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	**WRITTEN SUBMISSIONS OF THE SAWRIDGE FIRST NATION IN RESPONSE TO THE APPLICATION BY THE STONEY APPLICANTS TO BE ADDED AS PARTIES OR INTERVENORS**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. All submissions by Sawridge First Nation ("Sawridge") on the merits of the Stoney Application are to be considered by this Honourable Court only if Sawridge is granted leave to intervene in the Stoney Application.

2. 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, along with its response to the merits of the Stoney Application.

3. On September 28, 2016, the Stoney Applicants also filed their written submissions on the merits of the Stoney Application.

4. These submissions are intended to supplement the September 28, 2016 written submissions of Sawridge dealing with the merits of the Stoney Application by responding to the arguments put forth by the Stoney Applicants in their written submissions.

5. Sawridge's intends to address the merits of the Stoney Applicants' submissions by addressing each of the following areas of concern:

   (a) There are a number of factual inaccuracies in the Stoney Applicants' submissions, many of which stem from the inaccuracies in the Affidavit of Maurice Stoney filed in support of the Stoney Application. This Honourable Court should give little, if any, weight to Maurice Stoney's Affidavit, as his counsel effectively refused to permit cross-examination on the substance of the Affidavit and refused to permit Sawridge to participate in the cross-examination.

   (b) The Stoney Applicants have mischaracterized or misinterpreted the decisions of the Federal Court and the Federal Court of Appeal concerning "acquired rights" membership and the impact of those decisions on the Stoney Applicants. The Stoney Applicants are not acquired rights members of Sawridge.

   (c) There is a clear relationship between the arguments advanced by the Stoney Applicants in the Stoney Application and the previous litigation between Maurice Stoney and Sawridge concerning membership.

(d) The Stoney Applicants have failed to make any submissions on why they should be granted intervenor status in accordance with the well-recognized legal test for same.

(e) The Stoney Applicants' submissions further justify Sawridge's request for costs on a solicitor and his own client basis, as Sawridge has yet again been required to respond to identical arguments previously advanced by Maurice Stoney regarding the Stoney Applicants' alleged entitlement to automatic membership in Sawridge.

II. ISSUES

6. The issues before this Honourable Court are as follows:

(a) Should the Stoney Application be struck, in whole or in part, pursuant to Rule 3.68 of the *Rules of Court*?

(b) In the alternative, should the Stoney Application be dismissed?

(c) 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?

7. Sawridge's 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 for the additional reasons set out below.

III. ANALYSIS

A. The Stoney Applicants' submissions contain factual inaccuracies and little to no weight should be given to the Affidavit evidence of Maurice Stoney.

8. The Stoney Applicants' submissions are rife with factual inaccuracies, the most notable of which is an assertion that Maurice Stoney and his siblings are members of Sawridge and are beneficiaries of the 1985 Trust. None of the Stoney Applicants are members of Sawridge or beneficiaries of the 1985 Trust.

9. As discussed below and in Sawridge's submissions of September 28, 2016, the issue of Maurice Stoney's (and therefore his siblings') alleged membership in Sawridge, on the basis of "acquired rights" or an automatic entitlement to membership under Bill C-31, has been adjudicated and is *res judicata*. Further litigation of this membership is barred by the doctrine of issue estoppel.

10. The Stoney Applicants are not acquired rights members. They are not members of Sawridge. They have never been members of Sawridge at any time so as to make them beneficiaries of the 1985 Trust.

11. Sawridge takes issue with many other statements presented as "fact" in the Stoney Applicants' submissions and Maurice Stoney's Affidavit, such as the following:

    (a) The Stoney Applicants assert that Maurice Stoney and all of his brothers and sisters were born to William and Margaret Stoney; however, there is no corroborating evidence to support this finding. On his enfranchisement documents, William Stoney only listed two minors, Alvin and Maurice, while the Stoney Applicants assert that Billy Stoney was also a son of William Stoney at the time of his enfranchisement.

    (b) The Stoney Applicants assert that William Stoney enfranchised because he was working; however, the enfranchisement documents indicate that William Stoney voluntarily applied for enfranchisement and was paid $777.08 for his, his wife's and his two minor son's (Alvin and Maurice) share of the band funds upon their enfranchisement on August 1, 1944.

12. Sawridge need not address these and other inaccuracies in detail, as they are ultimately irrelevant. The Stoney Applicants' position depends upon on a finding that they are members of Sawridge, which finding cannot be made in light of prior judicial determinations.

13. Additionally, the Stoney Application and the Stoney Applicants' written submissions are based on the Affidavit of Maurice Stoney. Maurice Stoney's counsel refused to permit counsel for Sawridge to attend at the Questioning of Maurice Stoney on his Affidavit.

Furthermore, the transcript from that Questioning shows that his counsel effectively interrupted, obstructed, and refused to permit any Questioning on the substance of the Application and Affidavit. As such, the truth of the evidence contained in Maurice Stoney's Affidavit has not been tested. Accordingly, his evidence should be given little to no weight.

B. The Stoney Applicants have mischaracterized or misinterpreted previous Federal Court and Federal Court of Appeal decisions.

14. The Stoney Applicants incorrectly assert that the Federal Court issued an Order of Mandamus in *Sawridge Band v Canada*, [2003] 4 FCR 748, compelling Sawridge to restore the Stoney Applicants as members of Sawridge on the basis that the Stoney Applicants are "acquired rights" members under Bill C-31.

15. In *Sawridge Band v Canada*, [2003] 4 FCR 748, Justice Hugessen considered an application by the Crown for a interlocutory injunction requiring Sawridge to enter and record the memberships of persons whose membership in Sawridge were required by Bill C-31. In particular, the Crown sought to have the names of 11 women, who had lost their membership status in Sawridge due to their marriages to non-Indian men, restored to the membership list pursuant to Bill C-31.

16. Justice Hugessen summarized the intention of Bill C-31, as follows:

> While I shall later deal in detail with the precise text of the relevant amendments, I cannot do better here than reproduce the Court of Appeal's brief description of the thrust of the legislation when it set aside the first judgment herein and ordered a new trial [*Sawridge Band v. Canada*, 1997 CanLII 5294 (FCA), [1997] 3 F.C. 580 (C.A.), at paragraph 2]:
>
> > Briefly put, this legislation, while conferring on Indian bands the right to control their own band lists, obliged bands to include in their membership certain persons who became entitled to Indian status by virtue of the 1985 legislation. Such persons included: women who had become disentitled to Indian status through marriage to non-Indian men and the children of such women; those who had lost status because their mother and paternal grandmother were non-Indian and had gained Indian status through marriage to an Indian; and those who had lost status on the basis that they were illegitimate offspring of an Indian woman and a non-Indian man.

> Bands assuming control of their band lists would be obliged to accept all these people as members. Such bands would also be allowed, if they chose, to accept certain other categories of persons previously excluded from Indian status.

Sawridge Band v Canada, 2003 FCT 347, [2003] 4 FCR 748, at para 1 **[Tab 1]** [Emphasis added]

17. Justice Hugessen reviewed the relevant provisions of Bill C-31 and turned to the legislative debates surrounding its enactment in order to clarify that its purpose and intention was to create an automatic entitlement to membership to women who had lost their status because they married non-Indian men:

> 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."
>
> 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.
>
> A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (House of Commons Debates, idem, at page 2645):
>
> > This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were

> wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.

