

Fast Track

COURT OF APPEAL OF ALBERTA



COURT OF APPEAL FILE NUMBER: 1803 0076AC

COURT FILE NUMBER: 1103 14112

REGISTRY OFFICE: EDMONTON

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

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

APPLICANTS: MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS

STATUS ON APPEAL: Interested Party

RESPONDENTS (ORIGINAL APPLICANTS): ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWINN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")

STATUS ON APPEAL: Respondents

RESPONDENT PUBLIC TRUSTEE OF ALBERTA (the "OPGT")

STATUS ON APPEAL: Not a Party to the Appeal

INTERVENOR: SAWRIDGE FIRST NATION

STATUS ON APPEAL: Respondent

INTERESTED PARTY: PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers and Sisters

STATUS ON APPEAL: Appellant

DOCUMENT: **FACTUM OF THE RESPONDENT,
SAWRIDGE FIRST NATION**

Appeal from the Case Management Order of
The Honourable Mr. Justice D.R.G. Thomas
Dated March 20, 2018
Filed the 2nd day of May, 2018

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FACTUM OF THE RESPONDENT, SAWRIDGE FIRST NATION

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PART 1 – INTRODUCTION AND STATEMENT OF FACTS

A. Introduction

1. After *Sawridge #6* found that Maurice Stoney ("Stoney") had engaged in serious litigation misconduct, he and his counsel, Priscilla Kennedy ("Kennedy"), elected to disregard this finding and again filed written submissions that repeated the same litigation misconduct. Despite repeated warnings from the Case Management Justice ("CMJ"), clear findings that the arguments were *res judicata*, and express findings that arguing these issues was abusive, Kennedy sought to again re-litigate them and make misleading submissions to the Court. Her conduct was inexcusable. Moreover, Kennedy was aware of the potential consequences because of the findings in *Sawridge #6* but chose to advance the same arguments again. Contrary to the Appellant's arguments, there was no error with the CMJ's analysis. When the Appellant's conduct is viewed in the context of the repeated litigation misconduct, a personal costs award was clearly warranted in *Sawridge #9* on a similar basis as was found in *Sawridge #7*. This appeal should be dismissed.

B. Statement of Facts

2. Sawridge continues to rely on the statement of facts set out in its factum in the appeal filed in relation to *Sawridge #7* (the "First Appeal"). The relevant facts in this second appeal commence with the decision in *Sawridge #6*, which was released on July 12, 2017.¹ That decision resulted in the following orders, *inter alia*:

- (i) Stoney's application was dismissed;
- (ii) Sawridge and the Sawridge Trustees were awarded solicitor and own client indemnity costs;
- (iii) Kennedy was directed to appear before the Court on July 28, 2017 to make submissions on whether she should be personally liable for some or all of the above costs;
- (iv) Stoney was subjected to an interim court filing restriction and was invited to make written submissions by August 4, 2017 on whether his access to Alberta Courts should be restricted. Sawridge was also invited to make submissions in respect of same by July 28, 2017.²

3. Upon the release of the Court's decision in *Sawridge #6*, the interests of Kennedy/DLA Piper and Stoney were in conflict. Pursuant to the Law Society of Alberta's Code of Conduct, a lawyer must not act when there is a conflict of interest between lawyer and client, unless the client consents and it is in the

¹ 1985 *Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 436 [Tab 8 of Appellant Book of Authorities in 1703-0239AC ("Sawridge #6")]

² *Sawridge #6*, [Tab 8 of Appellant Book of Authorities in 1703-0239AC], at para 52, 63-65, 79

client's best interests that the lawyer act.³ Consent requires full disclosure, including the taking of reasonable steps by Kennedy to ensure Stoney understood the matters disclosed.⁴ Kennedy and DLA Piper continued to act for Stoney during *Sawridge #7* and *Sawridge #8*. Accordingly, the only conclusion is that Stoney consented and that it was in Stoney's best interests to have continued representation by Kennedy / DLA Piper, despite this conflict. As a result, all written and oral representations made by Kennedy and DLA Piper were made on behalf of Stoney as well as on behalf of Kennedy in her personal capacity.

