



## **Court of Queen's Bench of Alberta**

**Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 436**

**Date:**  
**Docket: 1103 14112**  
**Registry: Edmonton**

**In the Matter of the Trustee Act, RSA 2000, c T-8, as amended**

**And in the matter of the Sawridge Band, Inter Vivos Settlement, created by  
Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known  
as Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust" or "Trust")**

**Between:**

**Maurice Felix Stoney and His Brothers and Sisters**

**Applicants**

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

**Respondents (Original Applicants)**

**- and -**

**Public Trustee of Alberta ("OPTG")**

**Respondent**

**- and -**

**The Sawridge Band  
(the "Band" or "SFN")**

**Intervenor**

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**Case Management Decision (Sawridge #6)  
of the  
Honourable Mr. Justice D.R.G. Thomas**

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### I. Introduction

[1] This is a case management decision on an application filed on August 12, 2016 (the “Stoney Application”) by Maurice Felix Stoney “and his brothers and sisters” (Billy Stoney, Angeline Stoney, Linda Stoney, Bernie Stoney, Betty Jean Stoney, Gail Stoney, Alma Stoney, and Bryan Stoney) to be added “as beneficiaries to these Trusts”. In his written brief of September 28, 2016, Maurice Stoney asks that his legal costs and those of his siblings be paid for by the 1985 Sawridge Trust.

[2] The Stoney Application is opposed by the Trustees and the Sawridge Band, which applied for and has been granted intervenor status on this Application. The Public Trustee of Alberta (“OPTG”) did not participate in the Application.

[3] The Stoney Application is denied. Maurice Stoney is a third party attempting to insert himself (and his siblings) into a matter in which he has no legal interest. Further, this Application is a collateral attack which attempts to subvert an unappealed and crystallized judgment of a Canadian court which has already addressed and rejected the Applicant’s claims and arguments. This is serious litigation misconduct, which will have costs implications for Maurice Stoney and also potentially for his lawyer Priscilla Kennedy.

## II. Background

[4] This Action was commenced by Originating Notice, filed on June 12, 2011, by the 1985 Sawridge Trustees and is sometimes referred to as the “Advice and Direction Application”.

[5] The history of the Advice and Direction Application is set out in previous decisions (including the Orders taken out in relation thereto) reported as *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365, 543 AR 90 (“*Sawridge #1*”), aff’d 2013 ABCA 226, 543 AR 90 (“*Sawridge #2*”), *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 (“*Sawridge #3*”), time extension for appeal denied 2016 ABCA 51, 616 AR 176, *1985 Sawridge v Alberta (Public Trustee)*, 2017 ABQB 299 (“*Sawridge #4*”). A separate motion by three third parties to participate in this litigation was rejected on July 5, 2017, and that decision is reported as *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377 (“*Sawridge #5*”), (collectively the “*Sawridge Decisions*”).

[6] Some of the terms used in this decision (“*Sawridge #6*”) are also defined in the various Sawridge Decisions.

[7] I directed that this Application be dealt with in writing and the materials filed include the following:

<b>August 12, 2016</b>	Application by Maurice Felix Stoney and His Brothers and Sisters
<b>September 28, 2016</b>	Written Argument of Maurice Stoney, supported by an Affidavit of Maurice Stoney sworn on May 17, 2016.
<b>September 28, 2016</b>	Written Submission of the Sawridge Band, supported by an Affidavit of Roland Twinn, dated September 21, 2016, for the Sawridge Band to be granted Intervenor status in the Advice and Direction Application in relation to the August 12, 2016 Application, and that the Application be struck out per <i>Rule</i> 3.68.
<b>September 30, 2016</b>	Application by the Sawridge Trustees that Maurice Stoney pay security for costs.
<b>October 27, 2016</b>	Written Response Argument to the Application of Sawridge First Nation filed by Maurice Stoney.
<b>October 31, 2016</b>	The OPTG sent the Court and participants a letter indicating it has “no objection” to the Stoney Application.
<b>October 31, 2016</b>	Trustees’ Written Submissions in relation to the Maurice Stoney Application and the proposed Sawridge Band intervention.
<b>October 31, 2016</b>	Sawridge Band Written Submissions responding to the Maurice Stoney Application.
<b>November 14, 2016</b>	Reply argument to Maurice Stoney’s Written Response Argument filed by the Sawridge Band.