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

> . . . I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals.
>
> This is a difficult issue. It has been for many years. The challenge is striking. The fairest possible balance must be struck and I believe it has been struck in this Bill. I believe we have fulfilled the promise made by the Prime Minister in the Throne Speech that discrimination in the Indian Act would be ended.

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

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

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

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

Sawridge Band v Canada, 2003 FCT 347, [2003] 4 FCR 748, at paras 27-32 [**Tab 1**] [Emphasis added]

18. Ultimately, Justice Hugessen ordered that Sawridge enter or register the names of the 11 woman, and any others who were acquired rights members, on its membership list. His order was upheld on appeal in *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 FCR 274.

19. The key here is the distinction between entitlement to status as an Indian under Bill C-31 and entitlement to membership in Sawridge, as noted by Minister Crombie in the excerpts of the legislative debates referenced by Justice Hugessen.

20. Maurice Stoney and his siblings are not acquired rights members of Sawridge by virtue of Bill C-31, and the order of Justice Huggesen does not apply to them. While Maurice Stoney was entitled to status as an Indian by virtue of Bill C-31, he did not fall within the categories of persons entitled to have his name entered on Sawridge's membership list.

21. The Stoney Applicants' assertion that the issue of acquired rights, and the rights of unspecified persons *including* Maurice Stoney and his siblings to membership in Sawridge, was determined by the Federal Court of Appeal in *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 FCR 274 is, therefore, misleading and incorrect.

C. The arguments of the Stoney Applicants have already been advanced and determined through litigation between Maurice Stoney and Sawridge.

22. In fact, Maurice Stoney's current counsel advanced this very argument, that he is an acquired rights member of Sawridge under Bill C-31, when she represented him in Federal Court on the judicial review of Sawridge's denial of his membership application from 2012 through 2013. She relied upon Justice Hugessen's decision in *Sawridge Band v Canada*, [2003] 4 FCR 748 and the Federal Court of Appeal's decision in *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 FCR 274, in support of her position during the judicial review.

Stoney's Memorandum of Fact and Law filed in Federal Court Action No. T-923-12, at paras 14 - 20 **[Tab 2]**

23. In his decision dismissing Maurice Stoney's application for judicial review, Justice Barnes recognized that if Maurice Stoney (and the other applicants) were acquired rights members, then Sawridge could not refuse their membership applications pursuant to the decision of Justice Hugessen which was upheld by the Federal Court of Appeal:

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

Stoney v Sawridge First Nation, 2013 FC 509, at para 9 **[Tab 3]**

24. Justice Barnes determined that Maurice Stoney was <u>not</u> an acquired rights member. He engaged in a thorough analysis of Mr. Stoney's argument regarding his entitlement to membership under Bill C-31. He found that Bill C-31 did not provide Maurice with an automatic right to membership in Sawridge. Rather, Justice Barnes noted that Maurice lost his right to membership when his father obtained enfranchisement for the entire Stoney family:

> ...
>
> 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).
>
> ...
>
> 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 paras 11-15 [**Tab 3**] [Emphasis in original]

25. Justice Barnes also noted that the judicial review application was an attempt by Maurice Stoney to re-litigate the matters that were in issue in the 1995 Action which was brought by counsel on behalf of Maurice Stoney and others, relating to his entitlement to membership as a result of Bill C-31. In the 1995 Action, the Federal Court of Appeal determined that "[i]t 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." Justice Barnes accordingly concluded that the arguments related to Bill C-31 were barred under the doctrine of issue estoppel.

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

Stoney v Sawridge First Nation, 2013 FC 509, at para 17 [**Tab 3**]

26. As such, the Stoney Applicants' assertion that this matter is unrelated to the judicial review application (or for that matter the 1995 Action) is disingenuous. Having regard to the definition of "Beneficiaries" in the 1985 Trust, which is tied to membership, the

Stoney Applicants' position that they are beneficiaries pre-supposes and is conditional upon their assertion that they are members of Sawridge.

27. This very issue of automatic entitlement to membership was at the heart of the 2012 Action, as is demonstrated by a review of the memorandums of fact and law filed by the parties in the 2012 Action.

Stoney's Memorandum of Fact and Law filed in Federal Court Action No. T-923-12, at paras 14 - 20 **[Tab 2]**

Sawridge's Memorandum of Fact and Law filed in Federal Court Action No. T-923-12, at paras 21-30 **[Tab 5]**

28. For the reasons set out in Sawridge's written submissions filed on September 28, 2016 and the reasons set out above, it is clear that Maurice Stoney and his siblings are not members of Sawridge and have not been members of Sawridge at any point in time which would make them beneficiaries of the 1985 Trust.

29. Sawridge submits that the Stoney Application should be struck, as the basis for Mr. Stoney and his family to request status as a party is directly connected to their assertion that they are or have been members of Sawridge.

30. As that issue is *res judicata*, the Stoney Application constitutes an abuse of process. In the alternative, the fact that the membership-related matters at the heart of the Stoney Application have already been adjudicated is a basis for dismissing said application.

D. The Stoney Applicants have failed to address the merits of their application for intervenor status, which ought to be dismissed in any event.

31. The Stoney Application purports to be an "Application to be added as a party or intervenor"; however, the Stoney Applicants' submissions do not address the merits of their application for intervenor status.

32. The two-step approach for reviewing applications to intervene was set out in Sawridge's September 28, 2016 brief. In short, a person should be given intervenor status if they are specially affected by the decision in a matter or have some special expertise or perspective concerning the issues in a matter.

33. The Stoney Applicants are not members of Sawridge and are not beneficiaries of the 1985 Trust, such that they are not specially affected by any of the issues in the within Action. In any event, they have provided no evidence as to any special expertise or perspective concerning the issues in the within Action which would warrant them being granted intervenor status.

E. The Stoney Applicants' submissions further justify Sawridge's claim to entitlement to solicitor and client or enhanced costs for this Application.

34. In its September 28, 2016 written submissions, Sawridge noted that the following may provide grounds for an award of solicitor and client costs:

(a) Conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) Any application, proceeding or step in an action that was unnecessary, improper or a mistake;

(c) A person has engaged in misconduct or conduct that is reprehensible, scandalous or outrageous; and

(d) A person has done something to hinder, delay, or confuse the litigation, where there was no serious issue of fact or law which required the lengthy, expensive proceedings.

35. It has become abundantly clear from a review of the Stoney Applicants' written submissions that the Stoney Application is, at base, the most recent attempt in a longstanding pattern of Maurice Stoney (and his family) using any and all judicial means to try to assert some entitlement to membership in Sawridge.

36. The Stoney Applicants' attempt to phrase the issue as one relating to the definition of "Beneficiaries" under the 1985 Trust, as opposed to one of membership, is disingenuous. A determination that Maurice Stoney and his siblings are beneficiaries of the 1985 Trust is conditional on a determination that they were members of Sawridge in 1982.

37. The Stoney Applicants are not members of Sawridge and have never been members of Sawridge at any time so as to make them beneficiaries of the 1985 Trust. This membership issue has been litigated in the 1995 Action with representation from counsel.

(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 Applicants on a solicitor and his own client basis, or on an enhanced basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2016.

PARLEE McLAWS LLP

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

LIST OF AUTHORITIES

2003 FCT 347, 2003 CFPI 347
Federal Court of Canada, Trial Division

Sawridge Band v. R.

