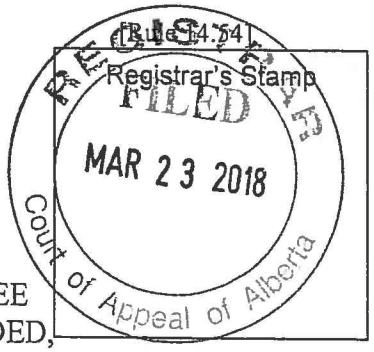
COURT OF APPEAL OF ALBERTA



COURT OF APPEAL FILE NO.: 1803-0076 AC

TRIAL COURT FILE NUMBER: 1103 14112

REGISTRY OFFICE: Edmonton

IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, C T-8, AS AMENDED, and
IN THE MATTER OF THE SAWRIDGE BAND, INTER VIVOS SETTLEMENT, CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")

APPLICANTS:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
STATUS ON APPLICATION:	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:	Respondent
STATUS ON APPLICATION:	Respondent
RESPONDENT:	PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL:	Not a party to the Appeal
STATUS ON APPLICATION:	Not a party to the Application
INTERVENOR:	THE SAWRIDGE BAND
STATUS ON APPEAL:	Respondent
STATUS ON APPLICATION:	Respondent
INTERESTED PARTY:	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers and Sisters
STATUS ON APPEAL:	Appellant
STATUS ON APPLICATION:	Applicant
DOCUMENT:	**MEMORANDUM OF ARGUMENT of Priscilla Kennedy on Application for Permission to Appeal *Sawridge #9***

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Field LLP 2500, 10175 - 101 Street Edmonton, Alberta T5J OH3 Attention: P. Jonathan Faulds, QC Phone: 780-423-7625 Fax: 780-429-9329 Email: jfaulds@fieldlaw.com File: 65063-1
And CONTACT INFORMATION OF ALL OTHER PARTIES:	DENTONS LLP 2900 Manulife Place 10180-101 Street NW Edmonton, AB T5J 3V5 Attention: Doris Bonora Phone: 780 423 7188 Fax: 780 423 7276 Email: doris.bonora@dentons.com Counsel for the Sawridge Trustees PARLEE MCLAWS LLP 1700 Enbridge Centre 10175-101 Street NW Edmonton, AB T5J 0H3 Attention: Edward Molstad, QC Phone: 780 423 8500 Fax: 780 423 2870 Email: emolstad@parlee.com Counsel for the Sawridge First Nation Maurice Felix Stoney 500 4th Street NW Slave Lake, AB T0G 2A1 Phone: 780 516 1143

COURT OF APPEAL OF ALBERTA

[Rule 14.54]

Registrar's Stamp

COURT OF APPEAL FILE NO.:	
TRIAL COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	Edmonton
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, C T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND, INTER VIVOS SETTLEMENT, CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
STATUS ON APPLICATION:	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:	Respondent
STATUS ON APPLICATION:	Respondent
RESPONDENT:	PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL:	Not a party to the Appeal
STATUS ON APPLICATION:	Not a party to the Application
INTERVENOR:	THE SAWRIDGE BAND
STATUS ON APPEAL:	Respondent
STATUS ON APPLICATION:	Respondent
INTERESTED PARTY:	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers and Sisters
STATUS ON APPEAL:	Appellant
STATUS ON APPLICATION:	Applicant
DOCUMENT:	**MEMORANDUM OF ARGUMENT of Priscilla Kennedy on Application for Permission to Appeal *Sawridge #9***

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Field LLP 2500, 10175 - 101 Street Edmonton, Alberta T5J OH3 Attention: P. Jonathan Faulds, QC Phone: 780-423-7625 Fax: 780-429-9329 Email: jfaulds@fieldlaw.com File: 65063-1
And CONTACT INFORMATION OF ALL OTHER PARTIES:	DENTONS LLP 2900 Manulife Place 10180-101 Street NW Edmonton, AB T5J 3V5 Attention: Doris Bonora Phone: 780 423 7188 Fax: 780 423 7276 Email: doris.bonora@dentons.com Counsel for the Sawridge Trustees PARLEE MCLAWS LLP 1700 Enbridge Centre 10175-101 Street NW Edmonton, AB T5J 0H3 Attention: Edward Molstad, QC Phone: 780 423 8500 Fax: 780 423 2870 Email: emolstad@parlee.com Counsel for the Sawridge First Nation Maurice Felix Stoney 500 4th Street NW Slave Lake, AB T0G 2A1 Phone: 780 516 1143

CONTENTS

OVERVIEW

1. The Applicant, a barrister and solicitor, seeks leave pursuant to Rule 14.44 for permission to appeal a decision awarding enhanced and other costs against her personally. The decision in question is an extension of a previous award of enhanced costs against her personally for which leave to appeal has already been granted. The Applicant proposes that if leave is granted, the new appeal be expedited and heard together with the existing appeal.

FACTS

2. The proposed appeal and the existing appeal arise out of a long running application for advice and directions respecting a trust established by the Sawridge Band, now referred to as the Sawridge First Nation (SFN). The Applicant represented her client, Marice Felix Stoney, in an application which he sought to bring on behalf of himself and his siblings to be added as parties or intervenors in the advice and direction proceedings as potential beneficiaries of the trust. Their claim to potential beneficiary status rested on their claim to be entitled to membership in the Sawridge Band.

3. Mr. Stoney's application was heard in writing by the Honourable Mr. Justice Thomas as Case Management Justice (CMJ). In his decision referred to as *Sawridge #6*, issued July 12, 2017, the CMJ:

- dismissed the application,
- awarded enhanced costs against Maurice Stoney to the Respondents on a solicitor and own client indemnity basis,
- directed that the Applicant appear before the Court on July 28, 2017 to show cause why she should not be held personally liable for the costs award against Maurice Stoney, and
- directed that an application as to whether Maurice Stoney should be declared a vexatious litigant be conducted in writing with written submissions due by August 4, 2017.[1]

4. The show cause hearing on July 28 resulted in the CMJ's decision known as *Sawridge #7*. In that decision the CMJ rejected the Applicant's arguments on behalf of her client and concluded she had engaged in serious litigation misconduct in bringing an application which he

[1] Affidavit of Priscilla Kennedy sworn March 23, 2018 (PK Affidavit) at para. 4; Decision of CMJ in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436, 2017 CarswellAlta 1236 (*Sawridge #6*) **[Tab 1]**

described as abusive, futile and busybody litigation. The CMJ held the Applicant personally liable for the costs awarded against her client in *Sawridge #6* on a joint and several basis and referred his decision to the Law Society of Alberta for review with respect to her conduct.[2]

5. Leave to appeal that decision awarding enhanced costs against the Applicant personally was granted by the Honourable Mr. Justice Slatter. That appeal has been perfected and is scheduled to be heard June 8, 2018.[3]

6. The Applicant made submissions in writing on behalf of Mr. Stoney for the vexatious litigant proceeding. In his resulting decision known as *Sawridge #8* the CMJ held the Applicant had continued to advance the same arguments he had rejected in *Sawridge #6*. He issued a vexatious litigant order against Mr. Stoney and referred this decision also to the Law Society for review with respect to the Applicant's conduct.[4]

7. The CMJ's decisions in *Sawridge #7* and *#8* did not address costs of the proceedings giving rise to those decisions (i.e. the July 28 show cause hearing and the vexatious litigation desk hearing). The Respondents, the Sawridge Trustees and the SFN, took the position that due to the relationship between the various proceedings the enhanced costs award made in *Sawridge #6* automatically extended to *Sawridge #7 and #8* and provided the Applicant with draft Bills of Costs on that basis. The Applicant disagreed so the issue was referred to the CMJ. In placing the issue before the CMJ, Counsel for the Sawridge Trustees and the SFN stated their position that:

> the solicitor and own 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, namely:
>
> - preparation for and attendance at the July 28, 2017 hearing directed by [Justice Thomas] in Sawridge #6 on the issue of whether Ms. Kennedy ought to be held personally liable for some or all of the costs award made in Sawridge #6; and
>
> - preparation of written submissions on the vexatious litigant status of Maurice Stoney as directed by [Justice Thomas] in Sawridge #6."[5]

---

[2] PK Affidavit at para 5; Decision of CMJ in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530, 2017 CarswellAlta 1569 (*Sawridge #7*) **[Tab 2]**

[3] *1985 Sawridge Trust v Kennedy*, 2017 ABCA 368, 2017 CarswellAlta 2303 **[Tab 3]**; PK Affidavit at para 19

[4] PK Affidavit at para 5; Decision of CMJ in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548, 2017 CarswellAlta 1639 (*Sawridge #8*) **[Tab 4]**

[5] PK Affidavit at para 11 and Exhibit C

8. After receiving written submissions the CMJ issued his decision referred to as *Sawridge #9* on March 20, 2018. He held that the costs of *Sawridge #7* and *#8* had not previously been addressed by the Court or the parties. With respect to *Sawridge #7* he awarded party and party costs against the Applicant in favor of the Sawridge Trustees and the SFN. With respect to *Sawridge #8* he awarded enhanced costs on a solicitor client basis against Mr. Stoney and the Applicant, personally, on a joint and several basis.[6]

9. In making the award of enhanced costs against the CMJ held (emphasis added):

> [24] Here, Ms. Kennedy and Mr. Stoney were provided notice that the Sawridge Participants were seeking solicitor and own client full indemnity costs in relation to the applications in *Sawridge #6* and should have been aware of the possibility of such an order in the related proceedings if their litigation misconduct continued (see *Sawridge #6* at para 67). **There is direct connection between *Sawridge #6*, *#7* and *#8*, the participants are the same, and the issues are related to and flow from *Sawridge #6*;**
>
> and
>
> [29] In *Sawridge #8*, Ms. Kennedy, acting as "Counsel for Maurice Stoney," continued to advance futile arguments concerning Mr. Stoney's status as a member of Sawridge Band (*Sawridge #8* at paras 27-32, 113-122). I rejected these arguments in *Sawridge #6*, finding 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 (*Sawridge #6* at para 67). Ms. Kennedy's submissions in *Sawridge #8* were a collateral attack on the result in *Sawridge #6*, constituting a notorious and serious form of litigation abuse (*Chutskoff v Bonora*, 2014 ABQB 389 at para 92, aff'd 2014 ABCA 444).
>
> and
>
> [31] ... **In accordance with the reasoning for awarding costs against a lawyer personally in Sawridge #7,** there is a sufficient basis to award solicitor-client costs against Ms. Kennedy and Mr. Stoney on a joint and several basis in *Sawridge #8*.[7]

10. The Applicant previously filed a notice of appeal from that part of the CMJ's decision in *Sawridge #8* in which he concluded he would refer her conduct in that application to the Law Society. That notice of appeal was struck by a panel of this Court on December 19, 2017 on the

---

[6] PK Affidavit at para 18; Decision of CMJ in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2018 ABQB 215 *(Sawridge #9)* **[Tab 5]**

[7] CMJ Decision in *Sawridge #9* **[Tab 5]**

basis that such action by the CMJ did not constitute an appealable decision.[8] The costs award now sought to be appealed from *Sawridge #8* had not been argued or determined at that time.[9]

SUBMISSIONS

11. The Applicant respectfully submits the award of enhanced costs against her in *Sawridge #9* is an extension of the award of enhanced costs against her in *Sawridge #7* for which leave to appeal has already been granted. The CMJ relied upon his decision in *Sawridge #7* awarding enhanced costs against the Applicant personally to justify his further award of costs against her in *Sawridge* #9.

12. Specifically, the CMJ found:

- the proceedings are directly connected, the participants are the same and the issues all flow from the same source, the decision in *Sawridge #6;*
- the arguments warranting the costs award against the Applicant in *Sawridge #9* were the same arguments which gave rise to the costs award against the Applicant in *Sawridge #7*; and
- the same reasoning that justified the award of enhanced costs against the Applicant personally in *Sawridge #7* underlies the award in *Sawridge #9.*

13. The connection has also been clearly recognized by the Respondents, given their position that the costs award against the Applicant in *Sawridge #7* automatically entitled them without more to costs of the other proceedings on the same basis. The Respondent Sawridge Trustees also invokes the Applicant's submissions in *Sawridge #8* in its factum on the *Sawridge #7* appeal.

14. The Applicant submits in the circumstances it is just, fair and appropriate that the awards of costs against the Applicant in *Sawridge #9* be reviewed on appeal on the same basis and at the same time as the award in #7.

15. With respect to the factors governing leave to appeal, the Applicant submits these were previously addressed and found to be met by this Court when leave was sought and granted with

---

[8] *Kennedy v Trustees for the 1985 Sawridge Trust*, 2017 ABCA 439, 2017 CarswellAlta 2698 **[Tab 6]**
[9] PK Affidavit at para 7

respect to *Sawridge #7*. The Applicant also submits with respect to the question of arguable issues:

- The proposed appeal from *Sawridge #9* involves the additional argument that the CMJ misconstrued the Applicant's submissions on Mr. Stoney's behalf in the vexatious litigant hearing.
- The CMJ held the Applicant had misconducted herself by repeating arguments previously rejected and thereby making a collateral attack on a prior decision. In fact the Applicant was attempting to explain the reasoning underlying the previous application as part of the context for the vexatious litigant determination. Her submissions contained an explicit acknowledgement that the arguments had been rejected and did not seek to change that.
- The Applicant respectfully submits that punishing her in costs for her efforts to explain her client's position in a proceeding brought by the Court of its own motion is an error in principle.

16. The Applicant is prepared to expedite the steps necessary for this appeal, including the filing of the Appeal record and the Applicant's factum and materials to allow an appeal to be heard concurrently with the currently scheduled appear from *Sawridge #7*.

RELIEF SOUGHT

17. The Applicant seeks:

- an order granting her permission to appeal the decision of the CMJ ordering enhanced costs of *Sawridge #8* in favor of the Sawridge Trustees and the SFN and the decision that she be personally liable for such costs jointly and severally with Maurice Stoney; and
- an order directing that such appeal be expedited and heard together with the existing appeal from the decision in *Sawridge #7* scheduled to be heard June 8, 2018.

All of which is respectfully submitted this 23rd day of March, 2018.

FIELD LLP
Counsel for the Applicant/Appellant

Per: _____
P. Jon Faulds, QC

_____
Kimberly Precht

TABLE OF AUTHORITIES

1. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436, 2017 CarswellAlta 1236 (*Sawridge #6*)
2. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530, 2017 CarswellAlta 1569 (*Sawridge #7*)
3. *1985 Sawridge Trust v Kennedy*, 2017 ABCA 368, 2017 CarswellAlta 2303 (application re leave to appeal *Sawridge #7*)
4. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548, 2017 CarswellAlta 1639 (*Sawridge #8*)
5. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2018 ABQB 215 (*Sawridge #9*)
6. *Kennedy v Trustees for the 1985 Sawridge Trust*, 2017 ABCA 439, 2017 CarswellAlta 2698 (application to dismiss Kennedy's appeal of *Sawridge #8*)

TAB 1

2017 ABQB 436
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

2017 CarswellAlta 1236, 2017 ABQB 436, [2017] A.W.L.D. 4344, [2017] A.W.L.D. 4345, [2017] A.W.L.D. 4347, [2017] A.W.L.D. 4348, 282 A.C.W.S. (3d) 2

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 byChief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust" or "Trust")

Maurice Felix Stoney and His Brothers and Sisters (Applicants), Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelleand Clara Midbo, As Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees") (Respondents / Original Applicants) and Public Trustee of Alberta ("OPTG") (Respondent) and The Sawridge Band (the "Band" or "SFN") (Intervenor)

D.R.G. Thomas J.

Judgment: July 12, 2017
Docket: Edmonton 1103-14112

Counsel: Priscilla Kennedy (written), for Applicant, Maurice Felix Stoney
D.C. Bonora (written), A. Loparco, Q.C. (written), for Respondents, 1985 Sawridge Trustees
J.L. Hutchison (written), for Respondent, OPTG
Edward Molstad, Q.C. (written), for Intervenor, Sawridge Band

Subject: Civil Practice and Procedure; Estates and Trusts; Public

Related Abridgment Classifications

Aboriginal law
X Practice and procedure
X.3 Parties
X.3.c Intervenors

Aboriginal law
X Practice and procedure
X.7 Miscellaneous

Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.f Costs on solicitor and own client basis

Headnote

Aboriginal law --- Practice and procedure — Parties — Intervenors
Chief of First Nation (FN) created particular trust in 1985 — Beneficiaries of trust were defined directly or indirectly by

membership in FN — In 2011, trust commenced action against Public Trustee for advice and directions — Aboriginal man S was child of parents who had been members of FN but who had given up their family's Indian status and membership in FN in 1944 — S unsuccessfully applied to become member of FN, and rejection of his application was upheld on judicial review — S brought application on his own behalf and on behalf of 10 siblings for order adding them as beneficiaries of trust — FN brought cross-application for leave to intervene — Cross-application granted — FN's intervention was appropriate since S was making collateral attack on FN's decision-making on core subject of membership — FN was particularly prejudiced by potential implications of S's application — Indeed, it was hard to imagine more fundamental impact than where court considers litigation that potentially finds in law that individual who is currently outsider is, instead, part of established community group that holds title and property, and exercises rights, in sui generis and communal basis.

Aboriginal law --- Practice and procedure — Miscellaneous
Abuse of process — Chief of First Nation (FN) created particular trust in 1985 — Beneficiaries of trust were defined directly or indirectly by membership in FN — In 2011, trust commenced action against Public Trustee for advice and directions — Aboriginal man S was child of parents who had been members of FN but who had given up their family's Indian status and membership in FN in 1944 — S unsuccessfully applied to become member of FN, and rejection of his application was upheld on judicial review — S brought application on his own behalf and on behalf of 10 siblings for order adding them as beneficiaries of trust — Application dismissed — S was third party attempting to insert himself and his siblings into matter in which they had no legal interest — Issue of S's potential membership in FN was closed, and there was no evidence indicating siblings had even taken steps to involve themselves in this litigation — Further, this application was collateral attack that attempted to subvert unappealed and crystallized judgment that had already addressed and rejected S's claims and arguments — As matter of court's inherent jurisdiction to control litigation abuse, S was given opportunity to provide written submissions as to whether his access to Alberta courts should be restricted and scope of any such restriction — Trustees and FN were given opportunity to make submissions on this issue and introduce additional relevant evidence.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and own client basis
Chief of First Nation (FN) created particular trust in 1985 — Beneficiaries of trust were defined directly or indirectly by membership in FN — In 2011, trust commenced action against Public Trustee for advice and directions — Aboriginal man S was child of parents who had been members of FN but who had given up their family's Indian status and membership in FN in 1944 — S unsuccessfully applied to become member of FN, and rejection of his application was upheld on judicial review — S unsuccessfully brought application on his own behalf and on behalf of 10 siblings for order adding them as beneficiaries of trust — S, trustees, and intervener FN made submissions on costs — Trustees and FN were awarded costs on solicitor and own client basis — S's application had no merit, and was instead abusive in manner that exhibited hallmark characteristics of vexatious litigation — Costs award to FN was appropriate given its valid intervention and important implications of S's attempted litigation.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs against solicitor personally — Misconduct of solicitor
Chief of First Nation (FN) created particular trust in 1985 — Beneficiaries of trust were defined directly or indirectly by membership in FN — In 2011, trust commenced action against Public Trustee for advice and directions — Aboriginal man S was child of parents who had been members of FN but who had given up their family's Indian status and membership in FN in 1944 — S unsuccessfully applied to become member of FN, and rejection of his application was upheld on judicial review — S unsuccessfully brought application on his own behalf and on behalf of 10 siblings for order adding them as beneficiaries of trust — S, trustees, and intervener FN made submissions on costs — Trustees and FN were awarded costs on solicitor and own client basis — S's application had no merit, and was instead abusive in manner that exhibited hallmark characteristics of vexatious litigation — Costs award against S's counsel was potentially warranted for having advanced futile application on behalf of S and possibly having not obtained consent of siblings — S's counsel was given opportunity to make submissions on why she should not be personally responsible for some or all of costs awards against S, and trustees and FN were given opportunity to introduce evidence and comment on issue.

Table of Authorities

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

British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal) (2011), 2011 SCC 52,

2011 CarswellBC 2702, 2011 CarswellBC 2703, 25 Admin. L.R. (5th) 173, 337 D.L.R. (4th) 413, [2011] 12 W.W.R. 1, 23 B.C.L.R. (5th) 1, 421 N.R. 338, 95 C.C.E.L. (3d) 169, (sub nom. *B.C. (W.C.B.) v. Figiola)* 2012 C.L.L.C. 230-001, (sub nom. *British Columbia (Workers' Compensation Board) v. Figliola)* [2011] 3 S.C.R. 422, 311 B.C.A.C. 1, 529 W.A.C. 1, (sub nom. *British Columbia (Workers' Compensation Board) v. Figliola)* 73 C.H.R.R. D/1 (S.C.C.) — considered

Brown v. Silvera (2010), 2010 ABQB 224, 2010 CarswellAlta 624, 25 Alta. L.R. (5th) 70, 58 E.T.R. (3d) 141, 488 A.R. 22 (Alta. Q.B.) — considered

Brown v. Silvera (2011), 2011 ABCA 109, 2011 CarswellAlta 518, 65 E.T.R. (3d) 169, 39 Alta. L.R. (5th) 201, 95 R.F.L. (6th) 279, 505 A.R. 196, 522 W.A.C. 196 (Alta. C.A.) — referred to

Chutskoff Estate v. Bonora (2014), 2014 ABQB 389, 2014 CarswellAlta 1040, 590 A.R. 288 (Alta. Q.B.) — followed

Chutskoff Estate v. Bonora (2014), 2014 ABCA 444, 2014 CarswellAlta 2380, 588 A.R. 303, 626 W.A.C. 303, 26 Alta. L.R. (6th) 255 (Alta. C.A.) — referred to

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — referred to

Donaldson v. Farrell (2011), 2011 ABQB 11, 2011 CarswellAlta 21 (Alta. Q.B.) — referred to

Edmonton (City) v. Urban Development Institute (2014), 2014 ABCA 340, 2014 CarswellAlta 1875, 61 C.P.C. (7th) 309, 584 A.R. 255, 623 W.A.C. 255, 7 Alta. L.R. (6th) 338 (Alta. C.A.) — referred to

Ewanchuk v. Canada (Attorney General) (2017), 2017 ABQB 237, 2017 CarswellAlta 561 (Alta. Q.B.) — referred to

Haljan v. Serdahely Estate (2008), 2008 ABQB 472, 2008 CarswellAlta 1028, 93 Alta. L.R. (4th) 151, 42 E.T.R. (3d) 198, 59 C.P.C. (6th) 108, (sub nom. *Serdahely Estate, Re)* 453 A.R. 337 (Alta. Q.B.) — referred to

Hok v. Alberta (2016), 2016 ABQB 335, 2016 CarswellAlta 1142 (Alta. Q.B.) — considered

Hok v. Alberta (2016), 2016 ABQB 651, 2016 CarswellAlta 2234, [2017] 6 W.W.R. 831 (Alta. Q.B.) — considered

Hunt v. T & N plc (1990), 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 1990 CarswellBC 216 (S.C.C.) — referred to

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

Kavanagh v. Kavanagh (2016), 2016 ABQB 107, 2016 CarswellAlta 211 (Alta. Q.B.) — referred to

Lymer v. Jonsson (2016), 2016 ABCA 32, 2016 CarswellAlta 134, (sub nom. *Lymer (Bankrupt), Re)* 612 A.R. 122, (sub nom. *Lymer (Bankrupt), Re)* 662 W.A.C. 122 (Alta. C.A.) — considered

McCargar v. Canada (2017), 2017 ABQB 416, 2017 CarswellAlta 1180 (Alta. Q.B.) — referred to

Mcmeekin v. Alberta (Attorney General) (2012), 2012 ABQB 144, 2012 CarswellAlta 424, 29 C.P.C. (7th) 409, 537 A.R. 136 (Alta. Q.B.) — referred to

Morin v. TransAlta Utilities Corporation (2017), 2017 ABQB 409, 2017 CarswellAlta 1125 (Alta. Q.B.) — considered

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2005), 2005 ABCA 320, 2005 CarswellAlta 1407, (sub nom. *Lameman v. Canada (Attorney General))* 380 A.R. 301, (sub nom. *Lameman v. Canada (Attorney General))* 363 W.A.C. 301 (Alta. C.A.) — referred to

Québec (Directeur des poursuites criminelles et pénales) c. Jodoin (2017), 2017 SCC 26, 2017 CSC 26, 2017 CarswellQue 3091, 2017 CarswellQue 3092, 346 C.C.C. (3d) 433, 408 D.L.R. (4th) 581, 37 C.R. (7th) 1 (S.C.C.) — considered

Québec (Procureur général) c. Laroche (2002), 2002 SCC 72, 2002 CarswellQue 2413, 2002 CarswellQue 2414, (sub nom. *Quebec (Attorney General) v. Laroche)* 169 C.C.C. (3d) 97, 219 D.L.R. (4th) 723, 6 C.R. (6th) 272, 295 N.R. 291, (sub nom. *Quebec (Attorney General) v. Laroche)* 99 C.R.R. (2d) 252, [2002] 3 S.C.R. 708 (S.C.C.) — referred to

R. v. Cody (2017), 2017 SCC 31, 2017 CSC 31, 2017 CarswellNfld 251, 2017 CarswellNfld 252, 37 C.R. (7th) 266 (S.C.C.) — considered

R. v. Hok (2017), 2017 ABCA 63, 2017 CarswellAlta 232 (Alta. C.A.) — referred to

R. v. Jordan (2016), 2016 SCC 27, 2016 CSC 27, 2016 CarswellBC 1864, 2016 CarswellBC 1865, 335 C.C.C. (3d) 403, 398 D.L.R. (4th) 381, 29 C.R. (7th) 235, 484 N.R. 202, 388 B.C.A.C. 111, 670 W.A.C. 111, 358 C.R.R. (2d) 97, [2016] 1 S.C.R. 631 (S.C.C.) — followed

R. v. Litchfield (1993), 14 Alta. L.R. (3d) 1, 161 N.R. 161, 25 C.R. (4th) 137, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97, 145 A.R. 321, 55 W.A.C. 321, 1993 CarswellAlta 160, 1993 CarswellAlta 568 (S.C.C.) — referred to

R. v. Sarson (1996), 197 N.R. 125, 107 C.C.C. (3d) 21, 135 D.L.R. (4th) 402, 36 C.R.R. (2d) 1, 91 O.A.C. 124, 49 C.R. (4th) 75, [1996] 2 S.C.R. 223, 1996 CarswellOnt 3983, 1996 CarswellOnt 3984 (S.C.C.) — referred to

R. v. Van der Peet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, 1996 CarswellBC 2309, 1996 CarswellBC 2310, 80 B.C.A.C. 81, 109 C.C.C. (3d) 1, [1996] 4 C.N.L.R. 177, 137 D.L.R. (4th) 289, 200 N.R. 1, [1996] 2 S.C.R. 507, 130 W.A.C. 81 (S.C.C.) — referred to

R. v. Wilson (1983), [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 1983 CarswellMan 154, 1983 CarswellMan 189 (S.C.C.) — considered

Reece v. Edmonton (City) (2011), 2011 ABCA 238, 2011 CarswellAlta 1349, 85 M.P.L.R. (4th) 36, 46 Alta. L.R. (5th) 1, [2011] 11 W.W.R. 1, 335 D.L.R. (4th) 600, 9 C.P.C. (7th) 21, 243 C.R.R. (2d) 230, 513 A.R. 199, 530 W.A.C. 199 (Alta. C.A.) — referred to

Sawridge Band v. R. (2004), 2004 FCA 16, 2004 CarswellNat 130, 2004 CAF 16, 2004 CarswellNat 966, (sub nom. *Sawridge Indian Band v. Canada)* 316 N.R. 332, [2004] 2 C.N.L.R. 316, (sub nom. *Sawridge Indian Band v. Canada)* 247 F.T.R. 160 (note), (sub nom. *Sawridge Indian Band v. Canada)* [2004] 3 F.C.R. 274 (F.C.A.) — considered

Scaduto v. Law Society of Upper Canada (2015), 2015 ONCA 733, 2015 CarswellOnt 16545, 81 C.P.C. (7th) 258, 343 O.A.C. 87 (Ont. C.A.) — referred to

Scaduto v. Law Society of Upper Canada (2016), 2016 CarswellQue 3281, 2016 CarswellQue 3282 (S.C.C.) — referred to

Simpson v. Chartered Professional Accountants of Ontario (2016), 2016 ONCA 806, 2016 CarswellOnt 17495 (Ont. C.A.) — referred to

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

Stoney v. Twinn (2016), 2016 ABCA 51, 2016 CarswellAlta 238, (sub nom. *Twinn v. Public Trustee (Alta.))* 616 A.R. 176, (sub nom. *Twinn v. Public Trustee (Alta.))* 672 W.A.C. 176 (Alta. C.A.) — referred to

Thompson v. IUOE, Local 955 (2017), 2017 ABQB 210, 2017 CarswellAlta 505, 2 C.P.C. (8th) 299 (Alta. Q.B.) — referred to

Thompson v. International Union of Operating Engineers Local No 995 (2017), 2017 ABCA 193, 2017 CarswellAlta

1039 (Alta. C.A.) — referred to

Tottrup v. Alberta (Minister of Environment) (2000), 2000 CarswellAlta 365, (sub nom. *Tottrup v. Lund)* 186 D.L.R. (4th) 226, (sub nom. *Tottrup v. Lund)* 255 A.R. 204, (sub nom. *Tottrup v. Lund)* 220 W.A.C. 204, 21 Admin. L.R. (3d) 58, 81 Alta. L.R. (3d) 27, [2000] 9 W.W.R. 21, 34 C.E.L.R. (N.S.) 250, 2000 ABCA 121 (Alta. C.A.) — referred to

Wong v. Leung (2011), 2011 ABQB 688, 2011 CarswellAlta 1918, (sub nom. *V.W.W. v. Leung)* 530 A.R. 82 (Alta. Q.B.) — referred to

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2012), 2012 ABQB 365, 2012 CarswellAlta 1042, 75 Alta. L.R. (5th) 188, (sub nom. *Twinn v. Public Trustee (Alta.))* 543 A.R. 90, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee))* [2013] 3 C.N.L.R. 395 (Alta. Q.B.) — referred to

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2015), 2015 ABQB 799, 2015 CarswellAlta 2373 (Alta. Q.B.) — referred to

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2017), 2017 ABQB 299, 2017 CarswellAlta 745 (Alta. Q.B.) — referred to

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2013), 2013 ABCA 226, 2013 CarswellAlta 1015, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee))* [2013] 3 C.N.L.R. 411, 85 Alta. L.R. (5th) 165, (sub nom. *Twinn v. Alberta (Public Trustee))* 553 A.R. 324, (sub nom. *Twinn v. Alberta (Public Trustee))* 583 W.A.C. 324 (Alta. C.A.) — referred to

1985 Sawridge Trust v. Alberta (Public Trustee) (2017), 2017 ABQB 377, 2017 CarswellAlta 1193 (Alta. Q.B.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 15 — considered

Indian (Soldier Settlement) Act, R.S.C. 1927, c. 98
Generally — referred to

s. 114 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 1.2 — considered

R. 2.11-2.21 — referred to

R. 3.68 — considered

R. 3.68(1) — considered

R. 3.68(2)(b) — considered

R. 3.68(2)(c) — considered

R. 3.68(2)(d) — considered

R. 3.68(3) — considered

R. 3.68(4)(a) — considered

R. 10.29(1) — considered

R. 10.33 — considered

R. 10.50 — considered

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 2.1 [en. O. Reg. 43/14] — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C — referred to

Words and phrases considered:

frivolous

A pleading is frivolous if its substance indicates bad faith or is factually hopeless . . . A frivolous plea is one so palpably bad that the Court needs no real argument to be convinced of that fact.

APPLICATION by purported member of First Nation (FN), on his own behalf and on behalf of his siblings, for order adding them as beneficiaries of trust created in 1985 by Chief of FN; CROSS-APPLICATION by FN for leave to intervene.

***D.R.G. Thomas J.*:**

I. Introduction

1 This is a case management decision on an application filed on August 12, 2016 (the "Stoney Application") by Maurice Felix Stoney "and his brothers and sisters" (Billy Stoney, Angeline Stoney, Linda Stoney, Bernie Stoney, Betty Jean Stoney, Gail Stoney, Alma Stoney, and Bryan Stoney) to be added "as beneficiaries to these Trusts". In his written brief of September 28, 2016, Maurice Stoney asks that his legal costs and those of his siblings be paid for by the 1985 Sawridge Trust.

2 The Stoney Application is opposed by the Trustees and the Sawridge Band, which applied for and has been granted intervenor status on this Application. The Public Trustee of Alberta ("OPTG") did not participate in the Application.

