Fast Track

COURT OF APPEAL OF ALBERTA

Form AP-5
[Rule 14.87]

Registrar's Stamp

REGISTRAR FILED JAN 31 2018 Court of Appeal of Alberta

COURT OF APPEAL FILE NO.:	1703-0239AC
TRIAL COURT FILE NO.:	1103 14112
REGISTRY OFFICE:	Edmonton
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, C T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND, INTER VIVOS SETTLEMENT, CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANT:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
RESPONDENTS (ORIGINAL APPLICANTS):	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE AND CLARA MIDBO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST (the "Sawridge Trustees")
STATUS ON APPEAL:	Respondents
RESPONDENTS:	PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL:	Not a Party to the Appeal
INTERVENOR:	SAWRIDGE FIRST NATION
STATUS ON APPEAL:	Respondent
INTERESTED PARTY	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers And Sisters
STATUS ON APPEAL:	Appellant
DOCUMENT:	**BOOK OF AUTHORITIES**

Appeal from the Decision of
The Honourable Mr. Justice D.R.G. Thomas
Dated the 31st day of August, 2017
Filed the 31st day of January, 2018

BOOK OF AUTHORITIES OF THE APPELLANT
PRISCILLA KENNEDY

FIELD LLP
2500, 10175 – 101 Street
Edmonton, AB T5J 0H3
Attention: P. Jonathan Faulds, QC
Phone: 780 423 7625
Fax: 780 429 9329
Email: jfaulds@fieldlaw.com
File: 65063-1
FOR THE APPELLANT – Priscilla Kennedy

DENTONS LLP
2900 Manulife Place
10180-101 Street NW
Edmonton, AB T5J 3V5
Attention: Doris Bonora & Erin Lafuente
Phone: 780 423 7188
Fax: 780 423 7276
Email: doris.bonora@dentons.com
FOR THE RESPONDENTS – Sawridge Trustees

PARLEE MCLAWS LLP
1700 Enbridge Centre
10175-101 Street NW
Edmonton, AB T5J 0H3
Attention: Edward Molstad, QC & Ellery Sopko
Phone: 780 423 8500
Fax: 780 423 2870
Email: emolstad@parlee.com
FOR THE RESPONDENT – Sawridge First Nation

Maurice Felix Stoney
500 4th Street NW
Slave Lake, AB T0G 2A1
Phone: 780 516 1143
Fax: 780 849 3128
INTERESTED PARTY

Prepared by Field LLP, 2500, 10175-101 Street, Edmonton, Alberta T5J 0H3
Phone: 780 423 3003 Fax: 780 428 9329

COURT OF APPEAL OF ALBERTA

Form AP-5
[Rule 14.87]

Registrar's Stamp

COURT OF APPEAL FILE NO.:	1703-0239AC
TRIAL COURT FILE NO.:	1103 14112
REGISTRY OFFICE:	Edmonton
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, C T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND, INTER VIVOS SETTLEMENT, CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANT:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
RESPONDENTS (ORIGINAL APPLICANTS):	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE AND CLARA MIDBO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST (the "Sawridge Trustees")
STATUS ON APPEAL:	Respondents
RESPONDENTS:	PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL:	Not a Party to the Appeal
INTERVENOR:	SAWRIDGE FIRST NATION
STATUS ON APPEAL:	Respondent
INTERESTED PARTY	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers And Sisters
STATUS ON APPEAL:	Appellant
DOCUMENT:	**BOOK OF AUTHORITIES**

Appeal from the Decision of
The Honourable Mr. Justice D.R.G. Thomas
Dated the 31st day of August, 2017
Filed the 31st day of January, 2018

BOOK OF AUTHORITIES OF THE APPELLANT
PRISCILLA KENNEDY

FIELD LLP
2500, 10175 – 101 Street
Edmonton, AB T5J 0H3
Attention: P. Jonathan Faulds, QC
Phone: 780 423 7625
Fax: 780 429 9329
Email: jfaulds@fieldlaw.com
File: 65063-1
FOR THE APPELLANT – Priscilla Kennedy

DENTONS LLP
2900 Manulife Place
10180-101 Street NW
Edmonton, AB T5J 3V5
Attention: Doris Bonora & Erin Lafuente
Phone: 780 423 7188
Fax: 780 423 7276
Email: doris.bonora@dentons.com
FOR THE RESPONDENTS – Sawridge Trustees

PARLEE MCLAWS LLP
1700 Enbridge Centre
10175-101 Street NW
Edmonton, AB T5J 0H3
Attention: Edward Molstad, QC
& Ellery Sopko
Phone: 780 423 8500
Fax: 780 423 2870
Email: emolstad@parlee.com
FOR THE RESPONDENT – Sawridge First Nation

Maurice Felix Stoney
500 4th Street NW
Slave Lake, AB T0G 2A1
Phone: 780 516 1143
Fax: 780 849 3128
INTERESTED PARTY

Prepared by Field LLP, 2500, 10175-101 Street, Edmonton, Alberta T5J 0H3
Phone: 780 423 3003 Fax: 780 428 9329

TABLE OF CONTENTS

Decisions in these Proceedings

1. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365, 2012 CarswellAlta 1042 (*Sawridge #1*)
2. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2013 ABCA 226, 2013 CarswellAlta 1015 (*Sawridge #2*)
3. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799, 2015 CarswellAlta 2373 (*Sawridge #3*)
4. *Stoney v Twinn*, 2016 ABCA 51, 2016 CarswellAlta 238 (application for extension of time to appeal *Sawridge #3*)
5. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299, 2017 CarswellAlta 745 (*Sawridge #4*)
6. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377, 2017 CarswellAlta 1193 (*Sawridge #5*)
7. *Twinn v Twinn,* 2017 ABCA 419, 2017 CarswellAlta 2650 (appeal of *Sawridge #5*)
8. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436, 2017 CarswellAlta 1236 (*Sawridge #6*)
9. *1985 Sawridge Trust v Alberta (Public Trustee),* 2017 ABCA 418, 2017 CarswellAlta 2594 (application by Kennedy for party appellant status in *Sawridge #6*)
10. *Stoney v Trustees for the 1985 Sawridge Trust*, 2017 ABCA 437, 2017 CarswellAlta 2740 (security for costs application against Stoney in appeal of *Sawridge #6*)
11. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530, 2017 CarswellAlta 1569 (*Sawridge #7*)
12. *1985 Sawridge Trust v Kennedy*, 2017 ABCA 368, 2017 CarswellAlta 2303 (application re leave to appeal *Sawridge #7*)
13. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548, 2017 CarswellAlta 1639 (*Sawridge #8*)
14. *Kennedy v Trustees for the 1985 Sawridge Trust*, 2017 ABCA 439, 2017 CarswellAlta 2698 (application to dismiss Kennedy's appeal of *Sawridge #8*)

Additional Authorities

15. *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26, [2017] 1 SCR 478
16. *Luft v Taylor, Zinkhofer & Conway*, 2017 ABCA 228, 2017 CarswellAlta 1183
17. *Morin v TransAlta Utilities Corporation*, 2017 ABQB 409, 2017 CarswellAlta 1125
18. *Stephen Aylward, Quebec v. Jodoin*: Costs Against Criminal Defence Lawyers, Dec 11, 2017
19. *Stoney v Sawridge First Nation*, 2013 FC 509, 2013 CarswellNat 1434
20. *Huzar v Canada*, 258 NR 246, 2000 CarswellNat 1132 (FCA)
21. *Huzar v Canada*, Reasons of Campbell J dated May 6, 1998, Federal Court Docket T-1529-95
22. *Huzar v Canada*, 1997 CarswellNat 2332 (FC), Reasons of Prothonotary Hargrave
23. *Lameman v Canada (Attorney General)*, 2007 ABCA 180, 2007 CarswellAlta 685
24. *Western Canadian Shopping Centres Inc. v Bennett Jones Verchere*, 1998 ABCA 392, 1998 CarswellAlta 1173
25. *Sawridge Band v Canada*, [1997] 3 FCR 580, 1997 CarswellNat 1086

Tab 1

2012 ABQB 365
Alberta Court of Queen's Bench

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)

2012 CarswellAlta 1042, 2012 ABQB 365, [2012] A.W.L.D. 3421, [2012] A.W.L.D. 3422, [2012] A.W.L.D. 3425, [2012] A.W.L.D. 3478, [2013] 3 C.N.L.R. 395, 217 A.C.W.S. (3d) 513, 543 A.R. 90, 75 Alta. L.R. (5th) 188

In the Matter of the Trustee Act, R.S.A. 2000, c. T-8, as amended

In the Matter of The Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle, and Clara Midbo, As Trustees for the 1985 Sawridge Trust Respondent and Public Trustee of Alberta Applicant

D.R.G. Thomas J.

Heard: April 5, 2012
Judgment: June 12, 2012
Docket: Edmonton 1103-14112

Counsel: Ms Janet L. Hutchison for Public Trustee / Applicants
Ms Doris Bonora, Mr. Marco S. Poretti for Sawridge Trustees / Respondents
Mr. Edward H. Molstad, Q.C. for Sawridge Band / Respondents

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

Related Abridgment Classifications

Aboriginal law
III Government of Aboriginal people
III.7 Membership
Aboriginal law
X Practice and procedure
X.3 Parties
X.3.g Miscellaneous
Civil practice and procedure
IV Actions involving parties under disability
IV.1 Minors (infants)
IV.1.b Guardian ad litem, next friend or litigation guardian
IV.1.b.ii Appointment
IV.1.b.ii.D Miscellaneous
Estates and trusts
III Trustees
III.2 Powers and duties of trustees
III.2.h Conflict of interest
III.2.h.v Miscellaneous

Headnote

Aboriginal law --- Practice and procedure — Parties — Miscellaneous

As Indian Act was being amended, Band set up trust to hold Band property on behalf of its then-members, to avoid sharing assets with persons previously excluded from membership by gender rules — Trustees eventually accepted that definition of beneficiaries in trust was potentially discriminatory and sought to redefine class of beneficiaries — Trustees applied for advice and directions, and as question arose as to effect on entitlements of certain dependent children to share in trust assets, Public Trustee was notified of proceedings — Public Trustee applied to be appointed litigation representative of interested minors, on condition that costs of representation would be paid by trust and that it would be shielded from any costs liability — Application granted — Litigation representative was appropriate and necessary because of substantial monetary interests involved — While trustees planned to use trust to provide for various social and health benefits to beneficiaries and their children, proposed amendment did not require distribution in that manner and could exclude minors from assets — Given overlap between identities of trustees, band council, and beneficiaries, there was clear potential for conflict of interest contrary to long-standing rule requiring fiduciaries to avoid conflicts of interest — Trustees and adult members of Band were in structural conflict of interest, that, along with fact that proposed beneficiary definition would remove some minors' entitlements, was sufficient basis for appointing representative — Public Trustee should be appointed as litigation representative not only of minors who were children of current band members but also of minor children of applicants seeking band membership.

Civil practice and procedure --- Actions involving parties under disability — Infants — Guardian ad litem, next friend or litigation guardian — Appointment — General principles

As Indian Act was being amended, Band set up trust to hold Band property on behalf of its then-members, to avoid sharing assets with persons previously excluded from membership by gender rules — Trustees eventually accepted that definition of beneficiaries in trust was potentially discriminatory and sought to redefine class of beneficiaries — Trustees applied for advice and directions, and as question arose as to effect on entitlements of certain dependent children to share in trust assets, Public Trustee was notified of proceedings — Public Trustee applied to be appointed litigation representative of interested minors, on condition that costs of representation would be paid by trust and that it would be shielded from any costs liability — Application granted — Litigation representative was appropriate and necessary because of substantial monetary interests involved — While trustees planned to use trust to provide for various social and health benefits to beneficiaries and their children, proposed amendment did not require distribution in that manner and could exclude minors from assets — Given overlap between identities of trustees, band council, and beneficiaries, there was clear potential for conflict of interest contrary to long-standing rule requiring fiduciaries to avoid conflicts of interest — Trustees and adult members of Band were in structural conflict of interest, that, along with fact that proposed beneficiary definition would remove some minors' entitlements, was sufficient basis for appointing representative — Public Trustee should be appointed as litigation representative not only of minors who were children of current band members but also of minor children of applicants seeking band membership — Operationally, role of Public Trustee was of neutral agent or officer of court, and it should receive full and advance indemnification from trust for its participation.

Estates and trusts --- Trustees — Powers and duties of trustees — Conflict of interest — Miscellaneous

As Indian Act was being amended, Band set up trust to hold Band property on behalf of its then-members, to avoid sharing assets with persons previously excluded from membership by gender rules — Trustees eventually accepted that definition of beneficiaries in trust was potentially discriminatory and sought to redefine class of beneficiaries — Trustees applied for advice and directions, and as question arose as to effect on entitlements of certain dependent children to share in trust assets, Public Trustee was notified of proceedings — Public Trustee applied to be appointed litigation representative of interested minors, on condition that costs of representation would be paid by trust and that it would be shielded from any costs liability — Application granted — Litigation representative was appropriate and necessary because of substantial monetary interests involved — While trustees planned to use trust to provide for various social and health benefits to beneficiaries and their children, proposed amendment did not require distribution in that manner and could exclude minors from assets — Given overlap between identities of trustees, band council, and beneficiaries, there was clear potential for conflict of interest contrary to long-standing rule requiring fiduciaries to avoid conflicts of interest — Trustees and adult members of Band were in structural conflict of interest, that, along with fact that proposed beneficiary definition would remove some minors' entitlements, was sufficient basis for appointing representative — Public Trustee should be appointed as litigation representative not only of minors who were children of current band members but also of minor children of applicants seeking band membership — Public Trustee was entitled to investigate

Band's membership rules and application processes to determine on behalf of potential minor claimants to trust whether beneficiary class could be ascertained.

Aboriginal law --- Government of Aboriginal people — Membership

As Indian Act was being amended, Band set up trust to hold Band property on behalf of its then-members, to avoid sharing assets with persons previously excluded from membership by gender rules — Trustees eventually accepted that definition of beneficiaries in trust was potentially discriminatory and sought to redefine class of beneficiaries — Trustees applied for advice and directions, and as question arose as to effect on entitlements of certain dependent children to share in trust assets, Public Trustee was notified of proceedings — Public Trustee applied to be appointed litigation representative of interested minors, on condition that costs of representation would be paid by trust and that it would be shielded from any costs liability — Application granted — Trustees and adult members of Band were in structural conflict of interest, that, along with fact that proposed beneficiary definition would remove some minors' entitlements, was sufficient basis for appointing representative — Public Trustee should be appointed as litigation representative not only of minors who were children of current band members but also of minor children of applicants seeking band membership — Operationally, role of Public Trustee was of neutral agent or officer of court, and it should receive full and advance indemnification from trust for its participation — Public Trustee was entitled to investigate Band's membership rules and application processes to determine on behalf of potential minor claimants to trust whether beneficiary class could be ascertained — Court had authority to examine band membership processes and determine whether they were discriminatory, unreasonable or delayed, but only Federal Court had authority to order judicial review remedy on that basis.

Table of Authorities

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

Addison & Leyen Ltd. v. Canada (2007), 284 D.L.R. (4th) 385, [2008] 2 C.T.C. 129, 65 Admin. L.R. (4th) 1, 2007 SCC 33, 2007 CarswellNat 1915, 2007 CarswellNat 1916, (sub nom. *Addison & Leyen Ltd. v. Canada Customs & Revenue Agency)* 365 N.R. 62, (sub nom. *Canada v. Addison & Leyen Ltd.)* [2007] 2 S.C.R. 793, (sub nom. *Canada v. Addison & Leyen Ltd.)* 2007 D.T.C. 5365 (Eng.), (sub nom. *Canada v. Addison & Leyen Ltd.)* 2007 D.T.C. 5368 (Fr.) (S.C.C.) — considered

B. (R.) v. Children's Aid Society of Metropolitan Toronto (1995), 9 R.F.L. (4th) 157, 21 O.R. (3d) 479 (note), 122 D.L.R. (4th) 1, [1995] 1 S.C.R. 315, 26 C.R.R. (2d) 202, (sub nom. *Sheena B., Re)* 176 N.R. 161, (sub nom. *Sheena B., Re)* 78 O.A.C. 1, 1995 CarswellOnt 105, 1995 CarswellOnt 515 (S.C.C.) — referred to

Barry v. Garden River Ojibway Nation No. 14 (1997), 1997 CarswellOnt 1812, (sub nom. *Barry v. Garden River Band of Ojibways)* [1997] 4 C.N.L.R. 28, (sub nom. *Barry v. Garden River Band of Ojibways)* 147 D.L.R. (4th) 615, (sub nom. *Barry v. Garden River Band of Ojibways)* 100 O.A.C. 201, (sub nom. *Barry v. Garden River Band of Ojibways)* 33 O.R. (3d) 782 (Ont. C.A.) — considered

Blueberry Interim Trust, Re (2012), 2012 CarswellBC 639, 2012 BCSC 254 (B.C. S.C.) — referred to

Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. (1972), 1972 CarswellMan 9, 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373 (Man. C.A.) — considered

Deans v. Thachuk (2005), 48 C.C.P.B. 65, 52 Alta. L.R. (4th) 41, 23 C.P.C. (6th) 100, 376 A.R. 326, 360 W.A.C. 326, 261 D.L.R. (4th) 300, 2005 ABCA 368, 2005 CarswellAlta 1518, 2005 C.E.B. & P.G.R. 8177, 20 E.T.R. (3d) 19, [2006] 4 W.W.R. 698 (Alta. C.A.) — referred to

Deans v. Thachuk (2006), 394 W.A.C. 400 (note), 404 A.R. 400 (note), 2006 CarswellAlta 447, 2006 CarswellAlta 448, 354 N.R. 200 (note) (S.C.C.) — referred to

Eve, Re (1986), 13 C.P.C. (2d) 6, (sub nom. *E. v. Eve)* [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1, 71 N.R. 1, 61 Nfld. & P.E.I.R. 273, 185 A.P.R. 273, 8 C.H.R.R. D/3773, 1986 CarswellPEI 37, 1986 CarswellPEI 22 (S.C.C.) — considered

Horse Lake First Nation v. Horseman (2003), [2003] 8 W.W.R. 457, [2003] 2 C.N.L.R. 180, 2003 CarswellAlta 220, 2003 ABQB 114, 17 Alta. L.R. (4th) 78, 337 A.R. 22 (Alta. Q.B.) — referred to

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency) (2007), 2007 SCC 2, 2007 CarswellBC 78, 2007 CarswellBC 79, 215 C.C.C. (3d) 449, 62 B.C.L.R. (4th) 40, 53 Admin. L.R. (4th) 153, 150 C.R.R. (2d) 189, 275 D.L.R. (4th) 1, (sub nom. *Little Sisters Book & Art Emporium v. Canada)* [2007] 1 S.C.R. 38, (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 235 B.C.A.C. 1, (sub nom. *Little*

Sisters Book & Art Emporium v. Minister of National Revenue) 388 W.A.C. 1, (sub nom. *Little Sisters Book and Art Emporium v. Minister of National Revenue)* 356 N.R. 83, 37 C.P.C. (6th) 1 (S.C.C.) — considered

R. v. B. (V.) (2004), 2004 ABQB 788, 7 C.P.C. (6th) 174, 2004 CarswellAlta 1656, (sub nom. *V.B. v. Alberta (Minister of Children's Services))* 365 A.R. 179 (Alta. Q.B.) — referred to

R. c. Caron (2011), 2011 CarswellAlta 81, 2011 CarswellAlta 82, 2011 SCC 5, 14 Admin. L.R. (5th) 30, 97 C.P.C. (6th) 205, [2011] 4 W.W.R. 1, (sub nom. *R. v. Caron)* 499 A.R. 309, (sub nom. *R. v. Caron)* 514 W.A.C. 309, [2011] 1 S.C.R. 78, (sub nom. *R. v. Caron)* 264 C.C.C. (3d) 320, (sub nom. *R. v. Caron)* 411 N.R. 89, 37 Alta. L.R. (5th) 19, (sub nom. *R. v. Caron)* 329 D.L.R. (4th) 50 (S.C.C.) — considered

Residential Warranty Co. of Canada Inc., Re (2006), 2006 ABQB 236, 2006 CarswellAlta 383, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 393 A.R. 340, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.) — referred to

Residential Warranty Co. of Canada Inc., Re (2006), 65 Alta. L.R. (4th) 32, 2006 ABCA 293, 2006 CarswellAlta 1354, 275 D.L.R. (4th) 498, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 417 A.R. 153, (sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 410 W.A.C. 153, 25 C.B.R. (5th) 38, [2006] 12 W.W.R. 213, (sub nom. *Kingsway General Insurance Co. v. Residential Warranty Co. of Canada Inc. (Trustee of))* [2006] I.L.R. I-4552 (Alta. C.A.) — referred to

S. (C.H.) v. Alberta (Director of Child Welfare) (2008), 66 C.P.C. (6th) 83, 452 A.R. 98, 2008 ABQB 620, 2008 CarswellAlta 1419 (Alta. Q.B.) — referred to

Sawridge Band v. Poitras (2012), (sub nom. *Twinn v. Poitras)* 428 N.R. 282, 2012 CAF 47, 2012 FCA 47, 2012 CarswellNat 351, 2012 CarswellNat 831 (F.C.A.) — referred to

Sawridge Band v. Poitras (2012), 2012 CarswellNat 2553, 2012 CarswellNat 2554 (S.C.C.) — referred to

Sawridge Band v. R. (2003), 2003 FCT 347, 2003 CarswellNat 1212, 2003 CFPI 347, 2003 CarswellNat 2857, [2003] 3 C.N.L.R. 344, (sub nom. *Sawridge Indian Band v. Canada)* 232 F.T.R. 54, (sub nom. *Sawridge Band v. Canada)* [2003] 4 F.C. 748 (Fed. T.D.) — referred to

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

Sawridge Band v. R. (2009), 2009 FCA 123, 2009 CarswellNat 944, 2009 CarswellNat 4764, 2009 CAF 123, (sub nom. *Sawridge Indian Band v. Canada)* 391 N.R. 375 (F.C.A.) — referred to

Sawridge Band v. R. (2009), 2009 CarswellNat 4215, 2009 CarswellNat 4216, (sub nom. *Sawridge Band v. Canada)* 403 N.R. 393 (note) (S.C.C.) — referred to

Sharbern Holding Inc. v. Vancouver Airport Centre Ltd. (2011), 5 R.P.R. (5th) 1, 331 D.L.R. (4th) 1, 416 N.R. 1, 18 B.C.L.R. (5th) 1, [2011] 2 S.C.R. 175, 306 B.C.A.C. 1, 316 W.A.C. 1, 2011 SCC 23, 2011 CarswellBC 1102, 2011 CarswellBC 1103, [2011] 7 W.W.R. 1, 81 B.L.R. (4th) 1, 82 C.C.L.T. (3d) 1 (S.C.C.) — referred to

W. (R.) v. Alberta (Director of Child Welfare) (2010), 44 Alta. L.R. (5th) 313, 2010 ABCA 412, 2010 CarswellAlta 2477 (Alta. C.A.) — referred to

783783 Alberta Ltd. v. Canada (Attorney General) (2010), 482 A.R. 136, 490 W.A.C. 136, 322 D.L.R. (4th) 56, [2010] 6 C.T.C. 194, 89 C.P.C. (6th) 21, 76 C.C.L.T. (3d) 32, 2010 CarswellAlta 1379, 2010 ABCA 226, 2010 D.T.C. 5125 (Eng.), 29 Alta. L.R. (5th) 37, [2010] 12 W.W.R. 472 (Alta. C.A.) — considered

Statutes considered:

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

Generally — referred to

Federal Courts Act, R.S.C. 1985, c. F-7

s. 18 — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

s. 52 — considered
Public Trustee Act, S.A. 2004, c. P-44.1
s. 10 — referred to

s. 12(4) — referred to

s. 21 — considered

s. 22 — considered

s. 41 — referred to

s. 41(b) — referred to
Tax Court of Canada Act, R.S.C. 1985, c. T-2
s. 12 — considered
Rules considered:
Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 2.11(a) — referred to

R. 2.15 — considered

R. 2.16 — referred to

APPLICATION by Public Trustee to be appointed litigation representative for interested minors, in trustees' application for advice and directions.

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

I. Introduction

1 On April 15, 1985 the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [the "Band" or "Sawridge Band"] set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band property on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, R.S.C. 1985, c. I-5 which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [the "*Charter*"].

2 The 1985 Sawridge Trust is administered by the Trustees named as Respondents in this application [the "Sawridge Trustees" or the "Trustees"] who now seek the advice and direction of this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust and confirmation of the transfer of assets into that Trust. One consequence of these proposed amendments to the 1985 Sawridge Trust would be that the entitlement of certain dependent children to share in Trust assets would be affected. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that certain children who are presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and entitled to shares in the Trust, while other dependent children would be excluded.

3 At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by variations to the 1985 Sawridge Trust were not represented by counsel. In my Order of August 31, 2011 [the "August 31 Order"] I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

4 On February 14, 2012 the Public Trustee applied to be appointed as the litigation representative of minors interested in the proceedings, for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others. The Public Trustee also applied, for the purposes of questioning on affidavits which might be filed in this proceeding, for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

5 On April 5, 2012 I heard submissions on the application by the Public Trustee which was opposed by the Sawridge Trustees and the Chief and Council of the Sawridge Band. The Trustees and the Band, through their Chief and Council, argue that the guardians of the potentially affected children will serve as adequate representatives of the interests of any minors.

6 Ultimately in this application I conclude that it is appropriate that the Public Trustee represent potentially affected minors, that all costs of such representation be borne by the Sawridge Trust and that the Public Trustee may make inquiries into the membership and application processes and practices of the Sawridge Band.

II. The History of the 1985 Sawridge Trust

7 An overview of the history of the 1985 Sawridge Trust provides a context for examining the potential role of the Public Trustee in these proceedings. The relevant facts are not in dispute and are found primarily in the evidence contained in the affidavits of Paul Bujold (August 30, 2011, September 12, 2011, September 30, 2011), and of Elizabeth Poitras (December 7, 2011).

8 In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. At the present time the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.

9 In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: *Sawridge Band v. R.*, 2009 FCA 123, 391 N.R. 375 (F.C.A.), leave denied [2009] S.C.C.A. No. 248 (S.C.C.). At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: *Sawridge Band v. R.*, 2003 FCT 347, [2003] 4 F.C. 748 (Fed. T.D.), affirmed 2004 FCA 16, [2004] 3 F.C.R. 274 (F.C.A.). Other litigation continues to the present in relation to disputed Band memberships: *Sawridge Band v. Poitras*, 2012 FCA 47, 428 N.R. 282 (F.C.A.), leave sought [2012] S.C.C.A. No. 152 (S.C.C.).

10 At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

11 At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

12 The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seeks to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

13 This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

III. Application by the Public Trustee

14 In its application the Public Trustee asks to be named as the litigation representative for minors whose interests are potentially affected by the application for advice and directions being made by the Sawridge Trustees. In summary, the Public Trustee asks the Court:

> 1. to determine which minors should be represented by it;
>
> 2. to order that the costs of legal representation by the Public Trustee be paid from the 1985 Sawridge Trust and that the Public Trustee be shielded from any liability for costs arising; and
>
> 3. to order that the Public Trustee be authorized to make inquiries through questioning into the Sawridge Band membership criteria and application processes.

The Public Trustee is firm in stating that it will only represent some or all of the potentially affected minors if the costs of its representation are paid from the 1985 Sawridge Trust and that it must be shielded from liability for any costs arising in this proceeding.

15 The Sawridge Trustees and the Band both argue that the Public Trustee is not a necessary or appropriate litigation representative for the minors, that the costs of the Public Trustee should not be paid by the Sawridge Trust and that the criteria and mechanisms by which the Sawridge Band identifies its members is not relevant and, in any event, the Court has no jurisdiction to make such determinations.

IV. Should the Public Trustee be Appointed as a Litigation Representative?

16 Persons under the age of 18 who reside in Alberta may only participate in a legal action via a litigation representative: *Alberta Rules of Court*, Alta Reg 124/2010, s. 2.11(a) [the "*Rules*", or individually a "*Rule*"]. The general authority for the Court to appoint a litigation representative is provided by *Rule*, 2.15. A litigation representative is also required where the membership of a trust class is unclear: *Rule*, 2.16. The common-law *parens patriae* role of the courts (*Eve, Re*, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1 (S.C.C.)) allows for the appointment of a litigation representative when such action is in the best interests of a child. The *parens patriae* authority serves to supplement authority provided by statute: *W. (R.) v. Alberta (Director of Child Welfare)*, 2010 ABCA 412 (Alta. C.A.) at para. 15, (2010), 44 Alta. L.R. (5th) 313 (Alta. C.A.). In summary, I have the authority in these circumstances to appoint a litigation representative for minors potentially affected by the proposed changes to the 1985 Sawridge Trust definition of "Beneficiaries".

17 The Public Trustee takes the position that it would be an appropriate litigation representative for the minors who may be potentially affected in an adverse way by the proposed redefinition of the term "Beneficiaries" in the 1985 Sawridge Trust documentation and also in respect to the transfer of the assets of that Trust. The alternative of the Minister of Aboriginal Affairs and Northern Development applying to act in that role, as potentially authorized by the *Indian Act*, R.S.C. 1985, c. I-5, s. 52, has not occurred, although counsel for the Minister takes a watching role.

18 In any event, the Public Trustee argues that it is an appropriate litigation representative given the scope of its authorizing legislation. The Public Trustee is capable of being appointed to supervise trust entitlements of minors by a trust instrument (*Public Trustee Act*, S.A. 2004, c. P-44.1, s. 21) or by a court (*Public Trustee Act*, s. 22). These provisions apply to all minors in Alberta.

A. Is a litigation representative necessary?

19 Both The Sawridge Trustees and Sawridge Band argue that there is no need for a litigation representative to be appointed in these proceedings. They acknowledge that under the proposed change to the definition of the term "Beneficiaries" no minors could be part of the 1985 Sawridge Trust. However, that would not mean that this class of minors would lose access to any resources of the Sawridge Trust; rather it is said that these benefits can and will be funnelled to those minors through those of their parents who are beneficiaries of the Sawridge Trust, or minors will become full members of the Sawridge Trust when they turn 18 years of age.

20 In the meantime the interests of the affected children would be defended by their parents. The Sawridge Trustees argue that the Courts have long presumptively recognized that parents will act in the best interest of their children, and that no one else is better positioned to care for and make decisions that affect a child: *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.), at 317-318, (1995), 122 D.L.R. (4th) 1 (S.C.C.). Ideally, a parent should act as a 'next friend' [now a 'litigation representative' under the new *Rules*]: *R. v. B. (V.)*, 2004 ABQB 788 at para. 19; (2004), 365 A.R. 179 (Alta. Q.B.); *S. (C.H.) v. Alberta (Director of Child Welfare)*, 2008 ABQB 620, 452 A.R. 98 (Alta. Q.B.).

21 The Sawridge Trustees take the position at para. 48 of its written brief that:

> [i]t is anachronistic to assume that the Public Trustee knows better than a First Nation parent what is best for the children of that parent.

The Sawridge Trustees observe that the parents have been notified of the plans of the Sawridge Trust, but none of them have commented, or asked for the Public Trustee to intervene on behalf of their children. They argue that the silence of the parents should be determinative.

22 The Sawridge Band argues further that no conflict of interest arises from the fact that certain Sawridge Trustees have served and continue to serve as members of the Sawridge Band Chief and Council. At para. 27 of its written brief, the Sawridge Band advances the following argument:

> ... there is no conflict of interest between the fiduciary duty of a Sawridge Trustee administering the 1985 Trust and the duty of impartiality for determining membership application for the Sawridge First Nation. The two roles are separate and have no interests that are incompatible. The Public Trustee has provided no explanation for why or how the two roles are in conflict. Indeed, the interests of the two roles are more likely complementary.

23 In response the Public Trustee notes the well established fiduciary obligation of a trustee in respect to trust property and beneficiaries: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 (S.C.C.) at para. 148, [2011] 2 S.C.R. 175 (S.C.C.). It observes that a trustee should avoid potential conflict scenarios or any circumstance that is "... ambiguous ... a situation where a conflict of interest and duty might occur ..." (citing D. W. M. Waters, M. Gillen and L. Smith, eds., *Waters' Law of Trusts in Canada*, 3rd. ed. (Toronto: Thomson Carswell, 2005), at p. 914 ["*Waters' Law of Trusts*"]. Here, the Sawridge Trustees are personally affected by the assignment of persons inside and outside of the Trust. However, they have not taken preemptive steps, for example, to appoint an independent person or entity to protect or oversee the interests of the 23 minors, each of whom the Sawridge Trustees acknowledge could lose their beneficial interest in approximately $1.1 million in assets of the Sawridge Trust.

24 In these circumstances I conclude that a litigation representative is appropriate and required because of the substantial monetary interests involved in this case. The Sawridge Trustees have indicated that their plan has two parts:

> firstly, to revise and clarify the definition of "Beneficiaries" under the 1985 Sawridge Trust; and
>
> secondly, then seek direction to distribute the assets of the 1985 Sawridge Trust with the new amended definition of beneficiary.

While I do not dispute that the Sawridge Trustees plan to use the Trust to provide for various social and health benefits to the beneficiaries of the Trust and their children, I observe that to date the proposed variation to the 1985 Sawridge Trust does not include a *requirement* that the Trust distribution occur in that manner. The Trustees could, instead, exercise their powers to liquidate the Sawridge Trust and distribute approximate $1.75 million shares to the 41 adult beneficiaries who are the present members of the Sawridge Band. That would, at a minimum, deny 23 of the minors their current share of approximately $1.1 million each.

25 It is obvious that very large sums of money are in play here. A decision on who falls inside or outside of the class of beneficiaries under the 1985 Sawridge Trust will significantly affect the potential share of those inside the Sawridge Trust. The key players in both the administration of the Sawridge Trust and of the Sawridge Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust.

26 I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances. I also reject as being unhelpful the argument of the Sawridge Trustees that it is "anachronistic" to give oversight through a public body over the wisdom of a "First Nations parent". In Alberta, persons under the age of 18 are minors and their racial and cultural backgrounds are irrelevant when it comes to the question of protection of their interests by this Court.

27 The essence of the argument of the Sawridge Trustees is that there is no need to be concerned that the current and potential beneficiaries who are minors would be denied their share of the 1985 Sawridge Trust; that their parents, the Trustees, and the Chief and Council will only act in the best interests of those children. One, of course, hopes that that would be the case, however, only a somewhat naive person would deny that, at times, parents do not always act in the best interests of their children and that elected persons sometimes misuse their authority for personal benefit. That is why the rules requiring fiduciaries to avoid conflicts of interest is so strict. It is a rule of very longstanding and applies to all persons in a position of trust.

28 I conclude that the appointment of the Public Trustee as a litigation representative of the minors involved in this case is appropriate. No alternative representatives have come forward as a result of the giving of notice, nor have any been nominated by the Respondents. The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

29 This is a 'structural' conflict which, along with the fact that the proposed beneficiary definition would remove the entitlement to some share in the assets of the Sawridge Trust for at least some of the children, is a sufficient basis to order that a litigation representative be appointed. As a consequence I have not considered the history of litigation that relates to Sawridge Band membership and the allegations that the membership application and admission process may be suspect. Those issues (if indeed they are issues) will be better reviewed and addressed in the substantive argument on the adoption of a new definition of "Beneficiaries" under the revised 1985 Sawridge Trust.

B. Which minors should the Public Trustee represent?

30 The second issue arising is who the Public Trustee ought to represent. Counsel for the Public Trustee notes that the Sawridge Trustees identify 31 children of current members of the Band. Some of these persons, according to the Sawridge Trustees, will lose their current entitlement to a share in the 1985 Sawridge Trust under the new definition of "Beneficiaries". Others may remain outside the beneficiary class.

31 There is no question that the 31 children who are potentially affected by this variation to the Sawridge Trust ought to be represented by the Public Trustee. There are also an unknown number of potentially affected minors, namely, the children of applicants seeking to be admitted into membership of the Sawridge Band. These candidate children, as I will call them, could, in theory, be represented by their parents. However, that potential representation by parents may encounter the same issue of conflict of interest which arises in respect to the 31 children of current Band members.

32 The Public Trustee can only identify these candidate children via inquiry into the outstanding membership applications of the Sawridge Band. The Sawridge Trustees and Band argue that this Court has no authority to investigate those applications and the application process. I will deal in more detail with that argument in Part VI of this decision.

33 The candidate children of applicants for membership in the Sawridge Band are clearly a group of persons who may be readily ascertained. I am concerned that their interest is also at risk. Therefore, I conclude that the Public Trustee should be appointed as the litigation representative not only of minors who are children of current Band members, but also the children of applicants for Band membership who are also minors.

V. The Costs of the Public Trustee

34 The Public Trustee is clear that it will only represent the minors involved here if:

> 1. advance costs determined on a solicitor and own client basis are paid to the Public Trustee by the Sawridge Trust; and
>
> 2. that the Public Trustee is exempted from liability for the costs of other litigation participants in this proceeding by an order of this Court.

35 The Public Trustee says that it has no budget for the costs of this type of proceedings, and that its enabling legislation specifically includes cost recovery provisions: *Public Trustee Act*, ss. 10, 12(4), 41. The Public Trustee is not often involved in litigation raising aboriginal issues. As a general principle, a trust should pay for legal costs to clarify the construction or administration of that trust: *Deans v. Thachuk*, 2005 ABCA 368 (Alta. C.A.) at paras. 42-43, (2005), 261 D.L.R. (4th) 300 (Alta. C.A.), leave denied (2006), [2005] S.C.C.A. No. 555 (S.C.C.).

36 Further, the Public Trustee observes that the Sawridge Trustees are, by virtue of their status as current beneficiaries of the Trust, in a conflict of interest. Their fiduciary obligations require independent representation of the potentially affected minors. Any litigation representative appointed for those children would most probably require payment of legal costs. It is not fair, nor is it equitable, at this point for the Sawridge Trustees to shift the obligation of their failure to nominate an independent representative for the minors to the taxpayers of Alberta.

37 Aline Huzar, June Kolosky, and Maurice Stoney agree with the Public Trustee and observe that trusts have provided the funds for litigation representation in aboriginal disputes: *Horse Lake First Nation v. Horseman*, 2003 ABQB 114, 337 A.R. 22 (Alta. Q.B.); *Blueberry Interim Trust, Re*, 2012 BCSC 254 (B.C. S.C.).

38 The Sawridge Trustees argue that the Public Trustee should only receive advance costs on a full indemnity basis if it meets the strict criteria set out in *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.) ["*Little Sisters*"] and *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.). They say that in this instance the Public Trustee can afford to pay, the issues are not of public or general importance and the litigation will proceed without the participation of the Public Trustee.

39 Advance costs on a solicitor and own client basis are appropriate in this instance, as well as immunization against costs of other parties. The *Little Sisters Book & Art Emporium* criteria are intended for advance costs by a litigant with an independent interest in a proceeding. Operationally, the role of the Public Trustee in this litigation is as a neutral 'agent' or 'officer' of the court. The Public Trustee will hold that position only by appointment by this Court. In these circumstances, the Public Trustee operates in a manner similar to a court appointed receiver, as described by Dickson J.A. (as he then was) in *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.* (1972), 29 D.L.R. (3d) 373, 17 C.B.R. (N.S.) 305 (Man. C.A.):

> In the performance of his duties the receiver is subject to the order and direction of the Court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the Court and not from the pocket of those who sought his appointment.

In this case, the property of the Sawridge Trust is the equivalent of the "assets under control of the Court" in an insolvency. Trustees in bankruptcy operate in a similar way and are generally indemnified for their reasonable costs: *Residential Warranty Co. of Canada Inc., Re*, 2006 ABQB 236, 393 A.R. 340 (Alta. Q.B.), affirmed 2006 ABCA 293, 275 D.L.R. (4th) 498 (Alta. C.A.)).

40 I have concluded that a litigation representative is appropriate in this instance. The Sawridge Trustees argue this litigation will proceed, irrespective of whether or not the potentially affected children are represented. That is not a basis to avoid the need and cost to represent these minors; the Sawridge Trustees cannot reasonably deny the requirement for independent representation of the affected minors. On that point, I note that the Sawridge Trustees did not propose an alternative entity or person to serve as an independent representative in the event this Court concluded the potentially affected minors required representation.

41 The Sawridge Band cites recent caselaw where costs were denied parties in estate matters. These authorities are not relevant to the present scenario. Those disputes involved alleged entitlement of a person to a disputed estate; the litigant had an interest in the result. That is different from a court-appointed independent representative. A homologous example to the Public Trustee's representation of the Sawridge Trust potential minor beneficiaries would be a dispute on costs where the Public Trustee had represented a minor in a dispute over a last will and testament. In such a case this Court has authority to direct that the costs of the Public Trustee become a charge to the estate: *Public Trustee Act*, s. 41(b).

42 The Public Trustee is a neutral and independent party which has agreed to represent the interests of minors who would otherwise remain unrepresented in proceedings that may affect their substantial monetary trust entitlements. The Public Trustee's role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation. In these circumstances, I conclude that the Public Trustee should receive full and advance indemnification for its participation in the proceedings to make revisions to the 1985 Sawridge Trust.

VI. Inquiries into the Sawridge Band Membership Scheme and Application Processes

43 The Public Trustee seeks authorization to make inquiries, through questioning under the *Rules*, into how the Sawridge Band determines membership and the status and number of applications before the Band Council for membership. The Public Trustee observes that the application process and membership criteria as reported in the affidavit of Elizabeth Poitras appears to be highly discretionary, with the decision-making falling to the Sawridge Band Chief and Council. At paras. 25 - 29 of its written brief, The Public Trustee notes that several reported cases suggest that the membership application and review processes may be less than timely and may possibly involve irregularities.

44 The Band and Trustees argue that the Band membership rules and procedure should not be the subject of inquiry, because:

A. those subjects are irrelevant to the application to revise certain aspects of the 1985 Sawridge Trust documentation; and

B. this Court has no authority to review or challenge the membership definition and processes of the Band; as a federal tribunal decisions of a band council are subject to the exclusive jurisdiction of the Federal Court of Canada: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.

A. In this proceeding are the Band membership rules and application processes relevant?

45 The Band Chief and Council argue that the rules of the Sawridge Band for membership and application for membership and the existence and status of any outstanding applications for such membership are irrelevant to this proceeding. They stress at para. 16 of their written brief that the "Advice and Direction Application" will not ask the Court to identify beneficiaries of the 1985 Sawridge Trust, and state further at para. 17 that "... the Sawridge First Nation is fully capable of determining its membership and identifying members of the Sawridge First Nation." They argue that any question of trust entitlement will be addressed by the Sawridge Trustees, in due course.

46 The Sawridge Trustees also argue that the question of yet to be resolved Band membership issues is irrelevant, simply because the Public Trustee has not shown that Band membership is a relevant consideration. At para. 108 of its written brief the Sawridge Trustees observe that the fact the Band membership was in flux several years ago, or that litigation had occurred on that topic, does not mean that Band membership remains unclear. However, I think that argument is premature. The Public Trustee seeks to investigate these issues not because it has *proven* Band membership is a point of uncertainty and dispute, but rather to reassure itself (and the Court) that the beneficiary class can and has been adequately defined.

47 The Public Trustee explains its interest in these questions on several bases. The first is simply a matter of logic. The terms of the 1985 Sawridge Trust link membership in the Band to an interest in the Trust property. The Public Trustee notes that one of the three 'certainties' of a valid trust is that the beneficiaries can be "ascertained", and that if identification of Band membership is difficult or impossible, then that uncertainty feeds through and could disrupt the "certainty of object": *Waters' Law of Trusts* at p. 156-157.

48 The Public Trustee notes that the historical litigation and the controversy around membership in the Sawridge Band suggests that the 'upstream' criteria for membership in the Sawridge Trust may be a subject of some dispute and disagreement. In any case, it occurs to me that it would be peculiar if, in varying the definition of "Beneficiaries" in the trust documents, that the Court did not make some sort inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway.

49 I agree with the Public Trustee. I note that the Sawridge Band Chief and Council argue that the Band membership issue is irrelevant and immaterial because Band membership will be clarified at the appropriate time, and the proper persons will then become beneficiaries of the 1985 Sawridge Trust. It contrasts the actions of the Sawridge Band and Trustees with the scenario reported in *Barry v. Garden River Ojibway Nation No. 14* (1997), 33 O.R. (3d) 782, 147 D.L.R. (4th) 615 (Ont. C.A.), where premature distribution of a trust had the effect of denying shares to potential beneficiaries whose claims, via band membership, had not yet crystalized. While the Band and Trustees stress their good intentions, this Court has an obligation to make inquiries as to the procedures and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be "ascertained". In coming to that conclusion, I also note that the Sawridge Trustees acknowledge that the proposed revised definition of "Beneficiaries" may exclude a significant number of the persons who are currently within that group.

B. Exclusive jurisdiction of the Federal Court of Canada

50 The Public Trustee emphasizes that its application is not to challenge the procedure, guidelines, or otherwise "interfere in the affairs of the First Nations membership application process". Rather, the Public Trustee says that the

information which it seeks is relevant to evaluate and identify the beneficiaries of the 1985 Sawridge Trust. As such, it seeks information in respect to Band membership processes, but not to affect those processes. They say that this Court will not intrude into the jurisdiction of the Federal Court because that is not 'relief' against the Sawridge Band Chief and Council. Disclosure of information by a federal board, commission, or tribunal is not a kind of relief that falls into the exclusive jurisdiction of the Federal Courts, per *Federal Court Act*, s. 18.

51 As well, I note that the "exclusive jurisdiction" of statutory courts is not as strict as alleged by the Trustees and the Band Chief and Council. In *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226, 322 D.L.R. (4th) 56 (Alta. C.A.), the Alberta Court of Appeal commented on the jurisdiction of the Tax Court of Canada, which per *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12 has "exclusive original jurisdiction" to hear appeals of or references to interpret the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp). The Supreme Court of Canada in *Addison & Leyen Ltd. v. Canada*, 2007 SCC 33, 365 N.R. 62 (S.C.C.) indicated that interpretation of the *Income Tax Act* was the sole jurisdiction of the Tax Court of Canada (para. 7), and that (para. 11):

> ... The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. ...

52 The legal issue in *783783 Alberta Ltd. v. Canada (Attorney General)* was an unusual tort claim against the Government of Canada for what might be described as "negligent taxation" of a group of advertisers, with the alleged effect that one of two competing newspapers was disadvantaged. Whether the advertisers had or had not paid the correct income tax was a necessary fact to be proven at trial to establish that injury: paras. 24-25. The Alberta Court of Appeal concluded that the jurisdiction of a provincial superior court includes whatever statutory interpretation or application of fact to law that is necessary for a given issue, in that case a tort: para. 28. In that sense, the trial court was free to interpret and apply the *Income Tax Act*, provided in doing so it did not determine the income tax liability of a taxpayer: paras. 26-27.

53 I conclude that it is entirely within the jurisdiction of this Court to examine the Band's membership definition and application processes, provided that:

> 1. investigation and commentary is appropriate to evaluate the proposed amendments to the 1985 Sawridge Trust, and
>
> 2. the result of that investigation does not duplicate the exclusive jurisdiction of the Federal Court to order "relief" against the Sawridge Band Chief and Council.

54 Put another way, this Court has the authority to examine the band membership processes and evaluate, for example, whether or not those processes are discriminatory, biased, unreasonable, delayed without reason, and otherwise breach *Charter* principles and the requirements of natural justice. However, I do not have authority to order a judicial review remedy on that basis because that jurisdiction is assigned to the Federal Court of Canada.

55 In the result, I direct that the Public Trustee may pursue, through questioning, information relating to the Sawridge Band membership criteria and processes because such information may be relevant and material to determining issues arising on the advice and directions application.

VII. Conclusion

56 The application of the Public Trustee is granted with all costs of this application to be calculated on a solicitor and its own client basis.

Application granted.

End of Document

Tab 2

2013 ABCA 226
Alberta Court of Appeal

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)

2013 CarswellAlta 1015, 2013 ABCA 226, [2013] 3 C.N.L.R. 411, [2013] A.W.L.D. 2729, [2013] A.W.L.D. 2730, [2013] A.W.L.D. 2733, [2013] A.W.L.D. 2768, [2013] A.W.L.D. 2801, [2013] A.W.L.D. 2810, 230 A.C.W.S. (3d) 54, 553 A.R. 324, 583 W.A.C. 324, 85 Alta. L.R. (5th) 165

In the Matter of the Trustee Act, R.S.A. 2000, c. T-8, as Amended

In the Matter of the Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation, on April 15, 1985 (the "1985" Sawridge Trust)

Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust Appellants (Respondents) and Public Trustee of Alberta Respondent (Applicant) and Sawridge First Nation, Minister of Indian Affairs and Northern Development, Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney Interested Parties

Peter Costigan, Clifton O'Brien, J.D. Bruce McDonald JJ.A.

Heard: June 5, 2013
Judgment: June 19, 2013
Docket: Edmonton Appeal 1203-0230-AC

Proceedings: affirming *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)* (2012), 2012 CarswellAlta 1042, 2012 ABQB 365, 75 Alta. L.R. (5th) 188 (Alta. Q.B.)

Counsel: F.S. Kozak, Q.C., M.S. Poretti for Appellants
J.L. Hutchison for Respondent

Subject: Public; Civil Practice and Procedure; Estates and Trusts
Related Abridgment Classifications
Aboriginal law
X Practice and procedure
X.7 Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.f Costs on solicitor and own client basis
Headnote
Aboriginal law --- Practice and procedure — Miscellaneous
Costs — Band set up trust to hold Band property on behalf of its members — Definition of beneficiaries in trust was potentially discriminatory and trustees sought to redefine class of beneficiaries — Trustees applied for advice and directions — Public Trustee brought successful application to be appointed litigation representative of interested minors, on condition that costs would be paid by trust and that it would be shielded from any costs liability — Trustees appealed order insofar as it related to costs and exemption therefrom — Appeal dismissed — Chambers judge did not err in awarding advance costs because he found that children's interest required protection and that it was necessary to secure costs to secure requisite independent representation of Public Trustee — Trustees' complaint that chambers judge erred

by awarding advance costs without any restrictions or guidelines was premature — Exemption for costs, while unusual, was not unknown — Chambers judge did not err in awarding costs of application to Public Trustee.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and own client basis

Band set up trust to hold Band property on behalf of its members — Definition of beneficiaries in trust was potentially discriminatory and trustees sought to redefine class of beneficiaries — Trustees applied for advice and directions — Public Trustee brought successful application to be appointed litigation representative of interested minors, on condition that costs would be paid by trust and that it would be shielded from any costs liability — Trustees appealed order insofar as it related to costs and exemption therefrom — Appeal dismissed — Chambers judge did not err in awarding advance costs because he found that children's interest required protection and that it was necessary to secure costs to secure requisite independent representation of Public Trustee — Trustees' complaint that chambers judge erred by awarding advance costs without any restrictions or guidelines was premature — Exemption for costs, while unusual, was not unknown — Chambers judge did not err in awarding costs of application to Public Trustee.

Table of Authorities

Cases considered:

Alberta (Director, Child, Youth and Family Enhancement Act) v. L. (D.) (2012), 2012 ABCA 275, 2012 CarswellAlta 1574, [2013] 4 W.W.R. 126, 536 A.R. 207, 559 W.A.C. 207, 77 Alta. L.R. (5th) 56, 354 D.L.R. (4th) 485 (Alta. C.A.) — considered

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003), 43 C.P.C. (5th) 1, 114 C.R.R. (2d) 108, [2004] 2 W.W.R. 252, 313 N.R. 84, [2003] 3 S.C.R. 371, 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161, 21 B.C.L.R. (4th) 209 (S.C.C.) — distinguished

Buckton, Re (1907), [1907] 2 Ch. 406 (Eng. Ch. Div.) — considered

C. (L.) v. Alberta (Metis Settlements Child & Family Services, Region 10) (2011), 2011 CarswellAlta 97, 2011 ABQB 42, (sub nom. *C. (L.) v. Alberta)* 509 A.R. 72 (Alta. Q.B.) — referred to

Deans v. Thachuk (2005), 48 C.C.P.B. 65, 52 Alta. L.R. (4th) 41, 23 C.P.C. (6th) 100, 376 A.R. 326, 360 W.A.C. 326, 261 D.L.R. (4th) 300, 2005 ABCA 368, 2005 CarswellAlta 1518, 2005 C.E.B. & P.G.R. 8177, 20 E.T.R. (3d) 19, [2006] 4 W.W.R. 698 (Alta. C.A.) — considered

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency) (2007), 2007 SCC 2, 2007 CarswellBC 78, 2007 CarswellBC 79, 215 C.C.C. (3d) 449, 62 B.C.L.R. (4th) 40, 53 Admin. L.R. (4th) 153, 150 C.R.R. (2d) 189, 275 D.L.R. (4th) 1, (sub nom. *Little Sisters Book & Art Emporium v. Canada)* [2007] 1 S.C.R. 38, (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 235 B.C.A.C. 1, (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 388 W.A.C. 1, (sub nom. *Little Sisters Book and Art Emporium v. Minister of National Revenue)* 356 N.R. 83, 37 C.P.C. (6th) 1 (S.C.C.) — distinguished

R. c. Caron (2011), 2011 CarswellAlta 81, 2011 CarswellAlta 82, 2011 SCC 5, 14 Admin. L.R. (5th) 30, 97 C.P.C. (6th) 205, [2011] 4 W.W.R. 1, (sub nom. *R. v. Caron)* 499 A.R. 309, (sub nom. *R. v. Caron)* 514 W.A.C. 309, [2011] 1 S.C.R. 78, (sub nom. *R. v. Caron)* 264 C.C.C. (3d) 320, (sub nom. *R. v. Caron)* 411 N.R. 89, 37 Alta. L.R. (5th) 19, (sub nom. *R. v. Caron)* 329 D.L.R. (4th) 50 (S.C.C.) — considered

Thomlinson v. Alberta (2003), 2003 ABQB 308, 335 A.R. 85, 2003 CarswellAlta 1926 (Alta. Q.B.) — referred to

Statutes considered:

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

Public Trustee Act, S.A. 2004, c. P-44.1

s. 41 — considered

Trustee Act, R.S.A. 2000, c. T-8

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

R. 2.21 — considered

APPEAL by trustees from judgment reported at *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)* (2012), 2012 CarswellAlta 1042, 2012 ABQB 365, 75 Alta. L.R. (5th) 188 (Alta. Q.B.), awarding advance costs to Public Trustee and exempting Public Trustee from liability for any other costs of litigation.

***Per curiam*:**

I. Introduction

1 The appellants are Trustees of the Sawridge Trust (Trust). They wish to change the designation of "beneficiaries" under the Trust and have sought advice and direction from the court. A chambers judge, dealing with preliminary matters, noted that children who might be affected by the change were not represented by counsel, and he ordered that the Public Trustee be notified. Subsequently, the Public Trustee applied to be named as litigation representative for the potentially interested children, and that appointment was opposed by the Trustees.

2 The judge granted the application. He also awarded advance costs to the Public Trustee on a solicitor and his own client basis, to be paid for by the Trust, and he exempted the Public Trustee from liability for any other costs of the litigation. The Trustees appeal the order, but only insofar as it relates to costs and the exemption therefrom. Leave to appeal was granted on consent.

II. Background

3 The detailed facts are set out in the Reasons for Judgment of the chambers judge: *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.). A short summary is provided for purposes of this decision.

4 On April 15, 1985 the Sawridge First Nation, then known as the Sawridge Indian Band No. 19 (Sawridge) set up the 1985 Sawridge Trust (Trust) to hold certain properties in trust for Sawridge members. The current value of those assets is approximately $70,000,000.

5 The Trust was created in anticipation of changes to the *Indian Act*, RSC 1985, c I-5, which would have opened up membership in Sawridge to native women who had previously lost their membership through marriage. The beneficiaries of the Trust were defined as "all persons who qualified as a member of the Sawridge First Nation pursuant to the provisions of the *Indian Act* as they existed on April 15, 1982."

6 The Trustees are now looking to distribute the assets of the Trust and recognize that the existing definition of "beneficiaries" is potentially discriminatory. They would like to redefine "beneficiaries" to mean the present members of Sawridge, and acknowledge that no children would be part of the Trust. The Trustees suggest that the benefit is that the children would be funnelled through parents who are beneficiaries, or children when then become members when they attain the age of 18 years.

7 Sawridge is currently composed of 41 adult members and 31 minors. Of the 31 minors, 23 currently qualify as beneficiaries under the Trust, and 8 do not. It is conceded that if the definition of beneficiaries is changed, as currently proposed, some children, formerly entitled to a share in the benefits of the trust, will be excluded, while other children who were formerly excluded will be included.

8 When Sawridge's application for advice and direction first came before the court, it was observed that there was no one representing the minors who might possibly be affected by the change in the definition of "beneficiaries." The judge ordered that the Public Trustee be notified of the proceedings and be invited to comment on whether it should act on behalf of the potentially affected minors.

9 The Public Trustee was duly notified and it brought an application asking that it be named as the litigation representative of the affected minors. It also asked the court to identify the minors it would represent, to award it advance costs to be paid for by the Trust, and to allow it to make inquiries through questioning about Sawridge's membership

criteria and application processes. The Public Trustee made it clear to the court that it would only act for the affected minors if it received advanced costs from the Trust on a solicitor and his own client basis, and if it was exempted from liability for costs to the other participants in the litigation.

III. The Chambers Judgment

10 The chambers judge first considered whether it was necessary to appoint the Public Trustee to act for the potentially affected minors. The Trustees submitted that this was unnecessary because their intention was to use the trust to provide for certain social and health benefits for the beneficiaries of the trust and their children, with the result that the interests of the affected children would ultimately be defended by their parents. The Trustees also submitted that they were not in a conflict of interest, despite the fact that a number of them are also beneficiaries under the Trust.

11 The chambers judge concluded that it was appropriate to appoint the Public Trustee to act as litigation representative for the affected minors. He was concerned about the large amount of money at play, and the fact that the Trustees were not required to distribute the Trust assets in the manner currently proposed. He noted, that while desirable, parents do not always act in the best interests of their children. Furthermore, he found the Trustees and the adult members of the Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

12 The chambers judge determined that the group of minors potentially affected included the 31 current minors who were currently band members, as well as an unknown number of children of applicants for band membership. He also observed that there had been substantial litigation over many years relative to disputed Band membership, which litigation appears to be ongoing (para 9).

13 The judge rejected the submission of the Trustees that advance costs were only available if the strict criteria set out in *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.), were met. He stated that the criteria set out in *Little Sisters* applied where a litigant has an independent interest in the proceeding. He viewed the role of the Public Trustee as being "neutral" and capable of providing independent advice regarding the interests of the affected minors which may not otherwise be forthcoming because of the Trustees' potential conflicts.

14 In result, the chambers judge appointed the Public Trustee as litigation representative of the minors, on the conditions that it would receive advance costs and be exempted from any liability for costs of other parties. He finished by ordering costs of the application to the Public Trustee on a solicitor and its own client basis.

IV. Grounds of Appeal

15 The appellants advance four grounds of appeal:

> (a) The Chambers Judge erred in awarding the Respondent advance costs on a solicitor and his own client basis by concluding that the strict criteria set by the Supreme Court of Canada for the awarding of advance costs does not apply in these proceedings.
>
> (b) In the alternative, the Chambers Judge erred in awarding advance costs without any restrictions or guidelines with respect to the amount of costs or the reasonableness of the same.
>
> (c) The Chambers Judge erred in exempting the Respondent of any responsibility to pay costs of the other parties in the proceeding.
>
> (d) The Chambers Judge erred in granting the Respondent costs of the application on a solicitor and his own client basis.

V. Standard of Review

16 A chambers judge ordering advance costs will be entitled to considerable deference unless he "has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts": *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.) at paras 42-43.

