Filed on the following condition(s):
it has incorrect or missing pagination (see section 12 of the Practice Direction)

To be met by date: December 08, 2025

(See the applicable Mandatory Requirements Check/Return Form for an explanation of the enumerated conditions) /AK

COURT OF APPEAL FILE NUMBER:	2503 0193AC
TRIAL COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	Edmonton

Registrar's Stamp

IN THE MATTER OF THE *TRUSTEE ACT*,
R.S.A. 2000, c. T-8, AS AMENDED, and
IN THE MATTER OF THE SAWRIDGE BAND *INTER VIVOS* SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")

APPLICANTS:	ROLAND TWINN, TRACEY SCARLETT, ROY TWINN, JONATHON POTSKIN AND BONNIE BLAKLEY, as Trustees for the 1985 Sawridge Trust
STATUS ON APPEAL:	Respondent
RESPONDENT:	CATHERINE TWINN
STATUS ON APPEAL:	Appellant
RESPONDENT	OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE
STATUS ON APPEAL:	Respondent

DOCUMENT: **APPELLANT'S FACTUM**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Catherine Twinn
Self-Represented
PO Box 1460
Slave Lake, AB T0G 2A0
ctwinn@twinnlaw.com
Telephone: (780) 886 2921

TABLE OF CONTENTS

PART 1 FACTS……4

PART 2 GROUNDS OF APPEAL……..7

PART 3 STANDARD OF REVIEW……8

PART 4 ARGUMENT……..9

PART 5 RELIEF SOUGHT……13

Table of Authorities……14

Overview:

1. There are two recognized types of Trusts: Private or Public Trusts, each having many subsets.[1] The new Case Management Judge (New CMJ) issued a decision, typecasting the April 15, 1985 Sawridge Band Inter Vivos Settlement[2] as a Private Trust.
2. He found that the unconstitutional discrimination in the beneficiary definition, "*defining the group by reference to federal legislation at a given date*", was not of the type **in a private trust** that permits intervention by the courts. Had it been "*discrimination by virtue of characteristics within a defined group or discrimination by the trustees in making distributions within a defined group*", that would be the kind of discrimination in a private trust that may permit intervention by the courts.[3] Respectfully, this is a distinction without a difference. The 2 examples where discrimination may require judicial intervention exist here. He found that unconstitutional discrimination in the beneficiary definition does not prohibit distribution as this is a Private Trust, despite its sui generis nature.[4]
3. The unconstitutional discrimination[5] in the Trust's beneficiary definition excludes upwards of 75% of the members of SFN[6] and permits distribution to non-Sawridge First Nation (SFN) members and persons who are not "Indians". This constitutes a wrongful appropriation of SFN wealth. Chief Walter Twinn, the Settlor, intended to **temporarily** transfer[7] into the 1985 Trust, SFN assets, which derive from the common rights of the SFN for the common use of the SFN (as opposed to individual members). The 1986 Trust, whose beneficiaries are SFN members, are determined by the SFN Membership Rules and process,[8] regulated by public law and the Charter.[9] The Decision cements unconstitutional discrimination in this Trust,

---

[1] SFN 'Threshold 'Brief filed May 26, 2025, at paras 50-59.
[2] "1985 Trust" [Appellant's Extracts of Key Evidence "**AEKE**" p. 003]; Questioning Bujold on Affidavit (May 27,28 2014), Undertaking SFN Council/Trustees from 1985 [AEKE p. 185]
[3] *Twinn v Alberta (Public Trustee),* 2025 ABKB 507 at para 41.
[4] Case Management Order – September 3, 2025 Re The Threshold Question, filed September 3, 2025, at para 1. [AEKE p. 148]
[5] C. Twinn "Threshold" Brief (filed June 2, 2025), p. 2-60; Consent Order (Discrimination) filed January 22/18, par 1 [AEKE p. 152]
[6] Affidavit Chief Isaac Twinn, filed Sept 5/24, refiled November 7/25, paras 5, 8-9, 12, 15-16, 20-27, 30 [AEKE p. 138]; "Constating" Application filed January 9, 2018 [AEKE p. 158]
[7] Affidavit of Paul Bujold, sworn and filed on February 15, 2017, at paras 75 and 153-155, Transcript, Undertakings [AEKE p. 023]
[8] SFN Membership Rules [AEKE p. 174]
[9] *Landry v Wôlinak Abenaki First Nation*, 2020 FC 945 (CanLII), at para 57 of *Dickson*: *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10

appropriating **public** power and functions into **private**, unfettered Trustee discretion. [10] Trustees are not competent, trusted, independent or able to exercise these "public" powers and functions.[11]

4. The facts in this Action's 14 year record are dense; the legal issues complex and far reaching. The Decision reflects narrow, arbitrary and shallow reasoning, employing an over-simplified binary application of Trust law. The new CMJ was blind to and gave no deference to extensive, pertinent, sui generis facts, indigenous realities and the law.[12] The Decision relies on unexamined factual and legal distortions, objected to[13] and contradicted by the 2011 record.[14] The scant, duplicative Briefs[15] filed by the Trustees and the OPGT, are elementary recitals of fiduciary duties, with assertions, not facts, some riddled in stereotypes. They assert that the Trust is "Private" and "Valid" yet validity is a pending application.[16]

5. A fair and just consideration of the facts and law situating the sui generis nature of the 1985 Trust into its proper factual and legal context, disqualifies this Trust as just another rich man's Private Trust.[17] Dr. Waters highlighted the incongruency in the application of the existing body of law to First Nation trusts, and wrote that the Courts have considered First Nation Trusts as "human beneficiary trusts" or "non Charitable purpose trusts.[18] For 14 years, the Trustees always maintained the 1985 Trust was **not** a Private Trust but a "*community trust*" or a "*quasi-public*" Trust.[19]

---

[10] *Indian Act* (R.S.C., 1985, c. I-5) at s.2, s.4, s.10-14, and s.109-113.
[11] Affidavit of Chief Twinn *supra note* 6; Statement of Claim, Catherine Twinn, filed June 19, 2015, paras 1-54 [AEKE p. 177]; Affidavit of Catherine Twinn filed September 30, 2015, paras 15-21 [AEKE p. 073]; Bujold 2017 Grandfathering [AEKE p. 411]; June 12, 2015 Trustee "Offer" Application and Brief [AEKE p. 413]; *(Canada) Registrar of Indian Register v. Sinclair*, 2001 FCT 319; *Canada (Registrar, Indian Register) v. Sinclair* (C.A.), 2003 FCA 265, [2004] 3 FCR 236; Trustees Jurisdiction Brief, March 29, 2019, para 54 [AEKE p. 432]
[12] SFN 'Threshold' Brief, *supra note 1*, paras 30, 37-45, 75-83; C Twinn "Threshold" Brief, *supra note* 5 paras 30, 48,65-73; Bujold *supra note 7* Transcript; Trustee Jurisdiction Brief March 29/19 para 35.
[13] OPGT Reply filed June 2, 2025, para 3, 10; Transcript filed October 31, 2025, p.15, lines 26-37 and p.29 line14-p.30, line 13 [Appeal Record "**AR**"]; Affidavit Bujold *supra note* 7, paras 75, 153-155.
[14] Affidavit Bujold, February 15, 2017, at paras 75 and 153-155 [AEKE p. 023] and Transcript [AEKE p. 379]
[15] OPGT Reply, *supra note 13*, para 15; Trustees Jurisdiction Brief *supra note 12*, para 35.
[16] Sawridge Trustees Application filed June 28, 2024, at para 1 [AEKE p. 144]
[17] SFN 'Threshold' Brief, *supra note 1*, paras 30, 37-45, 75-83; C Twinn "Threshold" Brief *supra note* 5, paras 30, 48, 65-73; Bujold *supra note 14*; Trustee Jurisdiction Brief *supra note 12*, para 35.
[18] Donovan W M Waters, Mark R Gillen & Lionel D Smith, Waters' Law of Trusts in Canada, 5th ed (Toronto: Carswell, 2021) at 28–29, 356. [TAB 1]
[19] Trustee Brief filed August 5, 2016, "Tab 2" [Proposed Distribution) at p. 7 'Nature of a Discretionary Trust']; Transcript filed October 31, 2025, p.5 (lines 15-33) [AR]; Trustee Jurisdiction Brief, *supra note 12*, para 35; Trustee "Threshold" Brief s filed April 16, 2025, at paras 37 and 39-41.

Part 1: Facts

6. This Factum adopts facts set out in:
   a. paragraphs 1-19 of this Court's 2022 Decision, and paragraphs 23, 24, 35, 36, 44, 51, 52, 56 and 57. [20] Paras 51 and 52 confirm, up until the 2025 "Threshold Application", the main issues and relief sought by the Trustees throughout this Action: "*to modify the discrimination by striking out language that has a discriminatory effect such that the definition of "Beneficiary" will be reduced to members of the Sawridge First Nation*.
   b. Facts including paragraphs 1-18 of the former CMH 2022 decision except for the numbers of affected persons referred to in paragraphs 16 & 17.[21]:
7. The facts in the SFN Affidavit filed in this Court.[22]
8. Facts set out in the SFN Brief and C. Twinn Brief, filed May 26, 2025.[23]
9. From the 70's until 2003, SFN legal status to hold assets was uncertain; [24]
10. SFN assets were originally held by individuals in trust for the SFN;[25]
11. Beginning in 1982, SFN assets were settled into Trusts;[26]
12. The 1982 Trust required that Trustees be Chief and Council; the 1985 Trust did not, but in fact, and by tradition, the Chief was a Trustee;[27]
13. Tremendous legal uncertainty and valid concerns[28] about Bill C-31's impact[29], including a potential 400% increase in SFN membership,[30] led to protective steps:
   a. The creation of the 1985 Trust was a temporary measure to secure SFN assets.[31]

---

[20] *Twinn v Alberta* (Office of the Public Trustee), 2022 ABCA 368 at para 15 (Constating Application).
[21] *Twinn v Trustee Act*, 2022 ABQB 107 at paras 1-15 and 18.
[22] Affidavit of Chief Twinn *supra note* 6 at paras 15-31.
[23] SFN 'Threshold' Brief, *supra note 1*, paras 30, 37-45, 75-83; C Twinn "Threshold" Brief *supra note* 12, paras 30, 48, 65-73; Bujold *supra note 7*; Transcript; Trustees Jurisdiction Brief *supra note 12*, at para 35.
[24] SFN 'Threshold' Brief *supra note 1*, para 39; Bujold Affidavit September 13, 2011 at para 8 [AEKE p. 014]; Bujold 2017 Affidavit *supra note* 7, paras 75, 153-155; Transcript, Questioning Bujold on Affidavit, March 7-10, 2017, at p. 420 (lines 3-24) [AEKE p. 379]; *Twinn v Alberta (2022), supra note* 20 at para 2.
[25] *Twinn v Alberta (2022), supra note* 20 at para 2.
[26] SFN 'Threshold' Brief, *supra note 1* at paras 44 and 45.
[27] Questioning Bujold on Affidavit (May 27 & 28, 2014), Undertaking *supra note* 2; *Supra Note* 6 Chief Twinn Affidavit [AEKE p. 185]
[28] Affidavit Chief Twinn, *supra note* 6; C Twinn Reply Brief. Chief Walter Twinn's concerns about Bill C-31; SFN's population increased per Registrar's List, from 38 members (1985) to 742 today, a 1,875% increase. https://fnp-ppn.aadnc-aandc.gc.ca/fnp/Main/Search/FNRegPopulation.aspx?BAND_NUMBER=454&lang=eng
[29] No pre or post C-31 impact studies on Bands' lands & resources despite statutory requirement to report to Parliament
[30] Affidavit of Chief Twinn *supra note* 6; Treaty 8 High Impact Brief.
[31] SFN 'Threshold' Brief (May 26, 2025), *supra note 1* at para 39; Bujold Affidavit filed September 13, 2011 at para 8; Bujold Affidavit February 15, 2017, at paras 75 and 153-155; Transcript, Questioning Bujold on Affidavit March 7-10, 2017, at p. 420 (lines 3-24) [AEKE p. 379]; *Twinn v Alberta (2022), supra note 20* at para 2.

b. Constitutional litigation in the Federal Court;[32]

c. Accelerating work begun in 1982[33] for implementation of Recognition legislation, for the SFN to remove itself from the *Indian Act* to its own negotiated, Federal Cabinet, ratified *Recognition* Act. The SFN passed its Constitution, per s.4 of the *Recognition* Act.[34] Both the *Recognition* Act (e.g. Bill S-16, Schedule 2) [35] and the *SFN Constitution* Article 15(16), recognize SFN law making authority over "**Trusts for the benefit of members and their variation"**.[36]

14. Regarding the Trust:

a. "Bill C-31" members would only be excluded for a short while until the SFN "knew what Bill C-31 was going to bring about;"[37] The 1985 Trust was temporary, "for a short purpose ,,, for a short while", until the effects of Bill C-31 were known. [38] Chief Twinn's ultimate Intention was "*that the 1985 Trust [be] no longer effective and that everything be in the 1986 Trust*."[39]

b. The Trust has never distributed since it was settled April 15, 1985. The Trustees had concerns about distributing pursuant to an unconstitutional beneficiary definition[40], and had not/could not identify beneficiaries or make distributions[41];

c. Trustees sought a judicial striking of words from the unconstitutional beneficiary definition except the opening words "All person who are members of the Band".[42]

d. The Trustees said the 1985 Trust is not a Private Trust, it's a "quasi-public" or a "Community Trust".[43] Now, "without more[44]" it's just a mainstream "private" trust, immune from public policy prohibitions.[45]