3 The Stoney Application is denied. Maurice Stoney is a third party attempting to insert himself (and his siblings) into a matter in which he has no legal interest. Further, this Application is a collateral attack which attempts to subvert an unappealed and crystallized judgment of a Canadian court which has already addressed and rejected the Applicant's claims and arguments. This is serious litigation misconduct, which will have costs implications for Maurice Stoney and also potentially for his lawyer Priscilla Kennedy.

II. Background

4 This Action was commenced by Originating Notice, filed on June 12, 2011, by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application".

5 The history of the Advice and Direction Application is set out in previous decisions (including the Orders taken out in relation thereto) reported as *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365, 543 A.R. 90 (Alta. Q.B.) ("*Sawridge #1*"), aff'd 2013 ABCA 226, 553 A.R. 324 (Alta. C.A.) ("*Sawridge #2*"), *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2015 ABQB 799 (Alta. Q.B.) ("*Sawridge #3*"), time extension for appeal denied *Stoney v. Twinn*, 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.), *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*,

2017 ABQB 299 (Alta. Q.B.) ("*Sawridge #4*"). A separate motion by three third parties to participate in this litigation was rejected on July 5, 2017, and that decision is reported as *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 377 (Alta. Q.B.) ("*Sawridge #5*"), (collectively the "*Sawridge Decisions*").

6 Some of the terms used in this decision ("*Sawridge #6*") are also defined in the various Sawridge Decisions.

7 I directed that this Application be dealt with in writing and the materials filed include the following:

August 12, 2016	Application by Maurice Felix Stoney and His Brothers and Sisters
September 28, 2016	Written Argument of Maurice Stoney, supported by an Affidavit of Maurice Stoney sworn on May 17, 2016.
September 28, 2016	Written Submission of the Sawridge Band, supported by an Affidavit of Roland Twinn, dated September 21, 2016, for the Sawridge Band to be granted Intervenor status in the Advice and Direction Application in relation to the August 12, 2016 Application, and that the Application be struck out per *Rule* 3.68.
September 30, 2016	Application by the Sawridge Trustees that Maurice Stoney pay security for costs.
October 27, 2016	Written Response Argument to the Application of Sawridge First Nation filed by Maurice Stoney.
October 31, 2016	The OPTG sent the Court and participants a letter indicating it has "no objection" to the Stoney Application.
October 31, 2016	Trustees' Written Submissions in relation to the Maurice Stoney Application and the proposed Sawridge Band intervention.
October 31, 2016	Sawridge Band Written Submissions responding to the Maurice Stoney Application.
November 14, 2016	Reply argument to Maurice Stoney's Written Response Argument filed by the Sawridge Band.
November 15, 2016	Further Written Response Argument of Maurice Stoney.

III. Preliminary Issue #1 - Who is/are the Applicant or Applicants?

8 As is apparent from the style of cause in this Application, the manner in which the Applicants have been framed is unusual. They are named as "Maurice Felix Stoney and His Brothers and Sisters". The Application further states that the Applicants are "Maurice Stoney and his 10 living brothers and sisters" (para 1). Para 2 of the Application states the issue to be determined is:

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

9 There is no evidence before me or on the court file that indicates any of these named individuals other than Maurice Stoney has taken steps to involve themselves in this litigation. The "10 living brothers or sisters" are simply named. Maurice Stoney's filings do not include any documents such as affidavits prepared by these individuals, nor has there been an *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"] application or appointment of a litigation representative, per *Rules* 2.11-2.21. In fact, aside from Maurice Stoney, the Applicant(s) materials provide no biographical information or records such as birth certificates for any of these additional proposed litigants, other than the year of their birth.

10 Counsel for Maurice Stoney, Priscilla Kennedy, has not provided or filed any data to show she has been retained by the "10 living brothers or sisters".

11 Participating in a legal proceeding can have significant adverse effects, such as exposure to awards of costs, findings of contempt, and declarations of vexatious litigant status. Being a litigant creates obligations as well, particularly in light of the positive obligations on litigation actors set by *Rule* 1.2.

12 In the absence of evidence to the contrary and from this point on, I limit the scope of Maurice Stoney's litigation to him alone and do not involve his "10 living brothers and sisters" in this application and its consequences. I will return to this topic because it has other implications for Maurice Stoney and his lawyer Priscilla Kennedy.

IV. Preliminary Issue #2 - The Proposed Sawridge Band Intervention and Motion to Strike Out the Stoney Application

13 To this point, the role of the Sawridge Band in this litigation has been what might be described as "an interested third party". The Sawridge Band has taken the position it is not a party to this litigation: *Sawridge #3* at paras 15, 27. The Sawridge Band does not control the 1985 Sawridge Trust, but since the beneficiaries of that Trust are defined directly or indirectly by membership in the SFN, there have been occasions where the Sawridge Band has been involved in respect to that underlying issue, particularly when it comes to the provision of relevant information on procedures and other evidence: see *Sawridge #1* at paras 43-49; *Sawridge #3*.

14 The Sawridge Band argued that its intervention application under *Rule* 2.10 should be granted because the Stoney Application simply continues a lengthy dispute between Maurice Stoney and the Sawridge Band over whether Maurice Stoney is a member of the Sawridge Band.

15 The Trustees support the application of the Sawridge Band, noting that the proposed intervention makes available useful evidence, particularly in providing context concerning Maurice Stoney's activities over the years.

16 The Applicant, Stoney responds that intervenor status is a discretionary remedy that is only exercised sparingly. Maurice Stoney submits the broad overlap between the Sawridge Band and the Trustees means that the Band brings no useful or unique perspectives to the litigation. Maurice Stoney alleges the Sawridge Band operates in a biased and discriminatory manner. If any party should be involved it should be Canada, not the Sawridge Band. Maurice Stoney demands that the intervention application be dismissed and costs ordered against the Band.

17 Two criteria are relevant when a court evaluates an application to intervene in litigation: whether the proposed intervenor is affected by the subject matter of the proceeding, and whether the proposed intervenors have expertise or perspective on that subject: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320, 380 A.R. 301 (Alta. C.A.); *Edmonton (City) v. Urban Development Institute*, 2014 ABCA 340, 584 A.R. 255 (Alta. C.A.).

18 The Sawridge Band intervention is appropriate since that response was made in reply to a collateral attack on its decision-making on the core subject of membership. The common law approach is clear; here the Sawridge Band is particularly prejudiced by the potential implications of the Stoney Application. Indeed, it is hard to imagine a more fundamental impact than where the Court considers litigation that potentially finds in law that an individual who is currently an outsider is, instead, a part of an established community group which holds title and property, and exercises rights, in a *sui generis* and communal basis: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 (S.C.C.); *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 (S.C.C.).

19 I grant the Sawridge Band application to intervene and participate in the Advice and Direction Application, but limited to the Stoney Application only.

V. Positions of the Parties on the Application to be Added

A. Maurice Stoney

20 The Applicant's argument can be reduced to the following simple proposition. Maurice Stoney wants to be named as a party to the litigation or as an intervenor because he claims to be a member of the Sawridge Band. The Sawridge 1985 Trust is a trust that was set up to hold property on behalf of members of the Sawridge Band. He is therefore a beneficiary of the Trust, and should be entitled to participate in this litigation.

21 The complicating factor is that Maurice Stoney is not a member of the Sawridge Band. He argues that his parents,

William and Margaret Stoney, were members of the Sawridge Band, and provides documentation to that effect. In 1944 William Stoney and his family were "enfranchised", per *Indian Act*, RSC 1927, c 98, s 114. This is a step where an Indian may accept a payment and in the process lose their Indian status. The "enfranchisement" option was subsequently removed by Federal legislation, specifically an enactment commonly known as "Bill C-31".

22 Maurice Stoney argues that the enfranchisement process is unconstitutional, and that, combined with the result of a lengthy dispute over the membership of the Sawridge Band, means he (and his siblings) are members of the Sawridge Band. In his Written Response argument this claim is framed as follows:

> Retroactive to April 17, 1985, Bill C-31 (R.S.C. 1985, c. 32 (1st Supp.) amended the provisions of the Indian Act, R.S.C. 1985, I-5 by removing the enfranchisement provisions returning all enfranchised Indians back on the pay lists of the Bands where they should have been throughout all of the years.

23 In 2012, Maurice Stoney applied to become a member of the Sawridge Band, but that application was denied. Maurice Stoney then conducted an unsuccessful judicial review of that decision: *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.). Maurice Stoney says all this is irrelevant to his status as a member of the Sawridge Band; the definition of beneficiaries is contrary to public policy, and unconstitutional. The Court should order that Maurice Stoney and his siblings are beneficiaries of the 1985 Sawridge Trust and add them as parties to this Action. The Trust should pay for all litigation costs.

24 The Written Response claims the Sawridge Band is in breach of orders of the Federal Court, that Maurice Stoney and others "have faced a tortuous long process with no success". Maurice Stoney and his siblings' participation does not cause prejudice to the Trustees, and claims that Maurice Stoney has not paid costs are false. I note the Written Response was not accompanied by any evidence to establish that alleged fact.

25 The October 27, 2016 Written Response Argument stresses the Sawridge Band is not a party to this litigation, it has voluntarily elected to follow that path, and a third party should not be permitted to interfere with Maurice Stoney's litigation. In any case, the Sawridge Band is wrong - Maurice Stoney is already a member of the Sawridge Band. He deserves enhanced costs in response to the *Rule* 3.68 Application by the Band.

B. Sawridge Band

26 The Sawridge Band points to the decision in *Stoney v. Sawridge First Nation* and says the Maurice Stoney Application is an attempt to revisit an issue that was decided and which is now subject to *res judicata* and issue estoppel. Maurice Stoney is wrong when he argues that he automatically became a Sawridge Band member when Bill C-31 was enacted. His Affidavit contains factual errors. Maurice Stoney's claim to be a Sawridge Band member was rejected in court judgments that Maurice Stoney did not appeal.

27 Instead, Maurice Stoney had a right to apply to become a Sawridge Band member. He did so, and that application was denied, as was the subsequent appeal. The Federal Court reviewed and confirmed that result in the *Stoney v. Sawridge First Nation* decision. The issue of Maurice Stoney's potential membership in the Sawridge Band is therefore closed.

28 The Sawridge Band has entered evidence that Maurice Stoney has not paid the costs that were awarded against him in the *Stoney v. Sawridge First Nation* action, and that Maurice Stoney has unpaid costs awards in relation to the unsuccessful appeal in *Stoney v. Twinn*, 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.).

29 On January 31, 2014, Maurice Stoney filed a Canadian Human Rights Commission complaint concerning the Sawridge Band's decision to refuse him membership. The Commission refused the complaint, and concluded the issue had already been decided by *Stoney v. Sawridge First Nation*.

30 The Sawridge Band says this Court should do the same and strike out the Stoney Application per *Rule* 3.68.

31 As for the "10 brothers and sisters", the Sawridge Band indicates it has received and refused an application from one individual who may be in that group.

32 The Sawridge Band seeks solicitor and own client costs, or elevated costs, in light of Maurice Stoney's litigation history in relation to his alleged membership in the Sawridge Band.

C. 1985 Sawridge Trustees

33 The Trustees echo the Sawridge Band's arguments, assert the Application is "unnecessary, vexatious, frivolous, *res judicata*, and an abuse of process", and that the Stoney Application should be denied. The Trustees seek solicitor and own client costs or enhanced costs as a deterrent against further litigation abuse by Maurice Stoney.

VI. Analysis

34 The law concerning *Rule* 3.68 is well established and is not in dispute. This is a civil litigation procedure that is used to weed out hopeless proceedings:

> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out;
>
> (b) that a commencement document or pleading be amended or set aside;
>
> (c) that judgment or an order be entered;
>
> (d) that an action, an application or a proceeding be stayed.
>
> (2) The conditions for the order are one or more of the following:
>
> . . .
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
>
> (c) a commencement document or pleading is frivolous, irrelevant or improper;
>
> (d) a commencement document or pleading constitutes an abuse of process;
>
> . . .
>
> (3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).
>
> (4) The Court may
>
> (a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;
>
> . . .

35 An action or defence may be struck under *Rule* 3.68 where it is plain and obvious, or beyond reasonable doubt, that the action cannot succeed: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321 (S.C.C.). Pleadings should be considered in a broad and liberal manner: *Tottrup v. Alberta (Minister of Environment)*, 2000 ABCA 121 (Alta. C.A.) at para 8, (2000), 186 D.L.R. (4th) 226 (Alta. C.A.).

36 A pleading is frivolous if its substance indicates bad faith or is factually hopeless: *Donaldson v. Farrell*, 2011 ABQB 11 (Alta. Q.B.) at para 20. A frivolous plea is one so palpably bad that the Court needs no real argument to be convinced of that fact: *Haljan v. Serdahely Estate*, 2008 ABQB 472 (Alta. Q.B.) at para 21, (2008), 453 A.R. 337 (Alta. Q.B.).

37 A proceeding that is an abuse of process may be struck on that basis: *Reece v. Edmonton (City)*, 2011 ABCA 238 (Alta. C.A.) at para 14, (2011), 335 D.L.R. (4th) 600 (Alta. C.A.). "Vexatious" litigation may be struck under either *Rule* 3.682(c) or (d): *Wong v. Leung*, 2011 ABQB 688 (Alta. Q.B.) at para 33, (2011), 530 A.R. 82 (Alta. Q.B.); *Mcmeekin v. Alberta (Attorney General)*, 2012 ABQB 144 (Alta. Q.B.) at para 11, (2012), 537 A.R. 136 (Alta. Q.B.).

38 The documentary record introduced by Maurice Stoney makes it very clear that in 1944 William J. Stoney, his wife Margaret, and their two children Alvin Joseph Stoney and Maurice Felix Stoney, underwent the enfranchisement process and ceased to be Indians and members of the Sawridge Band per the *Indian Act*.

39 As noted above, the Advice and Direction Application was initiated on June 11, 2011.

40 On December 7, 2011, the Sawridge Band rejected Maurice Stoney's application for membership. An appeal of that decision was denied.

41 Maurice Stoney then pursued a judicial review of the Sawridge Band membership application review process, in the Federal Court of Canada, which resulted in a reported May 15, 2013 decision, *Stoney v. Sawridge First Nation*. At that proceeding, Maurice Stoney and two cousins argued that they were automatically made members of the Sawridge Band as a consequence of Bill C-31. At paras 10-14, Justice Barnes investigates that question and concluded that this argument is wrong, citing *Sawridge Band v. R.*, 2004 FCA 16, 316 N.R. 332 (F.C.A.).

42 At para 15, Justice Barnes specifically addresses Maurice Stoney:

> I also cannot identify anything in Bill C-31 that would extend an automatic right of membership in the Sawridge First Nation to [Maurice] 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.

I note the original text of this paragraph uses the name "William Stoney" instead of "Maurice Stoney". This is an obvious typographical error, since it was William Stoney who in 1944 sought and obtained enfranchisement. Maurice Stoney is William Stoney's son.

43 Justice Barnes continues to observe at para 16 that this very same claim had been advanced in *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.), but that Maurice Stoney as a respondent in that hearing at para 4 had acknowledged this argument had no basis in law:

> 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.
>
> [Emphasis added.]

44 Justice Barnes at para 17 continues on to observe that:

> It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The

attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel ...

45 As for the actual judicial review, Justice Barnes concludes the record does not establish procedural unfairness due to bias: paras 19-21. A *Charter*, s 15 application was also rejected as unsupported by evidence, having no record to support the relief claims, and because the Crown was not served notice of a challenge to the constitutional validity of the *Indian Act*: para 22.

46 Maurice Stoney did not appeal the *Stoney v. Sawridge First Nation* decision.

47 The Sawridge Band and the Trustees argue that Maurice Stoney's current application is an attempt to attack an unappealed judgment of a Canadian court. They are correct. Maurice Stoney is making the same argument he has before - and which has been rejected - that he now is one of the beneficiaries of the 1985 Sawridge Trust because he is automatically a full member of the Sawridge Band, due to the operation of Bill C-31.

48 In summary, there are four separate grounds for rejecting Maurice Stoney's application:

1. He is estopped from making this argument via his concession in *Huzar v. Canada* that this argument has no legal basis.

2. He made this same argument in *Stoney v. Sawridge First Nation*, where it was rejected. Since Mr. Stoney did not choose to challenge that decision on appeal, that finding of fact and law has 'crystallized'.

3. In *Sawridge #3* at para 35 I concluded the question of Band membership should be reviewed in the Federal Court, and not in the Advice and Direction Application.

3. In any case I accept and adopt the reasoning of *Stoney v. Sawridge First Nation* as correct, though I am not obliged to do so.

49 Maurice Stoney has conducted a "collateral attack", an attempt to use 'downstream' litigation to attack an 'upstream' court result. This offends the principle of *res judicata*, as explained by Abella J in *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 SCC 52 (S.C.C.) at para 28, [2011] 3 S.C.R. 422 (S.C.C.):

The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route ...

[Emphasis added.]

50 McIntyre J in *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.) at 599, (1983), 4 D.L.R. (4th) 577 (S.C.C.) explains how it is the intended effect that defines a collateral attack:

It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[Emphasis added.]

See also: *R. v. Litchfield*, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97 (S.C.C.); *Québec (Procureur général) c. Laroche*, 2002 SCC 72, 219 D.L.R. (4th) 723 (S.C.C.); *R. v. Sarson*, [1996] 2 S.C.R. 223, 135 D.L.R. (4th) 402 (S.C.C.).

51 While I am not bound by the Federal Court judgments under the doctrine of *stare decisis*, I am constrained by *res judicata* and the prohibition against collateral attacks on valid court and tribunal decisions. Maurice Stoney's application to be a member of the Sawridge Band was rejected, and his court challenges to that result are over. He did not pursue all available appeals. He cannot now attempt to slip into the Sawridge Band and 1985 Sawridge Trust beneficiaries pool 'through the backdoor'.

52 I dismiss the Stoney Application to be named either as a party to this litigation, or to participate as an intervenor. Maurice Stoney has no interest in the subject of this litigation, and is nothing more than a third-party interloper. In light of this conclusion, it is unnecessary to address the Sawridge Band's application that Maurice Stoney pay security for costs.

VII. Vexatious Litigant Status

53 Maurice Stoney's conduct in relation to the Advice and Direction Application has been inappropriate. He arguably had a basis to be an interested party in 2011, because when the Trustees initiated the distribution process he had a live application to join the Sawridge Band. Therefore, at that time he had the potential to become a beneficiary. However, by 2013, that avenue for standing was closed when Justice Barnes issued the *Stoney v. Sawridge First Nation* decision and Maurice Stoney did not appeal.

54 Maurice Stoney nevertheless persisted, appearing before the Alberta Court of Appeal in *Stoney v. Twinn*, 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.), where Justice Watson concluded Mr. Stoney should not receive an extension of time to challenge *Sawridge #3* because he had no chance of success as he did not have standing and was "... 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.": paras 20-21. Now Maurice Stoney has attempted to add himself (and his siblings) to this action as parties or intervenors, in a manner that defies *res judicata* and in an attempt to subvert the decision-making of the Sawridge Band and the Federal Court of Canada.

55 *Chutskoff Estate v. Bonora*, 2014 ABQB 389 (Alta. Q.B.) at para 92, (2014), 590 A.R. 288 (Alta. Q.B.), aff'd 2014 ABCA 444 (Alta. C.A.) is the leading Alberta authority on the elements and activities that define abusive litigation. That decision identifies eleven categories of litigation misconduct which can trigger court intervention in litigation activities. Several of these indications of abusive litigation have already emerged in Maurice Stoney's legal actions:

> 1. Collateral attacks that attempt to determine an issue that has already been determined by a court of competent jurisdiction, to circumvent the effect of a court or tribunal decision, using previously raised grounds and issues;
>
> 2. Bringing hopeless proceedings that cannot succeed, here in both the present application and the *Sawridge #3* appeal where Maurice Stoney was declared to be an uninvolved third party; and
>
> 3. Initiating "busybody" lawsuits to enforce the rights of third parties, here the recruited participation of Maurice Stoney's "10 living brothers and sisters."

56 The Sawridge Band says Maurice Stoney does not pay his court-ordered costs. Maurice Stoney denies that. Failure to pay outstanding cost awards is another potential basis to conclude a person litigates in an abusive manner. However, I defer any finding on this point until a later stage.

57 Any of the abusive litigation activities identified in *Chutskoff Estate v. Bonora* are a basis to declare a person a vexatious litigant and restrict access to Alberta courts. Maurice Stoney has exhibited three independent bases to take that step. The Alberta Court of Queen's Bench has adopted a two-step vexatious litigant application process to meet procedural justice requirements set in *Lymer v. Jonsson*, 2016 ABCA 32, 612 A.R. 122 (Alta. C.A.), see *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 10-11, leave denied *R. v. Hok*, 2017 ABCA 63 (Alta. C.A.); *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237 (Alta. Q.B.) at para 97.

58 I therefore exercise this Court's inherent jurisdiction to control litigation abuse (*Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 14-25, *Thompson v. IUOE, Local 955*, 2017 ABQB 210 (Alta. Q.B.) at para 56, affirmed 2017 ABCA 193 (Alta. C.A.); *Ewanchuk v. Canada (Attorney General)* at paras 92-96; *McCargar v. Canada*, 2017 ABQB 416 (Alta. Q.B.) at para 110) and to examine whether Maurice Stoney's future litigation activities should be restricted.

59 To date this two-step process has sometimes involved a hearing on the second step, for example *Kavanagh v. Kavanagh*, 2016 ABQB 107 (Alta. Q.B.); *Ewanchuk v. Canada (Attorney General)*; *McCargar v. Canada*. However, other vexatious litigant analyses have been conducted via written submissions and affidavit evidence: *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.). Veldhuis J in *R. v. Hok*, 2017 ABCA 63 (Alta. C.A.) at para 8 specifically reproduces the trial court's instruction that the process was conducted via written submissions and subsequently concludes the vexatious litigant analysis and its result shows no error or legal issues that raise a serious issue of general importance with a reasonable chance of success: para 10.

60 In this case, I follow the approach of Verville J. in *Hok v. Alberta* and proceed using a document-only process. In *R. v. Cody*, 2017 SCC 31 (S.C.C.), the Court at para 39 identified that one of the ways courts may improve their efficiencies is to operate on a documentary record rather than to hold in-person court hearings. That advice was generated in the context of criminal proceedings, which are accorded a special degree of procedural fairness due to the fact the accused's liberty is at stake.

61 The Ontario courts use a document-based 'show cause' procedure authorized by *Rules of Civil Procedure*, RRO 1990, Reg 194, s 2.1 to strike out litigation and applications that are obviously hopeless, vexatious, and abusive. This mechanism has been confirmed as a valid procedure for both trial level (*Scaduto v. Law Society of Upper Canada*, 2015 ONCA 733, 343 O.A.C. 87 (Ont. C.A.), leave to the SCC denied 36753 (21 April 2016) [2016 CarswellQue 3281 (S.C.C.)]) and appellate proceedings (*Simpson v. Chartered Professional Accountants of Ontario*, 2016 ONCA 806 (Ont. C.A.)).

62 I conclude the procedural fairness requirements indicated in *Lymer v. Jonsson* are adequately met by a document-only approach, particularly given that the implications for a litigant of a criminal proceeding application, or for the striking out of a civil action or application, are far greater than the potential consequences of what is commonly called a vexatious litigant order. As Justice Verville observed in *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 30-34, the implications of a restriction of this kind should not be exaggerated, it instead "... is not a great hurdle."

63 I therefore order that Maurice Stoney is to make written submissions *by close of business on August 4, 2017*, if he chooses to do so, on whether:

1. his access to Alberta courts should be restricted, and

2. if so, what the scope of that restriction should be.

64 The Sawridge Band and the Trustees may make submissions on Maurice Stoney's potential vexatious litigant status, and introduce additional evidence that is relevant to this question, see*Chutskoff Estate v. Bonora* at paras 87-90 and *Ewanchuk v. Canada (Attorney General)* at paras 100-102. Any submissions by the Sawridge Band and the Trustees are due *by close of business on July 28, 2017*.

65 In addition, I follow the process mandated in *Hok v. Alberta*, 2016 ABQB 335 (Alta. Q.B.) at para 105, and order that Maurice Stoney's court filing activities are immediately restricted. 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 proceeding is conducted, or his or her designate. This order does not apply to:

1. written submissions or affidavit evidence in relation to the Maurice Stoney's potential vexatious litigant status; and

2. any appeal from this decision.

66 This order will be prepared by the Court and filed at the same time as this Case Management decision.

VIII. Costs

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. In *Sawridge #5*, I awarded solicitor and own client indemnity costs against two of the applicants since their litigation conduct met the criteria identified by Moen J in *Brown v. Silvera*, 2010 ABQB 224 (Alta. Q.B.) at paras 29-35, (2010), 488 A.R. 22 (Alta. Q.B.), affirmed 2011 ABCA 109, 505 A.R. 196 (Alta. C.A.), for the Court to exercise its *Rule* 10.33 jurisdiction to award costs beyond the presumptive *Rule* 10.29(1) party and party amounts indicated in Schedule C. The same principles apply here.

68 The costs award to the Sawridge Band is appropriate given its valid intervention and the important implications of Maurice Stoney's attempted litigation, as discussed above.

69 In *Sawridge #5*, at paras 50-51, I observed that there is a "new reality of litigation in Canada":

> *Rule* 1.2 stresses this Court should encourage cost-efficient litigation and alternative non-court remedies. The Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7 at para 2, [2014] 1 SCR 87 has instructed it is time for trial courts to undergo a "culture shift" that recognizes that litigation procedure must reflect economic realities. In the subsequent ***R v Jordan***, 2016 SCC 27, [2016] 1 SCR 631 and ***R v Cody***, 2017 SCC 31 decisions, Canada's high court has stressed it is time for trial courts to develop and deploy efficient and timely processes, "to improve efficiency in the conduct of legitimate applications and motions" (***R v Cody***, at para 39). I further note that in ***R v Cody*** the Supreme Court at para 38 instructs that trial judges test criminal law applications on whether they have "a *reasonable* prospect of success" [emphasis added], and if not, they should be dismissed summarily. That is in the context of *criminal* litigation, with its elevated protection of an accused's rights to make full answer and defence. This Action is a civil proceeding where I have found the addition of the Applicants as parties is unnecessary.
>
> This is the new reality of litigation in Canada. The purpose of cost awards is notorious; they serve to help shape improved litigation practices by creating consequences for bad litigation practices, and to offset the litigation expenses of successful parties. ...
>
> [Emphasis in original.]

70 Then at para 53, I concluded that the "new reality of litigation in Canada" meant:

> ... one aspect of Canada's litigation "culture shift" is that cost awards should be used to deter dissipation of trust property by meritless litigation activities by trust beneficiaries.

71 The Supreme Court of Canada has recently in *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin*, 2017 SCC 26 (S.C.C.) ["*Jodoin*"] commented on another facet of the problematic litigation, where lawyers abuse the court and its processes. *Jodoin* investigates when a costs award is appropriate against criminal defence counsel. At para 56, Justice Gascon explicitly links court discipline of abusive lawyers to the "culture of complacency" condemned in *R. v. Jordan* [2016 CarswellBC 1864 (S.C.C.)] and *R. v. Cody*. Costs awards are a way to help control this misconduct, and are a tool to help achieve the badly needed "culture shift" in civil and criminal litigation.

72 I pause at this point to note that *Jodoin* focuses on *criminal* litigation, where the Courts have traditionally been cautious to order costs against defence counsel "in light of the special role played by defence lawyers and the rights of

accused persons they represent": para 1.

73 At paras 16-24 Justice Gascon discusses the issue of costs awards against lawyers in a more general manner:

> The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them ... A court therefore has an inherent power to control abuse in this regard ... and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute" ...
>
> It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts ... It is therefore not reserved to superior courts but, rather, has its basis in the common law ...
>
> There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice ... As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct ...
>
> The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. ...
>
> ... although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court ... the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt ...
>
> In most cases, of course, the implications for a lawyer of being ordered personally to pay costs are less serious than those of the other two alternatives. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. Moreover, as this appeal shows, an order to pay costs personally will normally involve relatively small amounts, given that the proceedings will inevitably be dismissed summarily on the basis that they are unfounded, frivolous, dilatory or vexatious.
>
> [Emphasis added, citations omitted.]

74 This costs authority operates in a parallel but separate manner from the disciplinary and lawyer control functions of law societies: paras 22-23. Cost awards against a lawyer are potentially triggered by either:

> 1. "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer", or
>
> 2. "dishonest or malicious misconduct on his or her part, that is deliberate".
>
> [*Jodoin*, para 29]

75 The Court stresses that an investigation of a particular instance of potential litigation misconduct should be restricted to the specific identified litigation misconduct and not put the lawyer's "career[,] on trial": para 33. This investigation is not of the lawyer's "entire body of work", though external facts can be relevant in certain circumstances: paras 33-34.

76 The lawyer who is potentially personally subject to a costs sanction must receive notice of that, along with the relevant facts: para 36. This normally would occur after the end of litigation, once "... the proceeding has been resolved on its merits.": para 36.

77 I conclude this is one such occasion where a costs award against a lawyer is potentially warranted. Maurice Stoney's attempted participation in the Advice and Direction Application has ended, so now is the point where this issue may be addressed. I consider the impending vexatious litigant analysis a separate matter, though also exercised under the Court's inherent jurisdiction. I do not think this is an appropriate point at which to make any comment on whether Ms. Kennedy should or should not be involved in that separate vexatious litigant analysis, given her litigation representative activities to this point.

78 I have concluded that Maurice Stoney's lawyer, Priscilla Kennedy, has advanced a futile application on behalf of her client. I have identified the abusive and vexatious nature of that application above. This step is potentially a "serious abuse of the judicial system" given:

1. the nature of interests in question;

2. this litigation was by a third party attempting to intrude into an aboriginal community which has *sui generis* characteristics;

3. that the applicant sought to indemnify himself via a costs claim that would dissipate the resources of aboriginal community trust property;

4. the application was obviously futile on multiple bases; and

5. the attempts to involve other third parties on a "busybody" basis, with potential serious implications to those persons' rights.

79 I therefore order that Priscilla Kennedy *appear before me at 2:00 pm on Friday, July 28, 2017*, to make submissions on why she should not be personally responsible for some or all of the costs awards against her client, Maurice Stoney.

80 I note that in *Morin v. TransAlta Utilities Corporation*, 2017 ABQB 409 (Alta. Q.B.), Graesser J. applied *Rule* 10.50 and *Jodoin* to order costs against a lawyer who conducted litigation without obtaining consent of the named plaintiffs. Justice Graesser concludes at para 27 that a lawyer has an obligation to prove his or her authority to represent their clients. Here, that is a live issue for the "10 living brothers and sisters".

81 *Jodoin* at para 38 indicates the limited basis on which the other litigants may participate in a hearing that evaluates a potential costs award against a lawyer. The Sawridge Band and Trustees may introduce evidence as indicated in paras 33-34 of that judgment. They should also appear on July 28th to comment on this issue.

Cross-application granted; application dismissed.

End of Document

TAB 2

2017 ABQB 530
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

2017 CarswellAlta 1569, 2017 ABQB 530, [2017] A.W.L.D. 4934, [2017] A.W.L.D. 4935, [2017] A.W.L.D. 4937, [2017] A.W.L.D. 4938, [2018] 2 W.W.R. 390, 283 A.C.W.S. (3d) 40, 61 Alta. L.R. (6th) 324

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")

Maurice Felix Stoney and His Brothers and Sisters (Applicants) and Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees") (Respondents / Original Applicants) and Public Trustee of Alberta ("OPTG") (Respondent) and The Sawridge Band (Intervenor)

D.R.G. Thomas J.

Heard: July 28, 2017
Judgment: August 31, 2017
Docket: Edmonton 1103-14112

Proceedings: additional reasons to *1985 Sawridge Trust v. Alberta (Public Trustee)* (2017), 2017 CarswellAlta 1236, 2017 ABQB 436, D.R.G. Thomas J. (Alta. Q.B.)

Counsel: Donald Wilson (written), for Priscilla Kennedy
D.C. Bonora (written), Erin M Lafuente (written), for 1985 Sawridge Trustees
Edward Molstad, Q.C. (written), Ellery Sopko (written), for Intervenor, Sawridge Band

Subject: Civil Practice and Procedure; Estates and Trusts; Public

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.d Costs against solicitor personally
XXIV.7.d.ii Misconduct of solicitor

Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Costs against solicitor personally — Misconduct of solicitor
S claimed membership in First Nation but claim was rejected and affirmed by Federal Court — S brought unsuccessful application to be added to members of First Nation trust — Lawyer K was involved in protracted litigation on behalf of S — Solicitor and own client costs awarded against K personally — Unfounded, frivolous, dilatory or vexatious proceeding that denotes serious abuse of judicial system is new basis on which to order costs against lawyer — Professional discipline and court sanction for lawyer misconduct are distinct processes with separate purposes — Collateral attack on decision of Federal Court was very serious form of litigation misconduct — K conducted futile litigation that was collateral attack of prior

unappealed decision — K conducted that litigation allegedly on behalf of persons who were not her clients on busybody basis — K and S liable for full costs on joint and several basis.