VI. Analysis

A. Did the chambers judge err by failing to apply the Little Sisters criteria?

17 The Trustees argue that advanced interim costs can only be awarded if "the three criteria of impecuniosity, a meritorious case and special circumstances" are strictly established on the evidence before the court: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.), at para 36; as subsequently applied in the "public interest cases" of *Little Sisters* at para 37 and in *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.) at paras 36-39. They go on to submit that none of these requirements were met in the present case. We are not persuaded that the criteria set out in *Okanagan* and *Little Sisters* were intended to govern rigidly all awards of advance funding and, in particular, do not regard them as applicable to exclude such funding in the circumstances of this case. As will be discussed, a strict application is neither possible, nor serves the purpose of protecting the interests of the children potentially affected by the proposed changes to the Trust.

18 We start by noting that the rules described in *Okanagan* and *Little Sisters* apply in adversarial situations where an impecunious private party wants to sue another private party, or a public institution, and wants that party to pay its costs in advance. For one thing, the test obliges the applicant to show its suit has merit. In this case, however, the Public Trustee has not been appointed to sue anyone on behalf of the minors who may be affected by the proposed changes to the Trust. Its mandate is to ensure that the interests of the minor children are taken into account when the court hears the Trustees' application for advice and direction with respect to their proposal to vary the Trust. The minor children are not, as the chambers judge noted, "independent" litigants. They are simply potentially affected parties.

19 The Trustees submit the chambers judge erred by characterizing the role of the Public Trustee as neutral rather than adversarial. While we hesitate to characterize the role of the Public Trustee as "neutral", as it will be obliged, as litigation representative, to advocate for the best interests of the children, the litigation in issue cannot be characterized as adversarial in the usual sense of that term. This is an application for advice and direction regarding a proposed amendment to a Trust, and the merits of the application are not susceptible to determination, at least at this stage. Indeed, the issues remain to be defined, and their extent and complexity are not wholly ascertainable at this time; nor is the identity of all the persons affected presently known. However, what can be said with certainty at this time is that the interests of the children potentially affected by the changes require independent representation, and the Public Trustee is the appropriate person to provide that representation. No other litigation representative has been put forward, and the Public Trustee's acceptance of the appointment was conditional upon receiving advance costs and exemption.

20 There is a second feature of this litigation that distinguishes it from the situation in *Okanagan* and *Little Sisters*. Here the children being represented by the Public Trustee are potentially affected parties in the administration of a Trust. Unlike the applicants in *Okanagan* and *Little Sisters*, therefore, the Public Trustee already has a valid claim for costs given the nature of the application before the court. As this court observed in *Deans v. Thachuk*, 2005 ABCA 368 (Alta. C.A.) at para 43, (2005), 261 D.L.R. (4th) 300 (Alta. C.A.):

> In *Buckton, Re, supra*, Kekewich J. identified three categories of cases involving costs in trust litigation. **The first are actions by trustees for guidance from the court as to the construction or the administration of a trust. In such cases, the costs of all parties necessarily incurred for the benefit of the estate will be paid from the fund.** The second are actions by others relating to some difficulty of construction or administration of a trust that would have justified an application by the trustees, where costs of all parties necessarily incurred for the benefit of the trust will also be paid from the fund. The third are actions by some beneficiaries making claims which are adverse or hostile to the interests of other beneficiaries. In those cases, the usual rule that the unsuccessful party bears the costs will apply. [emphasis added]

21 Moreover, the chambers judge observed that the Trustees had not taken any "pre-emptive steps" to provide independent representation of the minors to avoid potential conflict and conflicting duties (para 23). Their failure to have done so ought not now to be a reason to shift the obligation to others to bear the costs of this representation. The Public Trustee is prepared to provide the requisite independent representation, but is not obliged to do so. Having regard to the fact that the Trust has ample funds to meet the costs, as well as the litigation surrounding the issue of membership, it cannot be said that the conditions attached by the Public Trustee to its acceptance of the appointment are unreasonable or otherwise should be disregarded.

22 It should be noted, parenthetically, that the Trustees rely on *Deans* as authority for the proposition that the *Okanagan* criteria will apply in pension trust fund litigation, which they submit is analogous to the situation here. But it is clear that the decision to apply the *Okanagan* criteria in *Deans* was based on the nature of the litigation in that case. It was an action against a trust by certain beneficiaries, was adversarial and fit into the third category described in the passage from *Buckton, Re* [[1907] 2 Ch. 406 (Eng. Ch. Div.)] quote above.

23 In our view, there are several sources of jurisdiction for an order of advance costs in the case before us. One is section 41 of the *Public Trustee Act*, SA 2004, c P-44.1 which provides:

> 41 Unless otherwise provided by an enactment, where the Public Trustee is a party to or participates in any matter before a court,
>
> (a) the costs payable to the Public Trustee, and the client, party or other person by whom the costs are to be paid, are in the discretion of the court, and
>
> (b) the court may order that costs payable to the Public Trustee are to be paid out of and are a charge on an estate.

24 It is evident that the court is vested with a large discretion with respect to an award of costs under section 41. While not dealing specifically with an award of advance costs, this discretionary power encompasses such an award. Further, the court has broad powers to "impose terms and conditions" upon the appointment of a litigation representative pursuant to Rule 2.21, which states:

> 2.21 The Court may do one or more of the following:
>
> (a) terminate the authority or appointment of a litigation representative;
>
> (b) appoint a person as or replace a litigation representative;
>
> (c) impose terms and conditions on, or on the appointment of, a litigation representative or cancel or vary the terms or conditions.

25 The chambers judge also invoked *parens patriae* jurisdiction as enabling him to award advance costs, in the best interests of the children, to obtain the independent representation of the Public Trustee on their behalf. To the extent that there is any gap in statutory authority for the exercise of this power, the *parens patriae* jurisdiction is available. As this Court commented in *Alberta (Director, Child, Youth and Family Enhancement Act) v. L. (D.)*, 2012 ABCA 275, 536 A.R. 207 (Alta. C.A.), in situations where there is a gap in the legislative scheme, the exercise of the inherent *parens patriae* jurisdiction "is warranted whenever the best interests of the child are engaged" (para 4).

26 In short, a wide discretion is conferred with respect to the granting of costs under the *Trustee Act*, the terms of the appointment of a litigation representative pursuant to the *Rules of Court*, and in the exercise of *parens patriae* jurisdiction for the necessary protection of children. In our view, the discretion is sufficiently broad to encompass an award of advanced costs in the situation at hand.

27 In this case, it is plain and obvious that the interests of the affected children, potentially excluded or otherwise affected by changes proposed to the Trust, require protection which can only be ensured by means of independent representation. It cannot be supposed that the parents of the children are necessarily motivated to obtain such representation. Indeed, it appears that all the childrenpotentially affected by the proposed changes have not yet been identified, and it may be that children as yet unborn may be so affected.

28 The chambers judge noted that there were 31 children potentially affected by the proposed variation, as well as an "unknown number of potentially affected minors" - the children of applicants seeking to be admitted into membership of the Band (para 31). He concluded that a litigation representative was necessary and that the Public Trustee was the appropriate person to be appointed. No appeal is taken from this direction. In our view, the trial judge did not err in awarding advance costs in these circumstances where he found that the children's interest required protection, and that it was necessary to secure the costs in such fashion to secure the requisite independent representation of the Public Trustee.

B. Did the chambers judge err in failing to impose costs guidelines?

29 The Trustees submit the chambers judge erred by awarding advance costs without any restrictions or guidelines. In our view, this complaint is premature and an issue not yet canvassed by the court. We would add that an award of advanced costs should not be construed as a blank cheque. The respondent fairly concedes that the solicitor and client costs incurred by it will be subject to oversight and further direction by the court from time to time regarding hourly rates, amounts to be paid in advance and other mechanisms for ensuring that the quantum of costs payable by the Trust is fair and reasonable. The subject order merely establishes that advance costs are payable; the mechanism for obtaining payment and guidelines for oversight has yet to be addressed by the judge dealing with the application for advice and directions.

C. Did the chambers judge err in granting an exemption from the costs of other participants?

30 Much of the reasoning found above applies with respect to the appeal from the exemption from costs. An independent litigation representative may be dissuaded from accepting an appointment if subject to liability for a costs award. While the possibility of an award of costs against a party can be a deterrent to misconduct in the course of litigation, we are satisfied that the court has ample other means to control the conduct of the parties and the counsel before it. We also note that an exemption for costs, while unusual, is not unknown, as it has been granted in other appropriate circumstances involving litigation representatives: *Thomlinson v. Alberta*, 2003 ABQB 308 (Alta. Q.B.) at paras 117-119, (2003), 335 A.R. 85 (Alta. Q.B.); and *C. (L.) v. Alberta (Metis Settlements Child & Family Services, Region 10)*, 2011 ABQB 42 (Alta. Q.B.) at paras 53-55, (2011), 509 A.R. 72 (Alta. Q.B.).

D. Did the chambers judge err in awarding costs of the application to the Public Trustee?

31 Finally, with respect to the appeal from the grant of solicitor and client costs on the application heard by the chambers judge, it appears to us that one of the subjects of the application was whether the Public Trustee would be entitled to such an award if it were appointed as litigation representative. The judge's award flowed from such finding. The appellant complains, however, that the judge proceeded to make the award without providing an opportunity to deal separately with the costs of the application itself. It does not appear, however, that any request was made to the judge to make any further representations on this point prior to the entry of his order. We infer that the parties understood that their submissions during the application encompassed the costs for the application itself, and that no further submission was thought to be necessary in that regard before the order was entered.

VII. Conclusion

32 The appeal is dismissed.

Appeal dismissed.

End of Document

Tab 3

2015 ABQB 799
Alberta Court of Queen's Bench

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)

2015 CarswellAlta 2373, 2015 ABQB 799, [2016] A.W.L.D. 313, 262 A.C.W.S. (3d) 1

In the Matter of the Trustees Act, RSA 2000, c T-8, as amended

In the Matter of The Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust, Respondents and Public Trustee of Alberta, Applicant

D.R.G. Thomas J.

Heard: September 2, 2015; September 3, 2015
Judgment: December 17, 2015
Docket: Edmonton 1103-14112

Counsel: Janet Hutchison, Eugene Meehan, Q.C., for Applicant, Public Trustee of Alberta
Edward H. Molstad, Q.C., for Respondent, Sawridge First Nation
Doris Bonora, Marco S. Poretti, for Respondents, 1985 Sawridge Trustees
J.J. Kueber, Q.C., for Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo
Karen Platten, Q.C., for Catherine Twinn

Subject: Civil Practice and Procedure; Constitutional; Estates and Trusts; Public; Human Rights
Related Abridgment Classifications
Aboriginal law
X Practice and procedure
X.5 Discovery
X.5.c Miscellaneous
Headnote
Aboriginal law --- Practice and procedure — Discovery — Miscellaneous
Band set up trust to hold Band property on behalf of its members — Trustees sought court advice and direction with respect to proposed definition to term "beneficiaries" of trust — Public Trustee brought successful application to be appointed litigation representative of interested minors, on condition that costs would be paid by trust and that it would be shielded from any costs liability — Public Trustee brought application for production of records and information from band — Information sought concerned band membership, members who had or were seeking band membership, processes involved to determine whether individuals may become part of band, records of application processes and associated litigation, and how assets ended up in trust — Band resisted application — Application dismissed — Public Trustee used legally incorrect mechanism to seek materials from Band — Band was third party to litigation and therefore was not subject to same disclosure proceedings as trustees, who were parties — Proximal relationships were not to be used as bridge for disclosure obligations — Only documents which were potentially disclosable in Public Trustee's application were those that were relevant and material to issue before court — It was further necessary to refocus proceedings and provide well-defined process to achieve fair and just distribution of trust assets — Future role of Public Trustee was to be limited to representing interests of existing and potential minor beneficiaries, examining manner in which property was placed in trust on behalf of minor beneficiaries, identifying potential but not yet identified minors who were children

of band members or membership candidates, and supervising distribution process — Public trustee was to have until March 15, 2016, to prepare and serve application on band which identified documents it believed to be relevant and material to test fairness of proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries — Public Trustee was to have until January 29, 2016 to prepare and serve application on band identifying specific documents relevant and material to issue of assets settled in trust — Public Trustee may seek materials and information from Band, but only in relation to specific issues and subjects — Public Trustee had no right to engage, and was not to engage, in collateral attacks on membership processes of band and trustees had no right to engage in collateral attacks on band's membership processes.

Table of Authorities

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

Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc. (2008), 2008 SCC 8, 2008 CarswellBC 411, 2008 CarswellBC 412, 75 B.C.L.R. (4th) 1, [2008] 4 W.W.R. 1, 50 C.P.C. (6th) 207, 290 D.L.R. (4th) 193, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.*) 372 N.R. 95, (sub nom. *Juman v. Doucette*) [2008] 1 S.C.R. 157, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.*) 252 B.C.A.C. 1, 422 W.A.C. 1 (S.C.C.) — referred to

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17, 1988 CarswellAlta 219 (Alta. Q.B.) — referred to

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1989), 98 A.R. 374, 45 C.C.L.I. 143, 1989 CarswellAlta 714 (Alta. Q.B.) — referred to

Gainers Inc. v. Pocklington Holdings Inc. (1995), 30 Alta. L.R. (3d) 273, [1995] 9 W.W.R. 117, 169 A.R. 288, 97 W.A.C. 288, 1995 CarswellAlta 200 (Alta. C.A.) — referred to

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

Kaddoura v. Hanson (2015), 2015 ABCA 154, 2015 CarswellAlta 780, [2015] 6 W.W.R. 535, 67 C.P.C. (7th) 376, 600 A.R. 184, 645 W.A.C. 184, 15 Alta. L.R. (6th) 37 (Alta. C.A.) — referred to

Poitras v. Sawridge Band (2013), 2013 FC 910, 2013 CF 910, 2013 CarswellNat 3938, 2013 CarswellNat 3939, (sub nom. *Poitras v. Sawridge Indian Band*) 438 F.T.R. 264 (Eng.) (F.C.) — considered

Royal Bank of Canada v. Trang (2014), 2014 ONCA 883, 2014 CarswellOnt 17254, 379 D.L.R. (4th) 601, 123 O.R. (3d) 401, 327 O.A.C. 199 (Ont. C.A.) — referred to

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

Strickland v. Canada (Attorney General) (2015), 2015 SCC 37, 2015 CSC 37, 2015 CarswellNat 2457, 2015 CarswellNat 2458, 386 D.L.R. (4th) 1, 87 Admin. L.R. (5th) 60, 473 N.R. 328, [2015] 2 S.C.R. 713 (S.C.C.) — considered

Toronto Dominion Bank v. Sawchuk (2011), 2011 ABQB 757, 2011 CarswellAlta 2131, 86 C.B.R. (5th) 1, 530 A.R. 172 (Alta. Master) — referred to

Trimay Wear Plate Ltd. v. Way (2008), 2008 ABQB 601, 2008 CarswellAlta 1330, 456 A.R. 371 (Alta. Q.B.) — referred to

Wasylyshen v. Canadian Broadcasting Corp. (September 5, 2006), Doc. 0403-08497 (Alta. Q.B.) — referred to

Weatherill Estate v. Weatherill (2003), 2003 ABQB 69, 2003 CarswellAlta 81, 49 E.T.R. (2d) 314, 11 Alta. L.R. (4th) 183, 337 A.R. 180, 40 E.T.R. (2d) 314 (Alta. Q.B.) — referred to

Z. (H.) v. Unger (2013), 2013 ABQB 639, 2013 CarswellAlta 2121, 49 C.P.C. (7th) 122, 573 A.R. 391 (Alta. Q.B.) — referred to

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

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

783783 Alberta Ltd. v. Canada (Attorney General) (2010), 2010 ABCA 226, 2010 CarswellAlta 1379, 2010 D.T.C. 5125 (Eng.), [2010] 6 C.T.C. 194, 89 C.P.C. (6th) 21, 322 D.L.R. (4th) 56, 76 C.C.L.T. (3d) 32, 29 Alta. L.R. (5th) 37, [2010] 12 W.W.R. 472, 482 A.R. 136, 490 W.A.C. 136 (Alta. C.A.) — considered

Statutes considered:

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

Generally — referred to

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

s. 2(1) "band" — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

s. 209 — referred to

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

Pt. V — referred to

R. 5.2 — referred to

R. 5.5-5.9 — referred to

R. 5.13 — considered

R. 5.13(1) — considered

R. 6.3 — considered

R. 9.19 — considered

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Federal Child Support Guidelines, SOR/97-175

Generally — referred to

APPLICATION by Public Trustee for production of records and information from band.

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

I Introduction

1 This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.) ["*Sawridge #1*"], (2012), 543 A.R. 90 (Alta. Q.B.) affirmed 2013 ABCA 226, 553 A.R. 324 (Alta. C.A.) ["*Sawridge #2*"]. The terms defined in *Sawridge #1* are used in this decision.

II. Background

2 On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the "Band", "Sawridge Band", or "SFN"], set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the "*Charter*"].

3 The 1985 Sawridge Trust is administered by the Trustees [the "Sawridge Trustees" or the "Trustees"]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust (the "Trust Amendments") and confirmation of the transfer of assets into that Trust.

4 One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

5 Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

> August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.
>
> February 14, 2012 - The Public Trustee applied:
>
> 1. to be appointed as the litigation representative of minors interested in this proceeding;
>
> 2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and
>
> 3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.
>
> April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.
>
> June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: *Sawridge #1*, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (***Sawridge #1***, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (***Sawridge #1***, at para 55).
>
> June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (***Sawridge #2***).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;
- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and
- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],
- the Trustees may withdraw their proposed settlement agreement and litigation plan, and
- some document and disclosure related items sought by the Public Trustee were adjourned *sine die*. ("September 2/3 Order")

October 5, 2015 - I directed the Public Trustee to provide more detailed information in relation to its accounts totalling $205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

6 Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

7 This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

8 *Sawridge #1* at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee's involvement in this matter:

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.

[9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.

[10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

[11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

[12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

9 This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a *Rules* Part V affidavit of records within 60 days of the September 2/3 Order.

10 The primary remaining issue relates to the disclosure of information in documentary form sought by the Public Trustee from the SFN and there are also a number of additional ancillary issues. The Public Trustee seeks information concerning:

1. membership in the SFN,

2. candidates who have or are seeking membership with the SFN,

3. the processes involved to determine whether individuals may become part of the SFN,

4. records of the application processes and certain associated litigation, and

5 how assets ended up in the 1985 Sawridge Trust.

11 The SFN resists the application of the Public Trustee, arguing it is not a party to this proceeding and that the Public Trustee's application falls outside the *Rules*. Beyond that, the SFN questions the relevance of the information sought.

V. Submissions and Argument

A. The Public Trustee

12 The Public Trustee takes the position that it has not been able to complete the responsibilities assigned to it by me in *Sawridge #1* because it has not received enough information on potential, incomplete and filed applications to join the SFN. It also needs information on the membership process, including historical membership litigation scenarios, as well as data concerning movement of assets into the 1985 Sawridge Trust.

13 It also says that, without full information, the Public Trustee cannot discharge its role in representing affected minors.

14 The Public Trustee's position is that the Sawridge Band is a party to this proceeding, or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information. It says that the Court can add the Sawridge Band as a party. In the alternative, the Public Trustee argues that *Rules* 5.13 and 9.19 provide a basis to order production of all relevant and material records.

B. The SFN

15 The SFN takes the position that it is not a party to the Trustee's proceedings in this Court and it has been careful not to be added as a party. The SFN and the Sawridge Trustees are distinct and separate entities. It says that since the SFN has not been made a party to this proceeding, the *Rules* Part V procedures to compel documents do not apply to it. This is a stringent test: *Trimay Wear Plate Ltd. v. Way*, 2008 ABQB 601, 456 A.R. 371 (Alta. Q.B.); *Wasylyshen v. Canadian Broadcasting Corp.*, [2006] A.J. No. 1169 (Alta. Q.B.).

16 The only mechanism provided for in the *Rules* to compel a non-party such as the SFN to provide documents is *Rule* 5.13, and its function is to permit access to specific identified items held by the third party. That process is not intended to facilitate a 'fishing expedition' (*Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 94 A.R. 17, 63 Alta. L.R. (2d) 189 (Alta. Q.B.)) or compel disclosure (*Gainers Inc. v. Pocklington Holdings Inc.* (1995), 169 A.R. 288, 30 Alta. L.R. (3d) 273 (Alta. C.A.)). Items sought must be particularized, and this process is not a form of discovery: *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1989), 98 A.R. 374, 16 A.C.W.S. (3d) 286 (Alta. Q.B.).

17 The SFN notes the information sought is voluminous, confidential and involves third parties. It says that the Public Trustee's application is document discovery camouflaged under a different name. In any case, a document is only producible if it is relevant and material to the arguments pled: *Rule* 5.2; *Weatherill Estate v. Weatherill*, 2003 ABQB 69, 337 A.R. 180 (Alta. Q.B.).

18 The SFN takes the position that *Sawridge #1* ordered the Public Trustee to investigate two points: 1) identifying the beneficiaries of the 1985 Sawridge Trust; and 2) scrutiny of transfer of assets into the 1985 Sawridge Trust. They say that what the decision in *Sawridge #1* did not do was authorize interference or duplication in the SFN's membership process and its results. Much of what the Public Trustee seeks is not relevant to either issue, and so falls outside the scope of what properly may be sought under *Rule* 5.13.

19 Privacy interests and privacy legislation are also factors: *Royal Bank of Canada v. Trang*, 2014 ONCA 883 (Ont. C.A.) at paras 97, (2014), 123 O.R. (3d) 401 (Ont. C.A.) ; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information unless the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, [2008] 1 S.C.R. 157 (S.C.C.). The cost to produce the materials is substantial.

20 The SFN notes that even though it is a target of the relief sought by the Public Trustee that it was not served with the July 16, 2015 application, and states the Public Trustee should follow the procedure in *Rule* 6.3. The SFN expressed

concern that the Public Trustee's application represents an unnecessary and prejudicial investigation which ultimately harms the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust. In *Sawridge #2* at para 29, the Court of Appeal had stressed that the order in *Sawridge #1* that the Public Trustee's costs be paid on a solicitor and own client basis is not a "blank cheque", but limited to activities that are "fair and reasonable". It asks that the Public Trustee's application be dismissed and that the Public Trustee pay the costs of the SFN in this application, without indemnification from the 1985 Sawridge Trust.

C. The Sawridge Trustees

21 The Sawridge Trustees offered and I ordered in my September 2/3 Order that within 60 days the Trustees prepare and deliver a *Rule* 5.5-5.9 affidavit of records to assist in moving the process forward. This resolved the immediate question of the Public Trustee's access to documents held by the Trustees.

22 The Trustees generally support the position taken by the SFN in response to the Public Trustee's application for Band documents. More broadly, the Trustees questioned whether the Public Trustee's developing line of inquiry was necessary. They argued that it appears to target the process by which the SFN evaluates membership applications. That is not the purpose of this proceeding, which is instead directed at re-organizing and distributing the 1985 Sawridge Trust in a manner that is fair and non-discriminatory to members of the SFN.

23 They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.). Further, the membership criteria used by the SFN operate until they are found to be invalid: *Huzar v. Canada*, [2000] F.C.J. No. 873 (Fed. C.A.) at para 5, (2000), 258 N.R. 246 (Fed. C.A.). Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

24 The 1985 Sawridge Trustees reviewed the evidence which the Public Trustee alleges discloses an unfair membership admission process, and submit that the evidence relating to Elizabeth Poitras and other applicants did not indicate a discriminatory process, and in any case was irrelevant to the critical question for the Public Trustee as identified in *Sawridge #1*, namely that the Public Trustee's participation is to ensure minor children of Band members are treated fairly in the proposed distribution of the assets of the 1985 Sawridge Trust.

25 Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

26 The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

27 I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: *Trimay Wear Plate Ltd. v. Way*, at para 17.

28 If I were to compel document production by the Sawridge Band, it would be via *Rule* 5.13:

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.

29 The modern *Rule* 5.13 uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule* 5.13 has referenced and used approaches developed in the application of that precursor provision: *Toronto Dominion Bank v. Sawchuk*, 2011 ABQB 757, 530 A.R. 172 (Alta. Master); *Z. (H.) v. Unger*, 2013 ABQB 639, 573 A.R. 391 (Alta. Q.B.). I agree with this approach and conclude that the principles in the pre-*Rule* 5.13 jurisprudence identified by the SFN apply here: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*; *Gainers Inc. v. Pocklington Holdings Inc.*; *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.*

30 The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: *Kaddoura v. Hanson*, 2015 ABCA 154 (Alta. C.A.) at para 15, (2015), 15 Alta. L.R. (6th) 37 (Alta. C.A.).

31 I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

32 It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee. A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

33 In *Sawridge #1* I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since *Sawridge #1* the Federal Court has ruled in *Stoney v. Sawridge First Nation* on the operation of the SFN's membership process.

34 Further, in *Sawridge #1* I noted at paras 51-52 that in *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226, 322 D.L.R. (4th) 56 (Alta. C.A.), the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in *Strickland v. Canada (Attorney General)*, 2015 SCC 37 (S.C.C.), the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

35 The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in *Stoney v. Sawridge First Nation*, there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or

excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

36 It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

37 Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;

2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and

3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

4. Supervising the distribution process itself.

38 The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

39 I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

40 The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

41 I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

42 On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

43 The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule* 5.13(1) application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

44 If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule* 5.13(1) application by the Public Trustee. In the event no *Rule* 5.13(1) application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 - Examining potential irregularities related to the settlement of assets to the Trust

45 There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

46 The Public Trustee shall by January 29, 2016 prepare and serve a *Rule* 5.13(1) application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

47 A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule* 5.13(1) application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

48 The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of individuals who are minor beneficiaries and potential minor beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and

2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

49 I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

50 As Aalto, J. observed in *Poitras v. Sawridge Band*, 2013 FC 910, 438 F.T.R. 264 (Eng.) (F.C.), "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

51 The Public Trustee has no relevant interest in the children of any parent who has an unresolved application for membership in the Sawridge Band. If that outstanding application results in the applicant being admitted to the SFN then that child will become another minor represented by the Public Trustee.

52 While the Public Trustee has sought information relating to incomplete applications or other potential SFN candidates, I conclude that an open-ended 'fishing trip' for unidentified hypothetical future SFN members, who may also have children, is outside the scope of the Public Trustee's role in this proceeding. There needs to be minimum threshold proximity between the Public Trustee and any unknown and hypothetical minor beneficiary. As I will stress later, the Public Trustee's activities need to be reasonable and fair, and balance its objectives: cost-effective participation in this process (i.e., not unreasonably draining the Trust) and protecting the interests of minor children of SFN members. Every dollar spent in legal and research costs turning over stones and looking under bushes in an attempt to find an additional, hypothetical minor beneficiary reduces the funds held in trust for the known and existing minor children who are potential beneficiaries of the 1985 Sawridge Trust distribution and the clients of the Public Trustee. Therefore, I will only allow investigation and representation by the Public Trustee of children of persons who have, at a minimum, completed a Sawridge Band membership application.

53 The Public Trustee also has a potential interest in a child of a Sawridge Band candidate who has been rejected or is rejected after an unsuccessful application to join the SFN. In these instances the Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection or challenge the rejection through judicial review in the Federal Court. If so, then that child is also a potential candidate for representation by the Public Trustee.

54 This Court's function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership. I mean by this that if the Public Trustee's inquiries determine that there are one or more outstanding applications for Band membership by a parent of a minor child then that is not a basis for the Public Trustee to intervene in or conduct a collateral attack on the manner in which that application is evaluated, or the result of that process.

55 I direct that this shall be the full extent of the Public Trustee's participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

56 In summary, what is pertinent at this point is to identify the potential recipients of a distribution of the 1985 Sawridge Trust, which include the following categories:

1. Adult members of the SFN;

2. Minors who are children of members of the SFN;

3. Adults who have unresolved applications to join the SFN;

4. Children of adults who have unresolved applications to join the SFN;

5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and

6. Children of persons in category 5 above.

57 The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:

   a) made applications to join the SFN which are pending (category 3); and

   b) had applications to join the SFN rejected and are subject to challenge (category 5); and

2. The contact information for those individuals where available.

58 As noted, the Public Trustee's function is limited *to representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and

2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

59 This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);

b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and

c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

60 These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

61 My understanding from the affidavit evidence and submissions of the SFN and the 1985 Sawridge Trustees is that the Public Trustee has already received much information about persons on the SFN's membership roll and prospective and rejected candidates. I believe that this will provide all the data that the Public Trustee requires to complete Task 3. Nevertheless, the Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, then it is to file a *Rule* 5.13 application by January 29, 2016. The Sawridge Band and Trustees will then have until March 15, 2016 to make written submissions in response to that application. I will hear any disputed *Rule* 5.13 disclosure application at a case management hearing to be set before April 30, 2016.

Task 4 - General and residual distributions

62 The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

63 Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

a) a potential future successful SFN membership applicant and/or child of a successful applicant, or

b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

64 As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or

2. on a pro rata basis:

a) be distributed to the members of Pool 1, and

b) be reserved in Pool 2 for future potential Pool 2 recipients.

65 A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

66 At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

67 First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

68 Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

69 As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

70 I believe that the instructions given here will refocus the process on Tasks 1 - 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in *Sawridge #1* I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in *Stoney v. Sawridge First Nation.* I repeat that inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

71 As the Court of Appeal observed in *Sawridge #2* at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule* 5.13 applications which may arise from completion of Tasks 1-3.

Application dismissed.

Tab 4

2016 ABCA 51
Alberta Court of Appeal

Stoney v. Twinn

2016 CarswellAlta 238, 2016 ABCA 51, [2016] A.W.L.D. 859, 264 A.C.W.S. (3d) 17, 616 A.R. 176, 672 W.A.C. 176

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 the Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust")

Maurice Stoney (Applicant / Putative) and Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, As Trustees for the 1985 Sawridge Trust (Respondents) and Public Trustee of Alberta (Respondent)

Jack Watson J.A.

Heard: February 17, 2016
Judgment: February 26, 2016
Docket: Edmonton Appeal 1603-0033-AC

Counsel: P.E. Kennedy, for Applicant / Putative
M.S. Poretti, D.C.E. Bonara, for Respondents, Roland Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo (Sawridge Trustees)
E.H. Molstad, Q.C., for Respondent, Sawridge First Nation
C. Osualdini, for Respondent, Catherine Twinn
E. Meehan, Q.C., J.L. Hutchinson, for Respondent, Public Trustee of Alberta

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

Related Abridgment Classifications

Aboriginal law
X Practice and procedure
X.6 Appeals
X.6.c Miscellaneous

Headnote

Aboriginal law --- Practice and procedure — Appeals — Miscellaneous

Sawridge Band Trust was created in 1985 to hold property in trust for members of Sawridge First Nation — Applicant claimed he was member of First Nation and that as consequence of that he had right to some share in distribution of trust when that was eventually carried out — Court issued decision in 2015 concerning involvement of Public Guardian and Trustee and production of documents — Case management judge sought to provide well-defined process to achieve fair and just distribution of trust assets — That decision was under appeal by two parties — Applicant sought extension of time to appeal — First Nation claimed that applicant was merely intermeddler seeking to intrude issue of membership into appeal — Application dismissed — In decision under appeal, case management judge avoided issue of membership — Decision was attempting to regulate processes for dealing with trust — Issue of whether or not applicant should be considered to be entitled to be beneficiary in trust had not yet arisen and would be decided at some future date whether or not appeal went ahead — On face of things, applicant did not have participatory right in relation to proceedings on trust, did not have standing to appeal within meaning of case decided by Court of Appeal and was, in fact, stranger to proceedings insofar as appeal from decision to Court of Appeal was concerned — Mere existence of decision under

appeal and of potential decision of Court of Appeal in relation to it did not create condition that would give rise to right of appeal on behalf of applicant in this respect — There was not, at this point in time, arguable point by applicant as against judgment under appeal — There was no reasonable chance of success on appeal by applicant.

Table of Authorities

Cases considered by *Jack Watson J.A.*:

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2015), 2015 ABCA 206, 2015 CarswellAlta 1090, 602 A.R. 135, 647 W.A.C. 135 (Alta. C.A.) — distinguished

Cairns v. Cairns (1931), [1931] 3 W.W.R. 335, 26 Alta. L.R. 69, [1931] 4 D.L.R. 819, 1931 CarswellAlta 52 (Alta. C.A.) — considered

Dreco Energy Services Ltd. v. Wenzel (2008), 2008 ABCA 36, 2008 CarswellAlta 131, 429 A.R. 51, 421 W.A.C. 51 (Alta. C.A.) — followed

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

Statutes considered:

Trustee Act, R.S.A. 2000, c. T-8

Generally — referred to

Words and phrases considered:

Sawridge Band *Inter Vivos* Settlement

The Sawridge Band *Inter Vivos* Settlement created back on April 15, 1985 . . . is referred to in the various proceedings as the Sawridge Band Trust.

APPLICATION to extend time to file appeal.

***Jack Watson J.A.*:**

1 This is Court of Appeal file number 1603-0033-AC, 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 the Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust").

2 The application before me now is by a gentleman named Maurice Stoney. Mr. Stoney claims, with some vigour, that he is a member of the First Nation in question and that he has been for a long time, and that as a member of the First Nation, certain legal rights of his follow from this.

3 The matter that is under appeal by two parties now — and for which the subject matter before me is a motion for an extension of time for a further appeal — is a decision by Mr. Justice Thomas that was given at [*1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*] 2015 ABQB 799 (Alta. Q.B.). His decision was in the course of a proceeding which dealt with The Sawridge Band *Inter Vivos* Settlement created back on April 15, 1985, which is referred to in the various proceedings as the Sawridge Band Trust. As mentioned, Mr. Stoney's position is that he is a member of the Sawridge First Nation and that as a consequence of that he presumably has a right to some share in the distribution of the trust when that is eventually carried out.

4 The application that is specifically is before me at this time is by Mr. Stoney for an extension of time to appeal the judgment of Mr. Justice Thomas. The part of the reasons of Mr. Justice Thomas which are objected to in the proposed appeal by Mr. Stoney arise from his role as a case manager in connection with the ongoing proceeding dealing with the trust. His position is that both inappropriately and unfairly, Mr. Justice Thomas in his role as case manager has made final determinations which seriously and adversely affect his situation *vis-à-vis* his rights to participate in the trust. It is interesting to note that in the course of so arguing, his supporting affidavit which was sworn on October 27, 2015 in para 13 contains the broader assertion that:

> For thirty years, I have been seeking to have my membership in Sawridge be recognized.

In that respect, therefore, Mr. Stoney has the concern that his membership is also an issue in the judgment of Mr. Justice Thomas, either directly or indirectly, by virtue of these case management determinations which Mr. Justice Thomas made.

5 During the course of argument with counsel, I referred counsel to para 56 of the judgment of Mr. Justice Thomas in which he purported to designate what he described as: "the potential recipients of a distribution of the 1985 Sawridge Trust...". I say purported because the existing two appeals from his decision dispute what he has said and done. He identified six categories.

6 The other appeals by the other parties in relation to that turn very much on that paragraph. I will, therefore, not offer any extensive discussion about what the implications are of that paragraph nor whether it is the product of fair process, nor whether it is accurate or anything of that sort. I merely observe that that paragraph would appear to be a key triggering paragraph in particular for Mr. Stoney's request that he also be part of the process before the Court of Appeal, in relation to the challenges to the judgment of Mr. Justice Thomas.

7 Indeed, Mr. Stoney's arguments to a large extent replicate points put forward by the appellants that have existing appeals against the judgment of Mr. Justice Thomas on the question of fair process. Certainly, Ms. Kennedy in her eloquent submissions on behalf of Mr. Stoney made considerable remarks in connection with the manner in which the issue of para 56 and, indeed, paras 32 and following in Mr. Justice Thomas' judgment arose. She takes the position that, in effect, Mr. Justice Thomas has seriously side-swiped the interest of Mr. Stoney and, although they are not appellants, the interest of the other two ladies whose names have been mentioned in the course of these proceedings.

8 The position that has been taken in answer to the application for an extension of time is to invoke firstly, the Reasons for Judgment of Mr. Justice Slatter in *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 206, 602 A.R. 135 (Alta. C.A.). The position taken on behalf of the First Nation, although the First Nation has not been, strictly speaking, a party to the proceedings before Mr. Justice Thomas, is that the objections and complaints made by Mr. Stoney (and, although they are not here, made by the two ladies presumably) are long since settled by the Federal Court and by other proceedings and other courts. The First Nation contends that the claims of Mr. Stoney, therefore, are not live questions here, whether or not they were implicitly raised in Mr. Justice Thomas' decision. They are certainly not the subject matter of the current appeals from Mr. Justice Thomas' decision, at least in the opinion of the First Nation.

9 The response in answer to the extension of time application given by the Trustees of the trust — albeit not for this purpose including a dissenting Trustee — are that Mr. Stoney's position does not meet any of the criteria contained in para 4 of the judgment of *Attila Dogan* to which I have just made reference. The position taken on that aspect should be addressed, therefore, first.

10 The position taken by the Trustees is that having regard to the way in which the record unfolded in this matter, there is not really adequate evidence before this Court to make a determination as to whether the principles in *Cairns v. Cairns*, [1931] 4 D.L.R. 819 (Alta. C.A.), which are quoted by Mr. Justice Slatter in *Attila Dogan*, are met. The situation is that they are suggesting that the affidavit evidence does not provide a reasonable explanation for the failure to file on time and it further does not provide an indication of a *bona fide* intention to appeal while the right of appeal existed.

11 I am prepared to infer that, in fact, there would have been intention to appeal while the right of appeal existed had Ms. Kennedy been aware of the judgment of Mr. Justice Thomas. Further, while there are certainly some strengths to the argument against Ms. Kennedy's position relative to the explanation for failure to file the appeal on time, I am satisfied that that would not be of itself a basis upon which to apply the *Attila Dogan* and *Cairns* test against the application being made on behalf of Mr. Stoney.

12 It seems to me that the real issue that comes to the forefront of this matter is whether under para 4(e) of *Attila Dogan* there is a reasonable chance of success on the appeal, which Justice Slatter goes on to describe as a reasonably arguable

appeal. This brings back into focus the objection made by the First Nation relative to whether or not the position of Mr. Stoney, at this stage, is merely that of an intermeddler seeking to intrude the issue of membership into an appeal to the Court of Appeal from Mr. Justice Thomas when Mr. Justice Thomas did not deal with membership.

13 Indeed, it is quite clear from the reasoning of Mr. Justice Thomas that he attempted to avoid the question of membership. That was because he was taking on, in his view, the strict issue of the administration of the trust. From the reasons that he provided, the Federal Court was the proper location in which to determine whether a person is or is not a member of that particular First Nation. Whether or not that is correct and whether or not that issue would be resolved later by this Court on the existing two appeals is an interesting point which I do not need to come to grips with here. But the point of the matter is that Mr. Justice Thomas, at least, did not consider himself to be dealing with the question of membership.

14 Mr. Justice Thomas' decision, in this respect, was attempting to regulate the processes for dealing with the trust. Insofar as doing so is concerned, it is clear that the administration of the trust would have a considerable effect on people who are entitled to be beneficiaries. The argument placed before me for Mr. Stoney is that a person who has a legitimate status as a member, and who has been foreclosed in the opportunity to put that position forward so far, may still very well be a person who should at some point by a competent authority be determined to be a beneficiary under the trust.

15 The difficulty with the argument in that respect, however, from the point of view of the viability of an appeal under the *Attila Dogan* case, is that once the appeal gets to the Court of Appeal from Mr. Justice Thomas' decision, the impact of the decision upon Mr. Stoney's situation is yet to be understood.

16 It seems to me that if the arguments that are put forward by the existing appellants from Mr. Justice Thomas' reasons hold sway in some way or another — and I would have to speculate what might happen there — that could very well address entirely the position of Ms. Kennedy's client. At least it would arguably do so insofar as her concern that Mr. Justice Thomas' judgment somehow stands in the path of Mr. Stoney in terms of getting some rights as a beneficiary.

17 It has already been pointed out in the argument before me that there has not been, up to now, an application made by Ms. Kennedy's client, Mr. Stoney, to be a participant in the proceedings before Mr. Justice Thomas, in any formal way at least. He is certainly not named as a party there, but with admirable fairness, Ms. Bonora, counsel for the Trustees, appreciates that there is no specific time running on this point before Mr. Justice Thomas. That is because the issue of who is a beneficiary for the purposes of division of this trust has not actually been made yet.

18 In fact, one of the reasons why Mr. Justice Thomas got to making his decision under appeal in the first place was because he was attempting to make determinations for the process to determine who gets to decide who is beneficiary and so forth.

19 That being the case, Ms. Bonora quite fairly points out that Mr. Stoney's position as to whether or not he should be considered to be entitled to be a beneficiary in the trust has not arisen yet before Justice Thomas. That is going to have to be decided at some future date whether or not the appeal goes ahead from Mr. Justice Thomas and whether or not Mr. Justice Thomas' judgment, in this particular regard, is upheld or changed or in some way dealt with by the Court of Appeal.

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

21 Since Mr. Stoney is interested in matters which were not entirely addressed by Mr. Justice Thomas, and which may or may not be addressed by the Court in the medium of other arguments by other parties before the Court of Appeal, I am left with the situation where it seems to be quite clear that there is no reasonable chance of success on an appeal by Mr. Stoney. That is because no one is going to say anything about him, particularly when the appeal is heard. If incidentally the result of the appeal is that somehow his status or ability to apply as a beneficiary is improved, so be it. The mere existence of that judgment and of a potential decision of the Court of Appeal in relation to the judgment of Mr. Justice Thomas does not, it seems to me, create a condition that would give rise to a right of appeal on behalf of Mr. Stoney in this respect.

22 Having said all that, then, I am not satisfied that an extension of time should be granted to Mr. Stoney to appeal the decision of Mr. Justice Thomas, even if I could discern precisely what it is about the decision of Mr. Justice Thomas that is directly under attack, or would be under attack, on an appeal by Mr. Stoney. I can make inferences about what Mr. Stoney might hope might unfold on appeal, but there is not, at this point in time, an arguable point by Mr. Stoney as against Justice Thomas' judgment, bearing in mind what the judgment is and what it says.

23 The application is dismissed.

[Discussion with counsel re costs]

Jack Watson J.A.:

24 Costs will follow for the parties that participated on the motion itself. And any parties who did not, do not get anything.

Application dismissed.

End of Document

Tab 5

2017 ABQB 299
Alberta Court of Queen's Bench

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)

2017 CarswellAlta 745, 2017 ABQB 299, [2017] A.W.L.D. 2283, [2017] A.W.L.D. 2298, 279 A.C.W.S. (3d) 670

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 the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust (Original Applicants) and Public Trustee of Alberta (Applicant / Respondent) and Sawridge First Nation (Respondent / Applicant)

D.R.G. Thomas J.

Heard: August 24, 2016
Judgment: April 28, 2017
Docket: Edmonton 1103-14112

Counsel: D.C. Bonora and A. Loparco, Q.C., for 1985 Sawridge Trustees
J.L. Hutchison, for Public Trustee of Alberta
E. H. Molstad, Q.C., G. Joshee-Arnal, for Sawridge First Nation

Subject: Civil Practice and Procedure; Public

Related Abridgment Classifications

Aboriginal law
X Practice and procedure
X.4 Evidence
X.4.b Burden of proof
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.f Non-party

Headnote

Aboriginal law --- Practice and procedure — Evidence — Burden of proof

Trust — Trust was established by First Nation as attempt to shield Band property from persons excluded from membership — Trustees brought applications to court for advice on how to identify beneficiaries and create equitable distribution scheme — Public Trustee was invited to participate and beneficiary identification issues were moved to trial — Decision was issued that authorized Public Trustee to prepare and serve applications on Band pursuant to R. 5.13 of Alberta Rules of Court in relation to specific membership and trust asset-related questions — Band provided information on two of three issues and Public Trustee did not proceed on R. 5.13 application relating to fairness of proposed distribution scheme — Public Trustee brought application for directions on whether information provided by Band satisfied R. 5.13 inquiry — Information provided by Band was sufficient — Band provided list of minor children that satisfied evidentiary requirement for category of minors — Bank provided list of adults who had pending applications, which met evidentiary requirement for those with unresolved but completed applications — Categories of rejected and unresolved applications were synonymous, and Band's information there were not outstanding appeals or judicial reviews was sufficient.

Civil practice and procedure --- Costs — Persons entitled to or liable for costs — Non-party

Against Public Trustee — Trust was established by First Nation as attempt to shield Band property from persons excluded from membership — Trustees brought applications to court for advice on how to identify beneficiaries and create equitable distribution scheme — Public Trustee was invited to participate and beneficiary identification issues were moved to trial — Decision was issued that authorized Public Trustee to prepare and serve applications on Band pursuant to R. 5.13 of Alberta Rules of Court in relation to specific membership and trust asset-related questions — Band brought application for costs from Public Trustee for its refusal to consent to adjournment and its abandoned R. 5.13 application — Application dismissed — Previous order was made that prohibited Public Trustee from paying costs of other parties to proceeding — Band did not fall outside scope of order; while it was not party to proceeding, it was clearly participant — Court retained jurisdiction to make costs order against Public Trustee — Litigation was ultimately intended to benefit those who would receive shares in trust and was not adversarial process — Public Trustee was court-sanctioned participant undertaking statutory function and, while degree of court management was required, costs were not warranted — R. 5.13(2) requirement that person requesting record must pay amount determined by court was not basis to award costs — Payment of amount determined by court was not same as costs, and trust had been indemnifying Band for its activities in relation to proceeding.

Table of Authorities

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

Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.) (2004), 2004 CarswellOnt 390, 46 R.F.L. (5th) 330 (Ont. C.J.) — followed

Endean v. British Columbia (2016), 2016 SCC 42, 2016 CSC 42, 2016 CarswellBC 2891, 2016 CarswellBC 2892, 88 B.C.L.R. (5th) 1, 401 D.L.R. (4th) 577, 91 C.P.C. (7th) 1, [2016] 12 W.W.R. 1, (sub nom. *Endean v. Canadian Red Cross Society)* 488 N.R. 246, [2016] 2 S.C.R. 162 (S.C.C.) — considered

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

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

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

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

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 1.1 — referred to

R. 1.2 — referred to

R. 5.13 — considered

R. 5.13(2) — considered

R. 10.29(1) — referred to

R. 10.31 — considered

R. 10.33 — considered

APPLICATION by Public Trustee for directions with respect to sufficiency of Band's disclosure; APPLICATION by Band for costs against Public Trustee.

D.R.G. Thomas J.:

1 This decision is the most recent step in a case management process which has the ultimate objective of distributing funds held in the 1985 Sawridge Trust [the "Trust"] to its beneficiaries. The initial step in this process is reported in *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365, 543 A.R. 90 (Alta. Q.B.) ["*Sawridge #1*"] affirmed 2013 ABCA 226, 553 A.R. 324 (Alta. Q.B.) ["*Sawridge #2*"]. The Trust was set up in 1985 by the Sawridge First Nation [the "SFN" or the "Band"] in an attempt to shelter Band property from persons who had been excluded from membership in the SFN because of their gender or the gender of their parent(s).

2 The proceeding began as an application to the Court by the Trustees for advice as to how to identify the beneficiaries of the Trust and create an equitable distribution scheme for the considerable assets of the Trust. That initial application has since metastasized into a number of areas of disagreement and has expanded as a succession of third parties have attempted to insert themselves into the process. At the outset, the Court invited the Public Trustee of Alberta [the "Public Trustee"] to participate in this proceeding and represent the interests of potential minor recipients of the proposed distribution of assets: *Sawridge #1*.

3 On December 17, 2015 I issued a decision which defined a process to identify who may qualify for a part of the distribution and how the distribution would then proceed: *1985 Sawridge Trust (Trustees of) v. Alberta1 (Public Trustee)*, 2015 ABQB 799 (Alta. Q.B.) ["*Sawridge #3*"]. *Sawridge #3* triggered at least three appeals (*Stoney v. Twinn*, 2016 ABCA 51 (Alta. C.A.) at para 3). Those appeals were apparently either discontinued or denied for late filing. The participants then returned to me for another case management hearing on August 24, 2016.

4 At that hearing I concluded the case management process was bogged down and, to some extent, futile, and that the best alternative was to move the beneficiary identification issue to trial. However, that conclusion still left a number of issues to be resolved.

5 This decision responds to two outstanding issues between the Public Trustee and the Band. As noted, the Public Trustee was brought into this proceeding to represent the interests of potential minor beneficiaries. In *Sawridge #1* I instructed the Trust to pay for the Public Trustee's litigation costs.

6 The SFN is not a party to this litigation but has nevertheless observed and participated throughout since Band membership (or being a child of a Band member) is a criterion for being a beneficiary of the Trust.

7 *Sawridge #3* at paras 43, 46 and 61 authorized the Public Trustee to prepare and serve *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"] s 5.13 applications on the Band in relation to specific membership and Trust asset-related questions. The Public Trustee engaged that procedure but, in the meantime, the Band has provided information that related to two of the three issues addressed in *Sawridge #3*. The Public Trustee did not proceed with the *Rule* 5.13 application which related to the fairness of a proposed distribution scheme.

8 These developments have left two remaining issues now addressed by this decision:

1. Does information provided by the Band concerning "current and possible" minor beneficiaries satisfy the *Rule* 5.13 inquiry mandated by *Sawridge #3*?

2. Should the Band receive costs as a consequence of an abandoned 2015 application and the discontinued *Rule* 5.13 motion?

II. "Current and Possible" Minor Beneficiaries

9 *Sawridge #3* at paras 48-61 authorizes the Public Trustee to investigate and identify minor children of persons who have:

1. completed an application for admission to Band membership, and

2. applied for admission to Band membership, had that application denied, but are engaged in a review or appeal process.

10 The Public Trustee expresses concern on the form and meaning of language in *Sawridge #3* that authorizes the Public Trustee's *Rule* 5.13 inquiries. This resolves to a number of questions on what kind of evidence is adequate to discharge the Public Trustee's obligation to identify and then represent potential minor child distribution recipients. At the hearing I suggested that while I could clarify my instructions in *Sawridge #3*, the sufficiency of information provided by the Band was a point better discussed by the parties and the Band, with my advice as a subsequent recourse. However, counsel for the Public Trustee clarified it is satisfied to rely on the Band as the best source of evidence on membership questions.

11 On that basis I make the following findings and instructions.

12 First, the Public Trustee inquires whether a list of minor children of Band members obtained on April 5, 2016 satisfies the evidentiary requirement for that category of minors. I confirm this information is adequate for that purpose.

13 Second, the Public Trustee expresses concern that the meaning of a "completed" Band application and/or a "rejected or unsuccessful" Band application is unclear. The Band on January 18, 2016 provided a list of adults with "pending" applications. The Public Trustee inquires whether this category meets the "unresolved" but "completed" Band applications. I confirm that it does. I am satisfied that if the Band deems an application "complete" but has not resolved that application then that individual belongs in "category 3", as defined in *Sawridge #3*, and their children, if any, fall into "category 4".

14 The third point on which the Public Trustee sought clarification is whether *Sawridge #3* used "rejected" and "unsuccessful" to indicate two different categories. To be clear, this language is operationally synonymous. It captures:

1. persons who have made Band applications prior to this date, had that application rejected, but are challenging that outcome, and

2. persons who have filed completed and unresolved Band applications ("pending" Band applications), who are in the future rejected during the application process, and then challenge that outcome.

The Public Trustee's obligation is to identify these populations, and to also determine whether they have children. I note that both these subgroups will fall into category 5, though some at present may be in category 3.

15 The Public Trustee also inquires on whether the Band providing information that there are no outstanding appeals or judicial reviews of rejected Band applications is sufficient to define the current category 5 set. In light of the Public Trustee's concession on the Band's expertise and role I conclude that it is.

III. Costs

16 The Band seeks costs from the Public Trustee, and that these costs not be indemnified by the Trust. This relates to two steps.

17 First, on June 24, 2015 the Band sought and received an adjournment to applications in this proceeding that named the Band as a respondent. The Band took the position that the Public Trustee's refusal to consent to that adjournment was unreasonable, and should result in a costs award without indemnification.

18 Second, in the *Sawridge #3* decision I directed the Public Trustee to proceed with the *Rule* 5.13 applications, and reserved the question of costs to follow completion of those applications. The Band argues that it was forced to prepare written materials in response. However, the Public Trustee then abandoned a *Rule* 5.13 application. The Band

also observes *Rule* 5.13(2) creates a mandatory obligation on the Public Trustee to pay for records produced via that procedure:

> 5.13(2) The person requesting the record must pay the person producing the record an amount determined by the Court.

19 The Band takes the position that my earlier order which directed that the Public Trustee not be responsible to pay the costs of other parties to the proceedings does not apply to the Band. That is because the Band is not a party to this litigation: *Sawridge #3* at para 27. The Band therefore argues that as a non-party it is not captured in my previous instruction.

20 Beyond that, the Band argues as a general principle of law that this Court retains the jurisdiction to award costs against any party. It cites *Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.)* (2004), 46 R.F.L. (5th) 330 (Ont. C.J.) at paras 53-54, (2004), 128 A.C.W.S. (3d) 888 (Ont. C.J.) for the proposition that a party should never be "immunized from costs", since litigant accountability is necessary to avoid wasteful, ill-focused court processes. An award of costs is the lever to control that potential abuse.

21 The Band argues as the successful party the Band presumptively should receive a costs award (*Rule* 10.29(1)) and that the Court should apply the foundational *Rules* 1.1-1.2 to encourage efficient litigation through costs. An award against the Public Trustee is warranted given the 2015 adjournment was inevitable, premature as the Public Trustee had alternative sources for the information it sought, and the Public Trustee took meritless steps including the abandoned *Rule* 5.13 application. In this case the Band says that enhanced costs are warranted.

22 The Public Trustee responds that Alberta Court of Appeal in *Sawridge #2* at para 30 confirmed my conclusion that the Public Trustee should be immune from any liability for a costs award. The Band has been a *de facto* participant in this matter, no matter that its legal status is as a litigation third party. Ordering costs against the Public Trustee would subvert the basis for the Public Trustee's participation in this proceeding. The Public Trustee has always acted in good faith and adhered to the mandates set by the Court in *Sawridge #1* and then in *Sawridge #3* .

23 First, I reject the Band's argument that the SFN falls outside the scope of the order I issued which prohibited the Public Trustee from paying costs of "the other parties in the within proceeding", or the Court of Appeal's subsequent confirmation of that direction. The Band, while not a party, is far from a non-participant in this litigation. Further, this strict interpretation of the order that I issued defeats the objective of the framework in which the Public Trustee was invited and agreed to participate in this matter.

24 That said, I agree with the Band that I retain jurisdiction to make a costs award against the Public Trustee, both on the basis of the principle in *Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.)*, due to this Court having the ongoing jurisdiction to vary its orders, and also through the Court's inherent jurisdiction to control its own processes and potential abuse of that: I H Jacob, "The Inherent Jurisdiction of the Court", (1970) 23 Current Legal Problems 23, most recently endorsed by the Supreme Court of Canada in *Endean v. British Columbia*, 2016 SCC 42 (S.C.C.) at para 23, [2016] 2 S.C.R. 162 (S.C.C.).

25 Although *Rule* 10.29(1) creates a presumption that the successful party will receive a payment of costs, courts have an exceptionally broad authority to make cost orders as they see fit: *Rules* 10.31, 10.33. Similarly, the very important role that costs awards serve to encourage efficient, timely, and responsive litigation, and create negative consequences for those who misuse the courts and abuse other court participants is well established.

26 I am going to approach the question of the Public Trustee's activities in a global sense, instead of parsing through individual applications and steps. That is consistent with the general purpose served by cost awards. As noted in *Sawridge #3* at paras 32-36, the Public Trustee's activities needed to be "re-focused". I now conclude that objective has been met. While I might otherwise have ordered costs of some kind, this litigation is ultimately intended to benefit the persons who will receive shares of the Trust. This is not so much an adversarial process than one where various organizations

are moving to a common goal: to protect the rights of the Trust beneficiaries, and ensure an equitable result is obtained. This is not an instance where a third-party interloper is interfering with a smooth running process, but instead involves a Court-sanctioned participant conducting its statutory function, though that process did require a degree of court management. I therefore decline to order costs against the Public Trustee.

27 As for whether the *Rule* 5.13(2)'s requirement that "[t]he person requesting the record must pay . . . an amount determined by the Court" that is not a basis to order costs. This provision has not been the subject of judicial commentary. The *Rule* uses the words "an amount" to describe the payment that "must" be paid, rather than "costs". I conclude that the intention of *Rule* 5.13 is that where a third party (here the Band) is obliged by court order to produce documents or other materials, then that third party should experience minimal financial consequences from cooperating with the Court and litigants in the production of relevant evidence.

28 Normally, I would consider instructing payment of "an amount" under *Rule* 5.13 except for the fact that I have been informed that the Trust is indemnifying the Band for its activities in relation to this proceeding. This means one way or another the Trust will end up 'on the hook' for these litigation activities. Accordingly, I find there is no point in me ordering payment of "an amount" because of the Public Trustee's *Rule* 5.13 activities.

IV. Conclusion

29 The Public Trustee has now received direction from me in relation to this litigation. The Band's application for costs without indemnification from the Public Trustee is denied.

30 I pause to add one further observation. I have taken a 'costs neutral' approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers), on a punitive or indemnity basis. True outsiders to the Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.

Order accordingly.

End of Document

Tab 6

Most Negative Treatment: Reversed
Most Recent Reversed: Twinn v. Twinn | 2017 ABCA 419 | (Alta. C.A., Dec 12, 2017)

2017 ABQB 377
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

2017 CarswellAlta 1193, 2017 ABQB 377, [2017] A.W.L.D. 3870, 281 A.C.W.S. (3d) 276

In the Matter of the Trustee Act, R.S.A. 2000, C. T-8, as amended

In the Matter of the Sawridge Band, Inter Vivos Settlement, created byChief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust" or "Trust"), Patrick Twinn, on his behalf, and on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley, and Shelby Twinn, and Deborah A. Serafinchon (Applicants) and Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees") (Respondents / Original Applicants) and Public Trustee of Alberta ("OPTG") (Respondent) andCatherine Twinn (Respondent)

D.R.G. Thomas J.

Judgment: July 5, 2017
Docket: Edmonton 1103-14112

Counsel: N.L. Golding, Q.C., for Applicants, Patrick Twinn et al.
D.C. Bonora, A. Lopraco, Q.C., for 1985 Sawridge Trustees
J.L. Hutchison, for OPTG
C.K.A. Platten, Q.C., C. Osualdini, for Catherine Twinn

Subject: Civil Practice and Procedure; Estates and Trusts; Public
Related Abridgment Classifications
Civil practice and procedure
III Parties
III.6 Adding or substituting parties
III.6.h Miscellaneous
Headnote
Civil practice and procedure --- Parties — Adding or substituting parties — Miscellaneous
Action was commenced in 2011 — Applicants brought application to be added as full parties in action, for payment of all present and future legal costs, and accounting to existing beneficiaries — Application dismissed — Applicants had not proven that their addition to this proceeding as full parties would not cause prejudice to trustees and trust — Proceeding had gone on for long time — Addition of more participants would make already complex piece of litigation more complicated — Further, it was possible that applicants would not be able to pay costs if they were unsuccessful.
Table of Authorities
Cases considered by *D.R.G. Thomas J.*:
Babchuk v. Kutz (2007), 2007 ABQB 88, 2007 CarswellAlta 162, 73 Alta. L.R. (4th) 232, 32 E.T.R. (3d) 223, 411 A.R. 181, 31 E.T.R. (3d) 235 (Alta. Q.B.) — considered
Babchuk v. Kutz (2009), 2009 ABCA 144, 2009 CarswellAlta 512, 47 E.T.R. (3d) 51, 457 W.A.C. 44, 457 A.R. 44 (Alta. C.A.) — referred to

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

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

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — considered

Manson Insulation Products Ltd. v. Crossroads C & I Distributors (2011), 2011 ABQB 51, 2011 CarswellAlta 108 (Alta. Q.B.) — considered

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

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

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

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

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

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

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

Statutes considered:

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 1.2 — considered

R. 3.74 — considered

R. 3.74(2)(b) — considered

R. 3.75 — considered

R. 3.75(3) — considered

R. 10.29(1) — referred to

R. 10.33 — referred to

APPLICATION by applicants to be added as full parties in action, for payment of all present and future legal costs, and accounting to existing beneficiaries.