---

[32] Fresh as Amended Statement of Claim on C-31 'whose laws determine membership' [AEKE p. 162]
[33] Special Committee on Indian Self Government recommending Recognition Legislation Proceedings no. 40 and report no. 2 (Online); *Supra 12*, paras 169-200 of C Twinn 2025 Brief, *supra note* 5 at paras 169-200.
[34] Constitution of the Sawridge First Nation, ratified on August 24, 2009, Articles 15(16) [TAB 3]
[35] Bill S-16; History and Index to Recognition Bills [TAB 2]
[36] C Twinn "Threshold" Brief *supra note* 5; Bill S-16, Schedule 2 (trusts for the benefit of members, and their variation); SFN Constitution, *supra note* 34 at Article 15(16).
[37] Transcript, Cross Examination of Chief Walter Twinn, held on October 28, 1993, at p. 3 (lines 13-17). [AEKE p. 387]
[38] *Ibid; para 59 Trustee Jurisdiction Brief March 29, 2019*.
[39] *Ibid; supra note 12 Trustee Jurisdiction Brief,* para 59.
[40] Bujold Affidavit, filed September 13, 2011 at para 8. [AEKE p. 014]
[41] Affidavit of Chief Twinn, *supra note 6*; Trustee Threshold Brief, *supra note 19*, paras 8-9, 11, 23, 46
[42] *Twinn v Alberta (2022), supra note 20*.
[43] Brief of the Sawridge Trustees, Jurisdiction Brief, *supra note 12*, at para 35.
[44] Transcript October 31, 2025 at p. 21 (lines 1-6) [AR]
[45] OPGT Reply *supra note 13*, para 15; Trustees Jurisdiction Brief *supra note 12* at para 35.

e. The Trust would allow for tight control of SFN assets to make money to replace expiring resources revenues,[46] providing an interim stable platform to shelter SFN assets from further Indian Act enabled dissipation, "so it [the assets] could make money",[47] providing the SFN a **stable and independent** economic future;

f. the Trust performs a function of SFN government.[48]The Trusts were integral to the SFN governmental structure involving "*the capital accounts of the band held in Ottawa, the band council, the corporations, and the trust [which] comprise the political and economic structure of the Sawridge Band*." [49]

g. When the 1985 Trust was settled, all its beneficiaries were SFN members. The unconstitutional discrimination in its beneficiary definition unfolded thereafter, beginning with Bill C-31 to the present.[50]

h. The Trustees cannot/have not identified the Trust's beneficiaries, for 40 years no distributions have occurred and unconstitutional discrimination is aggravated by the exercise of Trustee discretion.[51]

15. Trustees, in managing and administering the Trusts, rely on SFN's inherent powers of self-governance[52] and until now, deferred to the sui generis nature of the Trust;

16. Bureaucrats' derailed enactment of the *Recognition Act* (i.e. Bill S-16), by weaponizing Bill C-31, in breach of the signed 1989 Framework Agreement to negotiate in good faith with the SFN. It was agreed the Court would determine if the *Indian Act* or the SFN law has constitutional jurisdiction;[53]

---

[46] Transcript (Oct 28, 1993), *supra note 37* at p. 95 (lines 14-24); https://www.cbc.ca/news/indigenous/frog-lake-first-nation-federal-trust-documents-9.6992298.
[47] *Supra note 7* Transcript (Oct 28, 1993), *supra note 37* at p. 95 (lines 14-24); C Twinn "Threshold" Brief *supra note 5* at paras 200-207, $21,714,782.32 without interest, of SFN monies paid to persons enfranchising;
[48] *Supra note 7*, transcript Chief Twinn.
[49] Transcript, Cross Examination of Chief Walter Twinn, held on October 29, 1993, at p. 3-8 [AEKE p. 387]
[50] Catherine Twinn "Threshold" Brief, *supra note* 5 at p. 2-60.
[51] Affidavit of Chief Twinn (Nov 5, 2025), *supra note* 6.
[52] SFN 'Threshold' Brief, *supra note* 1 at para 41; Catherine Twinn "Threshold" Brief, *supra note* 5; SFN Constitution, *supra note 34*; Bill S-16, Schedule 1, s.15 and Schedule 2; *Guerin v. The Queen,* [1984] 2 SCR 335, at p. 387; *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010, at para 112, 113-115; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam),* [2020] 1 SCR 15; *R. v. Sparrow*, [1990] 1 SCR 1075; *Simon v. The Queen,* [1985] 2 SCR 387; *R. v. Sioui*, [1990] 1 SCR 1025; *Ontario (Attorney General) v. Restoule,* [2024] SCC 27; *Williams Lake Indian Band v. Canada,* [2018] SCC 4.
[53] Catherine Twinn "Threshold" Brief, *supra note 5* at pp.68-73, paras 246 250, including History/Index of *Recognition* Act. Despite two Trials, the issue was never determined. See further, *Sawridge Band v. Canada*, [1996] 1 FC 31.

17. INAC's SWAT group ("Special Words and Tactics) to spin and control the public narrative demonizing Indigenous leaders, like Chief Walter Twinn, pursuing self-determination;[54]
18. Chief Twinn suffered a massive, stress induced heart attack in 1994, dying in 1997 from a second heart attack. He built wealth for the SFN, not himself personally.
19. Chief Twinn's grandfather signed Treaty 8 for the SFN. Chief Twinn is not a person "*defined by that discriminatory, colonial statute*[55]*"* [Indian Act] but a person recognized by that statute.

Part II: Grounds of Appeal

20. This appeal arises from an application for advice and direction by the trustees of the 1985 Sawridge Trust, as they then were, asking the Court to affirm that notwithstanding that the definition of "Beneficiary" set out under the 1985 Sawridge Trust is discriminatory, the trustees may proceed to make distributions to the beneficiaries. The new CMJ granted the order and, in so doing, made errors of law, mixed fact and law, and fact, in regard to the following matters:

    A. Failing to consider pertinent facts, context and law and correctly characterize the *sui generis* nature of the 1985 Sawridge Trust;

    B. Incorrectly applying the law pertaining to private trusts to the 1985 Sawridge Trust;

    C. Incorrectly construing the discrimination caused by the terms of the 1985 Sawridge Trust, which has continuing and renewed effects for the entire duration of the trust;

    D. Ratifying the gender and related discrimination incorporated in the 1985 Sawridge Trust's beneficiary definition comprised of unconstitutional and repealed provisions of the Indian Act, 1970, contrary to public policy and human rights freedoms and protections;

    E. Misapprehending the "*judgement call and discretion*" actually exercised by Trustees in their selective application of the discriminatory rules, further compromised by the repeal of Indian Act provisions that operated in conjunction with the repealed discriminatory rules;

---

[54] Special Committee on Indian Self-Government), *supra note* 33; Bill S-16; History and Index to Recognition Bills [TAB 2]; Catherine Twinn "Threshold" Brief, *supra note* 5 at paras 181 and 185; *Sawridge Band v. Canada (C.A.)* [1997] 3 F.C. 580

[55] *Twinn v Alberta* (2025), *supra note 3* at para 43.

F. Incorrectly finding that the Trust "*names people such that they have a beneficial interest*" when the Trustees, for 40+ years, failed to cause a fair, competent, objective identification of beneficiaries consistent with due process;

G. Failing to consider pertinent facts, context and law leading to an incorrect finding that the Sawridge Trust does not perform a government function or a function related to government, which would effectively allow a public body to use a private trust to engage in illegal discrimination;

H. Enabling the wrongful appropriation of First Nation wealth to benefit persons who are not Indians and Sawridge members while excluding some 75% of current Sawridge Band members as beneficiaries;

I. Denied the SFN the opportunity to adduce probative evidence relevant to issues set out above, while reaching a Decision narrowed to what was put before him by the Trustees and the OPGT.

Part III: Standard of Review

21. The applicable standard of review for a Case Management Justice's decision is:
    a. Correctness for questions of law;
    b. Palpable and overriding error on findings of fact, with a higher standard of review for questions of mixed fact and law.[56]
22. A higher degree of deference can apply to discretionary or case flow decisions. Deference on substantive decisions is more limited.[57]
23. Appellate intervention is required where a case management judge has:
    a. Clearly misdirected themselves on the facts or the law;
    b. Failed to give sufficient weight to relevant factors;
    c. Committed an error in principle or an erroneous view of the facts;
    d. Proceeded arbitrarily; or
    e. The decision is so clearly wrong as to amount to an injustice.[58]

---

56 *Piikani Nation v McMullen*, 2020 ABCA 366 at para 26.
57 *Ibid.*
58 *Ibid* at paras 34 and 25.

24. The "elbow room" this Court allows case management justices does not extend to avoiding complex law and fact in favor of a simple type-casting of the 1985 Trust; putting distribution before validity; incorrectly cementing the constitutional discrimination; ignoring the sui generis nature of the Trust; distorting Chief Twinn's intentions; swayed by distortions and proclamations, not facts; proceeding despite objection from the Appellant and the SFN about putting the cart before the horse; excluding SFN from introducing new evidence; restricting SFN's participation despite previous interventions treating them as a full party; mischaracterizing SFN facts and law as "transform[ing] the court into a political arena."[59]
25. The was not a decision of a case management justice with an ongoing, long-term involvement in directing the case. This is a new and 3rd CMJ, quick to end the Action, facilitating the Trustees' redirection from remedying unconstitutional discrimination. In doing so, the CMJ mistreated the facts and the law in typecasting the 1985 Trust as a Private Trust. The factors giving rise to additional deference do not apply here.[60]

Part IV: Argument

26. Just as a band as a legal entity "is in a class by itself", this Trust is in a "class by itself", arising as it does from a unique mix of public and private law, intended as a **temporary** response to Bill C-31 impacts to safeguard SFN assets.
27. The Trustees, aided by the OPGT, gaslit the record on this application, reversed their long held positions and withheld the "more[61]" evidence required to determine what type of Trust the 1985 Trust is, including the Trust was temporary to protect and grow SFN assets.
28. The Trustees relied on Chief Twinn's 1993 Trial transcript evidencing his intentions and the sui generis legal and historic realities leading to the creation and structure of this sui generis Trust.[62] Counsel for the OPGT had this transcript evidence since 1993[63] and cross examined Chief Twinn on the very issues before this Court now. The OPGT distorts the facts and issues in the Bill C-31 litigation to say in this application that "*the discrimination reflects the clear*

---

59 *Ibid* at paras 34 and 23.
60 *Lameman v Alberta, 2013 ABCA 148* at para 13.
61 Transcript supra note 23
62 Bujold 2017 Affidavit *supra note 7*; Transcript, at p.80 (lines 3-10), p. 88 (lines 13-28), p. 95 (lines 14-24).
[63] *Sawridge Band v. Canada*, *supra note 53*. The decision was set aside on appeal and a new trial ordered on grounds of a reasonable apprehension of bias; June 4 2010 Directions of Trial J on Conduct and Contempt.

intentions of the settlor at the time and is consistent with the claimed historical customs practices of the SFN"[64], aka "*woman follows man*."[65]

29. The CMJ amplifies the distortions concerning Chief Twinn's intentions towards the 1985 Trust, and its sui generis nature and context that created and structured it.[66] He wrongly misconstrues the imposed challenges facing Chief Twinn, not of his making, but his choice.[67]

30. If the 1985 Trust does not fit squarely within the construct of a non-charitable purpose trust, it is a far better fit than a Private Trust, given the facts and the law, and the principles of public policy should apply to it, as they would apply to a public or non-charitable purpose trust. [68]

31. The 2022 amendments to the *Trustee Act* codified common law outlining what constitutes a valid non charitable purpose Trust.[69] The new CMJ dismissed this characterization for 3 reasons.[70] He ignores that on April 15, 1985, the Trust definition was not discriminatory when its status crystalized under common law as a non-Charitable Purpose Trust. The new CMJ reverse engineers the unconstitutional discrimination that arose **after** the Trust's settlement to mischaracterize it. When the Trust was established, its definition incorporated valid legislation. It should be presumed that the definition can only incorporate valid legislation. If the incorporated law subsequently becomes invalid, the definition becomes invalid. The two other disqualifying reasons given by the new CMJ are that the "*1985 Sawridge Trust names people, such that they have a beneficial interest as beneficiaries, and does not perform a government function."*[71] The Deed does not name people; after 40 years, there is no

---

[64] OPTG Reply, *supra note 13* at para 3.
[65] OPGT Reply, *supra note 13* at para 10; June 16 2025 Transcript pg 15, lines 33-37.
[66] *Twinn v Alberta (2025), supra note 3* at para 43.
[67] Harvard Indian Economic Development, 1997 (Online)
[68] *Canada Trust Co. v. Ontario Human Rights Commission*, [1990] 74 O.R. (2d) 481 at 484 (O.C.A.) [Re Leonard]; *Re Ramsden Estate* 139 D.L.R. (4th) 746 (P.E.I.S.C.T.D); *University of Victoria v. British Columbia (Attorney General)* 2000 BCSC 445, 185 D.L.R. (4th) 182; *Fox v. Fox Estate*, [1994] 5 E.T.R. (2d) 174 at para. 12 (Ont. Ct. J.(Gen. Div.)), rev'd on other grounds [1996] 28 O.R. (3d 496) (O.C.A.). **NTR: 12 pg. Factum gives insufficient space to lay out the argument from these cases and will be orally at the Hearing**.
[69] *Trustee Act,* SA 2022, c T-8, I at s.77 and 78.
[70] SFN 'Threshold' Brief, *supra note 1* at para 24-25.
[71] *Twinn v Alberta (2022), supra note 20* at para 25; Affidavit of Paul Bujold, sworn and filed on February 15, 2017, at paras 75 and 153-155; Transcript, Cross Examination of Chief Walter Twinn, held on October 28, 1993, at p. 80 (lines 3-10), p. 88 (lines 13-28), p. 95 (lines 14-24). [AEKE p. 387]

list and no distributions.[72] As for not performing a government function, this is contradicted by the facts and the law.

32. The Decision ignored the state of the law in 1985 and that the "*Trust becomes the Band, in essence"*.[73] Chief/Settlor/Senator Twinn testified to SFN's governmental structure using Trusts outside the strictures imposed by the Indian Act, driven by valid concerns that SFN assets could be politically and individually dissipated[74], given the circumstances and history.[75]

33. The SFN is an Aboriginal and Treaty Title and rights holder protected by s.25 and s.35 of the Constitution Act, 1982.[76] Chief Twinn's grandfather signed Treaty 8 for the SFN. The SFN was not created by the *Indian Act*, it was **recognized** by it. Minimally, SFN holds aboriginal title to its reserve lands[77] and a pre-existing sovereignty prior to Canada's assertion of sovereignty.[78] The purpose of s.35 is to reconcile those assertions of sovereignty.[79] It is "*an enduring entity with its own government, isa unique type of legal entity under Canadian law*" *... In law, a band is in a class by itself*." [80] The sui generis facts and law[81] is not accommodated by Private or Public Trusts law boxes.

