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Court of Queen's Bench of Alberta

Citation: Twinn v Sawridge Band, 2017 ABQB 366

Date: 20170607
Docket: 1103 09493
Registry: Edmonton

Between:

Catherine Twinn

Applicant

- and -

Sawridge Band

Respondent

Reasons for Decision
of the
Honourable Madam Justice Dawn Pentelechuk

I. Introduction

[1] This matter comes before me by way of a Reference from Review Officer Dennis Pawlowski under Rule 10.18 of the *Alberta Rules of Court*. Catherine Twinn [Ms. Twinn] is a barrister and solicitor in Alberta. On June 10, 2011, she filed an application before a Master in Chambers to permit a review of 14 accounts she had issued to the Sawridge Band, now Sawridge First Nation [Sawridge].

[2] These accounts were part of a retainer dating back to the mid 1980's, involving constitutional and *Charter* challenges to Bill C-31, which proposed amendments to membership under the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. Between 1999 and 2009, Ms. Twinn billed Sawridge in excess of $5 million on this file. The disputed accounts were issued between October 31, 2005 and October 19, 2009, and total $213,959.29. Sawridge argues the subject of these accounts did not form part of Ms. Twinn's retainer, are barred under the *Limitations Act*, RSA 2000 CL-12 [*Limitations Act*], and are excessive in any event.

[3] On June 10, 2011, Ms. Twinn filed an Appointment for Review of the disputed accounts.

[4] On July 6, 2011, an order was granted in Master's Chambers permitting review of the accounts.

[5] The review was originally scheduled for July 13 and 14, 2011. The parties appeared before Review Officer J.A.B. Christensen. Mr. Christensen suggested that a Reference to the Court might be required. Ultimately, the review was adjourned pending the appeal by Sawridge of the Master's Order.

[6] The appeal was heard on November 15, 2011, and dismissed by Browne, J with reasons reported at ***Twinn v Sawridge Band***, 2012 ABQB 44, 531 AR 158. She held that the *Alberta Rules of Court*, r 10.10(2) (which has since been amended) did not apply to lawyer-initiated reviews. Ms. Twinn's application to permit review was "perhaps wise, but not necessary": at para 62. Browne J held the quantum of the accounts should be decided first, and liability decided by Reference to a Justice of the Court of Queen's Bench.

[7] In September 2015, the parties appeared before Review Officer Dennis Pawlowski. The review did not proceed in order to allow for determination of the following issues outlined in his Reference:

1. Did Sawridge Band expressly, impliedly, orally or [in] writing, enter into any agreement with Catherine Twinn to provide the services that are claimed to have been provided by her and, if so, what was the nature and scope of the agreement or agreements?
2. Are any of Catherine Twinn's claims for legal costs barred by the *Limitations Act* (Alberta)?
3. Is Sawridge Band estopped, in any way, from contesting its liability with respect to any of the statements of account in question?

[8] The evidence in the application before me consists of the following:

1. Affidavit of Catherine Twinn, sworn June 8, 2011;
2. Transcript of Questioning on the Affidavit of Catherine Twinn on July 11, 2011;
3. Exhibits and Answers to Undertakings arising from Questioning on the Affidavit of Catherine Twinn;
4. Affidavit of Roland Twinn, Chief of Sawridge, sworn October 4, 2011;
5. Transcript of Questioning on Affidavit of Roland Twinn on November 2, 2011; and
6. Exhibits and Answers to Undertakings arising from Questioning on the Affidavit of Roland Twinn.

II. Background Facts

[9] Ms. Twinn was admitted to the Law Society of Alberta in 1980, practiced law in various locations in Alberta, and in 1983, opened an office in Edmonton [Lancaster House or Data Room].

[10] Ms. Twinn entered into a retainer agreement dated April 13, 1984 with the Lesser SI Slave Lake Indian Regional Council and other parts of Treaty 8, signed by Chief Walter Twinn, in his capacity as President [Retainer Agreement]. Ms. Twinn says this Retainer Agreement governs her retainer with Sawridge. It is agreed that Sawridge is part of Treaty 8.

[11] Ms. Twinn married Chief Walter Twinn in November 1984. Walter Twinn died on October 30, 1997. His son, Roland Twinn, was elected as a member of the Sawridge Band Council in September 1997, and in February 2003, became Chief of the Sawridge Band.

[12] The parties agree that the 1984 Retainer Agreement pertained to Bill C-47, which proposed various amendments to the *Indian Act*. This Bill died following the federal election in 1984.

[13] In 1985, Bill C-31 was tabled. Ms. Twinn acted primarily as "instructing solicitor" in a lawsuit commenced in 1986 in the Federal Court by numerous Indian Bands. The lawsuit involved lengthy *Charter* and constitutional challenges to Bill C-31.

[14] The first 79-day trial in Federal Court began in September 1993. Six Bands were named as plaintiffs, including Sawridge. The lawsuit was dismissed, but the plaintiff Bands successfully appealed to the Federal Court of Appeal in 1997. A new trial was ordered based on reasonable apprehension of bias on the part of the trial judge.

[15] The second trial was originally scheduled to commence in January 2005 but did not commence until January 2007. By this point, only two plaintiff Bands remained: Sawridge and Tsuu T'ina First Nation. While the date is not clear on the evidence, Sawridge agreed at some point to cover legal fees on behalf of Tsuu T'ina First Nation.

[16] Throughout these proceedings, the Twinn Law firm was one of the Counsel of Record on behalf of the plaintiffs. Lead counsel at that time was Philip Healey of Aird & Berlis LLP in Toronto.

[17] The claim was extensively case managed. In the course of the second trial, the plaintiffs made a number of controversial and unsuccessful applications, resulting in a cost award against the plaintiff Bands of approximately $1.8 million for their misconduct. The reasons for the costs award are reported at ***Sawridge First Nation v Canada***, 2008 FC 267, 320 FTR 166, aff'd 2009 FCA 123, leave to appeal to SCC refused, [2009] SCCA No 248.

[18] In early 2008, the plaintiff Bands advised the Court they were closing their case, would not be calling any further evidence and, based on the pre-trial rulings, would be appealing to the Federal Court of Appeal. The action was dismissed with reasons reported at ***Sawridge Band v Canada***, 2008 FC 322, 319 FTR 217.

[19] The plaintiffs' appeal to the Federal Court of Appeal was dismissed on April 21, 2009: ***Sawridge First Nation v Canada***, 2009 FCA 123, 391 NR 375. Leave to appeal to the Supreme Court of Canada was denied on December 10, 2009: ***Sawridge Band v R***, [2009] SCCA No 248, 403 NR 393.

[20] With that background, I will now turn to an analysis of the issues outlined in the Reference.

1. What was the nature and terms of the retainer agreement between the parties?

a) Does the April 13, 1984 Retainer Agreement govern the parties?

[21] Ms. Twinn argues that the agreement signed April 13, 1984 governs the retainer between the parties and applies to the disputed accounts.

[22] The agreement pertains to "Proposed Membership Amendments To The Indian Act." Ms. Twinn was authorized to "conduct all matters and negotiations required under this retainer and to take any legal steps which may be necessary or desirable in Counsel's sole opinion to protect the Client's interests...." and to retain other counsel as she deemed essential.

[23] As indicated earlier, the agreement was signed by Chief Walter Twinn in his capacity as President of the Lesser SI Slave Lake Indian Regional Council and other parts of Treaty 8. There is no evidence as to the legal status of the Lesser SI Slave Lake Indian Regional Council or which entities formed Treaty 8 in 1984, although it is agreed that Sawridge was, and continues to be, part of Treaty 8. Nor is there other evidence of whether the six Bands that originally filed the lawsuit in 1986 formed part of Treaty 8.

[24] It is agreed that the 1984 Retainer Agreement was executed when the proposed legislation was Bill C-47. However, the lawsuits challenged the subsequently tabled Bill C-31. I heard no evidence as to the degree of similarity between the two bills.

[25] There is no evidence that the parties took formal steps to end the Retainer Agreement, either before or after Chief Walter Twinn's passing. No further written retainer agreement was ever executed nor is there evidence before me of any written amendments to this Retainer Agreement.

[26] The legal fees outlined in the 1984 Retainer Agreement ($250 per day) increased over time, to $270 per hour, and Ms. Twinn billed not only for the services she provided personally, but for various staff of Twinn Law firm.

[27] In a broad sense, proposed amendments to membership under the *Indian Act* were the subject of both the Retainer Agreement and the ensuing litigation, but over time, the fundamental terms of the 1984 Retainer Agreement changed. The legal entity that signed the Retainer Agreement (i.e. the Lesser SI Slave Lake Indian Regional Council) is a different legal entity than Sawridge. The basis of billing not only increased, but changed from a daily flat rate to an hourly rate. Further, in reading the terms of the agreement, it cannot be said that the full scope of this protracted litigation was contemplated. The agreement speaks of negotiation and specifically allows for possible withdrawal of counsel if an application to the court is required.

[28] Consequently, I conclude that the Retainer Agreement has no application and does not inform the Review Officer's assessment of the accounts in question.

[29] Notwithstanding my conclusion that the 1984 Retainer Agreement does not apply to the parties, there is no question that Ms. Twinn had a form of retainer agreement with Sawridge.

b) *What was the scope of the retainer and did it cover the subject of the disputed accounts?*

[30] The determination of the type of retainer governing the parties and the terms of that agreement is largely a question of fact. In the case of an oral retainer, the onus is on the solicitor to prove its terms and the client's version is more likely to be accepted if the terms of the retainer have not been reduced to writing: ***Davis & Company v Jiwan***, 2006 BCSC 658 at para 73, 2006 CarswellBC 1094; ***Peterson, Ross v Kirwood***, [1984] AJ No 863 at para 71, 52 AR 284.