Table of Authorities

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

Andrews v. Grand & Toy Alberta Ltd. (1978), [1978] 2 S.C.R. 229, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452, 19 N.R. 50, [1978] 1 W.W.R. 577, 8 A.R. 182, 1978 CarswellAlta 214, 1978 CarswellAlta 295 (S.C.C.) — considered

Boisjoli, Re (2015), 2015 ABQB 629, 2015 CarswellAlta 1889, 29 Alta. L.R. (6th) 334 (Alta. Q.B.) — considered

Boisjoli, Re (2015), 2015 ABQB 690, 2015 CarswellAlta 2036 (Alta. Q.B.) — considered

Botan v. St. Amand (2012), 2012 ABQB 260, 2012 CarswellAlta 781, 68 Alta. L.R. (5th) 359, 538 A.R. 307 (Alta. Q.B.) — considered

Botan v. St. Amand (2013), 2013 ABCA 227, 2013 CarswellAlta 1051, 85 Alta. L.R. (5th) 199, 553 A.R. 333, 583 W.A.C. 333 (Alta. C.A.) — referred to

C. (A.R.) v. C. (L.L.) (1999), 1999 CarswellAlta 868, 72 Alta. L.R. (3d) 300, [2000] 1 W.W.R. 425, (sub nom. *C. (L.L.) v. C. (A.R.)*) 180 D.L.R. (4th) 361, 39 C.P.C. (4th) 324, 256 A.R. 311, 1999 ABQB 707 (Alta. Q.B.) — referred to

C. (L.) v. Alberta (2015), 2015 ABQB 84, 2015 CarswellAlta 169, 15 Alta. L.R. (6th) 225, 605 A.R. 1 (Alta. Q.B.) — considered

Chisan v. Fielding (2017), 2017 ABQB 233, 2017 CarswellAlta 551, 98 C.P.C. (7th) 257, 76 R.P.R. (5th) 247 (Alta. Q.B.) — referred to

Chutskoff Estate v. Bonora (2014), 2014 ABQB 389, 2014 CarswellAlta 1040, 590 A.R. 288 (Alta. Q.B.) — considered

Chutskoff Estate v. Bonora (2014), 2014 ABCA 444, 2014 CarswellAlta 2380, 588 A.R. 303, 626 W.A.C. 303, 26 Alta. L.R. (6th) 255 (Alta. C.A.) — referred to

Clark v. Pezzente (2017), 2017 ABCA 220, 2017 CarswellAlta 1170 (Alta. C.A.) — considered

Cunningham v. Lilles (2010), 2010 SCC 10, 2010 CarswellYukon 21, 2010 CarswellYukon 22, 73 C.R. (6th) 1, (sub nom. *R. v. Cunningham)* 317 D.L.R. (4th) 1, (sub nom. *R. v. Cunningham)* 254 C.C.C. (3d) 1, 399 N.R. 326, 283 B.C.A.C. 280, 480 W.A.C. 280, (sub nom. *R. v. Cunningham)* [2010] 1 S.C.R. 331 (S.C.C.) — considered

Ewanchuk v. Canada (Attorney General) (2017), 2017 ABQB 237, 2017 CarswellAlta 561, 54 Alta. L.R. (6th) 135 (Alta. Q.B.) — considered

Fearn v. Canada (Customs) (2014), 2014 ABQB 114, 2014 CarswellAlta 321, 94 Alta. L.R. (5th) 318, (sub nom. *Fearn v. Canada Customs)* 586 A.R. 23 (Alta. Q.B.) — considered

Fiander v. Mills (2015), 2015 NLCA 31, 2015 CarswellNfld 230, 1149 A.P.R. 80, 368 Nfld. & P.E.I.R. 80 (N.L. C.A.) — referred to

Gauthier v. Starr (2016), 2016 ABQB 213, 2016 CarswellAlta 680, 86 C.P.C. (7th) 348 (Alta. Q.B.) — considered

Hok v. Alberta (2016), 2016 ABQB 651, 2016 CarswellAlta 2234, [2017] 6 W.W.R. 831 (Alta. Q.B.) — considered

Hok v. Alberta (2017), 2017 CarswellAlta 1143 (S.C.C.) — referred to

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27

C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — considered

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

Kavanagh v. Kavanagh (2016), 2016 ABQB 107, 2016 CarswellAlta 211 (Alta. Q.B.) — considered

Law Society (British Columbia) v. Dempsey (2005), 2005 BCSC 1277, 2005 CarswellBC 2156 (B.C. S.C.) — considered

Law Society (British Columbia) v. Dempsey (2006), 2006 BCCA 161, 2006 CarswellBC 778 (B.C. C.A. [In Chambers]) — referred to

Law Society (British Columbia) v. Mangat (2001), 2001 SCC 67, 2001 CarswellBC 2168, 2001 CarswellBC 2169, 16 Imm. L.R. (3d) 1, 205 D.L.R. (4th) 577, 157 B.C.A.C. 161, 256 W.A.C. 161, 96 B.C.L.R. (3d) 1, 276 N.R. 339, [2002] 2 W.W.R. 201, [2001] 3 S.C.R. 113, 16 Imm. L.R. (2d) 1, 2001 CSC 67 (S.C.C.) — considered

Law Society of Upper Canada v. Bogue (2017), 2017 ONLSTH 119 (L.S. Tribunal) — considered

Lymer, Re (2014), 2014 ABQB 674, 2014 CarswellAlta 2043, 9 Alta. L.R. (6th) 57 (Alta. Q.B.) — considered

MacDonald Estate v. Martin (1990), [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 121 N.R. 1, (sub nom. *Martin v. Gray*) [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, 70 Man. R. (2d) 241, 1990 CarswellMan 384, 1990 CarswellMan 233, 285 W.A.C. 241 (S.C.C.) — considered

McCargar v. Canada (2017), 2017 ABQB 416, 2017 CarswellAlta 1180 (Alta. Q.B.) — considered

Meads v. Meads (2012), 2012 ABQB 571, 2012 CarswellAlta 1607, [2013] 3 W.W.R. 419, 74 Alta. L.R. (5th) 1, 543 A.R. 215 (Alta. Q.B.) — considered

Mealey (Litigation Guardian of) v. Godin (1999), 1999 CarswellNB 380, 179 D.L.R. (4th) 231, 38 C.P.C. (4th) 267, (sub nom. *Mealey v. Godin*) 221 N.B.R. (2d) 372, (sub nom. *Mealey v. Godin*) 567 A.P.R. 372 (N.B. C.A.) — considered

Moore v. Apollo Health & Beauty Care (2017), 2017 ONCA 383, 2017 CarswellOnt 6742 (Ont. C.A.) — considered

Morin v. TransAlta Utilities Corporation (2017), 2017 ABQB 409, 2017 CarswellAlta 1125 (Alta. Q.B.) — followed

Ontario v. 974649 Ontario Inc. (2001), 2001 SCC 81, 2001 CarswellOnt 4251, 2001 CarswellOnt 4252, (sub nom. *R. v. 974649 Ontario Ltd.*) 56 O.R. (3d) 359 (headnote only), (sub nom. *R. v. 974649 Ontario Inc.*) 206 D.L.R. (4th) 444, (sub nom. *R. v. 974649 Ontario Inc.*) 159 C.C.C. (3d) 321, 47 C.R. (5th) 316, (sub nom. *R. v. 974649 Ontario Inc.*) 88 C.R.R. (2d) 189, (sub nom. *R. v. 974649 Ontario Inc.*) 279 N.R. 345, (sub nom. *R. v. 974649 Ontario Inc.*) 154 O.A.C. 345, (sub nom. *R. v. 974649 Ontario Inc.*) [2001] 3 S.C.R. 575 (S.C.C.) — considered

Osborne v. Pinno (1997), 1997 CarswellAlta 880, 208 A.R. 363, 56 Alta. L.R. (3d) 404, 19 C.P.C. (4th) 383 (Alta. Q.B.) — referred to

Pacific Mobile Corp. v. Hunter Douglas Canada Ltd. (1979), [1979] 1 S.C.R. 842, 26 N.R. 453, 1979 CarswellQue 166, 1979 CarswellQue 166F (S.C.C.) — considered

Parkridge Homes Ltd. v. Anglin (1996), 1996 CarswellAlta 1136 (Alta. Q.B.) — considered

Peddle v. Alberta Treasury Branches (2004), 2004 ABQB 608, 2004 CarswellAlta 1054 (Alta. Q.B.) — considered

Pintea v. Johns (2017), 2017 SCC 23, 2017 CSC 23, 2017 CarswellAlta 680, 2017 CarswellAlta 681 (S.C.C.) — considered

Québec (Directeur des poursuites criminelles et pénales) c. Jodoin (2017), 2017 SCC 26, 2017 CSC 26, 2017 CarswellQue 3091, 2017 CarswellQue 3092, 346 C.C.C. (3d) 433, 408 D.L.R. (4th) 581, 37 C.R. (7th) 1 (S.C.C.) — followed

R. v. Cody (2017), 2017 SCC 31, 2017 CSC 31, 2017 CarswellNfld 251, 2017 CarswellNfld 252, 37 C.R. (7th) 266, 349 C.C.C. (3d) 488, 411 D.L.R. (4th) 619 (S.C.C.) — considered

R. v. Creasser (1996), 43 Alta. L.R. (3d) 1, [1996] 10 W.W.R. 391, (sub nom. *R. v. C. (D.D.)*) 110 C.C.C. (3d) 323, 3 C.R. (5th) 38, 187 A.R. 279, 127 W.A.C. 279, 1996 CarswellAlta 770, 1996 ABCA 303 (Alta. C.A.) — considered

R. v. Dick (2002), 2002 BCCA 27, 2002 CarswellBC 216, 163 B.C.A.C. 62, 267 W.A.C. 62 (B.C. C.A.) — considered

R. v. Eddy (2014), 2014 ABQB 391, 2014 CarswellAlta 1096, 2014 D.T.C. 5098 (Eng.), [2014] 10 W.W.R. 131, [2014] G.S.T.C. 91, 583 A.R. 268, 318 C.R.R. (2d) 61, 1 Alta. L.R. (6th) 131 (Alta. Q.B.) — considered

R. v. Hok (2017), 2017 ABCA 63, 2017 CarswellAlta 232 (Alta. C.A.) — considered

R. v. Jordan (2016), 2016 SCC 27, 2016 CSC 27, 2016 CarswellBC 1864, 2016 CarswellBC 1865, 335 C.C.C. (3d) 403, 398 D.L.R. (4th) 381, 29 C.R. (7th) 235, 484 N.R. 202, 388 B.C.A.C. 111, 670 W.A.C. 111, 358 C.R.R. (2d) 97, [2016] 1 S.C.R. 631 (S.C.C.) — considered

R. v. Maleki (2007), 2007 ONCJ 430, 2007 CarswellOnt 6209 (Ont. C.J.) — considered

R. v. Reddick (2002), 2002 SKCA 89, 2002 CarswellSask 455 (Sask. C.A.) — considered

R. v. Tossounian (2017), 2017 ONCA 618, 2017 CarswellOnt 11236 (Ont. C.A.) — considered

R. v. Wilson (1983), [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 1983 CarswellMan 154, 1983 CarswellMan 189 (S.C.C.) — considered

Robertson v. Edmonton (City) Police Service (2005), 2005 ABQB 499, 2005 CarswellAlta 949, 16 C.P.C. (6th) 229, 53 Alta. L.R. (4th) 355, [2006] 6 W.W.R. 739, (sub nom. *Robertson v. Edmonton Chief of Police)* 385 A.R. 325 (Alta. Q.B.) — considered

Starr v. Ontario (Commissioner of Inquiry) (1990), [1990] 1 S.C.R. 1366, (sub nom. *Starr v. Houlden)* 68 D.L.R. (4th) 641, (sub nom. *Starr v. Houlden)* 110 N.R. 81, (sub nom. *Starr v. Houlden)* 41 O.A.C. 161, (sub nom. *Starr v. Houlden)* 55 C.C.C. (3d) 472, (sub nom. *Starr v. Houlden)* 72 O.R. (2d) 701 (note), 1990 CarswellOnt 998, 1990 CarswellOnt 1299 (S.C.C.) — considered

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

Stoney v. Twinn (2016), 2016 ABCA 51, 2016 CarswellAlta 238, (sub nom. *Twinn v. Public Trustee (Alta.))* 616 A.R. 176, (sub nom. *Twinn v. Public Trustee (Alta.))* 672 W.A.C. 176 (Alta. C.A.) — referred to

Thompson v. IUOE, Local 955 (2017), 2017 ABQB 210, 2017 CarswellAlta 505, 2 C.P.C. (8th) 299 (Alta. Q.B.) — considered

Thompson v. International Union of Operating Engineers Local No 995 (2017), 2017 ABCA 193, 2017 CarswellAlta 1039 (Alta. C.A.) — referred to

Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General) (2014), 2014 SCC 59, 2014 CSC 59, 2014 CarswellBC 2873, 2014 CarswellBC 2874, 375 D.L.R. (4th) 599, [2014] 11 W.W.R. 213, 59 C.P.C. (7th) 1, 62 B.C.L.R. (5th) 1, 74 Admin. L.R. (5th) 181, 51 R.F.L. (7th) 1, 463 N.R. 336, 361 B.C.A.C. 1, 619 W.A.C. 1, (sub nom. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General))* [2014] 3 S.C.R. 31, (sub nom. *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General))* 320 C.R.R. (2d) 239 (S.C.C.) — considered

Young v. Noble (2017), 2017 NLCA 48, 2017 CarswellNfld 332 (N.L. C.A.) — considered

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — considered

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2012), 2012 ABQB 365, 2012 CarswellAlta 1042, 75 Alta. L.R. (5th) 188, (sub nom. *Twinn v. Public Trustee (Alta.)*) 543 A.R. 90, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee)*) [2013] 3 C.N.L.R. 395 (Alta. Q.B.) — considered

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2015), 2015 ABQB 799, 2015 CarswellAlta 2373 (Alta. Q.B.) — considered

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2017), 2017 ABQB 299, 2017 CarswellAlta 745 (Alta. Q.B.) — considered

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2013), 2013 ABCA 226, 2013 CarswellAlta 1015, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee)*) [2013] 3 C.N.L.R. 411, 85 Alta. L.R. (5th) 165, (sub nom. *Twinn v. Alberta (Public Trustee)*) 553 A.R. 324, (sub nom. *Twinn v. Alberta (Public Trustee)*) 583 W.A.C. 324 (Alta. C.A.) — referred to

1985 Sawridge Trust v. Alberta (Public Trustee) (2017), 2017 ABQB 377, 2017 CarswellAlta 1193 (Alta. Q.B.) — considered

644036 Alberta Ltd. v. Morbank Financial Inc. (2014), 2014 ABQB 681, 2014 CarswellAlta 2091, 26 Alta. L.R. (6th) 153 (Alta. Q.B.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 7 — considered

Judicature Act, R.S.A. 2000, c. J-2
s. 23.1(5) [en. 2007, c. 21, s. 2] — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 1.2 — considered

R. 2.11(c) — referred to

R. 2.11(d) — referred to

R. 2.11-2.21 — referred to

R. 2.14 — referred to

R. 2.14(4) — referred to

R. 10.29(1) — referred to

R. 10.50 — considered

ADDITIONAL REASONS to decision reported at *1985 Sawridge Trust v. Alberta (Public Trustee)* (2017), 2017 ABQB 436, 2017 CarswellAlta 1236 (Alta. Q.B.), as to costs.

D.R.G. Thomas J.:

I Introduction

1 On July 12, 2017 I issued *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 436 (Alta. Q.B.) ["*Sawridge #6*"] where I denied an application by Maurice Felix Stoney "and his 10 living brothers and sisters" to be added as interveners or parties to a proceeding intended to settle and distribute the assets of the 1985 Sawridge Trust, a trust set up by the Sawridge Band on behalf of its members.

2 In brief, Maurice Stoney had claimed he was in fact and law a member of the Sawridge Band, had been improperly denied that status, and therefore is a beneficiary of the Trust, and had standing to participate in this Action.

3 I denied that application on the basis (para 48) that:

> 1. Maurice Stoney is estopped from making this argument via his concession in *Huzar v. Canada*, [2000] F.C.J. No. 873 (Fed. C.A.) (QL), (2000), 258 N.R. 246 (Fed. C.A.) that this argument has no legal basis.
>
> 2. Maurice Stoney made this same argument in *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.), where it was rejected. Since Mr. Stoney did not choose to challenge that decision, that finding of fact and law has 'crystallized'.
>
> 3. In *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2015 ABQB 799 (Alta. Q.B.) at para 35, time extension denied 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.), I concluded the question of Band membership should be reviewed in the Federal Court, and not in the Advice and Direction Application by the 1985 Sawridge Trustees.
>
> 4. In any case I accept and adopt the reasoning of *Stoney v. Sawridge First Nation*, as correct, though I was not obligated to do so.

4 I made no findings in relation to Maurice Stoney's "10 living brothers and sisters" because I had no evidence they were actually voluntary participants in the application: *Sawridge #6* at paras 8-12.

5 At the conclusion of *Sawridge #6*, I ordered solicitor and own indemnity costs against Maurice Stoney (paras 67-68), and that he make written submissions on whether he should be subject to court access restrictions, and, if so, what those court access restrictions should be (paras 53-66). These steps were taken in response to what is clearly abusive litigation misconduct. Also at paras 71-81, I concluded that the activities of Maurice Stoney's lawyer, Ms. Priscilla Kennedy ["Kennedy"], required review.

6 I therefore ordered that Kennedy appear before me on July 28, 2017 and that the 1985 Sawridge Trust Trustees and the Sawridge Band could enter certain restricted evidence that is potentially relevant to whether she should be personally responsible for some or all of her client's costs penalty.

7 Prior to the July 28, 2017, hearing the Court received three affidavits relating to whether Maurice Stoney had obtained consent from his siblings to represent them in this litigation. At the hearing itself, Mr. Donald Wilson of DLA Piper represented Kennedy, who is also a lawyer with that firm. Mr. Wilson submitted that a costs award against Kennedy was unnecessary. Counsel for the Trust and the Sawridge Band argued costs were appropriate either vs Kennedy personally, or against Kennedy and Maurice Stoney on a joint and several basis.

8 At the July 28, 2017 hearing the issue arose of whether two siblings of Maurice Stoney who had provided affidavit

evidence that they authorized Maurice Stoney to act on their behalf should also be subject to the solicitor and own client indemnity costs award which I had ordered in *Sawridge #6* at para 67. I rejected that possibility in light of the limited and after-the-fact evidence and the question of informed consent.

9 I reserved my decision at the end of that hearing concerning Kennedy's potentially paying costs, with reasons to follow. These are those reasons.

II Background

10 This Action was commenced by Originating Notice, filed on June 12, 2011 by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application". In brief, this litigation involves the Court providing directions on how the property held in an aboriginally-owned trust may be equitably distributed to its beneficiaries, members of the Sawridge Band.

11 The history of the Advice and Direction Application is set out in previous decisions (including the Orders taken out in relation thereto) reported as *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365, 543 A.R. 90 (Alta. Q.B.) ("*Sawridge #1*"), aff'd 2013 ABCA 226, 553 A.R. 324 (Alta. Q.B.) ("*Sawridge #2*"), *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2015 ABQB 799 (Alta. Q.B.) ("*Sawridge #3*"), time extension denied 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.); *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2017 ABQB 299 (Alta. Q.B.) ("*Sawridge #4*"). A separate attempt by three other third parties to inject themselves into this litigation was rejected on July 5, 2017, and that decision is reported as *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 377 (Alta. Q.B.) ("*Sawridge #5*"). Collectively, these are the "*Sawridge Decisions*".

12 Some of the terms used in this decision ("*Sawridge #7*") are also defined in the earlier *Sawridge Decisions*.

III Evidence and Submissions at the July 28 Hearing

13 *Sawridge #6* provides detailed reasons on why I denied Maurice Stoney's application (paras 32-54) and concluded that Maurice Stoney's siblings should not be captured by the potential consequences of that application (paras 8-12).

14 I also concluded that the Maurice Stoney application exhibited three of the characteristic indicia of abusive litigation, as reviewed in *Chutskoff Estate v. Bonora*, 2014 ABQB 389 (Alta. Q.B.) at para 92, (2014), 590 A.R. 288 (Alta. Q.B.), aff'd 2014 ABCA 444, 588 A.R. 303 (Alta. C.A.):

> 1. Collateral attack that attempts to revisit an issue that has already been determined by a court of competent jurisdiction, to circumvent the effect of a court or tribunal decision, using previously raised grounds and issues.
>
> 2. Bringing hopeless proceedings that cannot succeed, here in both the present application and the *Sawridge #3* appeal where Maurice Stoney was an uninvolved third party.
>
> 3. Initiating "busybody" lawsuits to enforce the rights of third parties, here the recruited participation of Maurice Stoney's "10 living brothers and sisters."

15 This is the litigation misconduct that may potentially attract court sanction for Kennedy as she was the lawyer who represented Maurice Stoney when he engaged in this abusive litigation.

A. Priscilla Kennedy

16 As noted above, Ms. Kennedy was represented at the July 28, 2017 hearing by Donald Wilson, a partner at the law firm where Kennedy is employed. He acknowledged that a lawyer's conduct is governed by *Rule* 1.2, and that the question of Maurice Stoney's status had been the subject of judicial determination prior to the August 12, 2016 application.

17 Nevertheless, Mr. Wilson argued that Kennedy should not be sanctioned because Kennedy " . . . litigates with her heart." She had been influenced by a perceived injustice against Maurice Stoney, and Maurice Stoney's intention to be a member of the Sawridge Band, which "... goes to the totality of his being." If Kennedy is guilty of anything, it is that she "... is seeing a wrong and persistently tried to right that wrong."

18 Nevertheless, Mr. Wilson did acknowledge that the August 12, 2016 application was "a bridge too far" and should not have occurred. He advised the Court that he had discussed the Sawridge Advice and Direction Application with Kennedy, and concluded Maurice Stoney had exhausted his remedies. The August 12, 2016 application was not made with a bad motive or the intent to abuse court processes, but, nevertheless, " . . . it absolutely had that effect ...".

19 As for the "busybody" aspect of this litigation, Mr. Wilson argued that *Morin v. TransAlta Utilities Corporation*, 2017 ABQB 409 (Alta. Q.B.) involved a different scenario, since in that instance certain purported litigants were dead. The short timeline for this application had meant it was difficult to assemble evidence that Maurice Stoney was authorized to represent his siblings. These individuals were "a little older" and "[s]ome are not in the best of health."

20 The Court received three affidavits that relate to whether Maurice Stoney was authorized to represent his other siblings in the Sawridge Advice and Direction Application:

1. Shelley Stoney, dated July 20, 2017, saying she is the daughter of Bill Stoney and the niece of Maurice Stoney. She is responsible "for driving my father and uncles who are all suffering health problems and elderly." Shelley Stoney attests " . . . from discussions among my father and his brothers and sisters" that Maurice Stoney was authorized to bring the August 12, 2016 application on their behalf.

2. Bill Stoney, brother of Maurice Stoney, dated July 20, 2017, saying he authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.

3. Gail Stoney, sister of Maurice Stoney, dated July 20, 2017, saying she authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.

None of these affidavits attach any documentary evidence to support these statements. Kennedy has not provided any documentary evidence to support a relationship with these individuals or Maurice Stoney's other siblings.

21 Mr. Wilson acknowledged the limited value of this largely hearsay evidence.

22 Kennedy's counsel argued that in the end no costs award against Kennedy personally is necessary because she has already had the seriousness of her conduct "driven home" by the *Sawridge #6* decision and the presence of reporters in the courtroom. He said that is equally as effective as an order of contempt or a referral to the Law Society.

B. Sawridge Band

23 Mr. Molstad Q.C., counsel for the Sawridge Band, stressed that what had occurred was serious litigation misconduct. Kennedy had conducted a collateral attack with full knowledge of the prior unsuccessful litigation on this topic. She at the latest knew this claim was futile during the 2013 Federal Court judicial review that confirmed Maurice Stoney would not be admitted into the Sawridge Band. It is unknown whether Kennedy had any role in the subsequent unsuccessful 2014 Canadian Human Rights Commission challenge to the Sawridge Band's denying him membership, but she did know that application had occurred.

24 Kennedy had acted in an obstructionist manner during cross-examination of Maurice Stoney. She made false statements in her written submissions.

25 As in *Morin v. TransAlta Utilities Corporation*, Kennedy acted without instructions from the persons she purported to represent. Informed consent is a critical factor in proper legal representation. Where that informed consent is absent then a

lawyer who acts without authority should solely be responsible for the subsequent litigation costs.

26 The affidavit evidence does not established Kennedy was authorized to act on behalf of Maurice Stoney's siblings. If these persons were participants in this litigation they could be subject to unfavourable costs awards.

27 The Sawridge Band again confirmed that the *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.) costs order against Maurice Stoney remained unpaid. The costs awarded against Maurice Stoney in *Stoney v. Twinn*, 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.) also remain unpaid. Kennedy in her written submissions indicated that Maurice Stoney and his siblings have limited funds. Kennedy should be made personally liable for litigation costs so that the Sawridge Band and Trustees can recover the expenses that flowed from this meritless action.

C. Sawridge Trustees

28 The Sawridge Trustees adopted the submissions of the Sawridge Band. The question of Maurice Stoney's status had been decided prior to the August 12, 2016 application.

29 Counsel for the Trustees stressed that the Court should review the transcript of the cross-examination of Maurice Stoney's affidavit. During that process Kennedy objected to questions concerning whether Maurice Stoney had read certain court decisions, and Kennedy said Maurice Stoney did not understand what those decisions meant. That transcript also illustrated that Kennedy was " . . . the one holding the reins."

30 This meritless litigation was effectively conducted on the backs of the Sawridge Band community and dissipated the Trust. The only appropriate remedy is a full indemnity costs order vs Kennedy.

IV. Court Costs Awards vs Lawyers

31 *Sawridge #6* at paras 69-77 reviews the subject of when a court should make a lawyer personally liable for costs awarded against their client. *Rule* 10.50 of the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"] authorizes the Court to order a lawyer pay for their client's costs obligations where that lawyer has engaged in "serious misconduct":

> 10.50 If a lawyer for a party engages in serious misconduct, the Court may order the lawyer to pay a costs award with respect to a person named in the order.

32 The Supreme Court of Canada in *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin*, 2017 SCC 26 (S.C.C.) at para 29, (2017), 408 D.L.R. (4th) 581 (S.C.C.) ["*Jodoin*"] has also very recently commented on costs awards against lawyers, and identified two scenarios where these kinds of awards are appropriate, either:

> 1. "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer", or
>
> 2. "dishonest or malicious misconduct on his or her part, that is deliberate".

33 Alberta trial courts have often referenced the judgment of *Robertson v. Edmonton (City) Police Service*, 2005 ABQB 499, 385 A.R. 325 (Alta. Q.B.) as providing the test for when a lawyer's activities have reached a threshold that warrants a personal award of costs. In that decision Slatter J (as he then was) surveyed contemporary jurisprudence and concluded at para 21:

> . . . The conduct of the barrister must demonstrate or approach bad faith, or deliberate misconduct, or patently

unjustified actions, although a formal finding of contempt is not needed ...

34 I conclude this is no longer the entire test. *Jodoin* indicates a new two branch analysis. "[D]ishonest or malicious misconduct on his or her part, that is deliberate" is the category identified in *Robertson v. Edmonton (City) Police Service.* The second branch, "unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system", is a new basis on which to order costs against a lawyer.

35 I believe this is a useful point at which to look further into what is "serious abuse" that warrants a costs penalty vs a lawyer, following the first of the two branches of this analysis. I consider the language in *Rule* 10.50 ("serious misconduct") and *Jodion* ("serious abuse") to be equivalent. I use the Supreme Court of Canada's language in the analysis that follows.

36 In *Sawridge #6* at para 78 I indicated five elements that contributed to what I concluded was potentially "serious abuse":

1. the nature of interests in question;

2. this litigation was by a third party attempting to intrude into an aboriginal community which has *sui generis* characteristics;

3. that the applicant sought to indemnify himself via a costs claim that would dissipate the resources of aboriginal community trust property;

4. the application was obviously futile on multiple bases; and

5. the attempts to involve other third parties on a "busybody" basis, with potential serious implications to those persons' rights.

37 Ms. Kennedy's litigation conduct is a useful test example to evaluate whether her actions represent "serious abuse", and then should result in her being liable, in whole or in part, for litigation costs ordered against her client.

A. The Shifting Orientation of Litigation in Canada, Court Jurisdiction, and Control of Lawyers

38 Before proceeding to review the law on costs awards vs lawyers I believe it is helpful to step back and look more generally at how court processes in Canada are undergoing a fundamental shift away from blind adherence to procedure and formality, and towards a court apparatus that focuses on function and proportional response. This transformation of the operation of front-line trial courts has not simply been encouraged by the Supreme Court of Canada. Implementing this new reality is *an obligation* for the courts, but also for lawyers.

39 This has been called a "culture shift" (for example, *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para 2, [2014] 1 S.C.R. 87 (S.C.C.)), but this transformation is, in reality, more substantial than that. Court litigation, like any process, needs rules. The common law aims to develop rules that provide predictable results. That has several parts. One category of rules establishes functional principles of law, so that persons may structure their activities so that they conform with the law. A second category of rules aims to guarantee what is typically called "procedural fairness". Procedural fairness sets guidelines for how information is presented to the court and tested, how parties structure and order their arguments, that parties know and may respond to the case against them, and how decision-makers explain the reasoning and conclusions that were the basis to reach a decision. Much of these guidelines have been codified in legislation, such as the *Rules*. Other elements are captured as principles of fundamental justice, as developed in relation to *Charter*, s 7.

40 There is little dispute that litigation in Canada is now a very complex process, particularly in the superior courts such as the Alberta Court of Queen's Bench. Justice Karakatsanis in *Hryniak v. Mauldin* at para 1 observed that meaningful access to justice is now "the greatest challenge to the rule of law in Canada today." What is the obstacle? "Trials have become expensive and protracted." Canadians can no longer afford to sue or defend themselves. That strikes at the rule of law itself.

Justice Karkatsanis continues to explain that historic over-emphasis on procedural rights and exhaustive formality has made civil litigation impractical and inaccessible (para 2):

> . . . The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

41 Thus, the "culture shift" is a movement away from rigid formality to procedures that are *proportionate* and lead to results that are "fair and just". The Supreme Court of Canada in *Hryniak v. Mauldin* called for better ways to control litigation to ensure court processes serve their actual function - resolving disputes between persons - and to reflect economic realities.

42 More recently the Supreme Court has in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 (S.C.C.) and *R. v. Cody*, 2017 SCC 31 (S.C.C.) stressed it is time for trial courts to develop and deploy effective and timely processes "to improve efficiency in the conduct of legitimate applications and motions" (*R. v. Cody*, at para 39). In *R. v. Cody* the Supreme Court at para 38 instructs that trial judges test criminal law applications on whether they have "a *reasonable* prospect of success" [emphasis added], and if not, they should be dismissed summarily. That is in the context of criminal litigation, with its elevated procedural safeguards that protect an accused's rights to make full answer and defence. Both *R. v. Jordan* and *R. v. Cody* stress *all* court participants in the criminal justice process - the Crown, defence counsel, and judges - have an obligation to make trial processes more efficient and timely. This too is part of the "culture shift", and a rejection of "a culture of complacency".

43 The increasingly frequent appearance of self-represented litigants in Canadian courts illustrates how the court's renewed responsibility to achieve "fair and just" but "proportionate and effective" results is not simply limited to 'streamlining' processes. Chief Justice McLachlin has instructed that the "culture shift" extends to all court proceedings, but "especially those involving self-represented parties": *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (S.C.C.) at para 110, [2014] 3 S.C.R. 31 (S.C.C.).

44 As I have illustrated, a key aspect of the "culture shift" means reconsidering how procedural formalities can be an obstacle to "fair and just" litigation. Very recently in *Pintea v. Johns*, 2017 SCC 23 (S.C.C.) the Supreme Court of Canada endorsed the Canadian Judicial Counsel *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) ["*Statement of Principles*"]. That document and its Principles are important as they illustrate how the traditional formal rules of procedure and evidence bend to the new reality faced by trial courts, and what is required to provide a "fair and just" result for self-represented litigants:

> Principle 2 on page 5:
>
> > Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.
>
> Principle 3 on page 8:
>
> > Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

I note these and other instructions to trial judges in the "*Statement of Principles*" are not permissive, but mandatory. See for example: ***Gray v Gray***, 2017 CanLII 55190 (Ont Sup Ct J); *Young v. Noble*, 2017 NLCA 48 (N.L. C.A.); *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383 (Ont. C.A.); *R. v. Tossounian*, 2017 ONCA 618 (Ont. C.A.).