2003 CarswellNat 1212, 2003 CarswellNat 2857, 2003 FCT 347, 2003 CFPI 347, [2003] 3 C.N.L.R. 344, [2003] 4 F.C. 748, [2003] F.C.J. No. 723, 123 A.C.W.S. (3d) 2, 232 F.T.R. 54

Bertha l'Hirondelle suing on her own behalf and on behalf of all other members of the Sawridge Band, Plaintiffs and Her Majesty The Queen, Defendant and Native Council of Canada, Native Council of Canada (Alberta) Non-Status Indian Association of Alberta Native Women's Association of Canada, Interveners

Hugessen J.

Heard: March 19-20, 2003
Judgment: March 27, 2003
Docket: T-66-86A

Counsel: *Mr. Martin J. Henderson*, *Ms Lori A. Mattis*, *Ms Catherine Twinn*, *Ms Kristina Midbo*, for Plaintiffs
Mr. E. James Kindrake, *Ms Kathleen Kohlman*, for Defendant
Mr. Kennth S. Purchase, for Intervener, Native Council of Canada
Mr. P. Jon Faulds, for Intervener, Native Council of Canada (Alberta)
Mr. Michael J. Donaldson, for Intervener, Non-Status Indian Association of Alberta
Ms Mary Eberts, for Intervener, Native Women's Association of Canada

Subject: Public; Civil Practice and Procedure

Headnote

Native law --- Bands and band government — Registration

Amendments in 1985 to Indian Act required bands to automatically include in membership, amongst others, women who lost Indian status through marriage to non-Indian men and women who acquired Indian status through marriage — Band enacted membership rules which required lawful residency on reserve or significant commitment to band — Band brought application for declaration that 1985 amendments to Indian Act were unconstitutional — Federal crown brought interlocutory motion for declaration of entitlement to membership for eleven women who lost status through marriage and interlocutory mandatory injunction requiring band to register them — Motion was allowed in part and injunction was granted — Band's application of its membership rules to deny membership to the eleven women who had not previously lived on reserve contravened Indian Act — Legislative history of amendments made clear intention of legislation was to remove discriminatory provisions of Act and to restore status and membership to those deprived pursuant to them — Parliament attempted to balance rights of individuals to membership with right of bands to control their membership — Interlocutory motion for declaration of entitlement was not available because if court found right existed, declaration to that effect would end matter, leaving nothing for final judgment — Enforcement of duly adopted law to admit women into membership would not result in irreparable harm to band and inconvenience to band would not outweigh public interest in seeing law enforced — Indian Act, R.S.C. 1985, c. I-5.

Injunctions --- Availability of injunctions — Injunctions in specific contexts — Enforcement of by-laws and statutes

1985 amendments to Indian Act required bands to automatically include in membership, amongst others, women who lost Indian status through marriage to non-Indian men and women who acquired Indian status through marriage — Band enacted

membership rules which required lawful residency on reserve or significant commitment to band — Band brought application for declaration that 1985 amendments to Indian Act were unconstitutional — Federal crown brought interlocutory motion for declaration of entitlement to membership for eleven women who lost status through marriage and interlocutory mandatory injunction requiring band to register them — Motion was allowed in part and injunction was granted — Band's application of its membership rules to deny membership to the eleven women who had not previously lived on reserve contravened Indian Act — Legislative history of amendments made clear intention of legislation was to remove discriminatory provisions of Act and to restore status and membership to those deprived pursuant to them — Parliament attempted to balance rights of individuals to membership with right of bands to control their membership — Interlocutory motion for declaration of entitlement was not available because if court found right existed, declaration to that effect would end matter, leaving nothing for final judgment — Enforcement of duly adopted law to admit women into membership would not result in irreparable harm to band and inconvenience to band would not outweigh public interest in seeing law enforced — Indian Act, R.S.C. 1985, c. I-5.

MOTION by crown against Indian band for interlocutory declaration and interlocutory mandatory injunction.

***Hugessen J.*:**

1 In this action, started some 17 years ago, the plaintiff has sued the Crown seeking a declaration that the 1985 amendments to the Indian Act, R.S.C. 1985, c. I-5, commonly known as Bill C-31, are unconstitutional. While I shall later deal in detail with the precise text of the relevant amendments, I cannot do better here than reproduce the Court of Appeal's brief description of the thrust of the legislation when it set aside the first judgment herein and ordered a new trial:

> Briefly put, this legislation, while conferring on Indian bands the right to control their own band lists, obliged bands to include in their membership certain persons who became entitled to Indian status by virtue of the 1985 legislation. Such persons included: women who had become disentitled to Indian status through marriage to non-Indian men and the children of such women; those who had lost status because their mother and paternal grandmother were non-Indian and had gained Indian status through marriage to an Indian; and those who had lost status on the basis that they were illegitimate offspring of an Indian woman and a non-Indian man. Bands assuming control of their band lists would be obliged to accept all these people as members. Such bands would also be allowed, if they chose, to accept certain other categories of persons previously excluded from Indian status. [*Sawridge Band v. R.*, [1997] 3 F.C. 580 (Fed. C.A.) at paragraph 2]

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

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

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

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

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

6 First, I am quite satisfied that the relief sought by the Crown in paragraph a. above is not available. An interim declaration of right is a contradiction in terms. If a court finds that a right exists, a declaration to that effect is the end of the matter and nothing remains to be dealt with in the final judgment. If, on the other hand, the right is not established to the court's satisfaction, there can be no entitlement to have an unproved right declared to exist. (See *Sankey v. Canada (Minister of Transport)* (1978), [1979] 1 F.C. 134 (Fed. T.D.)) I accordingly treat the motion as though it were simply seeking an interlocutory injunction.

7 Second, in the unusual and perhaps unique circumstances of this case, I accept the submission that since I am dealing with a motion seeking an interlocutory injunction, the well-known three part test established in such cases as *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) should in effect be reversed. The universally applicable general rule for anyone who contests the constitutionality of legislation is that such legislation must be obeyed unless and until it is either stayed by court order or is set aside on final judgment. Here, assuming the Crown's allegations of non-compliance are correct, the plaintiff *Band* has effectively given itself an injunction and has chosen to act as though the law which it contests did not exist. I can only permit this situation to continue if I am satisfied that the plaintiff could and should have been given an interlocutory injunction to suspend the effects of C-31 pending trial. Applying the classic test, therefore, requires that I ask myself if the plaintiff has raised a serious issue in its attack on the law, whether the enforcement of the law will result in irreparable harm to the plaintiff, and finally, determine where the balance of convenience lies. I do not accept the proposition that because the injunction sought is of a mandatory nature, the test should in any way be different from that set down in the cited cases. (See *Ansa International Rent-A-Car (Canada) Ltd. v. American International Rent-A-Car Corp.*, [1990] F.C.J. No. 514 (Fed. T.D.); (1990), 32 C.P.R. (3d) 340 (Fed. T.D.) .)

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

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

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

10 The Supreme Court of Canada confirmed the Federal Court of Canada's broad jurisdiction to grant relief under section

44: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 (S.C.C.).

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

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

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

14 I start by setting out the principal relevant provisions.

> 2.(1) "member of a band" means a person whose name appears on a **Band** List or who is entitled to have his name appear on a **Band** List.
>
> 5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.
>
> . . . . .
>
> (3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.
>
> . . . . .
>
> (5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.
>
> 6. (1) Subject to section 7, a person is entitled to be registered if
>
> . . . . .
>
> > (c) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
>
> . . . . .
>
> 8. There shall be maintained in accordance with this Act for each band a **Band** List in which shall be entered the name of every person who is a member of that band.
>
> 9. (1) Until such time as a band assumes control of its **Band** List, the **Band** List of that band shall be maintained in the Department by the Registrar.
>
> (2) The names in a **Band** List of a band immediately prior to April 17, 1985 shall constitute the **Band** List of that band on April 17, 1985.
>
> (3) The Registrar may at any time add to or delete from a **Band** List maintained in the Department the name of any person

who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

. . . . .

