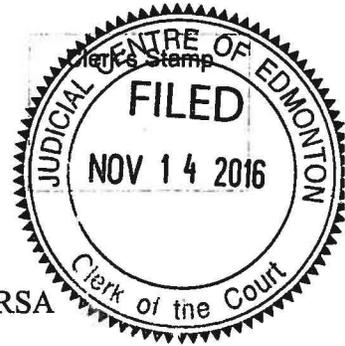


COURT FILE NUMBER 1103 14112
COURT: COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE: EDMONTON



IN THE MATTER OF THE TRUSTEE ACT, RSA
2000, c T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND
INTER VIVOS SETTLEMENT CREATED BY
CHIEF WALTER PATRICK TWINN, OF THE
SAWRIDGE INDIAN BAND, NO 19 now known as
SAWRIDGE FIRST NATION ON APRIL 15, 1985

APPLICANTS: ROLAND TWINN, CATHERINE TWINN,
WALTER FELIX TWIN, BERTHA
L'HIRONDELLE and CLARA MIDBO, as Trustees
for the 1985 Sawridge Trust

DOCUMENT

**REPLY OF THE SAWRIDGE FIRST
NATION TO THE STONEY
APPLICANTS' RESPONSE TO THE
SAWRIDGE FIRST NATION'S
APPLICATION TO INTERVENE IN THE
STONEY APPLICATION**

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

PARLEE McLAWS LLP
1500 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 4K1
Attention: Edward H. Molstad, Q.C.
Telephone: (780) 423-8500
Facsimile: (780) 423-2870
File Number: 64203-7/EHM

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I. INTRODUCTION

1. On September 28, 2016, Sawridge filed its written submissions setting out its position that it should be granted status to intervene in the Stoney Application (“**Sawridge Application**”), along with its response to the merits of the Stoney Application.
2. On October 27, 2016, the Stoney Applicants filed their Response to the merits of the Sawridge Application seeking intervenor status on the Stoney Application.
3. On October 31, 2016, the Office of the Public Guardian and Trustee (“**OPGT**”), as representative of the minor beneficiaries of the 1985 Trust filed a one page letter indicating it has no objection to the Stoney Application.
4. These submissions are filed as a Reply to the Stoney Applicants’ response to the Sawridge Application seeking status and in response to the OPGT’s October 31, 2016 letter. These submissions are intended to supplement the written submissions filed by Sawridge on September 28, 2016 and October 31, 2016.
5. With respect to the Stoney Applicants’ October 27, 2016 Response to the Sawridge Application, Sawridge is compelled to address the following issues:
 - (a) The Stoney Applicants continue to assert, incorrectly and without merit, that they are acquired rights members in Sawridge by virtue of Bill C-31. This assertion has been rejected by the Federal Court and is clearly incorrect based on the plain wording of the subject legislation and the circumstances of the Stoney family.
 - (b) By extension, the Stoney Applicants go on to assert, incorrectly and without merit, that Sawridge has failed to comply, and continues to fail to comply, with the Order of Justice Hugessen in *Sawridge Band v Canada*, [2003] 4 FCR 748 requiring Sawridge to add the names of acquired rights women to its membership pursuant to Bill C-31, including Elizabeth Poitras (“Ms. Poitras”). Sawridge has complied with the Order and has recognized Ms. Poitras as a member since 2003. Sawridge’s litigation with Ms. Poitras is of no relevance to the Stoney Application or the Sawridge Application. Yet, the Stoney Applicants have

misstated the status of that litigation and mischaracterized and misapplied decisions arising from that litigation in a futile attempt to suggest that Sawridge has repeatedly re-litigated or failed to comply with Justice Hugessen's Order.

- (c) The Stoney Applicants haven taken liberties in misstating or misinterpreting facts and case law, asserting rights which have been judicially determined not to exist, and raising issues of no relevance to the Stoney Application or the Sawridge Application. The Stoney Applicants' conduct demonstrates precisely why Sawridge should be granted intervenor status in the Stoney Application, so that Sawridge can set the record straight on membership issues raised by the Stoney Applicants, which issues specially affect Sawridge and to which Sawridge brings a unique perspective.
6. With respect to the OPGT's October 31, 2016 letter indicating it has no objection to the Stoney Application, Sawridge submits that it is improper for the OPGT to take such a position given this Honourable Court's decision in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ("*Sawridge #3*"). In *Sawridge #3*, Your Lordship's directed that the OPGT refocus its role in the within Action on the representation of minor and potential minor beneficiaries of the 1985 Trust and away from past and resolved membership issues between third parties and Sawridge.
7. The Stoney Application is plainly an attempt by the Stoney Applicants to re-litigate past and resolved membership issues which have determined that the Stoney Applicants are not acquired rights members of Sawridge. The Stoney Applicants seek to be named as beneficiaries to the 1985 Trust and to have their costs payable from the 1985 Trust, which ought to be of concern to the OPGT having regard to its fiduciary duties to the minor beneficiaries.
8. The OPGT's position on the Stoney Application flies in the face of this Court's direction in *Sawridge #3*. It is particularly concerning given that the costs incurred to respond to the Stoney Application reduce the funds held in trust for the minor and potential minor beneficiaries whose interests the OPGT has been appointed to protect.

9. Sawridge submits, that the OPGT's position on the Stoney Application is unnecessary and improper.

II. ISSUES

10. The issues before this Honourable Court are as follows:
- (a) Should Sawridge be granted the status to intervene in the Stoney Application, per Rule 2.10 of the *Rules of Court*?
 - (b) Should the Stoney Application be struck, in whole or in part, pursuant to Rule 3.68 of the *Rules of Court*?
 - (c) In the alternative, should the Stoney Application be dismissed?
 - (d) If the Stoney Application is struck and/or dismissed by this Honourable Court, is Sawridge entitled to costs on a solicitor and his own client basis, or, in the alternative, costs on an enhanced basis?
11. Sawridge submits that all of these questions should be answered in the affirmative, for the reasons set out in its submissions of September 28, 2016 and October 31, 2016 and for the additional reasons set out below.

III. ANALYSIS

- A. **The Stoney Applicants' repeated, unfounded, and incorrect assertion that they are acquired rights members of Sawridge demonstrates precisely why Sawridge ought to be granted intervenor status and solicitor client costs on the Stoney Application.**
12. Sawridge has addressed this issue in its submissions of September 28, 2016 and October 31, 2016 by thoroughly reviewing the history and intention of Bill C-31 and the history of litigation between Maurice Stoney and Sawridge concerning membership.
13. The Stoney Applicants are not acquired rights members of Sawridge by virtue of Bill C-31. This issue is *res judicata*, having been decided by the Federal Court. Yet, at every

opportunity, the Stoney Applicants continue to assert entitlement to acquired rights membership in Sawridge before this Honourable Court.

14. The Stoney Applicants assertion that they fall within the category of persons contemplated by Justice Hugessen's Order in *Sawridge Band v Canada*, [2003] 4 FCR 748 is based on their argument that the Stoney Applicants fall within the category of persons contemplated in section 11(1)(c) of Bill C-31.
15. As noted in Sawridge's previous written submissions, Maurice Stoney advanced this exact same argument in Federal Court proceedings before Justice Barnes, and the argument was rejected.
16. To date, Sawridge has not re-iterated the legal reasons why Maurice Stoney's position was rejected before the Federal Court. As the Stoney Applicants continue to assert entitlement to acquired rights membership, Sawridge believes is it necessary to now review the wording of the relevant legislation which supports Sawridge's position and forms the basis of Justice Barnes' decision. The Stoney Applicants' position is untenable based on the plain wording of the relevant legislation.
17. When Bill C-31 came into effect on April 17, 1985, it did not grant Maurice Stoney (or his siblings) acquired rights membership in Sawridge. Section 6 of Bill C-31 only granted Maurice Stoney the right to have his Indian status restored, pursuant to section 6(1)(d):

6. (1) Subject to section 7, a person is entitled to be registered [as an Indian] if

...

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

An Act to amend the Indian Act ["Bill C-31"], s 6 [Tab 1]

18. Section 11(1) specifically provides that a person has a right to have his name entered onto a band membership list if: (a) his name was on the band's membership list "immediately prior to April 17, 1985"; (b) he is a member of a new band created on or after April 17, 1985; (c) he was entitled to be restored to "Indian" status under section 6(1)(c) and he himself had ceased to be a member of the band and lost his status by reason of the discriminatory circumstances set out in that section; or (d) he was born on or after April 17, 1985 to parents who had or were entitled to have their names entered on the band's membership list.

Bill C-31, s 11(1) [Tab 1]

19. Maurice Stoney's personal history does not bring him within either sections 11(1)(a), (b) or (d); nor does he fall with section 11(1)(c).
20. Maurice Stoney ceased to be a member of Sawridge and lost his status under section 114 of the 1927 *Indian Act* through the voluntary enfranchisement of his father by Order in Council dated August 1, 1944. Accordingly, his name had been removed from Sawridge's membership list "prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985". As such his right to be reinstated to the Indian Register was under section 6(1)(d), not section 6(1)(c) of Bill C-31 (section 6(i)(c.1) was only enacted under 58 Eliz II (2010), c.18, s. 2(3), which only came into force after April 5, 2012). He does not fall within section 11(1)(c), which only provides for the reinstatement of women involuntarily enfranchised "under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985".

Indian Act, RSC 1927 c 98, s 114 [Tab 2]

Indian Act, RSC 1985 c 1-5 (unamended), ss 12 and 109(2) [Tab 3]

Gender Equity in Indian Registration Act, 59 Eliz II (2010), c 18 [Tab 4]

Bill C-31, ss 6 and 11 [Tab 1]

21. Section 11(1)(c) therefore does not give Maurice Stoney any "acquired" right to have his name put on Sawridge's membership list as of April 17, 1985, or at all.

22. Indeed, it is section 11(2) of Bill C-31 that specifically addresses the restoration of Maurice Stoney's band membership and the band membership of all children and wives of Indian men who were voluntarily enfranchised by orders under section 109(1). And, in enacting section 11(2), Parliament only create a conditional right to membership in a band, by delaying entitlement for two years until June 28, 1987 (2 years from the enactment of Bill C-31) and by only given that conditional right to persons seeking membership in bands that had not, before June 28, 1987, taken control of their own membership lists.

Bill C-31, s 11(2) [Tab 1]

23. Sawridge took control of its membership list effective July 8, 1985 so section 11(2) did not and does not give Maurice Stoney any right to membership in Sawridge.
24. Maurice Stoney had and has, therefore, no "acquired" right under Bill C-31 to membership in Sawridge either on April 17, 1985 or April 17, 1987 or December 7, 2011 or April 22, 2012.
25. This determination is *res judicata* and is not open for reconsideration, having been decided by the Federal Court and Federal Court of Appeal:

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

Stoney v Sawridge First Nation, 2013 FC 509, at para 15 [Emphasis added] [Tab 5]

It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents [including Maurice Stoney] have, at best, a right to apply to the Band for membership.

Huzar v Canada, 2000 CarswellNat 1132 (FCA), at paras 4 and 5 [Tab 6]

26. The Stoney Applicants are therefore incorrect in asserting that Sawridge has failed to comply with Justice Hugessen's Order by failing to add the Stoney Applicants to its

membership list. The Stoney Applicants are not within the category of person contemplated as acquired rights members under Bill C-31 and Justice Hugessen's Order.

27. The Stoney Applicants' assertion that the Government of Canada is the only party with a clear and direct interest in the persons who were recognized members of Sawridge on April 17, 1985, and that Sawridge has no such interest, is devoid of merit.
 28. The Stoney Applicants' suggestion that previous judicial considerations of Maurice Stoney's membership status in Sawridge only have application to matters after Sawridge assumed control of its membership on July 8, 1985, is similarly devoid of merit.
- B. The Stoney Applicants have falsely accused Sawridge of failing to comply with Justice Hugessen's Order in respect of Elizabeth Poitras, which is of no relevance to the subject Applications.**
29. Ms. Poitras' litigation with Sawridge is of no relevance to the Applications before this Honourable Court. Yet, the Stoney Applicants have misstated the status of that litigation and misapplied decisions arising from that litigation in an attempt to suggest that Sawridge has repeatedly re-litigated or failed to comply with Justice Hugessen's Order.
 30. Ms. Poitras fell within the category of persons contemplated by Justice Hugessen's Order, and she was in fact named as one of the 11 women he ordered to be added to Sawridge's membership list in 2003.
 31. The Stoney Applicants assert that Sawridge thereafter continued to deny Ms. Poitras membership and that Sawridge continues with actions denying membership to Ms. Poitras today.
 32. These statements are false.
 33. In fact, Elizabeth Poitras swore an Affidavit on December 7, 2011 which was filed in this Action on December 9, 2011. In that Affidavit, Ms. Poitras herself deposed to the fact that she was a member of Sawridge.

Affidavit of Elizabeth Poitras (without exhibits) at para 1 [Tab 7]

34. In her Questioning on Affidavit on April 16, 2015, Ms. Poitras testified that she became a member of Sawridge pursuant to the Order of Justice Hugessen and that Sawridge has recognized her as a member since 2003:

Q: And I think we looked at this earlier. On March 27, 2003 Justice Hugessen granted an order whereby you became a member of the Sawridge First Nation, correct?

A: I and several other people.

Q: Thank you. And those individuals that were included in the order have sometimes been referred to as the acquired-rights people, correct?

A: Yes.

Q: And as of today you are recognized as a member of the Sawridge First Nation, correct?

A: Yes, I am.

Q: And you indicated this morning, in reference to your [membership] application form, that you still had not received a response from the Sawridge First Nation. And I think what you have since told us you never received a yes or a no?

A: M-hm.

Q: Now since becoming a member pursuant to court order on March 27, 2003 is there some reason why you would expect a response from Sawridge First Nation in relation to your application?

A: I don't really expect a response. I am just saying that it still was never dealt with, that it does not have to be dealt with now because I am a full band member.

Q: Fair enough. You have been a member for the last 12 years or so?

A: Already, yeah.

Q: So you don't expect a response at this point in time?

A: No, no.

Q: Correct?

A: No, I don't.

Transcript from the Questioning on Affidavit of Elizabeth Poitras, April 16, 2015
at 114:18 to 115:22 [Emphasis added] [Tab 8]

35. Ms. Poitras in fact testified that not only is she a member of Sawridge, she was elected an Elder Commissioner for Sawridge on March 24, 2015. She is one of two members of the Elders Commission which provides advice to Chief and Council, the membership committee, and anyone else who may require some advice in relation to matters of interest to the community.