45 Read plain, this is a substantial rejection by the Supreme Court of Canada of the traditional approach, that rules of procedure and evidence apply the same to everyone who appears before a Canadian court. The reason for that is obvious to anyone who has observed a self-represented person in court. They face a complex apparatus, whose workings are at times both arcane and unwritten.

46 These objectives are all relevant to how the gate of "access to justice" swings both open and closed. The *Statement of Principles* is not simply a licence for self-represented persons to engage the courts as an exception to the rules. They also have responsibilities: *Clark v. Pezzente*, 2017 ABCA 220 (Alta. C.A.) at para 13. What is particularly pertinent to the discussion that follows is how the *Statement of Principles* at p 10 indicate that self-represented litigants should also adhere to standards expected of legal professionals, such as politeness, and not abusing the courts personnel, processes, and resources:

> Self-represented persons are required to be respectful of the court process and the officials within it. Vexatious litigants will not be permitted to abuse the process.

47 Similarly, the *Statement of Principles* in its commentary at p 5 emphasizes that abusive litigation is not excused because someone is self-represented:

> Self-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures. In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it. The ability of judges to promote access may be affected by the actions of self-represented litigants themselves.

48 That objective of controlling litigation abuse is a critical facet of the "new reality". This is reflected in recent jurisprudence of this Court. One mechanism to achieve this "culture shift" is interdiction of abusive litigation, for example via vexatious litigant orders issued under this Court's inherent jurisdiction (surveyed in *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 14-25, (2016), 273 A.C.W.S. (3d) 533 (Alta. Q.B.), leave denied 2017 ABCA 63 (Alta. C.A.), leave to the SCC requested, 37624 (12 April 2017) [2017 CarswellAlta 1143 (Alta. Q.B.)]). Recent Alberta jurisprudence in this strategic direction has stressed how "fair and just" litigant control responses are ones that tackle both caused and anticipated injuries, for example:

> 1. identifying litigation abuse that warrants intervention in a prospective manner, by investigating what is the plausible future misconduct by an abusive litigant, rather than a rote and reflex response where the Court only restricts forms of abuse that have already occurred (*Hok v. Alberta*, at paras 35-37; *Thompson v. IUOE, Local 955*, 2017 ABQB 210 (Alta. Q.B.) at para 61, leave denied 2017 ABCA 193 (Alta. C.A.); *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237 (Alta. Q.B.) at para 160-164; *Chisan v. Fielding*, 2017 ABQB 233 (Alta. Q.B.) at paras 52-54);
>
> 2. recognition that certain kinds of litigation abuse warrant a stricter response given their disproportionate harm to court processes (*Ewanchuk v. Canada (Attorney General)* at paras 170-187); and
>
> 3. taking special additional steps where an abusive litigant defies simple control in his or her attacks on the Court, its personnel, and other persons (*Boisjoli, Re*, 2015 ABQB 629, 29 Alta. L.R. (6th) 334 (Alta. Q.B.); *Boisjoli, Re*, 2015 ABQB 690 (Alta. Q.B.)).

49 In many ways none of this should be new. The *Alberta Rules of Court*, *Rule* 1.2 statements of purpose and intention stress both the Court and parties who appear before it are expected to resolve disputes in a timely, cost-effective manner that respects the resources of the Court.

50 What is new are the *implications* that can be drawn from a lawyer's actions and inactions. They, too, must be part of the "culture shift". If their actions, directly or by implication, indicate that a lawyer is not a part of that process, then that is an indication of intent. The future operation of this and other trial courts will depend in no small way on the manner in which

lawyers conduct themselves. If they elect to misuse court procedures then negative consequences may follow.

B. Costs Awards Against Lawyers

1. The Court's Jurisdiction to Control Litigation and Lawyers

51 Recent jurisprudence, and particularly *Jodoin*, has clarified the court's supervisory function in relation to lawyers. This is a facet of the inherent jurisdiction of a court to manage and control its own proceedings, which is reviewed in the often-cited paper by I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Leg Probs 23. The management and control power is a common law authority possessed by both statutory and inherent jurisdiction courts (*Jodoin* at para 17), that:

> . . . flows the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice ... [Citations omitted.]
>
> (*Jodoin* at para 18.)

52 *Jodoin* at paras 21, 24 discusses two separate court-mediated lawyer discipline mechanisms, contempt of court vs awards of costs. While "the criteria . . . are comparable", these two processes are distinguished in a functional sense by the degree of proof, the possibility of detention, and the implications of a sanction on a lawyer's career:

> . . . Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt ...
>
> . . .
>
> In most cases . . . the implications for a lawyer of being ordered personally to pay costs are less serious than [a finding of contempt or law society discipline]. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. ...

53 Of course, lawyers are also potentially subject to professional discipline by their supervising Law Society. Gascon J in *Jodoin* at paras 20, 22, citing *Cunningham v. Lilles*, 2010 SCC 10 (S.C.C.) at para 35, [2010] 1 S.C.R. 331 (S.C.C.), is careful to distinguish how professional discipline and court sanction for lawyer misconduct are distinct processes with separate purposes:

> The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. . . .
>
> As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public . . . However, the judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:
>
> The court's authority is preventative — to protect the administration of justice and ensure trial fairness. The

> disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court.

54 The Canadian courts' inherent jurisdiction extends to review of lawyers' fees (*Mealey (Litigation Guardian of) v. Godin* (1999), 179 D.L.R. (4th) 231 (N.B. C.A.) at para 20, (1999), 221 N.B.R. (2d) 372 (N.B. C.A.)).

55 Inherent jurisdiction provides the authority for a court to scrutinize and restrict persons who attempt to act as a litigation representative. This usually emerges in relation to problematic layperson representatives. For example, in *R. v. Dick*, 2002 BCCA 27, 163 B.C.A.C. 62 (B.C. C.A.), the British Columbia Court of Appeal evaluated whether an agent with a history of abusive litigation activities should be permitted to act as a representative. The British Columbia Court of Appeal concluded courts have a responsibility to ensure persons who appear before the court are properly represented, and more generally to maintain the integrity of the court process: para 7. Permission to act as an agent is a privilege subject solely to the court's discretion: para 6. A person who is dishonest, shows lack of respect for the law, or who engaged in litigation abuse is not an appropriate agent. Similar results were ordered in *Gauthier v. Starr*, 2016 ABQB 213, 86 C.P.C. (7th) 348 (Alta. Q.B.); *Peddle v. Alberta Treasury Branches*, 2004 ABQB 608, 133 A.C.W.S. (3d) 253 (Alta. Q.B.); *R. v. Maleki*, 2007 ONCJ 430, 74 W.C.B. (2d) 816 (Ont. C.J.); *R. v. Reddick*, 2002 SKCA 89, 54 W.C.B. (2d) 646 (Sask. C.A.); *Law Society (British Columbia) v. Dempsey*, 2005 BCSC 1277, 142 A.C.W.S. (3d) 346 (B.C. S.C.), affirmed 2006 BCCA 161, 149 A.C.W.S. (3d) 735 (B.C. S.C.).

56 It seems to me that the same should be true for lawyers. Appellate jurisprudence is clear that courts possess an inherent jurisdiction to remove a lawyer from the record, though this usually occurs in the context of a conflict of interest, see for example *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.)at 1245, (1990), 77 D.L.R. (4th) 249 (S.C.C.). I see no reason why a Canadian court cannot intervene to remove a lawyer if that lawyer is not an appropriate court representative. While that is undoubtedly an unusual step, rogue lawyers are not unknown. For example, the Law Society of Upper Canada has recently on an interim basis restricted the access of a lawyer, Glenn Patrick Bogue, who was advancing abusive and vexatious Organized Pseudolegal Commercial Argument ["OPCA"] concepts (*Meads v. Meads*, 2012 ABQB 571, 543 A.R. 215 (Alta. Q.B.)) in a number of court proceedings across Canada: *Law Society of Upper Canada v. Bogue*, 2017 ONLSTH 119 (L.S. Tribunal). It is disturbing that this vexatious litigation had been going on for over a year.

57 In relation to control of problematic lawyers I note that the *Judicature Act*, s 23.1(5) indicates that what are commonly called "vexatious litigant orders" cannot be used to restrict court access by a lawyer or other authorized person, provided they are acting as the representative of an abusive and vexatious litigant:

> An order under subsection (1) or (4) may not be made against a member of The Law Society of Alberta or a person authorized under section 48 of the Legal Profession Act when acting as legal counsel for another person.

58 Arguably, section 23.1(5) is intended to extinguish this Court's inherent jurisdiction to impose some supervisory or preliminary review element to a lawyer's court filings. While I will not continue to investigate the operation of this provision, I question whether *Judicature Act*, s 23.1(5) is constitutionally valid, since it purports to extinguish an element of the Alberta superior court's inherent jurisdiction to control its own processes, but does not provide for an alternative agency or tribunal that can take steps of this kind. Any argument that the Legislature has delegated that task to the Law Society of Alberta fails to acknowledge the distinct and separate court-mediated lawyer-control functionality identified by the Supreme Court of Canada in *Jodoin* and its predecessor judgments.

2. The Nuremberg Defence - I Was Just Following Orders

59 Lawyers are subject to a number of different forms of legal duties and responsibilities. They are employees of their client, and are bound by the terms of that contract. But a lawyer's allegiance is not solely to whoever pays their bills.

60 When lawyers are admitted to the Alberta Bar a lawyer swears an oath of office that includes this statement:

> That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. I will not seek to destroy anyone's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favor or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta. [Emphasis added.]
>
> This is not some empty ceremony, but instead these words are directly relevant to a lawyer's duties, and the standard expected of him or her by the courts: *Osborne v. Pinno* (1997), 208 A.R. 363 (Alta. Q.B.) at para 22, (1997), 56 Alta. L.R. (3d) 404 (Alta. Q.B.); *C. (A.R.) v. C. (L.L.)*, 1999 ABQB 707 (Alta. Q.B.) at para 26, (1999), 180 D.L.R. (4th) 361 (Alta. Q.B.).

61 This duty is also reflected in the Law Society of Alberta *Code of Conduct*. Though that document largely focuses on lawyers' duty to their clients and interactions with the Law Society, the *Code of Conduct* also requires that a lawyer operate " . . . honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.": Chapter 5.1-1. The *Code of Conduct* then continues in Chapter 5.1-2 to identify prohibitions, including that a lawyer may not:

- abuse a tribunal by proceedings that are motivated by malice and conducted to injure the other party (Chapter 5.1-2(a));
- "take any step . . . that is clearly without merit" (Chapter 5.1-2(b));
- "unreasonably delay the process of the tribunal" (Chapter 5.1-2(c));
- knowingly attempt to deceive the court by offering false evidence, misstating facts or law, or relying on false or deceptive affidavits (Chapter 5.1-2(g));
- knowingly misstate legislation (Chapter 5.1-2(h));
- advancing facts that cannot reasonably be true (Chapter 5.1-2(i)); and
- failure to disclose relevant adverse authorities (Chapter 5.1-2(n)).

62 The *Code of Conduct* chapter citations above are to the replacement *Code of Conduct* that came into force on November 1, 2011. Interestingly, I was only able to locate one reported post-2011 Law Society of Alberta Hearing Committee decision that references Chapter 5.1-1 or the 5.1-2 subsections, *Law Society of Alberta v Botan*, 2016 ABLS 8, where lawyer's abuse of court processes led to a one-day suspension.

63 Regardless, there is no question that lawyers have a separate, distinct, and direct obligation to the Court. As Justice Gascon recently stated in *Jodoin* at para 18:

> . . . As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct ...

64 Similarly *Law Society (British Columbia) v. Mangat*, 2001 SCC 67 (S.C.C.) at para 45, [2001] 3 S.C.R. 113 (S.C.C.), states that lawyer's status as officers of the court means:

> . . . they have the obligation of upholding the various attributes of the administration of justice such as judicial impartiality and independence, as well as professional honesty and loyalty.

65 Gavin MacKenzie in a paper titled "The Ethics of Advocacy" ((2008) The Advocates Society Journal 26) observed that a lawyers duty to his or her client vs the court " . . . are given equal prominence ...".

66 The Alberta Court of Appeal has repeatedly indicated that the lawyers who appear in Alberta courts have an independent and separate duty to those institutions. For example, in *R. v. Creasser*, 1996 ABCA 303 (Alta. C.A.) at para 13, (1996), 187 A.R. 279 (Alta. C.A.), the Court stressed:

> . . . the lawyer who would practise his profession of counsel before a Court owes duties to that Court quite apart from any duty he owes his client or his profession or, indeed, the public. That these duties are sometimes expressed as an ethical responsibility does not detract from the reality that the duties are owed to the Court, and the Court can demand performance of them. The expression "officer of the Court" is a common if flowery way to emphasize that special relationship. In Canada, unlike some other common law jurisdictions, the Courts do not license lawyers who practise before them, and do not suspend those licences when duties are breached. But that restraint does not contradict the fact that special duties exist. ... [Emphasis added.]

67 The professional standards expected of a lawyer as an officer of the court equally apply when a lawyer represents themselves. "[t]he lawyer as Plaintiff stands in a different position than a layman as Plaintiff.": *Botan v. St. Amand*, 2012 ABQB 260 (Alta. Q.B.) at paras 72-77, (2012), 538 A.R. 307 (Alta. Q.B.), aff'd 2013 ABCA 227, 553 A.R. 333 (Alta. Q.B.). As Rooke J (as he then was) explained in *Parkridge Homes Ltd. v. Anglin*, [1996] A.J. No. 768 (Alta. Q.B.) at para 33 (QL), 1996 CarswellAlta 1136 (Alta. Q.B.):

> . . . it is significant that he is a member of the Law Society of Alberta. If he were not, one could apply the standard of conduct of an ordinary citizen, and excuse some conduct for which an ordinary citizen might be ignorant or from which he or she would be otherwise excused. In my view such is not the case for an active practising member of the Law Society of Alberta, who has a standard to meet, regardless of his technical capacity of appearance, merely by virtue of that membership ...

68 Having countervailing obligations means that a lawyer's obligations to his or her client vs the Court may conflict, and judges have long recognized that fact. This is the reason why courts are cautious about applying potential sanctions again lawyers. As McLachlin J (as she then was) observed in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at 136, (1993), 108 D.L.R. (4th) 193 (S.C.C.), a court should be mindful that sanctions directed to a lawyer may interfere with that lawyer's execution of his or her duties:

> . . . courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

69 What this does not mean, however, is that a lawyer can simply point at a client and say abuse of the court is the client's fault, and I am just doing my job. In *C. (L.) v. Alberta*, 2015 ABQB 84 (Alta. Q.B.) at para 248, (2015), 605 A.R. 1 (Alta. Q.B.) my colleague Graesser J captured this principle in a colourful but accurate manner:

> "I was just following orders" does not work as a defence for lawyers any more than it worked for the Watergate burglars or at Nuremburg. Lawyers also owe a duty of candour to their opponents and have duties to the court regarding appropriate professional practices.

70 I agree. There are kinds of litigation misconduct where responsibility falls not just on the client, but also the lawyer who represents and advocates for that client. This judgment will explore that and chiefly investigate the award of costs against a lawyer on the basis of "unfounded, frivolous, dilatory or vexatious proceeding[s]", rather than the deliberate dishonest or malicious misconduct alternative branch, identified in *Jodoin* at para 29.

3. No Constitutional Right to Abusive Litigation

71 Though there should not have been any doubt on this point, McLachlin CJC has recently in *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)* at para 47 confirmed that:

> . . . There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice. [Emphasis added.]

72 I cannot see how this principle would apply differently for a self-represented litigant, or a person represented by a lawyer. A lawyer is a mechanism through which a client interacts with the Court and other court participants. However, a lawyer is not an automaton that does only what the client instructs. The preceding review explicitly indicates lawyers have duties to more than just their clients. They are not required to do whatever they are told.

73 I stress - there is *no right* to engage in this kind of litigation. Abusive litigation may be blocked, and actions may be taken to punish and control court participants who engage in this kind of litigation misconduct. Steps of that kind are appropriate to enhance access to justice and protect badly over-taxed court resources. Lawyers have a clear obligation not to promote abuse of court processes.

74 I therefore conclude any lawyer who acts on behalf of a client who engages in frivolous, vexatious, or abusive litigation is potentially personally subject to a costs award. A lawyer who is the mechanism to conduct frivolous, vexatious, or abusive litigation is not merely acting contrary of his or her obligations to the courts and other litigants. This is also a breach of a lawyer's obligations *to his or her own client*. By facilitating that misconduct the lawyer 'digs a grave for two.'

75 Restating this point:

1. clients have no right to engage in abusive litigation;

2. lawyers have obligations as professionals and as officers of the court to not misuse court resources and processes.

Combined, lawyers who advance litigation that is an abuse of court have no right to do so. Instead, that is a breach of the lawyer's obligations. Any lawyer who does so is an accessory to their client's misconduct.

4. An Exceptional Step

76 Appellate jurisprudence that discusses costs awards against lawyers sometimes describes that step as "exceptional", or "rare". For example, in *Jodoin*, at para 29, Gascon J writes:

> . . . an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. ...
>
> See also *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81 (S.C.C.) at para 85, [2001] 3 S.C.R. 575 (S.C.C.).

77 What these decisions are trying to capture is the fact that most of the time lawyers conduct themselves properly. Costs awards are presumptively awarded in civil litigation anytime a party is unsuccessful in an action or application (*Rule* 10.29(1)), but a lack of success does not necessarily mean actual bad litigation. An additional characteristic, abuse of the court and its processes, is what transforms a simple litigation failure into misconduct that may attract a costs award against a lawyer, personally. Fortunately, that 'added layer' is not a common occurrence. Most lawyers are responsible and responsive to their obligations.

78 In my opinion this language does not mean that lawyers are subject to a different and reduced standard from other persons who interact with the courts. Saying a costs award against a lawyer personally is "exceptional" does not mean that a lawyer can say that he or she is immune to a costs award because that lawyer may have abused court processes, but that abuse was not "exceptional". Abuse is abuse.

79 *Jodoin*, in fact, makes that clear. Paragraph 29 continues to make that point explicit:

> . . . This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer ... [Emphasis added.]

80 What constitutes "serious abuse" is a separate question. However Alberta courts have been developing guidelines and principles to test when court intervention is warranted to control litigant activities. This jurisprudence is also helpful to test when a lawyer has engaged in "serious abuse".

5. Abuse of the Court

81 Alberta decisions have collected and categorized types of litigation misconduct which are a basis on which to conclude that a litigant is "vexatious". These "indicia" are then each a potential basis to restrict a litigant's access to court. Put another way, these "indicia" are a basis to potentially conclude that a litigant is not a 'fair dealer', and so his or her activity needs to be monitored and controlled.

82 *Chutskoff Estate v. Bonora*, 2014 ABQB 389 (Alta. Q.B.) at para 92, (2014), 590 A.R. 288 (Alta. Q.B.), aff'd 2014 ABCA 444 (Alta. Q.B.) is the leading Alberta authority on the elements and activities that define abusive litigation. That decision identifies eleven categories of litigation misconduct which can trigger court intervention in litigation activities. These "indicia" are described in detail in *Chutskoff Estate v. Bonora*, however for this discussion it is useful to briefly outline those categories:

1. collateral attacks,
2. hopeless proceedings,
3. escalating proceedings,
4. bringing proceedings for improper purposes,
5. conducting "busybody" lawsuits to enforce alleged rights of third parties,
6. failure to honour court-ordered obligations,
7. persistently taking unsuccessful appeals from judicial decisions,
8. persistently engaging in inappropriate courtroom behaviour,
9. unsubstantiated allegations of conspiracy, fraud, and misconduct,
10. scandalous or inflammatory language in pleadings or before the court, and
11. advancing OPCA strategies.

83 Subsequent jurisprudence has identified two other categories of litigation misconduct that warrant court intervention to control court access:

1. using court processes to further a criminal scheme (*Boisjoli, Re*, 2015 ABQB 629 (Alta. Q.B.) at paras 98-103), and

2. attempts to replace or bypass the judge hearing or assigned to a matter, commonly called "judge shopping" (*McCargar v. Canada*, 2017 ABQB 416 (Alta. Q.B.) at para 112).

84 While each of these "indicia" is a basis to restrict court access, reported judgments that apply the *Chutskoff Estate v. Bonora* have instead reviewed the degree of misconduct in each category to assess its seriousness. For example, in *644036 Alberta Ltd. v. Morbank Financial Inc.*, 2014 ABQB 681 (Alta. Q.B.) at paras 71, 85, (2014), 26 Alta. L.R. (6th) 153 (Alta. Q.B.); *Ewanchuk v. Canada (Attorney General)* at para 136; *Boisjoli, Re*, 2015 ABQB 629 (Alta. Q.B.) at para 89 the presence of some "indicia" was not, alone, a basis to make a vexatious litigant order. These were, instead, "aggravating" factors.

85 Similarly, vexatious litigant judgments frequently conclude that the presence of multiple *Chutskoff Estate v. Bonora* "indicia" cumulatively strengthen the foundation on which to conclude court intervention is warranted in response to abusive litigation conduct: *Ewanchuk v. Canada (Attorney General)* at para 159; *Chutskoff Estate v. Bonora* at para 131; *Boisjoli, Re*, 2015 ABQB 629 (Alta. Q.B.) at para 104; *Hok v. Alberta* at para 39; *644036 Alberta Ltd. v. Morbank Financial Inc.* at para 91.

86 In *R. v. Eddy*, 2014 ABQB 391 (Alta. Q.B.) at para 48, (2014), 583 A.R. 268 (Alta. Q.B.), Marceau J awarded costs against a self-represented litigant in a criminal matter, and used the *Chutskoff Estate v. Bonora* "indicia" as a way to help test the seriousness of the litigation abuse. These were "aggravating" factors:

> I conclude that the characteristics of vexatious litigation, including those as identified in Judicature Act, s 23(2) and the common law authorities recently and comprehensively reviewed in Chutskoff v Bonora, 2014 ABQB 389 are 'aggravating' factors that favour a cost award against a criminal accused. These indicia form a matrix of traits that are shared by the kind of litigation misconduct that calls for court response and deterrence. [Emphasis added.]
>
> I note ***R v Eddy*** applies a costs award analysis developed in *Fearn v. Canada (Customs)*, 2014 ABQB 114, 586 A.R. 23 (Alta. Q.B.), which is cited with approval in *Jodoin* at paras 25, 27.

87 Similarly, Master Smart in *Lymer, Re*, 2014 ABQB 674 (Alta. Q.B.) at paras 34-35, (2014), 9 Alta. L.R. (6th) 57 (Alta. Q.B.) applied the *Chutskoff Estate v. Bonora* "indicia" as a way to evaluate whether a litigant had acted in contempt of court. In *Kavanagh v. Kavanagh*, 2016 ABQB 107 (Alta. Q.B.) at para 99, Shelley J concluded the presence of *Chutskoff Estate v. Bonora* "indicia" meant she should take additional steps to protect the interests of a potentially vulnerable third party to litigation.

88 I see the *Chutskoff Estate v. Bonora* "indicia" as a useful tool to test whether a lawyer's conduct is "serious abuse" warranting that costs be ordered against that lawyer. Each individual abusive conduct category is potentially relevant, and together these factors may operate in a cumulative manner.

89 In this discussion of the potential application of the *Chutskoff Estate v. Bonora* "indicia" I acknowledge that Gascon J in *Jodoin* is explicit that when a court examines whether a costs award should be made against a lawyer that the court's attention should focus on the specific conduct that has attracted court scrutiny. Justice Gascon stresses that an investigation of a particular instance of potential litigation misconduct should be restricted to the specific identified litigation misconduct and not put the lawyer's "career[,] on trial": para 33. A lawyer costs award analysis is not a review of the lawyer's "entire body of work", though external facts may be relevant in certain circumstances: paras 33-34.

90 This means for the purposes of a *Jodoin* lawyer costs analysis the *Chutskoff Estate v. Bonora* "indicia" will need to be adapted to the specific context. For example, a history of persistent through futile appeals is only relevant to a potential order of costs against a lawyer where the alleged abusive litigation is a persistent abusive appeal. Other *Chutskoff Estate v. Bonora* "indicia" have broader implications. An action where there is no prospect for success may not, in itself, illustrate a "serious abuse" of the court, but where the action also features scandalous or inflammatory language that may lead a judge to

conclude the lawyer is deliberately acting in breach of his or her duties.

91 I will later discuss how certain kinds of litigation misconduct will, on their own, in most cases represent a basis to order costs against a lawyer. However, first, it is important to consider whether litigation misconduct is deliberate.

6. Knowledge and Persistence

92 Lawyers make mistakes. They sometimes get the law wrong, miss a key authority, overlook a critical fact, or simply become confused.

93 What *Jodoin* and other decisions indicate is that a misstep such as a "mere mistake or error of judgment" is not a basis, in itself, for an order of costs against a lawyer. Something higher is necessary, for example gross negligence (para 27) or deliberate misconduct (para 29). One way of satisfying a higher standard of proof, even to "beyond a reasonable doubt", is where a court concludes an actor is "willfully blind" to the fact their actions are wrong.

94 A mistake, in itself, is therefore not often likely to be a basis to order costs against a lawyer, though the presence of *Chutskoff Estate v. Bonora* "indicia" may lead to a conclusion that a purported mistake was not honest, but instead a stratagem. What is more damning, however, is when a lawyer advances frivolous, vexatious, or abusive litigation in the face of warnings of exactly that.

95 For example, a costs award would rarely be warranted against a lawyer if:

1. a lawyer had made an argument, application, or proceeding based on a false statement of law, an invalid authority, or other mistake;

2. that error was identified by another party or the court; and

3. the lawyer then acknowledged the error and abandoned the argument, application, or proceeding.

Of course, party and party costs would still be presumptively due against the litigant (*Rule* 10.29(1)), but at least the lawyer had taken steps to conduct 'damage control', and that should be encouraged and respected.

96 However, where a lawyer persists despite being warned or alerted, then a court may apply the often stated rule that a person may be presumed to intend the natural consequence of their actions: *Starr v. Ontario (Commissioner of Inquiry)*, [1990] 1 S.C.R. 1366, 68 D.L.R. (4th) 641 (S.C.C.). In that context a court may conclude that a lawyer who is breaking the rules knows what the rules are, but has proceeded and broken them anyway. That will create a strong presumption that a costs award is appropriate for a lawyer who engaged in what is, effectively, deliberate misconduct.

7. Examples of Lawyer Misconduct that Usually Warrant Costs

97 With that foundation in place, I believe it is useful to provide a non-exclusive set of scenarios where a lawyer will likely be a potential valid target for a personal costs award. Again, I stress that anytime a court considers whether to make a costs award of this kind the analysis should be contextual. Exceptional circumstances are no doubt possible. That said, there are some ground rules that any reasonable lawyer would be expected to know and follow. Some of these examples will overlap with the *Chutskoff Estate v. Bonora* "indicia" because, naturally, neither a lawyer nor litigant should expect a court to stand by and tolerate certain abusive behaviour.

a. Futile Actions and Applications

98 Conducting a futile action or application is a potential basis for an award of costs against a lawyer, particularly where the court concludes the lawyer has advanced this litigation knowing that it is hopeless, or being willfully blind as to that fact.

99 A key category of futile action that warrants court sanction is a collateral attack. This is where litigation seeks to undo or challenge the outcome of another court case. A collateral attack is a breach of a cornerstone of the English tradition common law - the principle of *res judicata* - that once a court has made a decision and the appeal period has ended, then that decision is final. This is a basic principle of law taught to every lawyer. Collateral attacks are serious litigation misconduct because they waste court and litigant resources. A collateral attack inevitably fails in the face of *res judicata*.

100 Similarly, litigation conducted in the face of a binding authority may render that action futile. A court literally cannot ignore *stare decisis*, and any lawyer should know that. Defying identified binding authority leads to the presumption that the lawyer is intending the natural consequence. That said, this does not mean that a lawyer should automatically be subject to a potential costs award if that lawyer has advanced a basis for why an established rule is incorrect, or should be modified, or how this case is somehow factually or legally different. However, simply telling the trial judge to ignore a court of appeal or Supreme Court of Canada decision indicates a bad litigation objective. Similarly, claims to distinguish binding jurisprudence on an arbitrary basis that is unrelated to the principle(s) in play implies an attempt to circumvent *stare decisis*.

101 Other examples of futile litigation are litigation in the wrong venue, premature appeals or judicial reviews, or actions that seek impossible or grossly disproportionate remedies. A lawyer who seeks general damages near the *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (S.C.C.) maximum for a modest injury raises the presumption that the lawyer intended this breach of an obvious and well-established legal rule; overstating the damages claimed was deliberate. That is doubly so if the maximum were exceeded. Courts are permitted to read between the lines and, in the context of the "culture shift", inquire what it means when a client and his or her lawyer advance a dubious, overstated claim.

102 An application made outside a limitations period and without any explanation is another example of a futile action which puts the lawyer's motivation in doubt.

103 All of these prior examples should be examined in context. Knowledge (obvious or implied) of the critical defect will often be an important factor. Again, a lawyer who makes a misstep but then corrects it will usually not be liable for litigation costs, personally. The *Chutskoff Estate v. Bonora* "indicia" may, however, tip the balance.

b. Breaches of Duty

104 Another category of litigation conduct which will usually attract a costs award against a lawyer is where a lawyer has breached a basic aspect of their responsibility to the courts and clients. As I have previously indicated, the Court's supervisory function includes scrutinizing whether an in-court representative is qualified for that task.

105 For example, *Morin v. TransAlta Utilities Corporation*, 2017 ABQB 409 (Alta. Q.B.) involved a lawyer who had conducted litigation on behalf of persons who were not his clients. He had no authority to represent them. Graesser J concluded, and I agree, that this kind of misconduct would almost always warrant costs paid personally by that lawyer. This is a form of "busybody" litigation, one of the *Chutskoff Estate v. Bonora* "indicia", but for a lawyer this action is in clear violation of both their professional duties and is a basic and profound abuse of how courts trust lawyers to speak in court on behalf of others.

106 Similarly, a lawyer who is aware of but does not disclose relevant unfavourable jurisprudence or legislation runs the risk of being subject to a personal costs penalty, particularly if the concealed item is a binding authority. This disclosure requirement is an obligation under the Law Society of Alberta *Code of Conduct*, but is even more critically an aspect of a lawyer's role and duties as an officer of the court. The simple fact is that judges rely on lawyers to assist in understanding the law. Intentionally omitting unfavourable case law has no excuse, and does nothing but cause unnecessary appeals, unjust results, and the waste of critical resources.

107 The same is true for a lawyer who does not discharge their duty to provide full disclosure during an *ex parte* proceeding. It is too easy for a monologue to lead to spurious and unfair results. A judge has no way to test evidence in that context. This scenario creates a special and elevated obligation on a lawyer as an officer of the court, see *Botan v. St. Amand.*

c. Special Forms of Litigation Abuse

108 Certain kinds of litigation abuse will attract special court scrutiny because of their character and implications.

109 For example, *habeas corpus* is an unusual civil application that has a priority 'fast track' in Alberta courts. As I explained in *Ewanchuk v. Canada (Attorney General)* at paras 170-187, abuse of this procedure has a cascading negative effect on court function. Further, the potential basis and remedy for *habeas corpus* is extremely specific and specialized. *Habeas corpus* may only be used to challenge a decision to restrict a person's liberty. The only remedy that may result is release. A lawyer who makes a *habeas corpus* application which does not meet those criteria can expect the possibility of a personal costs award. This kind of application is "serious abuse" because of how it damages the court's effective and efficient functioning.

110 OPCA strategies, a category of vexatious and abusive litigation that was reviewed by Rooke ACJ in *Meads v. Meads*, are another special form of litigation abuse that will almost certainly be a basis for a costs award against a lawyer. In brief, these are legal-sounding concepts that are intended to subvert the operation of courts and the rule of law. These ideas are so obviously false and discounted that simply employing these concepts is a basis to conclude a party who argues OPCA motifs intends to abuse the courts and other parties for an ulterior purpose: *Fiander v. Mills*, 2015 NLCA 31, 368 Nfld. & P.E.I.R. 80 (N.L. C.A.). The same is true for a lawyer who invokes OPCA concepts.

