Federal Court  Cour fédérale

Date: 20130828

Docket: T-2655-89

Citation: 2013 FC 910

Toronto, Ontario, August 28, 2013

PRESENT: Kevin R. Aalto, Esquire, Case Management Judge

BETWEEN:

ELIZABETH BERNADETTE POITRAS

Plaintiff

and

**WALTER PATRICK TWINN,
THE COUNCIL OF THE SAWRIDGE BAND,
THE SAWRIDGE BAND AND
HER MAJESTY THE QUEEN IN RIGHT OF
CANADA AS REPRESENTED BY
THE MINISTER OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT**

Defendants

REASONS FOR ORDER AND ORDER

[1] Many gallons of judicial ink have been spilled in this case as it has inched its way along since 1989 to the present. Issues have gone up and down the judicial appellate escalator. Now after 24 years the Court is faced with motions to amend the pleadings.

[2] In this proceeding (the Poitras Action) there are now two motions before the Court to amend the pleadings. The first motion is brought by the Plaintiff (Ms. Poitras) to amend her Amended Statement of Claim (Poitras Claim) to specifically claim damages against the Defendant, Her Majesty the Queen as represented by The Minister of Indian Affairs and Northern Development (the Crown). The second motion is brought by the Defendants, Walter Patrick Twinn, the Council of the Sawridge Band and the Sawridge Band (collectively the Sawridge Band) to amend their Amended Statement of Defence and to raise a "crossclaim" against the Crown (Sawridge Pleading). The crossclaim seeks to obtain indemnification from the Crown for any damages or costs for which the Sawridge Band may be found liable to Ms. Poitras. While this is a simple summary of the two motions, their resolution is not simple.

[3] These motions must be considered in the context of the myriad of legal proceedings which have taken place, not only in this case, but in a second action, (*Sawridge Band v. The Queen*, 2008 FC 322 [aff'd 2009 F.C.A. 123; leave to the S.C.C. refused December 10, 2009] (the Sawridge Band Action).

[4] The Sawridge Band Action also had a long and tortuous history including a retrial. The issues in the Sawridge Band Action related to challenges by the Sawridge Band to amendments to the *Indian Act*, RSC 1970, c. I-6. Those amendments granted Indian bands such as the Sawridge Band a right under the *Constitution Act*, 1982, and specifically s. 35 thereof, to determine the membership of the Sawridge Band. The Sawridge Band Action has now been finally and conclusively decided by virtue of the Supreme Court refusing leave to appeal.

[5] Part of the delay in moving the Poitras Action forward resulted from a stay issued by former Case Management Judge, Justice James Hugessen. The stay related to the constitutional issues in this action, the Poitras Action, pending the outcome of the constitutional issues in the Sawridge Band Action. The constitutional issues in this case and the Sawridge Band Action were considered to be identical. Those issues centred on the constitutionality of the amendments to the *Indian Act*.

[6] In light of the conclusions reached by the Courts in the Sawridge Band Action the constitutional issues and other matters raised are now finally concluded.

Background

[7] In order to understand better the nature of the amendments now sought by Ms. Poitras and the Sawridge Band, some context is essential.

[8] The starting point for the amendments to the pleadings begins with an order of Justice Hugessen, made July 22, 2010. In that order, Justice Hugessen bluntly ordered "the issue of Ms. Poitras' membership in the band is now moot" [the Mootness Order]. The meaning of the Mootness Order has been put in dispute by the Sawridge Band and is discussed in greater detail later in theses reasons.

[9] The Sawridge Band appealed the Mootness Order. By a judgment dated February 8, 2012, the FCA held as follows:

> The appeal is dismissed without costs, with a direction that the parties return to the current Case Management Judge to bring the pleadings into line with the issues that remain in light of this judgment and the reasons therefore.