Transcript from the Questioning on Affidavit of Elizabeth Poitras, April 16, 2015
at 150:18 to 152:7 [Tab 8]

36. At this time, the ongoing litigation with Ms. Poitras is confined solely to the issue of damages. Membership is not in dispute as suggested by the Stoney Applicants.
37. The facts stand in direct contradiction to the assertions made by the Stoney Applicants in their written submissions filed on October 27, 2016 to the effect that Sawridge has failed to comply with the Order of Justice Hugessen ordering that it add the names of acquired rights members, including Ms. Poitras, to its membership list.
38. Furthermore, the Stoney Applicants assert, incorrectly, that the Order of Justice Hugessen as it relates to the Stoney Applicants is “moot”. This is not the case, as the Order of Justice Hugessen plainly does not apply to the Stoney Applicants, as set out above and determined by Justice Barnes in *Stoney v Sawridge First Nation*, 2013 FC 509.
39. As the Order of Justice Hugessen does not apply to the Stoney Applicants, their attempt to draw a parallel between their position and that of Ms. Poitras is flawed and ineffective.
40. It is absurd for the Stoney Applicants to suggest that this is a case where Sawridge is openly applying to the Court for re-litigation of a settled issue, namely the Order of Justice Hugessen, and that Sawridge has misused the judicial system such that its conduct amounts to an abuse of process.
41. In fact, the opposite is true: the Stoney Applicants are attempting to re-litigate the finding of Justice Barnes in *Stoney v Sawridge First Nation*, 2013 FC 509, that section 11(1) of Bill C-31 and Justice Hugessen’s Order do not apply to Maurice Stoney (or, by extension, his siblings).

C. The Stoney Applicants' repeated misstatement of facts and law relating to membership issues and previous litigation with Sawridge is egregious and demonstrates why the Sawridge Application for intervenor status should be granted with costs payable to Sawridge on a solicitor and client basis.

42. At every opportunity, the Stoney Applicants are attempting to re-litigate and advance arguments that their very same counsel, Priscilla Kennedy, made before Justice Barnes in the judicial review application in Federal Court. These arguments were rejected by Justice Barnes.
43. Sawridge does not wish to belabour this point further, having exhaustively set out its position in this regard in its submissions of September 28, 2016 and October 31, 2016.
44. Sawridge should be granted intervenor status in the Stoney Application. Sawridge is uniquely situated to address the membership issues raised by the Stoney Applicants. This issue is at the centre of the Stoney Application, given that a finding that the Stoney Applicants are members in Sawridge is a pre-condition to finding they are beneficiaries of the 1985 Trust. Their alleged entitlement to membership has been at the centre of prior litigation between Sawridge and Maurice Stoney in Federal Court and has been subject to a complaint by Maurice Stoney against Sawridge to the Canadian Human Rights Commission.
45. The Stoney Applicants are not members of Sawridge, and Sawridge is clearly specially affected by any suggestion to the contrary.
46. Upon a thorough review of the applicable case law, Bill C-31, and the evidence before this Court, it is clear that the Stoney Applicants are attempting to re-litigate their entitlement to membership in Sawridge under Bill C-31, which entitlement does not exist. This issue is *res judicata* and barred by the doctrine of issue estoppel.
47. The Stoney Applicants' conduct amounts to an abuse of process. It has unnecessarily delayed an already lengthy action by burdening this Honourable Court with a consideration of issues which have already been judicially determined in Federal Court.

48. Sawridge submits that, for the foregoing reasons and for those reasons set out in its submissions of September 28, 2016 and October 31, 2016, the Stoney Applicants' conduct warrants an award of solicitor and his own client costs being made in Sawridge's favour in respect of the Stoney Application and the Sawridge Application.

D. By failing to object to the Stoney Application despite the history of litigation involving Maurice Stoney and the determination that he (and his siblings) are not acquired rights members, the OPGT has failed to heed the direction of this Honourable to refocus its role in the within Action on the representation of potential minor beneficiaries and away from membership.

49. Sawridge submits that the OPGT's October 31, 2016 letter stating that it does not object to the Stoney Application is improper in light of this Honourable Court's decision in *Sawridge #3*, wherein Your Lordship's directed that the OPGT refocus its role in the within Action on the representation of minor and potential minor beneficiaries of the 1985 Trust and away from past and resolved membership issues:

I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

...

This Court's function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership. I mean by this that if the Public Trustee's inquiries determine that there are one or more outstanding applications for Band membership by a parent of a minor child then that is not a basis for the Public Trustee to intervene in or conduct a collateral attack on the manner in which that application is evaluated, or the result of that process.

I direct that this shall be the full extent of the Public Trustee's participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as

a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

...

I believe that the instructions given here will refocus the process on Tasks 1 – 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in *Sawridge #1* I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in *Stoney v Sawridge First Nation*. I repeat that inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799 at paras 49 and 54-55, and 70 [Emphasis added] [Tab 9]

50. Maurice Stoney's membership dispute with Sawridge has been resolved through litigation in Federal Court. By extension, his siblings assertion to membership, which is premised on identical grounds (as evidenced by Maurice Stoney bringing this application in a representative capacity), is also resolved. Further inquiry into this issue is no longer necessary or relevant.
51. The Stoney Applicants are not members of Sawridge and are not beneficiaries of the 1985 Trust, and the Stoney Application amounts to a collateral attack on prior decisions of the Federal Courts.
52. By voicing that it has no objection to the Stoney Application (instead of opposing it or taking no position), the OPGT effectively lends support to the Stoney Applicants' position. The OPGT has, therefore, again proceeded unnecessarily in supporting further consideration of the membership issues at the heart of the Stoney Application, which issues have been resolved and are no longer of relevance to the within Action.
53. The role of the OPGT as litigation representative of the minor beneficiaries is to advocate for the best interests of the children.

1985 Sawridge Trust v Alberta (Public Trustee), 2013 ABCA 226 at para 19 [Tab 10]

54. Sawridge submits that the OPGT has failed to fulfill its duty to the minor beneficiaries by entertaining the Stoney Applicants' attempt to re-litigate past and resolved membership issues. Furthermore, the Stoney Applicants seek advance costs payable from the 1985 Trust, which ought to be of particular concern to the OPGT. Any such an award would reduce the funds held in trust for the minor and potential minor beneficiaries and thereby prejudice their interests.

IV. RELIEF REQUESTED

55. For the above reasons and those reasons set out in its submissions of September 28, 2016 and October 31, 2016, Sawridge prays that this Honourable Court order that Sawridge be granted the status to intervene in the Stoney Application, pursuant to Rule 2.10 of the *Rules of Court*, on terms which include the following:

- (a) Sawridge shall have the right to question the Applicants on any Affidavits filed as part of the Stoney Application;
- (b) Sawridge shall have the right to apply to strike the Stoney Application and/or to have the Stoney Application dismissed;
- (c) Sawridge shall have the right to make submissions in response to the Stoney Application;
- (d) Sawridge shall have the right to seek costs as against Maurice with respect to the Stoney Application.

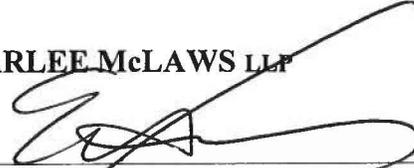
56. If Sawridge is granted the status to intervene in the Stoney Application, then Sawridge prays that this Honourable Court orders as follows:

- (a) That the Stoney Application be struck pursuant to Rule 3.68 of the *Rules of Court*;
- (b) In the alternative, that the Stoney Application be dismissed; and

- (c) That costs be paid to Sawridge by the Stoney Applicants on a solicitor and his own client basis, or on an enhanced basis, in respect of both the Stoney Application and the Sawridge Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November, 2016.

PARLEE McLAWS LLP



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

LIST OF AUTHORITIES

- Tab 1** *An Act to amend the Indian Act* [“Bill C-31”]
- Tab 2** *Indian Act*, RSC 1927 c 98
- Tab 3** *Indian Act*, RSC 1985, c I-5 (unamended)
- Tab 4** *Gender Equity in Indian Registration Act*, 59 Eliz II (2010), c 18
- Tab 5** *Stoney v Sawridge First Nation*, 2013 FC 509
- Tab 6** *Huzar v Canada*, 2000 CarswellNat 1132 (FCA)
- Tab 7** Affidavit of Elizabeth Poitras (without exhibits) sworn December 7, 2011
- Tab 8** Transcript from the Questioning on Affidavit of Elizabeth Poitras, April 16, 2015
- Tab 9** *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799
- Tab 10** *1985 Sawridge Trust v Alberta (Public Trustee)*, 2013 ABCA 226

33-34 ELIZABETH II

33-34 ELIZABETH II

CHAPTER 27

CHAPITRE 27

An Act to amend the Indian Act

Loi modifiant la Loi sur les Indiens

[Assented to 28th June, 1985]

[Sanctionnée le 28 juin 1985]

R.S., c. I-6, c. 10 (2nd Suppl.); 1974-75-76, c. 48; 1978-79, c. 11; 1980-81-82, cc. 47, 110; 1984, c. 4

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, décrète :

S.R., c. I-6, ch. 10 (2^e suppl.); 1974-75-76, ch. 48; 1978-79, ch. 11; 1980-81-82-83, ch. 47, 110; 1984, ch. 4

1. (1) The definitions "child", "elector" and "Registrar" in subsection 2(1) of the *Indian Act* are repealed and the following substituted therefor in alphabetical order within the subsection:

1. (1) Les définitions de «électeur», «enfant» et «registraire», au paragraphe 2(1) de la *Loi sur les Indiens*, sont abrogées et respectivement remplacées par ce qui suit :

"child"
«enfant»

"child" includes a child born in or out of wedlock, a legally adopted child and a child adopted in accordance with Indian custom;

«électeur» signifie une personne qui

«électeur»
«elector»

a) est inscrite sur une liste de bande,

b) a dix-huit ans révolus, et

c) n'a pas perdu son droit de vote aux élections de la bande;

"elector"
«électeur»

"elector" means a person who

(a) is registered on a Band List,

(b) is of the full age of eighteen years, and

(c) is not disqualified from voting at band elections;

"Registrar"
«registraire»

"Registrar" means the officer in the Department who is in charge of the Indian Register and the Band Lists maintained in the Department;

«enfant» comprend un enfant né du mariage ou hors mariage, un enfant légalement adopté, ainsi qu'un enfant adopté selon la coutume indienne;

«enfant»
«child»

«registraire» désigne le fonctionnaire du ministère responsable du registre des Indiens et des listes de bande tenus au ministère;

«registraire»
«Registrar»

(2) Subsection 2(1) of the said Act is further amended by adding thereto, in alphabetical order within the subsection, the following definitions:

(2) Le paragraphe 2(1) de la même loi est modifié par insertion, suivant l'ordre alphabétique, de ce qui suit :

"Band List"
«liste»

"Band List" means a list of persons that is maintained under section 8 by a band or in the Department;

«liste de bande» signifie une liste de personnes tenue en vertu de l'article 8 par une bande ou au ministère;

«liste de bande»
«Band List»

«registre des Indiens» signifie le registre de personnes tenu en vertu de l'article 8;

«registre des Indiens»
«Indian Register»

"Indian Register" registre...

"Indian Register" means the register of persons that is maintained under section 5."

2. Section 4 of the said Act is amended by striking out subsection (2) and substituting the following therefor:

2. L'article 4 de la même loi est modifié par retranchement du paragraphe (2) et son remplacement par ce qui suit :

Act may be declared inapplicable

"(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 5 to 14.3 or sections 37 to 41, shall not apply to

«(2) Le gouverneur en conseil peut, par proclamation, déclarer que la présente loi, ou toute partie de celle-ci, sauf les articles 5 à 14.3 et 37 à 41, ne s'applique pas

Pouvoir de déclarer la loi inapplicable

(a) any Indians or any group or band of Indians, or

a) à des Indiens ou à un groupe ou une bande d'Indiens, ou

(b) any reserve or any surrendered lands or any part thereof,

b) à une réserve ou à des terres cédées, ou à une partie y afférente,

and may by proclamation revoke any such declaration.

et peut par proclamation révoquer toute semblable déclaration.

Authority conferred for certain cases

(2.1) For greater certainty, and without restricting the generality of subsection (2), the Governor in Council shall be deemed to have had the authority to make any declaration under subsection (2) that he has made in respect of section 11, 12 or 14, or any provision thereof, as each section or provision read immediately prior to April 17, 1985."

(2.1) Sans qu'en soit limitée la portée générale du paragraphe (2), il est entendu que le gouverneur en conseil est réputé avoir eu le pouvoir de faire en vertu du paragraphe (2) toute déclaration qu'il a faite à l'égard des articles 11, 12 ou 14 ou d'une de leurs dispositions, dans leur version précédant immédiatement le 17 avril 1985.

Confirmation de la validité de certaines déclarations

3. The said Act is further amended by adding thereto, immediately after section 4 thereof, the following section:

3. La même loi est modifiée par insertion, après l'article 4, de ce qui suit :

Application of certain provisions to all band members

"4.1 A reference to an Indian in the definitions "band", "Indian moneys" and "mentally incompetent Indian" in section 2 or a reference to an Indian in subsection 4(2) or (3), subsection 18(2), section 20, sections 22 to 25, subsection 31(1) or (3), subsection 35(4), section 51, section 52, subsection 58(3), subsection 61(1), section 63, section 65, subsection 66(2), subsection 70(1) or (4), section 71, paragraph 73(g) or (h), subsection 74(4), section 84, paragraph 87(a), section 88, subsection 89(1) or paragraph 107(b) shall be deemed to include a reference to any person who is entitled to have his name entered in a Band List and whose name has been entered therein."

"4.1 La mention d'un Indien dans les définitions de "bandes", "deniers des Indiens" ou "Indien mentalement incapable" à l'article 2 et cette mention aux paragraphes 4(2) ou (3), au paragraphe 18(2), à l'article 20, aux articles 22 à 25, aux paragraphes 31(1) ou (3), au paragraphe 35(4), à l'article 51, à l'article 52, au paragraphe 58(3), au paragraphe 61(1), à l'article 63, à l'article 65, au paragraphe 66(2), aux paragraphes 70(1) ou (4), à l'article 71, aux alinéas 73g) ou h), au paragraphe 74(4), à l'article 84, à l'alinéa 87a), à l'article 88, au paragraphe 89(1) ou à l'alinéa 107b) sont réputées comprendre la mention de toute personne qui a droit à ce que son nom soit consigné dans une liste de bande et dont le nom y a effectivement été consigné."

Application de certaines dispositions à tous les membres d'une bande

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1974-75-76, c. 48, art. 23;
1978-79, c. 11, art. 10

4. Sections 5 to 14 of the said Act are repealed and the following substituted therefor:

4. Les articles 5 à 14 de la même loi sont abrogés et remplacés par ce qui suit :

1974-75-76, ch. 48, art. 23;
1978-79, ch. 11, art. 10

"Indian Register

«Registre des Indiens

Indian Register

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

5. (1) Est tenu au ministère un registre des Indiens où est consigné le nom de chaque personne ayant droit d'être inscrite comme Indien en vertu de la présente loi.