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

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

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

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

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

. . . . .

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

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

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

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

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

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

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

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

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

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

. . . . .

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

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

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

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

15 The amending statute was adopted on June 27, 1985 but was made to take effect retroactively to April 17, 1985, the date on which section 15 of the *Charter* took effect. This fact in itself, without more, is a strong indication that one of the prime objectives of the legislation was to bring the provisions of the *Indian Act* into line with the new requirements of that section, particularly as they relate to gender equality.

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

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

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

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

(i) is lawfully resident on the reserve; or

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

. . . . .

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

. . . . .

11. The **Band** Council may consider and deal with applications made pursuant to section 3 of these Rules according to

such procedure and as such time or times as it shall determine in its discretion and, without detracting from the generality of the foregoing, the **Band** Council may conduct such interviews, require such evidence and may deal with any two or more of such applications separately or together as it shall determine in its discretion.

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

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

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

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

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

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

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

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

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

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:

> ...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. [Canada, *House of Commons Debates*, March 1, 1985, p. 2644]

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:

> This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong. [*Debates, supra* at 2645]

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:

> ...I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals.
>
> This is a difficult issue. It has been for many years. The challenge is striking. The fairest possible balance must be struck and I believe it has been struck in this Bill. I believe we have fulfilled the promise made by the Prime Minister in the Throne Speech that discrimination in the Indian Act would be ended. [*Debates, supra* at 2646]

31 At a meeting of the Standing Committee on Indian Affairs and Northern Development, Minister Crombie again made it clear that, while the Bill works towards full Indian self-government, the Bill also has as a goal remedying past wrongs:

> Several members of this committee said during the debate on Friday that this bill is just a beginning and not an end in itself, but rather the beginning of a process aimed at full Indian self-government. I completely agree with that view. But before we can create the future, some of the wrongs of the past have to be corrected. That is, in part, the purpose of Bill C-31... [Canada, House of Commons, *Minutes of the Proceedings of the Special Committee on Indian Affairs and Northern Development*, Issue no. 12, March 7, 1985 at 12:7]

32 Furthermore, in the Minister's letter to Chief Walter Twinn on September 26, 1985, in which he accepted the

membership code, the Minister reminded Chief Twinn of subsections 10(4) and (5) of the Act, and stated as follows:

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

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

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

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

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

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

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

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

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

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

Order

The plaintiff and the persons on whose behalf she sues, being all the members of the Sawridge *Band*, are hereby ordered, pending a final resolution of the plaintiff's action, to enter or register on the Sawridge *Band* List the names of the individuals who acquired the right to be members of the Sawridge *Band* before it took control of its *Band* List, with the full rights and privileges enjoyed by all *Band* members.
Without restricting the generality of the foregoing, this Order requires that the following persons, namely, Jeannette Nancy Boudreau, Elizabeth Courtoreille, Fleury Edward DeJong, Roseina Anna Lindberg, Cecile Yvonne Loyie, Elsie Flora Loyie, Rita Rose Mandel, Elizabeth Bernadette Poitras, Lillian Ann Marie Potskin, Margaret Ages Clara Ward and Mary Rachel L'Hirondelle be forthwith entered on the *Band* List of the Sawridge *Band* and be immediately accorded all the rights and privileges attaching to *Band* membership.

Motion granted in part.

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MEMORANDUM OF FACT AND LAW

I. FACTS

1. The Applicant, Maurice Stoney, was born a member of the Sawridge First Nation.

   Affidavit of Maurice Stoney. [Tab B]

2. His grandfather, Johnny Stoney (also known as John Stephens), was a member of the Alexander Band under *Treaty No. 6,* who married Henrietta Sinclair, a member of what was then known as the Lesser Slave Lake Band, and became a member the Lesser Slave Lake Band with Chief Kinosayoo in or about 1895. The list of Kinosayoo's Band, Sawridge, showing Johnny Stony as number 18 shows that Johnny Stony formally transferred from Alexander's Band on September 14, 1910.

   Affidavit of Maurice Stoney. [Tab B]

3. Chief Kinosayoo signed *Treaty No. 8* in 1899 on behalf of the Lesser Slave Lake Band, recognized as a Band for that *Treaty* signing.

   Affidavit of Maurice Stoney. [Tab B]

4. Johnny Stoney possessed Lands on the banks of the Lesser Slave River where he operated a stopping place from 1895 on. These lands were initially considered to be held by him in severalty under *Treaty No. 8.*

   Affidavit of Maurice Stoney. [Tab B]

5. In or about 1912, Johnny Stoney and his family were recognized on the first paylist for the Sawridge Band. He was a member of Sawridge, on the paylist of the Sawridge Band until his death in 1956.

   Affidavit of Maurice Stoney. [Tab B]

6. In 1920, Johnny Stoney was advised by Indian Affairs that his lands would be part of the Sawridge Reserve.

Affidavit of Maurice Stoney. [Tab B]

7. Maurice's father was William Stoney, son of Johnny Stoney. William Stoney and his family lived in Slave Lake on the edge of the Sawridge Indian Reserve.

Affidavit of Maurice Stoney. [Tab B]

8. In 1944, William Stoney and his family were enfranchised.

Affidavit of Maurice Stoney. [Tab B]

9. Maurice Stoney applied to Sawridge for recognition of his membership which was automatic as a result of Bill C-31 on April 17, 1985.

Affidavit of Maurice Stoney. [Tab B]

10. The Sawridge Membership Rules did not become effective until September 26, 1985 and these Rules are stated to require recognition of all "acquired rights" members. On September 26, 1985 the Minister of Indian Affairs and Northern Development wrote to Chief Walter Twinn to advise him of this.

Affidavit of Maurice Stoney. [Tab B]

11. Sawridge refused to review the membership applications submitted in the years since 1985 until they 'concluded' that they had a 'completed membership form' from Maurice Stoney. Throughout the years since he first approached Sawridge until December 7, 2011, he was advised that Sawridge was not considering membership applications. On December 7, 2011, he was advised that the Council of Sawridge First Nation had denied his application for membership.

Affidavit of Maurice Stoney. [Tab B]

Completed Application of Maurice Stoney from Exhibit B to the Affidavit of Roland Twinn. [Tab C].

Exhibits C, D, G, H, I, J, K, L, M, N, O, P, Q, and R to the Affidavit of Roland Twinn. [Tab C]

12. On December 19, 2011, he appealed this decision denying his Membership in Sawridge.

20E

Affidavit of Maurice Stoney. [Tab B]

Exhibit T to Affidavit of Roland Twinn. [Tab C]

13. The Appeal Committee heard the appeal regarding Maurice's membership on April 21, 2012 and provided their decision on May 7, 2012 upholding the decision of Chief and Council denying his membership. The wording used was the same as the wording for denying his cousins membership, Aline Huzar and June Kolosky T-922-12. A judicial review of this appeal decision was filed in the Federal Court on May 11, 2012.

Affidavit of Maurice Stoney. [Tab B]

Exhibits W and Y to the Affidavit of Roland Twinn. [Tab C]

II. Beyond Jurisdiction: Requirements of Section 10(4) and 10(5) of the *Indian Act*

14. It is submitted that section 10, subsections 1, 4, 6, and 7 of the *Indian Act* provide the basis for determining membership in a band.