111 Another special category of litigation abuse that may attract a costs award against a lawyer personally is the practice of booking a hearing or an application in a time period that is obviously inadequate for the issues and materials involved. For example, a lawyer may appear in Chambers and attempt to jam in an application that obviously requires a full or half day, rather than the 30 minute time slot allotted. The end result will either be an incomplete application, an application that goes overtime and disrupts the conduct of the Chambers session, or that the judge who received the application simply orders it re-scheduled to a future appearance with the appropriate duration.

112 In criticizing this practice I understand why it happens. The Alberta Court of Queen's Bench is no longer able to respond to litigants in a timely manner due to the now notorious failure of governments to maintain an adequate judicial complement, facilities, and supporting staff. In *Ewanchuk v. Canada (Attorney General)*, at para 178 I reported how long persons must wait to access this court, for example waiting over a year to conduct a one-day special chambers hearing. While preparing this judgment I checked to see if things have improved. They haven't.

113 When people attempt to 'game the system', and jump the que, that simply makes things worse. Again, in saying this, I am not denying that I understand the reason why this happens. It is just this ship is riding low in the water, if not sinking. Placing unanticipated pressures on this institution only makes things worse.

114 Lawyers have a special responsibility in the efficient management and allocation of limited court resources. They are the ones who are best positioned to accurately estimate the time needed for a court procedure, a hearing, or a trial. Lawyers cause great and cascading harm when they try to squeeze large pegs into small holes. The result is the surrounding wood shatters. A lawyer should not be surprised if this Court concludes the lawyer should personally face costs for this pernicious practice. It must stop. In one sense or another, we are all on the same (sinking) ship. Don't make it capsize.

d. Delay

115 Delay is an increasing issue in both civil and criminal proceedings in Canada. *R. v. Jordan* and *R. v. Cody* challenge the "culture of complacency" which has led to long and unacceptable pre-trial delays. These two decisions demand all court actors take steps to ensure 'justice delayed is not justice denied.'

116 *Jodoin* also makes explicit that when a lawyer represents a client, delays in a civil proceeding may be a basis to order costs are paid by the lawyer. In *Pacific Mobile Corp. v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842, 26 N.R. 453 (S.C.C.) unnecessary repeated adjournments were one of the bases that Pigeon J identified for the award of costs against lawyers, personally. In *Jodoin* at para 29 Gascon J identifies "dilatory" proceedings as a basis for targeting a lawyer for costs:

> . . . lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. ...

117 Avoiding delay is clearly a priority in the new post-"culture shift" civil litigation environment, but since this particular factor is not in play in the current costs proceeding I will not comment further on this basis for a potential costs award against a lawyer. This complex subject is better explored in the context of a fact scenario that involves potentially unnecessary or unexplained adjournments, and other questionable procedures that caused delay.

C. Conclusion

118 The Supreme Court of Canada has now provided clear guidance that Canada's legal apparatus can only operate, provide "access to justice", by refocussing the operation of courts to achieve "fair and just" results, but in a manner that is proportionate to the issues and interests involved. I have reviewed some of the aspects of this "culture shift".

119 This objective involves many actors. Parliament and the legislatures should design procedures and rules that better align with this objective. Some kinds of disputes, such as family law matters that involve children, are poor matches for the adversarial court context. Judges and courts should develop new approaches, both formal and informal, to better triage, investigate, and resolve disputes. Judicial review and appeal courts should be mindful to limit their intrusion into the operation of subordinate tribunals.

120 Litigants and their lawyers have a part in this. *Hryniak v. Mauldin*, *R. v. Jordan*, *R. v. Cody*, and now *Jodoin* indicate that in Canada being in court is a right that comes with responsibilities. Lawyers are a critical interface between the courts and the lay public. Their conduct will be scrutinized in this new reality. The door of "access to justice" swings open or drops like a portcullis depending on how the courts and their resources are used. Personal court costs awards against lawyers are simply a tool to help the court apparatus function, and ultimately that is to everyone's benefit.

V. Priscilla Kennedy's Litigation Misconduct

121 I reject that 'litigating from one's heart' is any defence to a potential costs award vs a lawyer, or for that matter from any other sanction potentially faced by a lawyer. Lawyers are not actors, orators, or musicians, whose task is to convey and elicit emotions. They are highly trained technicians within a domain called law. A perceived injustice is no basis to abuse the court, breach one's oath of office, or your duties as a court officer.

122 When a lawyer participates in abusive litigation that lawyer is not an empty vessel, but an accessory to that abuse. Persons are subject to sanctions including imprisonment where they engage in misconduct but are willfully blind to that wrongdoing. Lawyers have responsibilities and are held to a standard that flows from their education and training, and it is on that basis that Canadian courts give them a special trusted status. Abuse of that trust will have consequences.

123 Turning to Stoney's lawyer, Priscilla Kennedy, there are two main bases on which Ms. Kennedy may be liable for a court-ordered costs award against her, personally.

A. Futile Litigation

124 First, the August 12, 2016 application filed by Kennedy on behalf of Stoney was clearly an example of futile litigation. This is detailed in *Sawridge #6* at paras 38-52.

125 The August 12, 2016 application seeks to have Stoney added as a beneficiary of Sawridge 1985 Trust because he says he is in fact and law a member of the Sawridge Band. Stoney was refused membership in the Sawridge Band and challenged that result in Federal Court by judicial review, where his application was rejected: *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.). The Federal Court decision was not appealed. Kennedy was Stoney's lawyer in this proceeding. I concluded in *Sawridge #6* that the August 12, 2016 application was a collateral attack on the Federal Court's decision and authority. It is " . . . an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.": *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.) at 599, (1983), 4 D.L.R. (4th) 577 (S.C.C.).

126 I have previously commented on how a collateral attack is a very serious form of litigation misconduct that is a basis for court intervention and response. Kennedy was perfectly aware of the result in *Stoney v. Sawridge First Nation*. She was Stoney's lawyer in that proceeding. Further, the arguments made against Stoney by the Sawridge Band and the Sawridge 1985 Trust Trustees made clear that Kennedy was attempting to re-litigate on the same ultimate subject.

127 My review of Stoney's submissions in *Sawridge #6* and the reported *Stoney v. Sawridge First Nation* arguments illustrates that Kennedy's arguments in these two proceedings are effectively the same. Kennedy brought nothing novel to the *Sawridge #6* dispute.

128 It gets worse. Not only was *Stoney v. Sawridge First Nation* judicial review unsuccessful, but in that decision Justice Barnes at para 16 observed that Maurice Stoney had raised the same claim years earlier, in *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.), and in that action at para 4 had acknowledged that Stoney had abandoned that aspect of the appeal because that claim "discloses no reasonable cause of action". Justice Barnes therefore at para 17 concluded (and I agree) that the result in *Stoney v. Sawridge First Nation* was already barred by issue estoppel - Stoney was attempting to " . . . relitigate the same issue that was conclusively determined in an earlier proceeding."

129 Kennedy therefore did not merely engage in a hopeless proceeding before me. The *Stoney v. Sawridge First Nation* judicial review was also doomed from the start. Both actions were abuse of the courts. Neither Stoney nor Kennedy had any right to waste court and respondent resources in these actions.

130 Kennedy's counsel admitted this is true, that the August 12, 2016 application was hopeless from the start, and an abuse of court processes.

131 Acting to advance a futile action such as a collateral attack which proceeds in the face of objections on that ground is a clear basis to find a lawyer has engaged in serious abuse of judicial processes, and to then order costs against the lawyer, personally. The *Sawridge #6* application was an unfounded, frivolous, and vexatious proceeding. This was a serious abuse not only because of the character of the misconduct (a futile action), but that misconduct is aggravated because Kennedy had done the same thing with the same client before. There is a pattern here, and one that should be sharply discouraged.

132 This is the first basis on which I conclude that Priscilla Kennedy should be personally liable for litigation costs in the *Sawridge #6* application.

B. Representing Non-Clients

133 The three affidavits presented by Kennedy do not establish that Maurice Stoney was authorized to represent his siblings. Even at the most generous, these affidavits only indicate that Bill and Gail Stoney gave some kind of oral sanction for Maurice Stoney to act on their behalf. I put no weight on the affidavit of Shelley Stoney. It is hearsay, and presumptively inadmissible.

134 I note that none of these affidavits were supported by any form of documentation, either evidence or records of communications between Maurice Stoney and his siblings, or between Kennedy and her purported clients.

135 I make an adverse inference from the absence of any documentary evidence of the latter. The fact that no documentation to support that Kennedy and the Stoney siblings communicated in any manner, let alone gave Kennedy authority to act on their behalf, means none exists.

136 There is no documentation to establish that Maurice Stoney applied to become a litigation representative or was appointed a litigation representative, per *Rules* 2.11-2.21. This is not a class action scenario where Maurice Stoney is a representative applicant. While Kennedy has argued that Maurice Stoney's siblings are elderly and unable to conduct litigation, then that is not simply a basis to arbitrarily add their names to court filing. Instead, a person who lacks the capacity to represent themselves (*Rule* 2.11(c-d)) may have a self-appointed litigation representative (*Rule* 2.14), but only after filing appropriate documentation (*Rule* 2.14(4)). That did not occur.

137 I therefore conclude on a balance of probabilities that Kennedy did not have instructions or a legal basis to file the August 12, 2016 application on behalf of "Maurice Felix Stoney and his brothers and sisters".

138 I adopt the reasoning of Graesser J in *Morin v. TransAlta Utilities Corporation* that a costs award against a lawyer is appropriate where that lawyer engages in unauthorized "busybody litigation". This is a deep and fundamental breach of a lawyer's professional, contractual, and court-related obligations.

139 While at the July 28, 2017 hearing I concluded that no potential costs liability should be placed on Bill and Gail Stoney, I stress the potential deleterious consequences to these individuals for them being gathered into this Action in an uncertain and ill-defined manner. The Sawridge Band and Trustees stressed the importance of *informed* consent, and I have no confidence that sort of consent was obtained for either Bill or Gail Stoney, let alone the other siblings of Maurice Stoney.

140 In any case, I order costs against Kennedy on the basis of her "busybody litigation", but I believe that the submissions received in this costs application are a further aggravating factor given the potential of putting persons who are operationally non-clients at risk of court-imposed sanctions. This is a second independent basis that I find Kennedy should be liable to pay costs.

C. The Presence of Chutskoff Estate v. Bonora *"Indicia" and other Aggravating Factors*

141 As previously indicated, the presence of *Chutskoff Estate v. Bonora* "indicia" may assist the court in determining whether or not a lawyer has engaged in abusive litigation that is "serious abuse".

142 A point that was in dispute at the *Sawridge #6* application was whether or not Stoney had outstanding unpaid costs orders. This is a well-established indicium of vexatious litigation: *Chutskoff Estate v. Bonora* at para 92. This is a useful point to illustrate how, in my opinion, *Jodoin* instructs how a court 'quarantines' relevant vs extraneous evidence when the court evaluates a lawyer's potential liability due to litigation abuse. One of the allegations that emerged was that Stoney had not paid the costs awarded against him in *Stoney v. Sawridge First Nation*. If so, then that fact aggravates the fact Kennedy then conducted a collateral attack on the judicial review's outcome. Similarly, Maurice Stoney's failure to pay costs in relation to the *Stoney v. Twinn* appeal of *Sawridge #3* is related to the August 12, 2016 application by both subject matter and as it occurred in the same overall litigation. However, if Stoney had, hypothetically, not paid costs awarded in other actions where he was represented by Kennedy then that is of little relevance to this specific decision and the question of whether Kennedy should be liable for the *Sawridge #6* costs award.

143 I conclude that the fact that Kennedy proceeded with the August 12, 2016 application while there were outstanding costs orders in relation to *Stoney v. Sawridge First Nation* and *Stoney v. Twinn* is an aggravating factor but not, in itself, a basis to order costs against Kennedy.

144 The Trustees and Band indicated I should consider Kennedy's conduct during cross-examination of her client on his affidavit. While I have reviewed that material I do not think it is germane to my analysis because Kennedy's obstructionist conduct is distinct from the main bases for my award of costs against Kennedy. Similarly, the degree to which Kennedy was "holding the reins" of this litigation is not actually directly relevant to my analysis. What is critical is that the August 12, 2016 application had no merit. Kennedy's misconduct is essentially the same no matter whether she 'was just following orders', or 'the person behind the wheel'.

145 Another factor which I conclude is relevant and aggravating is that the Stoney August 12, 2016 application attempts to off-load litigation costs on the 1985 Sawridge Trust. Stoney's application seeks to have his entire litigation costs paid from the Trust. I would consider it a significant indication of good faith litigation intent if Stoney had acknowledged his litigation was 'a long shot', and acknowledged a willingness to cover the consequences to other involved parties. Instead Stoney resisted an application by the Sawridge Band that he pay security for costs.

146 The attempted 'offloading' of litigation costs in this instance is not in itself a basis to conclude that Kennedy should be liable to pay her client's court costs, but it favours that result. Stoney, whether he won or lost, sought to have the beneficiaries of an aboriginally owned trust pay for his (and his lawyer's) expenses.

147 Another aggravating factor is that in *Sawridge #2* I concluded at para 35 that this Court would not take jurisdiction to review the Sawridge Band membership process. That was the jurisdiction of the Federal Courts. Stoney and Kennedy ignored that instruction by advancing the *Sawridge #6* application.

148 Last, I note that Stoney's application has a special aggravating element. The intended relief was that Stoney be added as a member of an Indian Band. There is no need to review and detail the extensive jurisprudence on the special *sui generis* character of aboriginal title, how aboriginal property is held in a collective and community-based manner, and the unique fiduciary relationship between the Crown and Canada's aboriginal peoples. Suffice to say that membership in an Indian Band brings unusual consequences to both the member and that band member's community.

149 Put simply, a challenge to that status, and the internal decision-making, self-determination, and self-government of an aboriginal community is a serious matter. If I had been unclear on whether an illegal and futile attempt to conduct a collateral attack on the *Stoney v. Sawridge First Nation* decision qualified as "serious abuse" then I would have no difficulty concluding the *Sawridge #6* application was "serious abuse of the judicial system" in light of the interests involved, combined with the fact the Stoney application had no basis in law or fact.

D. Conclusion

150 I conclude that Priscilla Kennedy has conducted "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system" on two independent bases:

1. she conducted futile litigation that was a collateral attack of a prior unappealed decision of a Canadian court, and
2. she conducted that litigation allegedly on behalf of persons who were not her clients on a "busybody" basis.

151 Each of these are a basis for concluding that Kennedy should be liable for the *Sawridge #6* costs, personally. The aggravating factors I have identified simple emphasize that conclusion and result is correct.

E. Quantum of the Costs Award

152 In certain instances it might be possible to conclude that a lawyer's participation in an abusive application or action is really only related to a part of the problematic events, and on that basis a court might only make a lawyer responsible for a part of the court-ordered costs.

153 Here, however, Kennedy was involved fully throughout the *Sawridge #6* application. The abusive character of that litigation was established from the August 12, 2016 application date, onwards. I therefore conclude that Kennedy and Stoney are liable for the full costs of *Sawridge #6*, on a joint and several basis.

VI. Conclusion

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.

155 Stoney, Kennedy, the Trustees, and the Sawridge Band may return to the court within 30 days of this decision if they require assistance to determine those costs. Once determined, costs are payable immediately.

156 In light of my conclusion that Kennedy is responsible for conducting litigation that abused the Alberta Court of Queen's Bench's processes and the other Sawridge Advice and Direction Application participants, Kennedy admitting the same, and the nature and character of that abuse, I direct that a copy of this judgment shall be delivered to the Law Society of Alberta for its review.

Order accordingly.

End of Document

TAB 3

2017 ABCA 368
Alberta Court of Appeal

1985 Sawridge Trust v. Kennedy

2017 CarswellAlta 2303, 2017 ABCA 368, [2017] A.W.L.D. 5753, [2017] A.W.L.D. 5758, 285 A.C.W.S. (3d) 5, 61 Alta. L.R. (6th) 21

Maurice Felix Stoney and His Brothers and Sisters (Interested Parties / Interested Parties) and Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees") (Respondents / Respondents) and Public Trustee of Alberta (Not a party to the Application / Not a party to the Appeal) and The Sawridge First Nation (Intervenor / Intervenor) and Priscilla Kennedy, counsel for Maurice Felix Stoney and His Brothers and Sisters (Applicant / Appellant)

Frans Slatter J.A.

Heard: November 2, 2017
Judgment: November 7, 2017
Docket: Edmonton Appeal 1703-0239-AC

Counsel: D.C. Bonora, A. Loparco, for Respondent, 1985 Sawridge Trustees
Catherine Twinn, for herself
E.H. Molstad, Q.C., for Intervenor, Sawridge First Nation
P.J. Faulds, Q.C., for Applicant

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.f Costs on solicitor and own client basis

Civil practice and procedure
XXIV Costs
XXIV.24 Appeals as to costs
XXIV.24.a Leave to appeal

Headnote

Civil practice and procedure --- Costs — Appeals as to costs — Leave to appeal
In previous proceeding court awarded solicitor-and-own-client costs against applicant counsel personally — Application by counsel for leave to appeal award of costs — Application granted — Counsel did not just challenge details or particulars of costs award, but underlying principles that should drive costs award against a party's lawyer — No direct appellate authority on new rule R. 10.50 of Alberta Rules of Court or circumstances in which it should be engaged although such awards considered extraordinary — Person subjected to out-of-ordinary costs will often have legitimate basis for appealing, and

where there is doubt permission to appeal should be granted — Test for permission to appeal is whether there is good arguable case, not whether appeal likely to succeed — Whether good arguable case depends in part on merits of appeal, and standard of review to be applied, but not invitation to pre-decide appeal.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and own client basis
In previous proceeding court awarded solicitor-and-own-client costs against applicant counsel personally — Application by counsel for leave to appeal award of costs — Application granted — Counsel did not just challenge details or particulars of costs award, but underlying principles that should drive costs award against a party's lawyer — No direct appellate authority on new rule R. 10.50 of Alberta Rules of Court or circumstances in which it should be engaged although such awards considered extraordinary — Person subjected to out-of-ordinary costs will often have legitimate basis for appealing, and where there is doubt permission to appeal should be granted — Test for permission to appeal is whether there is good arguable case, not whether appeal likely to succeed — Whether good arguable case depends in part on merits of appeal, and standard of review to be applied, but not invitation to pre-decide appeal.

Table of Authorities

Cases considered by *Frans Slatter J.A.*:

Brill v. Brill (2017), 2017 ABCA 235, 2017 CarswellAlta 1246 (Alta. C.A.) — considered

Bun v. Seng (2015), 2015 ABCA 165, 2015 CarswellAlta 854 (Alta. C.A.) — followed

CCS Corporation v. Pembina Pipeline Corporation (2017), 2017 ABCA 260, 2017 CarswellAlta 1418 (Alta. C.A.) — referred to

Condominium Corp. No. 9813678 v. Statesman Corp. (2011), 2011 ABQB 489, 2011 CarswellAlta 1341, [2012] 2 W.W.R. 401, 52 Alta. L.R. (5th) 252, 7 C.L.R. (4th) 300 (Alta. Q.B.) — considered

Jackson v. Canadian National Railway (2015), 2015 ABCA 89, 2015 CarswellAlta 306, 71 C.P.C. (7th) 21, 599 A.R. 237, 643 W.A.C. 237 (Alta. C.A.) — followed

Québec (Directeur des poursuites criminelles et pénales) c. Jodoin (2017), 2017 SCC 26, 2017 CSC 26, 2017 CarswellQue 3091, 2017 CarswellQue 3092, 346 C.C.C. (3d) 433, 408 D.L.R. (4th) 581, 37 C.R. (7th) 1, [2017] 1 S.C.R. 478 (S.C.C.) — considered

Young v. Young (1990), 1990 CarswellBC 1465 (B.C. C.A. [In Chambers]) — considered

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 10.29 — considered

R. 10.50 — considered

R. 14.5(1)(e) — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C, Tariff of Costs — referred to

APPLICATION by counsel for leave to appeal award of solicitor and own client costs against solicitor personally.

Frans Slatter J.A.:

1 The applicant, who was counsel for one of the parties in this litigation, seeks leave to appeal the decision reported as *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 (Alta. Q.B.). That decision found the applicant personally liable for the costs of the proceedings on a solicitor and own client basis.

2 The general rule in Alberta is that any party is entitled to one level of appeal as a matter of right. In some exceptional cases, an appeal is only allowed with permission, including an appeal of any decision "as to costs only": R. 14.5(1)(e). This rule is primarily intended to screen out potential appeals involving details of a costs award that do not justify a further level of review. It also reflects the fact that awards of costs are highly discretionary, and subject to a deferential standard of review.

3 The test for permission to appeal a costs award includes whether the applicant can show: (1) a good arguable case having sufficient merit to warrant scrutiny by a full panel of this Court; (2) issues of importance to the parties and in general; (3) the costs appeal has practical utility; and (4) no delay in proceedings will be caused by the costs appeal: *Bun v. Seng*, 2015 ABCA 165 (Alta. C.A.) at para. 4 and *Jackson v. Canadian National Railway*, 2015 ABCA 89 (Alta. C.A.) at paras. 9-10, (2015), 599 A.R. 237 (Alta. C.A.).

4 The *Rules of Court* contain a number of presumptions about costs awards. For example, R. 10.29 creates a presumption that the successful party is entitled to costs, and a presumption that costs are awarded on a "pay as you go" basis, not just at the end of the litigation. Schedule C creates a presumptive scale of costs. Costs that are consistent with the presumptions, guidelines and rules set out in the *Rules of Court* are resistant to appellate review, making appeals inappropriate. That is one reason that permission is required to appeal a decision as to costs only, and explains the outcome in cases like *Brill v. Brill*, 2017 ABCA 235 (Alta. C.A.), which is easily distinguishable from the present situation. Further, appeals on the details of costs awards (e.g., which Column applies, was second counsel required, etc.) are rarely appropriate.

5 However, where a costs award raises more general issues, or issues of principle, or large sums are involved, a further appeal may well be justified. One example is *Condominium Corp. No. 9813678 v. Statesman Corp.*, 2011 ABQB 489, 52 Alta. L.R. (5th) 252 (Alta. Q.B.) which concerned whether a Bullock order could include double costs generated by an offer to settle. Another is *Young v. Young*, [1990] B.C.J. No. 1051, [1990] B.C.W.L.D. 1239 (B.C. C.A. [In Chambers]), which considered the liability of non-parties for costs, and which eventually resulted in the leading decision *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at para. 253. A person subjected to an out-of-the-ordinary costs award will often have a legitimate basis for appealing, and where there is doubt permission to appeal should be granted.

6 Costs awards against lawyers personally are recognized by R. 10.50 as being available as a form of sanction:

> 10.50 If a lawyer for a party engages in serious misconduct, the Court may order the lawyer to pay a costs award with respect to a person named in the order.

There is no direct appellate authority on this new rule, or the circumstances in which the rule should be engaged, although such awards are considered to be extraordinary: *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin*, 2017 SCC 26 (S.C.C.) at para. 25, (2017), 346 C.C.C. (3d) 433 (S.C.C.). The interpretation of this rule, and its application in any particular situation, engages the tension between the lawyer's obligation to the client, and the lawyer's obligation to the system of justice.

7 The case management judge raised this issue on his own motion, and suggested at para. 34 that there is a new "second branch" of the test, and at para. 37 that this is a "test example". The amounts involved here are large, and the issue is important both to the applicant and to the legal community. The applicant does not just challenge details or particulars about the costs award, but the underlying principles that should drive a costs award against a party's lawyer.

8 The respondents emphasize the highly deferential standard of review citing, for example, the statements at paras. 51-2

of *Jodoin*:

> It was not open to the Court of Appeal to intervene without first identifying an error of law, a palpable and overriding error in the motion judge's analysis of the facts, or an unreasonable or clearly wrong exercise of his discretion . . . In a case involving an exercise of discretion, an appellate court must show great deference and must be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable or non-judicial manner . . .

The respondents argue that no such error can be identified here, and that permission to appeal should not be granted because the decision below is "correct". This argument misapprehends the test for permission to appeal, as well as the role of individual appellate judges who hear applications for permission to appeal: *CCS Corporation v. Pembina Pipeline Corporation*, 2017 ABCA 260 (Alta. C.A.) at paras. 6-7. The test for permission to appeal is whether there is a "good arguable case", not whether the appeal is likely to succeed. On an application for permission to appeal the point is not just whether the decision below is right or wrong, but whether the issue is important enough that a full panel of this Court should say whether it is right or wrong. Whether there is a "good arguable case" depends in part on the merits of the appeal, and the standard of review that will be applied, but it is not an invitation to pre-decide the appeal.

9 The applicant has met the test, and permission to appeal is granted. In order to circumscribe the costs of this appeal, the Sawridge First Nation will (subject to any contrary agreement by counsel) be the lead respondent, and will be entitled to file a full factum as provided for in the *Rules of Court*. Other interested parties may file respondents' factums, but they will not be due until 10 days after the Sawridge First Nation's factum is filed, they are not to be repetitive of arguments made in that factum, and unless permitted by the Case Management Officer they are to be limited to 8 pages.

Application granted.

End of Document

TAB 4

2017 ABQB 548, 2017 CarswellAlta 1639, [2017] A.W.L.D. 5010, 283 A.C.W.S. (3d) 55

2017 ABQB 548
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

2017 CarswellAlta 1639, 2017 ABQB 548, [2017] A.W.L.D. 5010, 283 A.C.W.S. (3d) 55

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")

Maurice Felix Stoney and His Brothers and Sisters (Applicants) and Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees") (Respondents / Original Applicants) and The Sawridge Band (Intervenor)

D.R.G. Thomas J.

Judgment: September 12, 2017
Docket: Edmonton 1103-14112

Counsel: Priscilla Kennedy, for Applicant, Maurice Felix Stoney
Edward H. Molstad, Q.C., for Sawridge Band
D.C. Bonora, for 1985 Sawridge Trustees

Subject: Civil Practice and Procedure; Estates and Trusts; Evidence; Public

Related Abridgment Classifications

Civil practice and procedure
VI Actions
VI.3 Suspension of right of action
VI.3.b Plaintiff persistently instituting vexatious proceedings

Headnote

Civil practice and procedure --- Actions — Suspension of right of action — Plaintiff persistently instituting vexatious proceedings
First Nations trust applied for directions as to distribution of trust — S whose family had formerly been members of First Nation was unsuccessful in attempts to be recognized as member — S continued to bring applications in various courts and before human rights tribunal in search for status — Case management judge put in place interim court order to restrict S from initiating or continuing litigation in Alberta courts, and sought submissions as to whether S should be subject to vexatious litigant order — Order made requiring S to seek leave prior to initiating or continuing litigation in Alberta Court of Queen's Bench and Alberta Provincial Court relating to persons and organizations involved with First Nation and S's disputes concerning membership in it — Payment of all outstanding costs awards prerequisite to leave — S's allegations of conspiracy against self and siblings raised concern that S might shift focus from First Nation and Trusts to individuals involved in the prior litigation and First Nation membership-related processes and decisions — S's refusal to accept dismissal of his claim was very strong predictor of future abusive litigation — Order flowed from court's inherent jurisdiction as strict persistence-driven approach in Judicature Act only targets misconduct that has already occurred — S had history of repeated collateral attacks in relation to subject and related parties — Attempts to re-litigate same issues also represented hopeless litigation — S engaged in busybody litigation exposing others to risk of costs consequences — S failed to pay costs and

attempted to shift responsibility onto trust, which would have depleted communal property of First Nation — Forum shopping by S implied intent to evade legitimate litigation control processes and legal principles, including res judicata — Unproven allegations of fraud provided insight into S's litigation objectives.

Table of Authorities

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

Ali v. Ford (2014), 2014 ONSC 6665, 2014 CarswellOnt 16048 (Ont. S.C.J.) — considered

B. (A.N.) v. Hancock (2013), 2013 ABQB 97, 2013 CarswellAlta 404, (sub nom. *A.N.B. v. Alberta (Minister of Human Services)*) 557 A.R. 364 (Alta. Q.B.) — considered

Bhamjee v. Forsdick (2003), [2003] EWCA Civ 1113 (Eng. C.A.) — referred to

Bishop v. Bishop (2011), 2011 ONCA 211, 2011 CarswellOnt 5050 (Ont. C.A.) — referred to

Bishop v. Bishop (2011), 2011 CarswellOnt 10865, 2011 CarswellOnt 10866, 428 N.R. 399 (note), 291 O.A.C. 400 (note) (S.C.C.) — referred to

Boisjoli, Re (2015), 2015 ABQB 629, 2015 CarswellAlta 1889, 29 Alta. L.R. (6th) 334 (Alta. Q.B.) — referred to

Boisjoli, Re (2015), 2015 ABQB 690, 2015 CarswellAlta 2036 (Alta. Q.B.) — referred to

Callow v. Board of School Trustees (#45 West Vancouver) (February 2, 2015), Doc. Vancouver T-2360-14 (F.C.) — referred to

Callow v. British Columbia (Court of Appeal Chief Justice) (November 9, 2011), Doc. T-1386-11 (F.C.) — referred to

Callow v. British Columbia (Court of Appeal Chief Justice) (December 2, 2011), Doc. Vancouver T-138611 (F.C.) — referred to

Callow v. West Vancouver S.D. No. 45 (2015), 2015 SKQB 308, 2015 CarswellSask 615 (Sask. Q.B.) — referred to

Callow v. West Vancouver S.D. No. 45 (2015), 2015 QCCS 5002, 2015 CarswellQue 10232 (C.S. Que.) — referred to

Callow v. West Vancouver S.D. No. 45 (2016), 2016 QCCA 60, 2016 CarswellQue 263 (C.A. Que.) — referred to

Callow v. West Vancouver S.D. No. 45 (2016), 2016 SKCA 25, 2016 CarswellSask 97 (Sask. C.A.) — referred to

Callow v. West Vancouver S.D. No. 45 (2016), 2016 CarswellQue 4744, 2016 CarswellQue 4745 (S.C.C.) — referred to

Callow v. West Vancouver S.D. No. 45 (2016), 2016 CarswellSask 624, 2016 CarswellSask 625 (S.C.C.) — referred to

Callow v. West Vancouver School District No. 45 (2008), 2008 BCSC 778, 2008 CarswellBC 1266 (B.C. S.C.) — referred to

Canada Post Corp. v. Varma (2000), 192 F.T.R. 278, 2000 CarswellNat 1183, 2000 CarswellNat 5698 (Fed. T.D.) — referred to

Chutskoff Estate v. Bonora (2014), 2014 ABQB 389, 2014 CarswellAlta 1040, 590 A.R. 288 (Alta. Q.B.) — referred to

Chutskoff Estate v. Bonora (2014), 2014 ABCA 444, 2014 CarswellAlta 2380, 588 A.R. 303, 626 W.A.C. 303, 26 Alta. L.R. (6th) 255 (Alta. C.A.) — referred to

Cormier v. Nova Scotia (2015), 2015 NSSC 352, 2015 CarswellNS 980, (sub nom. *Cormier v. Nova Scotia)* 1157

A.P.R. 295, (sub nom. *Cormier v. Nov Scotia)* 367 N.S.R. (2d) 295, 83 C.P.C. (7th) 380 (N.S. S.C.) — referred to

Curle v. Curle (2014), 2014 ONSC 1077, 2014 CarswellOnt 1937 (Ont. S.C.J.) — referred to

Doell v. British Columbia (Minister of Public Safety and Solicitor General) (2016), 2016 BCSC 1181, 2016 CarswellBC 1761 (B.C. S.C.) — considered

Dove v. R. (2015), 2015 FC 1126, 2015 CarswellNat 4972, 2015 D.T.C. 5109, 2015 CF 1126, 2015 CarswellNat 7726 (F.C.) — considered

Dove v. R. (2015), 2015 FC 1307, 2015 CarswellNat 6827, 2015 CF 1307, 2015 CarswellNat 10653 (F.C.) — referred to

Dove v. R. (2016), 2016 FCA 231, 2016 CarswellNat 4557, 2016 CAF 231, 2016 CarswellNat 11479 (F.C.A.) — referred to

Dykun v. Odishaw (2001), 2001 ABCA 204, 2001 CarswellAlta 968, 286 A.R. 392, 253 W.A.C. 392 (Alta. C.A.) — considered

Ebert v. Birch (1999), [2000] Ch. 484, [1999] 3 W.L.R. 670, [1999] EWCA Civ 3043, [2000] B.P.I.R. 14 (Eng. & Wales C.A. (Civil)) — considered

Ewanchuk v. Canada (Attorney General) (2017), 2017 ABQB 237, 2017 CarswellAlta 561, 54 Alta. L.R. (6th) 135, [2017] 9 W.W.R. 533, 378 C.R.R. (2d) 1 (Alta. Q.B.) — referred to

Fearn v. Canada (Customs) (2014), 2014 ABQB 114, 2014 CarswellAlta 321, 94 Alta. L.R. (5th) 318, (sub nom. *Fearn v. Canada Customs)* 586 A.R. 23 (Alta. Q.B.) — referred to

