Fast Track

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1703-0239AC
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 SAWIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
RESPONDENTS (ORIGINAL APPLICANTS):	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, AND CLARA MIDBO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST (The "Trustees")
STATUS ON APPEAL:	Respondents
RESPONDENT:	PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL:	Not a party to the Appeal
INTERVENOR:	SAWRIDGE FIRST NATION
STATUS ON APPEAL:	Respondent
INTERESTED PARTY	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers and Sisters
STATUS ON APPEAL:	Appellant
DOCUMENT:	**BOOK OF AUTHORITIES OF THE TRUSTEES**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora, Anna Loparco & Mandy L. England Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

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TABLE OF AUTHORITIES

Tab 1

Para 4

2018 ABCA 81, 2018 CarswellAlta 343

2018 ABCA 81
Alberta Court of Appeal

Stoney v. Twinn

2018 CarswellAlta 343, 2018 ABCA 81

Maurice Felix Stoney and His Brothers and Sisters (Applicants / Appellants) and Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Sawridge Trust (Respondents / Respondents) and Public Trustee of Alberta (Not a Party to the Application / Not a Party to the Appeal) and Sawridge First Nation (Respondent / Respondent)

Frans Slatter J.A.

Heard: February 28, 2018
Judgment: March 1, 2018
Docket: Edmonton Appeal 1703-0195-AC

Counsel: M.L. England, for Respondents, 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 Respondent, Sawridge First Nation
Maurice Felix Stoney, Applicant, for himself

Subject: Civil Practice and Procedure
Headnote
Civil practice and procedure

Frans Slatter J.A.:

1 On December 19, 2017 the appellant, Maurice Stoney, was ordered to post security for the costs of this appeal: *Stoney v 1985 Sawridge Trust*, 2017 ABCA 437. He was given about 2 $^{1}/_{2}$ months to post those costs, which were due on February 28, 2018.

2 On February 26, 2018, that is about 48 hours before the deadline, the appellant applied for an extension of the time to post those costs.

3 The appellant now seeks a five month extension of the time to post the costs, until July 31, 2018. That would be double the time originally given by the Court to post those costs.

4 The appellant argues that he has no funds available to post security for costs, but he also has no prospects of raising those funds between now and July 31. As noted in the reasons requiring security for costs, the appellant has had his day in court, and the merits of the appeal are questionable.

5 The time is come to bring this litigation to an end, and the request to extend the time to post security is denied.

End of Document

Tab 2

2010 ABCA 40
Alberta Court of Appeal

Balogun v. Pandher

2010 CarswellAlta 177, 2010 ABCA 40, [2010] A.W.L.D. 867, [2010] A.W.L.D. 868, 184 A.C.W.S. (3d) 976, 474 A.R. 258, 479 W.A.C. 258

Alexander O. Balogun, Esther Elizabeth Balogun (by her Next Friend, Alexander O. Balogun), Pauline Jessica Balogun (by her Next Friend, Alexander O. Balogun), Daniel Richard Balogun (by his Next Friend, Alexander O. Balogun) and Alexander Otto Balogun Jr. (by his Next Friend, Alexander O. Balogun) (Appellants / Plaintiffs) and Harbhajan Singh Pandher (Respondent / Defendant)

Frans Slatter J.A., Jack Watson J.A., and Patricia Rowbotham J.A.

Heard: February 1, 2010
Judgment: February 5, 2010
Docket: Edmonton Appeal 0903-0144-AC

Counsel: Alexander O. Balogun for himself
B.E. Wallace for Respondent

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Trials — Jury trial — Power of court to determine mode of trial — Discretion

Case management judge issued order denying jury trial in motor vehicle personal injuries action — This was second ruling during case management process by same judge denying jury trial — Case management judge found that basis for earlier ruling had not changed and that there was no reason to decide differently — Plaintiff appealed — Appeal dismissed — There was no discernable basis for intervention either on (a) decision of case management judge to refrain from re-considering his earlier decision (if that is what he did), or (b) decision on merits if he did reconsider matter — As to point (a), case management would not be very effective method for civil proceedings if rulings of case management judges could simply be revisited as of right at instance of unsatisfied party, even if there might have been some adjustment of factual platform on which earlier decision was made — Appellate deference on exercise of discretion is particularly appropriate to case management decisions which decline to re-open procedural adjudication which settled issue for case management purposes — Very essence of case management is judicial supervision of litigation process in order to provide coherence, predictability and stability to that process — As to point (b), there was no error in substantive ruling on jury trial that was within reach of applicable standard of review — Decision was not arbitrary, erroneous in law or fact, or productive of injustice.

Civil practice and procedure --- Pre-trial procedures — Case management and status hearing — Case management — Appeals

Case management judge issued order denying jury trial in motor vehicle personal injuries action — This was second ruling during case management process by same judge denying jury trial — Case management judge found that basis for earlier ruling had not changed and that there was no reason to decide differently — Plaintiff appealed — Appeal dismissed — There was no discernable basis for intervention either on (a) decision of case management judge to refrain from re-considering his earlier decision (if that is what he did), or (b) decision on merits if he did reconsider matter — As to point (a), case management would not be very effective method for civil proceedings if rulings of case management judges could simply be revisited as of right at instance of unsatisfied party, even if there might have been some adjustment of factual platform on which earlier decision was made — Appellate deference on exercise of discretion is particularly

appropriate to case management decisions which decline to re-open procedural adjudication which settled issue for case management purposes — Very essence of case management is judicial supervision of litigation process in order to provide coherence, predictability and stability to that process — As to point (b), there was no error in substantive ruling on jury trial that was within reach of applicable standard of review — Decision was not arbitrary, erroneous in law or fact, or productive of injustice.

APPEAL by plaintiff from order of case management judge denying jury trial in motor vehicle personal injuries action.

Per curium:

The adult appellant challenges a Court of Queen's Bench case management judge's order denying a jury trial in a motor vehicle personal injuries lawsuit. The adult appellant is a plaintiff in his own right and proceeds without counsel. He purports to represent, as next friend, his four children also as appellants. His representation of two children is problematic as those two children are no longer minors and should be represented by their own solicitor: *Salamon v. Alberta (Minister of Education)*, 120 A.R. 298, [1991] A.J. No. 922 (Alta. C.A.), leave denied (1993), [1991] S.C.C.A. No. 535 (S.C.C.); see also *Holland (Guardian ad litem of) v. Marshall*, 96 B.C.L.R. (4th) 55, [2009] B.C.J. No. 1294, 2009 BCCA 311 (B.C. C.A. [In Chambers]), leave denied, [2008] S.C.C.A. No. 327 (S.C.C.) and affirmed as *Holland (Guardian ad litem of) v. Marshall*, [2009] B.C.J. No. 2535, 2009 BCCA 582 (B.C. C.A.); *Balogun v. Pandher*, [2009] A.J. No. 1339, 2009 ABCA 409 (Alta. C.A.). Under the circumstances of this case, however, we do not need to address this procedural concern.

The case management in the Court of Queen's Bench relates to an incident on May 14, 2003 where the respondent (defendant)'s vehicle collided with the back end of a vehicle containing the appellants. The appellants' claims include general damages, loss of income earning capacity, and cost of future care. The respondent disputes the damage claims. Issues at trial will include causation and quantum of damages.

The ruling under appeal dated April 22, 2009 is the second ruling during the case management process by the same judge denying a jury trial, the earlier ruling being at 430 A.R. 229, [2007] A.J. No. 1134, 2007 ABQB 615 (Alta. Q.B.). The case management judge in the ruling under appeal held that the basis for his 2007 ruling had not changed and that there was no reason to decide differently in 2009.

In his 2007 ruling, the case management judge referred to s. 17(1)(b) of the *Jury Act*, R.S.A. 2000, c. J-3, which allows for jury trials in lawsuits such as this where the amount claimed "exceeds an amount prescribed by regulation". The regulation in this instance provides that the "amount claimed" must exceed $75,000 for actions commenced after March 1, 2003: s. 4.1 of *Jury Act Regulation*, Alta. Reg. 68/83. The Statement of Claim in this instance claims an amount in excess of $75,000 for each plaintiff. By this and the other terms of s. 17 of the Act, the Legislature has set the criteria for eligibility for a civil jury trial in this province. There is no residual discretion of case management judges to order a civil jury trial on a basis not provided for by legislation: *Purba v. Ryan*, 397 A.R. 251, [2006] A.J. No. 963, 2006 ABCA 229 (Alta. C.A.).

A jury trial, however, can be refused where the trial involves matters that cannot "conveniently be made by a jury": s.17(2) of the *Act*. The case management judge looked at the criteria from case law for determining inconvenience under s. 17(2) of the *Act*. Those criteria include "(a) a prolonged examination of documents or accounts, or (b) a scientific or long investigation". To assess these criteria, a case management judge will consider such factors as the number of parties and factual issues, the number of experts, the need for interpretation, the legal issues, the potential for conflicts of expert opinion, questions of causation and other factors including, in our view, what the history of the litigation suggests about the approach the parties can be expected to take. He concluded in his 2007 ruling that "this is not a case that can be conveniently heard by a jury taking into account the number of issues involved with five Plaintiffs, the length of trial time required, the amount and complexity of the expert evidence, the number of medical reports and the history of the litigation": at para. 43. No appeal was taken from that 2007 decision. As to the more recent 2009 ruling, the case management judge referred to his previous decision declining to order a jury trial and concluded that he saw "no reason to change [his] previous decision and order a jury trial."

In sum, the appellants argue that the trial of this action would not be so prolonged or complex that it could not be conveniently heard by a jury. The respondent submits that the case management judge properly considered the applicable criteria in determining that the case was inappropriate for a jury trial. The respondent also submits that the case management judge properly considered whether he should re-visit his earlier ruling.

The decision of the case management judge to decline to reverse his prior ruling, and his decision to find no basis to order a jury trial in this case, were both exercises of discretion. As such, the standard of review for the factual underpinnings of the exercise of discretion is deferential absent palpable and overriding error: *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24, 2005 SCC 25 (S.C.C.) at paras. 52 to 56. The standard of review for the exercise of discretion by a case management judge is also deferential and appellate intervention is warranted only if the case management judge has clearly misdirected himself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice: see e.g. *Chevron Canada Resources v. Canada (Executive Director of Indian Oil & Gas)*, 457 A.R. 132, [2009] A.J. No. 496, 2009 ABCA 180 (Alta. C.A.) at paras. 4 to 6; *Richard v. Lee-Knight*, [2009] A.J. No. 653, 2009 ABCA 224 (Alta. C.A.), leave denied, (2010), [2009] S.C.C.A. No. 429 (S.C.C.) at para. 9; *Balogun v. Pandher*, [2009] A.J. No. 1339, 2009 ABCA 409 (Alta. C.A.) at paras. 10 and 11.

