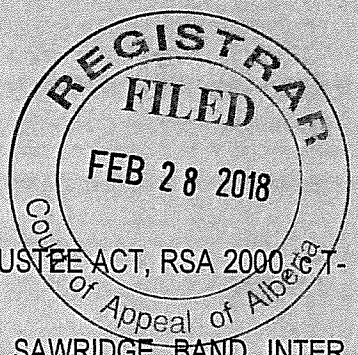
COURT OF APPEAL OF ALBERTA



COURT OF APPEAL FILE NUMBER:	1703 0239AC
COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000 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
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:	Respondents
RESPONDENT	PUBLIC TRUSTEE OF ALBERTA (the "OPGT")
STATUS ON APPEAL:	Not a Party to the Appeal
INTERVENOR:	SAWRIDGE FIRST NATION
STATUS ON APPEAL:	Respondent
INTERESTED PARTY:	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers and Sisters
STATUS ON APPEAL:	Appellant
DOCUMENT:	**FACTUM OF THE RESPONDENT, SAWRIDGE FIRST NATION**

Fast Track

Appeal from the Case Management Order of
The Honourable Mr. Justice D.R.G. Thomas
Dated the 31st day of August, 2017
Filed the 6th day of October, 2017

FACTUM OF THE RESPONDENT, SAWRIDGE FIRST NATION

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FACTUM OF THE RESPONDENT, SAWRIDGE FIRST NATION

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PART 1 – INTRODUCTION AND STATEMENT OF FACTS

A. Introduction

1. This Appeal is from the discretionary decision of the case management justice ("CMJ") in *Sawridge #7* holding the Appellant ("Kennedy"), personally liable, jointly and severally with her client Maurice Stoney ("Stoney"), for the solicitor and own client costs of the Respondents, Sawridge First Nation ("Sawridge") and the 1985 Sawridge Trustees (the "Trustees") in *Sawridge #6*.

2. The subject cost award arose in the context of an Application Kennedy (of DLA Piper LLP) filed on behalf of Stoney (and his siblings), seeking to add those persons as parties or intervenors to the Action (the "Stoney Application"). The "Action" is an application by the Trustees of the 1985 Sawridge Trust (the "1985 Trust") seeking advice and direction on the beneficiary definition. Sawridge settled the 1985 Trust on behalf of its members. Sawridge applied for and was granted intervener status in the Stoney Application, which was dismissed in *Sawridge #6* on the basis that it was hopeless and was an abuse of process. In its application to intervene, Sawridge notified Stoney and Kennedy of its position that the Stoney Application was frivolous and an abuse of process and sought solicitor and own client costs against Stoney.[1]

3. The award of costs against Kennedy was warranted. She deliberately advanced an unfounded, frivolous, vexatious proceeding that amounted to serious misconduct and serious abuse of the judicial system by her, having regard to the following:

(a) She advanced the Stoney Application on the grounds that Stoney and his siblings were factually and legally acquired rights members of Sawridge under Bill C-31, which amounts to a collateral attack on prior Federal Court decisions that determined that Stoney is not a member of Sawridge, including Justice Barnes' decision in *Stoney v Sawridge First Nation*, wherein Kennedy represented Stoney and wherein Justice Barnes held that the question of Stoney's acquired rights membership in Sawridge was barred by the doctrine of issue estoppel having regard to the Federal Court of Appeal's decision in *Huzar v Canada*;[2]

(b) She advanced the Stoney Application with full knowledge of the CMJ's direction in *Sawridge #3*, that membership disputes should be reviewed in the Federal Court and not in the Action;[3]

(c) She advanced the Stoney Application with full knowledge that Stoney was of limited funds and had not paid costs awards made in favour of Sawridge in prior litigation involving questions of membership, including the costs of in *Stoney v Sawridge First Nation*;[4]

(d) She advanced the Stoney Application on behalf of Stoney's siblings without clear evidence of authority from the siblings to do so;[5] and

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[1] Sawridge Application for Intervenor Status at para 3 [Sawridge's Extracts of Key Evidence ("Sawridg's EKE") at R1-R3]
[2] *Stoney v Sawridge First Nation*, 2013 FC 509, 2013 CarswellNat 1434 at paras 15-18 [*Stoney*] [Tab 19 Appellant's Book of Authorities ("Appellant's BOA")]; *Huzar v Canada*, 2000 CarswellNat 1132 (FCA) at paras 4-5 [*Huzar*] [Tab 20 Appellant's BOA]
[3] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799, 2015 CarswellAlta 2373 at paras 33-35 [*Sawridge #3*] [Tab 3 Appellant's BOA]
[4] Affidavit of Chief Roland Twinn ("Twinn Affidavit") at paras 22, 27-29, Exhibits "4" and "6" [Sawridg's EKE at R8-R9, R236-R244, R249-R252]; Kennedy's November 15, 2016 submissions at para 6 [Sawridge's EKE at R300]

(e) In the face of objections to the Stoney Application on the grounds that it was frivolous and a collateral attack on prior judicial decisions, Kennedy made baseless and false allegations in her filed submissions, accusing Sawridge of abuse of process and failure to comply with Court orders. [6]

4. Kennedy's misconduct cannot be excused on the basis of inadvertence, inexperience, or any genuine belief she holds in the merit of her clients' claims. A review of the history of disputes between Stoney and Sawridge, and Kennedy's involvement, supports a finding that her advancing of the Stoney Application was patently unjustified misconduct and the latest step in a series of attempts to re-litigate the question of Stoney's membership in an inappropriate forum. The CMJ was justified in awarding costs against Kennedy as a means of compensating the Respondents and deterring further litigation abuse.

B. Statement of Facts

5. It is key to understand that the Stoney Application was premised on the assertion that Stoney (and his siblings) have an automatic right to membership in Sawridge (i.e., acquired rights membership) and a corresponding right to beneficiary status to the 1985 Trust. As such, a historical review of Stoney's claims to membership and Kennedy's involvement in those claims is necessary to place *Sawridge #7* in context. Attached as Appendix A is a chronology showing the history of proceedings involving Stoney's claims to membership in Sawridge and Kennedy's involvement.[7]

6. In short, since his enfranchisement in 1944, Stoney has made seven unsuccessful attempts to gain membership in Sawridge (or have membership recognized): (1) his 1995 Action in Federal Court; (2) his application for membership in December 2011; (3) his appeal of the membership denial to the Appeal Committee, which was denied in April 2012 and in which he was represented by Kennedy; (4) his 2012 Action in Federal Court seeking judicial review of the Appeal Committee's decision, in which he was represented by Kennedy; (5) his January 31, 2014 complaint against Sawridge filed with the Canadian Human Rights Commission; (6) his application for an extension of time to file an appeal of the CMJ's decision in *Sawridge #3* in late 2015/early 2016, in which he was represented by Kennedy; and (7) the Stoney Application filed on August 24, 2016, in which he was again represented by Kennedy.

