of all members, present and future of the Band; provided, however, that at the end of twenty one (21) years after the death of the last decendant [sic] now living of the original signators of Treaty Number 8 who at the date hereof are registered Indians, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among all members of the Band then living.
>
> …
>
> The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for the beneficiaries set out above: and the Trustees may make such payments at such time, and from time to time, and in such manner as the Trustees in their uncontrolled discretion deem appropriate.[23]

16. The foregoing provisions are unambiguous in stating the assets held by the 1982 Trust were to be used only for the use and benefit of present and future members of SFN. The powers of the 1982 Trustees were circumscribed by the terms and conditions of the 1982 Trust and the *Trustee Act*. The beneficiaries are the present and future members of SFN and the definition is not tied to the provisions of the *Indian Act*.

17. The terms of the 1982 Trust deed required the trustees to deal with the trust assets in accordance with its terms and conditions.[24] Its terms prohibited use of the trust assets or diversion of trust assets for any purposes other than those set out in the deed, which in turn states the trust assets are to be held for the benefit of all members, present and future, of SFN.[25]

18. SFN currently consists of 47 members, one of whom is a minor.[26] These members are, by definition, the only beneficiaries of the 1982 Trust.[27]

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[23] Bujold September 12, 2011 Affidavit at Exhibit A paras 1, 3, 5-6 (OPGT EKE Tab 5 at A52-A55)
[24] Bujold September 12, 2011 Affidavit at Exhibit A para 3 (OPGT EKE Tab 5 at A53)
[25] Bujold September 12, 2011 Affidavit at Exhibit A paras 3 and 6 (OPGT EKE Tab 5 at A53-A55)
[26] Affidavit of Darcy Twin sworn April 19, 2022 (Application for intervenor status in these Appeals) at para 3. Due to a recent death, the number of members is now 47 instead of 48 as stated in councilor Darcy Twin's 2022 Affidavit.
[27] Bujold September 12, 2011 Affidavit at Exhibit A Preamble and para 6 (OPGT EKE Tab 5 at A52-A55)

iii. Bill C-31 Amendments to the *Indian Act*

19. On April 17, 1982, the *Constitution Act*, 1982, including the *Canadian Charter of Rights and Freedoms*, came into force, but section 15 of the *Charter* did not come into effect until April 17, 1985 to give provincial and federal governments time to bring legislation into compliance.[28]

20. The federal government introduced Bill C-31, *An Act to amend the Indian Act*, to address certain discriminatory provisions of the *Indian Act* relating to Indian status and membership.[29] Bill C-31 also provided a mechanism for bands to control their own membership if desired.[30]

21. In accordance with section 10 of the *Indian Act*, as amended by Bill C-31 effective April 17, 1985, SFN assumed control of its membership process on July 8, 1985, being the day its membership rules, supporting documentation and bylaws were handed to the Deputy Minister of Indian and Northern Affairs who accepted them on behalf of the Minister.[31] Nevertheless, SFN asserted an inherent right to control its membership.[32]

22. At the time SFN assumed control of its membership list, the Department of Indian and Northern Affairs' band membership list included 37 members, several of whom were minors.[33]

iv. The 1985 Trust and Transfer of Assets from 1982 Trust to 1985 Trust

23. Chief Walter Patrick Twinn testified at the Bill C-31 trial that SFN was concerned Bill C-31 would result in a large number of persons obtaining membership in SFN without SFN's consent.[34]

24. The 1985 Trust was created on April 15, 1985,[35] two days before Bill C-31 came into force, in anticipation of the passage of Bill C-31, and with the objectives that the beneficiaries of the 1985 Trust would be the people who were considered SFN members before the passage of Bill

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[28] Bujold September 12, 2011 Affidavit at para 13 (OPGT EKE Tab 5 at A46)
[29] Bujold September 12, 2011 Affidavit at para 13 and Exhibit F (Bill C-31) (OPGT EKE Tab 5 at A46, A86-A108)
[30] Bujold September 12, 2011 Affidavit, Exhibit F (Bill C-31), s 10 (OPGT EKE Tab 5 at A102)
[31] Affidavit of Roland Twinn filed September 28, 2016 at para 7 and Exhibit 2 at para 2 (SFN EKE at I42, I45-I47); Bujold September 12, 2011 Affidavit at para 13, Exhibit F (Bill C-31) at s 10 (OPGT EKE Tab 5 at A46, A102)
[32] Amended Statement of Claim in Action T66-86 filed April 25, 1986 at paras 11-12 (OPGT EKE Tab 1 at A5-A6)
[33] July 22, 1985 Letter from INAC and October 4, 1985 Letter from INAC attaching band list, being SAW002316-2323 of the Supplemental Affidavit of Records sworn by Paul Bujold on April 27, 2018 (SFN EKE at I48-I55)
[34] Twin 2019 Affidavit at para 7 and Exhibit B at 3761 (SFN EKE at I5-I6, I12); Bujold September 12, 2011 Affidavit at para 15 (OPGT EKE Tab 5 at A47)
[35] Bujold September 12, 2011 Affidavit at para 16 and Exhibit G (OPGT EKE at A47, A109-A119)

C-31 and that the people who might be declared to be SFN members under Bill C-31 would be excluded as beneficiaries for a short time until SFN could see what Bill C-31 would bring about. The people who might be declared to be SFN members under Bill C-31 would be excluded as beneficiaries.[36] Ultimately, however, the intention was that the assets from the 1985 Trust would be placed in the 1986 Trust (whose beneficiaries are defined as members of SFN).[37]

25. On April 15, 1985, the Trustees of the 1982 Trust passed a resolution to transfer all of the assets of the 1982 Trust to the 1985 Trustees pursuant to paragraph 6 of the 1982 Trust deed and their discretion to pay or apply all or such much of the net income or capital of the Trust Fund for the beneficiaries of the Trust.[38] SFN passed a resolution signed by nine members to approve the transfer of the assets from the 1982 Trust to the 1985 Trust.[39]

26. At the time of the transfer, the trustees of the 1982 Trust were the same the trustees of the 1985 Trust.[40] All assets in the 1982 Trust were transferred to the 1985 Trustees,[41] and the approximate net value of those assets as of December 31, 2010 was $70,263,960.[42]

27. After April 15, 1985, no further funds or assets were put into the 1985 Trust.[43] The debenture held in trust for the SFN which was purportedly then assigned to the 1985 Trust was discharged in 2003, and there is no evidence it ever entered the 1985 Trust.[44]

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[36] Twin Affidavit at para 7 and Exhibit B at 3906-3909 (SFN EKE at I5-I6, I16-I18)
[37] Twin Affidavit at para 7 and Exhibit B at 3948-3949 (SFN EKE at I5-I6, I19-I20); Bujold September 12, 2011 Affidavit at Exhibit K at para 2(a) (OPGT EKE Tab 5 at A136)
[38] Bujold September 12, 2011 Affidavit at para 19 and Exhibit H (OPGT EKE Tab 5 at A48, A120).
[39] Bujold September 12, 2011 Affidavit at para 20 and Exhibit I (OPGT EKE Tab 5 at A48, A138).
[40] Sawridge #12 at paras 202 and 286; Bujold September 12, 2011 Affidavit at Exhibit H (OPGT EKE Tab 5 at A121)
[41] Bujold September 12, 2011 Affidavit at para 22 (OPGT EKE Tab 5 at A48); Excerpts of Transcript from the Questioning on Affidavit of Paul Bujold May 27 & 28, 2014 48:4-27, 49:1-4; 53:7-8 (SFN EKE at I30-I32); Band Council Resolution 454-117-85/86 (OPGT EKE Tab 18 at A462).
[42] Bujold September 12, 2011 Affidavit at para 27 (OPGT EKE Tab 5 at A49).
[43] Bujold September 12, 2011 Affidavit at para 30 (OPGT EKE Tab 5 at A50).
[44] Excerpts of Transcript from Questioning on Affidavit of Paul Bujold February 26 & March 2, 2020 at 42:2-19, 44:3-6, 46:20-24, 48:1-4, 48:22-27 (SFN EKE I58-I61); Affidavit of Paul Bujold filed February 24, 2020 at para 11 and Exhibit B (SFN EKE at I124, I126-I128)

28. There are significant differences between the terms of the 1982 Trust and the 1985 Trust. Most importantly, the beneficiary definition in the 1985 Trust declaration is substantially different than that of the 1982 Trust declaration:

> "Beneficiaries" at any particular time shall mean all persons who at the time qualify as members of the Sawridge Band No. 19 pursuant to the provisions of the Indian Act, R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act, R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 under the Indian Act, R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall cease to be a Beneficiary for all purposes of this Settlement;[45]

29. The practical effect of this change in beneficiary definition is to exclude those persons granted membership in SFN in accordance with Bill C-31 and to permit non-members to qualify as beneficiaries. In other words, some persons who are members of SFN do not qualify as beneficiaries of the 1985 Trust and some persons who are not SFN members do qualify.[46]

30. The definition of beneficiaries in the 1985 Trust is also discriminatory.[47] It excludes the Bill C-31 woman and would disentitle any female beneficiary who marries a non-indigenous man.

31. Additionally, the discretionary power of encroachment or advancement granted to the trustees is substantially broader in the 1985 Trust deed and expressly permits them to favour or deprive any one or more of the beneficiaries:

> The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time

[45] Bujold September 12, 2011 Affidavit at para 17 and Exhibit G at para 2(a) (OPGT EKE Tab 5 at A47, A110-A111)
[46] Sawridge #12 at paras 63-64; Brief of the Sawridge Trustees in Respect of the Impact of the Definition of Beneficiaries, filed November 30, 2020 (Trustees' Extracts of Key Evidence ("Trustees EKE") at Tab 6, p 44-49).
[47] Consent Order (Issue of Discrimination) filed January 22, 2018 (OPGT EKE Tab 16 at A449).

> deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.[48]

32. The broader power of advancement was likely intentional in drafting the 1985 Trust deed in order to permit the eventual merger or transfer of assets with the contemplated 1986 Trust.

33. Since the transfer of assets from the 1982 Trust to the 1985 Trust, there have been no distributions of the assets held in the 1985 Trust to beneficiaries.[49] All benefits and programming and services have been paid out to or for members from the 1986 Trust.[50]

v. The 1986 Trust

34. The 1986 Trust was settled on August 15, 1986, after SFN took control of its membership list under s 10 of the *Indian Act*, and it defines its beneficiaries as members of SFN:

> "Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada;[51]

35. Chief Walter Patrick Twinn testified that it was the intention that the assets from the 1985 Trust would ultimately be placed in the 1986 Trust (whose beneficiaries are defined as members of SFN).[52] Paul Bujold, on behalf of the Trustees, also deposed that this was the intention:

> My investigation shows that the goal of the Settlor of the 1985 Trust had been to switch back to "members" of [SFN] as beneficiaries and combine the 1985 and 1986 Trusts once the result of Bill C-31 was known.[53]

B. The *Indian Act* Before Bill C-31

36. It must be noted that defining beneficiaries by reference to the Indian Act as it read on April 15, 1982 has given rise to uncertainty as evidenced by the differing positions advanced by

[48] Bujold September 12, 2011 Affidavit at Exhibit G at para 6 (OPGT EKE Tab 5 at A115)
[49] Excerpts of Transcript from Questioning on Affidavit of Paul Bujold May 27 & 28, 2014 at 146:19-27, 147:1-3 (SFN EKE at I39-I40)
[50] Excerpts of Transcript from Questioning on Affidavit of Paul Bujold May 27 & 28, 2014 at 98:1-14 (SFN EKE at I38)
[51] Bujold September 12, 2011 Affidavit at para 29, Exhibit K at para 2(a) (OPGT EKE Tab 5 at A49, A136)
[52] Twin 2019 Affidavit at para 7, Exhibit B at 3948-3949 (SFN EKE at I7, I18-I19); Bujold September 12, 2011 Affidavit at para 29, Exhibit K at para 2(a) (OPGT EKE Tab 5 at A49, A136)
[53] Affidavit of Paul Bujold sworn and filed February 15, 2017 at paras 75, 153-155 (SFN EKE at I63-I64)

the 1985 Trustees, the OPGT and Catherine Twinn as to who qualifies as a beneficiary based upon the definition in the 1985 Trust.[54]

37. Registration for Indian status and membership in a particular first nation was not one and the same prior to Bill C-31. Prior to Bill C-31, a status Indian could be registered as a member of a particular band or as an Indian on the General List.[55]

38. Subsection 9(1) of the 1970 Act allowed a band council or any ten electors to protest the addition of any person to that Band's list to the Registrar. Subsection 9(2) required the Registrar to investigate whether the impugned person should have been added to the Band List, and s 9(3) allowed a band council to refer the matter to a district or county court for judicial review of the Registrar's decision on the standard of correctness.[56] Subsection 13(a) required a band council to consent to the addition of a person registered on the General List to be added to the Band List.

39. Therefore, in accordance with the legislation, a person could be registered as a status Indian without being a member of a Band. Further, contrary to the assertion of Catherine Twinn,[57] bands had control over the addition of members to their band list. Registration as a status Indian was not synonymous with band membership.

C. The 2016 Consent Order

i. Terms of the 2016 Consent Order

40. This Action arises from an Application for Advice and Direction by the Trustees of the 1985 Trust wherein they have sought the advice and direction of this Honourable Court in relation to the transfer of assets from the 1982 Trust to the 1985 Trust and the beneficiaries. On August 24, 2016, the Parties to this Action presented to Justice Thomas a Consent Order, along with a written brief prepared by the 1985 Trustees, which would approve the transfer of assets from the 1982 Trust to the 1985 Trust *nunc pro tunc*.

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[54] Brief of the Sawridge Trustees in Respect of the Impact of the Definition of Beneficiaries, filed November 30, 2020 (Trustees EKE Tab 6, p 44-49).
[55] *Indian Act* RSC 1970, c I-6, s 6 ["1970 Indian Act"] **[Tab 2]**
[56] 1970 Indian Act, ss 9(1),(2) & (3), 13 **[Tab 2]**
[57] Factum of Catherine Twinn at para 6

41. Justice Thomas granted the Order, which states the following:

> UPON HEARING representations from counsel for the Sawridge Trustees that the Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust; AND that the parties to this Consent Order have been given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have reviewed; AND that the Trustees are not seeking an accounting of the assets transferred into the 1982 Trust; AND that the Trustees are not seeking an accounting of the assets transferred into the 1985 Trust; AND UPON noting that little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust;
>
> IT IS HEREBY ORDERED THAT:
>
> The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.
>
> Without limiting the generality of the foregoing, the Trustees' application and this Consent Order cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 Trust.[58]

42. Nothing in the terms of the 2016 Consent Order states the issue of beneficial title to the assets was being determined at the time it was issued. As the 1985 Trustees note in their Factum, the issue of who the beneficiaries were was still to be determined.

ii. SFN and 1982 Beneficiaries were not Parties to the 2016 Consent Order

43. The 1982 Trust beneficiaries were not parties to the 2016 Consent Order. While SFN's counsel was present in the courtroom to respond to a Rule 5.13 production application brought against it by the OPGT, SFN was not a party to the 2016 Consent Order. SFN's counsel therefore declined to make submissions on its behalf in relation to the Consent Order.[59]

44. SFN's suggestion that the OPGT agree to the 2016 Consent Order was a position of compromise in the face of the OPGT's over-reaching applications for production.[60] This does not mean that SFN was a party to the Consent Order or that SFN played any role in its drafting.

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[58] August 24, 2016 Consent Order (Appeal Record at 18-20)
[59] Twin 2019 Affidavit at para 10 (SFN EKE at I7)
[60] OPGT Amended Rule 5.13 Application filed July 16, 2015 (SFN EKE at I65) and OPGT Rule 5.13 Application filed February 1, 2016 (SFN EKE at I78)

45. The June 22, 2016 "With Prejudice" offer made by the 1985 Trustees, which circulated the draft consent order, contained no discussion of the legal basis for the order and made no reference to case law or to Section 42 of the *Trustee Act*.[61] At questioning on affidavit of Paul Bujold, counsel for SFN confirmed that SFN had no control over the consent order.[62]

46. No party or non-party to this action has produced any evidence showing that SFN was involved in the drafting or preparation of the 2016 Consent Order.

47. The position of SFN has been, and continues to be, that the trust property is held only for the benefit of members of SFN. Further, the position of SFN has always been to achieve resolution of this matter without continuing to dissipate the assets of the trust for payment of legal fees.

iii. The CMJ's Consideration of the Effect of the 2016 Consent Order

48. When the CMJ assumed conduct of this matter, he promptly inquired about the meaning and effect of the 2016 Consent Order, which he correctly identified as a fundamental and pivotal issue.[63] He did not predetermine the issue as suggested by the Appellants, noting various possible interpretations and inviting the parties' submissions.[64]

49. The 1985 Trustees voluntarily filed an application to have the Court formally consider this issue on September 13, 2019.[65] SFN and Shelby Twinn applied for and were granted intervenor status in the Court below with full rights to participate by way of putting forth evidence and making written and oral submissions.[66]

50. The CMJ afforded the parties and intervenors further opportunity to adduce any additional relevant and material evidence before considering the meaning and effect of the 2016

[61] Letter from Dentons to Hutchison Law, dated June 22, 2016 (OPGT EKE Tab 8 at A206-A209)
[62] Excerpt of Transcript from Questioning on Affidavit of Paul Bujold July 17, 2016 at 6:19-24 (SFN EKE at I84)
[63] April 25, 2019 email from Justice Henderson (OPGT EKE Tab 25 at A578); Transcript of the April 25, 2019 Proceeding) at 4:16-19 (OPGT EKE Tab 26 at A584); and Transcript of the September 4, 2019 Proceeding at 13:16-23, 14:3-13, 20:25-27, 20:31-32, 22:26-31, 26:1-7 (OPGT EKE Tab 27 at A606-A607, A613, A615, A619)
[64] April 25, 2019 email from Justice Henderson (OPGT EKE Tab 25 at A578); Transcript of April 25, 2019 Proceeding at 3:21-41, 4:16-19 (OPGT EKE Tab 26 at A583-A584); and Transcript of the September 4, 2019 Proceeding at 13:16-23, 14:3-13, 20:25-27, 20:31-32, 22:26-31, 26:1-7 (OPGT EKE Tab 27 at A606-A607, A613, A615, A619)
[65] Application of the 1985 Trustees filed September 13, 2019 (Appeal Record at 15)

[66] October 31, 2019 Order of the CMJ granting SFN and Shelby Twinn Intervenor Status (SFN EKE at I85-I87)

Consent Order. Further affidavits were filed by the 1985 Trustees and Catherine Twinn. The OPGT filed another Rule 5.13 production application against SFN, which was ultimately resolved by way of consent order.[67] In addition, 20 briefs or letter-form submissions were filed by the parties and intervenors between November 2019 and September 2021. An oral hearing occurred on September 27 and 28, 2021. The CMJ issued the decision in Sawridge #12 on February 4, 2022, nearly three years after first inquiring about the effect of the 2016 Consent Order.

51. The position SFN advanced in the Asset Transfer Application was ultimately successful, as the CMJ determined that the August 24, 2016 Consent order approved transfer of legal title to the 1985 Trustees but that beneficial title to the transferred assets remained with the 1982 Trust beneficiaries, being the present and future members of SFN.[68]

52. This Court should uphold the CMJ's decision and dismiss the Appeals.

PART 2 – GROUNDS OF APPEAL

53. SFN agrees with the 1985 Trustees' grouping of the grounds of appeal into three issues:[69]

A. Did the CMJ err in finding only legal title was transferred to the 1985 Trustees on April 15, 1985 and that beneficial title remained with the beneficiaries of the 1982 Trust?

B. Did the CMJ err by interpreting the 2016 Consent Order?

C. Did the CMJ exceed his jurisdiction in Sawridge #12?

54. SFN will focus its argument on the first and third grounds of appeal in an effort to avoid duplication of submissions already made by the 1985 Trustees.

PART 3 – STANDARD OF REVIEW

55. SFN agrees with and adopts the 1985 Trustees' description of the applicable standard of review on these Appeals.[70]

[67] Consent Order (OPGT Application for Additional Production) filed February 21, 2020 (SFN EKE at I88-I91)
[68] Sawridge #12 at paras 285-286
[69] Factum of the 1985 Trustees at paras 27-28
[70] Factum of the 1985 Trustees at paras 29-33

PART 4 – ARGUMENT

A. The CMJ correctly found only legal title was transferred to the to the 1985 Trustees and that beneficial title remained with the beneficiaries of the 1982 Trust.

i. A transfer of beneficial title from one trust to another is only permitted if the deed expressly permits it or consent and approval are obtained under section 42.

