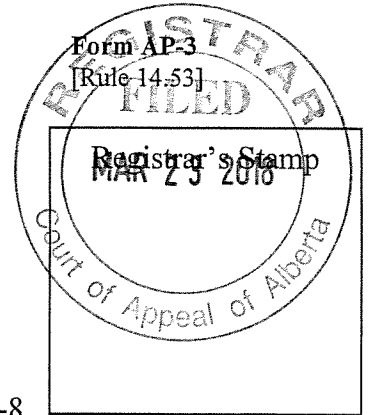


COURT OF APPEAL OF ALBERTA



COURT OF APPEAL FILE NUMBER: 1803-0076AC

TRIAL COURT FILE NUMBER: 1103 14112

REGISTRY OFFICE: Edmonton

IN THE MATTER OF THE
TRUSTEE ACT, RSA 2000, C T-8,
AS AMENDED, and

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

APPLICANTS: MAURICE FELIX STONEY AND
HIS BROTHERS AND SISTERS

STATUS ON APPEAL: Interested Party

STATUS ON APPLICATION: Interested Party

RESPONDENTS (ORIGINAL
APPLICANTS): ROLAND TWINN, CATHERINE
TWINN, WALTER FELIX TWIN,
BERTHA L'HIRONDELLE AND
CLARA MIDBO, AS TRUSTEES
FOR THE 1985 SAWRIDGE
TRUST (the "Sawridge Trustees")

STATUS ON APPEAL: Respondent

STATUS ON APPLICATION: Respondent

RESPONDENT: PUBLIC TRUSTEE OF ALBERTA

STATUS ON APPEAL: Not a party to the Appeal

STATUS ON APPLICATION: Not a party to the Application

INTERVENOR: SAWRIDGE FIRST NATION (SFN)

STATUS ON APPEAL: Respondent

STATUS ON APPLICATION: Respondent

INTERESTED PARTY: PRISCILLA KENNEDY, Counsel
for Maurice Felix Stoney and His
Brothers and Sisters

STATUS ON APPEAL: Appellant

STATUS ON APPLICATION: Application

DOCUMENT: **AFFIDAVIT IN SUPPORT OF APPLICATION OF
PRISCILLA KENNEDY FOR LEAVE TO APPEAL
(Sawridge #9)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT: Field LLP
2500, 10175 - 101 Street
Edmonton, Alberta T5J OH3
Attention: P. Jonathan Faulds, QC
Phone: 780-423-7625
Fax: 780-429-9329
File: 65063-1

AFFIDAVIT OF PRISCILLA KENNEDY

Sworn on March 23, 2018

I, Priscilla Kennedy, of the City of Edmonton in the Province of Alberta, Barrister and Solicitor, make oath and say that:

1. I am the Applicant herein and as such have personal knowledge of the matters set out herein save where stated to be on information and belief.
2. I was counsel for Maurice Felix Stoney in an application before the Honourable Mr. Justice Thomas which gave rise to his case management decision referred to as *Sawridge #6*. I am the subject his subsequent case management decisions issued on August 31, 2017 (referred to as *Sawridge #7*), September 12, 2017 (referred to as *Sawridge #8*), and March 20, 2018 (referred to as *Sawridge #9*).
3. The decision in *Sawridge #6* was released on July 12, 2017. In that decision Justice Thomas:
 - dismissed the application,

- awarded costs against Maurice Stoney to the Respondents on a solicitor and own client indemnity basis,
 - directed that I appear before the Court on July 28 to show cause why I should not be held personally liable for the costs award against Maurice Stoney, and
 - directed that an application as to whether Maurice Stoney should be declared a vexatious litigant be conducted in writing with written submissions due by August 4, 2017.
4. The hearing on July 28 heard submissions on my behalf and on behalf of the Respondents, the Sawridge Trustees and the SFN. It resulted in the decision in *Sawridge #7* in which Justice Thomas found that I had acted improperly in *Sawridge #6* and ordered that I be personally liable with Maurice Stoney on a joint and several basis for the solicitor and own client indemnity costs awarded against Mr. Stoney. The decision also stated that it would be referred to the Law Society of Alberta for review with respect to my conduct in the original application leading to *Sawridge #6*.
 5. Written submissions for the vexatious litigant hearing were filed by me on behalf of Maurice Stoney and by counsel on behalf of the Sawridge Trustees and the SFN. In the resulting decision, *Sawridge #8*, Justice Thomas declared Maurice Stoney a vexatious litigant. Justice Thomas also referred this decision to the Law Society of Alberta for review with respect to my conduct which he held involved continuation of my conduct in *Sawridge #6* which he had found improper in *Sawridge #7*.
 6. The decisions in *Sawridge #7* and *Sawridge #8* made no mention of costs with respect to the July 28 show cause hearing or the written vexatious litigant hearing themselves.
 7. I was granted leave to appeal *Sawridge #7* in a decision issued by Justice Slatter on November 7, 2017 (Court of Appeal File No. 1703-0239AC). The appeal is scheduled to be heard on June 8, 2018. I also took the following additional steps:
 - I applied to be added as a party Appellant in Maurice Stoney's appeal from *Sawridge #6* in order to address the original award, and scale, of costs for which I

was made liable in the proceeding where it was made. I considered this necessary to make my appeal from *Sawridge #7* effective. However, my application was dismissed as unnecessary in a decision issued by Justice Watson on December 8, 2017.

- I filed a notice of appeal from *Sawridge #8* from the decision of Mr. Justice Thomas to send his judgment to the Law Society of Alberta because of what he considered the continuation of the conduct by me that he had found improper in *Sawridge #7*. An application by the Sawridge Trustees and the SFN to strike my appeal was allowed by a panel of this Court on the basis that Justice Thomas' referral to the Law Society was not contained in a formal order and did not form a part of his adjudication. At the time of the panel's decision on December 19, 2017, no order with respect to the costs of *Sawridge #8* had been made.
8. In September 2017 my counsel (P. Jonathan Faulds Q.C.) received draft bills of the costs claimed against me by the Sawridge Trustees and the SFN as a result of the decision in *Sawridge #7*. These encompassed all of the fees incurred by the Sawridge Trustees and the SFN not only with respect to *Sawridge #6*, but also for #7, and #8. The costs claimed exceeded \$200,000.
 9. My counsel questioned the inclusion of costs of #7 and #8 in an email to counsel for the SFN and the Sawridge Trustees on September 19, 2017 as follows:

“Justice Thomas awarded costs on a solicitor and own client indemnity basis against Maurice Stoney in *Sawridge #6*. These are the costs in issue. The application in *Sawridge #6* was conducted in writing and as noted in Justice Thomas' reasons, the last submissions were filed in mid-November, 2016. It appears that both you and Ms. Bonora have included a substantial amount of time after that date relating to other applications.”

A copy of Mr. Faulds' email is attached as **Exhibit A**.

10. Counsel for the SFN replied the next day as follows:

“We are not certain about what you are referring to in the second paragraph of your email when you refer to ‘other applications’. We

suspect you may be referring to the work related to Sawridge #7 and Sawridge #8. It is our position that the Sawridge First Nation is entitled to its costs in relation to these matters as well as other matters including the assessment of costs and the resolution of the terms of orders.”

A copy of this email is attached as **Exhibit B**.

11. As agreement on the scope of the costs award against me could not be reached, my counsel and counsel for the Sawridge Trustees and the SFN concurred in referring the issue to Justice Thomas. Counsel for the Sawridge Trustees and the SFN set out their position in a letter to the court as follows:

“the solicitor and own client full indemnity costs award applies not only to the time period up to the issuance of Sawridge #6, but it also applies in relation to the costs subsequently incurred by these parties in relation to Sawridge #7 and Sawridge #8, namely:

- preparation for and attendance at the July 28, 2017 hearing directed by [Justice Thomas] in Sawridge #6 on the issue of whether Ms. Kennedy ought to be held personally liable for some or all of the costs award made in Sawridge #6; and
- preparation of written submissions on the vexatious litigant status of Maurice Stoney as directed by [Justice Thomas] in Sawridge #6.”

A copy of this letter is attached as **Exhibit C**.

12. My counsel forwarded a responding letter to the Court setting out my position which was that the costs award in *Sawridge #6* for which I was liable “applies only to the application giving rise to the decision in *Sawridge #6* and not to any subsequent hearings or proceedings.” A copy of Mr. Faulds’ November 16, 2017 letter is attached as **Exhibit D**.

13. Justice Thomas initially proposed the issue be addressed at a case management hearing on January 5, 2018 but as my counsel was out of the country at that time Justice Thomas directed the issue be dealt with in writing. The schedule for briefs was that my counsel provide a short brief by January 5, 2018, following which the SFN and the Sawridge Trustees were to respond with a short brief by January 12, 2018. Justice Thomas sent a

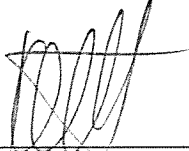
copy of his letter to Mr. Stoney, but did not make specific provision for Mr. Stoney, who had ceased to be represented by me or my firm in September 2017, to make submissions on the costs issue. A copy of Justice Thomas' January 2, 2018 letter containing his directions is attached as **Exhibit E**.

