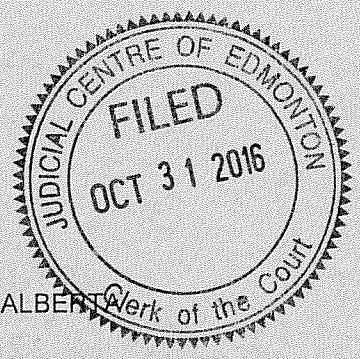
Clerk's stamp:



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

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

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

APPLICANTS	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, CATHERINE TWINN, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**WRITTEN SUBMISSIONS OF THE TRUSTEES ON THE APPLICATION BY MAURICE STONEY AND HIS SIBLINGS TO BE ADDED AS A PARTY OR INTERVENOR AND DECLARE THEM TO BE BENEFICIARIES AND ON THE APPLICATION BY THE SAWRIDGE FIRST NATION TO BE ADDED AS INTERVENOR**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

	Clerk's stamp:
COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985
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Counsel for the Stoney Applicants

TABLE OF CONTENTS

INTRODUCTION

1. On April 12, 2016, Maurice Stoney ("Stoney") applied on his own behalf, and on behalf of his 10 brothers and sisters (the "Stoney Applicants") to be added as a party, or alternatively, as an intervenor, in the within action, commenced by the trustees ("Trustees") of the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "1985 Trust"). The application further seeks the Court to declare the Stoney Applicants to be beneficiaries of the 1985 Trust.

2. In response to the application by the Stoney Applicants, the Sawridge First Nation ("Sawridge") brought an application to be granted intervenor status in the within Action, should the Stoney Applicants be successful in being added as an intervenor, or as a party.

3. The Trustees rely on the Affidavit of Chief Roland Twinn, sworn on September 21, 2016 and the written submissions of Sawridge. Chief Twinn's Affidavit provides crucial assistance to this Court to outline the history of Stoney's numerous, duplicative and unsuccessful attempts to gain membership status in Sawridge or have his alleged membership acknowledged. The attempt is being repeated herein, notwithstanding that the application by the Trustees is not the proper forum to address membership disputes, nor a declaration of beneficiary status. The duplication by this application is brought notwithstanding that the Courts and other tribunals have fully and finally decided Stoney's membership issue and this Court specifically advised it will not address membership.

4. The Trustees submit that Chief Twinn's Affidavit, earlier decisions of the Courts and other tribunals in relation to Stoney's attempts to attain membership in Sawridge, as well as Sawridge's Written Submissions, highlight overstatements and inaccuracies in the information that Stoney has filed in the Stoney Application.

5. The Trustees agree with the position of Sawridge that the Stoney Application may be disguised as an application to be added as intervenor or a party, but it is merely another attempt in a long history of attempts by Stoney and his family to assert an entitlement to membership and thereby be recognized as beneficiaries of the Trust.

6. The written submissions filed on behalf of Stoney do not, at any juncture, address the test to be added as a party or intervenor or otherwise provide any assistance to this Court in addressing such an application. The relief sought, at paragraph 30 of Stoney's written submissions, speaks to party or intervenor status tangentially to the *real* relief sought, which is stated as "an Order naming Maurice Stoney and his brother and sisters as beneficiaries of the 1985 Sawridge Trust".

7. By Order of this Court December 17, 2015, it was clearly stated that membership was not an issue to be addressed in this action. Stoney tried, unsuccessfully, to appeal this decision. The within application is another attempt by Stoney to relitigate not only the overarching membership issue, but the decision of this Court that membership is not a proper issue for consideration in this Action. Allowing the Stoney Applicants status in this action for the reasons that are argued in their written materials would squarely bring membership into these proceedings.

8. The Trustees oppose the Application by Stoney and his siblings as being unnecessary, vexatious, frivolous, *res judicata*, and an abuse of process.

9. The Trustees submit that the issue of Stoney and his siblings' alleged right to membership should, *inter alia,* be prohibited by the doctrine of issue estoppel and furthermore is irrelevant to these proceedings. The Trustees further submit that this Court is not the proper forum for the constitutional arguments being advanced by Stoney.

10. The August 24, 2016 Order in this action directed the parties to file written submissions on the applications by both the Stoney Applicants and Sawridge. In the interests of efficiency, the Trustees file the within submissions both in opposition to the application by Stoney and his siblings and in support of the application by Sawridge.

PART I – STATEMENT OF FACTS

11. The Trustees adopt the submissions of Sawridge, filed September 28, 2016, and the facts as submitted in Chief Twinn's Affidavit in relation to the historical background to the Stoney Application, the argument that the Stoney Application ought to be struck or dismissed as being *res judicata,* an abuse of process or pursuant to the doctrine of issue estoppel. Should the Court grant any form of status to Stoney and his siblings in this Action, Sawridge is in a position to be uniquely helpful to the Court in dealing with the merits of Stoney's application and should be granted intervenor status.

12. The Trustees wish to add that Stoney has had costs awarded against him his previous applications which he has failed to pay and thus his numerous applications on this membership have essentially been without recourse to him.

13. The Trustees further add that a review of the transcript of Stoney's questioning shows contempt for the litigation process and an obstructionist demeanor.

PART II - ISSUES

(a) Should the Stoney Applicants be granted status in this Action?

(b) If the Stoney Applicants are granted status in this Action, should Sawridge be granted intervenor status?

(c) Should the Trustees be awarded solicitor client costs or enhanced costs in light of the frivolous and vexatious nature of the Stoney Application?

PART III - SUBMISSIONS

Stoney Application

14. The Trustees adopt Sawridge's arguments in relation to the Stoney Application.

15. While the Trustees do not wish to repeat arguments that have been made by Sawridge, it is necessary to start at the fundamental problem with the Stoney Application, which is that the Application relies on, assumes and argues that Stoney has an automatic right to membership in Sawridge and a corresponding right to beneficiary status with respect to the 1985 Trust. It is therefore imperative to draw this Court's attention to the decision of the Federal Court of Appeal in *Huzar v Canada* at paragraphs 4 and 5:

> 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 with the consent of the Band.
>
> 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, <u>at best, a right to apply for membership</u>. 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.
>
> *Huzar v Canada,* 2000 CarswellNat 1132 (FCA), at paras. 4 and 5 [TAB 1]

16. The Stoney Application, the Stoney Affidavit, the Cross-Examination of Maurice Stoney and the Written Submissions of Maurice Stoney all presuppose that he has an automatic right to membership. A review of Chief Twinn's Affidavit and the materials attached to it, as well as the decisions of the Courts and various tribunals in relation to his matter, bely this assumption. It is submitted that the Stoney Application must fail as it is founded upon an erroneous assumption that has been successfully challenged by Sawridge each time Stoney has raised the issue.

17. The Trustees submit that Stoney's failure to identify or address the applicable Rules or legal test to be applied in considering the application for party or intervenor status ought to influence the Court to dismiss the application in its entirety, and to award costs against the Stoney Applicants. In the event that the Stoney Applicants try to correct their omission of any argument or discussion of the legal tests to be applied by way of reply submissions, the Trustees submit that reply on that topic would be improper and ought not to be given any consideration.

18. The Trustees identify for the Court that the relevant rules for consideration are Rule 3.75 (for adding a party to an originating application) and Rule 2.10 (for adding an intervenor).