4. On July 28, 2017, Kennedy appeared before the CMJ as directed in *Sawridge #6*. Donald Wilson of DLA Piper appeared before the CMJ on behalf of Kennedy, DLA Piper, and Stoney. At the commencement of the hearing, the Court asked the parties to identify themselves and indicate whether or not their clients are present. Mr. Wilson responded that he was "here speaking on behalf of Ms. Kennedy. I can tell you that Mr. Maurice Stoney is in the courtroom."⁵

5. Mr. Wilson proceeded to make a number of admissions about Kennedy's conduct and requested the Court not make a personal costs award. These admissions were made on behalf of Kennedy / DLA Piper and on behalf of Stoney. Some of those admissions included the following:

- (i) It was admitted that Kennedy had taken steps to prosecute this matter when she ought not to have and prosecuted it further than she should have;⁶
- (ii) It was admitted that *Sawridge* was the entity that gets to determine membership and that this is entirely appropriate;⁷
- (iii) It was admitted that the Court could not have been clearer in relation to its warning in *Sawridge #5* regarding interlopers and potential costs awards;⁸
- (iv) It was admitted that the application in *Sawridge #6* had the effect of an abuse of process;⁹

6. The July 28, 2017 hearing resulted in the decision in *Sawridge #7*, which was released on August 31, 2017 and is the subject of the First Appeal. However, *Sawridge #6* also directed that Stoney could make written submissions in respect of the potential vexatious litigant declaration prior to August 4, 2017.¹⁰ Accordingly, after all the above admissions were made, and after all the CMJ's findings in *Sawridge #6*

³ Law Society of Alberta Code of Conduct, Rule 3.4-12 [Tab 5, *Sawridge's Book of Authorities* ("*Sawridge's BOA*")]

⁴ Law Society of Alberta Code of Conduct, S.1.1-1, definitions of "consent" and "disclosure" [Tab 6, *Sawridge BOA*]

⁵ Transcript of July 28, 2017 appearance before CMJ, [Tab 19 of *Fast Track Appeal Record in 1703-0239AC* (July 28, 2017 *Hearing Transcript*)] p. 2, lines 4-6

⁶ July 28, 2017 Hearing Transcript, [Tab 19 of *Fast Track Appeal Record in 1703-0239AC*] p. 4, lines 33-35, lines 38-40, p. 5, lines 17-19

⁷ July 28, 2017 Hearing Transcript, [Tab 19 of *Fast Track Appeal Record in 1703-0239AC*], p. 6, lines 1-4

⁸ July 28, 2017 Hearing Transcript, [Tab 19 of *Fast Track Appeal Record in 1703-0239AC*], p. 6, lines 8-20

⁹ July 28, 2017 Hearing Transcript, [Tab 19 of *Fast Track Appeal Record in 1703-0239AC*], p. 7, lines 16-19

¹⁰ *Sawridge #6*, [Tab 8 of *Appellant Book of Authorities in 1703-0239AC*], at para 63-65

about litigation misconduct, Kennedy continued to act on behalf of Stoney in respect of the vexatious litigant issue. Kennedy filed written submissions on August 3, 2017.¹¹

7. Despite the gravity of the situation that was repeatedly impressed upon Kennedy, her written submissions again undertook the very same litigation misconduct that had already been identified in *Sawridge #6* and that she admitted was an abuse of process at the hearing on July 28, 2017. Kennedy's submissions on behalf of Stoney advanced arguments concerning Stoney's membership status in Sawridge. For example, Kennedy argued that the *Huzar v. Canada* decision could not be relied upon as evidence in this matter.¹² She argued that the *Stoney v. Sawridge First Nation* decision was not a thorough analysis of Stoney's arguments.¹³ She continued to advance arguments that were clearly rejected in *Sawridge #6* and that she had previously admitted were an abuse of process.¹⁴

8. On September 12, 2017, the Court released its decision on *Sawridge #8* wherein it ordered that Stoney would be subject to Court access restrictions in Alberta. The CMJ found that Kennedy's written submissions were "surprising" and were again re-litigating the issues that were already decided in *Sawridge #6* and in the previous decisions cited therein. The CMJ rejected the submissions and found they were "nothing more than an attempt to re-argue *Sawridge #6*."¹⁵ The Court further commented that: "Maurice Stoney and his counsel still do not accept that prior decisions mean Maurice Stoney has no right to continue his interference with the Sawridge Band and its membership processes. Instead, Maurice Stoney and his counsel say his arguments are viable, if not correct."¹⁶ The Court referred to the admissions made by Mr. Wilson at the July 28, 2017 hearing and commented:

*Mr. Wilson told me in open court that Ms. Kennedy had learned her lesson. When I read the written brief Kennedy prepared and submitted on behalf of Maurice Stoney, I questioned whether that was true.*¹⁷

9. Following the decision in *Sawridge #8*, Kennedy and DLA Piper filed a Notice of Withdrawal in respect of their representation of Stoney. The Notice of Withdrawal was filed September 17, 2017 and served on

¹¹ Written Response Argument of Maurice Stoney on Vexatious Litigant Order [Tab 3, Appellant's Extracts of Key Evidence, ("Vexatious Litigant Written Submissions")].