14. As we were unaware of the basis on which the SFN and the Sawridge Trustees were asserting the costs award in *Sawridge #6* had prospective effect so as to apply to #7 and #8, when my counsel forwarded our submissions on January 5 he asked for leave to file a brief reply to address any issues raised by the Respondents not anticipated in our submissions. A copy of our January 5, 2018 submissions, without attachments or authorities, is attached as **Exhibit F**.
15. The responding submissions on behalf of the Sawridge Trustees and the SFN, took the position they were not suggesting the costs award in *Sawridge #6* applied to #7 and #8 but rather were asking the Court to consider and issue what amounted to a new award of costs for *Sawridge #7* and #8. Copies of their submissions are attached as **Exhibits G and H**.
16. Given this change in position we submitted a reply brief on January 16, 2018, a copy of which is attached as **Exhibit I**.
17. No submissions from or on behalf of Mr. Stoney were made.
18. Justice Thomas issued his decision on the costs issue in *Sawridge #9* on March 20, 2018. In that decision Justice Thomas:
 - held: "There is direct connection between *Sawridge #6*, #7 and #8, the participants are the same and the issues are related to and flow from *Sawridge #6*."
 - confirmed that the issue of costs arising from *Sawridge #7* and #8 had not previously been addressed by any of the parties or by the Court;

- held that no litigation misconduct occurred in *Sawridge #7* which would provide a sufficient basis for an award of enhanced costs and ordered party and party costs on Column 3 of Schedule "C" against me in *Sawridge #7*;
- held that my submissions in *Sawridge #8* "continued to advance futile arguments concerning Mr. Stoney's status as a member of the Sawridge Band" and "reargued the same meritless points" which had previously been rejected, and amounted to a collateral attack on the result in *Sawridge #6*;
- ordered solicitor-client costs against me and Mr. Stoney on a joint and several basis in *Sawridge #8*; and
- ordered that there be no costs in *Sawridge #9* as success was mixed.

19. I make this affidavit in support of the Application for Permission to Appeal and for that appeal to be expedited so that it may be heard together with the appeal of *Sawridge #7* now scheduled to be heard on June 8, 2018.

SWORN BEFORE ME at Edmonton,
Alberta, this 23rd day of March, 2018.



Commissioner for Oaths in and for the
Province of Alberta

Kimberly J. Precht
Barrister & Solicitor

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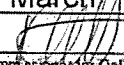


PRISCILLA KENNEDY

TAB A

Carly Erickson

From: Jon Faulds
Sent: Tuesday, September 19, 2017 6:18 PM
To: 'Edward H. Molstad'; 'Wilson, Donald'
Cc: 'Bonora, Doris'; Ellery Sopko; Kimberly Precht; Amy Ball
Subject: RE: Bill of Costs; Parlee File 64203-7/EHM

This is Exhibit "A" referred to
in the Affidavit of
Priscilla Kennedy
Sworn before me this 23rd day
of March, A.D., 2018

A Commissioner for Oaths in and for Alberta

Mr. Molstad,

Thank you for your email and the attachments.

Kimberly J. Precht
Barrister & Solicitor

You have provided a 20 page summary of redacted time entries for the period August 15, 2016 to August 31, 2017 in support of claimed fees of \$99,013.50. Ms. Bonora has provided a similar document of 17 pages for the period of August 15, 2016 to July 31, 2017 in support of claimed fees of 92, 324.50. The total of claimed fees, disbursements and taxes by the two parties is about \$210,000. This is a very large sum.

It will take some time to review these documents properly. However we have some preliminary observations. Justice Thomas awarded costs on a solicitor and own client indemnity basis against Maurice Stoney in Sawridge #6. These are the costs in issue. The application in Sawridge #6 was conducted in writing and as noted in Justice Thomas' reasons, the last submissions were filed in mid-November, 2016. It appears that both you and Ms. Bonora have included a substantial amount of time after that date relating to other applications.

It also appears to us that a number of the entries during the proper time period may relate to appearances or actions which were concerned with other matters besides Sawridge #6 and which call for an apportionment of time. One example of this is the August 24, 2016 hearing which concerned matters besides Mr. Stoney's application.

We also have concerns regarding discrepancies between Mr. Molstad and Ms. Bonora's time for the same events. Again, to use Aug 24, 2016, as an example, Mr. Bonora recorded 1.4 hours to prepare for and attend application on that date. Mr. Molstad recorded 3.3 hours to prepare and 3.5 hours to attend at court on that date. Mr. Molstad's associate (GJA) recorded 3 hours to attend hearing of case management conference.

We might speculate that Ms. Bonora has apportioned the time for August 24, 2016 while Mr. Molstad and his associate have not. Whether or not that is the case, the foregoing illustrates why careful scrutiny of the proposed costs will be required.

We note that Justice Thomas' decision states that "Stoney, Kennedy, the Trustee and Sawridge Band may return to the court within 30 days of this decision if they require assistance to determine these costs." We do not take this to mean that the costs must be determined within those 30 days, but that the process of obtaining the Court's assistance be commenced within that time, which we understand from your email has now been done.

Finally we should add that we understand DLA Piper has formally concluded its representation of Mr. Stoney and cannot speak for him on the issue of costs. Since the costs award was originally made against Mr. Stoney and he remains liable for those costs (Sawridge #7, paragraph 154) no agreement as to costs can be made without his approval and he is entitled to receive materials relating to the claimed costs and to notice of any application or hearing to deal with them.

We look forward hearing from you concerning the foregoing.

Jon Faulds



P. Jonathan Faulds, QC | Partner
T 780-423-7625 | F 780-428-9329 | jfaulds@fieldlaw.com
2500 - 10175 101 ST NW, Edmonton AB T5J 0H3

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From: Maile R. Bower [<mailto:mbower@parlee.com>] **On Behalf Of** Edward H. Molstad
Sent: Tuesday, September 19, 2017 10:56 AM
To: 'Wilson, Donald'; Jon Faulds
Cc: 'Bonora, Doris'; Ellery Sopko
Subject: Bill of Costs; Parlee File 64203-7/EHM

Mr. Wilson and Mr. Faulds,

For the benefit of Mr. Faulds, I am attaching the following:

1. Email to Mr. Wilson dated September 15, 2017 enclosing a draft Bill of Costs;
2. Email in response from Mr. Wilson dated September 15, 2017 requesting copies of the Statement of Accounts of Parlee rendered to the client;
3. A copy of our email to Mr. Wilson and Mr. Faulds enclosing a summary of information for each month that was billed;
4. Email from Mr. Wilson dated September 15, 2017 requesting additional information.

We are also enclosing a detailed description of the time and charges for fees for the months of August, September, October, November and December, 2016 and July and August, 2017, with the solicitor client privileged information redacted.

We would appreciate your confirmation as quickly as possible that Maurice Stoney, Priscilla Kennedy and DLA Piper are prepared to agree to the quantum of costs on a solicitor client full indemnity basis.

Should there be no agreement, we are prepared to produce for the Court only a copy of the time and charges which are not redacted when we attend upon Mr. Justice Thomas.

Ms. Bonora has already requested a date from the Court. However, if this matter cannot be resolved by agreement, we should advise the Court as soon as possible that it will be necessary to attend upon Mr. Justice Thomas.

Yours truly,

Edward H. Molstad, Q.C. | Counsel



PARLEE MCLAWS LLP

1700 Enbridge Centre, 10175-101 Street NW, Edmonton, Alberta T5J 0H3
Direct: 780.423.8506 | Fax: 780.423.2870 | Email: emolstad@parlee.com

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TAB B

Carly Erickson

From: Maile R. Bower <mbower@parlee.com> on behalf of Edward H. Molstad <emolstad@parlee.com>
Sent: Wednesday, September 20, 2017 11:08 AM
To: Jon Faulds
Cc: 'Wilson, Donald'; 'Bonora, Doris'; Kimberly Precht; Amy Ball; Ellery Sopko
Subject: Bill of Costs; Parlee File 64203-7/EHM
Attachments: Recap of August 2016 to August 2017 Time Entries for Bill of Costs [Sept 20-17] (E7560106).PDF

Mr. Faulds,

In reply to your email of September 19, 2017 at 6:18 p.m. in relation to the Bill of Costs, we agree that the time for August 24, 2016 should have been apportioned as Ms. Bonora has done. There was another matter that was dealt with in the Case Management Conference on August 24, 2016 in addition to the Maurice Stoney application. We apologize for this oversight.

We will reduce our time to 1.4 hours for myself to prepare and attend on August 24, 2016 and delete the Associate GJA time for attendance.

We also note that the time entry for GJA on August 22, 2016 relates both to the OPGT written submissions and the Maurice Stoney application. As a result, we have reduced this time to 1.1 hours in relation to Maurice Stoney. We are enclosing the detailed description of time and charges for fees for the months of August, September, October, November and December, 2016 and July and August, 2017 with the solicitor client privilege information redacted and with these amendments.