(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,

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

(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 this membership rules for the band.

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

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

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

Indian Act, S.C. 1985, c. 27. [Tab 1]

15. On July 9, 1985, Sawridge First Nation submitted membership rules however this did not complete the process for acceptance and effectiveness of these membership rules. Two points are clear from the letter of the Minister of Indian Affairs to Chief Walter Twinn dated September 26, 1985: first, membership consent did not occur until August 29, 1985, at the earliest, with the decision of the Minister being made as stated in his letter of September 26, 1985; and second, that these membership rules must "respect acquired rights" as set out in that letter from the Minister.

Affidavit of Maurice Stoney, Exhibit I. [Tab B]

16. Accordingly, it is submitted that on April 15, 1985, pursuant to Bill C-31, Maurice was a person with the right to have his name entered in the Band List under section 6 of the *Indian Act*. The passage of time did not remove this right and did not permit Sawridge Band to refuse to accept this "acquired rights".

Twinn et al. v. Poitras et al., 2012 FCA 47 [Tab 2]; Leave to Appeal to the Supreme Court of Canada dismissed July 19, 2012, Supreme Court of Canada Bulletin of Proceedings July 20, 2012, #34760. [Tab 3]

17. In 2003, Mr. Justice Hugessen granted a mandatory injunction to Bertha L'Hirondelle and 11 other women whose membership in Sawridge had been denied prior to passage of Bill C-31. He found that the Sawridge had refused membership to Bertha L'Hirondelle and the other 11, on the grounds that they were not resident on Reserve or had not demonstrated a significant commitment to the Band and submit to interviews by the Band. He found that these provisions violated the requirement for automatic membership provided by Bill C-31. Sawridge argued that these women had not applied for membership by completing the 43 page application form but Mr. Justice Hugessen held that this was a "red herring" because the issue was "whether those rules can lawfully be used to deprive them of rights to which Parliament has declared them to be entitled".

L'Hirondelle v. Canada, 2003 FCT 347, paras. 12, 18, 23-27, 32-34 and 39. [Tab 4]; appeal dismissed 2004 FCA 16 [Tab 5]

18. At that time, Sawridge had an action alleging that Bill C-31 was unconstitutional however that action has now been concluded and Bill C-31 is constitutional.

Twinn et al. v. Poitras et al., 2012 FCA 47 [Tab 2]; Leave to Appeal to the Supreme Court of Canada dismissed July 19, 2012, Supreme Court of Canada Bulletin of Proceedings July 20, 2012, #34760. [Tab 3].

19. Here, Sawridge argues as it did before, that "completed" applications were not submitted until 2011 however it is clear that the Applicant had been seeking to have his name added throughout the period since 1985 just as Bertha L'Hirondelle and all others had done.

Twinn et al. v. Poitras et al., supra 2012 FCA 47 [Tab 2]; SCC Proceedings July 20, 2012, #34760. [Tab 3]

L'Hirondelle, supra, paras. 1, 3-5, and 12. [Tab 4]; para. 35 [Tab 5]

Affidavit of Roland Twinn, paras. 3-5. [Tab C]

20. Finally, it is settled law that the provisions of Bill C-31 recognized membership effective April 17, 1985 of a number of classes of persons who had been excluded. Maurice was a member of Sawridge who was disentitled to Indian status from 1943 on because of the enfranchisement of his family. On April 17, 1985 all of these enfranchised persons were entitled to have their names added to the Band list. Sawridge had no ability to exclude their names from membership when they formulated their membership rules in July, August and September, 1985.

Sawridge, supra. para. 1. [Tab 4]

Canada v. Sawridge Band, 2009 FCA 245 , paras. 7-10. [Tab 6]

Attorney General of Canada v. Larkman, 2012 FCA 204, paras. 2, 10-14. [Tab 7]

IV. Contrary to the Charter of Rights, Section 15 and to Section 35 of the Constitution Act, 1982.

21. Sawridge has disputed the ability of enfranchised members to be Band members since the passage of Bill C-31 based on the argument that it had a right under section 35 of the *Constitution Act, 1982,* to determine who was a member of the Band. The matter of Bill C-31 has been argued in the Courts for a very lengthy period of time and was conclusively dismissed. Constitutional arguments based on section 35 and treaty rights can no longer be argued.

Sawridge Band v. The Queen, 2008 FC 322 [Tab 8]; aff'd 2009 FCA 123 [Tab 9]; leave to appeal to the Supreme Court of Canada dismissed December 10, 2009 [Tab 10].

22. In any event, it is clear that Johnny Stoney, the grandfather of Maurice, was accepted by Lesser Slave Lake Band based on the membership of his wife, Henrietta Sinclair, in or about 1895 and formally in 1910 by the Sawridge Band. His lands became part of the Reserve for Sawridge.

Affidavit of Maurice Stoney. [Tab B]

23. It is submitted that the actions of Sawridge in refusing to acknowledge the membership of Maurice is contrary to the aboriginal and *Treaty* rights recognized by section 35 of the *Constitution Act, 1982.*

24. The actions of Sawridge are without an aboriginal and treaty basis and are discriminatory under section 15 of the *Charter.*

A.G. v. Larkman, supra. para. 13. [Tab 7]

V. Procedural Fairness

25. The Appeal Committee held that there "are no grounds to set aside the decision of the Chief and Council". The decision of the Sawridge Chief and Council refused the applications of Maurice because he did not have "any specific "right" to have name entered in the Membership List" and the Council did not feel that it was "in the best interests and welfare of the First Nation".

Affidavit of Roland Twinn, Tabs S and Y. [Tab C]

26. As stated above, Maurice is entitled to membership as provided by Bill C-31 prior to the establishment and recognition of the Sawridge membership provisions and he is and has been entitled to be a member since April 17, 1985. There are no grounds to deny the membership of Maurice.

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27. The Sawridge First Nation Appeal Committee has a duty of procedural fairness requiring an unbiased tribunal who must apply the law fairly. An institutional problem will violate the principles of the rule against bias.

R. v. Lippe, [1991] 2 S.C.R. 114, pp. 32-38 and 47-52. [Tab 11]

Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, paras. 61-85. [Tab 12]

28. It is submitted that the total membership of Sawridge First Nation is small being in the range of 50 members and noted by the Federal Court of Appeal as 44 members. Only three applicants have been admitted to membership since 1985 and these three are (were) the sisters of the 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 Twin and Winona Twin, who made the original decision appealed from.

Sawridge, supra., paras. 10. [Tab 6]

Affidavit of Roland Twinn, Tab Y. [Tab C]

29. It is submitted that there was institutional bias and this decision must be set aside.

VI. Order Requested.

30. It is respectfully submitted that a Declaration should issue declaring that Maurice Stoney is a member of Sawridge, with solicitor-client costs.

ALL OF WHICH IS SUBMITTED this 1st day of August, 2012.

DAVIS LLP.

Per: _____
Priscilla Kennedy
Solicitor for Maurice Stoney

Time: 1.5 hours.

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TABLE OF AUTHORITIES

1. *Indian Act,* S.C. 1985, c. 27.

2. *Twinn et al. v. Poitras et al.*, 2012 FCA 47.

3. *Twinn et al. v. Poitras et al.*, Leave to Appeal to the Supreme Court of Canada dismissed July 19, 2012, Supreme Court of Canada Bulletin of Proceedings July 20, 2012, #34760.