Tenue du registre

Existing Indian Register

(2) The names in the Indian Register immediately prior to April 17, 1985 shall constitute the Indian Register on April 17, 1985.

(2) Les noms figurant au registre des Indiens immédiatement avant le 17 avril 1985 constituent le registre des Indiens au 17 avril 1985.

Registre des Indiens existant

Deletions and additions

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

(3) Le registraire peut ajouter au registre des Indiens, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans ce registre.

Additions et retranchements

Date of change

(4) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

(4) Le registre des Indiens indique la date où chaque nom y a été ajouté ou en a été retranché.

Date du changement

Application for registration

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

(5) Il n'est pas requis que le nom d'une personne qui a droit d'être inscrite soit consigné dans le registre des Indiens, à moins qu'une demande à cette effet soit présentée au registraire.

Demande

Persons entitled to be registered

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

6. (1) Sous réserve de l'article 7, une personne a droit d'être inscrite si elle remplit une des conditions suivantes:

Personnes ayant droit à l'inscription

(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;

a) elle était inscrite ou avait droit de l'être immédiatement avant le 17 avril 1985;

(b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

b) elle est membre d'un groupe de personnes déclaré par le gouverneur en conseil après le 16 avril 1985 être une bande pour l'application de la présente loi;

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

c) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande; en vertu du sous-alinéa 12(1)a)(iv), de l'alinéa 12(1)b) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version précédant immédiatement

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relating to the same subject-matter as any of those provisions;

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

(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section; or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

d) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(1), dans leur version précédant immédiatement le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

e) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande :

(i) soit en vertu de l'article 13, dans sa version précédant immédiatement le 4 septembre 1951, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article;

(ii) soit en vertu de l'article 111, dans sa version précédant immédiatement le 1^{er} juillet 1920, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article;

f) ses parents ont tous deux droit d'être inscrits en vertu du présent article ou, s'ils sont décédés, avaient ce droit à la date de leur décès.

Idem

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).

(2) Sous réserve de l'article 7, une personne a droit d'être inscrite si l'un de ses parents a droit d'être inscrit en vertu du paragraphe (1) ou, s'il est décédé, avait ce droit à la date de son décès.

Idem

Deeming provision

(3) For the purposes of paragraph (1)(f) and subsection (2),

(a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a); and

(3) Pour l'application de l'alinéa (1)f) et du paragraphe (2):

Présomption

a) la personne qui est décédée avant le 17 avril 1985 mais qui avait droit d'être inscrite à la date de son décès est réputée avoir droit d'être inscrite en vertu de l'alinéa (1)a);

b) la personne visée aux alinéas (1)c), d) ou e) qui est décédée avant le 17 avril

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(b) a person described in paragraph (1)(c), (d) or (e) who was no longer living on April 17, 1985 shall be deemed to be entitled to be registered under that paragraph.

1985 est réputée avoir droit d'être inscrite en vertu de ces alinéas.

Persons not entitled to be registered

7. (1) The following persons are not entitled to be registered:

7. (1) Les personnes suivantes n'ont pas droit d'être inscrites :

Personnes n'ayant pas droit à l'inscription

(a) a person who was registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and whose name was subsequently omitted or deleted from the Indian Register under this Act; or

a) celles qui étaient inscrites en vertu de l'alinéa 11(1)f), dans sa version précédant immédiatement le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et dont le nom a ultérieurement été omis ou retranché du registre des Indiens en vertu de la présente loi;

(b) a person who is the child of a person who was registered or entitled to be registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and is also the child of a person who is not entitled to be registered.

b) celles qui sont les enfants d'une personne qui était inscrite ou avait droit d'être en vertu de l'alinéa 11(1)f), dans sa version précédant immédiatement le 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et qui sont également les enfants d'une personne qui n'a pas droit d'être inscrite.

Exception

(2) Paragraph (1)(a) does not apply in respect of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act.

(2) L'alinéa (1)a) ne s'applique pas à une personne de sexe féminin qui, avant qu'elle ne soit inscrite en vertu de l'alinéa 11(1)f), avait droit d'être inscrite en vertu de toute autre disposition de la présente loi.

Exception

Idem

(3) Paragraph (1)(b) does not apply in respect of the child of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act.

(3) L'alinéa (1)b) ne s'applique pas à l'enfant d'une personne de sexe féminin qui, avant qu'elle ne soit inscrite en vertu de l'alinéa 11(1)f), avait droit d'être inscrite en vertu de toute autre disposition de la présente loi.

Idem

Band Lists

Listes de bande

Band Lists

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

8. Est tenue conformément à la présente loi, la liste de chaque bande où est consigné le nom de chaque personne qui en est membre.

Tenue de la liste

Band Lists maintained in Department

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

9. (1) Jusqu'à ce que la bande assume la responsabilité de sa liste, celle-ci est tenue au ministère par le registraire.

Liste de bande tenue au ministère

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Existing Band Lists

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

(2) Les noms figurant à une liste d'une bande immédiatement avant le 17 avril 1985 constituent la liste de cette bande au 17 avril 1985.

Listes de bande existantes

Deletions and additions

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

(3) Le registraire peut ajouter à une liste de bande tenue au ministère, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

Additions et retranchements

Date of change

(4) A Band List maintained in the Department shall indicate the date on which each name was added thereto or deleted therefrom.

(4) La liste de bande tenue au ministère indique la date où chaque nom y a été ajouté ou en a été retranché.

Date du changement

Application for entry

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

(5) Il n'est pas requis que le nom d'une personne qui a droit à ce que celui-ci soit consigné dans une liste de bande tenue au ministère y soit consigné à moins qu'une demande à cet effet soit présentée au registraire.

Demande

Band control of membership

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

10. (1) La bande peut décider de l'appartenance à ses effectifs si elle en fixe les règles par écrit conformément au présent article et si, après qu'elle a donné un avis convenable de son intention de décider de cette appartenance, elle y est autorisée par la majorité de ses électeurs.

Pouvoir de décision

Membership rules

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

(2) La bande peut, avec l'autorisation de la majorité de ses électeurs :

Règles d'appartenance

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

a) après avoir donné un avis convenable de son intention de ce faire, fixer les règles d'appartenance à ses effectifs;

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

b) prévoir une procédure de révision des décisions portant sur l'appartenance à ses effectifs.

Exception relating to consent

(3) Where the council of a band makes a by-law under paragraph 81(1)(p.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

(3) Lorsque le conseil d'une bande établit un statut administratif en vertu de l'alinéa 81(1)p.4) mettant en vigueur le présent paragraphe à l'égard d'une bande, l'autorisation requise en vertu des paragraphes (1) et (2) doit être donnée par la majorité des membres de la bande qui ont dix-huit ans révolus.

Statut administratif sur l'autorisation requise

Acquired rights

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his

(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce

Droits acquis

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name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

que son nom soit consigné dans la liste de bande immédiatement avant la fixation des règles du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.

Idem

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

(5) Il demeure entendu que le paragraphe (4) s'applique à la personne qui avait droit à ce que son nom soit consigné dans la liste de bande en vertu de l'alinéa 11(1)c) immédiatement avant que celle-ci n'assume la responsabilité de la tenue de sa liste si elle ne cesse pas ultérieurement d'avoir droit à ce que son nom y soit consigné.

Idem

Notice to the Minister

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

(6) Une fois remplies les conditions du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le Ministre du fait que celle-ci décide désormais de l'appartenance à ses effectifs et lui transmet le texte des règles d'appartenance.

Avis au Ministre

Notice to band and copy of Band List

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

(7) Sur réception de l'avis du conseil de bande prévu au paragraphe (6), le Ministre, sans délai, s'il constate que les conditions prévues au paragraphe (1) sont remplies :

Transmission de la liste

- (a) give notice to the band that it has control of its own membership; and
- (b) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

- a) avise la bande qu'elle décide désormais de l'appartenance à ses effectifs;
- b) ordonne au registraire de transmettre à la bande une copie de la liste de bande tenue au ministère.

Effective date of band's membership rules

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

(8) Lorsque la bande décide de l'appartenance à ses effectifs en vertu du présent article, les règles d'appartenance fixées par celle-ci entrent en vigueur à compter de la date où l'avis au Ministre a été donné en vertu du paragraphe (6); les additions ou retranchements de la liste de la bande effectués par le registraire après cette date ne sont valides que s'ils ont été effectués conformément aux règles d'appartenance fixées par la bande.

Date d'entrée en vigueur des règles d'appartenance

Band to maintain Band List

(9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph (7)(b), and, subject to section

(9) À compter de la réception de l'avis prévu à l'alinéa (7)b), la bande est responsable de la tenue de sa liste. Sous réserve de l'article 13.2, le ministère, à compter de

Transfert de responsabilité

13.2, the Department shall have no further responsibility with respect to that Band List from that date.

cette date, est dégagé de toute responsabilité à l'égard de cette liste.

Deletions and additions

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

(10) La bande peut ajouter à la liste de bande tenue par elle, ou en retrancher, le nom de la personne qui, aux termes des règles d'appartenance de la bande, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans la liste.

Additions et retranchements

Date of change

(11) A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom.

(11) La liste de bande tenue par celle-ci indique la date où chaque nom y a été ajouté ou en a été retranché.

Date du changement

Membership rules for Departmental Band List

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

11. (1) À compter du 17 avril 1985, une personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour cette dernière au ministère si elle remplit une des conditions suivantes :

Règles d'appartenance pour une liste tenue au ministère

(a) the name of that person was entered in the Band List for that band, or that person was entitled to have his name entered in the Band List for that band, immediately prior to April 17, 1985;

a) son nom a été consigné dans cette liste, ou elle avait droit à ce qu'il le soit immédiatement avant le 17 avril 1985;

(b) that person is entitled to be registered under paragraph 6(1)(b) as a member of that band;

b) elle a droit d'être inscrite en vertu de l'alinéa 6(1)b) comme membre de cette bande;

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

c) elle a droit d'être inscrite en vertu de l'alinéa 6(1)c) et a cessé d'être un membre de cette bande en raison des circonstances prévues à cet alinéa;

(d) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(f) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.

d) elle est née après le 16 avril 1985 et a droit d'être inscrite en vertu de l'alinéa 6(1)f) et ses parents ont tous deux droit à ce que leur nom soit consigné dans la liste de bande ou, s'ils sont décédés, avaient ce droit à la date de leur décès.

Additional membership rules for Departmental Band List

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

(2) À compter du jour qui suit de deux ans le jour où la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, a reçu la sanction royale ou de la date antérieure choisie en vertu de l'article 13.1, lorsque la bande n'a pas la responsabilité de la tenue de sa liste prévue à la présente loi, une personne a droit à ce que son nom soit consigné dans la liste de bande tenue au ministère pour cette dernière :

Règles d'appartenance supplémentaires pour les listes tenues au ministère

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

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

(3) For the purposes of paragraph (1)(d) and subsection (2), a person whose name was omitted or deleted from the Indian Register or a band list in the circumstances set out in paragraph 6(1)(c), (d) or (e) who was no longer living on the first day on which he would otherwise be entitled to have his name entered in the Band List of the band of which he ceased to be a member shall be deemed to be entitled to have his name so entered.

(4) Where a band amalgamates with another band or is divided so as to constitute new bands, any person who would otherwise have been entitled to have his name entered in the Band List of that band under this section is entitled to have his name entered in the Band List of the amalgamated band or the new band to which he has the closest family ties, as the case may be.

12. Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, any person who

(a) is entitled to be registered under section 6, but is not entitled to have his name entered in the Band List maintained in the Department under section 11, or

(b) is a member of another band, is entitled to have his name entered in the Band List maintained in the Department

a) soit si elle a droit d'être inscrite en vertu des alinéas 6(1)d) ou e) et qu'elle a cessé d'être un membre de la bande en raison des circonstances prévues à l'un de ces alinéas;

b) soit si elle a droit d'être inscrite en vertu de l'alinéa 6(1)f) ou du paragraphe 6(2) et qu'un de ses parents visés à l'une de ces dispositions a droit à ce que son nom soit consigné dans la liste de bande ou, s'il est décédé, avait ce droit à la date de son décès.

(3) Pour l'application de l'alinéa (1)d) et du paragraphe (2), la personne dont le nom a été omis ou retranché du registre des Indiens ou d'une liste de bande dans les circonstances prévues aux alinéas 6(1)c), d) ou e) et qui est décédée avant le premier jour où elle aurait le droit à ce que son nom soit consigné dans la liste de bande dont elle a cessé d'être membre est réputée avoir droit à ce que son nom y soit consigné.

(4) Lorsqu'une bande fusionne avec une autre ou qu'elle est divisée pour former de nouvelles bandes, toute personne qui aurait par ailleurs eu droit à ce que son nom soit consigné dans la liste de la bande en vertu du présent article a droit à ce que son nom soit consigné dans la liste de la bande issue de la fusion ou de celle de la nouvelle bande à l'égard de laquelle ses liens familiaux sont les plus étroits.

12. À compter du jour qui suit de deux ans le jour où la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, a reçu la sanction royale ou de la date antérieure choisie en vertu de l'article 13.1, la personne qui,

a) soit a droit d'être inscrite en vertu de l'article 6 sans avoir droit à ce que son nom soit consigné dans une liste de bande tenue au ministère en vertu de l'article 11,

b) soit est membre d'une autre bande, a droit à ce que son nom soit consigné dans la liste d'une bande tenue au ministère

Deeming provision

Présomption

Where band amalgamates or is divided

Fusion ou division de bandes

Entitlement with consent of band

Inscription sujette au consentement du conseil

for a band if the council of the admitting band consents.

pour cette dernière si le conseil de la bande qui l'admet en son sein y consent.

Limitation to one Band List

13. Notwithstanding sections 11 and 12, no person is entitled to have his name entered at the same time in more than one Band List maintained in the Department.

13. Par dérogation aux articles 11 et 12, nul n'a droit à ce que son nom soit consigné en même temps dans plus d'une liste de bande tenue au ministère.

Nom consigné dans une seule liste

Decision to leave Band List control with Department

13.1 (1) A band may, at any time prior to the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, decide to leave the control of its Band List with the Department if a majority of the electors of the band gives its consent to that decision.

13.1 (1) Une bande peut, avant le jour qui suit de deux ans le jour où la loi intitulée *Loi-modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, a reçu la sanction royale, décider de laisser la responsabilité de la tenue de sa liste au ministère à condition d'y être autorisée par la majorité de ses électeurs.

Première décision

Notice to the Minister

(2) Where a band decides to leave the control of its Band List with the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect.

(2) Si la bande décide de laisser la responsabilité de la tenue de sa liste au ministère en vertu du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le Ministre de la décision.