November 15, 2016

Further Written Response Argument of Maurice Stoney.

### III. Preliminary Issue #1 - Who is/are the Applicant or Applicants?

[8] As is apparent from the style of cause in this Application, the manner in which the Applicants have been framed is unusual. They are named as “Maurice Felix Stoney and His Brothers and Sisters”. The Application further states that the Applicants are “Maurice Stoney and his 10 living brothers and sisters” (para 1). Para 2 of the Application states the issue to be determined is:

Addition of Maurice Stoney, Billy Stoney, Angeline Stoney, Linda Stoney, Bernie Stoney, Betty Jean Stoney, Gail Stoney Alma Stoney, Alva Stoney and Bryan Stoney as beneficiaries of these Trusts.

[9] There is no evidence before me or on the court file that indicates any of these named individuals other than Maurice Stoney has taken steps to involve themselves in this litigation. The “10 living brothers or sisters” are simply named. Maurice Stoney’s filings do not include any documents such as affidavits prepared by these individuals, nor has there been an *Alberta Rules of Court*, Alta Reg 124/2010 [the “Rules”, or individually a “Rule”] application or appointment of a litigation representative, per *Rules* 2.11-2.21. In fact, aside from Maurice Stoney, the Applicant(s) materials provide no biographical information or records such as birth certificates for any of these additional proposed litigants, other than the year of their birth.

[10] Counsel for Maurice Stoney, Priscilla Kennedy, has not provided or filed any data to show she has been retained by the “10 living brothers or sisters”.

[11] Participating in a legal proceeding can have significant adverse effects, such as exposure to awards of costs, findings of contempt, and declarations of vexatious litigant status. Being a litigant creates obligations as well, particularly in light of the positive obligations on litigation actors set by *Rule* 1.2.

[12] In the absence of evidence to the contrary and from this point on, I limit the scope of Maurice Stoney’s litigation to him alone and do not involve his “10 living brothers and sisters” in this application and its consequences. I will return to this topic because it has other implications for Maurice Stoney and his lawyer Priscilla Kennedy.

### IV. Preliminary Issue #2 - The Proposed Sawridge Band Intervention and Motion to Strike Out the Stoney Application

[13] To this point, the role of the Sawridge Band in this litigation has been what might be described as “an interested third party”. The Sawridge Band has taken the position it is not a party to this litigation: *Sawridge #3* at paras 15, 27. The Sawridge Band does not control the 1985 Sawridge Trust, but since the beneficiaries of that Trust are defined directly or indirectly by membership in the SFN, there have been occasions where the Sawridge Band has been involved in respect to that underlying issue, particularly when it comes to the provision of relevant information on procedures and other evidence: see *Sawridge #1* at paras 43-49; *Sawridge #3*.

[14] The Sawridge Band argued that its intervention application under *Rule 2.10* should be granted because the Stoney Application simply continues a lengthy dispute between Maurice Stoney and the Sawridge Band over whether Maurice Stoney is a member of the Sawridge Band.

[15] The Trustees support the application of the Sawridge Band, noting that the proposed intervention makes available useful evidence, particularly in providing context concerning Maurice Stoney's activities over the years.

[16] The Applicant, Stoney responds that intervenor status is a discretionary remedy that is only exercised sparingly. Maurice Stoney submits the broad overlap between the Sawridge Band and the Trustees means that the Band brings no useful or unique perspectives to the litigation. Maurice Stoney alleges the Sawridge Band operates in a biased and discriminatory manner. If any party should be involved it should be Canada, not the Sawridge Band. Maurice Stoney demands that the intervention application be dismissed and costs ordered against the Band.

[17] Two criteria are relevant when a court evaluates an application to intervene in litigation: whether the proposed intervenor is affected by the subject matter of the proceeding, and whether the proposed intervenors have expertise or perspective on that subject: *Papaschase Indian Band v Canada (Attorney General)*, 2005 ABCA 320, 380 AR 301; *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2014 ABCA 340, 584 AR 255.

[18] The Sawridge Band intervention is appropriate since that response was made in reply to a collateral attack on its decision-making on the core subject of membership. The common law approach is clear; here the Sawridge Band is particularly prejudiced by the potential implications of the Stoney Application. Indeed, it is hard to imagine a more fundamental impact than where the Court considers litigation that potentially finds in law that an individual who is currently an outsider is, instead, a part of an established community group which holds title and property, and exercises rights, in a *sui generis* and communal basis: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289.

