COURT OF APPEAL OF ALBERTA

Form AP-5
[Rule 14.87]

COURT OF APPEAL FILE NO.:	1803-0076AC
TRIAL COURT FILE NO.:	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")
APPLICANT:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
RESPONDENTS (ORIGINAL APPLICANTS):	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE AND CLARA MIDBO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST (the "Sawridge Trustees")
STATUS ON APPEAL:	Respondents
RESPONDENTS:	PUBLIC TRUSTEE OF ALBERTA
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:	**EXTRACTS OF KEY EVIDENCE**

Appeal from the Decision of
The Honourable Mr. Justice D.R.G. Thomas
Dated the 20th day of March, 2018
To be filed

EXTRACTS OF KEY EVIDENCE
OF THE APPELLANT PRISCILLA KENNEDY

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Registrar's Stamp

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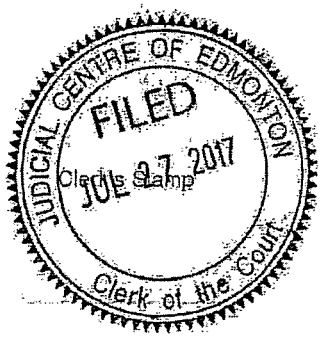

COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**WRITTEN SUBMISSIONS OF THE SAWRIDGE FIRST NATION ON MAURICE STONEY'S POTENTIAL VEXATIOUS LITIGANT STATUS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1700 Enbridge Centre 10175 – 101 Street NW Edmonton, AB T5J 0H3 Attention: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 File Number: 64203-7/EHM

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I. INTRODUCTION

1. On July 12, 2017, this Honourable Court issued a written case management decision in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436 ("*Sawridge #6*"), wherein it granted the Application by Sawridge First Nation ("**Sawridge**") to intervene in the Application by Maurice Felix Stoney ("**Maurice Stoney**") and his brothers and sisters (collectively, "**the Stoney Applicants**") to be added a parties to the within Action (the "**Stoney Application**") and struck out the Stoney Application in its entirety under Rule 3.68 with solicitor and own client indemnity costs awarded to Sawridge and the Sawridge Trustees. This Honourable Court found that the Stoney Application was inappropriate, devoid of merit, and abusive in a manner exhibiting the hallmark characteristics of vexatious litigation and that it amounted to serious litigation misconduct.

2. In *Sawridge #6*, this Honourable Court, of its own motion, imposed an Interim Court Filing Restriction Order for Maurice Stoney and directed that Maurice Stoney make written submissions by August 4, 2017 on whether his access to Alberta courts should be restricted and, if so, what the scope of that restriction should be. This Honourable Court further directed that Sawridge and the Sawridge Trustees may make written submissions on Maurice Stoney's potential vexatious litigant status and introduce additional evidence that is relevant to this question by July 28, 2017.

3. Sawridge will not be adducing any additional evidence on the issue of Maurice Stoney's litigant status; however, by way of these written submissions, Sawridge submits that this Honourable Court should declare Maurice Stoney a vexatious litigant and restrict his access to Alberta courts.

4. In support of its position, Sawridge relies not only upon this Honourable Court's inherent jurisdiction to control litigation abuse, but also upon sections 23 and 23.1 of the *Judicature Act*, RSA 2000, c J-2, which provides this Court with additional authority to control vexatious litigants. In accordance with section 23.1 and with the permission of this Honourable Court, Sawridge notified The Minister of Justice and Solicitor General of Alberta of the Interim Court Filing Restriction Order for Maurice Stoney and the Court's direction concerning the filing of additional evidence and written submissions.

5. These submissions are intended to supplement the evidence and written submissions filed by Sawridge in relation to the issues considered in *Sawridge #6*, to the extent that those prior submissions have already highlighted the vexatious and abusive nature of Maurice Stoney's litigation against Sawridge. For sake of clarity, the evidence and prior submissions of Sawridge relied upon include:

   (a) The Affidavit of Chief Roland Twinn, sworn on September 21, 2016 and filed on September 28, 2016 (the "**Twinn Affidavit**").

   (b) The Written Submissions of Sawridge filed September 28, 2016 in support of the Sawridge Application to be added as an intervenor and in response to the Stoney Application (the "**September 28, 2016 Sawridge Submissions**").

   (c) The Written Submissions of Sawridge in response to the Application by the Stoney Applicants to be added as parties or interveners filed October 31, 2016 (the "**October 31, 2016 Sawridge Submissions**").

   (d) The Reply of Sawridge to the Stoney Applicants' Response to Sawridge's Application to Intervene in the Stoney Application filed November 14, 2016 (the "**November 14, 2016 Sawridge Submissions**").

II. FACTS

6. The Stoney Application, which was at the centre of *Sawridge #6*, was merely the latest installment in a set of related actions growing from a dispute over Maurice Stoney's alleged entitlement to membership in Sawridge. As such, a historical review of Maurice Stoney's claim to membership in Sawridge is necessary to place the Stoney Application in context and in order to truly appreciate the abusive and vexatious nature of his persistent attempts to litigate this previously settled issue.

7. In 1944, William Stoney, the father of Maurice Stoney voluntarily gave up his Indian status and was enfranchised. As a result, William's family (including his wife and their two sons, Maurice and Alvin) were enfranchised and were consequently no longer members of Sawridge.

Twinn Affidavit, at paras 5, 31 and 32

8. Bill C-31 was enacted by the Federal Government on April 17, 1985. It gave Maurice Stoney the right to have his Indian status restored but did not give him any rights in relation to membership in Sawridge. At most, he was able to apply for membership in Sawridge.

Twinn Affidavit, at paras 6 and 7

9. Maurice Stoney, along with others, filed a claim in the Federal Court against Sawridge in 1995 wherein they sought damages related to Sawridge's decision not to grant them membership following the enactment of Bill C-31 (the "**1995 Action**"). Maurice Stoney and the other Plaintiffs also sought an Order that their names be added to the Sawridge's membership list.

Twinn Affidavit, at paras 8 - 10

10. In the 1995 Action the Plaintiffs brought an Application to amend their Statement of Claim to include a request for a declaration that Sawridge's membership rules were discriminatory and exclusionary and were, accordingly, invalid. The Application was initially granted, but that decision was appealed by Sawridge to the Federal Court of Appeal.

Twinn Affidavit, at paras 11 and 12

11. On June 13, 2000, the Federal Court of Appeal delivered its decision regarding Sawridge's Appeal. It agreed with Sawridge and allowed the appeal of the decision amending the Statement of Claim with costs payable to Sawridge for both the initial application and the appeal.

Huzar v Canada, 2000 CanLII 15589 (FCA) at para 6 (Tab 1 of the September 28, 2016 Sawridge Submissions)
Twinn Affidavit, at para 29

12. One of the arguments that was raised during the 1995 Action was that the plaintiffs were entitled to membership in Sawridge as a result of Bill C-31. Specifically, it was argued that Bill C-31 invalidated Sawridge's membership rules, and that accordingly, Maurice Stoney and the other plaintiffs were entitled to membership. In response to that argument, the Federal Court of Appeal noted as follows:

> 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.
>
> 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.
>
> *Huzar v Canada*, (FCA), at paras 4-5 (Tab 1 of the September 28, 2016 Sawridge Submissions)

13. Maurice Stoney was represented by legal counsel in the 1995 Action and it was conceded by his legal counsel and found by the Federal Court of Appeal that Maurice Stoney did not have an acquired right to be a member of Sawridge.

14. Maurice Stoney's next step in relation to his claim for membership in Sawridge was to complete a membership application pursuant to Sawridge's membership rules. His completed application for membership was submitted on August 30, 2011. Contrary to the assertions made in Maurice Stoney's Affidavit filed in support of the Stoney Application, that application was never ignored.

Twinn Affidavit, at paras 15 and 16

15. Maurice Stoney's application for membership was denied on or around December 7, 2011. According to the letter that was sent to Maurice Stoney enclosing Sawridge's decision, his application was rejected (i) because he did not have any specific right to membership, and (ii) because Sawridge's Council did not consider that his admission would be in the best interests and welfare of Sawridge and as a result did not see any reason to exercise its discretion under its membership rules to admit him as a member.

Twinn Affidavit, at para 16
Stoney Affidavit, at Exhibit "L"

16. This was yet another decision where it found that Maurice Stoney did not have any specific right (acquired right) to membership in Sawridge.

17. In accordance with Sawridge's membership rules and its Constitution, Maurice Stoney appealed the decision regarding his membership to Sawridge's Appeal Committee. The hearing of that appeal occurred on April 21, 2012. The committee which was made up of the electors of Sawridge upheld the initial decision to deny the application for membership.

Twinn Affidavit, at para 17

18. At the hearing before the Sawridge Appeal Committee, Maurice Stoney was represented by his current legal counsel, Ms. Priscilla Kennedy (then of Davis LLP).

Twinn Affidavit, Exhibit 2, Tab Y

19. The decision of the Appeal Committee was unanimous in their finding that there were no grounds to set aside the decision of the Sawridge Chief and Council.

Twinn Affidavit, Exhibit 2, Tab Y

20. Maurice Stoney then brought an application in the Federal Court of Canada for judicial review of the decision to deny him membership. That application was filed on May 11, 2012 (the "**2012 Action**").

Twinn Affidavit, at para 18

21. As part of the 2012 Action, Maurice Stoney advanced a number of grounds which he alleged were cause to overturn the decision to deny him membership. Those grounds are listed in Maurice Stoney's Notice of Application that was filed with the Federal Court. They included his alleged right to membership as a result of the enactment of Bill C-31.

Notice of Application, Federal Court Action No. T-923-12
(Tab 2 of the September 28, 2016 Sawridge Submissions)

22. Maurice Stoney swore an Affidavit as part of the 2012 Action. In that Affidavit, he alleged (much like in the Affidavit sworn in support of the Stoney Application) that he was entitled to automatic membership in Sawridge as a result of the enactment of Bill C-31.

Affidavit of Maurice Felix Stoney, sworn May 22, 2012, Federal Court Action No. T-923-12, at para 8 (Tab 3 of the September 28, 2016 Sawridge Submissions)

23. Chief Roland Twinn swore an Affidavit on June 26, 2012, in response to the Affidavit sworn by Maurice Stoney in the 2012 Action. In his Affidavit, Chief Twinn affirmed, *inter alia*, the following:

(a) Sawridge did not receive a completed membership application from Maurice Stoney until August 30, 2011;

(b) Sawridge's decision to deny Maurice Stoney's application for membership was based on a consideration of a number of records, including his completed membership application, historical documents, and media articles;

(c) Maurice Stoney was given the ability to make both written and oral submissions to Sawridge's Appeal Committee, both of which were done by his counsel; and

(d) Maurice Stoney's father (and as a result his whole family) voluntarily enfranchised in 1944.

Twinn Affidavit, at para 19 and at Exhibit "2" at paras 2, 3, 8, 11, 12, and 18

24. Maurice Stoney's application for judicial review in the 2012 Action proceeded on March 5, 2013, before Justice Barnes of the Federal Court (Trial Division). Justice Barnes dismissed Maurice's application, and awarded costs to Sawridge.

Stoney v Sawridge First Nation, 2013 FC 509 (Tab 4 of the September 28, 2016 Sawridge Submissions)

25. In his written reasons, Justice Barnes engaged in a thorough analysis of Maurice Stoney's argument regarding his entitlement to membership under Bill C-31. He found that Bill C-31 did not provide Maurice Stoney with an automatic right to membership in Sawridge. Rather, Justice Barnes noted that Maurice Stoney lost his right to membership when his father obtained enfranchisement for the entire Stoney family:

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

Stoney v Sawridge First Nation, 2013 FC 509, at paras 11-15
(Tab 4 of the September 28, 2016 Sawridge Submissions)

26. Additionally, Justice Barnes wrote that the judicial review application that was the subject matter of the 2012 Action was an attempt by Maurice Stoney to re-litigate the matters that were in issue in the 1995 Action, being his entitlement to membership as a result of Bill C-31. Justice Barnes accordingly concluded that the arguments related to Bill C-31 were barred under the doctrine of issue estoppel.

Stoney v Sawridge First Nation, 2013 FC 509, at para 17
(Tab 4 of the September 28, 2016 Sawridge Submissions)

27. Maurice Stoney was represented by his current legal counsel, Ms. Priscilla Kennedy (then of Davis LLP) in the 2012 Action.

Stoney v Sawridge First Nation, 2013 FC 509
(Tab 4 of the September 28, 2016 Sawridge Submissions)

28. Following the issuing of Justice Barnes' reasons in the 2012 Action, Sawridge proceeded to take steps to assess the costs that were payable by Maurice. A Federal Court Assessment Officer determined that Sawridge was entitled to $2,995.65 in costs. These costs have never been paid.

Twinn Affidavit, at paras 22 and 29

29. As noted by this Court, at the time that Justice Barnes issued his decision in the 2012 Action and it was not appealed, Maurice Stoney's avenue for standing in the within Action was closed and the question of his membership in Sawridge was *res judicata*.