[31] Here, the analysis is hampered by limited and rather vague evidence on the part of Ms. Twinn as well as the absence of evidence from Sawridge on the terms of the retainer. The Questioning of Roland Twinn was focused on Ms. Twinn's handling of the case and other issues not before me in this Reference.

[32] Ms. Twinn's evidence is that her primary role was to act as "instructing solicitor" for the other firms engaged in representing the plaintiff Bands. She was the lawyer primarily responsible for assembling the legal team, locating and documenting evidence as well as marshalling witnesses, including expert witnesses. She deposed she was heavily involved in managing legal and other research.

[33] The scope of Ms. Twinn's retainer was also addressed in her correspondence of October 2005 to the Chiefs of the two plaintiff Bands. She advised that Twinn Law would continue as Solicitor of Record and would be involved in all aspects of the case, including strategy, research and preparation for interlocutory motions and trial. Ms. Twinn would also lead evidence at trial.[1]

[34] Ms. Twinn was also described as "the conduit" through which the various legal counsel on the file were provided with the clients' instructions.

[35] The parties agree that the determination of whether or not the subject matter of the disputed accounts fell within the terms of Ms. Twinn's retainer is an issue properly before me.

[36] The accounts in question involve fees and expenses charged for the following:

i. Attendance at a UN Expert Conference in Arizona in October 2005;

ii. Set up of Lancaster House (also referred to as Data Room start-up) between June and August 2003;

iii. Data Room shutdown and creation of the "DML index" between February 2003 and February 2004.

i. UN Expert Conference

[37] In October 2005, Ms. Twinn travelled to Arizona to meet with Willie Littlechild and attend a UN Expert Conference. She billed Sawridge for 34 hours of her time plus expenses totalling $9,870.15. Ms. Twinn felt attendance at this Conference was part of her duties in connection with Bill C-31. She admits she did not obtain approval from Sawridge to attend the Conference at its expense.

[1] Exhibit A1, Tab 16 from Questioning on Affidavit of Catherine May Twinn on July 11, 2011.

[38] After she issued the account dated October 31, 2005, Sawridge refused to pay, stating this trip had not been approved.

[39] The limited evidence before me does not establish that attendance at this seminar was part of her retainer and, as will be explained later in these reasons, is now barred under the *Limitations Act*, in any event.

ii. Lancaster House/Data Room set-up

[40] In 2003, to facilitate the litigation, Ms. Twinn set up a second office in Edmonton, and staff from her Lac La Biche office began working in Edmonton.

[41] Ms. Twinn recorded time spent between February 2003 and February 2004 ($54,735) and expenses incurred between June and August 2003 ($27,204.26) in relation to the Data Room set-up. She did not prepare an account until May 31, 2009, after Sawridge had terminated her retainer. She first presented this account to Sawridge at a "without prejudice" meeting regarding her outstanding accounts, which occurred sometime in October 2009.

[42] Following this meeting, Ms. Twinn reduced her account for these services by 30%, from $81,939.26 to $60,943.26. She made hand written changes on the May 31, 2009 account and sent it along with a number of other accounts to Sawridge, on November 20, 2009.

[43] Ms. Twinn suggests the Data Room was established to support the second trial. As Sawridge had agreed to pay for an office for the first trial, this formed part of her understanding that the office set-up for the second trial would also be covered.

[44] Ms. Twinn's evidence is that this office provided a workspace in Edmonton for lead counsel (based in Toronto), a space to meet and interview witnesses, and a space to store trial production. In July 2005, Edward H. Molstad, QC of Parlee McLaws became Counsel of Record, replacing Phillip Healey.

[45] When Questioned on why these expenses were not billed until 2009, Ms. Twinn answered:

> Well, there were discussions with Mr. McKinney and - - which also included discussions with my legal counsel; there were discussions with myself, my accountant with them, with Mr. McKinney and this was a matter that was not resolved.[2]

[46] When asked again why these expenses were not included in her June 2003 account, she answered:

> Well, I wanted to have the conversation with the client about the cost of this office that had to be set up, and Samson in their litigation had to set up an office to support the litigation. They retained Terry Munroe and they paid for all the costs associated with that. In the first trial Sawridge also set up an office to support the trial process.

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[2] Questioning on Affidavit of Catherine May Twinn on July 11, 2011 starting on page 56, line 17.

> So I was expecting that we would reach some resolution that would be reasonable.[3]

[47] Ms. Twinn admits that Sawridge never expressly told her that the time and expenses she incurred in the office set up would be paid, but suggests that based on discussions with Michael McKinney, General Counsel to Sawridge, and Bertha L'Hirondelle, then Chief of Sawridge, she "was left with the clear understanding" these expenses would be covered, because Sawridge recognized the need for the office in Edmonton, and she did what was needed to fulfill her professional obligations.

[48] In his letter of April 22, 2010, Mr. McKinney addressed these charges:

> DATA ROOM
>
> We note that $60,943.26 was added to the May 2009 invoice in relation to Data Room start up. We believe that these items and amounts had been the subject of earlier discussions. We have previously advised you of our concerns with respect to these amounts, including the fact that some of these costs are office costs which would normally be incurred by legal counsel on their own account, the fact that the Band may have reduced or avoided these amounts had it been consulted and involved in the set up of the Data Room at a later time, the fact that some of the time included appears to be for the move of your office from the Band Administration building to your residence, the set up of an office at Enoch and the set up of an office at Hobbema and the fact that some of this work was charged at legal rates when it could have been done by others at non-legal rates. These issues have not been addressed.

[49] Was this expense an implied term of the retainer?

[50] In 2003, lead counsel was based in Toronto. It is logical that Ms. Twinn, as the coordinator and conduit of this litigation, would need space in Edmonton to support the trial. The issue is not whether an Edmonton office was logically required, but whether the resulting expense in establishing it was part of the retainer such that the client is responsible for it.

[51] The record before me does not suggest the monthly costs for leasing the space were charged to Sawridge.

[52] While it is entirely possible for a client to negotiate such an expense as part of his or her retainer, in this instance, nothing was reduced to writing and the evidence supporting Ms. Twinn's "clear understanding" (that the expenses would be covered) is scant. In the absence of an express agreement, would the client expect to absorb this expense as an incidental part of its retainer, or would it expect that this expense is part and parcel of a lawyer doing business?

[53] It is certainly conceivable that a lawyer may spend significant time and money setting up, or adapting their practice in order to serve their client. Absent an express agreement, it does not follow that time and money incurred with administrative functions should be the responsibility of the client. For instance, it cannot be said that a lawyer's time spent in hiring a legal assistant or buying a photocopier, or researching and learning new software programs, is an incidental part of a lawyer's retainer, even if those steps are driven by the retainer.

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[3] *Ibid*, page 56, line 27 to page 57, line 10.

[54] Further, Ms. Twinn's actions disaffirmed her assertion that she understood these expenses would be covered. From inception, she billed her time and disbursements regarding the Data Room to a different file, and never actually sent the account until her retainer ended, some six years later.

[55] While the concept of an Edmonton office or "war room" seems entirely logical given the scope of this litigation, I am unable to imply a term of this retainer that Sawridge was responsible not only for Ms. Twinn's disbursements in setting up the office, but significant professional time too. Accordingly, these accounts will not be before the Review Officer.

iii. Office shutdown and DML (June 2008 – September 2008)

[56] Sometime in early 2008, after the second trial was dismissed, Ms. Twinn wrote to Mr. McKinney and requested a meeting to discuss facilitating the intervention and winding down of the Data Room. Ms. Twinn requested that her counsel, Mr. Kaliel, Q.C.be present at the meeting.

[57] Ms. Twinn suggested that the file contents (685 boxes) be put in a storage container and placed on the Sawridge First Nation. Sawridge did not approve this request.

[58] The evidence suggests that all producible documents in the litigation had been scanned through "Summation" software and stored on the Parlee McLaws server.

[59] Nonetheless, Ms. Twinn felt it was necessary to organize the 685 boxes of material in order to retrieve hard copies in the event the appeal was successful. She instructed her staff to create a "detailed DML index" or database to accomplish this objective, and billed Sawridge $86,028.07. Although there were negligible disbursements associated with this, the account was almost entirely comprised of Ms. Twinn's staff's time, billed at between $45 and $60 per hour.

[60] Ms. Twinn believed preparing the file for storage was part of her retainer, but admits she did not receive instructions from Sawridge to create this data base. She deposed she was trying to have discussions with Mr. McKinney but it was a busy time. She did not advise Sawridge of the cost, as she did not know what the cost would be.

[61] In his April 22, 2010 letter, Mr. McKinney questions both the rate and total time charged, but does not dispute liability for these office shutdown expenses or suggest that the expenses were beyond the scope of the retainer. I conclude that these expenses regarding the office shutdown are properly before the Review Officer.

2. Are the claims barred by the *Limitations Act?*

[62] I have determined that the accounts relating to the attendance at the UN Expert Conference and the Data Room start-up did not form part of Ms. Twinn's retainer. Nonetheless, if I am incorrect in this conclusion, I will consider whether any of the accounts are barred by the *Limitations Act*. In order to make this determination, it is necessary to first determine the nature of the retainer agreement between the parties.

[63] In this case, I am satisfied that the retainer between Ms. Twinn and Sawridge was a continual one, as defined by Rooke ACJ in ***Samson Cree Nation v O'Reilly & Associés***, 2013

ABQB 350 at paras 29, 67, 564 AR 169, aff'd 2014 ABCA 268, that is, where legal counsel start to act and continue to act until the final appeal, or otherwise instructed.

[64] Clearly in this retainer, Ms. Twinn issued periodic accounts, usually on a monthly basis. Under a continual retainer, counsel and the client may agree to interim or provisional accounts pending the final account, or a series of final accounts.

[65] Whether Ms. Twinn's periodic accounts were interim or final is critical, as this determination informs when the limitation period starts to run.

[66] Ms. Twinn argues that the periodic accounts issued were interim and as a result, the limitation period did not start to run until her final account was rendered at the end of the retainer (November 20, 2009).