Here we are unable to discern any basis for intervention either on (a) the decision of the case management judge to refrain from re-considering his earlier decision (if, indeed, that is what he did since he appears to have taken a renewed look at the matter substantively) or (b) the decision of the case management judge on the merits under s. 17 of the *Act* if indeed the case management judge did re-consider the matter.

As to point (a), case management would not be a very effective method for civil proceedings if rulings of case management judges could simply be re-visited as of right at the instance of an unsatisfied party to the action - even if there might have been some adjustment of the factual platform on which the earlier decision was made. Accordingly, appellate deference on the exercise of discretion is particularly appropriate as to case management decisions which decline to re-open a procedural adjudication which settled an issue for case management purposes. That high deference is not merely because of the policy resistance to fragmentation of proceedings and piecemeal appellate review, nor because it may be that a specific case management ruling may be subject to appeal at the end of the trial if its effects can be traced through to that stage, but also because the very essence of case management is judicial supervision of the litigation process in order to provide coherence, predictability and stability to that process. We detect no error in the case management judge's decision not to re-open his earlier ruling.

As to point (b), we find no error in the substantive ruling on a jury trial that is within reach of the applicable standard of review. The decision was not arbitrary, erroneous in law or fact, nor productive of injustice.

The appeal is dismissed.

Appeal dismissed.

Tab 3

Paras 4-5

2012 ABCA 269
Alberta Court of Appeal

Beacon Hill Service (2000) Ltd. v. Esso Petroleum Canada

2012 CarswellAlta 1563, 2012 ABCA 269, [2012] A.W.L.D. 4993, [2012] A.W.L.D. 5043, [2013] 1 W.W.R. 509, 536 A.R. 221, 559 W.A.C. 221, 70 Alta. L.R. (5th) 238

Beacon Hill Service (2000) Limited (Appellant / Plaintiff) and Esso Petroleum Canada, A Division of Imperial Oil Limited and McColl-Frontenac Petroleum Inc. (Respondents / Defendants)

Imperial Oil, a Partnership of Imperial Oil Limited and McColl-Frontenac Petroleum Inc. (Respondents / Plaintiffs by Counterclaim) and Beacon Hill Service (2000) Limited and E.F. Anthony Merchant (Appellants / Defendants by Counterclaim)

Peter Martin, Jack Watson, Frans Slatter JJ.A.

Heard: September 12, 2012
Judgment: September 21, 2012
Docket: Calgary Appeal 1201-0043-AC

Proceedings: affirming *Beacon Hill Service (2000) Ltd. v. Esso Petroleum Canada* (2011), [2011] 9 W.W.R. 200, 45 Alta. L.R. (5th) 92, 512 A.R. 212, 2011 ABQB 138, 2011 CarswellAlta 366 (Alta. Q.B.)

Counsel: S. Flannigan, for Appellants
R. Bastedo, for Respondents

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

Headnote

Professions and occupations --- Barristers and solicitors — Employment of lawyer — Representation by solicitor — Application for removal as solicitor of record

M was principal partner of law firm — M wanted firms' associate(s) to act for him and for plaintiff corporation in action — M was one of shareholders and directors of company (M Ltd.) which owned 97 per cent of shares in plaintiff — M was defendant by counterclaim — M was to be key witness — Defendant sought to remove firm as counsel for plaintiff and for defendants by counterclaim — Chambers judge ruled that M was prohibited from acting for plaintiff, firm was prohibited from acting for either M or plaintiff, but M was not prohibited from acting for himself — Plaintiff and M and appealed — Appeal dismissed — Chambers judge's conclusion was reasonable and not afflicted by error of law — Decision was exercise of discretion within innate jurisdiction of Court of Queen's Bench to control its processes, uphold integrity of administration of justice and to prevent abuse of those processes — Exercise of discretion did not terminate proceeding to disadvantage of any party — It was not error of law or palpable error of fact for chambers judge to have regard to indications that M would inevitably be called as witness in trial, nor was it unreasonable for him to conclude that M's personal credibility would be disputed by opposing parties on important and material matters directly in issue between parties — Chambers judge's further conclusion that M's law firm would be unable to approach litigation with any greater detachment than M was not unreasonable.

Business associations --- Nature of business associations — Nature of corporation — Distinct existence — From owner — General principles

M was principal partner of law firm — M wanted firms' associate(s) to act for him and for plaintiff corporation in action — M was one of shareholders and directors of company (M Ltd.) which owned 97 per cent of shares in plaintiff — M was defendant by counterclaim — M was to be key witness — Defendant sought to remove firm as counsel for plaintiff

and for defendants by counterclaim — Chambers judge ruled that M was prohibited from acting for plaintiff, firm was prohibited from acting for either M or plaintiff, but M was not prohibited from acting for himself — Plaintiff and M and appealed — Appeal dismissed — Chambers judge's conclusion was reasonable and not afflicted by error of law — Decision was exercise of discretion within innate jurisdiction of Court of Queen's Bench to control its processes, uphold integrity of administration of justice and to prevent abuse of those processes — Exercise of discretion did not terminate proceeding to disadvantage of any party — It was not error of law or palpable error of fact for chambers judge to have regard to indications that M would inevitably be called as witness in trial, nor was it unreasonable for him to conclude that M's personal credibility would be disputed by opposing parties on important and material matters directly in issue between parties — Chambers judge's further conclusion that M's law firm would be unable to approach litigation with any greater detachment than M was not unreasonable.

APPEAL by plaintiff and M from judgment reported at *Beacon Hill Service (2000) Ltd. v. Esso Petroleum Canada* (2011), [2011] 9 W.W.R. 200, 45 Alta. L.R. (5th) 92, 512 A.R. 212, 2011 ABQB 138, 2011 CarswellAlta 366 (Alta. Q.B.) ruling that M was prohibited from acting for plaintiff, firm was prohibited from acting for either M or plaintiff, but M was not prohibited from acting for himself in action.

***Per curiam*:**

1 The appellants, being a lawyer (E.F.A. Merchant) and a company of which the lawyer is the "leading actor" (Beacon Hill Service (2000) Limited) challenge a ruling of a chambers judge that allowed the lawyer Merchant to represent himself in the proceedings but to prevent him from also representing Beacon Hill. The chambers judge also ruled that the lawyer's law firm, Merchant Law Group, could not represent Beacon Hill in the proceedings even before trial.

2 This decision was an exercise of discretion within the innate jurisdiction of the Court of Queen's Bench to control its processes, to uphold the integrity of the administration of justice and to prevent abuse and potential abuse of those processes. This jurisdiction extends to making orders that affect counsel, who are, after all, officers of the court: see *e.g. MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.) at paras 13 and paras 58 to 60; *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para 18; *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.) at para 24. This exercise of discretion did not terminate a proceeding to the disadvantage of any party.

3 Further, as pointed out in *MacDonald Estate* at paras 44 to 46 in the context of conflict of interest, a "probability of mischief" standard is "wanting" in terms of public confidence. Where the court is looking forward in the light of past events, the judgment of the Court as to the prospect of conflict or abuse is context-sensitive. This is not to substitute a "mere possibility" of mischief test: see *Forward v. Zurich Insurance Co.* (2002), 2002 ABCA 123, 303 A.R. 119 (Alta. C.A.) at para 7. But it is to recognize that the balancing of values involved is based on the realities of the situation.

4 Discretionary rulings that affect the procedural course of legal proceedings should generally be disturbed on appeal only if clearly unreasonable or legally erroneous, which in practical terms means "only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice": see *e.g. R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 (S.C.C.), at para 117 citing *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.), at paras 15 to 17 (p 1375); *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.), at para 87; *R. c. Bellusci*, 2012 SCC 44 (S.C.C.) at para 17. See also *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, 343 D.L.R. (4th) 577 (S.C.C.) at para 112 ("The exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts...."); *Indian Residential Schools, Re* (2001), 2001 ABCA 216, 286 A.R. 307 (Alta. C.A.) at paras 16 to 23 citing *Decock v. Alberta*, 2000 ABCA 122, 255 A.R. 234 (Alta. C.A.) at para 13 (appeal to SCC No. 37980 abandoned).

5 As observed in *Van Breda* at para 70: "Judicial discretion has an honourable history, and the proper operation of our legal system often depends on its being exercised wisely." This does not mean that the exercise of discretion is unreviewable. But an appeal court should not simply substitute its own view on an interlocutory ruling merely because the appeal court takes a different view of the circumstances from that of the court where the matter is proceeding: see

Indian Residential Schools, Re. See also *Boreta v. Primrose Drilling Ventures Ltd.*, 2010 ABCA 387, 499 A.R. 150 (Alta. C.A.) where it was pointed out at para 11 that "While the rules of court are intended to facilitate expeditious justice, they are intended to do so for all parties to the dispute, not for the convenience of one litigant only."

6 The appellant sought to persuade us that the chambers judge committed error of law by selecting what the appellant urges to be one of two distinct lines of authority as to interventions to require a party to change counsel. The appellant submits that the chambers judge in so doing took a rigid legal position. We doubt that there are two conflicting flows of reasoning in the cases provided to us. In any event we are not persuaded that the chambers judge adopted any bright line rule approach to the situation before him. In particular, we do not find the chambers judge made his decision purely based on any legal distinction between the business involvement of the appellant lawyer and his legal practice or conduct in the proceedings. Those aspects of the situations were just factors to be considered.

7 In our view, the chambers judge did not err in law in his assessment of the specific context of these slow moving proceedings and the events which had occurred therein as disclosed to him. It was not error of law or palpable error of fact for him to have regard to the indications that the appellant lawyer would inevitably be called as a witness in the trial. Nor was it unreasonable for the chambers judge to conclude that the appellant lawyer's personal credibility would be disputed by opposing parties on important and material matters directly in issue between the parties and not merely as to incidental or process topics. The chambers judge's further conclusion that the lawyer's law firm would be unable to approach the litigation with any greater detachment than the lawyer was also not unreasonable under the circumstances. The firm, like the lawyer, would arguably have a reputational if not also a financial stake in the outcome: see *e.g. Forward v. Zurich Insurance Co.* at para 8, citing with approval *Harvard Investments Ltd. v. Winnipeg (City)*, [1994] 6 W.W.R. 127 (Man. Q.B.), at 137. We also find no error of law in the chambers judge's conclusion that the corporate appellant had a distinct legal entity.

8 We do not find it necessary to be elaborate on the topic of what circumstances could give rise to requiring a party to obtain other counsel than the party would choose to have. We find this case to be one of particular circumstances. We find that the chambers judge's conclusion is reasonable and not afflicted by error of law and that it should be affirmed.

Appeal dismissed.

End of Document

Tab 4

Alta. Reg. 124/2010, s. 10.50

s 10.50 Costs imposed on lawyer

Currency

10.50Costs imposed on lawyer
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.