[TAB 2]

19. The Trustees adopt the submissions of Sawridge at paras. 40 to 49 of their written submissions as it relates to the test for granting intervenor status. The test for granting party and intervenor status has been said to be largely the same; however, the threshold for party status is greater than for intervenor status.

Carbon Development Partnership v Alberta (Energy & Utilities Board) 2007 ABCA 231 at para. 8 [TAB 3]

20. Judicial consideration of the rules relating to adding parties clearly identifies that the power to confer party or intervenor status is at the discretion of the Court and that the Court should be "satisfied that the Order should be made". The Court may not make an Order if prejudice would result for a party that could not be remedied. It is also a prerequisite that the claim to be added or reviewed not be "hopeless".

869120 Alberta Ltd v B&G Energy Ltd. 2011 ABQB 209 at para. 22 [TAB 4]

21. The Trustees submit that the Order should not be made as the claims being made are hopeless as they have been previously and conclusively decided.

22. The Trustees submit that there is serious prejudice to the Trustees given the 5 year progression of the application to date. Stoney submits that he has been involved in this application from the beginning and yet he waits for 5 years to bring this application.

23. The Stoney Applicants seek in their written submissions that the Trustees should pay Stoney's costs of the action "from the 1985 Trust" without arguments on this issue. As deposed by Chief Twinn, Stoney has failed to pay the costs awarded against him in favour of Sawridge and the Trustees in previous actions is a consideration in the prejudice that arises to the Trustees as Stoney has demonstrated a lack of respect for Court orders regarding costs and has sought an

order seeking the payment of his costs from the Trusts. This request, which is not identified in his motion, but raised in the written submissions, demonstrates a lack of care and concern for the impact of his actions on the beneficiaries of the 1985 Trust, who will be prejudiced by the further complication of this action and the consequent costs should the Stoney Applicants be allowed status.

24. The fact that Stoney's written submissions provide no assistance to this Court in terms of the applicable Rules, the legal tests and the application of the tests to the alleged facts ought to dissuade this Court from allowing the Stoney Applicants status in this action. It is submitted that there should be some element of providing assistance or special expertise to persuade the Court to exercise its discretion to allow the Stoney Applicants status in this action.

25. To the contrary, the Stoney Applicants have complicated the action, overstated their position, and otherwise abused the process in raising matters that are prohibited.

26. Stoney's repeated assertion that he and his siblings are "acquired rights members" and that they are members of Sawridge demonstrates a lack of candor with the Court that would undermine any assistance their participation could otherwise provide.

27. The Sawridge written submissions, along with the Affidavit of Chief Twinn, refute the assumptions made in the written submissions of the Stoney Applicants and clearly call into question the integrity of the Stoney Applicants in repeatedly mischaracterizing Stoney and his siblings as being members of Sawridge when they are clearly not. The Stoney applicants attempt to use this mischaracterization as the basis for a conclusion that Stoney and his siblings are beneficiaries of the 1985 Trust. It is clear from the record that Stoney and his sibling are not members of Sawridge, that Stoney sought judicial review of the decision to deny him membership, and that the application to overturn the decision was dismissed by Justice Barnes in 2013.

28. Justice Barnes' decision made it clear that Stoney did not have an automatic right to membership and noted that Stoney continued to try to relitigate an issue that had already been decided, which was barred under the doctrine of issue estoppel:

> I also cannot identify anything in Bill C-31 that would extend an automatic right of membership in 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 and 17
[TAB 5]

29. In light of the decision of Justice Barnes, it is hard to characterize the statements and submissions made by Stoney as anything but a mischaracterization of the facts. The Trustees specifically note the following occasions in which Stoney asserted facts to the direct contrary of Justice Barnes' conclusions:

- The Application at para. 3 (e);
- The Maurice Stoney Affidavit at para. 9;
- The cross-examination of Maurice Stoney at pages 22 and 23; and
- The Written Submissions of the Stoney Applicants at paras. 14, 15, 20, and 21.

Various Materials filed by Stoney Applicants [TAB 6]

30. The Trustees submit that the attempts made by the Stoney Applicants in the written submissions to frame and raise constitutional arguments in the characterization of a private trust does nothing but complicate an action that needs no further complication and is indicative of the complication that the Stoney Applicants will bring to this matter without any useful or helpful purpose.

The same is true for the Stoney Applicants asking this court to regulate the operations of First Nations, which are "bands" within the meaning of the Indian Act. The Federal Court is the only forum for such an issue and since the Federal Court has commented on the Sawridge membership process in previous decisions, there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership, then that should be reviewed in the Federal Court, and not in this 1985 Trust application for modification and distribution process.

1985 *Sawridge Trust v Alberta (Public Trustee)* 2015 ABQB 799 at para. 35 [TAB 7]

31. That Stoney framed his application as a representative action and filed his Affidavit "on behalf of" his siblings also, demonstrates the confusion that the Stoney Applicants will bring to this action. While representative actions may be appropriate in some circumstances, Stoney has not demonstrated that he can reliably "represent" his siblings in this matter as not all siblings share the same facts on their application for membership.

Questioning on Affidavit Transcript of Maurice Stoney, filed October 21, 2016, at pages 63 line 13 to page 66 line 2.

[Tab 8]

32. The evidence of Chief Twinn at paras. 30 – 36 of his Affidavit filed September 28, 2016 clarifies that William C. Stoney applied and his membership application was denied, that Sawridge

provided a membership application to Bernie Stoney and Gail Stoney, but had never received a completed application, and that Sawridge has no record of any membership application from Linda Stoney, Angeline Stoney, Betty Jena Stoney, Alma Stoney, Alva Stoney or Bryan Stoney.

33. In paragraph 29 of their Written Submissions, the Stoney Applicants suggest the Trust was not signed on the date it was signed. The Trustees state the Trust Deed speaks for itself and to suggest, without any corroborating evidence, that the Deed may not have been signed on the date purported is a further attempt to muddy the waters. The Court does not need to determine this issue and this Court should not exercise its discretion to add a party who is attempting to broaden the scope of this litigation into areas it does not need to go, particularly where there is no evidence to support the allegation.

34. The Affidavit of Stoney very loosely and liberally provides "facts" which cannot be proven and which are clearly refuted by the factual supporting material provided by Chief Twinn in his Affidavit. The affiant ought not to be given any weight in light of the interference of Stoney's counsel in the cross-examination and the refusal of his counsel – and Stoney himself – to answer relevant questions. The conduct of counsel and Mr. Stoney at the cross-examination was obstructionist and his answers, or the lack thereof and refusals clearly show the nature of a vexatious litigant.

Questioning on Affidavit Transcript of Maurice Stoney, filed October 21, 2016, Index of Objections [TAB 9]

35. It is submitted that the objections, particularly those to factual questions that relate to the oft stated "right" to membership status were improper objections by Mr. Stoney's counsel which impeded the flow of the examination and prevented the examiner from being able to use the exemption to test the truthfulness of the evidence, which is the very purpose of an examination on Affidavit. It is to be noted that, by pages 63 and 64, Mr. Stoney himself was objecting to questions which his counsel condoned. This is improper and ought to have been followed by a direction by his counsel to answer the proper question. As a result of this behaviour, the Trustees abandoned their questioning determining it would serve no useful purpose.