7. Given Kennedy's involvement in or knowledge of those proceedings, and the CMJ's findings that the Stoney Application was inappropriate, devoid of merit, abusive in a manner exhibiting the hallmark characteristics of vexatious litigation and amounted to serious litigation misconduct[8], the CMJ awarded the Respondents solicitor and own client costs on *Sawridge #6* and directed the parties to re-attend before him

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[5] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530, 2017 CarswellAlta 1569 at paras 7-8, 133-140 [*Sawridge #7*] [Tab 11 Appellant's BOA]
[6] Kennedy's October 27, 2016 submissions at paras 2, 21, 31, 33-36, 39-43, 48-49, 51, 55 [Sawridge's EKE at R281, R286, R288-R294]; Transcript from July 28, 2017 [Tab 19 Appeal Record at p 13, lines 26-37]
[7] Chronology of Stoney's Claims to Membership in Sawridge and Kennedy's Involvement **[Appendix A]**
[8] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436, 2017 CarswellAlta 1236 at paras 3, 47-52, 67 [*Sawridge #6*] [Tab 8 Appellant's BOA]

on July 28, 2017 for a hearing as to whether Kennedy should be held personally liable for some or all of those costs, the quantum of which is yet to be settled among the parties or by the lower Court.

8. The parties attended at the hearing on July 28, 2017, where Kennedy was represented by her counsel, Don Wilson of DLA Piper LLP ("Mr. Wilson"). Kennedy was present but did not address the Court herself to explain her conduct or address any issues or concerns relating to the show cause process or her exposure to personal liability. She deferred to her counsel, who made submissions on her behalf which effectively amounted to an admission of misconduct and a plea for mercy. The CMJ subsequently issued his decision finding her jointly and severally liable for the costs award in *Sawridge #6*.

PART 2 – GROUNDS OF APPEAL

9. The issues on this Appeal are as follows:

A. Did the CMJ err in his interpretation of the test for a personal cost award against a lawyer?

B. Did the CMJ err in holding Kennedy personally liable, jointly and severally with her client, for the Respondents' solicitor and own client costs?

PART 3 – STANDARD OF REVIEW

10. The standard of appellate review of a case management judge's costs decision generally is highly deferential, and a cost award will not be interfered with lightly.[9] The standard of appellate review on a personal cost award against a lawyer is also deferential given the discretionary nature of such awards: "an appellate court must show great deference and must be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable or non-judicial manner."[10] The Court of Appeal may intervene only where it identifies "an error of law, a palpable and overriding error in the motion judge's analysis of the facts, or an unreasonable or clearly wrong exercise of his discretion."[11]

11. The CMJ did not make a reversible error in principle (or law) in interpreting the test for a personal cost award against a lawyer. He made a discretionary decision which was reasonable and based on sufficient objective evidence to justify the award of costs against Kennedy personally.

PART 4 – ARGUMENT

A. The CMJ properly interpreted the test for a personal cost award.

12. The CMJ properly relied upon Rule 10.50 as authorizing him to order that a lawyer pay a cost award for engaging in "serious misconduct" and on the Court's inherent jurisdiction to control its process and litigation abuse by making such awards.[12] He applied the proper test for a personal cost award against

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[9] *Bun v Seng*, 2015 ABCA 165 (CanLII) at para 5 **[Tab 1 Sawridge's Book of Authorities ("Sawridge's BOA")]**
[10] *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26, [2017] 1 SCR 478 at para 52 [*Jodoin*] **[Tab 2 Sawridge's BOA]**
[11] *Jodoin* at para 51 **[Tab 2 Sawridge's BOA]**
[12] *Sawridge #7* at paras 31 and 51-57 [Tab 11 Appellant's BOA]; *Alberta Rules of Court*, Alta Reg 124/2010, Rule 10.50 **[Tab 3 Sawridge's BOA]**

a lawyer, citing extensively from *Jodoin* and other cases. He was well aware of the serious nature of such awards and the need for Courts to exercise caution in applying such sanctions against lawyers, particularly in light of the potential conflict in obligations owed to their client and the Courts.[13]

13. The crux of Kennedy's position is that the CMJ erred in interpreting *Jodoin* as creating a basis for personal costs awards which does not require deliberate misconduct by a lawyer and her assertion that she did not engage in deliberate misconduct. She relies upon a case comment prepared by Mr. Aylward and his suggestion that a misplaced comma in the English version of the decision may be read as creating a lower threshold for imposing costs in the absence of deliberate misconduct. While there may be a grammatical differences in the English and French versions of *Jodoin*, a fulsome review of the CMJ's decision does not support her assertion that he found that deliberate misconduct was not a requirement on both branches of the *Jodoin* test or that he imposed a lower threshold for a personal cost award. In fact, the CMJ noted the importance of considering whether litigation misconduct is deliberate.[14] He recognized something more than mere mistake or error of judgment was required.[15] He went on to note that proceeding in the face of a warning that a lawyer is advancing frivolous, vexatious, or abusive litigation effectively amounts to deliberate misconduct, as a person cannot be wilfully blind to the fact that their actions are wrong and "is presumed to intend the natural consequences of their actions."[16]

14. The CMJ did not accept Mr. Wilson's submissions that the Stoney Application was not made with bad motive or the intent to abuse court processes, which submissions were merely summarized (and not accepted) by the CMJ.[17] Nothing in the CMJ's decision supports Kennedy's assertion that there was an "absence of deliberate misconduct" and that "she clearly did not engage in deliberate misconduct".

15. The CMJ in fact found that Kennedy engaged in deliberate misconduct by collaterally attacking the unappealed decision of Justice Barnes, in which she represented Stoney and advanced effectively the same arguments.[18] Moreover, the CMJ noted that the result in the judicial review was "already barred by issue estoppel", as found by Justice Barnes, due to a concession made by Stoney's counsel in the earlier Federal Court of Appeal decision in *Huzar*.[19] He noted Kennedy proceeded with the Stoney Application in the face of the parties' objections that it was a collateral attack, that this was more problematic as she had done the same thing in the judicial review, and that this pattern of misconduct should be discouraged.[20]

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[13] *Sawridge #7* at paras 68, 76-80 [Tab 11 Appellant's BOA]
[14] *Sawridge #7* at para 91 [Tab 11 Appellant's BOA]
[15] *Sawridge #7* at para 93 [Tab 11 Appellant's BOA]
[16] *Sawridge #7* at para 93-94, 96 (under the heading, "6. Knowledge and Persistence"), and 98 [Tab 11 Appellant's BOA]
[17] *Sawrige #7* at para 18 [Tab 11 Appellant's BOA]; Transcript from July 28, 2017 [Tab 19 Appeal Record at p 7, lines 15-17]
[18] *Sawridge #7* at para 126-127 [Tab 11 Appellant's BOA]
[19] *Sawridge #7* at para 128 [Tab 11 Appellant's BOA]
[20] *Sawridge #7* at para 131 [Tab 11 Appellant's BOA]

16. As such, the issue of whether *Jodoin* requires deliberate misconduct is a red-herring. The CMJ found her misconduct was deliberate on the branch of the test he relied on: "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer."[21]

17. The CMJ's finding of deliberate misconduct should not be interfered with on appeal bearing in mind the evidence before him and that the burden of proof was a balance of probabilities.[22] Further, in exercising its discretion to award costs against a lawyer, a Court must consider the context of the proceedings: civil or criminal. Such an award in the civil context includes a compensatory aspect, and the role of a lawyer in the civil context is different from that of a defence lawyer in a criminal context.[23] In this civil context, the award was warranted in order to compensate the Respondents and deter further litigation abuse.