Avis au Ministre

Subsequent band control of membership

(3) Notwithstanding a decision under subsection (1), a band may, at any time after that decision is taken, assume control of its Band List under section 10.

(3) Malgré la décision visée au paragraphe (1), la bande peut, en tout temps après cette décision, assumer la responsabilité de la tenue de sa liste en vertu de l'article 10.

Seconde décision

Return of control to Department

13.2 (1) A band may, at any time after assuming control of its Band List under section 10, decide to return control of the Band List to the Department if a majority of the electors of the band gives its consent to that decision.

13.2 (1) La bande peut, en tout temps après avoir assumé la responsabilité de la tenue de sa liste en vertu de l'article 10, décider d'en remettre la responsabilité au ministère à condition d'y être autorisée par la majorité de ses électeurs.

Transfert de responsabilité au ministère

Notice to the Minister and copy of membership rules

(2) Where a band decides to return control of its Band List to the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect and shall provide the Minister with a copy of the Band List and a copy of all the membership rules that were established by the band under subsection 10(2) while the band maintained its own Band List.

(2) Lorsque la bande décide de remettre la responsabilité de la tenue de sa liste au ministère en vertu du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le Ministre de la décision et lui transmet une copie de la liste et le texte des règles d'appartenance fixées par la bande conformément au paragraphe 10(2) pendant qu'elle assumait la responsabilité de la tenue de sa liste.

Avis au Ministre et texte des règles

Transfer of responsibility to Department

(3) Where a notice is given under subsection (2) in respect of a Band List, the maintenance of that Band List shall be the responsibility of the Department from the date on which the notice is received and from that time the Band List shall be maintained in accordance with the membership rules set out in section 11.

(3) Lorsqu'est donné l'avis prévu au paragraphe (2) à l'égard d'une liste de bande, la tenue de cette dernière devient la responsabilité du ministère à compter de la date de réception de l'avis. Elle est tenue, à compter de cette date, conformément aux règles d'appartenance prévues à l'article 11.

Transfert de responsabilités au ministère



CHAPTER 98.

An Act respecting Indians.

SHORT TITLE.

1. This Act may be cited as the Indian Act. R.S., Short title. c. 81, s. 1.

INTERPRETATION.

2. In this Act, unless the context otherwise requires, Definitions.
- (a) "agent" or "Indian agent" means and includes a "Agent."
commissioner, assistant commissioner, superintendent, "Indian agent."
agent or other officer acting under the instructions of
the Superintendent General;
- (b) "band" means any tribe, band or body of Indians "Band."
who own or are interested in a reserve or in Indian
lands in common, of which the legal title is vested in
the Crown, or who share alike in the distribution of
any annuities or interest moneys for which the Gov-
ernment of Canada is responsible; and, when action
is being taken by the band as such, means the band
in council;
- (c) "Department" means the Department of Indian "Depart-
ment."
Affairs;
- (d) "Indian" means "Indian."
- (i) any male person of Indian blood reputed to be-
long to a particular band,
- (ii) any child of such person,
- (iii) any woman who is or was lawfully married to
such person;
- (e) "Indian lands" means any reserve or portion of a "Indian
lands."
reserve which has been surrendered to the Crown;
- (f) "intoxicants" means and includes all spirits, strong "Intoxi-
cants."
waters, spirituous liquors, wines, or fermented or com-
pounded liquors, or intoxicating drink of any kind
whatsoever, and any intoxicating liquor or fluid, and
opium, and any preparation thereof, whether liquid
or solid, and any other intoxicating drug or substance,
and tobacco or tea mixed or compounded or impreg-
nated

Care of Indian cemeteries, and common property which should be preserved.

Sales at public auction.

Regulations to enforce these provisions.

Final decision of Governor in Council.

Report to Parliament.

Enfranchisement of Indians.

last preceding section, but the Governor in Council may reserve and set apart from the funds of the band such sum as the Superintendent General may consider necessary for the perpetual care and protection of any Indian cemetery or burial plot belonging to such Indians, and any other common property which in the opinion of the Superintendent General should be preserved as such.

2. No part of such land or other property shall be sold to any person other than a member of the band except by public auction after three months' advertisement in the public press. 1920, c. 50, s. 3.

112. The Governor in Council may make regulations for the carrying out of the provisions of the two sections immediately preceding this section, and subject to the provisions of this Act for determining how the land, capital moneys and other property of a band, or any part thereof, shall be divided, granted and paid, upon the enfranchisement of any Indian or Indians belonging to such band or having any interest in any of the property of such band, and decide any questions arising under the said sections, and the decision of the Governor in Council thereon shall be final and conclusive. 1920, c. 50, s. 3.

113. The Superintendent General shall, within fifteen days after the opening of each session of Parliament, submit to both Houses of Parliament a list of the Indians enfranchised under this Act during the previous fiscal year, and the amount of land and money granted and paid to each Indian so enfranchised. 1920, c. 50, s. 3.

114. If an Indian who holds no land in a reserve, does not reside on a reserve and does not follow the Indian mode of life, makes application to be enfranchised, and satisfies the Superintendent General that he is self-supporting and fit to be enfranchised, and surrenders all claims whatsoever to any interest in the lands of the band to which he belongs, and accepts his share of the funds at the credit of the band including the principal of the annuities of the band, to which share he would have been entitled had he been enfranchised under the foregoing sections of the Act, in full of all claims to the property of the band, or in case the band to which he belongs has no funds or principal of annuities, surrenders all claims whatsoever to any property of the band, the Governor in Council may order that such Indian be enfranchised and paid his said share if any, and from the date of such order such Indian, together with his wife and unmarried minor children, shall be held to be enfranchised.

2. Any unmarried Indian woman of the age of twenty-one years, and any Indian widow and her minor unmarried children, may be enfranchised in the like manner in every respect as a male Indian and his said children. Indian women.

3. This section shall apply to the Indians in any part of Canada. 1918, c. 26, s. 6. Application.

Offences and Penalties.

115. Every person, or Indian other than an Indian of the band, who, without the authority of the Superintendent General, resides or hunts upon, occupies or uses any land or marsh, or who resides upon or occupies any road, or allowance for road, running through any reserve belonging to or occupied by such band shall be liable, upon summary conviction, to imprisonment for a term not exceeding one month or to a penalty not exceeding ten dollars and not less than five dollars, with costs of prosecution, half of which penalty shall belong to the informer. R.S., c. 81, s. 124. Residing, etc., upon any reserve without authority. Penalty.

116. Any person or Indian who, being lawfully required by an Indian agent, a chief of the band occupying a reserve, or a constable, Refusing to remove from reserve on demand of chief.

(a) to remove with his family, if any, from the land, marsh, road, or allowance for road upon which he is or has settled or is residing or hunting, or which he occupies;

(b) to remove his cattle from such land or marsh;

(c) to cease fishing in any marsh, river, stream or creek on or running through a reserve; or

(d) to cease using, occupying, settling or residing upon any land, river, stream, creek, marsh, road or allowance for a road in a reserve;

fails to comply with such requirement, shall, upon summary conviction, be liable to a penalty of not less than five dollars and not more than ten dollars for every day during which such failure continues, and, in default of payment, to be imprisoned for a term not exceeding three months. R.S., c. 81, s. 125. Penalty.

117. Every Indian, not being an Indian of the band, who, in the case where shooting privileges over a reserve or part of a reserve, or fishing privileges in any marsh, pond, river, stream or creek upon or running through a reserve, have with the consent of the Indians of the band, been leased or granted to any person, and, in such case, every person not, under such lease or grant, entitled so to do, who hunts, shoots, kills or destroys any game animals or birds, or who fishes for, takes, catches or kills any fish Shooting or fishing on reserved territory.

(c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b);

(d) is the legitimate child of

(i) a male person described in paragraph (a) or (b), or

(ii) a person described in paragraph (c);

(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d); or

(f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).

(ii) soit que le gouverneur en conseil a déclarée constituer une bande pour l'application de la présente loi;

c) elle est du sexe masculin et descendante directe par les hommes d'une personne du sexe masculin décrite à l'alinéa a) ou b);

d) elle est l'enfant légitime :

(i) soit d'une personne du sexe masculin décrite à l'alinéa a) ou b),

(ii) soit d'une personne décrite à l'alinéa c);

e) elle est l'enfant illégitime d'une personne du sexe féminin décrite à l'alinéa a), b) ou d);

f) elle est l'épouse ou la veuve d'une personne ayant le droit d'être inscrite aux termes de l'un des alinéas a) à e).

Exception

(2) Paragraph (1)(e) applies only to persons born after August 13, 1956. R.S., c. I-6, s. 11.

(2) L'alinéa (1)e) s'applique seulement aux personnes nées après le 13 août 1956. S.R., ch. I-6, art. 11.

Exception

Persons not entitled to be registered

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

(a) a person who

(i) has received or has been allotted half-breed lands or money scrip,

(ii) is a descendant of a person described in subparagraph (i),

(iii) is enfranchised, or

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

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

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

Protest re illegitimate child

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) may be protested at any time within twelve months after the addition, and if on the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

12. (1) Les personnes suivantes n'ont pas le droit d'être inscrites :

a) une personne qui, selon le cas :

(i) a reçu, ou à qui il a été attribué, des terres ou certificats d'argent de métis,

(ii) est un descendant d'une personne décrite au sous-alinéa (i),

(iii) est émancipée,

(iv) est née d'un mariage célébré après le 4 septembre 1951 et a atteint l'âge de vingt et un ans, dont la mère et la grand-mère paternelle ne sont pas des personnes décrites à l'alinéa 11(1)a), b) ou d) ou admises à être inscrites en vertu de l'alinéa 11(1)e),

sauf si, étant une femme, cette personne est l'épouse ou la veuve de quelqu'un décrit à l'article 11;

b) une femme qui a épousé un non-Indien, sauf si cette femme devient subséquemment l'épouse ou la veuve d'une personne décrite à l'article 11.

Personnes n'ayant pas droit à l'inscription

Protestation au sujet d'un enfant illégitime

(2) L'addition, à une liste de bande, du nom d'un enfant illégitime décrit à l'alinéa 11(1)e) peut faire l'objet d'une protestation dans les douze mois de l'addition; si, à la suite de la protestation, il est décidé que le père de l'enfant n'était pas un Indien, l'enfant n'a pas le droit d'être inscrit selon cet alinéa.

Certificate

(3) The Minister may issue to any Indian to whom this Act ceases to apply a certificate to that effect.

(3) Le ministre peut délivrer à tout Indien auquel la présente loi cesse de s'appliquer, un certificat à cet effet.

Certificat

Exception

(4) Subparagraphs (1)(a)(i) and (ii) do not apply to a person who

(4) Les sous-alinéas (1)a(i) et (ii) ne s'appliquent pas à une personne qui, selon le cas :

Exception

(a) pursuant to this Act is registered as an Indian on August 13, 1958; or

a) en conformité avec la présente loi, est inscrite à titre d'Indien le 13 août 1958;

(b) is a descendant of a person described in paragraph (a) of this subsection.

b) est un descendant d'une personne désignée à l'alinéa a) du présent paragraphe.

Idem

(5) Subsection (2) applies only to persons born after August 13, 1956. R.S., c. I-6, s. 12.

(5) Le paragraphe (2) s'applique seulement aux personnes nées après le 13 août 1956. S.R., ch. I-6, art. 12.

Idem

Admission to band and transfer

13. Subject to the approval of the Minister and, if the Minister so directs, to the consent of the admitting band,

13. Sous réserve de l'approbation du ministre et, si ce dernier l'ordonne, sous réserve du consentement de la bande qui accorde l'admission :

Admission au sein d'une bande et transfert d'un membre

(a) a person whose name appears on a General List may be admitted into membership of a band with the consent of the council of the band; and

a) une personne dont le nom apparaît sur une liste générale peut être admise au sein d'une bande avec le consentement du conseil de la bande;

(b) a member of a band may be admitted into membership of another band with the consent of the council of the latter band. R.S., c. I-6, s. 13.

b) un membre d'une bande peut être admis parmi les membres d'une autre bande avec le consentement du conseil de celle-ci. S.R., ch. I-6, art. 13.

Woman marrying outside band

14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, but if she marries a member of another band, she thereupon becomes a member of the band of which her husband is a member. R.S., c. I-6, s. 14.

14. Une femme qui est membre d'une bande cesse d'en faire partie si elle épouse une personne qui n'en est pas membre, mais si elle épouse un membre d'une autre bande, elle entre dès lors dans la bande à laquelle appartient son mari. S.R., ch. I-6, art. 14.

Femme qui épouse un homme n'étant pas de la bande

Payments to persons ceasing to be members

15. (1) Subject to subsection (2), an Indian who becomes enfranchised or who otherwise ceases to be a member of a band is entitled to receive from Her Majesty

15. (1) Sous réserve du paragraphe (2), un Indien qui devient émancipé ou qui, d'autre manière, cesse d'être membre d'une bande a droit de recevoir de Sa Majesté :

Paiements aux personnes qui cessent d'être membres

(a) one per capita share of the capital and revenue moneys held by Her Majesty on behalf of the band; and

a) une part *per capita* des fonds en capital et de revenu détenus par Sa Majesté au nom de la bande;

(b) an amount equal to the amount that in the opinion of the Minister he would have received during the next succeeding twenty years under any treaty then in existence between the band and Her Majesty if he had continued to be a member of the band.

b) un montant égal à la somme que, de l'avis du ministre, il aurait reçue durant les vingt années suivantes aux termes de tout traité alors en vigueur entre la bande et Sa Majesté s'il était demeuré membre de la bande.

Payments not to be made in certain cases

(2) A person is not entitled to receive any amount under subsection (1)

(2) Une personne n'a pas droit de recevoir un montant quelconque sous le régime du paragraphe (1) si, selon le cas :

Certains cas où les paiements ne sont pas versés

(a) if his name was removed from the Indian register pursuant to a protest made under section 9; or

a) son nom a été rayé du registre des Indiens à la suite d'une protestation faite en vertu de l'article 9;

ENFRANCHISEMENT

ÉMANCIPATION

Enfranchisement of Indian and wife and minor children

109. (1) On the report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian

- (a) is of the full age of twenty-one years,
- (b) is capable of assuming the duties and responsibilities of citizenship, and
- (c) when enfranchised, will be capable of supporting himself and his dependants,

the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised.

Enfranchisement of married women

(2) On the report of the Minister that an Indian woman married a person who is not an Indian, the Governor in Council may by order declare that the woman is enfranchised as of the date of her marriage and, on the recommendation of the Minister, may by order declare that all or any of her children are enfranchised as of the date of the marriage or such other date as the order may specify.