Questioning on Affidavit Transcript of Maurice Stoney, filed October 21, 2016, at pp 63 and 64 [Tab 8]

Ed Miller Sales & Rentals Ltd. v Caterpillar Tractor Co., 1981 CarswellAlta 811 (ABQB) at para. 3 [TAB 10]

36. It is submitted that as a result of Stoney's refusal to cooperate with the cross-examination process, the Trustees were not able to properly test Stoney's evidence, and accordingly, his Affidavit should be given little weight.

Sawridge Application for Intervenor Status

37. In the event that the Stoney Applicants are granted status in this action, the Trustees support the request by Sawridge for intervenor status.

38. Sawridge has clearly and helpfully set out the test as well as the supporting information in respect of its position.

39. The Trustees submit that no one is more poised to attest to the relevant facts in respect of Stoney's frequent and unsuccessful appearances before many levels of Court and tribunals in respect of the issue of membership than Sawridge. Sawridge has substantially outlined these unsuccessful appearances in the filed affidavit of Chief Twinn in support of their application to be added as an intervenor. Those facts are further analyzed in the written submissions filed by Sawridge.

40. The Trustees adopt the facts and arguments presented by Sawridge and support Sawridge's application for reasons which include:

    (a) The participation of Sawridge would likely render the process more efficient as submissions by Sawridge comprehensively contain all that this Court requires to provide balance to Stoney's arguments; and

    (b) Sawridge brings knowledge of its membership, process particular history in relation to Stoney and could assist this Court in that regard should the need arise.

Costs to the Trustees

41. The Trustees repeat and adopt Sawridge's arguments in respect to an award of solicitor and his own client, or enhanced, costs to the Trustees. These submissions, at paragraphs 74 to 79, provide support for an award of a punitive nature in these proceedings due to the delay, abuse of process and mischaracterization of evidence outlined herein. It is submitted that there is a both a general and a specific deterrent aim for such an award of costs and Stoney has proven to be a litigant with little respect for the finality of the court process and an award of costs of a substantial nature is necessary to deter him from further conduct of this nature.

42. Further, the Trustees point to the futile exercise of the questioning on Affidavit of Stoney, which was thwarted by the intervention of his counsel and further undermined by Stoney's personal

refusal to answer questions, as an example of the costs that have been needlessly and inappropriately borne by the Trustees to address these issues and as a further justification for an award of solicitor and own client costs or costs on an enhanced basis.

PART IV – REMEDY SOUGHT

43. The Trustees respectfully request that the Court deny the application by the Stoney Applicants completely. In the event that status is granted to the Stoney Applicants, the Trustees request that the Court grant intervenor status to Sawridge.

44. The Trustees request costs be awarded to the Trustees on an enhanced basis or solicitor and his own client basis for the reasons set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31 DAY OF OCTOBER, 2016.

DENTONS CANADA LLP

PER: _____
Doris Bonora
Solicitors for the Trustees

LIST OF ATTACHMENTS AND AUTHORITIES

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

Table of Authorities

Statutes considered:

Federal Court Act, R.S.C. 1985, c. F-7
s. 2(1) "federal board, commission or other tribunal" [rep. & sub. 1990, c. 8, s. 1(3)] — considered

s. 18(3) [en. 1990, c. 8, s. 4] — considered

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s. 18.1 [en. 1990, c. 8, s. 5] — considered

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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Alta. Reg. 124/2010, s. 2.10

s 2.10 Intervenor status

Currency

2.10Intervenor status

On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

Currency

Alberta Current to Gazette Vol. 112:19 (October 15, 2016)

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Alta. Reg. 124/2010, s. 3.75

s 3.75 Adding, removing or substituting parties to originating application

Currency

3.75Adding, removing or substituting parties to originating application

3.75(1) In an action started by originating application no party or person may be added or substituted as a party to the action except in accordance with this rule.

3.75(2) On application of a party or person, the Court may order that a person be added or substituted as a party to the action,

(a) in the case of a person to be added or substituted as an originating applicant, if consent of the person proposed to be added or substituted is filed with the application;

(b) in the case of an application to add or substitute a person as a respondent, or to remove or correct the name of a party, if the Court is satisfied the order should be made.

3.75(3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

Currency
Alberta Current to Gazette Vol. 112:19 (October 15, 2016)

Concordance References
Rules Concordance 23, Joinder of parties
Rules Concordance 167, Judicial review in civil matters

End of Document

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2007 ABCA 231
Alberta Court of Appeal (In Chambers)

Carbon Development Partnership v. Alberta (Energy & Utilities Board)

2007 CarswellAlta 896, 2007 ABCA 231, [2007] A.W.L.D. 3901, [2007] A.W.L.D. 3962, [2007] A.J. No. 727, 160 A.C.W.S. (3d) 396

IN THE MATTER OF Section 26 of the Alberta Energy and Utilities Board Act, R.S.A. c. A-17 and the Oil and Gas Conservation Act, R.S.A. 2000, c. 0-6 and the Regulations thereto

AND IN THE MATTER OF a Decision of the Alberta Energy and Utilities Board dated March 28, 2007 and identified as Decision 2007-024 and relating to Part II of Proceeding No. 1457147 — Review of Certain Well Licenses and Compulsory Pooling and Special Well Spacing (Holding) Orders in the Clive, Ewing Lake, Stettler, and Wimborne Fields

AND IN THE MATTER OF an Application for Leave to Appeal Decision 2007-024 of the Alberta Energy and Utilities Board

Carbon Development Partnership (Applicant) and Alberta Energy and Utilities Board, Devon Canada Corporation, Fairborne Energy Ltd., Apache Canada Ltd. and Canpar Holdings Ltd. (Respondents)

IN THE MATTER OF the Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, the Oil and Gas Conservation Act, R.S.A. 2000, c. 0-6, and the Energy Resources Conservation Act, R.S.A. 2000, c. E-10, and Regulations thereunder

AND IN THE MATTER OF Decision 2007-024 of the Alberta Energy and Utilities Board in Part 2 of Proceeding No. 1457147 — Review of Certain Well Licenses and Compulsory Pooling and Special Well Spacing (Holding) Orders in the Clive, Ewing Lake, Stettler, and Wimborne Fields dated March 28, 2007

AND IN THE MATTER OF an Application for Leave to Appeal from Decision 2007-024 of the Alberta Energy and Utilities Board

EnCana Corporation (Applicant) and Alberta Energy and Utilities Board, Devon Canada Corporation and Bearspaw Petroleum Ltd. (Respondents)

C. Hunt J.A.

Heard: July 4, 2007
Judgment: July 10, 2007
Docket: Calgary Appeal 0701-0110-AC, 0701-0111-AC

Counsel: G.S. Fitch for Applicant, Quicksilver Resources Canada Inc.
J.C. Price for Applicant, Centrica Canada Limited
A.L. Ross for Applicant, ConocoPhillips Canada Resources
J.E. Lowe for Applicant, Canpar Holdings Ltd.
W.T. Osvath for Applicant, Freehold Petroleum & Natural Gas Owners Association
C.J. Popowich, K.L. Reiffenstein for Respondent, EnCana Corporation
W.T. Corbett Q.C. for Respondent, Carbon Development Partnership

Subject: Civil Practice and Procedure; Natural Resources; Public

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Headnote

Civil practice and procedure --- Practice on appeal — Parties — Adding parties — Intervenors on appeal

Utilities board issued decision regarding methane development rights of corporations — Board determined that natural gas owners rather than coal owners had methane development rights with respect to certain specific contracts — Decision rescinded previous board bulletin which had held in abeyance all applications concerning legal entitlement to methane development rights — Corporations applied for leave to appeal decision of board — Owners were resource companies with interest in provincial methane development but not directly involved in original board hearing — Owners brought application for intervenor status during leave application — Application granted — Owners had sufficient interest in outcome of leave application to merit inclusion as intervenors — Owners had legal interests on other lands in Alberta that would be affected if board's decision was upheld, quashed or varied — Owners also had some expertise on subject matter of leave application which could likely assist court at hearing — Participation of owners as intervenors was subject to number of conditions to ensure manageability of leave hearing.