56. The 1982 Trust is unequivocal as to who its beneficiaries are – all members, present and future, of SFN. The 1985 Trust was not a named beneficiary of the 1982 Trust and therefore should not have been able to receive the trust assets directly in 1985, as noted by the 1985 Trustees in their brief in support of the August 24, 2016 Consent Order.[71]

57. What the 1982 Trustees purported to do on April 15, 1985 was tantamount to varying the trust deed to change the beneficiary definition (and other provisions), which is something they could only do if permitted by law: if the terms of the deed expressly provided for such power or if they sought and obtained the consent of beneficiaries and approval required for a resettlement or variation of a trust under s 42 of the *Trustee Act.*[72]

58. They did not comply with s 42 when transferring legal title to the 1982 Trust assets to the 1985 Trustees on April 15, 1985, at which time the trustees of both trusts were the same.[73]

59. There was similarly no compliance with s 42 when the 2016 Consent Order was obtained. The 1982 Beneficiaries were not parties to the 2016 Consent Order.

60. The primary duty of a trustee is to carry out the terms of the trust, and at common law the Trustees may only vary a trust if the settlor expressly grants them such power:

> It is the first duty of the trustees to preserve the trust property and to carry out the trust terms. Unless the settlor chooses to give them such a power, they have no authority to vary the terms of the trust, any more than they can neglect their duty to preserve the trust property. Nor does it matter whether the term which the trustees would like to vary is concerned with the beneficial interests created by the trust or the powers of themselves as trustees. It follows that, even if the trustees honestly and reasonably believe that it would be for the benefit of the beneficiaries were

[71] Brief of the Sawridge Trustees on Transfer of Assets filed August 17, 2016 at para 18 (OPGT EKE Tab 12 at A315)
[72] See also *Berg v Jaylevy*, 2019 ONSC 2255 at paras 42-43. Alberta eliminated the rule in *Saunders v Vautier* by statute. Variation or termination by court order was governed by s 42 of the *Trustee Act*.
[73] Bujold September 12, 2011 Affidavit at Exhibit H (OPGT EKE Tab 5 at A121)

> the trustees to depart in any way from any term of the trust, nevertheless they would be in breach of the trust were they to do so.[74]

61. In this case, the 1982 deed did not confer on the trustees a power of amendment. Recognizing this, they had previously sought a Court Order under section 42 of the *Trustee Act* permitting an amendment to the deed to provide for staggered terms for trustees in 1983.[75]

62. Instead, on April 15, 1985, the trustees purported to rely upon the power of advancement contained in paragraph 6 of the 1982 Trust deed to resettle the assets into the 1985 Trust,[76] thereby changing the class of beneficiaries along with other terms on which the assets were held.

ii. The power of advancement in the 1982 Trust did not permit transfer of beneficial title to a new class of beneficiaries thereby depriving some future members of beneficiary status and permitting non-members of SFN to qualify as beneficiaries.

63. The Appellants rely upon the House of Lords decision in *Pilkington* in support of their position that both legal and beneficial title were transferred on April 15, 1985; however, the CMJ correctly found "the lawfulness of a trust to trust transfer, as described in *Pilkington*, is dependent upon the transfer being in the best interests of the beneficiaries of the original trust, and not beyond the scope of power of the original trustees."[77]

64. In *Pilkington*, the trustees applied for a determination as to whether it was possible for them to exercise their discretion to resettle a part of a trust under a statutory power of advancement.[78] Funds had been settled by an uncle for, *inter alia*, the benefit of a nephew and that nephew's issue. For tax purposes, the trustees wanted, and the nephew appears to have agreed, to exercise the trustees' statutory power of advancement to effectively resettle a portion the nephew's funds on his young daughter, thereby avoiding estate duties. Section 32 of the Trustee Act 1925 of the UK, provided a general power of advancement to all trustees, provided

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[74] Donovan Waters, Mark Gillen & Lionel Smith, eds, *Waters' Law of Trusts in Canada* 4th Edition (Toronto: Carswell, 2012) at 1358 [*Waters*] **[Tab 3]**
[75] Bujold September 12, 2011 Affidavit at para 11 and Exhibit C (OPGT EKE Tab 5 at A46, A60-A61)
[76] Bujold September 12, 2011 Affidavit at Exhibit H (OPGT EKE Tab 5 at A120)
[77] Sawridge #12 at para 170.
[78] *Trustee Act 1925* 15 Geo 5, c19, s32 (UK) **[Tab 4]** (Section 32 of the *Trustee Act 1925* was not amended from enactment until after the relevant time period).

the settlor did not exclude such a power.[79] The trustees sought approval of the Court, which was granted. The tax authority appealed the order. The Court of Appeal reversed the order. On further appeal, the House of Lords restored the initial order approving the resettlement.

65. In *Pilkington*, Lord Reid commented that there was no dispute in that case that the proposed resettlement was for the benefit of the beneficiary.[80] This is the crux of the case and the basis upon which SFN submits the principle in *Pilkington* does not apply to this case.

66. It must also be noted that the power of advancement under analysis in *Pilkington* is markedly different from the power of advancement contained in the 1982 Trust.[81] The power to advance capital for the benefit of only one beneficiary is explicit. The 1982 Trust Deed instead only gives power to advance "for the beneficiaries". Section 32 from *Pilkington* also protects against a trustee advancing all of a trust's assets to one beneficiary to the exclusion of a co-equal or lesser beneficiary by only permitting a trustee to advance half of a beneficiary's maximum possible share to the beneficiary. Third, the 1982 Trust Deed also states that "no part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein." This is a further restraint on the 1982 Trustees which requires that beneficial ownership of 1982 Trust assets not be given to non-members.

67. The Ontario Court (General Division) applied *Pilkington* in *Hunter Estate*.[82] In *Hunter Estate*, the executors and trustees of a testator applied for advice and direction following a request by the two main trust beneficiaries to bifurcate the trust. The testator father left the entire residue of his estate into a "Family Trust" for the benefit of his two adult children and their issue, with a gift over to certain other individuals should there be no surviving issue.[83] The testator's two children wished to bifurcate the Family Trust into two identical trusts, one trust for each child and that child's issue, containing identical assets and settled on "substantially the

[79] *Trustee Act 1925* 15 Geo 5, c19, s32 (UK) **[Tab 4]**
[80] See page 14 of *Pilkington v Inland Revenue Commissioners*, [1964] AC 612 (1962), where Lord Reid states in the first sentence of the second paragraph: "…the fact is that from beginning to end of these proceedings it has not been in dispute that the proposed arrangement can properly be described as being for the benefit of Miss Penelope…" (Factum of Catherine Twinn at 59).
[81] *Trustee Act 1925* 15 Geo 5, c19, s32 (UK) **[Tab 4]**
[82] *Hunter Estate v Holton*, 1992 CarswellOnt 537 (ON SC) [*Hunter Estate*] **[Tab 5]**
[83] *Hunter Estate* at para 3 **[Tab 5]**

same terms and conditions as contained in the existing will", with the only exception being that only the issue of each child would be a beneficiary of that child's trust.[84] The gifts over to the certain other individuals would remain in both trusts and on identical terms to the Family Trust.[85] The purpose of this bifurcation was to allow the trustees to administer each child's half interest in a manner suited to that child's circumstances.[86]

68. The Court held that the Family Trust trustees could effect this resettlement via the exercise of the following power contained within the Testator's will: "to pay to or for the benefit of any one or more of my wife and my issue to the exclusion of any one or more of my wife and my issue as my trustees may determine such amounts out of the capital of the said Fund as my Trustees in their sole discretion may from time to time determine."[87]

69. The court held that it should not cut down a wide and discretionary power which was enacted for general use. The court applied *Pilkington* in finding that if a trustee has the power or discretion to advance, encroach, or otherwise appoint funds to a beneficiary directly, then the trustee also has the power or discretion to advance, encroach, or otherwise appoint those funds into a trust for the benefit of the beneficiary.[88]

70. However, both *Pilkington* and *Hunter Estate* show that the resettlement must be effected for the benefit of the beneficiaries identified in the original trust. Specifically, the court says that "subject to the approved basic division into two family trusts rather than the one, the new trusts closely mirror the provisions of the will, with certain minor modifications. Basically, they provide the interests to the children, grandchildren and issue of the testator, with the ultimate gift over to the (certain named individuals)".[89] The court found that the retention of the identical beneficiaries meant that the proposed new trusts were not alien to the intention of the testator

[84] *Hunter Estate* at para 5 **[Tab 5]**
[85] *Hunter Estate* at para 5 **[Tab 5]**
[86] *Hunter Estate* at para 6 **[Tab 5]**
[87] *Hunter Estate* at para 2 **[Tab 5]**
[88] *Hunter Estate* at para 16 **[Tab 5]**
[89] *Hunter Estate* at para 20 **[Tab 5]**

or beyond the scope of the powers of the trustees. All beneficiaries and contingent future interests were considered.[90]

71. The court ultimately approved the decision on the basis of the English case of *Re Hastings-Bass* which held that "the court should not interfere with his (a trustee's) action…unless (1) what he has achieved is unauthorized by the power conferred upon him or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account." [91] As the Family Trust trustees had the power, there was no reason for the court to interfere.

72. This differs from the 1982 Trust to 1985 Trust transfer, where the entire objective of resettlement was to cut out persons who would have otherwise become beneficiaries and where the practical implication is that non-members qualify as beneficiaries. This is not akin to *Pilkington* or *Hunter Estate* because the effect of a transfer of beneficial title on April 15, 1985 would be to dilute the interests of actual members of SFN by permitting non-members to be beneficiaries and to extinguish the interests of those who would become members (and therefore beneficiaries of the 1982 Trust) under Bill C-31 two days later.

73. As such, a transfer of beneficial title clearly could not be for the benefit of the class of beneficiaries defined in the 1982 Trust (all present and future members of SFN). Regardless of what may have been the intention of the 1982 Trustees back on April 15, 1985, it cannot be argued that the resettlement of the entire corpus of the 1982 Trust into the 1985 Trust was to the benefit of all present and future members of SFN when the effect of such a transfer was to change the class of beneficiaries to include non-members of SFN.

74. The 1982 Trustees did not have the authority or discretion to re-characterize funds held on trust for "current and future members" as effectively being held on trust for "current members" only and for persons who are not even members of SFN.

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[90] *Hunter Estate* at para 20 **[Tab 5]**
[91] *Hunter Estate* at para 19, citing *Re Hastings-Bass*, [1974] 2 All ER 193 (CA) **[Tab 5]**

75. To apply *Pilkington* to the facts of this case to find the beneficial interest in the subject trust property had been transferred to the beneficiaries as they are defined in the 1985 Trust deed would be an error. A finding by this Court that the beneficial ownership was transferred to the beneficiaries as defined in the 1985 Trust deed would be tantamount to a holding that the 1982 Trustees were permitted to do indirectly what they could not do directly, which is change the beneficiary definition in the trust to include a new class of people, non-members, and exclude future members under Bill C-31. This would be entirely inconsistent with the terms of the 1982 Trust which constrained the trustees' power of advancement and prohibited them from diverting trust assets to any purpose other than one benefitting the members (present and future) of SFN.

76. *Fox v Fox Estate*[92] also provides guidance as to the extent of a trustee's ability to use a discretion granted to the trustee to benefit one set of beneficiaries to the detriment of others. *Fox* stands for the principle that such discretion cannot be used to deprive a beneficiary of his interest unless the will or trust deed explicitly authorizes such a deprivation.

77. In *Fox*, a testator grandfather left the residue of his estate to his wife (the "grandmother"), son, and son's issue. His wife was to have a life interest in 75% of the estate's income and his son was to have the remaining 25%. The grandmother was sole testatrix and was given the following power by the will:

> Out of the capital thereof, to pay such amount or amounts as my Trustee may in its absolute discretion, consider advisable to or for my said son.
>
> Out of the capital thereof, to pay such amount or amounts as my Trustee may, in its absolute discretion, consider advisable from time to time to or for the benefit of my said son's issue or such one or more of them as my Trustee may select from time to time.[93]

78. After the testator's death, the son remarried out of the family's faith. The grandmother elected to encroach on the entire corpus of the estate to the son's issue's benefit, to the detriment of the son's interest.[94] There were no assets left in the estate to provide the son with

[92] *Fox v Fox Estate*, 1996 CarswellOnt 317, 28 OR (3d) 496 (ON CA) [*Fox*] **[Tab 6]**
[93] *Fox* at para 41 **[Tab 6]**
[94] *Fox* at para 5 **[Tab 6]**

the income. Evidence advanced at trial suggested that the grandmother was attempting to disinherit the son because she disagreed with his decision to re-marry out of the faith.[95]

79. The Ontario Court of Appeal was divided on the effect of the grandmother's motivation by mala fides towards the son, though a parallel can be drawn to this case where the intention in 1985 was improper and discriminatory. The Court focused on whether the grandmother was empowered by the will to disinherit the son.[96]

80. The Court held that while the language used in the will appeared to give the grandmother an unlimited discretion to encroach on property for the benefit of the son's issue, the fact that the son was also given a life interest in 25% of the income meant that the testator's intention was to not give the grandmother the discretion to fully disinherit the son.[97]

81. Additionally, the testator had provided the discretion to encroach on capital in favour of the son's issue on a "from time to time" basis. Meanwhile, the discretion to encroach on capital in favour of the son did not have such a limitation. The Court held that this indicated that the testator intended to allow an absolute discretion in favour of the son but only partial, episodic encroachments in favour of the son's issue. This distinction suggested the discretion to encroach in favour of the son's issue was constrained.[98] On this basis, the Court allowed the appeal. In concurring with McKinlay JA, Galligan JA cited *Re Hastings-Bass*.

82. Finally, *Edell v Sitzer* provides guidance on the application of *Fox*.[99] In particular, the explicit authorization of the deprivation of a beneficiary is addressed. In *Edell*, the court considered, *inter alia*, whether an encroachment was motivated by bad faith or was otherwise an improper exercise of a power of encroachment, as in *Fox*.

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[95] *Fox* at para 7 **[Tab 6]**
[96] *Fox* at para 43 **[Tab 6]**
[97] *Fox* at para 44 **[Tab 6]**
[98] *Fox* at para 45 **[Tab 6]**
[99] *Edell v Sitzer*, 2001 CanLII 27989 (ON SC), 55 OR (3d) 198 [*Edell*]

83. In *Edell*, the trustee father conveyed certain assets to his daughter on trust. After a falling out the father decided to encroach upon the assets for the benefit of the brother. The trustee relied upon the following power of encroachment:

> The Trustees shall have the right at any time or times…to pay to or for some one or more of the said children and more remote issue…who are then living…to the exclusion of any other or others, such amounts or amounts out of the capital of the Trust Property in such proportions as the Trustees in their unfettered discretion shall determine advisable or expedient.[100]

84. The Court relied on the above provision to distinguish *Edell* from *Fox*. The Court held that the specifics of the will in *Fox* required the trustee in that case to not encroach entirely on the property. The Court also held that the provisions of a will or trust deed must be "read in the light of the provisions and structure of a will taken as a whole".[101]

85. Reading the 1982 Trust deed as a whole indicates that the 1982 Trust settlor intended an outcome similar to *Fox* rather than *Edell*. Paragraph 6 of the 1982 Trust deed states that the trustees have the discretion to pay or apply any capital or income in unfettered discretion "for the beneficiaries". The first sentence of paragraph 6 states that the Trust Fund shall be held for the benefit of "all members, present and future" of the SFN. There is no power to pay to one beneficiary or set of beneficiaries to the exclusion of others.

86. The Court in *Edell* further relied upon *Re Hastings-Bass*, as cited in *Fox* and in *Hunter Estate*, re-iterating that a trustee's actions should not face curial interference if the act is authorized by the settlor.[102]

87. Read together, *Pilkington*, *Hunter Estate*, *Re Hastings-Bass*, *Fox*, and *Edell* show that a properly empowered trustee may advance, encroach on, or pay or apply capital by settling it into a new trust on new terms provided it is beneficial to the original beneficiary. A trustee may not use such a power to the detriment or exclusion of another beneficiary unless the trust deed expressly provides the trustee with that power.

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[100] *Edell* at para 34
[101] *Edell* at para 105
[102] *Edell* at para 159.

88. For instance, the discretionary power of advancement in the 1985 Trust deed is broader than in the 1982 trust as it permits use of the income or capital "for any one or more of the Beneficiaries".[103] By contrast, the 1982 Trust deed provides discretion to use the income or capital "for the beneficiaries" as a class.[104]

89. Trustees have an obligation to act fairly between beneficiaries in the exercise of their powers.[105] The duty of even-handedness requires that where there are two or more classes of beneficiaries, each class receives exactly what the terms of the documentation confer.[106]

90. Nothing in the 1982 Trust allowed an advance or encroachment which would be to the detriment of the members of SFN. The powers of the 1982 Trustees were circumscribed by their duty to treat the beneficiaries of the 1982 Trust fairly and by the terms and conditions of the trust declaration, which expressly prohibit the Trustees from using or diverting any part of the trust assets to purposes other than those set out in the declaration.

91. More specifically, the discretion granted to the Trustees to pay or apply any or all of the income or capital of the Trust Fund is constrained by the definition of beneficiaries and by the requirement that any such payment or application be "appropriate for the beneficiaries set out above", those beneficiaries being defined as all members, present and future, of SFN.[107] They were not permitted to resettle the 1982 Trust Fund into the 1985 Trust as this diluted the interests of SFN members by adding non-members as beneficiaries and extinguished the interests of those who would become members (and beneficiaries of the 1982 Trust) under Bill C-31.

92. It is a fallacy to equate what occurred on April 15, 1985 with a distribution of all 1982 Trust assets to the beneficiaries on that date, as suggested by Catherine Twinn, because that is not what occurred.[108]

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[103] Bujold September 12, 2011 Affidavit at Exhibit G at para 6 (OPGT EKE Tab 5 at A115)
[104] Bujold September 12, 2011 Affidavit at Exhibit A at para 6 (OPGT EKE Tab 5 at A55)
[105] *Hunter Estate* at para 19 **[Tab 5]**
[106] *Burke v Hudson's Bay Co*, 2010 SCC 34 at para 85
[107] Bujold September 12, 2011 Affidavit at Exhibit A at paras 3, 5-6 (OPGT EKE Tab 5 at A53-A55)
[108] Factum of Catherine Twinn at para 74

iii. The alleged overlap in beneficiaries of the Trusts on April 15, 1985 is irrelevant.

93. While on the surface the beneficiaries of the 1982 Trust and the 1985 Trust may have been the same persons on April 15, 1985, it was understood that when Bill C-31 took effect two days later the class of beneficiaries would not be the same. Bill C-31 was introduced into the House of Commons on February 28, 1985.[109] The individuals involved in the purported asset transfer would have known that the changes to band membership created by Bill C-31 would take effect on April 17, 1985.

94. In *Bruderheim Community Church v Board of Elders*, the Court construed a trust which defined its beneficiaries as a "static entity" of persons. Almost all members of a local congregation (the "Congregation") of a global church (the "Moravian Church") elected to dissociate themselves from the Moravian church following a doctrinal dispute. Although the individuals who composed that static entity changed over the trust's roughly 120-year existence, the static entity remained well defined and ascertainable. The trust property in that case involved land and a church building (the "Church Property"). The Church Property was held on trust by the Moravian Church "for the purposes of the Congregation of the Moravian Church at Bruderheim and be devoted to public purposes only" (the "Trust Conditions"). The individuals who had quit membership in the Congregation incorporated a new church (the "New Church") and applied for an injunction declaring that they continued to hold beneficial ownership in the Church Property. The New Church was opposed by the Moravian Church which argued that the Moravian Church held the Church Property on trust for the "Congregation of the Moravian Church at Bruderheim" to the extent that such an entity existed.[110]

95. The New Church argued that it, or its members, were the beneficiaries under the Trust Conditions. The New Church argued that its members were the same individuals who had worshiped at the Church Property for generations. The Court summarized the Applicants' argument as being that "after making major investments in the church and worshipping at the

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[109] Bill C-31, *An Act to amend the Indian Act*, 1st Sess. 33rd Parl, 1985 (First reading Feb. 28, 1985) (SFN EKE at I92)
[110] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 (*Bruderheim QB)*, aff'd *Bruderheim Community Church v Moravian Church In America (Canadian District)*, 2020 ABCA 393 (*Bruderheim CA*)

church for more than 120 years, it is simply unfair to exclude them from what they consider to be their own church."[111]

96. Almost every member of the Congregation departed for the New Church. The members of the New Church were effectively the same individuals as the Congregation. The New Church argued this meant that the New Church met the definition of "Congregation of the Moravian Church at Bruderheim" and the Church Property was therefore held on trust for the New Church.

97. This court rejected that reasoning, holding that the wording of the Trust Conditions indicates that the Church Property is held on trust for a congregation of members of the Moravian Church located at Bruderheim, rather than for the former members of the Congregation. Only members of the Moravian Church could be beneficiaries. The decision was upheld on appeal.[112]

98. *Bruderheim* shows that a trust settled for the object of benefiting an ascertainable static entity is constrained by the four corners of its deed to benefit that object or class and no others.

99. No specific power is given to the 1982 Trustees to disentitle beneficiaries. In the absence of that specific power, the duty to treat beneficiaries equally requires that no beneficiary be excluded. The 1982 Trustees did not have the power to change the definition of a beneficiary to a different class of persons. As such, beneficial title could not have been transferred in 1985.