Where wife living apart

(3) Where, in the opinion of the Minister, the wife of an Indian is living apart from her husband, the names of his wife and his minor children who are living with the wife shall not be included in an order under subsection (1) that enfranchises the Indian unless the wife has applied for enfranchisement, but where the Governor in Council is satisfied that the wife is no longer living apart from her husband, the Governor in Council may by order declare that the wife and the minor children are enfranchised.

Order of enfranchisement

(4) A person is not enfranchised unless his name appears in an order of enfranchisement made by the Governor in Council. R.S., c. I-6, s. 109.

Enfranchised person ceases to be Indian

110. A person with respect to whom an order for enfranchisement is made under this Act shall, from the date thereof, or from the date of enfranchisement provided for therein, be deemed not to be an Indian within the meaning of this Act or any other statute or law. R.S., c. I-6, s. 110.

Sale of lands of enfranchised Indian

111. (1) On the issue of an order of enfranchisement, any interest in land and improvements on an Indian reserve of which the enfranchised Indian was in lawful possession or over which he exercised rights of ownership at the time of his enfranchisement, may be dis-

109. (1) Lorsque le ministre signale, dans un rapport, qu'un Indien a demandé l'émancipation et qu'à son avis, ce dernier, à la fois :

- a) est âgé de vingt et un ans;
- b) est capable d'assumer les devoirs et les responsabilités de la citoyenneté;
- c) pourra, une fois émancipé, subvenir à ses besoins et à ceux des personnes à sa charge,

le gouverneur en conseil peut déclarer par décret que l'Indien, son épouse et ses enfants mineurs célibataires sont émancipés.

(2) Sur le rapport du ministre, indiquant qu'une Indienne a épousé un non-Indien, le gouverneur en conseil peut, par décret, déclarer que la femme en question est émancipée à compter de son mariage et, sur la recommandation du ministre, peut, par décret, déclarer que tous les enfants ou certains d'entre eux sont émancipés à compter de la date du mariage ou de telle autre date que le décret peut spécifier.

(3) Lorsque, de l'avis du ministre, l'épouse d'un Indien vit séparée de son mari, les noms de son épouse et de ses enfants mineurs qui demeurent avec l'épouse ne peuvent être inclus dans un décret, prévu par le paragraphe (1), qui émancipe l'Indien à moins que l'épouse n'ait demandé l'émancipation, mais quand le gouverneur en conseil est convaincu que l'épouse n'est plus séparée de son mari, il peut déclarer par décret que l'épouse et les enfants mineurs sont émancipés.

(4) Une personne n'est émancipée que si son nom apparaît dans un décret d'émancipation pris par le gouverneur en conseil. S.R., ch. I-6, art. 109.

110. Une personne à l'égard de laquelle un décret d'émancipation est pris en vertu de la présente loi est réputée, à compter de la date de ce décret ou de la date d'émancipation qu'il prévoit, ne pas être un Indien au sens de la présente loi ou de quelque autre loi ou règle de droit. S.R., ch. I-6, art. 110.

111. (1) Dès la prise d'un décret d'émancipation, les droits sur des terres et améliorations sur une réserve indienne, dont l'Indien émancipé était légalement en possession ou sur lesquels il exerçait des droits de propriété lors de son émancipation, peuvent être aliénés par cet

Émancipation d'un Indien, de son épouse et de ses enfants mineurs

Émancipation dans le cas d'une femme mariée

Épouse séparée de son mari

Décret d'émancipation

La personne émancipée cesse d'être un Indien

Vente de terres appartenant à un Indien émancipé

CHAPTER 18

CHAPITRE 18

An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in *McIvor v. Canada* (Registrar of Indian and Northern Affairs)

Loi favorisant l'équité entre les sexes relativement à l'inscription au registre des Indiens en donnant suite à la décision de la Cour d'appel de la Colombie-Britannique dans l'affaire *McIvor v. Canada* (Registrar of Indian and Northern Affairs)

[Assented to 15th December, 2010]

[Sanctionnée le 15 décembre 2010]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

SHORT TITLE

TITRE ABRÉGÉ

Short title 1. This Act may be cited as the *Gender Equity in Indian Registration Act*.

Titre abrégé 1. *Loi sur l'équité entre les sexes relativement à l'inscription au registre des Indiens*.

R.S., c. I-5

INDIAN ACT

LOI SUR LES INDIENS

L.R., ch. I-5

R.S., c. 32
(1st Supp.), s. 4

2. (1) The portion of subsection 6(1) of the French version of the *Indian Act* before paragraph (a) is replaced by the following:

2. (1) Le passage du paragraphe 6(1) de la version française de la *Loi sur les Indiens* précédant l'alinéa a) est remplacé par ce qui suit :

L.R., ch. 32
(1^{er} suppl.),
art. 4

Personnes ayant
droit à
l'inscription

6. (1) Sous réserve de l'article 7, toute personne a le droit d'être inscrite dans les cas suivants :

6. (1) Sous réserve de l'article 7, toute personne a le droit d'être inscrite dans les cas suivants :

Personnes ayant
droit à
l'inscription

R.S., c. 32
(1st Supp.), s. 4

(2) Paragraph 6(1)(a) of the Act is replaced by the following:

(2) L'alinéa 6(1)a) de la même loi est remplacé par ce qui suit :

L.R., ch. 32
(1^{er} suppl.),
art. 4

(a) that person was registered or entitled to be registered immediately prior to April 17, 1985;

a) elle était inscrite ou avait le droit de l'être le 16 avril 1985;

R.S., c. 32
(1st Supp.), s. 4

(3) Paragraph 6(1)(c) of the Act is replaced by the following:

(3) L'alinéa 6(1)c) de la même loi est remplacé par ce qui suit :

L.R., ch. 32
(1^{er} suppl.),
art. 4

(c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under

c) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-

subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(c.1) that person

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

(ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,

(iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and

(iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;

(4) Subsection 6(3) of the Act is amended by striking out "and" at the end of paragraph (a), by adding "and" at the end of paragraph (b) and by adding the following after paragraph (b):

(c) a person described in paragraph (1)(c.1) and who was no longer living on the day on which that paragraph comes into force is deemed to be entitled to be registered under that paragraph.

alinéa 12(1)(a)(iv), de l'alinéa 12(1)(b) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)(a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

c.1) elle remplit les conditions suivantes :

(i) le nom de sa mère a été, en raison du mariage de celle-ci, omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu de l'alinéa 12(1)(b) ou en vertu du sous-alinéa 12(1)(a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions,

(ii) son autre parent n'a pas le droit d'être inscrit ou, s'il est décédé, soit n'avait pas ce droit à la date de son décès, soit n'était pas un Indien à cette date dans le cas d'un décès survenu avant le 4 septembre 1951,

(iii) elle est née à la date du mariage visé au sous-alinéa (i) ou après cette date et, à moins que ses parents se soient mariés avant le 17 avril 1985, est née avant cette dernière date,

(iv) elle a eu ou a adopté, le 4 septembre 1951 ou après cette date, un enfant avec une personne qui, lors de la naissance ou de l'adoption, n'avait pas le droit d'être inscrite;

(4) Le paragraphe 6(3) de la même loi est modifié par adjonction, après l'alinéa b), de ce qui suit :

c) la personne visée à l'alinéa (1)(c.1) et qui est décédée avant l'entrée en vigueur de cet alinéa est réputée avoir le droit d'être inscrite en vertu de celui-ci.

-3. Section 11 of the Act is amended by adding the following after subsection (3):

3. L'article 11 de la même loi est modifié par adjonction, après le paragraphe (3), de ce qui suit :

Additional membership rule— paragraph 6(1)(c.1)

(3.1) A person is entitled to have the person's name entered in a Band List maintained in the Department for a band if the person is entitled to be registered under paragraph 6(1)(c.1) and the person's mother ceased to be a member of that band by reason of the circumstances set out in subparagraph 6(1)(c.1)(i).

(3.1) Toute personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour celle-ci au ministère si elle a le droit d'être inscrite en vertu de l'alinéa 6(1)c.1) et si sa mère a cessé d'être un membre de la bande en raison des circonstances prévues au sous-alinéa 6(1)c.1)(i).

Règle d'appartenance supplémentaire — alinéa 6(1)c.1)

REPORT TO PARLIAMENT

RAPPORT AU PARLEMENT

Report

3.1 (1) The Minister of Indian Affairs and Northern Development shall cause to be laid before each House of Parliament, not later than two years after this Act comes into force, a report on the provisions and implementation of this Act.

3.1 (1) Au plus tard deux ans après la date d'entrée en vigueur de la présente loi, le ministre des Affaires indiennes et du Nord canadien fait déposer devant chaque chambre du Parlement un rapport sur les dispositions de la présente loi et sa mise en oeuvre.

Rapport

Review by committee

(2) Such committee of Parliament as may be designated or established for the purposes of this subsection shall, forthwith after the report of the Minister is tabled under subsection (1), review that report and shall, in the course of that review, undertake a review of any provision of this Act.

(2) Le comité parlementaire désigné ou constitué pour l'application du présent paragraphe examine sans délai le rapport visé au paragraphe (1) après son dépôt. Dans le cadre de l'examen, le comité procède à la révision des dispositions de la présente loi.

Examen par le comité

RELATED PROVISIONS

DISPOSITIONS CONNEXES

Definitions

4. In sections 5 to 8, "band", "Band List", "council of a band", "registered" and "Registrar" have the same meaning as in subsection 2(1) of the *Indian Act*.

4. Aux articles 5 à 8, « bande », « conseil de bande », « inscrit », « liste de bande » et « registraire » s'entendent au sens du paragraphe 2(1) de la *Loi sur les Indiens*.

Définitions

Registration continued

5. For greater certainty, subject to any deletions made by the Registrar under subsection 5(3) of the *Indian Act*, any person who was, immediately before the day on which this Act comes into force, registered and entitled to be registered under paragraph 6(1)(a) or (c) of the *Indian Act* continues to be registered.

5. Il est entendu que, sous réserve de tout retranchement effectué par le registraire en vertu du paragraphe 5(3) de la *Loi sur les Indiens*, toute personne qui, à l'entrée en vigueur de la présente loi, était inscrite et avait le droit de l'être en vertu des alinéas 6(1)a) ou c) de la *Loi sur les Indiens* le demeure.

Inscription maintenue

Registration entitlements recognized

6. For greater certainty, for the purposes of paragraph 6(1)(f) and subsection 6(2) of the *Indian Act*, the Registrar must recognize any entitlements to be registered that existed under paragraph 6(1)(a) or (c) of that Act immediately before the day on which this Act comes into force.

6. Il est entendu que, pour l'application de l'alinéa 6(1)f) et du paragraphe 6(2) de la *Loi sur les Indiens*, le registraire est tenu de reconnaître tout droit d'être inscrit qui existait en vertu des alinéas 6(1)a) ou c) de cette loi à l'entrée en vigueur de la présente loi.

Droit à l'inscription maintenu

Membership
maintained—
paragraphs
6(1)(a) and (c)

7. For greater certainty, subject to any membership rules established by a band, any person who, immediately before the day on which this Act comes into force, was entitled to be registered under paragraph 6(1)(a) or (c) of the *Indian Act* and had the right to have their name entered in the Band List maintained by that band continues to have that right.

7. Il est entendu que, sous réserve des règles d'appartenance fixées par la bande, toute personne qui, à l'entrée en vigueur de la présente loi, avait le droit d'être inscrite en vertu des alinéas 6(1)(a) ou c) de la *Loi sur les Indiens* et avait droit à ce que son nom soit consigné dans la liste de bande tenue par celle-ci conserve le droit à ce que son nom y soit consigné.

Appartenance
maintenue :
alinéas 6(1)(a)
et c)

Membership
maintained—
paragraph
6(1)(c.1)

8. For greater certainty, subject to any membership rules established by a band on or after the day on which this Act comes into force, any person who is entitled to be registered under paragraph 6(1)(c.1) of the *Indian Act*, as enacted by subsection 2(3), and who had, immediately before that day, the right to have their name entered in the Band List maintained by that band continues to have that right.

8. Il est entendu que, sous réserve des règles d'appartenance fixées par la bande à compter de la date d'entrée en vigueur de la présente loi, toute personne qui a le droit d'être inscrite en vertu de l'alinéa 6(1)(c.1) de la *Loi sur les Indiens*, édicté par le paragraphe 2(3), et qui, à cette date, avait droit à ce que son nom soit consigné dans la liste de bande tenue par celle-ci conserve le droit à ce que son nom y soit consigné.

Appartenance
maintenue :
alinéa 6(1)(c.1)

No liability

9. For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty, or a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because

9. Il est entendu qu'aucune personne ni aucun organisme ne peut réclamer ou recevoir une compensation, des dommages-intérêts ou une indemnité de l'État, de ses préposés ou mandataires ou d'un conseil de bande en ce qui concerne les faits — actes ou omissions — accomplis de bonne foi dans l'exercice de leurs attributions, du seul fait qu'une personne n'était pas inscrite — ou que le nom d'une personne n'était pas consigné dans une liste de bande — à l'entrée en vigueur de la présente loi et que l'un de ses parents a le droit d'être inscrit en vertu de l'alinéa 6(1)(c.1) de la *Loi sur les Indiens*, édicté par le paragraphe 2(3).

Absence de
responsabilité

(a) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this Act comes into force; and

(b) one of the person's parents is entitled to be registered under paragraph 6(1)(c.1) of the *Indian Act*, as enacted by subsection 2(3).

COMING INTO FORCE

ENTRÉE EN VIGUEUR

Order in council

10. This Act comes into force, or is deemed to have come into force, on a day, on or after April 5, 2010, to be fixed by order of the Governor in Council.

10. La présente loi entre en vigueur ou est réputée être entrée en vigueur à la date fixée par décret, laquelle ne peut être antérieure au 5 avril 2010.

Décret

2013 FC 509, 2013 CF 509
Federal Court

Stoney v. Sawridge First Nation

2013 CarswellNat 1434, 2013 CarswellNat 2006, 2013 FC 509, 2013 CF 509, 228 A.C.W.S. (3d) 605, 432 F.T.R. 253
(Eng.)

Maurice Felix Stoney, Applicant and Sawridge First Nation, Respondent

Aline Elizabeth (McGillivray) Huzar and June Martha (McGillivray) Kolosky, Applicants and Sawridge First
Nation, Respondent

R.L. Barnes J.

Heard: March 05, 2013
Judgment: May 15, 2013
Docket: T-923-12, T-922-12

Counsel: Priscilla Kennedy, for Applicants
Edward H. Molstad, for Respondent

Subject: Public

Headnote

Aboriginal law --- Government of Aboriginal people — Membership

Applicants were descendants of individuals who were at one time members of First Nation group, but who, either voluntarily or by operation of law, lost their band memberships — Applicants were excluded from membership in First Nation by chief and council — Appeal committee upheld chief and council's decision — Applicants brought application for judicial review — Application dismissed — Applicants did not qualify for automatic band membership — Applicants' only option was to apply for membership in accordance with membership rules promulgated by First Nation — Further, applicants were named as plaintiffs in previous action seeking mandatory relief requiring that their names be added to First Nation's membership list, and that action was struck out — Attempt by applicants to reargue question of their automatic right of membership in First Nation was barred by principle of issue estoppel — There was no evidence to make finding of institutional bias — There was no evidence to support finding of breach of s. 15 of Canadian Charter of Rights and Freedoms.