Currency
Alberta Current to Gazette Vol. 114:2 (January 31, 2018)

End of Document

Tab 5

Paras 18, 20, 23, 30

2005 ABQB 499
Alberta Court of Queen's Bench

Robertson v. Edmonton (City) Police Service

2005 CarswellAlta 949, 2005 ABQB 499, [2005] A.W.L.D. 2965, [2005] A.W.L.D. 2966, [2005] A.J. No. 840, [2006] 6 W.W.R. 739, 141 A.C.W.S. (3d) 375, 16 C.P.C. (6th) 229, 385 A.R. 325, 53 Alta. L.R. (4th) 355

In the matter of a hearing pursuant to s. 45(3) of the Police Act, S.A. 1988, c. P-12.01, and Alberta Regulation 356/90

And In the Matter of a Notice and Record of Disciplinary Proceedings dated April 10, 2001

Ron Robertson (Applicant) and Bob Wasylyshen, Chief of Police of the Edmonton Police Service, and Dwayne Gibbs, Presiding Officer (Respondents)

Slatter J.

Heard: May 9, 2005
Judgment: July 8, 2005
Docket: Edmonton 0103-16123

Counsel: T.M. Engel for Applicant
S.D. Johnson for Respondent, Chief Wasylyshen
E.H. Molstad, Q.C. for T.M. Engel

Subject: Civil Practice and Procedure; Public

Headnote

Civil practice and procedure --- Costs — Scale and quantum of costs — Quantum of costs — Miscellaneous issues

Judicial review proceeding was held regarding allegations of bias made by applicant against chief of police, against other police officers, and against inspector who investigated allegations against applicant — Respondents were successful — Submissions were made as to costs of interlocutory proceedings and judicial review hearing — Respondent was entitled to costs of interlocutory proceedings on column 1 of Sched. C, and costs of hearing itself to be taxed on column 5, as if it was trial — As result of choices made by applicant, these proceedings were more analogous to trial — There were reasons why this proceeding justified costs taxed on higher column than normal for judicial review applications — Proceedings were exceptionally complex, applicant made unfounded allegations, complexity was entirely doing of applicant, issues justified rigorous defence, and applicant introduced improper evidence and persisted in lengthy, irrelevant cross-examination — Applicant's claim of impecuniosity was not basis to reduce award — Applicant who makes unsubstantiated allegations of misconduct by respondents in their professional capacity cannot then seek to hide behind impecuniosity when costs are awarded — Length and complexity of litigation was direct result of approach applicant chose to take.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs against solicitor personally — Misconduct of solicitor

Judicial review proceeding was held regarding allegations of bias made by applicant against chief of police, against other police officers, and against inspector who investigated allegations against applicant — Successful respondent police chief applied for costs against applicant, and sought order that counsel for applicant be jointly and severally responsible for one-half of those costs — Respondent was entitled to costs of interlocutory proceedings on column 1 of Sched. C, and costs of hearing itself to be taxed on column 5, as if it was trial — Respondent was not entitled to costs against applicant's counsel personally — As result of choices made by applicant, proceedings were more analogous to trial — There were number of instances where counsel's arguments and approach strained credibility — Among other things, counsel made unwarranted attacks on presenting officers, introduced scandalous and irrelevant evidence, defamed and attributed

improper motives to presiding officers, and made allegations of misconduct and bias based solely on speculation — While conduct of case clearly showed bad judgment, court was not satisfied that counsel made allegations in question without belief that they were or might be true — It appeared that applicant himself honestly believed that there was corruption in police service, and that there was conspiracy to discredit him — It appeared that applicant's counsel may have shared his belief in merits, or at least that applicant had right to have arguments in which he believed placed before court — Litigation was conducted in wholly unacceptable way, but there was no overt evidence of bad faith — One exception was with respect to particular affidavit, but that one incident did not justify remedy sought — Proper remedy for way case was handled was enhanced costs awarded against applicant — Remedy for affidavit in question was to deny costs of present application to applicant's counsel.

ADJUDICATION on costs of judicial review proceeding and interlocutory proceedings.

Slatter J.:

1 This application concerns the costs consequences of the decision on the merits reported as *Robertson v. Edmonton (City) Police Service*, 2004 ABQB 519, 362 A.R. 44, 19 Admin. L.R. (4th) 1 (Alta. Q.B.). It also covers the costs of two interlocutory applications reported as *Robertson v. Edmonton (City) Police Service*, 2004 ABQB 242, 355 A.R. 265, 13 Admin. L.R. (4th) 226 (Alta. Q.B.); and *Robertson v. Edmonton (City) Police Service*, 2004 ABQB 243, 355 A.R. 281 (Alta. Q.B.), and costs of other interlocutory steps.

2 The successful Respondent Chief of Police not only applies for costs against the Applicant, he also seeks an order that counsel for the Applicant be jointly and severally responsible for one-half of those costs. The Respondent Presiding Officer and the Attorney General have not applied for costs.

Cost of the Proceedings

3 While costs are in the discretion of the Court, the general rule is that costs follow the event. As the Court of Appeal stated in *Metz v. Weisgerber*, 2004 ABCA 151, 33 Alta. L.R. (4th) 17, 348 A.R. 143 (Alta. C.A.), at para. 15:

> Though costs are discretionary, there are limits to the discretion. Costs cannot be awarded or withheld on legally irrelevant grounds, such as sympathy, wealth, or dislike of proper conduct. And a judge exercising a discretion must similarly give some weight to all the legally relevant factors. So "the ordinary rules of costs should be followed unless the circumstances justify a different approach": ***Min. of Forests v. Okanagan I.B.***, [2003] 3 S.C.R. 371, [2004] 2 W.W.R. 252, 273, 313 N.R. 84, [2003] S.C.J. No. 76, 2003 SCC 71 (para. 22). Costs cannot be withheld to give the loser a consolation prize.

Since the Respondent was completely successful, he is *prima facie* entitled to costs.

4 The Applicant argues that he is impecunious, and accordingly the costs awarded to the Respondent should be reduced. As the Court of Appeal pointed out in *Metz*, *supra*, and *Anderson v. Canada Safeway Ltd.*, 2005 ABCA 6, 361 A.R. 270 (Alta. C.A.), impecuniosity is not a basis on which to refuse costs. In any event, an applicant who makes unsubstantiated allegations of misconduct by the respondents in their professional capacity cannot then seek to hide behind impecuniosity when costs are awarded. Likewise, an impecunious applicant should conduct the proceedings in an efficient and focussed manner, which was quite the opposite of the way that this particular litigation was conducted. The length and complexity of the litigation was a direct result of the approach that the Applicant chose to take, details of which are amply revealed in the Reasons for Decision on the merits, and in these Reasons.

5 The proceeding in question was a judicial review application. However, unlike most judicial review applications, this one was not heard in Chambers on a summary basis. This hearing actually extended over four weeks and involved *viva voce* evidence from a number of witnesses. Judicial review applications will generally attract costs as contested applications. However, as a result of choices made by the Applicant, these proceedings were more analogous to a trial, and I accordingly concur with the position of the Respondent that costs should be taxed as if this was a trial.

6 Since judicial review applications do not seek monetary relief, Rule 605(6) provides that they should normally be taxed on column 1. There are however a number of reasons why this proceeding justifies a higher column on Schedule C:

> (a) the proceedings were exceptionally complex, raising many issues of law and resulting in at least six reserved decisions.
>
> (b) the Applicant made unfounded allegations of actual bias against the Respondent Chief of Police, the Respondent Presiding Officer, the Presenting Officers, and the Inspector who investigated the allegations against the Applicant: *Smith v. Harrington*, [1996] O.J. No. 1006 (Ont. Gen. Div.); *Woolley v. Assn. of Land Surveyors (Ontario)*, [2001] O.J. No. 2741 (Ont. Div. Ct.).
>
> (c) the complexity of the litigation was entirely the doing of the Applicant, as he raised every substantive and procedural point imaginable, regardless of the merits or remoteness of the argument to any issue. The style of over-litigation that permeated the entire proceeding was criticized by the Court of Appeal in *Robertson v. Edmonton (City) Police Service*, 2003 ABCA 279, 28 Alta. L.R. (4th) 226, 339 A.R. 169 (Alta. C.A.), at para.9:
>
> > This is an appeal about the procedure (Rule 266) of the procedure (judicial review), of the procedure (alleged bias in selection), of the procedure (laying discipline charges), of the discipline accusations. It is thus procedure to the 4 th degree. Nothing has effectively occurred since the charges were laid almost two and one-half years ago.
>
> (d) the issues were of considerable importance to the Respondents, and justified a vigorous defence.
>
> (e) the Applicant introduced evidence, described (at para. 61 of the Reasons) as being evidence of general bad character that was improper, of no probative value, scandalous, irrelevant and oppressive.
>
> (f) counsel for the Applicant persisted in lengthy irrelevant cross-examination, and advanced contrived arguments of causation and conspiracy. Some details are set out in the particulars provided by the Respondent.

Under R. 601(1) these are all relevant factors in setting costs. I accordingly agree that the Respondent is entitled to tax his costs of the hearing on Column 5 of Schedule C.

7 Counsel for the Applicant picked up on certain comments in the Reasons on the merits in resisting the application for enhanced costs. In particular, the Reasons noted that certain aspects of the application were premature for various reasons. It was also noted that some of the evidence was inadmissible and might have been struck out. The Applicant now argues that since the Respondent did not move to strike the whole proceeding, or strike offending affidavits, the Applicant was justified in proceeding as he did. It is well known that the standard for striking out an entire proceeding, striking out an affidavit, or obtaining the summary dismissal of an application is a high one. Moving to strike scandalous evidence runs the risk of just drawing more attention to it. It hardly lies in the mouth of the unsuccessful Applicant to argue that if only the Respondent had reacted to the inappropriate procedures in a different way, the Applicant would have lost earlier and cheaper. In fact, the Respondent did resist some of the Applicant's inappropriate procedures: see *Robertson v. Edmonton (City) Police Service*, 2003 ABQB 188, 334 A.R. 151 (Alta. Q.B.); *Robertson v. Edmonton (City) Police Service*, 2003 ABQB 719 (Alta. Q.B.); *Robertson v. Edmonton (City) Police Service*, *supra*, and *Robertson v. Edmonton (City) Police Service*, 2003 ABCA 279 (Alta. C.A.), *supra*. At the end of the day it was the Applicant who set the agenda and controlled the way the litigation would be conducted. The Applicant cannot now escape the costs consequences of those decisions.

8 In all of these circumstances the costs requested by the Respondent are reasonable, and indeed the request is moderate and tempered. The Respondent shall have costs of all interlocutory proceedings (where costs were not previously dealt with) on column 1 of Schedule C. Costs of the hearing itself shall be taxed on column 5, as if it was a trial. The Respondent is also entitled to all reasonable disbursements and G.S.T.

Liability of Counsel for Costs

9 The general rule is that only the parties to the litigation are liable for costs, although in exceptional circumstances counsel may be liable as well. Rule 602 provides:

> **602** In any proper case any barrister and solicitor who has acted for any of the parties to any proceeding, may be ordered to pay any of the costs thereof.

In recognition of the special role that counsel play in the legal process, and in recognition of the need for counsel to strenuously put forward even unpopular arguments, this Rule is only invoked in the most extreme cases.