¹² Vexatious Litigant Written Submissions, at para 6

¹³ Vexatious Litigant Written Submissions, at para 7

¹⁴ July 28, 2017 Hearing Transcript, [Tab 19 of Fast Track Appeal Record in 1703-0239AC], p. 7, lines 16-19; See also Vexatious Litigant Written Submissions, [Tab 3, Appellant's Extracts of Key Evidence], at para 12, 16, 22, 24, and 28

¹⁵ 1985 *Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 548 [Tab 13 of Appellant's Book of Authorities in 1703-0239AC (*Sawridge #8*)], at para 32

¹⁶ *Sawridge #8*, [Tab 13 of Appellant's Book of Authorities in 1703-0239AC], at para 103

¹⁷ *Sawridge #8*, [Tab 13 of Appellant's Book of Authorities in 1703-0239AC], at para 116

September 19, 2017. The Affidavit of Service was filed on September 20, 2017. Accordingly, Kennedy / DLA Piper were counsel of record for Stoney until September 30, 2017.¹⁸

10. Prior to the decision in *Sawridge #9*, the CMJ invited submissions about the nature/scope of the cost award that should flow from *Sawridge #7* and *Sawridge #8*.¹⁹ In *Sawridge #9*, the Court declined to order enhanced costs in respect of the July 28, 2017 attendance (*Sawridge #7*). However, the Court ordered solicitor-client costs against Stoney and Kennedy on a joint and several basis for *Sawridge #8*. The Court found that "Kennedy's submissions in *Sawridge #8* were a collateral attack on the result in *Sawridge #6*, constituting a notorious and serious form of litigation abuse".²⁰

PART 2 – GROUNDS OF APPEAL

11. The issues on this Appeal are as follows:

- A. Legal Developments Since the Filing of the First Factum
- B. Did Kennedy's Submissions in *Sawridge #8* Continue to Advance Futile Arguments?
- C. Was Stoney Denied an Opportunity to Speak to Costs?
- D. Did the CMJ err in holding Kennedy personally liable for costs?

PART 3 – STANDARD OF REVIEW

12. The standard of appellate review of a case management judge's costs decision generally is highly deferential, and a cost award will not be interfered with lightly.²¹ The standard of appellate review on a personal cost award against a lawyer is also deferential given the discretionary nature of such awards.²² The Court of Appeal may intervene only where it identifies "an error of law, a palpable and overriding error in the motion judge's analysis of the facts, or an unreasonable or clearly wrong exercise of his discretion."²³

PART 4 – ARGUMENT

13. *Sawridge* continues to rely on its submissions filed in relation to the First Appeal, where applicable to this matter. *Sawridge* offers the following additional submissions.

¹⁸ *Alberta Rules of Court*, AR 124/2010, Rule 2.29 [Tab 7 *Sawridge BOA*] Affidavit of Service [Tab 1 *Sawridge Extracts of Key Evidence*]

¹⁹ January 2, 2018 letter from CMJ, [Tab 3 of Appellant's Factum]

²⁰ *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2018 ABQB 213 [Tab 4 of Appellant's Factum, ("*Sawridge #9*")], at para 29

²¹ *Bun v Seng*, 2015 ABCA 165 (CanLII) at para 5 [Tab 1 *Sawridge's Book of Authorities in 1703-0239AC*]

²² *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26, [2017] 1 SCR 478 at para 52 [*Jodoin*] [Tab 2 *Sawridge's Book of Authorities in 1703-0239AC*]

²³ *Jodoin* at para 51 [Tab 2 *Sawridge's Book of Authorities in 1703-0239AC*]

A. Legal Developments Since the Filing of Facta in the First Appeal

14. Since the filing of the facta in the First Appeal, two appellate decisions have been released that provide additional guidance in dealing with Rule 10.50 and with costs awards against lawyers personally. *Secure 2013 Group v. Tiger Calcium Services* ("*Tiger Calcium*") was a decision of the Alberta Court of Appeal that expressly considered Rule 10.50.²⁴ *Ferreira v. St. Mary's General Hospital* ("*Ferreira*") is a decision of the Ontario Court of Appeal that dealt with personal costs award against a lawyer.²⁵ Both decisions relied on *Jodoin* and both decisions are consistent with the CMJ's analysis in this matter.