[67] Ms. Twinn's Appointment for Review of the disputed accounts is a claim for a remedial order and subject to the two year limitation period in the *Limitations Act*: ***Samson Cree Nation v O'Reilly & Associés***, 2014 ABCA 268 at para 169, 580 AR 181. The Appointment for Review stops the two year limitation period from running.

[68] Ms. Twinn filed her Application for Review of the accounts on June 10, 2011, within two years of the date of her last account. Therefore, she argues, the *Limitations Act* does not preclude review of any of her accounts.

[69] Sawridge argues the periodic accounts issued were each final accounts, and therefore, many of the accounts were issued more than two years prior to the Application for Review filed June 10, 2011, and are now barred under the *Limitations Act.*

[70] In ***Samson Cree***, Rooke ACJ provides a helpful distinction between periodic *interim* and periodic *final* accounts (at paras 45-46):

> Periodic accounts may be interim or final. An interim account is one that is not final, but is issued pending a final account, and may be changed directly at any future time or in the end result between the time it is issued and the final account. It is thus customary that interim accounts are not the subject of taxation individually, but rather only the final account. When the final account is taxed, all the interim accounts issued leading to the final account are taxable.
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> Final accounts are ones that conclude all truly interim or provisional accounts before them (in which case, as noted, all the interim accounts are part of that taxation), or are final and taxable in themselves, with no regard to other accounts.

[71] Ms. Twinn issued in excess of 137 accounts in the course of this retainer. Were these accounts periodic interim or periodic final?

[72] In ***Samson Cree***, Rooke AJC undertook a comprehensive review of the authorities in determining whether a periodic account is interim or final. Those authorities were succinctly summarized in the later decision of Brown, J (as he then was) in ***Lewis Estates Communities Inc v Brownlee LLP***, 2013 ABQB 508 at para 42, 2013 CarswellAlta 1704 [***Lewis Estates***]:

> Taken together, these authorities have focussed on whether the lawyer and the client considered each of the accounts in question to be the lawyer's final account for the work recorded. And, in determining with regard to the dealings of the parties and the circumstances whether the parties intended that each account

> would be final, they establish that a periodic account is likely to be considered final [where] the parties understand that the lawyer's charges will be based upon hours spent and the lawyers' billable rates, and that the charges will not be adjusted, whether upwards or downwards, upon issuance of a final bill at the conclusion of the matter.

[73] It is not disputed that for the most part, Ms. Twinn issued accounts on a monthly basis and, with the exception of the disputed accounts, were paid by Sawridge.

[74] Ms. Twinn points to Roland Twinn's evidence that Sawridge reserved the right to question and reduce all legal accounts issued, including those of Ms. Twinn, as a factor suggesting the accounts were periodic interim. In my view, it is entirely appropriate (and expected) that Sawridge would develop an internal account review process. Over the course of this litigation, millions of dollars in legal fees were paid to various lawyers, including to Ms. Twinn. Good governance and an internal review of accounts are not determinative of this issue.

[75] There is nothing to suggest that Ms. Twinn's accounts overall, would either increase or decrease depending on the results of the litigation or some other contingency, or that the parties agreed to adjust the accounts up or down at the end of the retainer. Ms. Twinn's accounts included her professional services for a specific period, and were billed according to the time spent at the agreed hourly rates.

[76] Based on the conduct of the parties where each of the monthly accounts that pertained to the professional services rendered by Ms. Twinn were paid as due by Sawridge, I conclude that the periodic accounts issued by Ms. Twinn in the course of this very lengthy retainer are properly characterized as periodic final accounts, and were considered to be so by both Ms. Twinn and Sawridge: ***Lewis Estates*** at paras 44-46.

[77] As a result, Ms. Twinn had no more than two years from the date of the account, to pursue a remedial order by way of review.

[78] Ms. Twinn concedes that if I find the accounts were periodic final, then her Appointment for Review for the account dated October 31, 2005, in relation to her attendance at the UN Expert Conference, is clearly out of time.

a) The May 31, 2009 Account-Data Room Start-Up

[79] In the course of oral argument, I questioned counsel on whether a limitation issue arose from the fact that the time and expenses relating to Lancaster House/Data Room start-up were incurred between 2003 and 2004, but not billed until 2009. This had not been addressed by the parties in their Briefs, as they were focused on limitation issues arising from the date the account was issued.

[80] Counsel provided further written submissions on this issue on April 28, 2017.

[81] Section 3(1) of the *Limitations Act* provides the limitation period for actions and remedial orders. It states:

> Subject to subsections (1.1) and (1.2) and section 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose, whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[82] This section must be applied to the facts of any given case, taking into account the circumstances existing, to determine the starting date for a limitation period. A plaintiff is not required to bring a claim until two years after discovery of the three criteria listed in s 3(1)(a): ***Gayton v Lacasse***, 2010 ABCA 123 at paras 18-21, 482 AR 179.

[83] The parties agree that the limitation period to bring a claim for services rendered started when Ms. Twinn knew or ought to have known of the injury, that the injury could be attributable to Sawridge and that the injury warranted bringing an action. In the case of agreements, an injury is defined as "non-performance of an obligation": s 1, *Limitations Act*.

[84] Ms. Twinn argues that she understood, and her reasonable belief was, that she would be paid her time and the expenses incurred in setting up the Data Room. She argues the Court should not assume that she ought to have known "that the Band intended to be dishonest and deceitful with respect to its intention to pay the claim." She points out there is no evidence to contradict her reasonable belief that the Band, through continued discussions, would agree to pay these costs. Further, she argues, she could not have known Sawridge would refuse to pay until she actually rendered an account. Alternatively, Ms. Twinn argues that Sawridge's failure to pay did not warrant bringing a proceeding until her retainer was terminated, because the stakes were high in this litigation and jeopardizing the Band's position by suing over the relatively small cost of the Data Room set-up was not warranted.

[85] Sawridge argues the injury attributable to it occurred when the expense and the work was actually incurred, and Ms. Twinn should have issued invoices in the months the costs were incurred, in keeping with her usual practice.

[86] In the circumstances of this case, it is difficult to accept that Ms. Twinn, a barrister and solicitor, did not know and ought not to have known, that the *Limitations Act* applied to her claim for non-performance of Sawridge's obligation to pay.

[87] Significantly, in ***GJ White Construction Ltd v Palermo*** (1999), 2 CPC (5th) 110, 7 CLR (3d) 13 (Ont SCJ) (WL), the evidence before the Court in that case was that the invoice for work done in July and August 1989 was not sent out until December 30, 1994. In light of that circumstance, Nordheimer J commented, at para 20, that it would be improper to use the time when the invoice was *delivered* as the basis for determining when the plaintiff knew, or ought to have known, the material facts giving rise to the cause of action because to "select [the invoice

delivery] date would allow the plaintiff to effectively toll the limitation period for as long as it wished by simply withholding delivery of an invoice."

[88] Taking Ms. Twinn's evidence at its highest, she relies on a clear belief or a clear understanding she would be paid. With respect, this cannot delay the commencement of the limitation period. She leads no evidence to suggest that Sawridge waived the limitation period or voluntarily entered into some type of standstill agreement. A plaintiff cannot unilaterally impose a standstill agreement for delaying the preparation of an invoice: ***Royal Well Servicing Ltd v Murphy Oil Co***, 2016 ABQB 418 at para 14 (Alta Master) [***Royal Well***].

[89] Nor on these facts, is Ms. Twinn justified in issuing the account only after her retainer had been terminated, in light of her argued significant legal and fiduciary duties to the Band. Given the legal principle that a service provider cannot suspend the limitation period by delaying the issuance of an invoice, Ms. Twinn could have issued the account but delayed her request for payment pending discussions with Sawridge, or she could have negotiated a stand-still agreement on review. She did neither. (See ***Royal Well*** at para 14; ***Hugh Munro Construction Ltd v Moschuk***, 2012 ONCA 109 at para 1, 2012 CarswellOnt 1854).

[90] It is neither fair nor in the interests of justice to issue an account to a client five to six years after the work was done, particularly when the long standing practice was to issue monthly accounts for time and expenses incurred. It is incongruous to permit the lawyer an open-ended period in which to issue an account while imposing on the client, a regulatory limit of six months to review that account: *Alberta Rules of Court*, r 10.10; See also, the Law Society of Alberta, *Code of Conduct*, ch III, 3.6-3, Commentary 2, which stipulates, *inter alia*, that, "[s]ubject to any special agreement with the client, a final account should be rendered within a reasonable time after completion of the services."

[91] Further, the inordinate delay by Ms. Twinn in issuing the account for the Data Room start-up puts Sawridge at a distinct disadvantage in being able to recall any discussions surrounding the subject matter of the account. It also thwarts the client's ability to properly budget for and monitor its legal expenses. The modern approach to litigation delay and presumed prejudice, most recently articulated by our Court of Appeal in ***Humphreys v Trebilock***, 2017 ABCA 116, 2017 CarswellAlta 647, has, in my view, application to *all* aspects of litigation, including the rendering, enforcement of and challenge to accounts.

[92] Consequently, I conclude that the account of May 31, 2009, relating to the Data Room start-up, was issued too late and the Appointment for Review of that account was filed too late. Therefore, I find that the May 31, 2009 Data Room start-up account is barred by s 3(1)(a) of the *Limitations Act*.

b) The Accounts dated June 30, 2008-October 31, 2008 – Data Room shut-down and Creation of DML Index

[93] The five invoices in question were sent to Sawridge with Ms. Twinn's letter dated November 20, 2009. Ms. Twinn's Appointment for Review was filed June 10, 2011, more than two years from the date services were provided and more than two years from the date of the accounts. However, the limitation period may be extended by the application of s 8 of the *Limitations Act*, which extends the limitation period if, during the limitation period, there has been an acknowledgment of or part payment toward the claim.