18. Furthermore, Kennedy misconstrues Justice Graesser's comments in *Morin* in suggesting the CMJ diverged in his interpretation of *Jodoin* as compared to Justice Graesser's recent interpretation.[24] Justice Graesser did not reach a conclusion on *Jodoin*, other than to state it "does not create a remedy that was not already there in the Rules of Court or at common law in civil proceedings."[25]

19. The CMJ has not created any new law on the issue of personal costs awards against a lawyer. He merely applied existing case law in the context of the cultural shift called for by the Supreme Court of Canada in *Hryniak v Mauldin*, with an emphasis on that Court's recent decision in *Jodoin.* His decision highlighted the corresponding need to control litigation abuse, reinforced the important role of lawyers in that cultural shift, and detailed the Court's longstanding supervisory role over lawyers and inherent jurisdiction in controlling litigation abuse.[26] The CMJ synthesized and applied this existing case law to the specific circumstances of this case, recognizing that each case must be examined in context.[27] Here, there was serious misconduct on the part of Kennedy in advancing a hopeless application which constituted an abuse of process. The CMJ's properly exercised his discretion in the circumstances of this case.

B. The CMJ did not err in holding Kennedy jointly and severally liable with her client for the Respondents' solicitor and own client costs.

20. Personal costs awards against a lawyer are rare and exceptional by their nature, as noted by the CMJ.[28] Here, there was ample evidence to support the finding that Kennedy's misconduct met this high threshold in light of her past involvement litigating membership issues on behalf of Stoney, prior decisions

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[21] *Sawridge #7* at para 32, 34, 70 [Tab 11 Appellant's BOA]
[22] *Jodoin* at para 37 **[Tab 2 Sawridge's BOA]**
[23] *Jodoin* at paras 31-32 **[Tab 2 Sawridge's BOA]**; *Sawridge #7* at para 42 [Tab 11 Appellant's BOA]
[24] See Footnote 32 of Kennedy's Factum.
[25] *Morin v TransAlta Utilities Corporation*, 2017 ABQB 409, 2017 CarswellAlta 1125 at para 39 [Tab 17 Appellant's BOA]
[26] *Sawridge #7* at paras 38-39, 41, 48, 49, 51, 118-120 [Tab 11 Appellant's BOA]
[27] *Sawridge #7* at para 97 [Tab 11 Appellant's BOA]
[28] *Sawridge #7* at paras 76-79 [Tab 11 Appellant's BOA]

of the Federal Courts on the same subject matter, insufficient evidence to show she or Stoney had authority of his siblings to bring an application, prior unpaid costs awards made against Stoney in proceedings she represented him, and the nature of the underlying litigation and interests at stake.

21. Kennedy was alerted to the futile and abusive nature of the application by virtue of the decision of Justice Barnes and the materials filed by Sawridge and the Trustees in response to the Stoney Application. She was aware of the CMJ's direction in *Sawridge #3* that membership issues were not to be adjudicated in the underlying Action, which was the same decision for which she unsuccessfully sought extension of time to file an appeal on behalf of Stoney before Justice Watson. She acknowledges informal involvement in the underlying Action from the outset[29] and was fully aware of the CMJ's directions in respect of membership issues. In light of the warning in *Sawridge #3*, the Stoney Application should never have been brought. In light of the further warnings in *Sawridge #4* and *#5*, Kennedy could have considered abandonment before *Sawridge #6* was issued but instead persisted. Compounding this misconduct were Kennedy's baseless assertions that Sawridge was the one engaging in abuse of process and failing to abide by court orders.[30]

22. The CMJ recognized an emerging pattern of misconduct and properly awarded a remedy that would serve the dual purpose of a personal costs award in a civil context: compensating the opposing parties and deterring further misconduct.[31] He acted appropriately in awarding costs on the same scale as *Sawridge #6*. He properly noted that nobody has a right to engage in abusive litigation, that a lawyer has an obligation not to promote abuse of court processes and cannot simply follow client instructions in contravention of their duty to the Court, and that any lawyer who acts on behalf of a client who engages in frivolous, vexatious or abusive litigation is potentially subject to a cost award as they are an "accessory to their client's misconduct."[32] He found Kennedy an accessory to Stoney's misconduct, such that it is appropriate that the award of costs was on the same scale as *Sawridge #6* and on a joint and several basis. This is particularly appropriate given Stoney's impecuniosity. Absent this award, there would effectively be no consequences or redress. The Respondents ought not to bear any costs of an application which never should have been brought before the Court in the first place.

23. Finally, courts have awarded costs against lawyers personally on a solicitor and own client full indemnity or solicitor-client basis in cases of similar misconduct, including: where counsel advanced

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[29] Kennedy's Factum at para 6.

[30] Kennedy's October 27, 2016 submissions at paras 2, 21, 31, 33-36, 39-43, 48-49, 51, 55 [Sawridge EKE at R281, R286, R288-R294]; Transcript from July 28, 2017 [Tab 19 Appeal Record at p 13, lines 26-37]

[31] In *Jodoin* at para 31, the Supreme Court of Canada (SCC) recognized that personal costs awards serve a compensatory function in the civil context **[Tab 2 Sawridge's BOA]**. The SCC in *Young v Young*, [1993] 4 SCR 3 at 135-136 also recognized that such awards serve a compensatory function **[Tab 4 Sawridge's BOA]** and upheld the majority decision of Justice Cuming of the BC Court of Appeal in *Young v Young*, 1990 CanLII 3813 (BC CA) at, which also discussed the compensatory function of such awards **[Tab 5 Sawridge's BOA]**.

[32] *Sawridge #7* at paras 73-75 [Tab 11 Appellant's BOA]

abusive litigation that was a collateral attack on prior decisions and did so in the face of prior unpaid costs awards against his client;[33] where counsel attempted re-litigate the causes of action and the issues that were settled in prior proceedings;[34] where counsel attempted re-litigate earlier actions and collaterally attack court orders and where the claims were known to counsel to have been raised (or were capable of being raised) in earlier actions;[35] and where counsel knew or ought to have known that the client he represented lacked standing to bring a motion and that the motion was frivolous and amounted to a collateral attack as the issues raised were previously adjudicated and *res judicata*.[36] While recognizing that the specific rules are worded differently across provinces, these cases are nevertheless of assistance in considering the nature of misconduct that may attract such an award, particularly since the Courts in those cases applied the same or a similar test and recognized the rare and exceptional nature of such awards.

(i) Kennedy's misconduct constituted serious abuse.

24. Kennedy acknowledges the Stoneys' "claim to potential beneficiary status was grounded in their assertion of entitlement to membership";[37] however, her suggestion that she advanced this position on a legal basis never previously raised, argued, or adjudicated is disingenuous. It ignores the substance of the submissions made by Kennedy to the CMJ, which clearly assert acquired rights membership on the basis of Bill C-31 and the 2003 decision of Justice Hugessen in *Sawridge Band v Canada*,[38] which was upheld by the Federal Court of Appeal in 2004.[39] Justice Barnes rejected this very argument in the 2012 Action.[40]

25. A review of the written submissions made on the Stoney Application reveals that the argument now described is not what was presented to the CMJ. To give but a representative example, we refer the Court to those submissions, where she asserts the Stoneys' membership in Sawridge on the basis of the Bill C-31 amendments to the *Indian Act* and on the basis that they fall within the category of persons contemplated by Justice Hugessen's order, an argument previously rejected by Justice Barnes.[41]

26. It is difficult to conceive how the CMJ and all counsel could be found to have misconstrued Kennedy's argument. She made the same arguments in submissions filed September 28, October 27, and

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[33] In *Best v Ranking*, 2015 ONSC 6279 (CanLII) at paras 20, 39-41 **[Tab 6 Sawridge's BOA]**, aff'd *Best v Ranking*, 2016 ONCA 492 (CanLII) at paras 41, **[Tab 7 Sawridge's BOA]**, leave to appeal ref'd *Paul Slansky v Kingsland Estates Limited, et al.*, 2017 CanLII 4178 (SCC), the Court awarded full indemnity costs of $84,000.00 to be paid jointly and severally by the Plaintiff and his counsel.