15. On March 23, 2018, the Alberta Court of Appeal released its costs decision in *Tiger Calcium*.²⁶ This is the first occasion where this Court directly addressed Rule 10.50. In *Tiger Calcium*, this Court set aside a without notice combined *Mareva* injunction and attachment order against four individuals and seven corporations, and six without notice *Anton Piller* orders against some of the same parties and three third-party service providers.²⁷ The Court of Appeal set aside the Orders because the respondents had failed to satisfy their duty of candour when proceeding without notice, as well as a number of other deficiencies in the orders and the process leading up to obtaining the orders.²⁸

16. In *Tiger Calcium*, some, but not all of the appellants, sought costs against the respondents and their lawyers personally.²⁹ However, there was no issue with the respondents being unable to satisfy a costs award because the respondents were required to file a \$2,000,000 irrevocable letter of credit fortifying their undertaking in damages.³⁰ In considering the relevant rule, the Court stated: "Rule 10.50 contemplates that a lawyer who engages in serious misconduct may be ordered to pay costs personally. The threshold is high and the discretion to do so must be exercised cautiously".³¹ The Court went on to cite paragraph 29 of *Jodoin* and did not identify any issue with the English/French translation relied upon by the Appellant in this matter.³² In applying Rule 10.50 to the facts of *Tiger Calcium*, the Court stated:

[23] While the circumstances justify the exceptional award of solicitor-client costs, the conduct of Former Counsel was not so egregious as to merit the highly unusual remedy of awarding costs against them personally. For example, there is no reason to believe that any of the overstatements of the evidence with respect to third parties was done with the intention of misleading the chambers

²⁴ *Secure 2013 Group v. Tiger Calcium Services Inc.*, 2018 ABCA 110 [Tab 2 Sawridge BOA]

²⁵ *Ferreira v. St. Mary's General Hospital*, 2018 ONCA 247 [Tab 4 Sawridge BOA]

²⁶ *Secure 2013 Group v. Tiger Calcium Services Inc.*, 2018 ABCA 110 [Tab 2 Sawridge BOA]

²⁷ *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2017 ABCA 316 [Tab 1 Sawridge BOA]

²⁸ *Secure 2013 Group v. Tiger Calcium Services Inc.*, 2018 ABCA 110, at para 16 [Tab 2 Sawridge BOA]

²⁹ *Secure 2013 Group v. Tiger Calcium Services Inc.*, 2018 ABCA 110, at para 3-10 [Tab 2 Sawridge BOA]

³⁰ Order of ACJ Rooke, December 22, 2016 [Tab 3 of Sawridge BOA]

³¹ *Secure 2013 Group v. Tiger Calcium Services Inc.*, 2018 ABCA 110, at para 22 [Tab 2 Sawridge BOA]

³² This decision was released well after the case comment relied on by the Appellant, which was released December 11, 2017 – see tab 18 of the Appellant's Book of Authorities in relation to the First Appeal.

*judge who granted the Orders, but simply without the care that should have been exercised whenever without notice relief is sought.*³³

17. Sawridge submits that this analysis is consistent with the CMJ's analysis of Rule 10.50 in both *Sawridge #7* and *Sawridge #9*. *Tiger Calcium* involved one appearance before the Court wherein submissions were made without the necessary care that should have been exercised. The Court found that there was no evidence of an intention to mislead the chambers judge. This also did not involve any client not following court orders or not paying costs awards. In the present case, we have the advancement of futile litigation when Kennedy knew the arguments had previously been rejected and when the CMJ had previously expressly warned against interlopers making applications related to Sawridge membership.³⁴ We also have repeated instances of this conduct by Kennedy. Kennedy also repeatedly made the vexatious and incorrect assertion that it was Sawridge that was in breach of a prior Court order, when she knew that was not correct.³⁵ We have the additional factor of Kennedy purporting to represent clients when she knew she did not have their instructions.³⁶ This is precisely the type of egregious conduct that warrants a personal costs award under Rule 10.50.