Does Section 8 of the Limitations Act apply to any of the Disputed Accounts?

[94] Section 8 of the *Limitations Act* reads as follows:

> (2) Subject to subsections (3) and (4) and section 9, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation period begins again at the time of the acknowledgment or part payment.
>
> (3) A claim may be acknowledged only by an admission of the person liable in respect of it that the sum claimed is due and unpaid, but an acknowledgment is effective
>
> (a) whether or not a promise to pay can be implied from it, and
>
> (b) whether or not it is accompanied with a refusal to pay.
>
> (4) When a claim is for the recovery of both a primary sum and interest on it, an acknowledgment of either obligation, or a part payment in respect of either obligation, is an acknowledgment of, or a part payment in respect of, the other obligation.

[95] Ms. Twinn argues there has been both an acknowledgment and part- payment with respect to the accounts, which would serve to extend the limitation periods.

[96] Sawridge, relying on the decision of Verville J in ***Dicorp Properties Ltd v Zellers Inc,*** 2005 ABQB 399, 381 AR 19, argues that any acknowledgment or part payment must be in relation to the disputed debt or accounts.

[97] In ***Dicorp***, the defendant objected to common area expenses assessed by the claimant landlord, raising concerns about the calculation of the common area taxes, but it did not object to the common area expense attributable to a parking lot. Despite making a payment towards those common area expenses it did not question, Verville J concluded that the defendant's correspondence did not constitute an acknowledgement of the common area taxes being claimed.

[98] Graesser J, in ***John Barlot Architect Ltd v 973189 Alberta Ltd***, 2008 ABQB 458, 73 CLR (3d) 44, distinguished ***Dicorp***, concluding that the decision turned on the specific wording of the defendant's correspondence and that the case did not otherwise provide guidance as to the nature or necessary form an acknowledgment must take to extend a limitation period.

[99] Graesser J held it was not necessary for the acknowledgment to refer to the specific amount of the debt. Citing ***Re Heffren***, [1922] 2 WWR 1038, 68 DLR 766 (Man KB), he concluded that an acknowledgment is sufficient if the words either expressly or by implication amount to an unconditional acknowledgment of the debt, but the acknowledgement must be in writing. See also ***Nikel Investments Ltd v Gallaher***, 2012 ABQB 276 at paras 22-23, 538 AR 373 (*per* Manderscheid J).

[100] ***John Barlot*** involved a claim for outstanding architectural fees in relation to three different projects. Graesser J considered the application of s 8 of the *Limitations Act* in relation to the "Haven Project."

[101] Graesser J reviewed three pieces of correspondence issued by the client. The first was a letter in July 2004 saying "in follow up with our discussions of July 15, 2004, you have advised me that you will prepare the completion certificates for the Haven [Project]. Once these certificates are completed, please contact me so that I can certify the cheque for final payment..."

[102] Then, in early 2005, a settlement meeting took place between the parties. The plaintiff asked the client that the proposal be put in writing. The client made an offer in writing to pay the full amount owing under the "Haven Project" and some amount to another project.

[103] Finally, on April 20, 2005, the client wrote requesting certain schedules be prepared to obtain completion certificates for the various units and that upon completion of the requested schedules, the client would "prepare a certified cheque in the amount of $87,007.79" being the full amount owing on the "Haven Project."

[104] In dismissing the related appeal, the Court of Appeal concluded that the July 2004 letter, the February 2005 settlement offer and the April 2005 letter, either alone or in combination, provided ample support for Graesser J's conclusion that the client had acknowledged the plaintiff's claim respecting the "Haven Project," and therefore extended the limitation period, pursuant to s 8: ***John Barlot Architect Ltd v 973189 Alberta Ltd***, 2009 ABCA 307 at para 15, 460 AR 393.

[105] In reviewing the authorities provided, the following principles emerge:

- "Claim" is defined in s 8(1) as being an "accrued liquidated pecuniary sum";
- For the purposes of s 8, an acknowledgement need not refer to the specific amount of the debt;
- The acknowledgement must be in writing; oral promises to pay are not sufficient;
- The words used must expressly or by implication amount to an *unconditional* acknowledgement of the debt;
- The limitation period may be extended by either an acknowledgment or a part payment.

[106] I would add that the analysis is factually driven, and the words used must be assessed in the context of the circumstances existing.

[107] In ***Dicorp***, the defendant never acknowledged the claim relating to common area taxes, because its correspondence consistently questioned the calculations. The part payments made were found to be made towards amounts not in dispute. In that case, Verville J, at paras 68-69, commented:

> [68] Partial payment, sometimes constituting a form of acknowledgement, may extend a limitation. However, here the Defendant clearly indicated to the Plaintiffs that it would pay only with respect to the separate parking lot, which debt it did not dispute. The Defendant submitted that this was not an acknowledgement of the remainder of the debt.
>
> [69] *Brandon v. Dale*, [1930] 2 D.L.R. 272 (Sask.C.A.) stands for the principle that for a part payment to extend a limitation, it must be made on account of the debt for which the action is brought, and it must appear that the payment was made on account of a greater debt, because unless a payment amounts to an

> admission that more is due, it cannot be taken as an admission of a still existing debt. There is nothing in the [*Limitations Act*] which indicates that this principle is no longer applicable. I find that the Defendant's payment was on account of the charges with respect to which it admitted liability, not for any of the disputed debt. The payment did not extend the limitation.

[108] In ***John Barlot***, while the correspondence seemed to tie payment to requests that further services be provided, the defendant nevertheless agreed to pay the entire amount owing.

[109] In the matter before me, Ms. Twinn points to a series of communications from Sawridge as evidencing its acknowledgment of her claims. First, a letter from Roland Twinn, dated September 17, 2009, in response to Ms. Twinn's explanatory letter regarding certain contentious invoices. In this letter, Roland Twinn advised that Sawridge would like to resolve all outstanding accounting matters between Ms. Twinn and Sawridge, and requested that she issue accounts for the period July 2008 to September 2008 so that all issues and concerns could be dealt with at one time.

[110] In response, Ms. Twinn sent a series of accounts under her cover of November 20, 2009. These accounts included new accounts isolating the DML indexing charges as well as accounts for the period July 2008 to September 2008.

[111] Secondly, she relies on Mr. McKinney's letter to her, dated December 1, 2009, advising that Sawridge would be paying $10,000 per month towards the remaining outstanding balance and that he would be reviewing the invoices recently submitted, and advising of any issues or comments.

[112] Mr. McKinney's comments and concerns were later outlined in his letter of April 22, 2010.

[113] Counsel for Sawridge concedes that part payments were made on three accounts, thus extending the limitation period to allow for review: September 9, 2008 (Inv. 1034.200809), October 31, 2008 (Inv. 1034.200810) and December 31, 2008 (Inv. 1034.200812).

[114] Regarding the balance of the invoices that relate to the Data Room shut down and DML Index, Sawridge argues it did not provide an acknowledgement as contemplated by the *Limitations Act*, s 8, because at the time Sawridge issued the letter of September 17, 2009, it had not received the majority of the accounts in issue, and the balance of the correspondence clearly outlined various concerns as well as questions regarding the accounts issued.

[115] In ***Nickel Investments Ltd***, Manderscheid J referenced the Alberta Law Reform Instititute's December 1989 Report No 55, *Limitations*, discussing the policy reasons for allowing an extension of the limitation period where there is an acknowledgement of the debt by the debtor:

> There are two policy reasons for the common law doctrine of acknowledgement:
>
> > 1. If a debtor has admitted his indebtedness and his legal duty to pay the debt, he has, by his conduct, renounced his need for the protection afforded by a limitations system. If he has admitted his legal liability, the reasons for limitations protection based on stale evidence, peace and repose, and economic cost are so reduced that a renewed limitation period is justified;

> 2. The second reason is based on estoppel. If the debtor has promised to pay a debt, the creditor should be permitted to rely on this new promise without bringing an action for a renewed limitation period.

[116] These stated policy reasons are consistent with the established principle that to extend the limitation period, the acknowledgment must be unconditional.

[117] In ***Dicorp***, it was clear that the partial payment made by the defendant related only to the debt it did not dispute. In ***John Barlot***, the defendant agreed to pay the entire amount owing. Here, the correspondence of September 17, 2009, December 1, 2009 and April 22, 2010 is not clear cut.

[118] The letter of April 22, 2010 provides a detailed outline of questions and concerns regarding various accounts covering the period June 2008 to December 2008 and May 2009 through October 2009. While there is no indication that Sawridge was refusing to pay these accounts outright (as was the case with the charges for attendance at the UN expert seminar) it cannot be said this letter, in isolation or together with the earlier correspondence, viewed contextually, constitutes an unconditional acknowledgment. This is evidenced in the penultimate paragraph of that letter:

> "We note that we are still paying $10,000 per month in respect of the outstanding amounts *which we do not have concerns with...*" (Emphasis added)

[119] With the exception of the three invoices in which part payments were made, referenced earlier, the invoices dated June 30, 2008 (Inv. DML 200806), July 31, 2008 (Inv. DML 200807) and August 31, 2008 (Inv. DML 200808) are barred by the *Limitations Act* as the Appointment for Review was not filed in time and there was no acknowledgement or a part payment extending the limitation period for these invoices.

3. Estoppel

[120] In the alternative, Ms. Twinn argues Sawridge is estopped from relying on the limitation period by reason of representations by Sawridge that it would pay for the costs relating to the Data Room start-up and shut-down that she relied on to her detriment.

[121] Words or conduct, combined with detrimental reliance, may estop a party from relying on the *Limitations Act* as a bar to the claim. The common law doctrine of promissory estoppel continues to operate in conjunction with the *Limitations Act*. Whether the words or conduct constitute a representation and whether that representation was relied on to a party's detriment, are findings of fact: ***Brar v Roy***, 2005 ABCA 269 at para 32, 371 AR 290.