Similar Fact Evidence

10 Counsel for Mr. Engel attempted to refer to a number of previous cases in which Mr. Engel had been involved to demonstrate how "fearless" he has been, how well he represents his clients' interests, and therefore why he should be entitled to conduct litigation in an aggressive manner without fear of a costs award against himself. Counsel also noted that Mr. Engel had been awarded the 2004 Harradence Prize for "exceptional commitment to protecting the rights of the accused and others who have suffered at the hands of government".

11 There was no sworn evidence produced in support of this unusual position. It was really evidence being bootlegged as argument: *Canada (Human Rights Commission) v. Taylor*, [1987] 3 F.C. 593 (Fed. C.A.) at p. 608. However, even if proper evidence had been tendered, such evidence would be inadmissible for several reasons:

> (a) it is general evidence of good character;
>
> (b) it is so unprobative as to be inadmissible; and
>
> (c) it violates the rule that marginal and collateral evidence is not admissible, even if it is theoretically relevant on some abstract notion of probability.

12 It should first be noted that general evidence of good character is rarely admissible in civil cases unless it amounts to similar fact evidence. This is simply because such evidence is rarely probative. The fact that a litigant may have done good deeds on a prior occasion is little evidence that they did not do a bad deed on this particular occasion: *Attorney General v. Radloff* (1854), 10 Exch. 84, 156 E.R. 366 (Eng. Exch.). For example, the fact that a litigant did not drive through a red light on a previous occasion does not mean that he or she stopped at the red light on this occasion. On the other hand, the fact that a defendant did drive through a red light on a previous occasion is no evidence that he or she also drove through the red light on this occasion. Where it is clear someone went through a red light, even proving that the defendant had a "habit" of stopping for red lights is not probative of much, as all motorists have that habit. Evidence tending to show that Mr. Engel had conducted himself in a proper manner on previous occasions is no evidence of what he did on this occasion.

13 The Reasons on the merits in this case cited (at para. 179) the following passage from *R. v. Hector* (2000), 146 C.C.C. (3d) 81, 132 O.A.C. 152 (Ont. C.A.), at para. 21:

> This quasi-similar act evidence is representative of a practice, all too prevalent in my opinion, of inviting the court to venture into a parallel investigation of what, superficially, appears to be a similar situation, only to find after an extended hearing that it is every bit as contentious as the primary issue in the case and most unlikely to be dispositive of it. . . . The complaints of another client in an unrelated case are of little or no probative value and simply extend and confuse the investigation into the main issue.

These comments, which have been approved in *R. v. Dunbar*, 2003 BCCA 667, 191 B.C.A.C. 223 (B.C. C.A.), at para. 39, were made in response to an argument that because counsel had acted incompetently in previous cases, he probably

acted in an incompetent manner in the appeal presently before the Court. For the same reason that previous instances of incompetence are inadmissible, so are previous instances of good conduct. Simply because Mr. Engel may have prosecuted other cases properly, does not mean that he prosecuted this case properly.

14 Evidence of good character is also generally not admitted because it violates the related rule against proof of collateral facts of marginal relevance. The rule is summarized in Delisle and Stuart, *Evidence: Principles and Problems*, 6th ed., (Toronto: Carswell, 2001) at pg. 125:

> Evidence of how a person acted on another occasion is evidence of a circumstance from which we ask the trier of fact to infer that the person acted in a similar fashion on the occasion being litigated. If the evidence is that the person always, invariably, acted in a certain way, the circumstantial evidence is very probative and deserves to be received. We label this as evidence of Habit but see it for what it is — a piece of circumstantial evidence, more specific than evidence of the person's general character but differing only in degree and not in kind. If the circumstantial evidence indicates invariable habit the evidence is very powerful. If the evidence is that the person normally acted in that way the circumstantial evidence is less powerful. If the evidence is that he acted in that way occasionally the court may have concerns that the time necessary to hear the evidence may not be justified given the low probative value. If the evidence is of the person's general character or personality trait, the court recognizes that, even though the person's character or trait has relevance, the probative value may be outweighed by competing considerations and should be excluded. The court recognizes that even so-called "good people" sometimes do bad things and "bad people" do good things. Plumbing the depths of their character may not be worth the time and trouble. Determining receivability is thus seen to be a matter for the trial judge's discretion where she weighs probative value against the dangers of consumption of time, confusion of the issues and prejudice to the proper outcome of the trial.

The policy reasons for limiting proof of facts that are technically relevant, but too remote, were also discussed in *Robertson v. Edmonton (City) Police Service*, *supra*, at paras. 12-14. A "habit" of responding in a regular mechanical way to a particular set of circumstances may have probative value. For example, a doctor may testify that he routinely did a medical procedure in a particular way. But to attempt to show that someone was in the "habit" of acting "reasonably and properly" provides no probative evidence. This is merely evidence of general good character.

15 As the Court pointed out in *Hector*, *supra*, proof of prior deeds invites a parallel investigation into all sorts of collateral issues. Citing previous cases in which Mr. Engel was counsel in support of his aggressive style of litigation invites the citation of other cases in which Mr. Engel arguably went over the line. For example, in *Libo-on v. Fort Saskatchewan Correctional Centre*, 2004 ABQB 416, 32 Alta. L.R. (4th) 128, 362 A.R. 231 (Alta. Q.B.), at para. 15, Mr. Engel made the impossible argument that an inmate with morphine concealed in his rectum was not in possession of that morphine. In *R. v. Jarema* (1996), 43 Alta. L.R. (3d) 345, 187 A.R. 194 (Alta. C.A.) the accused had pleaded guilty to raping three young girls. He then retained Mr. Engel and attempted to withdraw the guilty pleas. In support of that application Mr. Engel issued a Statement of Claim against the three victims, claiming general damages of $1 million. As the Court of Appeal stated at para. 11: "Needless to say, we were not impressed with this tactic". Counsel for the Respondent cited *Ilnicki v. MacLeod*, 2003 ABQB 676, 20 Alta. L.R. (4th) 78 (Alta. Q.B.) at para. 13, and *Munoz v. Director of the Edmonton Remand Centre*, 2004 ABQB 769 (Alta. Q.B.), at paras. 96-99 for the same purpose.

16 It will be readily apparent from citing these few examples that the attempt to use general evidence of good character simply invites a public inquiry into Mr. Engel's entire career. For reasons I gave in *Robertson v. Edmonton (City) Police Service*, *supra*, at paras. 12-20, the system simply cannot devote the resources necessary to conduct proceedings in that way. See also Sopinka, *The Law of Evidence in Canada*, 2nd ed. (Markham: Butterworths, 1999) at para. 10.27. In any event, even if such an inquiry was conducted, the resulting conclusions will not be sufficiently probative to be of any use. Even if the inquiry should conclude that Mr. Engel was in some instances a good advocate, and in other instances a bad advocate, but that overall in his entire career he was good (or bad), that does not provide any probative evidence as to whether in the particular case before the Court he misconducted himself or not. I have accordingly disregarded all this "evidence".

Costs Payable by a Barrister

17 The leading case on awarding costs against a barrister personally is *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.). In this case a religious organization had intervened in support of one of the parties. The trial judge had ordered that the religious organization and counsel for the party be jointly liable for costs on a solicitor and client basis. The Court of Appeal reversed the award of costs, and the Supreme Court of Canada concurred, stating the following principle at paragraph 254:

> The Court of Appeal held that no order for costs should have been made against Mr. How. There is no need to repeat that entirely satisfactory analysis. The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that *repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved*, and *that the lawyer acted in bad faith in encouraging this abuse and delay*. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. But the fault that might give rise to a costs award against Mr. How does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, 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. (emphasis added)

The conjunction "and" in the italicized portion indicates that bad faith must be shown.

18 The Supreme Court endorsed the more detailed reasons of the British Columbia Court of Appeal on this topic, reported as *Young v. Young* (1990), 75 D.L.R. (4th) 46, 50 B.C.L.R. (2d) 1 (B.C. C.A.) at paras. 81-101. That court made the following points:

> (a) An award of costs should not be made against a solicitor personally on the ground that proceedings brought on behalf of a client lack merit unless it is beyond doubt not only that the proceedings are devoid of merit, and that the solicitor knew or ought to have known them to be so, but also that the responsibility for continuing with the proceedings despite their lack of merit lies with the solicitor, rather than the client.
>
> (b) Counsel bears the responsibility for determining what evidence should be adduced to advance his client's cause. In doing so counsel must be allowed some latitude.
>
> (c) A solicitor ought not to be ordered to pay solicitor-and-client costs where his conduct is merely the product of excessive zeal, and the production of material not strictly necessary for the court's decision is not grounds for an award of solicitor-and-client costs against him.
>
> (d) An award of costs should not be made against a solicitor personally on the ground that an excessive number of interlocutory proceedings were brought, unless responsibility for them lies with the solicitor, rather than the client.

The general principles are also discussed in *155569 Canada Ltd. v. 248524 Alberta Ltd.*, [1997] A.J. No. 296 (Alta. Q.B.).

19 Also of importance are the provisions of the *Code of Professional Conduct* that govern the conduct of counsel when acting as an advocate:

> **Chapter 10 The Lawyer as Advocate**
>
> STATEMENT OF PRINCIPLE When acting as advocate, a lawyer has a duty to advance the client's cause resolutely and to the best of the lawyer's ability, subject to limitations imposed by law or professional ethics.

1. A lawyer must not take any step in the representation of a client that is clearly without merit.

17. (a) A lawyer's representations to the court concerning the facts of a case must be limited to representations supported by the evidence.

(b) A lawyer's representations to the court concerning the law must be supported by judicial decision or other legal authority unless the lawyer informs the court that there is no such support.

21. A lawyer must treat with fairness all witnesses and others involved in a matter.

Commentary General

G.2 The exclusive right of lawyers to speak for another citizen before a body that will adjudicate that person's legal rights and obligations creates corresponding duties not only to clients, but to opposing parties, the court, others involved in the litigation process and society at large. *The duty to zealously represent the client is therefore not unqualified.* Lawyers must actively participate in safeguarding the fairness, integrity and propriety of judicial proceedings, including efforts to govern the behaviour of clients and witnesses.

R.1 A lawyer must not take any step in the representation of a client that is clearly without merit.

C.1 A lawyer has a duty to take full advantage of legal procedure for the benefit of each client and may assert a position on a client's behalf, including one that the lawyer does not believe will ultimately prevail, if the position is supportable by a good faith argument on the merits. A lawyer may have greater latitude if (for example) all of the facts have yet to be fully substantiated or the lawyer expects to develop further evidence through discovery.

It is an abuse of process, however, for a lawyer to commence or defend an action on grounds that are not, *and have no chance of becoming, a legitimate and meritorious claim or defence.* In evaluating the client's position and determining the extent to which it should be pursued, a lawyer must realistically assess all factual, evidential and jurisprudential factors bearing on the matter. A step taken for the sole purpose of embarrassing, inconveniencing or harassing another party is improper.