30. Nevertheless, on January 31, 2014, Maurice Stoney filed a complaint with the Canadian Human Rights Commission ("**CHRC**") regarding Sawridge's decision to deny him membership (the "**CHRC Complaint**"). Much like in both the 1995 Action and the 2012 Action, Maurice Stoney's complaint was based on an allegation that Sawridge's decision to deny his membership was discriminatory.

Twinn Affidavit, at para 24

31. The Deputy Chief Commissioner of the CHRC issued a decision regarding the complaint by Maurice Stoney on April 15, 2015. The Deputy Chief Commissioner refused to

address the complaint, as the subject matter of the complaint had already been dealt with as part of the 1995 Action and the 2012 Action:

> The complainant has been a party to two different proceedings before the Federal Court with respect to the matters raised in this complaint: an action against the respondent [Sawridge] which was struck by the Federal Court of Appeal in 2000 and an application for judicial review which was dismissed in May 2013. The essence of the complaint, i.e., the respondent's denial of the complainant's membership in the band, was central to both proceedings. The complainant clearly raised discrimination in his application for judicial review when he alleged that the decision violated the Charter; however, he did not provide adequate evidence for the Federal Court to overturn the decision of the respondent. The Supreme Court in *Figliola* held that human rights commissions must respect the finality of decisions made by other administrative decision-makers with concurrent jurisdiction to apply human rights legislation when the issues raised in both processes are the same. In this instance, the other decision-makers are judges of the Federal Court and the Federal Court of Appeal and could have clearly considered the human rights allegations raised. Therefore, it would not be unfair for the Commission to decide not to deal with this complaint.

Record of Decision re: File 20140008, dated April 15, 2015; *Twinn Affidavit*, at Exhibit "5"

32. Most recently, Maurice Stoney attempted to become involved in this Action in late 2015. Specifically, he attempted to file an appeal of a case management decision made by Justice D.R.G. Thomas, being *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ("***Sawridge #3***"). Maurice Stoney was not a party to this Action at that time. In light of the fact that Maurice Stoney's counsel had failed to file a Civil Notice of Appeal within the requisite time under the *Rules of Court*, Maurice Stoney brought an application to extend the time for him to file an appeal of *Sawridge #3*. That application was heard by Justice J. Watson of the Court of Appeal on February 17, 2016.

Stoney v 1985 Sawridge Trust, 2016 ABCA 51 (Tab 5 of the September 28, 2016 Sawridge Submissions)

33. Maurice Stoney was represented his current counsel, Ms. Priscilla Kennedy of DLA Piper (Canada) LLP in the Application to the Court of Appeal before Mr. Justice J. Watson.

Stoney v 1985 Sawridge Trust, 2016 ABCA 51 (Tab 5 of the September 28, 2016 Sawridge Submissions)

34. On February 26, 2016, Justice Watson issued his reasons for decision regarding Maurice Stoney's application. He dismissed the application and awarded costs to the parties that participated in that application, which included Sawridge.

Stoney v 1985 Sawridge Trust, 2016 ABCA 51, at paras 23-24
(Tab 5 of the September 28, 2016 Sawridge Submissions)

35. In his written reasons, Justice Watson provided an overview of the basis of Maurice Stoney's argument that he should participate in this Action:

> The application before me now is by a gentleman named Maurice Stoney. Mr. Stoney claims, with some vigour, that he is a member of the First Nation in question and that he has been for a long time, and that as a member of the First Nation, certain legal rights of his follow from this.
>
> [...] As mentioned, Mr. Stoney's position is that he is a member of the Sawridge First Nation and that as a consequence of that he presumably has a right to some share in the distribution of the trust when that is eventually carried out.

Stoney v 1985 Sawridge Trust, 2016 ABCA 51, at paras 2 and 3
(Tab 5 of the September 28, 2016 Sawridge Submissions)

36. With regards to Maurice Stoney's allegations regarding his membership in Sawridge, Justice Watson did not make any findings regarding same, but he did note the following:

> It therefore follows that in terms of determining reasonable chance of success in the appeal, the embargo against the participation of Mr. Stoney that is or has been created by the various proceedings that have occurred in various courts including the Federal Court as raised by the First Nation, has an enhanced status for the purposes of determining the extension of time here. That is because, on the face of things, Mr. Stoney does not have a participatory right in relation to the proceedings on the trust, does not have standing to appeal within the meaning of the case of Dreco Energy Services Ltd et al v Wenzel Downhole Tools Ltd, 2008 ABCA 36 (CanLII), 429 AR 51 at paras 5 to 8, and is, in fact, a stranger to the proceedings insofar as an appeal from the decision of Mr. Justice Thomas to the Court of Appeal is concerned. [Emphasis Added]

Stoney v 1985 Sawridge Trust, 2016 ABCA 51, at para 20
(Tab 5 of the September 28, 2016 Sawridge Submissions)

37. Pursuant to Justice Watson's decision, Sawridge prepared a Bill of Costs regarding the application. That Bill of Costs was agreed to by Maurice Stoney's counsel, Ms. Priscilla Kennedy of DLA Piper (Canada) LLP, and was filed on June 14, 2016. Pursuant to that

Bill of Costs, Maurice Stoney is required to pay Sawridge $898.70. To date, he has not paid Sawridge these costs.

Twinn Affidavit, at paras 28 and 29

38. Then, on August 12, 2016, Maurice Stoney filed the Stoney Application seeking to be added as a party to the within Action on the basis that he and his siblings are acquired rights members in Sawridge and therefore beneficiaries to the 1985 Trust. In *Sawridge #6*, this Honourable Court struck the Stoney Application under Rule 3.68 on the basis that it was inappropriate, devoid of merit, and abusive.

39. The Stoney Application and the Stoney Applicants' September 28, 2016 written submissions were based on the Affidavit of Maurice Stoney. Maurice Stoney's counsel, Ms. Priscilla Kennedy of DLA Piper (Canada) LLP, refused to permit counsel for Sawridge to attend at his Questioning on his Affidavit.

40. The transcript from that Questioning shows that Ms. Priscilla Kennedy of DLA Piper (Canada) LLP interrupted, obstructed, and refused to permit any Questioning on the substance of the Application and Affidavit. In addition, Maurice Stoney refused to answer questions and his legal counsel, Ms. Priscilla Kennedy of DLA Piper (Canada) LLP, acquiesced in his refusal.

Transcript from Questioning on Affidavit of Maurice Stoney [TAB 1]

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

42. Maurice Stoney and his siblings are not acquired rights members of Sawridge by virtue of Bill C-31, and the order of Justice Hugessen does not apply to them. This has been plain and obvious since the decision in the 1995 Action. It was also plain and obvious that Maurice Stoney was entitled to status as an Indian by virtue of Bill C-31, but that he did

not fall within the categories of persons entitled to have his name entered on Sawridge's membership list.

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

44. In the judicial review application, Justice Barnes found that Maurice Stoney was attempting to re-litigate the matters that were in issue in the 1995 Action which was brought by legal counsel on behalf of Maurice Stoney and others, relating to his entitlement to membership as a result of Bill C-31. Justice Barnes concluded in the judicial review application that the arguments advanced by Maurice Stoney related to Bill C-31 were barred under the doctrine of issue estoppel.

Huzar v Canada, 2000 CarswellNat 1132 (FCA), at paras 4-5
(Tab 4 of the October 31, 2016 Sawridge Submissions)

Stoney v Sawridge First Nation, 2013 FC 509, at para 17
(Tab 3 of the October 31, 2016 Sawridge Submissions)

45. Maurice Stoney's attempt to re-litigate the membership issue in the within Action and forum was conduct that was unnecessary and unnecessarily lengthened and delayed an already lengthy action. Maurice Stoney's conduct was vexatious and an abuse of process.

46. Further, in their written submissions in support of the Stoney Application and in response to the Sawridge Application to intervene, Maurice Stoney and his counsel misstated the status of the Poitras litigation and misapplied decisions arising from that litigation in an attempt to suggest that Sawridge has repeatedly failed to comply with Justice Hugessen's Order. They also asserted that Sawridge continued to deny Ms. Poitras membership and that Sawridge continues with actions denying membership to Ms. Poitras today. These statements are false.

Transcript from the Questioning on Affidavit of Elizabeth Poitras, April 16, 2015 at 114:18 to 115:22
(Tab 8 of the November 14, 2016 Sawridge Submissions)

47. For Maurice Stoney and his legal counsel to have suggested that this was a case where Sawridge was openly applying to the Court for re-litigation of a settled issue, namely the Order of Justice Hugessen, and that Sawridge misused the judicial system such that its conduct amounts to an abuse of process is both false and in itself, constitutes an abuse of process on the part of Maurice Stoney.

48. This Honourable Court has now been determined, in *Sawridge #6*, that it was in fact Maurice Stoney and his legal counsel, and not Sawridge, who were attempting to re-litigate the finding of Justice Barnes in *Stoney v Sawridge First Nation*, 2013 FC 509, that section 11(1) of Bill C-31 and Justice Hugessen's Order do not apply to Maurice Stoney (or, by extension, his siblings).

III. ISSUES

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

(a) Should Maurice Stoney be declared a vexatious litigant and have his access to Alberta courts restricted?

(b) If so, what should be the scope of the restriction on Maurice Stoney's access to Alberta courts?

IV. LAW

50. This Honourable Court has jurisdiction to declare Maurice Stoney a vexatious litigant, of its own motion, on either (or both) of the following bases, which co-exist:

(a) pursuant to its inherent jurisdiction to prevent abuse by control of the litigation process, and

(b) pursuant to the statutory authority to control vexatious proceedings granted to it under sections 23 and 23.1 of the *Judicature Act*.

Hok v Alberta, 2016 ABQB 651 at para 25 ["*Hok*"] [TAB 2]

51. As such, the non-exhaustive list of indicators of vexatious litigation set out in section 23(2) of the *Judicature Act* is relevant:

(2) For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:

(a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;

(b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;

(c) persistently bringing proceedings for improper purposes;

(d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;

(e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;

(f) persistently taking unsuccessful appeals from judicial decisions;

(g) persistently engaging in inappropriate courtroom behaviour.

Judicature Act, RSA 2000, c J-2, s 23.1(2) [*Judicature Act*] [TAB 3]

52. Of further relevance is the more fulsome list of indicators of vexatious litigation set out in, *Chutskoff v Bonora*, 2014 ABQB 389, aff'd 2014 ABCA 444, the leading case on the elements and activities that define abusive litigation:

[92] This is a useful occasion then to collect and update the catalogue of established stereotypic features of vexatious litigation:

1. collateral attack:

   a) bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction: *Judicature Act*, s 23(2)(a); *Dykun v Odinshaw* at para 42;

   b) using previously raised grounds and issues improperly in subsequent proceedings: *Judicature Act*, s 23(2)(c); *Dykun v Odinshaw* at para 42;

   c) conducting a proceeding to circumvent the effect of a court order: *Stout v Track*, at paras 79-82, 84-87;

2. hopeless proceedings:

a) bringing proceedings that cannot succeed or that have no reasonable expectation to provide relief: *Judicature Act*, s 23(2)(b); *Dykun v Odinshaw* at para 42;

b) seeking forms of relief that cannot be obtained: *Fearn v Canada Customs*, at para 106; *McMeekin v Alberta (Attorney General)*, 2012 ABQB 456 at paras 196, 203, 543 AR 132; *Onischuk v Alberta*, at paras 14, 35;

c) seeking relief that is unwarranted or grossly disproportionate to any plausible remedy: *Stout v Track*, at paras 68-71; *Arabi v Alberta*, 2014 ABQB 295, at paras 101-103; *McMeekin v Alberta (Attorney General)*, 2012 ABQB 456 at paras 196, 203, 543 AR 132;

d) advancing excessive cost claims: *McMeekin v Alberta (Attorney General)*, 2012 ABQB 456 at paras 196, 203, 543 AR 132; *Arabi v Alberta* at paras 101-103;

e) advancing incomprehensible arguments and allegations: *R v Fearn*, 2014 ABQB 233 at paras 22-23;

3. escalating proceedings:

a) grounds and issues tend to roll forward into subsequent actions, repeated and supplemented (*Dykun v Odinshaw* at para 42; *McMeekin v Alberta (Attorney General)*, 2012 ABQB 456 at paras 203, 205, 543 AR 132); this factor is aggravated where this results in simultaneous active overlapping actions (*Wong v Leung*, 2010 ABQB 628 at para 16);

b) with an 'accumulative' nature where, as proceedings continue:

i) new parties are added, frequently these are lawyers: *Dykun v Odinshaw* at para 42; *Big Bear Hills Inc v Bennett Jones Alberta LLP*, 2010 ABQB 764, 507 AR 21; *McMeekin v Alberta (Attorney General)*, 2012 ABQB 456 at paras 203, 205, 543 AR 132; *Arabi v Alberta*, at para 104; or

ii) unrelated issues and subjects which were not a part of the original action are added to the litigation: this decision, see paras 110-111;