[122] The evidence before me does not establish that Sawridge, through its words or conduct, represented that it would pay these costs, nor does it establish that Ms. Twinn relied on these representations to her detriment. The alternative claim of estoppel is dismissed.

III. Conclusion

[123] The account relating to Ms. Twinn's attendance at the UN Expert seminar in Phoenix did not form part of her retainer with Sawridge, and in any event, is barred under the *Limitations Act*.

[124] The accounts relating to the Lancaster House/Data Room start-up did not form part of Ms. Twinn's retainer with Sawridge, and in any event, are barred by the *Limitations Act*.

[125] The accounts relating to the Data Room shut down and DML index constitute an incidental part of Ms. Twinn's retainer, with the exception of the accounts noted below however, the accounts are barred by the *Limitations Act* as the limitation period to enforce these accounts was not extended by virtue of s 8 of the *Limitations Act*.

[126] Therefore the following accounts shall be remitted to a Review Officer for review in accordance with the *Alberta Rules of Court*:

- Invoice 1034.200809 dated September 9, 2008;
- Invoice 1034.200810 dated October 31, 2008;
- Invoice 1034.200812 dated December 31, 2008;
- Invoice 1034.200905 dated June 30, 2009;
- Invoice 1034.200907 dated July 31, 2009;
- Invoice 1034.200909 dated September 9, 2009;
- Invoice 1034.200910 dated October 9, 2009.

Heard on the 24th day of March, 2017.
Dated at the City of Edmonton, Alberta, this 7th day of June, 2017.

Dawn Pentelechuk
J.C.Q.B.A.

Appearances:

Brian P. Kaliel, Q.C.
Miller Thomson LLP
for the Applicant

Patty Ko
Bishop & McKenzie LLP
for the Respondent

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Federal Court  Cour fédérale

Date: 20130828

Docket: T-2655-89

Citation: 2013 FC 910

Toronto, Ontario, August 28, 2013

PRESENT: Kevin R. Aalto, Esquire, Case Management Judge

BETWEEN:

ELIZABETH BERNADETTE POITRAS

Plaintiff

and

**WALTER PATRICK TWINN,
THE COUNCIL OF THE SAWRIDGE BAND,
THE SAWRIDGE BAND AND
HER MAJESTY THE QUEEN IN RIGHT OF
CANADA AS REPRESENTED BY
THE MINISTER OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT**

Defendants

REASONS FOR ORDER AND ORDER

[1] Many gallons of judicial ink have been spilled in this case as it has inched its way along since 1989 to the present. Issues have gone up and down the judicial appellate escalator. Now after 24 years the Court is faced with motions to amend the pleadings.

[2] In this proceeding (the Poitras Action) there are now two motions before the Court to amend the pleadings. The first motion is brought by the Plaintiff (Ms. Poitras) to amend her Amended Statement of Claim (Poitras Claim) to specifically claim damages against the Defendant, Her Majesty the Queen as represented by The Minister of Indian Affairs and Northern Development (the Crown). The second motion is brought by the Defendants, Walter Patrick Twinn, the Council of the Sawridge Band and the Sawridge Band (collectively the Sawridge Band) to amend their Amended Statement of Defence and to raise a "crossclaim" against the Crown (Sawridge Pleading). The crossclaim seeks to obtain indemnification from the Crown for any damages or costs for which the Sawridge Band may be found liable to Ms. Poitras. While this is a simple summary of the two motions, their resolution is not simple.

[3] These motions must be considered in the context of the myriad of legal proceedings which have taken place, not only in this case, but in a second action, (*Sawridge Band v. The Queen*, 2008 FC 322 [aff'd 2009 F.C.A. 123; leave to the S.C.C. refused December 10, 2009] (the Sawridge Band Action).

[4] The Sawridge Band Action also had a long and tortuous history including a retrial. The issues in the Sawridge Band Action related to challenges by the Sawridge Band to amendments to the *Indian Act*, RSC 1970, c. I-6. Those amendments granted Indian bands such as the Sawridge Band a right under the *Constitution Act*, 1982, and specifically s. 35 thereof, to determine the membership of the Sawridge Band. The Sawridge Band Action has now been finally and conclusively decided by virtue of the Supreme Court refusing leave to appeal.

[5] Part of the delay in moving the Poitras Action forward resulted from a stay issued by former Case Management Judge, Justice James Hugessen. The stay related to the constitutional issues in this action, the Poitras Action, pending the outcome of the constitutional issues in the Sawridge Band Action. The constitutional issues in this case and the Sawridge Band Action were considered to be identical. Those issues centred on the constitutionality of the amendments to the *Indian Act*.

[6] In light of the conclusions reached by the Courts in the Sawridge Band Action the constitutional issues and other matters raised are now finally concluded.

Background

[7] In order to understand better the nature of the amendments now sought by Ms. Poitras and the Sawridge Band, some context is essential.

[8] The starting point for the amendments to the pleadings begins with an order of Justice Hugessen, made July 22, 2010. In that order, Justice Hugessen bluntly ordered "the issue of Ms. Poitras' membership in the band is now moot" [the Mootness Order]. The meaning of the Mootness Order has been put in dispute by the Sawridge Band and is discussed in greater detail later in theses reasons.

[9] The Sawridge Band appealed the Mootness Order. By a judgment dated February 8, 2012, the FCA held as follows:

> The appeal is dismissed without costs, with a direction that the parties return to the current Case Management Judge to bring the pleadings into line with the issues that remain in light of this judgment and the reasons therefore.

[10] Brief reasons for decision were given by Justice David Stratas on behalf of the Court (2012 F.C.A. 47). As those reasons are brief, they are set out in their entirety:

> **REASONS FOR JUDGMENT OF THE COURT**
> **(Delivered from the Bench at Ottawa, Ontario, on February 8, 2012)**
>
> [1] This is an appeal against the Order dated July 27, 2010 made by a case management judge in the Federal Court (Justice Hugessen). The case management judge ordered that an issue central to an action (the "main action") has become moot.
>
> [2] The circumstances giving rise to the Order are as follows.
>
> [3] Some time ago, the respondent, Ms. Poitras, started the main action against the appellant Band, claiming membership in it. The Band defended, in part, on the basis that it had a right under section 35 of the *Constitution Act, 1982* to determine who was a member of the Band.
>
> [4] The main action was stayed pending the outcome of another action that the Federal Court regarded as being closely related (the "closely related action"). In the closely related action, the Band was challenging amendments to the *Indian Act*, advancing the same argument, namely that it had a right under section 35 of the *Constitution Act, 1982* to determine who was a member of the Band. That action had a long history, including a retrial. In the end result, the closely related action was dismissed: *Sawridge Band v. The Queen*, 2008 FC 322, aff'd 2009 FCA 123.
>
> [5] With the dismissal of the closely related action, what was to become of the main action and the issue of Ms. Poitras' membership in the Band? To determine this, the Federal Court issued a notice of status review concerning the main action.
>
> [6] As a result of the status review, a case management conference in the Federal Court was held. There, the issue of mootness was discussed, having been raised in the submissions filed.
>
> [7] The case management judge's Order followed. The case management judge ordered that the issue of Ms. Poitras' membership in the Band was moot.
>
> [8] In this Court, the appellants appeal that Order.

> [9] The appellate standard of review applies. The appellants must show that the Order is vitiated either by legal error or by palpable and overriding error on some issue of fact or fact-based discretion. In reviewing the exercise of discretion in this case, it must also be borne in mind that this is an Order made by a case management judge who had managed the main action and the closely related action for many years and, as a result, possessed great familiarity with the factual issues and history of the matters: *Sawridge Band v. Canada*, 2001 FCA 338 at paragraph 11, [2002] 2 F.C. 346.
>
> [10] In our view, the appellants have not shown any reversible error on the part of the case management judge that would warrant permitting the Band to relitigate the constitutional issues.
>
> [11] There can be circumstances which can prompt the Court to exercise its discretion to allow relitigation, notwithstanding the doctrines of issue estoppel and abuse of process: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.
>
> [12] But there is nothing in the record of this case showing that the appellants offered to the case management judge any such circumstances. Indeed, the record shows that the appellants deliberately decided, for reasons known to them, to close their case in the closely related action knowing they could have called more evidence and made further submissions. They knew that a dismissal would result after they closed their case. See *Sawridge Band v. Canada*, 2008 FC 322 at paragraphs 10-21 and 60.
>
> [13] For the foregoing reasons, we shall dismiss the appeal and direct the parties to return to the current case management judge to bring the pleadings into line with the issues that remain in light of this Court's decision.

[11] By way of further background, on March 17, 1999, Justice Hugessen, granted a stay in the Poitras Action [Order, March 17, 1999, Court File No. T-2655-89]. Justice Hugessen, also the Case Management Judge in the Sawridge Band Action, issued an injunction in the Sawridge Band Action on March 27, 2003 [*Sawridge Band v. Canada*, 2003 FCT 347]. The injunction in the Sawridge

Band Action affirmed Ms. Poitras' right to membership in the Sawridge Band until the matters raised in the Sawridge Band Action were decided. The injunction order of Justice Hugessen was appealed to the FCA and was upheld [2004 FCA 16].

[12] The order granting the injunction resulted in the declaration that Ms. Poitras and certain other individuals who were seeking membership in the Sawridge Band, "are hereby ordered, pending a final resolution of the Plaintiff's action [the Sawridge Band 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." Ms. Poitras was one of the individuals included in the scope of that Order (the Membership Order).