[19] I grant the Sawridge Band application to intervene and participate in the Advice and Direction Application, but limited to the Stoney Application only.

## **V. Positions of the Parties on the Application to be Added**

### **A. Maurice Stoney**

[20] The Applicant's argument can be reduced to the following simple proposition. Maurice Stoney wants to be named as a party to the litigation or as an intervenor because he claims to be a member of the Sawridge Band. The Sawridge 1985 Trust is a trust that was set up to hold property on behalf of members of the Sawridge Band. He is therefore a beneficiary of the Trust, and should be entitled to participate in this litigation.

[21] The complicating factor is that Maurice Stoney is not a member of the Sawridge Band. He argues that his parents, William and Margaret Stoney, were members of the Sawridge Band, and provides documentation to that effect. In 1944 William Stoney and his family were "enfranchised", per *Indian Act*, RSC 1927, c 98, s 114. This is a step where an Indian may accept a payment and in the process lose their Indian status. The "enfranchisement" option was subsequently removed by Federal legislation, specifically an enactment commonly known as "Bill C-31".

[22] Maurice Stoney argues that the enfranchisement process is unconstitutional, and that, combined with the result of a lengthy dispute over the membership of the Sawridge Band, means he (and his siblings) are members of the Sawridge Band. In his Written Response argument this claim is framed as follows:

Retroactive to April 17, 1985, Bill C-31 (R.S.C. 1985, c. 32 (1st Supp.) amended the provisions of the Indian Act, R.S.C. 1985, I-5 by removing the enfranchisement provisions returning all enfranchised Indians back on the pay lists of the Bands where they should have been throughout all of the years.

[23] In 2012, Maurice Stoney applied to become a member of the Sawridge Band, but that application was denied. Maurice Stoney then conducted an unsuccessful judicial review of that decision: *Stoney v Sawridge First Nation*, 2013 FC 509, 432 FTR 253. Maurice Stoney says all this is irrelevant to his status as a member of the Sawridge Band; the definition of beneficiaries is contrary to public policy, and unconstitutional. The Court should order that Maurice Stoney and his siblings are beneficiaries of the 1985 Sawridge Trust and add them as parties to this Action. The Trust should pay for all litigation costs.

[24] The Written Response claims the Sawridge Band is in breach of orders of the Federal Court, that Maurice Stoney and others “have faced a tortuous long process with no success”. Maurice Stoney and his siblings’ participation does not cause prejudice to the Trustees, and claims that Maurice Stoney has not paid costs are false. I note the Written Response was not accompanied by any evidence to establish that alleged fact.

[25] The October 27, 2016 Written Response Argument stresses the Sawridge Band is not a party to this litigation, it has voluntarily elected to follow that path, and a third party should not be permitted to interfere with Maurice Stoney’s litigation. In any case, the Sawridge Band is wrong - Maurice Stoney is already a member of the Sawridge Band. He deserves enhanced costs in response to the *Rule 3.68* Application by the Band.

#### **B. Sawridge Band**

[26] The Sawridge Band points to the decision in *Stoney v Sawridge First Nation* and says the Maurice Stoney Application is an attempt to revisit an issue that was decided and which is now subject to *res judicata* and issue estoppel. Maurice Stoney is wrong when he argues that he automatically became a Sawridge Band member when Bill C-31 was enacted. His Affidavit contains factual errors. Maurice Stoney’s claim to be a Sawridge Band member was rejected in court judgments that Maurice Stoney did not appeal.

[27] Instead, Maurice Stoney had a right to apply to become a Sawridge Band member. He did so, and that application was denied, as was the subsequent appeal. The Federal Court reviewed and confirmed that result in the *Stoney v Sawridge First Nation* decision. The issue of Maurice Stoney’s potential membership in the Sawridge Band is therefore closed.

[28] The Sawridge Band has entered evidence that Maurice Stoney has not paid the costs that were awarded against him in the *Stoney v Sawridge First Nation* action, and that Maurice Stoney has unpaid costs awards in relation to the unsuccessful appeal in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2016 ABCA 51, 616 AR 176.

[29] On January 31, 2014, Maurice Stoney filed a Canadian Human Rights Commission complaint concerning the Sawridge Band’s decision to refuse him membership. The Commission

refused the complaint, and concluded the issue had already been decided by *Stoney v Sawridge First Nation*.