100. Neither Appellant reconciles this fundamental problem with their respective positions: a finding that the 2016 Consent Order transferred beneficial title to the beneficiaries as defined in the 1985 Trust deed, which has the practical effect of qualifying non-members as beneficiaries.[113] This is not consistent with the express intention of the settlor of the 1982 Trust that the trust assets only be used for the benefit of the present and future members of SFN.

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[111] *Bruderheim QB* at para 100
[112] *Bruderheim CA*
[113] Brief of the Sawridge Trustees in Respect of the Impact of the Definition of Beneficiaries, filed November 30, 2020 (Trustees EKE Tab 6 at 44-49).

101. The Appellants' positions are also inconsistent with the uncontradicted evidence that the ultimate intention was to merge the 1985 Trust and the 1986 Trust for the benefit of SFN members once the Bill C-31 litigation was resolved.[114]

iv. The CMJ was correct to find beneficial title remains with the 1982 Beneficiaries.

102. Given that beneficial title could not lawfully be transferred to the beneficiaries as defined in the 1985 Trust on April 15, 1985, the CMJ was correct to find that effect of the 2016 Consent Order was to find that only legal title was transferred to the 1985 Trustees and that the assets continue to be held for the 1982 beneficiaries.

103. The starting point is that trust property remains trust property, unless the recipient positively establishes the defence that he acquired a legal interest in the property, in good faith, for value, without notice of the breach of trust or other want of authority on the part of the trustee. The defendant must establish all elements of the defence."[115]

104. In discussing equitable claims, Waters notes:

> If a third party, not being a bona fide purchaser of a legal interest for value without notice of the plaintiff's equitable interest, received trust property, he is himself a trustee…A trust beneficiary could obtain a declaration that the third party holds the property on trust, and any appropriate consequential orders for transfer to the original or successor trustees.[116]
>
> …
>
> The basic principle is that the traceable proceeds of trust property will themselves be trust property, if the beneficiary so elects.[117]

105. In this case, the 1985 Trust did not receive the assets for value and was essentially a donee, such that it was correct for the CMJ to find the assets are held for the 1982 beneficiaries.

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[114] Affidavit of Paul Bujold sworn and filed February 15, 2017 at paras 75, 153-155 (SFN EKE at I63-I64); Twin 2019 Affidavit at para 7, Exhibit B at 3948-3949 (SFN EKE at I7, I18-I19); Bujold September 12, 2011 Affidavit at para 29, Exhibit K at para 2(a) (OPGT EKE Tab 5 at A49, A136); Affidavit of Paul Bujold sworn and filed February 15, 2017 at paras 75, 153-155 (SFN EKE at I63-I64) where he notes Catherine Twinn's position on this issue of merger has changed during the course of these proceedings.

[115] *Waters* at 1334-35 **[Tab 3]**

[116] *Waters* at 1340-41 **[Tab 3]**

[117] *Waters* at 1341, and footnote 31: "It is usually understood to be a constructive trust but it may be best understood as resulting trust." **[Tab 3]**

106. A resulting trust will arise when an express trust fails and the trustees are left holding the property.[118] As the 1982 Trustees did not have the power to change the beneficial ownership of the 1982 Trust assets, the assets are held by the 1985 Trustees on resulting trust for the beneficiaries as defined in the 1982 Trust deed, being all present and future members of SFN.

B. The CMJ acted properly by interpreting the 2016 Consent Order.

107. The SFN agrees with and adopts the 1985 Trustees' position on this issue.

108. The August 24, 2016 Consent Order states: "The transfer of assets which occurred in 1985 from the [1982 Trust] to the [1985 Trust] is approved *nunc pro tunc*." It does not expressly address the terms pursuant to which those transferred assets are held.[119]

109. Nothing on the face of the 2016 Consent Order states that it approved transfer of beneficial title and it in fact reserved rights to beneficiaries relating to an accounting of both the 1982 Trust and 1985 Trust.[120]

110. At the time the 2016 Consent Order was sought, the core concern was the possibility a reversal of the transfer and unravelling the trust assets could create enormous costs which would be detrimental to beneficiaries, such the intention was to protect the assets for beneficiaries.[121]

111. SFN did not understand the 2016 Consent Order to have determined who the beneficiaries were. SFN has always maintained that the beneficiaries are only members of SFN.

C. The CMJ did not exceed his jurisdiction in Sawridge #12.

i. The CMJ did not exceed the authority of a Case Management Judge.

112. A case management judge must hear every application filed with respect to the action for which the case management judge is appointed.[122] The meaning and effect of the 2016 Consent

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[118] *Waters* at 446 **[Tab 3]**
[119] August 24, 2016 Consent Order (Appeal Record at 18-20)
[120] August 24, 2016 Consent Order (Appeal Record at 18-20)
[121] Bujold September 12, 2011 Affidavit at para 28 (OPGT EKE Tab 5 at A49); Brief of the Sawridge Trustees filed August 17, 2016 at para 17 (OPGT EKE Tab 12 at A315)
[122] *Alberta Rules of Court*, Alta Reg 124/2010 [*Alberta Rules of Court*], Rule 4.14(2)

Order was a legal issue affecting the obligations of the 1985 Trustees and was properly before the CMJ by way of their Advice and Direction Application filed September 13, 2019.[123]

113. The only restriction on matters which may be heard by the case management justice is contained in Rule 4.15, which states that he or she must not hear an application for judgment by way of summary trial and must not preside at the trial of the action for which the case management judge is appointed unless all the parties and the judge agree.[124]

114. There was nothing in the Rules precluding the CMJ from hearing an application that would have the effect of granting final relief. For instance, it is not uncommon for a case management judge to hear and decide a summary judgment or summary dismissal application. There is a fundamental difference between a "summary trial" as referred to in Rule 4.15 and a summary judgment or dismissal application which may nevertheless result in final relief.[125]

115. There is nothing within the rules that states consent of all parties was required before the CMJ could consider the Advice and Direction Application filed by the 1985 Trustees in relation to the meaning and effect of the 2016 Consent Order.

116. This Court has adopted the cultural shift in the resolution of claim disputes identified by Supreme Court of Canada in *Hryniak v Maudlin*. Trials are no longer be the default procedure for deciding disputes and more proportionate, timely and affordable procedures should be used.[126]

117. In this case, it was appropriate for the CMJ to adjudicate on the extensive record before him, as there is no realistic prospect that any better record would be available at a trial and the CMJ was able to make a fair and just determination.[127]

118. Ms. Twinn relies on the 2016 decision of the British Columbia Supreme Court in *Re Tomlinson* in support of her position that an advice and direction application is not a procedure

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[123] Application of the 1985 Trustees filed September 13, 2019 (Appeal Record at 15)
[124] *Alberta Rules of Court*, Rule 4.15
[125] *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at paras 36, 47 [*Weir-Jones*]
[126] *Weir-Jones* at para 15
[127] *Weir-Jones* at para 39

to be utilized to affect the rights of parties to property.[128] In *Re Brodylo Estate*, Justice Dario cited favourably the decision of the Ontario Superior Court in *Re Fulford* which stating the following with respect to the role of the court in an application for advice and direction by a trustee:

> I agree with the court's statement that "The advice which the Court is authorized to give is not of that type or kind [speaking of when to sell stock or whether the price is right, and by extension what stock to buy]; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern": *Re Fulford* at p 850.[129]

119. The meaning and effect of the 2016 Consent Order was a legal issue affecting the discharge of the 1985 Trustees' duties and therefore is appropriately heard on an application for advice and direction. In any event, it is inconsistent for Catherine Twinn to suggest that an advice and direction application is not the appropriate forum to affect the rights of parties to property when she advocates for a finding that the 2016 Consent Order effectively approved the transfer of beneficial title to the 1985 beneficiaries. This inconsistency was properly noted by the CMJ.[130]

ii. There was no reasonable apprehension of bias or lack of neutrality.

120. The OPGT asserts the CMJ exceeded his jurisdiction because he "entered the fray", "injected himself too deeply into the proceedings", and made a direction and subsequent decision that had the "appearance of undermining the neutrality of the court" and which was "result-oriented".[131] Catherine Twinn asserts the CMJ created "a perception that the Court was acting as both litigant and decision-maker", his conduct "carrie[d] a risk of calling into question the fair administration of justice," and his decision was "clearly designed to achieve a pre-determined result that was desired by the CMJ."[132] Shelby Twin appears to assert actual bias.[133]

121. In support of such statements, the Appellants cite cases which deal directly with allegations of a reasonable apprehension of bias.[134] The Appellants, in effect, assert the CMJ

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[128] Factum of Catherine Twinn at paras 97-98
[129] *Re Brodylo Estate*, 2022 ABQB 358 at para 42
[130] Sawridge #12 at para 26-27
[131] Factum of the OPGT at paras 4, 116, 119-120
[132] Factum of Catherine Twinn at paras 5, 53-54
[133] Factum of Shelby Twinn at paras 3-8
[134] Factum of the OPGT at para 4, footnote 4, Tab T, *R v Switzer*, 2014 ABCA 129; Factum of Catherine Twinn filed June 24, 2022 at paras 53-54, foonote 50, *Chatel v The Queen*, 1985 CanLII 56 (SCC), [1985] 1 SCR 39. The OPGT also

exhibited a reasonable apprehension of bias without expressly saying so and without stating or applying the well-established test for same and without recognizing the high burden to prove such claims and strong presumption of judicial impartiality.[135]

122. The context of these proceedings and the CMJ's conduct is distinguishable from cases where an apprehension of bias or a lack of neutrality have been found. Most notably, the nature of these proceedings is an Advice and Direction application framed by the 1985 Trustees which was case managed. It is not traditional adversarial civil litigation or criminal proceedings.

123. Under the Foundational Rules, the parties and the court are encouraged to resolve claims fairly and justly in a timely and cost-effective way. The Court is specifically empowered to provide advice, make proposals, provide guidance, and make suggestions and recommendations in order to achieve these purposes.[136] Under Rule 1.3(2), the Court may grant a remedy whether or not it is claimed in an action.[137] Logically, this must also include the authority to raise issues or remedies of the court's own volition regardless of whether that issue has been raised by the parties.

124. Courts are imbued with authority to raise new issues as part of the Court's role in ensuring justice is done given their ultimate objective is to find the truth and do justice according to law.[138]

125. That the CMJ inquired about the meaning and effect of the 2016 Consent Order in April 2019 does not preclude the CMJ's consideration and determination of the issue, particularly where the CMJ afforded the parties and intervenors ample opportunity to address the issue through the provision of additional evidence and extensive written and oral submissions.

126. In so doing, the CMJ maintained impartiality as defined by the Courts: "True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge

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relies upon *Jonsson v Lymer*, 2020 ABCA 167 and cases cited therein which deal with a reasonable apprehension of bias, such as *R v Oracz*, 2011 ABCA 341.

[135] *Al-Ghamdi v Alberta*, 2016 ABQB 424 at paras 57-58, citing *McElheran v Canada*, 2006 ABCA 161 at para 5 and *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 25-26
[136] *Alberta Rules of Court*, Rules 1.2 – 1.4, Rule 4.14(1)
[137] *Alberta Rules of Court*, Rule 1.3(2)
[138] *R v Mian*, 2014 SCC 54 at para 40

nevertheless be free to entertain and act upon different points of view with an open mind."[139] The CMJ did not predetermine the issue as suggested by the Appellants, noting various possible interpretations and inviting the parties' submissions.[140]

PART 5 – RELIEF SOUGHT

127. SFN is a small closely-knit First Nation consisting of 47 members. It has always been SFN's position the subject trust assets, which were first settled in 1982 for the benefit of its members, are only to be used for the benefit of SFN members. The CMJ correctly determined in Sawridge #12 that beneficial ownership of these assets remains with the members of SFN.

128. For the reasons stated herein and for those set out by the 1985 Trustees, Sawridge #12 should be upheld, and these Appeals should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of September, 2022.

Estimate of time required for the oral argument: 30 minutes.

[139] *Al-Ghamdi v Alberta*, 2016 ABQB 424 at para 60, citing *R v S (RD)*, 1997 CanLii 324 (SCC) at para 18

[140] April 25, 2019 email from Justice Henderson (OPGT EKE Tab 25 at A578); Transcript of April 25, 2019 Proceeding at 3:21-41, 4:16-19 (OPGT EKE Tab 26 at A583-A584); and Transcript of the September 4, 2019 Proceeding at 13:16-23, 14:3-13, 20:25-27, 20:31-32, 22:26-31, 26:1-7 (OPGT EKE Tab 27 at A606-A607, A613, A615, A619)

TABLE OF AUTHORITIES

1. *Trustee Act*, RSA 2000, c T-8, s 42

2. *Twinn v Trustee Act*, 2022 ABQB 107 (Sawridge #12)

3. **[Tab 1]** "Treaty No. 8 – Indian and Northern Affairs", Woodward, Consolidated Native Law Statutes, Regulations and Treaties 2019 (Thomson Reuters: Toronto, 2018)

4. *Indian Oil and Gas Act*, RSC 1985, c I-7, s 4

5. *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9

6. *Indian Act*, RSC 1985, c I-5, ss 62 and 64

7. **[Tab 2]** *Indian Act*, RSC 1970, c I-6, ss 6, 9, 13

8. *Berg v Jaylevy*, 2019 ONSC 2255

9. **[Tab 3]** Donovan Waters, Mark Gillen & Lionel Smith, eds, *Waters' Law of Trusts in Canada* 4th Edition (Toronto: Carswell, 2012) [*Waters*]

10. **[Tab 4]** *Trustee Act 1925* 15 Geo 5, c19, s32 (UK)

11. *Pilkington v Inland Revenue Commissioners*, [1964] AC 612 (1962)

12. **[Tab 5]** *Hunter Estate v Holton*, 1992 CarswellOnt 537 (ON SC) [*Hunter Estate*]

13. **[Tab 6]** *Fox v Fox Estate*, 1996 CarswellOnt 317, 28 OR (3d) 496 (ON CA) [*Fox*]

14. *Edell v Sitzer*, 2001 CanLII 27989 (ON SC), 55 OR (3d) 198 [*Edell*]

15. *Burke v Hudson's Bay Co*, 2010 SCC 34 at para 85

16. *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 (*Bruderheim QB)*, aff'd *Bruderheim Community Church v Moravian Church In America (Canadian District)*, 2020 ABCA 393 (*Bruderheim CA*)

17. *Alberta Rules of Court*, Alta Reg 124/2010, Rules 1.2 – 1.4, Rules 4.14 & 4.15

18. *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at paras 15 36, 39, 47 [*Weir-Jones*]

19. *Re Brodylo Estate*, 2022 ABQB 358 at para 42

20. *Al-Ghamdi v Alberta*, 2016 ABQB 424 at paras 57-58, 60

21. *R v Mian*, 2014 SCC 54 at para 40

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CONSOLIDATED NATIVE LAW STATUTES, REGULATIONS AND TREATIES 2019

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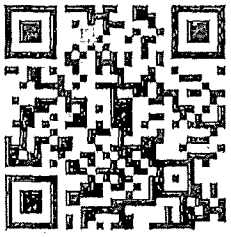

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TREATY NO. 8 — INDIAN AND NORTHERN AFFAIRS CANADA

ARTICLES OF TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand eight hundred and ninety-nine, between Her most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part: —

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendant General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for every, all their rights, titles

and privileges whatsoever, to the lands included within the following limits, that is to say: —

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said Lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a priviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, building, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

FURTHER, Her Majesty agrees to pay the salaries of such teachers to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and its prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets

annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, do hereby solemnly promise and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.

IN WITNESS WHEREOF Her Majesty's said Commissioners and the Cree Chief and Headmen of Lesser Slave Lake and the adjacent territory, have hereunto set their hands at Lesser Slave Lake on the twenty-first day of June, in the year herein first above written.

Signed by the parties hereto, in the presence of the undersigned witnesses, the same having been first explained to the Indians by Albert Tate and Samuel Cunningham, Interpreters.

CHAPTER I-6

An Act respecting Indians

SHORT TITLE

Short title

1. This Act may be cited as the *Indian Act*. R.S., c. 149, s. 1.

INTERPRETATION

Definitions

2. (1) In this Act

"band" *«bande»*

"band" means a body of Indians

(*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951,

(*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

(*c*) declared by the Governor in Council to be a band for the purposes of this Act;

"child" *«enfant»*

"child" includes a legally adopted Indian child;

"council of the band" *«conseil...»*

"council of the band" means

(*a*) in the case of a band to which section 74 applies, the council established pursuant to that section,

(*b*) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

"Department" *«Ministère»*

"Department" means the Department of Indian Affairs and Northern Development;

"elector" *«électeur»*

"elector" means a person who

(*a*) is registered on a Band List,

(*b*) is of the full age of twenty-one years, and

(*c*) is not disqualified from voting at band elections;

CHAPITRE I-6

Loi concernant les Indiens

TITRE ABRÉGÉ

Titre abrégé

1. La présente loi peut être citée sous le titre : *Loi sur les Indiens*. S.R., c. 149, art. 1.

INTERPRÉTATION

Définitions

2. (1) Dans la présente loi

«bande» *"band"*

«bande» signifie un groupe d'Indiens,

a) à l'usage et au profit communs desquels, des terres, dont le titre juridique est attribué à Sa Majesté, ont été mises de côté avant ou après le 4 septembre 1951,

b) à l'usage et au profit communs desquels, Sa Majesté détient des sommes d'argent, ou

c) que le gouverneur en conseil a déclaré être une bande aux fins de la présente loi;

«biens» *"estate"*

«biens» comprend les biens réels et personnels et tout intérêt dans un terrain;

«conseil de la bande» *"council..."*

«conseil de la bande» signifie

a) dans le cas d'une bande à laquelle s'applique l'article 74, le conseil établi conformément audit article;

b) dans le cas d'une bande à laquelle l'article 74 n'est pas applicable, le conseil choisi selon la coutume de la bande ou, en l'absence d'un conseil, le chef de la bande choisi selon la coutume de la bande;

«deniers des Indiens» *"Indian moneys"*

«deniers des Indiens» signifie toutes les sommes d'argent perçues, reçues ou détenues par Sa Majesté à l'usage et au profit des Indiens ou des bandes;

«électeur» *"elector"*

«électeur» signifie une personne qui

a) est inscrite sur une liste de bande,

b) a vingt et un ans révolus, et

c) n'a pas perdu son droit de vote aux élections de la bande;

"estate" «*biens*»
"estate" includes real and personal property and any interest in land;

"Indian" «*Indien*»
"Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

"Indian moneys" «*deniers...*»
"Indian moneys" means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands;

"intoxicant" «*spiritueux*»
"intoxicant" includes alcohol, alcoholic, spirituous, vinous, fermented malt or other intoxicating liquor or combination of liquors and mixed liquor a part of which is spirituous, vinous, fermented or otherwise intoxicating and all drinks or drinkable liquids and all preparations or mixtures capable of human consumption that are intoxicating;

"member of a band" «*membre...*»
"member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

"mentally incompetent Indian" «*Indien mentalement incapable*»
"mentally incompetent Indian" means an Indian who, pursuant to the laws of the province in which he resides, has been found to be mentally defective or incompetent for the purposes of any laws of that province providing for the administration of estates of mentally defective or incompetent persons;

"Minister" «*Ministre*»
"Minister" means the Minister of Indian Affairs and Northern Development;

"registered" «*inscrit*»
"registered" means registered as an Indian in the Indian Register;

"Registrar" «*registraire*»
"Registrar" means the officer of the Department who is in charge of the Indian Register;

"reserve" «*réserve*»
"reserve" means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band;

"superintendent" «*surintendant*»
"superintendent" includes a commissioner, regional supervisor, Indian superintendent, assistant Indian superintendent and any other person declared by the Minister to be a superintendent for the purposes of this Act, and with reference to a band or a reserve, means the superintendent for that band or reserve;

"surrendered lands" «*terres...*»
"surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit

«enfant» "*child*"
«enfant» comprend un enfant indien légalement adopté;

«Indien» "*Indian*"
«Indien» signifie une personne qui, conformément à la présente loi, est inscrite à titre d'Indien ou a droit de l'être;

«Indien mentalement incapable» "*mentally...*"
«Indien mentalement incapable» signifie un Indien qui, conformément aux lois de la province où il réside, a été déclaré mentalement déficient ou incapable, aux fins de toute loi de cette province régissant l'administration des biens de personnes mentalement déficientes ou incapables;

«inscrit» "*registered*"
«inscrit» signifie inscrit comme Indien dans le registre des Indiens;

«membre d'une bande» "*member...*"
«membre d'une bande» signifie une personne dont le nom apparaît sur une liste de bande ou qui a droit à ce que son nom y figure;

«ministère» "*Department*"
«ministère» signifie le ministère des Affaires indiennes et du Nord canadien;

«Ministre» "*Minister*"
«Ministre» désigne le ministre des Affaires indiennes et du Nord canadien;

«registraire» "*Registrar*"
«registraire» désigne le fonctionnaire du ministère qui est préposé au registre des Indiens;

«réserve» "*reserve*"
«réserve» signifie une parcelle de terrain dont le titre juridique est attribué à Sa Majesté et qu'Elle a mise de côté à l'usage et au profit d'une bande;

«spiritueux» "*intoxicant*"
«spiritueux» comprend l'alcool, une liqueur ou une combinaison de liqueurs alcooliques, spiritueuses, vineuses, à base de malt fermenté ou autrement enivrantes et une liqueur mélangée dont une partie est spiritueuse, vineuse, fermentée ou autrement enivrante, et tous les breuvages ou boissons et tous les mélanges ou préparations susceptibles de consommation par l'homme, qui sont enivrants;

«surintendant» "*superintendent*"
«surintendant» comprend un commissaire, un surveillant régional, un surintendant des Indiens, un surintendant adjoint des Indiens et toute autre personne que le Ministre a déclarée un surintendant aux fins de la présente loi, et, relativement à une bande ou une réserve, signifie le surintendant de cette bande ou réserve;

«terres cédées» "*surrendered...*"
«terres cédées» signifie une réserve ou partie d'une réserve, ou tout intérêt y afférent, dont le titre juridique demeure attribué à Sa Majesté et que la bande à l'usage et au profit de laquelle il avait été mis de côté a abandonné ou cédé.

it was set apart.