APPLICATION for judicial review of appeal committee's decision upholding chief and council's decision to exclude applicants from membership in First Nation.

R.L. Barnes J.:

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

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

3 The Applicants Aline Huzar and June Kolosky are sisters and, like Mr. Stoney, they are the grandchildren of Johnny Stoney. The mother of Ms. Huzar and Ms. Kolosky was Johnny Stoney's daughter, Mary Stoney. Mary Stoney married Simon McGillivray in 1921. Because of her marriage Mary Stoney lost both her Indian status and her membership in Sawridge by operation of law. When Ms. Huzar and Ms. Kolosky were born in 1941 and 1937 respectively Mary Stoney was not a member of the Sawridge Band First Nation and she did not reacquire membership before her death in 1979.

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

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

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

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

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

9 I accept that, if the Applicants had such an acquired right of membership by virtue of their ancestry, Sawridge had no right to refuse their membership applications: see *Sawridge Band v. R.*, 2004 FCA 16 (F.C.A.) at para 26, [2004] F.C.J. No. 77 (F.C.A.).

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

11 A plain reading of sections 6 and 7 of Bill C-31 indicates that Parliament intended only that persons who had their Indian status and band memberships directly removed by operation of law ought to have those memberships unconditionally restored. The only means by which the descendants of such persons could gain band membership (as distinct from regaining their Indian status) was to apply for it in accordance with a First Nation's approved membership rules. This distinction was, in fact, recognized by Justice James Hugessen in *Sawridge Band v. R.*, 2003 FCT 347 (Fed. T.D.) at paras 27 to 30, [2003] 4 F.C. 748 (Fed. T.D.):

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

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

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

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

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

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

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

[Emphasis added]

This decision was upheld on appeal in *Sawridge Band v. R.*, 2004 FCA 16, [2004] F.C.J. No. 77 (F.C.A.).

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

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

[Emphasis added]

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

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

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

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

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

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

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

[5] It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as

disclosing no reasonable cause of action.

See *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.).

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

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

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

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

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

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

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

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

Judgment

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

Application dismissed.

2000 CarswellNat 1132
Federal Court of Appeal

Huzar v. Canada

2000 CarswellNat 1132, 2000 CarswellNat 5603, [2000] F.C.J. No. 873, 258 N.R. 246

Her Majesty the Queen, in Right of Canada, Department of Indian and Northern Affairs Canada and Walter Patrick Twinn, as Chief of the Sawridge Indian Band and the Sawridge Indian Band, Defendants (Appellants) and Aline Elizabeth Huzar, June Martha Kolosky, William Bartholomew McGillivray, Margaret Hazel Anne Blair, Clara Hebert, John Edward Joseph McGillivray, Maurice Stoney, Allen Austin McDonald, Lorna Jean Elizabeth McRee, Frances Mary Tees, Barbara Violet Miller (nee McDonald), Plaintiffs (Respondents)

Décary J.A., Evans J.A., Sexton J.A.

Judgment: June 13, 2000
Docket: A-326-98

Counsel: *Mr. Philip P. Healey*, for Defendants/Appellants.
Mr. Peter V. Abrametz, for Plaintiffs/Respondents.

Subject: Public; Civil Practice and Procedure

Headnote

Native law --- Bands and band government — Miscellaneous issues

Practice --- Pleadings — Amendment — Application to amend — Practice and procedure

Administrative law --- Action for declaration

APPEAL from order granting plaintiffs' motion to amend statement of claim and dismissing defendants' motion to strike the claim.

Evans J.A.:

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

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

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

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

5 It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

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

Appeal allowed.

	Clerk's stamp:
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	 <p>IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c, T-8, AS AMENDED</p> <p>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")</p>
APPLICANTS	<p>ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Trustees")</p>
DOCUMENT	AFFIDAVIT OF ELIZABETH POITRAS
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	<p>Attention: Janet L. Hutchison Chamberlain Hutchison #155, 10403 - 122 Street NW Edmonton, Alberta T5N 4C1</p> <p>Telephone: (780) 423-3661 Fax: (780) 426-1293 File No: 51433</p>

AFFIDAVIT OF ELIZABETH POITRAS

Sworn on December 7, 2011

I, ELIZABETH POITRAS, of Elk Point, Alberta, SWEAR THAT:

1. I am currently a member of the Sawridge Indian Band and a Sawridge Trust beneficiary, as such, have personal knowledge of the matters sworn to herein, unless stated to be based on information and belief, in which case I verily believe the same to be true.
2. I lost my Indian status and Sawridge Band membership as a young woman when I married Homer Poitras, who was not a registered Indian, on October 16, 1965. When the Indian Act was amended in 1985 to allow women such as myself to regain their status and membership, I applied for reinstatement of my Indian status and my Sawridge Band membership.
3. My Registered Indian Status was restored by the Department of Indian Affairs. I was told by the Department of Indian Affairs that the Sawridge Indian Band had taken control of its own membership effective July 8, 1985 and that I would have to apply directly to the Band for membership.
4. Shortly after I received that information, I verbally requested membership for myself and my children, all of whom except Tracey were minors at that time, in a phone conversation with Chief Walter Twinn. I understood from that conversation my children and I would be reinstated to Band membership but that did not occur.
5. I later learned from the Department of Indian Affairs that the Sawridge Indian Band had a membership code and required an application form to be filled out. I did not receive that information from the Sawridge Indian Band directly. I then began asking the Sawridge Indian Band to provide me with information on its membership process and its membership application form but received no response.
6. In 1988, I began a court action in the Federal Court of Canada to have my Band membership recognized. The action is Federal Court Action T-2655-89.
7. After a lengthy wait, I received an application form from Sawridge Indian Band and submitted it. My application was dated December 16, 1994. At that time, the application form was approximately 75 pages and requested extensive and often intrusive personal information. It was never clear to me, nor did Sawridge Indian Band explain, why that information was needed to decide my Band membership.
8. In my applications, I was also seeking membership for the children Homer and I had - namely Tracey, born in 1966; Crystal Marie, born in 1968; Heather, born in 1970; Nicole Tanya, born in 1974; and Bruce, born in 1978. We also adopted our grandson, Corbin, born in 1988, and I sought membership for him as well.

9. As of the date of this affidavit, I have never received a response or a decision from Sawridge Indian Band on my application for membership or on my children's right to membership.
10. My Band membership was eventually recognized as a result of an injunction issued by the Federal Court in Sawridge vs. Canada. Attached to this my Affidavit as Exhibits "A" and "B", respectively, are the Federal Court trial division and Federal Court of Appeal decisions on the injunction. In these decisions, the court referred to the women, including myself, who were restored to status by Bill C-31 as "acquired rights women".
11. While I do not know the dates on which this occurred, I know that three of the other acquired rights women, Clara Midbo, Bertha L'Hirondelle and Freida Draney, were not only restored to membership but had their children restored to membership. I am aware of this because I saw their names on a membership voting list posted for elections some time after my membership was restored. These ladies are also the sisters of the late Chief Walter Twinn.
12. I am informed by my daughter, Tracey Poitras-Collins, that she has been applying to Sawridge Indian Band for membership directly since approximately 1985 and has never received a response to her applications. Attached to this my Affidavit as Exhibit "C" is a true copy of a Sawridge application form that Tracey advises me that she received from the Sawridge Indian Band. I am informed by Tracey and do verily believe that this is a recent version of the Sawridge Indian Band Membership application.
13. On or about October 1st, 2011 I was at a Sawridge Band meeting and I took a copy of membership applications completed by my children, Tracey, Crystal, Corbin and Nicole and hand delivered them to Chief Roland Twinn. I also advised the originals were being delivered to the Band office. I am informed by my children and do verily believe that they have not received any response to their membership applications at this time.
14. I have never been able to get an explanation from the Sawridge Indian Band as to why my children have been treated differently from the children of the other acquired rights women.
15. I have attached as Exhibit "D" to this my affidavit, a true copy of what I understand to be the current version of the Sawridge membership code. As far as I am able to tell from comparing this Code to the ones I have seen in the past, the membership provisions have not changed from the membership code I saw in the 1980's.
16. Based on my knowledge and experience dealing with the Sawridge Indian Band membership process over the past 3 decades, I would say that the membership process is very unclear and lacks transparency. Applicants may not even receive a

decision on applications. If applications are processed and accepted, it is not clear why those applications have been dealt with while others that have been submitted earlier have not yet been decided.

17. I make this application in relation to the application filed by the 1985 Sawridge Trust Trustees in the within action.

SWORN BEFORE ME at St. Paul, Alberta,)
this 7 day of December, 2011.)

_____)
Commissioner for Oaths in and for the)
Province)
of Alberta)

Brenda Lee Yuschyshyn
My Commission will
Expire June 4, 2014.

Elizabeth D. Poitras
_____)
ELIZABETH POITRAS)

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

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000,
c.T-8 as amended

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS
SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN,
OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as
SAWRIDGE FIRST NATION, ON APRIL 15, 1985
(The "1985 SAWRIDGE TRUST")

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

QUESTIONING ON AFFIDAVIT
OF
ELIZABETH POITRAS

M.S. Poretti, Esq. For the Applicants
Ms. J.L. Hutchison For the Public Trustee

Susan Stelter Court Reporter

Edmonton, Alberta

9 April, 2015

1 gain access, or to gain membership in the Sawridge
2 First Nation was dealt with through your legal counsel
3 in the litigation that had been commenced for that
4 purpose. Is that fair?

5 A Yes, I just left it to my counsel.

6 Q Now was there a mediation that you were involved in, in
7 or around 2002, where you attempted to resolve the
8 issue?

9 A I believe it was in November, and it was in St. Albert
10 at, I don't know, at North Star?

11 Q Yes.

12 A Yeah, there was a mediation.

13 Q And you think that that was in November of 2002?

14 A I think so. I can't remember the date.

15 Q Obviously it would have been prior to March 2003 when
16 Justice Huggessen's order was granted?

17 A Yeah, yeah.

18 Q And I think we looked at this earlier. On March 27,
19 2003 Justice Huggessen granted an order whereby you
20 became a member of the Sawridge First Nation, correct?

21 A I and several other people.

22 Q Thank you. And those individuals that were included in
23 the order have sometimes been referred to as the
24 acquired-rights people, correct?

25 A Yes.

26 Q And as of today you are recognized as a member of the
27 Sawridge First Nation, correct?

1 A Yes, I am.

2 Q And you indicated this morning, in reference to your
3 application form, that you still had not received a
4 response from the Sawridge First Nation. And I think
5 what you have since told us you never received a yes or
6 a no?

7 A M-hm.

8 Q Now since becoming a member pursuant to court order on
9 March 27, 2003 is there some reason why you would
10 expect a response from Sawridge First Nation in
11 relation to your application?

12 A I don't really expect a response. I am just saying
13 that it still was never dealt with, that it does not
14 have to be dealt with now because I am a full band
15 member.

16 Q Fair enough. You have been a member for the last 12
17 years or so?

18 A Already, yeah.

19 Q So you don't expect a response at this point in time?

20 A No, no.

21 Q Correct?

22 A No, I don't.

23 Q Now if I could take you back to your Affidavit,
24 paragraph 11. And there in the first sentence you
25 indicate, "While I do not know the dates on which this
26 occurred, I know that three of the other
27 acquired-rights women, Clara Midbo, Bertha

1 A I don't recall when they started.

2 Q Do you recall prior to 2009 there being open band
3 meetings for the same purpose?

4 A I don't recall.

5 Q Where do you live currently?

6 A I live in, by Kehewin Lake, northeast of here.

7 Q In any event, you have attended some of these
8 assemblies from time to time?

9 A I have attended some of the assemblies.

10 Q Have you ever made any inquiries at these assemblies
11 with respect to your membership status, or the status
12 of the membership of your children?

13 A I have not.

14 Q Have you ever been at an assembly where membership
15 issues are raised by either the council or by members
16 of the nation?

17 A No.

18 Q Now I understand that you were recently elected as an
19 elder commissioner; is that correct?

20 A Yes.

21 Q And that was in the last month or so; is that correct?

22 A It was on March the 24th.

23 Q Can you explain -- March 24th of this year, correct?

24 A Yes.

25 Q Could you explain what an elder commissioner is?

26 A I am not really sure. I asked for a job description
27 and the Chief said you just have to look at the

1 constitution. So when I looked at the constitution it
2 is -- they are part of the governance, they -- when
3 there is issues that cannot be resolved the elders
4 commissioner can give advice, not to dictate, but
5 advice. And the Chief and council can choose to use
6 that advice not. And as an elder's commissioner I am
7 only one of two. I'm not the whole.

8 Q And so who would you be giving advice to? Would it be
9 Chief and council?

10 A I imagine it would be Chief and council. Like I said,
11 I did ask for a job description, but they haven't given
12 it to me. And it is an elected position. And I had to
13 run off with Freida Draney.

14 Q So you ran for a position and you weren't sure what you
15 were getting yourself into?

16 A I wanted to be part of the community somehow. Yes, I
17 did.

18 Q Well, hopefully that will work out for you.

19 A I hope so.

20 Q Do you know whether the elder commissioner provides
21 advice to the membership committee, for example?

22 A I am sure that they can. I was trying to figure out
23 the -- how it goes, is it Chief and council,
24 committees, commissioner; or is it committee, Chief and
25 council. I haven't been told yet, and I haven't
26 figured it out.

27 Q Is it fair to say, based on your understanding, that an

1 elder commissioner is a position where the Sawridge
2 First Nation elects two elders to fill that role to
3 provide advice to Chief and council, the membership
4 committee, and anyone else who may require some advice
5 in relation to matters of interest to the community?
6 Is that your understanding?

7 A Right now that is my understanding, yes.

8 Q Just off the record.

9 (Discussion off the Record.)