[30] The Sawridge Band says this Court should do the same and strike out the Stoney Application per *Rule 3.68*.

[31] As for the “10 brothers and sisters”, the Sawridge Band indicates it has received and refused an application from one individual who may be in that group.

[32] The Sawridge Band seeks solicitor and own client costs, or elevated costs, in light of Maurice Stoney’s litigation history in relation to his alleged membership in the Sawridge Band.

### **C. 1985 Sawridge Trustees**

[33] The Trustees echo the Sawridge Band’s arguments, assert the Application is “unnecessary, vexatious, frivolous, *res judicata*, and an abuse of process”, and that the Stoney Application should be denied. The Trustees seek solicitor and own client costs or enhanced costs as a deterrent against further litigation abuse by Maurice Stoney.

## **VI. Analysis**

[34] The law concerning *Rule 3.68* is well established and is not in dispute. This is a civil litigation procedure that is used to weed out hopeless proceedings:

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

- (a) that all or any part of a claim or defence be struck out;
  - (b) that a commencement document or pleading be amended or set aside;
  - (c) that judgment or an order be entered;
  - (d) that an action, an application or a proceeding be stayed.
- (2) The conditions for the order are one or more of the following:
- ...
  - (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
  - (c) a commencement document or pleading is frivolous, irrelevant or improper;
  - (d) a commencement document or pleading constitutes an abuse of process;
  - ...
- (3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).
- (4) The Court may
- (a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;

...

[35] An action or defence may be struck under *Rule* 3.68 where it is plain and obvious, or beyond reasonable doubt, that the action cannot succeed: *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, 74 DLR (4th) 321. Pleadings should be considered in a broad and liberal manner: *Tottrup v Lund*, 2000 ABCA 121 at para 8, 186 DLR (4th) 226.

[36] A pleading is frivolous if its substance indicates bad faith or is factually hopeless: *Donaldson v Farrell*, 2011 ABQB 11 at para 20. A frivolous plea is one so palpably bad that the Court needs no real argument to be convinced of that fact: *Haljan v Serdahely Estate*, 2008 ABQB 472 at para 21, 453 AR 337.

[37] A proceeding that is an abuse of process may be struck on that basis: *Reece v Edmonton (City)*, 2011 ABCA 238 at para 14, 335 DLR (4th) 600. "Vexatious" litigation may be struck under either *Rule* 3.682(c) or (d): *Wong v Leung*, 2011 ABQB 688 at para 33, 530 AR 82; *Mcmeekin v Alberta (Attorney General)*, 2012 ABQB 144 at para 11, 537 AR 136.

[38] The documentary record introduced by Maurice Stoney makes it very clear that in 1944 William J. Stoney, his wife Margaret, and their two children Alvin Joseph Stoney and Maurice Felix Stoney, underwent the enfranchisement process and ceased to be Indians and members of the Sawridge Band per the *Indian Act*.

[39] As noted above, the Advice and Direction Application was initiated on June 11, 2011.

[40] On December 7, 2011, the Sawridge Band rejected Maurice Stoney's application for membership. An appeal of that decision was denied.

[41] Maurice Stoney then pursued a judicial review of the Sawridge Band membership application review process, in the Federal Court of Canada, which resulted in a reported May 15, 2013 decision, *Stoney v Sawridge First Nation*. At that proceeding, Maurice Stoney and two cousins argued that they were automatically made members of the Sawridge Band as a consequence of Bill C-31. At paras 10-14, Justice Barnes investigates that question and concluded that this argument is wrong, citing *Sawridge v Canada*, 2004 FCA 16, 316 NR 332.

[42] At para 15, Justice Barnes specifically addresses Maurice Stoney:

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

I note the original text of this paragraph uses the name "William Stoney" instead of "Maurice Stoney". This is an obvious typographical error, since it was William Stoney who in 1944 sought and obtained enfranchisement. Maurice Stoney is William Stoney's son.

[43] Justice Barnes continues to observe at para 16 that this very same claim had been advanced in *Huzar v Canada*, [2000] FCJ 873, 258 NR 246 (FCA), but that Maurice Stoney as a respondent in that hearing at para 4 had acknowledged this argument had no basis in law:

It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band. [Emphasis added.]



[44] Justice Barnes at para 17 continues on to observe that:

It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel ...