4. *L'Hirondelle v. Canada,* 2003 FCT 347.

5. *Sawridge Band v. Canada,* 2004 FCA 16.

6. *Canada v. Sawridge Band,* 2009 FCA 245.

7. *Attorney General of Canada v. Larkman,* 2012 FCA 204.

8. *Sawridge Band v. The Queen,* 2008 FC 322.

9. *Sawridge Band v. The Queen,* 2009 FCA 123.

10. *Sawridge Band v. The Queen,* Leave to Appeal December 10, 2009.

11. *R. v. Lippe,* [1991] 2 S.C.R. 114.

12. *Canadian Pacific Ltd. v. Matsqui Indian Band,* [1995] 1 S.C.R. 3.

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.

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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.

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Court File: T-923-11

FEDERAL COURT

BETWEEN:

MAURICE STONEY

Applicant

-and-

SAWRIDGE FIRST NATION

Respondent

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT

PART I – STATEMENT OF FACTS

1. The Respondent ("Sawridge") accepts that the historical documents attached to the Affidavit of the Applicant Maurice Stoney and to the Affidavit of Sawridge Chief Roland Twinn show that:

(a) The Applicant is the son of William Stoney;

Baptism Certificate, Applicant's Record page 54

(b) William Stoney identified himself and was identified by the Indian Affairs Branch in 1944 as a member of the Sawridge Band of the Lesser Slave Lake Agency;

Application for Enfranchisement, pages 62 – 63 of the Applicant's Record;

Release and Surrender, pages 66 – 67 of the Applicant's Record;

Indian Affairs Branch Precis dated July 7, 1944, Applicant's Record page 71;

Indian Affairs Branch Requisition for Cheque dated August 12, 1944 referring to Order-in-Council P.C. 40/6000 dated August 1, 1944, Applicant's Record page 72;

Indian Affairs Branch Letter dated August 24, 1944 referring to August 1, 1944 Order-in-Council, Applicant's Record page 68.

(c) William Stoney's father was Johnny Stoney, a member of the Alexander Band, Edmonton Agency who transferred to Sawridge in the Lesser Slave Lake Agency on September 14, 1910 and was identified by the Assistant Deputy and Secretary of the Indian Affairs Branch as a member of "the Sawridge Band" on August 19, 1920;

Certificate of Birth and Baptism, Applicant's Record page 58;

Lesser Slave Lake Agency paylist, Applicant's Record page 10;

Indian Affairs Branch Letter dated April 22, 1913, Applicant's Record page 11;

Indian Affairs Branch Letter dated August 19, 1920, Applicant's Record, page 25.

(d) William Stoney voluntarily gave up his status as an "Indian" and also his membership in Sawridge and was enfranchised by Order in Council P.C. 40/6000 dated August 1, 1944 under section 114 of the *Indian Act*, R.S.C. 1927, c. 98, the predecessor to section 109(1) of the *Indian Act,* R.S.C. 1985, c. I-5, as it read immediately prior to April 17, 1985;

See documents listed under paragraph 1(b) *supra.*

(e) by section 114 of the 1927 *Indian Act*, William Stoney's wife Margaret and his two minor sons, Alvin and the Applicant, were also enfranchised and ceased to be members of Sawridge effective August 1, 1944.

Indian Affairs Branch Letter dated August 24, 1944, Applicant's Record page 68.

Section 114 of the *Indian Act*, R.S.C. 1927, c. 98 **[Sawridge Authorities Tab 1]**

2. Paragraphs 3, 4, 5 and 6 of the Applicant's Memorandum of Fact and Law are completely irrelevant to the membership and natural justice issues before the Court on this judicial review.

3. Contrary to paragraph 9 of the Applicant's Memorandum of Fact and Law, his membership in Sawridge was not "automatic as a result of Bill C-31 on April 17, 1985". That is a question of law – one of the questions underlying this judicial review. Nor did the Applicant provide a completed application for membership in Sawridge until he provided his Sawridge Indian Band Membership Application Form signed August 30, 2011.

> Paragraph 3 and Exhibit 3 of the Twinn Affidavit, Applicant's Record pages 38 and 46 – 53.

4. Such an application is contemplated under the Sawridge membership rules and is expressly required unless, under section 3(a)(i) of those rules, the applicant, but for the establishment of the rules, would have been entitled pursuant to section 11(1) of the Act to have his name entered on the band list maintained by the Department and is "lawfully resident on the reserve" or, under section 3(b) of those rules, the applicant for membership is the natural child of parents both of whose names are on the Sawridge membership list.

> Section 3 of the membership rules, Applicant's Record pages 29 - 30.

5. Contrary to paragraph 10 of the Applicant's Memorandum of Fact and Law, Sawridge's membership rules became <u>effective July 8, 1985</u> under section 10(8) of *An Act to amend the Indian Act*, 33 – 34 Eliz II c. 27 ("Bill C-31"), the date upon which Sawridge gave notice to the Minister that it was "assuming control of its own membership" and provided to the Minister a copy of the Sawridge membership rules under section 10(6); <u>not</u> on September 25, 1985.

> Paragraphs 2 and Exhibit "A" of the Twinn Affidavit, Applicant's Record pages 38 and 44 – 45.

L'Hirondelle v. Her Majesty the Queen, 2003 FCT 347, at para 16 [Applicant's Authorities Tab 4].

6. After receiving the Applicant's completed application for membership the Sawridge Chief and Council, acting under the Sawridge membership rules, decided that the Applicant did not have a "specific right" to have his name entered on the Sawridge membership list and also decided not to exercise its discretion under the membership rules to enter his name on the membership list. The decision on the Applicant's August 30, 2011 application for membership was communicated to the Applicant by registered letter on or about December 7, 2011.

Paragraph 5 and Exhibit "S" of the Twinn Affidavit, Applicant's Record pages 40 and 117 – 119.

7. On December 22, 2011 the Applicant's appeal from Chief and Council's decision dismissing his application for membership was faxed to the Sawridge office.

Paragraph 6 and Exhibit "T" of the Twinn Affidavit, Applicant's Record pages 40 and 120 – 121.

8. The appeal hearing was originally scheduled for February 25, 2012 but was, at the request of the Applicant, rescheduled to April 21, 2012.

Paragraph 7 of the Twinn Affidavit, Applicant's Record page 40.

9. On or about March 23, 2012 the Applicant's lawyer was provided with a document entitled "Appeal Procedure", the Record that was before Chief and Council and the Applicant's notice of appeal.

Paragraph 7 of the Twinn Affidavit, Applicant's Record pages 40 – 41

Complete copy of Exhibit "V" to the Twinn Affidavit, **[Sawridge Authorities Tab 2]**.

Exhibits "U" and B" through T" of the Twinn Affidavit, Applicant's Record pages 126 and 46 – 125.

10. On April 21, 2012 the Sawridge Appeal Committee convened to hear the Applicant's appeal.

Paragraph 8 of the Twinn Affidavit, Applicant's Record page 41.

11. The Appeal Committee, under sections 12 and 13 of the membership rules, consists of the electors of Sawridge who attend a meeting convened to hear a membership appeal. Twenty-two Sawridge electors attended the April 21, 2012 meeting, including Chief Twinn and Councillors Justin Twin and Winona Twin.

Paragraph 9 and see the second page of Exhibit "Y" listing the chairman of the Appeal Committee and the other 21 members of the committee, Applicant's Record pages 41 and 196.