10 EXHIBIT NO. X FOR IDENTIFICATION:

11 LETTER DATED AUGUST 28, 1992 FROM MR.
12 MITCHELL TO MR. GLANCY.

13 EXHIBIT NO. Y FOR IDENTIFICATION:

14 LETTER DATED SEPTEMBER 3, 1992 FROM MR.
15 MITCHELL TO MR. GLANCY.

16 EXHIBIT NO. Z FOR IDENTIFICATION:

17 LETTER DATED SEPTEMBER 22, 1992 FROM MR.
18 MITCHELL TO MR. GLANCY.

19 EXHIBIT NO. AA FOR IDENTIFICATION:

20 LETTER DATED MARCH 11, 1994 FROM MR.
21 GLANCY TO MR. MCKINNEY.

22 EXHIBIT NO. BB FOR IDENTIFICATION:

23 LETTER DATED MAY 19, 1995 FROM MR.
24 GLANCY TO MR. MCKINNEY.

25 Q MR. PORETTI: We have now marked a number of
26 documents for identification purposes. These documents
27 are entitled without prejudice documents, and they have

2015 ABQB 799
Alberta Court of Queen's Bench

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)

2015 CarswellAlta 2373, 2015 ABQB 799, [2016] A.W.L.D. 313, 262 A.C.W.S. (3d) 1

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

In the Matter of The Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust, Respondents and Public Trustee of Alberta, Applicant

D.R.G. Thomas J.

Heard: September 2, 2015; September 3, 2015

Judgment: December 17, 2015

Docket: Edmonton 1103-14112

Counsel: Janet Hutchison, Eugene Meehan, Q.C., for Applicant, Public Trustee of Alberta
Edward H. Molstad, Q.C., for Respondent, Sawridge First Nation
Doris Bonora, Marco S. Poretti, for Respondents, 1985 Sawridge Trustees
J.J. Kueber, Q.C., for Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo
Karen Platten, Q.C., for Catherine Twinn

Subject: Civil Practice and Procedure; Constitutional; Estates and Trusts; Public; Human Rights

Headnote

Aboriginal law --- Practice and procedure — Discovery — Miscellaneous

Band set up trust to hold Band property on behalf of its members — Trustees sought court advice and direction with respect to proposed definition to term "beneficiaries" of trust — Public Trustee brought successful application to be appointed litigation representative of interested minors, on condition that costs would be paid by trust and that it would be shielded from any costs liability — Public Trustee brought application for production of records and information from band — Information sought concerned band membership, members who had or were seeking band membership, processes involved to determine whether individuals may become part of band, records of application processes and associated litigation, and how assets ended up in trust — Band resisted application — Application dismissed — Public Trustee used legally incorrect mechanism to seek materials from Band — Band was third party to litigation and therefore was not subject to same disclosure proceedings as trustees, who were parties — Proximal relationships were not to be used as bridge for disclosure obligations — Only documents which were potentially disclosable in Public Trustee's application were those that were relevant and material to issue before court — It was further necessary to refocus proceedings and provide well-defined process to achieve fair and just distribution of trust assets — Future role of Public Trustee was to be limited to representing interests of existing and potential minor beneficiaries, examining manner in which property was placed in trust on behalf of minor beneficiaries, identifying potential but not yet identified minors who were children of band members or membership candidates, and supervising distribution process — Public trustee was to have until March 15, 2016, to prepare and serve application on band which identified documents it believed to be relevant and material to test fairness of proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries — Public Trustee was to have until January 29, 2016 to prepare and serve application on band identifying specific documents relevant and material to issue of assets settled in trust — Public Trustee may

seek materials and information from Band, but only in relation to specific issues and subjects — Public Trustee had no right to engage, and was not to engage, in collateral attacks on membership processes of band and trustees had no right to engage in collateral attacks on band’s membership processes.

APPLICATION by Public Trustee for production of records and information from band.

D.R.G. Thomas J.:

I Introduction

1 This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.) [“Sawridge #1”], (2012), 543 A.R. 90 (Alta. Q.B.) affirmed 2013 ABCA 226, 553 A.R. 324 (Alta. C.A.) [“Sawridge #2”]. The terms defined in *Sawridge #1* are used in this decision.

II. Background

2 On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the “Band”, “Sawridge Band”, or “SFN”], set up the 1985 Sawridge Trust [sometimes referred to as the “Trust” or the “Sawridge Trust”] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the “Charter”].

3 The 1985 Sawridge Trust is administered by the Trustees [the “Sawridge Trustees” or the “Trustees”]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term “Beneficiaries” in the 1985 Sawridge Trust (the “Trust Amendments”) and confirmation of the transfer of assets into that Trust.

4 One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

5 Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the “Public Trustee”] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

February 14, 2012 - The Public Trustee applied:

1. to be appointed as the litigation representative of minors interested in this proceeding;
2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and
3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.

June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: *Sawridge #1*, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (*Sawridge #1*, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (*Sawridge #1*, at para 55).

June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (*Sawridge #2*).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;
- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and
- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],
- the Trustees may withdraw their proposed settlement agreement and litigation plan, and
- some document and disclosure related items sought by the Public Trustee were adjourned *sine die*. ("September 2/3 Order")

October 5, 2015 - I directed the Public Trustee to provide more detailed information in relation to its accounts totalling \$205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

6 Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel

assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

7 This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

8 *Sawridge #1* at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee's involvement in this matter:

[8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately \$70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.

[9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: *Sawridge Band v. Canada*, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: *Sawridge Band v. Canada*, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: *Poitras v. Sawridge Band*, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.

[10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

[11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

[12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

9 This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a

VI. Analysis

26 The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

27 I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: *Trimay Wear Plate Ltd. v. Way*, at para 17.

28 If I were to compel document production by the Sawridge Band, it would be via *Rule 5.13*:

5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if

- (a) the record is under the control of that person,
- (b) there is reason to believe that the record is relevant and material, and
- (c) the person who has control of the record might be required to produce it at trial.

(2) The person requesting the record must pay the person producing the record an amount determined by the Court.

29 The modern *Rule 5.13* uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule 5.13* has referenced and used approaches developed in the application of that precursor provision: *Toronto Dominion Bank v. Sawchuk*, 2011 ABQB 757, 530 A.R. 172 (Alta. Master); *Z. (H.) v. Unger*, 2013 ABQB 639, 573 A.R. 391 (Alta. Q.B.). I agree with this approach and conclude that the principles in the pre-*Rule 5.13* jurisprudence identified by the SFN apply here: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*; *Gainers Inc. v. Pocklington Holdings Inc.*; *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.*

30 The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: *Kaddoura v. Hanson*, 2015 ABCA 154 (Alta. C.A.) at para 15, (2015), 15 Alta. L.R. (6th) 37 (Alta. C.A.).

31 I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

32 It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee. A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

33 In *Sawridge #1* I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since *Sawridge #1* the Federal Court has ruled in *Stoney v. Sawridge First Nation* on the operation of the SFN's membership process.

34 Further, in *Sawridge #1* I noted at paras 51-52 that in *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226, 322 D.L.R. (4th) 56 (Alta. C.A.), the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in *Strickland v. Canada (Attorney General)*, 2015 SCC 37 (S.C.C.), the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

35 The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in *Stoney v. Sawridge First Nation*, there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

36 It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

37 Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;
2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and
3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and
4. Supervising the distribution process itself.

38 The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

39 I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

40 The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed

scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

41 I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

42 On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

43 The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule 5.13(1)* application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

44 If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule 5.13(1)* application by the Public Trustee. In the event no *Rule 5.13(1)* application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 - Examining potential irregularities related to the settlement of assets to the Trust

45 There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

46 The Public Trustee shall by January 29, 2016 prepare and serve a *Rule 5.13(1)* application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

47 A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule 5.13(1)* application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

48 The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of individuals who are minor beneficiaries and potential minor beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and
2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

49 I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

50 As Aalto, J. observed in *Poitras v. Sawridge Band*, 2013 FC 910, 438 F.T.R. 264 (Eng.) (F.C.), “[M]any gallons of judicial ink have been spilt” in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN’s past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

51 The Public Trustee has no relevant interest in the children of any parent who has an unresolved application for membership in the Sawridge Band. If that outstanding application results in the applicant being admitted to the SFN then that child will become another minor represented by the Public Trustee.

52 While the Public Trustee has sought information relating to incomplete applications or other potential SFN candidates, I conclude that an open-ended ‘fishing trip’ for unidentified hypothetical future SFN members, who may also have children, is outside the scope of the Public Trustee’s role in this proceeding. There needs to be minimum threshold proximity between the Public Trustee and any unknown and hypothetical minor beneficiary. As I will stress later, the Public Trustee’s activities need to be reasonable and fair, and balance its objectives: cost-effective participation in this process (i.e., not unreasonably draining the Trust) and protecting the interests of minor children of SFN members. Every dollar spent in legal and research costs turning over stones and looking under bushes in an attempt to find an additional, hypothetical minor beneficiary reduces the funds held in trust for the known and existing minor children who are potential beneficiaries of the 1985 Sawridge Trust distribution and the clients of the Public Trustee. Therefore, I will only allow investigation and representation by the Public Trustee of children of persons who have, at a minimum, completed a Sawridge Band membership application.

53 The Public Trustee also has a potential interest in a child of a Sawridge Band candidate who has been rejected or is rejected after an unsuccessful application to join the SFN. In these instances the Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection or challenge the rejection through judicial review in the Federal Court. If so, then that child is also a potential candidate for representation by the Public Trustee.

54 This Court’s function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership. I mean by this that if the Public Trustee’s inquiries determine that there are one or more outstanding applications for Band membership by a parent of a minor child then that is not a basis for the Public Trustee to intervene in or conduct a collateral attack on the manner in which that application is evaluated, or the result of that process.

55 I direct that this shall be the full extent of the Public Trustee’s participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

56 In summary, what is pertinent at this point is to identify the potential recipients of a distribution of the 1985 Sawridge Trust, which include the following categories:

1. Adult members of the SFN;
2. Minors who are children of members of the SFN;
3. Adults who have unresolved applications to join the SFN;
4. Children of adults who have unresolved applications to join the SFN;
5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and
6. Children of persons in category 5 above.

57 The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify

persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:
 - a) made applications to join the SFN which are pending (category 3); and
 - b) had applications to join the SFN rejected and are subject to challenge (category 5); and
2. The contact information for those individuals where available.

58 As noted, the Public Trustee's function is limited to *representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and
2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

59 This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;
2. allow timely identification of:
 - a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);
 - b) the number of adults and minors whose potential participation in the distribution has "crystallized" (categories 1 and 2); and
 - c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

60 These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

61 My understanding from the affidavit evidence and submissions of the SFN and the 1985 Sawridge Trustees is that the Public Trustee has already received much information about persons on the SFN's membership roll and prospective and rejected candidates. I believe that this will provide all the data that the Public Trustee requires to complete Task 3. Nevertheless, the Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, then it is to file a *Rule 5.13* application by January 29, 2016. The Sawridge Band and Trustees will then have until March 15, 2016 to make written submissions in response to that application. I will hear any disputed *Rule 5.13* disclosure application at a case management hearing to be set before April 30, 2016.

Task 4 - General and residual distributions

62 The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

63 Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

- a) a potential future successful SFN membership applicant and/or child of a successful applicant, or
- b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

64 As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

1. be distributed to a successful applicant and/or child of the applicant as that result crystallizes; or
2. on a pro rata basis:

- a) be distributed to the members of Pool 1, and
- b) be reserved in Pool 2 for future potential Pool 2 recipients.

65 A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

66 At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

67 First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

68 Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

69 As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

70 I believe that the instructions given here will refocus the process on Tasks 1 - 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in *Sawridge #1* I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in *Stoney v. Sawridge First Nation*. I repeat that inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

71 As the Court of Appeal observed in *Sawridge #2* at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule 5.13* applications which may arise from completion of Tasks 1-3.

Application dismissed.

2013 ABCA 226
Alberta Court of Appeal

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)

2013 CarswellAlta 1015, 2013 ABCA 226, [2013] 3 C.N.L.R. 411, [2013] A.W.L.D. 2729, [2013] A.W.L.D. 2730, [2013] A.W.L.D. 2733, [2013] A.W.L.D. 2768, [2013] A.W.L.D. 2801, [2013] A.W.L.D. 2810, 230 A.C.W.S. (3d) 54, 553 A.R. 324, 583 W.A.C. 324, 85 Alta. L.R. (5th) 165

In the Matter of the Trustee Act, R.S.A. 2000, c. T-8, as Amended

In the Matter of the Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation, on April 15, 1985 (the "1985" Sawridge Trust)

Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust Appellants (Respondents) and Public Trustee of Alberta Respondent (Applicant) and Sawridge First Nation, Minister of Indian Affairs and Northern Development, Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney Interested Parties

Peter Costigan, Clifton O'Brien, J.D. Bruce McDonald J.J.A.

Heard: June 5, 2013
Judgment: June 19, 2013
Docket: Edmonton Appeal 1203-0230-AC

Proceedings: affirming *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)* (2012), 2012 CarswellAlta 1042, 2012 ABQB 365, 75 Alta. L.R. (5th) 188 (Alta. Q.B.)

Counsel: F.S. Kozak, Q.C., M.S. Poretti for Appellants
J.L. Hutchison for Respondent

Subject: Public; Civil Practice and Procedure; Estates and Trusts

Headnote

Aboriginal law --- Practice and procedure — Miscellaneous

Costs — Band set up trust to hold Band property on behalf of its members — Definition of beneficiaries in trust was potentially discriminatory and trustees sought to redefine class of beneficiaries — Trustees applied for advice and directions — Public Trustee brought successful application to be appointed litigation representative of interested minors, on condition that costs would be paid by trust and that it would be shielded from any costs liability — Trustees appealed order insofar as it related to costs and exemption therefrom — Appeal dismissed — Chambers judge did not err in awarding advance costs because he found that children's interest required protection and that it was necessary to secure costs to secure requisite independent representation of Public Trustee — Trustees' complaint that chambers judge erred by awarding advance costs without any restrictions or guidelines was premature — Exemption for costs, while unusual, was not unknown — Chambers judge did not err in awarding costs of application to Public Trustee.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and own client basis

Band set up trust to hold Band property on behalf of its members — Definition of beneficiaries in trust was potentially discriminatory and trustees sought to redefine class of beneficiaries — Trustees applied for advice and directions — Public

Trustee brought successful application to be appointed litigation representative of interested minors, on condition that costs would be paid by trust and that it would be shielded from any costs liability — Trustees appealed order insofar as it related to costs and exemption therefrom — Appeal dismissed — Chambers judge did not err in awarding advance costs because he found that children’s interest required protection and that it was necessary to secure costs to secure requisite independent representation of Public Trustee — Trustees’ complaint that chambers judge erred by awarding advance costs without any restrictions or guidelines was premature — Exemption for costs, while unusual, was not unknown — Chambers judge did not err in awarding costs of application to Public Trustee.

APPEAL by trustees from judgment reported at *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)* (2012), 2012 CarswellAlta 1042, 2012 ABQB 365, 75 Alta. L.R. (5th) 188 (Alta. Q.B.), awarding advance costs to Public Trustee and exempting Public Trustee from liability for any other costs of litigation.