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

I Introduction

1 This is a case management decision on an application filed on August 17, 2016 (the "Application") by Patrick Twinn, Shelby Twinn and Deborah A. Serafinchon ("Applicants") to be added as full parties in Action No. 1103 14112 (the "Action"), for payment of all present and future legal costs and an accounting to existing Beneficiaries. The application by Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn and his wife, Melissa Megley, appears to have been abandoned and, in order to keep the record clear, is dismissed. The balance of the Application by the Applicants is also dismissed, although the claims for an accounting from the Trustees by Patrick and Shelby Twinn are dismissed on a without prejudice basis.

II Background

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

3 The history of the Advice and Direction Application is set out in previous decisions (including the Orders taken out in relation thereto) reported as *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365, 543 A.R. 90 (Alta. Q.B.) ("*Sawridge #1*"), aff'd 2013 ABCA 226 (Alta. C.A.), (2012), 543 A.R. 90 (Alta. Q.B.) ("*Sawridge #2*"), *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2015 ABQB 799 (Alta. Q.B.) ("*Sawridge #3*"), time extension denied [*Stoney v. Twinn*] 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.), *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2017 ABQB 299 (Alta. Q.B.) ("*Sawridge #4*") (collectively the "*Sawridge Decisions*"). Some of the terms used in this decision ("*Sawridge #5*") are also defined in the previous *Sawridge Decisions*.

4 I had directed that this Application be dealt with through the filing of written briefs, subject to requests for clarification through correspondence between the Court and counsel. These letters have been added to the court file in this Action in a packet described as "*Sawridge #5 Correspondence*" and are listed in Schedule 'A' Part II to this decision.

III The Applicants

5 Some factual background in relation to the three remaining Applicants is set out below and has been derived from the Affidavits forming part of the materials filed by the participants as described in Schedule 'A' Part I to this decision.

A Patrick Twinn

6 Patrick Twinn was born on October 22, 1985. His father, Walter Patrick Twinn was the Chief of the Sawridge First Nation ("SFN") from 1966 to his death on October 30, 1997 ("Chief Walter Twinn").

7 His mother is Sawridge Trustee, Catherine Twinn, who is also a member of the SFN.

8 Patrick is also a member of the SFN and acknowledges that he is currently and will remain a Beneficiary of the 1985 Sawridge Trust even if the Trustees are successful in their application to vary the definition of 'beneficiary'.

9 Patrick Twinn also acknowledges that his beneficial interest in the 1985 Sawridge Trust may either be diluted or enhanced if the Trustees vary the definition of 'beneficiary' under the Trust.

B Shelby Twinn

10 Shelby Twinn was born on January 3, 1992 and resided on the SFN Reserve for the first 5 years of her life. She is a granddaughter of Chief Walter Twinn and the daughter of Paul Twinn, a son of Chief Walter Twinn. Paul Twinn is recognized as an Indian by the Government of Canada under the *Indian Act* and is a member of the SFN. The mother of Shelby Twinn was married to Paul Twinn at the time of Shelby's birth.

11 Shelby Twinn is registered as an Indian under the *Indian Act*. She is not listed as a member of the SFN and claims that she may lose her entitlement as a Beneficiary if the application of the Trustees to vary the definition of 'beneficiary'

under the 1985 Sawridge Trust succeeds. Shelby Twinn acknowledges that she is currently a Beneficiary under the 1985 Sawridge Trust.

C Deborah Serafinchon

12 Deborah Serafinchon claims to be the daughter of Chief Walter Twinn and Lillian McDermott, the latter being recognized as an Indian under the *Indian Act*.

13 Deborah Serafinchon states that she was born an illegitimate child, was placed in foster care at birth and was raised in that system. Deborah Serafinchon asserts that Patrick Twinn is her brother and co-applicant.

14 Deborah Serafinchon notes that if the current definition of 'beneficiary' under the 1985 Sawridge Trust is varied to exclude discriminatory language, such as "illegitimate", "male" and "female", she will then be included as a 'beneficiary' under the 1985 Sawridge Trust. She expresses concern about any proposed definition which would have the effect of excluding her as a 'beneficiary' being accepted by the Court.

IV Positions of the Parties

15 The materials filed on this Application and reviewed by me are extensive. They are described in Schedule 'A'. The written briefs forming part of this array of materials contain the arguments of the various participants.

16 The initial position of the Public Trustee of Alberta ("OPTG") on the Application is set out in a short letter, dated October 31, 2016, as supplemented by clarification letters of June 23 and 30, 2017 and are all included in the "Sawridge #5 Correspondence" packet.

17 The Application is also supported by Sawridge Trustee Catherine Twinn, who is the mother of the Applicant, Patrick Twinn. She disassociates herself from the opposition to the Application by the other Trustees.

18 The Sawridge Trustees (except Catherine Twinn) oppose the Application in its entirety.

V Issues

19 The issues to be decided on this Application are:

a Whether some or all of the Applicants should be made a Party to this Action?

b Whether the Applicants should be awarded advance costs and indemnification for future legal fees from the 1985 Sawridge Trust?

20 While claims for an accounting by the Trustees have been made by some of the Applicants, no submissions were made on this remedy.

VI Disposition of the Application

21 I confirm that the claims by Patrick Twinn on behalf of his infant daughter, Aspen Saya Twinn, and his wife, Melisa Megley, have been abandoned and, for clarity of record purposes, are dismissed.

22 I also dismiss the claims of the remaining Applicants for the reasons which follow.

A Applicability of Rules 3.74 and 3.75 of the Alberta Rules of Court, Alta Reg 124/2010

23 *Alberta Rules of Court*, Alta Reg 124/2010 (the "*Rules*" or individually a "*Rule*") *Rules* 3.74 and 3.75 provide for the procedure for the addition of parties to an action commenced by a statement of claim or originating notice, respectively.

24 The Trustees characterize the Applicants as "third parties" and argue that they cannot be added as parties, because they are not persons named in the original litigation. They rely on the decision of Poelman, J in *Manson Insulation Products Ltd. v. Crossroads C & I Distributors*, 2011 ABQB 51 (Alta. Q.B.) at para 48, 2011 CarswellAlta 108 (Alta. Q.B.) ("*Manson Insulation*").

25 *Manson Insulation* involves an action commenced by statement of claim. This Action was commenced by an originating notice, a procedure under which all participants are not known at the outset and it is also less clear as to when the 'pleadings' close. I do not accept that the Applicants are barred by application of *Rule* 3.74(2)(b) because they may be "third parties".

26 However, *Rules* 1.2 and 3.75(3) do have application to the circumstances here. I must be satisfied that an order should be made to add the Applicants as parties and I must also be satisfied that the addition of these Applicants as parties will not cause prejudice to the primary Respondents, the Trustees.

27 The Advice and Direction Application has been underway for almost six years. There have been a number of complex applications resulting in a variety of decisions (See the *Sawridge Decisions*). The Trustees assert that some of the Applicants have chosen not to abide by deadlines imposed by this Court. In turn the Applicants take issue with the effectiveness of the early notifications in respect to the Advice and Direction Application. All of that said it is clear that this proceeding has gone on for a long time. I agree with the Trustees that the addition of more participants will make an already complex piece of litigation more complicated, not only in terms of potential new issues, but also in terms of more difficult logistics in coordinating additional counsel and individual parties and prolonging the procedural steps in this litigation, for example, even more questioning. All of that will in turn result in increased costs likely to be borne one way or another by the 1985 Sawridge Trust and the assets held by the Trust for its beneficiaries whom, I have already noted, include at a minimum two of the Applicants, namely Patrick and Shelby Twinn.

28 In my decisions to date I have attempted to narrow and define the issues in this litigation. To allow additional parties at this stage will expand the lawsuit rather than create a more focussed set of issues for determination by a trial judge who will ultimately be tasked with determining this litigation.

29 Further, I am not satisfied that the Applicants can pay the costs if they are unsuccessful and are not awarded an indemnity against paying the Trustees and, therefore, the costs of the Trust. In other words, if this attempted entry into this Action is unsuccessful, then the Trust and its beneficiaries are left again to pay the bill.

30 In conclusion, the Applicants have not satisfied me that their addition to this proceeding as full parties will not cause prejudice to the Trustees and the 1985 Sawridge Trust. Delay in bringing this litigation to a conclusion and expanding its scope are not, in my view, capable of being remedied by costs awards.

B Is it necessary to add Patrick and Shelby Twinn as Parties?

31 The Trustees take the position that the interests of Patrick and Shelby Twinn are already represented in the Advice and Direction Application and that their addition would be redundant.

32 In respect to Patrick Twinn, I agree that it is unnecessary to add him as a party. Patrick Twinn takes the position that he is currently, and will remain a Beneficiary of the 1985 Sawridge Trust. The Trustees confirm this and I accept that is correct and declare him to be a current Beneficiary of the Trust.

33 Patrick Twinn understands and accepts that his beneficial interest under the 1985 Sawridge Trust may either be diluted or enhanced if the Trustees vary the definition of 'beneficiary' under the 1985 Sawridge Trust. There is no circumstance that I can foresee where his status as a Beneficiary will be eliminated and there is no need to add him as a party to this Action. In fact, adding him to the litigation will only result in the Trust's resources being further reduced, to the detriment of all current and future beneficiaries.

34 Further, counsel for the OPTG in her letters of June 23 and June 30, 2017 has confirmed that the Public Trustee continues to represent minors who have become adults during the course of this litigation. As a result, both Patrick and Shelby Twinn will have their interests looked after by the OPTG in any event.

35 Shelby Twinn is in a similar situation. She acknowledges that she is currently a Beneficiary under the 1985 Sawridge Trust. The Trustee states at para 24 of its Brief, filed October 31, 2016, that:

> Shelby and her sister, Kaitlyn Twinn, are both **current beneficiaries** of the 1985 Trust.
>
> (Emphasis added.)

36 I accept the Trustees' confirmation and declare Shelby Twinn to be a current Beneficiary of the Trust.

37 As with Patrick Twinn, I cannot foresee a circumstance where the status of Shelby Twinn as a Beneficiary under the 1985 Sawridge Trust will be eliminated. Her participation through her own lawyer offers no benefit other than to dissipate the Trust's property through the payout of another set of legal fees.

38 For these reasons, there is no need to add Shelby Twinn as a party to this Action.

39 A further reason of more general application for not adding Patrick and Shelby Twinn as parties to this Action is that to do so would have the effect of making this lawsuit a more adversarial process. Since both of these Applicants are already recognized as Beneficiaries by the Trustees and now by the Court, I observe that their ongoing involvement in the litigation would be better served by transparent and civil communications with the Trustees and their legal counsel and through a positive dialogue with the Trustees to ensure that their status as Beneficiaries is respected.

C Should Deborah Sarafinchon be added as a Party?

40 On the evidence presented to me, Debora Sarafinchon is not currently a Beneficiary under the 1985 Sawridge Trust. She accepts that she is not an Indian under the *Indian Act* and is not a member of the SFN. She has not applied for membership in the SFN and apparently has no intention of making such an application.

41 As I have said in my earlier decisions in *Sawridge #3*, it is not appropriate for this Court to get involved in disputes over membership in the SFN. Apart from the jurisdictional issues which might arise if I was tempted to address membership issues, it would be contrary to my position that this litigation should be narrowed rather than unnecessarily expanded.

42 I will give Ms. Sarafinchon the benefit of the doubt and will not characterize her application to be added as a party as being a collateral attack on SFN membership issues. However, I am concerned about the Court being drawn into that sort of contest in this long-running litigation.

43 There is nothing stopping Ms. Sarafinchon from monitoring the progress of this litigation and reviewing the proposals which the Trustees may make in respect to the definition of 'beneficiary' under the 1985 Sawridge Trust and providing comments to the Trustees and the Court. I also repeat my concern about increasing the adversarial nature of this Advice and Direction Application.

44 For all these reasons, I decline the request by Ms. Sarafinchon to be added as a party to this Action.

VII Is the consent of beneficiaries required to vary the 1985 Sawridge Trust such that they ought to be entitled to party status?

45 It is not necessary for me to address this issue in deciding this Application and I decline to do so.

VIII Should the Applicants be entitled to advance costs?

46 In light of my decision to refuse to add all of these Applicants as parties to this Action, it is not necessary for me to decide the issue of awarding them advance costs.

IX Costs

47 As is apparent from my analysis, I have concluded that Patrick and Shelby Twinn, who are attempting to participate in this process, offer nothing and instead propose to fritter away the Trust's resources to no benefit. In coming to this conclusion I observe that Patrick and Shelby Twinn were not interested in paying for their own litigation costs. They instead sought to offload that on the Trust, which would then have to pay for their representation in this litigation. I would not have permitted that, even if I had concluded these were appropriate litigation participants, which they are not.

48 There is a parallel here with estate disputes where an unsuccessful litigation participant seeks to have an estate pay his or her legal costs. In that type of litigation a cost award of that kind means someone inside the group of intended beneficiaries loses, usually the residual beneficiary. Moen J in *Babchuk v. Kutz*, 2007 ABQB 88, 411 A.R. 181 (Alta. Q.B.), affirmed *en toto* 2009 ABCA 144, 457 A.R. 44 (Alta. C.A.), conducted a detailed review of the principles that guide when an estate should indemnify an unsuccessful litigant. That investigation investigates the role and need for the unsuccessful litigant's participation, for example by asking who caused the litigation, whether the unsuccessful litigant's participation was reasonable, and how the parties as a whole conducted themselves.

49 Here I have concluded that Patrick and Shelby Twinn had no basis to participate, and, worse, that their proposed participation would only end up harming the pool of beneficiaries as a whole. Their appearance is late in the proceeding, and they have not promised to take steps to ameliorate the cost impact of their proposed participation, other than to shift it to the Trust.

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

51 This is the new reality of litigation in Canada. The purpose of cost awards is notorious; they serve to help shape improved litigation practices by creating consequences for bad litigation practices, and to offset the litigation expenses of successful parties. By default successful litigation parties are due costs for that reason: *Rule* 10.29(1). The Court nevertheless retains a broad jurisdiction to vary costs depending on the circumstances (*Rule* 10.33), and naturally should make cost awards to encourage the *Rules* overall objectives and purposes (*Rule* 1.2).

52 Elevated cost awards are appropriate in a wide variety of circumstances so as to achieve those objectives, as is reviewed in *Brown v. Silvera*, 2010 ABQB 224 (Alta. Q.B.) at paras 29-35, (2010), 488 A.R. 22 (Alta. Q.B.), affirmed 2011 ABCA 109, 505 A.R. 196 (Alta. C.A.).

53 I conclude one aspect of Canada's litigation "culture shift" is that cost awards should be used to deter dissipation of trust property by meritless litigation activities by trust beneficiaries. I therefore order that Patrick and Shelby Twinn shall pay solicitor and own client indemnity costs of the Trustees in responding to this Application.

54 In respect to Deborah Serafinchon, she was outside the Trust relationship and though I have rejected her application she has not litigated as an 'insider' who has done nothing but attempt to diminish resources of the Trust. I therefore

award costs against Deborah Serafinchon in favour of the Trustees on a party/party basis. If there is any dispute over the resolution of the amount of costs in both cases, I retain jurisdiction to resolve that problem should it arise.

55 In closing, I confirm the OPTG representation of minors who have become adults will be subject to the existing indemnity and costs exemption orders. This direction shall be included in the formal order documenting this judgment.

Schedule 'A'

Part I - Materials filed by the participants in the Application by Patrick Twinn et al.

FILING DATE	*DESCRIPTION*
August 17, 2016	Application by Patrick Twinn et al. to be added as parties to Action 1103 14112 - Borden Ladner Gervais ("BLG").
August 17, 2016	Affidavit of Patrick Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Shelby Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Deborah Sarafinchon, sworn July 26, 2016.
September 30, 2016	Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - BLG.
September 30, 2016	Extracts of Evidence of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - BLG.
September 30, 2016	Book of Authorities of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - BLG.
October 21, 2016	Transcript of Questioning on Affidavit of Patrick Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Shelby Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Deborah Serafinchon.
October 31, 2016	Response Brief of the Trustees for the 1985 Sawridge Trust in Response to the Brief of the Applicants Patrick Twinn, Shelby Twinn, and Deborah Serafinchon - Dentons.
October 31, 2016	Letter from Hutchison Law to Denise Sutton re Application by Patrick Twinn et al. - Hutchison Law.
November 1, 2016	Brief of Catherine.
November 1, 2016	Affidavit of Paul Bujold sworn October 31, 2016 - Dentons.
November 10, 2016	Letter from Dentons to counsel (cc'd to Thomas J) re Undertaking Responses of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - Dentons.
November 10, 2016	Undertakings of Patrick Twinn.
November 10, 2016	Undertakings of Shelby Twinn.
November 10, 2016	Undertakings of Deborah Serafinchon.
November 14, 2016	Letter from Dentons to Thomas J re typo in response to the Brief of Patrick Twinn.
December 2, 2016	Affidavit of Deborah Serafinchon sworn November 24, 2016.
December 2, 2016	Letter from Dentons to Thomas J re response to unfiled Affidavit of Deborah Serafinchon.
December 5, 2016	Reply Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - BLG.
December 5, 2016	Extract of Evidence related to Reply Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - BLG.
December 9, 2016	Letter from Dentons to Thomas J re filed Undertakings of Paul Bujold from the Questioning on Affidavit on November 29, 2016.
December 9, 2016	Undertakings of Paul Bujold - Dentons.
December 12, 2016	Transcript on Questioning of Paul Bujold of November 29, 2016 - Dentons.

Part II - List of Correspondence

DATE	*FROM*	*TO*
June 09, 2017	Justice D.R.G. Thomas	Ms. Nancy L. Golding
June 16, 2017	Ms. Nancy L. Golding, QC	Justice D.R.G. Thomas
June 19, 2017	Ms. Nancy L. Golding, QC	Justice D.R.G. Thomas
June 20, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas

June 22, 2017	Justice D.R.G. Thomas	Ms. Nancy L. Golding, QC and Ms. Janet Hutchison
June 22, 2017	Justice D.R.G. Thomas	Ms. Janet Hutchison
June 23, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas
June 27, 2017	Ms. Doris C.E. Bonora	Justice D.R.G. Thomas
June 28, 2017	Ms. Karen A. Platten, QC	Justice D.R.G. Thomas
June 29, 2017	Justice D.R.G. Thomas	Ms. Janet Hutchison
June 30, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas

Included in a filed packet described as "Sawridge #5 Correspondence".

End of Document

Tab 7

2017 ABCA 419
Alberta Court of Appeal

Twinn v. Twinn

2017 CarswellAlta 2650, 2017 ABCA 419

Patrick Twinn, on his behalf, Shelby Twinn and Deborah A. Serafinchon (Appellants / Applicants) and Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees") (Respondents / Respondents) and Public Trustee of Alberta ("OPTG") (Respondent / Respondent) and Catherine Twinn (Respondent / Respondent) and Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley (Not Parties to the Appeal / Respondents)

Marina Paperny J.A., Barbara Lea Veldhuis J.A., Sheilah Martin J.A.

Heard: November 1, 2017
Judgment: December 12, 2017
Docket: Edmonton Appeal 1703-0193-AC

Proceedings: Reversed, 2017 CarswellAlta 1193, 2017 ABQB 377, [2017] A.W.L.D. 3870, 281 A.C.W.S. (3d) 276 (Alta. Q.B.)

Counsel: N.L. Golding, Q.C., for Appellants
D.C. Bonora, A. Loparco, for Respondents, Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Trust
J.L. Hutchison, for Respondent, The Office of the Public Guardian and Trustee
D.D. Risling, for Respondent, Catherine Twinn

Subject: Civil Practice and Procedure
Headnote
Civil practice and procedure
Table of Authorities
Cases considered:

Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co. (1993), 10 Alta. L.R. (3d) 325, 140 A.R. 244, 18 C.P.C. (3d) 275, 1993 CarswellAlta 32 (Alta. Q.B.) — referred to

Amon v. Raphael Tuck & Sons Ltd. (1955), [1956] 1 Q.B. 357, [1956] 1 All E.R. 273, [1956] R.P.C. 29, 2 W.L.R. 372 (Eng. Q.B.) — referred to

Ashraf v. SNC Lavalin ATP Inc. (2017), 2017 ABCA 95, 2017 CarswellAlta 462 (Alta. C.A.) — referred to

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

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

Bröeker v. Bennett Jones Law Firm (2010), 2010 ABCA 67, 2010 CarswellAlta 1498, 29 Alta. L.R. (5th) 167, 487 A.R. 111, 495 W.A.C. 111 (Alta. C.A.) — referred to

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — considered

Lameman v. Alberta (2013), 2013 ABCA 148, 2013 CarswellAlta 458, 282 C.R.R. (2d) 279, 85 Alta. L.R. (5th) 64, 553 A.R. 44, 583 W.A.C. 44 (Alta. C.A.) — referred to
Luft v. Taylor, Zinkhofer & Conway (2017), 2017 ABCA 228, 2017 CarswellAlta 1183, 53 Alta. L.R. (6th) 44, [2017] 10 W.W.R. 39 (Alta. C.A.) — referred to
Penner v. Niagara Regional Police Services Board (2013), 2013 SCC 19, 2013 CarswellOnt 3743, 2013 CarswellOnt 3744, 32 C.P.C. (7th) 223, 49 Admin. L.R. (5th) 1, 356 D.L.R. (4th) 595, 442 N.R. 140, 304 O.A.C. 106, [2013] 2 S.C.R. 125, (sub nom. *Penner v. Niagara (Police Services Board)*) 118 O.R. (3d) 800 (note) (S.C.C.) — followed
Sawridge Band v. Poitras (2012), 2012 FCA 47, 2012 CarswellNat 351, 2012 CAF 47, 2012 CarswellNat 831, (sub nom. *Twinn v. Poitras*) 428 N.R. 282 (F.C.A.) — referred to
Sawridge Band v. R. (2009), 2009 FCA 123, 2009 CarswellNat 944, (sub nom. *Sawridge Indian Band v. Canada*) 391 N.R. 375, 2009 CAF 123, 2009 CarswellNat 4764 (F.C.A.) — referred to
Sawridge Band v. R. (2009), 2009 CarswellNat 4215, 2009 CarswellNat 4216, (sub nom. *Sawridge Band v. Canada*) 403 N.R. 393 (note) (S.C.C.) — referred to
Stagg v. Condominium Plan 882-2999 (2013), 2013 ABQB 684, 2013 CarswellAlta 2393, (sub nom. *Stagg v. Owners-Condominium Plan No. 882-2999*) 574 A.R. 363, 3 Alta. L.R. (6th) 219 (Alta. Q.B.) — referred to
Stoney v. Sawridge First Nation (2013), 2013 FC 509, 2013 CarswellNat 1434, 2013 CF 509, 2013 CarswellNat 2006, 432 F.T.R. 253 (Eng.) (F.C.) — referred to
Sturgeon Lake Indian Band v. Alberta (2015), 2015 ABCA 253, 2015 CarswellAlta 1385, 391 D.L.R. (4th) 61, [2016] 1 W.W.R. 213, 27 Alta. L.R. (6th) 115, (sub nom. *Goodswimmer v. Canada*) 606 A.R. 291, (sub nom. *Goodswimmer v. Canada*) 652 W.A.C. 291 (Alta. C.A.) — referred to
1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2012), 2012 ABQB 365, 2012 CarswellAlta 1042, 75 Alta. L.R. (5th) 188, (sub nom. *Twinn v. Public Trustee (Alta.)*) 543 A.R. 90, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee)*) [2013] 3 C.N.L.R. 395 (Alta. Q.B.) — referred to
1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2017), 2017 ABQB 299, 2017 CarswellAlta 745 (Alta. Q.B.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to
Indian Act, R.S.C. 1970, c. I-6
Generally — referred to
Indian Act, R.S.C. 1985, c. I-5
s. 2(1) "Indian" — referred to

s. 2(1) "band" — referred to
Indian Act, Act to amend the, S.C. 1985, c. 27
Generally — referred to
Trustee Act, R.S.A. 2000, c. T-8
s. 42 — considered

Rules considered:

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

R. 3.75 — considered

Appeal from the Order by The Honourable Mr. Justice D.R.G. Thomas Dated the 5th day of July, 2017 Filed on the 19th day of July, 2017 (2017 ABQB 377, Docket: 1103 14112)

Per curiam:

Introduction

1 This appeal is part of ongoing litigation involving the 1985 Sawridge Trust (the Trust), which was established by the Sawridge Indian Band No. 19 (the Band, now known as the Sawridge First Nation, or SFN) to hold certain assets belonging to the Band. Disputes regarding membership in the SFN have a history going back decades, but the current Trust litigation deals specifically with potential amendments to the Trust. The Trust litigation has been case managed since 2011, and several procedural orders have been made including the one on appeal: *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 377 (Alta. Q.B.) (Sawridge #5). The specific procedural issues on this appeal are straightforward: did the case management judge err in declining to add three potential parties to the Trust litigation, and did he err in awarding solicitor and his own client costs against those potential parties?

Background to the Sawridge Trust Litigation

2 In 1982, various assets purchased with Band funds were placed in a formal trust for Band members. On April 15, 1985, then Chief Walter Patrick Twinn established the 1985 Sawridge Trust, into which those assets were transferred. The Trust was established in anticipation of proposed amendments to the *Indian Act*, RSC 1970, c I-6, intended to make the *Indian Act* compliant with the *Canadian Charter of Rights and Freedoms* by addressing gender discrimination in provisions governing band membership. It was expected that the legislative amendments (later known as Bill C-31) would result in an increase in the number of individuals included on the Band membership list. Specifically, it was expected that persons, mainly women and their descendants, who had been excluded from Band membership under earlier membership rules, would become members of the Band under the new amendments. Since 1985, and continuing to the present day, there has been extensive litigation regarding who is entitled to be a member of the SFN: see, eg., *Sawridge Band v. R.*, 2009 FCA 123, 391 N.R. 375 (F.C.A.), leave denied [2009] S.C.C.A. No. 248 (S.C.C.); *Sawridge Band v. Poitras*, 2012 FCA 47, 428 N.R. 282 (F.C.A.); *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.).

3 The 1985 Sawridge Trust restricts the Beneficiaries of the Trust to those persons who qualified as members of the Band under the provisions of the *Indian Act* in existence as of April 15, 1982, that is before the legislative amendments of Bill C-31. The Trust is currently administered by five Trustees, at least four of whom are also Beneficiaries. In 2011, the Trustees sought advice and direction from the court with respect to possible amendments to the Trust, and specifically to the definition of Beneficiaries, which the Trustees recognize as potentially discriminatory. It is not clear how the Trust might be amended to address any discrimination, although there is a suggestion that Beneficiaries could be defined as present members of the SFN. As of April 2012, the SFN had 41 adult and 31 minor members. Most, but not all, of those members qualify as Beneficiaries of the Trust under the existing definition. If the Trust is amended, some individuals may cease to be Beneficiaries, and others, not currently Beneficiaries, may come within the amended definition.

4 On August 31, 2011, the case management judge issued a procedural order intended to provide notice of the application for advice and direction to potentially affected persons. The current parties to the litigation include four of the Trustees, Roland Twinn, Walter Felix Twinn, Berta L'Hirondelle and Clara Midbo. A fifth Trustee, Catherine Twinn, is a separately named and separately represented party. Ms. Twinn, who was married to the late Chief Walter Patrick Twinn, is a dissenting trustee; although her position is not entirely clear, she seems to take the position that the Trust does not necessarily have to be amended. In 2012, the Public Trustee was added as a party to act as litigation representative for affected minors and those who were minors at the commencement of the proceeding but who have since become adults: 2012 ABQB 365 (Alta. Q.B.) (Sawridge #1).

The application to be added as parties (Sawridge #5)

5 The application that gives rise to this appeal was filed by three individuals who wish to be added as party respondents to the Trust litigation. Each of the three is differently situated. Patrick Twinn is the son of Catherine Twinn. He is a member of the SFN and a beneficiary of the Trust. Shelby Twinn is Patrick Twinn's niece (she is the daughter of Paul Twinn, who is Patrick Twinn's half-brother). Roland Twinn, one of the trustees, is also Shelby's uncle. Catherine Twinn is her great-aunt. Shelby is a beneficiary of the Trust but not a member of the SFN. The third applicant, Deborah

Serafinchon, is neither a member of the SFN nor a current beneficiary of the Trust. She says that her father is the late Walter Twinn. She is not currently a status Indian under the *Indian Act*.

6 The appellants submit that their interests are directly affected by the Trust litigation and that they should be added as parties to that litigation. Shelby Twinn, in particular, wishes to argue that she may cease to be a beneficiary under the Trust if it is amended. Both she and Patrick Twinn wish to argue that the Trust cannot and ought not be amended. The position to be taken by Ms. Serafinchon is currently unclear.

7 The first procedural order, as amended on November 8, 2011, provided that any person interested in participating in the advice and direction application was to file an affidavit no later than December 7, 2011. Two of the three applicants were served with that order. There was no suggestion any of the applicants was unaware of the application and the time lines.

8 The case management judge denied the applications to be added as parties. He held that the addition of more parties would add to the complexity of the litigation, increase the costs to the Trust and the assets held in it, and expand the issues beyond those identified during case management.

9 With respect to the applications of Shelby and Patrick Twinn, the case management judge held that their participation in the advice and direction application would be redundant as their interests are already represented. He noted that both Shelby and Patrick are currently Beneficiaries under the Trust and opined that this status would not be eliminated by the outcome of the Trust litigation, a conclusion that is challenged by the appellants. He further held that the ongoing involvement of current Beneficiaries would be better served by transparent communications with the Trustees and their legal representatives, in order to ensure that their status as Beneficiaries is respected.

10 With respect to the application of Deborah Sarafinchon, the case management judge noted that she has not applied for membership in the SFN and apparently has no intention to do so. He also noted that the Trust litigation is not intended to address membership issues, and that the purpose of case management has been to narrow the issues in the litigation rather than expand them. He held that Ms. Sarafinchon can monitor the progress of the Trust litigation, review proposals made by the Trustees as to the definition of Beneficiaries under the Trust, and provide comments to the Trustees and the court.

11 The case management judge then went on to consider costs. He concluded that Patrick and Shelby Twinn "offer nothing and instead propose to fritter away the Trust's resources to no benefit". He concluded that they had no basis to participate in the Trust litigation, and that their proposed litigation would end up harming the pool of beneficiaries as a whole. They appeared late in the proceeding, and they did not promise to take steps to ameliorate the cost impact of their proposed participation, instead proposing to have the Trust pay for that participation. Based on the Supreme Court's decision in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para 2, [2014] 1 S.C.R. 87 (S.C.C.), he noted a "culture shift" toward more efficient litigation procedure and concluded that one aspect of that culture shift is to use costs awards to deter dissipation of trust property by meritless litigation activities. He therefore ordered Patrick and Shelby Twinn to pay solicitor and own client indemnity costs of the Trustees in respect of the application. He awarded party and party costs against Deborah Serafinchon in favour of the Trustees.

12 All three applicants appeal the denial of their applications to be added as parties to the Trust litigation. Patrick and Shelby Twinn also appeal the award of solicitor and own client costs made against them.

Standard of review

13 Case management decisions are entitled to considerable deference on appeal. Absent a legal error, this Court will not interfere with a case management judge's exercise of discretion unless the result is unreasonable. This is particularly the case where a decision is made by a case management judge as part of a series of decisions in an ongoing matter: *Ashraf v. SNC Lavalin ATP Inc.*, 2017 ABCA 95 (Alta. C.A.) at para 3, [2017] A.J. No. 276 (Alta. C.A.); *Sturgeon Lake*

Indian Band v. Alberta, 2015 ABCA 253 (Alta. C.A.) at para 8, (2015), 606 A.R. 291 (Alta. C.A.); *Lameman v. Alberta*, 2013 ABCA 148 (Alta. C.A.) at para 13, (2013), 553 A.R. 44 (Alta. C.A.).

14 Cost awards are also discretionary, and are entitled to deference on appeal. The standard of review for discretionary decisions of a lower court was succinctly stated by the Supreme Court in *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 (S.C.C.) at para 27, [2013] 2 S.C.R. 125 (S.C.C.):

> A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations [*citations omitted*].

15 This Court has noted that when reviewing discretionary decisions, appellate intervention is required where a) a case management judge failed to give sufficient weight to relevant considerations; b) a case management judge proceeded arbitrarily, on wrong principles or on an erroneous view of the facts; or c) there is likely to be a failure of justice if the impugned decision is upheld: *Bröeker v. Bennett Jones Law Firm*, 2010 ABCA 67 (Alta. C.A.) at para 13, (2010), 487 A.R. 111 (Alta. C.A.).

Did the case management judge err in declining to add the appellants as parties to the Sawridge Trust litigation?

16 The Alberta *Rules of Court* provide a discretionary procedure for the addition of parties to litigation. Rule 3.75 applies to litigation commenced by way of originating application. It requires that the court be satisfied that the order adding a respondent *should* be made, and that the addition of the party will not result in prejudice that cannot be remedied through costs, an adjournment, or the imposition of terms.

17 Two main questions have been identified when considering whether a party should be added to litigation under the Rules: (1) Does the proposed party have a legal interest (not only a commercial interest) that will be directly affected by the order sought? (2) Can the question raised be effectually and completely resolved without the addition of the party as a party? (*Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.* (1993), 10 Alta. L.R. (3d) 325 (Alta. Q.B.) at paras 23-25). In a narrow sense, the only reason that it is necessary to make a person a party to an action is to ensure they are bound by the result: see *Amoco* at paras 13-15, citing *Amon v. Raphael Tuck & Sons Ltd.* (1955), [1956] 1 Q.B. 357 (Eng. Q.B.) at 380. That the person may have relevant evidence or arguments does not make it necessary that they be added as a party. In the appropriate circumstances, such a person may be added as an intervenor, or may be a necessary witness.

18 In this case, it is unclear what interest the individual appellants have that is not represented by the parties already before the court, or what position they would bring to the litigation, necessary to permit the issues to be completely and effectually resolved, that will not be presented by those existing parties. As a matter of law, the Trustees represent the interests of the Beneficiaries, who include Patrick and Shelby Twinn. Catherine Twinn, as dissenting trustee, is separately represented, has taken an opposing view as to the need for amendment of the Trust, and will place that position before the court. The Public Trustee is tasked with representing the interests of all Beneficiaries who were minors when the litigation began, although it is acknowledged that the Public Trustee does not represent the interests of Patrick and Shelby Twinn (notwithstanding a comment made by the case management judge to the contrary).

19 Neither the record, nor the oral or written submissions of the appellants, puts forward the positions each of the proposed parties intends to advance. As such, it is impossible for us to conclude that each proposed party has an interest that is not yet represented. Given the absence of information about the actual views of the appellants, we have no foundation to conclude otherwise. It is to be presumed that the Trustees and Public Trustee will put forward the various arguments regarding proposed amendments to the Trust and how those proposed amendments could affect the interests of various categories of current and potential beneficiaries. That there is a separately represented dissenting Trustee before the court adds to the likelihood that all views will be canvassed and all interests protected.

20 The case management judge has been involved in the Trust litigation for several years, and deference is owed to his assessment of which parties need to be before the court in order for the questions raised in the litigation to be effectively

resolved. His cautious approach to increasing the cost burden on the Trust and its beneficiaries, and unnecessarily expanding the Trust litigation, is well founded. Adding all the beneficiaries and potential beneficiaries as full parties to the Trust litigation is neither advisable nor necessary. We would not interfere with the case management judge's decision not to grant party status to the appellants.

21 The appellants and Catherine Twinn also argue that the process followed here is flawed, as no originating application was filed to commence the Trust litigation. The Trustees say that it was always intended that the Procedural Order made by the case management judge on August 31, 2011 would be the constating document for the application for advice and direction. We agree with the Trustees that the lack of an originating application is not fatal to the litigation. However, the lack of an originating application, setting out specifics of the relief being sought, has resulted in a lack of clarity regarding if and how the Trust will be varied, whose interests will be affected by the variation, and how those interests might be affected. The Procedural Order provides details of how the litigation will proceed, including notice provisions and timelines, but it does not address the nature of the relief being sought.

22 During the oral hearing, this issue and a number of others arose that have not yet been the subject of an application to, or direction from the case management judge. One such issue is whether there is a need for a formal pleading setting forth the position of the Trustees and the relief being sought; specifically, whether the Trust is discriminatory; and if so, what remedy is being sought. A second issue is what procedure will be implemented for beneficiaries and/or potential beneficiaries to participate in the Trust litigation either individually or as representatives of a particular category of beneficiary. In addition, concern was raised to whether discrete legal issues could be determined prior to the merits of the Trust litigation being heard. These include whether the Trust is discriminatory, and whether s 42 of the *Trustee Act* applies. To date, we understand no formal application has been made to the case management judge on any of these matters. We strongly recommend that they be dealt with forthwith.

Did the case management judge err in awarding solicitor and own client costs?

23 The case management judge awarded solicitor and own client costs against two of the appellants, Patrick and Shelby Twinn, in favour of the Trustees. His rationale for doing so was "to deter dissipation of trust property by meritless litigation activities by trust beneficiaries": see para 53.

24 Solicitor and own client costs allow for a complete indemnification of legal fees and other costs for the successful party. This can include payment for "frills and extras" authorized by the client, but which should not fairly be passed on to a third party. They are distinct from solicitor-client costs, which allow for recovery of reasonable fees and disbursements, for all steps reasonably necessary within the four corners of the litigation: *Brown v. Silvera*, 2010 ABQB 224 (Alta. Q.B.) at para 8, (2010), 25 Alta. L.R. (5th) 70 (Alta. Q.B.); *Luft v. Taylor, Zinkhofer & Conway*, 2017 ABCA 228 (Alta. C.A.) at para 77, (2017), 53 Alta. L.R. (6th) 44 (Alta. C.A.).

25 Awards of solicitor-client costs are reserved for exceptional circumstances constituting blameworthy conduct of litigation; cases where a party's litigation conduct has been described as reprehensible, egregious, scandalous or outrageous: see *Stagg v. Condominium Plan 882-2999*, 2013 ABQB 684 (Alta. Q.B.) at para 25; *Brown v. Silvera* at paras 29-35; aff'd 2011 ABCA 109 (Alta. C.A.). The increased costs award is intended to deter others from like misconduct. This court has reiterated recently that awards of solicitor and client costs are rare and exceptional; awards of solicitor and "own client" costs are virtually unheard of except where provided by contract: see *Luft* at para 78.

26 In an earlier case management decision in the Trust litigation, the case management judge issued an *obiter* warning to all parties, including counsel for Patrick Twinn, who seems to have been in attendance, of the possibility of awards for increased costs, saying:

> I have taken a "costs neutral" approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution

> process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers) on a punitive or indemnity basis. True outsiders to the Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.
>
> *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299 (Sawridge #4) at para 30.

27 The case management judge's concerns in this regard may provide the basis for an award of solicitor-client costs in appropriate circumstances, but they do not eliminate the requirement to assess the appropriateness of such an award on a case by case basis. The judgment under appeal here does not set out what exceptional circumstances existed to justify an award of solicitor and own client costs against these appellants on this application, nor is it apparent from the reasons, or from the record, what litigation misconduct on the part of these appellants led to the making of this costs award. Moreover, an award for increased or punitive costs ought not be made in the absence of notice of the possibility of such an order and an opportunity for parties to make submissions as to whether the order is warranted. Although the case management judge raised the prospect of punitive cost awards in Sawridge #4, there was no specific notice or specific submissions on the issue in this application and no party to the proceedings sought those costs. On that basis alone the costs award should be set aside.

28 In the circumstances, we conclude that there was not a sufficient basis for the award of extraordinary costs against the appellants on this application, and the appeal from the costs award is allowed. The case management judge awarded party and party costs against Deborah Serafinchon in favour of the Trustees, and we make the same award against Patrick and Shelby Twinn.

End of Document

Tab 8

2017 ABQB 436
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

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

In the Matter of the Trustee Act, RSA 2000, c T-8, as amended

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

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

D.R.G. Thomas J.

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

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

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

Related Abridgment Classifications

Aboriginal law
X Practice and procedure
X.3 Parties
X.3.c Intervenors
Aboriginal law
X Practice and procedure
X.7 Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.f Costs on solicitor and own client basis

Headnote

Aboriginal law --- Practice and procedure — Parties — Intervenors

Chief of First Nation (FN) created particular trust in 1985 — Beneficiaries of trust were defined directly or indirectly by membership in FN — In 2011, trust commenced action against Public Trustee for advice and directions — Aboriginal man S was child of parents who had been members of FN but who had given up their family's Indian status and membership in FN in 1944 — S unsuccessfully applied to become member of FN, and rejection of his application was upheld on judicial review — S brought application on his own behalf and on behalf of 10 siblings for order adding them as beneficiaries of trust — FN brought cross-application for leave to intervene — Cross-application granted —

FN's intervention was appropriate since S was making collateral attack on FN's decision-making on core subject of membership — FN was particularly prejudiced by potential implications of S's application — Indeed, it was hard to imagine more fundamental impact than where court considers litigation that potentially finds in law that individual who is currently outsider is, instead, part of established community group that holds title and property, and exercises rights, in sui generis and communal basis.

Aboriginal law --- Practice and procedure — Miscellaneous

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

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and own client basis

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

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

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

Table of Authorities

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

British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal) (2011), 2011 SCC 52, 2011 CarswellBC 2702, 2011 CarswellBC 2703, 25 Admin. L.R. (5th) 173, 337 D.L.R. (4th) 413, [2011] 12 W.W.R. 1, 23 B.C.L.R. (5th) 1, 421 N.R. 338, 95 C.C.E.L. (3d) 169, (sub nom. *B.C. (W.C.B.) v. Figiola)* 2012 C.L.L.C. 230-001, (sub nom. *British Columbia (Workers' Compensation Board) v. Figliola)* [2011] 3 S.C.R. 422, 311

B.C.A.C. 1, 529 W.A.C. 1, (sub nom. *British Columbia (Workers' Compensation Board) v. Figliola*) 73 C.H.R.R. D/1 (S.C.C.) — considered

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Statutes considered:

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

brief of September 28, 2016, Maurice Stoney asks that his legal costs and those of his siblings be paid for by the 1985 Sawridge Trust.

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

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

II. Background

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

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

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

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

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

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

8 As is apparent from the style of cause in this Application, the manner in which the Applicants have been framed is unusual. They are named as "Maurice Felix Stoney and His Brothers and Sisters". The Application further states that

the Applicants are "Maurice Stoney and his 10 living brothers and sisters" (para 1). Para 2 of the Application states the issue to be determined is:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Maurice Stoney

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

21 The complicating factor is that Maurice Stoney is not a member of the Sawridge Band. He argues that his parents, William and Margaret Stoney, were members of the Sawridge Band, and provides documentation to that effect. In 1944 William Stoney and his family were "enfranchised", per *Indian Act*, RSC 1927, c 98, s 114. This is a step where an Indian may accept a payment and in the process lose their Indian status. The "enfranchisement" option was subsequently removed by Federal legislation, specifically an enactment commonly known as "Bill C-31".

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

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

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

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

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

B. Sawridge Band

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

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

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

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

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

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

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

C. 1985 Sawridge Trustees

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

VI. Analysis

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

> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out;
>
> (b) that a commencement document or pleading be amended or set aside;
>
> (c) that judgment or an order be entered;
>
> (d) that an action, an application or a proceeding be stayed.
>
> (2) The conditions for the order are one or more of the following:
>
> . . .
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;

(c) a commencement document or pleading is frivolous, irrelevant or improper;

(d) a commencement document or pleading constitutes an abuse of process;

...

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

(4) The Court may

(a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;

...

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

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

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

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

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

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

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

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

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

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

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

> It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.
>
> [Emphasis added.]

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

> It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel ...

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

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

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

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

> 1. He is estopped from making this argument via his concession in *Huzar v. Canada* that this argument has no legal basis.
>
> 2. He made this same argument in *Stoney v. Sawridge First Nation*, where it was rejected. Since Mr. Stoney did not choose to challenge that decision on appeal, that finding of fact and law has 'crystallized'.
>
> 3. In *Sawridge #3* at para 35 I concluded the question of Band membership should be reviewed in the Federal Court, and not in the Advice and Direction Application.
>
> 3. In any case I accept and adopt the reasoning of *Stoney v. Sawridge First Nation* as correct, though I am not obliged to do so.

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

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

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

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

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

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

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

VII. Vexatious Litigant Status

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

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

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

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

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

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

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

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

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

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

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

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

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

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

64 The Sawridge Band and the Trustees may make submissions on Maurice Stoney's potential vexatious litigant status, and introduce additional evidence that is relevant to this question, see*Chutskoff Estate v. Bonora* at paras 87-90

and *Ewanchuk v. Canada (Attorney General)* at paras 100-102. Any submissions by the Sawridge Band and the Trustees are due *by close of business on July 28, 2017.*

65 In addition, I follow the process mandated in *Hok v. Alberta*, 2016 ABQB 335 (Alta. Q.B.) at para 105, and order that Maurice Stoney's court filing activities are immediately restricted. I declare that Maurice Stoney is prohibited from filing any material on any Alberta court file, or to institute or further any court proceedings, without the permission of the Chief Justice, Associate Chief Justice, or Chief Judge of the court in which the proceeding is conducted, or his or her designate. This order does not apply to:

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

2. any appeal from this decision.

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

VIII. Costs

67 I have indicated Maurice Stoney's application had no merit, and was instead abusive in a manner that exhibits the hallmark characteristics of vexatious litigation. The Sawridge Band and Trustees seek solicitor and own client indemnity costs against Maurice Stoney. Those are amply warranted. In *Sawridge #5*, I awarded solicitor and own client indemnity costs against two of the applicants since their litigation conduct met the criteria identified by Moen J in *Brown v. Silvera*, 2010 ABQB 224 (Alta. Q.B.) at paras 29-35, (2010), 488 A.R. 22 (Alta. Q.B.), affirmed 2011 ABCA 109, 505 A.R. 196 (Alta. C.A.), for the Court to exercise its *Rule* 10.33 jurisdiction to award costs beyond the presumptive *Rule* 10.29(1) party and party amounts indicated in Schedule C. The same principles apply here.

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

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

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

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

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

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

72 I pause at this point to note that *Jodoin* focuses on *criminal* litigation, where the Courts have traditionally been cautious to order costs against defence counsel "in light of the special role played by defence lawyers and the rights of accused persons they represent": para 1.

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

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

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

1. "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer", or

2. "dishonest or malicious misconduct on his or her part, that is deliberate".

[*Jodoin*, para 29]

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

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

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

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

1. the nature of interests in question;

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

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

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

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

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

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

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

Cross-application granted; application dismissed.

End of Document

Tab 9

2017 ABCA 418
Alberta Court of Appeal

1985 Sawridge Trust v. Alberta (Public Trustee)

2017 CarswellAlta 2594, 2017 ABCA 418, [2018] A.W.L.D. 14, 286 A.C.W.S. (3d) 240

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 the Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust")

Maurice Felix Stoney and His Brothers and Sisters (Respondent / Appellant) 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 The Sawridge Band (Respondent / Respondent) and Priscilla Kennedy, Counsel for Maurice Felix Stoney and His Brothers and Sisters (Applicant / Proposed Appellant or Intervenor)

Jack Watson J.A.

Heard: November 29, 2017
Judgment: December 8, 2017
Docket: Edmonton Appeal 1703-0195-AC

Counsel: Maurice Felix Stoney, Respondent, for himself
D.C. Bonora, for Respondents, Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle, and Clara Midbo (Sawridge Trustees)
E.H. Molstad, Q.C., for Respondent, Sawridge Band
P.J. Faulds, Q.C., K. Precht, for Applicant

Subject: Civil Practice and Procedure; Public
Related Abridgment Classifications
Civil practice and procedure
III Parties
III.8 Intervenors
III.8.b As party
Headnote
Civil practice and procedure --- Parties — Intervenors — As party
In previous proceeding (Decision 7) costs personally against lawyer had been ordered — Lawyer brought motion for participation privileges on her own behalf in appeal by her client S from Decision 6 — Decision 6 was motion by S and his "10 living brothers and sisters" to be added as "parties or intervenors" in Trust Action, and for costs, with aim of each being recognized as eligible beneficiary of trust — Motion was dismissed with solicitor and own client costs — In Decision 7, judge found lawyer had engaged in serious misconduct and she should be held jointly and severally liable together with S for those costs — Lawyer's position was that it was necessary for her to participate fully ability to challenge underpinnings of Decision 6 essential to her ability to challenge Decision 7 — Motion dismissed — Court not persuaded that lawyer had any personal interest in how appeal on Decision 6 proceeds or results — Lawyer would have to show real prospect that she would face effective abuse of process bar to any submission she might make in challenging basis of her liability for costs in Decision 7 if unable to challenge basis of liability of S in Decision 6 — There is no issue estoppel or abuse of process arising within dispute on point of law.

Table of Authorities

Cases considered by *Jack Watson J.A.*:

Alberta (Attorney General) v. Malin (2016), 2016 ABCA 396, 2016 CarswellAlta 2365, 46 Alta. L.R. (6th) 11, 406 D.L.R. (4th) 368, 344 C.C.C. (3d) 420, [2017] 4 W.W.R. 233, 15 Admin. L.R. (6th) 78 (Alta. C.A.) — considered

Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (2012), 2012 SCC 37, 2012 CarswellNat 2419, 2012 CarswellNat 2420, 102 C.P.R. (4th) 255, 347 D.L.R. (4th) 287, 38 Admin. L.R. (5th) 214, 432 N.R. 134, (sub nom. *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*) [2012] 2 S.C.R. 345 (S.C.C.) — referred to

B. (M.) v. C. (S.) (2008), 2008 ABCA 298, 2008 CarswellAlta 1172, 42 E.T.R. (3d) 1, 448 A.R. 263, 447 W.A.C. 263 (Alta. C.A.) — considered

Banuelos v. TD Bank Financial Group (2010), 2010 FCA 94, 2010 CarswellNat 854, 2010 CAF 94, 2010 CarswellNat 2358, (sub nom. *Banuelos v. Cassels Brock & Blackwell LLP*) 402 N.R. 71 (F.C.A.) — considered

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — referred to

Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City) (2017), 2017 ABCA 280, 2017 CarswellAlta 1571 (Alta. C.A.) — considered

Elton Estate v. Elton (2009), 2009 NLCA 34, 2009 CarswellNfld 146, 72 C.P.C. (6th) 33, 287 Nfld. & P.E.I.R. 46, 885 A.P.R. 46, 50 E.T.R. (3d) 1 (N.L. C.A.) — referred to

Hayes v. Mayhood (1958), 24 W.W.R. 332, 1958 CarswellAlta 11 (Alta. C.A.) — referred to

Hayes v. Mayhood (1959), 7 A.D.2d 568, [1959] S.C.R. 568, 18 D.L.R. (2d) 497, 1959 CarswellAlta 85 (S.C.C.) — referred to

Orphan Well Assn. v. Grant Thornton Ltd. (2016), 2016 ABCA 238, 2016 CarswellAlta 1466, 89 C.P.C. (7th) 14, 39 C.B.R. (6th) 1, 40 Alta. L.R. (6th) 11 (Alta. C.A.) — considered

Piikani Nation v. Kostic (2017), 2017 ABCA 259, 2017 CarswellAlta 1404 (Alta. C.A.) — considered

R. v. Mahalingan (2008), 2008 SCC 63, 2008 CarswellOnt 6664, 2008 CarswellOnt 6665, 381 N.R. 199, 61 C.R. (6th) 207, 237 C.C.C. (3d) 417, 300 D.L.R. (4th) 1, 243 O.A.C. 252, [2008] 3 S.C.R. 316 (S.C.C.) — considered

R. v. Punko (2012), 2012 SCC 39, 2012 CarswellBC 2078, 2012 CarswellBC 2079, 284 C.C.C. (3d) 285, 348 D.L.R. (4th) 418, 94 C.R. (6th) 285, 433 N.R. 60, 324 B.C.A.C. 23, 551 W.A.C. 23, [2012] 2 S.C.R. 396 (S.C.C.) — considered

R. v. Shepherd (2009), 2009 SCC 35, 2009 CarswellSask 430, 2009 CarswellSask 431, 66 C.R. (6th) 149, [2009] 8 W.W.R. 193, 245 C.C.C. (3d) 137, 81 M.V.R. (5th) 111, 309 D.L.R. (4th) 139, 391 N.R. 132, 331 Sask. R. 306, 460 W.A.C. 306, [2009] 2 S.C.R. 527, 194 C.R.R. (2d) 86 (S.C.C.) — referred to

Reference re Election Act (British Columbia) (2012), 2012 BCCA 301, 2012 CarswellBC 2001, 324 B.C.A.C. 189, 551 W.A.C. 189 (B.C. C.A. [In Chambers]) — referred to

Saskatchewan Power Corp. v. Alberta (Utilities Commission) (2014), 2014 ABCA 318, 2014 CarswellAlta 1712, 584 A.R. 107, 623 W.A.C. 107 (Alta. C.A.) — referred to

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

Toronto (City) v. C.U.P.E., Local 79 (2003), 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, [2003] 3 S.C.R. 77, 9 Admin. L.R. (4th) 161, 31 C.C.E.L. (3d) 216 (S.C.C.) — considered

Wemyss v. Hopkins (1875), L.R. 10 Q.B. 378 (Eng. Q.B.) — referred to

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

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

1985 Sawridge Trust v. Alberta (Public Trustee) (2017), 2017 ABQB 436, 2017 CarswellAlta 1236 (Alta. Q.B.) — referred to
1985 Sawridge Trust v. Alberta (Public Trustee) (2017), 2017 ABQB 530, 2017 CarswellAlta 1569 (Alta. Q.B.) — referred to
1985 Sawridge Trust v. Alberta (Public Trustee) (2017), 2017 ABQB 548, 2017 CarswellAlta 1639 (Alta. Q.B.) — referred to
1985 Sawridge Trust v. Kennedy (2017), 2017 ABCA 368, 2017 CarswellAlta 2303 (Alta. C.A.) — considered
321665 Alberta Ltd. v. Mobil Oil Canada Ltd. (2013), 2013 ABCA 221, 2013 CarswellAlta 992, 82 Alta. L.R. (5th) 124, [2013] 10 W.W.R. 758, (sub nom. *321665 Alberta Ltd. v. Exxon Mobil Canada Ltd.*) 553 A.R. 293, (sub nom. *321665 Alberta Ltd. v. ExxonMobil Canada Ltd.*) 583 W.A.C. 293, 2 C.C.L.T. (4th) 188 (Alta. C.A.) — referred to
321665 Alberta Ltd. v. Mobil Oil Canada Ltd. (2014), 2014 CarswellAlta 62, 2014 CarswellAlta 63, 470 N.R. 394 (note), 593 A.R. 400 (note), 637 W.A.C. 400 (note) (S.C.C.) — referred to

Rules considered:

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

R. 14.1(1)(k) "party" — considered

R. 14.37(2)(e) — referred to

R. 14.37(2)(f) — considered

R. 14.55(1) — referred to

R. 14.57 — considered

R. 14.58 — considered

R. 14.67(1) — considered

R. 14.67(2) — considered

R. 14.71 — referred to

R. 14.88(1) — referred to

MOTION by lawyer for participation privileges on her own behalf in appeal by her client.

Jack Watson J.A.:

I Introduction

1 The surrounding circumstances of the specific motion that I am presently dealing with in these reasons are rather out of the ordinary. This present motion was originally one of a group of motions by different parties related to what has been described as Decision No 6 (2017 ABQB 436 (Alta. Q.B.)), Decision No 7 (2017 ABQB 530 (Alta. Q.B.)) and Decision No 8 (2017 ABQB 548 (Alta. Q.B.)) by Thomas J, a case management judge of the Court of Queen's Bench on proceedings in that Court. Each of Decisions No 6, No 7 and No 8 were supported by detailed written reasons by the judge. Each of them is the platform for one of three proceedings in this Court under three different Court file numbers.

2 The motions before me specifically arose out of Decisions No 6 and No 7, but Decision No 8 was also in the background. In these reasons, I will refer to the parties to the various appeals and motions by their names rather than venture linguistically to sort them out as appellants or respondents or applicants and so forth.

3 As things developed when all the motions came on before me, I decided that some of the motions then booked before me should be deferred to a panel of this Court which was scheduled on December 14, 2017 to deal with another motion related to Decision No 8.

4 Two of the motions originally before me were applications for security for costs made by each of the Sawridge First Nation (formerly referred to as a Band; "Sawridge") and the Sawridge Trustees ("the Trustees") on the appeal to this Court by Maurice Stoney ("Mr Stoney") from Decision No 6. I had jurisdiction as a single judge to deal with those motions: Rule 14.67(1) of the *Alberta Rules of Court*. Nonetheless, for practical reasons and in light of the possible finality of any such orders — which the parties also debated as having potential implications for the appeal from Decision No 7 — I decided to defer those motions to the panel on December 14, 2017, pursuant to Rule 14.37(2)(f) of the *Rules of Court*.

5 Another motion before me was by Mr Stoney's former lawyer, Priscilla Kennedy, the appellant on decision No 7 ("Ms Kennedy"). Her underlying appeal on Decision No 7 was from an order made against her personally regarding costs in the Court of Queen's Bench proceedings which spawned all three decisions (and others). The principal motion of Ms Kennedy before me was for participation privileges on her own behalf in the appeal by Mr Stoney from Decision No 6.

6 An ancillary motion of Ms Kennedy was for an order which would 'consolidate' the hearing of all three appeals on Decisions No 6, No 7 and No 8 as a single appeal proceeding. This motion to 'consolidate' -- or at least organize -- the hearings of all three appeals was premature. That was so because the motion on December 14, 2017 related to the appeal on Decision No 8 and was to have that appeal quashed.

7 Likewise, if the motions for security for costs on the appeal from Decision No 6 were successful, and if, furthermore, Mr Stoney could not post any security that might be required by such orders, that set of circumstances could lead to a practical extinction of Mr Stoney's appeal from Decision No 6 under Rule 14.67(2) of the *Rules of Court*.

8 In other words, there could conceivably be nothing to 'consolidate' if the appellate ground was reduced to a discussion of Ms Kennedy's appeal from Decision No 7. Accordingly, I also deferred that motion for 'consolidation' to be heard by the panel on December 14, 2017 under Rule 14.37(2)(f) of the *Rules of Court*.

9 The present motion therefore remaining before me was Ms Kennedy's application for participation status on the appeal by Mr Stoney from Decision No 6. Her motion in this respect was originally for intervenor status. The written submissions filed before me largely focused on that proposed mode of entry, *viz* intervention. However, at the hearing, counsel for Ms Kennedy moved away from an intervention mode of participation to a motion for status as a full party in that appeal, essentially as a form of appellant in her own right. Ms Kennedy, as discussed below, submitted her own rationale and she asserted that she had a personal interest in participating in the appeal from Decision No 6 either way.

10 Incidental side effects of permitting her participation in the appeal from Decision No 6 were apparent. First, such participation could conceivably mean that the appeal from Decision No 6 could persevere even if Mr Stoney failed to post security for costs (if so ordered) so as to continue it for himself. Second, in addition to Ms Kennedy contending — discussed below — that she anticipated arguing in a manner beneficial to the position of Mr Stoney on the appeal from Decision No 6, she risked liability for costs on that appeal. If so, and if their positions were covalent if not indeed overlapping, her potential liability for costs might make a security for costs order against Mr Stoney and for Sawridge and the Trustees somewhat close to superfluous.

11 Having reflected on that remaining motion and with the benefit of full argument of counsel on it, I am persuaded that I should dispose of it and not pass the baton to the panel on December 14, 2017. Before turning to the merits of Ms Kennedy's application for party status in the appeal on Decision No 6, it is useful to encapsulate what all the appeals are about.