We are not certain about what you are referring to in the second paragraph of your email when you refer to "other applications". We suspect that you may be referring to the work related to Sawridge #7 and Sawridge #8. It is our position that the Sawridge First Nation is entitled to its costs in relation to these matters as well as other matters including the assessment of costs and the resolution of the terms of orders.

It would appear to us that we will not be able to come to an agreement in relation to costs and as a result, we would request that Ms. Bonora advise the Court accordingly and request a specific date that we can attend upon Mr. Justice Thomas to speak to this issue.

With respect to the role of DLA Piper on behalf of Mr. Maurice Stoney, we would advise that they continue to be the lawyer of record in this matter until 10 days after the Affidavit of Service of the Notice of Withdrawal has been filed.

We would ask that you keep us informed in terms of when the Affidavit of Service of the Notice of Withdrawal has been filed and when 10 days expire from that date and we will proceed to serve Mr. Maurice Stoney directly after that date.

Yours truly,

This is Exhibit " B " referred to in the Affidavit of Priscilla Kennedy

Sworn before me this 23rd day of March, 2018

A COMMISSIONER FOR OATHS IN AND FOR ALBERTA

Edward H. Molstad, Q.C. | Counsel



1700 Enbridge Centre, 10175-101 Street NW, Edmonton, Alberta T5J 0H3A, D., 20/18
Direct: 780.423.8506 | Fax: 780.423.2870 | Email: emolstad@parlee.com

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Kimberly J. Precht
Barrister & Solicitor

TAB C



PARLEE MCLAWS LLP
BARRISTERS & SOLICITORS | PATENT & TRADEMARK AGENTS

November 15, 2017

EDWARD H. MOLSTAD, Q.C.
DIRECT DIAL: 780.423.8506
DIRECT FAX: 780.423.2870
EMAIL: emolstad@parlee.com
OUR FILE #: 64203-23/EHM

*Delivered by Hand and
Via email to Nicole.stansky@albertacourts.ca*

Court of Queen's Bench of Alberta
6th Floor Law Courts Building
1A Sir Winston Churchill Square
Edmonton, Alberta T5J 0R2

Attention: The Honourable Mr. Justice D.R.G. Thomas

Dear Mr. Justice Thomas:

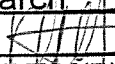
Re: Solicitor and own client full indemnity costs award in
Sawridge #6, Sawridge #7 and Sawridge #8
Court of Queen's Bench Action No: 1103 14112

This is Exhibit "C" referred to in the
Affidavit of

Priscilla Kennedy

Sworn before me this 23rd day

of March A.D., 2018


A COMMISSIONER FOR OATHS IN AND FOR ALBERTA

Kimberly J. Precht
Barrister & Solicitor

We write to seek your direction in relation to the resolution of a dispute between the parties.

You have directed the parties to attend before an Assessment Officer for a determination as to the quantum of costs in relation to the above matters. The parties cannot agree with respect to the time for which costs are recoverable. We are of the view that it is probable that the Assessment Officer would not likely address this issue in dispute and would direct that we return to your Lordship for a determination on this point.

The Sawridge First Nation and the Sawridge Trustees take the position that the solicitor and own client full indemnity costs award applies not only to the time period up to the issuance of Sawridge #6, but it also applies in relation to the costs subsequently incurred by these parties in relation to Sawridge #7 and Sawridge #8, namely:

- o preparation for and attendance at the July 28, 2017 hearing directed by Your Lordship in Sawridge #6 on the issue of whether Ms. Kennedy ought to be held personally liable for some or all of the cost award made in Sawridge #6; and
- o preparation of written submissions on the vexatious litigant status of Maurice Stoney as directed by Your Lordship in Sawridge #6.

Mr. Faulds will communicate to the Court the position of Ms. Kennedy in relation to this dispute.

Mr. Stoney is no longer represented by legal counsel and as a result, we would suggest that a date be set with Mr. Stoney being given notice of this date in order that he be given the opportunity to attend to make submissions.

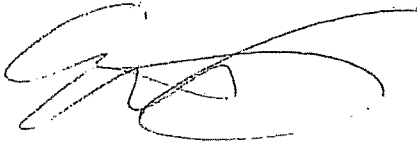
Legal Counsel, on behalf of the Sawridge Trustees and the Sawridge First Nation are prepared to appear before you to make submissions on this point.

When you receive Mr. Faulds' response to setting out his position, should you agree that a date be scheduled, we would request that you advise Counsel of the dates that you have available and we will arrange for all counsel to agree on one of those dates.

We would appreciate your direction in terms of how this matter should be dealt with.

Yours truly,

PARLEE McLAWS LLP



EDWARD H. MOLSTAD, Q.C.
EHM/ELS

- cc: Jon Faulds, Field Law
Via email: jfaulds@fieldlaw.com
- cc: Doris Bonora and Anna Loparco, Dentons Canada LLP
Via email: doris.bonora@dentons.com ; anna.loparco@dentons.com
- cc: Karen Platten, Q.C., McLennan Ross
Via email: kplatten@mross.com
- cc: Maurice Felix Stoney
500 4 Street
Slave Lake, AB T0G 2A1
Via Regular Mail

TAB D



2500 - 10175 101 ST NW
Edmonton AB T5J 0H3
fieldlaw.com

CALGARY / EDMONTON / YELLOWKNIFE

Jon Faulds, QC
Partner
AB
T 780-423-7625
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pfaulds@fieldlaw.com
Assistant: Amy Ball
T 587-773-7180
aball@fieldlaw.com
Our File: 65063-1

November 16, 2017

VIA EMAIL TO (NICOLE.STANSKY@ALBERTACOURTS.CA)

Court of Queen's Bench of Alberta
6th Floor Law Courts Building
1A Sir Winston Churchill Square
Edmonton, AB T5J 0R2

Attention: The Honourable Mr. Justice D.R.G. Thomas

My Lord:

Re: Solicitor and own client full indemnity costs award In Sawridge #6
Court of Queen's Bench Action No.: 1103 14112

This is Exhibit " D " referred to in the
Affidavit of
Priscilla Kennedy

Sworn before me this 23rd day
of March A.D., 20 18

A COMMISSIONER FOR OATHS IN AND FOR ALBERTA

Kimberly J. Precht
Barrister & Solicitor

We acknowledge receipt of Mr. Molstad's letter to you concerning the assessment of the costs award in Sawridge #6.

We understand Mr. Molstad wishes to arrange a hearing before you concerning the scope of the award of costs on a solicitor and own client indemnity basis made against Mr. Stoney in Sawridge #6. We understand Mr. Molstad's position to be that costs award applies prospectively to the subsequent proceedings that gave rise to your decisions in Sawridge #7 and #8.

On behalf of Ms. Kennedy, who is jointly and severally liable for the costs award made in Sawridge #6, it is our position that award applies only to the application giving rise to the decision in Sawridge #6 and not to any subsequent hearings or proceedings. Besides being the normal course we note this is consistent with the language of the decisions including paragraphs 153 and 154 of Sawridge #7 in which Ms. Kennedy was made personally liable for the costs of Sawridge #6 on a joint and several basis with Mr. Stoney.

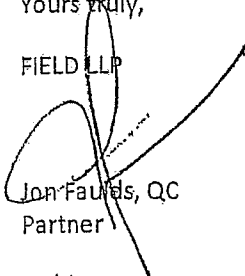
In the circumstances we agree with Mr. Molstad that the ruling he seeks likely lies beyond the scope of the assessment officer.

Should your Lordship consider a hearing is required to address this we also agree with Mr. Molstad that it should be on notice to Mr. Stoney on a date agreeable to all parties.



Yours truly,

FIELD LLP


Jon Faulds, QC
Partner

PJF/ab

cc: Edward Molstad, Parlee McLaws (via email)
Doris Bonora and Anna Loparco, Dentons Canada LLP (via email)
Karen Platten, Q.C., McLennan Ross (via email)
Maurice Felz Stoney (via fax)

TAB E

THE HONOURABLE MR. JUSTICE
DENNIS R. THOMAS



THE LAW COURTS
EDMONTON, ALBERTA
T5J 0R2
TEL: (780) 422-2200

January 2, 2018

COURT OF QUEEN'S BENCH OF ALBERTA

Fax No. (780) 422-8854

Edward Molstad, Q.C.
Parlee McLaws LLP
Email: emolstad@parlee.com

Jon Faulds, Q.C.
Field Law LLP
Email: jfaulds@fieldlaw.com

Dear Counsel:

Re: Solicitor and own client full indemnity costs award in Sawridge #6,
Sawridge #7 and Sawridge #8
Action No. 1103 14112

Further to me letter of December 20, 2017, and Mr. Faulds e-mail of the same date addressed to my assistant, Ms. Stansky, it will not be necessary for Mr. Faulds to attend the case management session set for January 5, 2018 at 2 pm.

Instead, I am going to resolve the costs issue described in Mr. Molstad's letter of November 15, 2017 and Mr. Faulds letter of November 16, 2017 through the exchange of written briefs. A hearing to resolve the matter will not be necessary at this time.

