

Clerk's Stamp



COURT FILE NO.: 1103 14112
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE: EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, as am.

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

APPLICANTS: ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA
L'HIRONDELLE AND CLARA MIDBO, AS TRUSTEES FOR THE 1985
SAWRIDGE TRUST

RESPONDENT: MAURICE STONEY

INTERVENER: SAWRIDGE FIRST NATION

DOCUMENT: **WRITTEN RESPONSE ARGUMENT OF MAURICE STONEY ON VEXATIOUS
LITIGANT ORDER**

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TABLE OF CONTENTS

- I. Question Set by the Court
- II. Facts
- III. Restricted Access to Alberta Courts
- IV. Scope of Restriction
- V. Order Sought

Authorities

1. Consent Order of Associate Chief Justice Rooke July 19, 2017.
2. *Huzar v. Canada*, 2000 CanLII 15589 (FCA).
3. *Powder v. H.M.T.Q.* August 16, 2016.
4. *Stoney v. Sawridge First Nation; Huzar and Kolosky v. Sawridge Frist Nation*, 2013 FC 509.
5. *Benner v. Canada*, [1997] 1 SCR 358 (headnote only).
6. *Re Manitoba Language Rights*, [1985] 1 SCR 721 (headnote only).
7. *Mclvor v. Canada*, 2009 BCCA 153.
8. *Descheneaux v. Canada (A.G.)*, 2015 QCCS 3555 [this is currently before the Quebec Court of Appeal as a result of Canada failing to comply with the 18 months' time period to resolve the issues of membership and status under the *Indian Act*, set to be heard on August 9, 2017].
9. *The Government of Canada's Response to the Descheneaux Decision*.
10. *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99.
11. *Sawridge Band v. H.M.T.Q.* 2009 FCA 123.
12. And see *Twinn v. Sawridge Band*, 2017 ABQB 366.
13. *Poitras v. Twinn*, 2013 FC 910.
14. *Federal Court Rules*, Rule 114.

I. QUESTION SET BY THE COURT

1. Case Management Decision (Sawridge #6) orders in paragraph 63 that Maurice Stoney make written submissions prior to the close of the Law Courts on August 4, 2017 on the following two matters:

1. his access to Alberta courts should be restricted, and
2. if so, what the scope of that restriction should be.

2. This Order further stipulates:

I declare that Maurice Stoney is prohibited from filing any material on any Alberta court file, or to institute or further any court proceedings, without the permission of the Chief Justice, Associate Chief Justice, or Chief Judge of the court in which the proceedings is conducted, or his or her designate. ...

3. An exception to the Interim Court Filing Restriction Order was granted by Associate Chief Justice Rooke on July 19, 2017 filed on July 20, 2017 which permits completion of the direction of Master Schulz in Alberta QB Action 1603 03761 *Gabriel Nussbaum v. Maurice Felix Stoney and Eliza Marie Stoney*. The Associate Chief Justice did not require any notice to any other person nor any conditions or security for costs.

Consent Order of Associate Chief Justice Rooke July 19, 2017. [Tab 1]

4. This Consent Order was agreed to by Counsel for the Trustees and by Counsel for the Sawridge First Nation who both signed the Consent Order.

II. FACTS

5. The 1985 Sawridge Trustees have adopted the arguments of the Sawridge First Nation. Paragraph 2 of the submissions of the 1985 Sawridge Trustees states:

The trustees have reviewed the brief filed by the Sawridge First Nation and confirm that they agree with the contents. In the interests of saving costs to the 1985 Sawridge Trustee and in the interest of avoiding duplicative arguments, the Trustees wish to adopt the arguments of the Sawridge First Nation as filed in this action.

(A) Misstated Facts of Sawridge First Nation

6. The Federal Court of Appeal struck the Statement of Claim issued in Federal Court in 1995 on the ground that there was “no reasonable cause of action” and that the matter was properly a judicial review under section 18(3) of the *Federal Court Act*. On such a proceeding where the argument is that there is no reasonable cause of action, no evidence is admissible: *Canada (A.G.) v. Inuit Tapirisit of Canada*, [1980] SCJ No. 99 quoted at paragraph 24 in *Powder v. H.M.T.Q.* [Tab 3]. Accordingly, the striking of the Statement of Claim does not rely on any Affidavit evidence of Sawridge First Nation nor make any finding on it. It is improper to rely upon that evidence in this matter.