II Circumstances

12 The decisions of Thomas J emerged out of an elongated history of events. The origins of the proceedings before Thomas J relate to an application launched on June 2, 2011, by the Trustees for the 1985 Sawridge Trust for directions on distribution of the trust property to eligible beneficiaries being members of the Sawridge First Nation. Mr Stoney, then represented by Ms Kennedy, sought — putatively with others of his family — to be recognized as eligible Band members and beneficiaries. I call this the "Trust Action" hereafter for brevity.

13 Without addressing all the intricacies of the Trust Action, it is pertinent to note that the matter has been before this Court at least twice. In *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2013 ABCA 226, 553 A.R. 324 (Alta. C.A.), this Court affirmed a decision of Thomas J to permit the Public Trustee of Alberta to have a role in those proceedings. This Court also dealt with ancillary issues. In *Stoney v. Twinn*, 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.), I dealt with a motion by Mr Stoney, represented by Ms Kennedy, for an extension of time to appeal to this Court from a decision of Thomas J at 2015 ABQB 799 (Alta. Q.B.). For the reasons I provided there, I dismissed that application. In those reasons I observed that, from what I was told, Mr Stoney had not yet made a formal motion to Thomas J to participate in those proceedings on the basis that he was an eligible member of the Band eligible to share in allocation of the Trust proceeds.

14 Decision No 6 of Thomas J was released as *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 436 (Alta. Q.B.). It dealt with a motion by Mr Stoney and his "10 living brothers and sisters" to be added as "parties or intervenors" in the Trust Action, and for costs, evidently with the ultimate aim of each being recognized as an eligible beneficiary of the trust. Thomas J dismissed the putative expansion of the motion to the "10 living brothers and sisters", and dismissed Mr Stoney's motion. He also awarded "solicitor and own client indemnity costs against Maurice Stoney". Crucial to the motion before me are the following statements from that decision.

15 Thomas J firstly concluded on the motion to participate:

> 51 While I am not bound by the Federal Court judgments under the doctrine of *stare decisis*, I am constrained by *res judicata* and the prohibition against collateral attacks on valid court and tribunal decisions. Maurice Stoney's application to be a member of the Sawridge Band was rejected, and his court challenges to that result are over. He did not pursue all available appeals. He cannot now attempt to slip into the Sawridge Band and 1985 Sawridge Trust beneficiaries pool 'through the backdoor'.
>
> 52 I dismiss the Stoney Application to be named either as a party to this litigation, or to participate as an intervenor. Maurice Stoney has no interest in the subject of this litigation, and is nothing more than a third-party interloper. In light of this conclusion, it is unnecessary to address the Sawridge Band's application that Maurice Stoney pay security for costs.

16 Later in decision No 7 at para 4, he added that he "made no findings [in No 6] in relation to Maurice Stoney's '10 living brothers and sisters' because I had no evidence they were actually voluntary participants in the application." The next passage of importance to the motion before me from decision No 6 is as follows:

> 53 Maurice Stoney's conduct in relation to the Advice and Direction Application has been inappropriate. He arguably had a basis to be an interested party in 2011, because when the Trustees initiated the distribution process he had a live application to join the Sawridge Band. Therefore, at that time he had the potential to become a beneficiary. However, by 2013, that avenue for standing was closed when Justice Barnes issued the *Stoney v Sawridge First Nation* decision and Maurice Stoney did not appeal.
>
> 54 Maurice Stoney nevertheless persisted, appearing before the Alberta Court of Appeal in *1985 Sawridge Trust (Trustee for) v Alberta (Public Trustee)*, 2016 ABCA 51, 616 AR 176, where Justice Watson concluded Mr. Stoney should not receive an extension of time to challenge *Sawridge #3* because he had no chance of success as he did not have standing and was " . . . in fact, a stranger to the proceedings insofar as an appeal from the decision of Mr. Justice Thomas to the Court of Appeal is concerned.": paras 20-21. Now Maurice Stoney has attempted to

add himself (and his siblings) to this action as parties or intervenors, in a manner that defies *res judicata* and in an attempt to subvert the decision-making of the Sawridge Band and the Federal Court of Canada.

17 The quotation from my reasons in 2016 ABCA 51 (Alta. C.A.) is accurate. The passage in question was restricted to the points then in issue before me at that time. As I then wrote, Mr Stoney was in actuality a stranger to the Trust Action at that stage. Thomas J in his judgment being impugned at that stage, namely at 2015 ABQB 799 (Alta. Q.B.), had not, as I wrote, made a ruling as to whether Mr Stoney should have standing as a participant in the Trust Action. I went on to add, at para 21, that on an appeal by an actual party to that ruling from that 2015 decision:

> " . . . no one is going to say anything about him, particularly when the appeal is heard. If incidentally the result of the appeal is that somehow his status or ability to apply as a beneficiary is improved, so be it. The mere existence of that judgment and of a potential decision of the Court of Appeal in relation to the judgment of Mr. Justice Thomas does not, it seems to me, create a condition that would give rise to a right of appeal on behalf of Mr. Stoney in this respect."

18 In my ruling, I went on to add, at para 22, that there was "not, at this point in time, an arguable point by Mr. Stoney as against Justice Thomas' judgment, bearing in mind what the judgment is and what it says." Thomas J thereafter was, plainly, not operating under any belief that I had, in 2016 ABCA 51 (Alta. C.A.), shut the door on Mr Stoney. Rather, as his reasoning in Decision No 6 makes clear, he undertook to address the question of whether Mr Stoney should be able to participate in the Trust Action himself.

19 The outcome of that consideration was not favourable to Mr Stoney for reasons adumbrated by Thomas J. Thomas J then made directions in No 6 for a hearing on whether Mr Stoney should be found to be a vexatious litigant in light of 'serious litigation misconduct' on his part, and also directing that he be liable for costs, saying:

> 67 I have indicated Maurice Stoney's application had no merit, and was instead abusive in a manner that exhibits the hallmark characteristics of vexatious litigation. The Sawridge Band and Trustees seek solicitor and own client indemnity costs against Maurice Stoney. Those are amply warranted. In *Sawridge #5*, I awarded solicitor and own client indemnity costs against two of the applicants since their litigation conduct met the criteria identified by Moen J in *Brown v Silvera*, 2010 ABQB 224 at paras 29-35, 488 AR 22, affirmed 2011 ABCA 109, 505 AR 196, for the Court to exercise its Rule 10.33 jurisdiction to award costs beyond the presumptive Rule 10.29(1) party and party amounts indicated in Schedule C. The same principles apply here.
>
> 68 The costs award to the Sawridge Band is appropriate given its valid intervention and the important implications of Maurice Stoney's attempted litigation, as discussed above.

20 Thomas J went on in No 6 to add specifically in relation to Ms Kennedy as follows:

> 76 The lawyer who is potentially personally subject to a costs sanction must receive notice of that, along with the relevant facts: para 36. This normally would occur after the end of litigation, once " . . . the proceeding has been resolved on its merits.": para 36.
>
> 77 I conclude this is one such occasion where a costs award against a lawyer is potentially warranted. Maurice Stoney's attempted participation in the Advice and Direction Application has ended, so now is the point where this issue may be addressed. I consider the impending vexatious litigant analysis a separate matter, though also exercised under the Court's inherent jurisdiction. I do not think this is an appropriate point at which to make any comment on whether Ms. Kennedy should or should not be involved in that separate vexatious litigant analysis, given her litigation representative activities to this point.
>
> 78 I have concluded that Maurice Stoney's lawyer, Priscilla Kennedy, has advanced a futile application on behalf of her client. I have identified the abusive and vexatious nature of that application above. This step is potentially a "serious abuse of the judicial system" given:

1. the nature of interests in question;

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

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

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

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

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

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

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

21 Counsel for Ms Kennedy interprets these observations by Thomas J as inexorably linked to comments later made by Thomas J in decision No 7 about Ms Kennedy. As discussed below, counsel argues that they were not merely linked, but were foundationally operative in Decision No 7 as the substratum of the exposure of Ms Kennedy to costs in the Trust Action. In this respect, I did not hear counsel for Ms Kennedy to contend in this respect that Thomas J already had his mind made up in Decision No 6 to hold Ms Kennedy jointly accountable for those costs based on fact findings already made in decision No 6 such that fact findings Thomas J made in Decision No 7 were redundant or window dressing. There was no suggestion of apprehension of bias made to me.

22 The point of counsel for Ms Kennedy was, in effect, that whether or not a factual Rubicon was finally crossed on the characterization of the various steps in the Trust Action and actions related to it by Mr Stoney was concerned, a head of steam was built up such that Ms Kennedy would be unable to fully argue her position on appeal from decision No 7 without, in a sense, collaterally attacking a substantial part of Decision No 6. At the hearing before me, I noted that decision No 8 came *after* Decision No 7 and the findings made as to the characterization of the conduct of Mr Stoney were more conclusive there.

23 Indeed, as per the reasons given in relation to decision No 8, some rulings contained in Decision No 6 were, in a sense, over-written. Decision No 8 of Thomas J was released as *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 548 (Alta. Q.B.). At para 112, he wrote "[t]he interim order made per *Sawridge #6* at para 65-66 is vacated." Paragraphs 65 and 66 of No 6 specified terms of proceeding by Mr Stoney in response to the interim direction of Thomas J for Mr Stoney to respond to his direction of a vexatious litigant hearing.

24 Returning to the key ruling under appeal by Ms Kennedy, namely Decision No 7, Thomas J found that Ms. Kennedy had engaged in serious misconduct and he concluded that she should be held jointly and severally liable together with Mr. Stoney for the costs awarded in Decision No 6. Decision No 7 was released as *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 (Alta. Q.B.).

25 In so deciding that Ms Kennedy should be held liable for the costs on the Trust Action to the extent that he did, Thomas J considered the position of then counsel for Ms Kennedy, Mr Wilson, who said that Ms Kennedy "litigates with her heart".

26 In addition to that, Mr Wilson made certain statements that raised, at the hearing before me, the question whether or not Ms Kennedy was making admissions or concessions relevant to the costs question. I mention this now only to point out that am definitely not offering any opinion about whether those statements by Mr Wilson have any juridical effect. By the same token, I am not suggesting that Thomas J erred in considering what Ms Kennedy's counsel had to say. Analysis of the reasoning of Thomas J in Decision No 7 is not for me to state here.

27 There was a reason that the question came up before me as to whether the comments of Mr Wilson should be taken as admissions or concessions for the purposes of the motion before me. According to counsel for the Trustees, those statements would arguably be an Achilles' Heel to the present submission on behalf of Ms Kennedy that if she could not have participation rights in the appeal as to Decision No 6, her position as to Decision No 7 would be impaired. Counsel for the Trustees suggested that any impairment of her ability to argue her appeal from Decision No 7 arising from any findings or conclusion in Decision No 6 would have to be considered diminished by those statements. Their content would, if taken as concessions or admissions, reduce any reason to allow Ms Kennedy to participate in the appeal from Decision No 6 to the vanishing point, or at least counsel for the Trustees suggested this. As indicated below, I do not think I need to grapple with this interesting contention.

28 At any rate, it is appropriate here to quote significant paragraphs of Decision No 7 for present purposes. Those passages start with these comments:

> 36 In *Sawridge #6* at para 78 I indicated five elements that contributed to what I concluded was potentially "serious abuse":
>
> 1. the nature of interests in question;
>
> 2. this litigation was by a third party attempting to intrude into an aboriginal community which has sui generis characteristics;
>
> 3. that the applicant sought to indemnify himself via a costs claim that would dissipate the resources of aboriginal community trust property;
>
> 4. the application was obviously futile on multiple bases; and
>
> 5. the attempts to involve other third parties on a "busybody" basis, with potential serious implications to those persons' rights.
>
> 37 Ms. Kennedy's litigation conduct is a useful test example to evaluate whether her actions represent "serious abuse", and then should result in her being liable, in whole or in part, for litigation costs ordered against her client."

29 Perhaps at the ultimate appeal from Decision No 7, those paragraphs could be taken as both being prefatory to what followed in Decision No 7, and being explicative of the tentative nature of the findings in Decision No 6. Thomas J then provided an overview of the evolving law of the modern operation of the administration of justice and of the modernized obligations of barristers and solicitors in that operation. One key observation he made at para 75 that "lawyers who advance litigation that is an abuse of court have no right to do so. Instead, that is a breach of the lawyer's obligations. Any lawyer who does so is an accessory to their client's misconduct."

30 Thomas J went on to opine in No 7 at para 94 that, inasmuch as lawyers make mistakes, "a 'mere mistake or error of judgment' is not a basis, in itself, for an order of costs against a lawyer". He provided examples. As a potential exception from 'mistake', he described at para 98 a situation where "[c]onducting a futile action or application is a potential basis

for an award of costs against a lawyer, particularly where the court concludes the lawyer has advanced this litigation knowing that it is hopeless, or being willfully blind as to that fact."

31 This is merely a selection from these passages of Decision No 7, and is mentioned here because it reveals that Thomas J was, in these passages, distinguishing between the lawyer and the client. Adverse findings about the conduct of a client would not, at least in his view, necessarily lead to adverse findings about the lawyer. This is a factor to consider about whether the outcome of the appeal of Decision No 6 is crucial to the appeal of Decision No 7. Thomas J went on to distinguish the liability of the client and the lawyer from the other perspective in his further descriptions of situation where it is actually counsel who does the misconduct in relation to matters of disclosure, delay or forthrightness.

32 Thomas J made further findings adverse to Ms Kennedy, a crucial one being a finding that she pressed "Futile Litigation", a topic arguably shared with Mr Stoney. He found that she engaged in "Representing Non-Clients". It is not apparent that such conduct was determined in Decision No 6. He listed some other items which he suggested would not have been misconduct justifying costs, or would not have been misconduct of Mr Stoney but only of Ms Kennedy.

33 It is important for me to make clear that I express no opinion about any findings adverse to Ms. Kennedy. The foregoing paragraphs of my decision is my attempt to describe what might be called the 'architecture' of Decision No 7. In the end, Thomas J said as follows:

> 150 I conclude that Priscilla Kennedy has conducted "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system" on two independent bases:
>
> 1. she conducted futile litigation that was a collateral attack of a prior unappealed decision of a Canadian court, and
>
> 2. she conducted that litigation allegedly on behalf of persons who were not her clients on a "busybody" basis.
>
> 151 Each of these are a basis for concluding that Kennedy should be liable for the *Sawridge #6* costs, personally. The aggravating factors I have identified simple [sic] emphasize that conclusion and result is correct.

34 Ms Kennedy was granted permission to appeal Decision No 7 by my colleague Slatter JA in *1985 Sawridge Trust v. Kennedy*, 2017 ABCA 368 (Alta. C.A.), Slatter JA did not confine the scope of permission, or state specific questions to be covered. He wrote:

> 8 . . . The test for permission to appeal is whether there is a "good arguable case", not whether the appeal is likely to succeed. On an application for permission to appeal the point is not just whether the decision below is right or wrong, but whether the issue is important enough that a full panel of this Court should say whether it is right or wrong. Whether there is a "good arguable case" depends in part on the merits of the appeal, and the standard of review that will be applied, but it is not an invitation to pre-decide the appeal.

35 He then concluded that "[t]he applicant has met the test, and permission to appeal is granted." Slatter JA's reasons canvass the arguments inveighed against permission to appeal, but they do not provide any reason to think that he was of the view that Ms Kennedy would not be entitled to raise any arguments available to her to challenge the outcome against her. For that matter it is not obvious that counsel opposing the motion suggested any restriction. I turn therefore to resolve the motion before me.

III Discussion

36 As noted above, Ms Kennedy's position is that it is necessary for her to participate fully in the appeal of Decision No 6 because her ability to challenge the underpinnings of Decision No 6 is essential to her ability to challenge Decision No 7. Imbricated in this submission is the premise that Ms Kennedy fears that if the appeal of Decision No 6 fails for any procedural reason, as it might, she would be faced with a sort of 'fait accompli' as to some topic vital to her appeal. A single judge has jurisdiction to permit an intervention: see Rule 14.37(2)(e) of the *Rules of Court*.

37 In her initial motion for intervenor status, there was the suggestion that Ms Kennedy would also be able to protect the interests of Mr Stoney, her former client, in a manner he could not do if he was representing himself. While I had no reason to doubt the sincerity of this as a form of altruism, I raised with counsel for Ms Kennedy the question whether or not, in light of the circumstances, Ms Kennedy might be in a conflict of interest. It seems unnecessary to venture too far into the topic of the granting of intervenor status since that was not pursued.

38 Counsel moved instead to a motion for full participation so the issue of intervenor status became a moot point. Arguably there are significant distinctions between the two forms of participation (although some different Court's Rules seem to blend the forms of participation): see *eg Reference re Election Act (British Columbia)*, 2012 BCCA 301 (B.C. C.A. [In Chambers]) at paras 1 to 5, (2012), 324 B.C.A.C. 189 (B.C. C.A. [In Chambers]). Our Rule 14.1(1)(k) provides:

> "party" means a party to an appeal or an application under this Part and includes an intervenor where the context requires;

39 Our Rules distinguish cases of application for status as parties and as intervenors under Rules 14.57 and 14.58 of the *Rules of Court.* As a matter of statutory construction on the tautology principle, doing so was not to create a pointless ornament in the Rules: see eg *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency*, 2012 SCC 37 (S.C.C.) at para 47, [2012] 2 S.C.R. 345 (S.C.C.), cited in *321665 Alberta Ltd. v. Mobil Oil Canada Ltd.*, 2013 ABCA 221 (Alta. C.A.) at para 24, (2013), 82 Alta. L.R. (5th) 124 (Alta. C.A.), leave denied (2014), [2013] S.C.C.A. No. 341 (S.C.C.) (QL) (SCC No 35529). Fortunately, it is not necessary for me to embroider any of the differences here.

40 It might be mentioned that the various elements of the test for intervenor status, as discussed in *Orphan Well Assn. v. Grant Thornton Ltd.*, 2016 ABCA 238, 40 Alta. L.R. (6th) 11 (Alta. C.A.), *Piikani Nation v. Kostic*, 2017 ABCA 259 (Alta. C.A.) and *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2017 ABCA 280 (Alta. C.A.) are not all met here. Sincerity is insufficient by itself to make for intervener status. As in *Canadian Centre*, it is of concern as to intervention that the outside party's participation might widen the specific dispute beyond the specific case in question. Also, Ms Kennedy's interests might (arguably) diverge from a complete tracking of Mr Stoney's interests, particularly in light of findings of Thomas J in Decision No 7 as noted above. *Kostic* adds that the proposed intervener would have to show how failure to permit the intervention would prejudice him.

41 In my view, Ms Kennedy does not meet the criteria for a helpful role and fairness necessity to justify intervention. As for full participation rights on the *appeal* from Decision No 6, that submission depends essentially on whether anything in Decision No 6 would have an operative legal effect to cabin or crimp the ability of Ms Kennedy to argue her own appeal. As pointed out in *Alberta (Attorney General) v. Malin*, 2016 ABCA 396 (Alta. C.A.) at para 18, (2016), 406 D.L.R. (4th) 368 (Alta. C.A.), the proposed addition of a new *appellant* raises questions of standing to appeal:

> 18 The courts have historically recognized that limitations on who can sue about an issue are required: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 22, [2012] 2 SCR 524 [*Downtown Eastside*]. Legal standing is the vehicle courts have used to determine who is entitled to bring a case for a decision: *Downtown Eastside, supra* at para 1. *This includes who can appeal a decision.* Generally speaking, legal standing is grounded on either (a) a personal basis where one(s [sic] legal rights have been or are likely to be affected; or (b) on a public interest basis where the person claiming standing can be seen as a genuine representative of a larger class of individuals intent on bringing matters of public interest and importance before the courts: *Downtown Eastside*, *supra* at para 22. The Judge does not satisfy the test for either. [Emphasis added]

42 Ms Kennedy's argument falls into the category of her alleging "a personal basis where one's legal rights have been or are likely to be affected". Put another way, her position appears to be that her interests are not going to be adequately represented in the appeal from Decision No 6: see *Hayes v. Mayhood* (1958), 24 W.W.R. 332 (Alta. C.A.), affirmed [1959] S.C.R. 568 (S.C.C.), cited in *Saskatchewan Power Corp. v. Alberta (Utilities Commission)*, 2014 ABCA 318 (Alta. C.A.) at para 10, (2014), 584 A.R. 107 (Alta. C.A.):

> 10 This Court has the inherent power to add parties to an appeal, especially if an applicant's interests are not represented: *Hayes v Mayhood* (1958), 24 WWR 332 (Alta CA), aff'd [1959] SCR 568. The parties here all agree that the test for adding a party in this context was set out in *Carbon Development Partnership v Alberta (Energy Utilities Board)*, 2007 ABCA 231 at para 9: the applicant must first show that it has a legal interest in the outcome of the proceedings. If so, there are two sub-tests: whether it is just and convenient to add the applicant, and whether the applicant's interest can be adequately protected only if it is granted party status.

43 It is unnecessary to try to compare the tests in *Downtown Eastside* and *Saskatchewan Power*, because the material aspect is shared, namely legal interest in the sense of legal rights being affected and whether it is 'just and convenient'.

44 There is no dispute that Ms Kennedy's legal rights and factual situation are seriously affected by Decision No 7 and that they would be in relation to the appeal from Decision No 7. The real question is whether anything that happens as to Decision No 6 could change anything as to the appeal of Decision No 7.

45 To be fair, it has been held that a lawyer might be given status to participate in an appeal where the lawyer's reputation was directly involved and he was, in effect, the voice of his deceased client whose Will was under attack inasmuch as he had testified at trial: *Elton Estate v. Elton*, 2009 NLCA 34, 72 C.P.C. (6th) 33 (N.L. C.A.). That is not this case. Further, I have reservations about the accuracy of para 14 in that single judge decision.

46 This is also not a situation where an existing party is attempting to dragoon a non-party into the appeal as in *B. (M.) v. C. (S.)*, 2008 ABCA 298, 448 A.R. 263 (Alta. C.A.) or *Banuelos v. TD Bank Financial Group*, 2010 FCA 94, 402 N.R. 71 (F.C.A.). Ms Kennedy is volunteering to take the shilling herself with the costs exposure that might involve in her being a party to the appeal on Decision No 6: see *eg* Rules 14.55(1) and Rule 14.88(1) of the *Rules of Court*. Be that as it may, Ms Kennedy was not a party below and in my view she still must make a threshold showing of a reasonable prospect of being directly affected adversely in a significant personal manner by what happens as to Decision No 6. It would not be good enough that she has an interest in how the law works out in the appeal from Decision No 6 because she can air the law in her own appeal in Decision No 7.

47 In my view, Ms Kennedy does not face any real predicament for the appeal from Decision No 7. She was not a party to Decision No 6. Although she is worried about it, I am not persuaded that she would be impeded by any fact findings in Decision No 6 on her appeal in Decision No 7 by the rules of *res judicata* or issue estoppel howsoever "carefully engrossed on parchment" Decision No 6 might be: see *Wemyss v. Hopkins* (1875), L.R. 10 Q.B. 378 (Eng. Q.B.). In this respect, one should not overlook the triune test of same issue, finality and mutuality set out in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (S.C.C.) at para 23, [2003] 3 S.C.R. 77 (S.C.C.):

> 23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, per Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, " *Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality*" (1990), 69 Can. Bar Rev. 623, at pp. 648-51.) In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.' [underlining in original]

48 There was no submission that Ms Kennedy was a "privy" of her client in the Trust Action. Whether privy status might arise for a lawyer to client in another context, there is no obvious reason to find such here. Merely because it might have been Ms Kennedy's submissions that failed before Thomas J did not mean Ms Kennedy personally was bound by them in fact as well as in law (although of course the law binds everybody equally).

49 Indeed, the fact that Thomas J took pains to provide Ms Kennedy with a hearing on her potential personal liability for costs illuminates the reality that even he did not think that she was disqualified from arguing to 'relitigate' the characterization of the court proceedings in a manner she saw fit in relation to addressing her personal professional risk.

50 Furthermore, as noted above, not all the topics in her situation in Decision No 7 were the same as in Decision No 6. *R. v. Punko*, 2012 SCC 39 (S.C.C.) at para 62, [2012] 2 S.C.R. 396 (S.C.C.) noted *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316 (S.C.C.) where Charron J at para 122 stated:

> 122 Determining whether a question was distinctly put in issue and clearly determined in a prior proceeding can prove difficult at times, even in the context of a civil action with its precise system of pleadings and, in the vast majority of cases, with the assistance of a reasoned judgment delivered by a judge sitting alone.

51 Significantly, it would appear to be the characterization *in law* by Thomas J of the *factual* history of legal proceedings leading up to the conclusions in Decision No 6 which is of greatest concern to Ms Kennedy in her appeal from Decision No 7. A characterization in law is the application of a legal test. If there is no dispute about the foundational facts for that application of the legal test, then a question of law is involved: see *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.) at para 39; *R. v. Shepherd*, 2009 SCC 35 (S.C.C.) at para 20, [2009] 2 S.C.R. 527 (S.C.C.). There is no 'issue estoppel' or for that matter 'abuse of process' arising within a dispute on a point of law. A party is not entitled to their own law different from the general law, but that is not a bar of argument, but of outcome.

52 Furthermore, I am unaware of any 'finality' principle on any issues which Thomas J disposed of conclusively for his Court in Decision No 6 that would prevent this Court from parting ways with that decision of the Court of Queen's Bench on an issue of fact (or law for that matter) in Decision No 7. For what it is worth, my reasons here do not bind a panel of the Court either: see Rule 14.71 of the *Rules of Court*.

53 Accordingly, if anything contained in Decision No 6 should, when the matter is bruited downstream, be claimed by Sawridge or the Trustees to be itself operative to block Ms Kennedy from taking full effect of the 'at large' permission order made by Slatter JA on her own appeal from Decision No 7, it would presumably arise in the backstop zone of abuse of process. This is not to say Sawridge or the Trustees would be disentitled to contend that Thomas J was correct in Decision No 6 or Decision No 8, or, in any event, that this Court should find Mr Stoney's conduct was deserving of costs sanction based on Decision No 6.

54 But that is not the same thing as attempting to extract any findings of fact (or law) made by Thomas J in Decision No 6 and seeking to inject them into Decision No 7 such as to say it would be abuse of process for Ms Kennedy to dispute them in this Court. (It must be made clear that I am not talking about any inoculation that might be argued by Sawridge or the Trustees to arise from what Mr Wilson said on her behalf in the hearing of Decision No 7 and whether those circumstances might make anything she argues in her own appeal there demurrable.) Before any of Ms Kennedy's submissions on appeal from Decision No 7 could be blown out of the saddle by that abuse of process doctrine, the terms of that doctrine would have to be met.

55 It is noteworthy that in *Mahalingan*, albeit in the context of discussing why the 'abuse of process' limitation on re-litigation would not be sufficient to overcome a need for issue estoppel against the Crown in criminal cases, McLachlin CJC wrote:

> 42 . . . To date, the doctrine has not been much used to protect against relitigation, and indeed there is authority for the proposition that relitigation, without more, simply does not reach the threshold required for a finding of abuse of process: *Bradford & Bingley Building Society v. Seddon*, [1999] 1 W.L.R. 1482 (C.A.), at pp. 1492-93. To protect parties from relitigation, abuse of process would need to be cast in a less discretionary form than it now takes. Therefore, considering the high threshold for proof and the unpredictability of its operation, it is unlikely that the doctrine of abuse of process adequately achieves the fairness goal that underlies the doctrine of issue estoppel.

56 So for present purposes, to create a real interest on Ms Kennedy's part in any decision this Court might make as to an appeal from Decision No 6, so as to support participation right in the appeal on Decision No 6, Ms Kennedy would have to show a real prospect that she would face an effective abuse of process bar to any submission she might make in challenging the entire superstructure of the basis of her liability for costs in Decision No 7 if she is not able to challenge the entire superstructure of the basis of liability on Mr Stoney in Decision No 6.

57 In my view, Ms Kennedy has not showed she faces any such jeopardy. (I again set to one side the question of Mr Wilson's statements and whether they make her position demurrable.) Neither the reasons for Decision No 6 or for that matter Decision No 8 would be binding on this Court in relation to Decision No 7 if neither of them was debated here on their own. There is, after all, a hierarchy in the Alberta Courts and the conclusions of Thomas J even if not under appeal would not bind this Court.

58 If there is more than one appeal outstanding this Court would presumably attempt to be coherent in the assessment of the issues of law, but it would not be required to be consistent on facts if the records for each appeal were different. It is not uncommon for co-accused persons to achieve different results even on the same record, let alone different ones. Here the ground is simply not identical for Mr Stoney and Ms Kennedy.

59 In the end, I am not persuaded that Ms Kennedy has any personal interest in how the appeal on Decision No 6 proceeds or results. I am also not persuaded that justice would be impaired or denied for either Mr Stoney or Ms Kennedy if Ms Kennedy were not a party to Mr Stoney's appeal.

IV Conclusion

60 The motion for participation status is dismissed.

Motion dismissed.

End of Document

Tab 10

2017 ABCA 437
Alberta Court of Appeal

Stoney v. Trustees for the 1985 Sawridge Trust

2017 CarswellAlta 2740, 2017 ABCA 437, [2018] A.W.L.D. 213, 286 A.C.W.S. (3d) 438

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

Jack Watson J.A., Frans Slatter J.A., Myra Bielby J.A.

Heard: December 14, 2017
Judgment: December 19, 2017
Docket: Edmonton Appeal 1703-0195-AC

Counsel: D.C. Bonora, A. Loparco, for Applicants, Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Sawridge Trust
E.H. Molstad, Q.C., for Applicant, Sawridge First Nation
Maurice Felix Stoney, Respondent, for himself

Subject: Civil Practice and Procedure; Public

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.3 Security for costs
XXIV.3.d Grounds for requiring security
XXIV.3.d.vii Miscellaneous

Headnote

Civil practice and procedure --- Costs — Security for costs — Grounds for requiring security — Miscellaneous
S had engaged in 17 years of litigation in attempt to establish his right to be member of First Nation and was unsuccessful in all of his legal proceedings — S applied to intervene in litigation concerning trust, with view to asserting same right to be member of First Nation — Case management judge dismissed application on basis that claim was barred by issue estoppel as result of all prior proceedings and gave collateral orders including vexatious litigant order and costs award — S appealed — Applicants applied for security for costs — Application granted — Rules 4.22(a) and (b) of Alberta Rules of Court were met — S lived on fixed income, had very few if any exigible assets and was unable to easily post security for costs or pay costs award — Previous costs awards made against S in both Federal Court and in Alberta remained unpaid — Merits of appeal were questionable — S was ordered to post security for costs in sum of $5,000 for each of two applicants.

Table of Authorities

Cases considered:

Access Mortgage Corporation (2004) Ltd. v. Arres Capital Inc. (2017), 2017 ABCA 373, 2017 CarswellAlta 2397 (Alta. C.A.) — considered

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

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

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

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 4.22 — considered

R. 4.22(a) — considered

R. 4.22(b) — considered

R. 4.22(d) — considered

R. 9.4(2)(c) — considered

R. 14.67 — considered

APPLICATION for security for costs.

Per curiam:

1 The applicants (respondents in the appeal) have applied for security for the costs of this appeal.

2 Mr. Stoney, the appellant, has engaged in 17 years of litigation in an attempt to establish his right to be a member of the Sawridge First Nation. He has been unsuccessful in all of his legal proceedings: see for example *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.), and *Huzar v. Canada* (2000), 258 N.R. 246 (Fed. C.A.) . Mr. Stoney applied to intervene in Alberta litigation concerning the 1985 Sawridge Trust, with a view to asserting the same right to be a member of the Sawridge First Nation. The case management judge dismissed that application on the basis that Mr. Stoney's claim was barred by issue estoppel as a result of all of the prior proceedings: *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 436 (Alta. Q.B.) at paras. 47-52 (*Sawridge #6*). The case management judge also gave collateral orders, including a vexatious litigant order and a costs award.

3 Mr. Stoney has appealed *Sawridge #6*, and the applicants have applied for security for costs under R. 4.22, which applies to appeals through R. 14.67:

> 4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate.

The test for the application of the rule to appeals is discussed in *Access Mortgage Corporation (2004) Ltd. v. Arres Capital Inc.*, 2017 ABCA 373 (Alta. C.A.).

4 It is conceded that R. 4.22(a) and (b) are met. Mr. Stoney confirms that he lives on a fixed income, has very few if any exigible assets, and that he is unable to easily post security for costs or pay a costs award. Previous costs awards made against Mr. Stoney in both the Federal Court and in Alberta remain unpaid.

5 Mr. Stoney's Notice of Appeal contains few particulars. There is no obvious reviewable error in the conclusion of the case management judge that the proposed arguments are barred by issue estoppel. The merits of the appeal are questionable.

6 Rule 4.22(d) requires consideration of whether a security for costs order "would unduly prejudice the respondent's ability to continue the action". This criterion is often central to the competing interests that arise in this type of application. On the one hand, the courts are always reluctant to deprive a litigant of his day in court, particularly because of economic hardship. On the other hand, respondents should not be subjected to continuous litigation where they have no prospect of recovering their costs. The presumption in civil procedure that the successful party is entitled to costs acts as an important control on the quantity and intensity of litigation, and that control is missing if the appellant is judgment proof.

7 In this appeal, concerns about depriving Mr. Stoney of his day in court are diminished. As noted, he has had repeated opportunities to pursue his claim to membership in the Sawridge First Nation. All of those attempts have been unsuccessful. He has neglected or been unable to pay the resulting costs. Shortly put, Mr. Stoney has had his day in court, and given that his application was dismissed based on issue estoppel his right to further pursue the same arguments on appeal is severely limited.

8 The scale of costs applicable to this appeal will be in the discretion of the panel hearing the appeal. The amount of security ordered must balance the rights of the respondents to have any costs award secured with Mr. Stoney's means and interests. Mr. Stoney is accordingly ordered to post security for costs in the sum of $5,000 for each of the two applicants (The Sawridge First Nation, and the Trustees of the 1985 Sawridge Trust). That security ($10,000 in total) must be paid into Court by February 28, 2018, failing which the appeal will be deemed abandoned. Until security is posted, the appeal is stayed. The costs of these applications will be in the cause. Rule 9.4(2)(c) will apply.

Application granted.

End of Document

Tab 11

2017 ABQB 530
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

2017 CarswellAlta 1569, 2017 ABQB 530, [2017] A.W.L.D. 4934, [2017] A.W.L.D. 4935, [2017] A.W.L.D. 4937, [2017] A.W.L.D. 4938, 283 A.C.W.S. (3d) 40

In the Matter of the Trustee Act, RSA 2000, c T-8, as amended

And In the Matter of the Sawridge Band, Inter Vivos Settlement, created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust")

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

D.R.G. Thomas J.

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

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

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

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

Related Abridgment Classifications

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

Headnote

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

S claimed membership in First Nation but claim was rejected and affirmed by Federal Court — S brought unsuccessful application to be added to members of First Nation trust — Lawyer K was involved in protracted litigation on behalf of S — Solicitor and own client costs awarded against K personally — Unfounded, frivolous, dilatory or vexatious proceeding that denotes serious abuse of judicial system is new basis on which to order costs against lawyer — Professional discipline and court sanction for lawyer misconduct are distinct processes with separate purposes — Collateral attack on decision of Federal Court was very serious form of litigation misconduct — K conducted futile litigation that was collateral attack of prior unappealed decision — K conducted that litigation allegedly on behalf of persons who were not her clients on busybody basis — K and S liable for full costs on joint and several basis.

Table of Authorities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — considered

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Starr v. Ontario (Commissioner of Inquiry) (1990), [1990] 1 S.C.R. 1366, (sub nom. *Starr v. Houlden*) 68 D.L.R. (4th) 641, (sub nom. *Starr v. Houlden*) 110 N.R. 81, (sub nom. *Starr v. Houlden*) 41 O.A.C. 161, (sub nom. *Starr*

v. Houlden) 55 C.C.C. (3d) 472, (sub nom. *Starr v. Houlden)* 72 O.R. (2d) 701 (note), 1990 CarswellOnt 998, 1990 CarswellOnt 1299 (S.C.C.) — considered

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

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

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

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

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

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

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

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

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

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

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

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

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

Statutes considered:

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

s. 7 — considered

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

s. 23.1(5) [en. 2007, c. 21, s. 2] — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

R. 1.2 — considered

R. 2.11(c) — referred to

R. 2.11(d) — referred to

R. 2.11-2.21 — referred to

R. 2.14 — referred to

R. 2.14(4) — referred to

R. 10.29(1) — referred to

R. 10.50 — considered

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

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

I Introduction

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

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

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

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

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

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

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

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

8 At the July 28, 2017 hearing the issue arose of whether two siblings of Maurice Stoney who had provided affidavit evidence that they authorized Maurice Stoney to act on their behalf should also be subject to the solicitor and own client indemnity costs award which I had ordered in *Sawridge #6* at para 67. I rejected that possibility in light of the limited and after-the-fact evidence and the question of informed consent.

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

II Background

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

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

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

III Evidence and Submissions at the July 28 Hearing

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

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

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

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

A. Priscilla Kennedy

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

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

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

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

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

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

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

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

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

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

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

B. Sawridge Band

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

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

25 As in *Morin v. TransAlta Utilities Corporation*, Kennedy acted without instructions from the persons she purported to represent. Informed consent is a critical factor in proper legal representation. Where that informed consent is absent then a lawyer who acts without authority should solely be responsible for the subsequent litigation costs.

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

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

C. Sawridge Trustees

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

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

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

IV. Court Costs Awards vs Lawyers

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

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

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

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

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

> . . . The conduct of the barrister must demonstrate or approach bad faith, or deliberate misconduct, or patently unjustified actions, although a formal finding of contempt is not needed ...

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

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

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

> 1. the nature of interests in question;
>
> 2. this litigation was by a third party attempting to intrude into an aboriginal community which has *sui generis* characteristics;
>
> 3. that the applicant sought to indemnify himself via a costs claim that would dissipate the resources of aboriginal community trust property;
>
> 4. the application was obviously futile on multiple bases; and
>
> 5. the attempts to involve other third parties on a "busybody" basis, with potential serious implications to those persons' rights.

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

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

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

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

40 There is little dispute that litigation in Canada is now a very complex process, particularly in the superior courts such as the Alberta Court of Queen's Bench. Justice Karakatsanis in *Hryniak v. Mauldin* at para 1 observed that meaningful

access to justice is now "the greatest challenge to the rule of law in Canada today." What is the obstacle? "Trials have become expensive and protracted." Canadians can no longer afford to sue or defend themselves. That strikes at the rule of law itself. Justice Karkatsanis continues to explain that historic over-emphasis on procedural rights and exhaustive formality has made civil litigation impractical and inaccessible (para 2):

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

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

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

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

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

> Principle 2 on page 5:
>
> > Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.
>
> Principle 3 on page 8:
>
> > Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.
>
> I note these and other instructions to trial judges in the "*Statement of Principles*" are not permissive, but mandatory. See for example: ***Gray v Gray***, 2017 CanLII 55190 (Ont Sup Ct J); *Young v. Noble*, 2017 NLCA 48 (N.L. C.A.); *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383 (Ont. C.A.); *R. v. Tossounian*, 2017 ONCA 618 (Ont. C.A.).

45 Read plain, this is a substantial rejection by the Supreme Court of Canada of the traditional approach, that rules of procedure and evidence apply the same to everyone who appears before a Canadian court. The reason for that is

obvious to anyone who has observed a self-represented person in court. They face a complex apparatus, whose workings are at times both arcane and unwritten.

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

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

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

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

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

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

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

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

B. Costs Awards Against Lawyers

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Nuremberg Defence - I Was Just Following Orders

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

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

> That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. I will not seek to destroy anyone's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favor or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta. [Emphasis added.]

> This is not some empty ceremony, but instead these words are directly relevant to a lawyer's duties, and the standard expected of him or her by the courts: *Osborne v. Pinno* (1997), 208 A.R. 363 (Alta. Q.B.) at para 22, (1997), 56 Alta. L.R. (3d) 404 (Alta. Q.B.); *C. (A.R.) v. C. (L.L.)*, 1999 ABQB 707 (Alta. Q.B.) at para 26, (1999), 180 D.L.R. (4th) 361 (Alta. Q.B.).

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

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

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

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

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

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

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

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

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

> . . . the lawyer who would practise his profession of counsel before a Court owes duties to that Court quite apart from any duty he owes his client or his profession or, indeed, the public. That these duties are sometimes expressed

> as an ethical responsibility does not detract from the reality that the duties are owed to the Court, and the Court can demand performance of them. The expression "officer of the Court" is a common if flowery way to emphasize that special relationship. In Canada, unlike some other common law jurisdictions, the Courts do not license lawyers who practise before them, and do not suspend those licences when duties are breached. But that restraint does not contradict the fact that special duties exist. ... [Emphasis added.]

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

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

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

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

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

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

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

3. No Constitutional Right to Abusive Litigation

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

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

72 I cannot see how this principle would apply differently for a self-represented litigant, or a person represented by a lawyer. A lawyer is a mechanism through which a client interacts with the Court and other court participants. However,

a lawyer is not an automaton that does only what the client instructs. The preceding review explicitly indicates lawyers have duties to more than just their clients. They are not required to do whatever they are told.

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

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

75 Restating this point:

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

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

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

4. An Exceptional Step

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

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

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

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

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

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

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

5. Abuse of the Court

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

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

1. collateral attacks,

2. hopeless proceedings,

3. escalating proceedings,

4. bringing proceedings for improper purposes,

5. conducting "busybody" lawsuits to enforce alleged rights of third parties,

6. failure to honour court-ordered obligations,

7. persistently taking unsuccessful appeals from judicial decisions,

8. persistently engaging in inappropriate courtroom behaviour,

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

10. scandalous or inflammatory language in pleadings or before the court, and

11. advancing OPCA strategies.

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

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

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

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

85 Similarly, vexatious litigant judgments frequently conclude that the presence of multiple *Chutskoff Estate v. Bonora* "indicia" cumulatively strengthen the foundation on which to conclude court intervention is warranted in response to abusive litigation conduct: *Ewanchuk v. Canada (Attorney General)* at para 159; *Chutskoff Estate v. Bonora* at para

131; *Boisjoli, Re*, 2015 ABQB 629 (Alta. Q.B.) at para 104; *Hok v. Alberta* at para 39; *644036 Alberta Ltd. v. Morbank Financial Inc.* at para 91.

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

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

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

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

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

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

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

6. Knowledge and Persistence

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

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

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

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

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

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

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

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

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

7. Examples of Lawyer Misconduct that Usually Warrant Costs

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

a. Futile Actions and Applications

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

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

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

claims to distinguish binding jurisprudence on an arbitrary basis that is unrelated to the principle(s) in play implies an attempt to circumvent *stare decisis*.

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

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

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

b. Breaches of Duty

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

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

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

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

c. Special Forms of Litigation Abuse

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

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

of a personal costs award. This kind of application is "serious abuse" because of how it damages the court's effective and efficient functioning.

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

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

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

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

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

d. Delay

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

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

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

117 Avoiding delay is clearly a priority in the new post-"culture shift" civil litigation environment, but since this particular factor is not in play in the current costs proceeding I will not comment further on this basis for a potential costs

award against a lawyer. This complex subject is better explored in the context of a fact scenario that involves potentially unnecessary or unexplained adjournments, and other questionable procedures that caused delay.

C. Conclusion

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

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

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

V. Priscilla Kennedy's Litigation Misconduct

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

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

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

A. Futile Litigation

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

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

126 I have previously commented on how a collateral attack is a very serious form of litigation misconduct that is a basis for court intervention and response. Kennedy was perfectly aware of the result in *Stoney v. Sawridge First Nation*.

She was Stoney's lawyer in that proceeding. Further, the arguments made against Stoney by the Sawridge Band and the Sawridge 1985 Trust Trustees made clear that Kennedy was attempting to re-litigate on the same ultimate subject.

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

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

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

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

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

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

B. Representing Non-Clients

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Conclusion

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

1. she conducted futile litigation that was a collateral attack of a prior unappealed decision of a Canadian court, and

2. she conducted that litigation allegedly on behalf of persons who were not her clients on a "busybody" basis.

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

E. Quantum of the Costs Award

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

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

VI. Conclusion

154 I order that Kennedy is personally liable for the solicitor and own client indemnity costs that I ordered in *Sawridge #6* at paras 67-68, along with her client.

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

156 In light of my conclusion that Kennedy is responsible for conducting litigation that abused the Alberta Court of Queen's Bench's processes and the other Sawridge Advice and Direction Application participants, Kennedy admitting

the same, and the nature and character of that abuse, I direct that a copy of this judgment shall be delivered to the Law Society of Alberta for its review.

Order accordingly.

End of Document

Tab 12

2017 ABCA 368
Alberta Court of Appeal

1985 Sawridge Trust v. Kennedy

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

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

Frans Slatter J.A.

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

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

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.f Costs on solicitor and own client basis
Civil practice and procedure
XXIV Costs
XXIV.24 Appeals as to costs
XXIV.24.a Leave to appeal
Headnote
Civil practice and procedure --- Costs — Appeals as to costs — Leave to appeal
In previous proceeding court awarded solicitor-and-own-client costs against applicant counsel personally — Application by counsel for leave to appeal award of costs — Application granted — Counsel did not just challenge details or particulars of costs award, but underlying principles that should drive costs award against a party's lawyer — No direct appellate authority on new rule R. 10.50 of Alberta Rules of Court or circumstances in which it should be engaged although such awards considered extraordinary — Person subjected to out-of-ordinary costs will often have legitimate basis for appealing, and where there is doubt permission to appeal should be granted — Test for permission to appeal is whether there is good arguable case, not whether appeal likely to succeed — Whether good arguable case depends in part on merits of appeal, and standard of review to be applied, but not invitation to pre-decide appeal.
Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and own client basis

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

Table of Authorities

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

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

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

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

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

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

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

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

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

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

R. 10.29 — considered

R. 10.50 — considered

R. 14.5(1)(e) — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Sched. C, Tariff of Costs — referred to

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

***Frans Slatter J.A.*:**

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

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

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

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

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

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

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

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

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

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

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

The respondents argue that no such error can be identified here, and that permission to appeal should not be granted because the decision below is "correct". This argument misapprehends the test for permission to appeal, as well as the role of individual appellate judges who hear applications for permission to appeal: *CCS Corporation v. Pembina Pipeline*

Corporation, 2017 ABCA 260 (Alta. C.A.) at paras. 6-7. The test for permission to appeal is whether there is a "good arguable case", not whether the appeal is likely to succeed. On an application for permission to appeal the point is not just whether the decision below is right or wrong, but whether the issue is important enough that a full panel of this Court should say whether it is right or wrong. Whether there is a "good arguable case" depends in part on the merits of the appeal, and the standard of review that will be applied, but it is not an invitation to pre-decide the appeal.

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

Application granted.

End of Document

Tab 13

2017 ABQB 548
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

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

In the Matter of the Trustee Act, RSA 2000, c T-8, as amended

And In the Matter of the Sawridge Band, Inter Vivos Settlement, created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust")

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

D.R.G. Thomas J.

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

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

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

Related Abridgment Classifications

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

Headnote

Civil practice and procedure --- Actions — Suspension of right of action — Plaintiff persistently instituting vexatious proceedings

First Nations trust applied for directions as to distribution of trust — S whose family had formerly been members of First Nation was unsuccessful in attempts to be recognized as member — S continued to bring applications in various courts and before human rights tribunal in search for status — Case management judge put in place interim court order to restrict S from initiating or continuing litigation in Alberta courts, and sought submissions as to whether S should be subject to vexatious litigant order — Order made requiring S to seek leave prior to initiating or continuing litigation in Alberta Court of Queen's Bench and Alberta Provincial Court relating to persons and organizations involved with First Nation and S's disputes concerning membership in it — Payment of all outstanding costs awards prerequisite to leave — S's allegations of conspiracy against self and siblings raised concern that S might shift focus from First Nation and Trusts to individuals involved in the prior litigation and First Nation membership-related processes and decisions — S's refusal to accept dismissal of his claim was very strong predictor of future abusive litigation — Order flowed from court's inherent jurisdiction as strict persistence-driven approach in Judicature Act only targets misconduct that has already occurred — S had history of repeated collateral attacks in relation to subject and related parties — Attempts to re-litigate same issues also represented hopeless litigation — S engaged in busybody litigation exposing others to risk of costs consequences — S failed to pay costs and attempted to shift responsibility onto trust, which would have depleted communal property of First Nation — Forum shopping by S implied intent to evade legitimate litigation control processes and legal principles, including res judicata — Unproven allegations of fraud provided insight into S's litigation objectives.

Table of Authorities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cormier v. Nova Scotia (2015), 2015 NSSC 352, 2015 CarswellNS 980, (sub nom. *Cormier v. Nova Scotia)* 1157 A.P.R. 295, (sub nom. *Cormier v. Nov Scotia)* 367 N.S.R. (2d) 295, 83 C.P.C. (7th) 380 (N.S. S.C.) — referred to

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

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

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

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

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

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

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

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

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

Fiander v. Mills (2015), 2015 NLCA 31, 2015 CarswellNfld 230, 1149 A.P.R. 80, 368 Nfld. & P.E.I.R. 80 (N.L. C.A.) — considered
Gauthier v. Starr (2016), 2016 ABQB 213, 2016 CarswellAlta 680, 86 C.P.C. (7th) 348 (Alta. Q.B.) — referred to
Henry v. El (2010), 2010 ABCA 312, 2010 CarswellAlta 2056 (Alta. C.A.) — referred to
Henry v. El (2011), 2011 CarswellAlta 1197, 2011 CarswellAlta 1198, 426 N.R. 392 (note), 524 A.R. 399 (note), 545 W.A.C. 399 (note) (S.C.C.) — referred to
Hok v. Alberta (2016), 2016 ABQB 335, 2016 CarswellAlta 1142 (Alta. Q.B.) — referred to
Hok v. Alberta (2016), 2016 ABQB 651, 2016 CarswellAlta 2234, [2017] 6 W.W.R. 831 (Alta. Q.B.) — referred to
Hok v. Alberta (2017), 2017 CarswellAlta 1143 (S.C.C.) — referred to
Holmes v. Canada (Attorney General) (2016), 2016 FC 918, 2016 CarswellNat 4864, 2016 CF 918, 2016 CarswellNat 10954 (F.C.) — referred to
Huzar v. Canada (2000), 2000 CarswellNat 1132, 258 N.R. 246, 2000 CarswellNat 5603 (Fed. C.A.) — considered
Isis Nation Estates v. R. (2013), 2013 FC 590, 2013 CarswellNat 1683, 2013 CF 590, 2013 CarswellNat 2339 (F.C.) — considered
Koerner v. Capital Health Authority (2010), 2010 ABQB 590, 2010 CarswellAlta 1854, 498 A.R. 109, 498 N.R. 109 (Alta. Q.B.) — referred to
Koerner v. Capital Health Authority (2011), 2011 ABQB 191, 2011 CarswellAlta 456, 506 A.R. 113 (Alta. Q.B.) — considered
Koerner v. Capital Health Authority (2011), 2011 ABCA 289, 2011 CarswellAlta 2079, 515 A.R. 392, 532 W.A.C. 392 (Alta. C.A.) — referred to
Koerner v. Capital Health Authority (2012), 2012 CarswellAlta 724, 2012 CarswellAlta 725, 435 N.R. 393 (note), 536 A.R. 405 (note), 559 W.A.C. 405 (note) (S.C.C.) — referred to
MacDonald Estate v. Martin (1990), [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 121 N.R. 1, (sub nom. *Martin v. Gray*) [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, 70 Man. R. (2d) 241, 1990 CarswellMan 384, 1990 CarswellMan 233, 285 W.A.C. 241 (S.C.C.) — considered
McCargar v. Canada (2017), 2017 ABQB 416, 2017 CarswellAlta 1180 (Alta. Q.B.) — referred to
McMeekin v. Alberta (Attorney General) (2012), 2012 ABQB 456, 2012 CarswellAlta 1220, 543 A.R. 132 (Alta. Q.B.) — referred to
McMeekin v. Alberta (Attorney General) (2012), 2012 ABQB 625, 2012 CarswellAlta 1739, 543 A.R. 11 (Alta. Q.B.) — referred to
Meads v. Meads (2012), 2012 ABQB 571, 2012 CarswellAlta 1607, [2013] 3 W.W.R. 419, 74 Alta. L.R. (5th) 1, 543 A.R. 215 (Alta. Q.B.) — considered
Nussbaum v. Stoney (July 20, 2017), Doc. 1603-03761 (Alta. Q.B.) — considered
O. (R.) v. F. (D.) (2016), 2016 ABCA 170, 2016 CarswellAlta 964, 87 C.P.C. (7th) 1, 76 R.F.L. (7th) 253, 36 Alta. L.R. (6th) 282 (Alta. C.A.) — considered
R. (F.J.) v. R. (I.) (2015), 2015 ABQB 112, 2015 CarswellAlta 250 (Alta. Q.B.) — considered
R. v. Claeys (2013), 2013 MBQB 313, 2013 CarswellMan 709, (sub nom. *Claeys v. Canada*) 300 Man. R. (2d) 257 (Man. Q.B.) — considered
R. v. Dick (2002), 2002 BCCA 27, 2002 CarswellBC 216, 163 B.C.A.C. 62, 267 W.A.C. 62 (B.C. C.A.) — referred to
R. v. Dove (2017), 2017 CarswellNat 2531, 2017 CarswellNat 2532 (S.C.C.) — referred to
R. v. Fearn (2014), 2014 ABQB 233, 2014 CarswellAlta 681, 586 A.R. 182 (Alta. Q.B.) — referred to
R. v. Grabowski (2015), 2015 ABCA 391, 2015 CarswellAlta 2267, 609 A.R. 217, 656 W.A.C. 217 (Alta. C.A.) — considered
R. v. Hok (2017), 2017 ABCA 63, 2017 CarswellAlta 232 (Alta. C.A.) — referred to
R. v. Prefontaine (2002), 2002 ABQB 980, 2002 CarswellAlta 1369, [2003] 5 W.W.R. 367, 12 Alta. L.R. (4th) 50 (Alta. Q.B.) — considered
R. v. Prefontaine (2004), 2004 ABCA 100, 2004 CarswellAlta 407 (Alta. C.A.) — referred to
Sikora Estate v. Sikora (2015), 2015 ABQB 467, 2015 CarswellAlta 1383 (Alta. Q.B.) — considered

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Statutes considered:

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

Generally — referred to

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

Generally — referred to

s. 23(2) — considered

s. 23(2)(a) — referred to

ss. 23-23.1 — referred to

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

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

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

R. 9.13 — considered

Federal Courts Rules, SOR/98-106

Generally — referred to

R. 114 — considered

CONSIDERATION by court of vexatious litigant order.

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

I Introduction

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

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

3 I therefore:

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

2. struck out the August 12, 2016 application;

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

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

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

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

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

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

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

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

II. Abusive Litigation and Court Access Restrictions

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

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

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

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

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

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

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

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

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

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

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

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

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

15 When a court considers limits to future court access by a person with a history of litigation misconduct the key questions for a court are:

> 1. Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?
>
> 2. What litigation subject or subjects are likely involved in that abuse of court processes?
>
> 3. In what forums will that abuse occur? (*Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at para 36).

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

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

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

III. Submissions and Evidence Concerning Appropriate Litigation Control Steps

A. The Sawridge Band

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

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

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

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

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

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

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

B. The Sawridge 1985 Trust Trustees

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

C. Maurice Stoney

27 Maurice Stoney's written submissions were signed by and filed by lawyer Priscilla Kennedy, identified as "Counsel for Maurice Stoney". The contents of the written submissions are, frankly, unexpected. Paragraphs 6 through 13 advance legal arguments concerning Maurice Stoney's status as a member of the Sawridge Band:

1. the *Huzar v. Canada* decision cannot be relied on as "evidence in this matter";

2. *Stoney v. Sawridge First Nation* is not a "thorough analysis" of Maurice Stoney's arguments;

3. Maurice Stoney has not attempted to re-litigate the membership issue but rather to set out the legal arguments that address the definition of a beneficiary of the 1985 Sawridge Trust; and

4. " . . . there have been a number of recent decisions on these constitutional issues that have and are in the process of completely altering the law related to these issues of the membership/citizenship of Indians, in order to have them comply with the *Constitution*." [Italics in original].

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

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

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

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

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

As shown by the litigation in the Sawridge Band cases above, the on-going case in [Descheneaux c Canada (Procureur Général), 2015 QCCS 3555] and the decision of the Supreme Court of Canada in [Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 SCR 99], and the review of the Federal Court of Appeal decision in Huzar and the judicial review in Stoney, it is submitted that this is not a proceeding where the issue has been determined by a court of competent jurisdiction. Nor is this a matter where proceedings have been brought that cannot succeed or have no reasonable expectation of providing relief.

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

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

. . . No conclusion was made in the 1995 Federal Court proceedings which were struck as showing no reasonable cause of action and the judicial review was concerned with the issue of the Sawridge First Nation Appeal Committee decision based on membership rules post September, 1985.

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

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

(Written brief, para 23).

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

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

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

> . . . The Federal Court Rules, provide for Representative proceedings where the representative asserts common issues of law and fact, the representative is authorized to act on behalf of the represented persons, the representative can fairly and adequately represent the interests of the represented persons and the use of a representative proceeding is the just, more efficient and least costly manner of proceeding. This method of proceeding is frequently used for aboriginals and particularly for families who are aboriginal. It is submitted that this was the most efficient and least costly manner of proceeding in the circumstances where the claim of all of the living children possess the same precise issues respecting their citizenship.
>
> (Written Brief, para 24.)

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

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

D. Evidence

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

1. Maurice Stoney claims to be acting on behalf of himself and his brothers and sisters, and that he has their consent to do that: pp 9-10.

2. Maurice Stoney believes his father was forced out of Indian status by the federal government: p 12.

2. Maurice Stoney and his counsel Priscilla Kennedy do not accept that Maurice Stoney was refused automatic membership in the Sawridge Band by the *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.) and *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.) decisions: pp 23-27, 30-33.

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

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

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

• the health status of the siblings for whom Maurice Stoney was allegedly a representative (p 66).

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

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

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

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

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

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

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

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

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

There is no documentation to establish that Maurice Stoney applied to become a litigation representative or was appointed a litigation representative, per *Rules* 2.11-2.21. This is not a class action scenario where Maurice Stoney is a

representative applicant. While Kennedy has argued that Maurice Stoney's siblings are elderly and unable to conduct litigation, then that is not simply a basis to arbitrarily add their names to court filing. Instead, a person who lacks the capacity to represent themselves (*Rule* 2.11(c-d)) may have a self-appointed litigation representative (*Rule* 2.14), but only after filing appropriate documentation (*Rule* 2.14(4)). That did not occur.

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

IV. Analysis

40 What remains are two steps:

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

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

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

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

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

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

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

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

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

> . . . inherent jurisdiction of the court may be defined as the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. ...
>
> (Jacobs at 51)

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

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

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

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

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

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

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

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

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

54 That outcome can sometimes be avoided.

1. Statements of Intent

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

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

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

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

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

1. voluntarily terminating or limiting abusive litigation,

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

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

2. *Demeanor and Conduct*

3. *Abuse Caused by Mental Health Issues*

4. *Litigation Abuse Motivated by Ideology*

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

2. Demeanor and Conduct

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

61 Mr. Prefontaine presented himself in a generally ordered, polite manner in court. He was at one point a lawyer. He has for years pursued a dispute with the Canada Revenue Agency, and has appeared on many occasions in relation to that matter. Mr. Prefontaine's behaviour changed in a marked but predictable manner when his submissions were rejected. He explodes, making obscene insults and threats directed to the hearing judge and opposing parties. When

a person responds to the court in this manner, that conduct is a significant basis to conclude that future problematic litigation is impending from that abusive court participant. Sure enough, that has been the case with Mr. Prefontaine.

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

3. Abuse Caused by Mental Health Issues

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

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

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

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

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

4. Litigation Abuse Motivated by Ideology

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

pp 11) has observed for this population that abuse of court processes is a political action, " . . . the vector of an ideology for a class of actors in the legal system."