[45] As for the actual judicial review, Justice Barnes concludes the record does not establish procedural unfairness due to bias: paras 19-21. A *Charter*, s 15 application was also rejected as unsupported by evidence, having no record to support the relief claims, and because the Crown was not served notice of a challenge to the constitutional validity of the *Indian Act*: para 22.

[46] Maurice Stoney did not appeal the *Stoney v Sawridge First Nation* decision.

[47] The Sawridge Band and the Trustees argue that Maurice Stoney's current application is an attempt to attack an unappealed judgment of a Canadian court. They are correct. Maurice Stoney is making the same argument he has before - and which has been rejected - that he now is one of the beneficiaries of the 1985 Sawridge Trust because he is automatically a full member of the Sawridge Band, due to the operation of Bill C-31.

[48] In summary, there are four separate grounds for rejecting Maurice Stoney's application:

1. He is estopped from making this argument via his concession in *Huzar v Canada* that this argument has no legal basis.
2. He made this same argument in *Stoney v Sawridge First Nation*, where it was rejected. Since Mr. Stoney did not choose to challenge that decision on appeal, that finding of fact and law has 'crystallized'.
3. In *Sawridge #3* at para 35 I concluded the question of Band membership should be reviewed in the Federal Court, and not in the Advice and Direction Application.
3. In any case I accept and adopt the reasoning of *Stoney v Sawridge First Nation* as correct, though I am not obliged to do so.

[49] Maurice Stoney has conducted a "collateral attack", an attempt to use 'downstream' litigation to attack an 'upstream' court result. This offends the principle of *res judicata*, as explained by Abella J in *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 28, [2011] 3 SCR 422:

The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route ... [Emphasis added.]

[50] McIntyre J in *Wilson v The Queen*, [1983] 2 SCR 594 at 599, 4 DLR (4th) 577 explains how it is the intended effect that defines a collateral attack:

It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be

described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. [Emphasis added.]

See also: *R v Litchfield*, [1993] 4 SCR 333, 86 CCC (3d) 97; *Quebec (Attorney General) v Laroche*, 2002 SCC 72, 219 DLR (4th) 723; *R v Sarson*, [1996] 2 SCR 223, 135 DLR (4th) 402.

[51] While I am not bound by the Federal Court judgments under the doctrine of *stare decisis*, I am constrained by *res judicata* and the prohibition against collateral attacks on valid court and tribunal decisions. Maurice Stoney's application to be a member of the Sawridge Band was rejected, and his court challenges to that result are over. He did not pursue all available appeals. He cannot now attempt to slip into the Sawridge Band and 1985 Sawridge Trust beneficiaries pool 'through the backdoor'.

[52] I dismiss the Stoney Application to be named either as a party to this litigation, or to participate as an intervenor. Maurice Stoney has no interest in the subject of this litigation, and is nothing more than a third-party interloper. In light of this conclusion, it is unnecessary to address the Sawridge Band's application that Maurice Stoney pay security for costs.

## VII. Vexatious Litigant Status

[53] Maurice Stoney's conduct in relation to the Advice and Direction Application has been inappropriate. He arguably had a basis to be an interested party in 2011, because when the Trustees initiated the distribution process he had a live application to join the Sawridge Band. Therefore, at that time he had the potential to become a beneficiary. However, by 2013, that avenue for standing was closed when Justice Barnes issued the *Stoney v Sawridge First Nation* decision and Maurice Stoney did not appeal.

[54] Maurice Stoney nevertheless persisted, appearing before the Alberta Court of Appeal in *1985 Sawridge Trust (Trustee for) v Alberta (Public Trustee)*, 2016 ABCA 51, 616 AR 176, where Justice Watson concluded Mr. Stoney should not receive an extension of time to challenge *Sawridge #3* because he had no chance of success as he did not have standing and was "... in fact, a stranger to the proceedings insofar as an appeal from the decision of Mr. Justice Thomas to the Court of Appeal is concerned.": paras 20-21. Now Maurice Stoney has attempted to add himself (and his siblings) to this action as parties or intervenors, in a manner that defies *res judicata* and in an attempt to subvert the decision-making of the Sawridge Band and the Federal Court of Canada.