4. bringing proceedings for improper purposes (*Judicature Act*, s 23(2)(c); *Dykun v Odishaw* at para 42), including proceedings:

a) without a legal basis and intended disrupt, pre-empt, or frustrate other litigation: *R v Fearn*, 2014 ABQB 233 at para 48; *O'Neill v Deacons*, 2007 ABQB 754 at para 25, 83 Alta LR (4th) 152; *McDonald Estate (Re)*, 2013 ABQB 602 at para 44;

b) with an ulterior motive or to seek a collateral advantage: *Hughes Estate v Hughes*, 2006 ABQB 159 at para 20, 396 AR 250, varied on other grounds 2007 ABCA 277, 285 DLR (4th) 57;

c) intended to extort a settlement or other benefit: *Allen v Gray*, 2012 ABQB 66 at para 41, 532 AR 252, appeal dismissed for want of prosecution 2013 ABCA 176, 553 AR 124; *Arabi v Alberta* at para 100; *McMeekin v Alberta (Attorney General)*, 2012 ABQB 625 at paras 32, 38, 41, 543 AR 11

d) intended as revenge, harassment, to oppress, or to inflict harm: *Stout v Track*, at paras 79-82; *Serdahely Trust (Trustee of) v Serdahely Estate; Halfan v Serdahely Estate*, 2008 ABQB 472, 453 AR 367; *Wong v Leung; V.W.W. v Leung*, 2011 ABQB 688 at para 36, 530 AR 82; and

e) conducted in retaliation to other persons' successes or their failure to cooperate with the plaintiff, including unwarranted complaints to professional bodies: *McDonald Estate (Re)*, 2013 ABQB 602 at para 45;

5. initiating "busybody" lawsuits to enforce alleged rights of third parties: *Wong v Giannacopoulos*, 2011 ABCA 206 at para 4, 510 AR 234, leave refused 2011 ABCA 277, 515 AR 58;

6. failure to honour court-ordered obligations:

a) failing to pay costs: *Judicature Act*, s 23(2)(e); *Dykun v Odinshaw* at para 42;

b) a failure to abide by court orders: *R v Fearn*, 2014 ABQB 233 at paras 45, 49; *BNP Paribas (Canada) v Pawlus*, 2007 ABCA 325 at para 4, 162 ACWS (3d) 420; *McDonald Estate (Re)*, 2013 ABQB 602 at para 46;

c) misconduct that is intended to or has the effect of circumventing the operation of court orders: this decision, see paras 121-124.

7. persistently taking unsuccessful appeals from judicial decisions (*Judicature Act*, s 23(2)(f); *Dykun v Odinshaw*, at para 42), spurious appeals intended to incur cost and cause delay are an aggravating factor (*McMeekin v Alberta (Attorney General)*, 2012 ABQB 625 at paras 38, 41, 543 AR 11);

8. persistently engaging in inappropriate courtroom behaviour: *Judicature Act*, s 23(2)(g); *Allen v Gray*, at para 44;

9. unsubstantiated allegations of conspiracy, fraud, and misconduct, including:

a) claims of judge and lawyer deception, fraud, perjury, conspiracy, tampering of records and transcripts, and other conspiratorial misconduct made without the positive evidence (reviewed in *Fearn v Canada Customs*, at paras 73, 76-78, 85) legally required to support such allegations: *Onischuk v Alberta*, at para 35; *Koerner v Capital Health Authority*, 2011 ABQB 462 at para 21, 518 AR 35; *McMeekin v Alberta (Attorney General)*, 2012 ABQB 625 at paras 27-29 38, 543 AR 11;

b) sensational claims of conspiracies and intimidation, harassment and racial bias: *Allen v Gray*, at para 42; *V.W.W. v Wasylyshen*, 2013 ABQB 327 at

para 59; 563 AR 281, leave refused 2014 ABCA 121; *Wong v Giannacopoulos*, at para 4;

c) pleadings that are "replete with extreme and unsubstantiated allegations, and often refer to far-flung conspiracies involving large numbers of individuals and institutions", "where the allegations may be unfounded in fact or merely speculative, but the language is vitriolic, offensive and defamatory": *Del Bianco v 935074 Alberta Ltd.*, at para 35;

10. scandalous or inflammatory language in pleadings or before the court: *Wilson v Canada (Revenue)*, 2006 FC 1535 at para 31, 305 FTR 250; *McMeekin v Alberta (Attorney General)*, 2012 ABQB 456 at para 205, 543 AR 132; *Onischuk v Alberta*, at paras 14, 35; and

11. advancing Organized Pseudolegal Commercial Argument ["OPCA"] strategies: *Meads v Meads*; *R v Fearn*, 2014 ABQB 233 at para 49.

Chutskoff v Bonora, 2014 AQBQ 389 at paras 92-93 ["*Chutskoff*"] [TAB 4]

53. As noted in both the *Judicature Act* and in *Chutskoff* any one or more of the listed indicia are a basis on which to classify litigation as vexatious.

Judicature Act, s 23(2) [TAB 3]

Chutskoff at para 93 [TAB 4]

54. Once a finding is made that a litigant is vexatious, the question becomes how to structure the court order restricting the litigant's access to the Court.

55. In *Hok*, Justice Verville stated that the key questions for the Court on this issue are:

(a) Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?

(b) What litigation subject or subjects are likely to be involved in that abuse of court process?

(c) In what forums will that abuse occur?

Hok at para 36 [TAB 2]

56. It is open to this Honourable Court to tailor the terms of order to suit the circumstances of this particular case. For example, in *R v Grabowski*, 2015 ABCA 12, the Alberta Court of Appeal amended the chambers judge's vexatious litigant order to include a provision requiring that all outstanding costs be paid in full before leave of the court is sought for

any further litigation and that evidence of such payment be filed with the court where proceedings are contemplated.

R v Grabowski, 2015 ABCA 391 at para 12 ["*Grabowski*"] [TAB 5]

V. ANALYSIS

A. The Stoney Application was vexatious and Maurice Stoney should be declared a vexatious litigant and have his access to Alberta courts restricted.

57. The historical review of Maurice Stoney's claims to membership in Sawridge, the most recent of which is the Stoney Application, and a review of the number and variety of proceedings he has commenced in this regard and his and his counsel's conduct, clearly demonstrate numerous indicia of vexatious litigation set out in the *Judicature Act* and in the case law. These indicia include: collateral attack, hopeless proceedings, escalating proceedings, unsubstantiated allegations of misconduct, bringing proceedings for an improper purpose, failing to honour court-ordered obligations, inappropriate behaviour during litigation, and initiating busybody lawsuits to enforce the alleged rights of third parties.

Collateral Attack:

58. Maurice Stoney has persistently brought proceedings to determine an issue that has already been determined by courts of competent jurisdiction; namely, the question of his acquired rights membership in Sawridge under Bill C-31. That he is not an acquired rights member was conceded by his counsel and confirmed by the Federal Court of Appeal in the 1995 Action. This issue was then determined to be *res judicata* by the Federal Court of Canada when he again tried to argue he was an acquired rights member in the 2012 Action, which decision was not appealed by Maurice Stoney, who was represented at the time by legal counsel, Ms. Priscilla Kennedy (then of Davis LLP).

59. Despite these decisions, and in the face of an unpaid costs award against him in the 2012 Action, Maurice Stoney filed a human rights complaint against Sawridge in 2014 wherein Sawridge was again required to respond to the same arguments previously advanced by Maurice Stoney in the 1995 Action and the 2012 Action. The Deputy Chief

Commissioner of the CHRC subsequently refused to address the complaint on the basis that the subject matter of the complaint had already been dealt with in the 1995 Action and the 2012 Action.

60. Still, these prior decisions did not dissuade Maurice Stoney from subsequently attempting to interject himself into the within Action involving the 1985 Trust on the basis that he was an acquired rights member of Sawridge under Bill C-31 and was therefore an interested party.

61. In the first instance, Maurice Stoney attempted to appeal this Honourable Court's case management decision in *Sawridge #3*, but his application was dismissed by Justice Watson, who commented on the "the embargo against the participation of Mr. Stoney that is or has been created by the various proceedings that have occurred in various courts including the Federal Court". Again, costs were awarded to Sawridge on the failed leave application but have never paid by Maurice Stoney.

62. Even then, Maurice Stoney continued to demonstrate his persistence in re-litigating the acquired rights membership issue by subsequently filing the Stoney Application, seeking to have himself and his siblings added as parties to the within Action. Again, Sawridge was required to take action and expend resources to respond to the same arguments previously made by Maurice Stoney on the issue of his membership which were rejected by courts of competent jurisdiction in the 1995 Action and 2012 Action. Unsurprisingly, this Honourable Court in *Sawridge #6* again rejected Maurice Stoney's position on acquired rights membership, noting that he issue was *res judicata* and had never been appealed by Maurice Stoney through the appropriate forums.

Hopeless Proceedings:

63. To the extent that Maurice Stoney persistently brings proceedings in an attempt to re-litigate the issue of his acquired rights membership under Bill C-31, which issue is *res judicata*, the proceedings are hopeless. There is no chance that the proceedings can succeed, and he could have no reasonable expectation that he would be granted relief.

64. Furthermore, it is particularly aggravating that he sought as part of the Stoney Application to have his (and his siblings') solicitor client costs paid from the 1985 Trust. Any such order would have the effect of depleting the Trust's assets and thereby prejudicing the proper beneficiaries of the Trust. This relief was clearly unwarranted in the circumstances and grossly disproportionate to any plausible remedy.

Escalating Proceedings and Unsubstantiated Allegations of Misconduct:

65. Maurice Stoney has also demonstrated persistence in escalating proceedings, repeating and supplementing grounds and issues and rolling them into subsequent actions. As the proceedings have escalated from the 1995 Action, to the membership application and appeal before Sawridge, to the 2012 Action, to the CHRC complaint, and, now, to the within Action, Maurice Stoney has started to raise, unnecessarily, subjects and issues which are irrelevant and which did not form part of his original proceedings.

66. For example, in his submissions on the Stoney Application and in response to Sawridge's intervenor application, he unnecessarily, and for no proper purpose, raised the issue of Sawridge's unrelated litigation with Elizabeth Poitras in a failed attempt to paint Sawridge in a poor light and in a failed attempt to suggest that it is in fact Sawridge, and not Maurice Stoney, who has failed to comply with previous court orders and who is re-litigating the issue of acquired rights membership under Bill C-31. Maurice Stoney's allegations against Sawridge were completely unfounded as demonstrated in Sawridge's response to same in the November 14, 2016 Sawridge Submissions.

67. Maurice Stoney and his counsel took liberties in misstating or misinterpreting facts and case law, asserting rights which have been judicially determined not to exist, and raising issues of no relevance to the Stoney Application or the Sawridge Application which formed the subject matter of *Sawridge #6*.

Bringing Proceedings for Improper Purpose:

68. As was the case with the impugned party's intentions in *Chutskoff*, Maurice Stoney's intentions in continually attempting re-litigate the same issue are clearly improper in that, in each instance, he initiates the proceedings to attack the results of other legal actions

and judicial decisions where he has been unsuccessful or where he has not sought a timely appeal.

69. This is a case where Maurice Stoney, like the vexatious litigant in *Grabowski*, is quite simply unable to take "no" for an answer when it comes to the issue in question the various proceedings he has commenced in courts and other forums, being whether he is an acquired rights member of Sawridge under Bill C-31.

Failing to Honour Court-Ordered Obligations and Inappropriate Behaviour:

70. As noted by Justice Browne in *644036 Alberta Ltd v Morbank Financial Inc*: "A person is presumed to intend the natural consequences of their acts, so repeated misconduct is a presumptive indication that a litigant does not intend to follow court rules and procedure."

644036 Alberta Ltd v Morbank Financial Inc, 2014 ABQB 681 at para 56 [TAB 6]

71. Maurice Stoney has failed to pay the outstanding costs awards owed to Sawridge in the 2012 Action and in relation to his failed leave application in the Court of Appeal in the within Action. He has also repeatedly failed to respect the settled decisions of courts of competent jurisdiction by attempting to re-litigate issues in Court or other forums instead of having followed the appropriate appeal procedure to attack those prior decisions.

72. Furthermore, Maurice Stoney misconducted himself during Questioning on his Affidavit in support of the Stoney Application. The transcript shows that he refused to answer proper questions and that his legal counsel acquiesced in his refusal instead of properly instructing him to answer appropriate questions.

Transcript from Questioning on Affidavit of Maurice Stoney [TAB 1]

73. The Stoney Application and the Sawridge Intervenor Application were dealt with through written submissions only, such that his misconduct did not take place in the courtroom as is often the case with vexatious litigants. Nevertheless, when Maurice Stoney's misconduct during Questioning is viewed in the context of his clear disregard for previous Court orders, Sawridge submits that there is a presumptive indication that he

does not intend to follow court rules and procedure (or the rules and procedures for litigation generally).