18. On March 14, 2018, the Ontario Court of Appeal released its decision in *Ferreira*, which upheld a personal costs award against a lawyer.³⁷ That decision also cited *Jodoin* and did not identify any issue with the English/French translation relied upon by the Appellant. *Ferreira* dealt with a lawyer that pursued an action without instructions from her client. The Court upheld a personal costs award against the lawyer because counsel's actions "seriously interfered with the administration of justice".³⁸ In comments that could be applicable to Kennedy's misconduct in this matter, the Court found as follows:

*What Ms. Masgras appears not to understand is the fundamental principle that lawyers must act in accordance with the instructions of their clients. Lawyers do not have a carte blanche to take steps of their own volition under the guise of furthering the client's perceived cause. In particular, lawyers do not have the right to institute proceedings without being armed with instructions from their clients to do so.*³⁹

³³ *Secure 2013 Group v. Tiger Calcium Services Inc.*, 2018 ABCA 110, at para 23 [Tab 2 Sawridge BOA]

³⁴ *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 [Tab 11 of Appellant's Book of Authorities in 1703-0239AC ("Sawridge #7")], at para 131

³⁵ See paragraph 14, 15, & 20 of Kennedy's Written Argument on the Application to be Added as a Party [P. R273 & 274 of Sawridge Extracts of Key Evidence in 1703-0239AC]; See also Paragraphs 2, 21, 31, 33, 43, 49 of Kennedy's Written Response Argument on Sawridge Intervener Application [P. R281, 286, 288, 289, 292, 293 of Sawridge Extracts of Key Evidence in 1703-0239AC]; See also paragraph 2 of Kennedy's Written Response Argument on Submissions of 1985 Sawridge Trustees [P. 299 of Sawridge Extracts of Key Evidence in 1703-0239AC]

³⁶ *Sawridge #7*, [Tab 11 of Appellant's Book of Authorities in 1703-0239AC], at para 133-140

³⁷ *Ferreira v. St. Mary's General Hospital*, 2018 ONCA 247 [Tab 4 Sawridge BOA]

³⁸ *Ferreira v. St. Mary's General Hospital*, 2018 ONCA 247 [Tab 4 Sawridge BOA], at para 35

³⁹ *Ferreira v. St. Mary's General Hospital*, 2018 ONCA 247 [Tab 4 Sawridge BOA], at para 30

19. Overall, this decision supports the CMJ's analysis in imposing a costs award for Kennedy / Stoney's misconduct of engaging in busybody litigation without the instructions of all purported clients.⁴⁰ This is more directly applicable to the appeal of *Sawridge #7*, however, this decision confirms the type of misconduct that will warrant a personal costs award. The Court in *Ferreira* also confirmed that a full indemnity costs award is appropriate in that circumstance.⁴¹ *Sawridge* submits that *Feirrer*a supports the CMJ's analysis in the present case.

B. Kennedy's Submissions Continued to Advance Futile Arguments and Were a Collateral Attack on the CMJ's Earlier Decision

20. Contrary to the Appellant's assertions in her factum, her written submissions on *Sawridge #8* continued to advance futile arguments and collaterally attack previous decisions. The Appellant selectively quotes from portions of her written argument wherein she acknowledges that the arguments were dismissed. However, she ignores the portions of her written arguments where she clearly did try to re-litigate issues that were previously decided. The fact that Kennedy stated in her submissions that "No collateral attack was intended"⁴² but then turned around and collaterally attacked the prior decision does not change the essential nature of what she was trying to do with her submissions. For example, consider the following argument in the Appellant's Written Submissions to the CMJ:

*"As shown by this litigation in the Sawridge Band cases above, the on-going case in Descheneaux and decision of the Supreme Court of Canada in Daniels, and by the review of the Federal Court of Appeal decision in Huzar and the judicial review in Stoney, it is submitted that this is not a proceeding where the issue has already been determined by a court of competent jurisdiction. Nor is this a matter where proceedings have been brought that cannot succeed or have no reasonable expectation of providing relief."*⁴³

21. With respect, this is not the submission of someone that accepts the result in *Sawridge #6*. On the contrary, Kennedy continued to argue that the matter had not been decided by a court of competent jurisdiction. It is irrelevant that Kennedy prefaced some of these arguments with assertions that "no disrespect" to the Court was intended.⁴⁴

