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, 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 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
STATUS ON APPEAL:	Respondents
STATUS ON APPLICATION:	Respondents
RESPONDENT	PUBLIC TRUSTEE OF ALBERTA (the "OPGT")
STATUS ON APPEAL:	Not a Party to the Appeal
STATUS ON APPLICATION:	Not a Party to the Application
INTERVENOR:	SAWRIDGE FIRST NATION
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:	Applicant
DOCUMENT	**MEMORANDUM OF ARGUMENT OF SAWRIDGE**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Parlee McLaws LLP 1700 Enbridge Centre 10175 – 101 Street NW Edmonton, AB T5J 0H3 **Attention: Edward H. Molstad, Q.C.** Telephone: (780) 423-8500 Facsimile: (780) 423-2870 **File Number: 64203-21/EHM**
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TABLE OF CONTENTS

I. INTRODUCTION

1. This Application arises in relation to a discretionary decision by the case management justice (the "CMJ") in *Sawridge #7* to hold the Applicant (Ms. Kennedy), personally liable, on a joint and several basis with her client Maurice Stoney ("Stoney"), for the solicitor and own client full indemnity costs of the Respondents. The decision arose in the context of an Application filed by Stoney (and his siblings) seeking to be added as parties or intervenors to the underlying action ("Stoney Application"). The action is an application brought by the Trustees of the 1985 Sawridge Trust ("1985 Trust") seeking advice and direction on the beneficiary definition of the Trust. The 1985 Trust was settled by the Sawridge First Nation ("Sawridge") on behalf of its members. Sawridge applied for and was granted permission to intervene in the Stoney Application, which was dismissed in *Sawridge #6* because it was hopeless and constituted an abuse of process.

2. The quantum of the personal costs award in this case is not directly before the Court of Appeal on this Application and should not be given much, if any, weight on this Application, as this aspect of the matter has not yet been resolved. The CMJ has directed the parties to appear before an Assessment Officer to resolve quantum, which will occur in due course.

3. It is key to understand that the Stoney Application, which was dismissed in *Sawridge #6*, was premised on the assertion that Stoney (and his siblings) have an automatic right to membership in Sawridge (i.e., acquired rights membership) and therefore a corresponding right to beneficiary status with respect to the 1985 Trust. As such, a historical review of Stoney's claims to membership in Sawridge is helpful, if not necessary, to place the Stoney Application and the CMJ's decision in context. Attached hereto is a chronology showing the history of proceedings involving Stoney's claims to membership in Sawridge, the determinations made in those proceedings, and Ms. Kennedy's involvement in those proceedings.[1]

II. ISSUES

4. The issues on this Application are as follows:

(a) Is permission to appeal required for an appeal of a decision awarding costs against a lawyer personally?

[1] Chronology of Maurice Stoney's Claims to Membership in Sawridge **[Appendix A]**

(b) If so, should permission to appeal be granted in this case?

III. ARGUMENT

A. Permission to appeal is required for an appeal of a decision awarding costs against a lawyer personally, as the decision is "as to costs only".

5. Rule 14.5 states that no appeal is allowed to the Court of Appeal unless permission has been obtained for the types of decisions listed within that rule, which decisions include "a decision as to costs only".[2] *Sawridge #7* is a decision as to costs only and therefore permission to appeal is required for an appeal of that decision.

6. In *Young v Young*, in the context of an appeal by a lawyer from a personal cost award, the British Columbia Court of Appeal considered what was then section 6.2 of the *Court of Appeal Act*, which provided that an appeal respecting costs only does not lie without leave of a justice. The lawyer argued that leave to appeal is not required in such a scenario, but the Court of Appeal rejected that argument, noting that there is no ambiguity in the provision, and, on an application of the usual rules of statutory interpretation, it is clear that leave is required.[3]

7. The Applicant's submission that the decision appealed from is not "as to costs only", because it was made pursuant to Rule 10.50, under a division entitled "Sanctions", and was based on a finding of serious misconduct by a lawyer, is flawed. While the award of costs in this circumstance amounts to a sanction, it is nevertheless still a "costs" award that is compensatory in nature as it indemnifies the successful parties for their solicitor and own client costs.

8. The direction of the CMJ that a copy of *Sawridge #7* be sent to the Law Society of Alberta ("LSA") for its review similarly does not mean the decision is not as to costs only. The Court's power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of law societies to sanction unethical conduct by their members, and such sanctions are not mutually exclusive and may be imposed

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[2] *Alberta Rules of Court*, Alta Reg 124/2010, Rule 14.5(1)(e) [Emphasis added] **[Tab 1]**
[3] *Young v Young*, 1990 CanLII 1965 (BCCA) at pp 2-3 **[Tab 2]**

concurrently.[4] It is up to the LSA to determine if and how it will deal with the subject matter of *Sawridge #7*. This matter is moot in any event, as the decision has already been sent to the LSA.

9. It should be noted that Rule 14.5(1)(e) goes on to state that "an appeal or cross appeal is not "as to costs only" if a related substantive decision is also being appealed."[5] While *Sawridge #6* is currently under appeal by Maurice Stoney, in a self-represented capacity, the appeals of *Sawridge #6* and *Sawridge #7* are separate and distinct decisions. They should be handled as such on appeal, particularly given that Ms. Kennedy's counsel admitted the wrongdoing found by the CMJ in *Sawridge #6* in his submissions before the CMJ in relation to *Sawridge #7*. On this basis, the Court should find that permission to appeal is required before Ms. Kennedy can appeal *Sawridge #7* notwithstanding the appeal of *Sawridge #6*.

B. Permission to appeal should not be granted in this case.

10. Sawridge agrees that the appropriate test for permission to appeal is set out in *Bun v Seng* and requires that the Applicant demonstrate: (i) a good arguable case having sufficient merit to warrant scrutiny by this Court; (ii) issues of importance to the parties and in general; (iii) that the costs appeal has practical utility; and (iv) no delay in proceedings caused by the costs appeal. Permission should be denied on the basis that the Applicant has not demonstrated a good arguable case, an issue of general importance, or the practical utility of this costs appeal.

(i) The standard of review on the CMJ's cost decision is high, as the decision is discretionary and will not be interfered with lightly by the Court of Appeal.

11. In considering whether the Applicant has a good arguable case having sufficient merit to warranty scrutiny by this Court, a key consideration is the standard of appellate review, which in the case of CMJ's costs award is highly deferential:

> The standard of appellate review of a costs award is important in assessing the first step of the test, the merits of the appeal. Costs decisions are highly discretionary and will not be interfered with lightly... Costs awards should not be set aside on appeal unless the judge below made an error in principle or the award is plainly wrong... Discretionary orders of case management justices are similarly

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[4] *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, [2017] 1 SCR 478, 2017 SCC 26 at para 20 [*Jodoin*] **[Tab 3]**

[5] *Alberta Rules of Court*, Alta Reg 124/2010, Rule 14.5(1)(e) **[Tab 1]**

> afforded deference, and absent an error of law, this Court will not interfere unless the decision was unreasonable...[6]

12. The Supreme Court of Canada recently confirmed in *R v Jodoin*, that the standard of appellate review on a personal cost award against a lawyer is deferential given the discretionary nature of such cost 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."[7] 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."[8]

13. The CMJ did not make any error in principle (or law) and made a discretionary decision which was reasonable and based on sufficient objective evidence to justify the award of costs against the Applicant personally. The Court of Appeal ought to afford his decision deference.

(ii) The CMJ properly found that the Stoney Application constituted serious abuse, and this was admitted by Ms. Kennedy's counsel during the hearing.

14. The crux of the Applicant's submission is that there is merit to the position she advanced in the Stoney Application and that the basis on which she asserted membership in Sawridge on behalf of Stoney and siblings before the CMJ was a basis which had not been previously raised, argued, or adjudicated, such that the CMJ misconstrued the argument which formed the basis of the Stoney of the Application. In particular, the Applicant now submits that there is an alternative constitutional basis upon which acquired rights membership for Stoney and his siblings might be found under section 35 of the *Constitution Act, 1982*, which recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada.

15. This argument ignores the substance of the written submissions made by Ms. Kennedy on behalf of Stoney (and his siblings) before the CMJ, which clearly assert acquired rights membership on the basis of Bill C-31 and the 2003 decision of Federal Court Justice Hugessen in *Sawridge Band v Canada*,[9] which was upheld by the Federal Court of Appeal in 2004.[10] This

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[6] *Bun v Seng*, 2015 ABCA 165 at para 5 [Applicant's Memorandum of Argument, Tab 1]
[7] *Jodoin*, at para 52 **[Tab 3]**
[8] *Jodoin* at para 51 **[Tab 3]**
[9] *Sawridge Band v Canada*, [2003] 4 FCR 748 **[Tab 4]**
[10] *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 FCR 274 **[Tab 5]**

very argument was rejected by Justice Barnes of the Federal Court of Canada in the 2012 Action, a judicial review application brought by the Applicant on behalf of Stoney following the denial of his membership application by Sawridge and the Sawridge Appeal Committee.[11]

16. 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 paragraphs 14-16, 20-21, and 28 of the Applicant's September 28, 2016 submissions, [12] to paragraphs 4, 21, 36, 39, and 53 of the Applicant's October 27, 2016 submissions, [13] and paragraphs 2-3 of the Applicant's November 15, 2016 submissions.[14] In all of these submissions, the Applicants asserts membership in Sawridge on behalf of Stoney (and his siblings) 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 2003 Federal Court order and the Federal Court of Appeal's 2004 decision upholding that order.

17. It is difficult to conceive how the CMJ (and all counsel) could be found to have misconstrued the argument being advanced by the Applicant. She repeatedly made the same submissions in three separate written submissions filed September 28, October 27, and November 15, 2016, the latter two of which were been filed with the benefit of having received, and presumably reviewed, Sawridge's submissions from September 28, 2016, and the final of which was filed with the benefit of having received, and presumably reviewed, Sawridge's and the Trustees' respective submissions dated October 31, 2016.

18. Additionally, it is problematic that the Applicant waited until this Application before the Court of Appeal to clarify the basis of her assertion of membership before the CMJ. She did not raise this particular argument in any of her three written submissions. Even more concerning and problematic is that neither she nor her counsel addressed the apparent misconstruing of her submissions during the July 28, 2017 hearing before the CMJ which was a hearing convened specifically by the CMJ to provide her with an opportunity to make submissions as to why she ought to not be subjected to a personal cost award. Instead, her counsel admitted she had prosecuted Stoney's claim too far in bringing the Stoney Application.

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[11] *Stoney v Sawridge First Nation*, 2013 FC 509 **[Tab 6]**
[12] Affidavit of Priscilla Kennedy, Exhibit E.
[13] Ms. Kennedy's October 27, 2016 submissions **[Respondent's Other Materials to be Relied on, Tab D]**
[14] Affidavit of Priscilla Kennedy, Exhibit G.

19. These admissions were not lost on the CMJ, who noted in his decision that the Applicant's counsel at the July 28, 2017 hearing admitted that the Stoney Application was hopeless and constituted an abuse of process.[15]The admissions cannot be ignored on this Application.[16]

20. Furthermore, section 35 of the *Constitution Act, 1982* and Treaty 8, which are now relied upon by the Applicant as the *new* basis on which membership could be asserted, were expressly *raised* in the grounds for the Application for judicial review of the Sawridge Appeal Committee's denial of membership that the Applicant filed on behalf of Mr. Stoney in the Federal Court of Canada in 2012 and in her written submissions to the Federal Court.[17]

21. In any event, the argument now advanced by the Applicant on this Application fails to distinguish between indigenous persons' right to recognized *status* under the *Indian Act* as compared to any right such persons might have to *membership* in Sawridge. Bill C-31 gave Stoney the right to have his Indian *status* restored, but did not give him anything more than the right to apply for membership in Sawridge pursuant to its membership rules, as previously conceded and determined in Federal Court proceedings involving Mr. Stoney,[18] and as addressed at length in the written submissions filed by Sawridge before the CMJ.[19]

22. Based on the foregoing, there is no merit to the Applicant's assertion that the CMJ misconstrued her submissions or that she raised a new basis on which to assert membership in Sawridge which had not previously been considered by the Court. The question of Stoney's automatic right to membership is *res judicata* having been denied by the Federal Court. It was not (and is not) open to the Applicant to circumvent that decision, which was not appealed, by making alternative arguments on membership to the CMJ (or now to the Court of Appeal).

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[15] *Sawridge #7* at para 130 [Applicant's Memorandum of Argument, Appendix A]
[16] Affidavit of Priscilla Kennedy, Exhibit H, Transcript of Proceedings before the CMJ on July 28, 2017 at 4:38-40, 5:18-21, 6:22-26, 7:15-19; and 8:23-28.
[17] Sawridge's September 28, 2016 submissions at Tab 2 **[Respondent's Other Materials to be Relied on, Tab C]** and Sawridge's October 31, 2016 submissions at Tab 2 **[Respondent's Other Materials to be Relied on, Tab E]**
[18] *Huzar v Canada*, 2000 CanLII 15589 at paras 4-5 (FCA) **[Tab 7]**; *Stoney v Sawridge First Nation*, 2013 FC 509 at paras 15-17 **[Tab 6]**
[19] Sawridge's September 28, 2016 submissions **[Respondent's Other Materials to be Relied on, Tab C]**; Sawridge's October 31, 2016 submissions **[Respondent's Other Materials to be Relied on, Tab E]**; Sawridge's November 14, 2016 submissions **[Respondent's Other Materials to be Relied on, Tab F]**

(iii) The CMJ applied the correct test for a personal costs award.

23. The CMJ applied the proper test for a personal cost award against a lawyer, citing extensively from the recent Supreme Court of Canada decision in *Jodoin* and numerous other cases. The CMJ was well aware of the serious nature of a personal costs award and the need for Courts to exercise caution in applying such sanctions to lawyers, particularly in light of the potential conflict in obligations owed to their client and the Courts.[20]

24. Reading the decision of the CMJ in its entirety shows that he did not accept submissions made on behalf of Ms. Kennedy that the application was not made with bad motive or the intent to abuse court processes. Rather, at paragraph 18 of the decision, cited by the Applicant in her argument, the CMJ was simply summarizing the submissions made by the Applicant's counsel, Mr. Wilson, during oral submissions.[21]

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

25. The CMJ's expressly stated two bases for ordering costs, and he expressed that these were *independent bases* either of which were sufficient for concluding the Applicant should be liable for costs personally, namely: (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 person that were not her clients on a busybody basis.[22] What the CMJ highlighted in making the costs award against the Applicant is the futile nature of the application: "What is critical is that the August 12, 2016 application had no merit."[23]

26. The CMJ expressly did not base his decision on the factors he characterized as "aggravating"; he simply stated that these factors emphasize his conclusion is correct and that these factors include the following: that Ms. Kennedy proceeded with the Stoney Application in the face of previous unpaid costs awards by her client; the attempt to offload the costs of the Stoney Application onto the 1985 Sawridge Trust; that Ms. 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

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[20] *Sawridge #7* at paras 68, 76-80 [Applicant's Memorandum of Argument, Appendix A]
[21] Affidavit of Priscilla Kennedy, Exhibit H, Transcript of Proceedings before the CMJ on July 28, 2017 at 7:15-17.
[22] *Sawridge #7* at paras 150-151 [Applicant's Memorandum of Argument, Appendix A]
[23] *Sawridge #7* at paras 144 [Applicant's Memorandum of Argument, Appendix A] [Emphasis added]

Application was a challenge to Sawridge's internal decision making, self-determination, and self-government.[24]

27. The Applicant submits that the CMJ erred by treating her as though she had been "warned or alerted" that her application was abusive, and she focuses only the warnings issued by the CMJ in *Sawridge #4* and *Sawridge #5* (which came after the materials had been filed in relation to *Sawridge #6*). This position ignores the fact that the Applicant had already been alerted to the futile and abusive nature of the application by virtue of the decision of Justice Barnes in Federal Court and the materials filed by Sawridge and the Trustees in response to the Application. It further ignores that she was aware of the CMJ's direction in *Sawridge* #3 that membership issues were not to be adjudicated by the Court 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. In these circumstances, the CMJ acted appropriately in treating her as if she had been warned. In any event, in light of previous warnings and the warnings in *Sawridge #4* and *#5,* she could have considered abandonment of the Application at any time before the decision in *Sawridge #6* was issued.

(v) The CMJ was correct with respect to his busybody finding and would have ordered costs against the Applicant personally in any event.

28. The Applicant asserts that the Stoney Application was being advanced as 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 one or more persons on their own behalf and *on behalf of* others, as reflected in the style of cause.[25]

29. In Alberta, a person purporting to sue in a representative capacity must set out in the style of cause that he or she is suing in such a capacity, and the representative action must relate to "numerous persons" having a common interest.[26]

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[24] *Sawridge #7* at paras 143, 147-150. [Applicant's Memorandum of Argument, Appendix A]
[25] *Lameman v Canada (Attorney General)*, 2007 ABCA 180 [Applicant's Memorandum of Argument, Tab 3] and *Western Canadian Shopping Centres Inc. v Bennett Jones Verchere*, 1998 ABCA 392 at para 14 [Applicant's Memorandum of Argument, Tab 4]
[26] *Goodfellow v Knight* (1977), 5 AR 573, 1977 CanLII 538 (QB) at paras 6 and 23 **[Tab 8]**

30. A review of the Stoney Application indicates that it was not clearly framed as a representative action, as now claimed. No mention of the applicable Rule of Court is made in the Application or in written submissions in response to this submission made by the Trustees that a representative action is not even appropriate in this circumstance where not all siblings share the same facts on their applications for membership.[27]

31. The Application itself specifically identifies and names a finite group of 10 people as those persons seeking to be added as parties or intervenors to the underlying action, namely: Maurice Stoney, Billy Stoney, Angeline Stoney, Linda Stoney, Bernie Stoney, Betty Jean Stoney, Gail Stoney, Alma Stoney, Alva Stoney, and Bryan Stoney. In her September 28, 2016 submissions to the CMJ, the Applicant specifically identified these persons as the "the Applicants in this Application" and specifically sought indemnification for each of the siblings from the Trust.[28] She further specifically identified each of these persons as the "Respondents" to Sawridge's intervenor application in her submission filed October 27, 2016.[29]

32. In any event, even absent the busybody finding, the CMJ expressly stated he would have found her liable for costs based on her role in advancing a futile and vexatious claim, which he stated was an independent basis on which to make the personal costs award against her.

(vi) The issues on appeal are of no general importance or practical utility.

33. Given the discretionary and fact-specific nature of the decision, an appeal would be of little general importance and have limited practical utility. The CMJ has not created any new law on the issue of personal costs awards against a lawyer. He has merely applied existing case law in the context of the cultural shift called for by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7, with an emphasis on that Court's recent decision in *Jodoin*.

34. In suggesting that the Court of Appeal's consideration is required in this case because the CMJ diverged in his interpretation of *Jodoin* as compared to Justice Graesser's recent interpretation of same in *Morin v TransAlta Utilities Corporation*, the Applicant has misconstrued Justice Graesser's comments in *Morin*. Justice Graesser did not reach a conclusion

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[27] Affidavit of Priscilla Kennedy, Exhibit B and Exhibit E; see also *Western Canadian Shopping Centres Inc. v Bennett Jones Verchere*, 1998 ABCA 392 at para 14 [Applicant's Memorandum of Argument, Tab 4]
[28] Affidavit of Priscilla Kennedy, Exhibit B and Exhibit E at para 11 and 30-32.
[29] Ms. Kennedy's October 27, 2016 submissions **[Respondent's Other Materials to be Relied on, Tab D]**

about *Jodoin*, other than to state that it "does not create a remedy that was not already there in the Rules of Court or at common law in civil proceedings."[30]

35. The CMJ has synthesized and applied this existing case law to specific circumstances of this case, where there was serious misconduct on the part of the Applicant in advancing a hopeless application on behalf of Maurice Stoney (and his siblings) which constituted an abuse of process. The decision was proper exercise of the CMJ's judicial discretion having regard to the specific circumstances of this particular case.

III. RELIEF REQUESTED

36. For the foregoing reasons, the Respondent, Sawridge, requests the following relief:

(a) A determination that the Applicant does require permission to appeal *Sawridge #7*, in accordance with Rule 14.5(1)(e);

(b) Denial of the Application for permission to appeal *Sawridge #7*; and

(c) Costs of this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of October, 2017.

PARLEE McLAWS LLP

per:

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

Estimated Time for Oral Argument: 30 minutes

[30] *Morin v TransAlta Utilities Corporation*, 2017 ABQB 409 at para 39 [Applicant's Memorandum of Argument, Tab 8]

IV. LIST OF AUTHORITIES AND OTHER MATERIALS RELIED ON

A. AUTHORITIES (attached this this Memorandum of Argument)

Appendix A	Chronology of Maurice Stoney's Claims to Membership in Sawridge
Appendix B	Filed Order of The Honourable Mr. Justice D.R.G. Thomas in *Sawridge #7*
Tab 1	*Alberta Rules of Court*, Alta Reg 124/2010, Rule 14.5(1)(e)
Tab 2	*Young v Young*, 1990 CanLII 1965 (BCCA)
Tab 3	*Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, [2017] 1 SCR 478, 2017 SCC 26
Tab 4	*Sawridge Band v Canada*, [2003] 4 FCR 748
Tab 5	*Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 FCR 274
Tab 6	*Stoney v Sawridge First Nation*, 2013 FC 509
Tab 7	*Huzar v Canada*, 2000 CanLII 15589 (FCA)
Tab 8	*Goodfellow v Knight* (1977), 5 AR 573, 1977 CanLII 538 (QB)
Tab 9	*1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548 (*Sawridge #8*)

B. OTHER MATERIALS TO BE RELIED ON (in separate volume)

Tab A	Affidavit of Roland Twinn sworn September 21, 2016
Tab B	Exhibit "L" to the Affidavit of Maurice Stoney sworn May 17, 2016
Tab C	Sawridge's September 28, 2016 submissions with only Tabs 2 and 3 attached
Tab D	Ms. Kennedy's October 27, 2016 submissions (no attachments)
Tab E	Sawridge's October 31, 2016 submissions with only Tab 2 attached
Tab F	Sawridge's November 14, 2016 submissions (no attachments)

Tab A

Chronology of Maurice Stoney's Claims to Membership in Sawridge

1. In 1944, William Stoney, the father of Maurice 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 and were consequently no longer members of Sawridge.

Affidavit of Roland Twinn sworn September 21, 2016 ("Twinn Affidavit") at paras 5, 31 and 32 **[Respondent's Other Materials to be Relied on, Tab A]**

2. Bill C-31 was enacted by the Federal Government on April 17, 1985. It gave Maurice 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.

Twinn Affidavit at paras 6 and 7 **[Respondent's Other Materials to be Relied on, Tab A]**

3. Maurice 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**"). Maurice Stoney and the other Plaintiffs also sought an Order that their names be added to the Sawridge's membership list.

Twinn Affidavit at paras 8 - 10 **[Respondent's Other Materials to be Relied on, Tab A]**

4. 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.

Twinn Affidavit at paras 11 and 12**[Respondent's Other Materials to be Relied on, Tab A]**

5. 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.

Huzar v Canada, 2000 CanLII 15589 (FCA) at para 6 **[Tab 7]**

Twinn Affidavit at para 29 **[Respondent's Other Materials to be Relied on, Tab A]**

6. One of the arguments that was 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, Maurice 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 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.

Huzar v Canada, 2000 CanLII 15589 (FCA) at paras 4-5 **[Tab 7]**

7. Maurice 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 Maurice Stoney did not have an acquired right to be a member of Sawridge.

8. Maurice 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 Maurice Stoney's Affidavit filed in support of the Stoney Application, that application was never ignored.

Twinn Affidavit at paras 15 and 16 **[Respondent's Other Materials to be Relied on, Tab A]**

9. Maurice Stoney's application for membership was denied on or around December 7, 2011. According to the letter that was sent to Maurice 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.

Twinn Affidavit at para 16

Exhibit "L" to the Affidavit of Maurice Stoney **[Respondent's Other Materials to be Relied on, Tab B]**

10. In accordance with Sawridge's membership rules and its Constitution, Maurice 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.

Twinn Affidavit, at para 17 and Exhibit 2 at Tab Y **[Respondent's Other Materials to be Relied on, Tab A]**

11. At the hearing before the Sawridge Appeal Committee, Maurice Stoney was represented by legal counsel, Ms. Priscilla Kennedy (then of Davis LLP) ("**Ms. Kennedy**"), who submitted that Maurice 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.

Twinn Affidavit, Exhibit 2 at Tab W **[Respondent's Other Materials to be Relied on, Tab A]**

12. 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.

Twinn Affidavit, Exhibit 2, Tab Y **[Respondent's Other Materials to be Relied on, Tab A]**

13. Maurice 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, Ms. Kennedy.

Twinn Affidavit at para 18 **[Respondent's Other Materials to be Relied on, Tab A]**

14. As part of the 2012 Action, Maurice Stoney advanced a number of grounds which he alleged were cause to overturn the decision to deny him membership. Those grounds are listed in Maurice 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.*

September 28, 2016 Sawridge Submissions at Tab 2 **[Respondent's Other Materials to be Relied on, Tab C]**

15. Maurice Stoney swore an Affidavit as part of 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.

September 28, 2016 Sawridge Submissions at Tab 3**[Respondent's Other Materials to be Relied on, Tab C]**

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

    (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.

Twinn Affidavit at para 19 and Exhibit 2 at paras 2, 3, 8, 11, 12, and 18
[Respondent's Other Materials to be Relied on, Tab A]

17. Maurice 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 Maurice's application, and awarded costs to Sawridge.

Stoney v Sawridge First Nation, 2013 FC 509 **[Tab 6]**

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

Rather, Justice Barnes noted that Maurice 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.

Stoney v Sawridge First Nation, 2013 FC 509 at paras 11-15 **[Tab 6]**

19. Additionally, Justice Barnes wrote that the judicial review application that was the subject matter of the 2012 Action was an attempt by Maurice 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.

Stoney v Sawridge First Nation, 2013 FC 509 at para 17**[Tab 6]**

20. Maurice Stoney was represented by Ms. Kennedy in the 2012 Action.

Stoney v Sawridge First Nation, 2013 FC 509 **[Tab 6]**

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

Twinn Affidavit at paras 22 and 29 **[Respondent's Other Materials to be Relied on, Tab A]**

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

Sawridge #6 at paras 47-51[Applicant's Memorandum of Argument, Tab 2]

23. Nevertheless, on January 31, 2014, Maurice 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, Maurice Stoney's complaint was based on an allegation that Sawridge's decision to deny his membership was discriminatory.

Twinn Affidavit at para 24 **[Respondent's Other Materials to be Relied on, Tab A]**

24. The Deputy Chief Commissioner of the CHRC issued a decision regarding the complaint by Maurice 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 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.

Twinn Affidavit, Exhibit "5" **[Respondent's Other Materials to be Relied on, Tab A]**

25. In late 2015, Maurice 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***"). Maurice Stoney was not a party to the action at that time. In light of the fact that Maurice Stoney's counsel, Ms. Kennedy, had failed to file a Civil Notice of Appeal within the requisite time under the *Rules of Court*, Maurice 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.

Stoney v 1985 Sawridge Trust, 2016 ABCA 51 [Applicant's Memorandum of Argument, Tab 9]

26. Maurice Stoney was represented by Ms. Kennedy in the Application to the Court of Appeal before Mr. Justice J. Watson.

Stoney v 1985 Sawridge Trust, 2016 ABCA 51 at p 6 [Applicant's Memorandum of Argument, Tab 9]

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

Stoney v 1985 Sawridge Trust, 2016 ABCA 51 at paras 23-24 [Applicant's Memorandum of Argument, Tab 9]

28. In his written reasons, Justice Watson provided an overview of the basis of Maurice 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.

Stoney v 1985 Sawridge Trust, 2016 ABCA 51 at paras 2-3 [Applicant's Memorandum of Argument, Tab 9]

29. With regards to Maurice Stoney's allegations regarding his membership in Sawridge, Justice 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. [Emphasis Added]

Stoney v 1985 Sawridge Trust, 2016 ABCA 51 at para 20 [Applicant's Memorandum of Argument, Tab 9]

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

Twinn Affidavit at paras 28 and 29 **[Respondent's Other Materials to be Relied on, Tab A]**

31. Then, on August 12, 2016, Maurice 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.

Affidavit of Priscilla Kennedy, Exhibit B

32. 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 restricting Maurice Stoney's access to the courts.

Sawridge #6 at paras 47-51[Applicant's Memorandum of Argument, Tab 2]

33. Maurice Stoney, on his own behalf, filed an appeal of *Sawridge #6* on August 11, 2017, being Court of Appeal File Number 1703-0195AC.

34. In *Sawridge #6*, the CMJ directed that the parties re-attend before him on July 28, 2017 for a hearing as to whether Ms. 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 Maurice Stoney should be declared a vexatious litigant.

Sawridge #6 at paras 63-66 and 77-81[Applicant's Memorandum of Argument, Tab 2]

35. On July 28, 2017, the parties appeared before the CMJ, as directed in *Sawridge #6*, to make submissions on the question of whether Ms. Kennedy should be held personally liable for some or all of the costs award made against her client, Maurice Stoney, in *Sawridge #6*. Ms. Kennedy was represented by Don Wilson of DLA Piper at the hearing.

Affidavit of Priscilla Kennedy, Exhibit H, Transcript of Proceedings before the CMJ on July 28, 2017

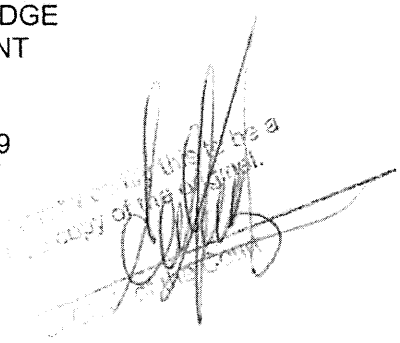
36. On September 12, 2017, the CMJ issued his decision on the July 28, 2017 hearing in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530 (***Sawridge #7***) and ordered that Ms. Kennedy be held personally liable for the costs award made in *Sawridge #6* on a joint and several basis with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

Sawridge #7, [Applicant's Memorandum of Argument, Appendix A]

37. S*awridge #7* forms the subject matter of the within Appeal and Application by Ms. Kennedy which is currently before the Court of Appeal for advice and direction as to whether permission of the Court is required to appeal *Sawridge #7* and, if so, for permission to appeal.