To that end, I direct Mr. Faulds to provide to me a short brief, not exceeding three pages in length, on the issue by close of business on Friday, January 5, 2018. The Sawridge First Nation and Sawridge Trustees shall respond with a similar brief, not exceeding three pages, which shall be forwarded to me by close of business on January 12, 2018. All briefs shall be delivered electronically c/o my assistant at nicole.stansky@albertacourts.ca

I am copying the other counsel involved by e-mail and Mr. Stoney by ordinary mail.

Yours truly,

D.R.G. Thomas

DRGT/ns

cc: Doris Bonora and Anna Loparco (via email)
Karen Platten, Q.C. (via email)
Janet Hutchison (via email)
Maurice Felix Stoney (via regular mail)
Sharon Hinz, Case Management Coordinator (via email)

This is Exhibit " E " referred to in the
Affidavit of

Priscilla Kennedy

Sworn before me this 23rd day

of March A.D. 20 18

A COMMISSIONER FOR OATHS IN AND FOR ALBERTA

Kimberly J. Precht
Barrister & Solicitor

TAB F

Clerk's stamp:

COURT FILE NUMBER: 1103 14112
COURT: COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE: EDMONTON

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

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

APPLICANTS: ROLAND TWINN,
WALTER FELIX TWIN,
BERTHA L'HIRONDELLE,
CLARA MIDBO, and
CATHERINE TWINN, as Trustees for the 1985 Sawridge
Trust

DOCUMENT: WRITTEN SUBMISSIONS OF PRISCILLA
KENNEDY RESPECTING THE SCOPE OF THE
COSTS AWARD IN SAWRIDGE #6

ADDRESS FOR SERVICES AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT: Field Law
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Email: jfaulds@fieldlaw.com
File No.: 65063-1 PJF

This is Exhibit " F " referred to in the
Affidavit of

Priscilla Kennedy

Sworn before me this 23rd day

of March 10th A.D., 2018

Kimberly J. Precht
A COMMISSIONER FOR OATHS IN AND FOR ALBERTA

Kimberly J. Precht
Barrister & Solicitor

FACTS

1. In August, 2016, Maurice Stoney applied to be added as an intervenor to the Advice and Direction proceedings brought by the 1985 Sawridge Trust. This Court as case management judge (CMJ) directed his motion be heard in writing. The Sawridge First Nation sought and was granted intervenor status to oppose Mr. Stoney's application.

2. Both the Trust and the First Nation asked that Mr. Stoney's application be struck or dismissed and that he be ordered to pay solicitor and own client indemnity costs for his conduct in bringing the application.¹ The Sawridge First Nation specified the costs sought were of the Stoney application and of its application to intervene.² Neither Respondent sought costs personally against Mr. Stoney's counsel, Ms. Kennedy. Neither applied to have Mr. Stoney declared a vexatious litigant.

3. The CMJ dismissed Mr. Stoney's application with Reasons issued July 12, 2017 (*Sawridge #6*). With respect to costs the CMJ stated:

[67] I have indicated Maurice Stoney's application had no merit and was instead abusive in a manner that exhibits the hallmark characteristics of vexatious litigation. The Sawridge Band and Trustees seek solicitor and own client indemnity costs against Maurice Stoney. Those are amply warranted.

4. The CMJ further stated his intention "to exercise this Court's inherent jurisdiction to control litigation abuse". He directed a hearing in writing to determine whether Mr. Stoney should be declared a vexatious litigant. The CMJ held the Respondents "may make submissions on Maurice Stoney's potential vexatious litigant status, and introduce additional evidence that is relevant to this question."³

5. Finally, the CMJ concluded a costs award against Ms. Kennedy was potentially warranted and directed she appear before the Court at a stated time "to make submissions on why she should not be personally responsible for some or all of the costs awarded against her client, Maurice Stoney."⁴ The Court noted "the limited basis on which other litigants may participate in a hearing that evaluates a potential costs award against a lawyer" and allowed the Respondents to participate on such a basis.⁵

6. The show cause hearing concerning Ms. Kennedy was conducted on July 28, 2017. Counsel for both the First Nation and the Trust appeared and made submissions. Insofar as present counsel can ascertain, costs of the show cause hearing were not raised by any party. The CMJ issued his decision with Reasons on August 31, 2017 (*Sawridge #7*) and held:

¹ Sawridge First Nation's briefs filed Sept 28, 2016, paras 74 to 79 and 81(d), and Oct 31, 2016, paras 42 and 43 [Tab 1]; 1985 Sawridge Trustees' brief filed Oct 31, 2016, paras 41, 42 and 44 [Tab 2]

² Sawridge First Nation's brief filed Nov 14, 2016, para 56 [Tab 1]

³ *Sawridge #6*, paras 58 and 64

⁴ *Ibid*, paras 77 and 79

⁵ *Ibid*, para 81

[153] ... I therefore conclude that Kennedy and Stoney are liable for the full costs of *Sawridge #6*, on a joint and several basis.

[154] I order that Kennedy is personally liable for the solicitor and own client indemnity costs that I ordered in *Sawridge #6* at paras 67-68, along with her client.

Those Reasons made no mention of the costs of the show cause hearing.

7. Written submissions for the vexatious litigant hearing were concluded on August 4, 2017. Again, insofar as present counsel can determine, costs of the vexatious litigant hearing were not raised by any party. The CMJ issued his decision with Reasons on September 12, 2017 and issued a limited Court Access Control Order. The Reasons made no mention of costs of the vexatious litigant hearing.

8. The Respondents have submitted draft Bills of Costs in the combined sum of approximately \$209,000.00.⁶ About \$67,000 of this sum relates to costs of the proceedings in *Sawridge #7* and *#8*.⁷ The CMJ directed issues relating to the proposed Bills of Costs be addressed by an assessment officer. The parties have requested that before such an assessment occurs, the CMJ rule on the scope of the award of costs made in *Sawridge #6*.

SUBMISSIONS

9. Ms. Kennedy understands that the Sawridge Trustees and the Sawridge First Nation take the position that the award of solicitor and client indemnity costs made in *Sawridge #6* also applies prospectively to costs subsequently incurred by them in relation to the hearings resulting in *Sawridge #7* and *Sawridge #8*. On behalf of Ms. Kennedy we submit this is incorrect for the following reasons:

- There is nothing in the language of *Sawridge #6* to suggest the costs award was intended to have such a prospective effect, or was meant to apply to future hearings yet to be decided. It would be extraordinary that an exceptional award of indemnity costs would apply to future proceedings without express language to that effect.⁸ There is also nothing in the substantial Reasons given in *Sawridge #7* and *#8* to suggest either Mr. Stoney or Ms. Kennedy would be liable for costs of those hearings on an indemnity basis.
- On the contrary, the Reasons in *Sawridge #6* indicate the award of exceptional costs applies to the application giving rise to that decision. The basis for the award is the circumstances and conduct of Mr. Stoney in bringing forward that application. The CMJ's decision to hold a show cause hearing with respect to Ms. Kennedy's liability for those costs is based upon her conduct and participation in that application. The show cause hearing was directed to the question of her liability for the costs already awarded against her client in that application. This is confirmed by the Reasons in *Sawridge #7* which state clearly that Ms. Kennedy and Mr. Stoney are jointly and severally liable for "the full costs of *Sawridge #6*".

⁶ This total includes fees claimed by both Respondents, but disbursements and taxes of the Sawridge Trustees only.

⁷ This figure would be increased by any disbursements and taxes claimed by the Sawridge First Nation.

⁸ The Alberta Court of Appeal recently referred to an award of full indemnity costs as "virtually unheard of except where provided by contract"; *Twin v. Twin*, 2017 ABCA 419 at para. 25 [Tab 3]

- Moreover, absent a specific direction by the Court the application of the award in *Sawridge #6* to future undecided hearings is contrary to Rule 10.30 which states:⁹

Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made (a) in respect of an application or proceeding of which a party had notice, **after the application has been decided.** (emphasis added)

- Under Rule 10.31, with limited exceptions costs awards are for costs incurred, not future costs. The exceptions specified in the Rule at 10.31(2)(b) are the subsequent costs of assessing costs before the Court or an assessment officer which are not relevant here. While the Court under Rule 10.31(1)(b) may award “an indemnity to a party for that party’s lawyer’s charges” it is respectfully submitted it would take explicit language to extend such an award to costs not yet incurred relating to proceedings yet to be heard.¹⁰
- The subsequent hearings giving rise to the decisions in *Sawridge #7* and *#8* were taken on the CMJ’s own motion as a result of the conduct which gave rise to the decision to award indemnity costs against Mr. Stoney in *Sawridge #6*. Those hearings do not concern relief sought by the Respondents. In directing Ms. Kennedy and Mr. Stoney appear before him for these further proceedings the CMJ made no suggestion or warning that that they were facing full indemnity costs for those hearings too, as required where such an award may be made.¹¹
- The position of the Respondents that the costs award in *Sawridge #6* automatically extends to the subsequent proceedings in *Sawridge #7* and *#8* has the appearance of suggesting that the outcome of those hearings was predetermined. With respect, who (if anyone) was liable for the costs of those proceedings and on what scale could only be determined after those hearings had been conducted. No such determination has been made or requested.
- Moreover since Mr. Stoney and Ms. Kennedy are jointly liable for the costs awarded in *Sawridge #6*, the effect of automatically extending those costs to the subsequent hearings would have the effect of making Mr. Stoney responsible for the costs of the show cause hearing against Ms. Kennedy over which he had no control and in which he did not participate.