[34] In *Soderstrom v Hoffman-La Roche Limited*, 2008 CanLII 15778 (ON SC) at paras 24, 27, 59, 66-68 and 80 **[Tab 8 Sawridge's BOA]**, the Court awarded costs on a substantial indemnity basis to be paid jointly and severally by the Plaintiff and his counsel.

[35] In *Donmor Industries Ltd. v Kremlin Canada Inc. (No. 2)*, 1992 CanLII 7543 (ON SC) **[Tab 9 Sawridge's BOA]**, the Court awarded solicitor-client costs of $29,087.32 to be paid jointly and severally by the Plaintiff and its counsel.

[36] In *2403177 Ontario Inc. v Bending lake Iron Group Limited*, 2017 ONSC 3566 (CanLII) at paras 32-34, 37-39 **[Tab 10 Sawridge's BOA]**, the Court awarded costs to be paid jointly and severally by the client and its counsel.

[37] Appellant's Factum at para 7.

[38] *Sawridge Band v Canada*, [2003] 4 FC 748, 2003 FCT 347 (CanLII) **[Tab 11 Sawridge's BOA]**

[39] *Sawridge Band v Canada*, 2004 FCA 16 (CanLII) **[Tab 12 Sawridge's BOA]**

[40] *Stoney* at paras 8-17 [Tab 19 Appellant's BOA]

[41] Kennedy's September 28, 2016 submissions at paras 14-16, 19-21, 28 [Sawridge's EKE at R273-R277]; Kennedy's October 27, 2016 submissions at paras 4, 19-21, 36, 39-40, 42-43, and 53 [Sawridge's EKE at R282, R285-R286, R291-R294]; Kennedy's November 15, 2016 submissions at paras 2-3 [Sawridge's EKE at R299-R300]

November 15, 2016, the latter two of which were filed after Sawridge's September 28, 2016 submissions, and the final of which was filed after of Sawridge's and the Trustees' October 21, 2016 submissions.

27. It is also problematic that Kennedy waited until this Appeal to raise this issue. Neither she nor her counsel addressed the apparent misconstruing of her submissions during the July 28, 2017 hearing which was convened specifically by the CMJ to provide her with an opportunity to explain why she ought to not bear personally liability for costs. Instead, her counsel admitted she had prosecuted Stoney's claim too far in bringing the Stoney Application. These admissions were not lost on the CMJ, who noted that Kennedy's counsel admitted the Stoney Application was hopeless and constituted an abuse of process.[42]The admissions should not be ignored on this Appeal, although Sawridge acknowledges that, to the extent any admissions may be characterized as admission of law, they do not bind this Court.[43]

28. Furthermore, section 35 of the *Constitution Act, 1982* and *Treaty No. 8*, which relied upon as a new basis on which to assert membership, were raised by Kennedy in the grounds for the application for judicial review she filed on behalf of Stoney in the 2012 Action and in her written submissions in that court.[44]

29. In any event, the argument now advanced by Kennedy fails to distinguish between indigenous persons' right to recognized status under the *Indian Act* as compared to any right to membership in Sawridge. Bill C-31 gave Stoney the right to have his Indian status restored, but gave him nothing more than the right to apply for membership in Sawridge, as conceded and determined in prior proceedings.[45]

30. The question of Stoney's automatic right to membership was *res judicata* having been denied by the Justice Barnes. It was not, and is not, open to Kennedy to circumvent that unappealed decision by making the same or alternative arguments on membership to the CMJ (or now to the Court of Appeal).

31. The effect of the Stoney Application was a collateral attack on the Federal Court's decision and authority, as it was "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment."[46] The effect of accepting Kennedy's position would be to reverse or nullify Justice Barnes' decision by recognizing Stoney as a member of Sawridge. There is no denying she was re-litigating the same ultimate subject – membership – as noted by the CMJ.[47]

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[42] *Sawridge #7* at para 130 [Tab 11 Appellant's BOA]

[43] Transcript from July 28, 2017 [Tab 19 Appeal Record at p 4, lines 38-40, p 5, lines 18-21, p 6 lines 22-26, p 7 lines 15-19; and p 8 lines 23-28]; *R v Barros*, 2010 ABCA 116 (CanLII) at para 47 **[Tab 13 Sawridge's BOA]**

[44] May 11, 2012 Application for Judicial Review [Sawridge's EKE at R253-R257]; Affidavit of Maurice Stoney on Judicial Review [Sawridge's EKE at R258-R259]; Kennedy's Written Submissions on the Judicial Review at paras 20-24 [Sawridge EKE at R264-R265]

[45] *Huzar* paras 4-5 [Tab 20 Appellant's BOA]; *Stoney* at paras 15-17 [Tab 19 Appellant's BOA]

[46] *Sawridge #7* at para 125 [Tab 11 Appellant's BOA]

[47] *Sawridge #7* at para 126 [Tab 11 Appellant's BOA]. In its decision ordering security for costs against Stoney on his appeal of *Sawridge #6*, the panel noted "[t]here is no obvious reviewable error in the conclusion of the case management judge that the proposed arguments are barred by issue estoppel. The merits of the appeal are questionable": *Stoney v Trustees for the 1985 Sawridge Trust*, 2017 ABCA 437 at para 5 [Tab 10 Appellant's BOA]

(ii) Kennedy engaged in busybody litigation, but the CMJ would have ordered costs against her even absent that finding.

32. Kennedy asserts the Stoney Application was a representative action authorized by Rule 2.6. The cases relied upon in support of the validity of such actions are distinguishable, as they were clearly framed as representative actions brought by persons on their own behalf and on behalf of others in the style of cause.[48] A person purporting to sue in a representative capacity must set out in the style of cause they are suing in such a capacity, and the action must relate to "numerous persons" having a common interest.[49]

33. The Stoney Application was not clearly framed as a representative action, as now claimed, but rather states it is an "Application...by Maurice Felix Stoney and his brothers and sisters."[50] No mention of Rule 2.6 is made in the Application or any written submissions, even though the Trustees argued that a representative action was not appropriate this circumstances where not all siblings share the same facts on their applications for membership.[51] The Application specifically identifies and names a finite group of 10 people as those persons seeking to be added as parties or intervenors.[52] In her September 28, 2016 submissions, Kennedy specifically identified these persons as the "the Applicants in this Application" and sought indemnification for each of them from the 1985 Trust.[53] She specifically identified each person as the "Respondents" to Sawridge's intervenor application in her submission filed October 27, 2016.[54]

34. Furthermore, it is not clear whether Rule 2.6, entitled "Representative Actions", applies to the Stoney Application. An "action" is typically commenced by Statement of Claim or Originating Application. The Rule refers to a representative making a "claim", which is in turn defined to mean "claim in respect of a matter in which a plaintiff, originating applicant, plaintiff-by-counterclaim or third party plaintiff seeks a remedy."[55] There is no reference to an application.