[13] In his reasons for decision relating to the Membership Order, Justice Hugessen engaged in a thorough analysis of the provisions of the *Indian Act*, R.S.C. 1985 c.I-5, commonly known as the Bill C-31 amendments. The summary of their impact is taken from a judgment of the FCA in one of the many appeals in the Sawridge Band Action as follows:

> Briefly put, this legislation, while conferring on Indian Bands, the right to control their own Band List, 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 women and a non-Indian man. Bands assuming control of their Band list would be obliged to accept all of these people as members. Such bands will also be allowed, if they chose to accept certain other categories of persons previously

> excluded from Indian status. [*Sawridge Band v. Canada* (FCA), (1997) 3 FC 580 at para. 2]

[14] In the course of his reasons for decision in the Membership Order, Justice Hugessen determined that an "interim" declaration of rights regarding membership was not legally possible. However, he was satisfied that injunctive relief could and should be granted regarding membership of certain individuals including Ms. Poitras. The Sawridge Band had contested the constitutionality of Bill C-31 (which amended the *Indian Act*) and further had argued that the women in question could not become members of the Sawridge Band because they had not applied for membership. Justice Hugessen disposed of this argument as follows:

> [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. [*Sawridge Band v. Canada*, 2003 FCT 347]

[15] The decision of Justice Hugessen was appealed by the Sawridge Band to the FCA. The appeal was dismissed [2004 FCA 16]. Justice Rothstein writing for the Court made the following observation regarding the requirement to apply for membership as follows:

> 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 have been created to membership, was in contravention of the Act.

[16] As noted, the Sawridge Band Action involved two trials. During the re-trial of the Sawridge Band Action before the Justice James Russell, it appears that the Sawridge Band made a determination during the presentation of their case not to call further evidence and consented to the dismissal of the action so that they could immediately seek an appeal of prior orders of Justice Russell The FCA dismissed the appeal on April 22, 2009 [*Sawridge Band v. R.*, 2009 FCA 123] and leave to the Supreme Court of Canada was denied on December 10, 2009 [*Sawridge Band v. R.*, 403 NR 393]. As a result, the Sawridge Band Action finally came to an end.

[17] Thereafter, on March 16, 2010, Justice Hugessen issued an Interim Notice of Status Review in this action, the Poitras Action. As a result of the Notice of Status of Review, counsel for Ms. Poitras took the position that the issue of Ms. Poitras' membership in the Sawridge Band had become moot. In reply submissions on behalf of the Sawridge Band, the Sawridge Band agreed with the submissions of Ms. Poitras which included the issue of Ms. Poitras' band membership being moot.

[18] Notwithstanding these events, the Sawridge Band maintains the position that they can pursue defences to Ms. Poitras' claim for membership in the Sawridge Band.

[19] The FCA upheld the decision of Justice Hugessen on the point of mootness and thus the parties now seek to bring their pleadings in line with the decision of the FCA and seek to add certain amendments which are the specific subject of the motions before the Court.

What are the Implications of the Mootness Order and the Appeal

[20] During the course of argument of these motions, counsel for the Sawridge Band took the position that Ms. Poitras' membership in the Sawridge Band was still a live issue in this litigation. This position was taken notwithstanding the Mootness Order made by Justice Hugessen that the issue of Ms. Poitras' membership is moot and the Court of Appeal's dismissal of the Sawridge Band's appeal from that order. In essence, the Sawridge Band argues that only the constitutional issues became moot and not other issues which relate to the membership of Ms. Poitras. In particular, the Sawridge Band alleges in its proposed Sawridge Pleading as follows:

> 6. With respect to the allegations in paragraph 6 of the statement of claim, these defendants state that the plaintiff was never a member of the Sawridge Band and put the plaintiff to the strict proof thereof. In the alternative, these Defendants stated that if the Plaintiff and/or the Plaintiff's predecessors or forbearers were ever members of the Sawridge Band, they agreed to waive release, extinguish and thereafter voluntarily, did waive, release, and extinguish, for sufficient valuable consideration, their membership in the Band. In doing so, they voluntarily ended any connection they may have had with the Band and severed all interests, if any, that they and/or their decedants might otherwise have enjoyed in the Band or the Band's Indian title to its lands. In the further alternative, if the Plaintiff's predecessors or full bearers were ever members of the Sawridge Band, it was without the consent of the said Band and without the required transfer of lands and money. Accordingly, the Plaintiff has no right, title, or claim to the Sawridge reserve.
>
> 6a) These defendants state that the plaintiff is estopped, as would be the Plaintiff's forbearers, from asserting claims for membership.

[21] Because these paragraphs do not relate to constitutional issues which were finally determined in the Sawridge Band Action, it is argued that it was not open to Justice Hugessen to finally determine once and for all that all issues relating to Ms. Poitras' membership in the Sawridge Band were moot. At best, the Sawridge Band argues the Mootness Order only deals with the question of Ms. Poitras' membership insofar as it falls within any of the constitutional issues relating to Bill C-31.

[22] Further, the Sawridge Band argues that if membership in the band had been finally determined by the Mootness Order, then the FCA would simply have directed a reference to determine what damages, if any, Ms. Poitras would be entitled. As the FCA did not do so, but directed that the pleadings be amended to conform with the issues that remained, the FCA did not intend to remove the question of Ms. Poitras' membership as a live issue in the proceeding.

[23] The argument by the Sawridge Band that the FCA would have sent this directly to a reference to determine damages if there were no issues relating to membership outstanding misses the point. The flaw in this argument is that there are still liability issues to be determined. In the Claim of Ms. Poitras, it does not automatically follow that Ms. Poitras is entitled to any damages. The Court must determine, based on the evidence led at trial, whether there is liability for damages, payable by whom and in what amount.

[24] The Sawridge Band has defences which it can raise against any liability for payment of damages. For example, it alleges that there were misunderstandings regarding the interpretation to be given to s. 10(4) and s. 10(5) of the *Indian Act* which could result in no liability for damages.

[25] In the both the granting of and the appeal from the Mootness Order, the Sawridge Band were fully aware of these issues as now pleaded in paragraphs 6 and 6(a). They did not seek to carve those out in any way in the proceeding in front of Justice Hugessen or in front of the FCA.

Meaning of "Moot"

[26] Dukelow, *The Dictionary of Canadian Law* (Third Ed.) at p. 804 defines "moot" and "mootness" as follows:

> **MOOT.** *Adj.* A case is moot when something occurs after proceedings are commenced which eliminates the issues between the parties.
>
> **MOOTNESS.** *n.* 1. "[A]n aspect of general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or the proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot." *Borowski v. Canada (Attorney General)* (1989), 38 C.R.R. 232 at 239, [1989] 3 W.W.R. 97, 33 C.P.C. (2d) 105, 47 C.C.C. (3d) 1, 57 D.L.R. (4th) 231, 92 N.R. 110, [1989] 1 S.C.R. 342, 75 Sask. R. 82, the court per Sopinka, J. 2. The criteria for courts to consider in exercising discretion to hear a moot case (at pp. 358-63) are: (1) the presence of an adversarial context; (2) the concern for judicial economy; and (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework. Sopinka, J. in *Borowski v. Canada*, cited above.

[27] Thus, insofar as the membership of Ms. Poitras in the Sawridge Band is concerned, that issue is at an end. There are no extant issues regarding her membership. It has been finally determined. If the Sawridge Band wanted to carve out some requirement of membership they had ample opportunity to do so both before Justice Hugessen, and the FCA. They did not. They consented to the mootness determination made by Justice Hugessen and then appealed the Mootness Order with no reservations as to any matter outstanding relating to membership. One is required to

twist the decision of the FCA out of all possible meaning and logic to conclude that the issue of Ms. Poitras' membership was still an open issue in this proceeding.

[28] The doctrine of *stare decisis* also supports this approach. In a recent decision, *Apotex Inc. v. Pfizer Canada Inc.*, 2013 FC 493, Justice O'Reilly reviewed the meaning and application of this doctrine as follows:

> [11] The full Latin phrase from which the term *stare decisis* derives is *stare decisis et non quieta movere*, which means "to stand by decisions and not to disturb settled matters" (*Holmes v Jarrett*, [1993] OJ No 679 (Ont Ct J (Gen Div) [*Holmes*], at para 12). This doctrine serves important purposes in the administration of justice. It "promotes consistency, certainty and predictability in the law, sound judicial administration, and enhances the legitimacy and acceptability of the common law" (*R v Bedford*, 2012 ONCA 186, at para 56; see also *R v Neves*, 2005 MBCA 112, at para 90).
>
> [12] Judges readily accept that this doctrine obliges them to follow decisions of higher courts. But the actual concept is broader than that – if a matter is settled, then it should not be disturbed. A matter may be settled if another judge, even of the same Court, has decided it. Generally, only if the material facts are different will the earlier decision not be considered binding on judges of the same Court (*Holmes*, above, at para 12).

[29] In this case, Justice Hugessen determined the issue of Ms. Poitras' membership to be moot, a decision upheld by the FCA and therefore the Court must stand by the decision and not disturb a settled matter. Not to put too fine a tautological point on it – moot is moot is moot is moot.

[30] Since the issue of Ms. Poitras' membership in the Sawridge Band is now moot, the pleadings must, in the words of the FCA, be brought "into line with the issues that remain in light of this Court's decision".

Amendments to the Poitras Claim

[31] Little if any prejudice is occasioned to the Crown by permitting an amendment even at this late date by Ms. Poitras regarding damages. The burden is on Ms. Poitras to demonstrate damages and the quantum of those damages. The damages claim that Ms. Poitras alleges is very much the same against the Crown as it is against the Sawridge Band. A general damages claim has been in the claim against the Sawridge Band since the commencement of the action.