Fiander v. Mills (2015), 2015 NLCA 31, 2015 CarswellNfld 230, 1149 A.P.R. 80, 368 Nfld. & P.E.I.R. 80 (N.L. C.A.) — considered

Gauthier v. Starr (2016), 2016 ABQB 213, 2016 CarswellAlta 680, 86 C.P.C. (7th) 348 (Alta. Q.B.) — referred to

Henry v. El (2010), 2010 ABCA 312, 2010 CarswellAlta 2056 (Alta. C.A.) — referred to

Henry v. El (2011), 2011 CarswellAlta 1197, 2011 CarswellAlta 1198, 426 N.R. 392 (note), 524 A.R. 399 (note), 545 W.A.C. 399 (note) (S.C.C.) — referred to

Hok v. Alberta (2016), 2016 ABQB 335, 2016 CarswellAlta 1142 (Alta. Q.B.) — referred to

Hok v. Alberta (2016), 2016 ABQB 651, 2016 CarswellAlta 2234, [2017] 6 W.W.R. 831 (Alta. Q.B.) — referred to

Hok v. Alberta (2017), 2017 CarswellAlta 1143 (S.C.C.) — referred to

Holmes v. Canada (Attorney General) (2016), 2016 FC 918, 2016 CarswellNat 4864, 2016 CF 918, 2016 CarswellNat 10954 (F.C.) — referred to

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

Isis Nation Estates v. R. (2013), 2013 FC 590, 2013 CarswellNat 1683, 2013 CF 590, 2013 CarswellNat 2339 (F.C.) — considered

Koerner v. Capital Health Authority (2010), 2010 ABQB 590, 2010 CarswellAlta 1854, 498 A.R. 109, 498 N.R. 109 (Alta. Q.B.) — referred to

Koerner v. Capital Health Authority (2011), 2011 ABQB 191, 2011 CarswellAlta 456, 506 A.R. 113 (Alta. Q.B.) — considered

Koerner v. Capital Health Authority (2011), 2011 ABCA 289, 2011 CarswellAlta 2079, 515 A.R. 392, 532 W.A.C. 392 (Alta. C.A.) — referred to

Koerner v. Capital Health Authority (2012), 2012 CarswellAlta 724, 2012 CarswellAlta 725, 435 N.R. 393 (note), 536 A.R. 405 (note), 559 W.A.C. 405 (note) (S.C.C.) — referred to

MacDonald Estate v. Martin (1990), [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 121 N.R. 1, (sub nom. *Martin v. Gray)* [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, 70 Man. R. (2d) 241, 1990 CarswellMan 384, 1990 CarswellMan 233, 285 W.A.C. 241 (S.C.C.) — considered

McCargar v. Canada (2017), 2017 ABQB 416, 2017 CarswellAlta 1180 (Alta. Q.B.) — referred to

McMeekin v. Alberta (Attorney General) (2012), 2012 ABQB 456, 2012 CarswellAlta 1220, 543 A.R. 132 (Alta. Q.B.) — referred to

McMeekin v. Alberta (Attorney General) (2012), 2012 ABQB 625, 2012 CarswellAlta 1739, 543 A.R. 11 (Alta. Q.B.) — referred to

Meads v. Meads (2012), 2012 ABQB 571, 2012 CarswellAlta 1607, [2013] 3 W.W.R. 419, 74 Alta. L.R. (5th) 1, 543 A.R. 215 (Alta. Q.B.) — considered

Nussbaum v. Stoney (July 20, 2017), Doc. 1603-03761 (Alta. Q.B.) — considered

O. (R.) v. F. (D.) (2016), 2016 ABCA 170, 2016 CarswellAlta 964, 87 C.P.C. (7th) 1, 76 R.F.L. (7th) 253, 36 Alta. L.R. (6th) 282 (Alta. C.A.) — considered

R. (F.J.) v. R. (I.) (2015), 2015 ABQB 112, 2015 CarswellAlta 250 (Alta. Q.B.) — considered

R. v. Claeys (2013), 2013 MBQB 313, 2013 CarswellMan 709, (sub nom. *Claeys v. Canada)* 300 Man. R. (2d) 257 (Man. Q.B.) — considered

R. v. Dick (2002), 2002 BCCA 27, 2002 CarswellBC 216, 163 B.C.A.C. 62, 267 W.A.C. 62 (B.C. C.A.) — referred to

R. v. Dove (2017), 2017 CarswellNat 2531, 2017 CarswellNat 2532 (S.C.C.) — referred to

R. v. Fearn (2014), 2014 ABQB 233, 2014 CarswellAlta 681, 586 A.R. 182 (Alta. Q.B.) — referred to

R. v. Grabowski (2015), 2015 ABCA 391, 2015 CarswellAlta 2267, 609 A.R. 217, 656 W.A.C. 217 (Alta. C.A.) — considered

R. v. Hok (2017), 2017 ABCA 63, 2017 CarswellAlta 232 (Alta. C.A.) — referred to

R. v. Prefontaine (2002), 2002 ABQB 980, 2002 CarswellAlta 1369, [2003] 5 W.W.R. 367, 12 Alta. L.R. (4th) 50 (Alta. Q.B.) — considered

R. v. Prefontaine (2004), 2004 ABCA 100, 2004 CarswellAlta 407 (Alta. C.A.) — referred to

Sikora Estate v. Sikora (2015), 2015 ABQB 467, 2015 CarswellAlta 1383 (Alta. Q.B.) — considered

Starr v. Ontario (Commissioner of Inquiry) (1990), [1990] 1 S.C.R. 1366, (sub nom. *Starr v. Houlden)* 68 D.L.R. (4th) 641, (sub nom. *Starr v. Houlden)* 110 N.R. 81, (sub nom. *Starr v. Houlden)* 41 O.A.C. 161, (sub nom. *Starr v. Houlden)* 55 C.C.C. (3d) 472, (sub nom. *Starr v. Houlden)* 72 O.R. (2d) 701 (note), 1990 CarswellOnt 998, 1990 CarswellOnt 1299 (S.C.C.) — referred to

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

Stoney v. Twinn (2016), 2016 ABCA 51, 2016 CarswellAlta 238, (sub nom. *Twinn v. Public Trustee (Alta.))* 616 A.R. 176, (sub nom. *Twinn v. Public Trustee (Alta.))* 672 W.A.C. 176 (Alta. C.A.) — referred to

Thompson v. IUOE, Local 955 (2017), 2017 ABQB 210, 2017 CarswellAlta 505, 2 C.P.C. (8th) 299 (Alta. Q.B.) — referred to

Thompson v. International Union of Operating Engineers Local No 995 (2017), 2017 ABCA 193, 2017 CarswellAlta 1039 (Alta. C.A.) — referred to

Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General) (2014), 2014 SCC 59, 2014 CSC 59, 2014 CarswellBC 2873, 2014 CarswellBC 2874, 375 D.L.R. (4th) 599, [2014] 11 W.W.R. 213, 59 C.P.C. (7th) 1, 62 B.C.L.R. (5th) 1, 74 Admin. L.R. (5th) 181, 51 R.F.L. (7th) 1, 463 N.R. 336, 361 B.C.A.C. 1, 619 W.A.C. 1, (sub nom. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General))* [2014] 3 S.C.R. 31, (sub nom. *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General))* 320 C.R.R. (2d) 239 (S.C.C.) — considered

West Vancouver School District No. 45 v. Callow (2014), 2014 ONSC 2547, 2014 CarswellOnt 5274 (Ont. S.C.J.) — referred to

Wong v. Giannacopoulos (2011), 2011 ABCA 277, 2011 CarswellAlta 1770, 515 A.R. 58, 532 W.A.C. 58, 4 C.C.L.I. (5th) 1 (Alta. C.A.) — referred to

Yankson v. Canada (Attorney General) (2013), 2013 BCSC 2332, 2013 CarswellBC 3837 (B.C. S.C.) — referred to

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2012), 2012 ABQB 365, 2012 CarswellAlta 1042, 75 Alta. L.R. (5th) 188, (sub nom. *Twinn v. Public Trustee (Alta.))* 543 A.R. 90, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee))* [2013] 3 C.N.L.R. 395 (Alta. Q.B.) — referred to

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2015), 2015 ABQB 799, 2015 CarswellAlta 2373 (Alta. Q.B.) — referred to

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2017), 2017 ABQB 299, 2017 CarswellAlta 745 (Alta. Q.B.) — referred to

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2013), 2013 ABCA 226, 2013 CarswellAlta 1015, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee))* [2013] 3 C.N.L.R. 411, 85 Alta. L.R. (5th) 165, (sub nom. *Twinn v. Alberta (Public Trustee))* 553 A.R. 324, (sub nom. *Twinn v. Alberta (Public Trustee))* 583 W.A.C. 324 (Alta. C.A.) — referred to

1985 Sawridge Trust v. Alberta (Public Trustee) (2017), 2017 ABQB 377, 2017 CarswellAlta 1193 (Alta. Q.B.) — referred to

1985 Sawridge Trust v. Alberta (Public Trustee) (2017), 2017 ABQB 436, 2017 CarswellAlta 1236 (Alta. Q.B.) — considered

1985 Sawridge Trust v. Alberta (Public Trustee) (2017), 2017 ABQB 530, 2017 CarswellAlta 1569 (Alta. Q.B.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2

Generally — referred to

s. 23(2) — considered

s. 23(2)(a) — referred to

ss. 23-23.1 — referred to

s. 23.1 [en. 2007, c. 21, s. 2] — referred to

s. 23.1(1) [en. 2007, c. 21, s. 2] — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 9.13 — considered

Federal Courts Rules, SOR/98-106
Generally — referred to

R. 114 — considered

CONSIDERATION by court of vexatious litigant order.

***D.R.G. Thomas J.*:**

I Introduction

1 The Action to which this decision ultimately relates was commenced on June 12, 2011 by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application". The 1985 Sawridge Trust applied to this Court for directions on how to distribute the Trust property to its beneficiaries. Members of the Sawridge Band are the beneficiaries of that Trust. The initial application has led to many court case management hearings, applications, decisions, and appeals: *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365, 543 A.R. 90 (Alta. Q.B.) ("*Sawridge #1*"), aff'd 2013 ABCA 226, 553 A.R. 324 (Alta. C.A.) ("*Sawridge #2*"); *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2015 ABQB 799 (Alta. Q.B.) ("***Sawridge #3***"), time extension denied 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.); *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2017 ABQB 299 (Alta. Q.B.) ("***Sawridge #4***"); *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 377 (Alta. Q.B.) ("***Sawridge #5***"); *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 436 (Alta. Q.B.) ("***Sawridge #6***"); *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 (Alta. Q.B.) ("***Sawridge #7***").

2 On July 12, 2017 I rejected an August 12, 2016 application by Maurice Felix Stoney that he and "his brothers and sisters" should be added as beneficiaries to the 1985 Sawridge Trust: *Sawridge #6*. In that decision I concluded that Stoney's application was a collateral attack on previously decided issues, hopeless, without merit, and an abuse of court: paras 34-52. I also concluded that there was no evidence to support that Maurice Stoney's "10 living brothers or sisters" were, in fact, voluntary participants in this application: paras 8-12.

3 I therefore:

1. limited the scope of the August 12, 2016 application to Maurice Stoney;

2. struck out the August 12, 2016 application;

3. ordered solicitor and own client indemnity costs against Maurice Stoney;

4. ordered that Stoney's lawyer, Priscilla Kennedy, appear on July 28, 2017 to make submissions as to whether she should be personally liable for that litigation costs award;

5. concluded that Maurice Stoney's August 12, 2016 application exhibits indicia of abusive litigation, and, therefore, on my own motion and pursuant to the Court's inherent jurisdiction:

a) put in place an interim court order to restrict Maurice Stoney's initiating or continuing litigation in Alberta Courts, and

b) instructed that Maurice Stoney, the Sawridge 1985 Trustees, and the intervener Sawridge Band may file written submissions as to whether Maurice Stoney should have his court access restricted via what is commonly called a "vexatious litigant" order.

4 Written submissions were received from the Trustees on July 26, 2017, the Sawridge Band on July 27, 2017, and Maurice Stoney on August 3, 2017.

5 On August 31, 2017 I issued *Sawridge #7*, where I concluded that Priscilla Kennedy and Maurice Stoney were jointly and severally liable for the costs award ordered in *Sawridge #6*.

6 This judgment evaluates whether Maurice Stoney should be the subject of restrictions on his future litigation activity in Alberta courts.

II. Abusive Litigation and Court Access Restrictions

7 The principles and procedure that govern court-ordered restrictions to access Alberta courts are developed in a number of recent decisions of this Court. This Court's inherent jurisdiction to control abuse of its processes includes that the Alberta Court of Queen's Bench may order that a person requires leave to initiate or continue an action or application: *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 14-25, (2016), 273 A.C.W.S. (3d) 533 (Alta. Q.B.), leave denied 2017 ABCA 63 (Alta. C.A.), leave to the SCC requested, 37624 (12 April 2017) [2017 CarswellAlta 1143 (S.C.C.)]; *Thompson v. IUOE, Local 955*, 2017 ABQB 210 (Alta. Q.B.) at para 56, affirmed 2017 ABCA 193 (Alta. C.A.); *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237 (Alta. Q.B.) at paras 92-96;*McCargar v. Canada*, 2017 ABQB 416 (Alta. Q.B.) at para 110.

8 An intervention of this kind is potentially warranted when a litigant exhibits one or more "indicia" of abusive litigation: *Chutskoff Estate v. Bonora*, 2014 ABQB 389 (Alta. Q.B.) at para 92, (2014), 590 A.R. 288 (Alta. Q.B.), aff'd 2014 ABCA 444 (Alta. C.A.); *Boisjoli, Re*, 2015 ABQB 629 (Alta. Q.B.) at paras 98-103, (2015), 29 Alta. L.R. (6th) 334 (Alta. Q.B.); *McCargar v. Canada*, 2017 ABQB 416 (Alta. Q.B.) at para 112. Where a judge concludes these "indicia" are present and control of abusive litigation may be appropriate then the Court usually follows a two-step process prior to imposing court access restrictions, if appropriate: *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 10-11; *Ewanchuk v. Canada (Attorney General)*, at para 97.

9 *Sawridge #6*, at para 55 identified three types of litigation abuse behaviour by Maurice Stoney that potentially warranted court access restrictions:

1. Collateral attack that attempts to reopen an issue that has already been determined by a court of competent jurisdiction, to circumvent the effect of a court or tribunal decision, using previously raised grounds and issues.

2. Bringing hopeless proceedings that cannot succeed, here in both the present application and the *Sawridge #3* appeal where Maurice Stoney was an uninvolved third party.

3. Initiating "busybody" lawsuits to enforce the rights of third parties, here the recruited participation of Maurice Stoney's "10 living brothers and sisters."

10 I therefore on an interim basis and pursuant to *Hok v. Alberta*, 2016 ABQB 335 (Alta. Q.B.) at para 105 restricted Maurice Stoney's litigation activities (*Sawridge #6*, at para 65-66), and invited submissions on whether Maurice Stoney's litigation activities should be restricted, and if so, in what manner (*Sawridge #6*, at paras 63-64).

11 Subsequently Associate Chief Justice Rooke on July 20, 2017 granted an exception to this interim order in relation to *Nussbaum v. Stoney* [(July 20, 2017), Doc. 1603-03761 (Alta. Q.B.)], Alberta Court of Queen's Bench docket 1603 03761 (the "Rooke Order").

12 The current decision completes the second step of the two-part *Hok v. Alberta* process.

13 Relevant evidence for this analysis includes activities both inside and outside of court:

Bishop v. Bishop, 2011 ONCA 211 (Ont. C.A.) at para 9, (2011), 200 A.C.W.S. (3d) 1021 (Ont. C.A.), leave to SCC refused, 34271 (20 November 2011) [2011 CarswellOnt 10865 (S.C.C.)]; *Henry v. El*, 2010 ABCA 312 (Alta. C.A.) at paras 2-3, 5, (2010), 193 A.C.W.S. (3d) 1099 (Alta. C.A.), leave to SCC refused, 34172 (14 July 2011) [2011 CarswellAlta 1197 (S.C.C.)]. A litigant's entire court history is relevant, including litigation in other jurisdictions: *McMeekin v. Alberta (Attorney General)*, 2012 ABQB 456 (Alta. Q.B.) at paras 83-127, (2012), 543 A.R. 132 (Alta. Q.B.); *Curle v. Curle*, 2014 ONSC 1077 (Ont. S.C.J.) at para 24;*Fearn v. Canada (Customs)*, 2014 ABQB 114 (Alta. Q.B.) at paras 102-105, (2014), 586 A.R. 23 (Alta. Q.B.). That includes non-judicial proceedings, as those may establish a larger pattern of behaviour: *Bishop v. Bishop* at para 9; *Canada Post Corp. v. Varma* [2000 CarswellNat 1183 (Fed. T.D.)], 2000 CanLII 15754 at para 23, (2000), 192 F.T.R. 278 (Fed. T.D.); *West Vancouver School District No. 45 v. Callow*, 2014 ONSC 2547 (Ont. S.C.J.) at para 39. A court may take judicial notice of public records when it evaluates the degree and kind of misconduct caused by a candidate abusive litigant: *Wong v. Giannacopoulos*, 2011 ABCA 277 (Alta. C.A.) at para 6, (2011), 515 A.R. 58 (Alta. C.A.).

14 A court may order court access restrictions where future litigation abuse is *anticipated*. As Verville J observed in *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at para 37:

. . . when a court makes a vexatious litigant order it should do so to respond to anticipated abuse of court processes. This is a prospective case management step, rather than punitive. [emphasis in original]

15 When a court considers limits to future court access by a person with a history of litigation misconduct the key questions for a court 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? (*Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at para 36).

16 Court access restriction orders should be measured versus and responsive to the anticipated potential for future abuse of court processes. Court access restrictions are designed in a functional manner and not restricted to formulaic approaches, but instead respond in a creative, but proportionate, manner to anticipated potential abuse: *Bhamjee v. Forsdick*, [2003] EWCA Civ 1113 (Eng. C.A.).

17 A vexatious litigant order that simply requires the abusive person obtain permission, "leave", from the court before

filing documents to initiate or continue an action is a limited impediment to a person's ability to access court remedies: *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 32-33. Though this step is sometimes called "extraordinary", that dramatic language exaggerates the true and minimal effect of a leave application requirement: *Wong v. Giannacopoulos*, at para 8; *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 32-33.

18 Other more restrictive alternatives are possible, where appropriate, provided that more strict intervention is warranted by the litigant's anticipated future misconduct: *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at para 34; *Ewanchuk v. Canada (Attorney General)*, at paras 167-68.

III. Submissions and Evidence Concerning Appropriate Litigation Control Steps

A. The Sawridge Band

19 The Sawridge Band submits that this Court should exercise its inherent jurisdiction and *Judicature Act*, RSA 2000, c J-2 ss 23-23.1 to restrict Maurice Stoney's access to Alberta courts. The Sawridge Band relied on evidence concerning Maurice Stoney's activities that was submitted to the Court in relation to *Sawridge #6*.

20 The August 12, 2016 application was futile because Maurice Stoney had continued to repeat the same, already discounted argument. Maurice Stoney had not been granted automatic membership in the Sawridge Band by Bill C-31, and that fact had been either admitted or adjudicated in the *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.) and *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.) decisions.

21 Maurice Stoney was allowed to apply to become a member of the Sawridge Band, but that application was denied, as was the subsequent appeal. The lawfulness of those processes was confirmed in *Stoney v. Sawridge First Nation*.

22 A subsequent 2014 Canadian Human Rights Commission complaint concerning the membership application process again alleged the same previously rejected arguments. The same occurred before the Alberta Court of Appeal in *Stoney v. Twinn*, 2016 ABCA 51 (Alta. C.A.)

23 Maurice Stoney's persistent attempts to re-litigate the same issue represent collateral attacks and are hopeless proceedings. Stoney has failed to pay outstanding costs orders. His attempts to shift litigation costs to the 1985 Sawridge Trust are an aggravating factor. These factors imply that Maurice Stoney had brought these actions for an improper purpose. The August 12, 2016 application was a "busybody" attempt to enforce (alleged) rights of uninvolved third parties.

24 Combined, these indicia of abusive litigation mean Maurice Stoney should be the subject of a vexatious litigant order that globally restricts his access to Alberta courts. In the alternative, a vexatious litigant order with a smaller scope should, at a minimum, restrict Maurice Stoney's potential litigation activities in relation to the Sawridge Band, its Chief and Council, the Sawridge 1985 and 1986 Trusts, and the Trustees of those trusts.

25 Given Stoney's history of not paying cost awards he should be required to pay outstanding costs orders prior to any application for leave to initiate or continue actions, as in *R. v. Grabowski*, 2015 ABCA 391 (Alta. C.A.) at para 15, (2015), 609 A.R. 217 (Alta. C.A.).

B. The Sawridge 1985 Trust Trustees

26 The Sawridge 1985 Trust Trustees adopted the arguments of the Sawridge Band, but also emphasized the importance of Maurice Stoney's answers and conduct during cross-examination on his May 16, 2016 affidavit. The Trustees stress this record shows that Maurice Stoney is uncooperative and refused to acknowledge the prior litigation results.

C. Maurice Stoney

27 Maurice Stoney's written submissions were signed by and filed by lawyer Priscilla Kennedy, identified as "Counsel

for Maurice Stoney". The contents of the written submissions are, frankly, unexpected. Paragraphs 6 through 13 advance legal arguments concerning Maurice Stoney's status as a member of the Sawridge Band:

> 1. the *Huzar v. Canada* decision cannot be relied on as "evidence in this matter";
>
> 2. *Stoney v. Sawridge First Nation* is not a "thorough analysis" of Maurice Stoney's arguments;
>
> 3. Maurice Stoney has not attempted to re-litigate the membership issue but rather to set out the legal arguments that address the definition of a beneficiary of the 1985 Sawridge Trust; and
>
> 4. " . . . 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*." [Italics in original].

28 Paragraph 14 of the written brief, which follows these statements, reads:

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

29 I reject that a bald statement that these are "the facts" proves anything, or establishes these statements are, in fact, true or correct.

30 The brief then continues at paras 16-17, 24, 28 to state:

> As shown by the litigation in the Sawridge Band cases above, the on-going case in [Descheneaux c Canada (Procureur Général), 2015 QCCS 3555] and the decision of the Supreme Court of Canada in [Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 SCR 99], and 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 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.
>
> It is submitted that litigation seeking to determine whether or not you qualify as a beneficiary under a trust established on April 15, 1985 is 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 . . .
>
> 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 proceedings 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.
>
> . . . 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.

31 These are reasons why the August 12, 2016 application was not a collateral attack:

> 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 definitions of a beneficiary of this trust.

(Written brief, para 23).

32 Prior to going any further I will at this point explain that I put no *legal* weight on these statements. If Maurice Stoney wishes to appeal *Sawridge #6* and my conclusions therein he may do so. In fact he did file an appeal of *Sawridge #6* as a self-represented litigant on August 11, 2017. If Maurice Stoney or his counsel wish to revisit *Sawridge #6* then they could have made an application under *Rule* 9.13 of the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"], however they did not elect to do so. I conclude these statements, no matter how they were allegedly framed in paragraphs 14 and 23 of Stoney's written arguments, are nothing more than an attempt to re-argue *Sawridge #6*. Again, I put no *legal* weight on these arguments, but conclude these statements are highly relevant as to whether Maurice Stoney is likely to in the future re-argue issues that have been determined conclusively by Canadian courts.

33 Other submissions by Maurice Stoney are more directly relevant to his potentially being the subject of court-ordered restrictions. He acknowledges that there are unpaid costs to the Sawridge First Nation, but says these will be paid " . . . as soon as it is possible ...". Stoney indicates he has been unable to pay these costs amounts because of a foreclosure action.

34 Affidavit evidence allegedly has established that Maurice Stoney was authorized to represent his brothers and sisters, and that Maurice Stoney was directed to act on their behalf. Counsel for Stoney unexpectedly cites *Federal Courts Rules*, SOR/98-106, s 114 as the authority for the process that Maurice Stoney followed when filing his August 12, 2016 application in the Alberta Court of Queen's Bench:

> . . . 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, more 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.
>
> (Written Brief, para 24.)

Maurice Stoney therefore denies this was a "busybody" proceeding where he without authority attempted to represent third parties.

35 The written argument concludes that Maurice Stoney should not be the subject of court access restrictions, but if the Court concludes that step is necessary then that restriction should only apply to litigation vs the Sawridge Band and 1985 Sawridge Trust.

D. Evidence

36 The Trustees and the Sawridge Band entered as evidence a transcript of Maurice Stoney's cross-examination on his May 16, 2016 affidavit. This transcript illustrates a number of relevant points.

> 1. Maurice Stoney claims to be acting on behalf of himself and his brothers and sisters, and that he has their consent to do that: pp 9-10.
>
> 2. Maurice Stoney believes his father was forced out of Indian status by the federal government: p 12.
>
> 2. Maurice Stoney and his counsel Priscilla Kennedy do not accept that Maurice Stoney was refused automatic membership in the Sawridge Band by the *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.) and *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.) decisions: pp 23-27, 30-33.

3. Maurice Stoney claims he made an application for membership in the Sawridge Band in 1985 but that this application was "ignored": pp 37-39. Stoney however did not have a copy of that application: pp 39-40.

4. Maurice Stoney refused to answer a number of questions, including:

- whether he had read the *Stoney v. Sawridge First Nation* decision (pp 32-33),
- whether he had made a Canadian Human Rights Commission complaint against the Sawridge Band (p 54),
- whether he had ever read the Sawridge Trust's documentation (pp 60-61),
- the identity of other persons whose Sawridge Band applications were allegedly ignored (pp 63-64), and
- the health status of the siblings for whom Maurice Stoney was allegedly a representative (p 66).

5. Maurice Stoney claims that the Sawridge Band membership application process is biased: pp 41-42.

37 Maurice Stoney introduced three affidavits which he says indicate the August 12, 2016 application was not a "busybody" proceeding and instead Maurice Stoney was authorized to represent his other siblings in the Sawridge Advice and Direction Application:

1. Shelley Stoney, dated July 20, 2017, saying she is the daughter of Bill Stoney and the niece of Maurice Stoney. She is responsible "for driving my father and uncles who are all suffering health problems and elderly." Shelley Stoney attests " . . . from discussions among my father and his brothers and sisters" that Maurice Stoney was authorized to bring the August 12, 2016 application on their behalf.

2. Bill Stoney, brother of Maurice Stoney, dated July 20, 2017, saying he authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.

3. Gail Stoney, sister of Maurice Stoney, dated July 20, 2017, saying she authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.

38 In *Sawridge #7* at paras 133-37 I conclude these affidavits should receive little weight:

The three affidavits presented by Kennedy do not establish that Maurice Stoney was authorized to represent his siblings. Even at the most generous, these affidavits only indicate that Bill and Gail Stoney gave some kind of oral sanction for Maurice Stoney to act on their behalf. I put no weight on the affidavit of Shelley Stoney. It is hearsay, and presumptively inadmissible.

I note that none of these affidavits were supported by any form of documentation, either evidence or records of communications between Maurice Stoney and his siblings, or between Kennedy and her purported clients.

I make an adverse inference from the absence of any documentary evidence of the latter. The fact that no documentation to support that Kennedy and the Stoney siblings communicated in any manner, let alone gave Kennedy authority to act on their behalf, means none exists.

There is no documentation to establish that Maurice Stoney applied to become a litigation representative or was appointed a litigation representative, per *Rules* 2.11-2.21. This is not a class action scenario where Maurice Stoney is a representative applicant. While Kennedy has argued that Maurice Stoney's siblings are elderly and unable to conduct

litigation, then that is not simply a basis to arbitrarily add their names to court filing. Instead, a person who lacks the capacity to represent themselves (*Rule* 2.11(c-d)) may have a self-appointed litigation representative (*Rule* 2.14), but only after filing appropriate documentation (*Rule* 2.14(4)). That did not occur.

39 I come to the same conclusion here and also find as a fact that in this proceeding Maurice Stoney was not authorized to file the August 12, 2016 application on behalf of his siblings.

IV. Analysis

40 What remains are two steps:

1. to evaluate the form and seriousness of Maurice Stoney's litigation misconduct, and

2. determine whether court access restrictions are appropriate, and, if so, what those restrictions should be.

41 However, prior to that I believe it is helpful to briefly explore the inherent jurisdiction of this Court to limit litigant activities, vs the authority provided in *Judicature Act*, ss 23-23.1, since these two mechanisms were broached in the submissions of the parties.

A. Control of Abusive Litigation via Inherent Jurisdiction vs the Judicature Act

42 An argument can be made that that Alberta Court of Queen's Bench may only restrict prospective litigation via the procedure in *Judicature Act*, ss 23-23.1. I disagree with that position, though at present this question has not been explicitly and conclusively decided by the Alberta Court of Appeal, or the Supreme Court of Canada.

43 The most detailed investigation of this issue is found in *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.), where Verville J at paras 14-25 concluded that one element of this Court's inherent jurisdiction is an authority to restrict prospective and hypothetical litigation activities, both applications and entirely new actions.

44 In coming to that conclusion Justice Verville rejected a principle found in I H Jacobs often-cited paper, "The Inherent Jurisdiction of the Court" ((1970) 23:1 Current Legal Problems 23 at 43), that UK tradition courts do not have an inherent jurisdiction to block commencement of potentially abusive proceedings:

> The court has no power, even under its inherent jurisdiction, to prevent a person from commencing proceedings which may turn out to be vexatious. It is possibly by virtue of this principle that many a litigant in person, perhaps confusing some substratum of grievance with an infringement of legal right, is lured into using the machinery of the court as a remedy for his ills only to find his proceedings summarily dismissed as being frivolous and vexatious and an abuse of the process of the court. The inherent jurisdiction of the court has, however, been supplemented by statutory power to restrain a vexatious litigant from instituting or continuing any legal proceedings without leave of the court.

45 Jacobs elsewhere in his paper explains that the inherent jurisdiction of the court flows from its historic operation, and stresses this is an adaptive tool that applies as necessary to address issues that would otherwise interfere with the administration of justice and the court's operations:

> . . . inherent jurisdiction of the court may be defined as the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. ...

(Jacobs at 51)

46 However, Jacob's conclusion that courts have no inherent jurisdiction to limit future litigation was based on a historical error, as explained in *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.), at para 17:

> Two UK Court of Appeal decisions, Ebert v Birch & Anor, (also cited as Ebert v Venvil), [1999] EWCA Civ 3043 (UK CA) and Bhamjee v Forsdick & Ors (No 2), [2003] EWCA Civ 1113 (UK CA), set out the common law authority of UK courts to restrict litigant court access. Some Commonwealth authorities had concluded that UK and Commonwealth courts had no inherent jurisdiction to restrict a person from initiating new court proceedings, and instead that authority was first obtained when Parliament passed the Vexatious Actions Act, 1896.
>
> Ebert concludes that is false, as historical research determined that in the UK courts had exercised common law authority to restrict persons initiating new litigation prior to passage of the Vexatious Actions Act, 1896. That legislation and its successors do not codify the court's authority, but instead legislative and common-law inherent jurisdiction control processes co-exist.

47 Furthermore, the Alberta Court of Appeal has itself issued vexatious litigant orders which do not conform to *Judicature Act* processes. For example, in *Dykun v. Odishaw*, 2001 ABCA 204, 286 A.R. 392 (Alta. C.A.), that Court issued an "injunction" that restricted court access without either an originating notice or the consent of the Minister of Justice and Attorney General of Alberta (then required by *Judicature Act*, s 23.1). Justice Verville concludes (*Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.), at paras 19-20, 25), and I agree, that this means Alberta courts have an inherent jurisdiction to take steps of this kind. If the Court of Appeal had the inherent jurisdiction to make the order it issued in *Dykun v. Odishaw*, then so does the Alberta Court of Queen's Bench.

48 Beyond that, the efficient administration of justice simply requires that there must be an effective mechanism by which the courts may control abusive litigation and litigants. This must, of course, meet the constitutional requirement that any obstacle or expense requirement placed in front of a potential court participant does not " . . . effectively [deny] people the right to take their cases to court ..." or cause "undue hardship": *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (S.C.C.) at paras 40, 45-48, [2014] 3 S.C.R. 31 (S.C.C.). As I have previously observed, an obligation to make a document-based application for leave to file is a comparatively minor imposition and obviously does not cause "undue hardship".

49 The question, then, is whether the *Judicature Act*, ss 23-23.1 procedure is an adequate one, or does the Court need to draw on its "reserve" of "residual powers" to design an effective mechanism to control abusive litigants and litigation. I conclude that it must. A critical defect in this legislation is that section 23(2) defines proceedings that are conducted in a "vexatious manner" as requiring "persistent" misconduct, for example "persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction" [emphasis added]: *Judicature Act*, s 23(2)(a).