12. After dealing with a procedural motion the Appeal Committee accepted written and oral submissions from the Applicant's lawyer, questioned the Applicant's lawyer and then met in camera for approximately 3 hours, until about 5:00 P.M. when it came out of camera and dismissed the appeal on the "grounds that having heard the evidence and the submissions of the Appellant and the Appellant's Legal Counsel, there are no grounds to set aside the decision of the Chief and Council.".

Paragraphs 10 – 15 of the Twinn Affidavit, Applicant's Record pages 41 – 42.

Decision, Exhibit "Y" of the Twinn Affidavit, Applicant's Record pages 195 – 196 of the Applicant's Record.

13. It bears noting that the sole ground of appeal identified in the Applicant's written submissions before the Appeal Committee was that "Enfranchisement and its removal [by Bill C-31] effective April 17, 1985 entitles Maurice Stoney to membership under section 6(1)(c.1)".

Paragraph 13 of "Appeal to the Appeal Committee Composed of the Electors of the Sawridge First Nation" dated April 21, 2012, contained in Exhibit "W" of the Twinn Affidavit, Applicant's Record pages 131 – 134.

14. The Applicant started the within application for judicial review of the Appeal Committee's April 21, 2012 decision on May 11, 2012.

Notice of Application, Applicant's Record pages 1 – 7.

PART II – POINTS IN ISSUE

15. Did, as the Applicant argues in his Memorandum of Fact and Law, the Appeal Committee act beyond its jurisdiction by denying the Applicant's "acquired" right to Sawridge membership?

16. Did, as the Applicant argues in his Memorandum of Fact and Law, the Appeal Committee discriminate against the Applicant and deny him aboriginal and treaty rights recognized by section 35 of the *Charter of Rights and Freedoms*?

17. Should the Appeal Committee's decision be set aside for institutional bias?

PART III – SUBMISSIONS

The Appeal Committee Did Not Act Beyond its Jurisdiction

A. Sawridge Membership Rules

18. Sawridge assumed control over its own membership on July 8, 1985, the day its membership rules, supporting documentation and by-laws No, 103, 104, 105 and 106 were handed to the Deputy Minister of Indian and Northern Affairs who accepted them on behalf of the Minister. Contrary to what the Applicant argues, this completed the process for the effectiveness of Sawridge's membership rules, as long as they have satisfied the conditions set out in section 10(1) of Bill C-31. Expressly under section 10(8) they became effective on the date on which notice was given to the Minister under section 10(6), not on the date of the Minister's "notice" under section 10(7).

> Paragraph 2 and Exhibit "A" of the Twinn Affidavit, Applicant's Record pages 38 and 44 – 45.
>
> Section 10 of B- C-31, Applicant's Authorities Tab 1.
>
> *L'Hirondelle v. Her Majesty the Queen*, 2003 FCT 347, at para 16 [Applicant's Authorities Tab 4].

19. The Minister has no discretion to review, approve or disapprove a band's membership rules under Bill C-31 or any other provision of the *Indian Act*.. And, as the Sawridge membership rules were accepted as having met the conditions set forth in section 10(1), section 10(8) clearly and unequivocally provides that they became effective on July 8, 1985.

20. The Appeal Committee has clear jurisdiction under those membership rules to hear and decide the Applicant's application for membership. And, it has had that jurisdiction since July 8, 1985.

B. The Applicant Has No "Acquired" Right to Membership

21. The Applicant argues that he was a person entitled to have his name entered in the Sawridge membership list, a right he acquired effective April 17, 1985 under Bill C-31 by reference to section 6 of Bill C-31.

22. However, the Applicant has no such "acquired right". The Applicant has "at best, a right to apply to the Band for Membership"; and, that point is *res judicata.*

> *Her Majesty the Queen v. Huzar, Kolosky et al*, Appeal N. A-326-98 (June 13, 2000) **[Sawridge Authorities Tab 14]**
>
> *Cf. L'Hirondelle v. Her Majesty the Queen*, 2003 FCT 347, at paras. 25, 27 and 29 [Applicant's Authorities Tab 4]

23. Section 6 of Bill C-31 only provides the Applicant with a right to have his name restored to the Indian Register maintained by the Department in Ottawa; that is, it restores his status as an "Indian". Section 6 gave and gives him no right to have his name entered on any band membership list. For restoration of membership in a band effective April 17, 1985 the Applicant must look to section 11(1) of Bill C-31.

> Sections 6 and 11 of Bill C-31 [Applicant's Authorities Tab 1].

24. Section 11(1) specifically provides that a person has a right to have his name entered onto a band list if: (a) his name was on the band's membership list "immediately prior to April 17, 1985"; (b) he is a members 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.

25. The Applicant'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).

26. The Applicant 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".

> Section 114 of the *Indian Act*, RSC 1927 c. 98 **[Sawridge Authorities Tab 1]**
>
> Section 12 of the *Indian Act*, RSC 1985, c I-5, (unamended) **[Sawridge Authorities Tab 3]**
>
> Section 109(2) of the *Indian Act*, RSC 1985, c I-5, (unamended) **[Sawridge Authorities Tab 3]**
>
> *Gender Equity in Indian Registration Act*, 59 Eliz II (2010), c. 18 **[Sawridge Authorities Tab 4]**.

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

28. Indeed, it is section 11(2) of Bill C-31 that specifically addresses the restoration of the Applicant'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.

29. Sawridge took control of its membership list effective July 8, 1985 so section 11(2) did not and does not give the Applicant any right to membership in Sawridge.

30. The Applicant 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. The Applicant's argument that the Appeal Committee acted beyond its jurisdiction by upholding Chief and Council's decision that he had no "specific" right to membership under Bill C-31 should be rejected.

> *L'Hirondelle v. Her Majesty the Queen*, 2003 FCT 347 [Applicant's Authorities Tab 4].

The Appeal Committee Did Not Discriminate Against the Applicant or Deny Him Aboriginal and Treaty Rights

31. The Applicant did not argue before the Appeal Committee that the Sawridge membership rules were discriminatory or that they denied the Applicant's aboriginal and treaty rights. Nor does the Applicant's Memorandum of Fact and Law in this judicial review explain how the Sawridge membership rules, rules which do not deny any "specific" or "acquired" right to membership under Bill C-31, discriminate against the Applicant contrary to section 15 of the *Charter of Rights and Freedoms* or how they violate the Applicant's aboriginal or treaty rights.

32. There was no evidence before the Appeal Committee and there is no evidence before this Court in this judicial review of the Appeal Committee's decision upon which any such constitutional ruling could or should be made.

33. Neither does the Applicant's refer the Court to any authority upon which this Court might find that holding the Applicant to the consequences of his father's voluntary enfranchisement, in compliance with both Bill C-31 and the Sawridge membership rules, could discriminate against the Applicant or breach the Applicant's aboriginal or treaty rights. *Larkin*, the Applicant's sole authority in this section of his argument, is a procedural decision and deals with forgeries and fraud perpetrated upon an Indian woman enfranchised in 1952, forgeries and fraud that had been proven in litigation before the Ontario courts before the issue came before the Federal Courts in 2010 when Ms. Larkin sought an extension of time to judicially review her grandmother's 1952 enfranchisement order in council.

34. The Applicant's unexplained and groundless allegations that the Sawridge membership rules are discriminatory and breach the Applicant's aboriginal and treaty rights and his argument that the Appeal Committee's decision under those rules must be quashed (if that is his argument), should be rejected.