Natural resources --- Oil and gas — Practice and procedure — Leave to appeal

Utilities board issued decision regarding methane development rights of corporations — Board determined that natural gas owners rather than coal owners had methane development rights with respect to certain specific contracts — Decision rescinded previous board bulletin which had held in abeyance all applications concerning legal entitlement to methane development rights — Corporations applied for leave to appeal decision of board — Owners were resource companies with interest in provincial methane development but not directly involved in original board hearing — Owners brought application for intervenor status during leave application — Application granted — Owners had sufficient interest in outcome of leave application to merit inclusion as intervenors — Owners had legal interests on other lands in Alberta that would be affected if board's decision was upheld, quashed or varied — Owners also had some expertise on subject matter of leave application which could likely assist court at hearing — Participation of owners as intervenors was subject to number of conditions to ensure manageability of leave hearing.

Table of Authorities

Cases considered by *C. Hunt J.A.*:

Bearspaw Petroleum Ltd., Re (2007), 2007 CarswellAlta 723 (Alta. E.U.B.) — referred to

CPCS Ltd. v. Western Industrial Clay Products Ltd. (1995), 1995 CarswellAlta 247, 31 Alta. L.R. (3d) 257 (Alta. C.A.) — referred to

Elizabeth Metis Settlement v. Metis Settlements Appeal Tribunal (2004), 2004 ABCA 418, 2004 CarswellAlta 1748 (Alta. C.A.) — referred to

Frog Lake First Nation v. Alberta (Energy Utilities Board) (2003), 2003 CarswellAlta 1832, 2003 ABCA 373 (Alta. C.A.) — referred to

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granted if important questions of law or jurisdiction are raised: *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, s. 26(1) ("*AEUB* Act"). At this stage, it is unknown whether leave will be granted and, if so, on what questions. It is therefore extremely difficult to know what interests, if any, of the applicants may be affected and what, if anything, they may be able to contribute to the proceedings. This no doubt explains the wisdom behind the Supreme Court of Canada's practice to usually defer intervener applications until after leave has been granted, even if a party has enjoyed intervener status before the lower courts: *R. v. P. (N.M.)*, 2000 SCC 59, [2000] 2 S.C.R. 857 (S.C.C.) at para. 5. An even stronger rationale for awaiting the outcome of the leave applications may exist in regulatory proceedings like this where, if leave is granted, the questions will be limited in scope.

7 In this case, the EnCana and Carbon leave applications together suggest that there may be more than twenty legal or jurisdictional questions arising from the Decision. This underscores the fact that, even without the participation of additional parties, the leave application is likely to be very complex. And depending on whether leave is granted, and in relation to what questions, the same may be true of the appeal proper. Under these circumstances it is especially imperative that the Court control its process to ensure orderly hearings and timely decisions.

8 The parties are in general agreement on the legal tests for granting party and intervener status. The factors to be considered as to the two types of status overlap somewhat. The threshold for party status is necessarily greater than that for intervener.

9 This Court has inherent power to add parties to an appeal, especially if an applicant's interests are not represented: *Hayes v. Mayhood* (1958), 24 W.W.R. 332 (Alta. C.A.), aff'd [1959] S.C.R. 568, 1959 CarswellAlta 85 (S.C.C.). The test developed for Rule 38 (*Alberta Rules of Court*, Alta. Reg 390/68, the joinder rule) is useful. The joinder test is whether or not the applicant has a legal interest in the outcome of the proceeding. If so, there are two different sub-tests. The first is whether it is just and convenient to add the applicant. The second is whether or not the applicant's interest would only be adequately protected if it were granted party status.: *CPCS Ltd. v. Western Industrial Clay Products Ltd.* (1995), 31 Alta. L.R. (3d) 257 (Alta. C.A.) at para. 4, (1995), 56 A.C.W.S. (3d) 479 (Alta. C.A.) .

10 The test for intervener status has been stated many times. The Court first considers the subject matter of the proceeding and then determines the proposed intervener's interest in that subject matter. See *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320, 143 A.C.W.S. (3d) 211 (Alta. C.A.) at para. 5. A proposed intervener should be specially affected by the decision facing the Court or have some special expertise or insight to bring to bear on the issues: *Papaschase* at para. 2. A proposed intervener must have a direct interest in the case or a stake in its result: *R. v. Finta*, [1993] 1 S.C.R. 1138 (S.C.C.) at para. 7; *Mackie v. Wolfe*, [1995] A.J. No. 638 (Alta. C.A.) at para. 3; *R. v. Trang*, 2002 ABQB 185, [2002] 8 W.W.R. 755 (Alta. Q.B.) at para. 13. Intervener status should be granted sparingly: *R. v. N. (L.C.)* (1996), 184 A.R. 359 (Alta. C.A.) at para. 16.

Analysis

11 In deciding these applications, I put no weight on recent amendments to sub-section 26(3) of the *AEUB* Act or sub-section 41(2.1) of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, both of which require that notice of an application for leave to appeal be given to "parties affected by the appeal". These statutes do not define "affected party". As the Hansard debates reveal (Alberta, Legislative Assembly, *Hansard*, Second Reading — Bill 19 — *Appeal Procedures Statutes Amendment Act*, 2007, (17 April 2007) at 620 *ff*), these provisions merely reflect the Court's longstanding practice of trying to ensure that those whose rights may be affected are aware of leave to appeal applications so they can, if they wish, apply for status at some point. These provisions do not suggest any automatic entitlement to status as either a party or an intervener. Such applications must continue to be assessed on their individual merits at an appropriate time, according to well-established legal principles.

12 Putting aside Canpar's legal interests arising from the Carbon application (where it already has respondent status), none of the applicants have any ownership or similar rights in relation to the lands that are the subject of the Decision. Although Quicksilver submits that the interrelationship between the Decision and the Bulletin gives it the requisite legal interest in the appeal, this does not apply to the leave to appeal application since an appeal does not stay the Board's order: ss. 26(4) *AEUB* Act. The Board itself has authority under sub-section 26(5) to suspend the operation of its decision while the appeal is pending. Such an application by EnCana is pending and presumably Canpar and the others can make whatever

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submissions they like before the Board.

13 Each applicant has made submissions about how its interests are affected by the Decision. In the end, however, it basically comes down to the same thing. Although they hold no legal interests in the lands dealt with by the Decision, it sets out a number of principles that the Board obviously intends to apply throughout the province. Each applicant has legal interests on other lands in Alberta that will be affected if the Decision is upheld, quashed or varied, or if some or all of the issues are sent back to the Board for further determination.