Tab B

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") and
	THE OFFICE OF THE PUBLIC TRUSTEE AND GUARDIAN ("OPGT")
INTERVENOR	SAWRIDGE FIRST NATION aka THE SAWRIDGE BAND ("SFN")
DOCUMENT	**ORDER RE: SAWRIDGE #7**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Dentons Canada LLP** 2900, 10180 101 Street Edmonton, AB T5J 3V5 Attention: Doris Bonora Telephone: (780) 423-7188 Facsimile: (780) 423-7276 File No.: 551880 -1



DATE ON WHICH ORDER WAS PRONOUNCED: August 31, 2017 (Sawridge #7)

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Honourable Justice D.R.G. Thomas

UPON THIS COURT'S DIRECTION that Priscilla Kennedy appear before me at 2 p.m. on Friday, July 28, 2017, to make submissions on why she should not be personally responsible for some or all of the costs awarded against her client, Maurice Stoney; in Case Management Decision (Sawridge #6) herein;

AND UPON THIS COURT'S FURTHER DIRECTION that counsels for the Sawridge First Nation and the Trustees of the 1985 Sawridge Trust should appear to comment on this issue and may introduce evidence as further described at paragraph 81 of Case Management Decision (Sawridge #6);

AND UPON HAVING READ THE AFFIDAVITS filed on behalf of Priscilla Kennedy only;

AND UPON HAVING HEARD what was said by the counsels for Priscilla Kennedy, the Sawridge First Nation and the Trustees of the 1985 Sawridge Trust;

AND UPON THE DELIVERY OF WRITTEN REASONS FOR DECISION of Honourable Mr. Justice Thomas dated August 31, 2017, entitled Case Management Decision (Sawridge #7);

IT IS HEREBY ORDERED THAT:

1. Priscilla Kennedy has conducted an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system on two independent bases:

   (a) Priscilla Kennedy conducted futile litigation that was a collateral attack of a prior unappealed decision of a Canadian court; and

   (b) Priscilla Kennedy conducted that litigation allegedly on behalf of persons who were not her clients on a "busybody" basis (150).

2. Priscilla Kennedy and Maurice Stoney are liable jointly and severally for solicitor and client indemnity costs of the Sawridge Trustees and the Sawridge First Nation. (150, 152, 153 and 154).

3. Maurice Stoney, Priscilla Kennedy, the Sawridge Trustees and Sawridge First Nation may return to the Court if they require assistance to determine the costs payable. Costs are payable immediately. (155)

4. A copy of Case Management Decision (Sawridge #7) shall be delivered to the Law Society of Alberta for its review.

Honourable Justice D.R.G. Thomas

Entered this _____ day of October, A.D. 2017

CLERK OF THE COURT

Tab 1

Subdivision 2
Appeals as of Right

Right to appeal

14.4(1) Except as otherwise provided, an appeal lies to the Court of Appeal from the whole or any part of a decision of a Court of Queen's Bench judge sitting in court or chambers, or the verdict or finding of a jury.

(2) No appeal is allowed to the Court of Appeal from the dismissal by a Court of Queen's Bench judge of an application made without notice.

(3) Where an application has been made to the Court of Queen's Bench without notice and has been dismissed, the applicant may reapply

(a) on notice, if the dismissal was for lack of notice, or

(b) by renewal of the application if the dismissal was for reasons other than the lack of notice.

(4) No appeal is allowed directly to the Court of Appeal from a decision of a master in chambers.

(5) No appeal is allowed

(a) from a judgment granting a divorce, on or after the date on which the divorce takes effect, or

(b) unless an appeal judge extends the time, from an order made in a divorce proceeding, more than 30 days after the date on which the order was made.

AR 41/2014 s4

Subdivision 3
Appeals with Permission

Appeals only with permission

14.5(1) Except as provided in this rule, no appeal is allowed to the Court of Appeal from the following types of decisions unless permission to appeal has been obtained:

(a) a decision of a single appeal judge;

(b) any pre-trial decision respecting adjournments, time periods or time limits;

(c) any ruling during trial, where the appeal is brought before the trial is concluded;

(d) a decision made on the consent of the parties;

(e) a decision as to costs only, but an appeal or cross appeal is not "as to costs only" if a related substantive decision is also being appealed;

(f) any decision where permission to appeal is required by an enactment;

(g) any decision in a matter where the controversy in the appeal can be estimated in money and does not exceed the sum of $25 000 exclusive of costs;

(h) any decision on security for costs;

(i) any decision of the Court of Queen's Bench sitting as an appeal court under rule 12.71;

(j) any appeal by a person who has been declared a vexatious litigant in the court appealed from.

(2) Permission to appeal decisions of single appeal judges under subrule (1)(a) must be sought from the same judge who made the decision that is to be appealed.

(3) No appeal is allowed under subrule (1)(a) from a decision of a single appeal judge granting or denying permission to appeal.

(4) No appeal is allowed under subrule (1)(j) from an order denying the vexatious litigant permission to institute or continue proceedings.

AR 41/2014 s4; 85/2016

Subdivision 4
Cross Appeals

Cross appeals

14.6(1) A respondent to an appeal may cross appeal any decision on which it could have commenced an appeal, by filing a notice of cross appeal under rule 14.11.

(2) Subject to subrule (3), where an appeal has been commenced as of right or with permission, the respondent does not need permission to file a cross appeal with respect to any decision described in rule 14.5 if the cross appeal is only intended to vary the decision already under appeal.

(3) Where an enactment provides that an appeal may be commenced in the Court of Appeal with permission, a respondent who wishes to cross appeal must apply for permission to cross appeal.

AR 41/2014 s4

Tab 2

CA011865, CA011864, CA011867
Vancouver Registry

ORAL REASONS FOR JUDGMENT:

BEFORE THE HONOURABLE — April 12, 1990

MR. JUSTICE HINKSON

IN CHAMBERS — Vancouver, B.C.

BETWEEN:

JAMES KAM CHEN YOUNG

RESPONDENT
(APPELLANT)

AND:

IRENE HELEN YOUNG

PETITIONER
(RESPONDENT)

AND:

W. GLEN HOW

APPELLANT

AND:

THE BURNABY UNIT OF THE NEW WESTMINSTER CONGREGATION OF JEHOVAH'S WITNESSES

APPELLANT

G. Turriff, Esq. — appearing for the Appellants, G. How and Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses

Miss J. Dassonville and M. Patton, Esq. — appearing for the Appellant, James Kam Chen Young

L. MacLean, Esq. and F. Lowther, Esq. — appearing for the Respondents

(applications for leave to appeal and for extension of time)

HINKSON, J.A.: These are applications from decisions made at trial in these proceedings in which the trial judge awarded costs against the Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses personally, and against counsel for the plaintiff, Mr. How. Neither of these parties were litigants but in view of the proceedings before the trial judge and the conduct of those proceedings before trial and at trial, the trial judge exercised a discretion and exercised the inherent jurisdiction of the Supreme Court to make the awards of costs. Costs were to be paid by both the Burnaby Unit and Mr. How on a solicitor and client basis.

To begin with Mr. How seeks a declaration that he has an appeal as of right notwithstanding the provisions of s.6.2 of the *Court of Appeal Act*, R.S.B.C. 1979, c.7. That subsection provides notwithstanding 6.1 an appeal respecting costs only does not lie to the Court without leave of a justice.

Mr. Turriff urged on behalf of Mr. How that as a solicitor he was entitled to appeal the award of costs against him personally and did not require leave. In making that submission he relied on certain English authorities. In my view the proper interpretation of s.6.2 leaves no doubt that in this jurisdiction a person seeking to appeal costs only, does require leave. I indicated that I did not subscribe to that submission.

I am reinforced in that view when I come to the application on behalf of the Burnaby Unit. It too, sought a similar declaration and it was on the basis that by analogy if solicitors who are ordered to pay costs personally do

not require leave to appeal, even though leave is otherwise required for an appeal respecting costs only, non-parties against whom orders for costs are made should also have an appeal without the leave requirement. There is no ambiguity about the provisions of s.6.2. Applying the usual Rules of Statutory Interpretation, in my view it is clear that leave is required.

In those circumstances, Mr. Turriff proceeded then on an alternative basis to seek leave to appeal. He seeks leave to appeal upon the basis that this Court should pass on what principles should be applied when costs are to be awarded against a solicitor personally.

In the past this Court has had occasion to deal with the matter of costs awarded on a solicitor and client basis and has established that such costs should only be awarded where there has been misconduct in the course of the proceedings. But, the issues sought to be raised by Mr. Turriff has not been passed upon by this Court.

The costs at trial have been taxed by agreement, in the sum of $50,000. Mr. Turriff has been placed in funds in that amount and those funds are presently in his trust account. Pursuant to my request, he has determined that the money, namely the $50,000 has been loaned by the Jehovah's Witnesses Church to those liable to pay costs personally. Mr. Turriff has informed me that the appellant, Mr. Young, is not going to have to pay the costs awarded at trial, nor is the Burnaby Congregation, and that only Mr. How is at risk in respect of those costs.

Having regard to the decisions in this Court dealing with the basis in which leave ought to be granted, it seems to me that in this case there is an important principle raised on this application and there is merit to the arguments to be advanced. In those circumstances, with some reluctance that the respondent, Mrs. Young, is going to be embroiled in further litigation in this

matter, I have concluded that this is an appropriate case in which to grant leave to Mr. How.

In my opinion, different considerations apply to the Burnaby Unit. Costs were awarded against it personally but as I have indicated Mr. Turriff has informed me that regardless of the outcome, the Burnaby Unit will not be personally liable to pay the costs. In that sense, in my opinion, the application for leave to appeal, and if it were granted, the appeal of the Burnaby Unit, has become academic.

It also seeks to raise the question of when a non-party can be held liable to pay the costs on a personal basis. This Court in the past has dealt with that issue, not just on the basis of where fraud has been shown to have been perpetrated by the party against whom costs are sought but in other situations as well. In my opinion, there are some overriding considerations with respect to granting leave to that party.

The trial judge has commented on the number of interlocutory applications that have taken place in these proceedings on behalf of the husband. The wife at times has been on welfare. She has no substantial funds with which to retain counsel. She has the responsibility of the upbringing of the three children who were the subject matter of these proceedings, and it seems to me that it is not in the interests of justice that she should become involved in a further appeal involving the Burnaby Unit. Those considerations outweigh, in my opinion, the consideration of granting leave to that applicant to have the issue it seeks to raise determined by this Court.

Sitting as a judge in chambers I have a discretion in this matter and exercising that discretion upon the basis of the considerations I have mentioned, I would refuse leave to the Burnaby Unit to appeal the matter of costs against it.

By agreement of counsel this appeal is limited to grounds three, four, five, and seven as set out in the Amended Notice of Appeal.

There will be orders accordingly.

E.E.H.
J.A.

Tab 3

Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin, [2017] 1 SCR 478, 2017 SCC 26 (CanLII)

Date: 2017-05-12
Docket: 36539
Other citations: 408 DLR (4th) 581; [2017] SCJ No 26 (QL); [2017] ACS no 26
Citation: Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin, [2017] 1 SCR 478, 2017 SCC 26 (CanLII), <http://canlii.ca/t/h3q0c>, retrieved on 2017-10-26

SUPREME COURT OF CANADA

CITATION: Quebec (Director of Criminal and Penal Prosecutions) *v.* Jodoin, 2017 SCC 26, [2017] 1 S.C.R. 478

APPEAL HEARD: December 5, 2016
JUDGMENT RENDERED: May 12, 2017
DOCKET: 36539

BETWEEN:

Director of Criminal and Penal Prosecutions
Appellant

and

Robert Jodoin
Respondent

- and -

Director of Public Prosecutions,
Criminal Lawyers' Association (Ontario),
Association des avocats de la défense de Montréal,
Trial Lawyers Association of British Columbia and
Canadian Civil Liberties Association
Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of Gascon J.

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

REASONS FOR JUDGMENT: (paras. 1 to 57)	Gascon J. (McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Brown and Rowe JJ. concurring)
JOINT DISSENTING REASONS: (paras. 58 to 75)	Abella and Côté JJ.

Quebec (Director of Criminal and Penal Prosecutions) *v.* Jodoin, 2017 SCC 26, [2017] 1 S.C.R. 478

Director of Criminal and Penal Prosecutions *Appellant*

v.

Robert Jodoin *Respondent*

and

Director of Public Prosecutions,
Criminal Lawyers' Association (Ontario),
Association des avocats de la défense de Montréal,
Trial Lawyers Association of British Columbia and
Canadian Civil Liberties Association *Interveners*

Indexed as: Quebec (Director of Criminal and Penal Prosecutions) *v.* Jodoin

2017 SCC 26

File No.: 36539.

2016: December 5; 2017: May 12.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Costs — Lawyers — Courts — Jurisdiction — Superior Court dismissing motions of defence lawyer for writs of prohibition and awarding costs against lawyer personally — Court of Appeal setting award aside — Criteria and process applicable to exercise by courts of their power to impose such sanction on lawyer — Whether awarding costs against lawyer personally was justified in this case — Whether Court of Appeal erred in substituting its own opinion for that of Superior Court.

J, an experienced criminal lawyer, was representing 10 clients charged with impaired driving. On the morning of a scheduled hearing in the Court of Québec on a motion for disclosure of evidence in his clients' cases, before it even began, J had the office of the Superior Court stamp a series of motions for writs of prohibition in which he challenged the jurisdiction of the Court of Québec judge who was to preside over the hearing, alleging bias on the judge's part. However, before the motions were served, the parties learned that another judge would be presiding instead. The motions were therefore put aside, and the hearing on the motion for disclosure of evidence began. At the hearing, J objected to the testimony of an expert witness called by the Crown on the ground that he had not received the required notice. The judge decided to authorize the examination in chief of the expert after the lunch break. During the break, J drew up a new series of motions for writs of prohibition, this time challenging that judge's jurisdiction and alleging, once again, bias on the judge's part. After the break, he informed the judge of this and the hearing was adjourned, as the service of such motions suspends proceedings until the Superior Court has ruled on them. The Superior Court dismissed the motions and, at the Crown's request, awarded costs against J personally. The Court of Appeal affirmed the Superior Court's judgment on the disposition of the motions, but allowed the appeal solely to set aside the award of costs against J personally.

Held (Abella and Côté JJ. dissenting): The appeal should be allowed and the award of costs restored.

Per McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ.: The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them. A court therefore has an inherent power to control abuse in this regard and to prevent the use of procedure in a way that would be manifestly unfair to a party to the litigation before it or would in some

other way bring the administration of justice into disrepute. This is a discretion that must be exercised in a deferential manner, but it allows a court to ensure the integrity of the justice system.

The awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct. This power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases, which means that it may be exercised against defence lawyers. This power applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members.

The threshold for exercising the courts' discretion to award costs against a lawyer personally is a high one. An award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate.

There are two important guideposts that apply to the exercise of this discretion. The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers, whose role is not comparable in every respect to that of a lawyer in a civil case. If costs are awarded against a lawyer personally, the purpose must not be to discourage the lawyer from defending his or her client's rights and interests, and in particular the client's right to make full answer and defence. Thus, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings. The second guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial. To consider facts external to the case before the court can be justified only for the limited purpose of determining, first, the intention behind the lawyer's actions and whether he or she was acting in bad faith, and, second, whether the lawyer knew, on bringing the impugned proceeding, that the courts do not approve of such proceedings and that this one was unfounded.

A court cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards. A lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts, and should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. The applicable standard of proof is the balance of probabilities. In criminal

proceedings, the Crown's role on this issue must be limited to objectively presenting the evidence and the relevant arguments.

The circumstances of this case were exceptional and justified an award of costs against J personally. The Superior Court correctly identified the applicable criteria and properly exercised its discretion. As the court noted, J's conduct in the cases in question was particularly reprehensible. The purpose of that conduct was unrelated to the motions he brought. J was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. J thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the court to conclude that J had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice. The Court of Appeal should not have intervened in the absence of an error of law, a palpable and overriding error of fact or an unreasonable exercise of discretion by the Superior Court.

Per Abella and Côté JJ. (dissenting): Personal costs orders are of an exceptional nature. In the criminal context, such orders could have a chilling effect on criminal defence counsel's ability to properly defend their client. Accordingly, they should only be issued in the most exceptional of circumstances and the Crown should be very hesitant about pursuing them.

In the instant case, J's behaviour did not warrant the exceptional remedy of a personal costs order. It appears that his conduct was not unique and that he was being punished as a warning to other lawyers engaged in similar tactics. The desire to make an example of J's behaviour does not justify straying from the legal requirement that his conduct be rare and exceptional before costs are ordered personally against him.

Moreover, J's motions for writs of prohibition were not unfounded to a sufficient degree to attract a personal costs order. The Crown had not provided J with the notice required for an expert witness testimony under s. 657.3(3) of the *Criminal Code*. J was, as a result, entitled to an adjournment under s. 657.3(4). The judge presiding in the Court of Québec only granted him a brief one over the lunch break and mistakenly said that J had already cross-examined the Crown's expert in other matters. In the circumstances, J's filing of motions for writs of prohibition for the purpose of suspending the proceedings can easily be seen as an error of judgment, but hardly one justifying a personal costs order. For these reasons, the appeal should be dismissed.

Cases Cited

By Gascon J.

Applied: *Quebec (Attorney General) v. Cronier* (1981), 63 C.C.C. (2d) 437; **considered:** *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, 1979 CanLII 201 (SCC), [1979] 1 S.C.R. 842;

referred to: *R. v. Anderson*, 2014 SCC 41 (CanLII), [2014] 2 S.C.R. 167; *Canam Enterprises Inc. v. Coles* (2000), 2000 CanLII 8514 (ON CA), 51 O.R. (3d) 481, rev'd 2002 SCC 63 (CanLII), [2002] 3 S.C.R. 307; *Morel v. Canada*, 2008 FCA 53 (CanLII), [2009] 1 F.C.R. 629; *Myers v. Elman*, [1940] A.C. 282; *Pearl v. Gentra Canada Investments Inc.*, 1998 CanLII 12881 (QC CA), [1998] R.L. 581; *R. v. Liberatore*, 2010 NSCA 26 (CanLII), 292 N.S.R. (2d) 69; *R. v. Smith* (1999), 133 Man. R. (2d) 89; *Canada (Procureur général) v. Bisson*, [1995] R.J.Q. 2409; *United Nurses of Alberta v. Alberta (Attorney General)*, 1992 CanLII 99 (SCC), [1992] 1 S.C.R. 901; *R. v. Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 S.C.R. 331; *R. v. 974649 Ontario Inc.*, 2001 SCC 81 (CanLII), [2001] 3 S.C.R. 575; *R. v. Trang*, 2002 ABQB 744 (CanLII), 323 A.R. 297; *Fearn v. Canada Customs*, 2014 ABQB 114 (CanLII), 586 A.R. 23; *R. v. Ciarniello* (2006), 2006 CanLII 29633 (ON CA), 81 O.R. (3d) 561; *Leyshon-Hughes v. Ontario Review Board*, 2009 ONCA 16 (CanLII), 240 C.C.C. (3d) 181; *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395; *Histed v. Law Society of Manitoba*, 2007 MBCA 150 (CanLII), 225 Man. R. (2d) 74; *Groia v. Law Society of Upper Canada*, 2016 ONCA 471 (CanLII), 131 O.R. (3d) 1; *R. v. G.D.B.*, 2000 SCC 22 (CanLII), [2000] 1 S.C.R. 520; *R. v. Joanisse* (1995), 1995 CanLII 3507 (ON CA), 102 C.C.C. (3d) 35; *R. v. Handy*, 2002 SCC 56 (CanLII), [2002] 2 S.C.R. 908; *R. v. Carrier*, 2012 QCCA 594 (CanLII); *St-Jean v. Mercier*, 2002 SCC 15 (CanLII), [2002] 1 S.C.R. 491; *Ontario (Attorney General) v. Bear Island Foundation*, 1991 CanLII 75 (SCC), [1991] 2 S.C.R. 570; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (CanLII), [2004] 1 S.C.R. 303; *Galganov v. Russell (Township)*, 2012 ONCA 410 (CanLII), 294 O.A.C. 13; *Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136 (CanLII); *Québec (Procureur général) v. Bélanger*, 2012 QCCA 1669 (CanLII), 4 M.P.L.R. (5th) 21; *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 S.C.R. 631.

By Abella and Côté JJ. (dissenting)

Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3; *R. v. Gunn*, 2003 ABQB 314 (CanLII), 335 A.R. 137.

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APPEAL from a judgment of the Quebec Court of Appeal (Dutil, Levesque and Émond JJ.A.), 2015 QCCA 847 (CanLII), [2015] AZ-51175627, [2015] J.Q. n° 4142 (QL), 2015 CarswellQue 4364 (WL Can.), setting aside in part a decision of Bellavance J., 2013 QCCS 4661 (CanLII), [2013] AZ-51004528, [2013] J.Q. n° 13287 (QL), 2013 CarswellQue 10170 (WL Can.). Appeal allowed, Abella and Côté JJ. dissenting.

Daniel Royer and *Catherine Dumais*, for the appellant.

Catherine Cantin-Dussault, for the respondent.

Gilles Villeneuve and *Mathieu Stanton*, for the intervener the Director of Public Prosecutions.

Maxime Hébrard and *Marlys A. Edwardh*, for the intervener the Criminal Lawyers' Association (Ontario).

Walid Hijazi, *Lida Sara Nouraie* and *Nicholas St-Jacques*, for the intervener Association des avocats de la défense de Montréal.

Mathew P. Good and *Ariane Bisaillon*, for the intervener the Trial Lawyers Association of British Columbia.

Frank Addario and *Stephen Aylward*, for the intervener the Canadian Civil Liberties Association.

English version of the judgment of McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. delivered by

GASCON J. —

I. Overview

[1] This appeal concerns the scope of the courts' power to award costs[1] against a lawyer personally in a criminal proceeding. Although the courts have the power to maintain respect for their authority and to preserve the integrity of the administration of justice, the appropriateness of imposing such a sanction in a criminal proceeding must be assessed in light of the special role played by defence lawyers and the rights of the accused persons they represent. In such cases, the courts must be cautious in exercising this discretion.

[2] The respondent is an experienced criminal lawyer and a member of the Barreau du Québec. In several impaired driving cases joined for hearing on a single motion for disclosure of evidence, he filed two series of motions on the same day for writs of prohibition against two judges of the Court of Québec, each time on questionable grounds of bias, apparently in order to obtain a postponement of the scheduled hearing. A first judge had initially been assigned to preside over that hearing, but a second one replaced the first unexpectedly at the last minute. In response to that unprecedented strategy, which resulted in the postponement of the hearing in the Court of Québec, the appellant, the Crown, asked not only that the motions be dismissed, but also that the costs of the motions be awarded against the respondent personally.

[3] The Superior Court held that awarding costs against a lawyer personally can be justified in the case of a frivolous proceeding that denotes a serious and deliberate abuse of the judicial system. The judge expressed the opinion that the respondent's intentional acts were indicative of such abuse and constituted exceptional conduct that justified making an award against him personally. The Court of Appeal acknowledged that the motions for writs of prohibition should be dismissed, but nonetheless set aside the award of costs against the respondent personally, finding that his conduct did not satisfy the strict criteria developed by the courts in this regard.

[4] In my opinion, the appeal should be allowed. The Superior Court correctly identified the applicable criteria and properly exercised the discretion it has in such matters. The Court of Appeal should not have intervened in the absence of an error of law, a palpable and overriding error of fact or an unreasonable exercise of his discretion by the motion judge. Although the exercise of this discretion will be warranted only in rare cases, the circumstances of the instant case were exceptional and justified an award of costs against the respondent personally.

II. Context

[5] The relevant context of this case can be summarized briefly. In April 2013, the respondent was representing 10 clients charged with driving while impaired by alcohol or while their blood alcohol level exceeded the legal limit. There were 12 cases, and they were joined for a hearing scheduled in the Court of Québec on a motion for disclosure of evidence, because the accused were all represented by the respondent. On the morning of the hearing, before it even began, the respondent had the office of the Superior Court stamp a

series of motions for writs of prohibition in which he challenged the jurisdiction of the Court of Québec judge who was to preside over the hearing, alleging bias on the judge's part. As an experienced criminal lawyer, the respondent was well aware that the filing of such motions results in the immediate postponement of the hearing then under way until the Superior Court has ruled on them.

[6] However, the same morning, before the motions were served, the parties learned that another judge would be presiding over the hearing instead. The motions were therefore put aside, and the hearing on the motion for disclosure of evidence began. At the hearing, the Crown stated that it wished to call its expert witness. The respondent objected on the ground that he had not received the notice required by s. 657.3(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, and that he had been unable to consult the expert's resumé. He requested a postponement. The judge heard the parties on this subject and decided to authorize the examination in chief of the expert after the lunch break. In his view, the respondent would have an opportunity to examine the expert's resumé before the hearing resumed.

[7] During the break, the respondent chose instead to draw up a new series of motions for writs of prohibition, this time challenging the second judge's jurisdiction and alleging, once again, bias on the judge's part. After the break, he informed the judge of this. As a result of s. 25 of the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002*, SI/2002-46, which provides that the service of such motions suspends proceedings, the judge had no choice but to adjourn the hearing.

[8] The appellant, believing that the sole purpose of these successive extraordinary remedies was to obtain a postponement for an ulterior motive, objected to the respondent's tactic. He told the respondent that he intended to seek an award of costs against the respondent personally because of the latter's dilatory motions and abuse of process. The Superior Court thus heard the motions for writs of prohibition both on the merits and on the award of costs being sought against the respondent personally.

III. Judicial History

A. *Quebec Superior Court (2013 QCCS 4661 (CanLII))*

[9] The Superior Court judge began by rejecting the arguments on the merits of the motions for writs of prohibition against the Court of Québec judge. He found that the motions were unfounded and frivolous and that they were of questionable legal value for an experienced lawyer such as the respondent.

[10] The judge then dealt with the costs award being sought against the respondent. Indeed, he devoted the bulk of his reasons to that issue, as it was clear, to say the least, that the proceeding was frivolous, given that there was nothing in the words of the Court of Québec judge to indicate an excess of jurisdiction.

[11] On the law applicable to the issue of costs in criminal proceedings, the Superior Court judge cited *Quebec (Attorney-General) v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.). He noted that L'Heureux-Dubé J.A., as she then was, had emphasized [TRANSLATION] "the inherent power of the Superior Court to manage cases within its jurisdiction and to award costs not provided for by statute" (para. 115 (CanLII)). On the basis of the principles enunciated in *Cronier*, the judge found that the issue was whether what was before him was "a frivolous proceeding that denotes a serious abuse of the judicial system", an abuse that was "deliberate" (para. 117).

[12] On the facts of the case before him, the judge found that the [TRANSLATION] "preparation, at lunchtime on April 23, 2013, of a series of motions for writs of prohibition in a legal situation that did not call for such a proceeding, and the continued presentation of those proceedings," constituted abuse of "section 25 of the *Rules of Practice* and the suspension order it entails" (para. 118). In his analysis, the judge took the respondent's conduct in other cases into account in determining whether he had had culpable intent to file, as a calculated act, proceedings that he knew to be frivolous and abusive.

[13] The judge concluded that the respondent's conduct satisfied the applicable criteria and that it had [TRANSLATION] "led, in a manner that well-informed Canadians would not approve of, to paralysis of the legitimate work of the Court of Québec sitting in a criminal proceeding and to disruption of its local judges' case management work" (para. 119). He dismissed the motions for writs of prohibition and awarded costs against the respondent personally, setting them at $3,000 for all the cases combined, or $250 per case.

B. *Quebec Court of Appeal (2015 QCCA 847 (CanLII))*

[14] The Court of Appeal affirmed the Superior Court's judgment on the disposition of the motions for writs of prohibition, but allowed the appeal solely to set aside the award of costs against the respondent personally. It noted that, in criminal cases, [TRANSLATION] "costs have no longer been systematically awarded since the 1954 reform of the criminal justice system" (para. 5 (CanLII)). However, it acknowledged that, "in circumstances that are quite rare and exceptional", the Superior Court can, "in the exercise of its inherent superintending and reforming powers, award costs" (para. 6). In the case at bar, the Court of Appeal was of the view that the Superior Court should not have exercised those inherent powers to sanction conduct that had occurred in another court that itself had the power to punish for contempt of court. It concluded that, on the facts, the situation "does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice" (para. 11).

IV. Issue

[15] The only issue in this appeal is whether the Superior Court was justified in awarding costs against the respondent personally. What must be done to resolve it is, first, to determine the scope of the courts' power to impose such a sanction, the applicable criteria and the process to be followed, next, to ascertain whether the criteria were properly applied

by the Superior Court judge and, finally, to determine whether the intervention of the Court of Appeal was necessary.

V. Analysis

A. *Awarding of Costs Against a Lawyer Personally*

(1) Power of the Courts

[16] The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them (*R. v. Anderson*, 2014 SCC 41 (CanLII), [2014] 2 S.C.R. 167, at para. 58). A court therefore has an inherent power to control abuse in this regard (*Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 136) and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute": *Canam Enterprises Inc. v. Coles* (2000), 2000 CanLII 8514 (ON CA), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63 (CanLII), [2002] 3 S.C.R. 307. This is a discretion that must, of course, be exercised in a deferential manner (*Anderson*, at para. 59), but it allows a court to "ensure the integrity of the justice system" (*Morel v. Canada*, 2008 FCA 53 (CanLII), [2009] 1 F.C.R. 629, at para. 35).

[17] It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts (*Anderson*, at para. 58). It is therefore not reserved to superior courts but, rather, has its basis in the common law: *Myers v. Elman*, [1940] A.C. 282 (H.L.), at p. 319; M. Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 126.

[18] There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice: *Myers*, at p. 319; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, 1979 CanLII 201 (SCC), [1979] 1 S.C.R. 842, at p. 845; *Cronier*, at p. 448; *Pearl v. Gentra Canada Investments Inc.*, 1998 CanLII 12881 (QC CA), [1998] R.L. 581 (Que. C.A.), at p. 587. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct (M. Code, at p. 121).

[19] This power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases (*Cronier*). This means that it may sometimes be exercised against defence lawyers in criminal proceedings, although such situations are rare: *R. v. Liberatore*, 2010 NSCA 26 (CanLII), 292 N.S.R. (2d)

69; *R. v. Smith* (1999), 133 Man. R. (2d) 89 (Q.B.), at para. 43; *Canada (Procureur général) v. Bisson*, [1995] R.J.Q. 2409 (Sup. Ct.); M. Code, at p. 122.

[20] The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. Punishment for contempt is thus based on the same power the courts have "to enforce their process and maintain their dignity and respect" (*United Nurses of Alberta v. Alberta (Attorney General)*, 1992 CanLII 99 (SCC), [1992] 1 S.C.R. 901, at p. 931). These sanctions are not mutually exclusive, however. If need be, they can even be imposed concurrently in relation to the same conduct.

[21] This being said, although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court (*Cronier*, at p. 449), the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt (I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Leg. Probl.* 23, at pp. 46–48).

[22] As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public (s. 23 of the *Professional Code*, CQLR, c. C-26). However, the judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:

> The court's authority is preventative — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court. [Emphasis deleted.]

(*R. v. Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 S.C.R. 331, at para. 35)

[23] The courts therefore do not have to rely on law societies to oversee and sanction any conduct they may witness. It is up to the courts to determine whether, in a given case, to exercise the power they have to award costs against a lawyer personally in response to the lawyer's conduct before them. However, there is nothing to prevent the law society from exercising in parallel its power to assess its members' conduct and impose appropriate sanctions.