10. For all of the foregoing reasons it is respectfully submitted that the special award of costs made in *Sawridge #6* bears its natural and ordinary meaning and effect and applies only to the application giving rise to that award and not to the subsequent proceedings and hearings directed by the Court. In the event the Respondents believe they are entitled to costs of their submissions relating to *Sawridge #7* and *#8* they may presumably seek an assessment pursuant to Rules 10.30 and 10.41.

11. As Ms. Kennedy is unaware of the basis on which the Respondents assert the costs award has prospective effect, they respectfully ask leave to file a brief reply (by January 16, 2018) to address any issue raised by the Respondent not anticipated in these submissions.

⁹ See extract from Alberta Rules of Court, Alta Reg 124/2010 [Tab 4]

¹⁰ See also *Ma v. Coyne*, 2013 ABQB 426 (aff’d 2016 ABCA 119) at paras 58-62 re costs “incurred” under Rule 10.41 [Tab 5]

¹¹ See *Twinn v. Twinn*, *ibid*, at para.27 [Tab 3]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2018

FIELD LLP
Counsel for Priscilla Kennedy

Per: 
P. Jon Faulstich, QC

EXTRACTS and AUTHORITIES

1. Written Submissions of the Sawridge First Nation, filed September 28, 2016, October 31, 2016, and November 14, 2016 (extracts)
2. Written Submissions of the 1985 Sawridge Trustees, filed October 31, 2016 (extract)
3. *Twinn v. Twinn*, 2017 ABCA 419 (extract)
4. Alberta Rules of Court, Alta Reg 124/2010, Rules 10.28 through 10.43
5. *Ma v. Coyne*, 2013 ABQB 426 (extract)

TAB G

COURT FILE NUMBER

1103 14112

Clerk's Stamp

COURT:

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE:

EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c
T-8, AS AMENDED

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

APPLICANTS:

ROLAND TWINN, CATHERINE TWINN, WALTER
FELIX TWIN, BERTHA L'HIRONDELLE and CLARA
MIDBO, as Trustees for the 1985 Sawridge Trust

DOCUMENT

WRITTEN SUBMISSIONS OF THE SAWRIDGE
FIRST NATION ON COSTS

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

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Facsimile: (780) 423-2870
File Number: 64203-7/EHM

This is Exhibit " G " referred to in the
Affidavit of

Priscilla Kennedy

Sworn before me this 23rd day

of March A.D., 2018


A COMMISSIONER FOR OATHS IN AND FOR ALBERTA

Kimberly J. Precht
Barrister & Solicitor

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D. The costs award in Sawridge #7 should be as against Ms. Kennedy only.....3

III. COSTS SOUGHT By Sawridge3

I. INTRODUCTION

1. Sawridge prepared and circulated a Bill of Costs claiming costs on a solicitor and own client basis for all steps taken in relation to *Sawridge #6*, #7 and #8, and Ms. Kennedy objected to the inclusion of any costs related to the July 28, 2017 hearing resulting in *Sawridge #7* or the written submissions prepared in relation to *Sawridge #8*.
2. On November 15, 2017, Sawridge wrote to this Honourable Court to request its direction as to whether a solicitor and own client full indemnity costs applied in relation to the costs incurred for *Sawridge #7* and #8 and to advise of Sawridge's position that it should be able to recover its costs on #7 and #8 on a solicitor and own client full indemnity basis. The Court directed that this issue be addressed in writing by the parties.
3. Ms. Kennedy characterizes the issue before this Court as a request for a ruling on the scope of the award of costs made in *Sawridge #6*. She goes on to characterize Sawridge's position as effectively being that the "the award of solicitor and own client indemnity costs made in *Sawridge #6* also applies prospectively to costs subsequently incurred by them in relation to the hearings resulting in *Sawridge #7* and *Sawridge #8*."
4. Sawridge submits that the foregoing is a mischaracterization of its position. Sawridge is not suggesting the cost award in *Sawridge #6* had a prospective effect; rather, its position is that, as a successful party in *Sawridge #7* and #8, which were effectively extensions of the original applications at issue in *Sawridge #6*, it is entitled to costs and that, consistent with *Sawridge #6*, such costs should be on a solicitor and own client basis.
5. To be clear, Sawridge is asking the Court to consider and issue a direction on the costs of *Sawridge #7* and #8. To the extent that Ms. Kennedy may not agree that Sawridge's November 15, 2017 letter to the Court amounted to a request for a determination as to who is liable for the costs of *Sawridge #7* and #8, Sawridge agrees that Ms. Kennedy (and Mr. Stoney) should have an opportunity to respond to any submissions raised in this brief on the issue of costs payable in relation to *Sawridge #7* and #8.

II. SAWRIDGE'S POSITION ON COSTS

- A. This Court retains jurisdiction to issue a direction in respect of costs on #7 and #8.
6. Sawridge acknowledges that the issue of costs on *Sawridge #7* and #8 was not directly addressed by the parties during the July 28, 2017 hearing, in their written submissions on the vexatious litigant application, or by the Court in its written reasons. Nevertheless, this Court retains jurisdiction to provide the parties with its direction in respect of the costs of #7 and #8, as Rule 10.30 has dispensed with any kind of time limit by which the Court must make such a direction. Rule 10.30(1)(c) states that the Court retains jurisdiction to make a cost award in respect of matters in an action even after judgment or a final order has been entered.¹ Further, the case law supports a finding that this Court is not *functus officio* on costs directions merely because of entry of the formal judgment.²
7. In this case, where solicitor and own client full indemnity costs are sought, it is most appropriate for this Court, which dealt first hand with what it characterized as serious litigation misconduct

¹ Rule 10.30, *Alberta Rules of Court*, Alta Reg 124/2010 [Tab 1]

² *Firemaster Oilfield Services Ltd. v Safety Boss (Canada) (1993) Ltd.*, 2002 ABCA 96 at para 2 [Tab 2] and *Saskatchewan Power Corporation v Alberta (Utilities Commission)*, 2015 ABCA 281 at paras 9-10 [Tab 3].

on the part of Ms. Kennedy and Stoney, to deal with costs as opposed to leaving the issue to an assessment Review Officer.

- B. Sawridge is entitled to costs for *Sawridge #7* and *#8* as a successful party.
8. Rule 10.28 states that for the purpose of the rules pertaining to the recoverable costs of litigation, a “party” includes a person filing, or participating in an application or proceeding who is or may be entitled to or subject to a costs award.³ Rule 10.29 goes on to state the general rule for payment of litigation costs, which is that “[a] successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith.”⁴
 9. While the proceedings relating to *Sawridge #7* and *#8* were initiated by the Court, exercising its inherent jurisdiction, Sawridge was directed to appear on the July 28, 2017 hearing and invited to make submissions on the vexatious litigant status of Stoney. It participated in those proceedings and argued in support of a costs award personally against Ms. Kennedy and a vexatious litigant award against Stoney, both of which orders were ultimately made by this Court. Ms. Kennedy and Stoney argued against such orders. As a successful party to those proceedings, Sawridge is entitled to costs.
- C. The costs for *Sawridge #7* and *#8* should be on a solicitor and own client basis as these applications were an extension of the applications at issue in *Sawridge #6*, wherein Sawridge expressly sought solicitor and own client full indemnity costs.
10. Ms. Kennedy argues that she was not provided with notice that solicitor and own client full indemnity costs would be sought in relation to the proceedings giving rise to *Sawridge #7* and *#8*. She relies upon the Court of Appeal’s recent decision in *Twinn v Twinn*, 2017 ABCA 419 in support of the principle that such an award ought not to be made, and will be reversed on appeal, where no specific notice is given, no submissions are made on the issue, and no party in the proceedings sought those costs.
 11. The *Twinn* decision, which overturned this Court’s award of solicitor and own client full indemnity costs against the applicants in *Sawridge #5*, is clearly distinguishable. Unlike the application at issue in *Sawridge #5*, both Sawridge and the Trustees provided notice that they were seeking solicitor and own client full indemnity costs in relation to the applications in *Sawridge #6*, and all parties, including Ms. Kennedy on behalf of Stoney, made written submissions on the issue. Ms. Kennedy and Stoney were both fully aware of Sawridge’s position that the Stoney Application was vexatious and abusive in nature.
 12. In any event, Ms. Kennedy and Stoney were aware that such costs were being sought at least as of the time Sawridge presented them with its Bill of Costs seeking solicitor and own client full indemnity costs in relation to *Sawridge #7* and *#8*. They were further notified that Sawridge was seeking such costs and a direction from the Court to that effect by way of Sawridge’s November 15, 2017 letter addressed to this Court and copied to Mr. Faulds and Stoney.
 13. In the circumstances, an award of solicitor and own client full indemnity costs is warranted. In *Sawridge #6*, this Honourable Court found that the Stoney Application was inappropriate, devoid of merit, and abusive in a manner exhibiting the hallmark characteristics of vexatious litigation and that it amounted to serious litigation misconduct, and held that the award of solicitor and own

³ Rule 10.28, *Alberta Rules of Court*, Alta Reg [24/2010] [Tab 1] [Emphasis added]

⁴ Rule 10.29, *Alberta Rules of Court*, Alta Reg [24/2010] [Tab 1]

client indemnity costs against Maurice Stoney was “amply warranted.”⁵ While the Court, of its own motion, directed the proceedings resulting in *Sawridge #7* and *#8*, these proceedings were an extension of and a direct result of the original application and submissions made by the parties in *Sawridge #6* such they ought to attract the same scale of costs.