14 I might have been inclined to the view that it was too early to ascertain whether the applicants meet the test for intervener status. Until the leave applications are decided, it is difficult to predict whether the Court might adopt a rule of law that will adversely affect their interests: *Mackie v. Wolfe*, [1995] A.J. No. 638 (Alta. C.A.) at para. 6. However, I find it difficult to distinguish their situation from that of Mr. Pollo, who has already been granted intervener status by a panel of this Court. Moreover, for present purposes, I am persuaded that the applicants may have some particular expertise that might assist the Court when it hears the leave applications.

Conclusion

15 Accordingly, I will exercise my discretion and grant them intervener status. All the applicants except Canpar are given intervener status in both leave applications. Canpar is given intervener status in the EnCana leave application. Given that the applicants do not have legal interests in the lands involved in the Decision (with the exception of Canpar, who already has respondent status in the Carbon application because of its legal interest in those lands), they are not entitled to party status.

16 Because of my concerns about the manageability of both the leave applications and the appeals themselves if leave is granted, participation of the interveners will be subject to a number of conditions:

1. Each intervener except Canpar may submit a memorandum of no more than five double-spaced pages in regard to both (but not each of) the EnCana and Carbon leave applications to be submitted within seven days of the submission of the memoranda of the respondents to the leave applications. The intervener memoranda are not to repeat anything contained in the latter. The same direction applies to Canpar except that its intervener memorandum only pertains to the EnCana leave application. Should interveners choose to make submissions jointly with other interveners, they will be permitted to "pool" the above page limits.

2. EnCana and Carbon will each be permitted to file a reply memorandum, not to exceed five double-spaced pages, within seven days of the filing of the intervener memoranda.

3. The interveners will not be entitled to make oral submissions at the hearing of the leave applications unless otherwise ordered by the judge hearing the leave applications.

4. If leave to appeal is granted, the judge hearing the leave applications can set the terms of any continued intervention in the appeals themselves.

5. The interveners will have neither entitlement to nor liability for costs.

Application granted.

End of Document

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2011 ABQB 209
Alberta Court of Queen's Bench

869120 Alberta Ltd. v. B & G Energy Ltd.

2011 CarswellAlta 512, 2011 ABQB 209, [2011] A.W.L.D. 3203, [2011] A.J. No. 366, 200 A.C.W.S. (3d) 62

869120 Alberta Ltd., Plaintiff and B & G Energy Ltd., Defendant

K.M. Eidsvik J.

Heard: November 10, 2010
Judgment: March 28, 2011
Docket: Calgary 0901-10713

Counsel: Mr. Jeffrey Thom, Q.C., for Plaintiff
Mr. David Tupper, Mr. Chris Petrucci, for Defendant

Subject: Corporate and Commercial; Civil Practice and Procedure; Torts; Contracts

Headnote

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Pleadings — Amendment

Plaintiff was company that was joint venture partner along with companies owned by BH and GG — Defendant was company that operated joint venture while acting as trustee for joint venture partners — BH and GG were directors of defendant — Plaintiff agreed to sell its interest in joint venture to BH's and GG's companies — Defendant subsequently sold interests of BH's and GG's companies to non-party — Plaintiff alleged defendant, BH, and GG had failed to disclose significant information before buying plaintiff's interest — Plaintiff commenced action against defendant and BH's and GG's companies for damages for negligence — Plaintiff discontinued action against BH's and GG's companies — Plaintiff brought application for leave to amend statement of claim to add and expand upon claims and damages, and to add BH and GG and their companies as defendants — Application granted in part — Amendments to claims and damages were allowed except for tracing remedies — BH and GG were added as defendants but their companies were not added — BH and GG had been not only directors and controlling minds of defendant but also principals of companies that purchased plaintiff's interest — Since BH and GG wore dual hats, it was arguable they had separate interest from defendant with respect to tortious claims that plaintiff wanted to add — Amended claims appeared to be within limitation period since plaintiff allegedly did not become aware of withheld information until recently — Plaintiff satisfied requirements for seeking oppression remedy — Tracing remedies were not appropriate at this stage since plaintiff first had to establish trust property that could be traced — Availability of tracing remedies in this case was far from clear.

Table of Authorities

Cases considered by *K.M. Eidsvik J.*:

Balm v. 3512061 Canada Ltd. (2003), 2003 ABCA 98, 2003 CarswellAlta 458, 14 Alta. L.R. (4th) 221, 327 A.R. 149,

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22 The test found in 3.74 (2) (b) states that the Court may order that a person be added if it is "satisfied that the order should be made". Subsection 3 goes on to add however that "The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms."

23 The former *Rules*, rules 132 and 133, although somewhat differently worded, were similarly broad. The parties agreed that these new rules do not materially alter the legal test and accordingly reliance can be made on the case law on point to date. Indeed, subsection 3 basically codifies the "classic rule" that "an amendment should be allowed no matter how careless or late, unless there is prejudice" as outlined by Justice Côté in *Balm v. 3512061 Canada Ltd.*, 2003 ABCA 98 (Alta. C.A.) at para. 43 and *Milfive Investments Ltd. v. Sefel* (1998), 216 A.R. 196 (Alta. C.A.).

24 The other criteria that is generally accepted is that the amendment must raise a triable issue, or otherwise said, not be "hopeless" (*Stolk v. 382779 Alberta Inc.*, 2005 ABQB 440 (Alta. Q.B.), *M. (T.) v. R. (O.)*, 2000 ABQB 931 (Alta. Q.B.)), there must be a "modest degree of evidence" if the amendment is beyond trivial or of a clarifying nature, unless the claim to be added is fraud, and there a "stiffer test" is to be used (*Balm* at paras. 29 and 63). Finally, if the claim against a person to be added, or the cause of action is outside of the limitation period then reference is to be made to section 6 of the *Limitation Act* R.S.A. 2000 c. L- 12 to determine if it should be allowed.

1. Claims against the proposed individual Defendants re duties to disclose

25 Paragraphs 19 - 21 of the original Statement of Claim claimed that B & G was possessed with proprietary information that it failed to disclose to the Plaintiff in breach of its duties of honesty, good faith and in its position as joint venture partner and trustee. Paragraphs 17 - 22 of the proposed Amended Statement of Claim expand the details of the proprietary information and add that the individual proposed Defendants also owed the duties alleged as against B & G in the original claim, and seek to add the breaches of fiduciary or contractual duties, and negligent and intentional misrepresentations.

26 The Plaintiff argued that these allegations are based in the evidence of Mr. Arnason sworn on November 5, 2010, that they allege causes of action recognised in law, are based on claims within the limitation period, and therefore should be allowed.

27 The proposed Defendants argue that these proposed amendments fail to disclose a cause of action since the transactions put at issue occurred entirely in a corporate context and therefore the individuals should not be added, they lack particulars, and in any event there is a lack of evidence in their support. In the alternative, if they do disclose a cause of action, they are beyond the limitation period and should not be allowed.

Piercing the corporate veil

28 I agree with the Defendants that courts are wary where individuals in a corporate context are sought to be added in a corporate lawsuit. The *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, [1996] O.J. No. 1568 (Ont. Gen. Div.) and the *Condominium Corp. No. 022 5840 v. Executive Loft Inc.*, 2010 ABQB 232 (Alta. Master) cases are both good examples of where the courts did not allow individual defendants to be added into claims involving corporate disputes.

29 However, both cases also discuss exceptions where individuals may be added. In *Transamerica Life* Justice Sharpe said at paras. 21 and 22:

> There are undoubtedly situations where justice requires that the corporate veil be lifted...
>
> ...the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct.