Huzar v. Canada, 2000 CanLII 15589 (FCA). [Tab 2]

Powder v. H.M.T.Q. August 16, 2016. [Tab 3]

7. The judicial review in 2013 did not include a “thorough analysis” of Maurice Stoney’s arguments regarding his entitlement to membership since it was determined that no constitutional arguments could be made, see paragraph 22 as a result of not completing the Constitutional Question Notice required by section 57 of the *Federal Courts Act*, which provides in subsection 1 that it applies whenever “the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the ...Federal Court” must be served on each Attorney General in Canada.

Stoney v. Sawridge First Nation; Huzar and Kolosky v. Sawridge Frist Nation, 2013 FC 509, para. 22. [Tab 4]

8. Paragraphs 10 to 14 are in reference to the claims by Aline Huzar and June Kolosky to Sawridge First Nation membership as stated by Mr. Justice Barnes at paragraphs 10 to 14 and concluded by his statement “the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership”. Only paragraph 15 refers to Maurice Stoney.

Stoney, supra, paras. 10-14, 15. [Tab 4]

9. As noted at paragraph 4, Mr. Justice Barnes did state that the Sawridge First Nation membership rules only applied from the point when the Minister of Indian and Northern Affairs gave notice under section 10(7) of the *Indian Act*, which occurred in September, 1985. This is contrary to the assertions throughout the facts stated by Sawridge First Nation. The date of issue in this matter of the beneficiaries of the 1985 Sawridge Trust is the date of the Trust which is dated April 15, 1985.

Stoney, supra., para. 4. [Tab 4]

(B) Other Facts

10. Following the cross-examination of Maurice Stoney on September 23, 2016, counsel for the Trustees did not make any applications to require further examination nor request any further cross-examination.
11. At no time did the Sawridge First Nation apply for clarification of whether or not they were a party entitled to attend cross-examination prior to the examination although they were well aware of the timing of the examination and the refusal of their participation much earlier in September, 2016 and had time to apply for such an Order.
12. Maurice Stoney has not attempted to re-litigate the membership issue but rather to set out the legal arguments to address the direct issue of the definition of a beneficiary under the 1985 Sawridge Trust made on April 15, 1985 at a time when the Sawridge First Nation was not legally able to limit its membership as noted by Mr. Justice Barnes in his decision at paragraph 4. The Supreme Court of Canada has held that citizenship is always an issue to be reviewed on constitutional rights see: *Benner v. Canada*, [1997] 1 SCR 358 (headnote only). Limitation periods, long periods where legislation have been treated as being constitutional, and prior decisions, even of the Supreme Court of Canada do not limit the ability to bring forward a question before the Courts: *Re Manitoba Language Rights*, [1985] 1 SCR 721. In this context, there have been a number of recent decisions on these constitutional issues that have and are in the

process of completely altering the law related to these issues of the membership/citizenship of Indians, in order to have them comply with the *Constitution*.

Benner v. Canada, [1997] 1 SCR 358 (headnote only). [Tab 5]

Re Manitoba Language Rights, [1985] 1 SCR 721 (headnote only). [Tab 6]

Mclvor v. Canada, 2009 BCCA 153. [Tab 7]

Descheneaux v. Canada (A.G.), 2015 QCCS 3555 [this is currently before the Quebec Court of Appeal as a result of Canada failing to comply with the 18 months' time period to resolve the issues of membership and status under the *Indian Act*, set to be heard on August 9, 2017]. [Tab 8]

The Government of Canada's Response to the Descheneaux Decision. [Tab 9]

Daniels v. Canada (Indian Affairs and Northern Development), [2016] 1 SCR 99. [Tab 10]

13. The Federal Court of Appeal determined on April 21, 2009, that the Sawridge Band's action seeking an order declaring that certain amendments to the *Indian Act* regarding membership, were unconstitutional. Sawridge Band had brought action against all of the amendments which "compelled the appellants [Sawridge Band], against their wishes, to add certain individuals to the list of band members. The appellants had argued that the legislation is an invalid attempt to deprive them of their right to determine the membership of their own bands." The first trial had commenced in 1993 and the history of the trial and re-trial is set out at paragraph 4. It is to be noted that the length of time this matter was before the Federal Court is indicative of the unsettled nature of the issues raised. The issue of membership/citizenship remains an unsettled matter as shown by the decisions of various courts including the Supreme Court of Canada, cited in paragraph 12 above.