[24] In most cases, of course, the implications for a lawyer of being ordered personally to pay costs are less serious than those of the other two alternatives. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more

significant and more lasting consequences than a one-time order to pay costs. Moreover, as this appeal shows, an order to pay costs personally will normally involve relatively small amounts, given that the proceedings will inevitably be dismissed summarily on the basis that they are unfounded, frivolous, dilatory or vexatious.

(2) Applicable Criteria

[25] While the courts do have the power to award costs against a lawyer personally, the threshold for exercising it is a high one. It is in fact rarely exercised, and the question whether it should be arises only infrequently: *Cronier*; *Young*; *R. v. 974649 Ontario Inc.*, 2001 SCC 81 (CanLII), [2001] 3 S.C.R. 575, at para. 85; *R. v. Trang*, 2002 ABQB 744 (CanLII), 323 A.R. 297, at para. 481; *Fearn v. Canada Customs*, 2014 ABQB 114 (CanLII), 586 A.R. 23, at para. 121; *Smith*, at para. 43. Only serious misconduct can justify such a sanction against a lawyer. Moreover, the courts must be cautious in imposing it in light of the duties owed by lawyers to their clients:

> Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

(*Young*, at p. 136)

[26] The type of conduct that can be sanctioned in this way was analyzed in depth in *Cronier*. L'Heureux-Dubé J.A. concluded after reviewing the case law that the courts are justified in exercising such a discretion in cases involving abuse of process, frivolous proceedings, misconduct or dishonesty, or actions taken for ulterior motives, where the effect is to seriously undermine the authority of the courts or to seriously interfere with the administration of justice. She noted, however, that this power must not be exercised in an arbitrary and unlimited manner, but rather with restraint and caution. The motion judge in the case at bar properly relied on *Cronier*, and the Court of Appeal also endorsed the principles stated in it.

[27] Several courts across the country have adopted the requirement of conduct that represents a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system: *Bisson*; *R. v. Ciarniello* (2006), 2006 CanLII 29633 (ON CA), 81 O.R. (3d) 561 (C.A.), at para. 31; *Leyshon-Hughes v. Ontario Review Board*, 2009 ONCA 16 (CanLII), 240 C.C.C. (3d) 181, at para. 62; *Fearn*, at para. 119; *Smith*, at para. 58. Also, as the House of Lords stated in a case that has been cited by Canadian courts, including in *Cronier*, a mere mistake or error of judgment will not be sufficient to justify awarding costs against a lawyer personally; there must at the very least be gross neglect or inaccuracy (*Myers*, at p. 319).

[28] There are in this Court's jurisprudence examples of conduct that has led to awards of costs being made against lawyers personally. In *Young*, the Court held that such a

sanction is justified if "repetitive and irrelevant material, and excessive motions and applications, characterized" the conduct in question and if this was the result of a lawyer's acting "in bad faith in encouraging this abuse and delay" (pp. 135-36). In *Pacific Mobile*, the Court awarded costs against a company's solicitors personally in a bankruptcy case. The solicitors had been granted a number of adjournments and had instituted proceedings that were inconsistent with directions given by the trial judge. On the issue of costs, Pigeon J. stressed that he did "not consider it fair to make the debtor's creditors bear the cost of proceedings which were not instituted in their interest: quite the contrary". He added that such an award of costs, "far from appropriately discouraging unnecessary appeals occasioning costly delays, tends on the contrary to favour them" (p. 844). In the circumstances, he determined that "the Court should [therefore] make use of its power to order costs payable by solicitors personally" (p. 845).

[29] In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate. Thus, a lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner.

[30] This being said, however, it should be noted that there are two important guideposts that apply to the exercise of this discretion in a situation like the one in this appeal.

[31] The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers. In considering the circumstances, the courts must bear in mind that the context of criminal proceedings differs from that of civil proceedings. In criminal cases, the rule is that costs are not awarded; no provision is made, for example, for awards of costs where extraordinary remedies are sought (*Cronier*, at p. 447). Awards of costs made against lawyers personally are therefore purely punitive and do not include the compensatory aspect costs have in civil cases.

[32] As well, the role of a defence lawyer is not comparable in every respect to that of a lawyer in a civil case. For example, the latter has an ethical duty to encourage compromise and agreement as much as possible. In contrast, a defence lawyer has no obligation to help the Crown in the conduct of its case. It is the very essence of the role of a defence lawyer to challenge, sometimes forcefully, the decisions and arguments of other players in the judicial system in light of the serious consequences they may have for the lawyer's client: *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395, at paras. 64-66, citing *Histed v. Law Society of Manitoba*, 2007 MBCA 150 (CanLII), 225 Man. R. (2d) 74, at para. 71. Indeed, committed and zealous advocacy for clients' rights and interests and a strong and independent defence bar are essential in an adversarial system of justice: *Groia v. Law Society of Upper Canada*, 2016 ONCA 471 (CanLII), 131 O.R. (3d) 1, at para. 129; P. J. Monahan, "The Independence of the Bar as a Constitutional Principle in Canada", in Law Society of Upper Canada, ed., *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law &*

the Independence of the Bar (2007), 117. If these conditions are not met, the reliability of the process and the fairness of the trial will suffer: *R. v. G.D.B.*, 2000 SCC 22 (CanLII), [2000] 1 S.C.R. 520, at para. 25, quoting *R. v. Joanisse* (1995), 1995 CanLII 3507 (ON CA), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 57. In short, if costs are awarded against a lawyer personally in criminal proceedings, the purpose must not be to discourage the lawyer from defending his or her client's rights and interests, and in particular the client's right to make full answer and defence. From this point of view, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings.

[33] The second guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial. The facts that can be considered in awarding costs against a lawyer personally must generally be limited to those of the case before the court. In its analysis, the court must not conduct an ethics investigation or seek to assess the whole of the lawyer's practice. It is not a matter of punishing the lawyer "for his or her entire body of work". To consider facts external to the case before the court can be justified only for the limited purpose of determining, first, the intention behind the lawyer's actions and whether he or she was acting in bad faith, and, second, whether the lawyer knew, on bringing the impugned proceeding, that the courts do not approve of such proceedings and that this one was unfounded.

[34] In this regard, certain evidence that is external to the case before the court may sometimes be considered, because it is of high probative value and has a strong similarity to the alleged facts, in order to establish, for example, wilful intent and knowledge on the lawyer's part. However, it must be limited to the specific issue before the court, that is, the lawyer's conduct. It may not serve more broadly as proof of a general propensity or bad character (*R. v. Handy*, 2002 SCC 56 (CanLII), [2002] 2 S.C.R. 908, at paras. 71-72 and 82).

(3) Process to Be Followed

[35] This being said, a court obviously cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards (Y.-M. Morissette, "L'initiative judiciaire vouée à l'échec et la responsabilité de l'avocat ou de son mandant" (1984), 44 *R. du B.* 397, at p. 425). However, it is important that this process be flexible and that it enable the courts to adapt to the circumstances of each case.

[36] Thus, a lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts. The notice should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should, of course, have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. Ideally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits.

[37] However, these protections differ from the ones conferred by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*. Where an award of costs is sought against a lawyer personally, the lawyer is not a "person charged with an offence" and the proceeding is not a criminal one *per se*. Although the applicable criteria are strict, the standard of proof is the balance of probabilities.

[38] In closing, I note that the Crown's role on this specific issue must be limited in criminal proceedings. In such a situation, it is of course up to the parties as well as the court to raise a problem posed by a lawyer's conduct. However, the Crown's role is to objectively present the evidence and the relevant arguments on this point. It is the court that is responsible for determining whether a sanction should be imposed, and that has the power to impose one, in its role as guardian of the integrity of the administration of justice. The Crown must confine itself to its role as prosecutor of the accused. It must not also become the prosecutor of the defence lawyer.

B. *Application to the Facts of the Instant Case*

(1) Judgment of the Superior Court

[39] In light of the foregoing, I am of the view that the motion judge properly exercised his discretion in awarding costs against the respondent personally.

[40] The motion judge first correctly identified the standard of conduct on which such an award is based and correctly summed up the law in requiring that there be a [TRANSLATION] "frivolous proceeding that denotes a serious abuse of the judicial system" and a "deliberate strategy" (para. 117).

[41] Next, he properly analyzed the facts to find that the respondent's acts constituted abusive conduct that was designed to indirectly obtain a postponement and had led to [TRANSLATION] "paralysis of the legitimate work of the Court of Québec" and "disruption of its local judges' case management work" (para. 119). He correctly distinguished an "unintended result" from a "deliberate strategy" (para. 117). The judge cannot be faulted for choosing to exercise his discretion in respect of a defence lawyer here.

[42] As the judge noted, the respondent's conduct in the cases in question was particularly reprehensible. Its purpose was unrelated to the motions he brought. The respondent was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. His subsequent conduct was consistent with this finding. It is quite odd, if not unprecedented, for a lawyer to file, on the same day and in the same cases, two series of motions for writs of prohibition against two different judges on the same ground of bias. The respondent thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the judge to conclude that the respondent had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice.

[43] Finally, the procedural safeguards were observed in this case. The Crown sent the respondent two prior notices of its intention to seek an award of costs against him personally. The respondent had more than three months to prepare. The prosecution's role was limited to notifying the respondent of its intention to seek an award of costs against him personally and presenting the relevant evidence to the judge. The respondent had an opportunity to make submissions to the judge in this regard. Moreover, he raised no objection to the process or to the evidence adduced on the issue of costs. Nor did he insist on being represented by counsel or ask that the issue of costs be dealt with separately from the merits of the motions.

[44] That being the case, I do not accept the respondent's criticisms to the effect that the judge improperly relied on inadmissible similar fact evidence. On the contrary, I note that the judge's findings were based on admissible evidence that supported his analysis on the respondent's intention and knowledge:

> [TRANSLATION] His preparation, at lunchtime on April 23, 2013, of a series of motions for writs of prohibition in a legal situation that did not call for such a proceeding, and the continued presentation of those proceedings, were two calculated acts that did not result from ignorance of the law on the part of Mr. Jodoin, an able tactician who defends his clients forcefully when he is before the Court. [Emphasis added; para. 118.]

[45] For this purpose, the judge focused primarily on evidence specific to the cases before him. He discussed the specific circumstances that led to the preparation of the motions for writs of prohibition. He reviewed in detail the transcript of the hearing that had culminated in the postponement being granted by the Court of Québec judge. And he considered the respondent's conduct in the broader context of the motions for which he was ordered to pay costs personally.

[46] It is true that the judge took note of certain facts from other cases in which the respondent had been involved, as the Crown had invited him to do with no objection from the respondent. However, the judge considered those facts to be [TRANSLATION] "relevant to the determination of whether [the respondent's] motions are frivolous and dilatory and whether an award of costs must be made against him personally, and in what amount" (para. 109). He found that this evidence was relevant to his analysis on whether the respondent had had culpable intent to file and present a proceeding that he knew to be frivolous and abusive. The judge referred to it in determining, among other things, that the impugned conduct was a deliberate strategy on the respondent's part and not an unintended result.

[47] In this regard, the judge was justified in referring to motions for writs of prohibition that had been filed in 2011 against one of the two Court of Québec judges concerned in the 2013 motions. The motions from 2011 were all dismissed in a judgment that was subsequently affirmed by the Court of Appeal (*R. v. Carrier*, 2012 QCCA 594 (CanLII)). In that case, the respondent had sought writs of prohibition in relation to a refusal by the judge in question to allow the withdrawal of a motion for the disclosure of evidence. In its judgment, the Court of Appeal mentioned that a court can review a party's decision to

withdraw a proceeding, especially where the goal is to obtain a postponement. It concluded that the alleged apprehension of bias on the judge's part was without merit, because [TRANSLATION] "although the judge was overly interventionist, the fact remains that there is no reason to doubt his impartiality" (para. 4 (CanLII)).

[48] As the motion judge observed, there is a strong similarity between those motions from 2011 and the 2013 motions in terms of the facts, the decisions being challenged, the procedures that were chosen and the nature of the exchanges between the respondent and the judge in question. This could support findings that the respondent's actions were calculated and intentional and that he had knowledge of the applicable legal rules and had deliberately ignored them. It could be concluded from this relevant evidence that the respondent was well aware of the invalidity of the extraordinary remedy he had chosen to seek and of the foreseeable consequences of his actions, the *modus operandi* of which was similar to that of 2011. This was not improper evidence of a general propensity or bad character, but admissible evidence of the respondent's state of mind when he filed the proceedings.

[49] As regards the respondent's argument that the judge wanted to make an example of his case in the district in question, I am of the view that there is not really any support for it. That is certainly not what the judge said at para. 11 of his reasons. Moreover, it is clear from his reasons as a whole that he did not rely either on that factor or on the specific context of the district to support his conclusions. As can be seen from his analysis, he objectively had enough evidence to justify awarding costs against the respondent personally on the basis of the specific facts of the case before him.

(2) Judgment of the Court of Appeal

[50] In this context, the Court of Appeal was in my view wrong to choose to substitute its own opinion for that of the Superior Court on this issue. In fact, the Court of Appeal reassessed the facts before concluding that the situation before the Superior Court did not have the exceptional character required in the case law. And it did so despite having acknowledged that the motion judge had, after thoroughly analyzing the facts, been right to dismiss the motions for writs of prohibition he had found to be frivolous, unfounded and abusive.

[51] It was not open to the Court of Appeal to intervene without first identifying 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. It did not identify such an error. This Court, too, is subject to this standard for intervention (*St-Jean v. Mercier*, 2002 SCC 15 (CanLII), [2002] 1 S.C.R. 491, at para. 46). Furthermore, given its position at the second level of appeal, this Court's role is not to reassess the findings of fact of a judge at the trial level that an appellate court has not questioned: ". . . the principle of non-intervention 'is all the stronger in the face of concurrent findings of both courts below' . . ." (*ibid.*, at para. 45, quoting *Ontario (Attorney General) v. Bear Island Foundation*, 1991 CanLII 75 (SCC), [1991] 2 S.C.R. 570, at p. 574 (emphasis deleted)).

[52] It is well established that costs are awarded on a discretionary basis: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (CanLII), [2004] 1 S.C.R. 303, at para. 27; *Galganov v. Russell (Township)*, 2012 ONCA 410 (CanLII), 294 O.A.C. 13, at paras. 23–25. In a case involving an exercise of discretion, 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: *Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136, at para. 36 (CanLII); *Québec (Procureur général) v. Bélanger*, 2012 QCCA 1669 (CanLII), 4 M.P.L.R. (5th) 21. In its brief judgment, the Court of Appeal did not specify an error of any kind whatsoever in the motion judge's reasons that would justify its intervention.

[53] As for the comment that the Superior Court should not have exercised its jurisdiction in relation to facts or conduct that had occurred in a court that itself had the power to punish the respondent for contempt of court, I believe that it reflects a misunderstanding of the situation. Costs are in order in this case because of the frivolous and abusive nature of the motions for writs of prohibition that were heard and dismissed by the Superior Court. It was the Superior Court that had the discretion to determine whether the costs of those motions should be awarded against the respondent.

VI. Conclusion

[54] In the final analysis, the Superior Court judge addressed the valid concerns voiced by the Crown, which he summarized as follows:

> [TRANSLATION] Take a more rigorous approach to the criminal law, fight tooth and nail for your clients, be demanding of the prosecution so that it makes its entire case competently, but face the music so that, in an overburdened judicial system in which each person's time must be used sparingly and efficiently, cases move forward. [Emphasis deleted; para. 11.]

[55] The judge sent a clear message to the players in the judicial system, in terms that were once again unequivocal, by denouncing actions and decisions that had led to an unjustified paralysis of the legitimate work of courts sitting in criminal proceedings and to the disruption of the management of cases by their judges, and by sanctioning an abuse of process whose sole purpose had been to obtain a postponement and delay cases.

[56] The judge's comments were consistent with the principles recently enunciated by this Court in *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 S.C.R. 631, in which the majority denounced, among other things, the culture of complacency toward delay that impairs the efficiency of the criminal justice system. In *Jordan*, the Court emphasized the importance of timely justice and noted that all participants in the criminal justice system must co-operate in achieving reasonably prompt justice. From this perspective, it is essential to allow the courts to play their role as guardians of the integrity of the administration of justice by controlling proceedings and eliminating unnecessary delay. That is what the Superior Court did here.

[57] I would therefore allow the appeal and restore the award of costs against the respondent.

The following are the reasons delivered by

[58] ABELLA AND CÔTÉ JJ. (dissenting) — We agree that superior courts have, in theory, the power to award costs personally against counsel in the criminal context in exceptional circumstances. Justice Gascon, drawing on caselaw from both the civil and criminal context, has set out an excellent summary of the relevant principles. In our respectful view, however, the test was not met in this case. As noted by the Quebec Court of Appeal:

> [TRANSLATION] The situation in the Quebec Superior Court . . ., as regards the conduct of the appellant . . ., *does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice.* [Emphasis added; footnote omitted.]

(2015 QCCA 847, at para. 11 (CanLII))

[59] The exceptional nature of personal costs orders was emphasized by this Court in *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3:

> . . . courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling. [p. 136]

[60] These concerns are magnified in the criminal context. In *R. v. Gunn*, 2003 ABQB 314 (CanLII), 335 A.R. 137, the Court of Queen's Bench of Alberta highlighted the chilling effect that personal costs orders could have on criminal defence counsel, where Langston J. observed:

> . . . to sanction defence counsel in the course of their duties of protecting the criminally accused could have a chilling effect on counsel's ability to properly and zealously defend their client against all the powers that a state has to wield against them. [para. 50]

[61] The more appropriate response, if any, is to seek a remedy from the law society in question. As Michael Code observed, disciplinary processes present advantages over awards of costs:

> A useful intermediate remedy, when repeated injunctions and reprimands have failed to put an end to counsel's "incivility," is for the trial judge to report the offending counsel to the Law Society. This is the remedy that was adopted by the B.C. Court of Appeal in *R. v. Dunbar et al.* and it was only exercised at the end of the hearing, when the Court delivered its Judgment. *The great value of this remedy, before resorting to more punitive sanctions such as costs orders and contempt citations, is that it does not disrupt the trial and it does not cause prejudice to the client of the offending counsel.* When the misconduct escalates to the point that costs and contempt remedies are under consideration, the lawyer is entitled to a hearing and the trial will inevitably be disrupted. By simply reporting the lawyer's misconduct to the Law Society, the court is able to escalate the available remedies without the need to conduct its own hearing into the alleged "incivility." Furthermore, the client may not be complicit in the lawyer's "incivility" and should not bear the cost or the prejudice of a hearing to consider sanctions against the lawyer. [Footnote omitted; emphasis added.]

(Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 119)

[62] This forms the policy basis for why the threshold is so high before ordering costs against criminal defence counsel. Only in the most exceptional of circumstances should they be ordered. Given the policy concerns and the exceptional nature of costs orders against defence counsel, it is worth emphasizing that the Crown should be very hesitant about pursuing them.

[63] We do not challenge the motion judge's finding that the writs of prohibition were requested for the purpose of postponing the proceedings and that the motions seeking the writs may not have had a solid legal foundation. Like the Court of Appeal, however, we are of the view that Mr. Jodoin's behaviour did not warrant the exceptional remedy of a personal costs order.

[64] It appears that Mr. Jodoin's conduct in this case was not unique in the district of Bedford, as reflected in the motion judge's comment that: [TRANSLATION] "In seeking a personal costs order against Mr. Jodoin, the prosecution wants to send a message to certain defence lawyers" (2013 QCCS 4661, at para. 11 (CanLII)). This suggests that Mr. Jodoin was being punished as a warning to other lawyers engaged in similar tactics. The court ordered costs against Mr. Jodoin personally for a total of $3,000.

[65] The desire to make an "example" of Mr. Jodoin's behaviour does not justify straying from the legal requirement that his conduct be "rare and exceptional" before costs are ordered personally against him.

[66] Logically, the idea that costs should only be ordered against a lawyer personally in rare and exceptional circumstances cannot be reconciled with the fact that other defence counsel appear to have engaged in similar conduct.

[67] Mr. Jodoin has certainly not engaged in conduct we would commend. But to the extent that his behaviour was not unique in the district of Bedford, it is hard to see how it would amount to "dishonest or malicious misconduct" that would justify awarding costs personally against him (reasons of Gascon J., at para. 29).

[68] Moreover, we are not persuaded that Mr. Jodoin's motions for writs of prohibition were unfounded to a sufficient degree to attract a personal costs order. The Superior Court concluded that Mr. Jodoin had filed those motions only for the purpose of obtaining an adjournment. This, however, does not take full account of the context of the proceedings, where one of the grounds raised involved the application of s. 657.3(3) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[69] This provision states that "a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial or within any other period fixed by the justice or judge, give notice to the other party or parties of his or her intention to do so". Crown counsel intending to call an expert witness also has to provide a copy of the expert witness's report or a summary of the opinion anticipated to be given by the expert witness to the other party within a reasonable period before trial (s. 657.3(3)(b)).

[70] If notice is not given, s. 657.3(4) states that

> **(4)** . . . the court shall, at the request of any other party,
>
> **(a)** grant an adjournment of the proceedings to the party who requests it to allow him or her to prepare for cross-examination of the expert witness;
>
> **(b)** order the party who called the expert witness to provide that other party and any other party with the material referred to in paragraph (3)(b); and
>
> **(c)** order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness's testimony, unless the court considers it inappropriate to do so.

[71] The Crown had not provided Mr. Jodoin with the required notice. When Mr. Jodoin sought the adjournment to which he was entitled under s. 657.3(4), the judge presiding in the Court of Québec granted him a brief one over the lunch break. And, in refusing the requested adjournment, the judge mistakenly said that Mr. Jodoin had already cross-examined the Crown's expert witness in other matters.

[72] This is the context in which Mr. Jodoin filed his motions for writs of prohibition after the lunch hour.

[73] Mr. Jodoin now concedes, based on other decisions rendered subsequently in similar matters, that he ought not to have used motions for writs of prohibition in response to the court's refusal to grant the requested adjournment. But it is also undisputed that the

Crown did not in fact give proper notice and that Mr. Jodoin was, as a result, entitled to an adjournment.

[74] In the circumstances, Mr. Jodoin's filing of motions for writs of prohibition for the purpose of suspending the proceedings can easily be seen as an error of judgment, but hardly one justifying a personal costs order.

[75] For these reasons, we would dismiss the appeal.

Appeal allowed, ABELLA *and* CÔTÉ JJ. *dissenting.*

Solicitor for the appellant: Director of Criminal and Penal Prosecutions, Québec.

Solicitors for the respondent: Jodoin & Associés, Granby.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Montréal.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Schurman Longo Grenier, Montréal; Goldblatt Partners, Toronto.

Solicitors for the intervener Association des avocats de la défense de Montréal: Walid Hijazi, Montréal; Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Solicitors for the intervener the Trial Lawyers Association of British Columbia: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Addario Law Group, Toronto; Stockwoods, Toronto.

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[1] The Superior Court and the Court of Appeal used the French term "*dépens*" in their reasons and in their conclusions. The appellant and the respondent have referred sometimes to the concept of "*dépens*" and sometimes to that of "*frais*". For consistency, I will use the term used by the courts below in the French version of these reasons.

Tab 4

CanLII

Sawridge Band v. Canada, [2003] 4 FCR 748, 2003 FCT 347 (CanLII)

Date: 2003-03-27
Docket: T-66-86A
Other citations: [2003] 3 CNLR 344; 232 FTR 54
Citation: Sawridge Band v. Canada, [2003] 4 FCR 748, 2003 FCT 347 (CanLII), <http://canlii.ca/t/hbq>, retrieved on 2017-10-26

T-66-86 A

2003 FCT 347

Bertha L'Hirondelle suing on her own behalf and on behalf of all other members of the Sawridge Band (*Plaintiffs*)

v.

Her Majesty the Queen (*Defendant*)

and

Native Council of Canada, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta, Native Women's Association of Canada (*Interveners*)

Indexed as: Sawridge Band v. Canada (T.D.)

Trial Division, Hugessen J.--Toronto, March 19 and 20; Edmonton, March 27, 2003.

Native Peoples -- Registration -- Crown motion for interlocutory declaration or mandatory injunction requiring registration on Band List of persons having acquired rights under 1985 amendments to Indian Act -- Crown says Band has refused to comply with Bill C-31 remedial provisions -- Interim relief necessary due to old age of women seeking registration, protracted litigation -- Band's argument: doing only what empowered by legislation -- Interim declaration could not be granted -- Band having effectively given itself injunction to which not entitled in terms of irreparable harm, balance of convenience -- Public interest damaged by Band's flouting of law enacted by Parliament -- Court having power to grant injunction -- Crown not lacking standing -- Irrelevant that some of 11 women in question not having applied under Band membership rules as implicitly refused -- Amendments intended to bring Indian Act into line with Charter guarantee of gender equality -- Band having imposed onerous membership application rules for acquired rights persons -- Whether acquired rights persons entitled to automatic membership, inclusion in Band's own List -- As of date assumed control of List, Band obliged to include names of acquired rights women --

Could not create membership barriers for those deemed members by law -- Intention of Parliament revealed by House of Commons debates -- Amendments recognized women's rights at expense of certain Native rights -- Mandatory injunction granted.

Administrative Law -- Judicial Review -- Injunctions -- Interlocutory mandatory injunction sought by Crown requiring registration on Indian Band List of persons having acquired rights under 1985 Indian Act amendments -- Crown says Band refused to comply with remedial legislation -- Interim relief needed as litigation protracted, women seeking registration aged -- Band says just exercising powers conferred by legislation -- Band having, in effect, given itself injunction, disregarding law -- Three-part test reversed in unusual circumstances: has Band raised serious issue, will it suffer irreparable harm if law enforced, where lies balance of convenience? -- Band not meeting last two parts of test -- Enforcement of law rarely causes irreparable harm -- Flouting of law damaging to public interest -- Private interests of women seeking registration -- Delegated, subordinate Band legislation (membership rules) insufficient to abrogate Charter-protected rights -- Mandatory injunction granted.

Some 17 years ago, plaintiff commenced litigation against the Crown seeking a declaration that the 1985 amendments to the *Indian Act*--Bill C-31--were unconstitutional. That legislation, while conferring on bands the right to control their own band lists, obliged them to include certain persons in their membership.

This motion by the Crown was for an interlocutory declaration, pending final determination of plaintiff's action, that those who acquired the right of membership in the Sawridge Band before it took control of its List, be deemed to be registered thereon or, in the alternative, an interlocutory mandatory injunction requiring plaintiffs to register such persons. The Crown alleged that the Band has refused to comply with the remedial provisions of Bill C-31 and that 11 women who lost Band membership due to marriage to non-Indians continue to be denied the benefits of the amendments. Interim relief is needed since these women are getting on in years and it may still be a long time before a trial date is fixed. The Band argued that it is merely exercising the powers conferred upon it by the legislation.

Held, a mandatory injunction should be granted.

An interim declaration of right could not be granted for that is a contradiction in terms. A declaration of right puts an end to a matter. On the other hand, there can be no entitlement to have an unproved right declared to exist. Therefore the motion was considered as one for an interlocutory injunction.

In the unusual--perhaps unique--circumstances of this case, the three-part test was, in effect, reversed. If the allegations of non-compliance are true, the Band has effectively given itself an injunction, choosing to act as if the law did not exist. Would the Band have been entitled to an interlocutory injunction suspending the effects of Bill C-31 pending trial? The classic test required that the Court determine (1) whether the Band had raised a serious issue, (2) whether it will suffer irreparable harm if the law is enforced, and (3) where lay the balance of convenience. The test was not altered in that the injunction sought was mandatory in nature.

While the Band met the first part of the test, it could not possibly meet the other two parts. Rarely will the enforcement of a law cause irreparable harm. Any inconvenience to the Band in admitting 11 elderly women to membership is nothing compared to the damage to the public interest caused by the flouting of a law enacted by Parliament and to the private

interests of the these women who are unlikely to benefit from a statute adopted with persons such as them in mind.

The argument that the Court lacked power to grant the injunction in that the Crown had not alleged a cause of action in support thereof in its statement of defence, was rejected. The Court's power to issue injunctions is granted by *Federal Court Act*, section 44 and is very broad. Nor could the Court agree that the Crown lacked standing. It is the Crown which represents the public interest in upholding the laws of Canada unless and until struck down by a court of competent jurisdiction.

It was irrelevant that only some of these women had applied in accordance with the Band's membership rules. They were refused, at least implicitly, because they could not fulfil the onerous application requirements.

The amending statute was made retroactive to the date Charter, section 15 took effect. That was an indication that the amendments were intended to bring the legislation into line with the Charter guarantee of gender equality.

The Band lost no time in taking control of its List and none of these 11 women were able to have their names entered by the Registrar before the Band took control. Under the Band's membership rules, to secure membership acquired rights individuals must either be resident on the reserve or demonstrate a significant commitment to the Band and they must also complete a 43-page application form requiring the composition of several essays. In addition, they must submit to interviews. If the legislation provides for automatic membership entitlement, these requirements would violate it. The Act does entitle women who lost status for marrying non-Indians to be registered as status Indians and to have their names automatically added to the Departmental Band List. The question remains as to whether a band is obliged to add names to its own Band List. Unfortunately, subsections 10 (4) and 10(5) do not make it absolutely clear that acquired rights persons are entitled to automatic membership and that a band may not establish pre-conditions for membership. But the use of "shall" in section 8 makes it clear that a band must enter the names of all entitled persons on the list, which it maintains. As of the date the Sawridge Band assumed control of its List, it was obliged to include therein the names of the acquired rights women. A band may not create barriers to membership for those deemed by law to be members. By reference to certain debates in the House of Commons and what was said by the Minister to the Standing Committee on Indian Affairs and Northern Development, it was clear that Parliament's intention was to create an automatic right to Band membership even though this would restrict a band's control over membership. The legislation establishes a membership regime that recognizes women's rights at the expense of certain Native rights.

Subsection 10(5) states, by reference to paragraph 11(*c*), that nothing can deprive an acquired rights individual of automatic membership entitlement unless the entitlement is subsequently lost. The Band's membership rules fail to make specific provision for the subsequent loss of membership and establishment of the application requirements was not enough to abrogate the rights of Charter-protected persons. The Band's application of its membership rules in which pre-conditions were created to membership, is in contravention of the *Indian Act*.

A mandatory injunction should be granted and the names of these 11 acquired rights women shall be added to the Band List. They shall be accorded all the rights of Band membership.

statutes and regulations judicially

considered

An Act to amend the Indian Act, R.S.C., 1985 (1st Supp.), c. 32.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 15.

Federal Court Act, R.S.C., 1985, c. F-7 , s. 44.

Federal Court Rules, 1998, SOR/98-106, r. 369.