[10] Brief reasons for decision were given by Justice David Stratas on behalf of the Court (2012 F.C.A. 47). As those reasons are brief, they are set out in their entirety:

> **REASONS FOR JUDGMENT OF THE COURT**
> **(Delivered from the Bench at Ottawa, Ontario, on February 8, 2012)**
>
> [1] This is an appeal against the Order dated July 27, 2010 made by a case management judge in the Federal Court (Justice Hugessen). The case management judge ordered that an issue central to an action (the "main action") has become moot.
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> [2] The circumstances giving rise to the Order are as follows.
>
> [3] Some time ago, the respondent, Ms. Poitras, started the main action against the appellant Band, claiming membership in it. The Band defended, in part, on the basis that it had a right under section 35 of the *Constitution Act, 1982* to determine who was a member of the Band.
>
> [4] The main action was stayed pending the outcome of another action that the Federal Court regarded as being closely related (the "closely related action"). In the closely related action, the Band was challenging amendments to the *Indian Act*, advancing the same argument, namely that it had a right under section 35 of the *Constitution Act, 1982* to determine who was a member of the Band. That action had a long history, including a retrial. In the end result, the closely related action was dismissed: *Sawridge Band v. The Queen*, 2008 FC 322, aff'd 2009 FCA 123.
>
> [5] With the dismissal of the closely related action, what was to become of the main action and the issue of Ms. Poitras' membership in the Band? To determine this, the Federal Court issued a notice of status review concerning the main action.
>
> [6] As a result of the status review, a case management conference in the Federal Court was held. There, the issue of mootness was discussed, having been raised in the submissions filed.
>
> [7] The case management judge's Order followed. The case management judge ordered that the issue of Ms. Poitras' membership in the Band was moot.
>
> [8] In this Court, the appellants appeal that Order.

> [9] The appellate standard of review applies. The appellants must show that the Order is vitiated either by legal error or by palpable and overriding error on some issue of fact or fact-based discretion. In reviewing the exercise of discretion in this case, it must also be borne in mind that this is an Order made by a case management judge who had managed the main action and the closely related action for many years and, as a result, possessed great familiarity with the factual issues and history of the matters: *Sawridge Band v. Canada*, 2001 FCA 338 at paragraph 11, [2002] 2 F.C. 346.
>
> [10] In our view, the appellants have not shown any reversible error on the part of the case management judge that would warrant permitting the Band to relitigate the constitutional issues.
>
> [11] There can be circumstances which can prompt the Court to exercise its discretion to allow relitigation, notwithstanding the doctrines of issue estoppel and abuse of process: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.
>
> [12] But there is nothing in the record of this case showing that the appellants offered to the case management judge any such circumstances. Indeed, the record shows that the appellants deliberately decided, for reasons known to them, to close their case in the closely related action knowing they could have called more evidence and made further submissions. They knew that a dismissal would result after they closed their case. See *Sawridge Band v. Canada*, 2008 FC 322 at paragraphs 10-21 and 60.
>
> [13] For the foregoing reasons, we shall dismiss the appeal and direct the parties to return to the current case management judge to bring the pleadings into line with the issues that remain in light of this Court's decision.

[11] By way of further background, on March 17, 1999, Justice Hugessen, granted a stay in the Poitras Action [Order, March 17, 1999, Court File No. T-2655-89]. Justice Hugessen, also the Case Management Judge in the Sawridge Band Action, issued an injunction in the Sawridge Band Action on March 27, 2003 [*Sawridge Band v. Canada*, 2003 FCT 347]. The injunction in the Sawridge

Band Action affirmed Ms. Poitras' right to membership in the Sawridge Band until the matters raised in the Sawridge Band Action were decided. The injunction order of Justice Hugessen was appealed to the FCA and was upheld [2004 FCA 16].

[12] The order granting the injunction resulted in the declaration that Ms. Poitras and certain other individuals who were seeking membership in the Sawridge Band, "are hereby ordered, pending a final resolution of the Plaintiff's action [the Sawridge Band Action] to enter or register on the Sawridge Band list the names of the individuals who acquired the right to be members of the Sawridge Band before it took control of its Band List with the full rights and privileges enjoyed by all Band members." Ms. Poitras was one of the individuals included in the scope of that Order (the Membership Order).