35. The CMJ put Kennedy on notice in *Sawridge #6* that her authority to represent Stoney's siblings was a "live issue" for the show cause hearing.[56] While she tried to present evidence of that authority in *at* the hearing,[57] she did not raise Rule 2.6 or the representative action argument. It was not until she subsequently made submissions on behalf of Stoney as to why he ought not to be declared a vexatious

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[48] *Lameman v Canada (Attorney General)*, 2007 ABCA 180, 2007 CarswellAlta 685 [Tab 23 Appellant's BOA]; *Western Canadian Shopping Centres Inc. v Bennett Jones Verchere*, 1998 ABCA 392, 1998 CarswellAlta 1173 [Tab 24 Appellant's BOA]

[49] *Goodfellow v Knight* (1977), 5 AR 573, 1977 CanLII 538 (QB) at paras 6 and 23 **[Tab 14 Sawridge's BOA]**

[50] Stoney Application [Appeal Record at P01]; *Sawridge #6* at para 1 [Tab 8 Appellant's BOA]

[51] Stoney Application [Appeal Record at P01], Kennedy's September 28, 2016 submissions [Sawridge's EKE at R268-R278]; Kennedy's October 27, 2016 submissions [Sawridge's EKE at R279-R296]; Kennedy's November 15, 2016 submissions [Sawridge's EKE at R297-R303]; See also *Western Canadian Shopping Centres Inc. v Bennett Jones Verchere*, 1998 ABCA 392 at para 14 [Tab 24 Appellant's BOA]

[52] Stoney Application [Appeal Record at P01 at para 2(a)].

[53] Kennedy's September 28, 2016 submissions at para 11 and 30-32 [Sawridge's EKE at R272, R277]

[54] Kennedy's October 27, 2016 submissions at para 16 [Sawridge's EKE at R284-R285]

[55] *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.6, Appendix – Definitions **[Tab 3 Sawridge's BOA]**

[56] *Sawridge #6* at para 80 [Tab 8 Appellant's BOA]

[57] Affidavits of Bill Stoney, Gail Stoney, and Shelley Stoney [Appellant's EKE at A055-A057]

litigant that she first presented the representative action argument to the CMJ. At that time, she did not rely refer to Rule 2.6 but relied upon Rule 114 of the *Federal Court Rules*, which permits representative actions where the representative has authority of the group members to bring the application and they otherwise meet certain criteria, but which clearly has no application to Court of Queen's Bench matters.[58]

36. In any event, even absent the busybody finding, the CMJ would have found her liable for costs for advancing a futile and vexatious claim, which was an independent basis for the personal costs award.

(iii) The CMJ did not base his decision on irrelevant considerations.

37. The CMJ set out two main independent bases for the costs against Kennedy, either of which alone were sufficient to conclude she should be personally liable for costs: (1) she conducted futile litigation that was a collateral attack of a prior unappealed decision of a Canadian court, and (2) she conducted litigation allegedly on behalf of persons that were not her clients on a busybody basis.[59] The CMJ highlighted the futile nature of the application: "What is critical is that the August 12, 2016 application had no merit."[60]

38. The CMJ expressly did not base his decision on the factors he characterized as "aggravating", but stated these factors emphasize his conclusion is correct and that they include: that Kennedy proceeded with the Stoney Application in the face of previous unpaid costs awards by her client from the Federal Court judicial review and the decision of Justice Watson in 2016; the attempt to offload the costs of the Stoney Application onto the 1985 Trust; that Kennedy ignored the CMJ's December 2015 direction in *Sawridge #3* that the Court would not take jurisdiction to review issues of membership which is the jurisdiction of the Federal Courts; and that the Stoney Application was a challenge to Sawridge's internal decision making, self-determination, and self-government.[61] These findings are supported by the evidence.

39. In *Sawridge #1*, issued in 2012, the CMJ stated that he would not entertain membership issues that would have the effect of duplicating the exclusive jurisdiction of the Federal Court to order "relief" as against Sawridge.[62] In *Sawridge #3*, issued on December 17, 2015, the CMJ had the benefit of Justice Barnes 2013 decision. He sought to refocus the litigation and directed that disputes as to whether a person should be admitted or excluded from membership should be reviewed in Federal Court and not in the Action.[63]

40. Kennedy's position[64] ignores that she presented an affidavit and submissions in support of the Stoney Application that asserted, as a matter of fact and law, that Stoney was a member in Sawridge as

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[58] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548 at paras 34 and 84-86 [*Sawridge #8*] [Tab 13 Appellant's BOA]; *Federal Court Rules*, SOR/98-106, Rule 114 **[Tab 15 Sawridge's BOA]**
[59] *Sawridge #7* at paras 123, 140, 150-151 [Tab 11 Appellant's BOA]; Filed Order on *Sawridge #7* [Appeal Record at F046 at para 1].
[60] *Sawridge #7* at paras 144 [Emphasis added] [Tab 11 Appellant's BOA]
[61] *Sawridge #7* at paras 143, 146-151 [Tab 11 Appellant's BOA]
[62] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365, 2012 CarswellAlta 1042 at para 53-54 [*Sawridge #1*] [Tab 1 Appellant's BOA]
[63] *Sawridge #3* at paras 7, 26, 33-35 [Tab 3 Appellant's BOA]
[64] Appellant's Factum at para 40.

the ground for the application.[65] Acceptance of that assertion by the CMJ would have the effect of recognizing Stoney as a member of Sawridge, which Sawridge and the Federal Courts have determined he is not and which issue the CMJ expressly directed in 2015 were not to be considered in the Action.

(iv) The CMJ afforded Kennedy appropriate procedural protections.

41. Kennedy was not deprived of the opportunity to explain the thinking behind the Stoney Application, address the appropriate scale of costs against her personally, or address the relative levels of responsibility as between Stoney and herself for costs. The CMJ was acutely aware of the need for procedural protections and fairness for lawyers facing a costs award, citing directly from *Jodoin* in expressing the need for prior notice and an opportunity to respond and a preference that a determination on the merits of the underlying proceedings be made prior to considering a personal costs award against a lawyer.[66] The CMJ complied these requirements, and restricted the evidence before him to that which was relevant, namely: the facts of the case before him and those external facts which may inform the intention behind the lawyer's actions and whether the lawyer knew that the proceeding being brought was unfounded.[67] These facts included a consideration of Kennedy's involvement in Stoney's prior membership disputes with Sawridge.

42. The need for procedural protections was the CMJ's impetus for directing the show cause hearing.[68] The CMJ provided Kennedy with an opportunity to appear in person on July 28, 2017 for the express purpose of explaining herself and why she should not be personally responsible for "some or all of the costs" award made in *Sawridge #6*, which was an open invitation for Kennedy to address any and all issues of relevance to the show cause hearing. Kennedy was present on July 28, 2017 and was represented by Mr. Wilson. When provided with this opportunity to address her personal exposure to costs before the CMJ and the parties, she sat in silence while her lawyer made submissions on her behalf. Neither the CMJ nor the parties could have known that Kennedy disagreed (or would later disagree) with the position advanced by Mr. Wilson or would subsequently take the position that he failed to advance critical arguments she now highlights on appeal, such as the legal theory underlying the Stoney Application, Rule 2.6 as the basis for a representative action, or the appropriate scale of costs.