Indian Act, R.S.C., 1985, c. I-5 , ss. 2(1) "member of a band", 5 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4), 6 (as am. *idem*), 8 (as am. *idem*), 9 (as am. *idem*), 10 (as am. *idem*), 11 (as am. *idem*), 12 (as am. *idem*).

cases judicially considered

applied:

Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd., 1996 CanLII 215 (SCC), [1996] 2 S.C.R. 495; (1996), 136 D.L.R. (4th) 289; 21 B.C.L.R. (3d) 201; 45 Admin. L.R. (2d) 95; 50 C.P.C. (3d) 128; 198 N.R. 161.

considered:

Sawridge Band v. Canada, 1997 CanLII 5294 (FCA), [1997] 3 F.C. 580; (1997), 3 Admin. L.R. (3d) 69; 215 N.R. 133 (C.A.); *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110; (1987), 38 D.L.R. (4th) 321; [1987] 3 W.W.R. 1; 46 Man. R. (2d) 241; 25 Admin. L.R. 20; 87 CLLC 14,015; 18 C.P.C. (2d) 273; 73 N.R. 341; *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311; (1994), 111 D.L.R. (4th) 385; 54 C.P.R. (3d) 114; 164 N.R. 1; 60 Q.A.C. 241.

referred to:

Sankey v. Minister of Transport, [1979] 1 F.C. 134 (T.D.); *Ansa International Rent-a-Car (Canada) Ltd. v. American International Rent-a-Car Corp.* (1990), 32 C.P.R. (3d) 340; 36 F.T.R. 98 (F.C.T.D.); *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626; (1998), 157 D.L.R. (4th) 385; 6 Admin. L.R. (3d) 1; 22 C.P.C. (4th) 1; 224 N.R. 241.

authors cited

Canada. *House of Commons Debates*, Vol. II, 1st Sess., 33rd Parl., March 1, 1985, p. 2644.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development*, Issue No. 12 (March 7, 1985).

MOTION for an interlocutory declaration or an interlocutory mandatory injunction with respect to the registration of names on an Indian Band List. Mandatory injunction granted.

appearances:

Martin J. Henderson, Lori A. Mattis, *Catherine M. Twinn* and *Kristina Midbo* for plaintiffs.

James E. Kindrake and *Kathleen Kohlman* for defendant.

Kenneth S. Purchase for intervener Native Council of Canada.

P. Jonathan Faulds for intervener Native Council of Canada (Alberta).

Michael J. Donaldson for intervener Non-Status Indian Association of Alberta.

Mary Eberts for intervener Native Women's Association of Canada.

solicitors of record:

Aird & Berlis LLP, Toronto, for plaintiffs.

Deputy Attorney General of Canada for defendant.

Lang Michener, Ottawa, for intervener Native Council of Canada.

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Burnet, Duckworth & Palmer LLP for intervener Non-Status Indian Association of Alberta.

Eberts Symes Street & Corbett, Toronto, for intervener Native Women's Association of Canada.

The following are the reasons for order and order rendered in English by

[1]Hugessen J.: In this action, started some 17 years ago, the plaintiff has sued the Crown seeking a declaration that the 1985 amendments to the *Indian Act*, R.S.C., 1985, c. I-5, commonly known as Bill C-31 [*An Act to amend the Indian Act*, R.S.C., 1985 (1st Supp.), c. 32], are unconstitutional. While I shall later deal in detail with the precise text of the relevant amendments, I cannot do better here than reproduce the Court of Appeal's brief description of the thrust of the legislation when it set aside the first judgment herein and ordered a new trial [*Sawridge Band v. Canada*, 1997 CanLII 5294 (FCA), [1997] 3 F.C. 580 (C.A.), at paragraph 2]:

Briefly put, this legislation, while conferring on Indian bands the right to control their own band lists, obliged bands to include in their membership certain persons who became entitled to Indian status by virtue of the 1985 legislation. Such persons included: women who had become disentitled to Indian status through marriage to non-Indian men and the children of such women; those who had lost status because their mother and paternal grandmother were non-Indian and had gained Indian status through marriage to an Indian; and those who had lost status on the basis that they were illegitimate offspring of an Indian woman and a non-Indian man. Bands assuming control of their band lists would be obliged to accept all these people as members. Such bands would also be allowed, if they chose, to accept certain other categories of persons previously excluded from Indian status.

[2]The Crown defendant now moves for the following interlocutory relief:

a. An interlocutory declaration that, pending a final determination of the Plaintiff's action, in accordance with the provisions of the *Indian Act*, R.S.C. 1985 c. I-5, as amended, (the "*Indian Act, 1985*") the individuals who acquired the right to be members of the Sawridge Band before it took control of its own Band List, shall be deemed to be registered on the Band List as members of the Sawridge Band, with the full rights and privileges enjoyed by all band members;

b. In the alternative, an interlocutory mandatory injunction, pending a final resolution of the Plaintiffs' action, requiring the Plaintiffs to enter or register on the Sawridge Band List the names of the individuals who acquired the right to be members of the Sawridge Band before it took control of its Band list, with the full rights and privileges enjoyed by all band members.

[3]The basis of the Crown's request is the allegation that the plaintiff Band has consistently and persistently refused to comply with the remedial provisions of Bill C-31, with the result that 11 women, who had formerly been members of the Band and had lost both their Indian status and their Band membership by marriage to non-Indians pursuant to the former provisions of paragraph 12(1)(*b*) of the Act, are still being denied the benefits of the amendments.

[4]Because these women are getting on in years (a twelfth member of the group has already died and one other is seriously ill) and because the action, despite intensive case management over the past five years, still seems to be a long way from being ready to have the date of the new trial set down, the Crown alleges that it is urgent that I should provide some form of interim relief before it is too late.

[5]In my view, the critical and by far the most important question raised by this motion is whether the Band, as the Crown alleges, is in fact refusing to follow the provisions of Bill C-31 or whether, as the Band alleges, it is simply exercising the powers and privileges granted to it by the legislation itself. I shall turn to that question shortly, but before doing so, I want to dispose of a number of subsidiary or incidental questions which were discussed during the hearing.

[6]First, I am quite satisfied that the relief sought by the Crown in paragraph a. above is not available. An interim declaration of right is a contradiction in terms. If a court finds that a right exists, a declaration to that effect is the end of the matter and nothing remains to be dealt with in the final judgment. If, on the other hand, the right is not established to the court's satisfaction, there can be no entitlement to have an unproved right declared to exist. (See *Sankey v. Minister of Transport*, [1979] 1 F.C. 134 (T.D.).) I accordingly treat the motion as though it were simply seeking an interlocutory injunction.

[7]Second, in the unusual and perhaps unique circumstances of this case, I accept the submission that since I am dealing with a motion seeking an interlocutory injunction, the well-known three-part test established in such cases as *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110 and *RJR--MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 should in effect be reversed. The universally applicable general rule for anyone who contests the constitutionality of legislation is that such legislation must be obeyed unless and until it is either stayed by court order or is set aside on final judgment. Here, assuming the Crown's allegations of non-compliance are correct, the plaintiff Band has effectively given itself an injunction and has chosen to act as though the law which it contests did not exist. I can only permit this situation to continue if I am satisfied that the plaintiff could and should have been given an interlocutory injunction to suspend the effects of Bill C-31 pending trial. Applying the classic test, therefore, requires that I ask myself if the plaintiff has raised a serious issue in its attack on the law, whether the enforcement of the law will result in irreparable harm to the plaintiff, and finally, determine where the balance of convenience lies. I do not accept the proposition that because the injunction sought is of a mandatory nature, the test should in any way be different from that set down in the cited cases. (See *Ansa International Rent-a-*

Car (Canada) Ltd. v. American International Rent-a-Car Corp. (1990), 32 C.P.R. (3d) 340 (F.C.T.D.).)

[8]It is not contested by the Crown that the plaintiff meets the first part of the test, but it seems clear to me that it cannot possibly meet the other two parts. It is very rare that the enforcement of a duly adopted law will result in irreparable harm and there is nothing herein which persuades me that this is such a rarity. Likewise, whatever inconvenience the plaintiff may suffer by admitting 11 elderly ladies to membership is nothing compared both to the damage to the public interest in having Parliament's laws flouted and to the private interests of the women in question who, at the present rate of progress, are unlikely ever to benefit from a law which was adopted with people in their position specifically in mind.

[9]Thirdly, I reject the proposition put forward by the plaintiff that would deny the Court the power to issue the injunction requested because the Crown has not alleged a cause of action in support thereof in its statement of defence. The Court's power to issue injunctions is granted by section 44 of the *Federal Court Act* [R.S.C., 1985, c. F-7] and is very broad. Interpreting a similar provision in a provincial statute in the case of *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, 1996 CanLII 215 (SCC), [1996] 2 S.C.R. 495, the Supreme Court said at page 505:

Canadian courts since *Channel Tunnel* have applied it for the proposition that the courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined. . . . This accords with the more general recognition throughout Canada that the court may grant interim relief where final relief will be granted in another forum.

[10]The Supreme Court of Canada confirmed the Federal Court of Canada's broad jurisdiction to grant relief under section 44: *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626.

[11]Likewise, I do not accept the plaintiff's argument to the effect that the Crown has no standing to bring the present motion. I have already indicated that I feel that there is a strong public interest at play in upholding the laws of Canada unless and until they are struck down by a court of competent jurisdiction. That interest is uniquely and properly represented by the Crown and its standing to bring the motion is, in my view, unassailable.

[12]Finally, the plaintiff argued strongly that the women in question have not applied for membership. This argument is a simple "red herring". It is quite true that only some of them have applied in accordance with the Band's membership rules, but that fact begs the question as to whether those rules can lawfully be used to deprive them of rights to which Parliament has declared them to be entitled. The evidence is clear that all of the women in question wanted and sought to become members of the Band and that they were refused at least implicitly because they did not or could not fulfil the rules' onerous application requirements.

[13]This brings me at last to the main question: has the Band refused to comply with the provisions of Bill C-31 so as to deny to the 11 women in question the rights guaranteed to them by that legislation?

[14]I start by setting out the principal relevant provisions.

2. (1) . . .

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

. . .

5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.

. . .

(3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.

. . .

(5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.

6. (1) Subject to section 7, a person is entitled to be registered if

. . .

(*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

. . .

8. There shall be maintained in accordance with this Act for each band a Band List in which shall be entered the name of every person who is a member of that band.

9. (1) Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

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

. . .

(5) The name of a person who is entitled to have his name entered in a Band List maintained in the Department is not required to be entered therein unless an application for entry therein is made to the Registrar.

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given

appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

(2) A band may, pursuant to the consent of a majority of the electors of the band,

(*a*) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and

(*b*) provide for a mechanism for reviewing decisions on membership.

. . .

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(*c*) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.

(7) On receipt of a notice from the council of a band under subsection (6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith

(*a*) give notice to the band that it has control of its own membership; and

(*b*) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.

(9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph (7)(*b*), and, subject to section 13.2, the Department shall have no further responsibility with respect to that Band List from that date.

(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.

. . .

11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

. . .

(*c*) that person is entitled to be registered under paragraph 6(1)(*c*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; . . . .

. . .

(2) Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(*a*) if that person is entitled to be registered under paragraph 6(1)(*d*) or (*e*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(*b*) if that person is entitled to be registered under paragraph 6(1)(*f*) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

[15]The amending statute was adopted on June 28, 1985 but was made to take effect retroactively to April 17, 1985, the date on which section 15 of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] took effect. This fact in itself, without more, is a strong indication that one of the prime objectives of the legislation was to bring the provisions of the *Indian Act* into line with the new requirements of that section, particularly as they relate to gender equality.

[16]On July 8, 1985, the Band gave notice to the Minister that it intended to avail itself of the provisions of section 10 allowing it to assume control of its own Band List and that date, therefore, is the effective date of the coming into force of the Band's membership rules. Because Bill C-31 was technically in force but realistically unenforceable for over two months before it was adopted and because the Band wasted no time in assuming control of its own Band List, none of the 11 women who are in question here were able to have their names entered on the Band List by the Registrar prior to the date on which the Band took such control.

[17]The relevant provisions of the Band's membership rules are as follows:

3. Each of the following persons shall have a right to have his or her name entered in the Band List:

(a) any person who, but for the establishment of these rule, would be entitled pursuant to subsection 11(1) of the Act to have his or her name entered in the Band List required to be maintained in the Department and who, at any time after these rules come into force, either

(i) is lawfully resident on the reserve; or

(ii) has applied for membership in the band and, in the judgment of the Band Council, has a significant commitment to, and knowledge of, the history, customs, traditions, culture and communal life of the Band and a character and lifestyle that would not cause his or her admission to membership in the Band to be detrimental to the future welfare or advancement of the Band;

. . .

5. In considering an application under section 3, the Band Council shall not refuse to enter the name of the applicant in the Band List by reason only of a situation that existed or an action that was taken before these Rules came into force.

. . .

11. The Band Council may consider and deal with applications made pursuant to section 3 of these Rules according to such procedure and as such time or times as it shall determine in its discretion and, without detracting from the generality of the foregoing, the Band Council may conduct such interviews, require such evidence and may deal with any two or more of such applications separately or together as it shall determine in its discretion.

[18]Subparagraphs 3(a)(i) and (ii) clearly create pre-conditions to membership for acquired rights individuals, referred to in this provision by reference to subsection 11(1) of the Act. Those individuals must either be resident on the reserve, or they must demonstrate a significant commitment to the Band. In addition, the process as described in the evidence and provided for in section 11 of the membership rules requires the completion of an application form some 43 pages in length and calling upon the applicant to write several essays as well as to submit to interviews.

[19]The question that arises from these provisions and counsel's submissions is whether the Act provides for an automatic entitlement to Band membership for women who had lost it by reason of the former paragraph 12(1)(*b*). If it does, then the pre-conditions established by the Band violate the legislation.

[20]Paragraph 6(1)(*c*) of the Act entitles, *inter alia*, women who lost their status and membership because they married non-Indian men to be registered as status Indians.

[21]Paragraph 11(1)(*c*) establishes, *inter alia*, an automatic entitlement for the women referred to in paragraph 6(1)(*c*) to have their names added to the Band List maintained in the Department.

[22]These two provisions establish both an entitlement to Indian status, and an entitlement to have one's name added to a Band List maintained by the Department. These provisions do not specifically address whether bands have the same obligation as the Department to add names to their Band List maintained by the Band itself pursuant to section 10.

[23]Subsection 10(4) attempts to address this issue by stipulating that nothing in a band's membership code can operate to deprive a person of her or his entitlement to registration "by reason only of" a situation that existed or an action that was taken before the rules came into force. For greater clarity, subsection 10(5) stipulates that subsection 10(4) applies to persons automatically entitled to membership pursuant to paragraph 11(1)(*c*), unless they subsequently cease to be entitled to membership.

[24]It is unfortunate that the awkward wording of subsections 10(4) and 10(5) does not make it absolutely clear that they were intended to entitle acquired rights individuals to automatic membership, and that the Band is not permitted to create pre-conditions to membership, as it has done. The words "by reason only of" in subsection 10(4) do appear to suggest that a band might legitimately refuse membership to persons for reasons other than those contemplated by the provision. This reading of subsection 10(4), however, does not sit easily

with the other provisions in the Act as well as clear statements made at the time regarding the amendments when they were enacted in 1985.

[25]The meaning to be given to the word "entitled" as it is used in paragraph 6(1)(*c*) is clarified and extended by the definition of "member of a band" in section 2, which stipulates that a person who is entitled to have his name appear on a Band List is a member of the Band. Paragraph 11(1)(*c*) requires that, commencing on April 17, 1985, the date Bill C-31 took effect, a person was entitled to have his or her name entered in a Band List maintained by the Department of Indian Affairs for a band if, *inter alia*, that person was entitled to be registered under paragraph 6(1)(*c*) of the 1985 Act and ceased to be a member of that band by reason of the circumstances set out in paragraph 6(1)(*c*).

[26]While the Registrar is not obliged to enter the name of any person who does not apply therefor (see subsection 9(5)), that exemption is not extended to a band which has control of its list. However, the use of the imperative "shall" in section 8, makes it clear that the band is obliged to enter the names of all entitled persons on the list which it maintains. Accordingly, on July 8, 1985, the date the Sawridge Band obtained control of its List, it was obliged to enter thereon the names of the acquired rights women. When seen in this light, it becomes clear that the limitation on a band's powers contained in subsections 10(4) and 10(5) is simply a prohibition against legislating retrospectively: a band may not create barriers to membership for those persons who are by law already deemed to be members.

[27]Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."

[28]The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):

. . . today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.

[29]A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates, idem*, at page 2645):

This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.

[30]Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates, idem*, at page 2646):

. . . I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals.

This is a difficult issue. It has been for many years. The challenge is striking. The fairest possible balance must be struck and I believe it has been struck in this Bill. I believe we have fulfilled the promise made by the Prime Minister in the Throne Speech that discrimination in the Indian Act would be ended.

[31]At a meeting of the Standing Committee on Indian Affairs and Northern Development, Minister Crombie again made it clear that, while the Bill works towards full Indian self-government, the Bill also has as a goal remedying past wrongs (*Minutes of Proceedings and Evidence on the Standing Committee on Indian Affairs and Northern Development*, Issue No. 12, March 7, 1985, at page 12:7):

Several members of this committee said during the debate on Friday that this bill is just a beginning and not an end in itself, but rather the beginning of a process aimed at full Indian self-government. I completely agree with that view. But before we can create the future, some of the wrongs of the past have to be corrected. That is, in part, the purpose of Bill C-31.

[32]Furthermore, in the Minister's letter to Chief Walter Twinn on September 26, 1985, in which he accepted the membership code, the Minister reminded Chief Twinn of subsections 10(4) and (5) of the Act, and stated as follows:

We are both aware that Parliament intended that those persons listed in paragraph 6(1)(c) would at least initially be part of the membership of a Band which maintains its own list. Read in isolation your membership rules would appear to create a prerequisite to membership of lawful residency or significant commitment to the Band. However, I trust that your membership rules will be read in conjunction with the Act so that the persons who are entitled to reinstatement to Band membership, as a result of the Act, will be placed on your Band List. The amendments were designed to strike a delicate balance between the right of individuals to Band membership and the right of Bands to control their membership. I sponsored the Band control of membership amendments with a strongly held trust that Bands would fulfill their obligations and act fairly and reasonably. I believe you too feel this way, based on our past discussions.

[33]Sadly, it appears from the Band's subsequent actions that the Minister's "trust" was seriously misplaced. The very provisions of the Band's rules to which the Minister drew attention have, since their adoption, been invoked by the Band consistently and persistently to refuse membership to the 11 women in question. In fact, since 1985, the Band has only admitted three acquired rights women to membership, all of them apparently being sisters of the addressee of the Minister's letter.

[34]The quoted excerpts make it abundantly clear that Parliament intended to create an automatic right to Band membership for certain individuals, notwithstanding the fact that this would necessarily limit a band's control over its membership.

[35]In a very moving set of submissions on behalf of the plaintiff, Mrs. Twinn argued passionately that there were many significant problems with constructing the legislation as though it pits women's rights against Native rights. While I agree with Mrs. Twinn's concerns, the debates demonstrate that there existed at that time important differences between the positions of several groups affected by the legislation, and that the legislation was a result of Parliament's attempt to balance those different concerns. As such, while I agree wholeheart-edly with Mrs. Twinn that there is nothing inherently contradictory between women's rights and Native rights, this legislation nevertheless sets out a regime for membership that recognizes women's rights at the expense of certain Native rights. Specifically, it entitles women who lost their status and band membership on account of marrying non-Indian men to automatic band membership.

[36]Subsection 10(5) is further evidence of my conclusion that the Act creates an automatic entitlement to membership, since it states, by reference to paragraph 11(1)(*c*), that nothing can deprive acquired rights individuals of their automatic entitlement to membership unless they subsequently lose that entitlement. The Band's membership rules do not include specific provisions that describe the circumstances in which acquired rights individuals might subsequently lose their entitlement to membership. Enacting application requirements is certainly not enough to deprive acquired rights individuals of their automatic entitlement to band membership, pursuant to subsection 10(5). To put the matter another way, Parliament having spoken in terms of entitlement and acquired rights, it would take more specific provisions than what is found in section 3 of the membership rules for delegated and subordinate legislation to take away or deprive Charter protected persons of those rights.

[37]As a result, I find that the Band's application of its membership rules, in which pre-conditions have been created to membership, is in contravention of the *Indian Act*.

[38]While not necessarily conclusive, it seems that the Band itself takes the same view. Although on the hearing of the present motion, it vigorously asserted that it was in compliance with the Act, its statement of claim herein asserts without reservation that Bill C-31 has the effect of imposing on it members that it does not want. Paragraph 22 of the fresh as amended statement of claim reads as follows:

22. The plaintiffs state that with the enactment of the Amendments, Parliament attempted unilaterally to require the First Nations to admit certain persons to membership. The Amendments granted individual membership rights in each of the First Nations without their consent, and indeed over their objection. Furthermore, such membership rights were granted to individuals without regard for their actual connection to or interest in the First Nation, and regardless of their individual desires or that of the First Nation, or the circumstances pertaining the First Nation. This exercise of power by Parliament was unprecedented in the predecessor legislation.

[39]I shall grant the mandatory injunction as requested and will specifically order that the names of the 11 known acquired rights women be added to the Band List and that they be accorded all the rights of membership in the Band.

[40]I reserve the question of costs for the Crown. If it seeks them, it should do so by moving pursuant to rule 369 of the *Federal Court Rules, 1998* [SOR/98-106]. While the interveners have made a useful contribution to the debate, I would not order any costs to or against them.

ORDER

The plaintiff and the persons on whose behalf she sues, being all the members of the Sawridge Band, are hereby ordered, pending a final resolution of the plaintiff's action, to enter or register on the Sawridge Band List the names of the individuals who acquired the right to be members of the Sawridge Band before it took control of its Band List, with the full rights and privileges enjoyed by all Band members.

Without restricting the generality of the foregoing, this order requires that the following persons, namely, Jeannette Nancy Boudreau, Elizabeth Courtoreille, Fleury Edward DeJong, Roseina Anna Lindberg, Cecile Yvonne Loyie, Elsie Flora Loyie, Rita Rose Mandel, Elizabeth Bernadette Poitras, Lillian Ann Marie Potskin, Margaret Ages Clara Ward and Mary Rachel L'Hirondelle be forthwith entered on the Band List of the Sawridge Band and be immediately accorded all the rights and privileges attaching to Band membership.

Tab 5

Sawridge Band v. Canada, [2004] 3 FCR 274, 2004 FCA 16 (CanLII)

Date: 2004-01-19
Docket: A-170-03
Other citations: 316 NR 332; [2004] FCJ No 77 (QL); [2004] 2 CNLR 316
Citation: Sawridge Band v. Canada, [2004] 3 FCR 274, 2004 FCA 16 (CanLII), <http://canlii.ca/t/1g8b9>, retrieved on 2017-10-26

A-170-03

2004 FCA 16

Bertha L'Hirondelle, suing on her own behalf and on behalf of all other members of the Sawridge Band (*Plaintiffs*) (*Appellants*)

v.

Her Majesty the Queen (*Defendant*) (*Respondent*)

and

Native Council of Canada, Native Council of Canada (Alberta), Native Women's Association of Canada and **Non-Status Indian Association of Alberta** (*Interveners*) (*Respondents*)

Indexed as: Sawridge Band v. Canada (F.C.A.)

Federal Court of Appeal, Rothstein, Noël and Malone JJ.A.--Calgary, December 15 and 16, 2003; Ottawa, January 19, 2004.

Native Peoples -- Registration -- Appellants opposing requirement to enter on Sawridge Band List names of 11 individuals, to accord them rights, privileges attaching to Band membership -- Bill C-31 granting certain persons whose names omitted, deleted from Indian Register prior to April 17, 1985 entitlement to status under Indian Act -- Indian Act, s. 10(4), (5) must be interpreted in accordance with modern approach -- Act, s. 11(1)(c) granting appellants automatic entitlement to membership in Sawridge Band -- Requiring such acquired rights individuals to comply with Sawridge Band membership code in contravention of Act.

Administrative Law -- Judicial Review -- Injunctions -- Trial Judge granting mandatory interlocutory injunction sought by Crown, requiring appellants to register names of 11 individuals on Sawridge Band List -- Making determination of law as condition precedent to

granting of interlocutory injunction -- Such determination appropriate -- Where substantive question of law at issue, applicable standard of review correctness -- Three-part test for granting interlocutory injunction met -- First part, serious issue to be tried, applies to interlocutory injunction applications whether mandatory or prohibitory.

Constitutional Law -- Aboriginal and Treaty Rights -- Appellants submitting provisions of Bill C-31 conferring entitlement to Band membership inconsistent with Constitution Act, 1982, s. 35, therefore of no force, effect -- Legislation must be complied with until found to be unconstitutional -- Clear public interest in seeing legislation obeyed until application stayed by Court order, legislation set aside on final judgment.

Construction of Statutes -- Interpretation of Indian Act, s. 10(4), (5) -- All legislation must be read in context -- Trial Judge correctly interpreted s. 10(4), (5) in accordance with modern approach -- Act creating automatic entitlement to membership unless acquired rights individuals subsequently lose entitlement.

Practice -- Parties -- Standing -- Whether Crown lacked standing, has not met test for seeking interlocutory injunctive relief -- Crown having standing to seek injunctions to ensure public bodies, such as Indian band council, follow law.

This was an appeal from a Trial Judge's order granting a mandatory interlocutory injunction sought by the Crown, requiring the appellants to register the names of 11 individuals on the Sawridge Band List and to accord them all the rights and privileges attaching to Band membership. In an action commenced on January 15, 1986, the appellants sought a declaration that the provisions of Bill C-31(*An Act to amend the Indian Act*) that confer an entitlement to Band membership are inconsistent with section 35 of the *Constitution Act, 1982*, and are therefore of no force and effect. Bill C-31 granted certain persons whose names were omitted or deleted from the Indian Register by the Minister of Indian and Northern Affairs prior to April 17, 1985, entitlement to status under the *Indian Act*. By notice of motion, the Crown applied for an interlocutory mandatory injunction requiring the Sawridge Band to comply with the provisions of the Act unless and until they are determined to be unconstitutional. By order dated March 27, 2003, Hugessen J. granted the requested injunction. In appealing the order of Hugessen J., the appellants raised two issues: (1) whether the Band's membership application process complied with the requirements of the Act, and (2) whether the Crown had standing and had met the test for granting interlocutory injunctive relief.

Held, the appeal should be dismissed.

(1) The Crown's notice of motion for a mandatory interlocutory injunction was based on the appellants' refusal to comply with the legislation pending determination of whether the legislation was constitutional. It was agreed that the interpretation of the legislation and whether or not the appellants were in compliance with it was relevant to this litigation. Courts do not normally make determinations of law as a condition precedent to the granting of an interlocutory injunction, but that is what occurred here. It was appropriate for Hugessen J. to have made a preliminary determination of law that was final and conclusive for purposes of the action, subject to being varied on appeal.

Where a substantive question of law is at issue, even if it is decided by a case management judge, the applicable standard of review will be correctness. Hugessen J. was not satisfied that subsections 10(4) and (5) of the *Indian Act* are as clear and unambiguous as the appellants suggested. He correctly interpreted these provisions in accordance with the modern approach to statutory construction which states that the words of an Act are to be

read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The term "acquired rights" which appears as a marginal note beside subsection 10(4) is a convenient "shorthand" to identify those individuals who, by reason of paragraph 11(1)(*c*) of the Act, became entitled to automatic membership in the Indian Band with which they were connected. The instant paragraph 11(1)(*c*) came into force, i.e. April 17, 1985, these individuals were entitled to have their names entered on the membership list of their Band. The words "by reason only of" in subsection 10(4) could allow a band to create restrictions on continued membership for situations that arose or actions taken after the membership code came into effect. However, the code cannot operate to deny membership to those individuals who come within paragraph 11(1)(*c*). There is no automatic membership in a band, but there is an automatic entitlement to membership. The words "commencing on April 17, 1985" only indicate that subsection 11(1) was not retroactive to before April 17, 1985. As of that date, the individuals in question acquired an automatic entitlement to membership in the Sawridge Band. For these persons entitled to membership, a simple request to be included in the Band's membership list is all that is required. The fact that the individuals in question did not complete a Sawridge Band membership application is irrelevant. Requiring acquired rights individuals to comply with the Sawridge Band membership code, in which preconditions had been created to membership, was in contravention of the Act.

(2) The Crown was seeking an injunction, not only on behalf of the individuals denied the benefits of a validly enacted legislation, but on behalf of the public interest in having the laws of Canada obeyed. It has traditionally had standing to seek injunctions to ensure that public bodies, such as an Indian band council, follow the law. Having regard to the Crown's standing at common law, statutory authority is unnecessary. Hugessen J. correctly found that the Crown had standing to seek the injunction. Moreover, the Crown was seeking essentially the same relief on the injunction application as in the main action. Further, section 44 of the *Federal Courts Act* confers a very broad jurisdiction on the Federal Court, even to granting an injunction where it is not being asked to grant final relief. That being so, the Court surely has jurisdiction to grant an injunction where it will itself make a final determination on an interconnected issue. The requested injunction was therefore sufficiently connected to the final relief claimed by the Crown.

The test for granting an interlocutory injunction, as adopted by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*; and *RJR--MacDonald Inc. v. Canada (Attorney General)*, is threefold. First, there must be a serious question to be tried. Such test should be applied to an interlocutory injunction application, whether it is prohibitory or mandatory. The Crown's argument that Bill C-31 is constitutional was neither frivolous nor vexatious. There was, therefore, a serious question to be tried. Second, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Ordinarily the public interest would only be considered in the third branch of the test, but since the government was the applicant in this motion for interlocutory relief, the public interest had to be considered in the second stage as well. Allowing the appellants to ignore the requirements of the Act would irreparably harm the public interest in seeing that the law is obeyed. Until a law is struck down as unconstitutional or an interim constitutional exemption is granted by a court of competent jurisdiction, citizens and organizations must obey it. Further the individuals who have been denied Band membership are aging and may never benefit from amendments adopted to redress their discriminatory exclusion. The public interest in preventing discrimination by public bodies will be irreparably harmed if the requested injunction is denied and the appellants are able to continue to ignore their obligations under Bill C-31, pending a determination of its constitutionality. The appellants

argued that there could not be irreparable harm because the Crown would not have waited 16 years after the commencement of the action to seek an injunction. The question of whether delay in bringing an injunction application is fatal is a matter of discretion for the motions judge. There was no suggestion that Hugessen J. did not act judicially in the exercise of his discretion. The third branch of the test is the balance of convenience. In the *Metropolitan Stores* case, it was held that interlocutory injunctions should not be granted in public law cases, "unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry". In this case, the public interest in seeing that laws are obeyed and that prior discrimination is remedied weighs in favour of granting the injunction requested by the Crown. There is a clear public interest in seeing that legislation is obeyed until its application is stayed by court order or the legislation is set aside on final judgment. On the other hand, the Sawridge Band will suffer little or no damage by admitting nine elderly ladies and one gentleman to membership. Therefore, the balance of convenience favoured granting the injunction.

statutes and regulations judicially

considered

An Act to amend the Indian Act, R.S.C., 1985 (1st Supp.), c. 32.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 15.

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 35.