"Band"

(2) The expression "band" with reference to a reserve or surrendered lands means the band for whose use and benefit the reserve or the surrendered lands were set apart.

Exercise of powers conferred on band or council

(3) Unless the context otherwise requires or this Act otherwise provides

(*a*) a power conferred upon a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band, and

(*b*) a power conferred upon the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened. R.S., c. 149, s. 2; 1966-67, c. 25, s. 40.

ADMINISTRATION

Minister to administer Act

3. (1) This Act shall be administered by the Minister of Indian Affairs and Northern Development, who shall be the superintendent general of Indian affairs.

Authority of Deputy Minister and chief officer

(2) The Minister may authorize the Deputy Minister of Indian Affairs and Northern Development or the chief officer in charge of the branch of the Department relating to Indian affairs to perform and exercise any of the duties, powers and functions that may be or are required to be performed or exercised by the Minister under this Act or any other Act of the Parliament of Canada relating to Indian affairs. R.S., c. 149, s. 3; 1966-67, c. 25, s. 40.

APPLICATION OF ACT

Application of Act

4. (1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Eskimos.

Act may be declared inapplicable

(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 37 to 41, shall not apply to

(*a*) any Indians or any group or band of Indians, or

(*b*) any reserve or any surrendered lands or any part thereof,

(2) L'expression «bande», en ce qui concerne une réserve ou des terres cédées, signifie la bande à l'usage et au profit de laquelle la réserve ou les terres cédées ont été mises de côté. «Bande»

(3) Sauf si le contexte s'y oppose ou si la présente loi dispose autrement, Exercice des pouvoirs conférés à une bande ou un conseil

a) un pouvoir conféré à une bande est censé ne pas être exercé, à moins de l'être en vertu du consentement donné par une majorité des électeurs de la bande, et

b) un pouvoir conféré au conseil d'une bande est censé ne pas être exercé à moins de l'être en vertu du consentement donné par une majorité des conseillers de la bande présents à une réunion du conseil dûment convoquée. S.R., c. 149, art. 2; 1966-67, c. 25, art. 40.

ADMINISTRATION

3. (1) Le ministre des Affaires indiennes et du Nord canadien, qui doit être surintendant général des affaires indiennes, est chargé de l'application de la présente loi. Le Ministre est chargé de l'application de la loi

(2) Le Ministre peut autoriser le sous-ministre des Affaires indiennes et du Nord canadien ou le fonctionnaire en chef de la division du ministère relative aux affaires indiennes à accomplir et exercer tout devoir, pouvoir et fonction que peut ou doit accomplir ou exercer le Ministre aux termes de la présente loi ou de toute autre loi du Parlement du Canada concernant les affaires indiennes. S.R., c. 149, art. 3; 1966-67, c. 25, art. 40. Autorité du sous-ministre et du fonctionnaire en chef

APPLICATION DE LA LOI

4. (1) La mention d'un Indien, dans la présente loi, ne comprend pas une personne de la race d'aborigènes communément appelés Esquimaux. Application de la loi

(2) Le gouverneur en conseil peut, par proclamation, déclarer que la présente loi, ou toute partie de celle-ci, sauf les articles 37 à 41, ne s'applique pas On peut déclarer la loi inapplicable

a) à des Indiens ou à un groupe ou une bande d'Indiens, ou

b) à une réserve ou à des terres cédées, ou à une partie y afférente,

and may by proclamation revoke any such declaration.

Certain sections inapplicable to Indians living off reserves

(3) Sections 114 to 123 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province. R.S., c. 149, s. 4; 1956, c. 40, s. 1.

et peut par proclamation révoquer toute semblable déclaration.

Certains articles ne s'appliquent pas aux Indiens vivant hors des réserves

(3) Les articles 114 à 123 et, sauf si le Ministre en ordonne autrement, les articles 42 à 52 ne s'appliquent à aucun Indien, ni à l'égard d'aucun Indien, ne résidant pas ordinairement dans une réserve ou sur des terres qui appartiennent à Sa Majesté du chef du Canada ou d'une province. S.R., c. 149, art. 4; 1956, c. 40, art. 1.

DEFINITION AND REGISTRATION OF INDIANS

DÉFINITION ET ENREGISTREMENT DES INDIENS

Indian Register

5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian. R.S., c. 149, s. 5.

Registre des Indiens

5. Est maintenu au ministère un registre des Indiens, lequel consiste dans des listes de bande et des listes générales et où doit être consigné le nom de chaque personne ayant droit d'être inscrite comme Indien. S.R., c. 149, art. 5.

Band Lists and General Lists

6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List. R.S., c. 149, s. 6.

Listes de bande et listes générales

6. Le nom de chaque personne qui est membre d'une bande et a droit d'être inscrite doit être consigné sur la liste de bande pour la bande en question, et le nom de chaque personne qui n'est pas membre d'une bande et a droit d'être inscrite doit apparaître sur une liste générale. S.R., c. 149, art. 6.

Deletions and additions

7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

Additions et retranchements

7. (1) Le registraire peut en tout temps ajouter à une liste de bande ou à une liste générale, ou en retrancher, le nom de toute personne qui, d'après la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

Date of change

(2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom. R.S., c. 149, s. 7.

Date du changement

(2) Le registre des Indiens doit indiquer la date où chaque nom y a été ajouté ou en a été retranché. S.R., c. 149, art. 7.

Existing lists to constitute Register

8. The band lists in existence in the Department on the 4th day of September 1951 shall constitute the Indian Register, and the applicable lists shall be posted in a conspicuous place in the superintendent's office that serves the band or persons to whom the List relates and in all other places where band notices are ordinarily displayed. R.S., c. 149, s. 8.

Les listes existantes constituent le registre

8. Les listes de bande dressées au ministère le 4 septembre 1951 constituent le registre des Indiens et les listes applicables doivent être affichées à un endroit bien en vue dans le bureau du surintendant qui dessert la bande ou les personnes visées par la liste et dans tous les autres endroits où les avis concernant la bande sont ordinairement affichés. S.R., c. 149, art. 8.

Deletions and additions may be protested

9. (1) Within six months after a list has been posted in accordance with section 8 or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section 7

Les retranchements et les additions peuvent être l'objet d'une protestation

9. (1) Dans les six mois de l'affichage d'une liste conformément à l'article 8 ou dans les trois mois de l'addition du nom d'une personne à une liste de bande ou à une liste générale, ou de son retranchement d'une telle liste, en vertu de l'article 7,

(*a*) in the case of a Band List, the council of the band, any ten electors of the band, or any three electors if there are less than ten electors in the band,

(*b*) in the case of a posted portion of a General List, any adult person whose name appears on that posted portion, and

(*c*) the person whose name was included in or omitted from the List referred to in section 8, or whose name was added to or deleted from a Band List or a General List,

may, by notice in writing to the Registrar, containing a brief statement of the grounds therefor, protest the inclusion, omission, addition, or deletion, as the case may be, of the name of that person, and the onus of establishing those grounds lies on the person making the protest.

a) dans le cas d'une liste de bande, le conseil de la bande, dix électeurs de la bande ou trois électeurs, s'il y en a moins de dix,

b) dans le cas d'une portion affichée d'une liste générale, tout adulte dont le nom figure sur cette portion affichée, et

c) la personne dont le nom a été inclus dans la liste mentionnée à l'article 8, ou y a été omis, ou dont le nom a été ajouté à une liste de bande ou une liste générale, ou en a été retranché,

peuvent, par avis écrit au registraire, renfermant un bref exposé des motifs invoqués à cette fin, protester contre l'inclusion, l'omission, l'addition ou le retranchement, selon le cas, du nom de cette personne, et il incombe à la personne qui formule la protestation d'établir ces motifs.

Registrar to cause investigation

(2) Where a protest is made to the Registrar under this section he shall cause an investigation to be made into the matter and shall render a decision, and subject to a reference under subsection (3), the decision of the Registrar is final and conclusive.

Le registraire fait tenir une enquête

(2) Lorsqu'une protestation est adressée au registraire, en vertu du présent article, il doit faire tenir une enquête sur la question et rendre une décision qui, sous réserve d'un renvoi prévu au paragraphe (3), est définitive et péremptoire.

Reference to judge

(3) Within three months from the date of a decision of the Registrar under this section

(*a*) the council of the band affected by the Registrar's decision, or

(*b*) the person by or in respect of whom the protest was made,

may, by notice in writing, request the Registrar to refer the decision to a judge for review, and thereupon the Registrar shall refer the decision, together with all material considered by the Registrar in making his decision, to the judge of the county or district court of the county or district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other county or district as the Minister may designate, or in the Province of Quebec, to the judge of the Superior Court for the district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other district as the Minister may designate.

Renvoi devant un juge

(3) Dans les trois mois de la date d'une décision du registraire aux termes du présent article,

a) le conseil de la bande que vise la décision du registraire, ou

b) la personne qui a fait la protestation ou à l'égard de qui elle a eu lieu,

peut, moyennant un avis par écrit, demander au registraire de soumettre la décision à un juge, pour revision, et dès lors le registraire doit déférer la décision, avec tous les éléments que le registraire a examinés en rendant sa décision, au juge de la cour de comté ou district du comté ou district où la bande est située ou dans lequel réside la personne à l'égard de qui la protestation a été faite, ou de tel autre comté ou district que le Ministre peut désigner, ou, dans la province de Québec, au juge de la cour supérieure du district où la bande est située ou dans lequel réside la personne à l'égard de qui la protestation a été faite, ou de tel autre district que le Ministre peut désigner.

Inquiry and decision

(4) The judge of the county, district or Superior Court, as the case may be, shall inquire into the correctness of the Registrar's decision, and for such purposes may exercise

Enquête et décision

(4) Le juge de la cour de comté, de la cour de district ou de la cour supérieure, selon le cas, doit enquêter sur la justesse de la décision du registraire, et, à ces fins, peut exercer tous

all the powers of a commissioner under Part I of the *Inquiries Act*; the judge shall decide whether the person in respect of whom the protest was made is, in accordance with this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and the decision of the judge is final and conclusive.

les pouvoirs d'un commissaire en vertu de la Partie I de la *Loi sur les enquêtes*. Le juge doit décider si la personne qui a fait l'objet de la protestation a ou n'a pas droit, selon le cas, d'après la présente loi, à l'inscription de son nom au registre des Indiens, et la décision du juge est définitive et péremptoire.

One reference only

(5) Not more than one reference of a Registrar's decision in respect of a protest may be made to a judge under this section.

(5) La décision du registraire à l'égard d'une protestation ne peut être renvoyée qu'une seule fois devant un juge aux termes du présent article.

Un seul renvoi

Burden of proof

(6) Where a decision of the Registrar has been referred to a judge for review under this section, the burden of establishing that the decision of the Registrar is erroneous is on the person who requested that the decision be so referred. R.S., c. 149, s. 9; 1956, c. 40, s. 2.

(6) Lorsque la décision du registraire a été renvoyée devant un juge, pour revision, aux termes du présent article, il incombe à la personne qui a demandé ce renvoi d'établir que la décision du registraire est erronée. S.R., c. 149, art. 9; 1956, c. 40, art. 2.

Fardeau de la preuve

Wife and minor children

10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be. R.S., c. 149, s. 10.

10. Lorsque le nom d'une personne du sexe masculin est inclus dans une liste de bande ou une liste générale, ou y est ajouté ou omis, ou en est retranché, les noms de son épouse et de ses enfants mineurs doivent également être inclus, ajoutés, omis ou retranchés, selon le cas. S.R., c. 149, art. 10.

L'épouse et les enfants mineurs

Persons entitled to be registered

11. (1) Subject to section 12, a person is entitled to be registered if that person

(*a*) on the 26th day of May 1874 was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

(*b*) is a member of a band

(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or

(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

(*c*) is a male person who is a direct descendant in the male line of a male

11. (1) Sous réserve de l'article 12, une personne a droit d'être inscrite si

a) elle était, le 26 mai 1874, aux fins de la loi alors intitulée: *Acte pourvoyant à l'organisation du Département du Secrétaire d'État du Canada, ainsi qu'à l'administration des Terres des Sauvages et de l'Ordonnance*, chapitre 42 des Statuts du Canada de 1868, modifiée par l'article 6 du chapitre 6 des Statuts du Canada de 1869 et par l'article 8 du chapitre 21 des Statuts du Canada de 1874, considérée comme ayant droit à la détention, l'usage ou la jouissance des terres et autres biens immobiliers appartenant aux tribus, bandes ou groupes d'Indiens au Canada, ou affectés à leur usage;

b) elle est membre d'une bande

(i) à l'usage et au profit communs de laquelle des terres ont été mises de côté ou, depuis le 26 mai 1874, ont fait l'objet d'un traité les mettant de côté, ou

(ii) que le gouverneur en conseil a déclarée une bande aux fins de la présente loi;

c) elle est du sexe masculin et descendante directe, dans la ligne masculine, d'une personne du sexe masculin décrite à l'alinéa

Personnes ayant droit à l'inscription

person described in paragraph (*a*) or (*b*);

(*d*) is the legitimate child of

(i) a male person described in paragraph (*a*) or (*b*), or

(ii) a person described in paragraph (*c*);

(*e*) is the illegitimate child of a female person described in paragraph (*a*), (*b*) or (*d*); or

(*f*) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (*a*), (*b*), (*c*), (*d*) or (*e*).

Exception

(2) Paragraph (1)(*e*) applies only to persons born after the 13th day of August 1956. R.S., c. 149, s. 11; 1956, c. 40, s. 3.

Persons not entitled to be registered

12. (1) The following persons are not entitled to be registered, namely,

(*a*) a person who

(i) has received or has been allotted half-breed lands or money scrip,

(ii) is a descendant of a person described in subparagraph (i),

(iii) is enfranchised, or

(iv) is a person born of a marriage entered into after the 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(*a*),(*b*) or (*d*) or entitled to be registered by virtue of paragraph 11(1)(*e*),

unless, being a woman, that person is the wife or widow of a person described in section 11, and

(*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

Protest re illegitimate child

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(*e*) may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

Certificate

(3) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

Exception

(4) Subparagraphs (1)(*a*)(i) and (ii) do not apply to a person who

a) ou *b*);

d) elle est l'enfant légitime

(i) d'une personne du sexe masculin décrite à l'alinéa *a*) ou *b*), ou

(ii) d'une personne décrite à l'alinéa *c*);

e) elle est l'enfant illégitime d'une personne du sexe féminin décrite à l'alinéa *a*), *b*) ou *d*); ou

f) elle est l'épouse ou la veuve d'une personne ayant le droit d'être inscrite aux termes de l'alinéa *a*), *b*), *c*), *d*) ou *e*).

Exception

(2) L'alinéa (1)*e*) s'applique seulement aux personnes nées après le 13 août 1956. S.R., c. 149, art. 11; 1956, c. 40, art. 3.

Personnes n'ayant pas droit à l'inscription

12. (1) Les personnes suivantes n'ont pas le droit d'être inscrites, savoir:

a) une personne qui

(i) a reçu, ou à qui il a été attribué, des terres ou certificats d'argent de métis,

(ii) est un descendant d'une personne décrite au sous-alinéa (i),

(iii) est émancipée, ou

(iv) est née d'un mariage contracté après le 4 septembre 1951 et a atteint l'âge de vingt et un ans, dont la mère et la grand-mère paternelle ne sont pas des personnes décrites à l'alinéa 11(1)*a*),*b*) ou *d*) ou admises à être inscrites en vertu de l'alinéa 11(1)*e*),

sauf si, étant une femme, cette personne est l'épouse ou la veuve de quelqu'un décrit à l'article 11, et

b) une femme qui a épousé un non-Indien, sauf si cette femme devient subséquemment l'épouse ou la veuve d'une personne décrite à l'article 11.

Protestation au sujet d'un enfant illégitime

(2) L'addition, à une liste de bande, du nom d'un enfant illégitime décrit à l'alinéa 11(1)*e*) peut faire l'objet d'une protestation en tout temps dans les douze mois de l'addition et si, à la suite de la protestation, il est décidé que le père de l'enfant n'était pas un Indien, l'enfant n'a pas le droit d'être inscrit selon cet alinéa.

Certificat

(3) Le Ministre peut délivrer à tout Indien auquel la présente loi cesse de s'appliquer, un certificat dans ce sens.

Exception

(4) Les sous-alinéas (1)*a*)(i) et (ii) ne s'appliquent pas à une personne qui,

(*a*) pursuant to this Act is registered as an Indian on the 13th day of August 1958, or

(*b*) is a descendant of a person described in paragraph (*a*) of this subsection.

Idem

(5) Subsection (2) applies only to persons born after the 13th day of August 1956. R.S., c. 149, s. 12; 1956, c. 40, ss. 3, 4; 1958, c. 19, s. 1.

Admission to band and transfer

13. Subject to the approval of the Minister and, if the Minister so directs, to the consent of the admitting band,

(*a*) a person whose name appears on a General List may be admitted into membership of a band with the consent of the council of the band, and

(*b*) a member of a band may be admitted into membership of another band with the consent of the council of the latter band. 1956, c. 40, s. 5.

Woman marrying outside band

14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, but if she marries a member of another band, she thereupon becomes a member of the band of which her husband is a member. R.S., c. 149, s. 14.

Payments to persons ceasing to be members

15. (1) Subject to subsection (2), an Indian who becomes enfranchised or who otherwise ceases to be a member of a band is entitled to receive from Her Majesty

(*a*) one per capita share of the capital and revenue moneys held by Her Majesty on behalf of the band, and

(*b*) an amount equal to the amount that in the opinion of the Minister he would have received during the next succeeding twenty years under any treaty then in existence between the band and Her Majesty if he had continued to be a member of the band.

Payments not to be made in certain cases

(2) A person is not entitled to receive any amount under subsection (1)

(*a*) if his name was removed from the Indian register pursuant to a protest made under section 9, or

(*b*) if he is not entitled to be a member of a band by reason of the application of paragraph 11(1)(*e*) or subparagraph 12(1)(*a*)(iv).

Payments to minors

(3) Where by virtue of this section moneys

a) en conformité de la présente loi, est inscrite à titre d'Indien le 13 août 1958, ou

b) est un descendant d'une personne désignée à l'alinéa *a*) du présent paragraphe.

Idem

(5) Le paragraphe (2) s'applique seulement aux personnes nées après le 13 août 1956. S.R., c. 149, art. 12; 1956, c. 40, art. 3, 4; 1958, c. 19, art. 1.

Admission au sein d'une bande et transfert d'un membre

13. Sous réserve de l'approbation du Ministre et, si ce dernier l'ordonne, sous réserve du consentement de la bande qui accorde l'admission,

a) une personne dont le nom apparaît sur une liste générale peut être admise au sein d'une bande avec le consentement du conseil de la bande, et

b) un membre d'une bande peut être admis parmi les membres d'une autre bande avec le consentement du conseil de celle-ci. 1956, c. 40, art. 5.

Femme qui épouse un homme n'étant pas de la bande

14. Une femme qui est membre d'une bande cesse d'en faire partie si elle épouse une personne qui n'en est pas membre, mais si elle épouse un membre d'une autre bande, elle entre dès lors dans la bande à laquelle appartient son mari. S.R., c. 149, art. 14.

Paiements aux personnes qui cessent d'être membres

15. (1) Sous réserve du paragraphe (2), un Indien qui devient émancipé ou qui, d'autre manière, cesse d'être membre d'une bande a droit de recevoir de Sa Majesté

a) une part *per capita* des fonds de capital et de revenu détenus par Sa Majesté au nom de la bande, et

b) un montant égal à la somme que, de l'avis du Ministre, il aurait reçue durant les vingt années suivantes aux termes de tout traité alors en vigueur entre la bande et Sa Majesté s'il était demeuré membre de la bande.