C.17 As officers of the court, lawyers may not use improper means of persuasion that circumvent the safeguards of fairness inherent in the adversary system. Such tactics may also constitute a violation of the lawyer's duties to the court (see, for example, Rule #14). Paragraph (a) of Rule #17 requires that a lawyer present argument having *a rational basis in relation to the evidence.* While an advocate is obliged to advance all arguments that can be fairly made on the client's behalf, including those with which one does not agree or sympathize, it is unacceptable to distort the evidence or to create the impression that a matter is undisputed when in fact it is not. Nor may an advocate summarize the evidence in an inaccurate fashion, since the result may be to mislead the trier of fact.

Similarly, with respect to paragraph (b) of Rule #17, when a lawyer makes a representation as to the state of the law, it is presumed that legal authority exists to support the position taken unless the lawyer indicates the contrary to the court. If the lawyer is aware of relevant statutory or common-law authority, it is improper to misstate that law expressly or by implication, or to mislead the court regarding any aspect of a judicial decision, such as the underlying facts, the basis on which the case was decided, or the fact that it is under appeal or has been overruled (see also Rule #18).

C.21 It is in the best interests of the individual lawyer, the profession and the administration of justice that an advocate maintain a courteous demeanour throughout the litigation process. A witness must not be discouraged from coming forward for fear of mistreatment by opposing counsel.

In questioning a witness, a lawyer's primary motivation will be advancement of the client's position. However, professional ethics preclude actions by a lawyer having no substantial purpose other than to intimidate, harass or

embarrass a witness. (see Commentary 1) While a lawyer need not have evidentiary support for every question put to a witness, a question or comment that impugns the character of a witness must have a basis in fact and be justifiable on the grounds of relevance. (emphasis added).

20 The cases largely turn on their specific facts, but it is helpful to see the type of conduct that has justified costs awards against counsel:

(a) *Shum v. Mitchell*, 2000 ABQB 323, 265 A.R. 149, 47 C.P.C. (4th) 158 (Alta. Q.B.). Counsel was required to pay costs of a court-appointed expert on an issue that was abandoned during argument, and should have been abandoned earlier.

(b) *Brown v. Silvera*, 2004 ABQB 527, 364 A.R. 195 (Alta. Q.B.). Counsel misled the Court on an *ex parte* application for a preservation order by withholding relevant information.

(c) *Rahall, Re*, 2003 ABQB 1050, 31 Alta. L.R. (4th) 294, 349 A.R. 263 (Alta. Q.B.). Counsel misled the Court on the status of a bankruptcy file and on whether proper notice had been given.

(d) *Markdale Ltd. v. Ducharme*, 1998 ABQB 758, 238 A.R. 98 (Alta. Q.B.). Counsel was liable for costs for intimidating a witness by alleging a non-existing court order, by making unfounded allegations of misconduct, prolix proceedings, and for aiding in the breach of court orders.

(e) *Loates v. Loates*, 2000 ABQB 253, 264 A.R. 287, 185 D.L.R. (4th) 525 (Alta. Q.B.). Putting forward irrelevant material, intentionally frustrating the judgment, and running up costs justified an order for costs against counsel.

(f) *Lynch v. Checker Cabs Ltd.*, 1999 ABQB 514, 73 Alta. L.R. (3d) 74, 245 A.R. 182 (Alta. Q.B.). Counsel caused a mistrial by giving a without prejudice offer to the trial judge.

(g) *Kent v. Waldock*, 2000 BCCA 357, 139 B.C.A.C. 189, 76 B.C.L.R. (3d) 217 (B.C. C.A.). Intentionally failing to disclose documents justified costs against the solicitor, but raising weak and eventually unsuccessful defences did not.

21 It is apparent from the case law that there must be some finding of positive misconduct by counsel before costs will be awarded against him or her personally. It is not enough that the action was unsuccessful. It is not enough that the client advanced unmeritorious claims, or instructed counsel to pursue the matter in an undesirable way. Nor is it sufficient that counsel did not act in an exemplary fashion. A mere error of judgment, or even negligence, is not enough. Obviously, legitimate tactical decisions by counsel on the conduct of the litigation do not justify personal cost awards. 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: *Shum v. Mitchell*, *supra*, at para. 15; *Brown v. Silvera*, *supra*, at para. 32.

22 Deciding what evidence to tender and which arguments to make obviously involves a large degree of judgment by counsel. Simply because evidence is not accepted or arguments are unsuccessful does not mean that counsel should not have made them. Counsel are afforded a great deal of latitude. However, counsel are only admitted to the Bar because they have the training that entitles them to practice law. Where counsel persists in introducing evidence whose relevance is so contrived that there is no reasonable likelihood of it being accepted, then at some point counsel has crossed the line. Tendering an isolated piece of evidence of this sort will not warrant sanction, but where counsel builds an entire case on such evidence, at some point counsel will become exposed to a costs award. Likewise, counsel are entitled to make arguments that have not been made before, or have not succeeded before, because that is how the common law develops. However, even here there are boundaries that counsel, because of their training, are expected not to cross.

23 The Commentary on the *Code of Professional Conduct* specifically states that it is an abuse of process for counsel to advance an argument where there is no legitimate expectation that it might succeed. While the Commentary does not speak to interlocutory steps, in my view it clearly implies that improper, unnecessary, and excessive interlocutory procedural steps are not justified. The Court of Appeal pointed that out in this very case in *Robertson v. Edmonton (City) Police Service*, 2003 ABCA 279 (Alta. C.A.), *supra*.

24 Counsel for Mr. Engel emphasized the observation in *Young v. Young*, *supra*, that lawyers have a duty to fearlessly advance and defend the client's interest. Counsel noted that costs awards against counsel may have a "chilling effect" upon the independence of the Bar and the ability of counsel to effectively represent unpopular clients. It is factors like this that undoubtedly prompted the Court in *Young* to set the test for awarding costs against counsel so high.

25 Counsel argued that Mr. Engel was required under the *Code of Professional Conduct* to fearlessly advance the interests of his client. This is undoubtedly true, but the *Code of Professional Conduct* points out that this duty is not without its limits. See *Young*, *supra*, and see for a recent and extreme example, *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2005 SCC 39 (S.C.C.), at para. 16. In any event, in this context "fearlessly" means that the barrister must take on unpopular causes, and must not be dissuaded from pursuing them vigorously simply because public opinion or persons with power oppose the client's cause of action. It does not mean that counsel should advance every argument that pops into his or her head, no matter how implausible or lacking in probative value. Having a high tolerance for making unsupportable arguments is not "fearlessness", it just shows a lack of judgment.

26 Counsel relied on the classic passage from the *Trial of Queen Caroline*, quoted by Binnie, J. in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631 (S.C.C.), at para.12:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

This passage was cited by the Supreme Court in support of an argument that counsel must not accept any retainers that put counsel in a conflict with existing clients, and not in support of any argument that the obligation of counsel to vigorously represent the client has no limits. The *Young* decision is inconsistent with the latter proposition. The passage cited, considered in its historical context, refers to counsel's obligation to be "fearless" in the sense described above (in para. 25), and does not purport to sanction abuses of the civil litigation process. The argument here is not that Mr. Engel was not justified in pursuing his client's cause of action against the Edmonton Police Service, but rather that he pursued it in an inappropriate fashion. There is nothing improper about Mr. Engel making allegations of serious misconduct against public officials, but if he does so without reasonable grounds, or in a way that ignores the rules of procedure and the *Code of Professional Conduct*, then he exposes himself to claims for costs.

27 On behalf of counsel for the Applicant it was argued that he merely pursued a difficult case zealously on behalf of a client, and this was "in the finest tradition of the Alberta Bar". In my respectful view excessively lengthening proceedings by taking an excessive number of procedural steps, calling unnecessary witnesses, tendering irrelevant evidence, engaging in meaningless cross-examination, and making unpersuasive arguments does not reflect any tradition of the Alberta Bar. The conduct of counsel in this case may not have been bad enough to justify costs against him personally, but it is by no means an example of how litigation should be conducted.

28 It must also be remembered that the comments made by counsel in the courtroom are privileged. Further, since the *Defamation Act*, R.S.A. 2000, c. D-7, allows the media to print fair reports of court proceedings, what is said in the courtroom can be come widely published. Defamatory and irrelevant material stated in court becomes privileged defamatory and irrelevant material when published by the media. When counsel seeks to introduce such material in court,

special attention must be paid to whether it is relevant and probative, and whether there is any evidentiary basis for the allegations being made. As the Court of Appeal said in *R. v. Dean*, [1997] B.C.J. No. 1354 (B.C. C.A.), at paras. 15-16:

> . . . Moreover, the privilege of counsel for statements made and material filed in the course of proceedings cannot be used for personal attacks upon non-parties unless relevant to the proceedings. . . . While we are sitting in open court and fair reports of our proceedings including what I am saying now may, of course, be published in accordance with the general law, we continue the ban on access to and the publication of Mr. Goldberg's factum on fresh evidence and the other material he has filed in the two binders excepts items 1 to 7 of his Notice of Motion. We will not permit the process of the Court, particularly the privilege that accompanies legal proceedings, to be used in this way as a cloak for personal and apparent irrelevant attack.

On this point see my previous comments in *Robertson v. Edmonton (City) Police Service*, *supra*, at para. 43, and *R. v. Dunbar*, *supra*, at para. 333; *Rondel v. Worsley* (1967), [1969] 1 A.C. 191 (U.K. H.L.), at pp. 227-8; *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (Ont. C.A.), at para. 96. The affidavit of Vern Colley contained scandalous allegations whose relevance to these proceedings was completely contrived. Granted that counsel has a wide discretion in deciding what evidence to be called, I conclude that Mr. Engel was not entitled to put this evidence on the record and that he breached his obligations as an officer of the Court in doing so.

29 In this particular case there are a number of instances where Mr. Engel's arguments and approach strained credibility. Some have already been mentioned, and they can be summarized as follows:

(a) The attempt to build a case on the "differential treatment" argument. As I pointed out in *Robertson v. Edmonton (City) Police Service*, *supra*, at paras. 15-20, such evidence has little if any probative value.

(b) The attempt to show bias in the Gagnon Report by showing that the Report was not as detailed as it might have been, or by exploring the evidence behind each of the many events investigated, in support of an argument that since Inspector Gagnon came to the wrong conclusion on that minor fact, the whole Report must be not just wrong, but biased: *Robertson v. Edmonton (City) Police Service*, *supra*, at paras. 104-111. This is such a contrived argument that reasonable, competent counsel should not make it.

(c) There were unwarranted attacks on the Presenting Officers (essentially the prosecutors). The attempt to show that the Presenting Officers were biased (if that concept even applies to prosecutors) by exploring how those prosecutors approached specific prior cases had no reasonable prospect of having any success or being of any assistance to the Court: *Robertson v. Edmonton (City) Police Service*, *supra*, at paras. 177-80.