[55] *Chutskoff v Bonora*, 2014 ABQB 389 at para 92, 590 AR 288, aff'd 2014 ABCA 444 is the leading Alberta authority on the elements and activities that define abusive litigation. That decision identifies eleven categories of litigation misconduct which can trigger court intervention in litigation activities. Several of these indications of abusive litigation have already emerged in Maurice Stoney's legal actions:

1. Collateral attacks that attempt to determine an issue that has already been determined by a court of competent jurisdiction, to circumvent the effect of a court or tribunal decision, using previously raised grounds and issues;
2. Bringing hopeless proceedings that cannot succeed, here in both the present application and the *Sawridge #3* appeal where Maurice Stoney was declared to be an uninvolved third party; and

3. Initiating “busybody” lawsuits to enforce the rights of third parties, here the recruited participation of Maurice Stoney’s “10 living brothers and sisters.”

[56] The Sawridge Band says Maurice Stoney does not pay his court-ordered costs. Maurice Stoney denies that. Failure to pay outstanding cost awards is another potential basis to conclude a person litigates in an abusive manner. However, I defer any finding on this point until a later stage.

[57] Any of the abusive litigation activities identified in *Chutskoff v Bonora* are a basis to declare a person a vexatious litigant and restrict access to Alberta courts. Maurice Stoney has exhibited three independent bases to take that step. The Alberta Court of Queen’s Bench has adopted a two-step vexatious litigant application process to meet procedural justice requirements set in *Lymer v Jonsson*, 2016 ABCA 32, 612 AR 122, see *Hok v Alberta*, 2016 ABQB 651 at paras 10-11, leave denied 2017 ABCA 63; *Ewanchuk v Canada (Attorney General)*, 2017 ABQB 137 at para 97.

[58] I therefore exercise this Court’s inherent jurisdiction to control litigation abuse (*Hok v Alberta*, 2016 ABQB 651 at paras 14-25, *Thompson v International Union of Operating Engineers Local No. 955*, 2017 ABQB 210 at para 56, affirmed 2017 ABCA 193; *Ewanchuk v Canada (Attorney General)* at paras 92-96; *McCargar v Canada*, 2017 ABQB 416 at para 110) and to examine whether Maurice Stoney’s future litigation activities should be restricted.

[59] To date this two-step process has sometimes involved a hearing on the second step, for example *Kavanagh v Kavanagh*, 2016 ABQB 107; *Ewanchuk v Canada (Attorney General)*; *McCargar v Canada*. However, other vexatious litigant analyses have been conducted via written submissions and affidavit evidence: *Hok v Alberta*, 2016 ABQB 651. Veldhuis J in *Hok v Alberta*, 2017 ABCA 63 at para 8 specifically reproduces the trial court’s instruction that the process was conducted via written submissions and subsequently concludes the vexatious litigant analysis and its result shows no error or legal issues that raise a serious issue of general importance with a reasonable chance of success: para 10.

[60] In this case, I follow the approach of Verville J. in *Hok v Alberta* and proceed using a document-only process. In *R v Cody*, 2017 SCC 31, the Court at para 39 identified that one of the ways courts may improve their efficiencies is to operate on a documentary record rather than to hold in-person court hearings. That advice was generated in the context of criminal proceedings, which are accorded a special degree of procedural fairness due to the fact the accused’s liberty is at stake.

[61] The Ontario courts use a document-based ‘show cause’ procedure authorized by *Rules of Civil Procedure*, RRO 1990, Reg 194, s 2.1 to strike out litigation and applications that are obviously hopeless, vexatious, and abusive. This mechanism has been confirmed as a valid procedure for both trial level (*Scaduto v Law Society of Upper Canada*, 2015 ONCA 733, 343 OAC 87, leave to the SCC denied 36753 (21 April 2016)) and appellate proceedings (*Simpson v Institute of Chartered Accountants of Ontario*, 2016 ONCA 806).

[62] I conclude the procedural fairness requirements indicated in *Lymer v Jonsson* are adequately met by a document-only approach, particularly given that the implications for a litigant of a criminal proceeding application, or for the striking out of a civil action or application, are far greater than the potential consequences of what is commonly called a vexatious litigant order. As Justice Verville observed in *Hok v Alberta*, 2016 ABQB 651 at paras

30-34, the implications of a restriction of this kind should not be exaggerated, it instead "... is not a great hurdle."