30 Master Breitkreuz stated at para. 37 of the *Condominium* case:

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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.

Table of Authorities

Cases considered by *R.L. Barnes J.*:

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — referred to

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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.).

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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.

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

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

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19

DOCUMENT:	APPLICATION TO BE ADDED as a Party or Intervener by Maurice Felix Stoney and his brothers and sisters

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DLA PIPER (CANADA) LLP 1201 Scotia 2 Tower 10060 Jasper Avenue NW Edmonton, AB, T5J 4E5 Attn: Priscilla Kennedy Tel: 780.429.6830 Fax: 780.702.4383

NOTICE TO THE RESPONDENTS

You have the right to state your side of this matter before the judge.

To do so you must be in Court when the application is heard as shown below.

DATE:	Thursday, August 24, 2016
TIME:	10:00 A.M.
WHERE:	Law Courts Edmonton
BEFORE WHOM:	Justice D.R.G. Thomas

1. Applicants

   Maurice Stoney and his 10 living brothers and sisters.

2. Issue to be determined

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

3. Grounds for request and relief sought

   (a) William Stoney, father to these Applicants was a member of Sawridge ;

(b) Each of the Applicants was a member of Sawridge;

(c) William Stoney and his children were removed from the Sawridge Pay List by Indian Affairs as being enfranchised;

(d) The *Constitution Act, 1982,* section 35 recognized all *Treaty* rights as constitutional rights on April 17, 1982 so that every enfranchised *Treaty No. 8* members had constitutional rights recognized from then;

(e) Maurice Stoney and his brothers and sisters are all members of Sawridge and beneficiaries under the definitions of beneficiaries of the 1982 and 1985 Trusts;

4. Documents Filed in this application

(a) Affidavit of Maurice Stoney

5. Applicable Statutes

(a) *Constitution Act, 1982,* section 35.

(b) *Treaty No. 8*

(c) *Trustee Act,* RSA 2000, c T-8

(d) *Indian Act,* RSC 1985, c. I-5.

6. Any irregularity complained of or objection relied on:

7. How the application is proposed to be heard or considered:

In chambers before Mr. Justice D.R.G. Thomas, the case management Justice assigned to this file.

WARNING

If you do not come to Court either in person or by your lawyer, the court may give the applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in court on the date and time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

3. 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* and attached as **Exhibit "B"** are letters dated April 6, 1903 and April 15, 1903 to the Deputy Superintendent General of Indian Affairs; attached as **Exhibit "C"** is a letter dated April 16, 1903 from Indian Affairs; attached as **Exhibit "D"** is a letter dated April 17, 1903 from Indian Affairs; attached as **Exhibit "E"** is a letter dated December 9, 1911 from the Assistant Indian Agent; attached as **Exhibit "F"** is a copy of a letter dated April 18, 1913; attached as **Exhibit "G"** is a copy of a letter dated September 9, 1912; and as **Exhibit "H"** is a copy of a letter dated August 19, 1920.

4. 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 until his death in 1956. In 1920, Johnny Stoney was advised by Indian Affairs that his lands would be taken as part of the Sawridge Reserve, this appears to be contrary to the provisions of *Treaty No. 8* where lands could be held in severalty and were held in severalty by Johnny Stoney until 1920. It does not appear that Johnny Stoney agreed to this.

6. My father was William Stoney, was the son of Johnny Stoney, and he and my mother were members of the Sawridge Band. William Stoney lived in Slave Lake, Alberta on the edge of the Sawridge Reserve. The Sawridge Indian Reserve is located on the northeast boundary of the Town of Slave Lake, Alberta.

7. In 1944, my father William Stoney and all of his family including me, along with other members of Sawridge Band, were enfranchised because he was working and attached as **Exhibit "I"** is a copy of enfranchisement documents.

8. My parents had 15 children, 10 are still alive today: Billy born in 1940; myself born in 1941, Angeline born in 1944, Linda born in 1948, Bernie born in 1952, Betty Jean born in 1954, Gail born in 1956, Alma and Alva (twins) born in 1958 and Bryan born in 1959. I have been involved with the Sawridge First Nation all of my life.

9. I applied to Sawridge in 1985 for recognition of my membership because I had been removed from membership by Canada after the enfranchisement of my father. I remained

a descendant of the signatories to *Treaty No. 8* throughout all of the years when Canada treated me as "enfranchised". In 1982 when section 35 was passed as part of the *Constitution*, all of our family's *treaty rights* were recognized. I believe I am an acquired rights member recognized as an Registered Indian in 1985 when Sawridge's membership was governed by Indian Affairs. The Sawridge Membership Rules did not become effective until September 26, 1985 when the Minister of Indian Affairs and Northern Development wrote to Chief Walter Twinn reminding him that he must comply with recognition of all "acquired rights" members.

10. In March 1993, the Lesser Slave Lake Indian Regional Council, which included Sawridge Band, passed a Band Council Resolution, attached as **Exhibit "J"** to require Canada to provide lands in severalty as provided in *Treaty No. 8*, attached as **Exhibit "K"**, to all persons reinstated as Indians under Bill C-31.

11. In July, 1995, my cousins Aline Huzar and June Kolowsky, myself, and a number of other persons filed a Federal Court proceeding against Canada and Chief Walter Twinn *Huzar v. Canada*, Federal Court File No. T-1529-95, seeking to have our membership in the Sawridge Band be recognized and seeking a declaration that the membership application and rules of Sawridge were discriminatory and exclusionary. In *Huzar v. Canada*, [1997] F.C.J. 1556, Prothonotary Hargrave found that Sawridge had only accepted two individuals into band membership, both sisters of the Chief Walter Twinn, although there had been more than 200 applications. In June 2000, the Federal Court of Appeal (2000 CanLII 15589) struck this action as a claim for judicial review improperly brought as an action.

12. All of our applications for membership in Sawridge were ignored. On June 22, 2010 we submitted new applications and I called Sawridge many times thereafter to find out what was happening on my application. Finally in December, 2011 I was advised that the Council of Sawridge First Nation had denied my application for membership and attached as **Exhibit "L"** is the Registered letter from Sawridge. On December 19, 2011, I appealed this decision.

13. The Appeal Committee heard the appeal for my membership on April 21, 2012 with the appeal brought by my cousins Aline and June and provided their decision on May 7, 2012

200

Affidavit of Maurice Stoney. [Tab B]

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

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.

Q Okay. So they were not members of Sawridge when they were born; is that correct?
A I don't see how they wouldn't be members because my father was a member of Sawridge band.
Q Okay. Sir, but you understand that your father was not a member of Sawridge band in 1948; correct?
A Yeah.
Q Right.
A But he enfranchised in 1944.
Q Right.
A But he was born a band member, making all of his children eligible and should be members of the Sawridge band.
Q Okay. So you're of the opinion that they should be members --
A Well, they actually are members.
Q Okay. I'm going to turn, then, to paragraph 9 of your Affidavit, and I'll let you read paragraph 9. It's a little lengthy. Let me know when you're finished.
A Yeah.
Q Okay. And you state in that paragraph, "I believe I am an acquired-rights member." Do you see that?
A Could you explain "acquired"?
Q Well, sir, those are your words in your Affidavit, so I'm wondering whether -- did you mean that you were automatically a member? Is that what you mean

by "acquired-rights member"? Sorry, sir?
A Yes.
Q Thank you. Sir, what makes you believe that you are an automatic member?
A Because I was born a band member in 1941.
Q Okay.
A And I am still a band member.
Q Okay. Sir, you've had an opportunity to bring this issue to the courts on a number of occasions; is that correct?
A (No verbal response)
Q Sorry?
A Yes.
Q And has it not been made clear to you by the Courts that you are not an automatic member?
A I don't understand.
Q Have you been told by the Federal Court that you are not an automatic member of Sawridge?
A No.
Q Okay. Sir, I'm going to take you to the decision of Justice Evans of the Federal Court of Appeal.
MS. KENNEDY: No.
MS. LAFUENTE: Pardon me?
MS. KENNEDY: You can do that, but -- let's see it.
MS. LAFUENTE: Okay.
A What year is it?