14. In *Sawridge #7*, this Court noted that the directions made in *Sawridge #6* relating to the vexatious litigant status of Stoney “were taken in response to what is clearly abusive litigation misconduct.”⁶
 15. In *Sawridge #8*, despite having already participated in the July 28, 2017 hearing relating to a personal costs award against her arising from her conduct in *Sawridge #6* where her counsel acknowledged the abusive nature of the Stoney Application, Ms. Kennedy, on behalf of Stoney, continued to advance futile arguments which were previously rejected by the Court in *Sawridge #6*. She and Stoney thereby continued in their pattern of serious litigation misconduct.
- D. The costs award in *Sawridge #7* should be as against Ms. Kennedy only.
16. With respect to the costs of the July 28, 2017 hearing as to whether Ms. Kennedy ought to be responsible for some or all of the costs award made against Stoney in *Sawridge #6*, Sawridge accepts that this cost award should be as against Ms. Kennedy only and should not be joint and several with Stoney.
 17. While Stoney was present at the hearing, he did not make submissions or actively participate in any way, such that it would not be appropriate for him to bear costs for that hearing, which involved the liability of his lawyer only.
 18. Finally, if the Court is not inclined to award solicitor and own client costs against Ms. Kennedy on *Sawridge #7*, then Sawridge requests, in the alternative, that enhanced costs or, in the least, party and party costs, be awarded against Ms. Kennedy only.
 19. Sawridge relies upon its earlier written submissions on *Sawridge #6* and the case law, rules and general principles cited therein in support of its position that an award of solicitor and own client full indemnity costs is appropriate.

III. COSTS SOUGHT BY SAWRIDGE

20. In summary, Sawridge seeks the following costs relief:
 - (a) Solicitor and own client full indemnity costs as against Ms. Kennedy and Stoney, on a joint and several basis for the *Sawridge #8* proceedings; and
 - (b) Solicitor and own client full indemnity costs, or alternatively, enhanced or party and party costs, as against Ms. Kennedy only for the *Sawridge #7* proceedings.
21. Sawridge submitted a Bill of Costs for solicitor and own client costs for *Sawridge #6*, *#7* and *#8*, in the amount of \$95,471.50 in fees, \$1,037.70 in disbursements, and \$2,467.65 in other charges.⁷ Sawridge invites the Court to set the amount payable as part of its direction so as to dispense with any need to appear before a Review Officer and resolve the costs issue between the parties.

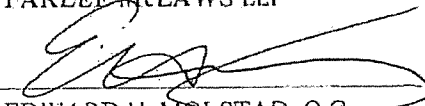
⁵ *Sawridge #6* at para 67 [Tab 4].

⁶ *Sawridge #7* at para 5 [Tab 5].

⁷ Bill of Costs of Sawridge First Nation and Related Correspondence. [Tab 6]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January, 2018.

PARLEE McLAWS LLP



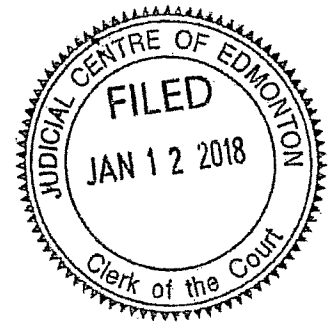
EDWARD H. MOLSTAD, Q.C.
Counsel for the Sawridge First Nation

LIST OF AUTHORITIES

- Tab 1** *Alberta Rules of Court*, Alta Reg 124/2010, Rules 10.28 to 10.30.
- Tab 2** *Firemaster Oilfield Services Ltd. v Safety Boss (Canada) (1993) Ltd.*, 2002 ABCA 96.
- Tab 3** *Saskatchewan Power Corporation v Alberta (Utilities Commission)*, 2015 ABCA 281.
- Tab 4** *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436 [“Sawridge #6”].
- Tab 5** *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530 [“Sawridge #7”].
- Tab 6** Bill of Costs of Sawridge First Nation and Related Correspondence:
- A.** September 19, 2017 e-mail to Mr. Wilson and Mr. Faulds with attachments, including:
- Draft Bill of Costs of Sawridge First Nation, including fees of \$99,013.50;
 - E-mail in response from Mr. Wilson dated September 15, 2017 requesting copies of the Statement of Accounts of Parlee McInnes rendered to Sawridge First Nation;
 - Copy of e-mail to Mr. Wilson and Mr. Faulds dated September 15, 2017 enclosing a summary of information for each month that was billed;
 - E-mail from Mr. Wilson dated September 15, 2017 requesting additional information; and
 - Detail description of the time and charges for fees for the months of August, September, October, November, and December, 2016 and July and August, 2017, with the solicitor client privileged information redacted.
- B.** September 20, 2017 e-mail to Mr. Faulds reducing the fees of Sawridge First Nation to \$95,471.50 and attaching revised summary of information for each month that was billed

TAB H

COURT FILE NUMBER 1103 14112
COURT: COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE: EDMONTON



IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8,
AS AMENDED

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: MAURICE STONEY and HIS BROTHERS AND SISTERS

RESPONDENTS: ROLAND TWINN, CATHERINE TWINN, WALTER FELIX
TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as
Trustees for the 1985 Sawridge Trust (the "Sawridge
Trustees")

INTERVENOR SAWRIDGE FIRST NATION aka THE SAWRIDGE BAND
("SFN")

DOCUMENT WRITTEN SUBMISSIONS OF THE SAWRIDGE TRUSTEES
ON COSTS (SAWRIDGE #6, #7 AND #8)

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PARTY FILING THIS
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File No.: 551880 -1

This is Exhibit "H" referred to in the
Affidavit of

Priscilla Kennedy

Sworn before me this 23rd day

of March A.D., 2018


A COMMISSIONER FOR OATHS IN AND FOR ALBERTA

Kimberly J. Precht
Barrister & Solicitor

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Attention: Edward Moistad, Q.C. & Ellery Sopko

Counsel for The Sawridge First Nation

1. These submissions respond to the "Written Submissions of Priscilla Kennedy Respecting the Scope of the Costs Award in Sawridge #6" ("Kennedy Submissions"). The Trustees generally accept the summary of facts in the Kennedy Submissions, except insofar as it is alleged that the Respondents (including the Trustees) did not seek full indemnity costs or indicate any such intention. The Trustees further address this point in the submissions below.¹ The Trustees have also reviewed the submissions of the Sawridge First Nation, and agree with its contents.

A. The Trustees do not argue that the Sawridge #6 costs award prospectively determined costs. Instead, they argue that costs against the unsuccessful parties in Sawridge #7 and #8 should be awarded on the same scale as in Sawridge #6.

2. Solicitor and own client costs were awarded in *Sawridge #6* because, according to Case Management Justice Thomas, the application "had no merit, and was instead abusive in a manner that exhibits the hallmark characteristics of vexatious litigation".²
3. That conduct continued, particularly in *Sawridge #8*, in which Ms. Kennedy repeated arguments made in *Sawridge #6*, despite her lawyer having admitted that those earlier arguments "absolutely" had the effect of being an abuse of the court's process,³ and despite the Court finding those arguments abusive and vexatious in *Sawridge #6*.
4. The result of *Sawridge #7* and *#8* was to find that Ms. Kennedy bore responsibility for the vexatious litigation conduct of her client. Those findings are an extension of the findings in *Sawridge #6*, which held that the litigation conduct warranted solicitor and own client costs, and these hearings and the resulting findings directly resulted from *Sawridge #6*.
5. The Trustees' argument is not that *Sawridge #6* ordered prospective costs in an advance determination of *Sawridge #7* and *#8*; rather, it is that the findings of conduct in *#7* and *#8* are consistent with the same findings regarding conduct in *Sawridge #6* that were held to warrant full indemnity costs. It is reasonable that counsel would interpret *Sawridge #7* and *#8*, which sprang directly from *Sawridge #6*, such that the same scale of costs would be awarded to them for the same conduct.

B. Since Sawridge #7 and #8 arose directly from Sawridge #6, in which full indemnity costs were sought and awarded, Ms. Kennedy had sufficient notice that full indemnity costs against her would be sought for those proceedings.