Certains cas où les paiements ne sont pas versés

(2) Une personne n'a pas droit de recevoir un montant quelconque sous le régime du paragraphe (1)

a) si son nom a été rayé du registre des Indiens à la suite d'une protestation faite en vertu de l'article 9, ou

b) si elle n'a pas droit d'être membre d'une bande en raison de l'application de l'alinéa 11(1)*e*) ou du sous-alinéa 12(1)*a*)(iv).

Paiements aux mineurs

(3) Lorsqu'en vertu du présent article, des

are payable to a person who is under the age of twenty-one, the Minister may

(*a*) pay the moneys to the parent, guardian or other person having the custody of that person or to the public trustee, public administrator or other like official for the province in which that person resides, or

(*b*) cause payment of the moneys to be withheld until that person reaches the age of twenty-one.

deniers sont payables à une personne de moins de vingt et un ans, le Ministre peut

a) payer les deniers au père ou à la mère, au tuteur ou à l'autre personne ayant la garde de cette personne, ou au curateur public ou administrateur public ou autre semblable fonctionnaire de la province où réside ladite personne, ou

b) faire suspendre le paiement des deniers jusqu'à ce que la personne ait atteint l'âge de vingt et un ans.

Compensation for permanent improvements

(4) Where the name of a person is removed from the Indian Register and he is not entitled to any payment under subsection (1), the Minister shall, if he considers it equitable to do so, authorize payment, out of moneys appropriated by Parliament, of such compensation as the Minister may determine for any permanent improvements made by that person on lands in a reserve.

(4) Lorsque le nom d'une personne est rayé du registre des Indiens et que celle-ci n'a droit à aucun paiement aux termes du paragraphe (1), le Ministre, s'il l'estime équitable, doit autoriser le paiement, à même les deniers votés par le Parlement, de l'indemnité qu'il fixe pour toute amélioration permanente faite par cette personne sur des terres d'une réserve.

Indemnité relative aux améliorations permanentes

Commutation of payments under former Act

(5) Where, prior to the 4th day of September 1951, any woman became entitled, under section 14 of the *Indian Act*, chapter 98 of the Revised Statutes of Canada, 1927, or any prior provisions to the like effect, to share in the distribution of annuities, interest moneys or rents, the Minister may, in lieu thereof, pay to such woman out of the moneys of the band an amount equal to ten times the average annual amounts of such payments made to her during the ten years last preceding or, if they were paid for less than ten years, during the years they were paid. R.S., c. 149, s. 15; 1956, c. 40, s. 6.

(5) Lorsque, avant le 4 septembre 1951, une femme est devenue admissible, selon l'article 14 de la *Loi des Indiens*, chapitre 98 des Statuts revisés du Canada de 1927, ou selon quelque disposition antérieure ayant le même effet, à participer à la distribution d'annuités, intérêts ou rentes, le Ministre peut, en remplacement des susdits, payer à cette femme, sur les deniers de la bande, un montant égal à dix fois les montants annuels moyens de ces paiements à elle effectués au cours des dix années précédentes ou, s'ils l'ont été pendant moins de dix ans, au cours des années pendant lesquelles ils ont été faits. S.R., c. 149, art. 15; 1956, c. 40, art. 6.

Commutation de paiements prévus par une loi antérieure

Transfer of funds

16. (1) Section 15 does not apply to a person who ceases to be a member of one band by reason of his becoming a member of another band, but, subject to subsection (3), there shall be transferred to the credit of the latter band the amount to which that person would, but for this section, have been entitled under section 15.

16. (1) L'article 15 ne s'applique pas à une personne qui cesse d'appartenir à une bande du fait qu'elle devient membre d'une autre bande, mais, sous réserve du paragraphe (3), le montant auquel cette personne aurait eu droit en vertu de l'article 15, sans le présent article, doit être transféré au crédit de la bande en dernier lieu mentionnée.

Transfert de fonds

Transferred member's interest

(2) A person who ceases to be a member of one band by reason of his becoming a member of another band is not entitled to any interest in the lands or moneys held by Her Majesty on behalf of the former band, but he is entitled to the same interest in common in lands and moneys held by Her Majesty on behalf of the latter band as other members of that band.

(2) Une personne qui cesse de faire partie d'une bande du fait qu'elle est devenue membre d'une autre bande n'a droit à aucun intérêt dans les terres ou deniers détenus par Sa Majesté au nom de la bande en premier lieu mentionnée, mais elle a droit au même intérêt en commun, dans les terres et les deniers détenus par Sa Majesté au nom de la bande en deuxième lieu mentionnée, que les

L'intérêt d'un membre transféré

Transfer of woman by marriage

(3) Where a woman who is a member of one band becomes a member of another band by reason of marriage, and the per capita share of the capital and revenue moneys held by Her Majesty on behalf of the first-mentioned band is greater than the per capita share of such moneys so held for the second-mentioned band, there shall be transferred to the credit of the second-mentioned band an amount equal to the per capita share held for that band, and the remainder of the money to which the woman would, but for this section, have been entitled under section 15 shall be paid to her in such manner and at such times as the Minister may determine. R.S., c. 149, s. 16.

Minister may constitute new bands

17. (1) The Minister may, whenever he considers it desirable,

(*a*) constitute new bands and establish Band Lists with respect thereto from existing Band Lists or General Lists, or both,

(*b*) amalgamate bands that, by a vote of a majority of their electors, request to be amalgamated, and

(*c*) where a band has applied for enfranchisement, remove any name from the Band List and add it to the General List.

Division of reserves and funds

(2) Where pursuant to subsection (1) a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Minister determines shall be held for the use and benefit of the new band.

No protest

(3) No protest may be made under section 9 in respect of the deletion from or addition to a list consequent upon the exercise by the Minister of any of his powers under subsection (1). R.S., c. 149, s. 17; 1956, c. 40, s. 7.

RESERVES

Reserves to be held for use and benefit of Indians

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any

autres membres de cette dernière.

Quand une femme change de bande du fait de son mariage

(3) Lorsqu'une femme qui fait partie d'une bande devient membre d'une autre bande du fait de son mariage et que la part *per capita* des fonds de capital et de revenu détenus par Sa Majesté au nom de la bande en premier lieu mentionnée, est plus élevée que la part *per capita* des fonds ainsi détenus pour la bande en deuxième lieu mentionnée, il doit être transféré au crédit de la bande en deuxième lieu mentionnée un montant égal à la part *per capita* détenue pour cette bande, et le solde des deniers auxquels cette femme aurait eu droit aux termes de l'article 15, sans le présent article, doit lui être versé de la manière et aux époques que le Ministre détermine. S.R., c. 149, art. 16.

Le Ministre peut constituer de nouvelles bandes

17. (1) Le Ministre peut, chaque fois qu'il l'estime opportun,

a) constituer de nouvelles bandes et établir à leur égard des listes de bande en se servant des listes de bande ou des listes générales existantes, ou des deux à la fois,

b) fusionner des bandes qui, par un vote majoritaire de leurs électeurs, demandent la fusion, et

c) lorsqu'une bande a demandé l'émancipation, retrancher tout nom de la liste de bande et l'ajouter à la liste générale.

Division des réserves et des fonds

(2) Si, conformément au paragraphe (1), une nouvelle bande a été constituée à même une bande existante ou quelque partie de cette dernière, on doit détenir à l'usage et au profit de la nouvelle bande telle fraction des terres de réserve et des fonds de la bande existante que le Ministre détermine.

Aucune protestation

(3) Aucune protestation ne peut être faite selon l'article 9 à l'égard du retranchement d'une liste ou de l'addition à une liste par suite de l'exercice, par le Ministre, de l'un quelconque de ses pouvoirs prévus au paragraphe (1). S.R., c. 149, art. 17; 1956, c. 40, art. 7.

RÉSERVES

Les réserves sont détenues à l'usage et au profit des Indiens

18. (1) Sauf les dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; et, sauf la présente loi et les stipulations de tout traité ou cession, le gouverneur en conseil peut

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

By

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that the payor can use the account for his own benefit during his life; but that on his death, the account shall belong beneficially to another, the volunteer. As Rothstein J. noted, this is not a joint account situation; the payor is the sole account holder throughout. Although the retention of such a high degree of control by the settlor/trustee might cast doubt on whether there was genuinely an intention to create a trust, Rothstein J. noted that U.S. authority has accepted that such trusts can be created.[257] There is also Canadian and English authority to similar effect.[258] The best analysis of this situation is presumably that the settlor/trustee has a power to encroach on the capital for his own benefit, but the underlying beneficial interest, in default of the exercise of the power, is in the volunteer.[259] This interest subsists when, on the payor's death, the legal right to the account falls into the payor's estate. But here, too, as Rothstein J. noted, the creation of this defeasible beneficial interest takes place *inter vivos*, and is not testamentary.[260]

5. Conclusion

The joint bank account is a popular device, particularly among married people, but increasingly between parents and their children, and it has long been recognized by banking practice. Sheard, Hull and Fitzpatrick felt compelled to warn practitioners in their *Canadian Forms of Wills*[261] that "such accounts are a prolific source of litigation," and that "with the passing of years the difficulties ... have certainly not decreased." Nor has this concern since declined. Those who open such accounts would do well to make their intentions perfectly clear, as the case law shows that the potential for uncertainty and litigation is vast.

F. Exhaustion or Failure of Express Trust Objects

We come now to the second group of resulting trust situations. A resulting trust will arise when for some reason an express trust fails, and the trustees are left holding the trust property. Clearly the trustees cannot as trustees take the property beneficially, unless this is expressly provided and, so, the question is what they are to do

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[257] *Pecore*, *supra*, note 244, at para. 52.

[258] *Paul v. Constance*, [1977] 1 W.L.R. 527, [1977] 1 All E.R. 195 (Eng. C.A.), in which both payor and volunteer were equally beneficially interested during the joint lives, but the surviving volunteer had the sole beneficial interest in the balance of the account remaining on the death of the payor. For another example of a trust of "whatever remains" after the life of a trustee who also had the power to encroach during her life for her own benefit, involving property other than bank accounts, see *Re Shamas*, 1967 CarswellOnt 111, [1967] 2 O.R. 275 (Ont. C.A.). In *Birmingham v. Renfrew* (1937), 57 C.L.R. 666 (Australia H.C.) the High Court of Australia noted that the trust that binds the survivor in a mutual will situation is often of this kind; see chapter 11, Part II F 3 (d).

[259] This was the interpretation in *Re Shamas*, *ibid.*

[260] Again, the payor cannot unilaterally revoke the arrangement, even though he has the ability to defeat the volunteer's interest by exercise of the power. A testamentary gift can always be revoked before death (at least outside of the mutual wills context).

[261] *Sheard, Hull and Fitzpatrick*, at 266.

I. INTRODUCTION

A. Proprietary Remedies

A beneficiary may bring his action for breach of trust in order to assert an interest of his own in the trust property, denied or overlooked by the trustee, or he may be suing, effectively on behalf of all the beneficiaries, because trust property has been misappropriated or otherwise improperly handled. In either case his prime remedy is against the trustee (or trustees) personally, and in most cases this remedy secures to the beneficiary compensation for the loss which the breach has caused. If the trustee successfully pleads one of the defences to an action for breach, is the beneficiary or the trust left without compensation? If the trustee or each trustee is insolvent, has the trust beneficiary or the trust to be content with a claim in bankruptcy and to take his or its place with the trustee's creditors? Insolvency of the trustee is a frequent companion of the misappropriation of trust property.

The answer is that, placed in either of these positions, the beneficiary has another recourse, namely, the pursuit and recovery of the wrongly alienated or misappropriated trust property. Again he is seeking to restore the trust corpus to its original condition, but instead of requiring the trustee to reconstitute the trust fund out of his own pocket, the beneficiary's object is to make good the loss by recovering the trust property. To make the Latin distinction, the remedy against the trustee is personal or *in personam*, the remedy to recover the trust property is proprietary or *in rem*. It will be clear that the particular value of the *in rem* remedy arises when the trustee is insolvent or the trust property has got into the hands of innocent third parties.

B. Tracing, Following and Claiming

There are really two distinct ideas which are involved when tracing of trust property is discussed. The first is the possibility of recovering the property from some third party into whose hands it has come. The starting point is that trust property remains trust property, unless the recipient positively establishes the defence that he acquired a legal interest in the property,[1] in good faith, for value, without notice of the breach of trust or other want of authority on the part of the trustee.[2] The defendant

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[1] The defence cannot be used by someone who only acquired an equitable interest; equitable interests are ranked according to the time of their creation.

[2] The crucial time for determining whether the transferee lacked notice is the time at which value was given, not the time of the acquisition of the legal interest, which might have been earlier or later: see *Bailey v. Barnes*, [1894] 1 Ch. 25 (Eng. C.A.); *McCarthy & Stone Ltd. v. Julian S. Hodge & Co.*, [1971] 1 W.L.R. 1547; and *MacMillan Inc. v. Bishopsgate Investment Trust plc (No. 3)*, [1995] 1 W.L.R. 978, 1000, 1003-4, affirmed on other grounds, [1996] 1 W.L.R. 387 (C.A.); see also *Botiuk v. Collison* (1979), 26 O.R. (2d) 580, 103 D.L.R. (3d) 322 (Ont. C.A.).

must establish all elements of the defence.[3] The defence may be modified in certain contexts, especially in relation to land where registration may partially or entirely displace the work done by the idea of notice, whether actual, constructive or imputed. The effect of this is that subject to a wide-ranging protection for third parties, the status of an asset as subject to a trust is capable of surviving the transfer of that asset to someone other than the original trustee. This represents one of the most important manifestations of the beneficiaries' proprietary rights in the trust property.[4] The decision that some property in the hands of a third party is subject to a trust will mean that the third party is liable to hand the property over to the trustees. This might be the original trustees, or, if those trustees have been removed, their successors. Only if the trust was a bare trust, giving the beneficiaries the right to demand the property from the trustees, will the third party recipient be liable likewise to transfer it directly to the beneficiaries. However, the third party is not automatically *personally* liable. If, for example, he no longer has the property, he is not necessarily liable for a kind of breach of trust. Personal liability of a non-trustee depends on a finding of wrongdoing.[5]

The second is a quite different idea, which operates when an unauthorized disposition of trust property is made by a trustee. The proceeds of the disposition, in the hands of the trustee, will themselves be treated as trust property if the beneficiaries so elect. In other words, a new asset is subjected to the trust in the hands of the original trustee, rather than (as in the discussion in the previous paragraph) the original asset being subject to the original trust, in the hands of some new transferee. The process of tracking a particular asset as it moves from hand to hand can be called *following*, while the process of identifying exchange products or substitutes can properly be called *tracing*.[6] These are very different ideas, even though they will often both be found in the same factual setting. For example, a trustee might wrongly sell trust property, use the proceeds to buy a yacht, and give the yacht to his accomplice. The beneficiaries could trace into the yacht, and then follow the yacht

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[3] In other words, if the defendant was a donee, it will be unnecessary to show that he was or ought to have been aware that the transfer to him was in breach of trust: *Banton v. CIBC Trust Corp.* (2001), 53 O.R. (3d) 567, 197 D.L.R. (4th) 212 (Ont. C.A.), leave to appeal refused (2001), [2001] S.C.C.A. No. 242, 2001 CarswellOnt 3069 (S.C.C.).

[4] For a conceptual and historical analysis, see L. Smith, "Transfers" in *Birks and Pretto* at 119.

[5] For a full discussion, see chapter 11. Though to date this has not been accepted by the courts, there is an argument (there discussed) that a third party recipient should be strictly personally liable (subject to defences) based on unjust enrichment (which does not require wrongdoing). Although, as the law stands, an innocent recipient is not liable in unjust enrichment at the moment of receipt of the trust property, it is arguable that he becomes liable in unjust enrichment if he later spends the money, so impoverishing the trust beneficiaries, in a way which gives the defendant some benefit or enrichment. See L. Smith, "Restitution: The Heart of Corrective Justice" (2001) 79 Texas L.R. 2115 at 2172-74.

[6] This terminology has been adopted by the House of Lords in *Foskett v. McKeown* (2000), [2001] 1 A.C. 102, [2000] 3 All E.R. 97 (U.K. H.L.); see also *Armstrong DLW GmbH v. Winnington Networks Ltd.*, [2012] EWHC 10 (Ch) at paras. 65-69. See *Smith*, especially at 6-14; *Grant v. Ste. Marie*, 2005 CarswellAlta 71, 39 Alta. L.R. (4th) 71 (Alta. Q.B.) at para. 18. In *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 CarswellBC 809, 2009 CarswellBC 810, [2009] 1 S.C.R. 504, 304 D.L.R. (4th) 292 (S.C.C.) at para. 75, the Supreme Court of Canada stated that "[t]racing is an identification process." The older usage of "following" in law, and "tracing" in equity is also often seen in Canada.

insolvency of the defendant.[28] By contrast, if the plaintiff can follow and identify his original property, which remains his, there will be insolvency priority; a trustee in bankruptcy or a receiver must surrender it, or be personally liable for damages.

The common law claims in relation to proceeds are not of much importance in the modern world given the availability of constructive trusts. If a thief stole the plaintiff's car and sold it, most courts, at least in North America, would hold that the proceeds are subject to a constructive trust, and so the plaintiff would be able to plead the case against any third party recipient of the proceeds using trust law principles.[29] And in the context of a trust, with which we are concerned, even if the third party received the original trust property, the beneficiary must generally rely on his equitable rights.[30]

B. Equitable Claims

1. Claims to Original Trust Property

If a third party, not being a *bona fide* purchaser of a legal interest for value without notice of the plaintiff's equitable interest, receives trust property, he is himself a trustee. This is quite separate from any personal liability he might have incurred (for example, for "knowing receipt of trust property" if he knew or should

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[28] In contrast, the plaintiff did obtain an insolvency priority in *Taylor v. Plumer* (1815), 3 M. & S. 562, 105 E.R. 721 (Eng. K.B.), which is often considered the root case for common law claims to traceable proceeds. Ironically, the case was actually decided when the Court of King's Bench applied the rules of equity governing constructive trusts. This was suggested in R.A. Pearce, "A Tracing Paper" (1976) 40 Conv. (N.S.) 277 and in S. Khurshid and P. Matthews, "Tracing Confusion" (1979) 95 Law Q. Rev. 78, and was proved by reference to contemporary sources in L. Smith, "Tracing in *Taylor v. Plumer:* Equity in the Court of King's Bench" [1995] L.M.C.L.Q. 240. See also L. Smith, "The Stockbroker and the Solicitor General: The Story Behind *Taylor v. Plumer*" (1994) 15 J.L.H. 1. It is often said that the common law cannot trace through a mixture, but since this is said to be based on the *Taylor* case, and that case was actually applying equitable principles, there seems little point in perpetuating that supposed limitation; see *Smith* at 162-74, arguing that the supposed limitation rests on neither authority nor principle. This was accepted by the Supreme Court of Canada in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 CarswellBC 809, 2009 CarswellBC 810, [2009] 1 S.C.R. 504, 304 D.L.R. (4th) 292 (S.C.C.) at paras. 80-85.

[29] This is effectively what happened in *Taylor v. Plumer*, *ibid.* See also L. Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 Law Q. Rev. 338, arguing that all claims to the proceeds of unauthorized dispositions of the plaintiff's assets are actually trust claims; the common law may allow a claim in money had and received, but this is because it was established in the 19th century that such a claim could be brought by a trust beneficiary who had a claim to a determined amount of money.

[30] A trust beneficiary might have an action in conversion against a third party recipient if the beneficiary could show that he was entitled to immediate possession of the thing transferred (*M.C.C. Proceeds Inc. v. Lehman Brothers International (Europe)*, [1998] 4 All E.R. 675 (Eng. C.A.)). Otherwise the person with an equitable title only must join the trustee as co-plaintiff, and the action is in fact enforcing the trustee's common law rights against the third party. See Chapter 24. If it is the trustee who has acted in abuse of the trust, the express trust beneficiary must look to actions in equity. If the trustee made a gift of the property to the third party, there is no claim in conversion, held by the trustee, which the beneficiary can require him to pursue.

have known of the trust). A trust beneficiary could obtain a declaration that the third party holds the property on trust, and any appropriate consequential orders for transfer to the original or successor trustees. If the original trust was a bare trust, entitling the beneficiary to call for the property at any time, then the third party can be ordered to transfer the property directly to the beneficiary. This claim is one which will prevail in the insolvency of the third party because that is nothing more than the insolvency of a trustee, which does not prejudice the beneficiaries insofar as they can locate their trust property.