(d) Mr. Engel suggested completely contrived chains of causation to attempt to prove bias. For example, he argued that since the Respondent Chief applied too high a standard in deciding whether to lay charges, this would create bias in the mind of the Presiding Officer: *Robertson v. Edmonton (City) Police Service*, *supra*, at paras. 155-65. This argument depended on an unsupported and speculative argument that presiding officers in general, and this particular Presiding Officer, are so malleable and intellectually dishonest that they would immediately decide the case according to what they perceive the wishes of the Chief of Police to be.

(e) The scandalous and irrelevant evidence of Vern Colley should never have been introduced: *Robertson v. Edmonton (City) Police Service*, *supra*, at paras. 60-61. Its probative value depended on some sort of speculation that since (unproven) misconduct by the Respondent Chief had allegedly been overlooked in the past, he in turn would overlook misconduct by other police officers. Not only was the premise of this argument not proven, the chain of causation was so contrived that the evidence had no probative value at all. It allowed the media to circulate unsupported defamatory material about the Respondent.

(f) Mr. Engel seemed to think that he was entitled to defame and attribute improper motives to anybody who stood in the way of his client's success in this litigation. The Colley affidavit and the allegations against the Presenting Officers are just two examples. Mr. Engel also felt entitled to accuse Inspector Gagnon of actual

bias without any reasonable evidentiary foundation for it: *Robertson v. Edmonton (City) Police Service*, *supra*, at paras. 112-4. Unwarranted attacks were also made on the integrity of the Respondent Presiding Officer. As the Commentary to the *Code of Professional Conduct* states, at paras. G.2 and C.21, a lawyer does not have a licence to attack the credibility of every witness or party in the case.

(g) There was a persistent attempt to avoid the rule that there is no discovery in judicial review proceedings by examining numerous witnesses under Rules 266 and 267, and by seeking general document production: *Robertson v. Edmonton (City) Police Service* and *Robertson v. Edmonton (City) Police Service*. At some times it appeared an attempt was being made to use the Rules of Court to conduct a public inquiry into the alleged infiltration of the Edmonton Police Service by criminal elements.

(h) When steps were taken that might otherwise be legitimate, they were taken to extremes. Attempts were made to examine an excessive number of witnesses, and excessive demands were made for the production of documents: *Robertson v. Edmonton (City) Police Service*, *supra*.

(i) Repeated attempts were made to inquire into collateral issues, when the probative value of the resulting evidence was weak or non-existent. Of particular note was the attempt to prove facts by inference from other facts in unrelated circumstances. This was a violation of the similar fact rule and the rule against character evidence: *Robertson v. Edmonton (City) Police Service*, *supra*, at paras. 105-111; *Robertson v. Edmonton (City) Police Service*, *supra*.

(j) Allegations of misconduct and bias were made based on nothing more than speculation: *Robertson v. Edmonton (City) Police Service*, *supra*, at paras. 96, 100, 112, 128, 134, 173, 177.

(k) When issues of some theoretical legal importance were identified, the link to this proceeding was so tenuous as to lack any air of reality. Of particular note was the argument that Inspector Gagnon was biased even when he recommended that charges *not* be laid against the Applicant: *Robertson v. Edmonton (City) Police Service*, *supra*, at para.110; *G. (S.) v. LaRochelle*, 2005 ABCA 111 (Alta. C.A.) at para. 6.

(l) An attempt was made to re-litigate issues: *Robertson v. Edmonton (City) Police Service*, *supra*, at paras. 32-34. Justice Clackson's decision on sec. 7 was not an interlocutory decision that permitted re-litigation.

It should be recalled that these judicial review proceedings are civil in nature. While a greater latitude may be allowed to counsel who is attempting to raise a reasonable doubt in a criminal case, (as in *R. v. Gunn*, 2003 ABQB 314, 15 Alta. L.R. (4th) 109 (Alta. Q.B.)) more restraint is called for in civil proceedings. In civil proceedings, there is the sanction of costs for irresponsible litigation. All of these examples justify awarding costs, or enhanced costs. Items (c), (e), (f) and (j) potentially expose counsel to a personal costs award.

30 While the conduct of the case clearly showed bad judgment, I am not satisfied that counsel for the Applicant made the allegations in question without a belief that they were or might be true. It appears that the Applicant himself honestly believes that there was corruption in the E.P.S., and that there was some sort of conspiracy to discredit him, despite the fact that there appears to be no credible evidence to support that view. In this respect I am prepared to assume that the Applicant pursued the litigation with an honest belief that there was some merit in it. Likewise, it appears that his counsel may have shared his belief in the merits, or at the very least may have believed that his client (the Applicant) had the right to have the arguments in which he believed placed before the Court: compare *Kent v. Waldock*, *supra*, at paras. 23, 30. In my view what occurred is equally consistent with a blind belief in the client's position and poor judgment, as it is with bad faith. While the cases confirm that following the client's instructions will not automatically shield counsel from a costs award, they also note the difficulty counsel have in defending a claim for costs while maintaining privilege over instructions. Unmeritorious proceedings are not enough for costs against counsel unless it is shown that counsel, not the client, was primarily responsible for pursuing the claim. The Respondent has therefore failed to meet the burden

of proving that this is a case where arguments were made with actual knowledge that the arguments were without merit: compare *Rahall, Re*, *supra*, at para. 29; *Shum v. Mitchell*, *supra*, at para. 15.

31 While this litigation was conducted in a wholly unacceptable way, I am not convinced that the Respondent has met the standard set in *Young*. There is no overt evidence of bad faith, and while this is a borderline case, I am not prepared to draw an inference of bad faith, given all the circumstances. The one exception is with respect to the Colley affidavit, but that one incident does not justify the remedy sought. The proper remedy for the way the case was handled is the enhanced costs awarded against the Applicant. The remedy for the Colley affidavit is to deny costs of this application to Mr. Engel.

Conclusion

32 In conclusion, the Respondent is awarded costs against the Applicant on the basis previously set out. There will be no costs to any party on this motion for costs.

Order accordingly.

Tab 6

Alberta Statutes
Legal Profession Act
Part 2 — Membership and Qualification to Practise (ss. 30-48)
Enrolment

R.S.A. 2000, c. L-8, s. 44

s 44. Admission to bar and enrolment as member

Currency

44.Admission to bar and enrolment as member

44(1) When the Executive Director has approved the enrolment of a person under section 40, 41 or 42 or the Benchers have approved the enrolment of a person under section 45, and the prescribed enrolment fee has been paid, the Executive Director shall issue a certificate to that effect directed to a clerk of the Court of Queen's Bench or of the Provincial Court.

44(2) When the certificate of the Executive Director has been delivered to the clerk, the applicant for enrolment shall, within 2 years after the date of the certificate, take and subscribe before a judge or judges of the Court of Queen's Bench or of the Provincial Court, in open court,

(a) an oath of allegiance in the form prescribed by the *Oaths of Office Act*,

(b) the official oath prescribed by the *Oaths of Office Act*, and

(c) any other oath prescribed by the rules.

44(3) The Executive Director may extend the 2-year period mentioned in subsection (2) whether the application for the extension was made before or after the expiration of that period.

44(4) When the applicant for enrolment has taken and subscribed the oaths referred to in subsection (2), the clerk or deputy clerk of the court shall issue a certificate to that effect and send it forthwith to the Executive Director.

44(5) A person becomes a member when a certificate in respect of that person is issued under subsection (4).

44(6) On receiving a certificate issued in respect of a member under subsection (4), the Executive Director shall enter the member's name in the roll in accordance with the rules.

Amendment History
2001, c. 23, s. 7(6)

Currency
Alberta Current to Gazette Vol. 114:2 (January 31, 2018)

End of Document

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Tab 7

Rule 67(7)

Law Society of Alberta

The Rules of the Law Society of Alberta

June 10, 2017

(b) the documents and payments that must accompany the application in accordance with the "Instructions to the Applicant" provided.

(9) A member who has been enrolled under section 42 of the Act shall apply to the Executive Director:

(a) before ceasing to be an employee of the corporation,

(b) within 30 calendar days after ceasing to be an employee of the corporation, or

(c) within such longer period as permitted by the Executive Director on application by the member

for the approval of the Committee for the continuation of that person's membership under section 42 of the Act.

Oct2002;June2003;Feb2004;Oct2004;Feb2008;Feb2017

Enrolment of Faculty Members, Society Employees & Counsel to a Court (Section 45 of the Act)

66.1 (1) An applicant for enrolment under section 45 (1) of the Act shall furnish to the Executive Director the following:

(a) an application in a form acceptable to the Executive Director, and

(b) the documents and payments that must accompany the application in accordance with the "Instructions to the Applicant" provided.

(2) An application for approval of the continuation of membership under section 45(3) of the Act

(a) shall be in writing,

(b) shall be accompanied by payment of any prescribed application fee and continuation fee, and

(c) shall provide such updating of the documents and information that accompanied the original application under section 45(1) of the Act, or its predecessor, as may be required by the Executive Director.

Sep2000;Feb2004;Feb2008;Feb2017

Additional Academic Requirements in Certain Cases

66.2 Additional requirements such as special examinations to be satisfied by an applicant under section 45(1) or 46(2) of the Act may be established by the Committee.

Feb2004;Feb2008

Enrolment Where Part 3 Proceedings have been Commenced

66.3 No student-at-law shall be enrolled as a member if proceedings have been commenced under Part 3 of the Act in respect of a matter regarding the student-at-law's conduct until such time as the matter has been reviewed by the Executive Director and the Executive Director is satisfied that the student-at-law should be enrolled as a member.

Feb2004;Feb2008

Enrolment Procedure

67 (1) The Executive Director shall consider each application for admission or enrolment and shall notify each applicant whether or not the application is approved, and if not, shall also notify the applicant of the reasons why it was not approved.

(2) In any case in which the application for admission or enrolment is not approved, the Executive Director shall also notify the applicant of the right of appeal to the Committee under section 43(2) of the Act and, subject to any appeal, the Executive Director shall refund the fees paid other than the prescribed application fee.

(3) A certificate issued by the Executive Director pursuant to section 44(1) of the Act shall be in a form acceptable to the Executive Director.

(4) A certificate issued by a clerk of the Court of Queen's Bench pursuant to section 44(4) of the Act shall be in a form acceptable to the Executive Director.

(5) On entering a member's name in the Roll pursuant to section 44(5) of the Act, the Executive Director shall furnish the member with a Certificate of Enrolment.

(6) An applicant for enrolment appearing before a judge for the purposes of section 44(2) of the Act shall be properly gowned and attired and shall be presented to the presiding judge by an active member of the Society.

(7) When an applicant for enrolment takes and subscribes in open court the oaths referred to in section 44(2)(a) and (b) of the Act, the applicant shall also take and subscribe the following oath:

> 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 favour 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 the public according to the law in force in Alberta.