Sawridge Band v. H.M.T.Q. 2009 FCA 123. [Tab 11]

And see *Twinn v. Sawridge Band*, 2017 ABQB 366. [Tab 12]; *Poitras v. Twinn*, 2013 FC 910. [Tab 13]

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

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

III. RESTRICTED ACCESS TO ALBERTA COURTS

(A) The Judicature Act, section 23(2)

15. Section 23(2) requires that the following matters be considered as a list of vexatious litigation:
 - (2) For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:
 - (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
 - (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
 - (c) persistently bringing proceedings for improper purposes;
 - (d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;
 - (e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
 - (f) persistently taking unsuccessful appeals from judicial decisions;
 - (g) persistently engaging in inappropriate courtroom behavior.
16. As shown by the litigation in the Sawridge Band cases above, the on-going case in *Descheneaux* and decision of the Supreme Court of Canada in *Daniels*, and by the review of the Federal Court of Appeal decision in *Huzar* and the judicial review in *Stoney*, it is submitted that this is not a proceeding where the issue has already been determined by a court of competent jurisdiction. Nor is this a matter where proceedings have been brought that cannot succeed or have no reasonable expectation of providing relief.
17. It is submitted that litigation seeking to determine whether or not you qualify as a beneficiary under a trust established on April 15, 1985 in a matter where the issue of membership/citizenship has not been settled by the courts, and this

application was not brought for an improper purpose. Nor have the matters raised in (d), (f) and (g) occurred.

18. Costs to the Sawridge First Nation have not been paid however the intention is to pay them as soon as it is possible for Maurice Stoney. Costs to the 1985 Sawridge Trust have been paid.

B. Inherent Jurisdiction

19. The elements of vexatious litigation are set out in *Chutskoff v. Bonora*, at paragraph 92 quoted at pages 13-16 of the Written Submissions of the Sawridge First Nation.

20. It is submitted that this application by Maurice Stoney was not a collateral attack. The issue before the Court here is the definition of beneficiary in the 1985 Sawridge Trust when beneficiary is to be determined as of April 15, 1985. As Mr. Justice Barnes stated at paragraph 4 of the judicial review of the Sawridge First Nation membership application, that the Sawridge First Nation membership application does not apply to anything before the date that the Minister agreed to the Sawridge First Nation membership by-law in September, 1985, leaving a period from April 17, 1985 until September, 1985 which is not covered by the Sawridge First Nation membership process. The issue that was argued in the written submission during the fall of 2016, was the status of Maurice Stoney under the Sawridge Band on or about April, 1985 which was not *res judicata* from the previous matters in Federal Court. The issue of the status in the period from April 15, 1985 to September, 1985 was a completely new issue. Mr. Justice Barnes determined that the decision of the Appeal Committee of the Sawridge First Nation was reasonable on the question of membership in the Sawridge First Nation, based on the application made by Maurice Stoney to the Sawridge First Nation.

Stoney, supra. [Tab 4]

21. It is acknowledged that the costs owed from the Federal Court proceeding are owed by Maurice Stoney and because the judicial review was heard with the judicial review by Aline Huzar and June Kolosky, owed by all three of them and have not been paid along with the costs of the application before the Court of Appeal in Feb. 2016, although the costs of the 1985 Sawridge Trustees have been paid by Maurice Stoney in November, 2016. Maurice Stoney is 77 years of age and Aline Huzar and June Kolosky are all senior citizens of limited means.
22. There has been no 'escalating' of proceedings in this matter. The law related to status of Indians in Canada has changed over the years and Canada is still involved in proceedings to determine and satisfy these membership and status issues currently outstanding as a result of the *Descheneaux v. Canada (A.G.)* decision [Tabs 8 and 9] and the decision in the *Daniels* case [Tab 10]. These matters all include the issue of who, in law, is a member of a band and that will affect the issue of the Sawridge Band during the time period from April 17, 1985 until September, 1985.
23. No disrespect for the court process or intention to bring proceedings for an improper purpose, was intended to be raised by these arguments respecting this time period and the definition of beneficiary in this trust.
24. Contrary to the argument of Sawridge First Nation these matters have not been determined in the past Federal Court proceedings. Issues of citizenship and the constitutionality of these provisions remains a legal question today as shown by the on-going litigation throughout Canada. Plainly this Court has determined that these arguments are dismissed in this matter and that is acknowledged.
25. Throughout all of these proceedings and proceedings in the Federal Court, Maurice Stoney has honoured his Court obligations. The failure to pay the costs of Sawridge First Nation is the intervening result of foreclosure proceedings against Maurice Stoney and his wife in Q.B. Action No. 1603 03761 (originally started in Peace River in 2011 and transferred to Edmonton in 2016) in which the Associate Chief Justice Rooke has issued a Consent Order on July 19, 2017

directing that this Action is an exception to the Interim Order granted on July 12, 2017. This Order of the Associate Chief Justice has been consented to by the 1985 Sawridge Trustees and by the Sawridge First Nation [see Tab 1].