Federal Courts Act, R.S.C., 1985, c. F-7 , ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 44 (as am. *idem*, s. 41).

Federal Court Rules, 1998, SOR/98-106, rr. 220, 369.

Indian Act, R.S.C., 1985, c. I-5 , ss. 6 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4), 10(4) (as am. *idem*), (5) (as am. *idem*), 11(1)(*c*) (as am. *idem*), 12.

Interpretation Act, R.S.C., 1985, c. I-21 , s. 14.

cases judicially considered

applied:

Manitoba (Attorney General) v. Metropolitan Stores Ltd., 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110; (1987), 38 D.L.R. (4th) 321; [1987] 3 W.W.R. 1; 46 Man. R. (2d) 241; 25 Admin. L.R. 20; 87 CLLC 14,015; 18 C.P.C. (2d) 273; 73 N.R. 341; *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311; (1994), 111 D.L.R. (4th) 385; 54 C.P.R. (3d) 114; 164 N.R. 1; 60 Q.A.C. 241.

considered:

Canada (Human Rights Commission) v. Canadian Liberty Net, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626; (1998), 157 D.L.R. (4th) 385; 6 Admin. L.R. (3d) 1; 22 C.P.C. (4th) 1; 50 C.R.R. (2d) 189; 224 N.R. 241; *Relais Nordik Inc. v. Secunda Marine Services Ltd.* (1988), 24 F.T.R. 256 (F.C.T.D.); *Ansa International Rent-a-Car (Canada) Ltd. v. American International Rent-a-Car Corp.* (1990), 32 C.P.R. (3d) 340; 36 F.T.R. 98 (F.C.T.D.); *Patriquen v. Canada (Correctional Services)* (2003), 2003 FC 927 (CanLII), 238 F.T.R. 153 (F.C.).

referred to:

Sawridge Band v. Canada, 2001 FCA 338 (CanLII), [2002] 2 F.C. 346; (2001), 213 F.T.R. 57; 283 N.R. 107 (C.A.); *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; (1998), 36 O.R. (3d) 418; 154 D.L.R. (4th) 193; 50 C.B.R. (3d) 163; 33 C.C.E.L. (2d) 173; 221 N.R. 241; 106 O.A.C. 1; *Ontario (Attorney General) v. Ontario Teachers' Federation* (1997), 1997 CanLII 12182 (ON SC), 36 O.R. (3d) 367; 44 O.T.C. 274 (Gen. Div.); *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.); *Breen v. Farlow*, [1995] O.J. No. 2971 (Gen. Div.) (QL); *493680 Ontario Ltd. v. Morgan*, [1996] O.J. No. 4776 (Gen. Div.) (QL); *Samoila v. Prudential of America General Insurance Co. (Canada)*, [1999] O.J. No. 2317 (Sup. Ct.) (QL); *Morgentaler et al. v. Ackroyd et al.* (1983), 1983 CanLII 1748 (ON SC), 42 O.R. (2d) 659; 150 D.L.R. (3d) 59 (H.C.); *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417 (CanLII), [2003] 2 F.C. 451; (2002), 22 C.P.R. (4th) 177; 297 N.R. 135 (C.A.).

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APPEAL from a Trial Division decision (*Sawridge Band v. Canada*, 2003 FCT 347 (CanLII), [2003] 4 F.C. 748; [2003] 3 C.N.L.R. 344; (2003), 232 F.T.R. 54) granting a mandatory interlocutory injunction sought by the Crown, requiring the appellants to enter on the Sawridge Band List the names of 11 individuals and to accord them all the rights and privileges attaching to Band membership. Appeal dismissed.

appearances:

Martin J. Henderson and *Catherine M. Twinn* for plaintiffs (appellants).

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Kenneth S. Purchase for intervener Native Council of Canada.

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Mary Eberts for intervener Native Women's Association of Canada.

Michael J. Donaldson for intervener Non-Status Indian Association of Alberta.

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Deputy Attorney General of Canada for defendant (respondent).

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Field LLP, Edmonton, for intervener Native Council of Canada (Alberta).

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Burnet, Duckworth & Palmer LLP, Calgary, for intervener Non-Status Indian Association of Alberta.

The following are the reasons for judgment rendered in English by

[1]Rothstein J.A.: By order dated March 27, 2003 [2003 FCT 347 (CanLII), [2003] 4 F.C. 748], Hugessen J. of the Trial Division (as it then was) granted a mandatory interlocutory injunction sought by the Crown, requiring the appellants to enter or register on the Sawridge Band List the names of 11 individuals who, he found, had acquired the right to be members of the Sawridge Band before it took control of its Band List on July 8, 1985, and to accord the 11 individuals all the rights and privileges attaching to Band membership. The appellants now appeal that order.

HISTORY

[2]The background to this appeal may be briefly stated. *An Act to amend the Indian Act*, R.S.C., 1985, (1st Supp.), c. 32 (Bill C-31), was given Royal Assent on June 28, 1985. However, the relevant provisions of Bill C-31 were made retroactive to April 17, 1985, the date on which section 15, the equality guarantee, of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (the Charter) came into force.

[3]Among other things, Bill C-31 granted certain persons an entitlement to status under the *Indian Act*, R.S.C., 1985, c. I-5 (the Act), and, arguably, entitlement to membership in an Indian Band. These persons included those whose names were omitted or deleted from the Indian Register by the Minister of Indian and Northern Affairs prior to April 17, 1985, in accordance with certain provisions of the Act as they read prior to that date. The disqualified persons included an Indian woman who married a man who was not registered as an Indian as well as certain other persons disqualified by provisions that Parliament considered to be discriminatory on account of gender. The former provisions read [section 12]:

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

(*a*) a person who

. . .

(iii) is enfranchised, or

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

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

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

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(*e*) may be protested at any time within twelve months after the addition, and if on the

protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

[4]Bill C-31 repealed these disqualifications and enacted the following provisions to allow those who had been stripped of their status to regain it [sections 6 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4), 11 (as am. *idem*)]:

6. (1) Subject to section 7, a person is entitled to be registered if

. . .

(*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

. . .

11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

. . .

(*c*) that person is entitled to be registered under paragraph 6(1)(*c*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph;

[5]By an action originally commenced on January 15, 1986, the appellants claim a declaration that the provisions of Bill C-31 that confer an entitlement to Band membership are inconsistent with section 35 of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] and are, therefore, of no force and effect. The appellants say that an Indian Band's right to control its own membership is a constitutionally protected Aboriginal and treaty right and that legislation requiring a Band to admit persons to membership is therefore unconsti-tutional.

[6]This litigation is now in its 18th year. By notice of motion dated November 1, 2002, the Crown applied for:

. . . an interlocutory mandatory injunction, pending a final resolution of the Plaintiffs' action, requiring the Plaintiffs to enter or register on the Sawridge Band List the names of the individuals who acquired the right to be members of the Sawridge Band before it took control of its Band list, with the full rights and privileges enjoyed by all band members.

[7]The basis of the Crown's application was that until legislation is found to be unconstitutional, it must be complied with. The mandatory injunction application was brought to require the Band to comply with the provisions of the Act unless and until they are determined to be unconstitutional. By order dated March 27, 2003, Hugessen J. granted the requested injunction.

[8]This Court was advised that, in order for the Band to comply with the order of Hugessen J., the 11 individuals in question were entered on the Sawridge Band List. Nonetheless, the appellants submit that Hugessen J.'s order was made in error and should be quashed.

ISSUES

[9]In appealing the order of Hugessen J., the appellants raise the following issues:

1. Does the Band's membership application process comply with the requirements of the Act?

2. Even if the Band has not complied with the Act, did Hugessen J. err in granting a mandatory interlocutory injunction because the Crown lacks standing and has not met the test for granting interlocutory injunctive relief?

APPELLANTS' SUBMISSIONS

[10]The appellants say that the Band's membership code has been in effect since July 8, 1985 and that any person who wishes to become a member of the Band must apply for membership and satisfy the requirements of the membership code. They say that the 11 individuals in question have never applied for membership. As a result, there has been no refusal to admit them. The appellants submit that the code's requirement that all applicants for membership go through the application process is in accordance with the provisions of the Act. Because the Band is complying with the Act, there is no basis for granting a mandatory interlocutory injunction.

[11]Even if the Band has not complied with the Act, the appellants say that Hugessen J. erred in granting a mandatory interlocutory injunction because the Crown has no standing to seek such an injunction. The appellants argue that there is no *lis* between the beneficiaries of the injunction and the appellants. The Crown has no interest or, at least, no sufficient legal interest in the remedy. Further, the Crown has not brought a proceeding seeking final relief of the nature sought in the mandatory interlocutory injunction application. In the absence of such a proceeding, the Court is without jurisdiction to grant a mandatory interlocutory injunction. Further, there is no statutory authority for the Crown to seek the relief in question. The appellants also argue that the Crown has not met the three-part test for the granting of an interlocutory injunction.

ARE THE APPELLANTS COMPLYING WITH THE *INDIAN ACT*?

The Appropriateness of Deciding a Legal Question in the Course of an Interlocutory Injunction Application

[12]The question of whether the Sawridge Band membership code and application process are in compliance with the Act appears to have been first raised by the appellants in response to the Crown's injunction application. Indeed, the appellants' fresh as amended statement of claim would seem to acknowledge that, at least when it was drafted, the appellants were of the view that certain individuals could be entitled to membership in an Indian Band without the consent of the Band. Paragraph 22 of the fresh as amended statement of claim states in part:

The plaintiffs state that with the enactment of the Amendments, Parliament attempted unilaterally to require the First Nations to admit certain persons to membership. The Amendments granted individual membership rights in each of the First Nations without their consent, and indeed over their objection.

[13]There is nothing in the appellants' fresh as amended statement of claim that would suggest that an issue in the litigation was whether the appellants were complying with the Act. The entire fresh as amended statement of claim appears to focus on challenging the constitutional validity of the Bill C-31 amendments to the *Indian Act*.

[14]The Crown's notice of motion for a mandatory interlocutory injunction was based on the appellants' refusal to comply with the legislation pending determination of whether the legislation was constitutional. The Crown's assumption appears to have been that there was no dispute that, barring a finding of unconstitutionality, the legislation required the appellants to admit the 11 individuals to membership.

[15]Be that as it may, the appellants say that the interpretation of the legislation and whether or not they are in compliance with it was always in contemplation in and relevant to this litigation. It was the appellants who raised the question of whether or not they were in compliance in response to the Crown's motion for injunction. It, therefore, had to be dealt with before the injunction application itself was addressed. The Crown and the interveners do not challenge the need to deal with the question and Hugessen J. certainly accepted that it was necessary to interpret the legislation and determine if the appellants were or were not in compliance with it.

[16]Courts do not normally make determinations of law as a condition precedent to the granting of an interlocutory injunction. However, that is what occurred here. In the unusual circumstances of this case, I think it was appropriate for Hugessen J. to have made such a determination.

[17]Although rule 220 [*Federal Court Rules, 1998*, SOR/98-106] was not expressly invoked, I would analogize the actions of Hugessen J. to determining a preliminary question of law. Subsections 220(1) and (3) read as follows:

220. (1) A party may bring a motion before trial to request that the Court determine

(*a*) a question of law that may be relevant to an action;

. . .

(3) A determination of a question referred to in subsection (1) is final and conclusive for the purposes of the action, subject to being varied on appeal.

[18]Although the appellants did not explicitly bring a motion under rule 220, the need to determine the proper interpretation of the Act was implicit in their reply to the respondent's motion for a mandatory interlocutory injunction. It would be illogical for the appellants to raise the issue in defence to the injunction application and the Court not be able to deal with it. There is no suggestion that the question could not be decided because of disputed facts or for any other reason. It was raised by the appellants who said it was relevant to the action. Therefore, I think that Hugessen J. was able to, and did, make a preliminary determination of law that was final and conclusive for purposes of the action, subject to being varied on appeal.

Does the Band's Membership Application Process Comply with the Requirements of the *Indian Act*?

[19]I turn to the question itself. Although the determination under appeal was made by a case management judge who must be given extremely wide latitude (see *Sawridge Band v. Canada*, 2001 FCA 338 (CanLII), [2002] 2 F.C. 346 (C.A.), at paragraph 11), the determination is one of law. Where a substantive question of law is at issue, even if it is decided by a case management judge, the applicable standard of review will be correctness.

[20]The appellants say there is no automatic entitlement to membership and that the Band's membership code is a legitimate means of controlling its own membership. They rely on subsections 10(4) [as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4] and 10(5) [as am. *idem*] of the *Indian Act* which provide:

10. . . .

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(*c*) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

[21]The appellants say that subsections 10(4) and (5) are clear and unambiguous and Hugessen J. was bound to apply these provisions. They submit the words "by reason only of" in subsection 10(4) mean that a band may establish membership rules as long as they do not expressly contravene any provisions of the Act. They assert that the Band's code does not do so. The code only requires that if an individual is not resident on the Reserve, an application must be made demonstrating, to the satisfaction of the Band Council, that the individual:

. . . has applied for membership in the band and, in the judgment of the Band Council, has a significant commitment to, and knowledge of, the history, customs, traditions, culture and communal life of the Band and a character and lifestyle that would not cause his or her admission to membership in the Band to be detrimental to the future welfare or advancement of the Band (paragraph 3(a)(ii)).

[22]With respect to subsection 10(5), the appellants say that the words "if that person does not subsequently cease to be entitled to have his name entered in the Band List" mean that the Band is given a discretion to establish membership rules that may disentitle an individual to membership in the Band. They submit that nothing in the Act precludes a band from establishing additional qualifications for membership.

[23]The Crown, on the other hand, says that persons in the position of the individuals in this appeal have "acquired rights." I understand this argument to be that paragraph 11(1)(*c*) [as am. *idem*] created an automatic entitlement for those persons to membership in the Indian Band with which they were previously connected. The Crown submits that subsection 10(4) prohibits a band from using its membership rules to create barriers to membership for such persons.

[24]Hugessen J. was not satisfied that subsections 10(4) and (5) are as clear and unambiguous as the appellants suggest. He analyzed the provisions in the context of related provisions and agreed with the Crown.

[25]The appellants seem to object to Hugessen J.'s contextual approach to statutory interpretation. However, all legislation must be read in context. Driedger's [*Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983, at page 87] well-known statement of the modern approach to statutory construction, adopted in countless cases such as *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paragraph 21, reads:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Hugessen J. interpreted subsections 10(4) and (5) in accordance with the modern approach and he was correct to do so.

[26]I cannot improve on Hugessen J.'s statutory construction analysis and I quote the relevant portions of his reasons, which I endorse and adopt as my own [at paragraphs 24-27 and 36]:

It is unfortunate that the awkward wording of subsections 10(4) and 10(5) does not make it absolutely clear that they were intended to entitle acquired rights individuals to automatic membership, and that the Band is not permitted to create pre-conditions to membership, as it has done. The words "by reason only of" in subsection 10(4) do appear to suggest that a band might legitimately refuse membership to persons for reasons other than those contemplated by the provision. This reading of subsection 10(4), however, does not sit easily with the other provisions in the Act as well as clear statements made at the time regarding the amendments when they were enacted in 1985.

The meaning to be given to the word "entitled" as it is used by paragraph 6(1)(*c*) is clarified and extended by the definition of "member of a band" in section 2, which stipulates that a person who is entitled to have his name appear on a Band List is a member of the Band. Paragraph 11(1)(*c*) requires that, commencing on April 17, 1985, the date Bill C-31 took effect, a person was entitled to have his or her name entered in a Band List maintained by the Department of Indian Affairs for a band if, *inter alia*, that person was entitled to be registered under paragraph 6(1)(*c*) of the 1985 Act and ceased to be a member of that band by reason of the circumstances set out in paragraph 6(1)(*c*).

While the Registrar is not obliged to enter the name of any person who does not apply therefor (see section 9(5)), that exemption is not extended to a band which has control of its list. However, the use of the imperative "shall" in section 8, makes it clear that the band is obliged to enter the names of all entitled persons on the list which it maintains. Accordingly, on July 8, 1985, the date the Sawridge Band obtained control of its List, it was obliged to enter thereon the names of the acquired rights women. When seen in this light, it becomes clear that the limitation on a band's powers contained in subsections 10(4) and 10(5) is simply a prohibition against legislating retrospectively: a band may not create barriers to membership for those persons who are by law already deemed to be members.

Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."

. . .

Subsection 10(5) is further evidence of my conclusion that the Act creates an automatic entitlement to membership, since it states, by reference to paragraph 11(1)(*c*), that nothing can deprive acquired rights individuals [sic] to their automatic entitlement to membership unless they subsequently lose that entitlement. The Band's membership rules do not include specific provisions that describe the circumstances in which acquired rights individuals

might subsequently lose their entitlement to membership. Enacting application requirements is certainly not enough to deprive acquired rights individuals of their automatic entitlement to band membership, pursuant to subsection 10(5). To put the matter another way, Parliament having spoken in terms of entitlement and acquired rights, it would take more specific provisions than what is found in section 3 of the membership rules for delegated and subordinate legislation to take away or deprive Charter protected persons of those rights.

[27]I turn to the appellants' arguments in this Court.

[28]The appellants assert that the description "acquired rights" used by Hugessen J. reads words into the *Indian Act* that are not there. The term "acquired rights" appears as a marginal note beside subsection 10(4). As such, it is not part of the enactment, but is inserted for convenience of reference only (*Interpretation Act*, R.S.C., 1985, c. I-21, section 14). However, the term is a convenient "shorthand" to identify those individuals who, by reason of paragraph 11(1)(*c*), became entitled to automatic membership in the Indian Band with which they were connected. In other words, the instant paragraph 11(1)(*c*) came into force, i.e. April 17, 1985, these individuals were entitled to have their names entered on the membership list of their Band.

[29]The appellants say that the words "by reason only of" in subsection 10(4) do not preclude an Indian Band from establishing a membership code, requiring persons who wish to be considered for membership to make application to the Band. I acknowledge that the words "by reason only of" could allow a band to create restrictions on continued membership for situations that arose or actions taken after the membership code came into force. However, the code cannot operate to deny membership to those individuals who come within paragraph 11(1)(*c*).

[30]A band may enact membership rules applicable to all of its members. Yet subsections 10 (4) and (5) restrict a band from enacting membership rules targeted only at individuals who, by reason of paragraph 11(1)(*c*), are entitled to membership. That distinction is not permitted by the Act.

[31]The appellants raise three further objections. First, they say that their membership code is required because of "band shopping." However, in respect of persons entitled to membership under paragraph 11(1)(*c*), the issue of band shopping does not arise. Under paragraph 11(1)(*c*), the individuals in question are only entitled to membership in the band in which they would have been a member but for the pre-April 17, 1985 provisions of the *Indian Act*. In this case, those individuals would have been members of the Sawridge Band.

[32]Second, the appellants submit that the opening words of subsection 11(1), "commencing on April 17, 1985," indicate a process and not an event, i.e. that there is no automatic membership in a band and that indeed some persons may not wish to be members; rather, the word "commencing" only means that a person may apply at any time on or after April 17, 1985. I agree that there is no automatic membership. However, there is an automatic entitlement to membership. The words "commencing on April 17, 1985" only indicate that subsection 11(1) was not retroactive to before April 17, 1985. As of that date, the individuals in question in this appeal acquired an automatic entitlement to membership in the Sawridge Band.

[33]Third, the appellants say that the individuals in question have not made application for membership. Hugessen J. dealt with this argument at paragraph 12 of his reasons:

Finally, the plaintiff argued strongly that the women in question have not applied for membership. This argument is a simple "red herring". It is quite true that only some of them have applied in accordance with the Band's membership rules, but that fact begs the question as to whether those rules can lawfully be used to deprive them of rights to which Parliament has declared them to be entitled. The evidence is clear that all of the women in question wanted and sought to become members of the Band and that they were refused at least implicitly because they did not or could not fulfil the rules' onerous application requirements.

[34]The appellants submit, contrary to Hugessen J.'s finding, that there was no evidence that the individuals in question here wanted to become members of the Sawridge Band. A review of the record demonstrates ample evidence to support Hugessen J.'s finding. For example, by Sawridge Band Council Resolution of July 21, 1988, the Band Council acknowledged that "at least 164 people had expressed an interest in writing in making application for membership in the Band." A list of such persons was attached to the Band Council Resolution. Of the 11 individuals in question here, 8 were included on that list. In addition, the record contains applications for Indian status and membership in the Sawridge Band made by a number of the individuals.

[35]For these persons entitled to membership, a simple request to be included in the Band's membership list is all that is required. The fact that the individuals in question did not complete a Sawridge Band membership application is irrelevant. As Hugessen J. found, requiring acquired rights individuals to comply with the Sawridge Band membership code, in which preconditions had been created to membership, was in contravention of the Act.

[36]Of course, this finding has no bearing on the main issue raised by the appellants in this action, namely, whether the provisions entitling persons to membership in an Indian band are unconstitutional.

THE INJUNCTION APPLICATION

Standing

[37]I turn to the injunction application. The appellants say that there was no *lis* between the Band and the 11 persons ordered by Hugessen J. to be included in the Band's Membership List. The 11 individuals are not parties to the main action. The appellants also say that the Crown is not entitled to seek interlocutory relief when it does not seek the same final relief.

[38]I cannot accept the appellants' arguments. The Crown is the respondent in an application to have validly enacted legislation struck down on constitutional grounds. It is seeking an injunction, not only on behalf of the individuals denied the benefits of that legislation but on behalf of the public interest in having the laws of Canada obeyed. The Crown, as represented by the Attorney General, has traditionally had standing to seek injunctions to ensure that public bodies, such as an Indian band council, follow the law (see Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, Ont.: Canada Law Book, 1998), at paragraph 3.30; *Ontario (Attorney General) v. Ontario Teachers' Federation* (1997), 1997 CanLII 12182 (ON SC), 36 O.R. (3d) 367 (Gen. Div.), at pages 371-372). Having regard to the Crown's standing at common law, statutory authority, contrary to the appellants' submission, is unnecessary. Hugessen J. was thus correct to find that the Crown had standing to seek the injunction.

[39]I also cannot accept the argument that the Crown may not seek interlocutory relief because it has not sought the same final relief in this action. The Crown is defending an

attack on the constitutionality of Bill C-31 and is seeking an interlocutory injunction to require compliance with it in the interim. If the Crown is successful in the main action, the result will be that the Sawridge Band will have to enter or register on its membership list the individuals who are the subject of the injunction application. The Crown therefore is seeking essentially the same relief on the injunction application as in the main action.

[40]Further, section 44 [as am. by S.C. 2002, c. 8, s. 41] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 , s. 1 (as am. *idem*, s. 14), confers jurisdiction on the Federal Court to grant an injunction "in all cases in which it appears to the court to be just or convenient to do so." The jurisdiction conferred by section 44 is extremely broad. In *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, the Supreme Court found that the Federal Court could grant injunctive relief even though there was no action pending before the Court as to the final resolution of the claim in issue. If section 44 confers jurisdiction on the Court to grant an injunction where it is not being asked to grant final relief, the Court surely has jurisdiction to grant an injunction where it will itself make a final determination on an interconnected issue. The requested injunction is therefore sufficiently connected to the final relief claimed by the Crown.

The Test for Granting an Interlocutory Injunction

[41]The test for whether an interlocutory injunction should be granted was set out in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.) and adopted by the Supreme Court in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110; and *RJR--MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, where, at page 334, Sopinka and Cory JJ. summarized the test as follows:

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[42]The appellants submit that Hugessen J. erred in applying a reverse onus to the test. Since, as will be discussed below, the Crown has satisfied the traditional test, I do not need to consider whether the onus should be reversed.

Serious Question

[43]In *RJR--MacDonald, supra*, at pages 337-338, the Court indicated that the threshold at the first branch is low and that the motions judge should proceed to the rest of the test unless the application is vexatious or frivolous.

[44]The appellants say that in cases where a mandatory injunction is sought, the older pre-*American Cyanamid* test of showing a strong *prima facie* case for trial should continue to apply. They rely on an Ontario case, *Breen v. Farlow*, [1995] O.J. No. 2971 (Gen. Div.) (QL), in support of this proposition. Of course, that case is not binding on this Court. Furthermore, it has been questioned by subsequent Ontario decisions in which orders in the nature of a mandatory interlocutory injunction were issued (*493680 Ontario Ltd. v. Morgan*, [1996] O.J. No. 4776 (Gen. Div.) (QL); *Samoila v. Prudential of America General Insurance Co. (Canada)*, [1999] O.J. No. 2317 (Sup. Ct.) (QL)). In *Morgan*, Hockin J. stated that *RJR-*

-*MacDonald* had modified the old test, even for mandatory interlocutory injunctions (paragraph 27).

[45]The jurisprudence of the Federal Court on this issue in recent years is divided. In *Relais Nordik Inc. v. Secunda Marine Services Ltd.* (1988), 24 F.T.R. 256 (F.C.T.D.), at page 9, Pinard J. questioned the applicability of the *American Cyanamid* test to mandatory interlocutory injunctions. On the other hand, in *Ansa International Rent-a-Car (Canada) Ltd. v. American International Rent-a-Car Corp.* (1990), 32 C.P.R. (3d) 340 (F.C.T.D.), at paragraph 15, MacKay J. accepted that the *American Cyanamid* test applied to mandatory injunctions in the same way as to prohibitory ones. Both of these cases were decided before the Supreme Court reaffirmed its approval of the *American Cyanamid* test in *RJR--MacDonald*. More recently, in *Patriquen v. Canada (Correctional Services)* (2003), 2003 FC 927 (CanLII), 238 F.T.R. 153 (F.C.), at paragraphs 9-16, Blais J. followed the *RJR--MacDonald* test and found that there was a serious issue to be tried in an application for a mandatory interlocutory injunction (which he dismissed on the basis that the applicant had not shown irreparable harm).

[46]Hugessen J. followed *Ansa International*, *supra*, and held that the *RJR--MacDonald* test should be applied to an interlocutory injunction application, whether it is prohibitory or mandatory. In light of Sopinka and Cory JJ.'s caution about the difficulties of engaging in an extensive analysis of the constitutionality of legislation at an interlocutory stage (*RJR--MacDonald*, at page 337), I think he was correct to do so. However, the fact that the Crown is asking the Court to require the appellants' to take positive action will have to be considered in assessing the balance of convenience.

[47]In this case, the Crown's argument that Bill C-31 is constitutional is neither frivolous nor vexatious. There is, therefore, a serious question to be tried.

Irreparable Harm

[48]Ordinarily, the public interest is considered only in the third branch of the test. However, where, as here, the government is the applicant in a motion for interlocutory relief, the public interest must also be considered in the second stage (*RJR--MacDonald, supra*, at page 349).

[49]Validly enacted legislation is assumed to be in the public interest. Courts are not to investigate whether the legislation actually has such an effect (*RJR-- MacDonald*, at pages 348-349).

[50]Allowing the appellants to ignore the requirements of the Act would irreparably harm the public interest in seeing that the law is obeyed. Until a law is struck down as unconstitutional or an interim constitutional exemption is granted by a court of competent jurisdiction, citizens and organizations must obey it (*Metropolitan Stores*, *supra*, at page 143, quoting *Morgentaler et al. v. Ackroyd et al.* (1983), 1983 CanLII 1748 (ON SC), 42 O.R. (2d) 659 (H.C.), at pages 666-668).

[51]Further, the individuals who have been denied membership in the appellant Band are aging and, at the present rate of progress, some are unlikely ever to benefit from amendments that were adopted to redress their discriminatory exclusion from Band membership. The public interest in preventing discrimination by public bodies will be irreparably harmed if the requested injunction is denied and the appellants are able to continue to ignore their obligations under Bill C-31, pending a determination of its constitutionality.

[52]The appellants argue that there cannot be irreparable harm because, if there was, the Crown would not have waited 16 years after the commencement of the action to seek an injunction. The Crown submits that it explained to Hugessen J. the reasons for the delay and stated that the very length of the proceedings had in fact contributed to the irreparable harm as the individuals in question were growing older and, in some cases, falling ill.

[53]The question of whether delay in bringing an injunction application is fatal is a matter of discretion for the motions judge. There is no indication that Hugessen J. did not act judicially in exercising his discretion to grant the injunction despite the timing of the motion.

Balance of Convenience

[54]In *Metropolitan Stores, supra*, at page 149, Beetz J. held that interlocutory injunctions should not be granted in public law cases, "unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry." In this case, the public interest in seeing that laws are obeyed and that prior discrimination is remedied weighs in favour of granting the injunction requested by the Crown.

[55]As discussed above and as Hugessen J. found, there is a clear public interest in seeing that legislation is obeyed until its application is stayed by court order or the legislation is set aside on final judgment. As well, Bill C-31 was designed to remedy the historic discrimination against Indian women and other Indians previously excluded from status under the *Indian Act* and Band membership. There is therefore a public interest in seeing that the individuals in this case are able to reap the benefits of those amendments.

[56]On the other hand, the Sawridge Band will suffer little or no damage by admitting nine elderly ladies and one gentleman to membership (the Court was advised that one of the 11 individuals had recently died). It is true that the Band is being asked to take the positive step of adding these individuals to its Band List but it is difficult to find hardship in requiring a public body to follow a law that, pending an ultimate determination of its constitutionality, is currently in force. Even if the Band provides the individuals with financial assistance on the basis of their membership, that harm can be remedied by damages against the Crown if the appellants subsequently succeed at trial. Therefore, as Hugessen J. found, the balance of convenience favours granting the injunction.

CONCLUSION

[57]The appeal should be dismissed.

COSTS

[58]The Crown has sought costs in this Court and in the Court below. The interveners have sought costs in this Court only.

[59]In his reasons for order, Hugessen J. reserved the question of costs in favour of the Crown, indicating that the Crown should proceed by way of a motion for costs under rule 369 [*Federal Court Rules, 1998*]. He awarded no costs to the interveners. It is not apparent from the record that the Crown made a costs motion under rule 369 and in the absence of an order for costs and an appeal of that order, I would not make any award of costs in the Court below.

[60]As to costs in this Court, the Crown and interveners are to make submissions in writing, each not exceeding three pages, double-spaced, on or before seven days from the date of

these reasons. The appellants shall make submissions in writing, not exceeding 10 pages, double-spaced, on or before 14 days from the date of these reasons. The Court will, if requested, consider the award of a lump sum of costs inclusive of fees, disbursements, and in the case of the interveners, GST (see *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417 (CanLII), [2003] 2 F.C. 451 (C.A.)).

[61]The judgment of the Court will be issued as soon as the matter of costs is determined.

Noël J.A.: I agree.

Malone J.A.: I agree.

Tab 6

Federal Court  Cour fédérale

Date: 20130515

Docket: T-923-12
Docket: T-922-12

Citation: 2013 FC 509

Ottawa, Ontario, May 15, 2013

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-923-12

BETWEEN:

MAURICE FELIX STONEY

Applicant

and

SAWRIDGE FIRST NATION

Respondent

Docket: T-922-12

BETWEEN:

ALINE ELIZABETH (MCGILLIVRAY) HUZAR AND JUNE MARTHA (MCGILLIVRAY) KOLOSKY

Applicants

and

SAWRIDGE FIRST NATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The Applicants are all descendants of individuals who were at one time members of the Sawridge First Nation, but who, either voluntarily or by operation of the law at the time, lost their band memberships. As a result the Applicants were excluded from membership in the Sawridge First Nation. They now ask this Court to review the Sawridge First Nation Appeal Committee's decision to uphold the Sawridge Chief and Council's decision which denied their applications for membership.