Per curiam:

I. Introduction

1 The appellants are Trustees of the Sawridge Trust (Trust). They wish to change the designation of “beneficiaries” under the Trust and have sought advice and direction from the court. A chambers judge, dealing with preliminary matters, noted that children who might be affected by the change were not represented by counsel, and he ordered that the Public Trustee be notified. Subsequently, the Public Trustee applied to be named as litigation representative for the potentially interested children, and that appointment was opposed by the Trustees.

2 The judge granted the application. He also awarded advance costs to the Public Trustee on a solicitor and his own client basis, to be paid for by the Trust, and he exempted the Public Trustee from liability for any other costs of the litigation. The Trustees appeal the order, but only insofar as it relates to costs and the exemption therefrom. Leave to appeal was granted on consent.

II. Background

3 The detailed facts are set out in the Reasons for Judgment of the chambers judge: *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.). A short summary is provided for purposes of this decision.

4 On April 15, 1985 the Sawridge First Nation, then known as the Sawridge Indian Band No. 19 (Sawridge) set up the 1985 Sawridge Trust (Trust) to hold certain properties in trust for Sawridge members. The current value of those assets is approximately \$70,000,000.

5 The Trust was created in anticipation of changes to the *Indian Act*, RSC 1985, c I-5, which would have opened up membership in Sawridge to native women who had previously lost their membership through marriage. The beneficiaries of the Trust were defined as “all persons who qualified as a member of the Sawridge First Nation pursuant to the provisions of the *Indian Act* as they existed on April 15, 1982.”

6 The Trustees are now looking to distribute the assets of the Trust and recognize that the existing definition of “beneficiaries” is potentially discriminatory. They would like to redefine “beneficiaries” to mean the present members of Sawridge, and acknowledge that no children would be part of the Trust. The Trustees suggest that the benefit is that the children would be funnelled through parents who are beneficiaries, or children when then become members when they attain the age of 18 years.

7 Sawridge is currently composed of 41 adult members and 31 minors. Of the 31 minors, 23 currently qualify as beneficiaries under the Trust, and 8 do not. It is conceded that if the definition of beneficiaries is changed, as currently

proposed, some children, formerly entitled to a share in the benefits of the trust, will be excluded, while other children who were formerly excluded will be included.

8 When Sawridge's application for advice and direction first came before the court, it was observed that there was no one representing the minors who might possibly be affected by the change in the definition of "beneficiaries." The judge ordered that the Public Trustee be notified of the proceedings and be invited to comment on whether it should act on behalf of the potentially affected minors.

9 The Public Trustee was duly notified and it brought an application asking that it be named as the litigation representative of the affected minors. It also asked the court to identify the minors it would represent, to award it advance costs to be paid for by the Trust, and to allow it to make inquiries through questioning about Sawridge's membership criteria and application processes. The Public Trustee made it clear to the court that it would only act for the affected minors if it received advanced costs from the Trust on a solicitor and his own client basis, and if it was exempted from liability for costs to the other participants in the litigation.

III. The Chambers Judgment

10 The chambers judge first considered whether it was necessary to appoint the Public Trustee to act for the potentially affected minors. The Trustees submitted that this was unnecessary because their intention was to use the trust to provide for certain social and health benefits for the beneficiaries of the trust and their children, with the result that the interests of the affected children would ultimately be defended by their parents. The Trustees also submitted that they were not in a conflict of interest, despite the fact that a number of them are also beneficiaries under the Trust.

11 The chambers judge concluded that it was appropriate to appoint the Public Trustee to act as litigation representative for the affected minors. He was concerned about the large amount of money at play, and the fact that the Trustees were not required to distribute the Trust assets in the manner currently proposed. He noted, that while desirable, parents do not always act in the best interests of their children. Furthermore, he found the Trustees and the adult members of the Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

12 The chambers judge determined that the group of minors potentially affected included the 31 current minors who were currently band members, as well as an unknown number of children of applicants for band membership. He also observed that there had been substantial litigation over many years relative to disputed Band membership, which litigation appears to be ongoing (para 9).

13 The judge rejected the submission of the Trustees that advance costs were only available if the strict criteria set out in *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.), were met. He stated that the criteria set out in *Little Sisters* applied where a litigant has an independent interest in the proceeding. He viewed the role of the Public Trustee as being "neutral" and capable of providing independent advice regarding the interests of the affected minors which may not otherwise be forthcoming because of the Trustees' potential conflicts.

14 In result, the chambers judge appointed the Public Trustee as litigation representative of the minors, on the conditions that it would receive advance costs and be exempted from any liability for costs of other parties. He finished by ordering costs of the application to the Public Trustee on a solicitor and its own client basis.

IV. Grounds of Appeal

15 The appellants advance four grounds of appeal:

(a) The Chambers Judge erred in awarding the Respondent advance costs on a solicitor and his own client basis by

concluding that the strict criteria set by the Supreme Court of Canada for the awarding of advance costs does not apply in these proceedings.

(b) In the alternative, the Chambers Judge erred in awarding advance costs without any restrictions or guidelines with respect to the amount of costs or the reasonableness of the same.

(c) The Chambers Judge erred in exempting the Respondent of any responsibility to pay costs of the other parties in the proceeding.

(d) The Chambers Judge erred in granting the Respondent costs of the application on a solicitor and his own client basis.

V. Standard of Review

16 A chambers judge ordering advance costs will be entitled to considerable deference unless he “has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts”: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.) at paras 42-43.

VI. Analysis

A. Did the chambers judge err by failing to apply the *Little Sisters* criteria?

17 The Trustees argue that advanced interim costs can only be awarded if “the three criteria of impecuniosity, a meritorious case and special circumstances” are strictly established on the evidence before the court: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.), at para 36; as subsequently applied in the “public interest cases” of *Little Sisters* at para 37 and in *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.) at paras 36-39. They go on to submit that none of these requirements were met in the present case. We are not persuaded that the criteria set out in *Okanagan* and *Little Sisters* were intended to govern rigidly all awards of advance funding and, in particular, do not regard them as applicable to exclude such funding in the circumstances of this case. As will be discussed, a strict application is neither possible, nor serves the purpose of protecting the interests of the children potentially affected by the proposed changes to the Trust.

18 We start by noting that the rules described in *Okanagan* and *Little Sisters* apply in adversarial situations where an impecunious private party wants to sue another private party, or a public institution, and wants that party to pay its costs in advance. For one thing, the test obliges the applicant to show its suit has merit. In this case, however, the Public Trustee has not been appointed to sue anyone on behalf of the minors who may be affected by the proposed changes to the Trust. Its mandate is to ensure that the interests of the minor children are taken into account when the court hears the Trustees’ application for advice and direction with respect to their proposal to vary the Trust. The minor children are not, as the chambers judge noted, “independent” litigants. They are simply potentially affected parties.

19 The Trustees submit the chambers judge erred by characterizing the role of the Public Trustee as neutral rather than adversarial. While we hesitate to characterize the role of the Public Trustee as “neutral”, as it will be obliged, as litigation representative, to advocate for the best interests of the children, the litigation in issue cannot be characterized as adversarial in the usual sense of that term. This is an application for advice and direction regarding a proposed amendment to a Trust, and the merits of the application are not susceptible to determination, at least at this stage. Indeed, the issues remain to be defined, and their extent and complexity are not wholly ascertainable at this time; nor is the identity of all the persons affected presently known. However, what can be said with certainty at this time is that the interests of the children potentially affected by the changes require independent representation, and the Public Trustee is the appropriate person to provide that representation. No other litigation representative has been put forward, and the Public Trustee’s acceptance of the appointment was conditional upon receiving advance costs and exemption.

20 There is a second feature of this litigation that distinguishes it from the situation in *Okanagan* and *Little Sisters*. Here the children being represented by the Public Trustee are potentially affected parties in the administration of a Trust. Unlike the applicants in *Okanagan* and *Little Sisters*, therefore, the Public Trustee already has a valid claim for costs given the nature of the application before the court. As this court observed in *Deans v. Thachuk*, 2005 ABCA 368 (Alta. C.A.) at para 43, (2005), 261 D.L.R. (4th) 300 (Alta. C.A.):

In *Buckton, Re, supra*, Kekewich J. identified three categories of cases involving costs in trust litigation. **The first are actions by trustees for guidance from the court as to the construction or the administration of a trust. In such cases, the costs of all parties necessarily incurred for the benefit of the estate will be paid from the fund.** The second are actions by others relating to some difficulty of construction or administration of a trust that would have justified an application by the trustees, where costs of all parties necessarily incurred for the benefit of the trust will also be paid from the fund. The third are actions by some beneficiaries making claims which are adverse or hostile to the interests of other beneficiaries. In those cases, the usual rule that the unsuccessful party bears the costs will apply. [emphasis added]

21 Moreover, the chambers judge observed that the Trustees had not taken any “pre-emptive steps” to provide independent representation of the minors to avoid potential conflict and conflicting duties (para 23). Their failure to have done so ought not now to be a reason to shift the obligation to others to bear the costs of this representation. The Public Trustee is prepared to provide the requisite independent representation, but is not obliged to do so. Having regard to the fact that the Trust has ample funds to meet the costs, as well as the litigation surrounding the issue of membership, it cannot be said that the conditions attached by the Public Trustee to its acceptance of the appointment are unreasonable or otherwise should be disregarded.

22 It should be noted, parenthetically, that the Trustees rely on *Deans* as authority for the proposition that the *Okanagan* criteria will apply in pension trust fund litigation, which they submit is analogous to the situation here. But it is clear that the decision to apply the *Okanagan* criteria in *Deans* was based on the nature of the litigation in that case. It was an action against a trust by certain beneficiaries, was adversarial and fit into the third category described in the passage from *Buckton, Re* [[1907] 2 Ch. 406 (Eng. Ch. Div.)] quote above.

23 In our view, there are several sources of jurisdiction for an order of advance costs in the case before us. One is section 41 of the *Public Trustee Act*, SA 2004, c P-44.1 which provides:

41 Unless otherwise provided by an enactment, where the Public Trustee is a party to or participates in any matter before a court,

(a) the costs payable to the Public Trustee, and the client, party or other person by whom the costs are to be paid, are in the discretion of the court, and

(b) the court may order that costs payable to the Public Trustee are to be paid out of and are a charge on an estate.

24 It is evident that the court is vested with a large discretion with respect to an award of costs under section 41. While not dealing specifically with an award of advance costs, this discretionary power encompasses such an award. Further, the court has broad powers to “impose terms and conditions” upon the appointment of a litigation representative pursuant to Rule 2.21, which states:

2.21 The Court may do one or more of the following:

(a) terminate the authority or appointment of a litigation representative;

(b) appoint a person as or replace a litigation representative;

(c) impose terms and conditions on, or on the appointment of, a litigation representative or cancel or vary the terms or conditions.

25 The chambers judge also invoked *parens patriae* jurisdiction as enabling him to award advance costs, in the best interests of the children, to obtain the independent representation of the Public Trustee on their behalf. To the extent that there is any gap in statutory authority for the exercise of this power, the *parens patriae* jurisdiction is available. As this Court commented in *Alberta (Director, Child, Youth and Family Enhancement Act) v. L. (D.)*, 2012 ABCA 275, 536 A.R. 207 (Alta. C.A.), in situations where there is a gap in the legislative scheme, the exercise of the inherent *parens patriae* jurisdiction “is warranted whenever the best interests of the child are engaged” (para 4).

26 In short, a wide discretion is conferred with respect to the granting of costs under the *Trustee Act*, the terms of the appointment of a litigation representative pursuant to the *Rules of Court*, and in the exercise of *parens patriae* jurisdiction for the necessary protection of children. In our view, the discretion is sufficiently broad to encompass an award of advanced costs in the situation at hand.

27 In this case, it is plain and obvious that the interests of the affected children, potentially excluded or otherwise affected by changes proposed to the Trust, require protection which can only be ensured by means of independent representation. It cannot be supposed that the parents of the children are necessarily motivated to obtain such representation. Indeed, it appears that all the children potentially affected by the proposed changes have not yet been identified, and it may be that children as yet unborn may be so affected.

28 The chambers judge noted that there were 31 children potentially affected by the proposed variation, as well as an “unknown number of potentially affected minors” - the children of applicants seeking to be admitted into membership of the Band (para 31). He concluded that a litigation representative was necessary and that the Public Trustee was the appropriate person to be appointed. No appeal is taken from this direction. In our view, the trial judge did not err in awarding advance costs in these circumstances where he found that the children’s interest required protection, and that it was necessary to secure the costs in such fashion to secure the requisite independent representation of the Public Trustee.

B. Did the chambers judge err in failing to impose costs guidelines?

29 The Trustees submit the chambers judge erred by awarding advance costs without any restrictions or guidelines. In our view, this complaint is premature and an issue not yet canvassed by the court. We would add that an award of advanced costs should not be construed as a blank cheque. The respondent fairly concedes that the solicitor and client costs incurred by it will be subject to oversight and further direction by the court from time to time regarding hourly rates, amounts to be paid in advance and other mechanisms for ensuring that the quantum of costs payable by the Trust is fair and reasonable. The subject order merely establishes that advance costs are payable; the mechanism for obtaining payment and guidelines for oversight has yet to be addressed by the judge dealing with the application for advice and directions.

C. Did the chambers judge err in granting an exemption from the costs of other participants?

30 Much of the reasoning found above applies with respect to the appeal from the exemption from costs. An independent litigation representative may be dissuaded from accepting an appointment if subject to liability for a costs award. While the possibility of an award of costs against a party can be a deterrent to misconduct in the course of litigation, we are satisfied that the court has ample other means to control the conduct of the parties and the counsel before it. We also note that an exemption for costs, while unusual, is not unknown, as it has been granted in other appropriate circumstances involving litigation representatives: *Thomlinson v. Alberta*, 2003 ABQB 308 (Alta. Q.B.) at paras 117-119, (2003), 335 A.R. 85 (Alta. Q.B.); and *C. (L.) v. Alberta (Metis Settlements Child & Family Services, Region 10)*, 2011 ABQB 42 (Alta. Q.B.) at paras 53-55, (2011), 509 A.R. 72 (Alta. Q.B.).

D. Did the chambers judge err in awarding costs of the application to the Public Trustee?

31 Finally, with respect to the appeal from the grant of solicitor and client costs on the application heard by the chambers judge, it appears to us that one of the subjects of the application was whether the Public Trustee would be entitled to such an award if it were appointed as litigation representative. The judge's award flowed from such finding. The appellant complains, however, that the judge proceeded to make the award without providing an opportunity to deal separately with the costs of the application itself. It does not appear, however, that any request was made to the judge to make any further representations on this point prior to the entry of his order. We infer that the parties understood that their submissions during the application encompassed the costs for the application itself, and that no further submission was thought to be necessary in that regard before the order was entered.

VII. Conclusion

32 The appeal is dismissed.

Appeal dismissed.

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