34. To treat this Trust on the same legal principles as the private disposition of property under a will is to be willfully blind to the legal and historic realities that led to its creation and

---

[72] Affidavit of Chief Twinn (Nov 5, 2025), *supra note* 6; Trustee Threshold Brief, *supra note 19* paras 8-9, 11, 23, 46.
[73] Bujold *supra note* 7 & transcript
[74] Catherine Twinn "Threshold" Brief, *supra note 5* paras *Supra note* SFN History of Enfranchisement, *supra note 47* at SFN; Gina Donald Sworn Statement 2015.
[75] CBC, "Court orders Indigenous Services to hand over Frog Lake First Nation financial documents: First Nation member requested records after federal trust funds decreased by $90M over 10 years" (27 November 2025) (Online)
[76] *Donald-Potskin v. Sawridge First Nation*, 2025 FC 648
[77] *Southwind v. Canada*, 2021 SCC 28 (CanLII), [2021] 2 SCR 450 at p. 452, 453, and 483-484.
[78] Twinn v Alberta (2025), *supra note* 3 at para 43:"…defined by that discriminatory, colonial statute."
[79] SFN 'Threshold' Brief, *supra note 1* at para 41; Catherine Twinn "Threshold" Brief, *supra note* 5; SFN Constitution, *supra note* 34; Bill S-16, History Index Recognition Bill *supra note* 35; SFN Constitution 15:16; *Guerin v. The Queen, supra note 52*; *Delgamuukw v. British Columbia, supra note 52*; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam), supra note 52; R. v. Sparrow*, *supra note 52*; *Simon v. The Queen, supra note 52*; *R. v. Sioui*, *supra note 52*; *Ontario (Attorney General) v. Restoule, surpa note 52; Williams Lake Indian Band v. Canada, supra note 52*
[80] *Montana Band v Canada (T.D. (1997),* [1998] 2 F.C. 3, PARA 21, CITING Jack Woodward, Native Law (Toronto: Carswell, 1990);
[81] National Aboriginal Trust Officers Association (NATOA), "Home" (2025), Online

structure, and its sui generis nature.[82] Given these facts and the sui generis nature of the Trust, deference is to be given to Chief Twinn, the indigenous decision maker.[83]

35. The law has expanded. It accommodates the legal and historic realities of the First Peoples; the wisdom and understandings of indigenous legal norms and traditions constituting indigenous common law; Canada's reception and reconciliation of indigenous laws with its law; deference to indigenous customs and practices which are not frozen in time;[84] and, important to this Appeal, the development and application of sui generis law to sui generis facts to affirm sui generis rights[85]. The term sui generis connotates uniqueness and distinction, can be translated to "of its own kind or class.[86] Over time, sui generis has become a catch-all term for describing different legal rights and interests held by Aboriginal peoples in Canada.

36. Beginning with the 1984 *Guerin* decision,[87] *Delgamuukw* described Aboriginal title as *sui generis* because it is *inalienable*, the source is the *prior* occupation of Canada by Aboriginal peoples, and it is held *communally*.[88] The Court recognized that Aboriginal rights (in this case, Aboriginal title) could be declared *sui generis* when they can be distinguished from normal proprietary interests and when their "characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in Aboriginal legal systems".[89] The Supreme Court reaffirmed these principles in 2020.[90]

---

[82] J Borrows and L Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?, 36-1 Alberta Law Review, 1997 10; *Guerin v the Queen*, *supra note 52*; *Delgamuukw v. British Columbia, supra note 52*; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam), supra note 52; R. v. Sparrow, supra note 52*; *Simon v. The Queen, supra note 52*; *R. v. Sioui*, *supra note 52*

[83] *Whitestone v Onion Lake Cree Nation* 2022 FC 399; see also, (*Commanda v Algonquins of Pikwakanagan First Nation*, 2018 FC 616 at para 19). *Pastion v Dene Tha' First Nation*, 2018 FC 648 [*Pastion*]: *Giroux v Swan River First Nation*, 2006 FC 285 at paras 54-55; *Shotclose v Stoney First Nation*, 2011 FC 750 p.58; *Beardy v Beardy*, 2016 FC 383 at para 43.

[84] *Campbell v. British Columbia (Attorney General)*, [2000] B.C.J. No. 1524; Dickson *supra note* 9; *Donald-Potskin v. Sawridge First Nation*, *supra note 76*

[85] *Supra note 82*

[86] *Ibid*.

[87] *Geurin v the Queen*, *supra note 52*; *Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85 (CanLII), [2001] 3 SCR 746, at para 41.

[88] *Delgamuukw v. British Columbia, supra note 52*, at para 113-115.

[89] *Ibid* at para 112.

[90] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, *supra note 52*

37. Rights that were first characterized as *sui generis* were hunting, fishing[91] and land rights, but the notion of *sui generis* has since been found to apply to the historic treaties between Indigenous peoples and the Crown.[92] It applies to the 1985 Trust.

38. The Decision weaponizes unconstitutional discrimination, re-traumatizing and dividing SFN members. These smoke signals foreshadow a hellish future seeded by this Decision, enabling an *Indian Act* generated culture of entitlement and dependency, fueled by windfall expectations about this now Lottery Trust for the few SFN members who may qualify, **assuming** the rules can be operationalized which the Trustees have demonstrated are unworkable.[93]

Part V: Relief Sought

39. That the declaration of the Honourable Justice J.S. Little that the Trustees may make distributions from the 1985 Trust notwithstanding that the trust deed is discriminatory be set aside and an award entered:

    1. Declaring that the 1985 Sawridge Trust is a *sui generis* or a special form of non-charitable purpose trust or both;
    2. Declaring that the 1985 Sawridge Trust offends public policy such that beneficial distributions may not be made under same;
    3. The parties are to return to Case Management for an application to determine the effect of the 1985 Sawridge Trust violating public policy and if given, the Declaration under paragraph 3.
    4. Full solicitor/client costs to be awarded to the Appellant from the 1985 Sawridge Trust assets.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of December, 2025.

Estimate of time required for the oral argument: 45 minutes.

---

[91] *R. v. Sparrow*, *supra note 52*

[92] *Simon v. The Queen, supra note 52*

[93] SFN 'Threshold' Brief (May 26, 2025), *supra note* 1 at paras 30, 37-45, 51-59, and 75-83; Brief of the Sawridge Trustees, Jurisdiction Brief, filed March 29, 2019 at para 35. See further, s. 87(1) of the *Trustee Act*, SA 2022, c T-8, I: "impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of a non-charitable purpose trust;" Affidavit of Chief Twinn (Nov 5, 2025), *supra note* 6 regarding no beneficiary identification or distributions in 40 years.

LIST OF AUTHORITIES

Beardy v. Beardy, 2016 FC 383

Campbell v. British Columbia (Attorney General), [2000] B.C.J. No. 1524

Canada (Registrar, Indian Register) v. Sinclair (C.A.), 2003 FCA 265, [2004] 3 FCR 236

Canada (Registrar of Indian Register) v. Sinclair 2001 FCT 319

Canada Trust Co. v. Ontario Human Rights Commission, [1990] 74 O.R. (2d) 481

CBC, "Court orders Indigenous Services to hand over Frog Lake First Nation financial documents: First Nation member requested records after federal trust funds decreased by $90M over 10 years" (27 November 2025)

Commanda v. Algonquins of Pikwakanagan First Nation, 2018 FC 616

Constitution of the Sawridge First Nation, ratified on August 24, 2009

Delgamuukw v. British Columbia [1997] 3 SCR 1010

Dickson v. Vuntut Gwitchin First Nation, 2024 SCC 10

Donald-Potskin v. Sawridge First Nation, 2025 FC 648

Fox v. Fox Estate, [1994] 5 E.T.R. (2d) 174 at para. 12 (Ont. Ct. J.(Gen. Div.), rev'd on other grounds [1996] 28 O.R. (3d 496) (O.C.A.)

Giroux v. Swan River First Nation, 2006 FC 285

Guerin v. The Queen, [1984] 2 SCR 335

Indian Act R.S.C., 1985, c-I-5

J Borrows and L Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference? 36-1 Alberta Law Review, 1997 10

Lameman v. Alberta, 2013 ABCA 148

Landry v. Wôlinak Abenaki First Nation, 2020 FC 945

Making Research Count in Indian Country: The Harvard Project on American Indian Economic Development

Montana Band v Canada (T.D. (1997), [1998] 2 F.C. 3

National Aboriginal Trust Officers Association (NATOA), “Home” (2025)

Newfoundland and Labrador (Attorney General) v. (Innu of Uashat and of Mani-Utenam), [2020] 1 SCR 15

*Ontario (Attorney General) v. Rostoul*e, [2024] SCC 27

Osoyoos Indian Band v. Oliver (Town), 2001 SCC 85 (CanLII), [2001] 3 SCR 746

Pastion v. Dene Tha’ First Nation, 2018 FC 648

Piikani Nation v. McMullen, 2020 ABCA 366

R. v. Sparrow, [1990] 1 SCR 1075

R. v. Sioui [1990] 1 SCR 1025

Re Ramsden Estate 139 D.L.R. (4th) 746 (P.E.I.S.C.T.D)

Sawridge Band v. Canada, [1996] 1 F.C 31

Sawridge Band v. Canada (C.A.) [1997] 3 F.C. 580

Sawridge First Nation 454 Registered Population List

Shotclose v. Stoney First Nation, 2011 FC 750

Simon v. The Queen, [1985] 2 SCR 387

Southwind v. Canada, 2021 SCC 28 (CanLII), [2021] 2 SCR 450

Special Committee on Indian Self Government Recommending Recognition Legislation, Proceedings No 40 and Report No. 2 – October 12, 1983 and October 20, 1983

Trustee Act, SA 2022, c T-8

Twinn v. Alberta (Office of the Public Trustee), 2022 ACBA 368

Twinn v Alberta (Public Trustee), 2025 ABKB 507

Twinn v. Trustee Act, 2022 ABQB 107

University of Victoria v. British Columbia (Attorney General) 2000 BCSC 445, 185 D.L.R. (4th) 182

Whitestone v Onion Lake Cree Nation, 2022 FC 399

Williams Lake Indian Band v. Canada, [2018] SCC 4

Donovan W.M. Walters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2021) at 28-29, 356 (Tab 1)

History and Index to Senate Recognition Bills (Tab 2)

Members of The Treaty Eight Group of Indian Bands, Bill C-31 (Amendments to the Indian Act), Presentation to The House of Commons Standing Committee on Indian Affairs and Northern Development et al, March 25, 1985 (Tab 3)

WATERS' LAW OF TRUSTS IN CANADA

FIFTH EDITION

By
Editor-in-Chief

Donovan W.M. Waters, Q.C.
M.A., D.C.L. (Oxon.), Ph. D. (London), LL.D. (Hons.) Victoria, McGill, F.R.S.C. Emeritus Professor, University of Victoria, B.C., of Lincoln's Inn, of the Bar of British Columbia, Barrister at Law, retired Associate Counsel, Horne Coupar, LLP, Barristers & Solicitors, Victoria, B.C.

Contributing Editors

Mark R. Gillen
B.Comm. (Toronto), M.B.A. (York), LL.B. (Osgoode), LL.M. (Toronto), Faculty of Law, University of Victoria

Lionel D. Smith
B.Sc. (Toronto), LL.B. (Western Ontario), LL.M. (Cantab.), D. Phil., M.A. (Oxon.), LL.B. (Montréal), Sir William C. Macdonald Professor of Law, McGill University, of the Bar of Alberta

THOMSON REUTERS®

A cataloguing record of this publication is available from Library and Archives Canada.

ISBN 978-0-7798-9727-8

Printed in the United States by Thomson Reuters.

THOMSON REUTERS®

THOMSON REUTERS CANADA, A DIVISION OF THOMSON REUTERS CANADA LIMITED

One Corporate Plaza
2075 Kennedy Road
Toronto, Ontario
M1T 3V4

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Cnaada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
Email CustomerSupport.LegalTaxCanada@TR.com

III. COMPLETELY AND INCOMPLETELY CONSTITUTED TRUSTS

Executed and executory trusts are completely constituted when the intention to create a trust is ascertained, the trust property is clearly defined and in the trustees' hands, and the trust "objects"[41] are clear. A trust is incompletely constituted on the other hand when every trust element is clear and precise but the settlor has not transferred the property to the trustees. If neither the trustees nor the trust beneficiaries are able to compel the settlor or his or her representatives to transfer the property, the trust must fail since there is nothing for its terms to operate upon. A trust which is completely constituted not only has clarity and precision of language, property and objects, but the property is vested in the trustees, and the trust is therefore operative.[42]

IV. LAWFUL AND UNLAWFUL TRUSTS

Any transaction or act which contravenes public policy, the common law or statute of the realm, is unlawful. The same principle applies to trusts. A trust is unlawful if its object is some such end as the encouragement of immoral behaviour which is contrary to public policy, if its terms contravene a common law rule, such as the rule against perpetuities,[43] or if it violates a statute, such as a *Fraudulent Conveyances Act* or the *Bankruptcy and Insolvency Act*.[44] If a trust is unlawful, it is void either *in toto* or as to that part which is contrary to law: for example, its entire object is the funding of a terrorist organization, or out of a number of successive interests there may be one limitation contravening the perpetuity rule.

V. PRIVATE AND PUBLIC TRUSTS

When the objects of a trust are specific and ascertainable persons, for example, to X for life, "remainder to his first son at 21", the trust is said to be a private trust. A trust is still private when it is in favour of a class, such as "the children of A at 21 equally and absolutely". The connection or nexus here is with a specific person, A. But settlors often wish to benefit persons at large, or persons living within a defined area, being motivated by a desire to achieve some benefit to that section of the public. Such a trust is known as a public or charitable trust. The essence of a public trust is that the trust objects, or those who will benefit from the trust, are the public at large or a significantly sizeable

---

[41] I.e., the beneficiaries of the trust, or the purpose or purposes to be carried out by the trustees. Clarity of objects will exist if, though clarity is lacking in detail, the trust fund is dedicated to exclusively charitable purposes.