[2] The father of the Applicant Maurice Stoney was William J. Stoney. William Stoney was a member of the Sawridge First Nation but in April 1944 he applied to the Superintendent General of Indian Affairs to be enfranchised under section 114 of the *Indian Act*, c 98, RSC 1927. In consideration of payments totalling $871.35, William Stoney surrendered his Indian status and his membership in the Sawridge First Nation. By operation of the legislation, William Stoney's wife, Margaret Stoney, and their two children, Alvin Stoney and Maurice Stoney, were similarly enfranchised thereby losing their Indian status and their membership in the Sawridge First Nation.

[3] The Applicants Aline Huzar and June Kolosky are sisters and, like Mr. Stoney, they are the grandchildren of Johnny Stoney. The mother of Ms. Huzar and Ms. Kolosky was Johnny Stoney's daughter, Mary Stoney. Mary Stoney married Simon McGillivray in 1921. Because of her marriage Mary Stoney lost both her Indian status and her membership in Sawridge by operation of law. When Ms. Huzar and Ms. Kolosky were born in 1941 and 1937 respectively Mary Stoney was

not a member of the Sawridge Band First Nation and she did not reacquire membership before her death in 1979.

[4] In 1985, with the passing of Bill C-31, *An Act to amend the Indian Act*, 33 – 34 Eliz II c 27, and pursuant to section 10 of the *Indian Act*, the Sawridge First Nation delivered its membership rules, supporting documentation and bylaws to the Deputy Minister of Indian and Northern Affairs, who accepted them on behalf of the Minister. The Minister subsequently informed Sawridge that notice would be given pursuant to subsection 10(7) of the *Indian Act* that the Sawridge First Nation had control of its membership. From that point on, membership in the Sawridge First Nation was determined based on the Sawridge Membership Rules.

[5] Ms. Kolosky submitted her application for membership with the Sawridge First Nation on February 26, 2010. Ms. Huzar submitted her application on June 21, 2010. Mr. Stoney submitted his application on August 30, 2011. In letters dated December 7, 2011, the Applicants were informed that their membership applications had been reviewed by the First Nation Council, and it had been determined that they did not have any specific "right" to have their names entered in the Sawridge Membership List. The Council further stated that it was not compelled to exercise its discretion to add the Applicants' names to the Membership list, as it did not feel that their admission would be in the best interests and welfare of Sawridge.

[6] After this determination, "Membership Processing Forms" were prepared that set out a "Summary of First Nation Councils Judgement". These forms were provided to the Applicants and outlined their connection and commitment to Sawridge, their knowledge of the First Nation, their

character and lifestyle, and other considerations. In particular, the forms noted that the Applicants had not had any family in the Sawridge First Nation for generations and did not have any current relationship with the Band. Reference was also made to their involvement in a legal action commenced against the Sawridge First Nation in 1995 in which they sought damages for lost benefits, economic losses, and the "arrogant and high-handed manner in which Walter Patrick Twinn and the Sawridge Band of Indians has deliberately, and without cause, denied the Plaintiffs reinstatement as Band Members…". The 1995 action was ultimately unsuccessful. Although the Applicants were ordered to pay costs to the First Nation, those costs remained unpaid.

[7] In accordance with section 12 of the Sawridge Membership Rules, the Applicants appealed the Council's decision arguing that they had an automatic right to membership as a result of the enactment of Bill C-31. On April 21, 2012 their appeals were heard before 21 Electors of the Sawridge First Nation, who made up the Appeal Committee. Following written and oral submissions by the Applicants and questions and comments from members of the Appeal Committee, it was unanimously decided that there were no grounds to set aside the decision of the Chief and Council. It is from the Appeal Committee's decision that this application for judicial review stems.

[8] The Applicants maintain that they each have an automatic right of membership in the Sawridge First Nation. Mr. Stoney states at para 8 of his affidavit of May 22, 2012 that this right arises from the provisions of Bill C-31. Ms. Huzar and Ms. Kolosky also argue that they "were persons with the right to have their names entered in the [Sawridge] Band List" by virtue of section 6 of the *Indian Act*.

[9] I accept that, if the Applicants had such an acquired right of membership by virtue of their ancestry, Sawridge had no right to refuse their membership applications: see *Sawridge v Canada*, 2004 FCA 16 at para 26, [2004] FCJ no 77.

[10] Ms. Huzar and Ms. Kolosky rely on the decisions in *Sawridge v Canada*, 2003 FCT 347, [2003] 4 FC 748, and *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77 in support of their claims to automatic Sawridge membership. Those decisions, however, apply to women who had lost their Indian status and their band membership by virtue of marriages to non-Indian men and whose rights to reinstatement were clearly expressed in the amendments to the *Indian Act*, including Bill C-31. The question that remains is whether the descendants of Indian women who were also deprived of their right to band membership because of the inter-marriage of their mothers were intended to be protected by those same legislative amendments.

[11] A plain reading of sections 6 and 7 of Bill C-31 indicates that Parliament intended only that persons who had their Indian status and band memberships directly removed by operation of law ought to have those memberships unconditionally restored. The only means by which the descendants of such persons could gain band membership (as distinct from regaining their Indian status) was to apply for it in accordance with a First Nation's approved membership rules. This distinction was, in fact, recognized by Justice James Hugessen in *Sawridge v Canada*, 2003 FCT 347 at paras 27 to 30, 4 FC 748, [2003] 4 FC 748:

> 27 Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic

entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."

28 The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):

> ... today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.

29 A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates*, idem, at page 2645):

> This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. [page766] While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.

30 Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates*, idem, at page 2646):

> ... I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals...
>
> [Emphasis added]

This decision was upheld on appeal in *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77.

[12] The legislative balance referred to by Justice Hugessen is also reflected in the 2010 Legislative Summary of Bill C-3 titled the *Gender Equity in Indian Registration Act*, SC 2010, c 18. There the intent of Bill C-31 is described as follows:

> Bill C-31 severed status and band membership for the first time and authorized bands to control their own membership and enact their own membership codes (section 10). For those not exercising that option, the Department of Indian Affairs would maintain "Band Lists" (section 11). Under the legislation's complex scheme some registrants were granted automatic band membership, while others obtained only conditional membership. The former group included women who had lost status by marrying out and were reinstated under paragraph 6(1)(c). The latter group included their children, who acquired status under subsection 6(2).
>
> [Emphasis added]

[13] While Mary Stoney would have an acquired right to Sawridge membership had she been alive when Bill C-31 was enacted, the same right did not accrue to her children. Simply put neither Ms. Huzar or Ms. Kolosky qualified under section 11 of Bill C-31 for automatic band membership. Their only option was to apply for membership in accordance with the membership rules promulgated by Sawridge.

[14] This second generation cut-off rule has continued to attract criticism as is reflected in the Legislative Summary at p 13, para 34:

> 34. The divisiveness has been exacerbated by the Act's provisions related to band membership, under which not all new or reinstated registrants have been entitled to automatic membership. As previously mentioned, under provisions in Bill C-31, women who had "married out" and were reinstated did automatically become band members, but their children registered under subsection 6(2) have been eligible for conditional membership only. In light of the high volume of new or returning "Bill C-31 Indians" and the scarcity of reserve land, automatic membership did not necessarily translate into a right to reside on-reserve, creating another source of internal conflict.

Notwithstanding the above-noted criticism, the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership.

[15] I also cannot identify anything in Bill C-31 that would extend an automatic right of membership in the Sawridge First Nation to William 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.

[16] Even if I am wrong in my interpretation of these legislative provisions, this application cannot be sustained at least in terms of the Applicants' claims to automatic band membership. All of the Applicants in this proceeding, among others, were named as Plaintiffs in an action filed in this Court on May 6, 1998 seeking mandatory relief requiring that their names be added to the Sawridge membership list. That action was struck out by the Federal Court of Appeal in a decision issued on June 13, 2000 for the following reasons:

> [4] It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim 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.
>
> [5] 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.

See *Huzar v Canada*, [2000] FCJ no 873, 258 NR 246.

[17] It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel: see *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460.

[18] The Applicants are, nevertheless, fully entitled to challenge the lawfulness of the appeal decision rejecting their membership applications.

[19] The Applicants did not challenge the reasonableness of the appeal decision but only the fairness of the process that was followed. Their argument is one of institutional bias and it is set out with considerable brevity at para 35 of the Huzar and Kolosky Memorandum of Fact and Law:

> 35. It is submitted that the total membership of Sawridge First Nation is small being in the range of 50 members. Only three applicants have been admitted to membership since 1985 and these three are (were) the sisters of deceased Chief, Walter Twinn. The Appeal Committee consisted of 21 of the members of Sawridge and three of these 21 were the Chief, Roland Twinn and Councillors, Justin Twinn and Winona Twin, who made the original decision appealed from.

[20] In the absence of any other relevant evidence, no inference can be drawn from the limited number of new memberships that have been granted by Sawridge since 1985. While the apparent involvement of the Chief and two members of the Band Council in the work of the Appeal Committee might give rise to an appearance of bias, there is no evidence in the record that would permit the Court to make a finding one way or the other or to ascertain whether this issue was waived by the Applicants' failure to raise a concern at the time.

[21] Indeed, it is surprising that this issue was not fully briefed by the Applicants in their affidavits or in their written and oral arguments. It is of equal concern that no cross-examinations were carried out to provide an evidentiary foundation for this allegation of institutional bias. The issue of institutional bias in the context of small First Nations with numerous family connections is nuanced and the issue cannot be resolved on the record before me: see *Sweetgrass First Nation v Favel*, 2007 FC 271 at para 19, [2007] FCJ no 347, and *Lavalee v Louison*, [1999] FCJ no 1350 at paras 34-35, 91 ACWS (3d) 337.

[22] The same concern arises in connection with the allegation of a section 15 Charter breach. There is nothing in the evidence to support such a finding and it was not advanced in any serious way in the written or oral submissions. The record is completely inadequate to support such a claim to relief. There is also nothing in the record to establish that the Crown was provided with any notice of what constitutes a constitutional challenge to the *Indian Act*. Accordingly, this claim to relief cannot be sustained.

[23] For the foregoing reasons these applications are dismissed with costs payable to the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications are dismissed with costs payable to the Respondent.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-923-12 T-922-12
STYLE OF CAUSE:	STONEY v SAWRIDGE FIRST NATION and HUZAR ET AL v SAWRIDGE FIRST NATION
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 5, 2013
REASONS FOR JUDGMENT:	BARNES J.
DATED:	May 15, 2013

APPEARANCES:

Priscilla Kennedy	FOR THE APPLICANTS
Edward H. Molstad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davis LLP Edmonton, Alberta	FOR THE APPLICANTS
Parlee McLaws LLP Edmonton, Alberta	FOR THE RESPONDENT

Tab 7

Huzar v. Canada, 2000 CanLII 15589 (FCA)

Date: 2000-06-13
Docket: A-326-98
Citation: Huzar v. Canada, 2000 CanLII 15589 (FCA), <http://canlii.ca/t/4kzg>, retrieved on 2017-10-26

Date:*20000613*

Docket:*A-326-98*

CORAM: *DÉCARY, J.A.*

SEXTON, J.A.

EVANS, J.A.

BETWEEN:

HER MAJESTY THE QUEEN, IN RIGHT OF CANADA, DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA and WALTER PATRICK TWINN, as Chief of the Sawridge Indian Band and the SAWRIDGE INDIAN BAND

Defendants

(Appellants)

- and -

ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY, WILLIAM BARTHOLOMEW McGILLIVRAY, MARGARET HAZEL ANNE BLAIR, CLARA

HEBERT, JOHN EDWARD JOSEPH McGILLIVRAY, MAURICE STONEY, ALLEN AUSTIN McDONALD, LORNA JEAN ELIZABETH McREE, FRANCES MARY TEES, BARBARA VIOLET MILLER (nee McDONALD)

Plaintiffs

(Respondents)

Heard at Toronto, Ontario, Tuesday, June 13, 2000

Judgment delivered from the Bench at Toronto, Ontario

on Tuesday, June 13, 2000

REASONS FOR JUDGMENT OF THE COURT BY: EVANS, J.A.

Date: 20000613

Docket: A-326-98

CORAM: DÉCARY J.A.

SEXTON J.A.

EVANS J.A.

BETWEEN:

HER MAJESTY THE QUEEN, IN RIGHT OF CANADA, DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA and WALTER PATRICK TWINN, as Chief of the Sawridge Indian Band and the SAWRIDGE INDIAN BAND

Defendants

(Appellants)

- and -

ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY, WILLIAM BARTHOLOMEW McGILLIVRAY, MARGARET HAZEL ANNE BLAIR, CLARA HEBERT, JOHN EDWARD JOSEPH McGILLIVRAY, MAURICE STONEY, ALLEN AUSTIN McDONALD, LORNA JEAN ELIZABETH McREE, FRANCES MARY TEES, BARBARA VIOLET MILLER (nee McDONALD)

Plaintiffs

(Respondents)

REASONS FOR JUDGMENT

(*Delivered from the Bench at Toronto, Ontario*

on Tuesday, June 13, 2000)

EVANS J.A.

[1] This is an appeal against an order of the Trial Division, dated May 6th, 1998, in which the learned Motions Judge granted the respondents" motion to amend their statement of claim by adding paragraphs 38 and 39, and dismissed the motion of the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, to strike the statement of claim as disclosing no reasonable cause of action.

[2] In our respectful opinion, the Motions Judge erred in law in permitting the respondents to amend and in not striking out the unamended statement of claim. The paragraphs amending the statement of claim allege that the Sawridge Indian Band rejected the respondents" membership applications by misapplying the Band membership rules (paragraph 38), and claim a declaration that the Band rules are discriminatory and exclusionary, and hence invalid (paragraph 39).

[3] These paragraphs amount to a claim for declaratory or prerogative relief against the Band, which is a federal board, commission or other tribunal within the definition provided by section 2 of the *Federal Court Act*. By virtue of subsection 18(3) of that Act, declaratory or prerogative relief may only be sought against a federal board, commission or other tribunal on an application for judicial review under section 18.1. The claims contained in paragraphs 38 and 39 cannot therefore be included in a statement of claim.

[4] It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim 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.

[5] 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] For these reasons, the appeal will be allowed with costs in this Court and in the Trial Division.

"John M. Evans"

J.A.

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

DOCKET: *A-326-98*

STYLE OF CAUSE: HER MAJESTY THE QUEEN, IN RIGHT OF CANADA, DEPARTMENT

OF INDIAN AND NORTHERN AFFAIRS CANADA and WALTER

PATRICK TWINN, as Chief of the Sawridge Indian Band and the

SAWRIDGE INDIAN BAND

- and -

ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY, WILLIAM BARTHOLOMEW McGILLIVRAY, MARGARET HAZEL ANNE BLAIR, CLARA HEBERT, JOHN EDWARD JOSEPH McGILLIVRAY, MAURICE STONEY, ALLEN AUSTIN McDONALD, LORNA JEAN ELIZABETH McREE, FRANCES MARY TEES, BARBARA VIOLET MILLER (nee McDONALD)

DATE OF HEARING: ***TUESDAY, JUNE 13, 2000***

PLACE OF HEARING: ***TORONTO, ONTARIO***

REASONS FOR JUDGMENT BY: ***EVANS J.A.***

Delivered at Toronto, Ontario on

Tuesday, June 13, 2000

APPEARANCES BY: ***Mr. Philip P. Healey***

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(Appellants)

Mr. Peter V. Abrametz

For the Plaintiffs

(Respondents)

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For the Plaintiffs

(Respondents)

FEDERAL COURT OF APPEAL

Date: 20000613

Docket: A-326-98

BETWEEN:

HER MAJESTY THE QUEEN, IN RIGHT OF

CANADA, DEPARTMENT OF INDIAN AND

NORTHERN AFFAIRS CANADA and WALTER

PATRICK TWINN, as Chief of the Sawridge Indian

Band and the SAWRIDGE INDIAN BAND

Defendants

(Appellants)

- and -

ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY, WILLIAM BARTHOLOMEW McGILLIVRAY, MARGARET HAZEL ANNE BLAIR, CLARA HEBERT, JOHN EDWARD JOSEPH McGILLIVRAY, MAURICE STONEY, ALLEN AUSTIN McDONALD, LORNA JEAN ELIZABETH McREE, FRANCES MARY TEES, BARBARA VIOLET MILLER (nee McDONALD)

Plaintiffs

(Respondents)

REASONS FOR JUDGMENT

Tab 8

Goodfellow v. Knight, 1977 CanLII 538 (AB QB)

Date: 1977-01-07
Docket: 116178
Other citations: 2 Alta LR (2d) 17; 5 AR 573; 2 CPC 209
Citation: Goodfellow v. Knight, 1977 CanLII 538 (AB QB), <http://canlii.ca/t/27nxv>, retrieved on 2017-10-26

Alberta Supreme Court
Goodfellow v. Knight
Date: 1977-01-07

R. A. Coad, for plaintiff.

D. A. Graham, for defendants.

(Calgary S.C. 116178)

7th January 1977.

[1] LAYCRAFT J.:—In an action for damages arising from a motor vehicle accident, the defendants seek to strike out that portion of the statement of claim by which the plaintiff purports in his action to represent the members of the law firm of which he is a member and the firm itself. The defendants argue that a representative action is invalid where the claim is for damages.

[2] In the statement of claim, the plaintiff sets out allegations of negligence against the defendants and gives particulars of personal injuries alleged to have been suffered by him and of personal damages resulting from them. Paragraph 1 states in part:

> "The Plaintiff sues in his own right and also sues on behalf of the law firm of Goodfellow, Pearce & MacKenzie, and John V. MacKenzie and Albert F. Pearce, the said Goodfellow, Pearce & MacKenzie, John V. MacKenzie and Albert F. Pearce having a common interest in the subject matter of the within action pursuant to the Rules of Court."

[3] This aspect of the action is amplified in para. 11, which states:

> "11. The Plaintiff on his own behalf, and as the representative of the law firm of Goodfellow, Pearce & MacKenzie, John V. MacKenzie and Albert F. Pearce, repeats the provisions of paragraphs 9 and 10, and claims on his own behalf and as the representative of the said law firm of Goodfellow, Pearce & MacKenzie, John V. MacKenzie and Albert F. Pearce special and general damages regarding the said problems as referred to caused to the Plaintiff and to the said law firm and business partners of the said law firm as a result of the accident and will be asking this Honourable Court to consider such problems in assessing the amount of special and general damages to be awarded to the Plaintiff and to the said law firm and to the said John V. MacKenzie and to the said Albert F. Pearce."

[4] The plaintiff filed with the statement of claim a document entitled "Consent of Interested Parties" by which his two partners named in the statement of claim and the firm itself "consent that the said action shall include" their claims. This document is not specifically contemplated by the Supreme Court Rules though the wording of it follows the language of R. 42, which provides:

> "42. Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all."

[5] There is, of course, no doubt that under the provisions of R. 36 the firm and each of the persons whom the plaintiff claims to represent could have joined as plaintiffs in the action. Whatever advantages it was hoped to derive from this form of action, the joinder of the additional plaintiffs would appear to me to be much less cumbersome than the representative form of action which was chosen. Rule 36 provides:

> "36. Claims by one or more plaintiffs against one or more defendants in respect of or arising out of the same transaction or occurrence or out of the same series of transactions or occurrences may be joined in the same action whether the plaintiffs claim to be entitled to relief jointly or separately or in the alternative, and whether the defendants are sought to be charged jointly or separately or in the alternative, and whether or not the relief or remedy against the several defendants is the same."

[6] It may first be observed that the plaintiff has not followed the usual practice of setting out in the style of cause that he is suing in a representative capacity. That practice is recognized both in England and in Ontario (*Re Tottenham; Tottenham v. Tottenham,* [1896] 1 Ch. 628 at 629; *Barton v. Hamilton* (1909), 13 O.W.R. 1118 (C.A.); *May v. Wheaton* (1917), 41 O.L.R. 369 at 372) and should be followed in this province.

[7] The wording of R. 42, which has been essentially unchanged since it appeared in the 1905 Alberta Rules of Court, is slightly different than that of the comparable rule in England and in other Canadian jurisdictions. The requirement for a representative action in Alberta is that "numerous persons have a common interest in the subject" of the action. The English rule (O. 16, R. 9) and the British Columbia rule (O. 16, R. 9 (M.R. 131)) require that "numerous persons have the same interest in one cause or matter". Ontario R. 75 enables a representative action "where there are numerous persons having the same interest".

[8] Notwithstanding the slightly different expression of the required conditions for a representative action, I am of the opinion that there is no difference in substance between the Alberta rule and those to which I have referred from other jurisdictions. The various terms have been used in the case law as being synonymous.

[9] Each of the rules appears to have been derived from the early Chancery practice in England. In *Bedford (Duke) v. Ellis,* [1901] A.C. 1, Lord Macnaghten said at p. 8 in referring to the Chancery practice:

> "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. To limit the rule to persons having a beneficial proprietary interest would be opposed to precedent, and not, I think, in accordance with common sense."

[10] In the same case, Lord Shand said at p. 14:

> "The rule has been framed and adopted for a useful and important object — the saving of the multiplication of actions, with the attendant costs, in cases where one action would serve to determine the rights of a number of persons in a question with another party called as defendant. A series of different actions one after another by different plaintiffs is to be no longer necessary in cases where numerous persons have 'the same interest in one cause or matter,' for in such cases 'one or more of such persons may sue on behalf or for the benefit of all persons so interested.' The rule is obviously one of advantage not only to plaintiffs but to defendants also, in the way of saving multiplication of suits, and it is of much importance to note, as observed by my noble and learned friend Lord Macnaghten, that it only applies the practice of the Court of Chancery, of which he gives many instances, to all divisions of the High Court."

[11] In *Bamber v. Bank of N.S.,* 1943 CanLII 244 (AB CA), [1943] 2 W.W.R. 529, [1943] 4 DX.R. 526 (Alta. C.A.), Ford J.A. considered the scope of the Alberta rule. At p. 537 he said:

> "Although there may be still some question as to how far, under our Rule 20, a judgment against a represented plaintiff is binding on him the Court should be careful to see that it is only in cases where there is a real common interest as well as a right common to all that a representative action should be allowed to proceed. See as to the binding effect of judgments in such actions the cases of *London Sewer Commrs. v. Gellatly* (1876), 3 Ch. D. 610 at 615-16, and *Re hart; Wilkinson v. Blades,* [1896] 2 Ch. 788 at 793, as to represented plaintiffs. See also *Barker v. Allanson,* [1937] 1 K.B. 463, as to represented defendants. See also 26 *Halsbury,* 2nd ed., p. 17.
>
> "The general practice of the Court is, of course, that all parties seeking relief should be before the Court, but the rule permitting one plaintiff to sue on behalf of others having a common interest with him is peculiarly applicable to cases where a declaration of a right common to the plaintiff and those represented is sought.
>
> "All persons may be said to have a common interest in the subject of an intended action, within the meaning of Rule 20, who would be benefited by the action succeeding though consequential relief will have to be sought in a new action after the common question is decided."

[12] In *A. E. Osler & Co. v. Solman,* 59 O.L.R. 368, [1926] 4 D.L.R. 345, Orde J.A. used the term "the same interest" as being synonymous with a "a common interest". At p. 349 he said:

> "... the rule does not mean a like or similar interest. There must be a common interest in the sense that the plaintiff and all those whom he claims to represent will gain some relief by his success, though possibly in different proportions and perhaps in different degrees."

[13] In *Kroman's Electric Ltd. v. Schultes,* 1970 CanLII 502 (ON SC), [1970] 2 O.R. 548 at 553, 11 D.L.R. (3d) 425, Pennell J. referred to the Ontario rule as requiring that there be "a common interest in a common subject... a common grievance and that the relief sought is beneficial to them all".

[14] I therefore conclude that the decisions from Ontario, British Columbia and England are applicable to the interpretation of Alberta R. 42.

[15] Whether or not persons claiming damages have "a common interest in the subject" of an action in my view depends on whether the damages are to be

assessed personally for each person sought to be represented or are in the nature of general damages for the class as a whole. While early authorities assert that no claim for damages may be advanced in a representative action, recent decisions in Canada permit the action where the damages are common to the class as a whole and are to be divided among its members.

[16] In *Markt & Co. Ltd. v. Knight 88. Co. Ltd.; Sale & Frazar v. Knight 88. Co. Ltd.,* [1910] 2 K.B. 1021, the plaintiff purported to claim against a shipowner on his own behalf and on behalf of all other shippers of goods in a vessel which had been intercepted and sunk during the Russo-Japanese war. At p. 1040, Fletcher Moulton L.J. said:

> "It may be that the claims are alike in nature, and that the litigation in respect of them will have much in common. But they are in no way connected; there is no common interest. Defences may exist against some of the shippers which do not exist against the others, such as estoppel, set-off, &c, so that no representative action can settle the rights of the individual members of the class...
>
> "But the writs even as proposed to be amended fail to comply with Lord Macnaghten's interpretation of the rule in another and most essential particular. The relief sought is damages. Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases. It is true that in *Bedford (Duke) v. Ellis* [supra] there was the claim for damages, but that was only a personal claim by the named plaintiffs, and it was solely on that ground that the action was held to be well framed so far as damages were concerned. The claims here are necessarily claims for damages only, and therefore no representative action can be brought. To hold that a representative action can be brought in a case where the causes are mere independent actions for damages arising out of one and the same set of circumstances would be to confound r. 1 with r. 9, and, as I have said, the language of these two rules shews that they are intended to have wholly different applications."

[17] Rule 1 referred to by Fletcher Moulton L.J. was comparable to Alberta R. 36, and R. 9 is, as I have said, in substance the same as Alberta R. 42. This case has been followed to bar representative actions for damages in a number of other cases: *A. E. Osier & Co. v. Solomon,* supra; *Preston v, Hilton* (1920), 48 O.L.R. 172 at 179, 55 D.L.R. 647; *Turtle v. Toronto* (1924), 56 O.L.R. 252. The authorities have been analyzed and reviewed in *Walker v. Billingsley,* 5 W.W.R. (N.S.) 363, [1952] 4 D.L.R. 490 (B.C.), and more recently in *Shaw v. Vancouver Real Estate Bd.,* 1972 CanLII 970 (BC SC), [1972] 5 W.W.R. 726, 29 D.L.R. (3d) 774, affirmed 1973 CanLII 1061 (BC CA), [1973] 4 W.W.R. 391, 36 D.L.R. (3d) 250 (B.C.C.A.).

[18] More recent Canadian decisions have affirmed that the existence of a claim for damages does not necessarily bar a representative action. To return to the language of the rule, the test must be whether there is, among the persons sought to be represented, a common interest.

[19] In *Farnham v. Fingold,* 1973 CanLII 523 (ON CA), [1973] 2 O.R. 132, 33 D.L.R. (3d) 156 (C.A.), Jessup J.A. stated that the *Markt* case cannot be taken as authority that all representative actions for damages are barred. In that case a representative action for damages was commenced on behalf of minority shareholders of a corporation claiming damages from a controlling group on the ground that they had in the sale of their shares accepted a benefit not available to all shareholders. The damages sought were for the class as a whole, being the

gross amount of premium over market price received by the controlling shareholders with the prayer that it be distributed pro-rata. A chambers motion to strike out the statement of claim had been dismissed by Morand J. Although the order of Morand J. was varied on appeal, Jessup J.A. said at p. 136:

> "Rule 75 should be applied to particular cases to produce an expeditious but just result. Thus, where the members of a class have damages that must be separately assessed, it would be unjust to permit them to be claimed in a class action because the defendant would be deprived of individual discoveries, and, in the event of success, would have recourse for costs only against the named plaintiff although his costs were increased by multiple separate claims."

[20] This statement was adopted in *Naken v. General Motors of Can. Ltd.* (1975), 1975 CanLII 498 (ON SC), 11 O.R. (2d) 389, 66 D.L.R. (3d) 205, where damages were sought for a class of persons each of whom owned a given model of automobile. Again, however, the damages sought were the same for each member of the class, being the alleged reduction in sale value of any car in the model group as compared to similar models of other makes of cars.

[21] In *Northdown Drywall & Construction Ltd. v. Austin Co. Ltd.* (1975), 1974 CanLII 756 (ON SC), 6 O.R. (2d) 223, 52 D.L.R. (3d) 351, affirmed in part 1975 CanLII 607 (ON SC), 8 O.R. (2d) 691, 59 D.L.R. (3d) 55, a union official sued on behalf of all members of a union local, alleging that the defendant had refused to let a unionized employer complete a contract with it so that the union members lost the benefit of employment on a particular construction project. Galligan J. refused to strike out the statement of claim on a chambers motion. In Divisional Court it was held that a class action is not an appropriate vehicle in which to claim lost wages, since the sum claimed is an accumulation of claims for personal relief and not a claim for the benefit of the class. The action was allowed to proceed insofar as it related to check-offs for ordinary union purposes and for pension, welfare and supplemental unemployment benefits.

[22] In my opinion even with the expanded role of the representative action illustrated by the recent Canadian cases, R. 42 does not authorize a representative action in the circumstances of this case. The damages sought are an accumulation of individual claims rather than damages payable to a class in general. An examination of the two paragraphs of the statement of claim quoted above shows that the court is being invited to consider the damages of each entity and person in the class for separate assessment.

[23] It may be doubted, moreover, whether the plaintiff, his two partners and their firm as a whole constitute a group of "numerous persons". Nothing in the rule indicates that the word "numerous" is to be taken in any sense other than its usual meaning as describing a group consisting of many individuals. The purpose of the rule is to avoid the inconvenience of having many parties to the action. In fact, naming each of the members of the firm as plaintiffs would in this case be a simpler procedure than the representative action which was commenced.

[24] Those portions of paras. 1 and 11 which relate to the representative action will therefore be struck out. The defendants will be entitled to costs in any event of the cause.

Tab 9

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 548

Date: 20170912
Docket: 1103 14112
Registry: 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")

Between:

Maurice Felix Stoney and His Brothers and Sisters

Applicants

Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees")

Respondents (Original Applicants)

- and –

The Sawridge Band

Intervenor

Case Management Decision re Vexatious Litigant Status of Maurice Stoney (Sawridge #8) of the Honourable Mr. Justice D.R.G. Thomas

---

I Introduction

[1] The Action to which this decision ultimately relates was commenced on June 12, 2011 by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application". The 1985 Sawridge Trust applied to this Court for directions on how to distribute the Trust property to its beneficiaries. Members of the Sawridge Band are the beneficiaries of that Trust. The initial application has led to many court case management hearings, applications, decisions, and appeals: ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365, 543 AR 90 ("***Sawridge #1***"), aff'd 2013 ABCA 226, 543 AR 90 ("***Sawridge #2***"); ***1985 Sawridge***

Trust v Alberta (Public Trustee), 2015 ABQB 799 ("***Sawridge #3***"), time extension denied 2016 ABCA 51, 616 AR 176; ***1985 Sawridge Trust (Trustee for) v Sawridge First Nation***, 2017 ABQB 299 ("***Sawridge #4***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 377 ("***Sawridge #5***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 436 ("***Sawridge #6***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 530 ("***Sawridge #7***").