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

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

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

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

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

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

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

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

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

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

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

72 Judicial and legal academic authorities uniformly identify OPCA narratives and their associated pseudolegal concepts as resting on and building from a foundation of paranoid and conspiratorial anti-government and anti-institutional political and social belief. These individuals are sometimes called 'litigation terrorists' for this reason. They may act for personal benefit, but they also do so with the belief they are justified and act lawfully when they injure others

and disrupt court processes. Persons who advance OPCA litigation to harm others have no place in Canada's courts. The court's inherent jurisdiction must be able to shield the innocent potential victims of these malcontents. Their next target can be anyone who crosses their path - government officials or organizations, peace officers, lawyers, judges, business employees - and who then offends the OPCA litigant's skewed perspectives.

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

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

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

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

However, that should not be the only evidence which is an appropriate basis on which to restrict court access.

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

77 Even though the *Judicature Act* is not the sole basis for this Court's jurisdiction to control abusive litigation, that legislation could be amended to make it more effective. One helpful step would be to remove the requirement that "vexatious" litigation involves misconduct that occurs "persistently". Another would be to re-focus the basis for when intervention should occur.

Currently, section 23.1(1) permits intervention when " . . . a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner ...". This again is backwards-looking, punitive language. In my opinion a superior alternative is "... when a Court is satisfied that a person may abuse court processes ...".

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

79 As Veit J observed in *Sikora Estate v. Sikora*, 2015 ABQB 467 (Alta. Q.B.) at paras 16-19, where a person seeks to have the court make an order that restricts court access then the appropriate procedure is *Judicature Act*, ss 23-23.1. That is a distinct process and authority from that possessed by judges of this Court. Given that the Masters of the Alberta Court of Queen's Bench derive their authority from legislation, another helpful step would be for the Legislature to extend *Judicature Act*, ss 23-23.1 to authorize Masters, on their own motion, to apply the *Judicature Act* procedure to

control abusive litigants who appear in Chambers. This is not an uncommon phenomenon; the Masters are in many senses the 'front line' of the Court, and frequently encounter litigation abuse in that role.

B. Maurice Stoney's Abusive Activities

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

1. Collateral Attacks

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

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

2. Hopeless Proceedings

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

3. Busybody Litigation

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

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

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

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

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

4. Failure to Follow Court Orders - Unpaid Costs Awards

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

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

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

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

5. Escalating Proceedings - Forum Shopping

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

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

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

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

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

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

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

6. Unproven Allegations of Fraud and Corruption

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

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

7. Improper Litigation Purposes

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

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

C. Anticipated Litigation Abuse

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

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

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

105 While I have agreed with many of the Sawridge Band and 1985 Sawridge Trust's arguments, I do not accept that Maurice Stoney's litigation history and apparent intentions means that his plausible future abusive litigation activities cannot be restricted to a particular target group or dispute. Instead, Maurice Stoney's complaint-related activities have

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

1. the Sawridge Band,

2. the 1985 Sawridge Trust,

3 the 1986 Sawridge Trust,

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

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

6. the Public Trustee of Alberta,

7. legal representatives of categories 1-6,

8. members of the Sawridge Band,

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

10. the Canadian federal government.

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

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

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

109 Maurice Stoney's "busybody" activities, and his attempts to justify his purportedly authorized representation activities in this hearing raise the troubling possibility that Stoney will again attempt to draw others into his disputes. Persons have no constitutional right to represent others (*Gauthier v. Starr*, 2016 ABQB 213, 86 C.P.C. (7th) 348 (Alta. Q.B.)), and appearing before a court is a privilege solely subject to the court's discretion (*R. v. Dick*, 2002 BCCA 27, 163 B.C.A.C. 62 (B.C. C.A.)). Maurice Stoney has badly abused that privilege and his arguments concerning his "busybody" activities are highly problematic. He has demonstrated he is an unfit litigation representative. I therefore order that Maurice Stoney is prohibited from representing any person in all Alberta Courts.

D. Court Access Control Order

110 I therefore order:

1. Maurice Felix Stoney is prohibited, under the inherent jurisdiction of the Alberta Court of Queen's Bench, from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, without an order of the Chief Justice or Associate Chief Justice, or Chief Judge, of the Court in which the proceeding is conducted, or his or her designate, where that litigation involves any one or more of:

(i) the Sawridge Band,

(ii) the 1985 Sawridge Trust,

(iii) the 1986 Sawridge Trust,

(iv) current, former, and future Chief and Council of the Sawridge Band,

(v) the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

(vi) Public Trustee of Alberta,

(vii) legal representatives of categories 1-6,

(viii) members of the Sawridge Band,

(ix) corporate and individual employees of the Sawridge Band, and

(x)) the Canadian federal government.

2. Maurice Felix Stoney is prohibited from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, until Maurice Felix Stoney pays in full all outstanding costs ordered by any Canadian court.

3. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may, at any time, direct that notice of an application to commence or continue an appeal, action, application, or proceeding be given to any other person.

4. Maurice Felix Stoney must describe himself, in the application or document to which this Order applies as "Maurice Felix Stoney", and not by using initials, an alternative name structure, or a pseudonym.

5. Any application to commence or continue any appeal, action, application, or proceeding must be accompanied by an affidavit:

(i) attaching a copy of the Order issued herein, restricting Maurice Felix Stoney's access to the Alberta Court of Queen's Bench and Provincial Court of Alberta;

(ii) attaching a copy of the appeal, pleading, application, or process that Maurice Felix Stoney proposes to issue or file or continue;

(iii) deposing fully and completely to the facts and circumstances surrounding the proposed claim or proceeding, so as to demonstrate that the proceeding is not an abuse of process, and that there are reasonable grounds for it;

(iv) indicating whether Maurice Felix Stoney has ever sued some or all of the defendants or respondents previously in any jurisdiction or Court, and if so providing full particulars;

(v) undertaking that, if leave is granted, the authorized appeal, pleading, application or process, the Order granting leave to proceed, and the affidavit in support of the Order will promptly be served on the defendants or respondents;

(vi) undertaking to diligently prosecute the proceeding; and

(vii) providing evidence of payment in full of all outstanding costs ordered by any Canadian court.

6. Any application referenced herein shall be made in writing.

7. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may:

(i) give notice of the proposed claim or proceeding and the opportunity to make submissions on the proposed claim or proceeding, if they so choose, to:

a) the involved potential parties;

b) other relevant persons identified by the Court; and

c) the Attorney Generals of Alberta and Canada.

(ii) respond to the leave application in writing; and

(iii) hold the application in open Court where it shall be recorded.

8. Leave to commence or continue proceedings may be given on conditions, including the posting of security for costs.

9. An application that is dismissed may not be made again.

10. An application to vary or set aside this Order must be made on notice to any person as directed by the Court.

111 This order will be prepared by the Court and filed at the same time, as this Case Management Decision and takes effect immediately. The exception granted in the Rooke Order shall apply to this court access control order.

112 The interim order made per *Sawridge #6* at para 65-66 is vacated.

V. Representation by Priscilla Kennedy in this Matter

113 I have deep concerns about the manner in which Maurice Stoney's lawyer, Priscilla Kennedy, has conducted herself in this matter. Certain of those issues are reviewed in *Sawridge #7*, a judgment where I determined that Kennedy should be personally responsible for her client's costs award because of her misconduct. She represented a client who made a hopeless application that was a serious abuse of the Court and other litigants, and involved other third parties without their authorization.

114 In *Sawridge #7* Ms. Kennedy was represented by Mr. Donald Wilson, a partner of the law firm DLA Piper, which is the law firm that employs Ms. Kennedy. I reproduce verbatim certain of Mr. Wilson's submissions to the Court in *Sawridge #7*:

. . . in these circumstances, I will say that Ms. Kennedy has prosecuted this action on [Maurice Stoney's] behalf further than I would've, further than I think she should've. ...

. . . the reason I go through this, Sir, is I think quite candidly I've conceded that Ms. Kennedy prosecuted this action further than I would've, further than I think she ought to have ...

Now, if I'm [counsel for the Sawridge Band], I can tell you that the Band is the person that gets to determine their membership and that is entirely appropriate. And in Mr. Stoney's case they've done that. Appeals were made on two different

levels. An additional attempt was made at the Human Rights tribunal. And Mr. Stoney has been told, and I know he's been told this because I told him this, he is at the end of his rope with respect to the Sawridge Band and the Court system.

And the reason for that is background and history. It's one of Montgomery's campaigns in World War II, it's a bridge too far. He would've been fine if he'd stopped at bridges, by going for a third bridge the campaign itself stopped. In this instance, had -- if I'd been engaged or consulted, if I read Sawridge 5 . . . the fact that the Court is not, unlikely earlier trust litigation where often the trust ends up paying for part of the litigant's costs, the Court could not have been clearer that is not going forward. And the Court indicated interlope. That is, someone does not have a claim on the trust, presumably would make the trial more complicated, more time consuming, higher costs for everyone. ...

Now, I can tell you that in the course of the last week . . . I had occasion to speak in depth with Ms. Kennedy. And Ms. Kennedy tried to convince me as to the merits of Mr. Stoney's case. And at a certain point in time, I had to tell her that he has exhausted his remedies in the legal realm with res pect to the Sawrid ges an d it's time to move on.

. . .

My submission would be the application that resulted in Sawridge 6 should not have been made. It was ill-advised. But was not done with bad motives, an attempt to abuse the process. It had that effect, I have to say in front of my friends it absolutely had that effect . . .

. . . what the Court is trying to do, as you properly cite in your decision with respect to sanctions, is to change behaviour. It's the same rationale behind torts which is you're giving a tort award so that some other idiot isn't going to follow and do the same thing. And, with respect, I would submit to you that the seriousness of what Sawridge 6 is has been driven home to Ms. Kennedy. And, with respect, it' s been driven home as much as an order of contempt or a referral to the Law Society.

The decision is out there, we have a courtroom full of reporters here to report on the matter.

And I'm reminded of someone once asked Warren Buffett when he was testifying at the congress as to what was reasonable, and it was on the context of a company he owned and insider trading. And Mr. Buffett to the U.S. congress testified it meets a very easy standard. And the standard is, if they printed the story in your home town and your mother and your father had an opportunity to read it, would you be embarrassed? And, with respect, Ms. Kennedy and the Sawridge 6

decision has brou ght ho me the falling o f continuing to prose cute the r eme d y she 's seeking for Mr. Stoney. Which, after meeting Mr. Stoney, I understand. But there's a certain point in time the legal remedies have been exhausted. . . .

[Emphasis added.]

115 I believe I am fair when I indicate these submissions say that at the *Sawridge #7* hearing Mr. Wilson, on behalf of Ms. Kennedy, had acknowledged that there was no merit to the August 12, 2016 application, and that the legal issues involved in that application had been decided,

conclusively, in a series of earlier court proceedings. Yet, here in her written submissions, Ms. Kennedy on behalf of Maurice Stoney, re-argues the very same points. Her submissions are the law is unsettled, issues remain arguable, despite her counsel's admission on July 28, 2017 that

> the effect of the August 12, 2016 application was to abuse of the court's process: " . . . it absolutely had that effect ..." [emphasis added].

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

117 In *Sawridge #7* at paras 98-99 I explained my conclusion why a lawyer who re-litigates or repeatedly raises settled issues has engaged in serious misconduct that is contrary to the standards expected of persons who hold the title "lawyer". I also observed on how advancing abusive litigation is a breach not merely of a lawyer's professional and court officer duties. It is a betrayal of the solicitor-client relationship, and 'digs a grave for two': para 74.

118 I am also troubled by Ms. Kennedy relying on a procedure found in the *Federal Court Rules* to explain why Maurice Stoney's August 12, 2016 application was not a "busybody" proceeding. Stating what should be obvious, civil proceedings in front of this Court are governed by the *Alberta Rules of Court*, not the *Federal Court Rules*. I question the competence of a lawyer who does not understand what court rules apply in a specific jurisdiction.

119 In *Sawridge #7* at paras 51-58 I reviewed case law concerning the inherent jurisdiction of a Canadian court to control lawyers and their activities. At para 56 I cited *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.) at 1245, (1990), 77 D.L.R. (4th) 249 (S.C.C.) for the rule that courts as part of their supervisory function may remove lawyers from litigation, where appropriate. In that decision representation by lawyers was challenged on the basis of an alleged conflict of interest.

However, the inherent jurisdiction of the court is not expressly restricted to simply that:

> . . . The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. ... [Emphasis added.]

120 In my opinion Ms. Kennedy's conduct raises the question of whether she is a suitable representative for Maurice Stoney, and whether the proper administration of justice requires that Ms. Kennedy should be removed from this litigation.

121 This judgment represents what I believe should be Ms. Kennedy's final opportunity to participate in the Advice and Direction Application in the Alberta Court of Queen's Bench as a representative of Maurice Stoney. If that were not the case then I would have proceeded to invite submissions from Ms. Kennedy why she and her law firm, DLA Piper, should not be removed as representatives of Maurice Stoney, and prohibited from any future representation of Maurice Stoney in the Advice and Direction Application.

122 Instead I will send a copy of this judgment to the Law Society of Alberta for review.

VI. Conclusion

123 I conclude that Maurice Felix Stoney has engaged in abusive litigation activities resulting in him being required to seek leave prior to initiating or continuing litigation in the Alberta Court of Queen's Bench and Alberta Provincial Court that relates to persons and organizations involved with the Sawridge Band and Maurice Stoney's disputes concerning membership in that Band. Maurice Stoney may only seek leave after he has paid all outstanding costs awards.

124 Maurice Stoney is also prohibited from representing others in any litigation before the Alberta Provincial Court, Alberta Court of Queen's Bench, and Alberta Court of Appeal.

125 I confirm that I will send a copy of this judgment to the Law Society of Alberta for review in respect to Ms. Kennedy.

Order accordingly.

End of Document

Tab 14

2017 ABCA 439
Alberta Court of Appeal

Kennedy v. Trustees for the 1985 Sawridge Trust

2017 CarswellAlta 2698, 2017 ABCA 439, [2018] A.W.L.D. 483, [2018] A.W.L.D. 5, 286 A.C.W.S. (3d) 373

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

Jack Watson J.A., Frans Slatter J.A., Myra Bielby J.A.

Heard: December 14, 2017
Judgment: December 19, 2017
Docket: Edmonton Appeal 1703-0252-AC

Proceedings: affirming *1985 Sawridge Trust v. Alberta (Public Trustee)* (2017), 2017 CarswellAlta 1639, 2017 ABQB 548, D.R.G. Thomas J. (Alta. Q.B.)

Counsel: D.C. Bonora, A. Loparco, for Applicants, Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Sawridge Trust
E.H. Molstad, Q.C., for Applicant, Sawridge First Nation
P.J. Faulds, Q.C., K. Precht, for Respondent / Appellant

Subject: Civil Practice and Procedure; Public
Related Abridgment Classifications
Professions and occupations
IX Barristers and solicitors
IX.6 Relationship with others
IX.6.b Duty as officer of court
Headnote
Professions and occupations --- Barristers and solicitors — Relationship with others — Duty as officer of court
First Nations trust applied for directions as to distribution of trust — S, whose family had formerly been members of First Nation, was unsuccessful in attempts to be recognized as member — S continued to bring applications in various courts and before human rights tribunal in search for status — Case management judge made S subject to vexatious litigant order — Judge was critical of conduct of S's lawyer and provided that he would send copy of judgment to law society for review — Lawyer appealed this direction — First Nations trust and related parties brought application to dismiss appeal — Application granted and appeal dismissed — Appeal was struck as being without merit, because judge was entitled to refer conduct of lawyer to law society — Law Society would be interested in any comments that appellate court may have when it disposed of substantive appeal, but that did not preclude judge from raising issue, nor did it bind law society — Matters that appellate court would consider in disposing of substantive appeal did not necessarily overlap completely with matters that would be considered by law society — There was no basis to appeal judge's direction since it was not included in formal order which formed basis of appeal — Judge's advice that he was referring matter to law society was simply for information of counsel and parties and was part of court's inherent jurisdiction to control its proceedings — It was open to judge to determine that such direction was not part of formal adjudication and to exclude it from order.
Table of Authorities
Cases considered:

Chisholm v. Lindsay (2017), 2017 ABCA 21, 2017 CarswellAlta 41 (Alta. C.A.) — referred to
Dool v. Nazarewycz (2009), 2009 ABCA 70, 2009 CarswellAlta 252, 2 Alta. L.R. (5th) 36, 46 E.T.R. (3d) 159, (sub nom. *Dool Estate, Re)* 448 A.R. 1, (sub nom. *Dool Estate, Re)* 447 W.A.C. 1, [2009] 7 W.W.R. 636 (Alta. C.A.) — referred to
Law v. Cheng (2016), 2016 BCCA 120, 2016 CarswellBC 679, 82 C.P.C. (7th) 39, 84 B.C.L.R. (5th) 238, 384 B.C.A.C. 236, 663 W.A.C. 236 (B.C. C.A.) — referred to
Luft v. Taylor, Zinkhofer & Conway (2017), 2017 ABCA 228, 2017 CarswellAlta 1183, 53 Alta. L.R. (6th) 44, [2017] 10 W.W.R. 39 (Alta. C.A.) — referred to
Québec (Directeur des poursuites criminelles et pénales) c. Jodoin (2017), 2017 SCC 26, 2017 CSC 26, 2017 CarswellQue 3091, 2017 CarswellQue 3092, 346 C.C.C. (3d) 433, 408 D.L.R. (4th) 581, 37 C.R. (7th) 1, [2017] 1 S.C.R. 478, (sub nom. *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin)* 380 C.R.R. (2d) 285 (S.C.C.) — referred to
R. & T. Thew Ltd. v. Reeves (No. 2) (1982), [1982] 3 All E.R. 1086, [1982] Q.B. 1283 (Eng. C.A.) — referred to
R. v. M. (R.E.) (2008), 2008 SCC 51, 2008 CarswellBC 2037, 2008 CarswellBC 2038, 83 B.C.L.R. (4th) 44, [2008] 11 W.W.R. 383, 60 C.R. (6th) 1, 235 C.C.C. (3d) 290, 297 D.L.R. (4th) 577, 380 N.R. 47, 260 B.C.A.C. 40, 439 W.A.C. 40, [2008] 3 S.C.R. 3 (S.C.C.) — referred to
Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — referred to

Statutes considered:

Judicature Act, R.S.A. 2000, c. J-2
s. 3 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 14.8(1) — considered

R. 14.74 — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C, Tariff of Costs, column 2 — referred to

APPLICATION to dismiss lawyer's appeal from judgment reported at *1985 Sawridge Trust v. Alberta (Public Trustee)* (2017), 2017 ABQB 548, 2017 CarswellAlta 1639 (Alta. Q.B.), disapproving of lawyer's conduct and providing that reasons would be sent to law society.

Per curiam:

1 The appellant was counsel for one of the parties in this litigation. The case management judge was critical of her conduct, and in his reasons reported as *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 548 (Alta. Q.B.) at paras. 122, 125 (*Sawridge #8*) he stated: " . . . I will send a copy of this judgment to the Law Society of Alberta for review." The appellant appealed this direction, and the applicants (respondents in the appeal) have now applied to strike the appeal.

2 The applicants argue that the appeal is without merit, and should be struck under R. 14.74 for several reasons. First of all, the applicants argue that the reasons have already been sent to the Law Society, so the appeal is moot. The appellant advises that the Law Society has indicated that it is holding the matter in abeyance pending the outcome of these proceedings, and so argues that the appeal is not moot.

3 Secondly, the applicants argue that a judge, like any concerned member of the public, can refer the conduct of a lawyer to the Law Society. The appellant responds that if this Court disagrees with the case management judge's assessment of the appellant's conduct, there would be no basis on which to refer the matter to the Law Society.

4 Thirdly, the applicants argue that appeals are from the formal order of the court, not the reasons, and the challenged direction was not a part of the formal order. While the direction was included in early drafts of the formal order, the case management judge specifically declined to include it in the final version of the order. The appellant argues that the direction is still a pronouncement, and that she should not be deprived of an opportunity to have it reviewed by this Court just because the case management judge did not include it in the formal order.

5 Fourthly, the applicants argue that the appellant was not a party to the proceedings and has not applied to be added as a party. The appellant replies that she is asserting the necessary status to launch her own appeal, not to be added as a party to an existing appeal. The appellant argues that the challenged direction directly engaged her interests, not just those of her client.

6 These applications should be allowed. This appeal should be struck as being without merit, because a judge is entitled to refer the conduct of a lawyer to the Law Society: *Dool v. Nazarewycz*, 2009 ABCA 70 (Alta. C.A.) at para. 75, (2009), 2 Alta. L.R. (5th) 36, 448 A.R. 1 (Alta. C.A.); *R. & T. Thew Ltd. v. Reeves (No. 2)*, [1982] Q.B. 1283 (Eng. C.A.) at p. 1286. The Law Society will undoubtedly be interested in any comments that this Court may have when it disposes of the substantive appeal, but that does not preclude the case management judge from raising the issue, nor does it bind the Law Society. The matters that this Court will consider in disposing of the substantive appeal do not necessarily overlap completely with the matters that would be considered by the Law Society, as the two institutions discharge different functions: *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin*, 2017 SCC 26 (S.C.C.) at paras. 22-3, [2017] 1 S.C.R. 478 (S.C.C.).

7 Further, there is no basis to appeal the case management judge's direction since it was not included in the formal order which forms the basis of the appeal. Section 3 of the *Judicature Act*, RSA 2000, c. J-2 confers jurisdiction upon this Court, subject to the *Rules of Court*, to hear and determine appeals respecting only a "judgment, order or decision". Discussions in the reasons for decision that do not form part of the formal order or judgment are not "decisions" generating a right of appeal: *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.) at para. 9, [2008] 3 S.C.R. 3 (S.C.C.); *Chisholm v. Lindsay*, 2017 ABCA 21 (Alta. C.A.) at para. 8; *Law v. Cheng*, 2016 BCCA 120 (B.C. C.A.) at paras. 17-8, (2016), 84 B.C.L.R. (5th) 238 (B.C. C.A.).

8 Rule 14.8(1), which measures the time in which an appeal must be filed from the date of "pronouncement", does not expand the scope of a permissible appeal to cover everything "pronounced" in the reasons for decision. Appeals are only available from a "judgment, order or decision", not the reasons. Comments by the trial judge that do not form a part of his adjudication, and accordingly do not find their way into the formal order, cannot support an appeal.

9 The appellant argues that it was an error of law for the case management judge not to include the direction in the formal order. The case management judge's advice that he was referring the matter to the Law Society was simply for the information of counsel and the parties, and did not constitute part of his "judgment, order or decision". He decided to refer his reasons to the Law Society as part of the court's inherent jurisdiction to control its proceedings and to regulate the conduct of its officers, not as a component of his adjudication of the merits of the action. It is open to a trial judge to determine that such a direction is not a part of the formal adjudication, and to exclude it from the order.

10 The applications are accordingly allowed, and the appeal is dismissed.

11 The applicants claim costs of these applications on a "solicitor and own client" basis, but that is not an appropriate scale of party and party costs: *Luft v. Taylor, Zinkhofer & Conway*, 2017 ABCA 228 (Alta. C.A.) at paras. 77-8, (2017), 53 Alta. L.R. (6th) 44 (Alta. C.A.). There has been no litigation misconduct in this appeal, and the mere fact that the appeal was ultimately determined to be without merit is not a sufficient justification for indemnity costs: *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at p. 134. The only assessable step taken by the applicants in this appeal would appear to be this contested application, and the applicants (respondents in the appeal) are each entitled to one-half of the assessable costs of that step, on Column 2. Accordingly, each respondent is entitled to $625 plus GST in costs for this appeal.

Application granted; appeal dismissed.

End of Document

Tab 15

Director of Criminal and Penal Prosecutions *Appellant*

v.

Robert Jodoin *Respondent*

and

Director of Public Prosecutions, Criminal Lawyers' Association (Ontario), Association des avocats de la défense de Montréal, Trial Lawyers Association of British Columbia and Canadian Civil Liberties Association *Interveners*

Directeur des poursuites criminelles et pénales *Appelant*

c.

Robert Jodoin *Intimé*

et

Directeur des poursuites pénales, Criminal Lawyers' Association (Ontario), Association des avocats de la défense de Montréal, Association des avocats plaideurs de la Colombie-Britannique et Association canadienne des libertés civiles *Intervenants*

INDEXED AS: QUEBEC (DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS) *v.* JODOIN

2017 SCC 26

File No.: 36539.

2016: December 5; 2017: May 12.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

RÉPERTORIÉ : QUÉBEC (DIRECTEUR DES POURSUITES CRIMINELLES ET PÉNALES) *c.* JODOIN

2017 CSC 26

N° du greffe : 36539.

2016 : 5 décembre; 2017 : 12 mai.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Costs — Lawyers — Courts — Jurisdiction — Superior Court dismissing motions of defence lawyer for writs of prohibition and awarding costs against lawyer personally — Court of Appeal setting award aside — Criteria and process applicable to exercise by courts of their power to impose such sanction on lawyer — Whether awarding costs against lawyer personally was justified in this case — Whether Court of Appeal erred in substituting its own opinion for that of Superior Court.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Dépens — Avocats — Tribunaux — Compétence — Cour supérieure rejetant les requêtes d'un avocat de la défense sollicitant la délivrance de brefs de prohibition et condamnant celui-ci personnellement au paiement des dépens — Condamnation annulée en appel — Critères et processus régissant l'exercice par les tribunaux de leur pouvoir d'infliger une telle sanction à un avocat — La condamnation personnelle aux dépens était-elle justifiée en l'espèce? — La Cour d'appel a-t-elle erré en substituant son opinion à celle de la Cour supérieure?

J, an experienced criminal lawyer, was representing 10 clients charged with impaired driving. On the morning of a scheduled hearing in the Court of Québec on a motion for disclosure of evidence in his clients' cases, before it even began, J had the office of the Superior Court stamp a series of motions for writs of prohibition in which he challenged the jurisdiction of the Court of

J, avocat criminaliste d'expérience, représente 10 clients accusés de conduite avec facultés affaiblies. Le matin d'une audience prévue en Cour du Québec sur une requête en communication de la preuve dans les dossiers de ses clients, avant qu'elle ne débute, J fait timbrer au greffe de la Cour supérieure une série de requêtes sollicitant la délivrance de brefs de prohibition contestant

Québec judge who was to preside over the hearing, alleging bias on the judge's part. However, before the motions were served, the parties learned that another judge would be presiding instead. The motions were therefore put aside, and the hearing on the motion for disclosure of evidence began. At the hearing, J objected to the testimony of an expert witness called by the Crown on the ground that he had not received the required notice. The judge decided to authorize the examination in chief of the expert after the lunch break. During the break, J drew up a new series of motions for writs of prohibition, this time challenging that judge's jurisdiction and alleging, once again, bias on the judge's part. After the break, he informed the judge of this and the hearing was adjourned, as the service of such motions suspends proceedings until the Superior Court has ruled on them. The Superior Court dismissed the motions and, at the Crown's request, awarded costs against J personally. The Court of Appeal affirmed the Superior Court's judgment on the disposition of the motions, but allowed the appeal solely to set aside the award of costs against J personally.

Held (Abella and Côté JJ. dissenting): The appeal should be allowed and the award of costs restored.

Per McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ.: The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them. A court therefore has an inherent power to control abuse in this regard and to prevent the use of procedure in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. This is a discretion that must be exercised in a deferential manner, but it allows a court to ensure the integrity of the justice system.

The awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct. This power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases, which means that it may be

la compétence du juge de la Cour du Québec appelé à présider et alléguant sa partialité. Toutefois, avant la signification des requêtes, les parties apprennent que ce sera plutôt un autre juge qui présidera l'audience. Les requêtes sont donc mises de côté et l'audience sur la requête en communication de la preuve débute. En cours d'audience, J s'oppose au témoignage d'un expert du ministère public, au motif qu'il n'a pas reçu le préavis requis. Le juge décide d'autoriser l'interrogatoire principal de l'expert après la pause du midi. Pendant la pause, J rédige une nouvelle série de requêtes sollicitant la délivrance de brefs de prohibition contestant la compétence de ce juge et alléguant, pour lui également, sa partialité. Au retour de la pause, il en informe le juge et l'audience est ajournée, car la signification de telles requêtes opère sursis des procédures jusqu'à ce que la Cour supérieure se soit prononcée sur celles-ci. La Cour supérieure rejette les requêtes et, à la demande du ministère public, condamne personnellement J au paiement des dépens. La Cour d'appel confirme le jugement de la Cour supérieure sur le sort des requêtes mais accueille l'appel, à seule fin d'annuler la condamnation personnelle de J aux dépens.

Arrêt (les juges Abella et Côté sont dissidentes) : Le pourvoi est accueilli et la condamnation aux dépens est rétablie.

La juge en chef McLachlin et les juges Moldaver, Karakatsanis, Wagner, Gascon, Brown et Rowe : Les tribunaux ont le pouvoir de veiller au respect de leur autorité. Cela inclut le pouvoir de gérer, contrôler et maîtriser les procédures qui se déroulent devant eux. Ils possèdent ainsi le pouvoir inhérent de réprimer les abus à cet égard et d'empêcher que la procédure ne soit utilisée d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait autrement pour effet de discréditer l'administration de la justice. Il s'agit d'un pouvoir discrétionnaire qui doit s'exercer avec retenue, mais qui permet à un tribunal d'assurer l'intégrité du système judiciaire.

La condamnation personnelle d'un avocat aux dépens découle du droit et du devoir des tribunaux de superviser la conduite des avocats présents devant eux et de signaler, et parfois sanctionner, toute conduite de nature à mettre en échec l'administration de la justice ou y porter atteinte. En tant qu'officiers de la cour, les avocats ont le devoir de respecter l'autorité des tribunaux. Le défaut des avocats d'agir en conformité avec leur statut peut obliger les tribunaux à sévir à leur endroit en sanctionnant leur inconduite. L'exercice par les tribunaux de ce pouvoir de condamner personnellement un avocat au paiement des dépens ne se limite pas aux instances civiles; il s'étend

exercised against defence lawyers. This power applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members.

The threshold for exercising the courts' discretion to award costs against a lawyer personally is a high one. An award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate.

There are two important guideposts that apply to the exercise of this discretion. The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers, whose role is not comparable in every respect to that of a lawyer in a civil case. If costs are awarded against a lawyer personally, the purpose must not be to discourage the lawyer from defending his or her client's rights and interests, and in particular the client's right to make full answer and defence. Thus, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings. The second guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial. To consider facts external to the case before the court can be justified only for the limited purpose of determining, first, the intention behind the lawyer's actions and whether he or she was acting in bad faith, and, second, whether the lawyer knew, on bringing the impugned proceeding, that the courts do not approve of such proceedings and that this one was unfounded.

A court cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards. A lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts, and should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should have an opportunity to make separate

aussi aux instances criminelles et peut donc viser les avocats de la défense. Ce pouvoir s'exerce parallèlement à celui des tribunaux de sévir par une condamnation pour outrage au tribunal et à celui des barreaux de sanctionner l'inconduite de leurs membres sur le plan déontologique.

L'application du pouvoir discrétionnaire des tribunaux de condamner personnellement un avocat au paiement des dépens est circonscrite par des critères d'exercice élevés. Une condamnation personnelle de l'avocat aux dépens ne peut se justifier que de manière exceptionnelle, en présence d'une atteinte sérieuse à l'autorité des tribunaux ou d'une entrave grave à l'administration de la justice. Ce critère élevé est respecté lorsqu'un tribunal est en présence d'une procédure mal fondée, frivole, dilatoire ou vexatoire, qui dénote un abus grave du système judiciaire ou une inconduite malhonnête ou malveillante, commis de propos délibéré par l'avocat.

Deux balises importantes encadrent l'exercice de ce pouvoir discrétionnaire. La première balise découle du contexte particulier des procédures en matière criminelle, lequel requiert une certaine souplesse de la part des tribunaux à l'égard des actions entreprises par les avocats de la défense, dont le rôle n'est pas comparable en tous points à celui de l'avocat en matière civile. La condamnation personnelle aux dépens ne doit pas viser à décourager l'avocat dans la défense des droits et intérêts de son client, notamment son droit à une défense pleine et entière. Ainsi, l'évaluation de la conduite de l'avocat de la défense doit tenir compte de considérations parfois différentes de celles de l'avocat en matière civile. La seconde balise exige que les tribunaux s'en tiennent aux faits propres à l'affaire dont ils sont saisis et qu'ils s'abstiennent de faire indirectement le procès du dossier disciplinaire de l'avocat, voire de sa carrière. Recourir à des faits externes à l'instance concernée ne peut se justifier que dans l'objectif limité de déterminer, d'une part, l'intention et la mauvaise foi derrière les actions de l'avocat et, d'autre part, la connaissance par ce dernier, au moment où il a entrepris les procédures qu'on lui reproche, de la désapprobation de celles-ci par les tribunaux et de leur caractère mal fondé.

Un tribunal ne peut condamner personnellement un avocat aux dépens sans respecter un certain processus et certaines garanties procédurales. L'avocat passible d'une telle sanction devrait recevoir un avis préalable l'informant des allégations formulées à son endroit et des conséquences qui pourraient en découler. Cet avis devrait contenir des informations suffisantes sur les faits reprochés et sur la teneur de la preuve à l'appui, et être transmis suffisamment à l'avance pour permettre à l'avocat de se préparer adéquatement. Ce dernier devrait avoir

submissions on costs and to adduce any relevant evidence in this regard. The applicable standard of proof is the balance of probabilities. In criminal proceedings, the Crown's role on this issue must be limited to objectively presenting the evidence and the relevant arguments.

The circumstances of this case were exceptional and justified an award of costs against J personally. The Superior Court correctly identified the applicable criteria and properly exercised its discretion. As the court noted, J's conduct in the cases in question was particularly reprehensible. The purpose of that conduct was unrelated to the motions he brought. J was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. J thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the court to conclude that J had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice. The Court of Appeal should not have intervened in the absence of an error of law, a palpable and overriding error of fact or an unreasonable exercise of discretion by the Superior Court.

Per Abella and Côté JJ. (dissenting): Personal costs orders are of an exceptional nature. In the criminal context, such orders could have a chilling effect on criminal defence counsel's ability to properly defend their client. Accordingly, they should only be issued in the most exceptional of circumstances and the Crown should be very hesitant about pursuing them.

In the instant case, J's behaviour did not warrant the exceptional remedy of a personal costs order. It appears that his conduct was not unique and that he was being punished as a warning to other lawyers engaged in similar tactics. The desire to make an example of J's behaviour does not justify straying from the legal requirement that his conduct be rare and exceptional before costs are ordered personally against him.

l'occasion de présenter des observations distinctes au sujet des dépens, et, le cas échéant, des éléments de preuve pertinents à cet égard. La norme de preuve qui s'impose est celle de la preuve prépondérante. Dans les instances criminelles, le rôle du ministère public sur cette question doit se limiter à présenter objectivement la preuve et les arguments pertinents.

La situation en l'espèce était exceptionnelle et autorisait la condamnation personnelle de J au paiement des dépens. La Cour supérieure a bien dégagé les critères applicables et correctement exercé son pouvoir discrétionnaire. Comme elle l'a souligné, la conduite de J dans ces dossiers était particulièrement répréhensible. Elle visait un but étranger aux requêtes entreprises. J était animé par une volonté d'obtenir une remise de l'audience plutôt que par une croyance sincère dans l'inimitié des juges qui étaient la cible de ses requêtes. J a ainsi utilisé les recours extraordinaires à une fin purement dilatoire dans le seul but d'entraver de manière calculée le bon déroulement du processus judiciaire. Devant cela, la cour pouvait raisonnablement conclure que J a fait preuve de mauvaise foi et a abusé des procédures, portant ainsi sérieusement atteinte à l'administration de la justice. La Cour d'appel ne devait pas intervenir en l'absence d'erreur de droit, d'erreur manifeste et déterminante en faits ou d'exercice déraisonnable par la Cour supérieure de son pouvoir discrétionnaire.

Les juges Abella et Côté (dissidentes) : Les ordonnances condamnant personnellement un avocat aux dépens sont des mesures de nature exceptionnelle. Dans le contexte de procédures criminelles, de telles ordonnances pourraient avoir un effet paralysant sur la capacité des avocats de la défense à défendre adéquatement leurs clients. En conséquence, une telle sanction ne devrait être infligée que dans les circonstances les plus exceptionnelles et le ministère public devrait faire montre de beaucoup de circonspection avant de demander qu'elle le soit.

En l'espèce, la conduite de J ne justifiait pas l'imposition de la sanction exceptionnelle que représente la condamnation personnelle d'un avocat aux dépens. Il semble que sa conduite ne présentait pas un caractère exceptionnel et que la sanction qui lui était infligée se voulait un avertissement aux autres avocats ayant recours à des tactiques similaires. Le désir de faire un exemple de J en sanctionnant sa conduite ne saurait justifier de déroger à la règle de droit exigeant que la conduite qu'on lui reproche présente un caractère rare et exceptionnel afin que le tribunal puisse le condamner personnellement aux dépens.

Moreover, J's motions for writs of prohibition were not unfounded to a sufficient degree to attract a personal costs order. The Crown had not provided J with the notice required for an expert witness testimony under s. 657.3(3) of the *Criminal Code*. J was, as a result, entitled to an adjournment under s. 657.3(4). The judge presiding in the Court of Québec only granted him a brief one over the lunch break and mistakenly said that J had already cross-examined the Crown's expert in other matters. In the circumstances, J's filing of motions for writs of prohibition for the purpose of suspending the proceedings can easily be seen as an error of judgment, but hardly one justifying a personal costs order. For these reasons, the appeal should be dismissed.

Cases Cited

By Gascon J.

Applied: *Quebec (Attorney General) v. Cronier* (1981), 63 C.C.C. (2d) 437; **considered:** *Young v. Young*, [1993] 4 S.C.R. 3; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842; **referred to:** *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, rev'd 2002 SCC 63, [2002] 3 S.C.R. 307; *Morel v. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629; *Myers v. Elman*, [1940] A.C. 282; *Pearl v. Gentra Canada Investments Inc.*, [1998] R.L. 581; *R. v. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69; *R. v. Smith* (1999), 133 Man. R. (2d) 89; *Canada (Procureur général) v. Bisson*, [1995] R.J.Q. 2409; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Trang*, 2002 ABQB 744, 323 A.R. 297; *Fearn v. Canada Customs*, 2014 ABQB 114, 586 A.R. 23; *R. v. Ciarniello* (2006), 81 O.R. (3d) 561; *Leyshon-Hughes v. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74; *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908; *R. v. Carrier*, 2012 QCCA 594; *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303; *Galganov v.*

De plus, les requêtes sollicitant la délivrance de brefs de prohibition n'étaient pas mal fondées au point de commander une condamnation personnelle aux dépens. Le ministère public n'avait pas donné à J, comme le requiert le par. 657.3(3) du *Code criminel*, de préavis de son intention de faire témoigner un expert. Par conséquent, J avait droit à un ajournement en vertu du par. 657.3(4). Le juge de la Cour du Québec qui présidait l'audience ne lui a accordé qu'une brève suspension pendant la pause du midi et a affirmé à tort que J avait déjà contre-interrogé le témoin expert du ministère public dans d'autres instances. Dans les circonstances, le dépôt par J des requêtes sollicitant la délivrance de brefs de prohibition en vue d'obtenir la suspension des procédures peut aisément être considéré comme une erreur de jugement, mais difficilement comme une erreur justifiant une condamnation personnelle aux dépens. Pour ces motifs, le pourvoi devrait être rejeté.

Jurisprudence

Citée par le juge Gascon

Arrêt appliqué : *Québec (Procureur général) c. Cronier* (1981), 23 C.R. (3d) 97; **arrêts examinés :** *Young c. Young*, [1993] 4 R.C.S. 3; *Pacific Mobile Corporation c. Hunter Douglas Canada Ltd.*, [1979] 1 R.C.S. 842; **arrêts mentionnés :** *R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167; *Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481, inf. par 2002 CSC 63, [2002] 3 R.C.S. 307; *Morel c. Canada*, 2008 CAF 53, [2009] 1 R.C.F. 629; *Myers c. Elman*, [1940] A.C. 282; *Pearl c. Gentra Canada Investments Inc.*, [1998] R.L. 581; *R. c. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69; *R. c. Smith* (1999), 133 Man. R. (2d) 89; *Canada (Procureur général) c. Bisson*, [1995] R.J.Q. 2409; *United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901; *R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331; *R. c. 974649 Ontario Inc.*, 2001 CSC 81, [2001] 3 R.C.S. 575; *R. c. Trang*, 2002 ABQB 744, 323 A.R. 297; *Fearn c. Canada Customs*, 2014 ABQB 114, 586 A.R. 23; *R. c. Ciarniello* (2006), 81 O.R. (3d) 561; *Leyshon-Hughes c. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181; *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395; *Histed c. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74; *Groia c. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1; *R. c. G.D.B.*, 2000 CSC 22, [2000] 1 R.C.S. 520; *R. c. Joanisse* (1995), 102 C.C.C. (3d) 35; *R. c. Handy*, 2002 CSC 56, [2002] 2 R.C.S. 908; *R. c. Carrier*, 2012 QCCA 594; *St-Jean c. Mercier*, 2002 CSC 15, [2002] 1 R.C.S. 491; *Ontario (Procureur général) c. Bear Island Foundation*, [1991] 2 R.C.S. 570; *Hamilton c. Open Window Bakery Ltd.*,

that itself had the power to punish for contempt of court. It concluded that, on the facts, the situation "does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice" (para. 11).

IV. Issue

[15] The only issue in this appeal is whether the Superior Court was justified in awarding costs against the respondent personally. What must be done to resolve it is, first, to determine the scope of the courts' power to impose such a sanction, the applicable criteria and the process to be followed, next, to ascertain whether the criteria were properly applied by the Superior Court judge and, finally, to determine whether the intervention of the Court of Appeal was necessary.

V. Analysis

A. *Awarding of Costs Against a Lawyer Personally*

(1) Power of the Courts

[16] The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 58). A court therefore has an inherent power to control abuse in this regard (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 136) and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute": *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63, [2002] 3 S.C.R. 307. This is a discretion that must, of course, be exercised in a deferential manner (*Anderson*, at para. 59), but it allows a court to "ensure the integrity of the justice system" (*Morel v. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629, at para. 35).

survenus devant une autre juridiction possédant elle-même le pouvoir de condamner l'outrage au tribunal. Elle en conclut que, dans les faits, la situation « ne révèle pas le caractère exceptionnel et rare que sont une atteinte sérieuse à l'autorité de ce tribunal ou une atteinte grave à l'administration de la justice » (par. 11).

IV. Question en litige

[15] La seule question que soulève le pourvoi est celle de savoir si la Cour supérieure était justifiée de condamner personnellement l'intimé au paiement des dépens. Pour y répondre, il faut d'abord cerner l'étendue du pouvoir des tribunaux d'infliger une telle sanction, les critères applicables et le processus à suivre, ensuite, vérifier si l'application des critères par le juge de la Cour supérieure était légitime et, enfin, déterminer si une intervention de la Cour d'appel s'imposait.

V. Analyse

A. *La condamnation personnelle de l'avocat aux dépens*

(1) Le pouvoir des tribunaux

[16] Les tribunaux ont le pouvoir de veiller au respect de leur autorité. Cela inclut le pouvoir de gérer, contrôler et maîtriser les procédures qui se déroulent devant eux (*R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167, par. 58). Ils possèdent ainsi le pouvoir inhérent de réprimer les abus à cet égard (*Young c. Young*, [1993] 4 R.C.S. 3, p. 136) et d'empêcher que la procédure ne soit utilisée [TRADUCTION] « d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait autrement pour effet de discréditer l'administration de la justice » : *Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481 (C.A.), par. 55, le juge Goudge, dissident, opinion approuvée par 2002 CSC 63, [2002] 3 R.C.S. 307. Il s'agit d'un pouvoir discrétionnaire qui doit certes s'exercer avec retenue (*Anderson*, par. 59), mais qui permet à un tribunal « d'assurer l'intégrité du système judiciaire » (*Morel c. Canada*, 2008 CAF 53, [2009] 1 R.C.F. 629, par. 35).

[17] It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts (*Anderson*, at para. 58). It is therefore not reserved to superior courts but, rather, has its basis in the common law: *Myers v. Elman*, [1940] A.C. 282 (H.L.), at p. 319; M. Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 126.

[18] There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice: *Myers*, at p. 319; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842, at p. 845; *Cronier*, at p. 448; *Pearl v. Gentra Canada Investments Inc.*, [1998] R.L. 581 (Que. C.A.), at p. 587. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct (M. Code, at p. 121).

[19] This power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases (*Cronier*). This means that it may sometimes be exercised against defence lawyers in criminal proceedings, although such situations are rare: *R. v. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69; *R. v. Smith* (1999), 133 Man. R. (2d) 89 (Q.B.), at para. 43; *Canada (Procureur général) v. Bisson*, [1995] R.J.Q. 2409 (Sup. Ct.); M. Code, at p. 122.

[20] The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. Punishment for contempt is thus based on the same power the courts have "to enforce their process and maintain

[17] Il est acquis que ce pouvoir appartient tant aux tribunaux jouissant d'une compétence inhérente qu'aux tribunaux d'origine législative (*Anderson*, par. 58). Il n'est donc pas réservé aux cours supérieures et tire plutôt son fondement de la common law : *Myers c. Elman*, [1940] A.C. 282 (H.L.), p. 319; M. Code, « Counsel's Duty of Civility : An Essential Component of Fair Trials and an Effective Justice System » (2007), 11 *Rev. can. D.P.* 97, p. 126.

[18] Une jurisprudence bien établie reconnaît que la condamnation personnelle d'un avocat aux dépens découle du droit et du devoir des tribunaux de superviser la conduite des avocats présents devant eux et de signaler, et parfois de sanctionner, toute conduite de nature à mettre en échec l'administration de la justice ou y porter atteinte : *Myers*, p. 319; *Pacific Mobile Corporation c. Hunter Douglas Canada Ltd.*, [1979] 1 R.C.S. 842, p. 845; *Cronier*, p. 110; *Pearl c. Gentra Canada Investments Inc.*, [1998] R.L. 581 (C.A. Qc), p. 587. En tant qu'officiers de la cour, les avocats ont le devoir de respecter l'autorité des tribunaux. Le défaut des avocats d'agir en conformité avec leur statut peut obliger les tribunaux à sévir à leur endroit en sanctionnant leur inconduite (M. Code, p. 121).

[19] L'exercice par les tribunaux de ce pouvoir de condamner personnellement un avocat au paiement des dépens ne se limite pas aux instances civiles; il s'étend aussi aux instances criminelles (*Cronier*). Bien qu'une telle situation soit rare, ce pouvoir peut donc viser parfois les avocats de la défense en matière criminelle : *R. c. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69; *R. c. Smith* (1999), 133 Man. R. (2d) 89 (B.R.), par. 43; *Canada (Procureur général) c. Bisson*, [1995] R.J.Q. 2409 (C.S.); M. Code, p. 122.

[20] Ce pouvoir de contrôler les abus de procédure et le processus judiciaire en condamnant personnellement un avocat au paiement des dépens s'exerce parallèlement à celui des tribunaux de sévir par une condamnation pour outrage au tribunal et à celui des barreaux de sanctionner l'inconduite de leurs membres sur le plan déontologique. Ainsi, la sanction de l'outrage repose sur ce même pouvoir qu'ont

their dignity and respect" (*United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931). These sanctions are not mutually exclusive, however. If need be, they can even be imposed concurrently in relation to the same conduct.

[21] This being said, although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court (*Cronier*, at p. 449), the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt (I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Leg. Probl.* 23, at pp. 46-48).

[22] As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public (s. 23 of the *Professional Code*, CQLR, c. C-26). However, the judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:

> The court's authority is preventative — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court. [Emphasis deleted.]

(*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 35)

les tribunaux « de faire observer leur procédure et de maintenir leur dignité et le respect qui leur est dû » (*United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901, p. 931). Ces sanctions ne sont par contre pas mutuellement exclusives. Elles peuvent même, à la rigueur, être appliquées concurremment pour une même conduite.

[21] Cela dit, même si les critères qui permettent une condamnation personnelle de l'avocat aux dépens se comparent à ceux applicables à l'égard de l'outrage au tribunal (*Cronier*, p. 111), les conséquences qui en découlent sont loin d'être identiques. L'outrage au tribunal est de droit strict et peut entraîner des sanctions sévères, dont l'emprisonnement. Les règles de preuve y afférentes sont du reste plus exigeantes que pour une condamnation personnelle de l'avocat aux dépens, l'outrage au tribunal devant être prouvé hors de tout doute raisonnable. Parce que les avocats ont le statut particulier d'officiers de la cour, un tribunal peut ainsi, dans une situation donnée, opter pour une condamnation personnelle aux dépens plutôt que pour une citation à comparaître pour outrage au tribunal (I. H. Jacob, « The Inherent Jurisdiction of the Court » (1970), 23 *Curr. Leg. Probl.* 23, p. 46-48).

[22] Quant aux barreaux, ils jouent à ce chapitre un rôle différent, mais parfois complémentaire, de celui des tribunaux. Ils ont bien sûr une responsabilité importante dans la surveillance et la sanction des comportements des avocats, responsabilité qui découle de leur mission première de protection du public (art. 23 du *Code des professions*, RLRQ, c. C-26). Cependant, les pouvoirs judiciaires des tribunaux et disciplinaires des barreaux en la matière se distinguent, comme l'a expliqué notre Cour dans les termes suivants :

> Le pouvoir judiciaire se veut préventif. Il vise à protéger l'administration de la justice et à assurer un procès équitable. Le rôle disciplinaire du barreau a un caractère réactif. Les deux sont nécessaires pour bien encadrer l'exercice de la profession d'avocat et protéger la procédure de la cour. [Italiques omis.]

(*R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331, par. 35)

[23] The courts therefore do not have to rely on law societies to oversee and sanction any conduct they may witness. It is up to the courts to determine whether, in a given case, to exercise the power they have to award costs against a lawyer personally in response to the lawyer's conduct before them. However, there is nothing to prevent the law society from exercising in parallel its power to assess its members' conduct and impose appropriate sanctions.

[24] In most cases, of course, the implications for a lawyer of being ordered personally to pay costs are less serious than those of the other two alternatives. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. Moreover, as this appeal shows, an order to pay costs personally will normally involve relatively small amounts, given that the proceedings will inevitably be dismissed summarily on the basis that they are unfounded, frivolous, dilatory or vexatious.

(2) Applicable Criteria

[25] While the courts do have the power to award costs against a lawyer personally, the threshold for exercising it is a high one. It is in fact rarely exercised, and the question whether it should be arises only infrequently: *Cronier*; *Young*; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 85; *R. v. Trang*, 2002 ABQB 744, 323 A.R. 297, at para. 481; *Fearn v. Canada Customs*, 2014 ABQB 114, 586 A.R. 23, at para. 121; *Smith*, at para. 43. Only serious misconduct can justify such a sanction against a lawyer. Moreover, the courts must be cautious in imposing it in light of the duties owed by lawyers to their clients:

> Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties

[23] Aussi, les tribunaux n'ont pas à s'en remettre aux ordres professionnels pour encadrer et sanctionner les conduites dont ils peuvent être témoins. Il appartient aux tribunaux de déterminer s'ils doivent, dans un cas précis, recourir au pouvoir dont ils disposent de condamner personnellement un avocat aux dépens pour la conduite qu'il a eue devant eux. Néanmoins, rien n'empêche que s'exerce en parallèle le pouvoir de l'ordre professionnel d'évaluer la conduite de ses membres et de déterminer les sanctions appropriées.

[24] Dans la plupart des cas, il faut bien réaliser que la condamnation personnelle de l'avocat aux dépens comporte pour le professionnel des implications moins fâcheuses que les deux autres possibilités. Contrairement à une condamnation ponctuelle au paiement de dépens, une condamnation pour outrage au tribunal ou une inscription au dossier disciplinaire de l'avocat ont généralement des conséquences plus importantes et plus durables. En outre, ce pourvoi en témoigne, une condamnation personnelle aux dépens implique normalement des sommes relativement peu élevées, puisque les procédures seront forcément écartées sommairement en raison de leur nature mal fondée, frivole, dilatoire ou vexatoire.

(2) Les critères applicables

[25] Si le pouvoir des tribunaux de condamner personnellement un avocat au paiement de dépens existe, son application est par contre circonscrite par des critères d'exercice élevés. Son exercice reste en effet exceptionnel et la décision d'y recourir ou non ne se présente que dans de rares cas : *Cronier*; *Young*; *R. c. 974649 Ontario Inc.*, 2001 CSC 81, [2001] 3 R.C.S. 575, par. 85; *R. c. Trang*, 2002 ABQB 744, 323 A.R. 297, par. 481; *Fearn c. Canada Customs*, 2014 ABQB 114, 586 A.R. 23, par. 121; *Smith*, par. 43. Seules les conduites graves justifient la condamnation d'un avocat à une telle sanction. Il importe d'ailleurs que les tribunaux demeurent prudents en la matière en raison des devoirs de l'avocat envers ses clients :

> De plus, les tribunaux doivent faire montre de la plus grande prudence en condamnant personnellement un

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.

(*Young*, at p. 136)

[26] The type of conduct that can be sanctioned in this way was analyzed in depth in *Cronier*. L'Heureux-Dubé J.A. concluded after reviewing the case law that the courts are justified in exercising such a discretion in cases involving abuse of process, frivolous proceedings, misconduct or dishonesty, or actions taken for ulterior motives, where the effect is to seriously undermine the authority of the courts or to seriously interfere with the administration of justice. She noted, however, that this power must not be exercised in an arbitrary and unlimited manner, but rather with restraint and caution. The motion judge in the case at bar properly relied on *Cronier*, and the Court of Appeal also endorsed the principles stated in it.

[27] Several courts across the country have adopted the requirement of conduct that represents a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system: *Bisson*; *R. v. Ciarniello* (2006), 81 O.R. (3d) 561 (C.A.), at para. 31; *Leyshon-Hughes v. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181, at para. 62; *Fearn*, at para. 119; *Smith*, at para. 58. Also, as the House of Lords stated in a case that has been cited by Canadian courts, including in *Cronier*, a mere mistake or error of judgment will not be sufficient to justify awarding costs against a lawyer personally; there must at the very least be gross neglect or inaccuracy (*Myers*, at p. 319).

[28] There are in this Court's jurisprudence examples of conduct that has led to awards of costs being made against lawyers personally. In *Young*, the Court held that such a sanction is justified if "repetitive and irrelevant material, and excessive motions and applications, characterized" the conduct in question and if this was the result of a lawyer's acting

avocat aux dépens, vu l'obligation qui lui incombe de préserver la confidentialité de son mandat et de défendre avec courage même des causes impopulaires. Un avocat ne devrait pas être placé dans une situation où la peur d'être condamné aux dépens pourrait l'empêcher de remplir les devoirs fondamentaux de sa charge.

(*Young*, p. 136)

[26] Le type de conduites susceptibles d'entraîner une telle sanction a fait l'objet d'une analyse approfondie dans *Cronier*. Sur la foi de sa revue de la jurisprudence, la juge L'Heureux-Dubé conclut que les tribunaux sont justifiés d'exercer un tel pouvoir discrétionnaire en présence d'abus de procédures, de procédures frivoles, d'inconduites ou de malhonnêtetés, ou encore de mesures prises pour des motifs obliques, et ce, lorsqu'il en résulte une atteinte sérieuse à l'autorité des tribunaux ou une entrave grave à l'administration de la justice. Elle note que ce pouvoir ne doit pas, par contre, être exercé arbitrairement et de façon illimitée, mais plutôt avec retenue et circonspection. En l'espèce, le premier juge s'est appuyé avec raison sur cet arrêt. La Cour d'appel en a aussi retenu les enseignements.

[27] Plusieurs tribunaux à travers le pays ont par ailleurs retenu la nécessité d'une conduite dérogeant d'une manière marquée et inacceptable à la norme de conduite raisonnable et attendue d'un acteur du système judiciaire : *Bisson*; *R. c. Ciarniello* (2006), 81 O.R. (3d) 561 (C.A.), par. 31; *Leyshon-Hughes c. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181, par. 62; *Fearn*, par. 119; *Smith*, par. 58. Dans un arrêt repris par des décisions canadiennes, dont *Cronier*, la Chambre des lords mentionne elle aussi qu'une simple erreur de jugement ne suffit pas mais qu'il faut à tout le moins une négligence grave ou une erreur grossière pour justifier la condamnation personnelle de l'avocat aux dépens (*Myers*, p. 319).

[28] Notre jurisprudence offre des exemples de conduites qui ont mené à une condamnation personnelle de l'avocat au paiement de dépens. Dans *Young*, notre Cour reconnaît qu'une conduite « marqué[e] par la production de documents répétitifs et non pertinents, de requêtes et de motions excessives », et qui est le fruit d'un avocat agissant « de mauvaise

"in bad faith in encouraging this abuse and delay" (pp. 135-36). In *Pacific Mobile*, the Court awarded costs against a company's solicitors personally in a bankruptcy case. The solicitors had been granted a number of adjournments and had instituted proceedings that were inconsistent with directions given by the trial judge. On the issue of costs, Pigeon J. stressed that he did "not consider it fair to make the debtor's creditors bear the cost of proceedings which were not instituted in their interest: quite the contrary". He added that such an award of costs, "far from appropriately discouraging unnecessary appeals occasioning costly delays, tends on the contrary to favour them" (p. 844). In the circumstances, he determined that "the Court should [therefore] make use of its power to order costs payable by solicitors personally" (p. 845).

[29] In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate. Thus, a lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner.

[30] This being said, however, it should be noted that there are two important guideposts that apply to the exercise of this discretion in a situation like the one in this appeal.

[31] The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers. In considering the circumstances, the courts must bear in mind that the context of criminal proceedings differs from that of civil proceedings. In criminal cases, the rule is that costs are

foi en encourageant ces abus et ces délais », justifie une telle sanction (p. 135-136). Dans *Pacific Mobile*, notre Cour condamne personnellement les procureurs d'une société au paiement des dépens dans une affaire de faillite. Ces avocats avaient obtenu plusieurs ajournements et entamé des procédures allant à l'encontre des directives données par le juge de première instance. Appelé à statuer sur les dépens, le juge Pigeon souligne qu'il ne lui « paraît pas juste de faire supporter par les créanciers de la débitrice les [dépens] de procédures qui ne sont pas formées dans leur intérêt mais plutôt à leur encontre », et qu'une telle adjudication des dépens, « loin de décourager comme il convient les appels futiles source de retards préjudiciables, tend au contraire à les favoriser » (p. 844). Dans les circonstances, il décide qu'il y a donc « lieu pour la Cour d'user de son pouvoir de mettre les dépens à la charge des procureurs personnellement » (p. 845).

[29] Il s'ensuit, à mon avis, qu'une condamnation personnelle de l'avocat aux dépens ne peut se justifier que de manière exceptionnelle, en présence d'une atteinte sérieuse à l'autorité des tribunaux ou d'une entrave grave à l'administration de la justice. Ce critère élevé est respecté lorsqu'un tribunal est en présence d'une procédure mal fondée, frivole, dilatoire ou vexatoire, qui dénote un abus grave du système judiciaire ou une inconduite malhonnête ou malveillante, commis de propos délibéré par l'avocat. Ainsi, un avocat ne peut sciemment utiliser les ressources judiciaires à une fin purement dilatoire, dans le seul but de faire obstruction de manière calculée au bon déroulement du processus judiciaire.

[30] Cela dit, il convient toutefois de rappeler que deux balises importantes encadrent l'exercice de ce pouvoir discrétionnaire dans une situation analogue à celle du présent pourvoi.

[31] La première balise découle du contexte particulier des procédures en matière criminelle, lequel requiert une certaine souplesse de la part des tribunaux à l'égard des actions entreprises par les avocats de la défense. Dans l'analyse des circonstances, les tribunaux doivent en effet retenir que le contexte particulier des procédures criminelles diffère de celui

not awarded; no provision is made, for example, for awards of costs where extraordinary remedies are sought (*Cronier*, at p. 447). Awards of costs made against lawyers personally are therefore purely punitive and do not include the compensatory aspect costs have in civil cases.