[32] The Crown argues that to allow an amendment at this late date will be prejudicial as discoveries are almost complete. However, amendments should be permitted where any prejudice can be compensated for in costs. There is much jurisprudence to support this proposition: see, for example, *Meyer v. Canada*, 1985 CarswellNat 117 (FCAD); and, *Canderel Ltd. v. R.* [1994] 1 F.C. 3 (FCA). In *Canderel*, a judge of the Tax Court had refused a fourth amendment to the Crown's Reply. The request for the amendment came on the sixth day of trial and sought to raise an issue for the first time. On appeal, Justice Décary, made the following observations regarding amendments:

> 10. With respect to amendments, it may be stated, as a result of the decisions of this Court in *Northwest Airporter Bus Service Ltd. v. The Queen and Minister of Transport*; (1978), 23 N.R. 49 (F.C.A.). *The Queen v. Special Risks Holdings Inc.*; [1984] CTC 563 (F.C.A.); affg [1984] CTC 71 (F.C.T.D.). *Meyer v. Canada*; (1985), 62 N.R. 70 (F.C.A.). *Glisic v. Canada*, [1988] 1 F.C. 731 (C.A.). and *Francoeur v. Canada reflex*, [1992] 2 F.C. 333 (C.A.). and of the decision of the House of Lords in *Ketteman v. Hansel Properties Ltd* [1988] 1 All ER 38 (H.L.). which was referred to in *Francoeur*, that while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice. Rule 54 of the *Tax Court of Canada Rules (General Procedure)*,

> [SOR/90-688] which applies in this instance, is not substantially different from Rule 420 of the *Federal Court Rules* [C.R.C., c. 663].

[33] The FCA dismissed the appeal on the grounds that the trial judge had made no error of law in the exercise of discretion to deny the amendment six days into the trial after witnesses, including experts had been called and the issue was new. To permit the amendment at that late date in the proceeding amounted to an abuse of process.

[34] In *Meyer*, an earlier decision of the Federal Court - Appeal Division, an amendment was allowed by the Trial Division during the course of the trial. The Federal Court-Appeal Division noted:

> 6. It is argued that the learned trial judge erred in exercising his discretion to allow the amendment. We accept the statement by Lord Esher, M.R., of the criteria properly to guide such an exercise of discretion. In *Steward v. North Metropolitan Tramways Co.* (1886), 16 Q.B.D. 556 at 558, he said:
>
> > The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made.

[35] The trial judge in *Meyer* allowed the amendment as it clarified the matter in dispute and was not prejudicial. The decision was upheld on appeal.

[36] The Crown also argues that the amendment is legally hopeless as it is barred by the *Limitations Act*, RSA 2000, c L-12, s. 3(1). The Crown relies upon *Royal Canadian Legion*

Norwood (Alberta) Branch 178 v. Edmonton (City), 149 AR 15 for the proposition that actions must be brought within six years of discovery of the cause of action.

[37] While this is correct, Ms. Poitras' counsel argues that the delay was subject to a final determination of the constitutional issues which lasted until December 10, 2009 when the Supreme Court of Canada refused leave in the Sawridge Band Action. Thus, any limitations act commences in December, 2009. Ms. Poitras' counsel also argues that it was only during examinations for discovery that it became apparent that damages from 1985 to 2003 are appropriate against the Crown because of the knowledge of the Sawridge Band and the knowledge of the Crown.

[38] Therefore, the amendment based on these arguments is within the discoverability principle as enunciated in the *Royal Canadian Legion* case. While the claim for damages could have been asserted earlier there is a legitimate position regarding discoverability and therefore the claim is not necessarily without hope because of any limitations argument. This conclusion is, of course, without prejudice to the right of the Crown to raise any limitations defences it chooses.

[39] The Crown also relies on *Potskin v. Canada (Minister of Indian Affairs and Northern Development)*, 2011 FC 457 for the proposition that the claim is hopeless in any event as the Crown owes no duty to Ms. Poitras. This case is argued to stand for the proposition that the Crown owes no fiduciary duty to individual band members and their registration as Indians or in respect of the benefits of band members. While that action was dismissed, it was decided on the basis of its "particular facts" (para. 4). The case involved illegitimate children within the meaning of s. 11(1)(e) of the *Indian Act* who alleged a fiduciary duty against the Crown to protect their economic

interests and ensure that a payment was made to a trustee on their behalf when their mother was transferred out of the band by virtue of the operation of s. 10 of the *Indian Act*. The *Potskin* decision may ultimately be determinative in this case as to any fiduciary obligation owed by the Crown, but such can only occur on a full factual trial record.

[40] In this case, a claim for damages has been an issue since the outset although not specifically against the Crown. Discoveries are not yet complete. While the Crown argues that Ms. Poitras' motion is not timely and will not lead to an expeditious trial, in my view, given the length of these proceedings and the fact that damages has always been an issue, there is no real prejudice to the Crown.

[41] The Crown points out that various documents including an August 12th document at tab 3(f), the September 22 order of Justice Hugessen and documents at tabs 3 (h) and (i) all indicate no damages were being sought against the Crown it was only costs. However, based on a consideration of all of the arguments of the parties, leave to amend will be granted to Ms. Poitras.

[42] The Crown seeks costs for the last three years in the event the amendment sought is granted. While costs would normally be awarded to the Crown, in this case as was explained during the hearing, there are arrangements in place with the Crown regarding payment of fees. An award of costs in the Crown's favour does not accomplish anything as it will simply go from one pocket to another within the Crown. Thus, the amendment is allowed but no costs are awarded to the Crown.

[43] Ms. Poitras' amendment to claim damages against the Crown is therefore allowed.

Striking the Affidavit of Roland Twinn

[44] The Crown moved to strike the affidavit of Roland Twinn (Twinn Affidavit) filed in support of the Sawridge Band's motion for its amendment. It was argued that the Twinn Affidavit was improper as it did not comply with Rule 81 of the *Federal Courts Rules*. Rule 81 requires that affidavits be "confined to facts within the deponent's person al knowledge" or "statements as to the deponent's belief' where the grounds for the belief are stated. The Crown argued that the Twinn Affidavit contained nothing more than a summary of legal argument, hearsay, prior legal positions taken, interpretations of court rulings, opinions and conclusions of law without including any material facts or the sources of belief. It was argued that the Twinn Affidavit was scandalous and vexatious and should be struck.

[45] Having reviewed the in detail the Twinn Affidavit, there is no doubt that it contains opinions, conclusions and legal argument. However, during the course of the hearing I determined that it was not necessary to deal with the issue of the Twinn Affidavit in detail. While I have read it and considered it, I give it little weight in coming to the decisions herein.

"Crossclaim" by the Sawridge Band against the Crown

[46] There is no reason in law to let the Sawridge Band resurrect a "crossclaim" against the Crown. This so for two reasons. First, there is no such thing in the *Federal Courts Rules* as a "crossclaim". Crossclaims are creatures of provincial civil procedure and are claims asserted in a case by one defendant against a co-defendant [see, for example, Rule 28, Ontario Rules of Civil Procedure].

[47] Second, and more importantly, the Sawridge Band had previously asserted a proper third party claim against the Crown. The Sawridge Band voluntarily discontinued that third party claim against the Crown. It did so at a time when there was a claim for damages by Ms. Poitras against the Sawridge Band. The third party claim included a claim for indemnification for liability for damages from the Crown. Litigation requires finality. Parties should not be allowed to take one position one day in which they voluntarily give up a claim and then the next day resile from that position and try and assert the same claim in a non-sanctioned pleading. It is akin to withdrawing an admission in a pleading. Thus, the "crossclaim" cannot be allowed. Termination of the third party proceeding voluntarily by the Band is final and binding.

[48] It is argued by counsel for the Sawridge Band that the current proposed crossclaim and the discontinued third party claim are very different. It is argued that the discontinued third party claim was based on constitutional issues while this crossclaim is based on the allegation that the Sawridge Band and the Crown interpreted the *Indian Act* the same way which resulted in membership being denied to Ms. Poitras. Counsel argues that if the Sawridge Band is responsible for damages then the Crown is equally as liable as the Sawridge Band for misinterpreting the applicability of s. 10(4) and 10(5) of the *Indian Act*.

[49] The denial of the amendment of the Sawridge Band Pleading does not, however, preclude the Sawridge Band from arguing that any liability be off-loaded onto the Crown as it can allege defences as to why it should not be liable and why it is the Crown that should be liable or why liability might be apportioned if liability for any damages is found.

[50] The argument by the Sawridge Band that this is a new cause of action on a new set of facts and was not subsumed within the prior discontinued third party claim is without merit. None of the facts currently alleged are new and have been known since at least the outset of this proceeding some 24 years ago when the dispute arose over the interpretation and meaning of s. 10(4) and s. 10(5) of the *Indian Act*.

[51] While other arguments were raised during the course of the hearing, they do not impact the final decision on the motions. What is necessary is to bring the pleadings into line with the FCA's decision on the appeal of the Mootness Order.

Pleadings

[52] The amendment sought by Ms. Poitras is granted. However, there is much in the proposed Amended Amended Statement of Claim that is now unnecessary in light of the FCA's decision: for example, paragraphs 7, 9, 9A, 13A, 14, 15, 15A, 15E (as against the Sawridge Band) sub-paragraphs b) through h) and 15E (as against the Crown) sub-paragraphs a) through d).

[53] All of these paragraphs were in a prior iteration of Ms. Poitras' claim and all relate to the claim for membership in the Sawridge Band. In light of the FCA's decision, the membership issue is moot and these paragraphs are no longer necessary. However, in order to provide context it will be necessary to include one or more brief paragraphs outlining the resolution of the issue of membership.

[54] With respect to the Sawridge Band Pleading, the Crown opposes paragraphs 6, 6(a), 9-12, 17, 25-30, 32, 34, 45 and 46b-f. As held above, the crossclaim is disallowed. Therefore, paragraphs 34, 45 and 46 b. through f. are struck without leave to amend. Paragraphs 35 – 44 and 46a. had been previously crossed out by the Sawridge Band.

[55] Paragraphs 6 and 6(a) of the Sawridge Band Pleading, recited above, are also struck without leave to amend. These paragraphs deal directly with the membership of Ms. Poitras in the Sawridge Band and amount to a denial of membership on various grounds. Paragraph 7 is also struck as it responds to paragraph 7 in the Poitras Claim which is struck. Paragraph 17 is also struck as it relates to membership.