Feb2004;Feb2008,May2009;Feb2017

Continuing Professional Development

67.1 (1) "Continuing professional development" is any learning activity that is:

(a) relevant to the professional needs of a lawyer;

(b) pertinent to long-term career interests as a lawyer;

(c) in the interests of the employer of a lawyer or

(d) related to the professional ethics and responsibilities of lawyers.

(2) Continuing professional development must contain significant substantive, technical, practical or intellectual content.

(3) It is each lawyer's responsibility to determine whether a learning activity meets these criteria and therefore qualifies as continuing professional development.

67.2 Every active member shall, in a form acceptable to the Executive Director:

(a) prepare and make a record of a plan for his or her continuing professional development during the twelve month period commencing October 1 of each year;

(b) make a declaration, no later than September 30 of each year, confirming compliance with (a) above;

(c) maintain a record of the plan for five years from the date of declaration; and

(d) produce a copy of the record of the plan to the Executive Director on request.

Nov2008;Sep2015;Feb2016;Sep2016

67.3 (1) Every active member who does not comply with Rule 67.2 before October 1 in a year shall stand automatically suspended as of that date.

(2) Rule 165.1 shall apply to any suspension under (1).

Sep2016

STATUS CHANGES

Election for Inactive Membership

68 (1) An election by an active member to become an inactive member

(a) shall be in Form 2-20, and

(b) subject to subrule (2) is effective when the Form, completed to the satisfaction of the Executive Director, is received in the Society's office in Calgary.

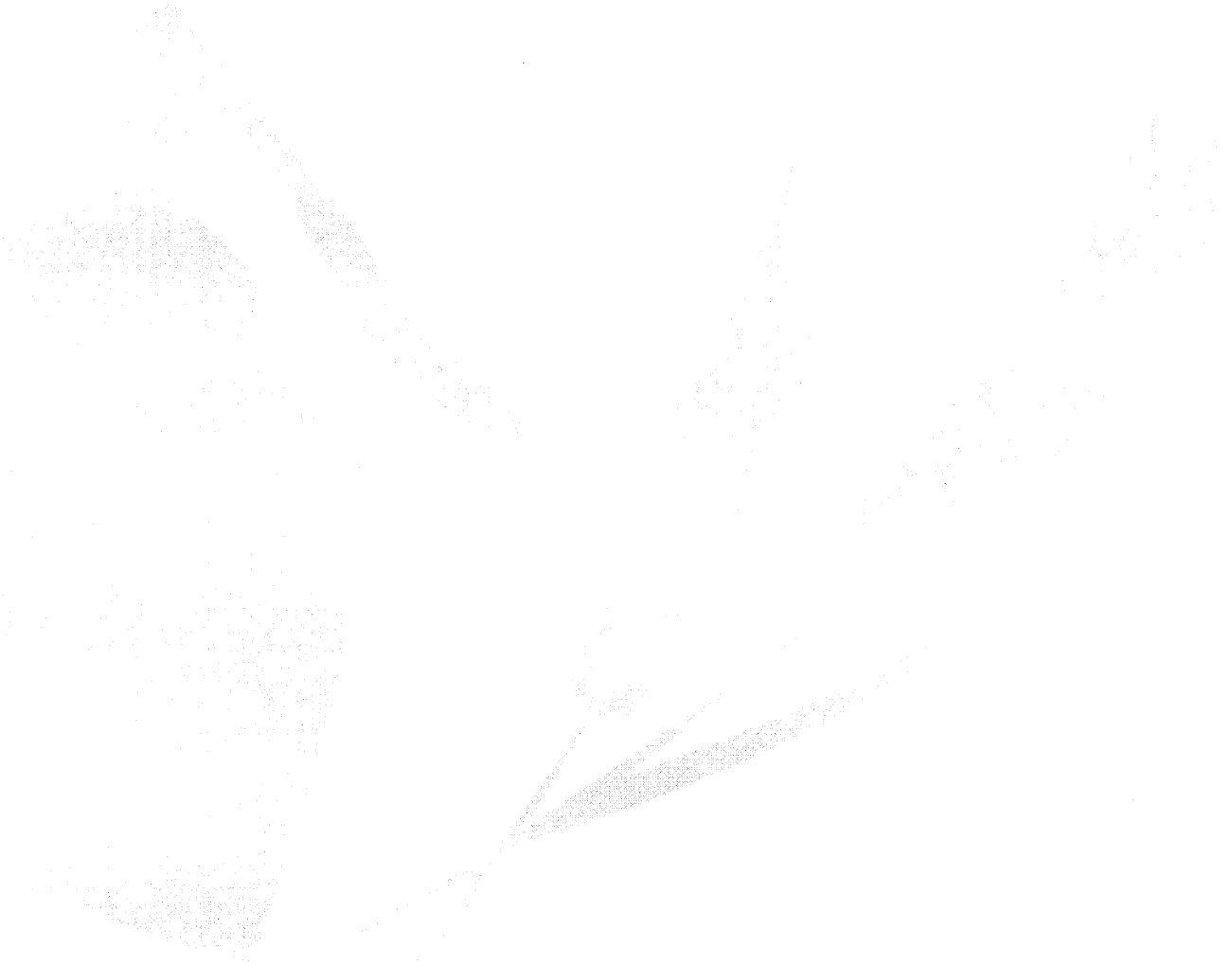
(2) The Executive Director may refuse to approve an election submitted under subrule (1) until the member furnishes proof, satisfactory to the Executive Director, as to the location of all of the files relating to the affairs of the clients for whom the member has provided legal services and proof that the current files are in the hands of an active member.

(3) (a) An inactive member, who has been an active member of the Society, or who has been a judge described in section 33 of the Act or a master in chambers, for a period or periods totalling at least 25 years, may elect not to pay the annual membership fees and assessments otherwise payable by inactive members.

(b) On making an election under clause (3)(a), the member shall become an inactive member (retired).

(c) An election under clause (3)(a) shall be filed with the Executive Director in writing signed by the applicant.

Tab 8



Law Society of Alberta

Code of Conduct

September 28, 2017

Chapter 5 – Relationship to the Administration of Justice

5.1 The Lawyer as Advocate

Advocacy

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

[1] In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

[2] This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.

[3] The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.

[4] In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client.

[5] A lawyer should refrain from expressing the lawyer's personal opinions on the facts in evidence of a client's case to a court or tribunal.

[6] A lawyer must not communicate with a tribunal respecting a matter unless the other parties to the matter, or their counsel, are present or have had reasonable prior notice, or unless the circumstances are exceptional and are disclosed fully and completely to the court.

[7] When a lawyer is required by law to notify one or more parties of a step taken or to be taken in a matter, the lawyer must notify all parties to the matter. Although certain steps appear to involve

only certain parties and not others, the interests of one or more of the other parties may be affected in a manner not immediately evident.

[8] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled. This situation creates an obligation on the lawyer present to prevent a manifestly unjust result by disclosing all material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

[9] The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent.

[10] In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

Duty as Defence Counsel

[11] When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.

[12] Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

5.1-2 When acting as an advocate, a lawyer must not:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by

malice on the part of the client and are brought solely for the purpose of injuring the other party;

(b) take any step in the representation of a client that is clearly without merit;

(c) unreasonably delay the process of the tribunal;

(d) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;

(e) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(f) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

(g) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

(h) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

(i) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;

(j) introduce or otherwise bring to the tribunal's attention facts or evidence that the lawyer knows to be inadmissible;

(k) make suggestions to a witness recklessly or knowing them to be false;

(l) permit or participate in a payment or other benefit to a witness in excess of reasonable compensation;

(m) counsel a witness to give evidence that is untruthful or misleading;

(n) deliberately refrain from informing a tribunal of any relevant adverse authority that the lawyer considers to be directly on point and that has not been mentioned by another party;

(o) improperly dissuade a witness from communicating with other parties or from giving evidence, or advise a witness to be absent;

(p) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;

(q) discuss the testimony of a witness with a person excluded by the tribunal during such testimony;

(r) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;

(s) needlessly abuse, hector or harass a witness;

(t) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal or quasi-criminal charge or complaint to a regulatory authority or by offering to seek or to procure the withdrawal of a criminal or quasi-criminal charge or complaint to a regulatory authority;

(u) needlessly inconvenience a witness; or

(v) appear before a court or tribunal while under the influence of alcohol or a drug or when it may be reasonably foreseen that the lawyer will be unable for any reason to provide competent services.

Commentary

[1] In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

[2] **Relevant adverse authority:** A decision is relevant where it refers to any point of law on which the case in question might turn. Relevance does not include cases that have merely some resemblance to the case before the court on the facts; it "means cases which decide a point of law" on which the current case depends. With respect to the lawyer's obligation to discover the relevant law, the duty does not extend to searching out unreported cases. The lawyer does have an obligation to bring to the court's attention cases of which the lawyer has knowledge and, as well, the lawyer cannot discharge this duty by not bothering to determine whether there is a relevant authority.

Lawyers are not obliged to bring forward facts that the other side has omitted to bring to the court's attention. They are not obliged to make the other side's case. They are, simply, obliged to make sure that the court has before it all relevant legal authority, whether helpful or not.

[3] A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, when the complainant or potential complainant is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. If the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

[4] It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit. See also Rules 3.2-11 to 3.2-12 and accompanying commentary.

[5] When examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

5.1-3 Except with the consent of all parties, a lawyer must not appear before a judge or a tribunal when the lawyer's past or present relationship with the judge or the tribunal would create a reasonable apprehension of bias.

Commentary

[1] The term "lawyer" is used in the sense of the individual lawyer. Most relationships contemplated by the Rule are sufficiently personal that others in the lawyer's firm should not be tainted by association. On the other hand, circumstances are conceivable in which it would be unwise for a partner or associate of the lawyer having the relationship to appear before the judge or tribunal in question.

[2] Impartiality is an essential element of judicial proceedings, from a substantive viewpoint and also in terms of society's perception of the justice system. Accordingly, lawyers have an ethical obligation to contribute to the fact and appearance of impartiality.

[3] The first aspect of the Rule is the relationship between a lawyer and an individual judge. The Rule clearly prohibits a lawyer from appearing before a judge who is a relative or with whom the lawyer has a business relationship. Other close or intimate relationships may also bar a lawyer from appearing, depending on the circumstances.

5.6 The Lawyer and the Administration of Justice

Encouraging Respect for the Administration of Justice

5.6-1 A lawyer must encourage public respect for and try to improve the administration of justice.

Commentary

[1] The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.

[2] Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and, because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.

[3] **Criticizing Tribunals** – Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system.

[4] A lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

5.6-2 A lawyer who seeks legislative or administrative changes must disclose the interest being advanced, whether the lawyer's interest, the client's interest or the public interest.

Commentary

[1] The lawyer may advocate legislative or administrative changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes that the lawyer conscientiously believes to be in the public interest.

Tab 9

Para 24

1999 ABQB 100
Alberta Court of Queen's Bench

Martin v. Busenius

1999 CarswellAlta 545, 1999 ABQB 100, [1999] A.J. No. 139, 239 A.R. 334

Patricia Evelyn Martin, Plaintiff (Applicant) and Gordon Brent Busenius, Defendant (Respondent)

Veit J.