[32] As well, the role of a defence lawyer is not comparable in every respect to that of a lawyer in a civil case. For example, the latter has an ethical duty to encourage compromise and agreement as much as possible. In contrast, a defence lawyer has no obligation to help the Crown in the conduct of its case. It is the very essence of the role of a defence lawyer to challenge, sometimes forcefully, the decisions and arguments of other players in the judicial system in light of the serious consequences they may have for the lawyer's client: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at paras. 64-66, citing *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, at para. 71. Indeed, committed and zealous advocacy for clients' rights and interests and a strong and independent defence bar are essential in an adversarial system of justice: *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1, at para. 129; P. J. Monahan, "The Independence of the Bar as a Constitutional Principle in Canada", in Law Society of Upper Canada, ed., *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law & the Independence of the Bar* (2007), 117. If these conditions are not met, the reliability of the process and the fairness of the trial will suffer: *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 25, quoting *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 57. In short, if costs are awarded against a lawyer personally in criminal proceedings, the purpose must not be to discourage the lawyer from defending his or her client's rights and interests, and in particular the client's right to make full answer and defence. From this point of view, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings.

des procédures civiles. En matière criminelle, la règle est l'absence de dépens; par exemple, rien n'en prévoit l'octroi dans le cadre de l'exercice de recours extraordinaires (*Cronier*, p. 108). La condamnation personnelle de l'avocat au paiement des dépens a donc un caractère purement punitif et ne comprend pas la composante compensatrice qu'ont les dépens en matière civile.

[32] En outre, le rôle de l'avocat de la défense n'est pas comparable en tous points à celui de l'avocat en matière civile. Ce dernier a par exemple le devoir éthique de favoriser les compromis et les ententes dans la mesure du possible. À l'opposé, l'avocat de la défense n'a aucune obligation d'aider le ministère public dans la conduite de son dossier. Il est de l'essence même du rôle de l'avocat de la défense de remettre en cause, de manière parfois vigoureuse, les décisions et prétentions des autres acteurs du système judiciaire, vu les conséquences graves qu'elles peuvent avoir sur son client : *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, par. 64-66, citant *Histed c. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, par. 71. Une défense dévouée et passionnée des droits et des intérêts des clients ainsi qu'une section de la défense forte et indépendante au sein du barreau sont d'ailleurs essentiels dans un système de justice contradictoire : *Groia c. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1, par. 129; P. J. Monahan, « L'indépendance du barreau en tant que principe constitutionnel au Canada », dans Barreau du Haut-Canada, dir., *Dans l'intérêt public : rapport et articles du groupe d'étude du barreau du Haut-Canada sur la règle de droit et l'indépendance du barreau* (2007), 127. Si ces conditions ne sont pas présentes, la fiabilité du processus et l'équité du procès en souffrent : *R. c. G.D.B.*, 2000 CSC 22, [2000] 1 R.C.S. 520, par. 25, citant *R. c. Joanisse* (1995), 102 C.C.C. (3d) 35 (C.A. Ont.), p. 57. Bref, en matière criminelle, la condamnation personnelle aux dépens ne doit pas viser à décourager l'avocat dans la défense des droits et intérêts de son client, notamment son droit à une défense pleine et entière. De ce point de vue, l'évaluation de la conduite de l'avocat de la défense doit tenir compte de considérations parfois différentes de celles de l'avocat en matière civile.

[33] The second guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial. The facts that can be considered in awarding costs against a lawyer personally must generally be limited to those of the case before the court. In its analysis, the court must not conduct an ethics investigation or seek to assess the whole of the lawyer's practice. It is not a matter of punishing the lawyer "for his or her entire body of work". To consider facts external to the case before the court can be justified only for the limited purpose of determining, first, the intention behind the lawyer's actions and whether he or she was acting in bad faith, and, second, whether the lawyer knew, on bringing the impugned proceeding, that the courts do not approve of such proceedings and that this one was unfounded.

[34] In this regard, certain evidence that is external to the case before the court may sometimes be considered, because it is of high probative value and has a strong similarity to the alleged facts, in order to establish, for example, wilful intent and knowledge on the lawyer's part. However, it must be limited to the specific issue before the court, that is, the lawyer's conduct. It may not serve more broadly as proof of a general propensity or bad character (*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at paras. 71-72 and 82).

(3) Process to Be Followed

[35] This being said, a court obviously cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards (Y.-M. Morissette, "L'initiative judiciaire vouée à l'échec et la responsabilité de l'avocat ou de son mandant" (1984), 44 *R. du B.* 397, at p. 425). However, it is important that this process be flexible and that it enable the courts to adapt to the circumstances of each case.

[36] Thus, a lawyer upon whom such a sanction may be imposed should be given prior notice of

[33] Par ailleurs, la seconde balise exige que les tribunaux s'en tiennent aux faits propres à l'affaire dont ils sont saisis et qu'ils s'abstiennent de faire indirectement le procès du dossier disciplinaire de l'avocat, voire de sa carrière. Les faits qui peuvent être pris en compte dans la condamnation personnelle d'un avocat au paiement des dépens doivent généralement se limiter à ceux de l'affaire dont est saisi le juge. L'analyse menée par le tribunal ne doit pas se substituer à une enquête déontologique ni chercher à évaluer l'ensemble de la pratique de l'avocat visé. Il ne s'agit pas de sanctionner l'avocat « pour l'ensemble de son œuvre ». Recourir à des faits externes à l'instance concernée ne peut se justifier que dans l'objectif limité de déterminer, d'une part, l'intention et la mauvaise foi derrière les actions de l'avocat et, d'autre part, la connaissance par ce dernier, au moment où il a entrepris les procédures qu'on lui reproche, de la désapprobation de celles-ci par les tribunaux et de leur caractère mal fondé.

[34] Sous ce rapport, certains éléments étrangers à l'affaire devant le juge peuvent à l'occasion être pris en compte en raison de leur forte valeur probante et de leur grande similitude avec les faits reprochés, afin par exemple d'établir l'intention délibérée et la connaissance de l'avocat. Ils doivent par contre se rapporter uniquement à la question précise en jeu, à savoir la conduite de l'avocat. Ils ne peuvent viser, plus largement, à prouver une propension générale ou la mauvaise moralité (*R. c. Handy*, 2002 CSC 56, [2002] 2 R.C.S. 908, par. 71-72 et 82).

(3) Le processus à suivre

[35] Cela dit, il va de soi qu'un tribunal ne peut condamner personnellement un avocat aux dépens sans respecter un certain processus et certaines garanties procédurales (Y.-M. Morissette, « L'initiative judiciaire vouée à l'échec et la responsabilité de l'avocat ou de son mandant » (1984), 44 *R. du B.* 397, p. 425). Il importe toutefois que ce processus demeure flexible et permette au tribunal de s'adapter aux circonstances de chaque affaire.

[36] Ainsi, l'avocat passible d'une telle sanction devrait recevoir un avis préalable l'informant des

the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts. The notice should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should, of course, have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. Ideally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits.

[37] However, these protections differ from the ones conferred by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*. Where an award of costs is sought against a lawyer personally, the lawyer is not a "person charged with an offence" and the proceeding is not a criminal one *per se*. Although the applicable criteria are strict, the standard of proof is the balance of probabilities.

[38] In closing, I note that the Crown's role on this specific issue must be limited in criminal proceedings. In such a situation, it is of course up to the parties as well as the court to raise a problem posed by a lawyer's conduct. However, the Crown's role is to objectively present the evidence and the relevant arguments on this point. It is the court that is responsible for determining whether a sanction should be imposed, and that has the power to impose one, in its role as guardian of the integrity of the administration of justice. The Crown must confine itself to its role as prosecutor of the accused. It must not also become the prosecutor of the defence lawyer.

B. *Application to the Facts of the Instant Case*

(1) Judgment of the Superior Court

[39] In light of the foregoing, I am of the view that the motion judge properly exercised his discretion in awarding costs against the respondent personally.

allégations formulées à son endroit et des conséquences qui pourraient en découler. Cet avis devrait contenir des informations suffisantes sur les faits reprochés et sur la teneur de la preuve à leur appui. L'avis devrait être transmis suffisamment à l'avance pour permettre à l'avocat de se préparer adéquatement. Ce dernier devrait bien sûr avoir l'occasion de présenter des observations distinctes au sujet des dépens, et, le cas échéant, des éléments de preuve pertinents à cet égard. Idéalement, le débat relatif à la condamnation personnelle de l'avocat aux dépens ne devrait avoir lieu qu'une fois la procédure visée tranchée sur le fond.

[37] Ces protections se distinguent cependant de celles conférées par la *Charte canadienne des droits et libertés* à ses art. 7 et 11. En ce qui touche la condamnation personnelle aux dépens recherchée contre lui, l'avocat n'est pas un « inculpé » et il ne s'agit pas d'une matière criminelle comme telle. Quoique les critères applicables soient exigeants, la norme de preuve qui s'impose reste la preuve prépondérante.

[38] En terminant, je note que dans les instances criminelles, le rôle du ministère public sur cette question précise doit demeurer limité. Certes, dans une telle situation, il appartient autant aux parties qu'au tribunal de soulever le problème que pose la conduite d'un avocat. Toutefois, le rôle du ministère public est de présenter objectivement la preuve et les arguments pertinents sur ce point. L'opportunité et le pouvoir d'imposer une sanction appartiennent au tribunal en vertu de son rôle de gardien de l'intégrité de l'administration de la justice. Le ministère public doit se confiner à son rôle de poursuivant de l'accusé. Il ne doit pas devenir en plus le poursuivant de l'avocat de la défense.

B. *L'application aux faits de l'espèce*

(1) Le jugement de la Cour supérieure

[39] À la lumière de ce qui précède, je considère que le juge de première instance a bien exercé la discrétion qui est la sienne en condamnant personnellement l'intimé au paiement des dépens.

Tab 16

2017 ABCA 228
Alberta Court of Appeal

Luft v. Taylor, Zinkhofer & Conway

2017 CarswellAlta 1183, 2017 ABCA 228, [2017] 10 W.W.R. 39, [2017] A.W.L.D. 4135, [2017] A.W.L.D. 4136, [2017] A.W.L.D. 4137, [2017] A.W.L.D. 4478, [2017] A.W.L.D. 4547, [2017] A.W.L.D. 4567, [2017] A.W.L.D. 4568, [2017] A.W.L.D. 4569, [2017] A.W.L.D. 4570, [2017] A.W.L.D. 4571, 280 A.C.W.S. (3d) 763, 53 Alta. L.R. (6th) 44

Donald Vance Luft and Susan Anne Luft (Respondents / Cross-Appellants / Plaintiffs / Defendants by Counterclaim) and Taylor, Zinkhofer & Conway and Frederick Zinkhofer (Appellants / Cross-Respondents / Defendants) and Frederick Zinkhofer (Appellant / Cross-Respondent / Defendant / Plaintiff by Counterclaim)

Frans Slatter, Barbara Lea Veldhuis, Sheila Greckol JJ.A.

Heard: February 8, 2017
Judgment: July 5, 2017
Docket: Calgary Appeal 1601-0100-AC

Proceedings: varying *Luft v. Taylor, Zinkhofer & Conway* (2016), 2016 CarswellAlta 543, 2016 ABQB 182, [2016] 9 W.W.R. 84, 30 Alta. L.R. (6th) 268, S.L. Martin J. (Alta. Q.B.)

Counsel: L.V. Halyn, for Respondents / Cross-Appellants
C. Jensen, Q.C., D.J. Marshall, for Appellants / Cross-Respondents

Subject: Civil Practice and Procedure; Estates and Trusts; Public; Torts
Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.f Costs on solicitor and own client basis
Professions and occupations
IX Barristers and solicitors
IX.4 Relationship with client
IX.4.e Conflict of interest
IX.4.e.v Miscellaneous
Remedies
I Damages
I.2 Remoteness and foreseeability
I.2.b Torts
I.2.b.ii Requirement of direct causal link
I.2.b.ii.C Miscellaneous
Remedies
I Damages
I.4 Damages for breach of fiduciary duty
I.4.c Professional relationship
Remedies
I Damages

I.6 Valuation of damages
I.6.c Measure of damages
I.6.c.vi Miscellaneous
Remedies
I Damages
I.6 Valuation of damages
I.6.d Duty to mitigate
I.6.d.iv Types of mitigation
I.6.d.iv.H Legal action against other parties
Remedies
I Damages
I.7 Exemplary, punitive and aggravated damages
I.7.c Grounds for awarding exemplary, punitive and aggravated damages
I.7.c.vi Breach of fiduciary duty

Headnote

Remedies --- Damages — Remoteness and foreseeability — Torts — Requirement of direct causal link — Miscellaneous
Plaintiffs hired defendant law firm to pursue legal action against their neighbours — Defendant lawyer never pursued plaintiffs' lawsuit against their neighbours — Plaintiffs fired defendant lawyer and hired new lawyer — Plaintiffs discovered that not only had defendant lawyer not done any of things he had told plaintiffs he was doing to pursue lawsuit against neighbours, he had, without telling plaintiffs, entered into counsel agreement that gave away plaintiffs' right to go to trial and committed them to binding judicial dispute resolution — Defendants were found liable at trial for defendant lawyer's breaches of fiduciary duty, breaches of contract, and negligence, and trial judge awarded plaintiffs $747,500 in damages — Defendants appealed and plaintiffs cross appealed — Appeal allowed in part on other grounds; cross appeal allowed in part — Defendants submitted that trial judge erred in finding causation with respect to alleged employment losses by admitting impermissible hearsay, making important time-line mistake, applying theory of "fade and replace" that was unknown to causation theory, failing to follow "but for" test, and allocating losses arbitrarily — Trial judge did not err in her conclusions on causation — As regards cross appeal, trial judge found that defendant lawyer "caused" plaintiff husband's employment loss on basis of "but for" test — Trial judge erred by reducing $276,000 in employment losses to $225,000 based upon other non-tortious causes.
Remedies --- Damages — Exemplary, punitive and aggravated damages — Grounds for awarding exemplary, punitive and aggravated damages — Breach of fiduciary duty
Plaintiffs hired defendant law firm to pursue legal action against their neighbours — Defendant lawyer never pursued plaintiffs' lawsuit against their neighbours — Plaintiffs fired defendant lawyer and hired new lawyer — Plaintiffs discovered that not only had defendant lawyer not done any of things he had told plaintiffs he was doing to pursue lawsuit against neighbours, he had, without telling plaintiffs, entered into counsel agreement that gave away plaintiffs' right to go to trial and committed them to binding judicial dispute resolution — Defendants were found liable at trial for defendant lawyer's breaches of fiduciary duty, breaches of contract, and negligence — Trial judge awarded plaintiffs $747,500 in damages, including $250,000 in punitive damages — Defendants appealed — Appeal allowed in part — As regards issue of punitive damages, trial judge's emphasis on deterrence, fact that award far exceeded what was being sought by plaintiffs, and fact that award was considerably higher than awards given in similar cases of lawyer misconduct led to conclusion that reasonable jury, properly instructed, could not have concluded that award in that amount, and no less, was rationally required to punish defendant's misconduct — Award of $100,000 in punitive damages was rational response to facts presented — Award of punitive damages should be payable by defendant lawyer only.
Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and own client basis
Plaintiffs sued defendant lawyer and defendant law firm for damages arising from alleged mishandling of their legal file — Defendants were found liable at trial for defendant lawyer's breaches of fiduciary duty, breaches of contract, and negligence — Trial judge awarded plaintiffs $747,500 in damages, plus pre-judgment interest and solicitor and own client costs — Defendants appealed — Appeal allowed in part — As there were no allegations of misconduct during course of

litigation, trial judge erred in law in awarding solicitor and own client costs — Plaintiffs were awarded party and party costs of trial assessed on Column 5 of Schedule C.

Remedies --- Damages — Valuation of damages — Duty to mitigate — Types of mitigation — Legal action against other parties

Plaintiffs hired defendant law firm to pursue legal action against their neighbours — Defendant lawyer never pursued plaintiffs' lawsuit against their neighbours — Plaintiffs fired defendant lawyer and hired new lawyer — Plaintiffs discovered that not only had defendant lawyer not done any of things he had told plaintiffs he was doing to pursue lawsuit against neighbours, he had, without telling plaintiffs, entered into counsel agreement that gave away plaintiffs' right to go to trial and committed them to binding judicial dispute resolution (JDR) — Defendants were found liable at trial for defendant lawyer's breaches of fiduciary duty, breaches of contract, and negligence, and trial judge awarded plaintiffs $747,500 in damages — Defendants appealed — Appeal allowed in part on other grounds — While defendants submitted that trial judge erred in finding plaintiffs were not required to pursue binding JDR in their action against neighbours, to mitigate their losses in action against defendant lawyer, there was no merit to this ground of appeal — Trial judge did not make palpable and overriding error in coming to conclusion she did — It was not agreed that trial judge erred in principle by conflating principles of causation and mitigation.

Remedies --- Damages — Valuation of damages — Measure of damages — Miscellaneous

Plaintiffs hired defendant law firm to pursue legal action against neighbours — Defendant lawyer never pursued plaintiffs' lawsuit against neighbours — Plaintiffs fired defendant lawyer and hired new lawyer — Plaintiffs discovered that not only had defendant lawyer not done any of things he had told plaintiffs he was doing to pursue lawsuit, he had, without telling them, entered into counsel agreement that gave away plaintiffs' right to go to trial and committed them to binding judicial dispute resolution — Defendants were found liable for defendant lawyer's breaches of fiduciary duty, breaches of contract, and negligence, and trial judge awarded plaintiffs damages including general damages of $105,000 for plaintiff husband and $100,000 for plaintiff wife — Defendants appealed and plaintiffs cross appealed — Appeal and cross appeal allowed in part on other grounds — No reason was seen to interfere with award of general damages — Trial judge may well have erred in law in approaching damages as she did — When certain factors were taken into account, trial judge's award of general damages to each of plaintiffs was reasonable, containing consideration of their pain and suffering and additional appropriate factors supporting award of damages — Consideration of cases submitted indicated awards were not out of line with other cases, nor were damages anywhere close to limit for general damages established by Supreme Court of Canada — Trial judge did not err by giving plaintiff wife almost equal amount of general damages as husband.

Remedies --- Damages — Damages for breach of fiduciary duty — Professional relationship

Plaintiffs hired defendant law firm to pursue legal action against neighbours — Defendant lawyer never pursued plaintiffs' lawsuit against neighbours — Plaintiffs fired defendant lawyer and hired new lawyer — Plaintiffs discovered that not only had defendant lawyer not done any of things he had told plaintiffs he was doing to pursue lawsuit, he had, without telling them, entered into counsel agreement that gave away plaintiffs' right to go to trial and committed them to binding judicial dispute resolution — Defendants were found liable for defendant lawyer's breaches of fiduciary duty, breaches of contract, and negligence, and trial judge awarded plaintiffs damages including general damages of $105,000 for plaintiff husband and $100,000 for plaintiff wife — Defendants appealed and plaintiffs cross appealed — Appeal and cross appeal allowed in part on other grounds — No reason was seen to interfere with award of general damages — Trial judge may well have erred in law in approaching damages as she did — When certain factors were taken into account, trial judge's award of general damages to each of plaintiffs was reasonable, containing consideration of their pain and suffering and additional appropriate factors supporting award of damages — Consideration of cases submitted indicated awards were not out of line with other cases, nor were damages anywhere close to limit for general damages established by Supreme Court of Canada — Trial judge did not err by giving plaintiff wife almost equal amount of general damages as husband.

Professions and occupations --- Barristers and solicitors — Relationship with client — Conflict of interest — Miscellaneous

Plaintiffs hired defendant law firm to pursue legal action against their neighbours — Defendant lawyer never pursued plaintiffs' lawsuit against their neighbours — Plaintiffs fired defendant lawyer and hired new lawyer — Plaintiffs

discovered that not only had defendant lawyer not done any of things he had told plaintiffs he was doing to pursue lawsuit against neighbours, he had, without telling plaintiffs, entered into counsel agreement that gave away plaintiffs' right to go to trial and committed them to binding judicial dispute resolution — Defendants were found liable at trial for defendant lawyer's breaches of fiduciary duty, breaches of contract, and negligence, and trial judge awarded plaintiffs $747,500 in damages, plus pre-judgment interest and solicitor and own client costs — Defendants' counterclaim concerning loan agreement was dismissed — Defendants appealed — Appeal allowed in part — With respect to counterclaim and loan agreement issue, plaintiffs and defendant law firm had entered into loan and retainer agreement, which, among other things, allowed firm to lend plaintiffs money, secured against outcome of their litigation against their neighbours — There was no indication that plaintiffs did not know what was involved, that they were coerced into agreeing to loan without giving meaningful consent, or that terms of loans were not fair and reasonable — Nothing unfair or improper was seen about setting off debt owed against plaintiffs' recovery in lawsuit.

The plaintiffs hired the defendant law firm to pursue legal action against their neighbours. The defendant lawyer provided advice about a release signed by the plaintiff husband when accepting a severance package from his employer, and was involved in certain other legal issues. The defendant lawyer never pursued the plaintiffs' lawsuit against their neighbours. The plaintiffs fired the defendant lawyer and hired a new lawyer. The plaintiffs discovered that not only had the defendant lawyer not done any of the things he had told the plaintiffs he was doing to pursue the lawsuit against their neighbours, he had, without telling the plaintiffs, entered into a counsel agreement that gave away the plaintiffs' right to go to trial and committed them to a binding judicial dispute resolution (JDR).

The plaintiffs sued the defendants for damages arising from the alleged mishandling of their legal file. The defendants were found liable at trial for the defendant lawyer's breaches of fiduciary duty, breaches of contract, and negligence. The trial judge awarded the plaintiffs damages in the amount of $67,500 for the failure to pursue the lawsuit against the neighbours, general damages of $105,000 for the plaintiff husband, general damages of $100,000 for the plaintiff wife, damages in the amount of $225,000 for the plaintiff husband's loss of income, $250,000 in punitive damages, pre-judgment interest, and solicitor and own client costs. The defendants' counterclaim concerning a loan agreement was dismissed. The defendants appealed and the plaintiffs cross appealed.

Held: The appeal and cross appeal were allowed in part.

Per Veldhuis J.A. (Greckol J.A. concurring): The appeal was allowed with respect to the punitive damages, solicitor and own client costs, and the loan agreement. The cross appeal was allowed to the extent that damages for employment loss were increased by $51,000.

The defendants submitted that the trial judge erred in finding causation with respect to the alleged employment losses by admitting impermissible hearsay, making an important time-line mistake, applying a theory of "fade and replace" that was unknown to causation theory, failing to follow the "but for" test, and allocating the losses arbitrarily. The trial judge did not err in her conclusions on causation.

As regards the issue of punitive damages, the need for personal deterrence was lessened by the fact that the defendant lawyer had been disbarred, for different misconduct, subsequent to the events giving rise to this case. The trial judge's emphasis on deterrence, the fact that the award far exceeded what was being sought by the plaintiffs, and the fact that the award was considerably higher than awards given in similar cases of lawyer misconduct led to the conclusion that a reasonable jury, properly instructed, could not have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct. An award of $100,000 in punitive damages was a rational response to the facts presented. The award of punitive damages should be payable by the defendant lawyer only.

As there were no allegations of misconduct during the course of the litigation, the trial judge erred in law in awarding solicitor and own client costs. The plaintiffs were awarded party and party costs of the trial assessed on Column 5 of Schedule C.

While the defendants submitted that the trial judge erred in finding the plaintiffs were not required to pursue the binding JDR in their action against their neighbours, to mitigate their losses in their action against the defendant lawyer, there was no merit to this ground of appeal. The disadvantageous terms of the counsel agreement, the plaintiffs' desire for an open process with a right of appeal, and the inability of the JDR judge to consider the issue of defamation were all matters contributing to the conclusion that the decision to pursue the defendant lawyer, rather than the neighbours, was an objectively reasonable decision. The trial judge did not make a palpable and overriding error in coming to the

conclusion that she did. It was not agreed that the trial judge erred in principle by conflating the principles of causation and mitigation.

No reason was seen to interfere with the award of general damages. While the trial judge may well have erred in law in approaching the damages as she did, it remained to be asked whether, despite the error in issue, the result would have been the same given the trial judge's findings of fact. When certain factors were taken into account, the trial judge's award of general damages to each of the plaintiffs was reasonable, containing, as it did, a consideration of the plaintiffs' pain and suffering and the additional appropriate factors supporting an award of damages. A consideration of the cases submitted by the parties indicated that the awards were not out of line with other cases, nor were the damages anywhere close to the limit for general damages established by the Supreme Court of Canada. It was not unreasonable to grant the plaintiff wife an award of general damages that almost equaled that given to her husband.

With respect to the counterclaim and the loan agreement issue, the plaintiffs and the defendant law firm had entered into a loan and retainer agreement, which set out the terms of the defendant lawyer's retainer and also allowed the firm to lend the plaintiffs money, secured against the outcome of their litigation against their neighbours. There was no indication that the plaintiffs did not know what was involved, that they were coerced into agreeing to the loan without giving meaningful consent, or that the terms of the loans were not fair and reasonable. The plaintiffs must have known that no lawsuit is certain and that regardless of whether the lawsuit against their neighbours was successful they would still have to pay off the loans. Nothing unfair or improper was seen about setting off the debt owed against the plaintiffs' recovery in this lawsuit.

As regards the cross appeal, the trial judge did not err by giving the plaintiff wife an almost equal amount of general damages as she awarded the plaintiff husband. The trial judge found that the defendant lawyer "caused" the plaintiff husband's employment loss on the basis of the "but for" test, and the trial judge erred by reducing $276,000 in employment losses to $225,000 based upon other non-tortious causes.

Per Slatter J.A. (concurring in part): The appeal and cross appeal would be disposed of as proposed by the majority, with two exceptions. The punitive damages award would be reduced to $10,000, and a further amount would be deducted because of the plaintiffs' failure to mitigate.

The conclusion at trial that the plaintiffs had discharged their obligation to mitigate reflected reviewable error. The defendants proved that the plaintiffs had an opportunity to mitigate, by participation in the JDR process which was sanctioned by the Rules of Court. Having found themselves bound by the counsel agreement, the plaintiffs had an obligation to make the most of it by participating in the binding JDR. A further deduction should have been made from the damage award to reflect the likely recovery in the JDR process for the harassment claim, and the reduced mental distress that would have resulted.

The punitive damage award rested on a number of errors of principle. Further, the quantum was far in excess of any amount that could reasonably be justified, and was not rationally connected to the objectives of such an award. Notwithstanding the deference owed to trial decisions on damages, an appellate court is entitled to intervene if the award exceeds the outer boundaries of a rational and measured response to the facts of the case. The punitive damage award should be set aside, and substituted with the conceded quantum of $10,000, payable by the defendant lawyer only.

Table of Authorities

Cases considered by *Barbara Lea Veldhuis J.A.*:

Athey v. Leonati (1996), [1997] 1 W.W.R. 97, 140 D.L.R. (4th) 235, 81 B.C.A.C. 243, 132 W.A.C. 243, 31 C.C.L.T. (2d) 113, 203 N.R. 36, [1996] 3 S.C.R. 458, 1996 CarswellBC 2295, 1996 CarswellBC 2296 (S.C.C.) — followed

Baud Corp., N.V. v. Brook (1978), [1979] 1 S.C.R. 633, [1978] 6 W.W.R. 301, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.*) 89 D.L.R. (3d) 1, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.*) 23 N.R. 181, 12 A.R. 271, 5 B.L.R. 225, 1978 CarswellAlta 268, 1978 CarswellAlta 302 (S.C.C.) — referred to

Blackwater v. Plint (2005), 2005 SCC 58, 2005 CarswellBC 2358, 2005 CarswellBC 2359, 258 D.L.R. (4th) 275, 46 C.C.E.L. (3d) 165, 339 N.R. 355, 35 C.C.L.T. (3d) 161, 48 B.C.L.R. (4th) 1, 216 B.C.A.C. 24, 356 W.A.C. 24, [2006] 3 W.W.R. 401, [2005] R.R.A. 1021, [2005] 3 S.C.R. 3 (S.C.C.) — referred to

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

Canavan v. Feldman (2004), 2004 CarswellOnt 3157, [2004] O.T.C. 672 (Ont. S.C.J.) — considered

Central & Eastern Trust Co. v. Rafuse (1986), 37 C.C.L.T. 117, (sub nom. *Central Trust Co. v. Rafuse)* [1986] 2 S.C.R. 147, (sub nom. *Central Trust Co. v. Rafuse)* 31 D.L.R. (4th) 481, (sub nom. *Central Trust Co. v. Rafuse)* 69 N.R. 321, (sub nom. *Central Trust Co. v. Rafuse)* 75 N.S.R. (2d) 109, (sub nom. *Central Trust Co. v. Rafuse)* 186 A.P.R. 109, 1986 CarswellNS 40, 1986 CarswellNS 135, 42 R.P.R. 161, 34 B.L.R. 187, (sub nom. *Central Trust Co. c. Cordon)* [1986] R.R.A. 527 (headnote only) (S.C.C.) — referred to

Christianson v. North Hill News Inc. (1993), 13 Alta. L.R. (3d) 78, 106 D.L.R. (4th) 747, 145 A.R. 58, 55 W.A.C. 58, 49 C.C.E.L. 182, 1993 CarswellAlta 116, [1994] L.V.I. 2564-1, 1993 ABCA 232 (Alta. C.A.) — referred to

Clements (Litigation Guardian of) v. Clements (2012), 2012 SCC 32, 2012 CarswellBC 1863, 2012 CarswellBC 1864, [2012] 7 W.W.R. 217, 31 B.C.L.R. (5th) 1, 93 C.C.L.T. (3d) 1, 29 M.V.R. (6th) 1, 346 D.L.R. (4th) 577, (sub nom. *Clements v. Clements)* 431 N.R. 198, (sub nom. *Clements v. Clements)* [2012] 2 S.C.R. 181, (sub nom. *Clements v. Clements)* 331 B.C.A.C. 1, (sub nom. *Clements v. Clements)* 565 W.A.C. 1 (S.C.C.) — referred to

Fidler v. Sun Life Assurance Co. of Canada (2006), 2006 SCC 30, 2006 CarswellBC 1596, 2006 CarswellBC 1597, [2006] 8 W.W.R. 1, 2006 C.E.B. & P.G.R. 8202 (headnote only), (sub nom. *Sun Life Assurance Co. of Canada v. Fidler)* [2006] I.L.R. 1-4521, 39 C.C.L.I. (4th) 1, 350 N.R. 40, 227 B.C.A.C. 39, 374 W.A.C. 39, 57 B.C.L.R. (4th) 1, 53 C.C.E.L. (3d) 1, (sub nom. *Sun Life Assurance Co. of Canada v. Fidler)* 271 D.L.R. (4th) 1, [2006] 2 S.C.R. 3, (sub nom. *Sun Life Assurance Company of Canada v. Fidler)* 2007 C.L.L.C. 210-015, [2006] R.R.A. 525 (S.C.C.) — considered

Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198, 1978 CarswellOnt 466 (Ont. C.A.) — considered

Guarantee Co. of North America v. Beasse (1993), 14 C.P.C. (3d) 182, 139 A.R. 241, 1993 CarswellAlta 463 (Alta. Q.B.) — considered

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

Jackson v. Trimac Industries Ltd. (1993), 8 Alta. L.R. (3d) 403, 138 A.R. 161, [1993] 4 W.W.R. 670, 1993 CarswellAlta 310 (Alta. Q.B.) — considered

L. (H.) v. Canada (Attorney General) (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 24 Admin. L.R. (4th) 1, 8 C.P.C. (6th) 199, 251 D.L.R. (4th) 604, 333 N.R. 1, [2005] 8 W.W.R. 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 1 S.C.R. 401, 29 C.C.L.T. (3d) 1, 2005 CSC 25 (S.C.C.) — referred to

McIntyre v. Grigg (2006), 2006 CarswellOnt 6815, 39 M.V.R. (5th) 39, 43 C.C.L.T. (3d) 209, 217 O.A.C. 217, 274 D.L.R. (4th) 28, 83 O.R. (3d) 161 (Ont. C.A.) — referred to

Moojelsky v. Rexnord Canada Ltd. (1989), 96 A.R. 91, 1989 CarswellAlta 295 (Alta. Q.B.) — referred to

Nance v. British Columbia Electric Railway (1951), [1951] A.C. 601, 2 W.W.R. (N.S.) 665, [1951] 3 D.L.R. 705, 1951 CarswellBC 72, 67 C.R.T.C. 340, [1951] 2 All E.R. 448, [1951] 2 T.L.R. 137, 95 S.J. 543 (Jud. Com. of Privy Coun.) — referred to

Pillar Resource Services Inc. v. PrimeWest Energy Inc. (2017), 2017 ABCA 19, 2017 CarswellAlta 67, 96 C.P.C. (7th) 1, 59 C.L.R. (4th) 179, 46 Alta. L.R. (6th) 224 (Alta. C.A.) — considered

R. v. Griffin (2009), 2009 SCC 28, 2009 CarswellQue 5997, 2009 CarswellQue 5998, 244 C.C.C. (3d) 289, 388 N.R. 334, 307 D.L.R. (4th) 577, 67 C.R. (6th) 1, [2009] 2 S.C.R. 42 (S.C.C.) — considered

R. v. Starr (2000), 2000 SCC 40, 2000 CarswellMan 449, 2000 CarswellMan 450, 36 C.R. (5th) 1, 147 C.C.C. (3d) 449, 190 D.L.R. (4th) 591, [2000] 11 W.W.R. 1, 148 Man. R. (2d) 161, 224 W.A.C. 161, 258 N.R. 250, [2000] 2 S.C.R. 144 (S.C.C.) — considered

Royal Trust Corp. of Canada v. Clarke (1989), 35 B.C.L.R. (2d) 82, 35 C.P.C. (2d) 293, 32 E.T.R. 171, [1989] 4 W.W.R. 319, 60 D.L.R. (4th) 257, 1989 CarswellBC 30 (B.C. C.A.) — considered

Sorochan v. Bouchier (2015), 2015 ABCA 212, 2015 CarswellAlta 1116, 602 A.R. 148, 647 W.A.C. 148 (Alta. C.A.) — considered

Whiten v. Pilot Insurance Co. (2002), 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, [2002] I.L.R. I-4048, 20 B.L.R. (3d) 165, 209 D.L.R. (4th) 257, 283 N.R. 1, 35 C.C.L.I. (3d) 1, 156 O.A.C. 201, [2002] 1 S.C.R. 595, 58 O.R. (3d) 480 (note), 2002 CSC 18 (S.C.C.) — followed

Woelk v. Halvorson (1980), [1980] 2 S.C.R. 430, [1981] 1 W.W.R. 289, 14 C.C.L.T. 181, 24 A.R. 620, 114 D.L.R. (3d) 385, 33 N.R. 232, 1980 CarswellAlta 277, 1980 CarswellAlta 317 (S.C.C.) — referred to

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

Baud Corp., N.V. v. Brook (1978), [1979] 1 S.C.R. 633, [1978] 6 W.W.R. 301, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* 89 D.L.R. (3d) 1, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* 23 N.R. 181, 12 A.R. 271, 5 B.L.R. 225, 1978 CarswellAlta 268, 1978 CarswellAlta 302 (S.C.C.) — referred to

Canavan v. Feldman (2004), 2004 CarswellOnt 3157, [2004] O.T.C. 672 (Ont. S.C.J.) — considered

Christianson v. North Hill News Inc. (1993), 13 Alta. L.R. (3d) 78, 106 D.L.R. (4th) 747, 145 A.R. 58, 55 W.A.C. 58, 49 C.C.E.L. 182, 1993 CarswellAlta 116, [1994] L.V.I. 2564-1, 1993 ABCA 232 (Alta. C.A.) — considered

Elgert v. Home Hardware Stores Ltd. (2011), 2011 ABCA 112, 2011 CarswellAlta 1263, 2011 C.L.L.C. 210-034, 93 C.C.E.L. (3d) 123, 47 Alta. L.R. (5th) 266, 336 D.L.R. (4th) 313, [2011] 12 W.W.R. 478, 510 A.R. 1, 527 W.A.C. 1 (Alta. C.A.) — referred to

Elgert v. Home Hardware Stores Ltd. (2011), 2011 CarswellAlta 1940, 2011 CarswellAlta 1941, 430 N.R. 389 (note), [2011] 3 S.C.R. vii (note) (S.C.C.) — referred to

Hill v. Church of Scientology of Toronto (1995), 30 C.R.R. (2d) 189, 25 C.C.L.T. (2d) 89, 184 N.R. 1, (sub nom. *Manning v. Hill)* 126 D.L.R. (4th) 129, 24 O.R. (3d) 865 (note), 84 O.A.C. 1, [1995] 2 S.C.R. 1130, 1995 CarswellOnt 396, 1995 CarswellOnt 534 (S.C.C.) — followed

Keays v. Honda Canada Inc. (2008), 2008 SCC 39, 2008 CarswellOnt 3743, 2008 CarswellOnt 3744, 66 C.C.E.L. (3d) 159, (sub nom. *Honda Canada Inc. v. Keays)* 2008 C.L.L.C. 230-025, 376 N.R. 196, 239 O.A.C. 299, 294 D.L.R. (4th) 577, (sub nom. *Honda Canada Inc. v. Keays)* [2008] 2 S.C.R. 362, 92 O.R. (3d) 479 (note), (sub nom. *Honda Canada Inc. v. Keays)* 63 C.H.R.R. D/247 (S.C.C.) — referred to

Rookes v. Barnard (1964), [1964] A.C. 1129, [1964] 1 All E.R. 367, [1964] 1 Lloyd's Rep. 28, [1964] 2 W.L.R. 269, [1964] UKHL 1 (U.K. H.L.) — referred to

Southcott Estates Inc. v. Toronto Catholic District School Board (2012), 2012 SCC 51, 2012 CarswellOnt 12505, 2012 CarswellOnt 12506, 351 D.L.R. (4th) 476, 3 B.L.R. (5th) 1, 24 R.P.R. (5th) 1, 435 N.R. 41, 296 O.A.C. 41, [2012] 2 S.C.R. 675 (S.C.C.) — referred to

Whiten v. Pilot Insurance Co. (2002), 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, [2002] I.L.R. I-4048, 20 B.L.R. (3d) 165, 209 D.L.R. (4th) 257, 283 N.R. 1, 35 C.C.L.I. (3d) 1, 156 O.A.C. 201, [2002] 1 S.C.R. 595, 58 O.R. (3d) 480 (note), 2002 CSC 18 (S.C.C.) — followed

Statutes considered by *Barbara Lea Veldhuis J.A.*:

Limitations Act, R.S.A. 2000, c. L-12

Generally — referred to

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

Legal Profession Act, R.S.A. 2000, c. L-8

s. 72(2)(b) — referred to

Rules considered by *Barbara Lea Veldhuis J.A.*:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 2.2 — considered

Sched. C, Tariff of Costs — referred to

Sched. C, Tariff of Costs, column 5 — referred to

APPEAL by defendants and CROSS APPEAL by plaintiffs from judgment reported at *Luft v. Taylor, Zinkhofer & Conway* (2016), 2016 ABQB 182, 2016 CarswellAlta 543, 30 Alta. L.R. (6th) 268, [2016] 9 W.W.R. 84 (Alta. Q.B.), awarding plaintiffs $747,500 in damages, and dismissing defendants' counterclaim.

***Barbara Lea Veldhuis J.A.*:**

I. INTRODUCTION

required for them or others in their position. We conclude, therefore, that the award of punitive damages should be payable by Zinkhofer only: *Blackwater v. Plint*, 2005 SCC 58 (S.C.C.) at paras 90-92, [2005] 3 S.C.R. 3 (S.C.C.).

Issue Three — Solicitor and Own Client Costs

72 The trial judge awarded solicitor and own client costs on the basis that "justice can only be done by the complete indemnification for costs." In coming to this conclusion she relied on the decision of Hutchinson J in *Jackson v. Trimac Industries Ltd.*, [1993] 4 W.W.R. 670 (Alta. Q.B.) at para 12, (1993), 138 A.R. 161 (Alta. Q.B.) in which the court held that solicitor and client costs could, in exceptional cases, be awarded on that basis. The appellants submit the trial judge erred by awarding such costs because they are usually reserved for punishing litigants for misconduct that occurs during the course of litigation. As misconduct of this kind was not alleged, the trial judge was precluded from awarding full indemnity costs.

73 We agree with the appellants. The trial judge did not explain whether she was basing her decision to award solicitor and own client costs on pre-litigation conduct or on conduct occurring during the litigation. The parties agree, however, that no litigation misconduct was alleged at trial, and counsel for the respondent made clear during the hearing of the appeal that the respondents were not alleging misconduct of this kind. Notwithstanding this admission, the respondents submitted the award of solicitor and own client costs could still be upheld because *Trimac* was still good law and these kinds of costs awards could be justified in cases where there has been a breach of fiduciary duty involving deceit and fraud spanning several years.

74 In *Trimac*, the court was dealing with intentional litigation misconduct, and the conclusory statement about justice only being possible with complete indemnification was directed towards such conduct. Even so, the category of case identified in *Trimac* where "justice can only be done" by indemnity costs was extracted from *Foulis v. Robinson* (1978), 92 D.L.R. (3d) 134, 21 O.R. (2d) 769 (Ont. C.A.):

> The expense of litigation is a matter of concern for all those interested in the administration of justice, but one must have regard for the burden which such costs place on all parties. Generally speaking, an award of costs on a party-and-party scale to the successful party strikes a proper balance as to the burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser. There are, of course, cases in which justice can only be done by a complete indemnification for costs, but, in my respectful opinion, this is not such a case.

In context, the broad statement in *Trimac* can, at best, be viewed as a confirmation that the court's discretion with respect to costs is wide. That was the sense in which it was made in *Foulis*. The conclusory statement about "justice being done" is not a freestanding test, and does not give a trial court the ability to award solicitor and client costs whenever it feels, in the abstract, such an award is warranted.

75 In *Trimac*, the court also held that blatant, calculated, and deliberate harm could on rare occasions lead to an award of solicitor and client costs despite "the technically proper conduct of the legal proceedings" (para 32). This holding, however, has been reversed by necessary implication through the subsequent decision of a majority of this Court in *Pillar Resource Services Inc. v. PrimeWest Energy Inc.*, 2017 ABCA 19 (Alta. C.A.). The majority held in *Pillar Resource Services Inc.* that solicitor and client costs cannot be awarded for pre-litigation conduct alone. The principle was stated by Bielby JA in the following passage with which McDonald JA agreed, although ultimately writing in dissent:

> Such costs are exceptional and generally to be awarded for misconduct that arises during the course of the litigation only, save for certain exceptions which do not include pre-litigation conduct **in and of itself**.
>
> [emphasis added] (para 1)

76 There was nothing inappropriate about the defence mounted by the appellants. For example, the respondents claimed between $600,000 and $850,000 of employment losses, and the trial judge awarded only $225,000. The appellants were fully justified in defending this claim. A fiduciary who admits breaching his duty does not have to give the claimant

a blank cheque, either with respect to quantum of damages or costs. As there were no allegations of misconduct during the course of the litigation here, the trial judge erred in law in awarding solicitor and own client costs and the appeal on this point must be allowed. The respondents are awarded party and party costs of the trial assessed on Column 5 of Schedule C.

77 We would add the following comments about the distinction between solicitor and client costs and solicitor and own client costs, and the propriety of using the latter where the circumstances require more than the usual party and party costs based on Schedule C. The distinction between the two types of costs awards was discussed in *Guarantee Co. of North America v. Beasse* (1993), 139 A.R. 241, 1993 CarswellAlta 463 (Alta. Q.B.) [cited to CarswellAlta]. Party and party costs assessed as between a "solicitor and client" include the reasonable fees and disbursements for all steps reasonably necessary within the four corners of the litigation. Costs between "solicitor and own client" allows for "frills or extras" authorized by the client, or which the client should reasonably pay his own solicitor, but which should not fairly be passed on to third parties who become responsible for those expenses. While the two methods of calculation might often result in the same amount, a third party litigant should not be required to pay for unnecessary extra services requested by a client. As pointed out in *Trimac* at paragraph 37, even in those rare cases where solicitor and client costs are justified:

> I do not take this to be a complete carte blanche so that a successful party can charge an unlimited amount. The contractual arrangement between the solicitor and client must be established and some check is necessary in order to justify the time spent and hourly rates which were presumably contracted for by Mr. Jackson. The key words are "essential to ... and 'arising within the four corners of litigation'".

78 There is an important distinction between "solicitor and client costs" and "solicitor and own client costs". An award of party and party costs calculated on a solicitor and client basis is rare and exceptional, but an award of solicitor and "own client" costs is virtually unheard of except where provided by contract. As the court noted in *Guarantee Co of North America v. Beasse* at paragraphs 12-13:

> Turning to the issue of whether solicitor-and-own-client costs should ever be awarded in party-party litigation, I believe that the answer, for the reasons set out below, should be a loud "No", except in the most exceptional, if any, cases...
>
> ...I believe that any costs ever approved by a court should always be subject to the test of reasonableness, and necessity or prudence. Furthermore, in my view the court should never condone without examination, and, where questioned, without specific analysis and decision, costs that are arguably, or even potentially, unnecessary or unreasonable. In other words, I believe that an "unsuccessful" party should not be left to accept, without question, the costs incurred by a "successful" party, but rather a "successful" party, entitled, to solicitor-client costs, has a prima facie duty to demonstrate that they are reasonable, and necessary or prudent.

Royal Trust Corp. of Canada v. Clarke (1989), 60 D.L.R. (4th) 257 (B.C. C.A.) at 262-3, (1989), 35 B.C.L.R. (2d) 82 (B.C. C.A.) is to the same effect. In this case, no reasons were given for awarding solicitor and *own* client costs, and no proper justification could have been offered even if this was an appropriate case for solicitor and client costs.

Issue Four — Failing to Properly Apply the Principles of Mitigation

79 The appellants submit the trial judge erred in finding the respondents were not required to pursue the binding JDR in their action against the Woods, to mitigate their losses in their action against Zinkhofer. They do not argue the trial judge made a legal error in setting out the onus. They simply say she made a palpable and overriding error in coming to her conclusion.

80 A plaintiff who has suffered damage has an obligation to mitigate that damage by taking all reasonable steps to avoid any damage that could result from the defendant's misconduct: *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.) at pp 660-661, (1978), 89 D.L.R. (3d) 1 (S.C.C.). At the same time, the plaintiff is not expected to take steps that are "risky or unsavory" and the plaintiff is only obliged to make an objectively reasonable decision that cannot be

Tab 17

2017 ABQB 409
Alberta Court of Queen's Bench

Morin v. TransAlta Utilities Corporation

2017 CarswellAlta 1125, 2017 ABQB 409, [2017] A.W.L.D. 3414, 281 A.C.W.S. (3d) 266

David Keeneth Morin, Lorna Karen Morin, Donna Elaine Morin, Percy Joseph Morin, Julian Edward Morin, Romeo Morin, Rita Gordon, Charles Cowan and Alex Peter Morin (Plaintiffs / Appellants) and TransAlta Utilities Corporation, AltaLink Partnership, Alberta Utilities Commission, the Attorney General in Right of Alberta, Aboriginal Affairs and Northern Development Canada and Minister John Duncan (Defendants / Respondents)

Robert A. Graesser J.

Heard: June 22, 2017
Judgment: June 27, 2017
Docket: Edmonton 1403-06722

Counsel: Will Willier, for Plaintiffs / Appellants
Gavin S. Fitch, Q.C., for Defendant / Respondent, TransAlta Utilities Corporation
Karen Wyke, for Defendant / Respondent, AltaLink Partnership
J.P. Mousseau, for Defendant / Respondent, Alberta Utilities Commission
Angela Croteau, for Defendant / Respondent, Attorney General in Right of Alberta
Alethea LeBlanc, Linda Maj, for Defendants / Respondents, Aboriginal Affairs and Northern Development Canada and Minister John Duncan

Subject: Civil Practice and Procedure; Property; Public

Related Abridgment Classifications

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

Headnote

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

Nine plaintiffs commenced action alleging defendants trespassed on lands owned by First Nation — Plaintiffs were represented by same lawyer — Master discontinued or dismissed claims against eight plaintiffs — Lawyer filed notice of appeal on behalf of remaining plaintiff and sought stay pending appeal — Lawyer did nothing further to obtain stay — Appeal was abandoned at beginning of hearing on basis that lawyer had difficulty obtaining instructions from client — Corporate defendant and defendant partnership sought enhanced costs against lawyer personally — Hearing was held to determine costs of abandoned appeal — Costs awarded against lawyer personally — Lawyer failed to provide evidence of authority to appeal on behalf of remaining plaintiff — It was unfair for remaining plaintiff or plaintiffs whose claims were discontinued or dismissed to bear costs of abandoned appeal — Award of costs against lawyer personally was only fair result — Corporate defendant and partnership were each awarded costs in amount of $4,850 against lawyer personally.

Table of Authorities

Cases considered by *Robert A. Graesser J.*:

Fricker v. Van Grutten (1896), [1896] 2 Ch. 649 (Eng. Ch. Div.) — referred to
Pollock v. Liberty Technical Services Ltd. (1997), 50 Alta. L.R. (3d) 335, 1997 CarswellAlta 469 (Alta. Q.B.) — referred to
Québec (Directeur des poursuites criminelles et pénales) c. Jodoin (2017), 2017 SCC 26, 2017 CSC 26, 2017 CarswellQue 3091, 2017 CarswellQue 3092, 346 C.C.C. (3d) 433, 408 D.L.R. (4th) 581, 37 C.R. (7th) 1 (S.C.C.) — followed
Trang v. Alberta (Director, Edmonton Remand Centre) (2007), 2007 ABCA 267, 2007 CarswellAlta 1098, 79 Alta. L.R. (4th) 21, 46 C.P.C. (6th) 212, 412 A.R. 276, 404 W.A.C. 276 (Alta. C.A.) — referred to
Ward Estate v. Olds Aviation Ltd. (1996), [1997] 2 W.W.R. 508, 46 Alta. L.R. (3d) 177, 40 C.C.L.I. (2d) 119, 193 A.R. 133, 135 W.A.C. 133, 1996 CarswellAlta 943 (Alta. C.A.) — referred to
Yonge v. Toynbee (1909), [1910] 1 K.B. 215, [1908-10] All E.R. Rep. 204 (Eng. C.A.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 6.37(3) — considered

R. 10.49 — considered

R. 10.50 — considered

Tariffs considered:

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

Sched. C, Tariff of Costs, item 7(3) — referred to

HEARING to determine costs of abandoned appeal.

Robert A. Graesser J.:

Introduction

1 The underlying matter before me was an appeal from Master Smart's decision dated July 18, 2016 in which he dismissed the claims of seven of the nine plaintiffs. With respect to a further plaintiff, he gave plaintiffs' counsel the opportunity to file evidence that this plaintiff had authorized the commencement of the lawsuit on her behalf, and had resiled from a settlement arrangement that had resulted in her providing the defendants with a discontinuance of action.

2 The action is a claim advanced against the defendants alleging, amongst other things, that the defendants were trespassing on lands owned by the Enoch Cree Nation (the "Nation") in relation to electrical transmission lines. The action was initially commenced by Mr. Willier at a time when he was in-house counsel for the Nation.

3 The named plaintiffs were the Nation, and the Chief and Council of the Nation suing for damages to Nation Lands and interests, and nine individually named plaintiffs on whose lands transmission towers or other facilities had been built. These plaintiffs were the holders of certificates of occupancy for the parcel of land they lived on recognizing possessory rights but not land ownership rights.

4 After the action was commenced, an election removed the Chief and Council. Mr. Willier was no longer retained as in-house counsel, and the Nation and the new Chief and Council retained new lawyers to represent them. A notice of change of solicitors was filed on behalf of the Chief and Council and the Nation, leaving Mr. Willier as solicitor of record for the named certificate of occupancy holders. Shortly after these changes, the litigation by the Nation and Chief and Counsel was settled.

5 The defendants each brought applications to strike the remaining plaintiffs' claims as against them. Before the applications to strike were heard by Master Smart in July 2016, the Nation procured discontinuances of action from

plaintiffs Peter Alex Morin and Donna Elaine Morin (Nielson), as well as releases. Peter Alex Morin was paid $20,000 by the Nation for signing the discontinuance and the release. It is not in evidence what, if anything, Donna Elaine Morin (Nielson) was paid.

6 Before the application before Master Smart, Peter Alex Morin resiled from the settlement, and Mr. Willier advised Master Smart that he acted for Peter Alex Morin. There was some uncertainty as to the status of his representation of Donna Elaine Morin (Nielson).

7 The basis for Master Smart's decision was that when the action was commenced, five of the plaintiffs were deceased. The uncontradicted evidence before him from Michelle Wilsdon, one of the Nation's current counsellors, was that the representatives of the estates of these former certificate of possession holders had not authorized the commencement of the action.

8 Two of the named plaintiffs were not, at the time the action was commenced, holders of certificates of possession, and the uncontradicted evidence before Master Smart through Ms. Wilsdon was that these former certificate of possession holders had not authorized the action to be brought in their names.

9 The Government of Canada had previously served a notice to admit on Mr. Willier to the effect that five of the nine plaintiffs were dead at the time the action was commenced and that two other plaintiffs were not certificate of possession holders at the time the action was commenced. There had been no response to the notice to admit, such that at the time of the application, its contents were deemed to be true, pursuant to Rule 6.37(3).

10 Since no information was filed by or on behalf of Donna Elaine Morin (Nielson) by August 15, 2016 (the time limit imposed by Master Smart), her claim too was struck by the operation of Master Smart's decision.

11 On August 19, 2017, Mr. Willier filed a notice of appeal on the whole of Master Smart's decision. The notice of appeal seeks a stay pending appeal, but nothing was done to apply for a stay. The appeal was set for October 14, 2017. At that time, Mr. Willier had agents appear to speak to an adjournment. An adjournment was granted, with costs to the defendants.

12 The appeal proceeded before me on June 22, 2017. At the outset of the appeal, Mr. Willier abandoned the appeal and cited difficulties obtaining instructions from Peter Alex Morin. The defendants, other than the Alberta Utilities Commission and the Government of Alberta, seek costs in relation to the appeal.

13 AltaLink and TransAlta seek enhanced costs from Mr. Willier personally, on the basis of Rule 10.49 as well as relying on common law principles relating to costs against lawyers personally. The Government of Canada seeks costs of the appeal, but not against Mr. Willier personally.

14 The Alberta Utilities Commission and the Government of Alberta seek no costs of the appeal.

Positions

15 AltaLink cites the following authorities:

Ward Estate v. Olds Aviation Ltd., [1996] A.J. No. 1048 (Alta. C.A.);

Québec (Directeur des poursuites criminelles et pénales) c. Jodoin, 2017 SCC 26 (S.C.C.);

Yonge v. Toynbee (1909), [1910] 1 K.B. 215 (Eng. C.A.);

Fricker v. Van Grutten, [1896] 2 Ch. 649 (Eng. Ch. Div.);

Trang v. Alberta (Director, Edmonton Remand Centre), 2007 ABCA 267 (Alta. C.A.); and

Pollock v. Liberty Technical Services Ltd., [1997] A.J. No. 488 (Alta. Q.B.).

16 AltaLink argues that the appeal from the Master's decision was inappropriate and falls within Rule 10.49. Additionally, it argues that Rule 10.50 is engaged, as it characterizes Mr. Willier's actions in pursuing the appeal as "serious misconduct."

17 AltaLink also argues that costs should be awarded on a full indemnity basis against a solicitor who has commenced proceedings without authority.

18 It seeks "penalty" costs of $10,000 in relation to the appeal.

19 TransAlta adopts the AltaLink submissions, and seeks costs in the amount of $15,000 in relation to the appeal.

20 Mr. Willier recognized that there would be a cost order relating to the abandonment of the appeal, but offered no suggestion as to who should be responsible for the costs. He indicated that he had been instructed by former Chief and Council to include the nine named certificate of possession holders in the action he commenced while he was in-house counsel for Enoch.

21 Counsel for AltaLink noted that Mr. Willier had essentially consented to the application relating to the deceased plaintiffs. Having reviewed the transcript, I do not see any express admission to that effect. Mr. Willier did not provide any information confirming that he had been retained by any of the certificate of possession holders other than Peter Alex Morin. He suggested that he might have been retained by the four plaintiffs who were alive, but wanted to have the striking application dealt with at the same time as his application to amend the statement of claim.

22 In any event, a notice of appeal was filed with respect to the entire decision.

Analysis

23 It is trite law that a lawsuit may not be commenced on behalf of a party without that party's consent. If the party is unable to provide an informed consent, a litigation representative may be appointed.

24 It is also clear from cases such as those cited by AltaLink that a solicitor who commences proceedings without proper authority may be liable for the defendant's costs.

25 The information on the application and before me indicates that Peter Alex Morin had instructed Mr. Willier to commence the action. The uncontradicted evidence of Michelle Wilsdon was that she had spoken to three of the four plaintiffs who were still alive, and that each of David Kenneth Morin, Lorna Karen Morin and Donna Elaine Morin (Nielson) told her that they had not instructed Mr. Willier to name them as plaintiffs in the action.

26 This information was presumptively inadmissible on the application as it is hearsay, and this is an application for a final order (dismissal of the claims). That was not raised before the Master, nor before me.

27 In any event, I am satisfied that once a solicitor's authority to represent someone is called into question, there is an onus on the solicitor to demonstrate that he or she has such authority: *Ward Estate v. Olds Aviation Ltd.*.

28 Despite being provided with ample opportunity to do so relating to Donna Elaine Morin (Nielson) and on the appeal with respect to any or all of the other plaintiffs, Mr. Willier did not do so.

29 In the absence of any evidence of authority (other than with respect to Peter Alex Morin), the application before Master Smart was bound to succeed and the appeal was bound to fail.

30 Because of well-established authority that a solicitor who commences proceedings without authority becomes liable for costs in the matter, the issue before me is really not whether Mr. Willier should pay costs to the defendants who seek them but rather, the amount of such costs.

31 Commencing proceedings without proper authority is a serious matter. Doing so exposes the commencing party to liability for costs, amongst other harms including reputational and relationship harms.

32 Lawyers who commence proceedings warrant that they have the authority to do so. When authority is absent, there is no obvious reason why the lawyer should not have to indemnify the defendants for their reasonable costs in defending themselves. The lawyer may also expose himself to other claims.

33 There may be situations where a lawyer genuinely but mistakenly believes he has authority from someone to represent them. There must, however, be a reasonable basis for that. Lawyers must be deemed to know that dead people cannot sue, and lawyers cannot commence an action on behalf of someone without capacity or an unrepresented estate without following the Rules of Court regarding litigation representatives.

34 Similarly, lawyers must be deemed to know that authority must come from the person him or herself, and not someone else (such as Chief and Council) telling the lawyer to sue on someone's behalf. There is no information before me that Chief and Council can authorize proceedings to be brought in individual Band member's names.

35 In the face of this, Mr. Willier resisted the application to strike the claim against people who cannot have given him the necessary authority to sue (the deceased ones) and three others for whom there is no evidence of any such authority. Master Smart reserved his decision on the costs of the application before him, understanding that there would be a further striking application relating to Peter Alex Morin's claim (and potentially Donna Elaine Morin (Nielson)'s claim if proof of authority had been provided by August 15, 2016). That application is proceeding on June 28, 2017 so it is not necessary for me to deal with costs of anything other than the appeal.

36 The Rules of Court are clear that costs follow the event unless otherwise ordered. Successful parties should be able to get costs from the party or parties opposing them. The losing parties are, in the absence of any direction by the Court to the contrary, jointly and severally responsible for costs ordered against them. The successful party can collect from whomever he or she chooses, leaving it to the unsuccessful parties to sort out ultimate responsibility amongst themselves and their lawyer(s).

37 Here, Peter Alex Morin is the only plaintiff left standing. But it would be unfair for him to bear the costs relating to the striking of the claims of his co-plaintiffs. Presumably Peter Alex Morin is unaware of the absence of authority to commence the lawsuit for his co-plaintiffs. There is no suggestion that he has done anything in relation to this appeal, and the result of the appeal (indeed the result of the application before Master Smart) does not affect his position in the lawsuit.