[63] I therefore order that Maurice Stoney is to make written submissions **by close of business on August 4, 2017**, if he chooses to do so, on whether:

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

[64] The Sawridge Band and the Trustees may make submissions on Maurice Stoney's potential vexatious litigant status, and introduce additional evidence that is relevant to this question, see *Chutskoff v Bonora* at paras 87-90 and *Ewanchuk v Canada (Attorney General)* at paras 100-102. Any submissions by the Sawridge Band and the Trustees are due **by close of business on July 28, 2017**.

[65] In addition, I follow the process mandated in *Hok v Alberta*, 2016 ABQB 335 at para 105, and order that Maurice Stoney's court filing activities are immediately restricted. 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 proceeding is conducted, or his or her designate. This order does not apply to:

1. written submissions or affidavit evidence in relation to the Maurice Stoney's potential vexatious litigant status; and
2. any appeal from this decision.

[66] This order will be prepared by the Court and filed at the same time as this Case Management decision.

### VIII. Costs

[67] I have indicated Maurice Stoney's application had no merit, and was instead abusive in a manner that exhibits the hallmark characteristics of vexatious litigation. The Sawridge Band and Trustees seek solicitor and own client indemnity costs against Maurice Stoney. Those are amply warranted. In *Sawridge #5*, I awarded solicitor and own client indemnity costs against two of the applicants since their litigation conduct met the criteria identified by Moen J in *Brown v Silvera*, 2010 ABQB 224 at paras 29-35, 488 AR 22, affirmed 2011 ABCA 109, 505 AR 196, for the Court to exercise its *Rule* 10.33 jurisdiction to award costs beyond the presumptive *Rule* 10.29(1) party and party amounts indicated in Schedule C. The same principles apply here.

[68] The costs award to the Sawridge Band is appropriate given its valid intervention and the important implications of Maurice Stoney's attempted litigation, as discussed above.

[69] In *Sawridge #5*, at paras 50-51, I observed that there is a "new reality of litigation in Canada":

*Rule* 1.2 stresses this Court should encourage cost-efficient litigation and alternative non-court remedies. The Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7 at para 2, [2014] 1 SCR 87 has instructed it is time for trial courts to undergo a "culture shift" that recognizes that litigation procedure must reflect economic realities. In the subsequent *R v Jordan*, 2016 SCC 27, [2016]

1 SCR 631 and *R v Cody*, 2017 SCC 31 decisions, Canada's high court has stressed it is time for trial courts to develop and deploy efficient and timely processes, "to improve efficiency in the conduct of legitimate applications and motions" (*R v Cody*, at para 39). I further note that in *R v Cody* the Supreme Court at para 38 instructs that trial judges test criminal law applications on whether they have "a *reasonable* prospect of success" [emphasis added], and if not, they should be dismissed summarily. That is in the context of *criminal* litigation, with its elevated protection of an accused's rights to make full answer and defence. This Action is a civil proceeding where I have found the addition of the Applicants as parties is unnecessary.

This is the new reality of litigation in Canada. The purpose of cost awards is notorious; they serve to help shape improved litigation practices by creating consequences for bad litigation practices, and to offset the litigation expenses of successful parties. ...

[Emphasis in original.]

[70] Then at para 53, I concluded that the "new reality of litigation in Canada" meant: ... one aspect of Canada's litigation "culture shift" is that cost awards should be used to deter dissipation of trust property by meritless litigation activities by trust beneficiaries.

[71] The Supreme Court of Canada has recently in *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 ["*Jodoin*"] commented on another facet of the problematic litigation, where lawyers abuse the court and its processes. *Jodoin* investigates when a costs award is appropriate against criminal defence counsel. At para 56, Justice Gascon explicitly links court discipline of abusive lawyers to the "culture of complacency" condemned in *R v Jordan* and *R v Cody*. Costs awards are a way to help control this misconduct, and are a tool to help achieve the badly needed "culture shift" in civil and criminal litigation.

[72] I pause at this point to note that *Jodoin* focuses on *criminal* litigation, where the Courts have traditionally been cautious to order costs against defence counsel "in light of the special role played by defence lawyers and the rights of accused persons they represent": para 1.

[73] At paras 16-24 Justice Gascon discusses the issue of costs awards against lawyers in a more general manner:

The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them ... A court therefore has an inherent power to control abuse in this regard ... and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute" ...

It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts ... It is therefore not reserved to superior courts but, rather, has its basis in the common law ...

There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the

courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice ... As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct ...