Initiating "busy body" Lawsuits to the Enforce the Alleged Rights of Third Parties

74. Finally, in his most recent attempt to re-litigate the acquired rights membership issue in the Stoney Application, Maurice Stoney purports to have brought the action on behalf of his siblings, and thereby attempted to enforce the alleged rights of those third parties to membership in Sawridge under Bill C-31. No affidavit evidence was filed by any of his siblings to support an application on their behalf. Nevertheless, Sawridge was compelled to respond to the application and expended further resources reviewing available records relating to the siblings identified in the Stoney Application and Maurice Stoney's supporting affidavit.

75. While one indicia is sufficient to find litigation vexatious, the presence of several indicia is aggravating and supports Sawridge's position that the Stoney Application was vexatious and that Maurice Stoney's persistent pattern of vexatious proceedings warrants him being declared a vexatious litigant both at common law and pursuant to the companion provisions contained in sections 23 and 23.1 of the *Judicature Act*.

B. The Interim Court Filing Restriction Order should be made Permanent.

76. Sawridge submits that for the foregoing reasons, this Honourable Court's July 12, 2017 Interim Court Filing Restriction Order should be made permanent.

77. As was the case with the vexatious litigant in *644036 Alberta Ltd v Morbank Financial Inc.*, Maurice Stoney is a person who is an appropriate target for a broad, global court restriction. He has demonstrated, in particular through the proceedings commenced in the within Action, that he is "willing and able to insinuate himself into other people's litigation". He purports to represent others (his siblings), and advances inappropriate, futile and vexatious arguments.

644036 Alberta Ltd v Morbank Financial Inc., 2014 ABQB 681 at paras 96-97 [TAB 6]

78. Furthermore, it has been noted the impact of the typical vexatious litigant order (with the broad application and provisions contained within the Interim Order) is not unduly harsh and is appropriate:

> [33] Typical vexatious litigant orders (for example *Henry v El*, 2010 ABCA 312, 193 ACWS (3d) 1099, leave denied [2011] SCCA No 138), require that the vexatious litigant provide to the court an unfiled copy of the proposed statement of claim, motion, or application, and a supporting affidavit to establish grounds for that filing. Realistically, this is not a great hurdle. There is no cost to submit this material (it is not "filed") or make this application. Filing fees only follow if leave is granted. The proposed filing had to be prepared anyway. Any person considering legitimate litigation should at least have taken the step of mustering the evidence and argument they plan to advance. Transforming that into an affidavit is a comparatively minor additional step. Courts often strike out actions that are based on bald allegations: *GH v Alcock*, 2013 ABCA 24 at para 58. A person subject to a vexatious litigant order should not be able to access the courts with bald allegations. This 'evidence mustering' requirement is therefore unremarkable and would be required for a valid claim in any event. This step does not represent "undue hardship" any more than other routine litigation steps that require documentation.

Hok at para 33 [TAB 2]

79. However, should this Honourable Court determine that the scope of the existing order is too broad, or that there is insufficient evidence to support an order that restricts litigation against any and all persons, then Sawridge submits that the order should, in the least, restrict Maurice Stoney's access to Alberta courts as it relates any litigation or steps in litigation against Sawridge (and those persons directly associated with Sawridge), and against the Sawridge Trusts and Trustees.

80. For sake of clarity, Sawridge submits that the order restricting Maurice Stoney's access to Alberta Courts should apply, in the least, to litigation steps and litigation against the following:

(a) Sawridge First Nation;

(b) any past, present, or future members of Chief and Council of the Sawridge First Nation;

(c) the 1985 Sawridge Trust;

(d) the 1986 Sawridge Trust; and

(e) the Trustees of the 1985 and 1986 Sawridge Trusts.

81. Furthermore, having regard to Maurice Stoney's historical failure to pay any costs awards made against him by the Courts, Sawridge submits that this is an appropriate case in which to add a condition to the Order requiring that all outstanding costs be paid in full before leave of the court is sought for any further litigation and that evidence of such payment be filed with the court where proceedings are contemplated.

VI. RELIEF REQUESTED

82. For the above reasons, Sawridge prays that this Honourable Court declare that Maurice Stoney is a vexatious litigant and order that his access to the Alberta Courts be restricted on the terms set out in the Interim Order, with the additional condition that all outstanding costs be paid in full before leave of the court is sought for any further litigation and that evidence of such payment be filed with the court where proceedings are contemplated.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of July, 2017.

PARLEE McLAWS LLP

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

LIST OF AUTHORITIES

TAB 2

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, RSA 2000,c T-8 AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, ("THE 1985 SAWRIDGE TRUST") OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Trustees")
DOCUMENT	**WRITTEN SUBMISSIONS OF THE TRUSTEES ON MAURICE STONEY'S POTENTIAL VEXATIOUS LITIGANT STATUS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	DENTONS CANADA LLP #2900, 10180 – 101 Street Edmonton, AB T5J 3V5 ATTENTION: Doris Bonora Telephone : 780-423-7100 Fax : 780-423-7276 File Number : 551860-1-DCEB

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Fax : 780-428-1066

Counsel for the Stoney Applicants

Submissions

1. The Trustees of the 1985 Sawridge Trust wish to respond to the request of the Court in the Sawridge #6 decision that written submissions be filed in respect of making a determination that Maurice Stoney is a vexatious litigant.

2. The Trustees have reviewed the brief filed by the Sawridge First Nation and confirm that they agree with the contents. In the interests of saving costs to the 1985 Sawridge Trust and in the interest of avoiding duplicative arguments, the Trustees wish to adopt the arguments of the Sawridge First Nation as filed in this action.

3. The Trustees wish to add for ease of reference for the Court the transcript of the questioning of Maurice Stoney on his affidavit dated September 23, 2017 and filed October 21, 2017.

4. The Trustees wish the Court to pay particular attention to the highlighted portions on the following pages which we submit shows conduct of Mr. Stoney that is particularly egregious:

    a. Page 23 line 14-19 – still denying that the Court has advised he is not an automatic member

    b. Page 32 line 13-27; page 60 line 19-27; page 61 line 1-8; page 61 line 24-27 –Mr. Stoney simply refuses to answer the question on whether he read the decision of Justice Barnes or read the trust document

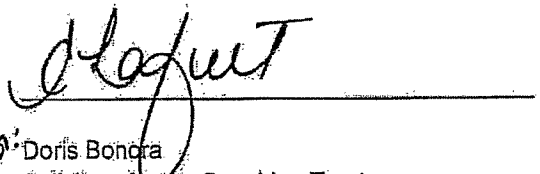
    c. Page 41 line 16-27 page 42 line 1-27; page 43 line 9-17; page 45 line 7-13; page 54 line 7-12; page 63 line 13-27; page 64 line 1-7 – in which Mr. Stoney will not answer a question about his application for membership

Conclusion

5. For the reasons set out in the brief filed by Sawridge First Nation and for the reasons set out above, the Trustees make the same prayer for relief as set out in the Sawridge First Nation Brief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of July, 2017.

Dentons Canada LLP



Doris Bonora
Solicitors for the Sawridge Trustees

TAB 3

Clerk's Stamp

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 ON APRIL 15, 1985 (the "1985 Sawridge Trust")

APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE AND CLARA MIDBO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST
RESPONDENT:	MAURICE STONEY
INTERVENER:	SAWRIDGE FIRST NATION
DOCUMENT:	**WRITTEN RESPONSE ARGUMENT OF MAURICE STONEY ON VEXATIOUS LITIGANT ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

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Authorities

1. Consent Order of Associate Chief Justice Rooke July 19, 2017.
2. *Huzar v. Canada*, 2000 CanLII 15589 (FCA).
3. *Powder v. H.M.T.Q.* August 16, 2016.
4. *Stoney v. Sawridge First Nation; Huzar and Kolosky v. Sawridge Frist Nation*, 2013 FC 509.
5. *Benner v. Canada*, [1997] 1 SCR 358 (headnote only).
6. *Re Manitoba Language Rights*, [1985] 1 SCR 721 (headnote only).
7. *McIvor v. Canada*, 2009 BCCA 153.
8. *Descheneaux v. Canada (A.G.)*, 2015 QCCS 3555 [this is currently before the Quebec Court of Appeal as a result of Canada failing to comply with the 18 months' time period to resolve the issues of membership and status under the *Indian Act*, set to be heard on August 9, 2017].
9. *The Government of Canada's Response to the Descheneaux Decision.*
10. *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99.
11. *Sawridge Band v. H.M.T.Q.* 2009 FCA 123.
12. And see *Twinn v. Sawridge Band*, 2017 ABQB 366.
13. *Poitras v. Twinn*, 2013 FC 910.
14. *Federal Court Rules*, Rule 114.

I. QUESTION SET BY THE COURT

1. Case Management Decision (Sawridge #6) orders in paragraph 63 that Maurice Stoney make written submissions prior to the close of the Law Courts on August 4, 2017 on the following two matters:

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

2. This Order further stipulates:

    I declare that Maurice Stoney is prohibited from filing any material on any Alberta court file, or to institute or further any court proceedings, without the permission of the Chief Justice, Associate Chief Justice, or Chief Judge of the court in which the proceedings is conducted, or his or her designate. ...

3. An exception to the Interim Court Filing Restriction Order was granted by Associate Chief Justice Rooke on July 19, 2017 filed on July 20, 2017 which permits completion of the direction of Master Schulz in Alberta QB Action 1603 03761 *Gabriel Nussbaum v. Maurice Felix Stoney and Eliza Marie Stoney.* The Associate Chief Justice did not require any notice to any other person nor any conditions or security for costs.

    Consent Order of Associate Chief Justice Rooke July 19, 2017. [Tab 1]

4. <u>This Consent Order was agreed to by Counsel for the Trustees and by Counsel for the Sawridge First Nation who both signed the Consent Order.</u>

II. FACTS

5. The 1985 Sawridge Trustees have adopted the arguments of the Sawridge First Nation. Paragraph 2 of the submissions of the 1985 Sawridge Trustees states:

    The trustees have reviewed the brief filed by the Sawridge First Nation and confirm that they agree with the contents. In the interests of saving costs to the 1985 Sawridge Trustee and in the interest of avoiding duplicative arguments, the Trustees wish to adopt the arguments of the Sawridge First Nation as filed in this action.

(A) Misstated Facts of Sawridge First Nation

6. The Federal Court of Appeal struck the Statement of Claim issued in Federal Court in 1995 on the ground that there was "no reasonable cause of action" and that the matter was properly a judicial review under section 18(3) of the *Federal Court Act*. On such a proceeding where the argument is that there is no reasonable cause of action, no evidence is admissible: *Canada (A.G.) v. Inuit Tapirisit of Canada,* [1980] SCJ No. 99 quoted at paragraph 24 in *Powder v. H.M.T.Q.* [Tab 3]. Accordingly, the striking of the Statement of Claim does not rely on any Affidavit evidence of Sawridge First Nation nor make any finding on it. It is improper to rely upon that evidence in this matter.

Huzar v. Canada, 2000 CanLII 15589 (FCA). [Tab 2]
Powder v. H.M.T.Q. August 16, 2016. [Tab 3]

7. The judicial review in 2013 did not include a "thorough analysis" of Maurice Stoney's arguments regarding his entitlement to membership since it was determined that no constitutional arguments could be made, see paragraph 22 as a result of not completing the Constitutional Question Notice required by section 57 of the *Federal Courts Act,* which provides in subsection 1 that it applies whenever "the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the ...Federal Court" must be served on each Attorney General in Canada.

Stoney v. Sawridge First Nation; Huzar and Kolosky v. Sawridge Frist Nation, 2013 FC 509, para. 22. [Tab 4]

8. Paragraphs 10 to 14 are in reference to the claims by Aline Huzar and June Kolosky to Sawridge First Nation membership as stated by Mr. Justice Barnes at paragraphs 10 to 14 and concluded by his statement "the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership". Only paragraph 15 refers to Maurice Stoney.

Stoney, supra, paras. 10-14, 15. [Tab 4]

9. As noted at paragraph 4, Mr. Justice Barnes did state that the Sawridge First Nation membership rules only applied from the point when the Minister of Indian and Northern Affairs gave notice under section 10(7) of the *Indian Act*, which occurred in September, 1985. This is contrary to the assertions throughout the facts stated by Sawridge First Nation. The date of issue in this matter of the beneficiaries of the 1985 Sawridge Trust is the date of the Trust which is dated April 15, 1985.

Stoney, supra., para. 4. [Tab 4]

(B) Other Facts

10. Following the cross-examination of Maurice Stoney on September 23, 2016, counsel for the Trustees did not make any applications to require further examination nor request any further cross-examination.

11. At no time did the Sawridge First Nation apply for clarification of whether or not they were a party entitled to attend cross-examination prior to the examination although they were well aware of the timing of the examination and the refusal of their participation much earlier in September, 2016 and had time to apply for such an Order.