[13] In his reasons for decision relating to the Membership Order, Justice Hugessen engaged in a thorough analysis of the provisions of the *Indian Act*, R.S.C. 1985 c.I-5, commonly known as the Bill C-31 amendments. The summary of their impact is taken from a judgment of the FCA in one of the many appeals in the Sawridge Band Action as follows:

> Briefly put, this legislation, while conferring on Indian Bands, the right to control their own Band List, obliged Bands to include in their membership certain persons who became entitled to Indian status by virtue of the 1985 legislation. Such persons included: women who had become disentitled to Indian status through marriage to non-Indian men and the children of such women; those who had lost status because their mother and paternal grandmother were non-Indian and had gained Indian status through marriage to an Indian; and those who had lost status on the basis that they were illegitimate offspring of an Indian women and a non-Indian man. Bands assuming control of their Band list would be obliged to accept all of these people as members. Such bands will also be allowed, if they chose to accept certain other categories of persons previously

> excluded from Indian status. [*Sawridge Band v. Canada* (FCA), (1997) 3 FC 580 at para. 2]

[14] In the course of his reasons for decision in the Membership Order, Justice Hugessen determined that an "interim" declaration of rights regarding membership was not legally possible. However, he was satisfied that injunctive relief could and should be granted regarding membership of certain individuals including Ms. Poitras. The Sawridge Band had contested the constitutionality of Bill C-31 (which amended the *Indian Act*) and further had argued that the women in question could not become members of the Sawridge Band because they had not applied for membership. Justice Hugessen disposed of this argument as follows:

> [12] Finally, the plaintiff argued strongly that the women in question have not applied for membership. This argument is a simple "red herring". It is quite true that only some of them have applied in accordance with the Band's membership rules, but that fact begs the question as to whether those rules can lawfully be used to deprive them of rights to which Parliament has declared them to be entitled. The evidence is clear that all of the women in question wanted and sought to become members of the Band and that they were refused at least implicitly because they did not or could not fulfil the rules' onerous application requirements. [*Sawridge Band v. Canada*, 2003 FCT 347]

[15] The decision of Justice Hugessen was appealed by the Sawridge Band to the FCA. The appeal was dismissed [2004 FCA 16]. Justice Rothstein writing for the Court made the following observation regarding the requirement to apply for membership as follows:

> 35. For these persons entitled to membership, a simple request to be included in the Band's membership list is all that is required. The fact that the individuals in question did not complete a Sawridge Band membership application is irrelevant. As Hugessen J. found, requiring acquired rights individuals to comply with the Sawridge Band membership code, in which preconditions have been created to membership, was in contravention of the Act.

[16] As noted, the Sawridge Band Action involved two trials. During the re-trial of the Sawridge Band Action before the Justice James Russell, it appears that the Sawridge Band made a determination during the presentation of their case not to call further evidence and consented to the dismissal of the action so that they could immediately seek an appeal of prior orders of Justice Russell The FCA dismissed the appeal on April 22, 2009 [*Sawridge Band v. R.*, 2009 FCA 123] and leave to the Supreme Court of Canada was denied on December 10, 2009 [*Sawridge Band v. R.*, 403 NR 393]. As a result, the Sawridge Band Action finally came to an end.

[17] Thereafter, on March 16, 2010, Justice Hugessen issued an Interim Notice of Status Review in this action, the Poitras Action. As a result of the Notice of Status of Review, counsel for Ms. Poitras took the position that the issue of Ms. Poitras' membership in the Sawridge Band had become moot. In reply submissions on behalf of the Sawridge Band, the Sawridge Band agreed with the submissions of Ms. Poitras which included the issue of Ms. Poitras' band membership being moot.

[18] Notwithstanding these events, the Sawridge Band maintains the position that they can pursue defences to Ms. Poitras' claim for membership in the Sawridge Band.

[19] The FCA upheld the decision of Justice Hugessen on the point of mootness and thus the parties now seek to bring their pleadings in line with the decision of the FCA and seek to add certain amendments which are the specific subject of the motions before the Court.