The Actions of the Appeal Committee Reveal Neither a Reasonable Apprehension of Bias Nor an Institutional Bias

35. It bears noting that, as is apparent from the Appeal Committee's Record and the Applicant's written submissions on the appeal, the Applicant and his legal counsel did not challenge the Chief and Council's decision not to exercise its discretion under the membership rule in favour of the Applicant. The argument before the Appeal Committee was brought entirely on the Applicant's alleged "acquired", right under Bill C-31, to automatic membership effective April 17. 1985.

36. However, as set out above, Bill C-31 (the *Indian Act* as amended by Bill C-31) does not create for the Applicant any such "acquired" right as of April 17, 1985, or ever, to have his name entered on the Sawridge membership list. The Appeal Committee had therefore the jurisdiction and legal grounds upon which to uphold the Sawridge Chief and Council's denial of the Applicant's application for membership.

37. The Applicant's only other argument against the Appeal Committee's decision is that the Appeal Committee was institutionally biased because, as suggested in paragraph 28 of the Applicant's Memorandum of Fact and Law, "The Appeal Committee consisted of 21 of the members of Sawridge and three of these 21 were the Chief, Roland Twinn and Councillors, Justin Twin and Winona Twin, who made the original decision appealed from.".

38. The time and place to raise such an allegation of bias was at the April 21, 2012 appeal hearing. The allegation of bias, not having been raised at the hearing, the Applicant cannot now complain of "institutional bias".

> Brown and Evans, *Judicial Review of Administrative Action in Canada*, Canvasback Publishing, Toronto (1998), para. 11:6000 **[Sawridge Authorities Tab 5]**.

39. In any event, the Applicant adduces absolutely no evidence of actual bias on the part of any of the 21 individual members of the Appeal Committee on April 21, 2012 or of the Appeal Committee itself. And there must be an evidentiary foundation before the Court can find any bias or a reasonable apprehension of bias upon which to set aside the Appeal Committee's decision.

> *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at paras. 112-13 **[Sawridge Authorities Tab 6]**.

Wewaykum Indian Band v. Canada, 2003 SCC 45 at paras. 60, 76 **[Sawridge Authorities Tab 7]**.

Finch v Association of Professional Engineers & Geoscientists, [1996] 5 WWR 690 (BCCA) **[Sawridge Authorities Tab 8]**, leave to appeal refused [1996] 10 WWR lix (note) (SCC).

40. The only evidence before the Court in this case is:

(a) that the members of Sawridge, in taking control of their membership list in 1985, voted in a referendum to give to Chief and Council under section 2 of their new membership rules the "direction and supervision "of the Sawridge membership list and also to give to "a meeting of the electors of the Band" under section 13 the power to hear and dispose of any appeal from Chief and Council's membership decisions; and,

(b) that 3 of the 21 members of the Appeal Committee were members of Chief and Council (but there is no evidence those 3 individuals were biased or that they controlled the other electors sitting on the committee).

Sawridge membership rules, Applicant's Record pages 29 – 31.

Paragraph 9 and second page of Exhibit Y of Twinn Affidavit, Applicant's Record pages 41 and 196.

41. Even where the structure or operation of a decision-making body is said to suggest bias, that appearance of apprehension must be reasonable and a judicial determination of institutional bias presupposes that "a well-informed person, viewing the matter realistically and practically – and having thought the matter through – would have a reasonable apprehension of bias *in a substantial number of cases*."

2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool), [1996] 3 SCR 919 at para 44 **[Sawridge Authorities Tab 9]**.

Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 SCR 3 at para 67 [Applicant's Authorities Tab 12].

42. In this case however, as in *Matsqui*, the decision under review is not based upon any member's personal interests; and, to suggest otherwise is mere speculation. Instead, having considered the "acquired rights" ground of appeal brought before it by the Applicant and by Applicant's legal counsel, the members of the Appeal Committee dismissed the appeal in accordance with the Sawridge membership rules which give Sawridge the discretion to deny membership to an applicant who has no "specific" or "acquired" right under Bill C-31.

43. For the reasons set out above, the Appeal Committee (and the Chief and Council) was correct in law in finding that the Applicant had no acquired right to Sawridge membership under section 11(1) of Bill C-31. Therefore, the Appeal Committee's decision is not only correct in law but it was also consistent with and in the interests of the Sawridge community as a whole.

Matsqui, *supra* at para 72 [Applicant's Authorities Tab 12].

44. As the decision of the Appeal Committee was correct at law and made in line with the community's interest in upholding the membership rules and not for reasons personal and distinct to members of the Appeal Committee (any such suggestions to the opposite being purely speculative), "it cannot be said that a reasonable apprehension of bias would exist in the mind of a fully informed person in a *substantial number* of cases."

Matsqui, *supra* at para 72.

45. Further, the suggestion that the small size of Sawridge, given the number of those on its Appeal Committee, might lead to a reasonable apprehension of bias was considered by Rothstein J. (as he was then) in *Sparvier v Cowesse Indian Band No. 73*. In that case he stated:

> If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the

election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process ...

Sparvier v Cowness Indian Band No. 73 (1994), 63 FTR 242 at para 75 **[Sawridge Authorities Tab 10]**.

46. Based upon the above, the Respondent submits that it is reasonable, in situations such as these, for the legal standard for bias to be adjusted given the contextual realities of Sawridge. Necessity, created by the fact that the First Nation is small, means that members who might otherwise be disqualified from determining an appeal cannot be disqualified; or the pool of candidates entitled to act is simply too small. Natural justice must give way to necessity because, otherwise, there would be no means of deciding the issue. To find the contrary is to allow the machinery of justice to break down.

Lower Nicola Indian Band v. Joe, 2011 FC 1220 at para 46 **[Sawridge Authorities Tab 11]**.

Sparvier, *supra* at 172-73, cited in *Bill v. Pelican Lake Appeal Board*, 2006 FCA 397 at para 8 **[Sawridge Authorities Tab 12]**.

47. Finally, there is no evidence that the Appeal Committee denied the Applicant fairness and natural justice during the hearing of his appeal. The Appeal Committee allowed him legal counsel to make or assist in making his case, it adjourned the hearing at his request from February 25 to April 21, 2012 and the chairman correctly limited the electors who could decide the appeal to those actually present for the meeting. The Appeal Committee did not act high-handedly. All this clearly "militates against finding the existence of inherent institutional bias or lack of impartiality" and the Applicant's complaint of bias should be rejected by this Court.

Leo Pharma Inc. v. Canada 2007 FC 306, at paras 58 – 82 **[Sawridge Authorities Tab 13]**.

Brown and Evans, *Judicial Review of Administrative Action in Canada*, Canvasback Publishing, Toronto (1998), para. 11:5100 **[Sawridge Authorities Tab 5]**.

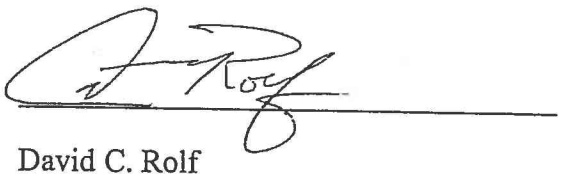
48. There is, on the record and in the evidence before this Court, no basis for a finding of bias or reasonable apprehension of bias or institutional bias on the part of the Appeal Committee; and this third and final ground of appeal offered by the Applicant should also be rejected.

PART IV – ORDER REQUESTED

49. The Respondent Sawridge First Nation asks that this judicial review be dismissed with costs.

All of which is submitted this 20th day of August, 2012

PARLEE McLAWS LLP



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