[56] Paragraphs 9 through 12 also deal with membership and are struck but with leave to amend. They are a mish mash of legal argument, conclusions and evidence. Paragraph 9 reads, in part: "In the further alternative, the Sawridge Band states that the plaintiff did not become a member of the Band for the claimed period for two reasons". The two reasons as further elaborated in paragraph 9 and paragraphs 10 through 12 essentially contain legal argument justifying the positions taken by the Sawridge Band regarding the membership of Ms. Poitras. They address alleged misinterpretations of sub-sections 10(4) and 10(5) of the *Indian Act*; the Sawridge Band's Membership Code; that Ms. Poitras did not "satisfactorily" complete a membership application; and, an allegation that the Sawridge Band is not liable for damages but if there is liability it is that of the Crown. This mish mash pleading contains the nuggets of matters that the Sawridge Band may rely upon at trial: for example, that by virtue of the misinterpretation they are not liable to Ms. Poitras; and that if there is any liability it is that of the Crown (paragraph 11). To this limited extent

the Sawridge Band is granted leave to amend these provisions as it will bring it into line with the FCA decision.

[57] With respect to paragraphs 25 -30, all of these paragraphs relate to an allegation that the Crown failed to provide information and resources required by the Sawridge Band to consider Ms. Poitras' application for membership or reinstatement to membership in the Sawridge Band. Again, as membership is not a live issue, these paragraphs must be struck.

[58] All matters alleging that Ms. Poitras is not a member of the Sawridge Band or that she failed to complete a membership application are struck without leave to amend. As was noted by Justice Rothstein in *Sawridge Band v. R.* 2004 FCA 16 at para. 35:

> 35 For these persons entitled to membership a simple request to be included in the Band's membership is all that is required. The fact that the individuals in question [of which Ms. Poitras was one] 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.

[59] In the result, the Poitras Claim and the Sawridge Band Pleading shall be amended in accordance with these reasons.

[60] With respect to costs, there shall be no costs as between the Crown and Ms. Poitras for the reasons discussed above. As between the Sawridge Band and the Crown, costs were not specifically addressed at the hearing. The Crown was substantially successful in opposing the amendments, particularly the "crossclaim". Thus, in the ordinary course costs should be in favour

of the Crown at a fixed amount. The Sawridge Band and the Crown are encouraged to agree upon costs, failing which written submissions on costs may be made by the Crown within 20 days of this order and by the Sawridge Band within 10 days thereafter.

ORDER

THIS COURT ORDERS that:

1. The Plaintiff is granted leave to amend her Statement of Claim in accordance with these reasons and for greater particularity paragraphs 7, 9, 9A, 13A, 14, 15, 15A, 15E (as against the Sawridge Band) sub-paragraphs b) through h) and 15 E (as against the Crown) sub-paragraphs a) through d) are struck.

2. The Defendants, Walter Patrick Twinn, the Council of the Sawridge Band and the Sawridge Band are granted leave to amend their Statement of Defence in accordance with these reasons and for greater particularity:

   a. Paragraphs 6, 6(a), 7, 17, 25 – 30, 34, 45 and 46 b. through f. are struck without leave to amend; and,

   b. Paragraphs 9 – 12 are struck but with leave to amend.

3. The pleadings shall be amended in accordance with this order within 30 days of the date of this Order.

4. The parties shall provide mutual available dates to the Court in order to convene a case conference to review and discuss the next steps in this proceeding.

"Kevin R. Aalto"
Case Management Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2655-89
STYLE OF CAUSE:	ELIZABETH BERNADETTE POITRAS v. WALTER PATRICK TWINN, THE COUNCIL OF THE SAWRIDGE BAND, THE SAWRIDGE BAND AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	May 14, 2013
REASONS FOR ORDER:	AALTO P.
DATED:	August 23, 2013

APPEARANCES:

Mr. Terence P. Glancy	FOR THE PLAINTIFF
Mr. Philip Healy	FOR THE DEFENDANTS (Walter Patrick Twinn et al.)
Mr. Kevin Kimmis	FOR THE DEFENDANT (HMQ)

SOLICITORS OF RECORD:

Terence P. Glancy Professional Corporation Barrister and Solicitor	FOR THE PLAINTIFF
Aird & Berlis Barristers and Solicitors	FOR THE DEFENDANTS (Walter Patrick Twinn et al.)
William F. Pentney Deputy Attorney General of Canada	FOR THE DEFENDANT (HMQ)

14

Estates and trusts

112 (1) A proceeding may be brought by or against the trustees, executors or administrators of an estate or trust without joining the beneficiaries of the estate or trust.

Order binding on beneficiaries

(2) Unless the Court orders otherwise, beneficiaries of an estate or trust are bound by an order against the estate or trust.

Where deceased has no representative

113 (1) Where a party to a proceeding is deceased and the estate of the deceased is not represented, the Court may appoint a person to represent the estate of the deceased or order that the proceeding continue without representation of the estate.

Notice

(2) Before making an order under subsection (1), the Court may require that notice be given to all persons who have an interest in the estate of the deceased.

Representative proceedings

114 (1) Despite rule 302, a proceeding, other than a proceeding referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that

(a) the issues asserted by or against the representative and the represented persons

(i) are common issues of law and fact and there are no issues affecting only some of those persons, or

(ii) relate to a collective interest shared by those persons;

(b) the representative is authorized to act on behalf of the represented persons;

(c) the representative can fairly and adequately represent the interests of the represented persons; and

(d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.

Powers of the Court

(2) At any time, the Court may

Successions et fiducies

112 (1) Une instance peut être introduite par ou contre les fiduciaires, les liquidateurs, les exécuteurs testamentaires ou les administrateurs d'une succession ou d'une fiducie sans qu'il soit nécessaire de faire intervenir les bénéficiaires de la succession ou de la fiducie.

Bénéficiaires liés par le jugement

(2) L'ordonnance rendue contre la succession ou la fiducie lie les bénéficiaires, à moins que la Cour n'en ordonne autrement.

Absence de représentant

113 (1) Dans le cas où une partie à une instance est décédée et où la succession de celle-ci n'a pas de représentant, la Cour peut nommer une personne à titre de représentant de la succession ou ordonner la poursuite de l'instance sans qu'un représentant soit nommé.

Avis préalable

(2) Avant de rendre une ordonnance en vertu du paragraphe (1), la Cour peut exiger qu'un avis soit donné aux personnes qui ont un intérêt dans la succession de la personne décédée.

Instances par représentation

114 (1) Malgré la règle 302, une instance — autre qu'une instance visée aux articles 27 ou 28 de la Loi — peut être introduite par ou contre une personne agissant à titre de représentant d'une ou plusieurs autres personnes, si les conditions suivantes sont réunies :

a) les points de droit et de fait soulevés, selon le cas :

(i) sont communs au représentant et aux personnes représentées, sans viser de façon particulière seulement certaines de celles-ci,

(ii) visent l'intérêt collectif de ces personnes;

b) le représentant est autorisé à agir au nom des personnes représentées;

c) il peut représenter leurs intérêts de façon équitable et adéquate;

d) l'instance par représentation constitue la façon juste de procéder, la plus efficace et la moins onéreuse.

Pouvoirs de la Cour

(2) La Cour peut, à tout moment :

(a) determine whether the conditions set out in subsection (1) are being satisfied;

(b) require that notice be given, in a form and manner directed by it, to the represented persons;

(c) impose any conditions on the settlement process of a representative proceeding that the Court considers appropriate; and

(d) provide for the replacement of the representative if that person is unable to represent the interests of the represented persons fairly and adequately.

Orders in representative proceeding

(3) An order in a representative proceeding is binding on the represented persons unless otherwise ordered by the Court.

Approval of discontinuance or settlement

(4) The discontinuance or settlement of a representative proceeding is not effective unless it is approved by the Court.

Style of cause

(5) Every document in a proceeding commenced under subsection (1) shall be prefaced by the heading "Representative Proceeding".

SOR/2007-301, s. 4.

Appointment of representatives

115 (1) The Court may appoint one or more persons to represent

(a) unborn or unascertained persons who may have a present, future, contingent or other interest in a proceeding; or

(b) a person under a legal disability against or by whom a proceeding is brought.

Who may be appointed

(2) The Court may appoint as a representative under subsection (1)

(a) a person who has already been appointed as such a representative under the laws of a province; or

(b) a person eligible to act as a representative in the jurisdiction in which the person to be represented is domiciled.

a) vérifier si les conditions énoncées au paragraphe (1) sont réunies;

b) exiger qu'un avis soit communiqué aux personnes représentées selon les modalités qu'elle prescrit;

c) imposer, pour le processus de règlement de l'instance par représentation, toute modalité qu'elle estime indiquée;

d) pourvoir au remplacement du représentant si celui-ci ne peut représenter les intérêts des personnes visées de façon équitable et adéquate.

Effet d'une ordonnance

(3) Sauf ordonnance contraire de la Cour, l'ordonnance rendue dans le cadre d'une instance par représentation lie toutes les personnes représentées.

Désistement et règlement

(4) Le désistement ou le règlement de l'instance par représentation ne prend effet que s'il est approuvé par la Cour.

Intitulé

(5) Dans une instance par représentation, la mention « Instance par représentation » est placée en tête des actes de procédure.

DORS/2007-301, art. 4.

Nomination de représentants

115 (1) La Cour peut désigner une ou plusieurs personnes pour représenter :

a) une personne pas encore née ou non identifiée qui peut avoir un intérêt actuel, futur, éventuel ou autre dans une instance;

b) une personne n'ayant pas la capacité d'ester en justice contre laquelle une instance est introduite ou qui en prend l'initiative.

Choix du représentant

(2) Aux fins de la désignation visée au paragraphe (1), la Cour peut :

a) nommer la personne qui a déjà été nommée dans une province à titre de représentant légal;

b) nommer une personne apte à agir à titre de représentant dans le territoire où est domiciliée la personne qui doit être représentée.