12. Maurice Stoney has not attempted to re-litigate the membership issue but rather to set out the legal arguments to address the direct issue of the definition of a beneficiary under the 1985 Sawridge Trust made on April 15, 1985 at a time when the Sawridge First Nation was not legally able to limit its membership as noted by Mr. Justice Barnes in his decision at paragraph 4. The Supreme Court of Canada has held that citizenship is always an issue to be reviewed on constitutional rights see: *Benner v. Canada*, [1997] 1 SCR 358 (headnote only). Limitation periods, long periods where legislation have been treated as being constitutional, and prior decisions, even of the Supreme Court of Canada do not limit the ability to bring forward a question before the Courts: *Re Manitoba Language Rights*, [1985] 1 SCR 721. In this context, there have been a number of recent decisions on these constitutional issues that have and are in the

process of completely altering the law related to these issues of the membership/citizenship of Indians, in order to have them comply with the *Constitution*.

Benner v. Canada, [1997] 1 SCR 358 (headnote only). [Tab 5]

Re Manitoba Language Rights, [1985] 1 SCR 721 (headnote only). [Tab 6]

McIvor v. Canada, 2009 BCCA 153. [Tab 7]

Descheneaux v. Canada (A.G.), 2015 QCCS 3555 [this is currently before the Quebec Court of Appeal as a result of Canada failing to comply with the 18 months' time period to resolve the issues of membership and status under the *Indian Act,* set to be heard on August 9, 2017]. [Tab 8]

The Government of Canada's Response to the Descheneaux Decision. [Tab 9]

Daniels v. Canada (Indian Affairs and Northern Development), [2016] 1 SCR 99. [Tab 10]

13. The Federal Court of Appeal determined on April 21, 2009, that the Sawridge Band's action seeking an order declaring that certain amendments to the *Indian Act* regarding membership, were unconstitutional. Sawridge Band had brought action against all of the amendments which "compelled the appellants [Sawridge Band], against their wishes, to add certain individuals to the list of band members. The appellants had argued that the legislation is an invalid attempt to deprive them of their right to determine the membership of their own bands." The first trial had commenced in 1993 and the history of the trial and re-trial is set out at paragraph 4. It is to be noted that the length of time this matter was before the Federal Court is indicative of the unsettled nature of the issues raised. The issue of membership/citizenship remains an unsettled matter as shown by the decisions of various courts including the Supreme Court of Canada, cited in paragraph 12 above.

Sawridge Band v. H.M.T.Q. 2009 FCA 123. [Tab 11]

And see *Twinn v. Sawridge Band,* 2017 ABQB 366. [Tab 12]; *Poitras v. Twinn,* 2013 FC 910. [Tab 13]

14. It is acknowledged that this court has dismissed these arguments and they are not referred to here, other than as the facts to set the context for the matters to

be dealt as directed on the issue of whether or not the application of Maurice Stoney was vexatious litigation.

III. RESTRICTED ACCESS TO ALBERTA COURTS

(A) The *Judicature Act*, section 23(2)

15. Section 23(2) requires that the following matters be considered as a list of vexatious litigation:

> (2) For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:
>
> (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
>
> (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
>
> (c) persistently bringing proceedings for improper purposes;
>
> (d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;
>
> (e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
>
> (f) persistently taking unsuccessful appeals from judicial decisions;
>
> (g) persistently engaging in inappropriate courtroom behavior.

16. As shown by the 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.

17. It is submitted that litigation seeking to determine whether or not you qualify as a beneficiary under a trust established on April 15, 1985 in a matter where the issue of membership/citizenship has not been settled by the courts, and this

application was not brought for an improper purpose. Nor have the matters raised in (d), (f) and (g) occurred.

18. Costs to the Sawridge First Nation have not been paid however the intention is to pay them as soon as it is possible for Maurice Stoney. Costs to the 1985 Sawridge Trust have been paid.

B. Inherent Jurisdiction

19. The elements of vexatious litigation are set out in *Chutskoff v. Bonora*, at paragraph 92 quoted at pages 13-16 of the Written Submissions of the Sawridge First Nation.

20. It is submitted that this application by Maurice Stoney was not a collateral attack. The issue before the Court here is the definition of beneficiary in the 1985 Sawridge Trust when beneficiary is to be determined as of April 15, 1985. As Mr. Justice Barnes stated at paragraph 4 of the judicial review of the Sawridge First Nation membership application, that the Sawridge First Nation membership application does not apply to anything before the date that the Minister agreed to the Sawridge First Nation membership by-law in September, 1985, leaving a period from April 17, 1985 until September, 1985 which is not covered by the Sawridge First Nation membership process. The issue that was argued in the written submission during the fall of 2016, was the status of Maurice Stoney under the Sawridge Band on or about April, 1985 which was not *res judicata* from the previous matters in Federal Court. The issue of the status in the period from April 15, 1985 to September, 1985 was a completely new issue. Mr. Justice Barnes determined that the decision of the Appeal Committee of the Sawridge First Nation was reasonable on the question of membership in the Sawridge First Nation, based on the application made by Maurice Stoney to the Sawridge First Nation.

Stoney, supra. [Tab 4]

21. It is acknowledged that the costs owed from the Federal Court proceeding are owed by Maurice Stoney and because the judicial review was heard with the judicial review by Aline Huzar and June Kolosky, owed by all three of them and have not been paid along with the costs of the application before the Court of Appeal in Feb. 2016, although the costs of the 1985 Sawridge Trustees have been paid by Maurice Stoney in November, 2016. Maurice Stoney is 77 years of age and Aline Huzar and June Kolosky are all senior citizens of limited means.

22. There has been no 'escalating' of proceedings in this matter. The law related to status of Indians in Canada has changed over the years and Canada is still involved in proceedings to determine and satisfy these membership and status issues currently outstanding as a result of the *Descheneaux v. Canada (A.G.)* decision [Tabs 8 and 9] and the decision in the *Daniels* case [Tab 10]. These matters all include the issue of who, in law, is a member of a band and that will affect the issue of the Sawridge Band during the time period from April 17, 1985 until September, 1985.

23. No disrespect for the court process or intention to bring proceedings for an improper purpose, was intended to be raised by these arguments respecting this time period and the definition of beneficiary in this trust.

24. Contrary to the argument of Sawridge First Nation these matters have not been determined in the past Federal Court proceedings. Issues of citizenship and the constitutionality of these provisions remains a legal question today as shown by the on-going litigation throughout Canada. Plainly this Court has determined that these arguments are dismissed in this matter and that is acknowledged.

25. Throughout all of these proceedings and proceedings in the Federal Court, Maurice Stoney has honoured his Court obligations. The failure to pay the costs of Sawridge First Nation is the intervening result of foreclosure proceedings against Maurice Stoney and his wife in Q.B. Action No. 1603 03761 (originally started in Peace River in 2011 and transferred to Edmonton in 2016) in which the Associate Chief Justice Rooke has issued a Consent Order on July 19, 2017

directing that this Action is an exception to the Interim Order granted on July 12, 2017. This Order of the Associate Chief Justice has been consented to by the 1985 Sawridge Trustees and by the Sawridge First Nation [see Tab 1].

26. Affidavit evidence has been filed and provided to the Court on July 28, 2017, by Bill Stoney, brother to Maurice, by Gail Stoney, sister to Maurice and by Shelley Stoney, daughter of Bill Stoney, respecting the approval of the other brothers and sisters, to show that they commenced this application and directed that Maurice Stoney proceed on their behalf. The *Federal Court Rules,* provide for Representative proceedings where the representative asserts common issues of law and fact, the representative is authorized to act on behalf of the represented persons, the representative can fairly and adequately represent the interests of the represented persons and the use of a representative proceeding is the just, most efficient and least costly manner of proceeding. This method of proceeding is frequently used for aboriginals and particularly for families who are aboriginal. It is submitted that this was the most efficient and least costly manner of proceeding in the circumstances where the claim of all of the living children possess the same precise issues respecting their citizenship.

Federal Court Rules, Rule 114. [Tab 14]

27. No collateral attack was intended nor was this brought as a "busy body" proceeding in presenting the arguments of Maurice Stoney and his brothers and sisters respecting the fact that they were born as members (citizens) of the Sawridge Band, they were removed by the provisions of the *Indian Act* during the 1940's and effective April 17, 1985 their removal from the *Indian Act,* was repealed.

28. It is also submitted that this application was not a hopeless proceeding without any reasonable expectation to provide relief. This is an area of the law that is changing rapidly as shown by *McIvor* [Tab 7], *Descheneaux* [Tab 8], *The Government of Canada's Response to the Descheneaux Decision* [Tab 9] and *Daniels* [Tab 10]. No conclusion was made in the 1995 Federal Court

proceedings which were struck as showing no reasonable cause of action and the judicial review was concerned with the issue of the Sawridge First Nation Appeal Committee decision based on membership rules post September, 1985.

IV. SCOPE OF THE RESTRICTION

29. In *Hok v. Alberta,* para. 36 [Tab 2 of the Sawridge First Nation Authorities], three questions are set out to be answered on the question of how to structure the court order restricting access to the court for the litigant. These questions are:

1. Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?

2. What litigation subject or subjects are likely involved in that abuse of court processes?

3. In what forums will that abuse occur?

30. The Sawridge First Nation submits at paragraph 57 of their Written Submissions, that the claims of Maurice Stoney to membership in the Sawridge First Nation show the indicia of vexatious litigation. In paragraph 80, their submission is that Maurice Stoney's access to the Alberta Courts should be restricted for any litigation against:

(a) Sawridge First Nation

(b) any past, present, or future members of the Chief and Council of the Sawridge First Nation;

(c) the 1985 Sawridge Trust;

(d) the 1986 Sawridge Trust; and

(e) the Trustees of the 1985 and 1986 Sawridge Trusts.

31. It is submitted that the Interim Court Filing Restriction Order should not be made permanent on the grounds that the necessary conditions for such an Order are not met as set out in argument above.

32. In the alternative, it is submitted that such an Order should only restrict actions by Maurice Stoney against the Sawridge First Nation and the 1985 Sawridge Trust.

33. In paragraph 82 of the Sawridge First Nation Written Argument it appears that the Sawridge First Nation is also asking that all access to the Courts be restricted for Maurice Stoney although they have submitted in the previous paragraph that the restriction should only be with respect to the bodies set out in paragraph 30 above. It is submitted that there is no basis for restriction of Mr. Stoney's rights to access the Alberta Courts for matters unrelated to the Sawridge First Nation and the 1985 Sawridge Trust.

V. ORDER SOUGHT

34. It is respectfully submitted that Maurice Stoney should not be declared to be a vexatious litigant and that the Interim Order should not be made permanent.

35. In the alternative, it is submitted that, if Maurice Stoney is declared to be a vexatious litigant, it should be narrowed to restrict actions against the Sawridge First Nation and the 1985 Sawridge Trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd day of August, 2017.

DLA PIPER (CANADA) LLP.

Per: _____

Priscilla Kennedy
Associate Counsel
Counsel for Maurice Stoney

LIST OF AUTHORITIES

1. Consent Order of Associate Chief Justice Rooke July 19, 2017.
2. *Huzar v. Canada*, 2000 CanLII 15589 (FCA).
3. *Powder v. H.M.T.Q.* August 16, 2016.
4. *Stoney v. Sawridge First Nation; Huzar and Kolosky v. Sawridge Frist Nation*, 2013 FC 509.
5. *Benner v. Canada*, [1997] 1 SCR 358 (headnote only).
6. *Re Manitoba Language Rights*, [1985] 1 SCR 721 (headnote only).
7. *McIvor v. Canada*, 2009 BCCA 153.
8. *Descheneaux v. Canada (A.G.)*, 2015 QCCS 3555 [this is currently before the Quebec Court of Appeal as a result of Canada failing to comply with the 18 months' time period to resolve the issues of membership and status under the *Indian Act*, set to be heard on August 9, 2017].
9. *The Government of Canada's Response to the Descheneaux Decision.*
10. *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99.
11. *Sawridge Band v. H.M.T.Q.* 2009 FCA 123.
12. And see *Twinn v. Sawridge Band*, 2017 ABQB 366.
13. *Poitras v. Twinn*, 2013 FC 910.
14. *Federal Court Rules*, Rule 114.

TAB 4

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, 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:	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, CLARA MIDBO, and CATHERINE TWINN, as Trustees for the 1985 Sawridge Trust
DOCUMENT:	**WRITTEN SUBMISSIONS OF PRISCILLA KENNEDY RESPECTING THE SCOPE OF THE COSTS AWARD IN SAWRIDGE #6**
ADDRESS FOR SERVICES AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Field Law 2500, 10175 - 101 Street Edmonton, AB T5J 0H3 Attention: P. Jon Faulds, QC Telephone: (780) 423-7625 Fax: (780) 428-9329 Email: jfaulds@fieldlaw.com File No.: 65063-1 PJF

FACTS

1. In August, 2016, Maurice Stoney applied to be added as an intervenor to the Advice and Direction proceedings brought by the 1985 Sawridge Trust. This Court as case management judge (CMJ) directed his motion be heard in writing. The Sawridge First Nation sought and was granted intervenor status to oppose Mr. Stoney's application.