2015 ABQB 799
Alberta Court of Queen's Bench

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

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

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

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

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

D.R.G. Thomas J.

Heard: September 2, 2015; September 3, 2015
Judgment: December 17, 2015
Docket: Edmonton 1103-14112

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

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

Headnote

Aboriginal law — Practice and procedure — Discovery — Miscellaneous

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

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Trustee was to have until January 29, 2016 to prepare and serve application on band identifying specific documents relevant and material to issue of assets settled in trust — Public Trustee may seek materials and information from Band, but only in relation to specific issues and subjects — Public Trustee had no right to engage, and was not to engage, in collateral attacks on membership processes of band and trustees had no right to engage in collateral attacks on band's membership processes.

Table of Authorities

Cases considered by *D.R.G. Thomas J.*:

Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc. (2008), 2008 SCC 8, 2008 CarswellBC 411, 2008 CarswellBC 412, 75 B.C.L.R. (4th) 1, [2008] 4 W.W.R. 1, 50 C.P.C. (6th) 207, 290 D.L.R. (4th) 193, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.*) 372 N.R. 95, (sub nom. *Juman v. Doucette*) [2008] 1 S.C.R. 157, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.*) 252 B.C.A.C. 1, 422 W.A.C. 1 (S.C.C.) — referred to

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17, 1988 CarswellAlta 219 (Alta. Q.B.) — referred to

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1989), 98 A.R. 374, 45 C.C.L.I. 143, 1989 CarswellAlta 714 (Alta. Q.B.) — referred to

Gainers Inc. v. Pocklington Holdings Inc. (1995), 30 Alta. L.R. (3d) 273, [1995] 9 W.W.R. 117, 169 A.R. 288, 97 W.A.C. 288, 1995 CarswellAlta 200 (Alta. C.A.) — referred to

Huzar v. Canada (2000), 2000 CarswellNat 1132, 258 N.R. 246, 2000 CarswellNat 5603 (Fed. C.A.) — referred to

Kaddoura v. Hanson (2015), 2015 ABCA 154, 2015 CarswellAlta 780, [2015] 6 W.W.R. 535, 67 C.P.C. (7th) 376, 600 A.R. 184, 645 W.A.C. 184, 15 Alta. L.R. (6th) 37 (Alta. C.A.) — referred to

Poitras v. Sawridge Band (2013), 2013 FC 910, 2013 CF 910, 2013 CarswellNat 3938, 2013 CarswellNat 3939, (sub nom. *Poitras v. Sawridge Indian Band*) 438 F.T.R. 264 (Eng.) (F.C.) — considered

Royal Bank of Canada v. Trang (2014), 2014 ONCA 883, 2014 CarswellOnt 17254, 379 D.L.R. (4th) 601, 123 O.R. (3d) 401, 327 O.A.C. 199 (Ont. C.A.) — referred to

Stoney v. Sawridge First Nation (2013), 2013 FC 509, 2013 CarswellNat 1434, 2013 CF 509, 2013 CarswellNat 2006, 432 F.T.R. 253 (Eng.) (F.C.) — referred to

Strickland v. Canada (Attorney General) (2015), 2015 SCC 37, 2015 CSC 37, 2015 CarswellNat 2457, 2015 CarswellNat 2458, 386 D.L.R. (4th) 1, 87 Admin. L.R. (5th) 60, 473 N.R. 328, [2015] 2 S.C.R. 713 (S.C.C.) — considered

Toronto Dominion Bank v. Sawchuk (2011), 2011 ABQB 757, 2011 CarswellAlta 2131, 86 C.B.R. (5th) 1, 530 A.R. 172 (Alta. Master) — referred to

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

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

B. Refocussing the role of the Public Trustee

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

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

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

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

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

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

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;

2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and

3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

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ORIGINAL

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 am.

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19

QUESTIONING ON AFFIDAVIT

OF

MAURICE STONEY

P. E. Kennedy, Ms.	For Maurice Stoney
D. C. Bonora, Ms. E. M. Lafuente, Ms.	For the Trustees of the Sawridge Band Inter Vivos Settlement
C. C. Osualdini, Ms.	For Cathrine Twinn
Joanne Lawrence, CSR(A)	Court Reporter

Edmonton, Alberta
September 23, 2016

SCANNED

MS. KENNEDY: In one particular portion, yes.
MS. LAFUENTE: Okay.
MS. KENNEDY: And what it says with respect to the rest of it is the wording in the trust deed which is what we're arguing about before the Court.
MS. LAFUENTE: And that's what you're attempting to bring before this Court by being added as a party.
MS. KENNEDY: That's what we're arguing in terms of our ability to be before the Court as a beneficiary.

Q MS. LAFUENTE: Okay. Sir, going back to paragraph 12 of your Affidavit, we talked about this first sentence here before, "All of our applications for membership in Sawridge were ignored," and we were focussing on your application. Can you tell me whose applications you mean when you say "our applications," the word O-U-R?

A I won't answer it.

Q Why won't you answer that, sir? It's your Affidavit, and I want to know what you mean when you say, "Our applications were ignored."

A Did you ask that question before?

Q No. I'm asking what you mean by the word, "Our" -- the words, "our applications." Whose applications?

A No, I won't answer that.
Q Sir, why aren't you answering that question?
A I'll leave it up to the courts.
Q You -- I'm going to point out that your counsel did not put an objection on the record but that you are refusing the answer the question because you want to leave it up to the courts.
MS. KENNEDY: That's what he said.
Q MS. LAFUENTE: Okay. So, sir --
MS. KENNEDY: You don't have to repeat it.
Q MS. LAFUENTE: -- how is the Court supposed to -- how is the Court supposed to understand what you mean by the word "our" if you won't tell us what you mean?
MS. KENNEDY: Okay. Now, let's not get into arguments with him, and that's what you're doing by characterizing the way he has made an answer. He has made an answer. You may not like it, but he has made an answer.
MS. LAFUENTE: Okay.

OBJECTION TO QUESTION:

Okay. Sir, going back to paragraph 12 of your Affidavit, we talked about this first sentence here before, "All of our applications for membership in Sawridge were ignored," and we were focussing on your application. Can you tell me whose

applications you mean when you say "our applications," the word O-U-R?

Q MS. LAFUENTE: Sir, do you have any information as to whether your siblings have applied for membership in Sawridge First Nation?

A Siblings? Yes, some of them -- some of them did, but they were all denied.

Q Who -- who made application?

A Uh, brothers.

Q Which brothers?

A Bill.

Q Okay.