[2] On July 12, 2017 I rejected an August 12, 2016 application by Maurice Felix Stoney that he and "his brothers and sisters" should be added as beneficiaries to the 1985 Sawridge Trust: ***Sawridge #6***. In that decision I concluded that Stoney's application was a collateral attack on previously decided issues, hopeless, without merit, and an abuse of court: paras 34-52. I also concluded that there was no evidence to support that Maurice Stoney's "10 living brothers or sisters" were, in fact, voluntary participants in this application: paras 8-12.

[3] I therefore:

1. limited the scope of the August 12, 2016 application to Maurice Stoney;
2. struck out the August 12, 2016 application;
3. ordered solicitor and own client indemnity costs against Maurice Stoney;
4. ordered that Stoney's lawyer, Priscilla Kennedy, appear on July 28, 2017 to make submissions as to whether she should be personally liable for that litigation costs award;
5. concluded that Maurice Stoney's August 12, 2016 application exhibits indicia of abusive litigation, and, therefore, on my own motion and pursuant to the Court's inherent jurisdiction:

   a) put in place an interim court order to restrict Maurice Stoney's initiating or continuing litigation in Alberta Courts, and

   b) instructed that Maurice Stoney, the Sawridge 1985 Trustees, and the intervener Sawridge Band may file written submissions as to whether Maurice Stoney should have his court access restricted via what is commonly called a "vexatious litigant" order.

[4] Written submissions were received from the Trustees on July 26, 2017, the Sawridge Band on July 27, 2017, and Maurice Stoney on August 3, 2017.

[5] On August 31, 2017 I issued ***Sawridge #7***, where I concluded that Priscilla Kennedy and Maurice Stoney were jointly and severally liable for the costs award ordered in ***Sawridge #6***.

[6] This judgment evaluates whether Maurice Stoney should be the subject of restrictions on his future litigation activity in Alberta courts.

II. Abusive Litigation and Court Access Restrictions

[7] The principles and procedure that govern court-ordered restrictions to access Alberta courts are developed in a number of recent decisions of this Court. This Court's inherent jurisdiction to control abuse of its processes includes that the Alberta Court of Queen's Bench may order that a person requires leave to initiate or continue an action or application: ***Hok v Alberta***, 2016 ABQB 651 at paras 14-25, 273 ACWS (3d) 533, leave denied 2017 ABCA 63, leave to the SCC requested, 37624 (12 April 2017); ***Thompson v International Union of***

Operating Engineers Local No. 955, 2017 ABQB 210 at para 56, affirmed 2017 ABCA 193; ***Ewanchuk v Canada (Attorney General)***, 2017 ABQB 137 at paras 92-96; ***McCargar v Canada***, 2017 ABQB 416 at para 110.

[8] An intervention of this kind is potentially warranted when a litigant exhibits one or more "indicia" of abusive litigation: ***Chutskoff v Bonora***, 2014 ABQB 389 at para 92, 590 AR 288, aff'd 2014 ABCA 444; ***Re Boisjoli***, 2015 ABQB 629 at paras 98-103, 29 Alta LR (6th) 334; ***McCargar v Canada***, 2017 ABQB 416 at para 112. Where a judge concludes these "indicia" are present and control of abusive litigation may be appropriate then the Court usually follows a two-step process prior to imposing court access restrictions, if appropriate: ***Hok v Alberta***, 2016 ABQB 651 at paras 10-11; ***Ewanchuk v Canada (Attorney General)***, at para 97.

[9] ***Sawridge #6***, at para 55 identified three types of litigation abuse behaviour by Maurice Stoney that potentially warranted court access restrictions:

1. Collateral attack that attempts to reopen an issue that has already been determined by a court of competent jurisdiction, to circumvent the effect of a court or tribunal decision, using previously raised grounds and issues.
2. Bringing hopeless proceedings that cannot succeed, here in both the present application and the ***Sawridge #3*** appeal where Maurice Stoney was an uninvolved third party.
3. Initiating "busybody" lawsuits to enforce the rights of third parties, here the recruited participation of Maurice Stoney's "10 living brothers and sisters."

[10] I therefore on an interim basis and pursuant to ***Hok v Alberta***, 2016 ABQB 335 at para 105 restricted Maurice Stoney's litigation activities (***Sawridge #6***, at para 65-66), and invited submissions on whether Maurice Stoney's litigation activities should be restricted, and if so, in what manner (***Sawridge #6***, at paras 63-64).

[11] Subsequently Associate Chief Justice Rooke on July 20, 2017 granted an exception to this interim order in relation to ***Nussbaum v Stoney***, Alberta Court of Queen's Bench docket 1603 03761 (the "Rooke Order").

[12] The current decision completes the second step of the two-part ***Hok v Alberta*** process.

[13] Relevant evidence for this analysis includes activities both inside and outside of court: ***Bishop v Bishop***, 2011 ONCA 211 at para 9, 200 ACWS (3d) 1021, leave to SCC refused, 34271 (20 November 2011); ***Henry v El***, 2010 ABCA 312 at paras 2-3, 5, 193 ACWS (3d) 1099, leave to SCC refused, 34172 (14 July 2011). A litigant's entire court history is relevant, including litigation in other jurisdictions: ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456 at paras 83-127, 543 AR 132; ***Curle v Curle***, 2014 ONSC 1077 at para 24; ***Fearn v Canada Customs***, 2014 ABQB 114 at paras 102-105, 586 AR 23. That includes non-judicial proceedings, as those may establish a larger pattern of behaviour: ***Bishop v Bishop*** at para 9; ***Canada Post Corp. v Varma***, 2000 CanLII 15754 at para 23, 192 FTR 278 (FC); ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547 at para 39. A court may take judicial notice of public records when it evaluates the degree and kind of misconduct caused by a candidate abusive litigant: ***Wong v Giannacopoulos***, 2011 ABCA 277 at para 6, 515 AR 58.

[14] A court may order court access restrictions where future litigation abuse is *anticipated.* As Verville J observed in ***Hok v Alberta***, 2016 ABQB 651 at para 37:

> ... when a court makes a vexatious litigant order it should do so to respond to anticipated abuse of court processes. This is a prospective case management step, rather than punitive. [emphasis in original]

[15] When a court considers limits to future court access by a person with a history of litigation misconduct the key questions for a court are:

1. Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?
2. What litigation subject or subjects are likely involved in that abuse of court processes?
3. In what forums will that abuse occur?

(***Hok v Alberta***, 2016 ABQB 651 at para 36).

[16] Court access restriction orders should be measured versus and responsive to the anticipated potential for future abuse of court processes. Court access restrictions are designed in a functional manner and not restricted to formulaic approaches, but instead respond in a creative, but proportionate, manner to anticipated potential abuse: ***Bhamjee v Forsdick & Ors (No 2)***, [2003] EWCA Civ 1113 (UK CA).

[17] A vexatious litigant order that simply requires the abusive person obtain permission, "leave", from the court before filing documents to initiate or continue an action is a limited impediment to a person's ability to access court remedies: ***Hok v Alberta***, 2016 ABQB 651 at paras 32-33. Though this step is sometimes called "extraordinary", that dramatic language exaggerates the true and minimal effect of a leave application requirement: ***Wong v Giannacopoulos***, at para 8; ***Hok v Alberta***, 2016 ABQB 651 at paras 32-33.

[18] Other more restrictive alternatives are possible, where appropriate, provided that more strict intervention is warranted by the litigant's anticipated future misconduct: ***Hok v Alberta***, 2016 ABQB 651 at para 34; ***Ewanchuk v Canada (Attorney General)***, at paras 167-68.

III. Submissions and Evidence Concerning Appropriate Litigation Control Steps

A. The Sawridge Band

[19] The Sawridge Band submits that this Court should exercise its inherent jurisdiction and *Judicature Act*, RSA 2000, c J-2 ss 23-23.1 to restrict Maurice Stoney's access to Alberta courts. The Sawridge Band relied on evidence concerning Maurice Stoney's activities that was submitted to the Court in relation to ***Sawridge #6***.

[20] The August 12, 2016 application was futile because Maurice Stoney had continued to repeat the same, already discounted argument. Maurice Stoney had not been granted automatic membership in the Sawridge Band by Bill C-31, and that fact had been either admitted or adjudicated in the ***Huzar v Canada***, [2000] FCJ 873, 258 NR 246 (FCA) and ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253 decisions.

[21] Maurice Stoney was allowed to apply to become a member of the Sawridge Band, but that application was denied, as was the subsequent appeal. The lawfulness of those processes was confirmed in ***Stoney v Sawridge First Nation***.

[22] A subsequent 2014 Canadian Human Rights Commission complaint concerning the membership application process again alleged the same previously rejected arguments. The same occurred before the Alberta Court of Appeal in ***Stoney v 1985 Sawridge Trust***, 2016 ABCA 51

[23] Maurice Stoney's persistent attempts to re-litigate the same issue represent collateral attacks and are hopeless proceedings. Stoney has failed to pay outstanding costs orders. His attempts to shift litigation costs to the 1985 Sawridge Trust are an aggravating factor. These factors imply that Maurice Stoney had brought these actions for an improper purpose. The August 12, 2016 application was a "busybody" attempt to enforce (alleged) rights of uninvolved third parties.

[24] Combined, these indicia of abusive litigation mean Maurice Stoney should be the subject of a vexatious litigant order that globally restricts his access to Alberta courts. In the alternative, a vexatious litigant order with a smaller scope should, at a minimum, restrict Maurice Stoney's potential litigation activities in relation to the Sawridge Band, its Chief and Council, the Sawridge 1985 and 1986 Trusts, and the Trustees of those trusts.

[25] Given Stoney's history of not paying cost awards he should be required to pay outstanding costs orders prior to any application for leave to initiate or continue actions, as in ***R v Grabowski***, 2015 ABCA 391 at para 15, 609 AR 217.

B. The Sawridge 1985 Trust Trustees

[26] The Sawridge 1985 Trust Trustees adopted the arguments of the Sawridge Band, but also emphasized the importance of Maurice Stoney's answers and conduct during cross-examination on his May 16, 2016 affidavit. The Trustees stress this record shows that Maurice Stoney is uncooperative and refused to acknowledge the prior litigation results.

C. Maurice Stoney

[27] Maurice Stoney's written submissions were signed by and filed by lawyer Priscilla Kennedy, identified as "Counsel for Maurice Stoney". The contents of the written submissions are, frankly, unexpected. Paragraphs 6 through 13 advance legal arguments concerning Maurice Stoney's status as a member of the Sawridge Band:

1. the ***Huzar v Canada*** decision cannot be relied on as "evidence in this matter";
2. ***Stoney v Sawridge First Nation*** is not a "thorough analysis" of Maurice Stoney's arguments;
3. Maurice Stoney has not attempted to re-litigate the membership issue but rather to set out the legal arguments that address the definition of a beneficiary of the 1985 Sawridge Trust; and
4. "... there have been a number of recent decisions on these constitutional issues that have and are in the process of completely altering the law related to these issues of the membership/citizenship of Indians, in order to have them comply with the *Constitution*." [Italics in original].

[28] Paragraph 14 of the written brief, which follows these statements, reads:

> It is acknowledged that this court has dismissed these arguments and they are not referred to here, other than as the facts to set the context for the matters to be dealt

with as directed on the issue of whether or not the application of Maurice Stoney was vexatious litigation.

[29] I reject that a bald statement that these are "the facts" proves anything, or establishes these statements are, in fact, true or correct.

[30] The brief then continues at paras 16-17, 24, 28 to state:

> As shown by the litigation in the Sawridge Band cases above, the on-going case in [Descheneaux c Canada (Procureur Général), 2015 QCCS 3555] and the decision of the Supreme Court of Canada in [Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 SCR 99], and the review of the Federal Court of Appeal decision in Huzar and the judicial review in Stoney, it is submitted that this is not a proceeding where the issue has been determined by a court of competent jurisdiction. Nor is this a matter where proceedings have been brought that cannot succeed or have no reasonable expectation of providing relief.
>
> It is submitted that litigation seeking to determine whether or not you qualify as a beneficiary under a trust established on April 15, 1985 is a matter where the issue of membership/citizenship has not been settled by the courts, and this application was not brought for an improper purpose ...
>
> Contrary to the argument of Sawridge First Nation these matters have not been determined in the past Federal Court proceedings. Issues of citizenship and the constitutionality of these proceedings remains a legal question today as shown by the on-going litigation throughout Canada. Plainly, this Court has determined that these arguments are dismissed in this matter and that is acknowledged.
>
> ... No conclusion was made in the 1995 Federal Court proceedings which were struck as showing no reasonable cause of action and the judicial review was concerned with the issue of the Sawridge First Nation Appeal Committee decision based on membership rules post September, 1985.

[31] These are reasons why the August 12, 2016 application was not a collateral attack:

> No disrespect for the court process or intention to bring proceedings for an improper purpose, was intended to be raised by these arguments respecting this time period and the definitions of a beneficiary of this trust.
>
> (Written brief, para 23).

[32] Prior to going any further I will at this point explain that I put no *legal* weight on these statements. If Maurice Stoney wishes to appeal ***Sawridge #6*** and my conclusions therein he may do so. In fact he did file an appeal of ***Sawridge #6*** as a self-represented litigant on August 11, 2017. If Maurice Stoney or his counsel wish to revisit ***Sawridge #6*** then they could have made an application under *Rule* 9.13 of the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"], however they did not elect to do so. I conclude these statements, no matter how they were allegedly framed in paragraphs 14 and 23 of Stoney's written arguments, are nothing more than an attempt to re-argue ***Sawridge #6***. Again, I put no *legal* weight on these arguments, but conclude these statements are highly relevant as to whether Maurice Stoney is likely to in the future re-argue issues that have been determined conclusively by Canadian courts.

[33] Other submissions by Maurice Stoney are more directly relevant to his potentially being the subject of court-ordered restrictions. He acknowledges that there are unpaid costs to the Sawridge First Nation, but says these will be paid "... as soon as it is possible ...". Stoney indicates he has been unable to pay these costs amounts because of a foreclosure action.

[34] Affidavit evidence allegedly has established that Maurice Stoney was authorized to represent his brothers and sisters, and that Maurice Stoney was directed to act on their behalf. Counsel for Stoney unexpectedly cites *Federal Courts Rules*, SOR/98-106, s 114 as the authority for the process that Maurice Stoney followed when filing his August 12, 2016 application in the Alberta Court of Queen's Bench:

> ... The Federal Court Rules, provide for Representative proceedings where the representative asserts common issues of law and fact, the representative is authorized to act on behalf of the represented persons, the representative can fairly and adequately represent the interests of the represented persons and the use of a representative proceeding is the just, more efficient and least costly manner of proceeding. This method of proceeding is frequently used for aboriginals and particularly for families who are aboriginal. It is submitted that this was the most efficient and least costly manner of proceeding in the circumstances where the claim of all of the living children possess the same precise issues respecting their citizenship.
>
> (Written Brief, para 24.)

Maurice Stoney therefore denies this was a "busybody" proceeding where he without authority attempted to represent third parties.

[35] The written argument concludes that Maurice Stoney should not be the subject of court access restrictions, but if the Court concludes that step is necessary then that restriction should only apply to litigation vs the Sawridge Band and 1985 Sawridge Trust.

D. Evidence

[36] The Trustees and the Sawridge Band entered as evidence a transcript of Maurice Stoney's cross-examination on his May 16, 2016 affidavit. This transcript illustrates a number of relevant points.

1. Maurice Stoney claims to be acting on behalf of himself and his brothers and sisters, and that he has their consent to do that: pp 9-10.
2. Maurice Stoney believes his father was forced out of Indian status by the federal government: p 12.
2. Maurice Stoney and his counsel Priscilla Kennedy do not accept that Maurice Stoney was refused automatic membership in the Sawridge Band by the ***Huzar v Canada***, [2000] FCJ 873, 258 NR 246 (FCA) and ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253 decisions: pp 23-27, 30-33.
3. Maurice Stoney claims he made an application for membership in the Sawridge Band in 1985 but that this application was "ignored": pp 37-39. Stoney however did not have a copy of that application: pp 39-40.
4. Maurice Stoney refused to answer a number of questions, including:

- whether he had read the ***Stoney v Sawridge First Nation*** decision (pp 32-33),
- whether he had made a Canadian Human Rights Commission complaint against the Sawridge Band (p 54),
- whether he had ever read the Sawridge Trust's documentation (pp 60-61),
- the identity of other persons whose Sawridge Band applications were allegedly ignored (pp 63-64), and
- the health status of the siblings for whom Maurice Stoney was allegedly a representative (p 66).

5. Maurice Stoney claims that the Sawridge Band membership application process is biased: pp 41-42.

[37] Maurice Stoney introduced three affidavits which he says indicate the August 12, 2016 application was not a "busybody" proceeding and instead Maurice Stoney was authorized to represent his other siblings in the Sawridge Advice and Direction Application:

1. Shelley Stoney, dated July 20, 2017, saying she is the daughter of Bill Stoney and the niece of Maurice Stoney. She is responsible "for driving my father and uncles who are all suffering health problems and elderly." Shelley Stoney attests "... from discussions among my father and his brothers and sisters" that Maurice Stoney was authorized to bring the August 12, 2016 application on their behalf.
2. Bill Stoney, brother of Maurice Stoney, dated July 20, 2017, saying he authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.
3. Gail Stoney, sister of Maurice Stoney, dated July 20, 2017, saying she authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.

[38] In ***Sawridge #7*** at paras 133-37 I conclude these affidavits should receive little weight:

> The three affidavits presented by Kennedy do not establish that Maurice Stoney was authorized to represent his siblings. Even at the most generous, these affidavits only indicate that Bill and Gail Stoney gave some kind of oral sanction for Maurice Stoney to act on their behalf. I put no weight on the affidavit of Shelley Stoney. It is hearsay, and presumptively inadmissible.
>
> I note that none of these affidavits were supported by any form of documentation, either evidence or records of communications between Maurice Stoney and his siblings, or between Kennedy and her purported clients.
>
> I make an adverse inference from the absence of any documentary evidence of the latter. The fact that no documentation to support that Kennedy and the Stoney siblings communicated in any manner, let alone gave Kennedy authority to act on their behalf, means none exists.
>
> There is no documentation to establish that Maurice Stoney applied to become a litigation representative or was appointed a litigation representative, per *Rules* 2.11-2.21. This is not a class action scenario where Maurice Stoney is a

> representative applicant. While Kennedy has argued that Maurice Stoney's siblings are elderly and unable to conduct litigation, then that is not simply a basis to arbitrarily add their names to court filing. Instead, a person who lacks the capacity to represent themselves (*Rule* 2.11(c-d)) may have a self-appointed litigation representative (*Rule* 2.14), but only after filing appropriate documentation (*Rule* 2.14(4)). That did not occur.

[39] I come to the same conclusion here and also find as a fact that in this proceeding Maurice Stoney was not authorized to file the August 12, 2016 application on behalf of his siblings.

IV. Analysis

[40] What remains are two steps:

1. to evaluate the form and seriousness of Maurice Stoney's litigation misconduct, and
2. determine whether court access restrictions are appropriate, and, if so, what those restrictions should be.

[41] However, prior to that I believe it is helpful to briefly explore the inherent jurisdiction of this Court to limit litigant activities, vs the authority provided in *Judicature Act*, ss 23-23.1, since these two mechanisms were broached in the submissions of the parties.

A. Control of Abusive Litigation via Inherent Jurisdiction vs the *Judicature Act*

[42] An argument can be made that that Alberta Court of Queen's Bench may only restrict prospective litigation via the procedure in *Judicature Act*, ss 23-23.1. I disagree with that position, though at present this question has not been explicitly and conclusively decided by the Alberta Court of Appeal, or the Supreme Court of Canada.

[43] The most detailed investigation of this issue is found in ***Hok v Alberta***, 2016 ABQB 651, where Verville J at paras 14-25 concluded that one element of this Court's inherent jurisdiction is an authority to restrict prospective and hypothetical litigation activities, both applications and entirely new actions.

[44] In coming to that conclusion Justice Verville rejected a principle found in I H Jacobs often-cited paper, "The Inherent Jurisdiction of the Court" ((1970) 23:1 Current Legal Problems 23 at 43), that UK tradition courts do not have an inherent jurisdiction to block commencement of potentially abusive proceedings:

> The court has no power, even under its inherent jurisdiction, to prevent a person from commencing proceedings which may turn out to be vexatious. It is possibly by virtue of this principle that many a litigant in person, perhaps confusing some substratum of grievance with an infringement of legal right, is lured into using the machinery of the court as a remedy for his ills only to find his proceedings summarily dismissed as being frivolous and vexatious and an abuse of the process of the court. The inherent jurisdiction of the court has, however, been supplemented by statutory power to restrain a vexatious litigant from instituting or continuing any legal proceedings without leave of the court.

[45] Jacobs elsewhere in his paper explains that the inherent jurisdiction of the court flows from its historic operation, and stresses this is an adaptive tool that applies as necessary to address issues that would otherwise interfere with the administration of justice and the court's operations:

> ... inherent jurisdiction of the court may be defined as the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. ...
>
> (Jacobs at 51)

[46] However, Jacob's conclusion that courts have no inherent jurisdiction to limit future litigation was based on a historical error, as explained in ***Hok v Alberta***, 2016 ABQB 651, at para 17:

> Two UK Court of Appeal decisions, Ebert v Birch & Anor, (also cited as Ebert v Venvil), [1999] EWCA Civ 3043 (UK CA) and Bhamjee v Forsdick & Ors (No 2), [2003] EWCA Civ 1113 (UK CA), set out the common law authority of UK courts to restrict litigant court access. Some Commonwealth authorities had concluded that UK and Commonwealth courts had no inherent jurisdiction to restrict a person from initiating new court proceedings, and instead that authority was first obtained when Parliament passed the Vexatious Actions Act, 1896. Ebert concludes that is false, as historical research determined that in the UK courts had exercised common law authority to restrict persons initiating new litigation prior to passage of the Vexatious Actions Act, 1896. That legislation and its successors do not codify the court's authority, but instead legislative and common-law inherent jurisdiction control processes co-exist.

[47] Furthermore, the Alberta Court of Appeal has itself issued vexatious litigant orders which do not conform to *Judicature Act* processes. For example, in ***Dykun v Odishaw***, 2001 ABCA 204, 286 AR 392, that Court issued an "injunction" that restricted court access without either an originating notice or the consent of the Minister of Justice and Attorney General of Alberta (then required by *Judicature Act*, s 23.1). Justice Verville concludes (***Hok v Alberta***, 2016 ABQB 651, at paras 19-20, 25), and I agree, that this means Alberta courts have an inherent jurisdiction to take steps of this kind. If the Court of Appeal had the inherent jurisdiction to make the order it issued in ***Dykun v Odishaw***, then so does the Alberta Court of Queen's Bench.

[48] Beyond that, the efficient administration of justice simply requires that there must be an effective mechanism by which the courts may control abusive litigation and litigants. This must, of course, meet the constitutional requirement that any obstacle or expense requirement placed in front of a potential court participant does not "... effectively [deny] people the right to take their cases to court ..." or cause "undue hardship": ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59 at paras 40, 45-48, [2014] 3 SCR 31. As I have previously observed, an obligation to make a document-based application for leave to file is a comparatively minor imposition and obviously does not cause "undue hardship".

[49] The question, then, is whether the *Judicature Act*, ss 23-23.1 procedure is an adequate one, or does the Court need to draw on its "reserve" of "residual powers" to design an effective

mechanism to control abusive litigants and litigation. I conclude that it must. A critical defect in this legislation is that section 23(2) defines proceedings that are conducted in a "vexatious manner" as requiring "persistent" misconduct, for example "persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction" [emphasis added]: *Judicature Act*, s 23(2)(a).

[50] The Alberta Court of Appeal in certain decisions that apply *Judicature Act*, ss 23-23.1 appears to apply this rule in a strict manner, for example, in ***RO v DF***, 2016 ABCA 170, 36 Alta LR (6th) 282 at para 38 the Court stresses this requirement. Further, the ***RO v DF*** decision restricts the scope of a *Judicature Act*, ss 23-23.1 order on the basis that the vexatious litigant had no "... history of "persistently" ..." engaging in misconduct that involves outside parties. In other words, according to ***RO v DF*** the *Judicature Act*, ss 23-23.1 process operates retrospectively. *Judicature Act*, ss 23-23.1 authorize court access restrictions only after "persistent" misconduct has occurred.

[51] That said, it is clear that the Alberta Court of Appeal does not actually apply that requirement in other instances where it has made an order authorized per the *Judicature Act*. For example, in ***Henry v El*** Slatter JA ordered a broad, multi-court ban on the plaintiff's court activities, though only one dispute is mentioned. There is no or little record of 'persistent history'. ***Henry v El*** does not identify repeated or persistent litigation steps, nor are multiple actions noted. The misconduct that warranted the litigation restraint was bad arguments, and out-of-court misconduct: a need for the target of the misconduct to obtain police assistance, the plaintiff had foisted allegedly binding legal documents on the defendant, the abusive plaintiff was the target of a court ordered peace bond, and the abusive plaintiff posted a bounty for the defendant on the Internet.

[52] In ***Hok v Alberta***, 2016 ABQB 651 at paras 36-37, Justice Verville concluded that an effective mechanism to limit court access should operate in a *prospective* manner - based on evidence that leads to a prediction of future abusive litigation activities. This is also the approach recommended in the UK Court of Appeal ***Ebert v Birch & Anor***, [1999] EWCA Civ 3043 (UK CA) and ***Bhamjee v Forsdick & Ors (No 2)*** decisions.

[53] However, the strict "persistence"-driven approach in the *Judicature Act* and ***RO v DF*** only targets misconduct that has already occurred. It limits the court to play 'catch up' with historic patterns of abuse, only fully reining in worst-case problematic litigants after their litigation misconduct has metastasized into a cascade of abusive actions and applications.

[54] That outcome can sometimes be avoided.

1. Statements of Intent

[55] First, abusive litigants are sometimes quite open about their intentions. For example, in ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 625 at para 44, 543 AR 11, a vexatious litigant said exactly what he planned to do in the future:

> I can write, I can write the judicature counsel, I can write the upper law society of Canada. I got Charter violations. I got administrative law violations. I've got civil contempt. I've got abuse of process. I've got abuse of qualified privilege. I can keep going, I haven't even got, I haven't even spent two days on this so far. And if you want to find out how good I am, then let's go at it. But you know, at the

> end of the day, I'm not walking away. And it's not going to get any better for them.

[56] It seems strange that a court is prohibited from taking that kind of statement of intent into account when designing the scope of court access restrictions. This kind of stated intention obviously favours broad control of future litigation activities.

[57] A modern twist on a statement of intentions is that some abusive litigants document their activities and intentions on Internet websites. For example, ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547 at paras 31, 40 describes how an abusive court litigant had, rather conveniently, documented and recorded online his various activities and his perceptions of a corrupt court apparatus.

[58] However, there is no reason why the opposite scenario would not be relevant. Where an abusive litigant chooses to take steps to indicate good faith conduct, then that action predicts future conduct, for example by taking tangible positive steps to demonstrate they are a 'fair dealer' by:

1. voluntarily terminating or limiting abusive litigation,
2. abandoning claims, restricting the scope of litigation, consenting to issues or facts previously in dispute,
3 retaining counsel, and
4. paying outstanding cost awards.

[59] These kinds of actions may warrant a problematic litigant receiving limited court access restrictions, or no court access restrictions at all. Rewarding positive self-regulation is consistent with the administration of justice, and a modern, functional approach to civil litigation.

2. Demeanor and Conduct

[60] Similarly, a trial court judge may rely on his or her perception of an abusive court participant's character, demeanor, and conduct. Obviously, there is a broad range of conduct that may be relevant, but it is helpful to look at one example. Maurice Prefontaine, a persistent and abusive litigant who has often appeared in Alberta and other Canadian courts, presents a predictable in-court pattern of conduct, which is reviewed in ***R v Prefontaine***, 2002 ABQB 980, 12 Alta LR (4th) 50, appeal dismissed for want of prosecution 2004 ABCA 100, 61 WCB (2d) 306.

[61] Mr. Prefontaine presented himself in a generally ordered, polite manner in court. He was at one point a lawyer. He has for years pursued a dispute with the Canada Revenue Agency, and has appeared on many occasions in relation to that matter. Mr. Prefontaine's behaviour changed in a marked but predictable manner when his submissions were rejected. He explodes, making obscene insults and threats directed to the hearing judge and opposing parties. When a person responds to the court in this manner, that conduct is a significant basis to conclude that future problematic litigation is impending from that abusive court participant. Sure enough, that has been the case with Mr. Prefontaine.

[62] Also perhaps unsurprising is that Mr. Prefontaine's conduct is probably linked to his being diagnosed with a persecutory delusional disorder, or a paranoid personality disorder: ***R v Prefontaine***, at paras 8-17, 82, 94-98.

3. Abuse Caused by Mental Health Issues

[63] There are many other examples of how litigation abuse has a mental health basis. For example, the plaintiff in ***Koerner v Capital Health Authority***, 2011 ABQB 191, 506 AR 113, affirmed 2011 ABCA 289, 515 AR 392, leave to SCC refused, 34573 (26 April 2012) engaged in vexatious litigation because her perceptions were distorted by somatoform disorder, a psychiatric condition where a person reports spurious physical disorders (***Koerner v Capital Health Authority***, 2010 ABQB 590 at paras 4-5, 498 AR 109). Similarly, in ***Re FJR (Dependent Adult)***, 2015 ABQB 112, court access restrictions were appropriate because the applicant was suffering from dementia that led to spurious, self-injuring litigation. In these cases future abuse of the courts can be predicted from a person's medical history.

[64] Another and very troubling class of abusive litigants are persons who are affected by querulous paranoia, a form of persecutory delusional disorder that leads to an ever-expanding cascade of litigation and dispute processes, which only ends after the affected person has been exhausted and alienated by this self-destructive process. Querulous paranoiacs attack everyone who becomes connected or involved with a dispute via a diverse range of processes including lawsuits, appeals, and professional complaints. Anyone who is not an ally is the enemy. This condition is reviewed in Gary M Caplan & Hy Bloom, "Litigants Behaving Badly: Querulousness in Law and Medicine" 2015 44:4 Advocates' Quarterly 411 and Paul E Mullen & Grant Lester, "Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour" (2006) 24 Behav Sci Law 333.