What are the Implications of the Mootness Order and the Appeal

[20] During the course of argument of these motions, counsel for the Sawridge Band took the position that Ms. Poitras' membership in the Sawridge Band was still a live issue in this litigation. This position was taken notwithstanding the Mootness Order made by Justice Hugessen that the issue of Ms. Poitras' membership is moot and the Court of Appeal's dismissal of the Sawridge Band's appeal from that order. In essence, the Sawridge Band argues that only the constitutional issues became moot and not other issues which relate to the membership of Ms. Poitras. In particular, the Sawridge Band alleges in its proposed Sawridge Pleading as follows:

> 6. With respect to the allegations in paragraph 6 of the statement of claim, these defendants state that the plaintiff was never a member of the Sawridge Band and put the plaintiff to the strict proof thereof. In the alternative, these Defendants stated that if the Plaintiff and/or the Plaintiff's predecessors or forbearers were ever members of the Sawridge Band, they agreed to waive release, extinguish and thereafter voluntarily, did waive, release, and extinguish, for sufficient valuable consideration, their membership in the Band. In doing so, they voluntarily ended any connection they may have had with the Band and severed all interests, if any, that they and/or their decedants might otherwise have enjoyed in the Band or the Band's Indian title to its lands. In the further alternative, if the Plaintiff's predecessors or full bearers were ever members of the Sawridge Band, it was without the consent of the said Band and without the required transfer of lands and money. Accordingly, the Plaintiff has no right, title, or claim to the Sawridge reserve.
>
> 6a) These defendants state that the plaintiff is estopped, as would be the Plaintiff's forbearers, from asserting claims for membership.

[21] Because these paragraphs do not relate to constitutional issues which were finally determined in the Sawridge Band Action, it is argued that it was not open to Justice Hugessen to finally determine once and for all that all issues relating to Ms. Poitras' membership in the Sawridge Band were moot. At best, the Sawridge Band argues the Mootness Order only deals with the question of Ms. Poitras' membership insofar as it falls within any of the constitutional issues relating to Bill C-31.

[22] Further, the Sawridge Band argues that if membership in the band had been finally determined by the Mootness Order, then the FCA would simply have directed a reference to determine what damages, if any, Ms. Poitras would be entitled. As the FCA did not do so, but directed that the pleadings be amended to conform with the issues that remained, the FCA did not intend to remove the question of Ms. Poitras' membership as a live issue in the proceeding.

[23] The argument by the Sawridge Band that the FCA would have sent this directly to a reference to determine damages if there were no issues relating to membership outstanding misses the point. The flaw in this argument is that there are still liability issues to be determined. In the Claim of Ms. Poitras, it does not automatically follow that Ms. Poitras is entitled to any damages. The Court must determine, based on the evidence led at trial, whether there is liability for damages, payable by whom and in what amount.

[24] The Sawridge Band has defences which it can raise against any liability for payment of damages. For example, it alleges that there were misunderstandings regarding the interpretation to be given to s. 10(4) and s. 10(5) of the *Indian Act* which could result in no liability for damages.

[25] In the both the granting of and the appeal from the Mootness Order, the Sawridge Band were fully aware of these issues as now pleaded in paragraphs 6 and 6(a). They did not seek to carve those out in any way in the proceeding in front of Justice Hugessen or in front of the FCA.

Meaning of "Moot"

[26] Dukelow, *The Dictionary of Canadian Law* (Third Ed.) at p. 804 defines "moot" and "mootness" as follows:

> **MOOT.** *Adj*. A case is moot when something occurs after proceedings are commenced which eliminates the issues between the parties.
>
> **MOOTNESS**. *n*. 1. "[A]n aspect of general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or the proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot." *Borowski v. Canada (Attorney General)* (1989), 38 C.R.R. 232 at 239, [1989] 3 W.W.R. 97, 33 C.P.C. (2d) 105, 47 C.C.C. (3d) 1, 57 D.L.R. (4th) 231, 92 N.R. 110, [1989] 1 S.C.R. 342, 75 Sask. R. 82, the court per Sopinka, J. 2. The criteria for courts to consider in exercising discretion to hear a moot case (at pp. 358-63) are: (1) the presence of an adversarial context; (2) the concern for judicial economy; and (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework. Sopinka, J. in *Borowski v. Canada*, cited above.

[27] Thus, insofar as the membership of Ms. Poitras in the Sawridge Band is concerned, that issue is at an end. There are no extant issues regarding her membership. It has been finally determined. If the Sawridge Band wanted to carve out some requirement of membership they had ample opportunity to do so both before Justice Hugessen, and the FCA. They did not. They consented to the mootness determination made by Justice Hugessen and then appealed the Mootness Order with no reservations as to any matter outstanding relating to membership. One is required to

twist the decision of the FCA out of all possible meaning and logic to conclude that the issue of Ms. Poitras' membership was still an open issue in this proceeding.