2. Both the Trust and the First Nation asked that Mr. Stoney's application be struck or dismissed and that he be ordered to pay solicitor and own client indemnity costs for his conduct in bringing the application.[1] The Sawridge First Nation specified the costs sought were of the Stoney application and of its application to intervene.[2] Neither Respondent sought costs personally against Mr. Stoney's counsel, Ms. Kennedy. Neither applied to have Mr. Stoney declared a vexatious litigant.

3. The CMJ dismissed Mr. Stoney's application with Reasons issued July 12, 2017 (***Sawridge #6***). With respect to costs the CMJ stated:

> [67] I have indicated Maurice Stoney's application had no merit and was instead abusive in a manner that exhibits the hallmark characteristics of vexatious litigation. The Sawridge Band and Trustees seek solicitor and own client indemnity costs against Maurice Stoney. Those are amply warranted.

4. The CMJ further stated his intention "to exercise this Court's inherent jurisdiction to control litigation abuse". He directed a hearing in writing to determine whether Mr. Stoney should be declared a vexatious litigant. The CMJ held the Respondents "may make submissions on Maurice Stoney's potential vexatious litigant status, and introduce additional evidence that is relevant to this question."[3]

5. Finally, the CMJ concluded a costs award against Ms. Kennedy was potentially warranted and directed she appear before the Court at a stated time "to make submissions on why she should not be personally responsible for some or all of the costs awarded against her client, Maurice Stoney."[4] The Court noted "the limited basis on which other litigants may participate in a hearing that evaluates a potential costs award against a lawyer" and allowed the Respondents to participate on such a basis.[5]

6. The show cause hearing concerning Ms. Kennedy was conducted on July 28, 2017. Counsel for both the First Nation and the Trust appeared and made submissions. Insofar as present counsel can ascertain, costs of the show cause hearing were not raised by any party. The CMJ issued his decision with Reasons on August 31, 2017 (***Sawridge #7***) and held:

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[1] Sawridge First Nation's briefs filed Sept 28, 2016, paras 74 to 79 and 81(d), and Oct 31, 2016, paras 42 and 43 [**Tab 1**]; 1985 Sawridge Trustees' brief filed Oct 31, 2016, paras 41, 42 and 44 [**Tab 2**]
[2] Sawridge First Nation's brief filed Nov 14, 2016, para 56 [**Tab 1**]
[3] ***Sawridge #6***, paras 58 and 64
[4] *Ibid*, paras 77 and 79
[5] *Ibid*, para 81

> [153] ... I therefore conclude that Kennedy and Stoney are liable for the full costs of ***Sawridge #6***, on a joint and several basis.
>
> [154] I order that Kennedy is personally liable for the solicitor and own client indemnity costs that I ordered in ***Sawridge #6*** at paras 67-68, along with her client.

Those Reasons made no mention of the costs of the show cause hearing.

7. Written submissions for the vexatious litigant hearing were concluded on August 4, 2017. Again, insofar as present counsel can determine, costs of the vexatious litigant hearing were not raised by any party. The CMJ issued his decision with Reasons on September 12, 2017 and issued a limited Court Access Control Order. The Reasons made no mention of costs of the vexatious litigant hearing.

8. The Respondents have submitted draft Bills of Costs in the combined sum of approximately $209,000.00.[6] About $67,000 of this sum relates to costs of the proceedings in ***Sawridge #7*** and ***#8***.[7] The CMJ directed issues relating to the proposed Bills of Costs be addressed by an assessment officer. The parties have requested that before such an assessment occurs, the CMJ rule on the scope of the award of costs made in ***Sawridge #6***.

SUBMISSIONS

9. Ms. Kennedy understands that the Sawridge Trustees and the Sawridge First Nation take the position that the award of solicitor and client indemnity costs made in ***Sawridge #6*** also applies prospectively to costs subsequently incurred by them in relation to the hearings resulting in ***Sawridge #7*** and ***Sawridge #8***. On behalf of Ms. Kennedy we submit this is incorrect for the following reasons:

- There is nothing in the language of ***Sawridge #6*** to suggest the costs award was intended to have such a prospective effect, or was meant to apply to future hearings yet to be decided. It would be extraordinary that an exceptional award of indemnity costs would apply to future proceedings without express language to that effect.[8] There is also nothing in the substantial Reasons given in ***Sawridge #7*** and ***#8*** to suggest either Mr. Stoney or Ms. Kennedy would be liable for costs of those hearings on an indemnity basis.
- On the contrary, the Reasons in ***Sawridge #6*** indicate the award of exceptional costs applies to the application giving rise to that decision. The basis for the award is the circumstances and conduct of Mr. Stoney in bringing forward that application. The CMJ's decision to hold a show cause hearing with respect to Ms. Kennedy's liability for those costs is based upon her conduct and participation in that application. The show cause hearing was directed to the question of her liability for the costs already awarded against her client in that application. This is confirmed by the Reasons in ***Sawridge #7*** which state clearly that Ms. Kennedy and Mr. Stoney are jointly and severally liable for "the full costs of ***Sawridge #6***".

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[6] This total includes fees claimed by both Respondents, but disbursements and taxes of the Sawridge Trustees only.
[7] This figure would be increased by any disbursements and taxes claimed by the Sawridge First Nation.
[8] The Alberta Court of Appeal recently referred to an award of full indemnity costs as "virtually unheard of except where provided by contract"; ***Twinn v. Twinn***, 2017 ABCA 419 at para. 25 **[Tab 3]**

- Moreover, absent a specific direction by the Court the application of the award in ***Sawridge #6*** to future undecided hearings is contrary to Rule 10.30 which states:[9]

  > Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made (a) in respect of an application or proceeding of which a party had notice, **after the application has been decided.** (emphasis added)

- Under Rule 10.31, with limited exceptions costs awards are for costs incurred, not future costs. The exceptions specified in the Rule at 10.31(2)(b) are the subsequent costs of assessing costs before the Court or an assessment officer which are not relevant here. While the Court under Rule 10.31(1)(b) may award "an indemnity to a party for that party's lawyer's charges" it is respectfully submitted it would take explicit language to extend such an award to costs not yet incurred relating to proceedings yet to be heard.[10]

- The subsequent hearings giving rise to the decisions in ***Sawridge #7*** and ***#8*** were taken on the CMJ's own motion as a result of the conduct which gave rise to the decision to award indemnity costs against Mr. Stoney in ***Sawridge #6.*** Those hearings do not concern relief sought by the Respondents. In directing Ms. Kennedy and Mr. Stoney appear before him for these further proceedings the CMJ made no suggestion or warning that that they were facing full indemnity costs for those hearings too, as required where such an award may be made.[11]

- The position of the Respondents that the costs award in ***Sawridge #6*** automatically extends to the subsequent proceedings in ***Sawridge #7*** and ***#8*** has the appearance of suggesting that the outcome of those hearings was predetermined. With respect, who (if anyone) was liable for the costs of those proceedings and on what scale could only be determined after those hearings had been conducted. No such determination has been made or requested.

- Moreover since Mr. Stoney and Ms. Kennedy are jointly liable for the costs awarded in ***Sawridge #6***, the effect of automatically extending those costs to the subsequent hearings would have the effect of making Mr. Stoney responsible for the costs of the show cause hearing against Ms. Kennedy over which he had no control and in which he did not participate.

10. For all of the foregoing reasons it is respectfully submitted that the special award of costs made in ***Sawridge #6*** bears its natural and ordinary meaning and effect and applies only to the application giving rise to that award and not to the subsequent proceedings and hearings directed by the Court. In the event the Respondents believe they are entitled to costs of their submissions relating to ***Sawridge #7*** and ***#8*** they may presumably seek an assessment pursuant to Rules 10.30 and 10.41.

11. As Ms. Kennedy is unaware of the basis on which the Respondents assert the costs award has prospective effect, they respectfully ask leave to file a brief reply (by January 16, 2018) to address any issue raised by the Respondent not anticipated in these submissions.

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[9] See extract from Alberta Rules of Court, Alta Reg 124/2010 **[Tab 4]**
[10] See also ***Ma v. Coyne***, 2013 ABQB 426 (aff'd 2016 ABCA 119) at paras 58-62 re costs "incurred" under Rule 10.41 **[Tab 5]**
[11] See ***Twinn v. Twinn***, ibid, at para.27 **[Tab 3]**

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2018

FIELD LLP
Counsel for Priscilla Kennedy

Per: _____
P. Jon Faulds, QC

EXTRACTS and AUTHORITIES

1. Written Submissions of the Sawridge First Nation, filed September 28, 2016, October 31, 2016, and November 14, 2016 (extracts)
2. Written Submissions of the 1985 Sawridge Trustees, filed October 31, 2016 (extract)
3. *Twinn v. Twinn*, 2017 ABCA 419 (extract)
4. Alberta Rules of Court, Alta Reg 124/2010, Rules 10.28 through 10.43
5. *Ma v. Coyne*, 2013 ABQB 426 (extract)

TAB 5

COURT FILE NUMBER	1103 14112	Clerk's Stamp
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE:	EDMONTON	
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985	
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust	
DOCUMENT	**WRITTEN SUBMISSIONS OF THE SAWRIDGE FIRST NATION ON COSTS**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1700 Enbridge Centre 10175 – 101 Street NW Edmonton, AB T5J 0H3 **Attention:** Edward H. Molstad, Q.C. **Telephone:** (780) 423-8500 **Facsimile:** (780) 423-2870 **File Number:** 64203-7/EHM	

TABLE OF CONTENTS

I. INTRODUCTION

1. Sawridge prepared and circulated a Bill of Costs claiming costs on a solicitor and own client basis for all steps taken in relation to *Sawridge #6, #7* and *#8*, and Ms. Kennedy objected to the inclusion of any costs related to the July 28, 2017 hearing resulting in *Sawridge #7* or the written submissions prepared in relation to *Sawridge #8*.

2. On November 15, 2017, Sawridge wrote to this Honourable Court to request its direction as to whether a solicitor and own client full indemnity costs applied in relation to the costs incurred for *Sawridge #7* and *#8* and to advise of Sawridge's position that it should be able to recover its costs on *#7* and *#8* on a solicitor and own client full indemnity basis. The Court directed that this issue be addressed in writing by the parties.

3. Ms. Kennedy characterizes the issue before this Court as a request for a ruling on the scope of the award of costs made in *Sawridge #6*. She goes on to characterize Sawridge's position as effectively being that the "the award of solicitor and own client indemnity costs made in *Sawridge #6* also applies prospectively to costs subsequently incurred by them in relation to the hearings resulting in *Sawridge #7* and *Sawridge #8*."

4. Sawridge submits that the foregoing is a mischaracterization of its position. Sawridge is not suggesting the cost award in *Sawridge #6* had a prospective effect; rather, its position is that, as a successful party in *Sawridge #7* and *#8*, which were effectively extensions of the original applications at issue in *Sawridge #6*, it is entitled to costs and that, consistent with *Sawridge #6*, such costs should be on a solicitor and own client basis.

5. To be clear, Sawridge is asking the Court to consider and issue a direction on the costs of *Sawridge #7* and *#8*. To the extent that Ms. Kennedy may not agree that Sawridge's November 15, 2017 letter to the Court amounted to a request for a determination as to who is liable for the costs of *Sawridge #7* and *#8*, Sawridge agrees that Ms. Kennedy (and Mr. Stoney) should have an opportunity to respond to any submissions raised in this brief on the issue of costs payable in relation to *Sawridge #7* and *#8*.

II. SAWRIDGE'S POSITION ON COSTS

A. This Court retains jurisdiction to issue a direction in respect of costs on *#7* and *#8*.

6. Sawridge acknowledges that the issue of costs on *Sawridge #7* and *#8* was not directly addressed by the parties during the July 28, 2017 hearing, in their written submissions on the vexatious litigant application, or by the Court in its written reasons. Nevertheless, this Court retains jurisdiction to provide the parties with its direction in respect of the costs of *#7* and *#8*, as Rule 10.30 has dispensed with any kind of time limit by which the Court must make such a direction. Rule 10.30(1)(e) states that the Court retains jurisdiction to make a cost award in respect of matters in an action even after judgment or a final order has been entered.[1] Further, the case law supports a finding that this Court is not *functus officio* on costs directions merely because of entry of the formal judgment.[2]

7. In this case, where solicitor and own client full indemnity costs are sought, it is most appropriate for this Court, which dealt first hand with what it characterized as serious litigation misconduct

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[1] Rule 10.30, *Alberta Rules of Court*, Alta Reg 124/2010 [Tab 1]

[2] *Firemaster Oilfield Services Ltd. v Safety Boss (Canada) (1993) Ltd.*, 2002 ABCA 96 at para 2 [Tab 2] and *Saskatchewan Power Corporation v Alberta (Utilities Commission)*, 2015 ABCA 281 at paras 9-10 [Tab 3].

on the part of Ms. Kennedy and Stoney, to deal with costs as opposed to leaving the issue to an assessment Review Officer.