[42] A trust is *created* or *set-up*, a verb often used in speech, when there is an intention to create a trust, certainty of property, certainty of objects and the property is vested in the trustees. An incompletely constituted trust, when the settlor cannot be compelled to transfer the property to the intended trustees, is therefore created only at the moment when the gift is completed (assuming an intention to make an immediate gift), that is, when the property is effectively transferred to the trustees. See further chapter 5, Part I, chapter 6, Part I, and *Scott and Ascher*, §§5.2.1 and 5.2.2.

[43] Chapter 8, Part IV B.

[44] Chapter 8, Part III.

section of the public. Questions often arise as to whether the beneficiaries of a particular would-be charitable trust have a common nexus or relationship with an individual, or whether the trust is really for the public benefit as a public or charitable trust.[45]

A charitable trust may be for a class of the public, such as the poor of Toronto or immigrant visible minority women in Vancouver; on the other hand it may have as its object the carrying out of a purpose. The settlor may transfer funds to trustees "for the building of a recreation hall for the Boy Scouts of Windsor," or "for the advancement of education in Canadian schools." Such is a charitable purpose trust. A settlor may also wish to promote a purpose which is not charitable, for example, the erection by a municipality of a suitable memorial to his parents; this would be a non-charitable purpose trust.[46]

VI. STATUTORY TRUSTS

Trusts created by statute, both federal and provincial, are, of course, familiar in Canada. One of the most familiar of these trusts is that which gives the Crown, either federally or provincially, the consequent status of a secured creditor in the bankruptcy of a person who is under the statutory duty to remit to the Crown moneys collected from third parties. Such moneys may represent, for instance, deductions by the employer from an employee's salary or wages as the employee's statutorily required contribution to the Canada Pension Plan, payments under the federal employment insurance scheme, or for income taxes.[47] Moneys are due to the Crown by right of a province, for example, when the vendor of goods or services, as he or she is required to do, collects for the Crown a tax on the sale. Statute has also enabled the Crown, in some situations, to claim by way of a "deemed trust" when the holder of the fund is bankrupt, and is found to have dissipated the funds in question.[48]

---

[45] But not everything that is for the benefit of the public is necessarily charitable, and if the trust object is not charitable then it will not be a public trust. The word "charitable" is, in fact, dominant; the usual reference is to "a charitable (or public) trust". An example: a bequest for the education of the Canadian public in the principles and policies of the Liberal Party is not within the legal definition of charity. Therefore, such a bequest does not create a valid "charitable (or public) trust".

[46] Not being charitable, the trust is not public either. There are two elements in a charitable trust: (a) the purpose is included within the law's description of charity, and (b) it is for the benefit of the public.

[47] See, e.g., *KRA Restaurants Ltd. v. Toronto Dominion Bank* (1977), 25 N.S.R. (2d) 605, 74 D.L.R. (3d) 272 (N.S. T.D.); *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182, 108 D.L.R. (3d) 257 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.* (1997), 143 D.L.R. (4th) 385 (S.C.C.); and *Ministre du Revenu national c. Caisse Populaire du bon Conseil*, 2009 CarswellNat 1569, [2009] 2 S.C.R. 94, (sub nom. *Caisse populaire Desjardins de l'Est de Drummond v. R.*) 2009 D.T.C. 5106, [2009] 4 C.T.C. 330, 309 D.L.R. (4th) 323 (S.C.C.). In terms of the effect of these trusts, H. MacDonald J. in *Canada (Attorney General) v. Thorne Riddell Inc.*, [1982] 6 W.W.R. 572, 140 D.L.R. (3d) 740 (Alta. Q.B.) at 575[W.W.R.], expressed the view that it did not matter whether they are categorized as "statutory trusts", "express trusts" or "constructive trusts." The effect is the same.

[48] The scope of prior Crown claims on the assets of a bankrupt by way of a "deemed trust" was reduced by a 1992 amendment to the *Bankruptcy and Insolvency Act* (am. S.C. 1992, c. 27, s. 33). Section 67(2) now provides that,

> [S]ubject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

J.'s guidelines constitute an accepted and useful starting point in identifying the existence of a fiduciary relationship.

More recently, however, McLachlin C.C., in a unanimous decision in *Elder Advocates of Alberta Society v. Alberta*,[14] said that,

> for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*; (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control. [15]

D. Trusts and Other Fiduciary Relationships Compared

As indicated above, the trust shares common features with other fiduciary relationships in terms of the duty of a fiduciary to act in good faith in the interests of the person to whom the fiduciary obligation is due. There are, however, important differences. The requirements for establishing a fiduciary relationship, as suggested above, are quite different from, for instance, the three certainties (discussed in Chapter 5) required for existence of an express trust. Further, a trust, whether express, resulting or constructive, involves property. A fiduciary relationship does not necessarily involve property. While a constructive trust may arise in the context of a fiduciary relationship, and may serve as a remedy for a breach of a fiduciary obligation, it does not necessarily arise. Further, the potential remedy for breach of a fiduciary obligation is not limited to a constructive trust.[16]

---

161 (S.C.C.); *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.) at 164; and see *Perez v. Galambos*, (sub nom. *Galambos v. Perez*) [2009] 3 S.C.R. 247 (S.C.C.). See the discussion in Leonard I. Rotman, "The Vulnerability Position of Fiduciary Doctrine in the Supreme Court of Canada" (1996) 24 Man. L.J. 60.

The numerous pronouncements in the Supreme Court of Canada on fiduciary obligation in the 1980s and 1990s produced a substantial volume of commentary. See, e.g., John D. McCamus, "The Evolving Role of Fiduciary Obligation" (1998-99) Meredith Memorial Lectures 171; John D. McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28 Can. Bus. L.J. 106; Timothy G. Youdan, "Liability for Breach of Fiduciary Obligation" in Special Lectures of the Law Society of Upper Canada, 1996, *Estates: Planning, Administration and Litigation* (Toronto: Carswell, 1996) 1; Special Lectures of the Law Society of Upper Canada, 1990, *Fiduciary Duties* (Toronto: DeBoo, 1990); Donovan W.M. Waters, "The Development of Fiduciary Obligations", in R. Johnson, J.P. McEvoy, T. Kuttner, H. Wade MacLauchlan, eds., *Gerard V. La Forest at the Supreme Court of Canada 1985-1997* (University of Manitoba, 2000); "Fiduciary Law in Canada Since *Guerin*" in James I. Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon, Sask.: Purich, 2005) at 127-44; Anthony Duggan, "Fiduciary Obligations in the Supreme Court of Canada: A Retrospective" (2011) 50 Can. Bus. L.J. 453; and Peter D. Maddaugh, "The Centrality of Undertaking in Identifying Fiduciary Relationships: *Glamabos v. Perez*" (2011) 26 Banking & Finance L.R. 315.

14 *Elder Advocates of Alberta Society v. Alberta* [2011] 2 SCR 261, 2011 SCC 24 (S.C.C.).

15 *Ibid.* at para. 36.

16 The subject of fiduciary law, other than in the context of trusts, falls outside the scope of this work. However, it is examined further in connection with "Constructive Trusts", see *supra*, note 1.

II. TRUST AND THE ADMINISTRATION OF DECEASEDS' ESTATES

A. Roles of Trustees and Personal Representatives Compared

1. The Role of the Personal Representative

How far, if at all, is the person who winds up the estate of a deceased person a trustee? The task of the personal representative of the deceased is to gather in the assets of the deceased, to discharge funeral and testamentary expenses and debts, and to distribute the remaining assets among the persons entitled. The personal representative may be an executor — that is, one appointed by the deceased in his or her will — or the representative may be appointed an administrator by the court.[17] In the latter circumstance, the representative may be appointed with the will annexed, there being no executor appointed by the will or an executor able and willing to act; or he or she may be appointed to act as on an intestacy.[18] If there is a will, that document lays down how the assets are to be distributed; if there is not a will, or the will does not dispose of all the deceased's assets, statute in each jurisdiction determines who is to take the unappropriated assets.

2. Similarity to the Role of the Trustee

It is evident at once that the personal representative has a role very like the trustee. The representative steps into the shoes of the deceased, title in both personal and real property vests in him or her,[19] and the representative's duties

---

[17] Personal representative is a term embracing both executor and administrator.

[18] If the will is an invalid document, the appointment of the executor is invalid, and an administrator would be appointed. An administrator in this position is similarly situated to the administrator appointed on an intestacy; both distribute the estate remaining after the payment of debts, etc., to the statutory next-of-kin.

[19] However, during the period of administration no Equitable interests exist in favour of testamentary beneficiaries of residuary estate, or of intestate heirs. They have a right of action to compel the representatives to perform their task, but during this time all legal and Equitable interests in the property under administration are vested in the representatives: *Commissioner of Stamp Duties (Queensland) v. Livingston* (1964), [1965] A.C. 694, [1964] 3 All E.R. 692 (Australia P.C.), followed in several cases in Canada — see, e.g., *Ogilvie-Five Roses Sales Ltd. v. Hawkins* (1979), 9 Alta. L.R. (2d) 271, 4 E.T.R. 163 (Alta. T.D.); *Leonhardt Estate v. Minister of National Revenue* (1989), 90 1034, [1990] 1 C.T.C. 2198 (T.C.C.); *Mugford v. Mugford* (1992), 103 Nfld. & P.E.I.R. 136, 49 E.T.R. 229 (Nfld. C.A.). English authorities establish that this rule does not apply to specific bequests or devises, but, if the reason for the rule is correct, it is difficult to explain why specific testamentary gifts are exempt. See (1974) 48 A.L.J. 36 (R.A.S.). *Sed quaere* how far the Privy Council decision is compatible with the trust created by s. 2(1) of the *Estates Administration Act*, R.S.O. 1990, E.22. *Cf.* the "trusteeship" of guardians: *Re Creelman* (1973), (sub nom. *Re Creelman Estate*)40 (3d) 306 (N.S. T.D.); *Wood v. British Columbia (Public Trustee)* (1986), 70 B.C.L.R. 373, 25 (4th) 356 (B.C. C.A.) at 382 [B.C.L.R.], at 366 [D.L.R.]; *Canada Permanent Trust Co. v. British Columbia (Public Trustee)* (1984), 53 B.C.L.R. 222, 9 D.L.R. (4th) 468 (B.C. C.A.) at 224 [B.C.L.R.], at 470 [D.L.R.]; *Seeds v. Seeds Estate* (1988), (sub nom. *Seeds v. Canada Trust Co.*) 93 N.B.R. (2d) 385 (N.B. Q.B.), affirmed (1989), (sub nom. *Seeds v. Can. Trust Co.*) 243 A.P.R. 177 (N.B. C.A.) at 389 [N.B.R.]. As to the trustee duties of administrators, see, *infra*, note 41. For the moment of entitlement of a beneficiary under an estate, see *Ogilvie-Five Roses Sales Ltd. v. Hawkins* (*ibid.*); *Borrie v. Beck*, [1974] 5 W.W.R. 554, 46 D.L.R. (3d) 758 (B.C. S.C.); *Caplan Estate v. Alberta (Public Trustee)* (April 10, 1984), Moore

estate remained to be distributed among the testator's children, and fourteen years later, when the distribution was not yet complete, one of the executors without the knowledge of the other pledged certain silver items forming part of the residuary estate with the appellant pawnbrokers, who also had no knowledge that the pledgor was anyone other than absolute owner of the plate.[45] After the pledgor's death his misdeed came to light, and the remaining executor together with a new co-trustee sought to recover the plate from the appellants. If the defaulting son was acting as a personal representative when he made the pledge then title passed and the estate was bound; if he was, in fact, a trustee at that time then he had no power to act alone and no title passed.

The House of Lords came to the conclusion that the matter must be approached from the angle of what the defaulting son had purported to do. It is true that an executor remains an executor for life, but in this case he had purported, acting alone, to convey title in certain estate property. Was he able to do this? That depended on whether he had title as an executor. The House held he did not. As soon as the executors have assented to the dispositions of the will taking effect, they no longer have title; on that assent it passes to the beneficiaries. In this case, assent could be inferred from the passing of the accounts, and the subsequent passage of fourteen years during which no administration was considered necessary by the executors.

The problems that stem from this case are due to the difficulty of determining on each set of facts whether administration is complete. The representatives' assent can be informal, and not only are their acts shortly after the testator's death relevant, but "the inference is strengthened",[46] as it was in *Solomon v. Attenborough & Son*, by such factors as the lapse of fourteen years during which the executors proved to be inactive.[47] The rights of the third party should surely not depend on such an uncertain moment for the transition of title; his or her position is intolerable when faced with a rogue. In England prior to 1925, the assent of the personal representative to the devolution of the estate in the manner set out by the testator could be informal whether the property concerned was realty or personalty, and it is even arguable that where the personal representatives were to continue holding the property, for example themselves as beneficiaries or trustees, no assent at all was called for — an automatic passing took place when administration was complete.[48]

D. The Present Position and Reform

What is the position in common law Canada on this problem?[49] Looking now at the whole equivalence of personal representation on the one hand and

---

[45] The pledging executor had expended the proceeds for his own purposes.

[46] *Solomon v. Attenborough & Son* (1912), [1913] A.C. 76 (U.K. H.L.) at 83.

[47] In *Re Claremont*, [1923] 2 K.B. 718, Rowlatt J. said there was a rebuttable presumption that executorship has come to a close when the residuary account is brought in.

[48] See J.F. Garner (1964) 28 The Conveyancer 298; *Re Yerburgh*, [1928] W.N. 208; *Re King's Will Trusts*, [1964] Ch. 542, [1964] 1 All E.R. 833. If executors appointed only as such become trustees of the estate which they hold after discharging debts, paying legatees, and conveying to devisees (see *infra*, note 51), can the *Attenborough v. Solomon* problem arise with any estate?