[28] The doctrine of *stare decisis* also supports this approach. In a recent decision, *Apotex Inc. v. Pfizer Canada Inc.*, 2013 FC 493, Justice O'Reilly reviewed the meaning and application of this doctrine as follows:

> [11] The full Latin phrase from which the term *stare decisis* derives is *stare decisis et non quieta movere*, which means "to stand by decisions and not to disturb settled matters" (*Holmes v Jarrett*, [1993] OJ No 679 (Ont Ct J (Gen Div) [*Holmes*], at para 12). This doctrine serves important purposes in the administration of justice. It "promotes consistency, certainty and predictability in the law, sound judicial administration, and enhances the legitimacy and acceptability of the common law" (*R v Bedford*, 2012 ONCA 186, at para 56; see also *R v Neves*, 2005 MBCA 112, at para 90).
>
> [12] Judges readily accept that this doctrine obliges them to follow decisions of higher courts. But the actual concept is broader than that – if a matter is settled, then it should not be disturbed. A matter may be settled if another judge, even of the same Court, has decided it. Generally, only if the material facts are different will the earlier decision not be considered binding on judges of the same Court (*Holmes*, above, at para 12).

[29] In this case, Justice Hugessen determined the issue of Ms. Poitras' membership to be moot, a decision upheld by the FCA and therefore the Court must stand by the decision and not disturb a settled matter. Not to put too fine a tautological point on it – moot is moot is moot is moot.

[30] Since the issue of Ms. Poitras' membership in the Sawridge Band is now moot, the pleadings must, in the words of the FCA, be brought "into line with the issues that remain in light of this Court's decision".

Amendments to the Poitras Claim

[31] Little if any prejudice is occasioned to the Crown by permitting an amendment even at this late date by Ms. Poitras regarding damages. The burden is on Ms. Poitras to demonstrate damages and the quantum of those damages. The damages claim that Ms. Poitras alleges is very much the same against the Crown as it is against the Sawridge Band. A general damages claim has been in the claim against the Sawridge Band since the commencement of the action.

[32] The Crown argues that to allow an amendment at this late date will be prejudicial as discoveries are almost complete. However, amendments should be permitted where any prejudice can be compensated for in costs. There is much jurisprudence to support this proposition: see, for example, *Meyer v. Canada*, 1985 CarswellNat 117 (FCAD); and, *Canderel Ltd. v. R.* [1994] 1 F.C. 3 (FCA). In *Canderel*, a judge of the Tax Court had refused a fourth amendment to the Crown's Reply. The request for the amendment came on the sixth day of trial and sought to raise an issue for the first time. On appeal, Justice Décary, made the following observations regarding amendments:

> 10. With respect to amendments, it may be stated, as a result of the decisions of this Court in *Northwest Airporter Bus Service Ltd. v. The Queen and Minister of Transport*; (1978), 23 N.R. 49 (F.C.A.). *The Queen v. Special Risks Holdings Inc.*; [1984] CTC 563 (F.C.A.); affg [1984] CTC 71 (F.C.T.D.). *Meyer v. Canada*; (1985), 62 N.R. 70 (F.C.A.). *Glisic v. Canada*, [1988] 1 F.C. 731 (C.A.). and *Francoeur v. Canada reflex*, [1992] 2 F.C. 333 (C.A.). and of the decision of the House of Lords in *Ketteman v. Hansel Properties Ltd* [1988] 1 All ER 38 (H.L.). which was referred to in *Francoeur*, that while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice. Rule 54 of the *Tax Court of Canada Rules (General Procedure)*,

> [SOR/90-688] which applies in this instance, is not substantially different from Rule 420 of the *Federal Court Rules* [C.R.C., c. 663].

[33] The FCA dismissed the appeal on the grounds that the trial judge had made no error of law in the exercise of discretion to deny the amendment six days into the trial after witnesses, including experts had been called and the issue was new. To permit the amendment at that late date in the proceeding amounted to an abuse of process.