43. If Kennedy, a lawyer and member of the Law Society of Alberta since 1987, disagreed with the process directed by the CMJ or with tactic or strategy employed and submissions made by her lawyer, it was incumbent upon her to raise these concerns immediately. Instead, she raises these objections for the first time on appeal. At no time did she write to the parties or the CMJ to request an in-person hearing to

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[65] Stoney Application [Appeal Record at P01 at para 3(e)].
[66] *Jodoin* at paras 35-36 **[Tab 2 Sawridge's BOA]**; *Sawridge #6* at paras 75-76, 79 [Tab 8 Appellant's BOA]
[67] *Jodoin* at paras 33-34 **[Tab 2 Sawridge's BOA]**; *Sawridge #6* at paras 75, 81 [Tab 8 Appellant's BOA]
[68] *Sawridge #6* at paras 76-81 [Tab 8 Appellant's BOA]

clarify the alleged legal theory underpinning the Stoney Application or to express her position that this theory may be misunderstood as a result of the application being dealt with in writing. At no time did she request an adjournment of the show cause hearing to provide her with additional time to address the merits or retain other counsel if she felt Mr. Wilson would not effectively advocate her position.

44. In the face of her silence and lack of objection to the process employed by the CMJ at any stage of her involvement, Kennedy ought to be found to have waived any concern about procedural fairness and should not be permitted to raise this issue on appeal simply because the tactic or strategy employed by her and her counsel at the hearing was unsuccessful.[69]

45. Finally, with respect to her position that she was deprived of an opportunity to address the relative levels of responsibility as between herself and Stoney for the cost award in *Sawridge #6*, any such deprivation was a result of Kennedy's conduct in continuing to act for Stoney at the time of the July 28, 2017 hearing and afterwards when she filed written submissions on August 3, 2017 on his behalf in relation to his vexatious litigant status in *Sawridge #8.* Neither the CMJ nor the parties were at liberty to make specific inquiries into their relative levels of fault, as this engages issues of solicitor-client privilege which may only be waived by Stoney. Moreover, having regard to his discussion of the duty a lawyer owes to the Court, the CMJ expressly held that any consideration as to who was holding the reins of this litigation was not directly relevant, as her conduct was problematic regardless of whether she was driving the litigation or was just following client orders.[70] That said, it should be noted that submissions were made to the CMJ, particularly by the Trustees, which support a finding that she was holding the reigns.[71]

46. In any event, the CMJ ultimately ordered that Kennedy is jointly and severally liable with Stoney for the cost award in *Sawridge #6.* It remains open to her and Stoney to initiate proceedings as between themselves to resolve the issue of their relative levels of responsibility.

PART 5 - RELIEF SOUGHT

47. For the foregoing reasons, Sawridge requests that the Appeal be dismissed, with costs.

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[69] *Leader Media Productions Ltd. v Sentinel Hill Alliance Atlantis Equicap Limited Partnership*, 2008 ONCA 463 (CanLII) at paras 46-56 **[Tab 16 Sawridge's BOA]**, leave to appeal ref'd, *Sentinel Hill Alliance Atlantis Equicap Limited Partnership, Sentinel Hill Productions IV Corporation and Sentinel Hill Ventures Corporation v Leader Media Productions Ltd.*, 2008 CanLII 63488 (SCC); *High-Crest Enterprises Limited v Canada*, 2017 FCA 88 (CanLII) at paras 102-103, 112-113 **[Tab 17 Sawridge's BOA]**.

[70] *Sawridge #7* at para 144 [Tab 11 Appellant's BOA]

[71] Transcript from July 28, 2017 [Tab 19 Appeal Record at p 17, line 36 – p 18, line 13]; Kennedy's November 15, 2016 submissions at para 7 [Sawridge's EKE at R301]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2018.

PARLEE McLAWS LLP

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

Estimated Time for Oral Argument: 45 minutes

TABLE OF AUTHORITIES

1. *Bun v Seng*, 2015 ABCA 165 (CanLII)
2. *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26, [2017] 1 SCR 478
3. *Alberta Rules of Court*, Alta Reg 124/2010, Rules 2.6, 10.50, Appendix – Definitions
4. *Young v Young*, [1993] 4 SCR 3
5. *Young v Young*, 1990 CanLII 3813 (BC CA)
6. *Best v Ranking*, 2015 ONSC 6279 (CanLII)
7. *Best v Ranking*, 2016 ONCA 492 (CanLII)
8. *Soderstrom v Hoffman-La Roche Limited*, 2008 CanLII 15778 (ON SC)
9. *Donmor Industries Ltd. v Kremlin Canada Inc. (No. 2)*, 1992 CanLII 7543 (ON SC)
10. *2403177 Ontario Inc. v Bending lake Iron Group Limited*, 2017 ONSC 3566 (CanLII)
11. *Sawridge Band v Canada*, [2003] 4 FC 748, 2003 FCT 347 (CanLII)
12. *Sawridge Band v Canada*, 2004 FCA 16 (CanLII)
13. *R v Barros*, 2010 ABCA 116 (CanLII)
14. *Goodfellow v Knight* (1977), 5 AR 573, 1977 CanLII 538 (QB)
15. *Federal Court Rules*, SOR/98-106, Rule 114
16. *Leader Media Productions Ltd. v Sentinel Hill Alliance Atlantis Equicap Limited Partnership*, 2008 ONCA 463 (CanLII)
17. *High-Crest Enterprises Limited v Canada*, 2017 FCA 88 (CanLII)

APPENDICES

Appendix A Chronology of Maurice Stoney's Claims to Membership in Sawridge

APPENDIX A

Chronology of Stoney's Claims to Membership in Sawridge and Kennedy's Involvement

Date	Description
1944	In 1944, William Stoney, the father of Maurice Stoney ("Stoney") voluntarily gave up his Indian status and was enfranchised. As a result, William's family (including his wife and their two sons, Maurice and Alvin) were enfranchised, were paid their share of Sawridge First Nation ("**Sawridge**") capital moneys, and were consequently no longer members of Sawridge.[1]
April 17, 1985	Bill C-31 was enacted by the Federal Government on April 17, 1985. It gave Stoney the right to have his Indian status restored but did not give him any rights in relation to membership in Sawridge. At most, he was able to apply for membership in Sawridge.[2]
1995	Stoney, along with others, filed a claim in the Federal Court against Sawridge in 1995 wherein they sought damages related to Sawridge's decision not to grant them membership following the enactment of Bill C-31 (the "**1995 Action**"). Stoney and the other Plaintiffs also sought an Order that their names be added to the Sawridge's membership list. [3] In the 1995 Action the Plaintiffs brought an Application to amend their Statement of Claim to include a request for a declaration that Sawridge's membership rules were discriminatory and exclusionary and were, accordingly, invalid. The Application was initially granted, but that decision was appealed by Sawridge to the Federal Court of Appeal.[4]
June 13, 2000	On June 13, 2000, the Federal Court of Appeal delivered its decision regarding Sawridge's Appeal. It agreed with Sawridge and allowed the appeal of the decision amending the Statement of Claim with costs payable to Sawridge for both the initial application and the appeal.[5] One of the arguments raised during the 1995 Action was that the plaintiffs were entitled to membership in Sawridge as a result of Bill C-31. Specifically, it was argued that Bill C-31 invalidated Sawridge's membership rules, and that accordingly, Stoney and the other plaintiffs were entitled to membership. In response to that argument, the Federal Court of Appeal noted as follows: > It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim

[1] Affidavit of Chief Roland Twinn ("Twinn Affidavit") at paras 5, 31 and 32 [Sawridge's Extracts of Key Evidence ("Sawridge's EKE") at R6, R9]
[2] Twinn Affidavit at paras 6 and 7 [Sawridge's EKE at R6]
[3] Twinn Affidavit at paras 8-10 [Sawridge's EKE at R7]
[4] Twinn Affidavit at paras 11 and 12 [Sawridge EKE at R7]
[5] Twinn Affidavit at para 13-14 [Sawridge's EKE at R7]; *Huzar v Canada*, 2000 CarswellNat 1132 (FCA) at para 6 [*Huzar*] [Tab 20 Appellant's Book of Authorities ("Appellant's BOA")]

> discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.
>
> It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.[6]

Stoney was represented by legal counsel in the 1995 Action and it was conceded by his legal counsel and found by the Federal Court of Appeal that Stoney did not have an acquired right to be a member of Sawridge.