B. Sawridge is entitled to costs for *Sawridge #7* and *#8* as a successful party.

8. Rule 10.28 states that for the purpose of the rules pertaining to the recoverable costs of litigation, a "'party'" includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a costs award."[3] Rule 10.29 goes on to state the general rule for payment of litigation costs, which is that "[a] successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith."[4]

9. While the proceedings relating to *Sawridge #7* and #8 were initiated by the Court, exercising its inherent jurisdiction, Sawridge was directed to appear on the July 28, 2017 hearing and invited to make submissions on the vexatious litigant status of Stoney. It participated in those proceedings and argued in support of a costs award personally against Ms. Kennedy and a vexatious litigant award against Stoney, both of which orders were ultimately made by this Court. Ms. Kennedy and Stoney argued against such orders. As a successful party to those proceedings, Sawridge is entitled to costs.

C. The costs for *Sawridge #7* and *#8* should be on a solicitor and own client basis as these applications were an extension of the applications at issue in *Sawridge #6*, wherein Sawridge expressly sought solicitor and own client full indemnity costs.

10. Ms. Kennedy argues that she was not provided with notice that solicitor and own client full indemnity costs would be sought in relation to the proceedings giving rise to *Sawridge #7* and *#8*. She relies upon the Court of Appeal's recent decision in *Twinn v Twinn*, 2017 ABCA 419 in support of the principle that such an award ought not to be made, and will be reversed on appeal, where no specific notice is given, no submissions are made on the issue, and no party in the proceedings sought those costs.

11. The *Twinn* decision, which overturned this Court's award of solicitor and own client full indemnity costs against the applicants in *Sawridge #5*, is clearly distinguishable. Unlike the application at issue in *Sawridge #5*, both Sawridge and the Trustees provided notice that they were seeking solicitor and own client full indemnity costs in relation to the applications in *Sawridge #6*, and all parties, including Ms. Kennedy on behalf of Stoney, made written submissions on the issue. Ms. Kennedy and Stoney were both fully aware of Sawridge's position that the Stoney Application was vexatious and abusive in nature.

12. In any event, Ms. Kennedy and Stoney were aware that such costs were being sought at least as of the time Sawridge presented them with its Bill of Costs seeking solicitor and own client full indemnity costs in relation to *Sawridge #7* and *#8*. They were further notified that Sawridge was seeking such costs and a direction from the Court to that effect by way of Sawridge's November 15, 2017 letter addressed to this Court and copied to Mr. Faulds and Stoney.

13. In the circumstances, an award of solicitor and own client full indemnity costs is warranted. In *Sawridge #6*, this Honourable Court found that the Stoney Application was inappropriate, devoid of merit, and abusive in a manner exhibiting the hallmark characteristics of vexatious litigation and that it amounted to serious litigation misconduct, and held that the award of solicitor and own

[3] Rule 10.28, *Alberta Rules of Court*, Alta Reg 124/2010 [Tab 1] [Emphasis added]
[4] Rule 10.29, *Alberta Rules of Court*, Alta Reg 124/2010 [Tab 1]

client indemnity costs against Maurice Stoney was "amply warranted."[5] While the Court, of its own motion, directed the proceedings resulting in *Sawridge #7* and *#8*, these proceedings were an extension of and a direct result of the original application and submissions made by the parties in *Sawridge #6* such they ought to attract the same scale of costs.

14. In *Sawridge #7*, this Court noted that the directions made in *Sawridge #6* relating to the vexatious litigant status of Stoney "were taken in response to what is clearly abusive litigation misconduct."[6]

15. In *Sawridge #8*, despite having already participated in the July 28, 2017 hearing relating to a personal costs award against her arising from her conduct in *Sawridge #6* where her counsel acknowledged the abusive nature of the Stoney Application, Ms. Kennedy, on behalf of Stoney, continued to advance futile arguments which were previously rejected by the Court in *Sawridge #6*. She and Stoney thereby continued in their pattern of serious litigation misconduct.

D. The costs award in *Sawridge #7* should be as against Ms. Kennedy only.

16. With respect to the costs of the July 28, 2017 hearing as to whether Ms. Kennedy ought to be responsible for some or all of the costs award made against Stoney in *Sawridge #6*, Sawridge accepts that this cost award should be as against Ms. Kennedy only and should not be joint and several with Stoney.

17. While Stoney was present at the hearing, he did not make submissions or actively participate in any way, such that it would not be appropriate for him to bear costs for that hearing, which involved the liability of his lawyer only.

18. Finally, if the Court is not inclined to award solicitor and own client costs against Ms. Kennedy on *Sawridge #7*, then Sawridge requests, in the alternative, that enhanced costs or, in the least, party and party costs, be awarded against Ms. Kennedy only.

19. Sawridge relies upon its earlier written submissions on *Sawridge #6* and the case law, rules and general principles cited therein in support of its position that an award of solicitor and own client full indemnity costs is appropriate.

III. COSTS SOUGHT BY SAWRIDGE

20. In summary, Sawridge seeks the following costs relief:

(a) Solicitor and own client full indemnity costs as against Ms. Kennedy and Stoney, on a joint and several basis for the *Sawridge #8* proceedings; and

(b) Solicitor and own client full indemnity costs, or alternatively, enhanced or party and party costs, as against Ms. Kennedy only for the *Sawridge #7* proceedings.

21. Sawridge submitted a Bill of Costs for solicitor and own client costs for *Sawridge #6*, *#7* and *#8*, in the amount of $95,471.50 in fees, $1,037.70 in disbursements, and $2,467.65 in other charges.[7] Sawridge invites the Court to set the amount payable as part of its direction so as to dispense with any need to appear before a Review Officer and resolve the costs issue between the parties.

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[5] *Sawridge #6* at para 67 [Tab 4].
[6] *Sawridge #7* at para 5 [Tab 5].
[7] Bill of Costs of Sawridge First Nation and Related Correspondence. [Tab 6]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January, 2018.

PARLEE McLAWS LLP

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

TAB 6

COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	MAURICE STONEY and HIS BROTHERS AND SISTERS
RESPONDENTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
INTERVENOR	SAWRIDGE FIRST NATION aka THE SAWRIDGE BAND ("SFN")
DOCUMENT	**WRITTEN SUBMISSIONS OF THE SAWRIDGE TRUSTEES ON COSTS (*SAWRIDGE #6, #7* AND *#8*)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Dentons Canada LLP** 2900, 10180 101 Street Edmonton, AB T5J 3V5 Attention: Doris Bonora Telephone: (780) 423-7188 Facsimile: (780) 423-7276 File No.: 551880 -1

Field LLP
2500, 10175 – 101 Street
Edmonton, AB T5J 0H3
Attention: P. Jonathan Faulds, Q.C.

Counsel for Priscilla Kennedy

Parlee McLaws LLP
1700 Enbridge Centre
10175 – 101 Street NW
Edmonton, AB T5J 0H3
Attention: Edward Molstad, Q.C. & Ellery Sopko

Counsel for The Sawridge First Nation

1. These submissions respond to the "Written Submissions of Priscilla Kennedy Respecting the Scope of the Costs Award in Sawridge #6" ("**Kennedy Submissions**"). The Trustees generally accept the summary of facts in the Kennedy Submissions, except insofar as it is alleged that the Respondents (including the Trustees) did not seek full indemnity costs or indicate any such intention. The Trustees further address this point in the submissions below.[1] The Trustees have also reviewed the submissions of the Sawridge First Nation, and agree with its contents.

A. The Trustees do not argue that the Sawridge #6 costs award prospectively determined costs. Instead, they argue that costs against the unsuccessful parties in Sawridge #7 and #8 should be awarded on the same scale as in Sawridge #6.

2. Solicitor and own client costs were awarded in *Sawridge #6* because, according to Case Management Justice Thomas, the application "had no merit, and was instead abusive in a manner that exhibits the hallmark characteristics of vexatious litigation".[2]

3. That conduct continued, particularly in *Sawridge #8*, in which Ms. Kennedy repeated arguments made in *Sawridge #6*, despite her lawyer having admitted that those earlier arguments "absolutely" had the effect of being an abuse of the court's process,[3] and despite the Court finding those arguments abusive and vexatious in Sawridge #6.

4. The result of *Sawridge #7* and *#8* was to find that Ms. Kennedy bore responsibility for the vexatious litigation conduct of her client. Those findings are an extension of the findings in *Sawridge #6*, which held that the litigation conduct warranted solicitor and own client costs, and these hearings and the resulting findings directly resulted from *Sawridge #6*.

5. The Trustees' argument is not that *Sawridge #6* ordered prospective costs in an advance determination of *Sawridge #7* and *#8*; rather, it is that the findings of conduct in *#7* and *#8* are consistent with the same findings regarding conduct in *Sawridge #6* that were held to warrant full indemnity costs. It is reasonable that counsel would interpret *Sawridge #7* and *#8*, which sprang directly from *Sawridge #6*, such that the same scale of costs would be awarded to them for the same conduct.

B. Since Sawridge #7 and #8 arose directly from Sawridge #6, in which full indemnity costs were sought and awarded, Ms. Kennedy had sufficient notice that full indemnity costs against her would be sought for those proceedings.

6. No separate application documents were filed in respect of *Sawridge #7* or *#8*. Both hearings were effectively continuations of issues raised in *Sawridge #6*. The Trustees expressly requested solicitor and his own client costs against Ms. Kennedy for *Sawridge #6*.[4] That is the scale of costs that was awarded in *Sawridge #6*. Ms. Kennedy therefore had sufficient notice that solicitor and his own client costs were at issue.

7. The circumstances here are very different than those discussed by the Court of Appeal in *Twinn v Twinn*.[5] In that decision, an appeal of *Sawridge #5*, the Court of Appeal commented that no request for full indemnity costs was made by any of the parties. Conversely, the Trustees sought full indemnity costs in *Sawridge #6*.

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[1] In particular, in paragraph 6.

[2] *Sawridge #6* at para 67 [TAB 1]

[3] *Sawridge #8* at paras 113-122 [TAB 2]

[4] Written Submissions of the Trustees filed October 31, 2016 [TAB 3]

[5] 2017 ABCA 419 at para 27, attached to the Kennedy Submissions at Tab 3 and cited in footnote 11.

8. The Court of Appeal also commented that the mention of the possibility of full indemnity costs in *Sawridge #4* was insufficient to constitute notice in *Sawridge #5*. However, it is important to recognize that there was no continuity between *Sawridge #4* and *#5*: the applicants were different (the OPGT in the former, potential interveners in the latter); the issues were different; and each had its own notice of application. Here, the parties are the same; the issues were related and flowed from *Sawridge #6*; and the only pleading-type documents filed were those in *Sawridge #6*. *Sawridge #6* through *#8* were effectively all the continuation of the same application.

9. If Ms. Kennedy did not have sufficient notice such that she had the opportunity to make submissions on the issue, she received notice when the Bills of Costs were presented and has made submissions, and has further notice through these submissions. The Trustees do not object to her request to have the opportunity to file brief reply submissions by January 16, 2018, if this Court so permits.[6] The Trustees specifically request that this matter be determined summarily by way of written brief as these applications advanced by Mr. Stoney and Ms. Kennedy have cost the 1985 Trust enormous amounts of money to respond to, with no corresponding benefit in any way.

C. The Trustees do not submit that Mr. Stoney should bear the costs of Sawridge #7.

10. The Trustees do not argue that Mr. Stoney is jointly and severally liable for the costs of *Sawridge #7*, which found his lawyer to have conducted herself improperly. Mr. Stoney presumably relied on his lawyer to advise him and govern her own conduct, and the Trustees agree that he cannot reasonably be asked to bear the costs of her conduct hearing.

11. Again, the Trustees submit that it is the scale of costs that extends from *Sawridge #6* to the subsequent proceedings, because the nature of the conduct that supported an award of costs on that scale remained the same. It is not the exact same cost award itself. Indeed, different bills of costs are being submitted for each hearing. Mr. Stoney was not a party to *Sawridge #7*. The Trustees do not agree that applying the same scale of costs in all three proceedings, due to the same underlying conduct, "has the effect of making Mr. Stoney responsible for the costs of the show cause hearing against Ms. Kennedy"[7].

12. Ms. Kennedy should be personally required to pay the costs of *Sawridge #7* to the other parties. There are few cases that have dealt with costs awards in the context of a hearing on the issue of whether a lawyer should be personally liable for the costs, as such hearings do not frequently arise. However, there is precedent for ordering a lawyer to pay costs to other parties for the hearing of an application to determine the lawyer's personal liability.[8]

D. The Trustees do submit that Mr. Stoney and Ms. Kennedy should be jointly and severally liable for the costs of Sawridge #8.