[34] In *Meyer*, an earlier decision of the Federal Court - Appeal Division, an amendment was allowed by the Trial Division during the course of the trial. The Federal Court-Appeal Division noted:

> 6. It is argued that the learned trial judge erred in exercising his discretion to allow the amendment. We accept the statement by Lord Esher, M.R., of the criteria properly to guide such an exercise of discretion. In *Steward v. North Metropolitan Tramways Co.* (1886), 16 Q.B.D. 556 at 558, he said:
>
> > The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made.

[35] The trial judge in *Meyer* allowed the amendment as it clarified the matter in dispute and was not prejudicial. The decision was upheld on appeal.

[36] The Crown also argues that the amendment is legally hopeless as it is barred by the *Limitations Act*, RSA 2000, c L-12, s. 3(1). The Crown relies upon *Royal Canadian Legion*

Norwood (Alberta) Branch 178 v. Edmonton (City), 149 AR 15 for the proposition that actions must be brought within six years of discovery of the cause of action.

[37] While this is correct, Ms. Poitras' counsel argues that the delay was subject to a final determination of the constitutional issues which lasted until December 10, 2009 when the Supreme Court of Canada refused leave in the Sawridge Band Action. Thus, any limitations act commences in December, 2009. Ms. Poitras' counsel also argues that it was only during examinations for discovery that it became apparent that damages from 1985 to 2003 are appropriate against the Crown because of the knowledge of the Sawridge Band and the knowledge of the Crown.

[38] Therefore, the amendment based on these arguments is within the discoverability principle as enunciated in the *Royal Canadian Legion* case. While the claim for damages could have been asserted earlier there is a legitimate position regarding discoverability and therefore the claim is not necessarily without hope because of any limitations argument. This conclusion is, of course, without prejudice to the right of the Crown to raise any limitations defences it chooses.

[39] The Crown also relies on *Potskin v. Canada (Minister of Indian Affairs and Northern Development),* 2011 FC 457 for the proposition that the claim is hopeless in any event as the Crown owes no duty to Ms. Poitras. This case is argued to stand for the proposition that the Crown owes no fiduciary duty to individual band members and their registration as Indians or in respect of the benefits of band members. While that action was dismissed, it was decided on the basis of its "particular facts" (para. 4). The case involved illegitimate children within the meaning of s. 11(1)(e) of the *Indian Act* who alleged a fiduciary duty against the Crown to protect their economic

interests and ensure that a payment was made to a trustee on their behalf when their mother was transferred out of the band by virtue of the operation of s. 10 of the *Indian Act*. The *Potskin* decision may ultimately be determinative in this case as to any fiduciary obligation owed by the Crown, but such can only occur on a full factual trial record.

[40] In this case, a claim for damages has been an issue since the outset although not specifically against the Crown. Discoveries are not yet complete. While the Crown argues that Ms. Poitras' motion is not timely and will not lead to an expeditious trial, in my view, given the length of these proceedings and the fact that damages has always been an issue, there is no real prejudice to the Crown.

[41] The Crown points out that various documents including an August 12th document at tab 3(f), the September 22 order of Justice Hugessen and documents at tabs 3 (h) and (i) all indicate no damages were being sought against the Crown it was only costs. However, based on a consideration of all of the arguments of the parties, leave to amend will be granted to Ms. Poitras.

[42] The Crown seeks costs for the last three years in the event the amendment sought is granted. While costs would normally be awarded to the Crown, in this case as was explained during the hearing, there are arrangements in place with the Crown regarding payment of fees. An award of costs in the Crown's favour does not accomplish anything as it will simply go from one pocket to another within the Crown. Thus, the amendment is allowed but no costs are awarded to the Crown.

[43] Ms. Poitras' amendment to claim damages against the Crown is therefore allowed.

Striking the Affidavit of Roland Twinn

[44] The Crown moved to strike the affidavit of Roland Twinn (Twinn Affidavit) filed in support of the Sawridge Band's motion for its amendment. It was argued that the Twinn Affidavit was improper as it did not comply with Rule 81 of the *Federal Courts Rules*. Rule 81 requires that affidavits be "confined to facts within the deponent's person al knowledge" or "statements as to the deponent's belief" where the grounds for the belief are stated. The Crown argued that the Twinn Affidavit contained nothing more than a summary of legal argument, hearsay, prior legal positions taken, interpretations of court rulings, opinions and conclusions of law without including any material facts or the sources of belief. It was argued that the Twinn Affidavit was scandalous and vexatious and should be struck.