6. No separate application documents were filed in respect of *Sawridge #7* or *#8*. Both hearings were effectively continuations of issues raised in *Sawridge #6*. The Trustees expressly requested solicitor and his own client costs against Ms. Kennedy for *Sawridge #6*.⁴ That is the scale of costs that was awarded in *Sawridge #6*. Ms. Kennedy therefore had sufficient notice that solicitor and his own client costs were at issue.
7. The circumstances here are very different than those discussed by the Court of Appeal in *Twinn v Twinn*.⁵ In that decision, an appeal of *Sawridge #5*, the Court of Appeal commented that no request for full indemnity costs was made by any of the parties. Conversely, the Trustees sought full indemnity costs in *Sawridge #6*.

¹ In particular, in paragraph 6.

² *Sawridge #6* at para 67 [TAB 1]

³ *Sawridge #8* at paras 113-122 [TAB 2]

⁴ Written Submissions of the Trustees filed October 31, 2016 [TAB 3]

⁵ 2017 ABCA 419 at para 27, attached to the Kennedy Submissions at Tab 3 and cited in footnote 11.

8. The Court of Appeal also commented that the mention of the possibility of full indemnity costs in *Sawridge #4* was insufficient to constitute notice in *Sawridge #5*. However, it is important to recognize that there was no continuity between *Sawridge #4* and *#5*: the applicants were different (the OPGT in the former, potential interveners in the latter); the issues were different; and each had its own notice of application. Here, the parties are the same; the issues were related and flowed from *Sawridge #6*; and the only pleading-type documents filed were those in *Sawridge #6*. *Sawridge #6* through *#8* were effectively all the continuation of the same application.
9. If Ms. Kennedy did not have sufficient notice such that she had the opportunity to make submissions on the issue, she received notice when the Bills of Costs were presented and has made submissions, and has further notice through these submissions. The Trustees do not object to her request to have the opportunity to file brief reply submissions by January 16, 2018, if this Court so permits.⁶ The Trustees specifically request that this matter be determined summarily by way of written brief as these applications advanced by Mr. Stoney and Ms. Kennedy have cost the 1985 Trust enormous amounts of money to respond to, with no corresponding benefit in any way.

C. The Trustees do not submit that Mr. Stoney should bear the costs of *Sawridge #7*.

10. The Trustees do not argue that Mr. Stoney is jointly and severally liable for the costs of *Sawridge #7*, which found his lawyer to have conducted herself improperly. Mr. Stoney presumably relied on his lawyer to advise him and govern her own conduct, and the Trustees agree that he cannot reasonably be asked to bear the costs of her conduct hearing.
11. Again, the Trustees submit that it is the scale of costs that extends from *Sawridge #6* to the subsequent proceedings, because the nature of the conduct that supported an award of costs on that scale remained the same. It is not the exact same cost award itself. Indeed, different bills of costs are being submitted for each hearing. Mr. Stoney was not a party to *Sawridge #7*. The Trustees do not agree that applying the same scale of costs in all three proceedings, due to the same underlying conduct, "has the effect of making Mr. Stoney responsible for the costs of the show cause hearing against Ms. Kennedy"⁷.
12. Ms. Kennedy should be personally required to pay the costs of *Sawridge #7* to the other parties. There are few cases that have dealt with costs awards in the context of a hearing on the issue of whether a lawyer should be personally liable for the costs, as such hearings do not frequently arise. However, there is precedent for ordering a lawyer to pay costs to other parties for the hearing of an application to determine the lawyer's personal liability.⁸

D. The Trustees do submit that Mr. Stoney and Ms. Kennedy should be jointly and severally liable for the costs of *Sawridge #8*.

13. *Sawridge #8* concluded that Mr. Stoney engaged in vexatious litigation conduct. Ms. Kennedy was found to have replicated the same conduct as in *Sawridge #6*.⁹ It was held in *Sawridge #7* that Ms. Kennedy would be jointly and severally liable with Mr. Stoney for the conduct in *Sawridge #6*. The Trustees submit that, by logical extension, they should be jointly and severally liable for *Sawridge #8*.

⁶ Request made in Kennedy Submissions, para 11.

⁷ As argued in the last bullet point in para 9 of the *Kennedy Submissions*

⁸ *Lynch v Checker Cabs Ltd.*, 1999 ABQB 514, 1999 CarswellAlta 640 at paras 64, 68 [Tab 4]

⁹ *Supra* note 3.

E. The fact that Sawridge #7 and #8 did not arise as a result of an application by the Trustees does not mean that costs should not be awarded to the Trustees for those proceedings.

14. The Kennedy Submissions suggest that an award of costs to the Trustees is not appropriate because the Trustees did not initiate *Sawridge #7* or *#8*, and they "do not concern relief sought by the Respondents".¹⁰ However, this contention is inconsistent with the general principles underlying costs awards.
15. The default Rule is that, if a party initiates a step in litigation and is unsuccessful in obtaining the relief they seek, then costs are awarded against them.¹¹ It is usually the case that the Respondent to an application does not itself seek relief, other than to have the application dismissed (with costs). The fact that *Sawridge #7* or *#8* "do not concern relief sought by the Respondents" is in no way determinative of whether an award of costs should be made against an unsuccessful Applicant.
16. As described above, *Sawridge #7* and *#8* were extensions of *Sawridge #6*. While the Case Management Justice requested that the parties return for a further hearing on those specific issues, to permit them the opportunity to make full submissions, they arose as a direct consequence of Mr. Stoney's unsuccessful application in *Sawridge #6*. They did not arise in a vacuum.
17. Given that they directly resulted from Mr. Stoney's application in *Sawridge #6*, it does not seem just that it should now be suggested that there be no cost consequences to Mr. Stoney and/or Ms. Kennedy for these hearings. Mr. Stoney and Ms. Kennedy were unsuccessful in respect of all three hearings. The 1985 Trust, and by extension its beneficiaries, have borne the brunt of the costs for these failed hearings.

F. In the alternative, the Trustees submit that costs should be awarded to them on a party and party basis for Sawridge #7 and Sawridge #8.

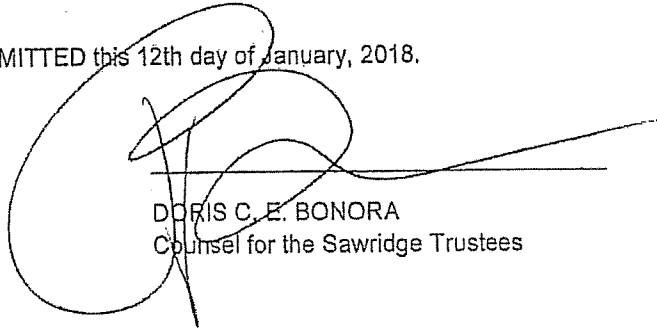
18. If this Honourable Court does not accept that costs on a solicitor and own client basis are appropriate, the Trustees submit that costs should be awarded to them on an elevated basis, or in the further alternative on the usual party and party basis, for the reasons outlined above.
19. We seek the direction of the Court on this matter so that we may conclude this chapter on the Kennedy/Stoney matters with no further expense to the Trusts. We invite the Court to set the amount of costs to be paid such that we need not have any further applications or attendance with the Review Officer.
20. To that end, the Trustees have expended \$109,706.21 in respect of the three applications.¹² We would accept a small reduction in the amount expended to have the efficiency of a conclusion in this matter.

¹⁰ Kennedy Submissions, para 9, fifth bullet.

¹¹ Alberta Rules of Court, Alta Reg 124/2010, Rule 10.29(1).

¹² Trustees' Bill of Costs [Tab 5]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January, 2018.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal tail extending to the right. The signature is positioned above a horizontal line that serves as a separator between the signature and the printed name below.

DORIS C. E. BONORA
Counsel for the Sawridge Trustees

TAB I

Clerk's stamp:

COURT FILE NUMBER: 1103 14112
COURT: COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE: EDMONTON

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

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

APPLICANTS: ROLAND TWINN,
WALTER FELIX TWIN,
BERTHA L'HIRONDELLE,
CLARA MIDBO, and
CATHERINE TWINN, as Trustees for the 1985 Sawridge
Trust

DOCUMENT: REPLY SUBMISSIONS OF PRISCILLA KENNEDY
RESPECTING THE SCOPE OF THE COSTS AWARD
IN SAWRIDGE #6

ADDRESS FOR SERVICES AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT: Field Law
2500, 10175 - 101 Street
Edmonton, AB T5J 0H3
Attention: P. Jon Faulds, QC
Telephone: (780) 423-7625
Fax: (780) 428-9329
Email: jfaulds@fieldlaw.com
File No.: 65063-1 PJF

This is Exhibit " I " referred to in the
Affidavit of

Priscilla Kennedy

Sworn before me this 23rd day
of March 2018 A.D., 20 18

[Signature]
A COMMISSIONER FOR OATHS IN AND FOR ALBERTA

Kimberly J. Precht
Barrister & Solicitor

OVERVIEW

1. In their joint letter to the Court dated November 15, 2016 the Sawridge Trustees and First Nation stated:

The Sawridge First Nation and the Sawridge Trustees take the position that **the solicitor and client full indemnity costs award** applies not only to the time period up to the issuance of *Sawridge #6*, but it also **applies in relation to the costs subsequently incurred by these parties in relation to *Sawridge #7* and *Sawridge #8*...** (emphasis added)

Ms. Kennedy's November 16 letter to the Court disputed that the costs award had such prospective effect. The Court directed the issue raised by the two letters be resolved by submissions in writing.¹

2. The January 5 submissions on behalf of Ms. Kennedy directly addressed that issue and set out the reasons why the costs award in *Sawridge #6* should not and did not have prospective effect. In response the Sawridge parties abandoned their position that the costs award in *Sawridge #6* applies to the subsequent proceedings. They now ask the Court to grant an order awarding them costs of *Sawridge #7* and *#8* on a solicitor and own client full indemnity basis, for which Ms. Kennedy is personally liable with respect to *Sawridge #7*, and for which Ms. Kennedy and Mr. Stoney are jointly liable in the case of *Sawridge #8*. They also seek summary determination of those costs, as well as the costs of *Sawridge #6* by the Court.