August 30, 2011

Stoney's next step in relation to his claim for membership in Sawridge was to complete a membership application pursuant to Sawridge's membership rules. His completed application for membership was submitted on August 30, 2011. Contrary to the assertions made in Stoney's Affidavit filed in support of the Stoney Application, that application was never ignored. [7]

December 7, 2011

Stoney's application for membership was denied on or around December 7, 2011. According to the letter that was sent to Stoney enclosing Sawridge's decision, his application was rejected (i) because he did not have any specific right to membership, and (ii) because Sawridge's Council did not consider that his admission would be in the best interests and welfare of Sawridge and as a result did not see any reason to exercise its discretion under its membership rules to admit him as a member.[8]

April 21, 2012

In accordance with Sawridge's membership rules and its Constitution, Stoney appealed the decision regarding his membership to Sawridge's Appeal Committee. The hearing of that appeal occurred on April 21, 2012. The committee which was made up of the electors of Sawridge upheld the initial decision to deny the application for membership.[9]

At the hearing before the Sawridge Appeal Committee, Stoney was represented by legal counsel, Ms. Priscilla Kennedy (then of Davis LLP) ("**Kennedy**"), who submitted that Stoney was an acquired rights member of Sawridge pursuant to Bill C-31 (and specifically section 6(1)(c.1) of the *Indian Act*) and the decision of the Federal Court of Appeal in *Sawridge Band v Canada*, 2004 FCA 16.[10]

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[6] *Huzar* at paras 4-5 [Tab 20 Appellant's BOA]
[7] Twinn Affidavit at paras 15 and 16 [Sawridge's EKE at R7]
[8] Twinn Affidavit at para 16 [Sawridge's EKE at R7]; Exhibit "L" to the Affidavit of Maurice Stoney [Appellant's EKE at A053]
[9] Twinn Affidavit at para 17 and Exhibit 2 at Tab Y [Sawridge's EKE at R7, R218-R220]
[10] Twinn Affidavit, Exhibit 2 at Tab W [Sawridge's EKE at R143-R146]

The decision of the Appeal Committee was unanimous in their finding that there were no grounds to set aside the decision of the Sawridge Chief and Council.[11]

May 11, 2012

Stoney then brought an application in the Federal Court of Canada for judicial review of the decision to deny him membership. That application was filed on May 11, 2012 (the "**2012 Action**") by his legal counsel, Kennedy.[12]

As part of the 2012 Action, Stoney advanced a number of grounds which he alleged were cause to overturn the decision to deny him membership. Those grounds are listed in Stoney's Notice of Application that was filed with the Federal Court. They included his alleged right to membership as a result of the enactment of Bill C-31, *Treaty No. 8*, and sections 15 and 35 of the *Constitution Act, 1982*.[13]

Stoney swore an Affidavit in the 2012 Action. In that Affidavit, he alleged (much like in the Affidavit sworn in support of the Stoney Application) that he was entitled to automatic membership in Sawridge as a result of the enactment of Bill C-31.[14]

Chief Roland Twinn swore an Affidavit on June 26, 2012, in response to the Affidavit sworn by Stoney in the 2012 Action. In his Affidavit, Chief Twinn affirmed, *inter alia*, the following:[15]

(a) Sawridge did not receive a completed membership application from Maurice Stoney until August 30, 2011;

(b) Sawridge's decision to deny Maurice Stoney's application for membership was based on a consideration of a number of records, including his completed membership application, historical documents, and media articles;

(c) Maurice Stoney was given the ability to make both written and oral submissions to Sawridge's Appeal Committee, both of which were done by his counsel; and

(d) Maurice Stoney's father (and as a result his whole family) voluntarily enfranchised in 1944.

Stoney's application for judicial review in the 2012 Action proceeded on March 5, 2013, before Justice Barnes of the Federal Court (Trial Division). Justice Barnes dismissed Stoney's application, and awarded costs to Sawridge.[16]

In his written reasons, Justice Barnes engaged in a thorough analysis of Stoney's argument regarding his entitlement to membership under Bill C-31. He found that Bill C-31 did not provide Stoney with an automatic right to membership in Sawridge.

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[11] Twinn Affidavit, Exhibit 2, Tab Y [Sawridge's EKE at R218-R220]
[12] Twinn Affidavit at para 18 [Sawridge's EKE at R7]
[13] May 11, 2012 Application for Judicial Review [Sawridge's EKE at R253-R257]
[14] Affidavit of Maurice Stoney on Judicial Review [Sawridge's EKE at R258-R259]
[15] Twinn Affidavit at para 19 and Exhibit 2 at paras 2, 3, 8, 11, 12, and 18 [Sawridge's EKE at R7-R8, R18-R23]
[16] *Stoney v Sawridge First Nation*, 2013 FC 509, 2013 CarswellNat 1434 [*Stoney*] [Tab 19 Appellant's BOA]

Rather, Justice Barnes noted that Stoney lost his right to membership when his father obtained enfranchisement for the entire Stoney family:

> I also cannot identify anything in Bill C-31 that would extend an automatic right of membership in the Sawridge First Nation to [Maurice] Stoney. He lost his right to membership when his father sought and obtained enfranchisement for the family. The legislative amendments in Bill C-31 do not apply to that situation.[17]

Additionally, Justice Barnes wrote that the judicial review application that was the subject matter of the 2012 Action was an attempt by Stoney to re-litigate the matters that were in issue in the 1995 Action, being his entitlement to membership as a result of Bill C-31. Justice Barnes accordingly concluded that the arguments related to Bill C-31 were barred under the doctrine of issue estoppel.[18]

Stoney was represented by Kennedy in the 2012 Action.[19]

The CMJ in *Sawridge #6* noted that at the time that Justice Barnes issued his decision in the 2012 Action and it was not appealed, Stoney's avenue for standing in the within Action was closed and the question of his membership in Sawridge was *res judicata*.[20]

Following the issuing of Justice Barnes' reasons in the 2012 Action, Sawridge proceeded to take steps to assess the costs that were payable by Stoney. A Federal Court Assessment Officer determined that Sawridge was entitled to $2,995.65 in costs. These costs have never been paid.[21]

January 31, 2014

On January 31, 2014, Stoney filed a complaint with the Canadian Human Rights Commission ("**CHRC**") regarding Sawridge's decision to deny him membership (the "**CHRC Complaint**"). Much like in both the 1995 Action and the 2012 Action, Stoney's complaint was based on an allegation that Sawridge's decision to deny his membership was discriminatory.[22]

The Deputy Chief Commissioner of the CHRC issued a decision regarding the complaint by Stoney on April 15, 2015. The Deputy Chief Commissioner refused to address the complaint, as the subject matter of the complaint had already been dealt with as part of the 1995 Action and the 2012 Action:

> The complainant has been a party to two different proceedings before the Federal Court with respect to the matters raised in this complaint: an action against the respondent [Sawridge] which was struck by the Federal Court of Appeal in 2000 and an application for judicial review which was dismissed in