22. Moreover, the submissions were misleading. Kennedy's submissions cited a number of cases and suggested that legal issues of "membership/citizenship" were "unsettled" and that the law is in the process

⁴⁰ *Sawridge #7* [Tab 11 of Appellant's Book of Authorities in 1703-0239AC], at para 133-140

⁴¹ *Ferreira v. St. Mary's General Hospital*, 2018 ONCA 247 [Tab 4 *Sawridge* BOA], at para 38

⁴² Written Submissions on Vexatious litigant [Tab 3, Appellant's Extracts of Key Evidence], para 27

⁴³ Written Submissions on Vexatious litigant [Tab 3, Appellant's Extracts of Key Evidence], para 16

⁴⁴ Written Submissions on Vexatious litigant [Tab 3, Appellant's Extracts of Key Evidence], para 23

of being completely altered.⁴⁵ This submission is not accurate. None of the decisions Kennedy cited dealt with membership in a first nation. They either deal with an individual's entitlement to status under the *Indian Act*, or with other matters altogether.⁴⁶ Membership in a first nation and status under the *Indian Act* are two entirely different issues and the attempt to conflate them is misleading. Stoney's entitlement to status under the *Indian Act* is not relevant and it is not accurate to suggest that recent decisions are in the process of "completely altering the law" on any matter that was relevant to the application is *Sawridge #6*.⁴⁷ The CMJ properly saw through this and rejected the arguments as further collateral attacks.

C. Stoney was Not Denied an Opportunity to Speak to Costs

23. Contrary to the Appellant's argument, Stoney was not denied an opportunity to speak to costs. The CMJ made reasonable efforts to involve Stoney in the proceedings. DLA Piper and Kennedy continued to represent Stoney for *Sawridge #7* and *Sawridge #8*. As indicated in the CMJ's decision, his findings in *Sawridge #9* were based on his prior reasoning in *Sawridge #7*, which is a proceeding wherein Stoney had counsel and where submissions were made on Stoney's behalf. Neither the Appellant, nor Stoney himself, have pointed to any different or additional submissions that Stoney would have made for *Sawridge #9* if given a further additional opportunity. Indeed, his submissions on the within appeal are revealing in that he merely agrees with and adopts the submissions of Kennedy.⁴⁸

24. In respect of *Sawridge #9*, while Stoney was no longer represented by DLA Piper at that time, he was copied on all communications from counsel and the Court. Had he wanted to make additional submissions, he was entitled to respond to this correspondence. In any event, *Sawridge* submits, and the Appellant correctly acknowledges, that the proper remedy for this argument would be a finding that Kennedy is solely liable for the costs award.

25. With respect to the Appellant's argument that Stoney should not be liable for any of the costs in *Sawridge #6, #7, and #9*,⁴⁹ this ignores the fact that Stoney was the party pursuing the litigation and that the default rule is that he is subject to a costs award.⁵⁰ Moreover, to the extent that the Appellant is arguing that Stoney was required to be provided some further independent opportunity to make representations for

⁴⁵ Written Submissions on Vexatious litigant [Tab 3, Appellant's Extracts of Key Evidence], para 12

⁴⁶ Written Submissions on Vexatious litigant [Tab 3, Appellant's Extracts of Key Evidence], para 12

⁴⁷ Written submissions on Vexatious Litigant, [Tab 3, Appellant's Extracts of Key Evidence], para 12

⁴⁸ Letter from Stoney to Court of Appeal filed April 23, 2018, [Tab 2, *Sawridge* Extracts of Key Evidence]

⁴⁹ Appellant's Factum, at para 34

⁵⁰ See Rules 10.28 and 10.29 of the *Alberta Rules of Court* [Tab 8 *Sawridge* BOA]

any of *Sawridge #7* or *Sawridge #8*,⁵¹ Sawridge submits that this was not necessary because Stoney was still represented by Kennedy / DLA Piper until well after those decisions.⁵²

26. Upon the release of the Court's decision in *Sawridge #6*, the interests of Kennedy/DLA Piper and Stoney were in conflict. Pursuant to the Law Society of Alberta's Code of Conduct (the "Code"), a lawyer must not act in that circumstance unless the client consents and it is in the client's best interests that the lawyer act. As stated in the Code:

*A lawyer must not act when there is a conflict of interest between lawyer and client, unless the client consents and it is in the client's best interests that the lawyer act.*⁵³

27. Since DLA Piper and Kennedy continued to act for Mr. Stoney throughout *Sawridge #7* and *Sawridge #8*, the only conclusion that can be drawn is that Stoney consented and that it was in Stoney's best interests that Kennedy / DLA Piper continue to act. Moreover, it must also be assumed that Kennedy took reasonable steps to ensure that Stoney understood the matters disclosed to him.⁵⁴ The CMJ had no ability to inquire into this issue because it would be privileged between Kennedy and Stoney. As a result, we must assume that all written and oral representations made by Kennedy, Mr. Wilson, and DLA Piper were made on behalf of Stoney as well as on behalf of Kennedy in her personal capacity. So to the extent that the Appellant now argues that Stoney should have been invited to "make any submissions on his own behalf",⁵⁵ this ignores the fact that the onus was on Kennedy & DLA Piper to make any submissions on Stoney's behalf.

D. CMJ Did Not Err in Finding Kennedy's Conduct Warranted Personal Liability for Costs:

28. The CMJ properly determined that Kennedy's submissions in *Sawridge #8* again warranted personal liability. The Appellant's suggestions that her submissions were "brave in the circumstances" ⁵⁶ demonstrates that she still fails to grasp the abusive nature of constantly attempting to re-litigate matters

⁵¹ Appellant's Factum, at para 33

⁵² The Notice of Withdrawal was filed on September 20, 2017 and took effect on September 30, 2017 [Tab 1, *Sawridge Extracts of Key Evidence*]

⁵³ Law Society Code of Conduct, Rule 3.4-12 [Tab 5, *Sawridge BOA*]

⁵⁴ The Law Society Code of Conduct provides the following definitions for "consent" and "disclosure":

"consent" means fully informed and voluntary consent after disclosure (a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or (b) orally, provided that each person consenting receives a separate letter recording the consent;

"disclosure" means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed; [Tab 6, *Sawridge BOA*]

⁵⁵ Appellant's Factum, at para 33

⁵⁶ Appellant's Factum, at para 38

that have long been decided.⁵⁷ She still fails to grasp the immense costs this type of abusive re-litigation has on the court system and on other parties. This was a unique situation because Kennedy knew there were no costs consequences for this misconduct because Stoney was impecunious. She knew that he had previously failed to pay costs awards in the past. Accordingly, it was appropriate to find that a personal costs award was justified in these circumstances.


29. Following the findings in *Sawridge #6*, Kennedy should have abandoned the arguments regarding Stoney's purported membership in Sawridge. Instead, she repeatedly asserted that the matter had not yet been determined.⁵⁸ In an effort to support her futile arguments, she misleadingly cited cases that have no application to the issues being decided in the Sawridge Trust litigation. Making matters worse, these arguments were resurrected only a matter of days following her admissions at the July 28, 2017 hearing that these very arguments were an abuse of process. In this circumstance, it was clearly appropriate to find her liable for personal costs in relation to those submissions.

PART 5 - RELIEF SOUGHT

30. For the foregoing reasons, Sawridge requests that the Appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of June, 2018.

PARLEE McLAWS LLP



EDWARD H. MOLSTAD, Q.C.
Counsel for Sawridge First Nation

Estimated Time for Oral Argument: 45 minutes

⁵⁷ See Chronology of Maurice Stoney's Claims to Membership in Sawridge, Appendix A to Factum filed in relation to Appeal 1703-0239AC

⁵⁸ Written Submissions on Vexatious litigant, [Tab 3, Appellant's Extracts of Key Evidence], para 16

TABLE OF AUTHORITIES

1. *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2017 ABCA 316
2. *Secure 2013 Group v. Tiger Calcium Services Inc.*, 2018 ABCA 110
3. Court File 1603 22128, Orders of December 16, 2016 and December 22, 2016, ACJ Rooke
4. *Ferreira v. St. Mary's General Hospital*, 2018 ONCA 247
5. Law Society of Alberta Code of Conduct, Rule 3.4-12
6. Law Society of Alberta Code of Conduct, Rule.1.1-1, definitions of "consent" and "disclosure"
7. *Alberta Rules of Court*, AR 124/2010, Rule 2.29
8. *Alberta Rules of Court*, AR 124/2010, Rules 10.28 and 10.29