C. Dispositions of Property Subject to Conditions

1. Generally

(a) Conditions Contrary to Public Policy

A gift may be made subject to a condition whether or not the giving is by way of trust. However, since most gifts of this kind do take the form of a trust interest, conditions must be discussed here.

Conditions may be imposed by a donor for a variety of purposes, but those with which we are here concerned involve questions of public policy. It is, of course, self-evident that no condition will be enforced whose object is to secure the performance of some illegal act or the furthering of illegality. Over and beyond such conditions are those whose object or effect is to interfere with the decisions persons make affecting their private lives. The courts are traditionally loath to stop a person from disposing of property in the way the person thinks best, but in the greater interests of public policy[52] they will not enforce conditions which interfere with husband and wife relations, or meddle in the discharge of parental duties.[53] There is also precedent laying down that conditions whose object or effect is to create racial discrimination are against public policy. However, the common law has not regarded restraint upon freedom of religion as being contrary to public policy, though if the condition also involves interference with husband and wife relations,[54] or with the discharge of parental duties,[55] it will contravene that policy.

(b) Conditions Precedent and Subsequent

What effect has the unenforceability of the condition upon the gift? The first thing to notice is that a condition which contravenes public policy is not only unenforceable, it is void. The effect of the voidity depends upon the type of condition in question. Conditions are either precedent or subsequent.[56] A condition is precedent when it must be fulfilled before the gift takes effect. For example: "I leave $5,000 to George on his attaining 25 years, provided he is a baptised member of the Episcopal Church at that time." The intention of the

---

[52] Testamentary freedom of disposition has itself been described as a principle emanating from public policy: *Blathwayt v. Cawley* (1975), [1976] A.C. 397, [1975] 3 All E.R. 625 (U.K. H.L.), an opinion expressly or impliedly supported by each of the five Law Lords. *Blathwayt v. Cowley* had been referred to in Canada for this point — see, e.g., *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1990 CarswellOnt 486, 69 D.L.R. (4th) 321, 38 E.T.R. 1 (Ont. C.A.); and *University of Victoria Foundation v. British Columbia (Attorney General)*, 2000 CarswellBC 529, 73 B.C.L.R. (3d) 375, (sub nom. *University of Victoria v. British Columbia (Ministry of the Attorney General)*) 185 D.L.R. (4th) 182 (B.C. S.C. [In Chambers]). Below, Part II C 5 a.

[53] It is probable that conditions restraining would-be donees or legatees from marriage belong to a bygone era, while interference in the relations of persons in common law marriage or same-sex marriage is today contrary to public policy.

[54] See *Church Property of Diocese of Newcastle (Trustees of) v. Ebbeck* (1960), 104 C.L.R. 394 (Australia H.C.), a powerfully argued decision of the High Court of Australia. Below, Part II C 5 c.

[55] *Re Sandbrook*, [1912] 2 Ch. 471 (Eng. Ch. Div.); *Re Borwick*, [1933] Ch. 657 (Eng. Ch. Div.). The notion is that the parent may be deflected from making the best decision when a condition as to religious belief is imposed on the infant or minor. The validity of this public policy principle was challenged in *Blathwayt v. Cawley*, *supra*, note 52. See further, below, Part II C 5 c.

[56] As to the requirement of certainty in a condition, see below, Part II C 1 e.

jurisdictions will be changing the legal landscape. Until then, though there are many issues on which this treatise might reason as to what is or may be the law, the existing case law, so far as it is not amended or abolished by the legislatures, is the base line from which the courts will proceed to harness the "unruly horse" of public policy at a time of ongoing change and the sensitivity of current society to the dignity of individual rights.

4. Conditions Interfering with the Discharge of Parental Duties

The view taken by the courts is that the rightful place of an infant is with his or her parents, and that in regard to the child's upbringing the parents should think only of what is best for the child's welfare.

The difficulty arises in these cases, however, when there has been a *de facto* or legal separation between the parents during the settlor's[122] lifetime, and the settlor is attempting by the gift to prevent the infant living, normally after the settlor's death, with a parent whose influence the settlor considered deleterious. Just such a situation occurred in *Clarke v. Darraugh*[123] where the testator left his entire estate on trust for an infant at twenty-one, but added, "should the said [G.H.] at any time before coming of age go to live with his father, [W.H.], he is to be disinherited of the whole or any portion of my estate." Ferguson J. held the condition to be subsequent, and to be void on the grounds that the father had a legal right to have his son with him, and the son a corresponding duty. The trial judge also thought fit to note that nothing immoral was proved against the father, that nothing had been left to the father by the testator, and that no provision was made by the testator for the custody and education of the child. One is therefore impelled to ask what the situation would have been had the father been immoral, and the testator had made provision for custody and education. Do these factors mean that the interfering condition is void unless the court agrees with the settlor's assessment of the parent or parents, and the settlor has provided for the child which is to live away from his or her parents?

In *Re Gross*[124] there had been a chequered history of unhappiness. The testator's son was unhappily married during the testator's lifetime, and the son's wife had secured alimony against him. By court order the custody of the child of the marriage was then given to the testator and his wife, with limited access rights granted to the parents. After the testator's death a further court order was sought, the parents agreeing that the child's mother should have custody. The mother then divorced her husband on grounds of adultery, and later the husband died. The child remained a minor throughout these events, and after the husband's death the court made an order embodying the parents' agreement as to custody of the child. The problem with the testator's will was that he had left a considerable sum to the child payable at twenty-one, and to

---

[122] The gift may be direct, of course, and not by way of trust.

[123] *Clarke v. Darraugh* (1884), 5 O.R. 140. *Wilkinson v. Wilkinson*, *supra*, note 117, was followed.

[124] *Re Gross*, [1937] O.W.N. 88 (Ont. C.A.).

"Public" trusts, it was said by the judge, referring to charitable trusts, have to conform to public policy concerns, but "private" trusts are not subject to the public policy doctrine. Distinguishing a number of post-*Leonard* court decisions that appeared to adhere to no such distinction, the appellate *Spence* court adopted Tarnopolsky J.A.'s distinction. But problems with the scope of each of "private" and "public" are at once apparent. For instance, is a trust in favour of a First Nations community, funded also by government out of taxpayer-sourced moneys, a "public" or a "private" trust? Such trusts are certainly not family trusts, like that challenged in the *Spence* case. First Nation trusts have been described by Canadian courts as human beneficiary trusts, following *Re Denley's Trust Deed*[168] and alternatively as "non-charitable purpose trusts".[169] Is a testamentary disposition to other than a *McCorkill* organization, being absolute or by way of a trust, that expressly challenges the *Charter* on discrimination, beyond the reach of public policy as a "private" disposition? Or does the express challenge make the disposition "public"?

D. Discrimination and Public Policy

Today the *Charter of Rights and Freedoms*, and, where they exist, provincial Human Rights Codes, represent a modern societal judgment in favour of equal treatment on the part of governments and private individuals towards each person, whoever that person be. But whether judges ought to be active today to strike down dispositions or the terms of dispositions because they contravene principles against discrimination or of public policy hitherto not raised by the case authorities is a matter upon which reasonable and informed persons can differ. The bases on which the courts might rule was recently considered at length by a first instance court in *Re Esther G. Castanera Scholarship Fund.*[170] A testatrix, who had spent a career in the sciences, endowed by her will the creation of scholarships in the physical sciences at the University of Manitoba, but expressly for women students. One question that arose was whether this constituted discrimination against male students. Considering and applying the distinction between a donor who seeks as a viewpoint to advance discrimination, as in the *Leonard's Foundation* case, and on the other hand a donor who intends to assist those needing support, such as women in the hitherto male-dominated physical sciences, the court approved a *cy-près* scheme which retained language stipulating women appointees. However, the court was of the opinion that there are no general rules governing these cases. Each fact situation must be examined by the court, or other decision agency concerned, in order to determine the donor's motivation, and to assess the impression the reasonable individual may draw from the

---

[167] *Supra*, note 157.

[168] *Re Denley's Trust Deed* (1968), [1969] 1 Ch. 373, [1968] 3 All E.R. 65 (Eng. Ch. Div.).

[169] See chapter 14, Part II C — Part II D.

[170] *Re Esther G. Castanera Scholarship Fund*, 2015 MBQB 28, [2015] 7 W.W.R. 191 (Man. Q.B.). See also *University of Victoria Foundation v. British Columbia (Attorney General)*, 2000 BCSC 445 (B.C. S.C. [In Chambers]), which was discussed, and its reasoning on this matter adopted, by the Manitoba court.

eddy, constantly being seen in a new light as the currents cross, re-cross and intermingle. The gift to such an association is therefore an excellent means of demonstrating the significance of the exemption which charitable trusts enjoy from each of these principles.

In the first place, a clear distinction has to be drawn between a gift by way of trust and a gift by way of an immediate, absolute transfer. The latter is sometimes called the out-and-out gift. An immediate, absolute gift can of course be made to a legal person, whether a human being or a corporation, but it can also be made to an unincorporated association. Such an association is not a legal person, but an aggregate of legal persons, and the donor is free to make his or her gift to that aggregate of persons, describing them by the group name under which they associate.[74] For example, a testamentary gift of $2,000 "to the West End Golf Club" may be intended by the donor as a reference to all those persons who are members of the Club at the date of the deceased's death. The donor does not intend a trust, but merely wishes to donate $2,000 to the general funds of the Club for the members at his or her death to spend, both as to capital as well as to income, as and when they please.

In the second place, a similarly clear distinction has to be made between a purpose trust and a trust for human beings. If the donor intended his or her gift to be held on trust for the work or purposes of the association, and he or she may have done this merely by making it clear he or she is referring to the association itself as opposed to its members, then he or she has created a purpose trust. On the other hand the donor may have intended to give for the individuals in the association rather than for the continuing work or purposes of the association, and then he or she will have created a trust for persons, either the individuals who make up the membership when his or her instrument of gift takes effect, or the members of the association both present and future.

It is difficult to understand why a donor would intend to create a trust for the individuals who are members when the testator dies or the *inter vivos* instrument takes effect because it is no more than a bare trust, and therefore equivalent in effect to the immediate, absolute gift. It is also difficult to understand how there can be an intention to create a trust for present and future members of the association, which is not equally an intention to create a trust for the work or purposes of the association. Nevertheless, the courts have felt themselves able to draw these distinctions.

Prior to the decision of the Privy Council in *Leahy v. Attorney General for New South Wales*,[75] it was thought that a gift on trust for the work or purposes of a non-charitable association was possibly another anomalously valid non-charitable purpose trust, provided there was no uncertainty of purpose and no contravention of the perpetuity rule. As we have said, this may have been because the enforceability principle of *Morice v. Bishop of Durham*[76] appeared

---

paras. 4.054 to 4-057. As to the status of membership and of property, see *Radmanovich v. Nedeljleovic* (2000), 52 N.S.W.L.R. 641, 3 I.T.E.L.R. 802 at 662-65 [N.S.W.L.R.].

74 See, e.g., the result in *Cocks v. Manners* (1871), L.R. 12 Eq. 574 (Eng. V.-C.), and *Re Smith*, [1914] 1 Ch. 937.

75 *Supra*, note 21.

76 *Supra*, note 7.

to be less important than it had been, but it was also due to the somewhat ambiguous way in which the courts were solving the problems of these gifts. Whether the donor made his or her gift to the association simply by its name, or by way of a trust for the association, the crucial test in those days was whether the association could expend immediately both capital and income. In determining whether such an expenditure could be carried out, reference was made both to the terms of the instrument creating the gift, and, if this language did not prevent an immediate expenditure, then to the rules of the association. Sometimes the courts referred to the nature of the association or its purpose, taking together in this way evidence both of its rules and of its character. The character of a dining club, for instance, is an organization that could easily be terminated at any time, but the character of a cloistered religious order is of a continuing dedication to a certain way of life. Whether they referred to the donor's language or to such objective evidence as the rules and character of the association in question, the courts were in pursuit of the intention of the donor. As Lord Campbell L.C. said in *Carne v. Long*,[77] the donor must be presumed to have known what the rules of the association were.

In almost all cases the character of the association to which the donor is giving, when that character is clearly discernible, will give a ready clue to the rules. A dining club may well have rules which permit the expenditure of capital at any time, or the division of the club's assets between the members at a time of their choosing. A cloistered religious order is likely to have rules requiring the holding of capital as an endowment, thus reflecting the continuing nature of the association.

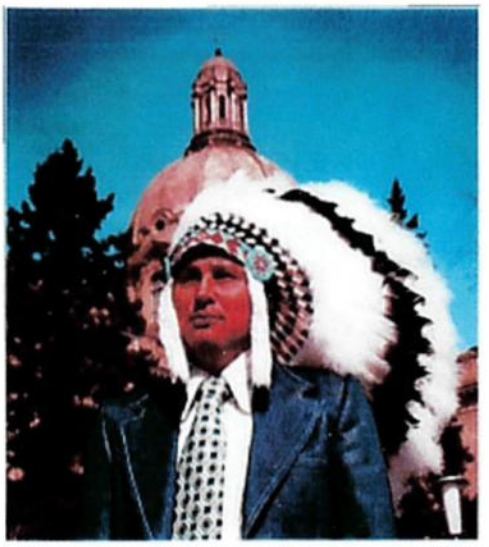
Leahy v. Attorney General for New South Wales gave a new slant to these authorities. A gift for a purpose must be clearly distinguished from a gift for persons, said the Privy Council. The non-charitable purpose trust remains subject to, and is invalidated by, the principle of enforceability in *Morice v. Bishop of Durham*, whose importance the court now chose to revive. As to a gift for persons, the court considered that it is not really a question whether the capital as well as the income of a gift can be expended by the members at any time, but whether the gift is to the members existing when the instrument of gift takes effect, or both to those members and to future members. Three propositions therefore arose from the decision in this case.

(i) If the gift is for a purpose (necessarily a trust), then, the purpose being non-charitable, the gift is void. The principle of *Morice v. Bishop of Durham* continues to be "the guiding principle". The anomalous cases of specific graves and animals remain anomalous.