13. *Sawridge #8* concluded that Mr. Stoney engaged in vexatious litigation conduct. Ms. Kennedy was found to have replicated the same conduct as in *Sawridge #6*.[9] It was held in *Sawridge #7* that Ms. Kennedy would be jointly and severally liable with Mr. Stoney for the conduct in *Sawridge #6*. The Trustees submit that, by logical extension, they should be jointly and severally liable for *Sawridge #8*.

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[6] Request made in Kennedy Submissions, para 11.

[7] As argued in the last bullet point in para 9 of the *Kennedy Submissions*

[8] *Lynch v Checker Cabs Ltd.*, 1999 ABQB 514, 1999 CarswellAlta 640 at paras 64, 68 [Tab 4]

[9] *Supra* note 3.

E. The fact that Sawridge #7 and #8 did not arise as a result of an application by the Trustees does not mean that costs should not be awarded to the Trustees for those proceedings.

14. The Kennedy Submissions suggest that an award of costs to the Trustees is not appropriate because the Trustees did not initiate *Sawridge #7* or *#8*, and they "do not concern relief sought by the Respondents".[10] However, this contention is inconsistent with the general principles underlying costs awards.

15. The default Rule is that, if a party initiates a step in litigation and is unsuccessful in obtaining the relief they seek, then costs are awarded against them.[11] It is usually the case that the Respondent to an application does not itself seek relief, other than to have the application dismissed (with costs). The fact that *Sawridge #7* or *#8* "do not concern relief sought by the Respondents" is in no way determinative of whether an award of costs should be made against an unsuccessful Applicant.

16. As described above, *Sawridge #7* and *#8* were extensions of *Sawridge #6*. While the Case Management Justice requested that the parties return for a further hearing on those specific issues, to permit them the opportunity to make full submissions, they arose as a direct consequence of Mr. Stoney's unsuccessful application in *Sawridge #6*. They did not arise in a vacuum.

17. Given that they directly resulted from Mr. Stoney's application in *Sawridge #6*, it does not seem just that it should now be suggested that there be no cost consequences to Mr. Stoney and/or Ms. Kennedy for these hearings. Mr. Stoney and Ms. Kennedy were unsuccessful in respect of all three hearings. The 1985 Trust, and by extension its beneficiaries, have borne the brunt of the costs for these failed hearings.

F. In the alternative, the Trustees submit that costs should be awarded to them on a party and party basis for Sawridge #7 and Sawridge #8.

18. If this Honourable Court does not accept that costs on a solicitor and own client basis are appropriate, the Trustees submit that costs should be awarded to them on an elevated basis, or in the further alternative on the usual party and party basis, for the reasons outlined above.

19. We seek the direction of the Court on this matter so that we may conclude this chapter on the Kennedy/Stoney matters with no further expense to the Trusts. We invite the Court to set the amount of costs to be paid such that we need not have any further applications or attendance with the Review Officer.

20. To that end, the Trustees have expended $109,706.21 in respect of the three applications.[12] We would accept a small reduction in the amount expended to have the efficiency of a conclusion in this matter.

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[10] Kennedy Submissions, para 9, fifth bullet.

[11] Alberta Rules of Court, Alta Reg 124/2010, Rule 10.29(1).

[12] Trustees' Bill of Costs [Tab 5]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January, 2018.

DORIS C. E. BONORA
Counsel for the Sawridge Trustees

TAB 7

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, 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:	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, CLARA MIDBO, and CATHERINE TWINN, as Trustees for the 1985 Sawridge Trust
DOCUMENT:	**REPLY SUBMISSIONS OF PRISCILLA KENNEDY RESPECTING THE SCOPE OF THE COSTS AWARD IN SAWRIDGE #6**
ADDRESS FOR SERVICES AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Field Law 2500, 10175 - 101 Street Edmonton, AB T5J 0H3 Attention: P. Jon Faulds, QC Telephone: (780) 423-7625 Fax: (780) 428-9329 Email: jfaulds@fieldlaw.com File No.: 65063-1 PJF

OVERVIEW

1. In their joint letter to the Court dated November 15, 2016 the Sawridge Trustees and First Nation stated:

> The Sawridge First Nation and the Sawridge Trustees take the position that **the solicitor and client full indemnity costs award** applies not only to the time period up to the issuance of *Sawridge #6*, but it also **applies in relation to the costs subsequently incurred by these parties in relation to *Sawridge #7* and *Sawridge #8*...** (emphasis added)

Ms. Kennedy's November 16 letter to the Court disputed that the costs award had such prospective effect. The Court directed the issue raised by the two letters be resolved by submissions in writing.[1]

2. The January 5 submissions on behalf of Ms. Kennedy directly addressed that issue and set out the reasons why the costs award in *Sawridge #6* should not and did not have prospective effect. In response the Sawridge parties abandoned their position that the costs award in *Sawridge #6* applies to the subsequent proceedings. They now ask the Court to grant an order awarding them costs of *Sawridge #7* and *#8* on a solicitor and own client full indemnity basis, for which Ms. Kennedy is personally liable with respect to *Sawridge #7*, and for which Ms. Kennedy and Mr. Stoney are jointly liable in the case of *Sawridge #8*. They also seek summary determination of those costs, as well as the costs of *Sawridge #6* by the Court.

3. The foregoing relief was not raised in the Sawridge parties' November 15 letter to the Court and hence was not addressed by Ms. Kennedy in her initial submissions, other than to note the provisions of the Rules that might apply in the event of a motion seeking costs. (See paragraph 10 of January 5 submissions.)

SUBMISSIONS

4. With respect to this new application, Ms. Kennedy makes the following general submissions:

- The Sawridge parties' primary argument for such costs is that the proceedings in *Sawridge #7* and *#8* flowed from the application in *Sawridge #6* and therefore should attract costs on the same scale. However Ms. Kennedy submits that this Court drew a clear line between the application in *Sawridge #6* which attracted the enhanced costs award and the subsequent

[1] We include the correspondence leading to this application at Tab 1, for reference:

- Emails sent to the Court by Ms. Bonora (on behalf of Trustees) and Mr. Faulds (on behalf of Ms. Kennedy), respectively, on Sept 20, 2017; Letter sent to the Court by Mr. Molstad (on behalf of First Nation) on Sept 21, 2017 (without attachments); Letter of the Court dated Sept 27, 2017, instructing parties to appear before Assessment Officer to resolve issues related to the costs award; Letter sent to the Court by Mr. Molstad (on behalf of Trustees and First Nation) on Nov 15, 2017; Letter sent to the Court by Mr. Faulds (on behalf of Ms. Kennedy) on Nov 16, 2017; Letters of the Court dated Dec 20, 2017 and Jan 2, 2018.

proceedings to determine whether she should be personally liable for such costs and whether Mr. Stoney should be declared a vexatious litigant (see paragraph 77 of *Sawridge #6*).

- The Sawridge parties' contention that the scale of costs in *Sawridge #6* logically extends to *Sawridge #7* and *#8* is not well founded. The scale of costs awarded in Sawridge #6 arose from the Court's conclusion that the bringing of that particular application was abusive. For the reasons set out in Ms. Kennedy's initial submissions, that award cannot be projected onto subsequent proceedings that were directed by the Court. Any costs relating to those proceedings must be evaluated on their own merits.

- The cases cited by the Sawridge parties also weigh against their contention. In both *Saskatchewan Power Corporation v Alberta (Utilities Commission* and *Lynch v Checker Cabs Ltd*, enhanced costs awards were made for litigation misconduct. However the enhanced costs were confined to the portion of the proceeding in which the misconduct was found to have occurred. In neither case did the enhanced costs carry over to the subsequent proceedings in which that conduct was evaluated. In *Saskatchewan Power* no costs were awarded for the application for costs.[2] In *Lynch* costs for the application seeking costs were assessed on the normal Schedule "C" basis.[3]

- Ms. Kennedy's appearance before the Court for *Sawridge #7* and Mr. Stoney's appearance with Kennedy as his counsel for *#8* were obligatory, being required by the Court. The Sawridge parties' role in *#7* was limited in nature in accordance with the SCC decision in *Jodoin* and their role in *#8* was optional.[4] Their suggestion that they were the successful parties misapprehends the nature of those proceedings and their role. While the Sawridge parties clearly "succeeded" in having Mr. Stoney's application dismissed and an award of solicitor and own client costs awarded in *Sawridge #6*, the proceedings in *Sawridge #7* and *#8* were of a significantly different nature: an exercise of the Court's supervisory function in relation to lawyers and litigants instituted of the Court's own motion.

- As the Court of Appeal recently reiterated in *Twinn v Twinn*, awards of costs on a solicitor and client basis are "rare and exceptional" while awards of solicitor and own client costs are "virtually unheard of except where provided by contract".[5] Ms. Kennedy submits that to award costs in the nature of sanctions against her or her then client for their court-ordered appearance and submissions in the court-ordered proceedings of *Sawridge #7* and *#8* would be extraordinary and unwarranted. If the Court is of the view costs are payable by Ms. Kennedy respecting the proceedings in *Sawridge #7* and *#8*, such costs should be on a party and party basis.

5. Ms. Kennedy also makes the following submissions with respect to costs in *Sawridge #8:*

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[2] *Saskatchewan Power Corporation v Alberta (Utilities Commission)*, 2015 ABCA 281 at para 40 [Tab 3 of First Nation's Submissions]

[3] *Lynch v Checker Cabs Ltd.*, 1999 ABQB 514 at para 68 [Tab 4 of Sawridge Trustees' Submissions]

[4] *Sawridge #6*, paras. 63, 64, 79 and 81. Ms. Kennedy also notes that while the Sawridge Trustees say that they expressly sought costs against Ms. Kennedy in their submissions on *Sawridge #6*, those submissions contain no such request.

[5] *Twinn v Twinn*, 2017 ABCA 419 at para 25 [Tab 3 of Kennedy's Jan 5 Submissions]

- The Sawridge parties rely upon the Court's concerns regarding Ms. Kennedy's submissions on behalf of Mr. Stoney in *Sawridge #8* as a specific basis for an award of enhanced costs. Ms. Kennedy submits that the Court's concerns regarding those submissions do not constitute a basis for an award of enhanced costs against her. Those submissions, which were filed last, responded to the Court's direction in *Sawridge #6*. They were made pursuant to Ms. Kennedy's view of her obligation to her then client Mr. Stoney as a result of the Court's decision to conduct a show cause hearing on whether Mr. Stoney should be declared a vexatious litigant. They did not give rise to, or prolong, the determination of the proceeding, which was initiated by the Court.
- Ms. Kennedy also notes that insofar as the Sawridge parties now seek a new order holding Mr. Stoney liable for the costs of *Sawridge #8*, Mr. Stoney has not been provided an opportunity to respond to that application.

6. The Sawridge parties further ask the Court to make a summary direction as to the amount of costs to be paid with respect to *Sawridge #6*, *#7*, and *#8*. Ms. Kennedy notes neither of the Sawridge parties has provided the Court with bills of costs for each proceeding. Moreover detailed submissions by Ms. Kennedy respecting specific issues with the claimed costs lies beyond the scope of this brief. The request by the Sawridge parties is impracticable and contrary to the Court's existing direction that issues respecting the amounts claimed under the existing costs award be determined by the Assessment officer.[6] Ms. Kennedy submits once the scope of the costs award in *Sawridge #6* is clarified and liability for costs (if any) in *Sawridge #7* and *#8* has been determined, any issues as may arise regarding the quantum of such costs can and should be dealt with by an Assessment Officer in accordance with the Court's existing direction.

RELIEF SOUGHT

7. Based on the foregoing, Ms. Kennedy asks that the Court:

- Direct that the costs award in *Sawridge #6* for which Ms. Kennedy was made jointly and severally liable in *Sawridge #7* does not extend to steps taken with respect to *Sawridge #7* and *#8*.
- Dismiss the applications of the Sawridge Trustees and First Nation for an order for enhanced costs payable by Ms. Kennedy with respect to the proceedings in *Sawridge #7* and *#8*.
- Direct that any issues related to the quantum of any costs awarded be resolved by an Assessment Officer in accordance with the Court's prior direction.

[6] We note this is the case, despite the Sawridge Trustees' statement at para 11 of their submissions that different bills of costs are being submitted for each hearing. Both Sawridge parties also suggest that they do not argue that Mr. Stoney is jointly and severally liable for costs in *Sawridge #7*. This contradicts their previous statements on the matter. See Ms. Bonora's letter dated Sept 14, 2017 at Tab 5 of the Trustees' Submissions, and Mr. Molstad's email sent Sept 19, 2017 at Tab 6A of the First Nation's Submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of January, 2018

FIELD LLP
Counsel for Priscilla Kennedy

Per: _____
P. Jon Faulds, QC