50 The Alberta Court of Appeal in certain decisions that apply *Judicature Act*, ss 23-23.1 appears to apply this rule in a strict manner, for example, in *O. (R.) v. F. (D.)*, 2016 ABCA 170, 36 Alta. L.R. (6th) 282 (Alta. C.A.) at para 38 the Court stresses this requirement. Further, the *O. (R.) v. F. (D.)* decision restricts the scope of a *Judicature Act*, ss 23-23.1 order on the basis that the vexatious litigant had no " . . . history of "persistently" ..." engaging in misconduct that involves outside parties. In other words, according to *O. (R.) v. F. (D.)* the *Judicature Act*, ss 23-23.1 process operates retrospectively. *Judicature Act*, ss 23-23.1 authorize court access restrictions only after "persistent" misconduct has occurred.

51 That said, it is clear that the Alberta Court of Appeal does not actually apply that requirement in other instances where it has made an order authorized per the *Judicature Act*. For example, in *Henry v. El* Slatter JA ordered a broad, multi-court ban on the plaintiff's court activities, though only one dispute is mentioned. There is no or little record of 'persistent history'. *Henry v. El* does not identify repeated or persistent litigation steps, nor are multiple actions noted. The misconduct that warranted the litigation restraint was bad arguments, and out- of-court misconduct: a need for the target of the misconduct to obtain police assistance, the plaintiff had foisted allegedly binding legal documents on the defendant, the abusive plaintiff was the target of a court ordered peace bond, and the abusive plaintiff posted a bounty for the defendant on the Internet.

52 In *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 36-37, Justice Verville concluded that an effective mechanism to limit court access should operate in a *prospective* manner - based on evidence that leads to a prediction of future abusive litigation activities. This is also the approach recommended in the UK Court of Appeal *Ebert v. Birch*, [1999] EWCA Civ 3043 (Eng. & Wales C.A. (Civil)) and *Bhamjee v. Forsdick* decisions.

53 However, the strict "persistence"-driven approach in the *Judicature Act* and *O. (R.) v. F. (D.)* only targets misconduct that has already occurred. It limits the court to play 'catch up' with historic patterns of abuse, only fully reining in worst-case problematic litigants after their litigation misconduct has metastasized into a cascade of abusive actions and applications.

54 That outcome can sometimes be avoided.

1. Statements of Intent

55 First, abusive litigants are sometimes quite open about their intentions. For example, in *McMeekin v. Alberta (Attorney General)*, 2012 ABQB 625 (Alta. Q.B.) at para 44, (2012), 543 A.R. 11 (Alta. Q.B.), a vexatious litigant said exactly what he planned to do in the future:

> I can write, I can write the judicature counsel, I can write the upper law society of Canada. I got Charter violations. I got administrative law violations. I've got civil contempt. I've got abuse of process. I've got abuse of qualified privilege. I can keep going, I haven't even got, I haven't even spent two days on this so far. And if you want to find out how good I am, then let's go at it. But you know, at the end of the day, I'm not walking away. And it's not going to get any better for them.

56 It seems strange that a court is prohibited from taking that kind of statement of intent into account when designing the scope of court access restrictions. This kind of stated intention obviously favours broad control of future litigation activities.

57 A modern twist on a statement of intentions is that some abusive litigants document their activities and intentions on Internet websites. For example, *West Vancouver School District No. 45 v. Callow*, 2014 ONSC 2547 (Ont. S.C.J.) at paras 31, 40 describes how an abusive court litigant had, rather conveniently, documented and recorded online his various activities and his perceptions of a corrupt court apparatus.

58 However, there is no reason why the opposite scenario would not be relevant. Where an abusive litigant chooses to take steps to indicate good faith conduct, then that action predicts future conduct, for example by taking tangible positive steps to demonstrate they are a 'fair dealer' by:

1. voluntarily terminating or limiting abusive litigation,

2. abandoning claims, restricting the scope of litigation, consenting to issues or facts previously in dispute,

59 These kinds of actions may warrant a problematic litigant receiving limited court access restrictions, or no court access restrictions at all. Rewarding positive self-regulation is consistent with the administration of justice, and a modern, functional approach to civil litigation.

2. *Demeanor and Conduct*

3. *Abuse Caused by Mental Health Issues*

4. *Litigation Abuse Motivated by Ideology*

5. *Persistent Abusive Conduct is Only One Predictor of Future Misconduct*

2. Demeanor and Conduct

60 Similarly, a trial court judge may rely on his or her perception of an abusive court participant's character, demeanor, and conduct. Obviously, there is a broad range of conduct that may be relevant, but it is helpful to look at one example. Maurice Prefontaine, a persistent and abusive litigant who has often appeared in Alberta and other Canadian courts, presents a predictable in-court pattern of conduct, which is reviewed in *R. v. Prefontaine*, 2002 ABQB 980, 12 Alta. L.R. (4th) 50 (Alta. Q.B.), appeal dismissed for want of prosecution 2004 ABCA 100, 61 W.C.B. (2d) 306 (Alta. C.A.).

61 Mr. Prefontaine presented himself in a generally ordered, polite manner in court. He was at one point a lawyer. He has for years pursued a dispute with the Canada Revenue Agency, and has appeared on many occasions in relation to that matter. Mr. Prefontaine's behaviour changed in a marked but predictable manner when his submissions were rejected. He explodes, making obscene insults and threats directed to the hearing judge and opposing parties. When a person responds to the court in this manner, that conduct is a significant basis to conclude that future problematic litigation is impending from that abusive court participant. Sure enough, that has been the case with Mr. Prefontaine.

62 Also perhaps unsurprising is that Mr. Prefontaine's conduct is probably linked to his being diagnosed with a persecutory delusional disorder, or a paranoid personality disorder: *R. v. Prefontaine*, at paras 8-17, 82, 94-98.

3. Abuse Caused by Mental Health Issues

63 There are many other examples of how litigation abuse has a mental health basis. For example, the plaintiff in *Koerner v. Capital Health Authority*, 2011 ABQB 191, 506 A.R. 113 (Alta. Q.B.), affirmed 2011 ABCA 289, 515 A.R. 392 (Alta. C.A.), leave to SCC refused, 34573 (26 April 2012) [2012 CarswellAlta 724 (S.C.C.)] engaged in vexatious litigation because her perceptions were distorted by somatoform disorder, a psychiatric condition where a person reports spurious physical disorders (*Koerner v. Capital Health Authority*, 2010 ABQB 590 (Alta. Q.B.) at paras 4-5, (2010), 498 A.R. 109 (Alta. Q.B.)). Similarly, in *R. (F.J.) v. R. (I.)*, 2015 ABQB 112 (Alta. Q.B.), court access restrictions were appropriate because the applicant was suffering from dementia that led to spurious, self-injuring litigation. In these cases future abuse of the courts can be predicted from a person's medical history.

64 Another and very troubling class of abusive litigants are persons who are affected by querulous paranoia, a form of persecutory delusional disorder that leads to an ever-expanding cascade of litigation and dispute processes, which only ends after the affected person has been exhausted and alienated by this self-destructive process. Querulous paranoiacs attack everyone who becomes connected or involved with a dispute via a diverse range of processes including lawsuits, appeals, and professional complaints. Anyone who is not an ally is the enemy. This condition is reviewed in Gary M Caplan & Hy Bloom, "Litigants Behaving Badly: Querulousness in Law and Medicine" 2015 44:4 Advocates' Quarterly 411 and Paul E Mullen & Grant Lester, "Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour" (2006) 24 Behav Sci Law 333.

65 Persons afflicted by querulous paranoia exhibit a unique 'fingerprint' in the way they frame and conduct their litigation as a crusade for retribution against a perceived broad-based injustice, and via a highly unusual and distinctive document style. The vexatious litigants documented in *McMeekin v. Alberta (Attorney General)*, 2012 ABQB 456, 543 A.R. 132 (Alta. Q.B.), *McMeekin v. Alberta (Attorney General)*, 2012 ABQB 625, 543 A.R. 11 (Alta. Q.B.), *Chutskoff Estate v. Bonora*, 2014 ABQB 389, 590 A.R. 288 (Alta. Q.B.), *Hok v. Alberta*, 2016 ABQB 335 (Alta. Q.B.), and *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) all exhibit the characteristic querulous paranoiac litigation and document fingerprint criteria.

66 Mullen and Grant observe these persons cannot be managed or treated: pp 347-48. Early intervention is the only possible way to interrupt the otherwise grimly predictable progression of this condition: Caplan & Bloom, pp 450-52; Mullen & Lester, pp 346-47. Disturbingly, these authors suggest that the formal and emotionally opaque character of litigation processes may, by its nature, transform generally normal people into this type of abusive litigant: Caplan & Bloom, pp 426-27, 438.

67 A "persistent misconduct" requirement means persons afflicted by querulous paranoia cannot be managed. They will always outrun any court restriction, until it is too late and the worst outcome has occurred.

4. Litigation Abuse Motivated by Ideology

68 Other abusive litigants are motivated by ideology. A particularly obnoxious example of this class are the Organized Pseudolegal Commercial Argument ["OPCA"] litigants described in *Meads v. Meads*, 2012 ABQB 571, 543 A.R. 215 (Alta. Q.B.). Many OPCA litigants are hostile to and reject conventional state authority, including court authority. They engage in group and organized actions that have a variety of motives, including greed, and extremist political objectives: *Meads v. Meads*, at paras 168-198. Justice Morissette ("Querulous or Vexatious Litigants, A Disorder of a Modern Legal System?" (Paper delivered at the Canadian Association of Counsel to Employers, Banff AB (26-28 September 2013)) at pp 11) has observed for this population that abuse of court processes is a political action, " . . . the vector of an ideology for a class of actors in the legal system."

69 Some OPCA litigants use pseudolegal concepts to launch baseless attacks on government actors, institutions, lawyers, and others. For example:

- *B. (A.N.) v. Hancock*, 2013 ABQB 97, 557 A.R. 364 (Alta. Q.B.) - after his children were seized by child services the Freeman-on-the-Land father sued child services personnel, lawyers, RCMP officers, and provincial court judges, demanding return of his property (the children) and $20 million in gold and silver bullion, all on the basis of OPCA paperwork.

- *Ali v. Ford*, 2014 ONSC 6665 (Ont. S.C.J.) - the plaintiff sued Toronto mayor Rob Ford and the City of Toronto for $60 million in retaliation for a police attendance on his residence. The plaintiff claimed he was a member of the Moorish National Republic, and as a consequence immune from Canadian law.

- *Dove v. R.*, 2015 FC 1126 (F.C.), aff'd 2015 FC 1307 (F.C.), aff'd *Dove v. R.*, 2016 FCA 231 (F.C.A.), leave to the SCC refused, 37487 (1 June 2017) [2017 CarswellNat 2531 (S.C.C.)] - the plaintiffs claimed international treaties and the *Charter* are a basis to demand access to a secret personal bank account worth around $1 billion that is associated with the plaintiffs' birth certificates; this is allegedly a source for payments owed to the plaintiffs so they can adopt the lifestyle they choose and not have to work.

- *R. v. Claeys*, 2013 MBQB 313, 300 Man. R. (2d) 257 (Man. Q.B.) - the plaintiff sued for half a million dollars and refund of all taxes collected from her, arguing she had waived her rights to be a person before the law, pursuant to the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Canada had no authority because Queen Elizabeth II was " . . . Crowned on a fraudulent Stone and ... violated her Coronation Oath by giving Royal Assent to laws that violate God's Law ...".

- *Doell v. British Columbia (Minister of Public Safety and Solicitor General)*, 2016 BCSC 1181 (B.C. S.C.) - an individual who received a traffic ticket for riding without a helmet sued British Columbia, demanding $150,000.00 in punitive damages, because he is a human being and not a person, and the RCMP had interfered with his right "to celebrate divine service".

- *Fiander v. Mills*, 2015 NLCA 31, 368 Nfld. & P.E.I.R. 80 (N.L. C.A.) - a person accused of fisheries offenses sued the Crown prosecutor, fisheries officer, and provincial court judge, arguing he was wrongfully prosecuted because he had opted out of "having" a "person" via the *Universal Declaration of Human Rights*.

- *Isis Nation Estates v. R.*, 2013 FC 590 (F.C.), the plaintiff, "Maitreya Isis Maryjane Blackshear, the Divine Holy Mother of all/in/of creation", sued Alberta and Canada for

$108 quadrillion and that they "cease and desist all blasphemy" against the plaintiff.

70 There is little need to explore why these claims are anything other than ridiculous.

71 OPCA litigants have been formally declared vexatious, for example: *Boisjoli, Re*, 2015 ABQB 629, 29 Alta. L.R. (6th) 334 (Alta. Q.B.); *Boisjoli, Re*, 2015 ABQB 690 (Alta. Q.B.); *Cormier v. Nova Scotia*, 2015 NSSC 352, 367 N.S.R. (2d) 295 (N.S. S.C.); *Curle v. Curle*, 2014 ONSC 1077 (Ont. S.C.J.); *Gauthier v. Starr*, 2016 ABQB 213, 86 C.P.C. (7th) 348 (Alta. Q.B.); *Holmes v. Canada (Attorney General)*, 2016 FC 918 (F.C.); *R. v. Fearn*, 2014 ABQB 233, 586 A.R. 182 (Alta. Q.B.); *Yankson v. Canada (Attorney General)*, 2013 BCSC 2332 (B.C. S.C.).

72 Judicial and legal academic authorities uniformly identify OPCA narratives and their associated pseudolegal concepts as resting on and building from a foundation of paranoid and conspiratorial anti-government and anti-institutional political and social belief. These individuals are sometimes called 'litigation terrorists' for this reason. They may act for personal benefit, but they also do so with the belief they are justified and act lawfully when they injure others and disrupt court processes. Persons who advance OPCA litigation to harm others have no place in Canada's courts. The court's inherent jurisdiction must be able to shield the innocent potential victims of these malcontents. Their next target can be anyone who crosses their path - government officials or organizations, peace officers, lawyers, judges, business employees - and who then offends the OPCA litigant's skewed perspectives.

73 These individuals believe they have a right to attack others via the courts, they like the idea of doing that, and they view their litigation targets as bad actors who deserve punishment. Waiting for these individuals to establish "persistent misconduct" simply means they just have more opportunities to cause harm.

74 The plaintiff in *Henry v. El* was obviously an OPCA litigant engaged in a vendetta. Slatter JA in that matter did not wait for the plaintiff to establish a pattern of "persistently" misusing the courts to attack others. I agree that is the correct approach. If a person uses pseudolaw to attack others as a 'litigation terrorist' then that should be a basis for immediate court intervention to prevent that from recurring. If the *Judicature Act* cannot provide an authority to do that, then this Court's inherent jurisdiction should provide the basis for that step.

5. Persistent Abusive Conduct is Only One Predictor of Future Misconduct

75 All this is not to say that "persistence" is irrelevant. In fact, it is extremely important. A history of persistent abuse of court processes implies the likelihood of other, future misconduct. Persistence is relevant, but must not be *the only prerequisite* which potentially triggers court intervention. Persistence is a clear and effective basis for a court to predict actions when it cannot ascertain motivation or pathology, and from that derive what is likely and predictable.
However, that should not be the only evidence which is an appropriate basis on which to restrict court access.

76 The reason that I and other Alberta Court of Queen's Bench judges have concluded that this Court has an inherent jurisdiction to limit court access to persons outside the *Judicature Act*, ss 23-23.1 scheme is not simply because the UK appeal courts have concluded that this jurisdiction exists, *but also because that authority is necessary*. *Sawridge #7* at paras 38-49 reviews how the Supreme Court has instructed that trial courts conduct a "culture shift" in their operation towards processes that are fair and proportionate, without being trapped in artificial and formulaic rules and procedures. This is *an obligation* on the courts. The current *Judicature Act*, ss 23-23.1 process is an inadequate response to the growing issue of problematic and abusive litigation.

77 Even though the *Judicature Act* is not the sole basis for this Court's jurisdiction to control abusive litigation, that legislation could be amended to make it more effective. One helpful step would be to remove the requirement that "vexatious" litigation involves misconduct that occurs "persistently". Another would be to re-focus the basis for when intervention should occur.
Currently, section 23.1(1) permits intervention when " . . . a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner ...". This again is backwards-looking, punitive language. In my opinion a superior alternative is "... when a Court is satisfied that a person may abuse court processes ...".

78 The Legislature should also explicitly acknowledge that the *Judicature Act* procedure does not limit how courts of inherent jurisdiction may on their own motion and inherent authority restrict a person's right to initiate or continue litigation.

79 As Veit J observed in *Sikora Estate v. Sikora*, 2015 ABQB 467 (Alta. Q.B.) at paras 16-19, where a person seeks to

have the court make an order that restricts court access then the appropriate procedure is *Judicature Act*, ss 23-23.1. That is a distinct process and authority from that possessed by judges of this Court. Given that the Masters of the Alberta Court of Queen's Bench derive their authority from legislation, another helpful step would be for the Legislature to extend *Judicature Act*, ss 23-23.1 to authorize Masters, on their own motion, to apply the *Judicature Act* procedure to control abusive litigants who appear in Chambers. This is not an uncommon phenomenon; the Masters are in many senses the 'front line' of the Court, and frequently encounter litigation abuse in that role.

B. Maurice Stoney's Abusive Activities

80 In reviewing Maurice Stoney's litigation activities I conclude on several independent bases that his future access to Alberta courts should be restricted. His misconduct matches a number *Chutskoff Estate v. Bonora* "indicia" categories and exhibits varying degrees of severity.

1. Collateral Attacks

81 First, Maurice Stoney has clearly attempted to re-litigate decided issues by conducting the *Stoney v. Sawridge First Nation* judicial review, the 2016 Canadian Human Rights Commission application, and his attempts to interfere in the Advice and Direction Application litigation via the *Stoney v. Twinn*, 2016 ABCA 51 (Alta. C.A.) appeal and his August 12, 2016 application. In each case he attempted to argue that he has automatically been made a member of the Sawridge Band by the passage of Bill C-31. He has also repeatedly attacked the processes of the Sawridge Band in administering its membership. My reasons for that conclusion are found in *Sawridge #6* at paras 41-52.

82 This is the first independent basis on which I conclude Maurice Stoney's litigation activity should be controlled. He has a history of repeated collateral attacks in relation to this subject and the related parties. This has squandered important court resources and incurred unnecessary litigation and dispute-related costs on other parties.

2. Hopeless Proceedings

83 Maurice Stoney's attempts to re-litigate the same issues also represent hopeless litigation. The principle of *res judicata* prohibits a different result. This is a second independent basis on which I conclude Maurice Stoney's litigation conduct needs to be controlled, though it largely overlaps with the issue of collateral attacks.

3. Busybody Litigation

84 Maurice Stoney appears to have alleged two bases for why I should conclude his purportedly acting in court as a representative of his "living brothers and sisters" is not "busybody" litigation:

1. he has provided affidavit evidence to establish he was an authorized representative, and

2. representation in this manner is authorized by the *Federal Court Rules*, s 114.

85 As I have previously indicated I reject that the affidavit evidence of Shelley, Bill, and Gail Stoney established on a balance of probabilities that Maurice Stoney was authorized to represent his siblings. As for the *Federal Court Rules*, that legislation has no legal relevance or application to a proceeding conducted in the Alberta Court of Queen's Bench.

86 "Busybody" litigation is a very serious form of litigation abuse, particularly since it runs the risk of injuring otherwise uninvolved persons. I am very concerned about how the weak affidavit evidence presented by Maurice Stoney represents an after-the-fact attempt to draw Maurice Stoney's relatives not only into this litigation, but potentially with the result these individuals face court sanction, including awards of solicitor and own client indemnity costs. While I have rejected that possibility (*Sawridge #7* at paras 8, 139), the fact that risk emerged is a deeply aggravating element to what is already a very

serious form of litigation abuse. This is a third independent basis on which I conclude Maurice Stoney's court access should be restricted.

4. Failure to Follow Court Orders - Unpaid Costs Awards

87 Maurice Stoney admitted he has outstanding unpaid cost awards. Maurice Stoney says he is unable to pay the outstanding costs orders because he does not have the money for that. No evidence was tendered to substantiate that claim.

88 A costs order is a court order. A litigant who does not pay costs is disobeying a court order.

89 Outstanding costs orders on their own may not be a basis to conclude that a person's litigation activities require control. What amplifies the seriousness of these outstanding awards is that Maurice Stoney has attempted to shift all his litigation costs to a third party, the 1985 Sawridge Trust: *Sawridge #6* at para 78. Worse, the effect of that would be to deplete a trust that holds the communal property of an aboriginal community: *Sawridge #7* at paras 145-46, 148.

90 A court may presume that a person intends the natural consequences of their actions: *Starr v. Ontario (Commissioner of Inquiry)*, [1990] 1 S.C.R. 1366, 68 D.L.R. (4th) 641 (S.C.C.). Maurice Stoney appears to intend to cause harm to those he litigates against. He conducts hopeless litigation and then attempts to shift those costs to innocent third parties. If unsuccessful, he says he is unable to pay those costs. In this context Maurice Stoney's failure to pay outstanding costs orders to the Sawridge Band is in itself a basis to take steps to restrict his court access.

5. Escalating Proceedings - Forum Shopping

91 In *Sawridge #6* and *Sawridge #7* I noted that Maurice Stoney's dispute with the Sawridge Band has been spread over a range of venues. He acted in Federal Court, and when unsuccessful there he shifted to the Canadian Human Rights Commission. Again unsuccessful, he now renewed his abusive litigation, this time in the Alberta Court of Queen's Bench and the Alberta Court of Appeal.

92 I conclude this is a special kind of escalating proceedings, "forum shopping", where a litigant moves between courts, tribunals, and jurisdictions in an attempt to prolong or renew abusive dispute activities. Forum shopping is a particular issue in relation to vexatious litigants because court-ordered restrictions on litigation have a limited scope. For example, I have no authority to order steps that would affect a litigant's access to a court in a different province, or the federal courts.

93 Abusive litigants can exploit this gap in Canadian court jurisdictions to repeatedly harm other litigants and, in the process, multiple courts. The litigation activities of a British Columbia resident, Roger Callow, are a dramatic example of forum shopping: reviewed in *West Vancouver School District No. 45 v. Callow*, 2014 ONSC 2547 (Ont. S.C.J.); *Callow v. West Vancouver School District No. 45*, 2008 BCSC 778, 168 A.C.W.S. (3d) 906 (B.C. S.C.).

94 Callow's dispute began in 1985 as a labour arbitration proceeding in response to Callow's employment being terminated. That led to litigation and appeals in that jurisdiction. The Supreme Court refused leave. More British Columbia lawsuits followed, and by 2003 Callow was declared a "vexatious litigant" in British Columbia. Callow then persisted with multiple appeals and leave applications. That led to a further 2010 order to control his court access. Callow now shifted to the Federal Court, where his actions were struck out as an abuse of process: *Callow v. British Columbia (Court of Appeal Chief Justice)* (November 9, 2011), Doc. T-1386-11 (F.C.), aff'd (December 2, 2011), Doc. Vancouver T-138611 (F.C.); *Callow v. Board of School Trustees (#45 West Vancouver)* (February 2, 2015), Doc. Vancouver T-2360-14 (F.C.). In 2012 Callow then sued in Ontario, which led to him being subjected to broad court access restrictions in that jurisdiction as well: *West Vancouver School District No. 45 v. Callow*, 2014 ONSC 2547 (Ont. S.C.J.).

95 The saga then continued, with Callow next having filings struck out in Quebec (*Callow v. West Vancouver S.D. No. 45*, 2015 QCCS 5002 (C.S. Que.), affirmed 2016 QCCA 60 (C.A. Que.), leave to the SCC refused, 36883 (9 June 2016) [2016 CarswellQue 4744 (S.C.C.)] and Saskatchewan (*Callow v. West Vancouver S.D. No. 45*, 2015 SKQB 308 (C.S. Que.), affirmed 2016 SKCA 25 (Sask. C.A.), leave to the SCC refused, 36993 (6 October 2016) [2016 CarswellSask 624 (S.C.C.)]. I would be unsurprised if Alberta is not at some point added to this list.

96 Clearly, at least some persistent abusive court participants are willing to 'shop around', and Roger Callow's litigation is an extreme example of the waste that can result. Given the manner in which Canadian court and tribunal jurisdictions are structured there seems little way at present to escape scenarios like this. Academic commentary on the control of abusive litigation has recommended a national "vexatious litigant" registry: Caplan & Bloom at 457-58, Morissette at 22. I agree that would be a useful addition.

97 Forum shopping by its very nature implies an intent to evade legitimate litigation control processes and legal principles, including *res judicata*. In the case of Maurice Stoney his forum shopping largely overlaps his abusive collateral attack and futile litigation activities, and is a highly aggravating factor to that misconduct.

6. Unproven Allegations of Fraud and Corruption

98 The May 16, 2016 cross-examination transcript reveals that Maurice Stoney believes he and his relatives are the subjects of fraud and conspiracy that is intended to deny them their birthright. For example, he says Sawridge Band membership applications have been ignored, though he has no proof of that.

99 These allegations are not in themselves a basis to restrict Maurice Stoney's court access, however they provide some insight into his litigation objectives and how he views his now longstanding conflict with the Sawridge Band and its administration.

7. Improper Litigation Purposes

100 The Sawridge Band argues Maurice Stoney's August 12, 2016 application has an improper purpose, or no legitimate purpose. Maurice Stoney's exact objective is not obvious. It may be he intends to pursue his perceived objective no matter the consequences or justification, to disrupt the membership process of the Sawridge Band, to obtain monies from the 1985 Sawridge Trust, or a combination of those motives. However, as I have previously indicated, the combination of futile litigation, unpaid costs awards, costs shifting, forum shopping, and a claim that the abusive litigant lacks the means to pay costs leads to a logical inference. The August 12, 2016 application had no legitimate purpose. Its only effect was to waste court and litigant resources.

101 This is another independent basis on which I conclude court intervention is warranted to control Maurice Stoney's access to Alberta Courts.

C. Anticipated Litigation Abuse

102 This decision identifies five independent bases on which this Court should take steps to control future litigation abuse by Maurice Stoney in Alberta Courts. Collectively, that strongly favours court intervention. His litigation history predicts future litigation abuse.

103 But that is secondary to another fact - that the submissions received in the second stage of the procedure found in *Hok v. Alberta* shows that Maurice Stoney and his counsel still do not accept that prior decisions mean Maurice Stoney has no right to continue his interference with the Sawridge Band and its membership processes. Instead, Maurice Stoney and his counsel say his arguments are viable, if not correct. Those are "the facts". This is a very strong predictor of future abusive litigation activities. Maurice Stoney's objectives and beliefs remain unchanged.

104 What remains is to determine the scope of that court access restriction order. The combination of trial, appeal, judicial review, and tribunal activities strongly predicts that Maurice Stoney will not restrict his abusive litigation activities to a particular forum. Instead, his history of forum shopping suggests the opposite.

105 While I have agreed with many of the Sawridge Band and 1985 Sawridge Trust's arguments, I do not accept that Maurice Stoney's litigation history and apparent intentions means that his plausible future abusive litigation activities cannot

be restricted to a particular target group or dispute. Instead, Maurice Stoney's complaint-related activities have a clear focus: his long-standing dispute with the Sawridge Band concerning band membership. I did not receive any evidence or statements that suggest that Stoney's abusive activities will expand outside that target set. I therefore only require Stoney obtain leave to initiate or continue litigation in Alberta courts where the litigation involves:

1. the Sawridge Band,

2. the 1985 Sawridge Trust,

3 the 1986 Sawridge Trust,

4 the current, former, and future Chief and Council of the Sawridge Band,

5. the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

6. the Public Trustee of Alberta,

7. legal representatives of categories 1-6,

8. members of the Sawridge Band,

9. corporate and individual employees of the Sawridge Band, and

10. the Canadian federal government.

106 I have defined this plausible target group broadly because Maurice Stoney's allegations of conspiracy against himself and his siblings raises a concern that Maurice Stoney may shift his focus from the Sawridge Band and the Trusts to the individuals who are involved in the prior litigation and Sawridge Band membership-related processes and decisions.

107 Maurice Stoney's litigation misconduct extends to appeals. Normally that would mean that I would restrict his access to all three levels of Alberta Courts, however in light of the inconsistent Alberta Court of Appeal jurisprudence on control of abusive and vexatious litigation in that forum I do not extend my order to that Court: *Hok v. Alberta*, 2016 ABQB 335 (Alta. Q.B.); *Ewanchuk v. Canada (Attorney General)*.

108 I agree that Maurice Stoney's future litigation activities should be made dependent on him first paying outstanding cost awards.

109 Maurice Stoney's "busybody" activities, and his attempts to justify his purportedly authorized representation activities in this hearing raise the troubling possibility that Stoney will again attempt to draw others into his disputes. Persons have no constitutional right to represent others (*Gauthier v. Starr*, 2016 ABQB 213, 86 C.P.C. (7th) 348 (Alta. Q.B.)), and appearing before a court is a privilege solely subject to the court's discretion (*R. v. Dick*, 2002 BCCA 27, 163 B.C.A.C. 62 (B.C. C.A.)). Maurice Stoney has badly abused that privilege and his arguments concerning his "busybody" activities are highly problematic. He has demonstrated he is an unfit litigation representative. I therefore order that Maurice Stoney is prohibited from representing any person in all Alberta Courts.

D. Court Access Control Order

110 I therefore order:

1. Maurice Felix Stoney is prohibited, under the inherent jurisdiction of the Alberta Court of Queen's Bench, from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, without

an order of the Chief Justice or Associate Chief Justice, or Chief Judge, of the Court in which the proceeding is conducted, or his or her designate, where that litigation involves any one or more of:

(i) the Sawridge Band,

(ii) the 1985 Sawridge Trust,

(iii) the 1986 Sawridge Trust,

(iv) current, former, and future Chief and Council of the Sawridge Band,

(v) the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

(vi) Public Trustee of Alberta,

(vii) legal representatives of categories 1-6,

(viii) members of the Sawridge Band,

(ix) corporate and individual employees of the Sawridge Band, and

(x)) the Canadian federal government.

2. Maurice Felix Stoney is prohibited from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, until Maurice Felix Stoney pays in full all outstanding costs ordered by any Canadian court.

3. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may, at any time, direct that notice of an application to commence or continue an appeal, action, application, or proceeding be given to any other person.

4. Maurice Felix Stoney must describe himself, in the application or document to which this Order applies as "Maurice Felix Stoney", and not by using initials, an alternative name structure, or a pseudonym.

5. Any application to commence or continue any appeal, action, application, or proceeding must be accompanied by an affidavit:

(i) attaching a copy of the Order issued herein, restricting Maurice Felix Stoney's access to the Alberta Court of Queen's Bench and Provincial Court of Alberta;

(ii) attaching a copy of the appeal, pleading, application, or process that Maurice Felix Stoney proposes to issue or file or continue;

(iii) deposing fully and completely to the facts and circumstances surrounding the proposed claim or proceeding, so as to demonstrate that the proceeding is not an abuse of process, and that there are reasonable grounds for it;

(iv) indicating whether Maurice Felix Stoney has ever sued some or all of the defendants or respondents previously in any jurisdiction or Court, and if so providing full particulars;

(v) undertaking that, if leave is granted, the authorized appeal, pleading, application or process, the Order granting leave to proceed, and the affidavit in support of the Order will promptly be served on the defendants or respondents;

(vi) undertaking to diligently prosecute the proceeding; and

(vii) providing evidence of payment in full of all outstanding costs ordered by any Canadian court.

6. Any application referenced herein shall be made in writing.

7. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may:

(i) give notice of the proposed claim or proceeding and the opportunity to make submissions on the proposed claim or proceeding, if they so choose, to:

a) the involved potential parties;

b) other relevant persons identified by the Court; and

c) the Attorney Generals of Alberta and Canada.

(ii) respond to the leave application in writing; and

(iii) hold the application in open Court where it shall be recorded.

8. Leave to commence or continue proceedings may be given on conditions, including the posting of security for costs.

9. An application that is dismissed may not be made again.

10. An application to vary or set aside this Order must be made on notice to any person as directed by the Court.

111 This order will be prepared by the Court and filed at the same time, as this Case Management Decision and takes effect immediately. The exception granted in the Rooke Order shall apply to this court access control order.

112 The interim order made per *Sawridge #6* at para 65-66 is vacated.

V. Representation by Priscilla Kennedy in this Matter

113 I have deep concerns about the manner in which Maurice Stoney's lawyer, Priscilla Kennedy, has conducted herself in this matter. Certain of those issues are reviewed in *Sawridge #7*, a judgment where I determined that Kennedy should be personally responsible for her client's costs award because of her misconduct. She represented a client who made a hopeless application that was a serious abuse of the Court and other litigants, and involved other third parties without their authorization.