38 It would be possible to award costs against the plaintiffs who were struck and leave them to claim indemnity from Mr. Willier, but that would encourage the commencement or maintenance of other proceedings that are unnecessary. Such an order would be contrary to the spirit of the new Rules of Court.

39 The only fair thing to do here is to award costs against Mr. Willier personally. The recent Supreme Court decision of *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin* is interesting but does not create a remedy that was not already there in the Rules of Court or at common law in civil proceedings. Although *Jodoin* is a criminal law case, the principles expressed in paragraph 29 are helpful:

> [29] In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory

> or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate. Thus, a lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner.

40 I do not see those principles as limiting the power of the Court in civil matters to follow its own rules of procedure in awarding costs in appropriate circumstances. The imperative of advising the lawyer in advance that a personal cost remedy will be sought, and affording the lawyer the opportunity to respond to the claim, is simple procedural fairness. The nature and timing of the notice may well depend on the circumstances of the individual case, and the request for such costs and argument on it may well proceed during an application itself.

41 Here, both TransAlta and AltaLink gave notice on this appeal that they would be seeking costs against Mr. Willier personally, so any notice requirements were amply met here in any event.

42 TransAlta and AltaLink complain that they should have been advised sooner that Mr. Willier was not going to proceed with the appeal. That would have been courteous, and may have avoided some of the costs involved, but is not a factor that I would consider to be aggravating here.

43 Nor is the absence of filing any materials on the appeal. Appeals from the Master do not require new materials to be filed by any party; the only mandatory filing is the transcript of the proceedings before the Master. That was done; albeit late.

44 The appeal was adjourned at Mr. Willier's request in October; Verville J awarded costs of the adjournment to the defendants, without making any finding as to which defendant should be responsible. There is frankly no plaintiff that should be made responsible for the costs of the appeal, so the costs ordered by Verville J should be paid personally by Mr. Willier.

45 The Alberta Utilities Commission seeks no costs in relation to the appeal, so this order does not affect them. Canada does not seek costs against Mr. Willier personally, so I vacate the costs awarded to them on the adjournment application, as it would be unfair for them to collect those costs from anyone other than Mr. Willier.

46 Alberta takes the same position. Since they do not seek costs on the appeal, the cost award in Alberta's favour arising from the adjournment is vacated.

47 That leaves TransAlta and AltaLink. Rule 10.49 states:

> 10.49(1) The Court may order a party, lawyer or other person to pay to the court clerk a penalty in an amount determined by the Court if
>
> > (a) the party, lawyer or other person contravenes or fails to comply with these rules or a practice note or direction of the Court without adequate excuse, and
> >
> > (b) the contravention or failure to comply, in the Court's opinion, has interfered with or may interfere with the proper or efficient administration of justice.
>
> (2) The order applies despite
>
> > (a) a settlement of the action, or
> >
> > (b) an agreement to the contrary by the parties.

48 Rule 10.50 states:

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

49 Penalty costs imposed under Rule 10.49 go to the Court, not the litigants. The measure of costs to be awarded to the parties is always in the discretion of the courts. The English cases cited by AltaLink support solicitor client or indemnity costs in these situations. Such an award is not an absolute. Both AltaLink and TransAlta seek fixed amounts of costs.

50 Here, Mr. Willier should not have commenced this action on behalf of the eight plaintiffs whose claims have been struck. He should not have resisted the application to strike against those plaintiffs. He should not have appealed Master Smart's decision; indeed he had no authority from anyone with the ability to authorize him to file the appeal. The appeal should not have been pursued. Once Mr. Willier determined that he was going to abandon the appeal, he should have notified other counsel immediately so they would have at least been spared the expense of preparation. I do not think an appearance would have been avoided, but it would have related only to costs and not the merits of the appeal.

51 Mr. Willier's conduct here was both unauthorized and discourteous. I am satisfied that this is one of those situations described in *Jodoin* where he has interfered with the administration of justice. He has also interfered with the administration of justice by ignoring the rules relating to litigation representatives. In doing so, there was a considerable waste of court resources. It is appropriate that he pay a penalty to the Court of Queen's Bench in the amount of $1,000.

52 Costs under Rule 10.50 are subsumed within the costs otherwise ordered under Schedule C; if there is a tariff item a multiplier might be used; if there is no tariff item then the Court should come up with an appropriate amount. I do not see that costs under Rule 10.50 are an add-on in themselves, to be imposed in addition to Schedule C.

53 Solicitor and client costs have not been sought. Under Schedule C, Column 1 is the appropriate column as there is no specified amount in the statement of claim. An old rule of thumb was that Schedule C costs represented approximately a third of what might be the reasonable solicitor and client costs of the proceedings. The Rules of Court costs are out of date. Treble Column C costs have been used in cases where fraud has been alleged and not proven, and in other cases where the Court determined it was appropriate to send a message to the losing party.

54 The appropriate measure of costs here, in my view, is to use four times Column 1 to recognize an inflationary factor to the tariff that was set some 20 years ago.

55 I do not want to put the parties to the cost or time of preparing bills of costs or arguing over disbursements. No travel costs would be appropriate in any event.

56 Therefore, each of TransAlta and AltaLink are awarded costs based on Schedule 1: $150 for the contested adjournment plus $1,000 for the application. Even though Mr. Willier abandoned the appeal at the hearing, that was too late for him to benefit from the reduction for abandoning the application specified in Schedule C item 7(3). The amount of $1,150 is thus quadrupled. I set disbursements for the appeal at $250 per party.

57 Accordingly, each of TransAlta and AltaLink is awarded $4,850 in costs against Mr. Willier personally.

Costs awarded against lawyer personally.

Tab 18

Quebec v. Jodoin: Costs Against Criminal Defence Lawyers

Stephen Aylward,[*] *Stockwoods LLP (mailto:stephena@stockwoods.ca)*

OBA "Ethics, Civility and Zealous Advocacy: How Do They Co-Exist?" Dec 11, 2017

Overview

Quebec v. Jodoin, 2017 SCC 26 marks the first time the Supreme Court of Canada has addressed the court's authority to award costs against a criminal lawyer personally in respect of their litigation conduct. The Court upheld the Superior Court's order that Mr. Jodoin pay $3,000 in costs personally as a result of abusive procedural steps he took in the course of defending his clients. However, the Court was careful to note the extraordinary nature of this sanction and to note procedural safeguards that must be followed in ordering costs against a lawyer personally. Notably, the Court held that specific protections were needed for criminal defence lawyers given their special role in the criminal justice system.

Facts

Mr. Jodoin represented 10 individuals charged with impaired driving. A joint hearing was scheduled on a disclosure motion involving a Crown expert relevant to all ten cases.

Mr. Jodoin practises in a small town in the district of Bedford in Quebec with two provincial court judges. The disclosure motion was scheduled to be heard in front of one of the two. Mr. Jodoin wished to seek an adjournment of the hearing but he was not certain he would obtain one. The morning of the hearing, he went across the street from the provincial court to the Superior Court and had issued an application for prohibition against the provincial court judge alleging that he was biased (note that Mr. Jodoin did not raise the bias issue by asking the provincial court judge to recuse himself, which would have been the proper procedure if there was a legitimate concern about bias). The grounds for the motion were spurious (essentially that Mr. Jodoin had filed for a writ of prohibition against the same judge in an unrelated matter two years earlier).

The effect of filing an application for prohibition in Superior Court was to trigger an automatic stay of the provincial court proceedings pending determination of the application, which could not be heard for several months. It appears that the purpose of this maneuver was to obtain the adjournment by brute force regardless of the judge's ruling on the request for an adjournment.

Unfortunately for Mr. Jodoin, it turned out that the other provincial court judge was sitting that morning. In other words, his bias application named the wrong judge. Undeterred, he asked this judge for an adjournment of the hearing Only a brief recess was granted for lunch. Over the recess, Mr. Jodoin returned to Superior Court and had issued a new application for prohibition, this time naming the correct judge. The grounds for the application were essentially that the judge had denied his request for an adjournment. He returned from the recess and informed the court that its proceedings were now subject to a stay.

---

[*] Stephen acted as co-counsel with Frank Addario for the Canadian Civil Liberties Association, which intervened in *Jodoin*. Stephen's practise includes issues of lawyers' ethics and professional conduct.

The Superior Court was unimpressed when it ultimately heard Mr. Jodoin's application. It awarded $3,000 in costs against him personally. The Court acknowledged that awarding costs against a lawyer personally was reserved for cases of serious and deliberate abuse of the court's process, but held that this was such a case. The Court of Appeal disagreed and set aside the costs award, holding that his conduct was not sufficiently egregious to warrant a personal costs award.

Decision of Gascon J. for the Majority

On further appeal, the Supreme Court of Canada decided (7-2) to allow the appeal and reinstate the personal costs award against Mr. Jodoin.

Unlike the civil context, there is no express provision that authorizes courts to impose costs against lawyers personally in criminal cases (c.f. rule 57.07 of the *Rules of Civil Procedure* in Ontario). However, Gascon J. endorsed a line of authority holding that courts may award costs against lawyers by virtue of their power to control their own process.

The Court noted that this power had been applied in the criminal context by the Quebec Court of Appeal in *Quebec (Attorney-General) v. Cronier* (1981), 63 C.C.C. (2d) 437. In that case, L'Heureux-Dubé J.A., as she then was, relied on "the inherent power of the Superior Court to manage cases within its jurisdiction and to award costs not provided for by statute."

The reasons of Gascon J. emphasized that the nature of this power was best understood as the court imposing discipline on lawyers as officers of the court:

> [18] As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct.

Personal costs reserved for exceptional cases

Gascon J. recognized that personal costs award against lawyers must be reserved for exceptional cases. One important aspect of this is that a sufficiently high fault threshold should be imposed to ensure that lawyers are not penalized for inadvertence or inexperience.

Unfortunately, the reasons of Gascon J. are somewhat equivocal as to what fault standard is required. At paragraph 27, he states, citing the decision of the House of Lords in *Myers v. Elman*, [1940] A.C. 282 at p. 319):

> As the House of Lords stated in a case that has been cited by Canadian courts, including in *Cronier*, a mere mistake or error of judgment will not be sufficient to justify awarding costs against a lawyer personally; there must at the very least be gross neglect or inaccuracy.

This passage suggests that a minimum standard of "gross negligence" is required before costs would be imposed on a lawyer. At paragraph 29, however, the test appears to be stated more expansively than this:

> [29] In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate.

This paragraph suggests that costs awards can be justified in two cases: 1) serious abuse of the judicial system; or 2) dishonest or malicious conduct. The placement of the comma after the word "lawyer" creates an ambiguity as to whether the requirement of "deliberate" misconduct applies to both branches of the test. This ambiguity is absent from the French version of the judgment:

> Ce critère élevé est respecté lorsqu'un tribunal est en présence d'une procédure mal fondée, frivole, dilatoire ou vexatoire, qui dénote un abus grave du système judiciaire ou une inconduite malhonnête ou malveillante, commis de propos délibéré par l'avocat.

In the (original) French formulation it is clear that the requirement of deliberate misconduct applies to both branches of para. 29. Reading para. 29 together with para. 27 and alongside the French version, it is clear that personal costs may only be ordered against a lawyer in the case of deliberate (or perhaps grossly negligent) conduct that amounts either to a serious abuse of the court's process or to malicious or dishonest conduct.

Considerations specific to defence lawyers

Rather than craft a one-size-fits-all rule for costs against lawyers in the criminal context, Gascon J. recognized that special rules were needed to protect defence lawyers given their role in the criminal justice system. Courts must bear in mind that costs in criminal proceedings do not fulfill the normal compensatory role of costs in the civil context. Awards of costs made against lawyers personally are therefore purely punitive [31]. Civil lawyers have an ethical duty to encourage compromise and agreement as much as possible. By contrast, a defence lawyer has no obligation to help the Crown in the conduct of its case. It is the very essence of the role of a defence lawyer to challenge, sometimes forcefully, the decisions and arguments of other players in the judicial system in light of the serious consequences they may have for the lawyer's client. Committed and zealous advocacy for clients' rights and interests and a strong and independent defence bar are essential in an adversarial system of justice [32].

Procedural fairness in costs awards

Gascon J. went on to note that appropriate procedural protections must be in place for lawyers who are facing a costs award. The level of procedural fairness that Gascon J. describes is that suited to a discipline hearing, although the more rigorous *Charter* protections available in a contempt hearing are absent. For instance, while a lawyer is entitled to prior notice and an opportunity to respond, a determination of liability is made on a balance of probabilities. Gascon J. also noted that consideration of personal costs should be left until after a determination on the merits of a proceeding.

Gascon J. recognized limits on the role of the Crown in this context. The Crown may properly raise an issue as to a lawyer's misconduct but its role is "to objectively present the evidence and the relevant arguments on this point...The Crown must confine itself to its role as prosecutor of the accused. It must not also become the prosecutor of the defence lawyer." [38]

Application of the framework to Mr. Jodoin

While Gascon J. emphasized the exceptional nature of costs awards against criminal defence lawyers, he believed that this threshold was satisfied by Mr. Jodoin's conduct, which he characterized as "particularly reprehensible":

> [42] As the judge noted, the respondent's conduct in the cases in question was particularly reprehensible. Its purpose was unrelated to the motions he brought. The respondent was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. His subsequent conduct was consistent with this finding. It is quite odd, if not unprecedented, for a lawyer to file, on the same day and in the same cases, two series of motions for writs of prohibition against two different judges on the same ground of bias. The respondent thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the judge to conclude that the respondent had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice.

Costs distinct from Law Society proceedings and contempt

This disciplinary power of the courts overlaps with the court's power to cite a lawyer for contempt and with the Law Society or Barreau's power to discipline its members. Gascon J. discusses in some detail the difference between these different sanctions.

> [21] Although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court, the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt.
>
> [22] As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public. However, the judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:

> The court's authority is preventative — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court. (*R. v. Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 S.C.R. 331, at para. 35).

Gascon J. also noted that a court should generally confine itself to examining the facts of the case before it. The conduct of the lawyer in other proceedings would be relevant only where it is evidence of the lawyer's motive. In particular, the court must "refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial." [33]

Abella and Côté JJ., in Dissent

Abella and Côté JJ. dissented, essentially on the grounds that this was not a sufficiently exceptional case to warrant imposing a personal costs award. They pointed in particular to evidence that the maneuver employed by Mr. Jodoin was relatively common in Bedford and so could not be characterized as "rare and exceptional" [64-65].

Abella and Côté JJ. specifically cited with approval an article by (now Justice) Code, to the effect that courts should prefer to discipline misconduct through a report to the Law Society and should only proceed to ordering costs in an exceptional case:

> [61] The more appropriate response, if any, is to seek a remedy from the law society in question. As Michael Code observed, disciplinary processes present advantages over awards of costs:
>
> > A useful intermediate remedy, when repeated injunctions and reprimands have failed to put an end to counsel's "incivility," is for the trial judge to report the offending counsel to the Law Society. This is the remedy that was adopted by the B.C. Court of Appeal in *R. v. Dunbar et al.* and it was only exercised at the end of the hearing, when the Court delivered its Judgment. *The great value of this remedy, before resorting to more punitive sanctions such as costs orders and contempt citations, is that it does not disrupt the trial and it does not cause prejudice to the client of the offending counsel.* When the misconduct escalates to the point that costs and contempt remedies are under consideration, the lawyer is entitled to a hearing and the trial will inevitably be disrupted. By simply reporting the lawyer's misconduct to the Law Society, the court is able to escalate the available remedies without the need to conduct its own hearing into the alleged "incivility." Furthermore, the client may not be complicit in the lawyer's "incivility" and should not bear the cost or the prejudice of a hearing to consider sanctions against the lawyer. [Footnote omitted; emphasis added in SCC judgment.]

Significance

Jodoin is the first time the Supreme Court of Canada has addressed costs against criminal lawyers and the first time since *Young v. Young*, [1993] 4 S.C.R. 3 that is has considered costs against lawyers at all. The decision brings much needed clarity to the framework that applies to

these proceedings. While the Court upheld the costs award against Mr. Jodoin, the message from the Court is clear that such awards are to be made sparingly and only in the exceptional cases given the potential impact on the criminal lawyer's role in defending their clients.

The Court's delineation of the respective roles and responsibilities of courts and law societies for the regulation of lawyer conduct is of particular interest to those following *Groia v. Law Society of Upper Canada*, which was heard by the Supreme Court last month and is currently under reserve.

Recent Developments

Since *Jodoin* has been released, several decisions have applied it in ways that suggest that it may have an impact in the area of costs awards outside the criminal context.

In *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530 (leave to appeal granted, 2017 ABCA 368), the Alberta court applied *Jodoin* in the context of a civil costs award. In doing so, the court purported to read *Jodoin* as creating a lower threshold for imposing costs in the absence of deliberate misconduct. This reading of *Jodoin* hinges on the ambiguity created b the misplaced comma at para. 29 of the English translation of Gascon J.'s judgment:

> [32] The Supreme Court of Canada in *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 (CanLII) at para 29, 408 DLR (4th) 581 ["*Jodoin*"] has also very recently commented on costs awards against lawyers, and identified two scenarios where these kinds of awards are appropriate, either:
>
> > 1. "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer", or
> >
> > 2. "dishonest or malicious misconduct on his or her part, that is deliberate".
>
> ...
>
> [34] *Jodoin* indicates a new two branch analysis. "[D]ishonest or malicious misconduct on his or her part, that is deliberate" is the category identified in *Robertson v Edmonton (City) Police Service*. The second branch, "unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system", is a new basis on which to order costs against a lawyer.

As noted above, the qualifier "that is deliberate" applies to both "branches" of the test recognized by Gascon J. in *Jodoin*. Leave to appeal has been granted to the Alberta Court of Appeal, where hopefully this point will be clarified.

Interestingly, the Alberta court went on to link the issue of costs against lawyers personally to the issue of access to justice:

> [120] Litigants and their lawyers have a part in this. *Hryniak v Mauldin*, *R v Jordan*, *R v Cody*, and now *Jodoin* indicate that in Canada being in court is a right that comes with responsibilities. Lawyers are a critical interface between the courts and the lay public. Their conduct will be scrutinized in this new reality. The door of "access to justice"

> swings open or drops like a portcullis depending on how the courts and their resources are used. Personal court costs awards against lawyers are simply a tool to help the court apparatus function, and ultimately that is to everyone's benefit.

Finally, *R v. Gowenlock*, 2017 MBCA 79, is an interesting development in the procedure to be followed in cases where a costs award against a lawyer is in issue. The Court of Appeal appointed *amicus curiae* to defend personal costs order made by court below, as the Crown was barred by *Jodoin* from actively defending the order.

Tab 19

2013 FC 509, 2013 CF 509
Federal Court

Stoney v. Sawridge First Nation

2013 CarswellNat 1434, 2013 CarswellNat 2006, 2013 FC 509,
2013 CF 509, 228 A.C.W.S. (3d) 605, 432 F.T.R. 253 (Eng.)

Maurice Felix Stoney, Applicant and Sawridge First Nation, Respondent

Aline Elizabeth (McGillivray) Huzar and June Martha (McGillivray) Kolosky, Applicants and Sawridge First Nation, Respondent

R.L. Barnes J.

Heard: March 05, 2013
Judgment: May 15, 2013
Docket: T-923-12, T-922-12

Counsel: Priscilla Kennedy, for Applicants
Edward H. Molstad, for Respondent

Subject: Public

Related Abridgment Classifications

Aboriginal law
III Government of Aboriginal people
III.7 Membership

Headnote

Aboriginal law --- Government of Aboriginal people — Membership

Applicants were descendants of individuals who were at one time members of First Nation group, but who, either voluntarily or by operation of law, lost their band memberships — Applicants were excluded from membership in First Nation by chief and council — Appeal committee upheld chief and council's decision — Applicants brought application for judicial review — Application dismissed — Applicants did not qualify for automatic band membership — Applicants' only option was to apply for membership in accordance with membership rules promulgated by First Nation — Further, applicants were named as plaintiffs in previous action seeking mandatory relief requiring that their names be added to First Nation's membership list, and that action was struck out — Attempt by applicants to reargue question of their automatic right of membership in First Nation was barred by principle of issue estoppel — There was no evidence to make finding of institutional bias — There was no evidence to support finding of breach of s. 15 of Canadian Charter of Rights and Freedoms.

Table of Authorities

Cases considered by *R.L. Barnes J.*:

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — referred to

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

Lavallee v. Louison (1999), 1999 CarswellNat 1771, 1999 CarswellNat 5553 (Fed. T.D.) — referred to

Sawridge Band v. R. (2003), 2003 FCT 347, 2003 CarswellNat 1212, 2003 CFPI 347, 2003 CarswellNat 2857, [2003] 3 C.N.L.R. 344, (sub nom. *Sawridge Indian Band v. Canada)* 232 F.T.R. 54, (sub nom. *Sawridge Band v. Canada)* [2003] 4 F.C. 748 (Fed. T.D.) — considered

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

Sweetgrass First Nation v. Favel (2007), 63 Admin. L.R. (4th) 207, 2007 CarswellNat 5180, 2007 CF 271, 2007 FC 271, 2007 CarswellNat 567 (F.C.) — referred to

Statutes considered:

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

s. 15 — referred to

Federal Courts Act, R.S.C. 1985, c. F-7

s. 18.1 [en. 1990, c. 8, s. 5] — pursuant to

Gender Equity in Indian Registration Act, S.C. 2010, c. 18

Generally — referred to

Indian Act, R.S.C. 1927, c. 98

Generally — referred to

s. 6 — considered

s. 10(7) — considered

s. 114 — referred to

Indian Act, Act to amend the, S.C. 1985, c. 27

Generally — referred to

APPLICATION for judicial review of appeal committee's decision upholding chief and council's decision to exclude applicants from membership in First Nation.

***R.L. Barnes J.*:**

1 This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The Applicants are all descendants of individuals who were at one time members of the Sawridge First Nation, but who, either voluntarily or by operation of the law at the time, lost their band memberships. As a result the Applicants were excluded from membership in the Sawridge First Nation. They now ask this Court to review the Sawridge First Nation Appeal Committee's decision to uphold the Sawridge Chief and Council's decision which denied their applications for membership.

2 The father of the Applicant Maurice Stoney was William J. Stoney. William Stoney was a member of the Sawridge First Nation but in April 1944 he applied to the Superintendent General of Indian Affairs to be enfranchised under section 114 of the *Indian Act*, c 98, RSC 1927. In consideration of payments totalling $871.35, William Stoney surrendered his Indian status and his membership in the Sawridge First Nation. By operation of the legislation, William Stoney's wife, Margaret Stoney, and their two children, Alvin Stoney and Maurice Stoney, were similarly enfranchised thereby losing their Indian status and their membership in the Sawridge First Nation.

3 The Applicants Aline Huzar and June Kolosky are sisters and, like Mr. Stoney, they are the grandchildren of Johnny Stoney. The mother of Ms. Huzar and Ms. Kolosky was Johnny Stoney's daughter, Mary Stoney. Mary Stoney married Simon McGillivray in 1921. Because of her marriage Mary Stoney lost both her Indian status and her membership in Sawridge by operation of law. When Ms. Huzar and Ms. Kolosky were born in 1941 and 1937 respectively Mary Stoney was not a member of the Sawridge Band First Nation and she did not reacquire membership before her death in 1979.

4 In 1985, with the passing of Bill C-31, *An Act to amend the Indian Act*, 33 - 34 Eliz II c 27, and pursuant to section 10 of the *Indian Act*, the Sawridge First Nation delivered its membership rules, supporting documentation and bylaws to the Deputy Minister of Indian and Northern Affairs, who accepted them on behalf of the Minister. The Minister

subsequently informed Sawridge that notice would be given pursuant to subsection 10(7) of the *Indian Act* that the Sawridge First Nation had control of its membership. From that point on, membership in the Sawridge First Nation was determined based on the Sawridge Membership Rules.

5 Ms. Kolosky submitted her application for membership with the Sawridge First Nation on February 26, 2010. Ms. Huzar submitted her application on June 21, 2010. Mr. Stoney submitted his application on August 30, 2011. In letters dated December 7, 2011, the Applicants were informed that their membership applications had been reviewed by the First Nation Council, and it had been determined that they did not have any specific "right" to have their names entered in the Sawridge Membership List. The Council further stated that it was not compelled to exercise its discretion to add the Applicants' names to the Membership list, as it did not feel that their admission would be in the best interests and welfare of Sawridge.

6 After this determination, "Membership Processing Forms" were prepared that set out a "Summary of First Nation Councils Judgement". These forms were provided to the Applicants and outlined their connection and commitment to Sawridge, their knowledge of the First Nation, their character and lifestyle, and other considerations. In particular, the forms noted that the Applicants had not had any family in the Sawridge First Nation for generations and did not have any current relationship with the Band. Reference was also made to their involvement in a legal action commenced against the Sawridge First Nation in 1995 in which they sought damages for lost benefits, economic losses, and the "arrogant and high-handed manner in which Walter Patrick Twinn and the Sawridge Band of Indians has deliberately, and without cause, denied the Plaintiffs reinstatement as Band Members...". The 1995 action was ultimately unsuccessful. Although the Applicants were ordered to pay costs to the First Nation, those costs remained unpaid.

7 In accordance with section 12 of the Sawridge Membership Rules, the Applicants appealed the Council's decision arguing that they had an automatic right to membership as a result of the enactment of Bill C-31. On April 21, 2012 their appeals were heard before 21 Electors of the Sawridge First Nation, who made up the Appeal Committee. Following written and oral submissions by the Applicants and questions and comments from members of the Appeal Committee, it was unanimously decided that there were no grounds to set aside the decision of the Chief and Council. It is from the Appeal Committee's decision that this application for judicial review stems.

8 The Applicants maintain that they each have an automatic right of membership in the Sawridge First Nation. Mr. Stoney states at para 8 of his affidavit of May 22, 2012 that this right arises from the provisions of Bill C-31. Ms. Huzar and Ms. Kolosky also argue that they "were persons with the right to have their names entered in the [Sawridge] Band List" by virtue of section 6 of the *Indian Act*.

9 I accept that, if the Applicants had such an acquired right of membership by virtue of their ancestry, Sawridge had no right to refuse their membership applications: see *Sawridge Band v. R.*, 2004 FCA 16 (F.C.A.) at para 26, [2004] F.C.J. No. 77 (F.C.A.).

10 Ms. Huzar and Ms. Kolosky rely on the decisions in *Sawridge Band v. R.*, 2003 FCT 347, [2003] 4 F.C. 748 (Fed. T.D.), and *Sawridge Band v. R.*, 2004 FCA 16, [2004] F.C.J. No. 77 (F.C.A.) in support of their claims to automatic Sawridge membership. Those decisions, however, apply to women who had lost their Indian status and their band membership by virtue of marriages to non-Indian men and whose rights to reinstatement were clearly expressed in the amendments to the *Indian Act*, including Bill C-31. The question that remains is whether the descendants of Indian women who were also deprived of their right to band membership because of the inter-marriage of their mothers were intended to be protected by those same legislative amendments.

11 A plain reading of sections 6 and 7 of Bill C-31 indicates that Parliament intended only that persons who had their Indian status and band memberships directly removed by operation of law ought to have those memberships unconditionally restored. The only means by which the descendants of such persons could gain band membership (as distinct from regaining their Indian status) was to apply for it in accordance with a First Nation's approved membership

rules. This distinction was, in fact, recognized by Justice James Hugessen in *Sawridge Band v. R.*, 2003 FCT 347 (Fed. T.D.) at paras 27 to 30, [2003] 4 F.C. 748 (Fed. T.D.):

> 27 Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."
>
> 28 The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):
>
> > ... today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.
>
> 29 A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates*, idem, at page 2645):
>
> > This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. [page766] While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.
>
> 30 Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates*, idem, at page 2646):
>
> > ... I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals...
>
> [Emphasis added]

This decision was upheld on appeal in *Sawridge Band v. R.*, 2004 FCA 16, [2004] F.C.J. No. 77 (F.C.A.).

12 The legislative balance referred to by Justice Hugessen is also reflected in the 2010 Legislative Summary of Bill C-3 titled the *Gender Equity in Indian Registration Act*, SC 2010, c 18. There the intent of Bill C-31 is described as follows:

> Bill C-31 severed status and band membership for the first time and authorized bands to control their own membership and enact their own membership codes (section 10). For those not exercising that option, the Department of Indian Affairs would maintain "Band Lists" (section 11). Under the legislation's complex scheme some registrants were granted automatic band membership, while others obtained only conditional membership.

> The former group included women who had lost status by marrying out and were reinstated under paragraph 6(1)(c). The latter group included their children, who acquired status under subsection 6(2).
>
> [Emphasis added]

13 While Mary Stoney would have an acquired right to Sawridge membership had she been alive when Bill C-31 was enacted, the same right did not accrue to her children. Simply put neither Ms. Huzar or Ms. Kolosky qualified under section 11 of Bill C-31 for automatic band membership. Their only option was to apply for membership in accordance with the membership rules promulgated by Sawridge.

14 This second generation cut-off rule has continued to attract criticism as is reflected in the Legislative Summary at p 13, para 34:

> 34. The divisiveness has been exacerbated by the Act's provisions related to band membership, under which not all new or reinstated registrants have been entitled to automatic membership. As previously mentioned, under provisions in Bill C-31, women who had "married out" and were reinstated did automatically become band members, but their children registered under subsection 6(2) have been eligible for conditional membership only. In light of the high volume of new or returning "Bill C-31 Indians" and the scarcity of reserve land, automatic membership did not necessarily translate into a right to reside on-reserve, creating another source of internal conflict.

Notwithstanding the above-noted criticism, the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership.

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

16 Even if I am wrong in my interpretation of these legislative provisions, this application cannot be sustained at least in terms of the Applicants' claims to automatic band membership. All of the Applicants in this proceeding, among others, were named as Plaintiffs in an action filed in this Court on May 6, 1998 seeking mandatory relief requiring that their names be added to the Sawridge membership list. That action was struck out by the Federal Court of Appeal in a decision issued on June 13, 2000 for the following reasons:

> [4] It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.
>
> [5] It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

See *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.).

17 It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel: see *Danyluk v Ainsworth Technologies Inc.* 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) .

18 The Applicants are, nevertheless, fully entitled to challenge the lawfulness of the appeal decision rejecting their membership applications.

19 The Applicants did not challenge the reasonableness of the appeal decision but only the fairness of the process that was followed. Their argument is one of institutional bias and it is set out with considerable brevity at para 35 of the Huzar and Kolosky Memorandum of Fact and Law:

> 35. It is submitted that the total membership of Sawridge First Nation is small being in the range of 50 members. Only three applicants have been admitted to membership since 1985 and these three are (were) the sisters of deceased Chief, Walter Twinn. The Appeal Committee consisted of 21 of the members of Sawridge and three of these 21 were the Chief, Roland Twinn and Councillors, Justin Twinn and Winona Twin, who made the original decision appealed from.

20 In the absence of any other relevant evidence, no inference can be drawn from the limited number of new memberships that have been granted by Sawridge since 1985. While the apparent involvement of the Chief and two members of the Band Council in the work of the Appeal Committee might give rise to an appearance of bias, there is no evidence in the record that would permit the Court to make a finding one way or the other or to ascertain whether this issue was waived by the Applicants' failure to raise a concern at the time.

21 Indeed, it is surprising that this issue was not fully briefed by the Applicants in their affidavits or in their written and oral arguments. It is of equal concern that no cross-examinations were carried out to provide an evidentiary foundation for this allegation of institutional bias. The issue of institutional bias in the context of small First Nations with numerous family connections is nuanced and the issue cannot be resolved on the record before me: see *Sweetgrass First Nation v. Favel*, 2007 FC 271 (F.C.) at para 19, [2007] F.C.J. No. 347 (F.C.), and *Lavallee v. Louison*, [1999] F.C.J. No. 1350 (Fed. T.D.) at paras 34-35, (1999), 91 A.C.W.S. (3d) 337 (Fed. T.D.).

22 The same concern arises in connection with the allegation of a section 15 Charter breach. There is nothing in the evidence to support such a finding and it was not advanced in any serious way in the written or oral submissions. The record is completely inadequate to support such a claim to relief. There is also nothing in the record to establish that the Crown was provided with any notice of what constitutes a constitutional challenge to the *Indian Act*. Accordingly, this claim to relief cannot be sustained.

23 For the foregoing reasons these applications are dismissed with costs payable to the Respondent.

Judgment

THIS COURT'S JUDGMENT is that these applications are dismissed with costs payable to the Respondent.

Application dismissed.

End of Document

Tab 20

2000 CarswellNat 1132
Federal Court of Canada — Appeal Division

Huzar v. Canada

2000 CarswellNat 1132, 2000 CarswellNat 5603, [2000] F.C.J. No. 873, 258 N.R. 246

Her Majesty the Queen, in Right of Canada, Department of Indian and Northern Affairs Canada and Walter Patrick Twinn, as Chief of the Sawridge Indian Band and the Sawridge Indian Band, Defendants (Appellants) and Aline Elizabeth Huzar, June Martha Kolosky, William Bartholomew McGillivray, Margaret Hazel Anne Blair, Clara Hebert, John Edward Joseph McGillivray, Maurice Stoney, Allen Austin McDonald, Lorna Jean Elizabeth McRee, Frances Mary Tees, Barbara Violet Miller (nee McDonald), Plaintiffs (Respondents)

Décary J.A., Evans J.A., Sexton J.A.

Judgment: June 13, 2000
Docket: A-326-98

Counsel: *Mr. Philip P. Healey*, for Defendants/Appellants.
Mr. Peter V. Abrametz, for Plaintiffs/Respondents.

Subject: Public; Civil Practice and Procedure

Related Abridgment Classifications

Aboriginal law
III Government of Aboriginal people
III.10 Miscellaneous
Administrative law
XI Private law remedies
XI.2 Action for declaration
Civil practice and procedure
X Pleadings
X.8 Amendment
X.8.f Application to amend
X.8.f.i Practice and procedure

Headnote

Native law --- Bands and band government — Miscellaneous issues
Practice --- Pleadings — Amendment — Application to amend — Practice and procedure
Administrative law --- Action for declaration

Table of Authorities

Statutes considered:

Federal Court Act, R.S.C. 1985, c. F-7

s. 2(1) "federal board, commission or other tribunal" [rep. & sub. 1990, c. 8, s. 1(3)] — considered

s. 18(3) [en. 1990, c. 8, s. 4] — considered

s. 18.1 [en. 1990, c. 8, s. 5] — considered

APPEAL from order granting plaintiffs' motion to amend statement of claim and dismissing defendants' motion to strike the claim.

Evans J.A.:

1 This is an appeal against an order of the Trial Division, dated May 6th, 1998, in which the learned Motions Judge granted the respondents' motion to amend their statement of claim by adding paragraphs 38 and 39, and dismissed the motion of the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, to strike the statement of claim as disclosing no reasonable cause of action.

2 In our respectful opinion, the Motions Judge erred in law in permitting the respondents to amend and in not striking out the unamended statement of claim. The paragraphs amending the statement of claim allege that the Sawridge Indian Band rejected the respondents' membership applications by misapplying the Band membership rules (paragraph 38), and claim a declaration that the Band rules are discriminatory and exclusionary, and hence invalid (paragraph 39).

3 These paragraphs amount to a claim for declaratory or prerogative relief against the Band, which is a federal board, commission or other tribunal within the definition provided by section 2 of the *Federal Court Act*. By virtue of subsection 18(3) of that Act, declaratory or prerogative relief may only be sought against a federal board, commission or other tribunal on an application for judicial review under section 18.1. The claims contained in paragraphs 38 and 39 cannot therefore be included in a statement of claim.

4 It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.

5 It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

6 For these reasons, the appeal will be allowed with costs in this Court and in the Trial Division.

Appeal allowed.

End of Document

Tab 21

Letter

Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

Date: 19980506

Docket: T-1529-95

BETWEEN:

ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY, WILLIAM BARTHOLOMEW McGILLIVRAY, MARGARET HAZEL ANNE BLAIR, CLARA HEBERT, JOHN EDWARD JOSEPH McGILLIVRAY, MAURICE STONEY, ALLAN AUSTIN McDONALD, LORNA JEAN ELIZABETH McREE, FRANCES MARY TEES, BARBARA VIOLET MILLER (nee McDONALD)

PLAINTIFFS

- and -

HER MAJESTY THE QUEEN, IN RIGHT OF CANADA, DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA and WALTER PATRICK TWINN, as Chief of the Sawridge Indian Band and the SAWRIDGE INDIAN BAND

DEFENDANTS

REASONS FOR ORDER
AND ORDER

CAMPBELL, J.:

[1] It is common ground in this action that the *Indian Act* status of the Plaintiffs is determined by s. 6(2) of the *Act* and their Band membership is determined by s. 11(2)(b), subject to s. 10 of the *Act*. As a result it is agreed that although the Plaintiffs have status

under the *Act*, by operation of the Sawridge Band Membership Rules in place, they do not have a right to mandatory inclusion in the membership of the Sawridge Band. That is, the Band must consent before they are entitled to membership.

[2] Since the statement of claim as filed purported to claim a right to mandatory inclusion, the Defendant Sawridge Indian Band brought an application before Prothonotary Hargrave to strike the statement of claim. In a written judgment dated November 14, 1997, Prothonotary Hargrave denied the motion. By way of an appeal of this decision, on March 17th, 1998, the application to strike was heard *de novo* before me.

[3] The principle argument advanced by the Defendant Sawridge Indian Band on the appeal was that the Plaintiffs have no right to be considered for membership in the Band because the *Indian Act* does not extend to them a right to apply for membership because of the existence of the Membership Rules in place. During the hearing of the appeal, counsel for the Plaintiffs applied for an adjournment to allow a motion to be brought to amend the statement of claim, such motion to be heard before a decision on the appeal. This adjournment was granted to today.

[4] Today the Plaintiffs applied for an amendment to the statement of claim to include the following paragraphs:

> 38. The Plaintiffs state as the fact is that the Defendants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band and the Sawridge Indian Band, having assumed control of its own membership pursuant to Section 10(1) of the *Indian Act*, did thereafter so twist and administer

> the process by which the applicants were entitled to apply for membership in the Sawridge Indian Band, that a complete absence of procedural fairness resulted, unless the applicants were related to the Chief. The Band failed to adhere to the membership rules established by the Sawridge Indian Band, engaged in a policy of nepotism and discriminated against the Plaintiffs specifically in the application of the Sawridge membership rules, resulting in unfairness so pervasive, that the only relief available to the Plaintiffs is a judicial review.
>
> 39. The Plaintiffs claim a declaration of this Honourable Court that the membership rules of the Sawridge Indian Band be struck as discriminatory and exclusionary, rather than inclusive and a further declaration that the Plaintiffs are entitled to membership in the Sawridge Indian Band and a declaration that the membership list of the Sawridge Indian Band as recorded with the Department of Indian Affairs, be so amended to reflect such membership.

[5] With respect to particulars of the claims in the amendment, I accept the statement of counsel for the plaintiffs that such particulars are known and can and will be supplied within thirty days.

[6] On the basis of the amendment requested, it is clear that the central question in the action concerns whether the Plaintiffs have a right to apply for membership in the Band and, if they do, whether they have been given a proper opportunity to exercise that right. With respect to this central question, the Plaintiffs' primary argument is that by virtue of the status conferred pursuant to s. 6(2) of the *Indian Act*, a right is also conferred to make a membership application, and to have that application considered fairly. I find this is a proper question for trial.

[7] The statement of claim as filed does claim entitlement to membership, but this claim

has been substantially narrowed and clarified in the proposed amendment. Therefore, I grant the Plaintiffs' motion to amend the statement of claim to include clauses 38 and 39. As a result, I dismiss the Defendant's motion to strike the statement of claim.

[8] Costs of the motion to strike the statement of claim will be in the cause. No costs are awarded respecting the motion to amend.

"Douglas R. Campbell"
Judge

EDMONTON, ALBERTA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

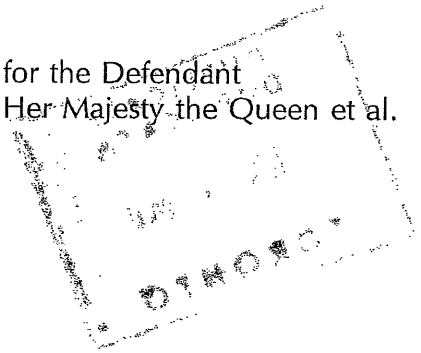
COURT FILE NO.:	T-1529-95
STYLE OF CAUSE:	Aline Elizabeth Huzar et al. v. Her Majesty the Queen et al.
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	May 6th, 1998
REASONS FOR ORDER AND ORDER:	Campbell, J.

APPEARANCES:

Peter V. Abrametz	for the Plaintiffs
Philip P. Healey and Catherine M. Twinn	for the Defendants, Walter P. Twinn et al.
Mary King Department of Justice	for the Defendant Her Majesty the Queen et al.

SOLICITORS OF RECORD:

Eggum, Abrametz & Eggum Prince Albert, Saskatchewan	for the Plaintiffs
Aird & Berlis Toronto, Ontario and Catherine M. Twinn Law Offices Slave Lake, Alberta	for the Defendants, Walter P. Twinn et al.
George Thomson Deputy Attorney General of Canada	for the Defendant Her Majesty the Queen et al.



Tab 22

1997 CarswellNat 2332
Federal Court of Canada — Trial Division

Huzar v. Canada

1997 CarswellNat 2332, 1997 CarswellNat 4163, [1997] F.C.J. No. 1556, 139 F.T.R. 81, 75 A.C.W.S. (3d) 1032

Aline Elizabeth Huzar, June Martha Kolosky, William Bartholomew McGillivray, Margaret Hazel Anne Blair, Clara Hebert, John Edward Joseph McGillivray, Maurice Stoney, Allan Austin McDonald, Lorna Jean Elizabeth McRee, Frances Mary Tees, Barbara Violet Miller (Nee McDonald), Plaintiffs, and Her Majesty The Queen in Right of Canada, Department of Indian and Northern Affairs Canada, and Walter Patrick Twinn, as Chief of the Sawridge Indian Band and the Sawridge Indian Band, Defendants

Hargrave Prothonotary

Heard: October 22, 1997
Judgment: November 14, 1997
Docket: T-1529-95

Counsel: *Mr. Peter Abrametz*, for the Plaintiffs.
Michael R. McKinney, for the Defendants, Walter P. Twinn and Sawridge Indian Band.
Mary King, Department of Justice, for the Defendant, Her Majesty the Queen.

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Aboriginal law
III Government of Aboriginal people
III.8 Contractual or tortious liability
III.8.b Miscellaneous
Aboriginal law
X Practice and procedure
X.2 Pleadings
X.2.d Striking out
Civil practice and procedure
X Pleadings
X.2 Statement of claim
X.2.a Form and content
X.2.a.i Sufficiency
Headnote
Native Law --- Bands and band government — Miscellaneous issues
Plaintiff status Indians brought action for declaration that they were members of defendant band because they were children or grandchildren of band members — Band moved to have action struck out as disclosing no reasonable cause of action or as scandalous, frivolous or vexatious — 1985 amendments to Indian Act provided that children and grandchildren of band members became entitled to band membership — Plaintiffs' pleadings respecting band lineage were not patently unreasonable — Real possibility of pleaded facts being proven through evidence — Action not plainly futile — Motion dismissed — Indian Act, R.S.C. 1985, c. I-5.
Native Law --- Practice and procedure — Pleadings and parties

Plaintiff status Indians brought action for declaration of band membership and damages for denial of reinstatement as band members — Defendant band moved to strike out portions of statement of claim under r.419(1)(b),(c), (d) of Federal Court Rules and for further and better particulars — Paragraphs referring to Constitution Act, 1982, treaties and Indian Act were not necessary but gave useful background information — Paragrpahs claiming economic loss due to denial of membership were crux of plaintiffs' claim and therefore did not fall within r.419(1) — Paragraphs claiming punitive damages had invective tone but included allegations material to claim — Paragraph claiming share of rents received by band included irrelevant reference to s.14 of Indian Act and should be struck out — Defendant band moved — Defendant's affidavits did not refer to need for particulars for pleading — Particulars already provided by plaintiffs more than sufficient to understand plaintiffs' case — Requiring further particulars would be abuse of process — Motion for further particulars dismissed — Federal Court Rules, C.R.C. 1978, c. 663, r.419(1)(b),(c),(d) — Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 — Indian Act, R.S.C. 1985. c. I-5, s.14.

Table of Authorities

Cases considered by *Mr. John A. Hargrave, Prothonotary*:

Amway Corp. v. R., [1986] 2 C.T.C. 339, 12 C.E.R. 150 (Fed. C.A.) — referred to

Belanger Inc. v. Keglonada Investments Ltd., [1986] 1 F.T.R. 238, 8 C.P.R. (3d) 557, 8 C.I.P.R. 123 (Fed. T.D.) — considered

Copperhead Brewing Co. v. John Labatt Ltd./John Labatt Ltée (1995), (sub nom. *Copperhead Brewing Co. v. John Labatt Ltd.*) 61 C.P.R. (3d) 317, (sub nom. *Copperhead Brewing Co. v. John Labatt Ltd.*) 95 F.T.R. 146 (Fed. T.D.) — considered

Dumont v. Canada (Attorney General), [1990] 4 W.W.R. 127, [1990] 2 C.N.L.R. 19, 65 Man. R. (2d) 182, 67 D.L.R. (4th) 159, [1990] 1 S.C.R. 279, 105 N.R. 228 (S.C.C.) — referred to

Embee Electronic Agencies Ltd. v. Agence Sherwood Agencies Inc. (1979), 43 C.P.R. (2d) 285 (Fed. T.D.) — considered

Flexi-Coil Ltd. v. F.P. Bourgault Industries Air Seeder Division Ltd. (1988), 19 C.P.R. (3d) 125, 18 C.I.P.R. 219 (Fed. T.D.) — referred to

Gulf Canada Ltd. v. "Mary Mackin" (The), [1984] 1 F.C. 884, 42 C.P.C. 146, 52 N.R. 282 (Fed. C.A.) — referred to

International Business Machines Corp. v. Printech Ribbons Inc. (1994), 55 C.P.R. (3d) 337, (sub nom. *IBM Canada Ltd. v. Printech Ribbons Inc.*) 77 F.T.R. 147 (Fed. T.D.) — referred to

Manitoba Fisheries Ltd. v. R. (1975), [1976] 1 F.C. 8, 58 D.L.R. (3d) 119 (Fed. T.D.) — considered

Pater International Automotive Franchising Inc. v. Mister Mechanic Inc. (1989), 27 C.I.P.R. 112, 28 C.P.R. (3d) 308, [1990] 1 F.C. 237 (Fed. T.D.) — considered

R. v. Amway of Canada Ltd./Amway du Canada Ltée (1985), [1986] 1 C.T.C. 138, 10 C.E.R. 163, [1986] 2 F.C. 312, (sub nom. *R. v. Amway of Canada Ltd.*) 20 C.R.R. 303 (Fed. T.D.) — considered

S.C. Johnson & Son Ltd. v. Pic Corp. (1975), 19 C.P.R. (2d) 26 (Fed. T.D.) — applied

Sawridge Band v. R., (sub nom. *Sawridge Band v. Canada*) [1997] 3 F.C. 580, (sub nom. *Twinn v. Canada*) 215 N.R. 133, 3 Admin. L.R. (3d) 69 (Fed. C.A.) — applied

Vulcan Equipment Co. v. Coats Co. (1981), 58 C.P.R. (2d) 47, 39 N.R. 518, [1982] 2 F.C. 77 (Fed. C.A.) — considered

Vulcan Equipment Co. v. Coats Co. (1982), 63 C.P.R. (2d) 261 (note) (S.C.C.) — referred to

Waterside Ocean Navigation Co. v. International Navigation Ltd., [1977] 2 F.C. 257 (Fed. T.D.) — referred to

Windsurfing International Inc. v. Novaction Sports Inc. (1987), 15 C.I.P.R. 164, 18 C.P.R. (3d) 230, 15 F.T.R. 302 (Fed. T.D.) — referred to

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

Indian Act, R.S.C. 1985, c. I-5

Generally — considered

s. 6 — referred to

ss. 8-12 — considered

s. 10 — referred to

s. 11 — referred to

s. 14 — considered

Rules considered:

Federal Court Rules, C.R.C. 1978, c. 663

R. 419 — considered

R. 419(1) — considered

R. 419(1)(a) — considered

R. 419(1)(b) — considered

R. 419(1)(c) — considered

R. 419(1)(d) — considered

R. 419(1)(e) — considered

R. 419(1)(f) — considered

Treaties considered:

Treaty No. 8, 1899, T8 1899

Generally — referred to

MOTION by defendant Indian band to strike out plaintiffs' action for declaration of band membership and damages, or to strike out portions of plaintiffs' statement of claim, and for further and better particulars.

***Mr. John A. Hargrave, Prothonotary*:**

1 These reasons arise out of an application on behalf of the defendants, Walter Patrick Twinn, Chief of the Sawridge Indian Band and the Sawridge Indian Band (the "Sawridge Band" and together referred to as the "Sawridge Defendants") to strike out all of the Statement of Claim or alternatively, part of the Statement of Claim and a portion of the reply to a demand for particulars, or in the further alternative, for further and better particulars, together with an extension of time within which to file a defence.

2 The motion is denied, for the reasons which follow, except as to paragraph 34 of the Statement of Claim, which is struck out with leave to amend and as to a 30 day extension, following service of an amended Statement of Claim, within which to file a defence. I now turn to some pertinent background material.

Background

3 The plaintiffs are Treaty Indians by virtue of the *Indian Act* (the" *Act*"), R.S.C. 1985 c. I-5, as amended. The plaintiffs' forbearers are said to have been either members of the Sawridge Band or duly constituted Sawridge Band members by adhesion to Treaty No. 8, [1899] a treaty signed by a group of Indians, known as the Treaty 8 Group, the Group including the Sawridge Band. The late Walter Twinn, Chief of the Sawridge Band, was cross-examined on his affidavit in support of this motion: he admitted that all of the plaintiffs had an affiliation with the Sawridge Band "through their parents" (p. 98). On the basis of band membership the plaintiffs' forbearers had such rights and benefits as would, in the normal course of events, accompany band membership, including land allocation, educational programmes, agriculture and economic incentives and an interest in the assets of the Sawridge Band: the plaintiffs would like to be in a similar position.

4 The plaintiffs point out, in their Statement of Claim, that members of Indian bands might at one time lose membership in their band by reason of provisions contained in the *Act*, but that the possibility of such a unilateral loss of membership, referred to by the plaintiffs as a discriminatory loss, was abolished by amendments to the *Act* in 1985. The amendments are referred to in the Statement of Claim, including in paragraph 19, where the plaintiffs set out their understanding of the effect of five new sections of the *Act*, which are now Sections 8 through 12 of the *Act*.

5 The plaintiffs, who wish a declaration of entitlement to membership in the Sawridge Band, plead that the effect of the 1985 amendments to the *Act* is that persons whose names were omitted or deleted from band membership and indeed, a number of additional persons, are entitled to have their names entered in the relevant Band List maintained by the Department of Indian Affairs and Northern Development ("DIAND"). Moreover, the plaintiffs say that while an Indian band may control its membership pursuant to the *Act*, there are limits to this control, which do not justify the Sawridge Band excluding the plaintiffs from band membership.

6 While the plaintiffs all hold status cards issued by DIAND, pursuant to the 1985 amendments to the *Act*, identifying them as members of the Sawridge Band, the Sawridge Band has refused to reinstate them.

7 The Sawridge Band is wealthy. As a result since 1985 there have been, according to the Sawridge Band, "hundreds" of applications for membership (p. 89 of the cross-examination of Walter Twinn) and "more than two hundred" (ibid p. 39). None of the applications have been put forward to the Sawridge Band membership for approval (ibid p. 42). Indeed, the Chief and Sawridge Band Council have never read any of the completed 42 page Sawridge Band membership application questionnaires received from applicants for band membership (ibid p. 68). Since 1985 there have only been two individuals accepted into band membership, both sisters of the Chief, Walter Twinn.

8 It is against this background that the plaintiffs seek band membership. Their claim is set out in detail in a moderately lengthy, but quite readable Statement of Claim, filed 20 July 1995.

9 On 22 September 1995 the defendants, Walter Twinn and the Sawridge Band, served a 12 point demand for particulars. The plaintiffs responded, 4 March 1996, with a detailed reply to the demand for particulars: one might even say an overly detailed response which, if read with the Statement of Claim, would seem to leave nothing to speculation, at least so far as particulars required for pleading are concerned.

10 On 2 May 1996 the Sawridge Defendants requested further particulars. Reading the Statement of Claim, the demand for particulars, the reply and the further request for particulars, one is hard pressed to see what else might be required or even available which could assist the Sawridge Defendants in filing a defence. Indeed, Walter Twinn, in his affidavit in support of this motion, fails to offer any explanation at to why further particulars are required in order to prepare a defence.

11 The present motion was filed on 23 May 1997, to be heard 20 August 1997. The motion referred to Mr. Twinn's affidavit in support, however the affidavit was not sworn until 13 August 1997. It was served on counsel for the plaintiffs at the last minute. As a result the motion was adjourned to allow plaintiffs' counsel to assimilate the affidavit and, as it turned out, to cross-examine on the affidavit. The matter finally came on for hearing 22 October 1997.

Analysis:

Some Applicable Principles

12 The Sawridge Defendants first seek to have the whole of the Statement of Claim struck out, either as disclosing no reasonable cause of action under Rule 419(1)(a) or as being scandalous, frivolous or vexatious (Rule 419(1)(c)).

13 A motion to strike out under Rule 419 places a heavy onus on the applicant. In the case of an allegation of want of a reasonable cause of action, I must accept the Statement of Claim as if the facts had been proven, unless the facts are patently unreasonable. No affidavit evidence is permitted, when testing for a reasonable cause of action, except where

there is a jurisdictional issue. It must be plainly, obviously and beyond doubt that a pleading is futile and will not succeed before it will be struck out. When it is alleged that an action is scandalous, frivolous or vexatious, under Rule 419(1)(c) the test is as stringent as or even more stringent than that under Rule 419(1)(a): *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, [1977] 2 F.C. 257 (Fed. T.D.) at 259. A court will not deny a party a day in court if there is any chance of the claim succeeding. If a claim might possibly succeed it ought to be allowed to proceed. Alternately, if the claim might succeed if the statement of claim were amended, an amendment should be allowed: to deny an amendment there must be no scintilla of a cause of action.

14 When there are contentious or serious issues of law, disputed points of law, or uncertain points of law, they ought not be determined on a summary motion to strike out, but rather left for a decision at trial when all the facts are known: *Manitoba Fisheries Ltd. v. R.* (1975), [1976] 1 F.C. 8 (Fed. T.D.) at 18; *Vulcan Equipment Co. v. Coats Co.* (1981), 58 C.P.R. (2d) 47 (Fed. C.A.) at 48 , leave to appeal to the Supreme Court of Canada refused (1982), 63 C.P.R. (2d) 261 (note) (S.C.C.) and *R. v. Amway of Canada Ltd./Amway du Canada Ltée* (1985), [1986] 2 F.C. 312 (Fed. T.D.) at 326, affirmed *Amway Corp. v. R.*, [1986] 2 C.T.C. 339 (Fed. C.A.) at 340.

15 The final relevant point of procedure is that a court will not strike out statements that are merely surplus, provided no prejudice flows from them: *Belanger Inc. v. Keglonada Investments Ltd.*, [1986] 1 F.T.R. 238 (Fed. T.D.) at 241; *Pater International Automotive Franchising Inc. v. Mister Mechanic Inc.* (1989), [1990] 1 F.C. 237 (Fed. T.D.) at 243; and *Copperhead Brewing Co. v. John Labatt Ltd./John Labatt Ltée* (1995), 61 C.P.R. (3d) 317 (Fed. T.D.) at 322.

Striking Out the Statement of Claim

16 Counsel for the Sawridge Band referred to s.10 of the *Act* and particularly the ability of an Indian band to elect to control its own membership. This submission left unanswered the question of whether the Sawridge Band had in fact assumed control for it would seem that, other than for two nepotistic inductions, the Band has not in fact provided any real mechanism or procedure for either making or reviewing decisions on membership.

17 Counsel also referred to Sections 6 and 11 of the *Act*, giving his interpretation of those Sections. He submitted that the Statement of Claim set out no facts that would allow any of the plaintiffs to meet the requirements in the *Act* and which might lead to membership in the Sawridge Band. Here I would note that band membership rules may not deprive a person, with pre-existing rights of membership under the *Act*, from becoming a member.

18 Rather than set out my own interpretation of the effect of the 1985 amendments to the *Act* on the rights of a person to rejoin a forebear's band, I would refer to the gloss given to the pertinent portions of the amended *Act* by the Federal Court of Appeal in *Sawridge Band v. R.*, A-779-95 and A-807-95, an unreported decision of 3 June, 1997 [reported (1997), 3 Admin. L.R. (3d) 69 (Fed. C.A.)]:

> This appeal involves an action commenced in 1986 for declarations that certain sections of the *Indian Act* are invalid. These sections were added by an amendment in 1985. Briefly put, this legislation, while conferring on Indian bands the right to control their own band lists, obliged bands to include in their membership certain persons who became entitled to Indian status by virtue of the 1985 legislation. Such persons included: women who had become disentitled to Indian status through marriage to non-Indian men and the children of such women; those who had lost status because their mother and paternal grandmother were non-Indian and had gained Indian status through marriage to an Indian; and those who had lost status on the basis that they were illegitimate offspring of an Indian woman and a non-Indian man. Bands assuming control of their band lists would be obliged to accept all these people as members. Such bands would also be allowed, if they chose, to accept certain other categories of persons previously excluded from Indian status. (p. 2)

Pertinent in the present instance is the concept that the children of women, who had lost status through marriage to a non-Indian man, might regain status under the 1985 amendments. Indeed, in Walter Twinn's own words, on cross-examination, each of the plaintiffs has an affiliation "through their parents".

19 On my reading of the Statement of Claim each of the plaintiffs, a status Indian identified by DIAND as a member of the Sawridge Band, is either the son or the daughter of a parent who was a Sawridge Band member at one time and is the grandchild of a Sawridge Band member or members. These facts are not patently unreasonable and therefore I must accept them, for the purposes of this motion, as proven. These facts fall within the view of the Court of Appeal in *Sawridge Band v. R.* (supra) as to those who became entitled to become members of a band by reason of the 1985 amendments to the *Act*. The defendants have not made their case that the action is plainly, obviously and beyond doubt a futile proceeding.

20 Once a reasonable cause of action has been established it often becomes difficult for a defendant to then go on to establish the action as one which is scandalous, frivolous or vexatious. In this instance, having found a reasonable cause of action on the pleaded facts and not being disabused of the real possibility that the plaintiffs may in due course establish these facts through evidence, I am unwilling to find the action one which should be struck out as scandalous, frivolous or vexatious and as a result futile.

Striking Out Portions of the Statement of Claim

21 The defendants' submissions as to striking out the Statement of Claim do not end here. The defendants submit, as an alternative, that paragraphs 11 through 18, 25, 26, 29, 30, 34 and 37 ought to be struck out under all of the heads contained in Rule 419(1) except Rules 419(1)(a) and (f). On the basis of the defendants' motion and counsel submissions, I will look at these paragraphs of the Statement of Claim to see if, in themselves, they are immaterial or redundant, scandalous, frivolous or vexatious, or are such as may prejudice, embarrass or delay a fair trial of the action: I do not accept that any of the paragraphs which the defendants seek to have struck out constitute a departure from a previous pleading and therefore do not consider further the application of Rule 419(1)(e) to any portions of the Statement of Claim.