The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. ...

... although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court ... the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt ...

In most cases, of course, the implications for a lawyer of being ordered personally to pay costs are less serious than those of the other two alternatives. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. Moreover, as this appeal shows, an order to pay costs personally will normally involve relatively small amounts, given that the proceedings will inevitably be dismissed summarily on the basis that they are unfounded, frivolous, dilatory or vexatious.

[Emphasis added, citations omitted.]

[74] This costs authority operates in a parallel but separate manner from the disciplinary and lawyer control functions of law societies: paras 22-23. Cost awards against a lawyer are potentially triggered by either:

1. "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer", or
2. "dishonest or malicious misconduct on his or her part, that is deliberate".

[*Jodoin*, para 29]

[75] The Court stresses that an investigation of a particular instance of potential litigation misconduct should be restricted to the specific identified litigation misconduct and not put the lawyer's "career[,] on trial": para 33. This investigation is not of the lawyer's "entire body of work", though external facts can be relevant in certain circumstances: paras 33-34.

[76] The lawyer who is potentially personally subject to a costs sanction must receive notice of that, along with the relevant facts: para 36. This normally would occur after the end of litigation, once "... the proceeding has been resolved on its merits.": para 36.

[77] I conclude this is one such occasion where a costs award against a lawyer is potentially warranted. Maurice Stoney's attempted participation in the Advice and Direction Application has ended, so now is the point where this issue may be addressed. I consider the impending vexatious litigant analysis a separate matter, though also exercised under the Court's inherent jurisdiction. I do not think this is an appropriate point at which to make any comment on whether Ms. Kennedy should or should not be involved in that separate vexatious litigant analysis, given her litigation representative activities to this point.

[78] I have concluded that Maurice Stoney's lawyer, Priscilla Kennedy, has advanced a futile application on behalf of her client. I have identified the abusive and vexatious nature of that application above. This step is potentially a "serious abuse of the judicial system" given:

1. the nature of interests in question;
2. this litigation was by a third party attempting to intrude into an aboriginal community which has *sui generis* characteristics;
3. that the applicant sought to indemnify himself via a costs claim that would dissipate the resources of aboriginal community trust property;
4. the application was obviously futile on multiple bases; and
5. the attempts to involve other third parties on a "busybody" basis, with potential serious implications to those persons' rights.

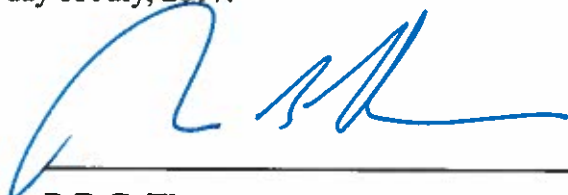
[79] I therefore order that Priscilla Kennedy **appear before me at 2:00 pm on Friday, July 28, 2017**, to make submissions on why she should not be personally responsible for some or all of the costs awards against her client, Maurice Stoney.

[80] I note that in *Morin v TransAlta Utilities Corporation*, 2017 ABQB 409, Graesser J. applied *Rule 10.50* and *Jodoin* to order costs against a lawyer who conducted litigation without obtaining consent of the named plaintiffs. Justice Graesser concludes at para 27 that a lawyer has an obligation to prove his or her authority to represent their clients. Here, that is a live issue for the "10 living brothers and sisters".

[81] *Jodoin* at para 38 indicates the limited basis on which the other litigants may participate in a hearing that evaluates a potential costs award against a lawyer. The Sawridge Band and Trustees may introduce evidence as indicated in paras 33-34 of that judgment. They should also appear on July 28<sup>th</sup> to comment on this issue.

Heard and decided on the basis of written materials described in paragraph 7 hereof.

**Dated** at the City of Edmonton, Alberta this 12<sup>th</sup> day of July, 2017.

  
\_\_\_\_\_  
D.R.G. Thomas  
J.C.Q.B.A. *Thomas*

**Submissions in writing from:**

Priscilla Kennedy  
DLA Piper  
for Maurice Felix Stoney (Applicant)

D.C. Bonora and  
A. Loparco, Q.C.  
Dentons LLP  
for 1985 Sawridge Trustees (Respondents)

J.L. Hutchison  
Hutchison Law LLP  
for the OPTG (Respondent)

Edward Molstad, Q.C.  
Parlee McLaws LLP  
for the Sawridge Band (Intervenor)