A And... I just can't recall right now. I'd have to -- I'd have to look at their response and stuff like that.

Q But you've brought this application --

A They did --

Q -- on behalf of all of you.

A They were supposed to send in their applications because we talked about this before, and -- and I told them that maybe you should do -- maybe you should be sending in your applications.

Q Okay.

A But -- now, whether it's -- they've done it or not, I'm not really sure. I can't answer that.

Q Okay. Okay.

A And another thing, if they did, they were -- it

would be automatically thrown out anyways. Their point of view would be, what is the use?

MS. LAFUENTE: Sir, I probably only have a few more questions for you, so I'm going to suggest we just take a 10-minute break, if that's okay with you, and then we'll reconvene and hopefully finish up quite quickly. Okay?

(ADJOURNMENT)

Q MS. LAFUENTE: Sir, earlier, you had indicated that you were bringing this application and representing your brothers and sisters in doing so. Can you tell me, are any of them incapacitated and unable to represent themselves in this litigation, in this application?

A I won't answer that.

MS. KENNEDY: I'm going to tell you that I have done a number of actions in QB and in the Federal Court as representative actions where one brother or sister acts for the entire family, and that is the standard method of proceeding, and that is the method of proceeding that's been used since 1997.

MS. LAFUENTE: So is the answer that they are incapacitated or this is the choice?

MS. KENNEDY: This is the choice.

MS. LAFUENTE: And this is a representative action?

ORIGINAL

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 am.

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19

QUESTIONING ON AFFIDAVIT

OF

MAURICE STONEY

P. E. Kennedy, Ms.	For Maurice Stoney
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Joanne Lawrence, CSR(A)	Court Reporter

Edmonton, Alberta
September 23, 2016

SCANNED

INDEX OF OBJECTIONS

(Objections are provided for your assistance. Counsel's records may differ. Please check to ensure that all objections have been listed according to your records.)

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membership in Sawridge were ignored," and we were focussing on your application. Can you tell me whose applications you mean when you say "our applications," the word O-U-R?

1981 CarswellAlta 811
Alberta Court of Queen's Bench

Ed Miller Sales & Rentals Co. v. Caterpillar Tractor Co.

1981 CarswellAlta 811, 9 A.C.W.S. (2d) 374

BETWEEN: ED MILLER SALES & RENTALS LTD., Plaintiff, - and - CATERPILLAR TRACTOR CO., CATERPILLAR AMERICAS CO., CATERPILLAR OF CANADA LTD., R. ANGUS ALBERTA LTD., FINNING TRACTOR & EQUIPMENT COMPANY LIMITED, KRAMER TRACTOR LTD., POWELL EQUIPMENT LTD., GEORGE W. CROTHERS (1965) LTD., HEWITT EQUIPMENT LTD., NEWFOUNDLAND TRACTORS & EQUIPMENT, NOVA SCOTIA TRACTORS & EQUIPMENT LTD., A. PICKARD MACHINERY LTD., TRACTOR AND EQUIPMENT (1962) LTD., Defendants.

Feehan J

Judgment: April 28, 1981
Docket: None given.

Counsel: A.M. Zariski Kramer Tractor Co.
I.H. Baker R. Angus Alberta Ltd.
Howard Rubin Ed Miller Sales & Rentals Ltd.

Subject: Civil Practice and Procedure

***MR. JUSTICE J. B. FEEHAN*:**

1 This is an application by the defendant Finning Tractor & Equipment Company Limited for an order requiring Ronald Miller, Chief Executive Officer of the plaintiff company, to answer certain questions put to him on examination on an affidavit filed by him in the within proceedings. Mr. Miller refused to answer some 20 questions on advice of counsel and I intend to go through them one by one. Some of the reasons for refusal fall into categories and some of the refusals to answer came after several lead up questions or discussion as between counsel. As a result, in some cases the actual question itself may be required to be answered but the general theme of the questioning may need further consideration.

2 The affidavit in question is a supplementary affidavit arising out of another application concerning service *ex juris*. There has not as yet been a decision as to whether or not the plaintiff has even achieved good and proper service on the defendant Finning Tractor & Equipment Company Limited and this application is therefore a very preliminary one. My intention is to progress the matter.

3 Rule 314 of the Alberta Rules of Court reads as follows:

> "314. (1) A person who has made an affidavit to be used in any action or proceedings, including an affidavit of documents, may be cross-examined thereon.

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(2) No order for cross-examination is necessary if the person is within the jurisdiction of the court.

(3) The person to be examined may be required to attend in the same manner as a party being examined for discovery and the procedure on his examination is subject to the same rules, so far as they are applicable, as apply to the examination of a party for discovery."

It is clear to me that the examination may be as searching and thorough as the party's cross-examination of the witness at the discovery could be. However, it must not extend to matters wholly immaterial or irrelevant to the affidavit. This does not mean to say that the examiner is limited to the four corners of the affidavit but that the questions must be relevant and material to the issues arising from the affidavit. See *College Brand Clothes Company Limited v. Brown and Fitzpatrick*, [1928] 1 W.W.R. 778 wherein Harvey, C.J.A. said at page 780:

"...a cross-examination on an affidavit is for the purpose of testing the truth of the statements in the affidavit...".

Also see *Alberta Pulpwood Exporting Company Limited v. Falls Paper & Power Company* (No. 2) (1954) 14 W.W.R. 121 at 125 where Egbert, J. considered the above quote from Harvey and stated:

"It seems obvious, therefore, that, for the purpose of testing the truth, the cross-examiner may go further afield in his question..."

4 There are of course limits to which the questioner can go. In *College Brand Clothes Company Limited. v. Brown and Fitzpatrick* Harvey said at page 783:

"I do not mean to suggest that there may be no limit to which a plaintiff may carry such examination or require such production. When it sufficiently appears that there is a real defence, depending on questions of fact or involved questions of law, the purpose has been accomplished and the examination should end...".

5 It must be kept in mind at all times that the reason for the examination on the affidavit is to assist the Court to decide the application and questions and answers which would not assist the Court and would not be relevant to the determination of the issue on the motion nor question the truth of the statement contained in the affidavit or the credibility of the affiant and are obviously questions that should be put on examination for discovery, should not be allowed. In *J. & E. Singer Investments (No. 1) Limited et al v. Sigma Realty Limited et al* (1957) 24 W.W.R. 235, Johnson, J.A. said at page 238:

'Turning to the questions which it is sought to have Singer answer, no attempt has been made to show and I am unable to see how any of these questions will assist the court to decide the application before it. They are therefore not relevant to the determination of the issue of the motion.

There remains the question of "testing the truth of the statement." Having regard to the limited nature of the facts deposed to, the question of the truth of the statement contained in the affidavit and the credibility of this witness, if it arises at all, could not be decided by the questions which have been asked, and not answered, in this case."

6 The first refusal to answer arises at page 36 of the examination on the affidavit and arises out of questioning on paragraphs 64 to 66 of the affidavit itself.

7 The actual question was:
page 36, line 25

MR. LUSK: Is Finning responsible for performing warranty?

MR. RUBIN: Just a minute, don't answer that question. We have gone on and on about the warranty fee and the service aspect and delivery service. Now, there is no mention of any delivery service in the Affidavit. What has this got to do with the motion to strike out service *ex juris* or cross-examination on the Affidavit?

MR. LUSK: Mr. Rubin, my question about 15 minutes ago was very simple.

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