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[17] *Stoney* at paras 11-15 [Emphasis added] [Tab 19 Appellant's BOA]
[18] *Stoney* at para 17 [Tab 19 Appellant's BOA]
[19] *Stoney* [Tab 19 Appellant's BOA]
[20] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436, 2017 CarswellAlta 1236 at paras 47-52 [*Sawridge #6*] [Tab 8 Appellant's BOA]
[21] Twinn Affidavit at paras 22 and 29, Exhibit "4" [Sawridge's EKE at R8-R9, R236-R244]
[22] Twinn Affidavit at para 24 [Sawridge's EKE at R8]

> May 2013. The essence of the complaint, i.e., the respondent's denial of the complainant's membership in the band, was central to both proceedings. The complainant clearly raised discrimination in his application for judicial review when he alleged that the decision violated the Charter; however, he did not provide adequate evidence for the Federal Court to overturn the decision of the respondent. The Supreme Court in *Figliola* held that human rights commissions must respect the finality of decisions made by other administrative decision-makers with concurrent jurisdiction to apply human rights legislation when the issues raised in both processes are the same. In this instance, the other decision-makers are judges of the Federal Court and the Federal Court of Appeal and could have clearly considered the human rights allegations raised. Therefore, it would not be unfair for the Commission to decide not to deal with this complaint.[23]

2015 - 2016

In late 2015, Stoney attempted to become involved in the underlying Action by filing an appeal of a case management decision made by Justice D.R.G. Thomas, being *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ("***Sawridge #3***"). Stoney was not a party to the action at that time. In light of the fact that Stoney's counsel, Kennedy, had failed to file a Civil Notice of Appeal within the requisite time under the *Rules of Court*, Stoney brought an application to extend the time for him to file an appeal of *Sawridge #3*. That application was heard by Justice J. Watson of the Court of Appeal on February 17, 2016. [24]

Stoney was represented by Kennedy in the Application to the Court of Appeal before Mr. Justice J. Watson.[25]

On February 26, 2016, Justice Watson issued his reasons for decision regarding Stoney's application. He dismissed the application and awarded costs to the parties that participated in that application, which included Sawridge.[26]

In his written reasons, Justice Watson provided an overview of the basis of Stoney's argument that he should participate in this Action:

> The application before me now is by a gentleman named Maurice Stoney. Mr. Stoney claims, with some vigour, that he is a member of the First Nation in question and that he has been for a long time, and that as a member of the First Nation, certain legal rights of his follow from this.
>
> [...] As mentioned, Mr. Stoney's position is that he is a member of the Sawridge First Nation and that as a consequence of that he presumably has a right to some share in the distribution of the trust when that is eventually carried out.[27]

With regards to Stoney's allegations regarding his membership in Sawridge, Justice

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[23] Twinn Affidavit, Exhibit "5" [Sawridge's EKE at R246-R248]
[24] *Stoney v Twinn*, 2016 ABCA 51, 2016 CarswellAlta 238 [Tab 4 of the Appellant's BOA]
[25] *Stoney v Twinn*, 2016 ABCA 51, 2016 CarswellAlta 238 [Tab 4 of the Appellant's BOA]
[26] *Stoney v Twinn*, 2016 ABCA 51, 2016 CarswellAlta 238 at paras 23-24 [Tab 4 of the Appellant's BOA]
[27] *Stoney v Twinn*, 2016 ABCA 51, 2016 CarswellAlta 238 at paras 2-3 [Tab 4 of the Appellant's BOA]

Watson did not make any findings regarding same, but he did note the following:

> It therefore follows that in terms of determining reasonable chance of success in the appeal, the embargo against the participation of Mr. Stoney that is or has been created by the various proceedings that have occurred in various courts including the Federal Court as raised by the First Nation, has an enhanced status for the purposes of determining the extension of time here. That is because, on the face of things, Mr. Stoney does not have a participatory right in relation to the proceedings on the trust, does not have standing to appeal within the meaning of the case of *Dreco Energy Services Ltd et al v Wenzel Downhole Tools Ltd*, 2008 ABCA 36 (CanLII), 429 AR 51 at paras 5 to 8, and is, in fact, a stranger to the proceedings insofar as an appeal from the decision of Mr. Justice Thomas to the Court of Appeal is concerned.[28]

Pursuant to Justice Watson's decision, Sawridge prepared a Bill of Costs regarding the application. That Bill of Costs was agreed to by Stoney's counsel, Kennedy, and was filed on June 14, 2016. Pursuant to that Bill of Costs, Stoney is required to pay Sawridge $898.70. To date, he has not paid Sawridge these costs.[29]

August 12, 2016

On August 12, 2016, Stoney (and his siblings) filed the Stoney Application seeking to be added as a party or intervenor to the underlying action on the basis that he and his siblings are acquired rights members in Sawridge and therefore beneficiaries to the 1985 Trust.[30] Stoney was again represented by Kennedy on that Application.

July 12, 2017

On July 12, 2017, the CMJ issued a written case management decision in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436 ("*Sawridge #6*"), wherein the CMJ granted the Application by Sawridge to intervene in the Stoney Application and struck out the Stoney Application in its entirety under Rule 3.68 with solicitor and own client indemnity costs awarded to Sawridge and the Sawridge Trustees. This CMJ 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. The CMJ issued an interim order restricting Stoney's access to the courts.[31]

In *Sawridge #6*, the CMJ directed that the parties re-attend before him on July 28, 2017 for a hearing as to whether Kennedy, counsel for the Stoney Applicants, should be held personally liable for some or all of the cost award made in *Sawridge #6*. The CMJ also directed the parties to file written submissions on the question of whether Stoney should be declared a vexatious litigant.[32]

July 28, 2017

On July 28, 2017, the parties appeared before the CMJ, as directed in *Sawridge #6*, to make submissions on the question of whether Kennedy should be held personally

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[28] *Stoney v Twinn*, 2016 ABCA 51, 2016 CarswellAlta 238 at para 20 [Emphasis added] [Tab 4 of the Appellant's BOA]
[29] Twinn Affidavit at paras 28 and 29, Exhibit "6" [Sawridge's EKE at R8-R9, R250-R252]
[30] Stoney Application [Appeal Record at P01]
[31] *Sawridge #6* at paras 47-51 [Tab 8 Appellant's BOA]
[32] *Sawridge #6* at paras 63-66 and 77-81 [Tab 8 Appellant's BOA]

liable for some or all of the costs award made against her client, Stoney, in *Sawridge #6*. Kennedy was represented by Don Wilson of DLA Piper at the hearing.[33]

August 11, 2017 Stoney, on his own behalf, filed an appeal of *Sawridge #6* on August 11, 2017, being Court of Appeal File Number 1703-0195AC, which is currently stayed pending his posting of security for costs by February 28, 2018.[34]

September 12, 2017 On September 12, 2017, the CMJ issued his decision on the July 28, 2017 hearing in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530 (***Sawridge #7***) and ordered that Kennedy be held personally liable for the costs award made in *Sawridge #6* on a joint and several basis with her client, Stoney.[35]

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[33] Transcript from July 28, 2017 [Tab 19 Appeal Record]
[34] *Stoney v Trustees for the 1985 Sawridge Trust*, 2017 ABCA 437, 2017 CarswellAlta 2740 at para 8 [Tab 10 Appellant's BOA]
[35] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530, 2017 CarswellAlta 1569 [*Sawridge #7*] [Tab 11 Appellant's BOA]