2. Claims to Traceable Proceeds

(a) Trust or Equitable Lien

The basic principle is that the traceable proceeds of trust property will themselves be trust property, if the beneficiary so elects.[31] In some cases, beneficiaries may choose other remedial possibilities. One of these is the equitable lien, which gives the plaintiff a proprietary security interest to secure a personal claim. Assume that a trustee misappropriated $10,000 of trust property, combined it with his own $10,000 and invested the $20,000 in land. The plaintiff can claim a 50 per cent beneficial interest in the land, and this is what he will do if it has risen in value; that claim will allow the plaintiff to capture half of the gain. If, however, the land has now dropped to a market value of $14,000, this would give the plaintiff a claim worth only $7,000. In this situation, the plaintiff would instead be allowed to assert a personal claim for recovery of the $10,000, and to secure that claim by asserting an equitable lien or charge over the land.[32] The charge, a proprietary non-possessory security interest arising by operation of law, carries with it the possibility of a court-ordered sale if the debt is not paid. Such a charge may be ordered on terms, taking account of the defendant's position.[33]

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[31] It is usually understood to be a constructive trust but it may be best understood as a resulting trust (*Chambers* at 104ff). The typical case of a purchase money resulting trust always requires the tracing of the plaintiff's value into the property subjected to the trust.

[32] *Foskett v. McKeown* (2000), [2000] 3 All E.R. 97, [2001] 1 A.C. 102 (U.K. H.L.), at 130 [A.C.].. The charge would not be available in a case in which the contributors to the purchase were innocent against one another (as where funds from two different trusts were misappropriated); in this case, the victims must be treated equally.

[33] *Re Gareau Estate* (1995), 9 E.T.R. (2d) 25 (Ont. Gen. Div.), additional reasons at (1996), 13 E.T.R. (2d) 316 (Ont. Gen. Div.). A lien was also imposed in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.), in favour of the otherwise unsuccessful defendant to secure its right to recover the costs of developing a mine which it was declared to hold on constructive trust for the plaintiff. This, however, was not a lien arising from tracing property, but one arising from the improvements. If a lien is to be based on tracing, the plaintiff must show that her value went into the acquisition of the property in question: *Siemens v. Bawolin*, 2002 CarswellSask 448, 46 E.T.R. (2d) 254 (Sask. C.A.), at para. 29.

pay customers. The agreement was that Christie Grant would set aside for the plaintiff equivalent sums to answer to these money orders; these sums would be held separate and in trust for the plaintiff. Each week thereafter Christie Grant sent a cheque to the plaintiff to cover the sums due, but on the bankruptcy and liquidation of the mail order house it was found that these cheques had been drawn on the general account of the payor. Into this account the customers' money had been paid on receipt, but at no time had any sum been set aside for the plaintiff. The promised trusts had never been created. In these circumstances, the plaintiff was an unsecured creditor.[55]

In many cases, a promise to make a trust will be executed by operation of law: Equity treats that as done which ought to be done. A promise to create a trust itself creates a trust for the same reason that a promise to convey land makes a kind of constructive trust of the land. This will occur where the promise was specifically enforceable, or, even if not, where the promisee has given value as agreed in exchange for the promise.[56] Even where one or the other of those is satisfied, there is another requirement for the trust to arise by operation of law: it must be clear what is the property that the trustee promised to hold in trust. A promise to put sums of money into trust does not identify any particular money as that which is destined to become trust property. The result is that even if, as in *Re Christie Grant Ltd.*, value was given for the promise, the trust cannot arise by operation of law, due to uncertainty of subject-matter.[57]

(d) Original Asset was a Security Interest

If the claimant was not beneficially entitled to an asset, but only had a security interest in it, then it follows that while he may be able to establish a proprietary interest in any traceable proceeds of the original asset, this will be a security interest and not a beneficial interest. For personal property, this possibility is now generally governed and controlled by provincial personal property security legislation. There are some situations not governed by legislation where this principle may still be important.[58]

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[55] See the similar English case, with the same holding, *MacJordan Construction Ltd. v. Brookmount Erostin Ltd.*, [1992] B.C.L.C. 350 (C.A.). Compare *British Columbia v. National Bank of Canada* (1994), 99 B.C.L.R. (2d) 358, 119 D.L.R. (4th) 669 (B.C. C.A.), leave to appeal refused [1995] S.C.C.A. No. 18, [1995] 9 W.W.R. lxxix (note) (S.C.C.), where, however, there was not even an intention to create a trust.

[56] This is "value" in equity's extended sense, which in the case of marriage settlements includes "marriage consideration".

[57] Note, however, the controversial decision of the English Court of Appeal in *Hunter v. Moss*, [1994] 1 W.L.R. 452 (Eng. C.A.), in which a declaration of trust in relation to some shares out of a larger holding of that kind of shares was held to be effective. The logical problem remains that the moment after the declaration one could not say which shares were held in trust and which belonged to the settlor/trustee beneficially. See the critique by Hayton, (1994) 110 L.Q.R. 335.

[58] For example, if a secured creditor had a mortgage over land and the debtor was somehow able to sell the land free of the mortgage, the creditor could claim an interest in the proceeds, but it would only be a security interest: see *Central Capital Corp. v. Clausi* (1993), 13 O.R. (3d) 335 (Ont. Gen. Div.), affirmed (1994), 21 O.R. (3d) 95 (Ont. C.A.). In *Lord Napier and Ettrick v. Hunter* (1992), [1993] A.C. 713 (U.K. H.L.), an insurer had indemnified its insured, which gave the insurer a subrogated

I. THE BACKGROUND TO THE VARIATION OF TRUSTS LEGISLATION

It is the first duty of the trustees to preserve the trust property and to carry out the trust terms. Unless the settlor chooses to give them such a power, they have no authority to vary the terms of the trust, any more than they can neglect their duty to preserve the trust property. Nor does it matter whether the term which the trustees would like to vary is concerned with the beneficial interests created by the trust or the powers of themselves as trustees. It follows that, even if the trustees honestly and reasonably believe that it would be for the benefit of the beneficiaries were the trustees to depart in any way from any term of the trust, nevertheless they would be in breach of trust were they to do so.

As we saw when examining the termination of a trust,[1] the only persons who can set aside the terms of a trust are the beneficiaries.[2] If the sole beneficiary is of age, mentally competent, and entitled to the whole beneficial interest in the trust property, he can call for the trust property from the trustees, and thus wind up the trust whatever the trustees may wish. His sole right to enjoyment of the property overrides the trustees' right as legal owners of the trust property to carry out the terms of the trust. From this it followed, as we saw, that, if there are two or more beneficiaries, including persons who may take on the occurrence of some contingency, they can get together, being all adult and mentally competent, and wind up the trust, even if it is over the objection of the trustees. In the same way, it is possible for such beneficiaries effectively to vary an existing trust by terminating the old one and creating a new one with terms that suit them.[3]

However, if the sole beneficiary, or one or more beneficiaries, is not an adult, or, being of age, is not mentally competent, he has no legal capacity to terminate the trust or to agree to its termination. And, of course, most trusts include children among the beneficiaries. After all, as a family provision device it is to be expected that children, both alive and yet to be born, will be found among the trust beneficiaries, together with persons who are not mentally competent. Prior to 1945 it did not much matter that such trusts could not be terminated under the rule in *Saunders v. Vautier*.[4] It might be irritating to the trustees as well as to the beneficiaries that the terms of the trust were not as they would have drawn them, and occasionally it might even cause some hardship, but seldom could it be said that disaster of some sort would ensue unless a variation of the terms of the trust was made. Indeed, if disaster did threaten, it normally took the form either that some part of the trust property, usually

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[1] *Supra*, chapter 23.

[2] Subject to any power the settlor or testator has conferred authorizing termination.

[3] Two points should be made. First, this may attract unwelcome fiscal consequences. Second, the existing trustees cannot be forced to hold on the new trusts because no one can be made an express trustee without his consent. If the existing trustees are unwilling to hold on the new trusts, the beneficiaries would have to find new trustees. See *Re Brockbank*, [1948] Ch. 206 (Eng. Ch. Div.); and *Stephenson (Inspector of Taxes) v. Barclays Bank Trust Co. Ltd.*, [1975] 1 W.L.R. 882, [1975] 1 All E.R. 625; *supra*, chapter 23, note 23.

[4] (1841), Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.).

Trustee Act 1925

1925 CHAPTER 19

An Act to consolidate certain enactments relating to trustees in England and Wales. [9th April 1925.]

BE IT ENACTEDby the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

INVESTMENTS

1 Authorised investments

(1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say:

(a) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom;

(b) On real or heritable securities in the United Kingdom, including the security of a charge on freehold land by way of legal mortgage and a charge under section thirty-three of the Finance Act, 1896;

(c) In the stock of the Bank of England or the Bank of Ireland;

(d) In India Seven, Five and a half, Four and a half, Three and a half, Three and Two and a half per cent. stock, or in any other capital stock which may at any time be issued by the Secretary of State in Council of India under the authority of any Act of Parliament, and charged on the revenues of India, or any other securities the interest in sterling whereon is payable out of and charged on the revenues of India;

(e) In any securities the interest of which is for the time being guaranteed by Parliament;

investing the same and the resulting income thereof from time to time in authorised investments, and shall hold those accumulations as follows :—

(i) If any such person—

(a) attains the age of twenty-one years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or

(b) on attaining the age of twenty-one years or on marriage under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;

the trustees shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge; and

(ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom ;

but the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five pounds per centum per annum.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.

(5) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

32 Power of advancement

(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of

appointment or revocation, or to be diminished by the increase of the class to which he belongs :

Provided that—

(a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and

(b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and

(c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.

(2) This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925.

(3) This section does not apply to trusts constituted or created before the commencement of this Act.

33 Protective trusts

(1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called " the principal beneficiary ") for the period of his life or for any less period, then, during that period (in this section called the " trust period ") the said income shall, without prejudice to any prior interest, be held on the following trusts, namely:—

(i) Upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;

(ii) If the trust aforesaid fails or determines during the subsistence of the. trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)—

(a) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or

(b) if there is no "wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity, as the case may be;

as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

1992 CarswellOnt 537
Ontario Court of Justice (General Division)

Hunter Estate v. Holton

1992 CarswellOnt 537, 32 A.C.W.S. (3d) 335, 46 E.T.R. 178, 7 O.R. (3d) 372

Re the Estate of DONALD FLEMING HUNTER, late of the City of Toronto, in the Municipality of Metropolitan Toronto, deceased

JOHN MILLER HOLTON, DONALD HOLTON HUNTER and MARY MARGARET McCALLUM (Continuing Executors and Trustees of the Estate of DONALD FLEMING HUNTER, deceased) v. JOHN MILLER HOLTON, DONALD HOLTON HUNTER, MARY MARGARET McCALLUM, D. HOLTON HUNTER, JOHN HUNTER, JOHN EDWARD HUNTER, KATINA MARIE HUNTER, WENDY JEANNE HUNTER, LINDA SCHUR and OFFICIAL GUARDIAN

Steele J.

Heard: February 17-19, 1992
Judgment: March 5, 1992
Docket: Doc. Toronto RE 2282/91

Counsel: *Barbara L. Grossman*, for applicants.
Maurice C. Cullity, Q.C. and *Christina H. Medland*, for Mary Margaret McCallum.
Ronald R. Anger, for Official Guardian.

***Steele J.*:**

1 This is an application by the executors and trustees of the estate of Donald Fleming Hunter, deceased (the "trustees") under s. 60 of the *Trustee Act*, R.S.O. 1990, c. T.23, and r. 14.05(3)(*a*) [*Rules of Civil Procedure*], requesting the court to interpret the will of Donald Fleming Hunter (the "testator"), and for the opinion, advice and direction of the court upon the following question:

> Having regard to the provisions of the Will as a whole and the language of ClauseIII(i)(C) thereof in particular, do the Applicants have the power and is it lawful for them to transfer all of the assets of the Family Fund established pursuant to the provisions of the Will to two newly created trusts referred to as the 1992 Hunter Family Trust No. 3 and the 1992 McCallum Family Trust No. 3?

2 The applicable clause of the will is as follows:

> III(i)(C)
>
> Until the death of my wife or the twentieth anniversary of my death, whichever event shall last occur, to pay to or for the benefit of any one or more of my wife and my issue to the exclusion of any one or more of my wife and my issue as my Trustees may determine such amounts out of the capital of the said Fund as my Trustees in their sole discretion may from time to time determine.

3 The application is supported by the children of the testator and notice has been given to all interested parties either directly or by service on the Official Guardian with a request that he be appointed to act for many of the parties. Most of the interested parties have consented to the application and others did not appear. The only party that opposes the application is the Official Guardian. The Official Guardian has been served with notice of a request to be appointed to represent the unborn issue of the testator and the unborn issue of Horace William Hunter (a brother of the deceased), and the employees of MacLean Hunter

Limited. The infant grandchildren of the testator were served with notice of this application. Under r. 9.01(2)(*aa*) such infant grandchildren should have been made parties. Under s. 102(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Official Guardian must act as litigation guardian of all minors. Because I felt that there was no prejudice, I added the infant grandchildren as parties and appointed the Official Guardian to act on their behalf. I also appointed the Official Guardian to represent all unborn infant children and unborn issue. The Official Guardian was also appointed under s. 102(3) of the *Courts of Justice Act* to represent the very future contingent interest of the employees of Maclean Hunter Limited.

4 The trustees are the continuing executors and trustees of the will of the testator, who died on October 3, 1976. John Miller Holton ("Holton") is the brother-in-law of the testator and the other two are the children of the testator. The testator's wife died on January 11, 1988. At the present time, the testator has two living children (Donald Hunter and Margaret McCallum), each of whom have three living children. Only one of the grandchildren is an adult. The will provides that after the death of his wife, the Family Fund that was set up is to be held for the issue of the deceased to be dealt with as specified therein until October 3, 2006. The Family Fund now represents the entire residue of the estate and has an exceptionally large value. After October 3, 2006, the net income of the Family Fund is to be divided among the issue of the deceased, excluding his children, Donald and Margaret, in equal shares per stirpes, until the twentieth anniversary of the death of the last survivor of certain named persons who are all family members, when the balance is to be distributed to the issue of the deceased in equal shares per stirpes. If there are then no issue surviving, provision is made for division amongst the applicant, Holden, the living issue of Horace Hunter, and the employees of MacLean Hunter Limited.

5 The trustees, upon the request of Donald Hunter and Margaret McCallum, propose to enter into certain transactions whereby the assets of the Family Fund will be settled on two new trusts. The new trusts are in draft form and have been presented to the court. The new trusts will have substantially the same terms and conditions as contained in the existing will, except that the primary beneficiaries of one of the two new trusts will be Margaret McCallum and her issue, and the primary beneficiaries of the other new trust will be Donald Hunter and his issue.

6 The object of the proposed transactions is to separate the interests of Margaret McCallum's family in the Family Fund from the interests of Donald Hunter's family, so that future decisions regarding the administration of the former Family Fund may be made having regard to the separate circumstances of each family, and to have the new trusts for the McCallum Family Trust administered by different trustees than the new trusts for the Donald Hunter family, and vice versa. Holton has sworn that it is the belief of the trustees that this will have benefits and advantages, and that future decisions in each trust can be made having primary regard to the circumstances of one family separate from the circumstances of the other. Holton is one of the present trustees and initially he will be one of the trustees of both the new trusts.

7 Apart from this application for advice of the court and establishing the new trusts, complex corporate reorganizations of assets of the Family Fund have already taken place, and advance income tax rulings have been received to confirm that there will be no adverse tax consequences. The trustees have made their decision to set up the new trusts and are asking the court whether or not that decision is within their power.

8 The new trusts will have substantially the same terms as those set out in the will, because no new beneficiaries are being added and no beneficiaries are being excluded, except relating to contingent benefits to the extent necessary as a result of the separation of the two families' interests. The basic issue is whether or not the words in clause III(i)(C) of the will, read in the context of the will as a whole, permit the trustees to exercise their discretion to encroach upon the entire assets of the Family Fund and settle them in the two new trusts. If there is such a power, is the purpose stated legitimate, and, lastly, would it be an abuse of the discretion to resettle the assets into the specific two trusts?

9 The court will not normally grant approval or advice to trustees as to how they should exercise their power of discretion where such power is clear. See *Re McKay* (Court of Appeal, November 29, 1991, unreported) [now reported *(*sub nom. *McKay Estate v. Love)* 44 E.T.R. 190, 6 O.R. (3d) 511 at 519, *(*sub nom. *Re McKay Estate)* 52 O.A.C. 159 (C.A.)]. The present application is not a case concerning the exercise of a discretion, but requires the interpretation of the will to determine whether or not there is a power to do what is proposed. The proposed scheme is complex and has far-reaching ramifications to the entire estate.

Although it was not expressly relied upon, it is obvious that there are tax ramifications because the trustees have obtained advance tax rulings.

10 I believe that the court should exercise its power in the present case. Section 60 of the *Trustee Act* authorizes an application for the opinion or direction of the court on any question respecting the management or administration of trust property. Rule 14.05(3)(*a*) allows an originating application to the court for such opinion. In a proper case, I do not think that the court should limit its opinion narrowly when all of the issues are before it. A trustee should not be required to face the risk of acting upon the limited opinion of the court and then face another possible action after it has acted on the same issues. I believe that s. 148 of the *Courts of Justice Act* mandates the avoidance of multiplicity of proceedings and r. 1.04(1) requires the most expeditious and least expensive determination of proceedings on their merits.

11 Cases similar to the present are common in England. Only two unreported Ontario cases were brought to the attention of the court. Both of these were considered under the same procedure and advice was given. No case was referred to that held the procedure to be improper where dealing with the establishment of new trusts. It was argued that the British Columbia case of *Re Lohn Estate* (1991), 41 E.T.R. 159 (B.C. S.C.), was authority for refusing to answer the question relating to the establishment of new trusts. In my opinion, that case was solely a tax case and no details of the requested advice were set out. I do not consider it to be a deterrent to giving advice in the present case.

12 In construing a will, the court must ascertain the intention of the testator by looking at the whole will, and the court can look to other cases only to the extent that they explain applicable rules of construction and principles of law. In looking at the present will, it is clear that the testator gave the trustees power to encroach on the entire estate which, if done, would make the balance of the will redundant.

13 It was conceded by counsel for the Official Guardian that the clause in the will would allow the trustees to exercise their power of encroachment to pay out all the assets of the Family Fund, one-half to Donald Hunter and one-half to Margaret McCallum, but he contended that there is no power given to the trustees to resettle the assets into the new trusts. *McLean Estate v. Stewart* (June 1, 1988), Doc. RE 822/82, Barr J. (Ont. H.C.) (unreported) is the only similar case for which any reasons were given. The terms of that will are not the same as the present will but I believe that the principle is the same. The reasons are brief and refer to no prior authorities, but include the following statement:

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

14 I agree with that statement if it is supported by authority.

15 The leading English authority is *Pilkington v. Inland Revenue Commissioners*, [1964] A.C. 612, [1962] 3 All E.R. 622 (H.L.). In that case, reliance was made upon a provision of the English *Trustee Act, 1925* [15 & 16 Geo. 5, c. 19], which permitted the application of any capital money for the "advancement or benefit" of a beneficiary. The issue before the House was the resettlement of the funds into a new trust and most of the arguments made were the same as have been advanced by the Official Guardian in the present case. At p. 631, Viscount Radcliffe, in effect, stated that it was irrelevant as to who the trustees of the old and new trusts were. He said, "What matters is that there are new trusts, not that there are old trustees." I agree. That case relied on the interpretation of the words of a statute but it was stated, at pp. 634 and 635, that the statute merely adopted the customary common law terminology that is often included in wills. I do not believe that the decision is limited to statutory provisions.

16 I adopt the following statements in *Pilkington* at pp. 638 and 639 as being applicable to the present case:

> The commissioners' objections seem to be concentrated upon such propositions as that the proposed transaction is 'nothing less than a resettlement' and that a power of advancement cannot be used so as to alter or vary the trusts created by the settlement from which it is derived. Such a transaction, they say, amounts to using the power of advancement as a way of appointing or declaring new trusts different from those of the settlement. The reason why I do not find that these propositions have any compulsive effect upon my mind is that they seem to me merely vivid ways of describing the

> substantial effect of that which is proposed to be done and they do not in themselves amount to convincing arguments against doing it. Of course, whenever money is raised for advancement on terms that it is to be settled on the beneficiary, the money only passes from one settlement to be caught up in the other. It is therefore the same thing as a resettlement. But, unless one is to say that such moneys can never be applied by way of settlement, an argument which, as I have shown, has few supporters and is contrary to authority, it merely describes the inevitable effect of such an advancement to say that it is nothing less than a resettlement. Similarly, if it is part of the trusts and powers created by one settlement that the trustees of it should have power to raise money and make it available for a beneficiary upon new trusts approved by them, then they are in substance given power to free the money from one trust and to subject it to another. So be it: but, unless they cannot require a settlement of it at all, the transaction they carry out is the same thing in effect as an appointment of new trusts.
>
> In the same way I am unconvinced by the argument that the trustees would be improperly delegating their trust by allowing the money raised to pass over to new trustees under a settlement conferring new powers on the latter. In fact I think that the whole issue of delegation is here beside the mark. The law is not that trustees cannot delegate: it is that trustees cannot delegate unless they have authority to do so. If the power of advancement which they possess is so read as to allow them to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises.