(ii) If the gift is to the present members of the association, and they can expend capital as well as income when they will, this is an absolute and immediate gift to persons, and is valid. It is most unlikely, though possible, that a gift to such persons and with such a result could take effect by way of a trust. Such a trust was construed to be present in *Re Drummond*,[78] but the Privy Council had reservations

---

[77] *Supra*, note 67.
[78] *Supra*, note 70.



Chief/Senator Walter Twinn, 1934-1997

FIRST NATIONS GOVERNMENT RECOGNITION ACT: HISTORY

1982 Draft Act tabled by Chief Walter Twinn for Treaty 8 with the Penner Committee on Indian Self Government.

1988 Chief Walter Twinn provides a revised draft Act to Canada (INAC Minister McKnight, 1988).

1989 Agreement in Principle signed by Minister Cadieux and Chief Twinn. Negotiation process 1989-1991 between the Sawridge First Nation (SFN) and Canada (led by INAC Self Government Unit, Chief Federal Negotiator Kerry Kipping with support from DOJ, Steve Aaronson).

April 27, 1991 Agreement in Principle (AIP) comprised of 26 subject matter Sub-Agreements signed by Chief Twinn and Canada and 3rd SFN ratification by Referendum; Cabinet approval October 10, 1991 directing the AIP be drafted into legislative form for introduction into the House of Commons.

1991-1994 Legislative drafting process between the SFN, INAC and DOJ; stopped September 26, 1991 by Canada at draft 7 unless SFN capitulates on a constitutional issue before the Court which Canada had agreed would be determined by the Court. Drafting stops and never resumes.

September 27, 1990 Chief Twinn appointed to Senate and after September 1994, takes over the drafting process, hires Federal drafter James Ryan who implements the AIP into a Bill which, before his death October 30, 1997, Chief Twinn introduces 3x into the Senate (Bill S-10 March 30, 1995; Bill S-9 June 13, 1996; Bill S-12 November 25, 1996).

INDEX
Catherine Twinn's Involvement

1. Treaty 8 Draft Act tabled with the Penner Committee on Indian Self-Government, 1982) as an alternative to the *Indian Act.* (Catherine Twinn not involved).

2. 1987/88 the Sawridge First Nation (SFN) drafting team (Catherine Twinn and Professor Moe Litman) draft an Act for the SFN with the Chief and Council and community.

3. 1988 the SFN Chief and Council review and provide final changes to the draft Act which the SFN community approves.

4. 1988 Draft Act submitted to INAC Minister McKnight by Chief Twinn.

5. 1989 Framework Agreement signed between SFN and Canada to govern the Negotiation process.

6. 1989-1991 SFN negotiating team and Canada reduce the draft Act into 26 subject matter Sub Agreements, the principles of which are circulated broadly throughout federal and provincial departments (Alberta) and agreed upon.

7. September 27, 1990 Chief Twinn appointed to the Senate of Canada.

8. An Agreement in Principle (AIP) comprised of the 26 Sub Agreements is signed April 27, 1991 by Canada's Chief Negotiator (Kerry Kipping) and the SFN (Chief Walter Twinn) and ratified by the community in its 3rd Referendum.

9. October 10, 1991 the Federal Cabinet approves the community ratified AIP and directs it be drafted into a Bill for introduction into the House of Commons by Canada as a Sawridge Self Government Act.

10. 1991- 1994 Drafting process between Canada and the SFN. By letter dated September 26, 1991, signed by Kerry Kipping, the drafting stops unless the SFN capitulates on a constitutional issue before the Court which the parties had agreed at the outset of the negotiations would be left to the Court to determine. SFN refuses. No further drafting occurs.

11. Senator/Chief Twinn retains, through his Senate office, a top legislative drafter (James Ryan) to implement the community and Cabinet ratified AIP into a generic Bill which any federally or Court recognized, land based, indigenous community can opt into from whatever legislation governs them (e.g. Indian Act, Cree Naskapi Act, Yukon Self Government Act, etc).

12. Bill S-10 - Senate Bill introduced March 30, 1995 by Senator Twinn (drafter James Ryan)

13. Bill S-9 - Senate Bill introduced June 13, 1996 by Senator Twinn (drafter James Ryan)

14. Bill S-12 - Senate Bill introduced November 25, 1996 by Senator Twinn (drafter James Ryan)

15. Bill S-14 - Senate Bill introduced March 25, 1998 introduced by Senator Tkachuk (drafter James Ryan)

16. Bill S-38 - Senate Bill introduced February 6, 2002 by Senator Gerry St. Germain:

    a. February 24, 2003 revisions to Senate Bill by Drafting Team (The Right Honorable Antonio Lamer, former Chief Justice of the Supreme Court of Canada, Willie Littlechild, Patrick Macklem and Catherine Twinn)

    b. May 16, 2003 Draft Recognition Legislation – by Senate Legislative drafter Michael Clegg – review by drafting team.

    c. December 15, 2003 Draft Recognition Legislation – by Senate Legislative drafter Michael Clegg – review by drafting team.

    d. March 12, 2004 Draft Recognition Legislation – by Senate Legislative drafter Michael Clegg – review by drafting team.

    e. March 15, 2004 Revised Draft Recognition Legislation – by Senate Legislative drafter Michael Clegg – review by drafting team.

17. Bill S-16 – Senate Bill introduced October 27, 2004 by Senator St. Germain. This Bill includes changes resulting from Catherine Twinn retaining former Chief Justice Antonio Lamer and others whose suggestions were implemented. Committee hearings held.

18. Bill S-216 -Senate Bill introduced May 30, 2006 by Senator St. Germain

19. Bill S 212 – Senate Bill introduced October 30, 2012 by Senator St. Germain. Catherine Twinn not involved in this Bill. The then AFN Vice Chief Jody Wilson-Raybould took over the Bill and with Steven Stewart of Senator St. Germain's office made further changes which have not been compared and analyzed against Bill S-16. Senator Germain retires and the Bill dies.

MEMBERS
of
THE TREATY EIGHT GROUP
of
INDIAN BANDS

BILL C-31
(Amendments to the Indian Act)

PRESENTATION

to

THE HOUSE OF COMMONS STANDING COMMITTEE ON INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

and

THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

MARCH 25, 1985

"While redressing past injustices is essential, we must also be fair to existing Indians. The fragility and diversity of Indian living conditions, languages, customs, political structures, economic activities and community resources point to a need to tailor membership rules to individual band or tribal circumstances. The small size of Indian bands (over 500 of the 579 bands have fewer than 1,000 members) suggest that even modest population changes could undermine the equilibrium of band social and political structures."

The Honourable David Crombie

SUMMARY

* The long debate over reforms to the Indian Act must not culminate in an emotional contest of clichés.

* The issues raised in Bill C-31 are essentially Indian issues and not merely ancillary aspects of issues relating to sexual discrimination in Canadian society.

* The provisions that remove sexual discrimination and increase Indian control of band membership are welcome.

* The mandatory inclusion of reinstated persons on band lists without band consent is inconsistent with fundamental Indian laws and customs and should be deleted.

* A study of the effect of the membership provisions of the Bill on the bands comprising the Lesser Slave Lake Indian Regional Council reveals that the impact on those bands will be far greater than that suggested by the estimates provided by the Minister of Indian Affairs and Northern Development.

* While the effect of the Minister's estimates would be a proportionate increase in the membership of bands

across Canada of approximately 7.5%, our study indicates that the increase in the membership of the Lesser Slave Lake bands will be significantly greater. Together with the much greater enlargement of the population on the reserves and the number of electors, this increase will seriously undermine the equilibrium of band social and political structures which the Minister has undertaken to preserve.

* The mandatory reinstatement to band membership for certain bands will have such a devastating effect on their aboriginal and treaty rights entrenched under section 35 of the Constitution that they could be validly implemented only with the consent of the bands or by a constitutional amendment.

* To avoid the serious injustices that will be created by the band membership provisions of Bill C-31 and the constitutional impediment to their implementation, we strongly endorse the views of those groups who have advocated returning to the bands complete control over their membership.

* If the Committee is determined to repudiate complete band control over band membership, adjustments

should be made to the Bill to deal specifically with the consequences to those bands on whom the membership provisions will have a much greater impact than the average estimated by the Minister.

* By allowing high impact bands to control their membership in accordance with specified criteria and procedures to be applied by the bands themselves, the injustice to these bands and the constitutional impediment to the implementation of Bill C-31 could be averted.

* The criteria to be applied by the bands would ensure that the determination of band membership would be made in accordance with principles of fairness and equity, without discrimination on the basis of sex. Decisions would be made in accordance with a written membership code that would establish guidelines for admission to membership based on such matters as the applicant's Indian descent, connection with the community, cultural affinity with the band, commitment to the traditions of the band, the needs of the applicant and the resources of the band community.

* Based on financial information available to the members of the Lesser Slave Lake Indian Regional Council the potential costs of implementing the provisions of the Bill

in their present form appear to be vastly in excess of those presented to the Committee by the Minister.

* Subsection 10(3) of the Bill is ambiguous and should be amended to make it clear that first generation descendants will not automatically become band members.

* Subsection 10(6) of the Bill effectively gives the Minister a veto over band rules. The subsection should be qualified by provisions that permit appeals to a court and by the imposition of a moratorium on unilateral inclusions on band lists while an appeal is pending.

* The Minister's discretionary power to disallow by-laws dealing with residence of band members and other persons on reserves and by-laws dealing with the other matters referred to in section 13 of the Bill is anachronistic and should be removed.

* Reinstated persons should not become band members until all amounts paid to such persons on their enfranchisement have been repaid with interest.

* PARLIAMENT MUST NOT ATTEMPT TO RECTIFY 116 YEARS OF INJUSTICES WITH ONE FINAL, QUICK INJUSTICE!

INTRODUCTION

1. Few people dispute that the Indian Act creates inequities that must be addressed. We are not here to attempt to divert the Government or the Committee from this goal. However, we must ensure that in the attempt to redress the past, serious inequities are not created.

2. The long debate over reforms to the Indian Act must not culminate in an emotional contest of clichés. The issues addressed in Bill C-31 affect all Indians. These are essentially Indian issues and should not be considered as merely part of the broader issue of sexual discrimination in Canadian society.

3. The Treaty Eight Group comprises 33 Indian bands located in the Provinces of British Columbia, Alberta and Saskatchewan and in the Northwest Territories with a total population of over 20,000 persons.

4. We strongly endorse many of the statements contained in briefs already presented to this Committee and, in particular, in those presented by the Assembly of First Nations, the Treaty Six Chiefs' Alliance, the Sarcee National Administration (Treaty Seven) and the Brotherhood

of Indian Nations (Treaty Five). We adopt and reiterate the insistence of the Brotherhood of Indian Nations that the fundamental ethos of our peoples diverges in important respects from those of other Canadian citizens.

> "Our fundamental law and process is different. Based on the notion that the collective community is a whole and must be adhered to, our people and their governments must employ the processes of consensus. Your system protects the parts be they the majority or the minority. We have no such concepts as the majority or the minority. We perceive our communities, our Nations within each as one as a collectivity whose destiny is in harmony and cooperation which can only be arrived at and maintained by consensus."
>
> - Brotherhood of Indian Nations, presentation, March 12, 1985

5. To the extent that the provisions of Bill C-31 remove discrimination on the ground of sex and increase Indian control of band membership, we welcome them. To the extent that those provisions purport to impose mandatory requirements with respect to band membership and thereby to reduce the power of the existing bands to manage and govern their own affairs, the provisions of Bill C-31 are fundamentally opposed to our collective ethos and customs and represent a continuation of the paternalistic policies

of successive Canadian governments that the present Government now professes to have repudiated.

6. We do not object to the inclusion of reinstated Indians on the General List. However, we believe that the mandatory inclusion of reinstated persons on Band Lists will cause great injustice to certain bands and raise serious doubts as to the constitutional validity of the provisions. As the arguments that bear on the issue of complete band control over band membership have been fully ventilated before the Committee, the principal thrust of our submissions will be directed at the effect and validity of the band membership provisions of Bill C-31 on the bands that will be most seriously affected.

7. The reasons for our concerns will be more easily appreciated if we provide a brief profile of a group of Treaty Eight Bands comprising the Lesser Slave Lake Indian Regional Council.

THE BANDS COMPRISING LESSER SLAVE LAKE INDIAN REGIONAL COUNCIL

8. Nine of the Treaty Eight bands in Alberta are members of the Lesser Slave Lake Indian Regional Council, incorporated in 1971. The bands range in size from the

smallest, with only 38 members, to the largest with 871 members.

9. By 1979 the Council had advanced to a stage that it was able to assume from the Department of Indian Affairs and Northern Development the entire administration and program function for the Lesser Slave Lake District. This historic takeover was the first complete takeover of band programs in Canada. Without band stability, this would not have been possible.

10. Today, the Council administers an annual budget of approximately $16 million and manages the following programs:

- Social Development
- Education
- Capital Management and Band Support
- Reserves, Trusts and Membership
- Economic Development
- Technical and Engineering Services
- Employment Services
- Finance and Administration

11. Among the particular accomplishments of the Council, education ranks foremost. The Council took over educational responsibility for the District in 1976, 3 years prior to its general takeover. In the last 10 years,

enrollment for native students in high school and post-secondary training has risen by 300%. In addition, the Council offers a range of employment services, including job placement and on-the-job training. The Council is working toward developing an accredited community-based child welfare agency. In these and many other ways, the Council is developing an Indian community, based on cooperation and mutual responsibility.

12. A brief description of each of the bands within the Council follows:

A. Driftpile - The Driftpile Reserve is located 65 km west of the town of Slave Lake and encompasses 15,688 acres. There are 791 members, many of whom are employed in a sawmill operation and a farm run by the band. Driftpile has taken over its own school, which includes kindergarten through grade six.

B. Horse Lake - The Horse Lake Reserve is 69 km northwest of the city of Grande Prairie, and is in two parts, comprising 4,600 acres and 3,823 acres, respectively. The band has 184 members. Six varied, privately-owned businesses on the reserve employ a large portion of the members. There are four gas wells in operation on the reserve.

C. Grouard - The Grouard reserve consists of 3 land parcels near the hamlet of Grouard. The band has 88 members and is run under tribal custom, with a life chief and council.