[45] Having reviewed the in detail the Twinn Affidavit, there is no doubt that it contains opinions, conclusions and legal argument. However, during the course of the hearing I determined that it was not necessary to deal with the issue of the Twinn Affidavit in detail. While I have read it and considered it, I give it little weight in coming to the decisions herein.

"Crossclaim" by the Sawridge Band against the Crown

[46] There is no reason in law to let the Sawridge Band resurrect a "crossclaim" against the Crown. This so for two reasons. First, there is no such thing in the *Federal Courts Rules* as a "crossclaim". Crossclaims are creatures of provincial civil procedure and are claims asserted in a case by one defendant against a co-defendant [see, for example, Rule 28, Ontario Rules of Civil Procedure].

[47] Second, and more importantly, the Sawridge Band had previously asserted a proper third party claim against the Crown. The Sawridge Band voluntarily discontinued that third party claim against the Crown. It did so at a time when there was a claim for damages by Ms. Poitras against the Sawridge Band. The third party claim included a claim for indemnification for liability for damages from the Crown. Litigation requires finality. Parties should not be allowed to take one position one day in which they voluntarily give up a claim and then the next day resile from that position and try and assert the same claim in a non-sanctioned pleading. It is akin to withdrawing an admission in a pleading. Thus, the "crossclaim" cannot be allowed. Termination of the third party proceeding voluntarily by the Band is final and binding.

[48] It is argued by counsel for the Sawridge Band that the current proposed crossclaim and the discontinued third party claim are very different. It is argued that the discontinued third party claim was based on constitutional issues while this crossclaim is based on the allegation that the Sawridge Band and the Crown interpreted the *Indian Act* the same way which resulted in membership being denied to Ms. Poitras. Counsel argues that if the Sawridge Band is responsible for damages then the Crown is equally as liable as the Sawridge Band for misinterpreting the applicability of s. 10(4) and 10(5) of the *Indian Act*.

[49] The denial of the amendment of the Sawridge Band Pleading does not, however, preclude the Sawridge Band from arguing that any liability be off-loaded onto the Crown as it can allege defences as to why it should not be liable and why it is the Crown that should be liable or why liability might be apportioned if liability for any damages is found.

[50] The argument by the Sawridge Band that this is a new cause of action on a new set of facts and was not subsumed within the prior discontinued third party claim is without merit. None of the facts currently alleged are new and have been known since at least the outset of this proceeding some 24 years ago when the dispute arose over the interpretation and meaning of s. 10(4) and s. 10(5) of the *Indian Act*.

[51] While other arguments were raised during the course of the hearing, they do not impact the final decision on the motions. What is necessary is to bring the pleadings into line with the FCA's decision on the appeal of the Mootness Order.

Pleadings

[52] The amendment sought by Ms. Poitras is granted. However, there is much in the proposed Amended Amended Statement of Claim that is now unnecessary in light of the FCA's decision: for example, paragraphs 7, 9, 9A, 13A, 14, 15, 15A, 15E (as against the Sawridge Band) sub-paragraphs b) through h) and 15E (as against the Crown) sub-paragraphs a) through d).

[53] All of these paragraphs were in a prior iteration of Ms. Poitras' claim and all relate to the claim for membership in the Sawridge Band. In light of the FCA's decision, the membership issue is moot and these paragraphs are no longer necessary. However, in order to provide context it will be necessary to include one or more brief paragraphs outlining the resolution of the issue of membership.

[54] With respect to the Sawridge Band Pleading, the Crown opposes paragraphs 6, 6(a), 9-12, 17, 25-30, 32, 34, 45 and 46b-f. As held above, the crossclaim is disallowed. Therefore, paragraphs 34, 45 and 46 b. through f. are struck without leave to amend. Paragraphs 35 – 44 and 46a. had been previously crossed out by the Sawridge Band.

[55] Paragraphs 6 and 6(a) of the Sawridge Band Pleading, recited above, are also struck without leave to amend. These paragraphs deal directly with the membership of Ms. Poitras in the Sawridge Band and amount to a denial of membership on various grounds. Paragraph 7 is also struck as it responds to paragraph 7 in the Poitras Claim which is struck. Paragraph 17 is also struck as it relates to membership.