22 Paragraphs 11 through 18 refer to the effect, in the view of the plaintiffs, of the *Constitution Act of 1982*, and the types of rights possessed by Aboriginal people in 1899, under Treaty No. 8, the Treaty adopted by adhesion by the representatives or predecessors of the Sawridge Band. These paragraphs also touch on the method by which the ancestors and predecessors of the plaintiffs determined membership in the Sawridge Band, and the rights and benefits accruing to the Band and its members by reason of Treaty No. 8. In the more recent past, this portion of the Statement of Claim also deals with loss of membership by way of operation of the *Indian Act*, before the 1985 amendments and submits that the 1985 amendments to the *Act* reestablished existing bands as they would have been, but for the termination of band membership by reason of provisions in the earlier versions of the *Indian Act*. These paragraphs provide background information which helps in establishing the views of the plaintiffs and their claim. The paragraphs or some of them may not be strictly necessary. As such they may be surplus to the Statement of Claim, but as I have pointed out they also have a useful aspect. Merely because they may be surplusage is not a reason to strike them out: see The *Belanger Inc.* , *Pater International Automotive Franchising Inc.* and *Copperhead Brewing Co.* cases, supra. Nor am I prepared to pass judgment on what may be contentious but serious issues of law and of the interpretation of the effect of early treaties and of provisions in the earlier versions of the *Indian Act*: see *Manitoba Fisheries Ltd. v. R.*, *Vulcan Equipment Co. v. Coats Co.* and *R. v. Amway of Canada Ltd./Amway du Canada Ltée*, supra. Indeed, the proper interpretation of relevant provisions of the legislation involved in this instance would in all probability be better determined at trial where a proper factual basis can be set out: see for example *Dumont v. Canada (Attorney General)*, [1990] 4 W.W.R. 127 (S.C.C.) at 129.

23 Paragraphs 25 and 26 allege that the plaintiffs, by reason of their loss of membership in the Sawridge Band, have lost a number of benefits including those of education, medical care, housing and tax exemption: each of the plaintiffs claims membership in the Sawridge Band and substantial damages for the loss of those benefits and entitlements. The Sawridge Defendants say the *Act* does not give rise to any rights or entitlements. However the claim is that the plaintiffs, having lost membership in the Sawridge Band and having been denied reinstatement, have suffered economic loss. I do not see this as immaterial or redundant, as scandalous, frivolous or vexatious, or as prejudicial, embarrassing or matters which would delay a fair trial. Indeed, these paragraphs are the crux of the plaintiffs' claim.

24 In paragraph 29 the plaintiffs claim punitive and exemplary damages. The wording of the paragraph has a somewhat invective tone. But this is not inconsistent with a claim for punitive and exemplary damages. The plaintiffs say that the actions of the Sawridge Defendants have, among other things, been arrogant, high-handed, unwarranted and unjustified. The plaintiffs will have to prove those allegations, but given all of the background paragraph 29 does not go so far as to be scandalous, frivolous, vexatious, prejudicial or embarrassing. Indeed the sort of allegations contained in paragraph 24 appear to be material to the claim for punitive and exemplary damages in this instance. Paragraph 29 will remain in the Statement of Claim.

25 Paragraph 30 is not directed toward the Sawridge Defendants, but rather against what the plaintiffs view as the discriminatory nature of previous versions of the *Indian Act* as passed by the Parliament of Canada and as administered by DIAND, all of which the plaintiffs say has resulted in loss to them. It does not impinge directly upon the Sawridge Defendants. It contains allegations basic to the claim of the plaintiffs against the Crown. While to explore this area may lengthen the trial, paragraph 30 is not one which ought to be struck out on the grounds of prejudice, embarrassment, or that it will unduly delay a fair trial of the action.

26 In paragraph 34 the plaintiffs refer to Section 14 of the *Indian Act* and then go on to plead that they are entitled to their pro rata share of the interest monies and rents received by the Sawridge Band. Section 14 of the *Act* refers to the provision, maintenance and posting of Band Lists. I do not see the relevance of the reference to Section 14 in paragraph 34 of the Statement of Claim, although the balance of the paragraph, the claim for a share of interest and rents, certainly follows in the progression of the Statement of Claim. As a result of the reference to Section 14, which seems immaterial, paragraph 34 is struck out. However the plaintiffs may amend should they wish to elaborate and explain the reference to Section 14 and, of course, to include the plea of the plaintiffs' entitlement to a share of interest and rents.

27 Paragraph 37 of the Statement of Claim alleges that the Sawridge Defendants are committing waste and are dissipating and squandering the assets of the reserve, in which the plaintiffs have a vested interest. It goes on to seek relief of an injunctive nature. Now the bare allegations of waste and of dissipation and squandering of assets, if made without any factual basis, might constitute a vexatious or an embarrassing pleading. However before moving to strike out such a pleading it is reasonable to request particulars and this has been done and reasonable particulars provided. Were I to strike out paragraph 37, leave to amend would certainly be indicated. Given the particulars, which become part of the pleadings, it would be counter-productive to strike out paragraph 37, which shall remain.

Striking Out of Particulars

28 The defendants seek to have paragraphs 11 and 12 of the Reply to Demand for Particulars struck out. A reply setting out particulars is a pleading (*S.C. Johnson & Son Ltd. v. Pic Corp.* (1975), 19 C.P.R. (2d) 26 (Fed. T.D.) at 28) and as such may be struck out.

29 Paragraph 11 of the particulars provided by the plaintiffs elaborates on the allegations of arrogant and high-handed behaviour by the Sawridge Defendants. Nothing in the affidavit of Walter Twinn, after his cross-examination, casts doubt on these particulars to the extent that they might be struck out under Rule 419(1)(b), (c), (d) or (e) as being particulars which beyond doubt are futile and unable, as a pleading, to succeed. Paragraph 11 will remain.

30 Paragraph 12 of the particulars provides examples of waste and of the squandering and dissipation of assets. Nothing in the affidavit evidence provided by the Sawridge Defendants bears on this. The particulars do not appear unreasonable. If proven, and assuming the plaintiffs have an interest as Band members, the allegations could well constitute the commission of waste and the dissipation and squandering of Band assets. This is not to say that the allegations will succeed, but I cannot say that they are futile. Paragraph 12 of the particulars will remain.

Further and Better Particulars

31 The function of particulars is to enable a party to know the nature of the case to be met and to limit the issues to be tried. Particulars prevent a party from being taken by surprise at trial and indeed to gather appropriate evidence in order to be prepared for trial. The leading case, as to particulars generally, is the decision of the Federal Court of Appeal in *Gulf Canada Ltd. v. "Mary Mackin" (The)* (1984), 52 N.R. 282 (Fed. C.A.).

32 One must keep in mind that particulars required, or granted by court order, for the purpose of pleading, are not nearly as broad as are particulars for trial: see for example *International Business Machines Corp. v. Printech Ribbons Inc.* (1994), 77 F.T.R. 147 (Fed. T.D.) at 149. Indeed, as Mr. Justice Marceau (as he then was) pointed out in *Embee Electronic Agencies Ltd. v. Agence Sherwood Agencies Inc.* (1979), 43 C.P.R. (2d) 285 (Fed. T.D.) at 286 and 287, particulars at an early stage, that is particulars for pleading, are furnished so that the defendant may understand the plaintiff's position and may reply intelligently to the statement of claim, but that such particulars need not go further:

> ...I wish to point out that, as I understand the law in this regard, a distinction must be made between a request for particulars made prior to the filing of the statement of defence and one made at a later stage of the proceedings. Before trial, after the issues have been defined, a defendant is entitled to be informed of any and every particular which will enable him to properly prepare his case, so that he may not be taken by surprise at the trial. But, before the filing of the defence, the right of a defendant to be furnished particulars is not so broad, since it does not have the same basis and serves a different purpose. A defendant should not be allowed to use a request for particulars as a means to pry into the brief of his opponent with a view to finding out about the scope of the evidence that might be produced against him at trial, nor should he be allowed to use such a request as a means to go on a sort of fishing expedition in order to discover some grounds of defence still unknown to him. At that early stage, a defendant is entitled to be furnished all particulars which will enable him to better understand the position of the plaintiff, see the basis of the case made against him and appreciate the facts on which it is founded so that he may reply intelligently to the statement of claim and state properly the grounds of defence on which he himself relies, but he is not entitled to go any further and require more than that.

33 Still dealing with applicable general principles, the burden is on the party requesting particulars to show they are necessary. Indeed, particulars will not generally be ordered unless the party requesting them establishes that they are necessary for pleading and not within its knowledge, subject to the pleadings, on their face, appearing inadequate: see for example *Windsurfing International Inc. v. Novaction Sports Inc.* (1987), 18 C.P.R. (3d) 230 (Fed. T.D.) at 237. A party requesting further and better particulars must justify the request by affidavit unless the need is apparent from the record: see for example *Flexi-Coil Ltd. v. F.P. Bourgault Industries Air Seeder Division Ltd.* (1988), 19 C.P.R. (3d) 125 (Fed. T.D.) at 127 - 128. In the present instance, not only does the affidavit material fail to disclose the need for further particulars, but also it does not disclose whether, by reason of a lack of further particulars, the defendants are not able to plead to the Statement of Claim. These are essential requirements where, as here, there appear to be more than ample particulars already in existence.

34 The request for further and better particulars might well be disposed of by pointing out that nowhere in the Sawridge affidavit material is there any specific averment as to the need for particulars for pleading. Granted, there is a letter of 2 May, 1996 on Sawridge Band stationary, pointing to some perceived shortcomings in the initial particulars provided by the plaintiffs, but when one considers the Statement of Claim and the initial particulars provided by the plaintiffs pursuant to the demand for further particulars, the request, particularly at this stage, is just not plausible. The plaintiffs submit that the cross-examination of Walter Twinn indicates not that particulars are required, but that there is some malice in requesting particulars. I would not go so far. It is sufficient to say that the Sawridge Defendants have demonstrated no need for additional particulars.

35 Even leaving aside that the Sawridge Defendants have not shown a need for particulars, those already provided by the plaintiffs are, by inspection, at least sufficient and indeed more than are really necessary in order to enable the defendants to understand the plaintiffs' case: this is clearly substantiated on the cross-examination of Walter Twinn. On the basis of the particulars provided to date, the Sawridge Defendants must be taken to know the case against them,

appreciate the facts on which it is founded and be in a position to provide an intelligent defence. To require further particulars would be an abuse of process.

Costs

36 There are two aspects to the consideration of costs. First, there is the failure of the Sawridge Defendants to provide the plaintiffs with their affidavit in support of this motion until the last minute. The present motion was filed in May of 1997 for a 20 August, 1997 hearing. The affidavit was not sworn until the 13th of August, 1997 and was served on counsel for the plaintiffs far too late. Quite properly the plaintiffs applied for an adjournment to consider the material and, as it turned out, to cross-examine Walter Twinn. The plaintiffs shall have the costs of that hearing in any event, in the amount of $500.00.

37 As to the costs of subsequent preparation for the motion and the ultimate disposition of the motion, the defendants have been successful on only one item, that of striking out paragraph 34. Paragraph 34 of the Statement of Claim did not invoke much debate on the hearing of the motion. The defendants sought no particulars. The plaintiffs have received leave to amend paragraph 34. All things considered, including the request for further particulars for pleading, a spurious request that ought not to have been brought to the court, the plaintiffs will also have their taxable costs, on an enhanced basis, including costs related to preparation for the hearing and the cross-examination of Walter Twinn, payable at the conclusion of the matter, in any event.

Order accordingly.

Tab 23

Most Negative Treatment: Check subsequent history and related treatments.

2007 ABCA 180
Alberta Court of Appeal

Papaschase Indian Band No. 136 v. Canada (Attorney General)

2007 CarswellAlta 685, 2007 ABCA 180, [2007] 10 W.W.R. 79, [2007] A.W.L.D. 3473, [2007] A.W.L.D. 3474, [2007] A.W.L.D. 3475, [2007] A.W.L.D. 3476, [2007] A.W.L.D. 3477, [2007] A.W.L.D. 3485, [2007] A.W.L.D. 3486, [2007] A.W.L.D. 3487, [2007] A.W.L.D. 3498, [2007] A.W.L.D. 3500, [2007] A.W.L.D. 3501, [2007] A.W.L.D. 3503, [2007] A.W.L.D. 3504, [2007] A.W.L.D. 3507, [2007] A.W.L.D. 3508, [2007] A.W.L.D. 3509, [2007] A.W.L.D. 3510, [2007] A.W.L.D. 3545, 158 A.C.W.S. (3d) 374, 394 W.A.C. 349 at 375, 404 A.R. 349 at 375, 78 Alta. L.R. (4th) 24

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on Their Own Behalf and on Behalf of All Descendants of the Papaschase Indian Band No. 136 (Appellants / Plaintiffs) and Attorney General of Canada (Respondent / Defendant) and Her Majesty the Queen in Right of Alberta (Respondent / Third Party) and Federation of Saskatchewan Indian Nations (Intervener)

J. Côté, M. Paperny, D. Sulyma JJ.A.

Heard: September 7, 2006
Judgment: May 30, 2007
Docket: Edmonton Appeal 0403-0299-AC

Proceedings: additional reasons to *Papaschase Indian Band No. 136 v. Canada (Attorney General)* (2006), 2006 CarswellAlta 1686, (sub nom. *Papaschase Indian Band No. 136 (Descendants of) v. Canada (Attorney General))* [2007] 2 C.N.L.R. 283, (sub nom. *Lameman v. Canada (Attorney General))* 404 A.R. 349, (sub nom. *Lameman v. Canada (Attorney General))* 394 W.A.C. 349, 66 Alta. L.R. (4th) 243, 2006 ABCA 392, [2007] 2 W.W.R. 440 (Alta. C.A.); reversing in part *Papaschase Indian Band No. 136 v. Canada (Attorney General)* (2004), 2004 ABQB 655, 2004 CarswellAlta 1170, 43 Alta. L.R. (4th) 41, [2004] 4 C.N.L.R. 110, [2005] 8 W.W.R. 442, (sub nom. *Lameman v. Canada (Attorney General))* 365 A.R. 1 (Alta. Q.B.)

Counsel: E.E. Meehan, Q.C., R.S. Maurice, M.-F. Major for Appellants / Plaintiffs
M.E. Annich, S.C. Latimer for Respondent / Defendant, Attorney General of Canada
D.N. Kruk, A.L. Edgington for Respondent / Third Party, H.M.Q. in Right of Alberta
M.J. Ouellette for Intervener, Federation of Saskatchewan Indian Nations

Subject: Public; Civil Practice and Procedure; Evidence; Property
Related Abridgment Classifications
Aboriginal law
X Practice and procedure
X.2 Pleadings
X.2.c Amendment
Aboriginal law
X Practice and procedure
X.3 Parties
X.3.e Representative or class actions
Aboriginal law

X Practice and procedure
X.6 Appeals
X.6.b Stay of proceedings
Civil practice and procedure
XXII Judgments and orders
XXII.3 Contents and form
Civil practice and procedure
XXII Judgments and orders
XXII.4 Drawing up and settling
Civil practice and procedure
XXII Judgments and orders
XXII.16 Amending or varying
XXII.16.c After judgment entered
XXII.16.c.ii Elimination of discrepancies
Civil practice and procedure
XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.c Divided success
XXIV.6.c.ii Apportionment of costs
Civil practice and procedure
XXIV Costs
XXIV.24 Appeals as to costs
XXIV.24.d Miscellaneous

Headnote

Aboriginal law --- Practice and procedure — Parties — Representative or class actions

In 1880s, Indian band P was granted reserve after adhering to treaty — Large number of band members withdrew from treaty in exchange for scrip — Other band members left reserve or joined other bands — Consent to surrender was signed by three former members of P band — Reserve was surrendered and eventually sold — Action by plaintiffs and descendants of some original P band members was dismissed on Crown's motion for summary judgment — Court of appeal determined there were arguable, triable issues with respect to issue of plaintiffs' standing to sue and allowed plaintiffs' appeal — Plaintiffs argued that some of Crown's reasoning regarding standing was circular: for example, very abolition of reserve in question created alleged holes in standing relied upon by Crown — For certain parts of Crown's standing arguments, plaintiffs' circularity rebuttal was arguable legal proposition which, on evidence, had factual foundation — Statement of claim was on behalf of descendants of former P band "on their own behalf and on behalf of all descendants of the band" who once lived on P reserve — If five named plaintiffs lacked standing to sue, but there is someone alive today who has that standing, then proper remedy was arguably not dismissal of action, but substitution of different representative plaintiffs — After judgment was pronounced, parties requested that certain aspects of court of appeal's judgment, including import of court's dismissal of appeal from case management judge's refusal of plaintiff's motion under R. 42 of Alberta Rules of Court, be settled — Court of appeal invited submissions with which to settle issue — Court of appeal's reasons on issue merely reflected existing statement of claim — While court of appeal dismissed appeal from that part of formal judgment, court of appeal did not rule on merits because plaintiffs' R. 42 motion was unnecessary — Representative actions under R. 42 by "numerous plaintiffs" do not require court approval and are good unless and until set aside — Case management judge refused motion for order pursuant to R. 42 as order was unnecessary, and one which judge probably could not grant.

Aboriginal law --- Practice and procedure — Appeals — Stay of proceedings

Civil practice and procedure --- Costs — Appeals as to costs — General principles

Aboriginal law --- Practice and procedure — Pleadings — Amendment

Civil practice and procedure --- Judgments and orders — Contents and form

Civil practice and procedure --- Costs — Effect of success of proceedings — Divided success — Apportionment of costs

Civil practice and procedure --- Judgments and orders — Drawing up and settling
Civil practice and procedure --- Judgments and orders — Amending or varying — After judgment entered — Elimination of discrepancies

Table of Authorities

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
R. 42 — considered

RULING to settle certain aspects of judgment, reported at *Papaschase Indian Band No. 136 v. Canada (Attorney General)* (2006), 2006 CarswellAlta 1686, (sub nom. *Papaschase Indian Band No. 136 (Descendants of) v. Canada (Attorney General)*) [2007] 2 C.N.L.R. 283, (sub nom. *Lameman v. Canada (Attorney General)*) 404 A.R. 349, (sub nom. *Lameman v. Canada (Attorney General)*) 394 W.A.C. 349, 66 Alta. L.R. (4th) 243, 2006 ABCA 392, [2007] 2 W.W.R. 440 (Alta. C.A.).

***The Court*:**

1 After we gave reasons for judgment, 2006 ABCA 392, counsel could not agree on four aspects of the formal judgment. After reading written submissions, we rule on them as follows.

A. Representative or Class Actions and R. 42

2 Only class actions need court approval. A representative action under R. 42 by "numerous plaintiffs" does not. The notice of motion in Court of Queen's Bench sought "an Order pursuant to Rule 42 . . . that the Plaintiffs may proceed by way of representative action . . ." and approving the plaintiffs. The case management judge refused that. The motion was unnecessary, and one which the judge probably could not grant. A representative suit is good unless and until set aside. The cross motion by the Attorney General of Canada was about summary judgment and striking out pleadings, not about R. 42. The comments in the earlier Court of Appeal Reasons (paras. 122, 131-2) merely reflected the existing statement of claim. The appeal from this part of the formal judgment is dismissed, but we do not rule on the merits, because the plaintiffs' R. 42 motion was unnecessary. We heard no arguments on the merits.

B. Temporary Stay

3 The Reasons say that that was sent back to Court of Queen's Bench to rehear. None of the suit is dismissed or struck out. The plaintiffs can take it all to trial if they wish. The Reasons are clear.

C. Court of Queen's Bench Costs

4 The Reasons are clear. There is no dispute here anymore. Any Court of Queen's Bench costs order is set aside. In its place is an order that after trial, the trial judge will award and fix Court of Queen's Bench costs. And if no trial is held, then any Court of Queen's Bench judge can award and fix them.

D. Pleadings Closed

5 An appeal is from the formal Court of Queen's Bench judgment, which here did not deal with the topic. The Court of Appeal Reasons likely make this *res judicata*, but that is without prejudice to the right of any party to move to amend its pleadings, or the right of any plaintiff to move for leave to file a late Reply.

E. Form of Formal Judgment

6 We attach a proper form of wording, which the Deputy Registrar may sign without any further approval. We note that both counsel's drafts used headings traditional for an order rather than a judgment.

F. Costs

7 Success was divided, but the Attorney-General's draft was closer to being correct. The Attorney-General of Canada will recover $1000 costs jointly and severally from the appellants. The third party and intervener will neither pay nor receive costs.

Order accordingly.

APPENDIX

Appeal No. 0403-0299-AC

Q.B. Action No. 0103-03088

In the Court of Appeal of Alberta

IN COURT AT EDMONTON, ALBERTA ON THURSDAY, THE 7TH DAY OF SEPTEMBER, 2006

PRESENT:

THE HONOURABLE MR. JUSTICE J.E.L. CÔTÉ

THE HONOURABLE MADAM JUSTICE M.S. PAPERNY

THE HONOURABLE MADAM JUSTICE D.A. SULYMA

BETWEEN:

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel

Waskewitch, and Elsie Gladue on Their Own Behalf and on

Behalf of All Descendants of the Papaschase Indian Band No. 136

Appellants

(Plaintiffs)

— and —

Attorney General of Canada

Respondent

(Defendant)

— and —

Her Majesty the Queen in Right of Alberta

Respondent

(Third Party)

— and —

Federation of Saskatchewan Indian Nations

Intervener

Judgment

THIS IS TO CERTIFY THAT THIS APPEAL from the Judgment of the Honourable Mr. Justice F.F. Slatter, dated the 13th day of September, 2004 and entered the 14th day of December, 2004 having come on for hearing before this Honourable Court on the 7th day of December, 2006; **AND UPON HEARING** the submissions of counsel; **AND UPON THE APPEAL BEING HEARD** and decision reserved on the 7th day of September, 2006; **AND UPON THIS COURT** being pleased to pronounce judgment on the 19th day of December, 2006; **AND UPON** further written submissions as to the form of judgment having been filed in the month of April, 2007; **AND UPON** the Court then settling these minutes;

IT WAS ORDERED AND ADJUDGED THAT:

1. No order was made with respect to Paragraph 1 of the appealed Queen's Bench Judgment.

2. The temporary stay contained in Paragraph 2 of the appealed Queen's Bench Judgment was referred back to the Case Management Judge for rehearing in light of the Judgment pronounced December 19, 2006 and of this Judgment.

3. Paragraph 3 of the appealed Queen's Bench Judgment was set aside in its entirety, and the motions to dismiss summarily or to strike out the statement of claim were denied.

4. Paragraph 4 of the appealed Queen's Bench Judgment was set aside.

5. The costs associated with the motions in the Court of Queen's Bench resulting in the appealed Judgment shall be awarded and fixed by the Trial Judge who ultimately hears the trial of the action. If no trial is held, any Court of Queen's Bench Judge may award and fix such Motions Costs.

6. All parties and the Intervener shall bear their own costs in relation to the within appeal.

Deputy Registrar,

Court of Appeal of Alberta

ENTERED this_____ day of May, 2007

_____

Deputy Registrar,

Court of Appeal of Alberta

Tab 24

Most Negative Treatment: Reversed
Most Recent Reversed: Western Canadian Shopping Centres Inc. v. Dutton | 2000 CarswellAlta 1383, 2000 CarswellAlta 1384 | (S.C.C., Dec 13, 2000)

1998 ABCA 392
Alberta Court of Appeal

Western Canadian Shopping Centres Inc. v. Dutton

1998 CarswellAlta 1173, 1998 ABCA 392, [1998] A.J. No. 1364, 188 W.A.C. 188, 228 A.R. 188, 30 C.P.C. (4th) 1, 73 Alta. L.R. (3d) 227, 84 A.C.W.S. (3d) 838

Western Canadian Shopping Centres Inc. and Muh-Min Lin and Hoi-Wah Wu, representatives of all holders of Class "A", Class "E" and "Class F" Debentures issued by Western Canadian Shopping Centres Inc., Plaintiffs (Respondents) and Bennett Jones Verchere, Garnet Schulhauser, Arthur Anderson & Co., Ernst & Young, Alan Lundell, The Royal Trust Company, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill, Defendants (Appellants) and Joseph Dutton, J.M.D. Management Ltd., E.A. Schiller and Associates Ltd., Cominco Engineering Services Ltd., A.C.A. Howe International Limited, William Wiese, Claude Resources Inc., John Keily and Ronald A. MacKenzie, Defendants Not Parties to the Appeal and Joseph Dutton, Bennett Jones Verchere, J.M.D. Management Ltd., Garnet Schulhauser, Arthur Anderson & Co., E.A. Schiller and Associates Ltd., Cominco Engineering Services Ltd., A.C.A. Howe International Limited, Ernst & Young, Alan Lundell, The Royal Trust Company, William Wiese, Claude Resources Inc., William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billinsley, John A. Keily, Peter K. Gummer, James B. Engdahl, Ronald O. Mackenzie, Jon R. MacNeill, Western Canadian Shopping Centres Inc., Jean Descarreaux, Ronald G. Walker, Roman Shklanka, Overseas Investments (1986) Ltd., Overseas Investments Consulting Inc., Security Pacific Bank S.A., Security Pacific Bank Canada, Security Pacific Corporation, Sino Canada Immigration and Investment Office Limited doing business as Rothe International Canada and the said Sino Canada Immigration and Investment Office Limited, International Immigration Ltd. doing business as Rothe International Canada and the said Investment Immigration Ltd., CIC International Immigration and Investment doing business as 21st Century Investment Consultants and the said CIC International Immigration and Investment, Grace Ku, Claudia Wong, Joseph Ng, Baker and MacKenzie, Beaumont Church, Henry Beaumont, Dora Lam, John Doe alias Hatfield, Alice Ho, Allstate Insurance Corporation, George Lee, Peter Young, Janet Li, Flanagan and Associates, F.M. Tam, Sara Mu, James Humpheries, John Doe, Jane Doe and ABC Corporation, Third Parties Not Parties to the Appeal and The Royal Trust Company, Plaintiff by Counterclaim (Defendant/Appellant) and Western Canadian Shopping Centres Inc., Defendant by Counterclaim (Plaintiff/Respondent)

Irving, Russell, Picard JJ.A.

Heard: October 2, 1998
Judgment: December 11, 1998
Docket: Edmonton Appeal 9603-0542

Proceedings: affirming (1996), 41 Alta. L.R. (3d) 412 (Alta. Q.B.)

Counsel: *B.R. Crump*, for the appellant The Royal Trust Company.
N.C. Wittman, for the appellants Bennett Jones Verchere and Garnet Schulhauser.
R. B. White, Q.C. and *M.E. Lesniak*, for the appellant Arthur Anderson & Co.
P.J. Peacock, Q.C., for the appellant C. Michael Ryer.
H.B. Madill, Q.C. and *J. Gormley*, for the appellants James G. Engdahl, William R. MacNeill, Jon R. MacNeill, Gary Billingsley, R. Byron Henderson.
R.B. Davison, Q.C. and *K.A. Smith*, for the appellant Ernst & Young & Alan Lundell.
J.R. Black and *G. Holan*, for the appellant Peter K. Gummer.
H.H. Durocher, for the respondents.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Torts
Related Abridgment Classifications
Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.g Fiduciary duties
III.1.g.ix Miscellaneous
Civil practice and procedure
V Class and representative proceedings
V.1 Representative or class proceedings not under class proceedings legislation
V.1.a Requirements
V.1.a.i Existence of cause of action
Civil practice and procedure
V Class and representative proceedings
V.1 Representative or class proceedings not under class proceedings legislation
V.1.a Requirements
V.1.a.vii Miscellaneous
Civil practice and procedure
V Class and representative proceedings
V.1 Representative or class proceedings not under class proceedings legislation
V.1.f Examination for discovery
Civil practice and procedure
V Class and representative proceedings
V.1 Representative or class proceedings not under class proceedings legislation
V.1.k Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.e Who may be examined
XII.4.e.iv Miscellaneous
Torts
VII Fraud and misrepresentation
VII.3 Negligent misrepresentation (Hedley Byrne principle)
VII.3.c Particular relationships

VII.3.c.iii Fiduciary relationship

Headnote

Fraud and misrepresentation --- Negligent misrepresentation (Hedley Byrne principle) — Particular relationships — Fiduciary relationship

Plaintiffs commenced representative action against defendants for breach of fiduciary duty with respect to failed investment — Defendants applied to strike representative action on grounds that plaintiffs failed to establish requisite element of reliance — Application was dismissed and defendants appealed — Appeal dismissed — Actual reliance not required to succeed in action based on fiduciary duty — Alberta Rules of Court, Alta. Reg. 390/68, R. 42.

Practice --- Parties — Representative or class actions — General

Plaintiffs commenced representative action against defendants for breach of fiduciary duty with respect to failed investment — Defendants applied to strike representative action on grounds that plaintiffs failed to establish requisite element of reliance — Application was dismissed on grounds that issue could be decided only by trial judge — Defendants appealed — Appeal dismissed — Chambers judge did not err in ruling that trial judge could determine if requirements of representative action were met — Alberta Rules of Court, Alta. Reg. 390/68, R. 42.

Practice --- Discovery — Examination for discovery — Who may be examined — General

Representative action — Plaintiffs commenced representative action against defendants for breach of fiduciary duty with respect to failed investment — Defendants applied to strike representative action on grounds that plaintiffs failed to establish requisite element of reliance — Application was dismissed on grounds that issue could be decided only by trial judge — Defendants appealed with issue arising as to whether all plaintiffs could be examined — Appeal dismissed — All plaintiffs in representative action can be discovered — Alberta Rules of Court, Alta. Reg. 390/68, R. 42, 201.

The plaintiffs purchased debentures in a corporation established to facilitate investment in Canada pursuant to an immigration investment scheme established by the federal government. They made their purchases at different times pursuant to different offering memorandum presented to them by different defendants. The corporation eventually invested all of its proceeds into a gold mine. The investment failed and the plaintiffs lost their money. Pursuant to R. 42 of the *Alberta Rules of Court*, they commenced a representative action against all of the defendants for breach of fiduciary duty. The defendants applied to strike the representative action on grounds that the plaintiffs as a group could not show the requisite element of reliance because they invested at different times under different offering memoranda. The application was dismissed on grounds that it was not plain and obvious that the plaintiffs failed to meet the requirements under R. 42 and that the existence of a fiduciary duty was an issue of fact that should be left for the trial judge. The defendants appealed. An issue arose as to whether, if the representative action were to proceed to trial, each of the individual plaintiffs in the representative action could be examined pursuant to R. 201 to determine the extent of their reliance on the applicable memoranda.

Held: The appeal was dismissed.

Per Russell J.A. (Irving J.A. concurring): Case law established that a party could proceed in a representative capacity if the class is capable of clear and definite definition, the principles of fact and law are the same, success of one plaintiff will mean success for all, and no individual assessment of claims of the individual plaintiffs need be made. Case law also established that the decision as to whether a representative action should be struck can be left to the trial judge. In this case, the key issue was whether there was reliance. The defendants' argument failed on this point as case law also established that actual reliance does not have to be proven to succeed in an action based on fiduciary duty. The chambers judge did not err in allowing the action to proceed to trial.

With respect to the issue of examining the individual plaintiffs, R. 201 must be read to allow discovery of all persons for whose benefit an action is prosecuted or defended.

Per Picard J.A. (dissenting): The chambers judge erred in law in ruling that the trial judge could determine if the requisite elements required to proceed with a representative action had been made out. With respect to the substantive argument regarding breach of fiduciary duty, reliance is only one of many factors that must be considered, with it having been essential that the plaintiffs brought forward evidence which established the existence of a fiduciary relationship. This required a meticulous examination of the facts and could not be done in a representative action nor by allowing a discovery of all the plaintiffs.

Table of Authorities

Cases considered by *Russell J.A.* (*Irving J.A.* concurring):

Gale (Public Trustee of) v. Heintz (1991), 2 C.P.C. (3d) 284, 82 Alta. L.R. (2d) 273, (sub nom. *Public Trustee (Alberta) v. Heintz*) 126 A.R. 40 (Alta. Master) — not followed

Korte v. Deloitte, Haskins & Sells (1993), 8 Alta. L.R. (3d) 337, 135 A.R. 389, 33 W.A.C. 389, 15 C.P.C. (3d) 109 (Alta. C.A.) — applied

Pasco v. Canadian National Railway (1989), (sub nom. *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*) 102 N.R. 76, [1990] 2 C.N.L.R. 96, [1989] 2 S.C.R. 1069, 63 D.L.R. (4th) 607 (S.C.C.) — applied

353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd. (July 31, 1989), Doc. JDE 8803-26537 (Alta. Master) — not followed

Cases considered by *Picard J.A.* (dissenting):

Canson Enterprises Ltd. v. Boughton & Co. (1991), [1992] 1 W.W.R. 245, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 131 N.R. 321, 85 D.L.R. (4th) 129, 61 B.C.L.R. (2d) 1, 6 B.C.A.C. 1, 13 W.A.C. 1, [1991] 3 S.C.R. 534, 43 E.T.R. 201 (S.C.C.) — considered

Frame v. Smith, 78 N.R. 40, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 9 R.F.L. (3d) 225 (S.C.C.) — considered

Hodgkinson v. Simms, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245 (S.C.C.) — considered

International Corona Resources Ltd. v. Lac Minerals Ltd., 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 26 C.P.R. (3d) 97, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) [1989] 2 S.C.R. 574 (S.C.C.) — considered

Korte v. Deloitte, Haskins & Sells (1993), 8 Alta. L.R. (3d) 337, 135 A.R. 389, 33 W.A.C. 389, 15 C.P.C. (3d) 109 (Alta. C.A.) — considered

Naken v. General Motors of Canada Ltd., [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385, 46 N.R. 139, 32 C.P.C. 138 (S.C.C.) — considered

Pasco v. Canadian National Railway (1989), (sub nom. *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*) 102 N.R. 76, [1990] 2 C.N.L.R. 96, [1989] 2 S.C.R. 1069, 63 D.L.R. (4th) 607 (S.C.C.) — considered

353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd. (July 31, 1989), Doc. JDE 8803-26537 (Alta. Master) — considered

Statutes considered by *Picard J.A.* (dissenting):

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

Rules considered by *Russell J.A.* (*Irving J.A.* concurring):

Alberta Rules of Court, Alta. Reg. 390/68

R. 42 — considered

R. 129(1)(a) — referred to

R. 187 — considered

R. 201 — considered

Rules considered by *Picard J.A.* (dissenting):

Alberta Rules of Court, Alta. Reg. 390/68

R. 42 — considered

APPEAL from judgment reported at (1996), 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329 (Alta. Q.B.) dismissing defendant's application to strike portions of statement of claim which purported to create representative action.

Russell J.A. **(*Irving J.A.* concurring):**

1 This is an appeal from an order dismissing applications to strike out portions of an amended statement of claim under Rule 42 for failing to meet the requirements of a representative action.

2 The Respondents are 231 foreign investors who lost money through investments under an immigration investment regime created by the Federal Government. On April 26, 1993 an amended statement of claim was issued indicating that two of the investors would sue on behalf the 229 other investors in the form of a representative action.

3 The Appellants, who are individuals, partnership and corporations, are the defendants in the representative action. They are being sued because of their participation in the sale of debentures in Western Canadian Shopping Centres (WCSC), a company that was incorporated to provide an avenue for investment in real estate in Saskatchewan as part of the Federal immigration investment regime.

4 The Federal investment regime allowed foreign investors to obtain immigration visas into Canada by investing a specified amount of money in Canada for a specified period of time. The Respondents all participated in this program through the purchase of debentures in WCSC.

5 The debentures were offered to the Respondents by the Appellants through various offering memorandum in different locations by different agents. Between December 1, 1988 and February 7, 1990 there were 4 different offering memoranda issued by the Appellants. Each of these offers were the same in basic composition, however, there were changes made in the method that funds could be released to WCSC and the description of the investments that would be sought by WCSC.

6 After the changes to the memoranda were complete, two other events of significance took place. First, on May 15, 1990, notice was given that WCSC would be investing in a gold mine in Northern Saskatchewan. Second, on December 1, 1990, a decision was made to pool all of the debentures issued up to that point and invest those funds in the gold mine.

7 As these changes occurred, new investors continued to purchase debentures. As a result, there is some confusion as to which offer each of the 231 investors was responding to. Also, there is some confusion as to what each investor's understanding was regarding the investments contemplated by WCSC.

8 On December 30, 1991, it became apparent that the investment in the gold mine had gone bad and that the money had not been properly secured. It is alleged that in dealing with the debenture funds, the Appellants breached their fiduciary duty to the investors by pooling the debentures and by squandering the pooled fund on an improperly secured investment.

Decision Below

9 In the application below, the Chambers Judge concluded that the court had an independent power under Rule 42 to strike, subject to the same standard of proof applied under Rule 129(1)(a), but not restricted to the pleadings. However, he held that in this case no resolution of facts was required, and that any determination of disputed facts was beyond his purview. Upon reviewing the materials before him, he was unable to conclude that it was plain and obvious that the Respondents' claim failed to meet the requirements of Rule 42. Thus, he held that the existence of a fiduciary duty and the extent of any damages arising from the breach of that duty, should it be shown to exist, were issues of fact best left to the Trial Judge.

10 The Appellants have asked us to reverse the Chambers Judge's decision and use our own discretion under Rule 42 to strike the pleadings as they now stand.

Analysis

11 Neither the power of the Court to strike a claim under Rule 42, nor the consideration of evidence outside the pleadings in considering an application under Rule 42 have been challenged in this appeal. The issue before us is whether the Chambers Judge erred in leaving the ultimate determination of whether the Respondents met the requirements for a representative action to the Trial Judge.

12 In *353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd.* (July 31, 1989), Doc. JDE 8803-26537 (Alta. Master), M. Funduk was of the view that an application to strike out a class action should not be left to the Trial Judge. However, that decision appears to have been overruled in *Pasco v. Canadian National Railway*, [1989] 2 S.C.R. 1069 (S.C.C.): Stevenson & Cote; *Civil Procedure Guide* 1996, Vol. I, p. 298.

13 In *Pasco* 36 Indian chiefs each commenced an actions on behalf of himself and all other members of his band. They then sought amendments to permit them to advance those claims on behalf of the members of three Indian nations as well. The appellants objected on the grounds that the proposed amendments were communal in nature whereas the action was framed as a personal one. McLachlin J. stated at p. 1071:

> In our opinion, the issue of authority to bring the claims, like the issue of the personal entitlement, if any, of the members of the Band or Nations is a question of fact or mixed fact and law which is best determined by the trial judge. ... Having said that, it appears to us that the possible conflict between the rights alleged on behalf of the Band and the rights alleged on behalf of the Nations may cause problems at the trial and the plaintiffs might well be advised to reconsider its pleadings. However, in our view, this is a matter for the trial judge.

14 The leading case in Alberta regarding representative actions is *Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337 (Alta. C.A.). According to *Korte*, a party may proceed in a representative capacity so long as: a) The class is capable of clear and definite definition; b) The principal issues of fact and law are the same; c) Success for one of the plaintiffs will mean success for all; and d) no individual assessment of the claims of the individual plaintiffs need be made. Further, *Korte* also stands for the proposition that a fiduciary duty may be established without proof of actual reliance by the beneficiary on the fiduciary.

15 The main thrust of the Appellant's argument was that reliance is a key factor in determining whether a fiduciary duty is owed to each individual investor. They argued that because of the different offering memoranda, and the different level of knowledge at different times among the plaintiffs, the Respondents did not establish reliance and, as a result, they failed to show that there are similar issues of fact and law among all 231 investors. However, this line of reasoning overlooks the fact that, according to *Korte*, actual reliance may not be needed to succeed in an action based on fiduciary duty. Further, it also discounts the fact that in an application under Rule 42 to strike the action, the court must proceed in a cautious manner. If the pleadings were struck as they now stand, it would mean that the 229 unnamed plaintiffs would be required to launch their own separate actions. If this were done, there is a grave risk that many of the unnamed plaintiffs would lose their claims due to the expiration of limitation periods. Given this possibility, and the fact that *Korte* states that it is possible to find a fiduciary duty without actual reliance, the Appellants have not convinced us that the Chambers Judge erred in allowing this action to proceed to trial.

16 This is not to say that we do not see problems in the manner in which this claim is presented. Given the emphasis the Appellants placed on reliance in their submissions, it is impossible to ignore the fact that the Trial Judge may find this to be a case where, notwithstanding *Korte*, actual reliance needs to be proven. Such a finding may prove fatal to the class action. As a matter of procedural fairness, the Appellants should not be barred from developing an argument based on actual reliance merely because there is a possibility that actual reliance will not be required. We feel that these concerns can be adequately met by allowing the Appellants the right to examinations for discovery for each of the 231 plaintiffs.

17 There was some concern expressed in oral submissions that discovery of the 229 unnamed plaintiffs would not be available through the operation of Rules 187 and 201. Specifically, the Court's attention was directed to the decision

of Master Waller in *Gale (Public Trustee of) v. Heintz* (1991), 82 Alta. L.R. (2d) 273 (Alta. Master) where he decided that Rule 201 was to be read disjunctively to mean that, in order to obtain discovery, the person must be both a member of the firm which is party to the litigation and a person for whose benefit an action is prosecuted or defended. This interpretation was further compounded by Fradsharn's annotated Rules where he uses the heading "member of Firm" over Rule 201. This is not a correct interpretation of Rule 201. In our opinion, Rule 201 should be read conjunctively to allow discovery of all persons for whose benefit an action is prosecuted or defended. This interpretation is made in light of, and in order to be consistent with, Rule 187 which allows for discovery of documents by declaring any person for whose benefit an action is brought as a party to the action.

18 Thus, it is available to the Appellants to obtain discovery of the unnamed plaintiffs through the use of Rules 201 and 187. Through discovery, the defendants can fully examine and investigate the factors which they think lead to the conclusion that there different issues of law and fact among the 231 plaintiffs. Specifically, they can examine their concerns over: 1) the different offering memos that could conceivably give rise to different contract terms; 2) the different levels of knowledge at different times for the investors; 3) possible rights of recission that were not exercised and; 4) the implications of the pooling of assets. Allowing discovery in this manner provides a balance in allowing the defendants to properly prepare their case while simultaneously avoiding the risk of extinguishing the claims of the 229 unnamed plaintiffs.

19 It was suggested by the Respondents that there was no need to discover anyone other than the two named plaintiffs and that many of the concerns raised by the Appellants could be addressed through undertakings. This is not a satisfactory proposal. If the Appellants were forced to rely on the undertakings of the Respondents, it would create an unnecessary barrier between the Appellants and the information they are entitled to. This would needlessly complicate the litigation process and would result in an even more unwieldy action.

20 We also find it necessary to comment on the inadequacy of Rule 42. The problems encountered in dealing with this application indicate the inadequacy of Rule 42 for dealing with representative actions. Although some of the problems encountered here could be dealt with through strict case management, this area of the law is clearly in want of legislative reform to provide a more uniform and efficient way to deal with class action law suits.

21 As a result of the foregoing considerations, we find that the Chambers Judge did not err in allowing this representative action to proceed. We also find that both oral and documentary discovery of all 231 plaintiffs is available for the Appellants. Although the Respondents were successful in this appeal, much of this litigation could have been avoided by the Respondents agreeing to discovery. As a result, costs will not be awarded.

***Picard J.A.* (dissenting):**

22 Two plaintiffs brought an action in their personal capacity and as representatives of 229 immigrant investors. The cause of action is breach of fiduciarY duties. The issue is whether a representative action is appropriate. Before this court, the plaintiffs in the lawsuit are respondents while the defendants are appellants.

23 The guideposts available to assist in this decision are Rule 42 and the decision of this court in the *Korte* case [*Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337 (Alta. C.A.)] and the decision of Master Funduk in *353850 Alberta Ltd.* [*353850 Alberta Ltd. v. Horne & Pitfield* (July 31, 1989), Doc JDE 8803-26537 (Alta. Master)]. All are set out in the judgement of the majority. As for the position taken by my colleagues that the decision of Master Funduk "appears to have been overruled", I find I must respectfully disagree. The *Pasco* decision [*Pasco v. Canadian National Railway*, [1989] 2 S.C.R. 1069 (S.C.C.)] is distinguishable from the decision of Master Funduk in *353850 Alberta Ltd.* and from this case. The cause of action in *Pasco* was trespass to Indian lands and fisheries by the railway. The plaintiffs were chiefs who had originally sued on behalf of band members but sought amendments to allow them to also sue on behalf of three Indian nations. Their authority for doing so raised issues of historical aboriginal occupation and use of lands and waters, the creation of reservations and the relationship of the bands and the nations and necessitated an interpretation of the *Indian Act*. Given the scope of the inquiry required and the extent and type of evidence necessary

to deal with it, it is not surprising that the Supreme Court found that the decision had to be made by the trial judge. By contrast the issue in this case is much more narrow and a great deal of relevant evidence was available to the court to allow it to make a decision. The question for the court was whether, bearing in mind the indicia of fiduciary duties, and utilizing the extensive affidavit evidence presented outlining the permutations and combinations of the investment profiles of the investors, it could be found that it was an appropriate case for a representative action. In my view the comments of Master Funduk in *353850 Alberta Ltd.* remain applicable to this case.

24 In *Korte* the court set out a list of requirements for a representative action which included: a case where the principal issues of fact and law are the same and where no individual assessment of the claims of the individual plaintiffs need be made.

25 The Supreme Court of Canada has set out the law on fiduciary duties and appropriate remedies in a number of cases: *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.); *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.); *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.); and *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.).

Some of the principles from those cases include the following:

> 1. The existence of a fiduciary relationship is a question of law.
>
> 2. Fiduciary duties are imposed only in the most extreme cases where the protection of the beneficiary demands it. They do not generally exist in commercial arm's length transactions where the primary purpose of the relationship is to pursue one's own self-interest.
>
> 3. It is a misuse of the term "fiduciary" to use it as a conclusion to justify a particular result, unless the pre-requisites of the fiduciary relationship are present.
>
> 4. Fiduciary relationships may arise in two circumstances: in *per se* relationships, traditionally considered fiduciary in nature (although this is a presumption that can be rebutted); in other relationships where the circumstances give rise to it (that is where the beneficiary has a reasonable expectation and believes that the fiduciary will act in his exclusive interest to the exclusion of the fiduciary's own self-interests or when the fiduciary undertakes or agrees to assume such responsibility).
>
> 5. There are some indicia of a fiduciary relationship including: discretion and power over the beneficiary's affairs, unilateral control of that power and discretion and vulnerability on the part of the beneficiary. (There are two lines of authority on importance of vulnerability: that it is an indicum but not determinative (Justice Laforest in *LAC Minerals Ltd.* and *Hodgkinson*) and that it is essential and an indispensable element to the existence of a fiduciary relationship (Justice Sopinka in the same cases).
>
> 6. Not every fiduciary relationship is encumbered by fiduciary duties. The extent of such duties requires a meticulous examination of the facts.
>
> 7. The scope of the remedy depends on the nature of the fiduciary duties.

26 In the hearing before the chambers judge, and before us, the respondents argued their case on the basis that reliance was a key factor in determining whether a fiduciary duty was owed to each individual investor and would be the key factor in the law suit. It is clear from an examination of the Supreme Court decisions that reliance is only one of the factors to be assessed by any court in coming to a decision about fiduciary duties.

27 These cases illustrate that it is essential that the respondents as plaintiffs bring forward the evidence to put themselves within a relationship requiring fiduciary duties and prove the scope of those obligations and any breaches. Such evidence is required not only to found liability but also to provide a basis for an appropriate remedy. The extent of fiduciary

duties in a particular case requires a meticulous examination of the facts, particularly of any contract between the parties: *Hodgkinson* pp. 412-414.

28 This responsibility of proof by the respondents cannot possibly be met by a representative action nor by giving a right of discovery of the 229 other parties to the action. Requiring anything less of the respondents than full participation in the lawsuit robs the appellants as defendants of their right to challenge the respondents' case.

29 In the decision appealed from, the chambers judge said he could not say, at that stage of the proceedings, that a representative action was inappropriate. He implies that the trial judge could do so after assessing whether there was reliance which he says will be determinative of the remedy. This was an error in law.

30 The logical consequence of finding that the respondents do not fit within Rule 42 or within the criteria set out in *Korte* is to strike those portions of the statement of claim in which the representative action is set up. The result is that the 229 immigrant investors would have to bring separate suits.

31 The logistical complexities of the resulting lawsuit could, no doubt, be mitigated by effective case management. However, it may be the case that some suits would be barred because of the passage of a limitation period. Unfortunate as this would be, it does not relieve a court of the duty of determining the correct meaning of a Rule and its proper application in the circumstances. The comments of Justice Estey in *Naken v. General Motors of Canada Ltd.* (1983), 144 D.L.R. (3d) 385 (S.C.C.), at 410make this point. However, these concerns are removed as a result of counsel for the appellants advising he was prepared to consent to an amendment of the pleadings adding the additional respondents as of the date of the filing of the statement of claim thus removing the need for further protracted and costly litigation for all parties.

32 In the result, I find that the chambers judge erred in holding that a representative action was appropriate. I would order that, with the consent of the appellants, the 229 persons be added to the statement of claim and recommend that the action be put under case management in the Court of Queen's Bench.

33 I join the majority in calling for reform of the law in Alberta dealing with representative or class actions.

Appeal dismissed.

Tab 25

1997 CarswellNat 1086
Federal Court of Canada — Appeal Division

Sawridge Band v. R.

1997 CarswellNat 1086, 1997 CarswellNat 2720, [1997] 3 F.C. 580, [1997] F.C.J. No. 794, 215 N.R. 133, 3 Admin. L.R. (3d) 69, 72 A.C.W.S. (3d) 78

Walter Patrick Twinn suing on his own behalf and on behalf of all other members of the Sawridge Band; Wayne Roan, suing on his own behalf and on behalf of all other members of the Ermineskin Band; and Bruce Starlight, suing on his own behalf and on behalf of all other members of the Sarcee Band, now known as the Tsuu T'ina First Nation; Appellants (Plaintiff) and Her Majesty The Queen, Respondent (Defendant) and Native Council of Canada Native Council of Canada (Alberta) Non-Status Indian Association of Alberta Horse Lake Indian Band Native Women's Association of Canada, Interveners

Isaac C.J., Strayer and Linden JJ.A.

Heard: June 2 and 3, 1997
Oral reasons: June 3, 1997
Docket: A-779-95, A-807-95

Proceedings: additional reasons to (June 3, 1997), Doc. A-779-95, A-807-95 (Federal Court of Canada — Appeal Division); setting aside or quashing [1995] 4 C.N.L.R. 121 (Federal Court of Canada — Appeal Division)

Counsel: *Martin J. Henderson, Philip P. Healey* and *Catherine M. Twinn* , for Sawridge/T'Suu Tina (Walter P. Twinn et al. Bruce Starlight et al.), Appellants.
Marvin Storrow, Q.C., Josiah Wood, Q.C. and *Heather Caswell* , for Wayne Roan et al., Appellants.
Terrence P. Glancy , for Non Status Indian Association of Alberta, Intervenor.
Jon Faulds , for Native Council of Canada (Alberta), Intervenor.
H. Derek Lloyd and *Heather Treacy* , for Horse Lake Indian Band, Intervenor.
Lucy McSweeney and *Mary Eberts* , for Native Women's Association of Canada, Intervenor.
Patrick G. Hodgkinson and *Mary King* , for the Respondent Her Majesty the Queen.

Subject: Public

Related Abridgment Classifications

Aboriginal law
III Government of Aboriginal people
III.2 Self-government
III.2.a Bands and First Nations

Civil practice and procedure
XX Trials
XX.7 New trial
XX.7.a Grounds for granting
XX.7.a.iv Interference by trial judge

Headnote

Practice --- Trials — New trial — Grounds for granting — Interference by trial judge
Reasonable apprehension of bias — Trial judge dismissed plaintiffs' claim that parts of Indian Act unconstitutional — Plaintiffs appealed on basis that trial judge displayed reasonable apprehension of bias — Appeal was allowed — Trial judge used critical and pejorative language during hearing and in written decision which would lead reasonable observer to believe he was biased — Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, s. 35 — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, s. 2(d) — Indian Act, R.S.C. 1985, c. I-5.

The plaintiffs were registered Indians under the *Indian Act* . The plaintiffs argued that ss. 8 to 14.3 of the *Indian Act* infringed the right of Indian bands to determine their own membership. The plaintiffs submitted that their right to control membership originated from an aboriginal and treaty right to practice a marital custom which permitted an Indian husband to bring his non-Indian wife onto a reserve but which prohibited an Indian wife from bringing a non-Indian husband onto the reserve. The plaintiffs further argued that the imposition of additional members on plaintiff bands pursuant to ss. 8 to 14.3 interfered with their freedom of association under s. 2(d) of the *Charter* . The plaintiffs applied for a declaration that the impugned sections were inconsistent with parts of s. 35 of the *Constitution Act* . The trial judge dismissed the application. The plaintiffs appealed on the basis that the record disclosed a reasonable apprehension of bias on the part of the trial judge against the plaintiffs.

Held: The appeal was allowed; the decision of the trial judge was set aside and a new trial was ordered.

A reasonable observer would have formed the impression that the trial judge was strongly opposed to a special regime for aboriginal peoples different from the system of rights and responsibilities applying to other Canadians. If this apprehension were formed, it could have led such an observer to think that the trial judge was thereby influenced in his conclusion that no aboriginal right had existed for the plaintiff bands to control their own membership, or if it had, the right had been extinguished prior to the adoption of section 35 of the *Constitution Act, 1982* .

During the trial and in his reasons, the trial judge used critical, pejorative language in describing the *Indian Act* and section 35 of the *Constitution Act* . He also repeatedly expressed views, confirmed in his reasons, that aboriginal rights are "racist" and a form of "apartheid". Having ascribed these pejorative terms to a system which is recognized in the history, the common law and the constitution of Canada, he might well have been expected to give the narrowest possible interpretation to, or reject, any newly claimed aboriginal right asserted by the plaintiffs. He might also have been taken to assume that this alleged right of bands to control their own membership would be used to promote racism and apartheid and should therefore not be recognized. There was material in the record upon which a reasonable apprehension of bias could be found.

Table of Authorities

Cases considered:

Blanchette v. C.I.S. Ltd., [1973] S.C.R. 833, [1973] 5 W.W.R. 547, 36 D.L.R. (3d) 561, [1973] I.L.R. 1-532 (S.C.C.) — considered

Canada (Human Rights Commission) v. Canada (Department of Indian Affairs & Northern Development) (1994), 25 C.R.R. (2d) 230, [1995] 3 C.N.L.R. 28, 25 C.H.R.R. D/386, (sub nom. *Canadian Human Rights Commission v. Canada (Minister of Indian Affairs & Northern Development))* 89 F.T.R. 249 (Fed. T.D.) — referred to

Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.) — considered

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), 134 N.R. 241, [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289, 4 Admin. L.R. (2d) 121, 95 Nfld. & P.E.I.R. 271, 301 A.P.R. 271 (S.C.C.) — considered

R. v. Curragh Inc., 113 C.C.C. (3d) 481, 159 N.S.R. (2d) 1, 144 D.L.R. (4th) 614, [1997] 1 S.C.R. 537, 5 C.R. (5th) 291, 209 N.R. 252, 468 A.P.R. 1 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11
s. 2(d) — referred to

Canadian Human Rights Act, R.S.C. 1985, c. H-6
s. 67 — referred to

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
s. 91(24) — considered

Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11
s. 35 — considered

s. 35(2) "aboriginal peoples of Canada" — considered

Indian Act, R.S.C. 1985, c. I-5
Generally — considered

Regulations considered:

Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11
Constitution Amendment Proclamation, 1983, SI/84-102

Generally

APPEAL from decision reported [1995] 4 C.N.L.R. 121 (Fed. T.D.) on basis of reasonable apprehension of bias on part of trial judge against plaintiffs.

***Per curiam*:**

Introduction

1 On June 3, 1997 this Court, having heard argument on the first ground of appeal that there was a reasonable apprehension of bias on the part of the trial judge, was obliged to dispose of that ground before hearing the remainder of the argument. As a result the Court allowed the appeal on that ground, for reasons to follow. These are those reasons. As will be apparent, they do not address the substance of the judge's decision.

Facts

2 This appeal involves an action commenced in 1986 for declarations that certain sections of the *Indian Act*[1] are invalid. These sections were added by an amendment in 1985.[2] Briefly put, this legislation, while conferring on Indian bands the right to control their own band lists, obliged bands to include in their membership certain persons who became entitled to Indian status by virtue of the 1985 legislation. Such persons included: women who had become disentitled to Indian status through marriage to non-Indian men and the children of such women; those who had lost status because their mother and paternal grandmother were non-Indian and had gained Indian status through marriage to an Indian; and those who had lost status on the basis that they were illegitimate offspring of an Indian woman and a non-Indian man. Bands assuming control of their band lists would be obliged to accept all these people as members. Such bands would also be allowed, if they chose, to accept

was motivated by several legitimate purposes: to allow "everyone to have a say on everything", not to conceal his reactions to evidence or submissions, to allow vigorous cross-examination on both sides, and to ensure by his questioning that a balanced version of the evidence was presented. In particular, he asserted that it would be unreasonable to interpret the trial judge's comments as critical of aboriginal peoples in general: indeed the reality was, in counsel's view, that this was more a dispute between various elements of the aboriginal community whose interests differ. He believed that the judge was legitimately exercising a discretion in his conduct of the trial and in particular in reference to ordering an R.C.M.P. investigation of alleged wrongful communication with a witness. In general, he observed that the trial judge's "colourful language" should not be taken as an indication of bias.

10 The Court was obliged to dispose of this ground of appeal before proceeding. In allowing the appeal on this basis, with reasons to be delivered later, the Court indicated that it had concluded that there was material in the record upon which a reasonable apprehension of bias could be found.

Analysis

11 It is first important to underline that no actual bias has been alleged on the part of the trial judge, nor does this Court find such bias.

12 It should also be observed that, when faced with an appeal based in part on reasonable apprehension of bias in the trial judge, an appellate court must approach such assertions with great caution. It is not uncommon for unsuccessful litigants, in reflecting on their loss, to attribute it to bias or an appearance of bias on the part of the trial judge. An appeal court, without very good justification, must not use the route of apprehended bias to nullify decisions of a trial judge which it could not otherwise review. A wide margin of discretion must be left to a trial judge in his conduct of a case, and his procedural decisions should not be interfered with unless there is a clear error of principle. Findings of fact should not be set aside in the absence of "palpable and overriding" error. It must further be kept in mind that in a trial of this length, many comments will be made in a variety of contexts which, when isolated, may appear to be tendentious. Some judges will engage in socratic dialogue which may seem to the uninitiated to reveal a predisposition.

13 It must also be observed in respect of this case that there were few if any instances brought to our attention where counsel made any objection during the trial, on the basis of apprehended bias, to the judge's interventions or his conduct of the case. It is also fair to observe, however, that many of the complaints of apparent bias are based on the mode of expression of the judge's reasons when considered against the background of the trial. The reasons were not, of course, available to counsel for comment prior to judgment.

14 According to the jurisprudence, a reasonable apprehension of bias may be said to exist where there is a reasonable apprehension "that the judge might not act in an entirely impartial manner...".[7] What is required is not a "possible" apprehension but a "reasonable" apprehension; that is, the opinion that a reasonably well informed person, viewing the matter realistically and practically, might form of the situation.[8]

15 Using this test and reading many of the judge's interventions in context we do not suppose that a reasonable observer would have understood the learned trial judge to harbour negative views about aboriginal people as such. Indeed, as noted earlier, the dispute before him involved in reality conflicting claims among various segments of the aboriginal community to control or to claim membership in Indian bands. Critical comments must also be read in association with his many expressions of respect for Indian witnesses and culture.

16 We do think, however, that a reasonable observer would have formed the impression that the trial judge was strongly opposed to a special regime for some or all aboriginal peoples different from the system of rights and responsibilities applying to other Canadians. If this apprehension were formed, it could have led such an observer to think that the trial judge was thereby influenced in his conclusion that no aboriginal right had existed for the plaintiff bands to control their own membership or if it had, the right had been extinguished prior to the adoption of section 35 of the *Constitution Act, 1982* .

17 Such an observer might well have reflected on the fact that, ever since the adoption of the *Constitution Act, 1867 [(U.K.)]* , section 91[24] thereof has given Parliament the power and responsibility to make special laws for Indians in distinction from other persons. This power and responsibility, of necessity, has always required some criteria for defining