D. Duncan - The Duncan Reserve is 4 km south of Brownvale and encompasses 5,122 acres. There are 62 members, many of whom are involved in farming.

E. Whitefish Lake - The Whitefish Lake Reserve consists of 3 parcels, 96 km northeast of High Prairie. There are 685 members who operate a sawmill, and commercial fishing enterprises. Producing oil and gas wells are located on this reserve.

F. Sucker Creek - The Sucker Creek Reserve is 16 km east of High Prairie. There are 687 members in the band involved in a number of occupations, including horse ranching, construction and a variety of other businesses, and the creation of a bird sanctuary.

G. Sturgeon Lake - The Sturgeon Lake Reserve has 3 locations along the shores of Sturgeon and Goose Lakes. The band has built a senior citizens' home, its own kindergarten and day-care centres and a health centre on the reserve. There are 871 members. Oil and gas wells are located on the reserve.

H. Swan River - The Swan River Reserve is on 2 locations south of Lesser Slave Lake's Auger Bay and west of Slave Lake. There are 271 members and employment is in the logging industry and in agriculture.

I. Sawridge - The Sawridge Reserve is on 6,000 acres of land near the town of Slave Lake. There are 38 members of the band. The band operates 2 hotels, in Slave Lake and in Jasper National Park, and owns manufacturing and industrial concerns. There are producing gas wells on the reserve.

13. Since the establishment of the Council, its activities have contributed greatly to the economic, social and general welfare of the nine bands. With the cooperation and encouragement of the Council, particular bands have entered into or are at present negotiating long-term

commercial and industrial commitments that are designed to further the economic development of the bands and the welfare of their members. It is critical to the continuation of our economic and social progress and development that the spirit of consensus and cooperation that constitutes the fabric of our communal life should not be disturbed by a sudden and uncontrolled influx of persons lacking any real commitment to that community, its traditions and customs.

THE BAND CONCEPT

14. Band and tribal membership has traditionally been defined through one or more of three basic systems: blood, kinship and style of life. Generally elements of more than one system are relied upon. In the United States, where in the absence of federal legislation Indian tribes have the power to define their own membership criteria, the criteria adopted have varied widely. Some bands have adopted a one-quarter blood rule, and others a kinship system not dissimilar to that in the current Indian Act. The bands may further have separate residency rules, allowing, for instance, residence of non-Indian spouses on reserves.

15. Beyond blood and kinship, there is an overriding concern with style of life. Persons may be adopted into a tribe or band. A turn of the century U.S. Supreme Court decision held that a person who was racially non-Indian had become a Cherokee Indian for the purposes of jurisdiction of a tribal court when he had been adopted into the tribe. Early negotiations between the Canadian Government and Indians focused on style of life when they dealt separately with Indians and half-breeds. Indians were granted tribally-controlled lands (reserves) by treaty. Half-breeds, **who were not necessarily mixed bloods,** received individual land allotments. The distinction was not based on blood, but on whether or not an individualistic lifestyle had been adopted.

16. The adoption of an individualistic lifestyle accorded with the long-standing Government policy of assimilation and with the values of the majority of Canadian society. The Indians who continue today in the traditional lifestyle are a tiny and fragile minority. The traditional lifestyle does not, of course, mean colour and costumes. Rather it involves the concept of a band as one complex entity, not as a collection of individuals. The elements that keep the entity alive and that give it an identity are

as unique and as impossible to define as the facets of a personality.

17. Therefore, apart from the relatively simply expressed concerns about limitations of band lands and other resources, it is very difficult for us to describe to the Committee just what could be lost by the unilateral grants of band membership contained in Bill C-31. What will inevitably change is the unique constitution of a band. Where the numbers are large and where the new (or reinstated) members have adopted an individualistic lifestyle, we are afraid that there will not only be a change, but a complete destruction of a band. The loss of even one band in this way is an irretrievable loss of a fragment of a way of life that at one time dominated this continent.

18. New and individualistic band members, by persuasion or by mere numbers, could take control of many bands. Those members may not value the customs and traditions or the religious and spiritual values of a band. They may not reflect the special attitudes of the band regarding communal rights to land, the extended family, and the law of harmony and consensus. Any or all of these characteritics could disappear without a trace.

19. Band government can take either a form determined by custom, or the Indian Act form of a chief and councillors elected by band members who are 21 years of age or older and ordinarily resident on the reserve. The chief acts as the voice of the band, and administrator of day-to-day affairs. The Council is responsible for developing and regulating the social, cultural and economic life of the band. The Council is given by-law powers under the Indian Act for these purposes. But the Council does not and cannot rely on legal powers to protect the band's way of life. The real power of the Council lies in the consensus of the band. Both the make-up and power of the Council depend completely on band membership.

UNEQUAL APPLICATION OF BILL C-31 TO CERTAIN BANDS

20. There are two major objectives apparent in Bill C-31. The first of these is to end the discriminatory provisions of the Indian Act relating to the loss of Indian status and band membership. The second is to allow Indian bands to assume control over future band membership. In order to achieve the first objective, the Government proposes to reinstate the Indian status of all persons affected by this discrimination. Partly in response to pressure from interest groups, the Government also proposes

unilaterally to restore band membership to those Indians who directly lost their rights by virtue of the discriminatory provisions. The Minister of Indian Affairs and Northern Development, the Honourable David Crombie, considers this to be a justifiable intrusion on the second objective.

21. Publicized figures indicate that Mr. Crombie expects approximately 68,000 persons to be eligible for restoration of Indian status. He expects approximately 22,000 of these will be eligible for unilateral reinstatement to band membership.

- February 28, 1985 Government Press Release
- Testimony of Mr. Lahey before the Commons Committee, at page 12:19

22. The Bill stops short of unilaterally reinstating to band membership the first generation descendants of those persons who lost their status under the Act. Mr. Crombie has stated:

> **"While redressing past injustices is essential, we must also be fair to existing Indians. The fragility and diversity of Indian living conditions, languages, customs, political structures, economic activities and community resources point to a need to tailor membership rules to individual band or tribal**

> **circumstances. The small size of Indian bands (over 500 of the 579 bands have fewer than 1,000 members) suggest that even modest population changes could undermine the equilibrium of band social and political structures."**

Mr. Crombie concludes that it would be unwise to grant band membership unilaterally to the descendants of those regaining band membership.

- "Leaked" Cabinet brief, paragraphs 29 and 30

23. The Government obviously believes that the unilateral reinstatement to band membership of only 22,000 persons would not have a significant impact on band social and political structures. Indeed, based on a total status Indian population of 292,700 Indians, the resultant proportionate increase would only be 7.5%.

- Statistics Canada, 1981 Census

24. To formulate a policy based only on averages, however, is both misleading and dangerous. Some of the 579 bands will experience much greater increases in band membership. For example, one band in the Lesser Slave Lake Indian Regional Council will likely experience an increase in band membership of more than 130%.

25. But, the potential increase in band membership is not the only factor that will destroy the equilibrium of band social and political structures. Traditionally, band membership has carried with it the right to live on the reserve. Under new section 18.1, a member of a band who resides on the reserve of the band may reside there with his or her dependent children. Thus, even though first generation descendants are not to be unilaterally granted band membership, many of them will be entitled to move on to the reserve with their reinstated parents.

26. We have also referred earlier to band government. Every band member over 21 years of age who is ordinarily resident on the reserve is an elector. Band government proceeds, for the most part, by consensus among the electors. The implementation of certain provisions of the Bill will require a majority vote by the electors. It is clear that the equilibrium of social and political structures of a band may be seriously disturbed by any dramatic increase in the number of electors. This will be particularly true in the case of the Lesser Slave Lake bands who have made such significant progress in managing and developing their social, educational and economic affairs.

27. The nine bands comprising the Lesser Slave Lake Indian Regional Council have analyzed the impact of the proposed unilateral reinstatement to band membership on their membership, reserve population and government. For the period subsequent to 1951, the analysis is based on actual numbers of women who married out of the band and their children who were enfranchised by the Governor-in-Council under section 109(2) of the Indian Act. Similarly, the actual number of adults and children enfranchised under section 109(1) and the illegitimate children removed from the band lists by protest under section 12(2) are included. Figures are not available, however, for the period prior to 1951 or with respect to the numbers of surviving first generation descendants of the women or of enfranchised families. For these groups, the analysis adopts the assumptions used by the Government in deriving its estimates even though, when applied to these bands, the assumptions produce very conservative results in some respects and unrealistically low results in others.

- Cabinet brief, Annex E
- Testimony of Mr. Lahey before the Commons Committee, page 11:9

28. A summary of this analysis shows that unilateral reinstatement will have a high impact on all of the bands in this group:

Name of Band	Unilateral Reinstatement to Membership(1)		Potential Increase in Reserve Population (1)(2)		Potential New Electors(1)(3)	
	No. of Persons	Increase	No. of Persons	Increase	No. of Persons	Increase
Driftpile	153	19%	262	61%	124	70%
Duncan	12	19%	22	52%	11	42%
Grouard	Insufficient Information Available					
Horse Lake	57	31%	98	82%	46	118%
Sawridge	51	134%	81	426%	41	410%
Sturgeon Lake	126	14%	264	44%	114	51%
Sucker Creek	136	20%	292	97%	126	101%
Swan River	103	38%	182	135%	85	152%
Whitefish Lake	110	16%	205	43%	94	55%

Note (1) These figures assume that the courts, through the Charter, will not expand the class of persons eligible for reinstatement. This assumption may well be ill-founded. As stated by Mr. Crombie in his Executive Summary to Cabinet:

> **"It is possible that denial of band membership for the children of persons regaining such membership, by a band controlling its own membership, could be construed by the courts to be a 'continuing effect' of past discrimination and therefore in contravention of the Charter."**

Clearly such a challenge could not be prevented by clause 16 of the Bill.

Mr. Crombie's opinion is substantiated by other independent legal counsel. If the class is expanded, the above figures would dramatically increase.

Note (2) (Residence) These numbers assume that all persons who have a right to return to the reserve will in fact do so. If the ratio between new members who choose to return to the reserve and those who continue to live off the reserve is the same as the existing ratio between current band members living on and off the reserve, these figures will be as follows:

Driftpile	- 33%
Duncan	- 36%
Horse Lake	- 54%
Sawridge	- 213%
Sturgeon Lake	- 30%
Sucker Creek	- 43%
Swan River	- 68%
Whitefish Lake	- 30%

Note (3) (Electors) These figures assume that all new members who are over the age of 21 years will return to live on the reserve. If the ratio between potential new electors who choose to live on the reserve and those who remain off the reserve is the same as the current ratio between band members living on and off the reserve, these figures become:

Driftpile	- 38%
Duncan	- 27%
Horse Lake	- 77%
Sawridge	- 210%
Sturgeon Lake	- 35%
Sucker Creek	- 44%
Swan River	- 76%
Whitefish Lake	- 38%

29. The Government has assumed that only 10% to 20% of those eligible will actually return to the reserves. This

assumption is founded in part on the belief that, on average, women who married non-Indians enjoy a higher standard of living than other natives. Again, averages can be misleading. The bands in the Lesser Slave Lake Indian Regional Council, which have enjoyed the social and economic success referred to earlier, can anticipate a much higher rate of return than the Government estimate.

- Testimony of Mr. Lahey before the Commons Committee, page 12:20

30. The only response provided by the Minister to the difficulties that will be experienced by high impact bands is the proposal to repeal section 112 of the Indian Act and the provisions which permit a distribution of band funds to individual band members who become enfranchised. The Minister has stated that this is to prevent individuals from applying for status and membership simply to re-enfranchise and cash in their per capita share of band funds. While we welcome the Minister's recognition of the difficulties that the Bill would impose on high impact bands, the proposed solution is in our view an unnecessarily draconian reaction to the problems that will be created by the Bill. This point will be developed latter in our presentation.

- Cabinet memo, paragraph 42

POTENTIAL ILLEGALITY OF BILL C-31

31. It is clear that some bands will suffer a much more serious impact from the proposed mandatory reinstatement to band membership than is suggested by Mr. Crombie's estimates based on the average impact across the country. We refer in this presentation to these bands as "high impact" bands.

32. The unilateral reinstatement to band membership of 22,000 persons has been justified on the assumption that the impact on Indian bands will not be sufficient to upset the equilibrium referred to by Mr. Crombie. Indeed, an increase in band membership of any band that does not materially exceed 7.5%, the average increase predicted by the Minister, may not be sufficient to upset that equilibrium. **Increases of the magnititude likely to be experienced by the bands in the Lesser Slave Lake Indian Regional Council, however, will be devastating.** The social and political fabric which has enabled these bands to achieve the successes referred to above would almost certainly be destroyed. These and other high impact bands will be unable to function and may shortly cease to exist.

33. The Government of Canada has committed itself to the preservation - not the destruction - of Indian culture. Cultural survival of native and aboriginal peoples is the cornerstone of section 25 of the Charter of Rights and Freedoms and sections 35 and 37 of the Constitution. As Indians do not constitute a single homogeneous group across the country, these sections recognize the existing cultural diversity among Indian bands. In its rush to correct past injustices, this Parliament must ensure that its actions will not jeopardize the survival of any Indian community.

34. If the Bill is not amended to permit high impact bands to avoid the consequences referred to above, they will be forced to defend their right of survival through the courts. We have been advised that they are likely to succeed. In its broadest concept, the Constitution, including the Charter of Rights and Freedoms, exists to guard against unjustifiable inequalities. In its efforts to grant equal protection of the law to the individual, the Bill overlooks the fact that the Charter also protects collective rights and freedoms, particularly where they impact upon cultural identity and survival. In rectifying injustices done to individuals (Indians who have been unjustly deprived of Indian status) the courts will not

permit the rights of collectivities (the high impact bands) to be destroyed.

- Charter, sections 2(d), 25, 27
- Constitution, sections 35, 37

35. More specifically, subsection 35(1) of the Constitution entrenches aboriginal and treaty rights existing on the 17th of April, 1982. Rights which were extinguished before that date are not entrenched. The rights of Indians to form bands and to live on their reserves are either treaty rights or, in non-treaty areas, the residue of aboriginal land rights. These are entrenched by subsection 35(1) to the extent that they existed in 1982 and can only be modified by constitutional amendment or with the consent of the bands affected. Legislation that unilaterally reinstates as band members substantial numbers of persons deprived of Indian status before April 17, 1982 is constitutionally invalid because it compels existing bands to share their entrenched rights with other people without their consent.