3. The foregoing relief was not raised in the Sawridge parties' November 15 letter to the Court and hence was not addressed by Ms. Kennedy in her initial submissions, other than to note the provisions of the Rules that might apply in the event of a motion seeking costs. (See paragraph 10 of January 5 submissions.)

SUBMISSIONS

4. With respect to this new application, Ms. Kennedy makes the following general submissions:

- The Sawridge parties' primary argument for such costs is that the proceedings in *Sawridge #7* and *#8* flowed from the application in *Sawridge #6* and therefore should attract costs on the same scale. However Ms. Kennedy submits that this Court drew a clear line between the application in *Sawridge #6* which attracted the enhanced costs award and the subsequent

¹ We include the correspondence leading to this application at Tab 1, for reference:

- Emails sent to the Court by Ms. Bonora (on behalf of Trustees) and Mr. Faulds (on behalf of Ms. Kennedy), respectively, on Sept 20, 2017; Letter sent to the Court by Mr. Molstad (on behalf of First Nation) on Sept 21, 2017 (without attachments); Letter of the Court dated Sept 27, 2017, instructing parties to appear before Assessment Officer to resolve issues related to the costs award; Letter sent to the Court by Mr. Molstad (on behalf of Trustees and First Nation) on Nov 15, 2017; Letter sent to the Court by Mr. Faulds (on behalf of Ms. Kennedy) on Nov 16, 2017; Letters of the Court dated Dec 20, 2017 and Jan 2, 2018.

proceedings to determine whether she should be personally liable for such costs and whether Mr. Stoney should be declared a vexatious litigant (see paragraph 77 of *Sawridge #6*).

- The Sawridge parties' contention that the scale of costs in *Sawridge #6* logically extends to *Sawridge #7* and *#8* is not well founded. The scale of costs awarded in *Sawridge #6* arose from the Court's conclusion that the bringing of that particular application was abusive. For the reasons set out in Ms. Kennedy's initial submissions, that award cannot be projected onto subsequent proceedings that were directed by the Court. Any costs relating to those proceedings must be evaluated on their own merits.
 - The cases cited by the Sawridge parties also weigh against their contention. In both *Saskatchewan Power Corporation v Alberta (Utilities Commission)* and *Lynch v Checker Cabs Ltd*, enhanced costs awards were made for litigation misconduct. However the enhanced costs were confined to the portion of the proceeding in which the misconduct was found to have occurred. In neither case did the enhanced costs carry over to the subsequent proceedings in which that conduct was evaluated. In *Saskatchewan Power* no costs were awarded for the application for costs.² In *Lynch* costs for the application seeking costs were assessed on the normal Schedule "C" basis.³
 - Ms. Kennedy's appearance before the Court for *Sawridge #7* and Mr. Stoney's appearance with Kennedy as his counsel for *#8* were obligatory, being required by the Court. The Sawridge parties' role in *#7* was limited in nature in accordance with the SCC decision in *Jodoin* and their role in *#8* was optional.⁴ Their suggestion that they were the successful parties misapprehends the nature of those proceedings and their role. While the Sawridge parties clearly "succeeded" in having Mr. Stoney's application dismissed and an award of solicitor and own client costs awarded in *Sawridge #6*, the proceedings in *Sawridge #7* and *#8* were of a significantly different nature: an exercise of the Court's supervisory function in relation to lawyers and litigants instituted of the Court's own motion.
 - As the Court of Appeal recently reiterated in *Twinn v Twinn*, awards of costs on a solicitor and client basis are "rare and exceptional" while awards of solicitor and own client costs are "virtually unheard of except where provided by contract".⁵ Ms. Kennedy submits that to award costs in the nature of sanctions against her or her then client for their court-ordered appearance and submissions in the court-ordered proceedings of *Sawridge #7* and *#8* would be extraordinary and unwarranted. If the Court is of the view costs are payable by Ms. Kennedy respecting the proceedings in *Sawridge #7* and *#8*, such costs should be on a party and party basis.
5. Ms. Kennedy also makes the following submissions with respect to costs in *Sawridge #8*:

² *Saskatchewan Power Corporation v Alberta (Utilities Commission)*, 2015 ABCA 281 at para 40 [Tab 3 of First Nation's Submissions]

³ *Lynch v Checker Cabs Ltd.*, 1999 ABQB 514 at para 68 [Tab 4 of Sawridge Trustees' Submissions]

⁴ *Sawridge #6*, paras. 63, 64, 79 and 81. Ms. Kennedy also notes that while the Sawridge Trustees say that they expressly sought costs against Ms. Kennedy in their submissions on *Sawridge #6*, those submissions contain no such request.

⁵ *Twinn v Twinn*, 2017 ABCA 419 at para 25 [Tab 3 of Kennedy's Jan 5 Submissions]

- The Sawridge parties rely upon the Court's concerns regarding Ms. Kennedy's submissions on behalf of Mr. Stoney in *Sawridge #8* as a specific basis for an award of enhanced costs. Ms. Kennedy submits that the Court's concerns regarding those submissions do not constitute a basis for an award of enhanced costs against her. Those submissions, which were filed last, responded to the Court's direction in *Sawridge #6*. They were made pursuant to Ms. Kennedy's view of her obligation to her then client Mr. Stoney as a result of the Court's decision to conduct a show cause hearing on whether Mr. Stoney should be declared a vexatious litigant. They did not give rise to, or prolong, the determination of the proceeding, which was initiated by the Court.
- Ms. Kennedy also notes that insofar as the Sawridge parties now seek a new order holding Mr. Stoney liable for the costs of *Sawridge #8*, Mr. Stoney has not been provided an opportunity to respond to that application.

6. The Sawridge parties further ask the Court to make a summary direction as to the amount of costs to be paid with respect to *Sawridge #6*, *#7*, and *#8*. Ms. Kennedy notes neither of the Sawridge parties has provided the Court with bills of costs for each proceeding. Moreover detailed submissions by Ms. Kennedy respecting specific issues with the claimed costs lies beyond the scope of this brief. The request by the Sawridge parties is impracticable and contrary to the Court's existing direction that issues respecting the amounts claimed under the existing costs award be determined by the Assessment officer.⁶ Ms. Kennedy submits once the scope of the costs award in *Sawridge #6* is clarified and liability for costs (if any) in *Sawridge #7* and *#8* has been determined, any issues as may arise regarding the quantum of such costs can and should be dealt with by an Assessment Officer in accordance with the Court's existing direction.

RELIEF SOUGHT

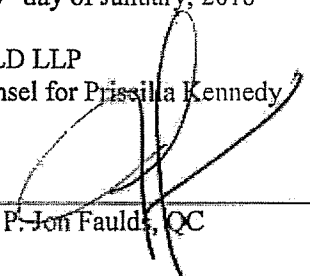
7. Based on the foregoing, Ms. Kennedy asks that the Court:
- Direct that the costs award in *Sawridge #6* for which Ms. Kennedy was made jointly and severally liable in *Sawridge #7* does not extend to steps taken with respect to *Sawridge #7* and *#8*.
 - Dismiss the applications of the Sawridge Trustees and First Nation for an order for enhanced costs payable by Ms. Kennedy with respect to the proceedings in *Sawridge #7* and *#8*.
 - Direct that any issues related to the quantum of any costs awarded be resolved by an Assessment Officer in accordance with the Court's prior direction.

⁶ We note this is the case, despite the Sawridge Trustees' statement at para 11 of their submissions that different bills of costs are being submitted for each hearing. Both Sawridge parties also suggest that they do not argue that Mr. Stoney is jointly and severally liable for costs in *Sawridge #7*. This contradicts their previous statements on the matter. See Ms. Bonora's letter dated Sept 14, 2017 at Tab 5 of the Trustees' Submissions, and Mr. Molstad's email sent Sept 19, 2017 at Tab 6A of the First Nation's Submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of January, 2018

FIELD LLP
Counsel for Prissilla Kennedy

Per:



P. Jon Faulds, QC