114 In *Sawridge #7* Ms. Kennedy was represented by Mr. Donald Wilson, a partner of the law firm DLA Piper, which is the law firm that employs Ms. Kennedy. I reproduce verbatim certain of Mr. Wilson's submissions to the Court in *Sawridge #7*:

. . . in these circumstances, I will say that Ms. Kennedy has prosecuted this action on [Maurice Stoney's] behalf further

than I would've, further than I think she should've. ...

. . . the reason I go through this, Sir, is I think quite candidly I've conceded that Ms. Kennedy prosecuted this action further than I would've, further than I think she ought to have ...

Now, if I'm [counsel for the Sawridge Band], I can tell you that the Band is the person that gets to determine their membership and that is entirely appropriate. And in Mr. Stoney's case they've done that. Appeals were made on two different

levels. An additional attempt was made at the Human Rights tribunal. And Mr. Stoney has been told, and I know he's been told this because I told him this, he is at the end of his rope with respect to the Sawridge Band and the Court system.

And the reason for that is background and history. It's one of Montgomery's campaigns in World War II, it's a bridge too far. He would've been fine if he'd stopped at bridges, by going for a third bridge the campaign itself stopped. In this instance, had -- if I'd been engaged or consulted, if I read Sawridge 5 . . . the fact that the Court is not, unlikely earlier trust litigation where often the trust ends up paying for part of the litigant's costs, the Court could not have been clearer that is not going forward. And the Court indicated interlope. That is, someone does not have a claim on the trust, presumably would make the trial more complicated, more time consuming, higher costs for everyone. ...

Now, I can tell you that in the course of the last week . . . I had occasion to speak in depth with Ms. Kennedy. And Ms. Kennedy tried to convince me as to the merits of Mr. Stoney's case. And at a certain point in time. I had to tell her that he has exhausted his remedies in the legal realm with res pect to the Sawrid ges an d it's time to move on.

. . .

My submission would be the application that resulted in Sawridge 6 should not have been made. It was ill-advised. But was not done with bad motives, an attempt to abuse the process. It had that effect. I have to say in front of my friends it absolutely had that effect . . .

. . . what the Court is trying to do, as you properly cite in your decision with respect to sanctions, is to change behaviour. It's the same rationale behind torts which is you're giving a tort award so that some other idiot isn't going to follow and do the same thing. And, with respect, I would submit to you that the seriousness of what Sawridge 6 is has been driven home to Ms. Kennedy. And, with respect, it' s been driven home as much as an order of contempt or a referral to the Law Society.

The decision is out there, we have a courtroom full of reporters here to report on the matter.

And I'm reminded of someone once asked Warren Buffett when he was testifying at the congress as to what was reasonable, and it was on the context of a company he owned and insider trading. And Mr. Buffett to the U.S. congress testified it meets a very easy standard. And the standard is, if they printed the story in your home town and your mother and your father had an opportunity to read it, would you be embarrassed? And, with respect, Ms. Kennedy and the Sawridge 6

decision has brou ght ho me the falling o f continuing to prose cute the r eme d y she 's seeking for Mr. Stoney. Which, after meeting Mr. Stoney, I understand. But there's a certain point in time the legal remedies have been exhausted. . . .

[Emphasis added.]

115 I believe I am fair when I indicate these submissions say that at the *Sawridge #7* hearing Mr. Wilson, on behalf of Ms. Kennedy, had acknowledged that there was no merit to the August 12, 2016 application, and that the legal issues involved in that application had been decided,
conclusively, in a series of earlier court proceedings. Yet, here in her written submissions, Ms. Kennedy on behalf of Maurice Stoney, re-argues the very same points. Her submissions are the law is unsettled, issues remain arguable, despite her counsel's admission on July 28, 2017 that

> the effect of the August 12, 2016 application was to abuse of the court's process: " . . . it absolutely had that effect ..." [emphasis added].

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

117 In *Sawridge #7* at paras 98-99 I explained my conclusion why a lawyer who re-litigates or repeatedly raises settled issues has engaged in serious misconduct that is contrary to the standards expected of persons who hold the title "lawyer". I also observed on how advancing abusive litigation is a breach not merely of a lawyer's professional and court officer duties. It is a betrayal of the solicitor-client relationship, and 'digs a grave for two': para 74.

118 I am also troubled by Ms. Kennedy relying on a procedure found in the *Federal Court Rules* to explain why Maurice Stoney's August 12, 2016 application was not a "busybody" proceeding. Stating what should be obvious, civil proceedings in front of this Court are governed by the *Alberta Rules of Court*, not the *Federal Court Rules*. I question the competence of a lawyer who does not understand what court rules apply in a specific jurisdiction.

119 In *Sawridge #7* at paras 51-58 I reviewed case law concerning the inherent jurisdiction of a Canadian court to control lawyers and their activities. At para 56 I cited *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.) at 1245, (1990), 77 D.L.R. (4th) 249 (S.C.C.) for the rule that courts as part of their supervisory function may remove lawyers from litigation, where appropriate. In that decision representation by lawyers was challenged on the basis of an alleged conflict of interest. However, the inherent jurisdiction of the court is not expressly restricted to simply that:

> . . . The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. ... [Emphasis added.]

120 In my opinion Ms. Kennedy's conduct raises the question of whether she is a suitable representative for Maurice Stoney, and whether the proper administration of justice requires that Ms. Kennedy should be removed from this litigation.

121 This judgment represents what I believe should be Ms. Kennedy's final opportunity to participate in the Advice and Direction Application in the Alberta Court of Queen's Bench as a representative of Maurice Stoney. If that were not the case then I would have proceeded to invite submissions from Ms. Kennedy why she and her law firm, DLA Piper, should not be removed as representatives of Maurice Stoney, and prohibited from any future representation of Maurice Stoney in the Advice and Direction Application.

122 Instead I will send a copy of this judgment to the Law Society of Alberta for review.

VI. Conclusion

123 I conclude that Maurice Felix Stoney has engaged in abusive litigation activities resulting in him being required to seek leave prior to initiating or continuing litigation in the Alberta Court of Queen's Bench and Alberta Provincial Court that relates to persons and organizations involved with the Sawridge Band and Maurice Stoney's disputes concerning membership in that Band. Maurice Stoney may only seek leave after he has paid all outstanding costs awards.

124 Maurice Stoney is also prohibited from representing others in any litigation before the Alberta Provincial Court, Alberta Court of Queen's Bench, and Alberta Court of Appeal.

125 I confirm that I will send a copy of this judgment to the Law Society of Alberta for review in respect to Ms. Kennedy.

Order accordingly.

End of Document

TAB 5

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2018 ABQB 215

Date:
Docket: 1103 14112
Registry: 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")

Between:

Maurice Stoney and His Brothers and Sisters

Applicants

- and -

Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees")

Respondents (Original Applicants)

- and -

The Sawridge Band

Respondent (Intervenor)

Memorandum of Decision on Costs (Sawridge #9) of the Honourable Mr. Justice D.R.G. Thomas

---

Table of Contents

I. Introduction

[1] This is my ruling on costs arising from ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 530 ("***Sawridge #7***") and ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 548 ("***Sawridge #8***").

II. Background

[2] The history of this matter to date is summarized at paras 1-6 of ***Sawridge #8***.

[3] On July 12, 2017 I issued ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 436 ("***Sawridge #6***"), wherein I denied an application by Maurice Felix Stoney "and his 10 living brothers and sisters" to be added as interveners or parties to a proceeding intended to settle and distribute the assets of the 1985 Sawridge Trust. I ordered solicitor and own client indemnity costs against Maurice Stoney and ordered that he make written submissions on whether he should be subject to court access restrictions (at paras 53-68). At paras 71-81 of that decision I concluded that the activities of Maurice Stoney's Lawyer, Ms. Priscilla Kennedy, required review. I ordered that Ms. Kennedy appear before me on July 28, 2017 to speak to the costs question.

[4] ***Sawridge #6*** was appealed by Maurice Stoney et al and the Sawridge Band and the Sawridge Trustees (the "Sawridge Participants") applied for security for costs. On December 19, 2017 the Court of Appeal granted that application and stayed the appeal pending the posting of security by February 28, 2017 (***Stoney v Trustees for the 1985 Sawridge Trust,*** 2017 ABCA 437). Mr. Stoney applied to extend the time to post security and that application was dismissed (***Stoney v Twinn,*** 2018 ABCA 81). The appeal in ***Sawridge #6*** is deemed abandoned.

[5] At the July 28, 2017 hearing the Sawridge Participants were permitted to enter evidence that was potentially relevant to whether Ms. Kennedy should be personally responsible for some or all of a costs award against her client, Maurice Stoney. Counsel for the Sawridge Participants argued that an award of costs was appropriate either against Ms. Kennedy personally, or against

Ms. Kennedy and Mr. Stoney on a joint and several basis. Submissions were also received from the Sawridge Participants as to whether Mr. Stoney should have his court access restricted via a "vexatious litigant" order.

[6] Following that July 28, 2017 hearing, I issued ***Sawridge #7*** wherein I concluded that Ms. Kennedy was personally liable, along with her client Maurice Stoney, for the solicitor and own client indemnity costs that I had ordered in ***Sawridge #6*** (***Sawridge #7*** at para 154). In ***Sawridge #8*** I found Mr. Stoney to be a vexatious litigant and that he should be subject to litigation restraints (***Sawridge #8*** at para 110).

[7] The issue of costs arising from ***Sawridge #7*** and ***#8*** had not been addressed by any of the Participants or by the Court. Given the dispute in respect to the scope of my costs award in ***Sawridge #6*** in relation to ***Sawridge #7*** and ***#8***, the Sawridge Participants and Ms. Kennedy were directed in my letter of January 2, 2018, to provide written briefs on the subject. Mr. Stoney was copied with that letter by mail.

III. Positions Taken

[8] The Sawridge Participants provided separate written submissions but given the similarities in their arguments, I summarize them as one. They argue that the costs against the unsuccessful parties in ***Sawridge #7*** and ***#8*** should be awarded on the same basis as in ***Sawridge #6***. They say that the findings of misconduct in ***#7*** and ***#8*** are consistent with the same findings of misconduct in ***Sawridge #6*** which were held to warrant full indemnity costs. ***Sawridge #7*** and ***#8*** are extensions and arise from the application dealt with in ***Sawridge #6***. Accordingly, the Sawridge Participants seek costs on a solicitor and own client full indemnity basis. They seek these costs as against Ms. Kennedy and Mr. Stoney on a joint and several basis for ***Sawridge #8***, and as against Ms. Kennedy only for ***Sawridge #7***. Alternatively, they seek enhanced or party and party costs.

[9] Ms. Kennedy's Reply Submissions take the position that the Court drew a clear line between the application in ***Sawridge #6***, which attracted an enhanced costs award, and the subsequent proceedings to determine whether she should be personally liable for such costs and whether Mr. Stoney should be declared a vexatious litigant. Any costs relating to ***Sawridge #7*** and ***#8*** must be evaluated on their own merits and enhanced costs are not carried over to subsequent proceedings where misconduct is evaluated. Furthermore, she argues that the role of the Sawridge Participants in ***Sawridge #7*** was limited and in ***Sawridge #8*** was optional, and that the suggestion that they were "successful" parties misapprehends the nature of those proceedings and their role. Those were hearings that resulted from the Court acting on its own motion. Thus, Ms. Kennedy asks that the costs award in ***Sawridge #6*** not be extended to proceedings in ***#7*** and ***#8***, and that the enhanced costs applications of the Sawridge Participants be dismissed. Finally, she asks that the Court direct any issues relating to the quantum of any costs awarded be resolved by an Assessment Officer in accordance with the Court's prior direction.

IV. Jurisdiction on Costs

[10] R 1.2 of the *Alberta Rules of Court*, Alta Reg 124/2010 sets out that the "purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way." The provisions that deal with costs uphold the

function of r 1.2(2)(e), providing "an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments."

[11] The issue of costs was not directly addressed by the parties or the Court in ***Sawridge #7*** or ***#8***. Nevertheless, the Court retains the jurisdiction to provide the parties with direction in respect of the costs of ***#7*** and ***#8*** (r 10.30(1)(c); ***Saskatchewan Power Corporation v Alberta (Utilities Commission)***, 2015 ABCA 281 at paras 8-10; ***Firemaster Oilfield Services Ltd v Safety Boss (Canada) (1993) Ltd***, 2002 ABCA 96 at para 2).

[12] R 10.30(1)(c) sets out:

> Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made
>
> ...
>
> (c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

[13] Cost awards are discretionary (r 10.29(1), 10.31; *Court of Queen's Bench Act*, RSA 2000, c C-31, s 21). R 10.33(1) sets out some of the considerations in making a costs award:

> (a) the result of the action and the degree of success of each party;
>
> (b) the amount claimed and the amount recovered;
>
> (c) the importance of the issues;
>
> (d) the complexity of the action;
>
> (e) the apportionment of liability;
>
> (f) the conduct of a party that tended to shorten the action;
>
> (g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

[14] In deciding whether to impose an amount through a costs award the Court may consider, among other things, whether a party has engaged in misconduct (r 10.33(2)(g)).

[15] As explained by Topolniski J in ***EAD Property Holdings (103) Corp v Greyhound Canada Transportation ULC***, 2015 ABQB 425 at para 19 the r 10.33 considerations "dovetail with Rule 1.2(4), which requires a proportionate remedy when the Court is called upon to exercise its discretion."

[16] Finally, a costs award in this case is appropriate and would not be inconsistent with the formal judgments given that neither ***Sawridge #7*** or ***#8*** directly spoke to costs (***Pivotal Capital Advisory Group Ltd v NorAmera BioEnergy Corp***, 2009 ABQB 230 at para 17).

V. Entitlement to Costs

[17] The general rule is that the successful party to an application is entitled to a costs award against the unsuccessful party (r 10.29(1)). R 10.28 sets out that a "party" for the purposes of the rules pertaining to the recoverable costs of litigation "includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a cost award." This is an expanded definition of "party" which allows a costs award against anyone participating in a

proceeding that is not an action (Stevenson & Côté, *Alberta Civil Procedure Handbook 2017* (Edmonton: Juriliber, 2017) at 10-32).

[18] Although the proceedings in ***Sawridge #7*** and ***#8*** were initiated by this Court, exercising its inherent jurisdiction, the Sawridge Participants were directed to appear and invited to make submissions. The Sawridge Participants participated in those proceedings and argued in support of a costs award personally against Ms. Kennedy and a vexatious litigant designation against Mr. Stoney. Both orders were made by this Court. Thus, the Sawridge Participants fall within the definition of "party" as described in r 10.28 and are entitled to costs.

[19] Commonly, enhanced costs are awarded for litigation misconduct, being confined to the portion of the proceeding in which the misconduct was found to have occurred and are not carried over to the subsequent proceeding in which the conduct is evaluated (see ***Lynch v Checker Cabs Ltd***, 1999 ABQB 514). However, even if that is the common practice, it is not a complete bar to a costs award here given the misconduct which occurred in ***Sawridge #6*** by both Ms. Kennedy and Mr. Stoney and continued by them in ***Sawridge #8***.

VI. Analysis

[20] This Court has broad jurisdiction to order costs (r 10.31, 10.33). However, an increased costs award ought not to be made where there is an absence of notice of the possibility of such an order, no submissions are made on the issue, and no party to the proceedings sought those costs (***Twinn v Twinn***, 2017 ABCA 419 at para 27, rev'g in part ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 377 ("***Sawridge #5***")). The Court of Appeal in ***Twinn*** also reiterated that 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" (at para 25).

[21] The ***Twinn*** decision should not be interpreted as restricting a judge's discretion to award enhanced costs in response to litigation misconduct that emerges during a proceeding (see, for example, ***Stagg v Condominium Plan No 882-2999***, 2013 ABQB 684 at para 32 citing ***Jackson v Trimac Industries Ltd*** (1993), 138 AR 161 at para 28, 8 Alta LR (3d) 403 (QB), aff'd on costs 1994 ABCA 199; ***Brown v Silvera***, 2010 ABQB 224 at paras 29-35, aff'd 2011 ABCA 109).

[22] As long as there is a sufficient basis for the award of extraordinary costs such an award may be appropriate (***Twinn*** at paras 25, 28).

[23] Costs need to be evaluated on their own merits since the appropriateness of an enhanced costs award is on a case by case basis (***Twinn*** at para 27). As such, the scale of costs from ***Sawridge #6*** should not automatically be extended to ***Sawridge #7*** and ***#8***.

[24] Here, Ms. Kennedy and Mr. Stoney were provided notice that the Sawridge Participants were seeking solicitor and own client full indemnity costs in relation to the applications in ***Sawridge #6*** and should have been aware of the possibility of such an order in the related proceedings if their litigation misconduct continued (see ***Sawridge #6*** at para 67). There is direct connection between ***Sawridge #6***, ***#7*** and ***#8***, the participants are the same, and the issues are related to and flow from ***Sawridge #6***.

[25] Ms. Kennedy and Mr. Stoney were also aware that the Sawridge Participants sought enhanced costs when they were presented with the draft bills of costs seeking solicitor and own client full indemnity costs in relation to ***Sawridge #7*** and ***#8***. An additional form of notification

occurred by way of the Sawridge Participants' letter of November 15, 2017 addressed to the Court and copied to Mr. Faulds and Mr. Stoney. Finally, all participants were offered the opportunity to make written submissions as to costs.

***Sawridge #7* Costs Award**

[26] I do not find it necessary, or even appropriate, to order enhanced costs against Ms. Kennedy for ***Sawridge #7*** and instead order the presumptive party and party costs (r 10.29). That hearing, where Ms. Kennedy was represented by Mr. Wilson, a senior lawyer at her firm, dealt with whether Ms. Kennedy ought to be responsible for all or some of the costs awarded against Mr. Stoney in ***Sawridge #6***. She was responding to my direction that she appear and explain her position on an award of costs.

[27] Although Mr. Stoney was present at the hearing, he did not make submissions or actively participate in any way and should not bear the costs for a hearing involving the liability of his lawyer for her actions.

[28] No litigation misconduct occurred in the course of ***Sawridge #7*** which would provide a sufficient basis for an award of enhanced costs. Instead, similar to ***Lynch v Checker Cabs Ltd***, 1999 ABQB 514, where enhanced costs were not awarded for the subsequent proceeding evaluating the lawyer's conduct, Column 3 of Schedule "C" costs as against Ms. Kennedy are awarded. Costs are set at Column 3 given the court's discretion, wide entitlement to fix the appropriate scale of costs, and in consideration of r 10.33 (***United Food and Commercial Workers, Local 401 v Alberta (Attorney General)***, 2012 ABCA 244 at para 3; ***Saskatchewan Power Corporation*** at para 18).

***Sawridge #8* Costs Award**

[29] In ***Sawridge #8***, Ms. Kennedy, acting as "Counsel for Maurice Stoney," continued to advance futile arguments concerning Mr. Stoney's status as a member of Sawridge Band (***Sawridge #8*** at paras 27-32, 113-122). I rejected these arguments in ***Sawridge #6***, finding 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 (***Sawridge #6*** at para 67). Ms. Kennedy's submissions in ***Sawridge #8*** were a collateral attack on the result in ***Sawridge #6***, constituting a notorious and serious form of litigation abuse (***Chutskoff v Bonora***, 2014 ABQB 389 at para 92, aff'd 2014 ABCA 444).

[30] Mr. Wilson, the lawyer that made representations on behalf of Ms. Kennedy in ***Sawridge #7***, admitted that these earlier arguments "absolutely" had the effect of being an abuse of the court's process (see submissions as reproduced in ***Sawridge #8*** at para 114). However, the written submissions of Ms. Kennedy in ***Sawridge #8*** re-argued those same meritless points (at paras 32, 115). I outlined my concerns with Ms. Kennedy's conduct in ***Sawridge #8*** (at paras 115-118):

> [Ms. Kennedy's] submissions are the law is unsettled, issues remain arguable, despite her counsel's admission on July 28, 2017 that the effect of the August 12, 2016 application was to abuse of the court's process: "... it absolutely had that effect ..." [emphasis added].
>
> Mr. Wilson told me in open court that Ms. Kennedy had learned her lesson. When I read the written brief Kennedy prepared and submitted on behalf of Maurice Stoney, I questioned whether that was true.

> In ***Sawridge #7*** at paras 98-99 I explained my conclusion why a lawyer who re-litigates or repeatedly raises settled issues has engaged in serious misconduct that is contrary to the standards expected of persons who hold the title "lawyer". I also observed on how advancing abusive litigation is a breach not merely of a lawyer's professional and court officer duties. It is a betrayal of the solicitor-client relationship, and 'digs a grave for two': para 74.
>
> I am also troubled by Ms. Kennedy relying on a procedure found in the *Federal Court Rules* to explain why Maurice Stoney's August 12, 2016 application was not a "busybody" proceeding. Stating what should be obvious, civil proceedings in front of this Court are governed by the *Alberta Rules of Court*, not the *Federal Court Rules*. I question the competence of a lawyer who does not understand what court rules apply in a specific jurisdiction.

[31] It is critical that this Court continue to disapprove of abusive litigation, changing positions, and re-arguing settled issues (***Stagg*** at para 32; ***Chutskoff*** at para 92; ***Sawridge #7*** at para 82-91). Consequently, Ms. Kennedy and Mr. Stoney, by virtue of their own actions, have opened themselves up to enhanced costs being awarded against them in relation to the proceedings that gave rise to ***Sawridge #8***. In accordance with the reasoning for awarding costs against a lawyer personally in ***Sawridge #7***, there is a sufficient basis to award solicitor-client costs against Ms. Kennedy and Mr. Stoney on a joint and several basis in ***Sawridge #8***.

VII. Conclusion:

[32] Costs are awarded on a party and party basis against Ms. Kennedy only for ***Sawridge #7*** (Column 3 of Schedule "C") and on a solicitor-client basis against Ms. Kennedy and Mr. Stoney on a joint and several basis for ***Sawridge #8***.

[33] There will be no costs associated with this ruling as success has been mixed.

[34] Any issues relating to quantum of costs for ***Sawridge #6***, ***#7***, and/or ***#8*** are to be resolved by an Assessment Officer.

Heard and decided on the basis of written materials directed and described in paras. [7] to [9] inclusive.
Dated at the City of Edmonton, Alberta this 20th day of March, 2018.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

P. Jon Faulds, Q.C.
Field Law
for Priscilla Kennedy

Edward H. Molstad, Q.C.
Parlee McLaws LLP
for the Sawridge Band

Doris Bonora
Dentons LLP
for the 1985 Sawridge Trustees

TAB 6

2017 ABCA 439
Alberta Court of Appeal

Kennedy v. Trustees for the 1985 Sawridge Trust

2017 CarswellAlta 2698, 2017 ABCA 439, [2018] A.W.L.D. 483, [2018] A.W.L.D. 5, 286 A.C.W.S. (3d) 373

Maurice Felix Stoney and His Brothers and Sisters (Not Parties to the Appeal) and Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Sawridge Trust (Applicants / Respondents) and Sawridge First Nation (Applicant / Respondent) and Public Trustee of Alberta (Not a party to the Appeal) and Priscilla Kennedy (Respondent / Appellant)

Jack Watson J.A., Frans Slatter J.A., Myra Bielby J.A.

Heard: December 14, 2017
Judgment: December 19, 2017
Docket: Edmonton Appeal 1703-0252-AC

Proceedings: affirming *1985 Sawridge Trust v. Alberta (Public Trustee)* (2017), 2017 CarswellAlta 1639, 2017 ABQB 548, D.R.G. Thomas J. (Alta. Q.B.)

Counsel: D.C. Bonora, A. Loparco, for Applicants, Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Sawridge Trust
E.H. Molstad, Q.C., for Applicant, Sawridge First Nation
P.J. Faulds, Q.C., K. Precht, for Respondent / Appellant

Subject: Civil Practice and Procedure; Public

Related Abridgment Classifications

Professions and occupations
IX Barristers and solicitors
IX.6 Relationship with others
IX.6.b Duty as officer of court

Headnote

Professions and occupations --- Barristers and solicitors — Relationship with others — Duty as officer of court
First Nations trust applied for directions as to distribution of trust — S, whose family had formerly been members of First Nation, was unsuccessful in attempts to be recognized as member — S continued to bring applications in various courts and before human rights tribunal in search for status — Case management judge made S subject to vexatious litigant order — Judge was critical of conduct of S's lawyer and provided that he would send copy of judgment to law society for review — Lawyer appealed this direction — First Nations trust and related parties brought application to dismiss appeal — Application granted and appeal dismissed — Appeal was struck as being without merit, because judge was entitled to refer conduct of lawyer to law society — Law Society would be interested in any comments that appellate court may have when it disposed of substantive appeal, but that did not preclude judge from raising issue, nor did it bind law society — Matters that appellate court would consider in disposing of substantive appeal did not necessarily overlap completely with matters that would be

considered by law society — There was no basis to appeal judge's direction since it was not included in formal order which formed basis of appeal — Judge's advice that he was referring matter to law society was simply for information of counsel and parties and was part of court's inherent jurisdiction to control its proceedings — It was open to judge to determine that such direction was not part of formal adjudication and to exclude it from order.

Table of Authorities

Cases considered:

Chisholm v. Lindsay (2017), 2017 ABCA 21, 2017 CarswellAlta 41 (Alta. C.A.) — referred to

Dool v. Nazarewycz (2009), 2009 ABCA 70, 2009 CarswellAlta 252, 2 Alta. L.R. (5th) 36, 46 E.T.R. (3d) 159, (sub nom. *Dool Estate, Re)* 448 A.R. 1, (sub nom. *Dool Estate, Re)* 447 W.A.C. 1, [2009] 7 W.W.R. 636 (Alta. C.A.) — referred to

Law v. Cheng (2016), 2016 BCCA 120, 2016 CarswellBC 679, 82 C.P.C. (7th) 39, 84 B.C.L.R. (5th) 238, 384 B.C.A.C. 236, 663 W.A.C. 236 (B.C. C.A.) — referred to

Luft v. Taylor, Zinkhofer & Conway (2017), 2017 ABCA 228, 2017 CarswellAlta 1183, 53 Alta. L.R. (6th) 44, [2017] 10 W.W.R. 39 (Alta. C.A.) — referred to

Québec (Directeur des poursuites criminelles et pénales) c. Jodoin (2017), 2017 SCC 26, 2017 CSC 26, 2017 CarswellQue 3091, 2017 CarswellQue 3092, 346 C.C.C. (3d) 433, 408 D.L.R. (4th) 581, 37 C.R. (7th) 1, [2017] 1 S.C.R. 478, (sub nom. *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin)* 380 C.R.R. (2d) 285 (S.C.C.) — referred to

R. & T. Thew Ltd. v. Reeves (No. 2) (1982), [1982] 3 All E.R. 1086, [1982] Q.B. 1283 (Eng. C.A.) — referred to

R. v. M. (R.E.) (2008), 2008 SCC 51, 2008 CarswellBC 2037, 2008 CarswellBC 2038, 83 B.C.L.R. (4th) 44, [2008] 11 W.W.R. 383, 60 C.R. (6th) 1, 235 C.C.C. (3d) 290, 297 D.L.R. (4th) 577, 380 N.R. 47, 260 B.C.A.C. 40, 439 W.A.C. 40, [2008] 3 S.C.R. 3 (S.C.C.) — referred to

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — referred to

Statutes considered:

Judicature Act, R.S.A. 2000, c. J-2
s. 3 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 14.8(1) — considered

R. 14.74 — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C, Tariff of Costs, column 2 — referred to

APPLICATION to dismiss lawyer's appeal from judgment reported at *1985 Sawridge Trust v. Alberta (Public Trustee)* (2017), 2017 ABQB 548, 2017 CarswellAlta 1639 (Alta. Q.B.), disapproving of lawyer's conduct and providing that reasons

would be sent to law society.

Per curiam:

1 The appellant was counsel for one of the parties in this litigation. The case management judge was critical of her conduct, and in his reasons reported as *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 548 (Alta. Q.B.) at paras. 122, 125 (*Sawridge #8*) he stated: " . . . I will send a copy of this judgment to the Law Society of Alberta for review." The appellant appealed this direction, and the applicants (respondents in the appeal) have now applied to strike the appeal.

2 The applicants argue that the appeal is without merit, and should be struck under R. 14.74 for several reasons. First of all, the applicants argue that the reasons have already been sent to the Law Society, so the appeal is moot. The appellant advises that the Law Society has indicated that it is holding the matter in abeyance pending the outcome of these proceedings, and so argues that the appeal is not moot.

3 Secondly, the applicants argue that a judge, like any concerned member of the public, can refer the conduct of a lawyer to the Law Society. The appellant responds that if this Court disagrees with the case management judge's assessment of the appellant's conduct, there would be no basis on which to refer the matter to the Law Society.

4 Thirdly, the applicants argue that appeals are from the formal order of the court, not the reasons, and the challenged direction was not a part of the formal order. While the direction was included in early drafts of the formal order, the case management judge specifically declined to include it in the final version of the order. The appellant argues that the direction is still a pronouncement, and that she should not be deprived of an opportunity to have it reviewed by this Court just because the case management judge did not include it in the formal order.

5 Fourthly, the applicants argue that the appellant was not a party to the proceedings and has not applied to be added as a party. The appellant replies that she is asserting the necessary status to launch her own appeal, not to be added as a party to an existing appeal. The appellant argues that the challenged direction directly engaged her interests, not just those of her client.

6 These applications should be allowed. This appeal should be struck as being without merit, because a judge is entitled to refer the conduct of a lawyer to the Law Society: *Dool v. Nazarewycz*, 2009 ABCA 70 (Alta. C.A.) at para. 75, (2009), 2 Alta. L.R. (5th) 36, 448 A.R. 1 (Alta. C.A.); *R. & T. Thew Ltd. v. Reeves (No. 2)*, [1982] Q.B. 1283 (Eng. C.A.) at p. 1286. The Law Society will undoubtedly be interested in any comments that this Court may have when it disposes of the substantive appeal, but that does not preclude the case management judge from raising the issue, nor does it bind the Law Society. The matters that this Court will consider in disposing of the substantive appeal do not necessarily overlap completely with the matters that would be considered by the Law Society, as the two institutions discharge different functions: *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin*, 2017 SCC 26 (S.C.C.) at paras. 22-3, [2017] 1 S.C.R. 478 (S.C.C.).

7 Further, there is no basis to appeal the case management judge's direction since it was not included in the formal order which forms the basis of the appeal. Section 3 of the *Judicature Act*, RSA 2000, c. J-2 confers jurisdiction upon this Court, subject to the *Rules of Court*, to hear and determine appeals respecting only a "judgment, order or decision". Discussions in the reasons for decision that do not form part of the formal order or judgment are not "decisions" generating a right of appeal: *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.) at para. 9, [2008] 3 S.C.R. 3 (S.C.C.); *Chisholm v. Lindsay*, 2017 ABCA 21 (Alta. C.A.) at para. 8; *Law v. Cheng*, 2016 BCCA 120 (B.C. C.A.) at paras. 17-8, (2016), 84 B.C.L.R. (5th) 238 (B.C. C.A.).

8 Rule 14.8(1), which measures the time in which an appeal must be filed from the date of "pronouncement", does not expand the scope of a permissible appeal to cover everything "pronounced" in the reasons for decision. Appeals are only available from a "judgment, order or decision", not the reasons. Comments by the trial judge that do not form a part of his adjudication, and accordingly do not find their way into the formal order, cannot support an appeal.

9 The appellant argues that it was an error of law for the case management judge not to include the direction in the formal order. The case management judge's advice that he was referring the matter to the Law Society was simply for the information of counsel and the parties, and did not constitute part of his "judgment, order or decision". He decided to refer

his reasons to the Law Society as part of the court's inherent jurisdiction to control its proceedings and to regulate the conduct of its officers, not as a component of his adjudication of the merits of the action. It is open to a trial judge to determine that such a direction is not a part of the formal adjudication, and to exclude it from the order.

10 The applications are accordingly allowed, and the appeal is dismissed.

11 The applicants claim costs of these applications on a "solicitor and own client" basis, but that is not an appropriate scale of party and party costs: *Luft v. Taylor, Zinkhofer & Conway*, 2017 ABCA 228 (Alta. C.A.) at paras. 77-8, (2017), 53 Alta. L.R. (6th) 44 (Alta. C.A.). There has been no litigation misconduct in this appeal, and the mere fact that the appeal was ultimately determined to be without merit is not a sufficient justification for indemnity costs: *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at p. 134. The only assessable step taken by the applicants in this appeal would appear to be this contested application, and the applicants (respondents in the appeal) are each entitled to one-half of the assessable costs of that step, on Column 2. Accordingly, each respondent is entitled to $625 plus GST in costs for this appeal.

Application granted; appeal dismissed.

End of Document