26. Affidavit evidence has been filed and provided to the Court on July 28, 2017, by Bill Stoney, brother to Maurice, by Gail Stoney, sister to Maurice and by Shelley Stoney, daughter of Bill Stoney, respecting the approval of the other brothers and sisters, to show that they commenced this application and directed that Maurice Stoney proceed on their behalf. The *Federal Court Rules*, provide for Representative proceedings where the representative asserts common issues of law and fact, the representative is authorized to act on behalf of the represented persons, the representative can fairly and adequately represent the interests of the represented persons and the use of a representative proceeding is the just, most efficient and least costly manner of proceeding. This method of proceeding is frequently used for aboriginals and particularly for families who are aboriginal. It is submitted that this was the most efficient and least costly manner of proceeding in the circumstances where the claim of all of the living children possess the same precise issues respecting their citizenship.

Federal Court Rules, Rule 114. [Tab 14]

27. No collateral attack was intended nor was this brought as a “busy body” proceeding in presenting the arguments of Maurice Stoney and his brothers and sisters respecting the fact that they were born as members (citizens) of the Sawridge Band, they were removed by the provisions of the *Indian Act* during the 1940's and effective April 17, 1985 their removal from the *Indian Act*, was repealed.
28. It is also submitted that this application was not a hopeless proceeding without any reasonable expectation to provide relief. This is an area of the law that is changing rapidly as shown by *Mclvor* [Tab 7], *Descheneaux* [Tab 8], *The Government of Canada's Response to the Descheneaux Decision* [Tab 9] and *Daniels* [Tab 10]. No conclusion was made in the 1995 Federal Court

proceedings which were struck as showing no reasonable cause of action and the judicial review was concerned with the issue of the Sawridge First Nation Appeal Committee decision based on membership rules post September, 1985.

IV. SCOPE OF THE RESTRICTION

29. In *Hok v. Alberta*, para. 36 [Tab 2 of the Sawridge First Nation Authorities], three questions are set out to be answered on the question of how to structure the court order restricting access to the court for the litigant. These questions are:
1. Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?
 2. What litigation subject or subjects are likely involved in that abuse of court processes?
 3. In what forums will that abuse occur?
30. The Sawridge First Nation submits at paragraph 57 of their Written Submissions, that the claims of Maurice Stoney to membership in the Sawridge First Nation show the indicia of vexatious litigation. In paragraph 80, their submission is that Maurice Stoney's access to the Alberta Courts should be restricted for any litigation against:
- (a) Sawridge First Nation
 - (b) any past, present, or future members of the Chief and Council of the Sawridge First Nation;
 - (c) the 1985 Sawridge Trust;
 - (d) the 1986 Sawridge Trust; and
 - (e) the Trustees of the 1985 and 1986 Sawridge Trusts.
31. It is submitted that the Interim Court Filing Restriction Order should not be made permanent on the grounds that the necessary conditions for such an Order are not met as set out in argument above.
32. In the alternative, it is submitted that such an Order should only restrict actions by Maurice Stoney against the Sawridge First Nation and the 1985 Sawridge Trust.

33. In paragraph 82 of the Sawridge First Nation Written Argument it appears that the Sawridge First Nation is also asking that all access to the Courts be restricted for Maurice Stoney although they have submitted in the previous paragraph that the restriction should only be with respect to the bodies set out in paragraph 30 above. It is submitted that there is no basis for restriction of Mr. Stoney's rights to access the Alberta Courts for matters unrelated to the Sawridge First Nation and the 1985 Sawridge Trust.

V. ORDER SOUGHT

34. It is respectfully submitted that Maurice Stoney should not be declared to be a vexatious litigant and that the Interim Order should not be made permanent.

35. In the alternative, it is submitted that, if Maurice Stoney is declared to be a vexatious litigant, it should be narrowed to restrict actions against the Sawridge First Nation and the 1985 Sawridge Trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd day of August, 2017.

DLA PIPER (CANADA) LLP.

Per: 

Priscilla Kennedy
Associate Counsel
Counsel for Maurice Stoney

LIST OF AUTHORITIES

1. Consent Order of Associate Chief Justice Rooke July 19, 2017.
2. *Huzar v. Canada*, 2000 CanLII 15589 (FCA).
3. *Powder v. H.M.T.Q.* August 16, 2016.
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12. And see *Twinn v. Sawridge Band*, 2017 ABQB 366.
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14. *Federal Court Rules*, Rule 114.