[65] Persons afflicted by querulous paranoia exhibit a unique 'fingerprint' in the way they frame and conduct their litigation as a crusade for retribution against a perceived broad-based injustice, and via a highly unusual and distinctive document style. The vexatious litigants documented in ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456, 543 AR 132, ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 625, 543 AR 11, ***Chutskoff v Bonora***, 2014 ABQB 389, 590 AR 288, ***Hok v Alberta***, 2016 ABQB 335, and ***Hok v Alberta***, 2016 ABQB 651 all exhibit the characteristic querulous paranoiac litigation and document fingerprint criteria.

[66] Mullen and Grant observe these persons cannot be managed or treated: pp 347-48. Early intervention is the only possible way to interrupt the otherwise grimly predictable progression of this condition: Caplan & Bloom, pp 450-52; Mullen & Lester, pp 346-47. Disturbingly, these authors suggest that the formal and emotionally opaque character of litigation processes may, by its nature, transform generally normal people into this type of abusive litigant: Caplan & Bloom, pp 426-27, 438.

[67] A "persistent misconduct" requirement means persons afflicted by querulous paranoia cannot be managed. They will always outrun any court restriction, until it is too late and the worst outcome has occurred.

4. Litigation Abuse Motivated by Ideology

[68] Other abusive litigants are motivated by ideology. A particularly obnoxious example of this class are the Organized Pseudolegal Commercial Argument ["OPCA"] litigants described in ***Meads v Meads***, 2012 ABQB 571, 543 AR 215. Many OPCA litigants are hostile to and reject conventional state authority, including court authority. They engage in group and organized actions that have a variety of motives, including greed, and extremist political objectives: ***Meads***

v Meads, at paras 168-198. Justice Morissette ("Querulous or Vexatious Litigants, A Disorder of a Modern Legal System?" (Paper delivered at the Canadian Association of Counsel to Employers, Banff AB (26-28 September 2013)) at pp 11) has observed for this population that abuse of court processes is a political action, "... the vector of an ideology for a class of actors in the legal system."

[69] Some OPCA litigants use pseudolegal concepts to launch baseless attacks on government actors, institutions, lawyers, and others. For example:

- ***ANB v Alberta (Minister of Human Services)***, 2013 ABQB 97, 557 AR 364 - after his children were seized by child services the Freeman-on-the-Land father sued child services personnel, lawyers, RCMP officers, and provincial court judges, demanding return of his property (the children) and $20 million in gold and silver bullion, all on the basis of OPCA paperwork.
- ***Ali v Ford***, 2014 ONSC 6665 - the plaintiff sued Toronto mayor Rob Ford and the City of Toronto for $60 million in retaliation for a police attendance on his residence. The plaintiff claimed he was a member of the Moorish National Republic, and as a consequence immune from Canadian law.
- ***Bursey v Canada***, 2015 FC 1126, aff'd 2015 FC 1307, aff'd ***Dove v Canada***, 2016 FCA 231, leave to the SCC refused, 37487 (1 June 2017) - the plaintiffs claimed international treaties and the *Charter* are a basis to demand access to a secret personal bank account worth around $1 billion that is associated with the plaintiffs' birth certificates; this is allegedly a source for payments owed to the plaintiffs so they can adopt the lifestyle they choose and not have to work.
- ***Claeys v Her Majesty***, 2013 MBQB 313, 300 Man R (2d) 257 - the plaintiff sued for half a million dollars and refund of all taxes collected from her, arguing she had waived her rights to be a person before the law, pursuant to the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Canada had no authority because Queen Elizabeth II was "... Crowned on a fraudulent Stone and ... violated her Coronation Oath by giving Royal Assent to laws that violate God's Law ...".
- ***Doell v British Columbia (Ministry of Public Safety and Solicitor General)***, 2016 BCSC 1181 - an individual who received a traffic ticket for riding without a helmet sued British Columbia, demanding $150,000.00 in punitive damages, because he is a human being and not a person, and the RCMP had interfered with his right "to celebrate divine service".
- ***Fiander v Mills***, 2015 NLCA 31, 368 Nfld & PEIR 80 - a person accused of fisheries offenses sued the Crown prosecutor, fisheries officer, and provincial court judge, arguing he was wrongfully prosecuted because he had opted out of "having" a "person" via the *Universal Declaration of Human Rights*.
- ***Isis Nation Estates v Canada***, 2013 FC 590, the plaintiff, "Maitreya Isis Maryjane Blackshear, the Divine Holy Mother of all/in/of creation", sued Alberta and Canada for $108 quadrillion and that they "cease and desist all blasphemy" against the plaintiff.

[70] There is little need to explore why these claims are anything other than ridiculous.

[71] OPCA litigants have been formally declared vexatious, for example: ***Boisjoli (Re)***, 2015 ABQB 629, 29 Alta LR (6th) 334; ***Boisjoil (Re)***, 2015 ABQB 690; ***Cormier v Nova Scotia***, 2015 NSSC 352, 367 NSR (2d) 295; ***Curle v Curle***, 2014 ONSC; ***Gauthier v Starr***, 2016 ABQB 213, 86 CPC (7th) 348; ***Holmes v Canada***, 2016 FC 918; ***R v Fearn***, 2014 ABQB 233, 586 AR 182; ***Yankson v Canada (Attorney General)***, 2013 BCSC 2332.

[72] Judicial and legal academic authorities uniformly identify OPCA narratives and their associated pseudolegal concepts as resting on and building from a foundation of paranoid and conspiratorial anti-government and anti-institutional political and social belief. These individuals are sometimes called 'litigation terrorists' for this reason. They may act for personal benefit, but they also do so with the belief they are justified and act lawfully when they injure others and disrupt court processes. Persons who advance OPCA litigation to harm others have no place in Canada's courts. The court's inherent jurisdiction must be able to shield the innocent potential victims of these malcontents. Their next target can be anyone who crosses their path - government officials or organizations, peace officers, lawyers, judges, business employees - and who then offends the OPCA litigant's skewed perspectives.

[73] These individuals believe they have a right to attack others via the courts, they like the idea of doing that, and they view their litigation targets as bad actors who deserve punishment. Waiting for these individuals to establish "persistent misconduct" simply means they just have more opportunities to cause harm.

[74] The plaintiff in ***Henry v El*** was obviously an OPCA litigant engaged in a vendetta. Slatter JA in that matter did not wait for the plaintiff to establish a pattern of "persistently" misusing the courts to attack others. I agree that is the correct approach. If a person uses pseudolaw to attack others as a 'litigation terrorist' then that should be a basis for immediate court intervention to prevent that from recurring. If the *Judicature Act* cannot provide an authority to do that, then this Court's inherent jurisdiction should provide the basis for that step.

5. Persistent Abusive Conduct is Only One Predictor of Future Misconduct

[75] All this is not to say that "persistence" is irrelevant. In fact, it is extremely important. A history of persistent abuse of court processes implies the likelihood of other, future misconduct. Persistence is relevant, but must not be *the only prerequisite* which potentially triggers court intervention. Persistence is a clear and effective basis for a court to predict actions when it cannot ascertain motivation or pathology, and from that derive what is likely and predictable. However, that should not be the only evidence which is an appropriate basis on which to restrict court access.

[76] The reason that I and other Alberta Court of Queen's Bench judges have concluded that this Court has an inherent jurisdiction to limit court access to persons outside the *Judicature Act*, ss 23-23.1 scheme is not simply because the UK appeal courts have concluded that this jurisdiction exists, *but also because that authority is necessary*. ***Sawridge #7*** at paras 38-49 reviews how the Supreme Court has instructed that trial courts conduct a "culture shift" in their operation towards processes that are fair and proportionate, without being trapped in artificial and formulaic rules and procedures. This is *an obligation* on the courts. The current *Judicature Act*, ss 23-23.1 process is an inadequate response to the growing issue of problematic and abusive litigation.

[77] Even though the *Judicature Act* is not the sole basis for this Court's jurisdiction to control abusive litigation, that legislation could be amended to make it more effective. One helpful step would be to remove the requirement that "vexatious" litigation involves misconduct that occurs "persistently". Another would be to re-focus the basis for when intervention should occur. Currently, section 23.1(1) permits intervention when "... a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner ...". This again is backwards-looking, punitive language. In my opinion a superior alternative is "... when a Court is satisfied that a person may abuse court processes ...".

[78] The Legislature should also explicitly acknowledge that the *Judicature Act* procedure does not limit how courts of inherent jurisdiction may on their own motion and inherent authority restrict a person's right to initiate or continue litigation.

[79] As Veit J observed in ***Sikora Estate (Re)***, 2015 ABQB 467 at paras 16-19, where a person seeks to have the court make an order that restricts court access then the appropriate procedure is *Judicature Act*, ss 23-23.1. That is a distinct process and authority from that possessed by judges of this Court. Given that the Masters of the Alberta Court of Queen's Bench derive their authority from legislation, another helpful step would be for the Legislature to extend *Judicature Act*, ss 23-23.1 to authorize Masters, on their own motion, to apply the *Judicature Act* procedure to control abusive litigants who appear in Chambers. This is not an uncommon phenomenon; the Masters are in many senses the 'front line' of the Court, and frequently encounter litigation abuse in that role.

B. Maurice Stoney's Abusive Activities

[80] In reviewing Maurice Stoney's litigation activities I conclude on several independent bases that his future access to Alberta courts should be restricted. His misconduct matches a number ***Chutskoff v Bonora*** "indicia" categories and exhibits varying degrees of severity.

1. Collateral Attacks

[81] First, Maurice Stoney has clearly attempted to re-litigate decided issues by conducting the ***Stoney v Sawridge First Nation*** judicial review, the 2016 Canadian Human Rights Commission application, and his attempts to interfere in the Advice and Direction Application litigation via the ***Stoney v 1985 Sawridge Trust***, 2016 ABCA 51 appeal and his August 12, 2016 application. In each case he attempted to argue that he has automatically been made a member of the Sawridge Band by the passage of Bill C-31. He has also repeatedly attacked the processes of the Sawridge Band in administering its membership. My reasons for that conclusion are found in ***Sawridge #6*** at paras 41-52.

[82] This is the first independent basis on which I conclude Maurice Stoney's litigation activity should be controlled. He has a history of repeated collateral attacks in relation to this subject and the related parties. This has squandered important court resources and incurred unnecessary litigation and dispute-related costs on other parties.

2. Hopeless Proceedings

[83] Maurice Stoney's attempts to re-litigate the same issues also represent hopeless litigation. The principle of *res judicata* prohibits a different result. This is a second independent basis on which I conclude Maurice Stoney's litigation conduct needs to be controlled, though it largely overlaps with the issue of collateral attacks.

3. Busybody Litigation

[84] Maurice Stoney appears to have alleged two bases for why I should conclude his purportedly acting in court as a representative of his "living brothers and sisters" is not "busybody" litigation:

1. he has provided affidavit evidence to establish he was an authorized representative, and
2. representation in this manner is authorized by the *Federal Court Rules*, s 114.

[85] As I have previously indicated I reject that the affidavit evidence of Shelley, Bill, and Gail Stoney established on a balance of probabilities that Maurice Stoney was authorized to represent his siblings. As for the *Federal Court Rules*, that legislation has no legal relevance or application to a proceeding conducted in the Alberta Court of Queen's Bench.

[86] "Busybody" litigation is a very serious form of litigation abuse, particularly since it runs the risk of injuring otherwise uninvolved persons. I am very concerned about how the weak affidavit evidence presented by Maurice Stoney represents an after-the-fact attempt to draw Maurice Stoney's relatives not only into this litigation, but potentially with the result these individuals face court sanction, including awards of solicitor and own client indemnity costs. While I have rejected that possibility (***Sawridge #7*** at paras 8, 139), the fact that risk emerged is a deeply aggravating element to what is already a very serious form of litigation abuse. This is a third independent basis on which I conclude Maurice Stoney's court access should be restricted.

4. Failure to Follow Court Orders - Unpaid Costs Awards

[87] Maurice Stoney admitted he has outstanding unpaid cost awards. Maurice Stoney says he is unable to pay the outstanding costs orders because he does not have the money for that. No evidence was tendered to substantiate that claim.

[88] A costs order is a court order. A litigant who does not pay costs is disobeying a court order.

[89] Outstanding costs orders on their own may not be a basis to conclude that a person's litigation activities require control. What amplifies the seriousness of these outstanding awards is that Maurice Stoney has attempted to shift all his litigation costs to a third party, the 1985 Sawridge Trust: ***Sawridge #6*** at para 78. Worse, the effect of that would be to deplete a trust that holds the communal property of an aboriginal community: ***Sawridge #7*** at paras 145-46, 148.

[90] A court may presume that a person intends the natural consequences of their actions: ***Starr v Houlden***, [1990] 1 SCR 1366, 68 DLR (4th) 641. Maurice Stoney appears to intend to cause harm to those he litigates against. He conducts hopeless litigation and then attempts to shift those costs to innocent third parties. If unsuccessful, he says he is unable to pay those costs. In this context Maurice Stoney's failure to pay outstanding costs orders to the Sawridge Band is in itself a basis to take steps to restrict his court access.

5. Escalating Proceedings - Forum Shopping

[91] In ***Sawridge #6*** and ***Sawridge #7*** I noted that Maurice Stoney's dispute with the Sawridge Band has been spread over a range of venues. He acted in Federal Court, and when unsuccessful there he shifted to the Canadian Human Rights Commission. Again unsuccessful, he now

renewed his abusive litigation, this time in the Alberta Court of Queen's Bench and the Alberta Court of Appeal.

[92] I conclude this is a special kind of escalating proceedings, "forum shopping", where a litigant moves between courts, tribunals, and jurisdictions in an attempt to prolong or renew abusive dispute activities. Forum shopping is a particular issue in relation to vexatious litigants because court-ordered restrictions on litigation have a limited scope. For example, I have no authority to order steps that would affect a litigant's access to a court in a different province, or the federal courts.

[93] Abusive litigants can exploit this gap in Canadian court jurisdictions to repeatedly harm other litigants and, in the process, multiple courts. The litigation activities of a British Columbia resident, Roger Callow, are a dramatic example of forum shopping: reviewed in ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547; ***Callow v Board of School Trustees, School District No. 45***, 2008 BCSC 778, 168 ACWS (3d) 906.

[94] Callow's dispute began in 1985 as a labour arbitration proceeding in response to Callow's employment being terminated. That led to litigation and appeals in that jurisdiction. The Supreme Court refused leave. More British Columbia lawsuits followed, and by 2003 Callow was declared a "vexatious litigant" in British Columbia. Callow then persisted with multiple appeals and leave applications. That led to a further 2010 order to control his court access. Callow now shifted to the Federal Court, where his actions were struck out as an abuse of process: ***Callow v B.C. Court of Appeal Chief Justice Threfal*** (9 November 2011), Vancouver T-1386-11 (FC), aff'd (2 December 2011), Vancouver T-138611 (FC); ***Callow v Board of School Trustees (#45 West Vancouver)*** (2 February 2015), Vancouver T-2360-14 (FC). In 2012 Callow then sued in Ontario, which led to him being subjected to broad court access restrictions in that jurisdiction as well: ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547.

[95] The saga then continued, with Callow next having filings struck out in Quebec (***Callow v Board of School Trustees (S.D. #45 West Vancouver)***, 2015 QCCS 5002, affirmed 2016 QCCA 60, leave to the SCC refused, 36883 (9 June 2016) and Saskatchewan (***Callow v West Vancouver School District No. 45***, 2015 SKQB 308, affirmed 2016 SKCA 25, leave to the SCC refused, 36993 (6 October 2016). I would be unsurprised if Alberta is not at some point added to this list.

[96] Clearly, at least some persistent abusive court participants are willing to 'shop around', and Roger Callow's litigation is an extreme example of the waste that can result. Given the manner in which Canadian court and tribunal jurisdictions are structured there seems little way at present to escape scenarios like this. Academic commentary on the control of abusive litigation has recommended a national "vexatious litigant" registry: Caplan & Bloom at 457-58, Morissette at 22. I agree that would be a useful addition.

[97] Forum shopping by its very nature implies an intent to evade legitimate litigation control processes and legal principles, including *res judicata*. In the case of Maurice Stoney his forum shopping largely overlaps his abusive collateral attack and futile litigation activities, and is a highly aggravating factor to that misconduct.

6. Unproven Allegations of Fraud and Corruption

[98] The May 16, 2016 cross-examination transcript reveals that Maurice Stoney believes he and his relatives are the subjects of fraud and conspiracy that is intended to deny them their

birthright. For example, he says Sawridge Band membership applications have been ignored, though he has no proof of that.

[99] These allegations are not in themselves a basis to restrict Maurice Stoney's court access, however they provide some insight into his litigation objectives and how he views his now longstanding conflict with the Sawridge Band and its administration.

7. Improper Litigation Purposes

[100] The Sawridge Band argues Maurice Stoney's August 12, 2016 application has an improper purpose, or no legitimate purpose. Maurice Stoney's exact objective is not obvious. It may be he intends to pursue his perceived objective no matter the consequences or justification, to disrupt the membership process of the Sawridge Band, to obtain monies from the 1985 Sawridge Trust, or a combination of those motives. However, as I have previously indicated, the combination of futile litigation, unpaid costs awards, costs shifting, forum shopping, and a claim that the abusive litigant lacks the means to pay costs leads to a logical inference. The August 12, 2016 application had no legitimate purpose. Its only effect was to waste court and litigant resources.

[101] This is another independent basis on which I conclude court intervention is warranted to control Maurice Stoney's access to Alberta Courts.

C. Anticipated Litigation Abuse

[102] This decision identifies five independent bases on which this Court should take steps to control future litigation abuse by Maurice Stoney in Alberta Courts. Collectively, that strongly favours court intervention. His litigation history predicts future litigation abuse.

[103] But that is secondary to another fact - that the submissions received in the second stage of the procedure found in ***Hok v Alberta*** shows that Maurice Stoney and his counsel still do not accept that prior decisions mean Maurice Stoney has no right to continue his interference with the Sawridge Band and its membership processes. Instead, Maurice Stoney and his counsel say his arguments are viable, if not correct. Those are "the facts". This is a very strong predictor of future abusive litigation activities. Maurice Stoney's objectives and beliefs remain unchanged.

[104] What remains is to determine the scope of that court access restriction order. The combination of trial, appeal, judicial review, and tribunal activities strongly predicts that Maurice Stoney will not restrict his abusive litigation activities to a particular forum. Instead, his history of forum shopping suggests the opposite.

[105] While I have agreed with many of the Sawridge Band and 1985 Sawridge Trust's arguments, I do not accept that Maurice Stoney's litigation history and apparent intentions means that his plausible future abusive litigation activities cannot be restricted to a particular target group or dispute. Instead, Maurice Stoney's complaint-related activities have a clear focus: his long-standing dispute with the Sawridge Band concerning band membership. I did not receive any evidence or statements that suggest that Stoney's abusive activities will expand outside that target set. I therefore only require Stoney obtain leave to initiate or continue litigation in Alberta courts where the litigation involves:

1. the Sawridge Band,
2. the 1985 Sawridge Trust,

3 the 1986 Sawridge Trust,

4 the current, former, and future Chief and Council of the Sawridge Band,

5. the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

6. the Public Trustee of Alberta,

7. legal representatives of categories 1-6,

8. members of the Sawridge Band,

9. corporate and individual employees of the Sawridge Band, and

10. the Canadian federal government.

[106] I have defined this plausible target group broadly because Maurice Stoney's allegations of conspiracy against himself and his siblings raises a concern that Maurice Stoney may shift his focus from the Sawridge Band and the Trusts to the individuals who are involved in the prior litigation and Sawridge Band membership-related processes and decisions.

[107] Maurice Stoney's litigation misconduct extends to appeals. Normally that would mean that I would restrict his access to all three levels of Alberta Courts, however in light of the inconsistent Alberta Court of Appeal jurisprudence on control of abusive and vexatious litigation in that forum I do not extend my order to that Court: ***Hok v Alberta***, 2016 ABQB 335; ***Ewanchuk v Canada (Attorney General)***.

[108] I agree that Maurice Stoney's future litigation activities should be made dependent on him first paying outstanding cost awards.

[109] Maurice Stoney's "busybody" activities, and his attempts to justify his purportedly authorized representation activities in this hearing raise the troubling possibility that Stoney will again attempt to draw others into his disputes. Persons have no constitutional right to represent others (***Gauthier v Starr***, 2016 ABQB 213, 86 CPC (7th) 348), and appearing before a court is a privilege solely subject to the court's discretion (***R v Dick***, 2002 BCCA 27, 163 BCAC 62). Maurice Stoney has badly abused that privilege and his arguments concerning his "busybody" activities are highly problematic. He has demonstrated he is an unfit litigation representative. I therefore order that Maurice Stoney is prohibited from representing any person in all Alberta Courts.

D. Court Access Control Order

[110] I therefore order:

1. Maurice Felix Stoney is prohibited, under the inherent jurisdiction of the Alberta Court of Queen's Bench, from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, without an order of the Chief Justice or Associate Chief Justice, or Chief Judge, of the Court in which the proceeding is conducted, or his or her designate, where that litigation involves any one or more of:

(i) the Sawridge Band,

(ii) the 1985 Sawridge Trust,

(iii) the 1986 Sawridge Trust,

(iv) current, former, and future Chief and Council of the Sawridge Band,

(v) the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

(vi) Public Trustee of Alberta,

(vii) legal representatives of categories 1-6,

(viii) members of the Sawridge Band,

(ix) corporate and individual employees of the Sawridge Band, and

(x)) the Canadian federal government.

2. Maurice Felix Stoney is prohibited from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, until Maurice Felix Stoney pays in full all outstanding costs ordered by any Canadian court.

3. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may, at any time, direct that notice of an application to commence or continue an appeal, action, application, or proceeding be given to any other person.

4. Maurice Felix Stoney must describe himself, in the application or document to which this Order applies as "Maurice Felix Stoney", and not by using initials, an alternative name structure, or a pseudonym.

5. Any application to commence or continue any appeal, action, application, or proceeding must be accompanied by an affidavit:

(i) attaching a copy of the Order issued herein, restricting Maurice Felix Stoney's access to the Alberta Court of Queen's Bench and Provincial Court of Alberta;

(ii) attaching a copy of the appeal, pleading, application, or process that Maurice Felix Stoney proposes to issue or file or continue;

(iii) deposing fully and completely to the facts and circumstances surrounding the proposed claim or proceeding, so as to demonstrate that the proceeding is not an abuse of process, and that there are reasonable grounds for it;

(iv) indicating whether Maurice Felix Stoney has ever sued some or all of the defendants or respondents previously in any jurisdiction or Court, and if so providing full particulars;

(v) undertaking that, if leave is granted, the authorized appeal, pleading, application or process, the Order granting leave to proceed, and the affidavit in support of the Order will promptly be served on the defendants or respondents;

(vi) undertaking to diligently prosecute the proceeding; and

(vii) providing evidence of payment in full of all outstanding costs ordered by any Canadian court.

6. Any application referenced herein shall be made in writing.

7. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may:

(i) give notice of the proposed claim or proceeding and the opportunity to make submissions on the proposed claim or proceeding, if they so choose, to:

a) the involved potential parties;

b) other relevant persons identified by the Court; and

c) the Attorney Generals of Alberta and Canada.

(ii) respond to the leave application in writing; and

(iii) hold the application in open Court where it shall be recorded.

8. Leave to commence or continue proceedings may be given on conditions, including the posting of security for costs.

9. An application that is dismissed may not be made again.

10. An application to vary or set aside this Order must be made on notice to any person as directed by the Court.

[111] This order will be prepared by the Court and filed at the same time, as this Case Management Decision and takes effect immediately. The exception granted in the Rooke Order shall apply to this court access control order.

[112] The interim order made per ***Sawridge #6*** at para 65-66 is vacated.

V. Representation by Priscilla Kennedy in this Matter

[113] I have deep concerns about the manner in which Maurice Stoney's lawyer, Priscilla Kennedy, has conducted herself in this matter. Certain of those issues are reviewed in ***Sawridge #7***, a judgment where I determined that Kennedy should be personally responsible for her client's costs award because of her misconduct. She represented a client who made a hopeless application that was a serious abuse of the Court and other litigants, and involved other third parties without their authorization.

[114] In ***Sawridge #7*** Ms. Kennedy was represented by Mr. Donald Wilson, a partner of the law firm DLA Piper, which is the law firm that employs Ms. Kennedy. I reproduce verbatim certain of Mr. Wilson's submissions to the Court in ***Sawridge #7***:

> ... in these circumstances, I will say that Ms. Kennedy has prosecuted this action on [Maurice Stoney's] behalf further than I would've, further than I think she should've. ...
>
> ... the reason I go through this, Sir, is I think quite candidly I've conceded that Ms. Kennedy prosecuted this action further than I would've, further than I think she ought to have ...
>
> Now, if I'm [counsel for the Sawridge Band], I can tell you that the Band is the person that gets to determine their membership and that is entirely appropriate. And in Mr. Stoney's case they've done that. Appeals were made on two different

levels. An additional attempt was made at the Human Rights tribunal. And Mr. Stoney has been told, and I know he's been told this because I told him this, he is at the end of his rope with respect to the Sawridge Band and the Court system.

And the reason for that is background and history. It's one of Montgomery's campaigns in World War II, it's a bridge too far. He would've been fine if he'd stopped at bridges, by going for a third bridge the campaign itself stopped. In this instance, had -- if I'd been engaged or consulted, if I read Sawridge 5 ... the fact that the Court is not, unlikely earlier trust litigation where often the trust ends up paying for part of the litigant's costs, the Court could not have been clearer that is not going forward. And the Court indicated interlope. That is, someone does not have a claim on the trust, presumably would make the trial more complicated, more time consuming, higher costs for everyone. ...

Now, I can tell you that in the course of the last week ... I had occasion to speak in depth with Ms. Kennedy. And Ms. Kennedy tried to convince me as to the merits of Mr. Stoney's case. And at a certain point in time, I had to tell her that he has exhausted his remedies in the legal realm with respect to the Sawridges and it's time to move on.

...

My submission would be the application that resulted in Sawridge 6 should not have been made. It was ill-advised. But was not done with bad motives, an attempt to abuse the process. It had that effect, I have to say in front of my friends it absolutely had that effect ...

... what the Court is trying to do, as you properly cite in your decision with respect to sanctions, is to change behaviour. It's the same rationale behind torts which is you're giving a tort award so that some other idiot isn't going to follow and do the same thing. And, with respect, I would submit to you that the seriousness of what Sawridge 6 is has been driven home to Ms. Kennedy. And, with respect, it's been driven home as much as an order of contempt or a referral to the Law Society. The decision is out there, we have a courtroom full of reporters here to report on the matter.

And I'm reminded of someone once asked Warren Buffett when he was testifying at the congress as to what was reasonable, and it was on the context of a company he owned and insider trading. And Mr. Buffett to the U.S. congress testified it meets a very easy standard. And the standard is, if they printed the story in your home town and your mother and your father had an opportunity to read it, would you be embarrassed? And, with respect, Ms. Kennedy and the Sawridge 6 decision has brought home the falling of continuing to prosecute the remedy she's seeking for Mr. Stoney. Which, after meeting Mr. Stoney, I understand. But there's a certain point in time the legal remedies have been exhausted. ...

[Emphasis added.]

[115] I believe I am fair when I indicate these submissions say that at the ***Sawridge #7*** hearing Mr. Wilson, on behalf of Ms. Kennedy, had acknowledged that there was no merit to the August 12, 2016 application, and that the legal issues involved in that application had been decided,

conclusively, in a series of earlier court proceedings. Yet, here in her written submissions, Ms. Kennedy on behalf of Maurice Stoney, re-argues the very same points. Her submissions are the law is unsettled, issues remain arguable, despite her counsel's admission on July 28, 2017 that the effect of the August 12, 2016 application was to abuse of the court's process: "... it absolutely had that effect ..." [emphasis added].

[116] Mr. Wilson told me in open court that Ms. Kennedy had learned her lesson. When I read the written brief Kennedy prepared and submitted on behalf of Maurice Stoney, I questioned whether that was true.

[117] In ***Sawridge #7*** at paras 98-99 I explained my conclusion why a lawyer who re-litigates or repeatedly raises settled issues has engaged in serious misconduct that is contrary to the standards expected of persons who hold the title "lawyer". I also observed on how advancing abusive litigation is a breach not merely of a lawyer's professional and court officer duties. It is a betrayal of the solicitor-client relationship, and 'digs a grave for two': para 74.

[118] I am also troubled by Ms. Kennedy relying on a procedure found in the *Federal Court Rules* to explain why Maurice Stoney's August 12, 2016 application was not a "busybody" proceeding. Stating what should be obvious, civil proceedings in front of this Court are governed by the *Alberta Rules of Court*, not the *Federal Court Rules*. I question the competence of a lawyer who does not understand what court rules apply in a specific jurisdiction.

[119] In ***Sawridge #7*** at paras 51-58 I reviewed case law concerning the inherent jurisdiction of a Canadian court to control lawyers and their activities. At para 56 I cited ***MacDonald Estate v Martin***, [1990] 3 SCR 1235 at 1245, 77 DLR (4th) 249 for the rule that courts as part of their supervisory function may remove lawyers from litigation, where appropriate. In that decision representation by lawyers was challenged on the basis of an alleged conflict of interest. However, the inherent jurisdiction of the court is not expressly restricted to simply that:

> ... The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. ... [Emphasis added.]

[120] In my opinion Ms. Kennedy's conduct raises the question of whether she is a suitable representative for Maurice Stoney, and whether the proper administration of justice requires that Ms. Kennedy should be removed from this litigation.

[121] This judgment represents what I believe should be Ms. Kennedy's final opportunity to participate in the Advice and Direction Application in the Alberta Court of Queen's Bench as a representative of Maurice Stoney. If that were not the case then I would have proceeded to invite submissions from Ms. Kennedy why she and her law firm, DLA Piper, should not be removed as representatives of Maurice Stoney, and prohibited from any future representation of Maurice Stoney in the Advice and Direction Application.

[122] Instead I will send a copy of this judgment to the Law Society of Alberta for review.

VI. Conclusion

[123] I conclude that Maurice Felix Stoney has engaged in abusive litigation activities resulting in him being required to seek leave prior to initiating or continuing litigation in the Alberta Court of Queen's Bench and Alberta Provincial Court that relates to persons and organizations involved with the Sawridge Band and Maurice Stoney's disputes concerning membership in that Band. Maurice Stoney may only seek leave after he has paid all outstanding costs awards.

[124] Maurice Stoney is also prohibited from representing others in any litigation before the Alberta Provincial Court, Alberta Court of Queen's Bench, and Alberta Court of Appeal.

[125] I confirm that I will send a copy of this judgment to the Law Society of Alberta for review in respect to Ms. Kennedy.

Appearances made by written submissions.
Dated at the City of Edmonton, Alberta this 12th day of September, 2017.

D.R.G. Thomas
J.C.Q.B.A.

Submissions in writing from:

Priscilla Kennedy
DLA Piper
for Maurice Felix Stoney (Applicant)

Edward H. Molstad, Q.C.
Parlee McLaws LLP
for the Sawridge Band

D.C. Bonora
Dentons LLP
for 1985 Sawridge Trustees