Judgment: February 9, 1999
Heard: January 19, 1999
Heard: February 2, 1999
Docket: Edmonton 4803-111994

Counsel: *T. Cameron*, for Plaintiff/Applicant.
S. Mandziuk, for Defendant/Respondent.

Subject: Family
Headnote
Family law --- Costs — Custody and access

REASONS respecting costs, on father's motion for interim child access on terms agreed to by parties.

Veit J.:

Summary

1 Mr. Busenius asks for solicitor-client costs for a court appearance required on December 18, 1998 to have the court issue an order reflecting an agreement between the parties made December 11, 1998. He indicates that some acceleration of costs over the party and party scale would be appropriate as a sanction against the other side for having failed to execute a consent order as agreed.

2 Ms. Martin claims that she should not be required to pay any costs whatever for the December 18 appearance. Indeed, she counter-claims for costs in the amount of $1,000.00, being the fees for steps taken from December 17th, 1998, to date. She also asks the court to strike paragraph 6 of this court's order of December 18, 1998; that paragraph incorporated the agreement the parties had reached on December 11, 1998 regarding 1998 Christmas access.

3 *Mr. Busenius' claim for accelerated costs is allowed. However, rather than costs on the solicitor/client scale, the court orders Ms. Martin to pay Mr. Busenius $750 for the court appearance on December 18, 1998. Ms. Martin's cross application for costs of $1,000.00 is dismissed, as is her claim to strike out paragraph 6 of the December 18, 1998 order.*

4 After lawyers agree on the terms of an order, in the absence of exceptional circumstances there is a professional obligation to sign the order which reflects the agreement. Ms. Martin's lawyer should have signed the form of order faxed to her on December 11th, 1998. There were no exceptional circumstances here.

1. Background

5 Ms. Martin and Mr. Busenius are the parents of a 5 year old boy. The parents ceased cohabiting in February or March, 1998.

6 Mr. Busenius is a bus driver; during 1998 he chose to work the night shift so as to have more time to care for his son. Ms. Martin works in retail; she works some nights and some Saturdays. For a time, the parents were able to informally arrange to care for their child when they were not working.

7 Subsequently however, difficulties cropped up between the parents about access. Each accuses the other of attempting to exercise control over the other parent by unreasonably denying access.

8 On November 24, 1998, Ms. Martin issued a notice of motion, returnable on December 2, 1998 asking the court to set specified access to their son. In that motion, Ms. Martin states that the parties have been unable to agree on access and that the unpredictability is hard on their son.

9 Mr. Busenius filed an affidavit in response to Ms. Martin's claim. The motion was adjourned to December 11, 1998.

10 On December 9, 1998, through his lawyer, Mr. Busenius faxed a proposal to Ms. Martin to resolve the issues in dispute between them. On the same date, through her lawyer, Ms. Martin faxed a proposal to Mr. Busenius to settle the dispute.

11 On December 10, 1998, Mr. Busenius' lawyer faxed a letter to Ms. Martin's lawyer, noting that their proposals had crossed each other, and proposing some modifications to Ms. Martin's proposal.

12 Later on December 10, 1998, Mr. Busenius' lawyer again faxed a letter to Ms. Martin's lawyer reiterating his December 9, 1998 proposal but modifying it in a specified form, which was set out in detail.

13 On December 10, 1998, Ms. Martin's lawyer faxed a letter to Mr. Busenius's lawyer stating:

> Further to yours of December 10th, 1998, our client is prepared in the interim on a Without Prejudice Basis, to extend the access contained in ours of December 9th, 1998 to include overnight on Sundays to Monday morning, during his weekends.
>
> On this basis we have adjourned our Application sine die.

14 Later still on December 10, 1998, Mr. Busenius' lawyer faxed a letter to Ms. Martin's lawyer which contained the following terms.

> I was surprised to receive your letter of December 10, 1998 containing your letter to the Clerk's office. I was not even aware that we had an agreement and, accordingly, I cannot consent to the adjournment of your client's application *sine die*.
>
> . . . . .
>
> Accordingly, I will be attending in Court tomorrow morning at 10:00 a.m. to address your client's application, unless I receive from you written confirmation that all of the terms of my December 9 and 10 letters are acceptable. In the absence of such a confirming letter, I will attend court tomorrow morning.

15 Ms. Martin's lawyer replied by fax on December 11, 1998:

> We confirm the Application was settled on the terms contained in yours of December 9th and 10th, 1998.
>
> Please provide a Draft Interim Order.

16 I pause here to note that, at that point on December 11, 1998, there was an agreement between the parties. The paper reflection of that agreement was a mere formality.

17 Mr. Busenius immediately faxed over a covering letter on December 11, 1998, asking Ms. Martin to endorse her consent on the form of order and return it to him that day along with a form of interim order. The interim order prepared and sent to Ms. Martin contained exactly and only the terms set out in Mr. Busenius's letters of December 9 and 10, 1998. Those terms included not only specified access over the Christmas holidays, but also the following terms:

> 4. At all times, the parties are directed to look to each other as the caregiver of first choice when babysitting or similar services are needed.
>
> 5. All of the Child's holidays will be shared equally between the parties, as arranged between the parties.
>
> 6. Notwithstanding the preceding paragraph, Christmas holidays every year will be divided into two portions. The first portion will begin on December 18 at noon. .... In subsequent years, these two portions will alternate between the parties, with the effect that the Applicant will have the Child for the first portion during even numbered years and the Respondent will have the Child for the first portion during odd numbered years.
>
> 7. These access arrangements will be reviewed by no later than September 1, 1999, unless agreed to otherwise by the parties or unless there is a court Order to the contrary.

18 December 11, 1998 was a Friday. Not only was it relatively close to Christmas 1998, it was also close to the end of regular court sessions prior to the short Christmas vacation.

19 Mr. Busenius did not hear from Ms. Martin on December 11, 1998, nor during the weekend which followed December 11, 1998. Nothing happened on Monday, December 14. On December 15, Mr. Busenius's lawyer contacted Ms. Martin's lawyer; he was told that the order would be sent to him that day. The order did not arrive on that day.

20 On December 16, Mr. Busenius lawyer contacted Ms. Martin's lawyer and was told that a letter had been drafted and that the order had been mailed out that day, December 16.

21 During business hours on Thursday, December 17, 1998, Mr. Busenius's lawyer received the order which had, indeed, been mailed on December 16th. The covering letter signed by Ms. Martin's lawyer indicated that the December 16th letter had been sent via fax, but that appears to have been in error. Although it had been signed, paragraph 6 relating to Christmas access had been struck out.

22 Mr. Busenius then brought the matter before the court, with a request to shorten the time for notice to the other side, on December 18, 1998 to have the court issue the order which had been agreed between the parties on December 11, 1998. Ms. Martin appeared on her own behalf in response to that motion. The court issued the order, as requested by Mr. Busenius, and as agreed between the parents on December 11, 1998.

23 At the costs hearing, and by way of explanation for not having signed the order agreed between the parties and faxed over to her office on December 11, 1998, and for not having advised Mr. Busenius' lawyer immediately on December 11, 1998 that she did not intend to sign the order, Ms. Martin's lawyer states:

- on December 17, 1998, at approximately 4:30 p.m., Ms. Martin sent a fax to her lawyer in which she stated: "Gordon and I had a very good conversation *today* [i.e. December 17th.] Most positive since separation. We have agreed upon the next two weeks for shared and split access. ...";
- Ms. Martin's lawyer sent that fax to Mr. Busenius' lawyer at approximately 5:00 p.m. on Thursday, December 17, 1998;,

• On December 18, 1998, Ms. Martin's lawyer sent a fax to Mr. Busenius's lawyer at approximately 3:00 p.m. [i.e. long after the conclusion of morning chambers on the 18th] saying: "This is to advise that [Ms. Martin] will be abiding by the Christmas Access Agreement made between her and Gordon (faxed to you December 17, 1998);

• Ms. Martin made enquiries about the cost of having a lawyer agent attend on December 18, 1998 to oppose Mr. Busenius's application, her lawyer then being on Christmas vacation, and having been told that the cost would be a minimum of $750.00, decided to forgo a lawyer and to appear on her own.

2. Obligation to comply with agreements

24 Lawyers are agents for their clients. When lawyers speak, they speak on behalf of their clients. When they agree, they agree on behalf of their clients. The justice system would fall apart if these basic principles did not apply. These standards are not Draconian: a client can sue a lawyer who abuses the agency relationship between them.

25 In this case, Ms. Martin, through her lawyer, had agreed to the terms of the order that were faxed to her lawyer on December 11, 1998. She was obliged to sign the order reflecting that agreement.

26 It is clearly no answer to say that late on December 17, 1998, Ms. Martin no longer wanted to agree to the same dates as she had agreed to on December 11, 1998.

3. Are party and party costs sufficient?

27 The failure to sign an order that had been agreed on is an egregious failure to properly conduct legal proceedings. This conduct calls for payment of costs on a scale higher than party and party costs. Mr. Busenius contends that costs should be awarded here on a solicitor-client basis.

28 Having in mind the increase in costs recently effected by the adoption of a new Schedule, and having in mind the cost to the parties of a taxation, and having in mind the information that Ms. Martin would have had to pay $750 to have a lawyer attend on December 18, 1998, I have concluded that an adequate sanction for the misconduct in forcing Mr. Busenius to come to court to issue the order which had been agreed to is to order Ms. Martin pay Mr. Busenius $750 in costs for that appearance.

4. Modification of December 11, 1998 agreement

29 Despite Ms. Martin's claim that perhaps she should have signed the December 11, 1998 order and then asked Mr. Busenius to sign a consent modification to that order, it was not necessary, in fact, to modify the December 11, 1998 agreement by the issuance of a further order to reflect an adjustment made between the parties to the specified dates set out in paragraph 6 of the December 11, 1998 agreement. The agreement itself provided both that the parties could modify the agreement by consent, and that, in any event, the access issue would be re-assessed by September 1, 1999 at the latest. It is difficult to understand why any party would want a new order to confirm what the agreement already contained; money paid to lawyers is not available for the benefit of children.

30 It is no answer for Ms. Martin to say that she was only trying to accommodate her husband's requests.

31 Nor is it an answer to say that Ms. Martin did not understand that the agreement earlier reached with her husband. A lawyer does not have an obligation to do everything a client says; this is, of course, different from saying that a lawyer can make agreements that bind her client without obtaining instructions from her client. A lawyer has an obligation to ensure that a client understands the full import of the agreements that have been made.

5. Costs of this application

32 If the parties are not agreed on the costs of this application, including the costs of the short appearance on January 11, 1999 during which Ms. Martin asked for an adjournment to present evidence, and of the hearing on February 2, 1999, I may be spoken to within 30 days of the release of this memorandum.

Order accordingly.

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