36. Subsection 35(4) of the Constitution guarantees equally to male and female persons the aboriginal and treaty

rights existing on April 17, 1982. Subsection 35(4) does not extend subsection (1) to rights extinguished prior to 1982. Its purpose is simply to ensure that in the future the male and female persons who enjoy subsection 35(1) rights will enjoy them equally.

37. Bill C-31 seeks to ensure that men and women are treated equally. The courts have emphasized, however, that while a law may have a legitimate purpose, its actual operation may result in the infringement of rights and freedoms guaranteed by the Constitution.

38. Unilateral reinstatement to band membership of relatively large numbers of persons will result in a diminution, and in some cases the destruction, of the entrenched rights of existing band members. Such a result cannot be accomplished legally without a constitutional amendment to section 35 or the consent of the bands affected.

A PROPOSED SOLUTION

39. The constitutional impediment can be avoided by removing from Bill C-31 the concept of unilateral

reinstatement of band membership - a position taken by many of the Indian groups who have appeared before this Committee and one which we strongly support. If the Committee will not accept this solution, the potentially devastating effects on high impact bands and the constitutional impediment can still be avoided with some relatively minor adjustments to Bill C-31 without materially affecting the Bill's primary thrust of ending discrimination and rectifying past injustices. Simply stated, any band for whom the potential influx of members, reserve inhabitants or electors is likely to exceed a threshold would be permitted to control reinstatement to membership of the band provided the band accepts prescribed conditions. These conditions would be designed to ensure that membership determination would be made in accordance with principles of fairness and equity, without discrimination on the basis of sex.

40. Specifically, we would propose that the Bill be revised to provide the following:

(a) establish three criteria for identifying a high impact band, viz: - potential influx of new members; potential increase in reserve population; and potential increase in electors;

(b) provide that a band would qualify as a high impact band if the potential increase in any of these criteria

exceeds 20% and if the band meets the other conditions referred to below;

(c) establish a category of associate band membership with the following attributes:

(i) all persons regaining status as an Indian under the Bill (including first generation descendants) would become associate members of the high impact band;

(ii) these persons would thus be afforded an identity with a particular band;

(iii) associate membership would be the first step in achieving full band membership;

(iv) associate members would be entitled to apply for full band membership and be granted a hearing;

(v) a band would be required to consider all applications on the basis of the written membership code referred to below; and

(vi) associate members would not be entitled to the other benefits of band membership until they are admitted as full band members; and

(d) to qualify as a high impact band, the electors of the band must have a written membership code that complies with the principles of fairness and equity without discrimination on the basis of sex; this would permit bands to establish guidelines for admission to membership based upon such matters as the applicant's Indian descent, connection with the community, cultural affinity with the band, commitment to the traditions of the band as well as the needs of the applicant and the resources of the band community.

COST OF BILL C-31 TO THE GOVERNMENT OF CANADA

41. The Minister has stated that he will seek funding of $295 million for the cost of implementing the measures in Bill C-31 in the first five years. The Minister has repeatedly assured the Indian people that the government will provide sufficient additional funds to ensure that the burden of absorbing additional band members and reserve population will not be borne by the existing bands. Mr. Crombie has reiterated his undertaking to the Committee but has stated that it is not possible at this time to determine the amount of additional funding that will be required. He has undertaken to seek additional funding approval for these amounts as they become known.

42. We believe that the magnitude of these undetermined costs may be several times the $295 million for which funding approval is to be sought. This conclusion is based, in part, upon an extrapolation of the expenditures by the Department of Indian Affairs and Northern Development during the fiscal year 1984/85 in respect of the nine bands comprising the Lesser Slave Lake Indian Regional Council. These expenditures totalled $15,935,215. Assuming that the ratio between expenditures in respect of Indians living on

the reserve to Indians living off the reserve is the same as shown in Annex B to the Cabinet memo, this was equivalent to an expenditure of $6,786 per Indian living on-reserve and $805 per Indian living off-reserve for the 1984/85 fiscal year. Accepting the Minister's assumption that no more than 14,000 Indians return to the reserve, these figures would indicate that the annual cost of the Bill C-31 program would be in excess of $136 million or, over a five year period, in excess of $684 million. If we add to that the one-time per capita cost of establishing an individual on the reserve, as estimated by the Minister, of $12,108 per person, the total cost of the program over five years becomes $854 million.

43. If, however, the proportion of reinstated Indians living on the reserves to those living off the reserves is the same as the equivalent proportion for existing band members in the Lesser Slave Lake Indian Regional Council (approximately 60% living on reserve), the total annual cost to the Government becomes approximately $290 million and the cost over five years becomes in excess of $1.929 billion.

44. None of the above figures includes any amounts for health care and welfare, central and regional administration costs or the purchase of additional land.

45. It may be seen from the foregoing, that the cost to the Government of maintaining an Indian on the reserve is approximately 8.5 times the cost of maintaining an Indian off the reserve. It follows, therefore, that whatever the cost of the program to the Government, it will be substantially reduced by the elimination of the unilateral reinstatement to band membership.

46. In addition to the foregoing, there are many costs associated with residence on the reserve that are borne by the bands themselves out of their own funds. To the extent that the influx of new members strains these funds, the Government will be forced to incur these expenditures itself.

PROBLEMS IN INTERPRETING SUBSECTION 10(3) OF THE BILL

47. Releases published by the government and explanations of the impact of the Bill given by Mr. Crombie indicate that first generation descendants of persons who directly lost their Indian status due to the inequities in the Act will only be entitled under the Bill to automatic registration on the Indian Register. During a two-year

transitional period in which bands may take control of their own membership, these descendants will not be unilaterally given band membership by the government. Admission to band membership of these descendants is to be determined by bands which assume control over their membership by establishing written membership rules and following the other procedures set out in section 10 of the Bill. Unless the distinction between these first generation descendants and those who directly lost status is to be meaningless, it follows that in appropriate circumstances, bands must have the right to establish membership rules which would have the effect of denying membership to some of these first generation descendants. In Mr. Crombie's words:

> "If I simply legislate that the first-generation descendants are automatically band members, without them going through a process whereby the band decides, then I think it would be dishonest to say we are supporting the principle of band control of band membership. I think it would make a mockery out of band control of band membership."
>
> - Mr. Crombie's testimony before the Commons Committee, page 14:25

48. Subsection 10(3) of the Bill reads as follows:

> "(3) Membership rules established by a band under this section may not deprive

> any person of the right to have his name entered on the Band List for that band by reason only of a situation that existed or an action that was taken before the rules came into force."

49. The wording of this subsection creates an unnecessary ambiguity in interpreting the Bill that has caused concern to some bands. The ambiguity results from the possibility that the "persons" referred to could include the first generation descendants. As that is clearly not the intention of the subsection, we would recommend that the section be amended by the insertion of the underlined words to read as follows:

> "(3) Membership rules established by a band under this section may not deprive any person of the right <u>that such person would otherwise have under subsection 11(1)</u> to have his name entered on the Band List for that band by reason only of a situation that existed or an action that was taken before the rules came into force."

MEMBERSHIP RULES AND BY-LAWS
MINISTER'S VETO POWERS

50. A band may assume control of its own membership if it establishes membership rules in accordance with section 10 and if it so notifies the Minister in writing and

provides the Minister with a copy of the membership rules for the band. Under subsection 10(6) the Minister is only required to direct the Registrar to provide the band with a copy of the Band List, thereby permitting the band to assume control over its membership, if the membership rules comply with section 10. There is no provision for resolving a dispute where the Minister feels that the membership rules do not so comply. Nor is there a provision preventing the Registrar from continuing to add names to the Band List while the band and the Minister attempt to sort out their differences.

51. We would recommend that provisions be added to the Bill after subsection 10(6) providing for an appeal to the courts by the band of the Minister's refusal to accept its membership rules, with a moratorium on additions by the Registrar to the Band List until the dispute has been resolved. We have attached as an appendix to this presentation suggested wording for new subsections 10(6.1), 10(6.2) and 10(6.3).

52. Subsection 82(2) of the existing Act permits the Minister to disallow any by-law made by the council of a band under section 81. Section 13 of Bill C-31 proposes to

amend section 81 of the Act to permit band councils to make by-laws covering the following matters:

> "(p.1) the residence of band members and other persons on the reserve;
>
> (p.2) to provide for the rights of spouses and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;
>
> (p.3) to authorize the Minister to make payments from revenue moneys to persons whose names were deleted from the Indian Register and the Band List of the band pursuant to section 14.4;"

53. Firstly, these suggested amendments are of little assistance in establishing band self-government in the absence of additional powers of enforcement. Bands have long been completely frustrated by the lack of adequate enforcement measures for breaches of their by-laws.

54. Secondly, it is anachronistic and inconsistent with the government's recognition of the right to self-determination of Indian bands to preserve a discretionary power of disallowance of by-laws validly made. We strongly urge that there be no power to disallow by-laws passed pursuant to either these new provisions or the existing provisions of section 81.

DISTRIBUTIONS OF BAND FUNDS TO REINSTATED AND DEPARTING MEMBERS

55. In recent years there have been distributions of very large sums of band funds to persons who have left these bands. In some cases, payments in excess of $150,000 have been made to each member of enfranchised families.

56. Each payment to a departing band member reduces the funds available to the remaining members that may be used to provide for the future needs of the band. The capital of the band and thus its earning power is thereby diminished. To permit any person to regain band status without restoration of these funds will be very unfair to other band members. The by-law powers contained in section 81 should be further expanded to permit bands to determine whether payback is required as a condition of restoration of band membership.

57. Mr. Crombie has said in both the Cabinet memo and his testimony before the Commons Committee that returning band members would not be eligible for current distributions of band funds until the amount foregone equals the amount previously paid out, plus interest. However, the Bill in its present form would only withhold distributions of

capital funds derived from the sale of surrendered lands. All other distributions are not affected. Because bands rarely surrender lands for sale, this provision is virtually meaningless.

- Testimony of Mr. Crombie to the Commons Committee, page 14:12
- Cabinet brief, paragraph 43

58. We have referred above to the proposed repeal of the provisions of the Indian Act dealing with the voluntary enfranchisement of bands. In order to deal with the possibility that reinstated members of a high impact band may seek enfranchisement of the band as a means of obtaining a distribution of band funds, the Government proposes to exclude the possibility of such distributions in the future upon the dissolution of a band. The proposal is paternalistic and fundamentally inconsistent with the fiduciary responsibilities of the Crown with respect to band funds. As a method of dealing with the pressures that the enactment of the Bill would necessarily impose on high impact bands it is as unjust and unnecessary as the provisions whose potentially devastating consequences it is designed to remedy. We cannot accept any increase in the power of the Government to maintain control over band

funds. Nor can we accept any attempt to prevent bands from determining their own future.

59. The abolition of capital and revenue payments to individual Indians who might become enfranchised under the existing procedures or who otherwise cease to be members of a band is proposed for the same reasons as the repeal of section 112 of the Indian Act. It is objectionable on the same grounds as the proposed repeal of section 112. In addition, we do not believe that it is in the interests of any of our bands to be forced to accept as band members individuals who have not maintained a commitment to the future of the band and who are prevented from leaving solely because of their inability to support themselves without the assistance of the per capita payments now available under subsection 15(1) of the Indian Act.

60. If either of the solutions we have recommended for the problems of high impact bands is accepted, neither the repeal of section 112 nor the abolition of capital and revenue payments to individuals who leave the band will be necessary. If our proposals are not accepted, these provisions should be restored to the Act with the proviso that any distributions be subject to band consent.

APPENDIX

10(6.1) Upon receipt of any notice under subsection 10(5), the Registrar shall not thereafter add or delete any name to or from the Band List for that band unless the Minister gives notice in writing to the band council of his decision that the membership rules do not comply with the conditions set out in subsection (1) and, in that event, the Registrar shall not add any name to the Band List for that band until the expiration of a period of six months after the Minister has given notice of his decision in writing to the band council.

10(6.2) Within six months after the Minister has given notice to a band council under subsection 10(6.1), the band council may either

(a) give any further notice or notices to the Minister under subsection 10(5), or

(b) appeal the decision of the Minister to a court referred to in subsection 14.3(5)

and, in the event that an appeal is taken under this subsection from a decision of the Minister, the provisions of subsections 14.3(2), 14.3(3) and 14.3(4) shall apply as if references in subsection 14.3(4) to the Registrar were references to the Minister.

10(6.3) In the event that, within six months after the Minister has given notice to a band council under subsection 10(6.1) the band council gives any further notice to the Minister under subsection 10(5) and the Minister decides that the further membership rules for that band provided to the Minister

THE ULTIMATE IRONY

61. For more than 100 years the policy diligently pursued by successive federal governments was the assimilation of native peoples into the wider community and the ultimate eradication of their heritage and culture. The reforms introduced by the Diefenbaker government in the 1960's heralded a dramatic reversal of this policy. The Constitution and the Charter of Rights and Freedoms entrenches this reversal. Against this background it is surely ironic that a group of Indian bands is compelled to appear before this Committee to protest measures that threaten their survival.

62. This Parliament must not attempt to rectify 116 years of injustices with one final, quick injustice!

Respectfully submitted,

MEMBERS OF THE
TREATY EIGHT GROUP
OF INDIAN BANDS

pursuant to that subsection do not comply with the conditions set out in subsection (1), the Minister may refer his decision to a court referred to in subsection 14.3(5) and the provisions of subsections 14.3(2), 14.3(3) and 14.3(4) shall thereupon apply mutatis mutandis as if the Minister was a person taking an appeal under subsection 14.3(2) and as if references to the Registrar in subsection 14.3(4) were references to the Minister.

10(6.4) After the commencement of an appeal under subsection 10(6.2) or subsection 10(6.3) in respect of the membership rules of a band, the Registrar shall not thereafter add or delete any name to the Band List for that band until the final resolution of such appeal.