I also adopt the statement at pp. 640-641 as follows:

> That would be a proper answer from a court to which trustees had referred their discretion with a request for its directions; but it does not really solve any question where, as here, they retain their discretion and merely ask whether it is impossible for them to exercise it.
>
> . . . . .
>
> ... First, I do not believe that it is wise to try to cut down an admittedly wide and discretionary power, enacted for general use, through fear of its being abused in certain hypothetical instances. ...

17 I believe that *Re Hampden Settlement Trusts*, [1977] T.R. 177 (Ch. D.), *Re Hastings-Bass*, [1975] Ch. 25, [1974] 2 All E.R. 193 (C.A.) and *Re Ropner's Settlement Trusts*, [1956] 1 W.L.R. 902, [1956] 3 All E.R. 332 (Ch. D.), and other cases, confirm this proposition. Counsel for the Official Guardian frankly conceded that he was not aware of any case anywhere in the Commonwealth that has been decided to the contrary.

18 While "advancement" may have a technical meaning, "benefit" does not. In *Pilkington*, supra, both "advancement" and "benefit" were considered and it was held that the word "benefit" was very wide in its meaning. In the present case, clause III(i)(C) gives an unfettered right to pay "for the benefit" of the testator's issue. In my opinion this includes the settlement of new trusts. I therefore find that the trustees have the power and it is lawful for them to transfer all of the assets of the Family Fund to new trusts.

19 The next question is whether the court should approve the transfer to these specific two trusts. Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluc tant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass*, supra, at p. 41 [Ch.] as being applicable to the court's review of the exercise of such power:

> To sum up the preceding observations, in our judgment, where by the terms of a trust (as under section 32) a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account. ...

Put in the reverse wording, I also adopt the opinion of Middleton J. in *Dunlop v. Ellis* (1917), 41 O.L.R. 303 (H.C.) at 307:

> Where there is, as here, a trust coupled with a discretionary power, the Court is entitled and bound to interfere when there is no attempt to exercise the discretion for the purpose for which it was given, but an attempt to accomplish a purpose quite alien from the intention of the testatrix, the author of the power.

20 It is not the function of the court to approve the specific words of the proposed new trusts and I do not do so. However, I have reviewed the proposed new trusts to determine whether or not they are alien to the intention of the testator, or would be beyond the scope of the power of the trustees. As I have stated, subject to the approved basic division into two family trusts rather than the one, the new trusts closely mirror the provisions of the will, with certain minor modifications. Basically, they provide the interests to the children, grandchildren and issue of the testator, with the ultimate gift over to the Horace Hunter family and the employees of MacLean Hunter Limited. Counsel for the Official Guardian submits that some of the changed provisions in the new trusts are so great that the court should interfere and refuse approval. I would like to comment upon some, but not all, of these issues.

21 1. Under the will, if only one person shall be acting as an executor, then such trustee is directed to appoint a trust company to act as an additional trustee. Also, no reference is made to trustee's compensation, which presumably would be set in the normal way by the courts. Under one of the new trusts, Holton, Donald Hunter and R.G.H. McAslin are to be the trustees, and in the other, Holton, Margaret McCallum and Donald Campbell are to be trustees. In the event of a vacancy, the continuing trustees have power to appoint any person to fill the vacancy. In the event of Margaret McCallum ceasing to be a trustee, each of her children who attains the age of 30 years has the right to be appointed a trustee. Decisions shall be made by a majority of trustees and a maximum compensation to be paid to trustees is imposed. There is to be no compensation paid to any child or grandchild of the testator. In view of the size of the estate, the old trustees believe that this compensation is less than would be commonly awarded by a court. I believe that this change is within the discretion of the trustees.

22 2. There is a possibility of a violation of the rule against perpetuities under the terms of the new trusts. However, in view of s. 3 of the *Perpetuities Act*, R.S.O. 1990, c. P.9, I do not believe that this is sufficient ground for the court to say that the trustees have exceeded their discretion.

23 3. In the new trusts there is a new total exculpatory clause in favour of the new trustees for any of their acts. In my opinion this is a detail of the new trust and is within the discretion of the trustees in setting up the new trusts.

24 4. The effect of the new trusts is to divide the Family Fund into two units. Counsel for the Official Guardian submits that this deprives some beneficiaries of future potential gifts over while conceding that it may benefit them under different circumstances. I believe that this is within the general discretion of the trustees in setting up the new trusts.

25 I believe that the trustees have the power to establish new terms in the new trusts within the parameters of the overall principles that I have set out. I have reviewed the provisions of the new trusts and find that they are substantially for the benefit of the family members within the contemplation of the testator, and find that they do not go beyond the powers of the trustees.

26 For these reasons the answer to the question presented to the court is yes.

27 Costs of all parties on a solicitor-and-client basis are to be paid out of the Family Trust. The costs of the Official Guardian may be agreed upon, but otherwise are to be assessed.

Order accordingly.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Spence v. BMO Trust Co. | 2016 ONCA 196, 2016 CarswellOnt 3345, 346 O.A.C. 108, [2016] O.J. No. 1162, 395 D.L.R. (4th) 297, 14 E.T.R. (4th) 31, 263 A.C.W.S. (3d) 550, 129 O.R. (3d) 561 | (Ont. C.A., Mar 8, 2016)

1996 CarswellOnt 317
Ontario Court of Appeal

Fox v. Fox Estate

1996 CarswellOnt 317, [1996] O.J. No. 375, 10 E.T.R. (2d) 229, 28 O.R. (3d) 496, 61 A.C.W.S. (3d) 211, 88 O.A.C. 201

WALTER FOX v. MIRIAM FOX (executrix of estate of RALPH FOX, deceased, and in her personal capacity), RALPH JAMES FOX and SHAYNE MELISSA FOX

McKinlay, Catzman and Galligan JJ.A.

Heard: October 10-11, 1995
Judgment: February 7, 1996
Docket: Doc. CA C20011

Counsel: *Bernard L. Eastman, Q.C.*, and *Cindy Cohen*, for appellant.
Rodney Hull, Q.C., and *Ian Hull*, for respondent Miriam Fox.
Sandra A. Forbes, for respondents Ralph James Fox and Shayne Melissa Fox.

***Galligan J.A.*:**

1 Walter Fox is a lawyer. He is the only child of Miriam Fox and the late Ralph Fox. Ralph made his will in 1961 when Walter was 20 years of age and still a student. Ralph died in 1969, two years after Walter was called to the bar. Walter married a few months before his father's death. He has two children from this marriage, a son and a daughter. Both were born after Ralph died. By his will Ralph appointed Miriam as his sole executrix.

2 In its essential parts the will gives Miriam a life interest in 75% of the residue and it gives Walter a life interest in the remaining 25%. It provides that, if Walter survives his mother, upon her death he is to receive the residue.

3 The will gives Miriam a very wide power to encroach "for the benefit of"; Walter's children. Miriam has exercised that power. She has given all of the residue to Walter's children with the result that Walter has been deprived of any interest in the residue and of any income from it. The issue in this appeal is whether Miriam was lawfully entitled to exercise her power to encroach in that fashion. The value of the residue is not insubstantial. It appears from information given to the court during argument that the value of the assets which make up the residue is upwards of $750,000.

4 For the purposes of my decision an extensive review of the evidence is not necessary. However, some reference to the circumstances surrounding the encroachments is required to see the issue in its factual context. Walter's son is age twenty-five and his daughter is twenty-two. His marriage to their mother was an unhappy one which ended by separation in 1984 and divorce in 1986. Following the separation Walter's son lived with him for a few years. His daughter lived with her mother. Both children are close to Miriam, their grandmother, particularly the son. The breakdown of the marriage was bitter. It involved much litigation mainly about support payments.

5 Some time after the divorce Walter became romantically involved with his long-time secretary. In the Spring of 1989 they decided to marry. This was a source of some tension for the Fox family. This is because the members of the Fox family are

Jewish; Walter's secretary is a gentile. In late April 1989 Walter told his mother about his plans to marry. She was upset and immediately made a new will disinheriting Walter. She also made the first of a series of encroachments in favour of her two grandchildren. With these encroachments she transferred all of the assets forming the residue of the estate to the grandchildren.

6 The trial was long and bitter [reported at (1994), 5 E.T.R. (2d) at p. 174]. It pitted a mother and her grandchildren against her son. The trial judge described the trial as the vehicle for exposing bitterness, general animosity and a desire to retaliate among the parties. No one came out of it looking very noble. The real issues, however, were narrow. The principal question concerned Miriam's reason for exercising her power to encroach. A second concomitant question was whether the exercise of the power was a proper one. The first issue was factual; the second was legal.

7 The trial judge's finding on the factual issue is clear. She found that Miriam used her power to encroach in order "... to deprive the applicant of his interest in the bulk of the residue of the estate *because he had married a gentile*. [Emphasis added.] There was overwhelming evidence to support that finding even though Miriam denied that this was her motive. The trial judge found that Miriam's motive was "perhaps coupled" with her concern for the welfare of her grandchildren but that her dislike of Walter's marriage was throughout "her prime motivation in encroaching as she did."

8 Unquestionably, concern for the welfare of her grandchildren would be a proper motive to encroach on their behalf. Initially, I was of the view that because Miriam's primary motive was "perhaps coupled" with a concern for her grandchildren's welfare, that the latter concern might support the exercise of the power of encroachment. However, upon reading the trial judge's reasons for judgment together with the reasons which she gave for her disposition of costs, I think I would be doing a disservice to the clear and unambiguous finding of fact made after a long, difficult and emotional trial if I relied on the possible concern of Miriam for her grandchildren's welfare to dispose of this case. I have concluded that I must examine the legal issue in the light of an unassailable finding of fact that Miriam's disapproval of Walter's proposed marriage to a gentile was her motivation for exercising her power to encroach.

9 The grant of the power to encroach is found in the following clause in the will:

> Out of the capital thereof, to pay such amount or amounts as my Trustee may, in its absolute discretion, consider advisable from time to time to or for the benefit of my said son's issue or such one or more of them as my Trustee may select from time to time.

The discretion conferred upon the trustee is absolute.

10 After a review of a number of leading cases, the trial judge concluded that because she did not find *mala fides* on Miriam's part, the exercise of her discretion had been a proper one.

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

12 The courts, however, have not always equated *mala fides* with fraud. I am spared an extensive review of authority by a very learned paper written by Professor Maurice Cullity, "*Judicial Control of Trustees' Discretions*" (1975), 25 U.T.L.J. 99. I think it can safely be said in the light of Professor Cullity's analysis of the authorities that some conduct which does not amount to fraud will be categorized as *mala fides* so as to bring it within the scope of judicial supervision. I am in respectful agreement with Professor Cullity when he expresses the opinion, at p. 119, that the term *mala fides* is sufficiently broad "to make the use of the term undesirable." Nevertheless, the term is still used. While I am not bold enough to attempt to define its outside limits, I think the cases do support Professor Cullity's conclusion at p. 117 that the courts may interfere if a trustee's decision is influenced by extraneous matters. I make particular reference to the judgment of Steele J. in *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 372 (Gen. Div.), at p. 379:

> Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluctant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass* ... at p. 41 Ch., p. 203 All E.R., as being applicable to the court's review of the exercise of such power:
>
> > To sum up the preceding observations, in our judgment, where by the terms of a trustee ... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, *unless* (1) what he has achieved is unauthorised by the power conferred upon him, or (2) *it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account*, or (b) had he not failed to take into account considerations which he ought to have taken into account.
>
> [Emphasis added.]

13 In this case, in my view, the fact that her son intended to marry a gentile was completely extraneous to the duty which the will obviously imposed upon Miriam, namely to be concerned about the welfare of her grandchildren. This extraneous consideration demonstrated sufficient *mala fides* to bring her conduct within any reasonable interpretation of that term.

14 The circumstances bear some similarity to those in *Klug v. Klug*, [1918] 2 Ch. 67 (Ch. D.). In that case a trustee refused to exercise a discretion allowing her to pay money for the advancement or benefit of her daughter because her daughter had married without her consent. In those circumstances Neville J. held at p. 71:

> ... it is the duty of the Court to interfere and, in the exercise of its control over the discretion given to the trustees, to direct that a sum be raised out of the capital sufficient to pay. ...

15 The duty which rested with the trustee was to pay monies for the advancement or benefit of the children if the trustee saw fit to do so. While Neville J. did not specifically state that the mother's displeasure at her daughter's marriage was an extraneous circumstance, it seems to me that the situation was analogous to this one. In the context of all the facts, disapproval of the marriage was extraneous to the child's advancement or benefit. The court interfered with the trustee's discretion in that case and I think this court ought to do the same.

16 There is another reason why the discretion which Miriam exercised in this case was improper and must be set aside. It is abhorrent to contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion. It is now settled that it is against public policy to discriminate on grounds of race or religion. This is made clear in the reasons delivered by Robins J.A. in *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481 (C.A.), at pp. 495-96:

> To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced. The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.
>
> To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.

17 In that case, Robins J.A. was discussing the restraint which public policy puts upon the freedom of the settlor to dispose of his property as he saw fit. If a settlor cannot dispose of property in a fashion which discriminates upon racial or religious grounds, it seems to me to follow that public policy also prohibits a trustee from exercising her discretion for racial or religious reasons.

18 I am of the view that in this case it would be contrary to public policy to permit a trustee effectively to disinherit the residual beneficiary because he dared to marry outside the religious faith of his mother. While there were decisions in the past which have upheld discriminatory conditions in wills, in response to a query from the bench, counsel in this case were not prepared to argue that any court would today uphold a condition in a will which provides that a beneficiary is to be disinherited if he or she marries outside of a particular religious faith. I find compelling Mr. Eastman's argument that if a testator could not do so then his trustee could not do it for him.

19 Counsel for the grandchildren argued that if Ralph were still alive there would have been nothing to prevent him from revoking his will and making a new one in which he left nothing to Walter. She argued therefore, that in the exercise of her absolute power to encroach Miriam should be able to do that for him. Even if it were accepted that Ralph, if alive, would have disinherited Walter because of his intention to marry out of Ralph's religious faith, that argument cannot succeed.

20 It is of course a given, assuming testamentary capacity, that a person is entitled to dispose of property by will in any fashion that he or she may wish. The exercise of a testator's right of disposition is not subject to supervision by the court. But a trustee's exercise of discretion is subject to curial control. Admittedly, because he would not be subject to judicial supervision, Ralph, if alive, could have disinherited Walter for reasons which would have contravened public policy. However, Ralph is not alive and is not preparing a new will. Miriam, while acting as a trustee, on the other hand is subject to judicial control and that control can and must prevent her from exercising her discretion in a fashion which offends public policy.

21 With great deference to the experienced trial judge who held a different view, it is my opinion that Miriam's exercise of discretion to the prejudice of Walter because he married outside of Miriam's and his own religious faith was unlawful and must be set aside. It follows that as a result of her improper dealing with the assets of the estate Miriam can no longer remain the executrix.

22 For these reasons it is my opinion that this appeal should succeed. I have read the reasons for judgment prepared by McKinlay J.A. and I agree that the appeal should also be allowed for the reasons which she has given. I would dispose of the appeal in the fashion which she proposes.

***McKinlay J.A.*:**

23 I agree with the result reached by Galligan J.A. in this appeal. I am not satisfied, however, that marriage outside the Jewish faith was the sole reason for the transfer of estate assets by the trustee to her grandchildren. Thus, I consider that it is necessary to consider some of the evidence and the specific terms of the will itself.

Cottage Property

24 I will first discuss the question of the proceeds of the cottage property, because it is clear from the reasons of Haley J. [reported at (1994), 5 E.T.R. (2d) 174 (Ont. Gen. Div.)] that Mrs. Fox intended to dispose of those proceeds to her grandchildren because of the possible marriage of Walter outside the faith. I see no reason to question that finding. The cottage property was sold, and the proceeds turned over by the executrix to her grandson before other estate property was transferred to her grandson and granddaughter. Mrs. Fox was of the view that all of the proceeds of the cottage property were hers personally to dispose of as she wished. Haley J. agreed with that position, in error, in my view.

25 There can be no doubt that the apartment building and the matrimonial home were intended to be held by the parties as tenants in common; indeed, that was never in issue in this case. However, there was no evidence, other than evidence of the testatrix, that there was ever an intent that the cottage be held by the parties in any form of joint tenancy. It was registered in

the sole name of the testator, there was no declaration of trust in favour of Mrs. Fox, and he made a clear disposition of the cottage property in paragraph 3 of his will, which reads as follows:

> 3. To permit my said wife to use, as long as she may desire, my summer cottage at Lake Simcoe.

26 Mrs. Fox had the right to use the physical cottage property during her lifetime, and a general power in the will to sell estate assets. On a sale of those assets, of course, the proceeds became part of the residue of the estate. In her reasons, Haley J. stated [at pp. 179-180, E.T.R.]:

> There is no explanation why the cottage property was not included in the statutory declaration of 1961 [which dealt with the apartment building, the matrimonial home, and a mortgage receivable] nor why it was treated specifically in Ralph's will as his separate property. If the property was Ralph's alone there is also no reason why Mr. Day who acted as estate solicitor and who also drew the statutory declarations of 1961, would have included it in the succession duty affidavit with the specific note to the contrary. I am satisfied that Miriam accepted the one-half sharing of all the real estate at the time of Ralph's death.

27 With respect, the fact that Mrs. Fox accepted a one-half sharing of the cottage property does not create any right for her to do so. The asset was registered in the sole name of the deceased, and when he signed his will he dealt with it specifically. In any event, Mrs. Fox disposed of the *total* proceeds to her grandson when even her own position would have entitled her to only one half of those proceeds. (There can be no suggestion that she was entitled to any interest in the cottage under any prevailing family law, since the *Family Law Reform Act*, R.S.O. 1980, c. 152, the predecessor of the *Family Law Act, 1986*, S.O. 1986, c. 4, had not yet been enacted in 1961.)

28 Mrs. Fox executed a "Memorandum of Decision of the Trustee of the Estate of Ralph Fox" expressing her purported reasons for her exercise of discretion in paying the cottage proceeds over to her grandson. However, that declaration was not drafted by her, but by her counsel two full years after the fact.

29 In my view, on the sale of the cottage, the total net proceeds fell into the residue of the estate to be dealt with accordingly, and the disposition of those proceeds by Mrs. Fox as if they were her own constituted a breach of trust.

Other Estate Property

30 The appellant signed a release in favour of Mrs. Fox as executrix of the estate with respect to his income entitlement out of the estate up to December 31, 1991. Although that release purports to release Mrs. Fox with respect to all matters pertaining to the estate to that date, the application which is the subject of this appeal alleges surreptitious and intentional misuse of the entire corpus of the estate.

31 On October 17, 1992, the grandson of the executrix, who was living with her, wrote to the solicitor of the executrix stating:

> ... included in this letter is a statement from my Grandmother which sets out her reasons for exercising an encroachment of the proceeds from the sale of the cottage.
>
> Late last week my father contacted Jonathon Suttner asking him to provide an income statement for 1992. It is the opinion of both myself and my Grandmother that the estate of Ralph Fox must formally be dissolved as soon as possible. We look forward to hearing from you in the near future so that *we may begin to take further action* in that direction. [Emphasis added.]

Of course, Mrs. Fox's grandson had no right to participate in a decision to "dissolve" the estate of his grandfather, who died before he was born.

32 The statement included with that letter was drafted by the grandson, and included many expressions of love of the grandmother for her grandchildren, and also references to the appellant's dereliction of duty toward his children. It states, among other things, the following:

... Walter's estrangement from his own family can be attributed to his ambition of remarrying and starting up a new family. In essence his plans were to begin a new family while simply discarding his old one.

... It was only several months ago upon the receipt of a legal document from my son asking for a financial statement of Ralph Fox's estate did I first become aware of the terms that my husband's will had prescribed for the estate. I had naively assumed that because I was an equal partner in building the Estate, and since I have exclusively attended to all matters concerning the Estate, that I had complete discretion over the assets of the Estate and the distribution of its income.

33 In her *viva voce* evidence, Mrs. Fox made it quite clear that she had no understanding whatever of her duty as executrix of her husband's estate. She in effect said that she was of the view that all of the assets were hers to dispose of as she pleased because she had worked with her husband to acquire them. The following are but a few relevant examples of that evidence.

p. 585 I had to send him to school [her grandson] and I had to see that he should get somewhere in this world and whatever I have, I want to give to those two children [her grandson and granddaughter].

p. 587 Well, I don't worry about him now [the appellant] ... I used to, but not now, now he's married and he's got a wife, let her worry about him.

p. 598-9 Q.... When you got this order [a court order freezing estate assets], did you, at that point, understand the difference between your half of the apartment building and the estate's half?

A. No.

Q. Did you at that point —

A. No, I didn't separate it, no.

Q. Did you at that point think that the whole apartment building was yours?

A. Yes.

Q. And that all the money was yours?

A. That's right.

Q. Did you do anything different —

A. No nothing.

Q. — as a result of this order?

A. No, I didn't do nothing.

Q. And so you kept paying the money out —

A. The same —

Q. — the same way that you did before?

A. Yes, I did.

Q. And treating all the money from the apartment building as if it was your own?

A. That's right ...

p. 609-10 Q. Now Mrs. Fox, you said, concerning the cottage property, I believe, that you thought it was yours from day one?