[56] Paragraphs 9 through 12 also deal with membership and are struck but with leave to amend. They are a mish mash of legal argument, conclusions and evidence. Paragraph 9 reads, in part: "In the further alternative, the Sawridge Band states that the plaintiff did not become a member of the Band for the claimed period for two reasons". The two reasons as further elaborated in paragraph 9 and paragraphs 10 through 12 essentially contain legal argument justifying the positions taken by the Sawridge Band regarding the membership of Ms. Poitras. They address alleged misinterpretations of sub-sections 10(4) and 10(5) of the *Indian Act*; the Sawridge Band's Membership Code; that Ms. Poitras did not "satisfactorily" complete a membership application; and, an allegation that the Sawridge Band is not liable for damages but if there is liability it is that of the Crown. This mish mash pleading contains the nuggets of matters that the Sawridge Band may rely upon at trial: for example, that by virtue of the misinterpretation they are not liable to Ms. Poitras; and that if there is any liability it is that of the Crown (paragraph 11). To this limited extent

the Sawridge Band is granted leave to amend these provisions as it will bring it into line with the FCA decision.

[57] With respect to paragraphs 25-30, all of these paragraphs relate to an allegation that the Crown failed to provide information and resources required by the Sawridge Band to consider Ms. Poitras' application for membership or reinstatement to membership in the Sawridge Band. Again, as membership is not a live issue, these paragraphs must be struck.

[58] All matters alleging that Ms. Poitras is not a member of the Sawridge Band or that she failed to complete a membership application are struck without leave to amend. As was noted by Justice Rothstein in *Sawridge Band v. R.* 2004 FCA 16 at para. 35:

> 35 For these persons entitled to membership a simple request to be included in the Band's membership is all that is required. The fact that the individuals in question [of which Ms. Poitras was one] did not complete a Sawridge Band membership application is irrelevant. As Hugessen J. found, requiring acquired rights individuals to comply with the Sawridge Band membership code, in which preconditions had been created to membership, was in contravention of the Act.

[59] In the result, the Poitras Claim and the Sawridge Band Pleading shall be amended in accordance with these reasons.

[60] With respect to costs, there shall be no costs as between the Crown and Ms. Poitras for the reasons discussed above. As between the Sawridge Band and the Crown, costs were not specifically addressed at the hearing. The Crown was substantially successful in opposing the amendments, particularly the "crossclaim". Thus, in the ordinary course costs should be in favour

of the Crown at a fixed amount. The Sawridge Band and the Crown are encouraged to agree upon costs, failing which written submissions on costs may be made by the Crown within 20 days of this order and by the Sawridge Band within 10 days thereafter.

ORDER

THIS COURT ORDERS that:

1. The Plaintiff is granted leave to amend her Statement of Claim in accordance with these reasons and for greater particularity paragraphs 7, 9, 9A, 13A, 14, 15, 15A, 15E (as against the Sawridge Band) sub-paragraphs b) through h) and 15 E (as against the Crown) sub-paragraphs a) through d) are struck.

2. The Defendants, Walter Patrick Twinn, the Council of the Sawridge Band and the Sawridge Band are granted leave to amend their Statement of Defence in accordance with these reasons and for greater particularity:
   a. Paragraphs 6, 6(a), 7, 17, 25 – 30, 34, 45 and 46 b. through f. are struck without leave to amend; and,
   b. Paragraphs 9 – 12 are struck but with leave to amend.

3. The pleadings shall be amended in accordance with this order within 30 days of the date of this Order.

4. The parties shall provide mutual available dates to the Court in order to convene a case conference to review and discuss the next steps in this proceeding.

"Kevin R. Aalto"
Case Management Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2655-89
STYLE OF CAUSE:	ELIZABETH BERNADETTE POITRAS v. WALTER PATRICK TWINN, THE COUNCIL OF THE SAWRIDGE BAND, THE SAWRIDGE BAND AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	May 14, 2013
REASONS FOR ORDER:	AALTO P.
DATED:	August 23, 2013

APPEARANCES:

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Mr. Philip Healy	FOR THE DEFENDANTS (Walter Patrick Twinn et al.)
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