A. Yes.

Q. And in 1989 when it was sold, you received the proceeds and you put them in your account; correct?

A. Mm-hm.

Q. Now, what was your understanding at that point of who owned those proceeds?

A. Me.

Q. You personally?

A. Yeah.

Q. And was it your understanding at that time that if you wanted to, you could go out and spend that money —

A. Exactly.

Q. — on anything you wanted?

A. Yes, that's what I thought it was.

Q. And did that apply — in 1989, is that the same way you thought about the apartment building?

A. Yes.

Q. That all the income was yours?

A. Right.

Q. So then anything you gave from the apartment, or from the cottage to anybody was something that you didn't have to do, you felt that this was something that was completely up to you?

A. Yes.

Q. And it was as if you were dealing with your own property?

A. Right.

p. 630-1 Q. Mrs. Fox, you indicated that you had no concern about giving all the money and property to Ralph and Shayne, right?

A. No.

Q. And did you feel, when you were doing that, that it was necessary to have some kind of an agreement so that you could still be in charge of things?

A. No. I'm in charge of things even if I gave it to them.

Q. So really, Mrs. Fox, as far as you're concerned, everything is continuing as before?

A. I hope so.

Q. With you being able to —

A. As long as I'm able to —

Q. With you being able to deal with all the property as if it's your own during your lifetime?

A. That's right.

Q. And the only difference is now you're sure that Walter can't get anything and that it will go to your grandchildren?

A. Well, to my knowledge, that's the way I see it.

Q. And otherwise everything is the same as before?

A. Everything is the same as before.

34 It is obvious that Mrs. Fox in no way considered the terms of the will when she made the encroachments she did. What she did, she did in the firm belief that she was dealing with her own property. In addition, she had no intention of giving up her own interest in the estate income. As she said, "I'm in charge even if I gave it to them." To this end, she had her solicitor draft an agreement between her and her grandchildren which required her signature to deal in any way with funds in the Canadian Imperial Bank of Commerce totalling $53,500 and with the income from and ownership of the Palmerston Boulevard apartment building.

35 The property of the estate, as sworn for Succession Duty purposes, included the matrimonial home at 16 Lilywood Road, North York, where it appears Mrs. Fox was still living with her grandson at the time of the trial; the apartment building at 532-534 Palmerston Blvd., Toronto; the cottage property in Innisfil Township; $18,674.99 in cash or deposits; and $1,556 in other assets. Nonetheless, a "Memorandum of Encroachment with Respect to the Estate of Ralph Fox", dated December 30, 1992, and signed by Mrs. Fox, and obviously drafted with legal advice, states in paragraph 6:

> The estate initially consisted of two assets: cottage property on Lake Simcoe and a 50% interest in real property in the City of Toronto, municipally known as 532-534 Palmerston Boulevard (the "property"). The cottage property on Lake Simcoe was sold in June 1989.

36 It is interesting to note that this memorandum indicates that the whole cottage property, and not merely a 50% interest in it, was an asset of the estate. Obviously missing from the list of original assets are the matrimonial home, the cash and other assets.

37 At the time of his father's death, the appellant was 29 years of age. After Mrs. Fox's grandson went to live with her, some twenty years after her husband's death, there was a breakdown in communications between the appellant and his mother. There is no evidence that before that time the appellant took issue with his mother's handling of estate assets. He seemed content to have her live in the matrimonial home and to give to him a share of income of the estate as determined by her. However, there was no contact with him, and obviously no consideration of the terms of the will when Mrs. Fox dealt with capital assets of the estate as if they were her own personal property.

38 It appears from the evidence that the appellant was not aware of capital encroachments until he received a letter from Mrs. Fox's solicitor on May 26, 1993 informing him as follows:

> The executrix has asked me to advise you that she has exercised her right of encroachment and transferred the entire estate to Ralph Fox and Shayne Fox pursuant to the provisions of the will.
>
> In fact the proceeds with respect to the summer cottage were transferred on December 31, 1991. The 50% in 532-534 Palmerston Boulevard was effectively transferred on December 30, 1992.

I have asked Mr. Jonathan Suttner to prepare estate accounts from the closing date of the last accounts sent to you to the wind up of the estate on December 30, 1992. I will provide you with a copy of those accounts as soon as they are received.

39 This letter makes no mention of the matrimonial home, cash, and other original estate assets.

40 Whether or not these encroachments were appropriate depends on whether they were made within the terms of the will. As stated earlier, I agree with Galligan J.A. that a capital encroachment made because of the appellant's involvement with a person not of the Jewish faith does not constitute a *bona fide* exercise of discretion. However, I wish also to look at the terms of the will for the purpose of determining whether there was a proper exercise of discretion within the terms of the will apart from religious considerations.

41 The relevant provisions of the will state:

4. During the lifetime of my said wife, if she shall survive me, to hold the residue of my estate upon the following trusts:

(a) To pay to my said wife, for her own use and benefit absolutely, 75% of the net income derived therefrom, and to pay the remaining 25% thereof as follows:

(i) For so long as my said son shall be living, to my said son,

(ii) After the death of my said son, to or for my said son's issue, or some one or more of them, in such proportions as my Trustee may, in its absolute discretion, consider advisable from time to time.

(iii) After the death of the last survivor of my said son and his issue, to my said wife, for her own use and benefit absolutely.

(b) Out of the capital thereof, to pay such amount or amounts as my Trustee may in its absolute discretion, consider advisable to or for my said son.

(c) Out of the capital thereof, to pay such amount or amounts as my Trustee may, in its absolute discretion, consider advisable from time to time to or for the benefit of my said son's issue or such one or more of them as my Trustee may select from time to time.

5. After the death of the survivor of me and my said wife, subject as hereinafter provided, to hold the residue of my estate upon trust to pay the net income therefrom to my said son until he attains the age of twenty-five years, and at that time or at the death of the survivor of me and my said wife, whichever be later, to pay, transfer and convey unto my said son the residue of my estate; provided that if my said son shall die before attaining the age of twenty-five years, either in my lifetime or after my death, the residue of my estate shall, after the death of the last survivor of me and my said wife and my said son, (hereinafter referred to as "the time of determination") be held in trust, in equal shares per stirpes, for the issue of my said son living at the time of determination, or, if there be no issue of my said son living at the time of determination. .....

42 With respect to the interpretation of the discretion provisions of the will, the trial judge stated in her reasons, at pp. 20-1 [p. 186 E.T.R.]:

Ralph was free at the time of making his will to consider the circumstances in which he wanted the power to be exercised. He elected to place utmost faith in the discretion of the executrix and by the discretion gave her power to re-make his will if she saw fit in the circumstances. Instead of using the will to reach into the future from the grave, Ralph decided to allow his executrix to take the actions framed by the power of encroachment to achieve his goals in events which he could not himself foresee. Therefore, if Walter made a marriage which his executrix considered unfortunate, in giving the power to his executrix that he did, it should be taken that Ralph approved her actions based on her disapproval.

43 If the discretion of the executrix was exercised in this case because of her religious bias, then the decision of Galligan J.A., in my view, is decisive. If she had reasons in addition to the religion of her son's proposed spouse, then the meaning of the will, and the nature of her exercise of discretion should be considered.

44 The law is clear that if there is any ambiguity in the terms of a will, the court should attempt to ascertain the intention of the testator at the time it was executed. The son of the testator was born on March 8, 1941. At the time of the execution of the will, on July 12, 1961, he was an only son, twenty years of age, and unmarried. With respect to income from the estate, it is clear that the appellant has a right to income during his life and that his issue take benefits under the will only on his death. (see clause 4(a)(ii)). The first provision for encroachment on capital is in sub-paragraph 4(b). It is in favour of the appellant, and permits encroachment to the extent of paying "such amount or amounts" as the trustee "may in its absolute discretion consider advisable". I think it is fair to say that all of the cases cited to us indicate that such a discretion, standing alone, permits the trustee to exercise discretion without the fear of intervention of the court other than in cases such as those referred to by Galligan J.A. However, there are a number of provisions in this will which would be defeated if sub-paragraph 4(c) were interpreted to permit a total capital encroachment.

45 The discretion to encroach on capital in favour of the issue of the appellant is found in sub-paragraph 4(c). It permits payment of "such amount or amounts" as the trustee "may, in its absolute discretion consider advisable from time to time". That wording is slightly different from that in sub-paragraph 4(b) which permits capital encroachment in favour of the appellant. The only apparent difference between the two provisions is that sub-paragraph 4(b) seems to permit a total encroachment in favour of the appellant at one time, whereas sub-paragraph 4(c) permits only periodic encroachments in favour of his issue.

46 Without reference to other provisions in the will, that difference might not seem significant. However, no cases were cited to us where there is a discretion provided in a will which, upon its exercise, would wipe out the possibility of an encroachment in favour of another beneficiary in whose favour there is a life interest in income and a remainder interest in capital. If the encroachment made in this case is permitted by the terms of the will, it raises startling possibilities. For instance, had Mrs. Fox been unable, perhaps because of infirmity, to act as trustee, another trustee could have transferred the entire estate (excepting only the cottage before its sale) to the appellant, and wiped out Mrs. Fox's life interest in income and her remainder interest without any consideration of her rights or the rights of other beneficiaries. Surely the court would have interfered in such a case, because it was clearly the intention of the testator that his widow should have a life interest in his estate. This intention was also clear with respect to his son. Grandchildren who, it should be remembered, were not born when the will was executed, were only to have an interest in income following the death of the appellant. Their interest in the remainder of the estate was also to fall in only after the death of their father.

47 In my view, it was the obvious intent of the testator that his son have a life income from his estate, and the remainder outright following the death of his mother. The power to encroach must be viewed in the light of that intent.

48 In addition, although the encroachment to the extent of the cottage proceeds was of an "amount" within the terms of 4(c), the encroachment to the extent of the transfer of the estate interest in the apartment building was not the payment of an "amount", but was the transfer of an interest in real property, which was the major source of estate income. Were it necessary to do so, I should hold that at least the transfer of the estate interest in the apartment building was not an encroachment within the terms of the will. However, I do not consider it necessary to do so.

49 It is clear that the testatrix, in transferring all of the property she did to her grandchildren, did not consider the provisions of the will at all. She arbitrarily decided to treat the estate assets as her own property and, even after an order of the court freezing estate assets, continued to do so. After the appellant properly requested an accounting of disbursements from the estate, Mrs. Fox obtained legal advice and her counsel drafted a memorandum of encroachment using all of the appropriate words to support the encroachment. However, her own clear *viva voce* evidence indicates that she always considered the estate assets to be hers to deal with as she pleased, and that she wished to disinherit her son. She can do that with her own estate, but not with that of her deceased husband. It is my view that all of the encroachments made by Mrs. Fox constitute breaches of trust.

50 In result, I would allow the appeal, set aside the judgment in appeal and replace it with judgment in favour of the appellant in the following terms:

1. Declaring that Miriam Fox is in breach of the trust provisions of the last will and testament of her deceased husband Ralph Fox.

2. Removing Miriam Fox as executrix of the estate of Ralph Fox, and replacing her by an executor or executrix, other than any of the other parties to this action, to be agreed upon by the parties. In the event that the parties cannot agree upon a new executor or executrix, one may be appointed upon application to the Ontario Court of Justice (General Division).

3. Ordering an accounting of all original estate assets, including the estate interest in the matrimonial home, the cash, and other original assets.

4. Ordering repayment of any funds improperly removed from the estate, plus appropriate interest thereon, including 100% of the net proceeds of the sale of the cottage property, from funds into which they can be traced, or from Miriam Fox personally where tracing is not possible.

5. Ordering a retransfer into the name of the estate of a one half interest in the Palmerston Avenue apartment building.

6. Ordering costs in favour of the appellant to be paid by Miriam Fox personally.

Catzman J.A.:

Introduction

51 I have read, in draft form, the reasons for judgment of my colleagues. They would allow the appeal on the grounds that:

(1) Miriam had no right to dispose of the cottage property in any capacity;

(2) Miriam did not exercise her discretion as executrix at all, but rather dealt with the estate assets as if they were her own;

(3) if Miriam did purport to act as executrix,

(a)the exercise of her discretion to encroach cannot be sustained because it was motivated by her disapproval of Walter's marriage outside the Jewish faith; and

(b)the power to encroach conferred by the will did not entitle her to encroach in the manner she did.

52 I agree with the conclusions identified above as items (1), (2) and (3)(b). If, however, those conclusions are wrong, and if this appeal falls to be determined on the basis of the nature of the motivation underlying the exercise of Miriam's discretion to encroach, I respectfully disagree with the views of my colleagues. I consider it advisable, in the event that this litigation proceeds further, to record the basis of my disagreement.

Miriam's Motivation

53 Galligan J.A. has concluded that Haley J. found as a fact that "Miriam's disapproval of Walter's proposed marriage to a gentile was her motivation for exercising her power to encroach". I agree with Galligan J.A. that, if Miriam's exercise of her discretion to encroach was actuated solely by her displeasure with her son's choice of spouse, her exercise of discretion should not permitted to stand. However, I have a different assessment of Miriam's motivation.

54 I begin by looking at what Haley J. said on the subject. Her reasons for judgment following the trial are reported at (1994), 5 E.T.R. (2d) 174 (Ont. Gen. Div.). At pp. 184-185, she says:

> I am satisfied that the first encroachment, being of the cottage proceeds, was motivated by Miriam's concern about the marriage and that this motive continued *and was perhaps coupled with her concern for the welfare of Walter's children as stated in the Memorandum of Encroachment of December 1992*. However, the conversation with Percy Freedman took place as late as August 1992 and I am satisfied that Miriam's dislike of Walter's marriage continued *as her prime motivation* in encroaching as she did.

(Emphasis added.)

55 Her reasons for judgment respecting costs, delivered some two months later, are reported at (1994), 5 E.T.R. (2d) 188 (Ont. Gen. Div.). At p. 191, she says:

> The central issue of this trial was whether the executrix had properly exercised the broad power of encroachment the testator had given her under the will when she had used it to deprive the applicant of his interest in the bulk of the residue of the estate because he had married a gentile.

56 Galligan J.A.'s view is that these passages reflect a clear and unambiguous finding of fact that Miriam's motivation for exercising her power to encroach was exclusively her disapproval of Walter's marriage. His reasons proceed on that premise, and I have no quarrel with the conclusion he reaches if that premise is correct. With deference, however, I read Haley J.'s reasons for judgment somewhat differently. On my reading, while Haley J. does clearly indicate that Miriam's displeasure with Walter's choice of spouse was the primary reason for her exercise of the power to encroach, she also indicates that Miriam's actions were motivated, at least in part, by her concern for the financial welfare and security of her grandchildren.

57 In fairness, Miriam's motivation for encroaching as she did was not the focus of Haley J.'s reasons for judgment. Her focus, rather, was on the broad and uncontrolled nature of the power to encroach conferred by the will. Although, unlike Galligan J.A., I do not find Haley J.'s finding of fact to be clear and unambiguous, I think it fair to say that the imprecision arises because she did not consider it necessary to be precise on the subject. On her analysis, the question whether Miriam was entitled to encroach as she did was far more important than the question why Miriam encroached as she did.

58 As Galligan J.A. has pointed out, there was evidence at the trial to support the finding that Miriam, despite her denials, exercised the power to encroach because Walter chose to marry out of the Jewish faith. But there was also evidence, none of which Haley J. purported to reject, that Miriam was moved as well by her concern for the financial welfare and security of her grandchildren. Indeed, it should be borne in mind that, in encroaching as she did, Miriam was acting against her own interest, for she thereby forfeited the portion of the income on the residue that would have otherwise accrued to her under her husband's will.

59 Walter's son, Ralph, testified that Miriam had expressed concern that Walter's new wife was after money, both Walter's and Miriam's. This concern was reflected in a memorandum prepared by Miriam's lawyer in May 1989, in which he wrote:

> Miriam's major concern is related to Walter's present folly. He appears to be deeply involved with his secretary — about whom his mother has very strong feelings and historial *(sic)* grounds for objection. She has made up her mind to "disinherit" Walter *so as to prevent this woman from getting her hands on any of her money.*

(Emphasis added.)

60 In Walter's own evidence, he acknowledged that, since 1989, he had no contact with Ralph and provided no financial support to him. Walter also acknowledged that his daughter, Shayne, was aware of the continuing court battles between him and his former wife on the issue of child support. The memorandum of encroachment signed by Miriam in December 1992 (to which Haley J. referred in the first of the two passages quoted above) recited, in part:

> Among my many reasons for giving positive consideration to exercising my discretion to transfer a major portion or all of the assets of the estate to my grandchildren are the following:

(a) My son, Walter, went through an extremely acrimonious divorce with his wife (the mother of Ralph and Shayne) in or about 1984. Through his actions, Walter has alienated both of his children, has not acted as a responsible parent to them either financially or emotionally and I have concerns that if any portion of the estate eventually passed to Walter on my death (as is provided under the will) he would not make proper provision for Ralph and Shayne, as was the hope of my late husband.

(b) I am aware that at various times Walter's financial circumstances have been very insecure. Therefore, I am concerned that a major portion of any part of the estate which is left to him would only go to satisfy his indebtedness.

(c) Both Ralph and Shayne attend school and Ralph particularly may be in university for many years. Walter has not been providing the financial support to Shayne that he was required to pursuant to Court Order and despite the fact that Shayne's mother has gone to the court on a number of occasions to attempt to have Walter meet his obligations. As a consequence, I have been personally paying for my grandson's, Ralph, university education.

(d) I have a very close relationship with my grandchildren, Ralph and Shayne, and I know them to be mature well beyond their years. As a result of the actions of their father, they have experienced a great deal of uncertainty in their lives and I believe that they would maturely benefit from a degree of financial security that would be provided by transferring the estate to them.

(e) Although I would lose my entitlement to income from the estate if I transferred the remaining assets to Ralph and Shayne, I have reviewed my own financial situation with my accountant and have concluded that my lifestyle and security will not be affected.

(f) I understand that at this particular time an incidental benefit of making the encroachment as regards the property is the fact that the estate would avoid the deemed capital disposition that would occur pursuant to the *Income Tax Act* on January 2, 1993 and would avoid the necessity of relying upon the proposed new legislation to attempt to defer the deemed capital disposition.

(g) Walter is fifty years old, has remarried, is a lawyer, and has been in his own private practice for over twenty-five years. He suffers no disability and is certainly able to fully support himself and his wife and maintain his lifestyle.

These were legitimate factors for Miriam to take into account in exercising the discretion conferred upon her by her husband's will.

61 As I read the evidence, therefore, having regard to the history of the estranged and unhappy relationship between Walter and his children and to Miriam's historically justified apprehension regarding Walter's sense of responsibility to provide for them, their financial welfare was a real and operating concern influencing Miriam to exercise her discretion as she did. I therefore conclude, as I understand Haley J. to have concluded, that there were two bases, both supported by credible evidence, on which Miriam exercised her discretion to encroach:

(1) the first, and inappropriate, basis, her displeasure with Walter's choice of spouse; and

(2) the second, and appropriate, basis, her concern for the financial welfare and security of her grandchildren.

62 While the first basis was undoubtedly primary and would, if standing alone, warrant intervention by the court, the second basis is a legitimate foundation for the exercise of discretion by the executrix under the will.

The Significance of Miriam's Motivation

63 If I am right that there were two bases on which Miriam exercised her discretion to encroach, one appropriate (her concern for his grandchildren's financial welfare and security) and one inappropriate (her displeasure with Walter's choice of spouse), what is the significance of her duplex motivation? Does the inappropriate motive fatally infect Miriam's decision to encroach,

notwithstanding the appropriate motive? Or does the appropriate motive save her decision to encroach, notwithstanding the inappropriate motive?

64 The point was not argued before us, and my research has failed to find any clear answer. There is some slender support for the former view — that the inappropriate motive is fatal — in the article, "*Judicial Control of Trustees' Discretions*" (1975) 25 U.T.L.J. 99, in which Professor Cullity writes, at p. 115:

> Extraneous benefits, motives, or desires will vitiate an attempt to exercise a discretion only if they actuate *or form part of the basis* upon which the trustee's decision was reached.

(Emphasis added.)

65 No authority is cited for that proposition and, in the absence of authority, I have difficulty in accepting that the exercise of discretion by an executrix on an appropriate basis must necessarily fail because of a concomitant inappropriate basis. In light of our proposed disposition of this appeal on other grounds, I need not resolve this question. I incline to the view, however, that if an executrix exercises her discretion to encroach for a "good" reason, clearly within the contemplation of the power conferred upon her by the will, we should be reluctant to interfere on the ground that she was, additionally, motivated by a "bad" reason that the court is unprepared on public policy grounds to support.

Disposition

66 Having regard to my agreement with those aspects of the reasons of my colleagues set out in the introduction to these reasons, I would dispose of this appeal in the manner proposed by McKinlay J.A.

Appeal allowed.