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

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Counsel for The Sawridge First Nation

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

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

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

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

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

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

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

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

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

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[1] In particular, in paragraph 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[9] *Supra* note 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

DORIS C. E. BONORA
Counsel for the Sawridge Trustees

TAB 1

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 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 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 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.

[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]

TAB 2

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 respect to the Sawridges and 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 brought home the falling of continuing to prosecute the remedy 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 SCR 1235 at 1245, 77 DLR (4th) 249 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:

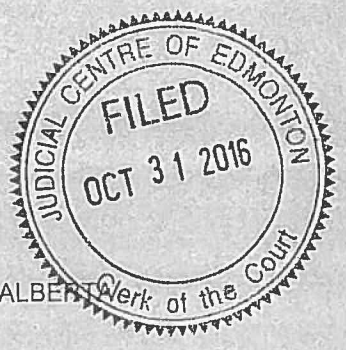
> ... The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration 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.

TAB 3



Clerk's stamp:	
COURT FILE NUMBER	1103 14112
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JUDICIAL CENTRE	EDMONTON
	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
APPLICANTS	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, CATHERINE TWINN, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**WRITTEN SUBMISSIONS OF THE TRUSTEES ON THE APPLICATION BY MAURICE STONEY AND HIS SIBLINGS TO BE ADDED AS A PARTY OR INTERVENOR AND DECLARE THEM TO BE BENEFICIARIES AND ON THE APPLICATION BY THE SAWRIDGE FIRST NATION TO BE ADDED AS INTERVENOR**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

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Counsel for the Stoney Applicants

36. It is submitted that as a result of Stoney's refusal to cooperate with the cross-examination process, the Trustees were not able to properly test Stoney's evidence, and accordingly, his Affidavit should be given little weight.

Sawridge Application for Intervenor Status

37. In the event that the Stoney Applicants are granted status in this action, the Trustees support the request by Sawridge for intervenor status.

38. Sawridge has clearly and helpfully set out the test as well as the supporting information in respect of its position.

39. The Trustees submit that no one is more poised to attest to the relevant facts in respect of Stoney's frequent and unsuccessful appearances before many levels of Court and tribunals in respect of the issue of membership than Sawridge. Sawridge has substantially outlined these unsuccessful appearances in the filed affidavit of Chief Twinn in support of their application to be added as an intervenor. Those facts are further analyzed in the written submissions filed by Sawridge.

40. The Trustees adopt the facts and arguments presented by Sawridge and support Sawridge's application for reasons which include:

(a) The participation of Sawridge would likely render the process more efficient as submissions by Sawridge comprehensively contain all that this Court requires to provide balance to Stoney's arguments; and

(b) Sawridge brings knowledge of its membership, process particular history in relation to Stoney and could assist this Court in that regard should the need arise.

Costs to the Trustees

41. The Trustees repeat and adopt Sawridge's arguments in respect to an award of solicitor and his own client, or enhanced, costs to the Trustees. These submissions, at paragraphs 74 to 79, provide support for an award of a punitive nature in these proceedings due to the delay, abuse of process and mischaracterization of evidence outlined herein. It is submitted that there is a both a general and a specific deterrent aim for such an award of costs and Stoney has proven to be a litigant with little respect for the finality of the court process and an award of costs of a substantial nature is necessary to deter him from further conduct of this nature.

42. Further, the Trustees point to the futile exercise of the questioning on Affidavit of Stoney, which was thwarted by the intervention of his counsel and further undermined by Stoney's personal

refusal to answer questions, as an example of the costs that have been needlessly and inappropriately borne by the Trustees to address these issues and as a further justification for an award of solicitor and own client costs or costs on an enhanced basis.

PART IV – REMEDY SOUGHT

43. The Trustees respectfully request that the Court deny the application by the Stoney Applicants completely. In the event that status is granted to the Stoney Applicants, the Trustees request that the Court grant intervenor status to Sawridge.

44. The Trustees request costs be awarded to the Trustees on an enhanced basis or solicitor and his own client basis for the reasons set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31 DAY OF OCTOBER, 2016.

DENTONS CANADA LLP

PER: _____
Doris Bonora
Solicitors for the Trustees

TAB 4

1999 ABQB 514
Alberta Court of Queen's Bench

Lynch v. Checker Cabs Ltd.

1999 CarswellAlta 640, 1999 ABQB 514, [1999] A.J. No. 782, [2000] 2 W.W.R. 59, 245 A.R. 182, 36 C.P.C. (4th) 58, 73 Alta. L.R. (3d) 74

Eulene Yvette Lynch, Cyriline Lynch-Parker and Delroy Lynch Ferrel, a minor by his next friend Eulene Yvette Lynch, Plaintiffs and Checker Cabs Ltd. and Farhan Bajwa, Defendants

Phillips J.

Judgment: June 30, 1999
Docket: Calgary 9701-16341

Counsel: *V.R. Shibley*, for the plaintiffs' counsel J.A. Sutherland.
Z. Verjee, for the defendants.

Subject: Civil Practice and Procedure

Headnote

Practice --- Costs — Jurisdiction and discretion as to costs

Personal injury trial between parties was set down for jury trial upon successful application of defendants — At trial, plaintiffs' counsel handed court letter containing defendants' offer to settle, under pretence it showed defendants' counsel's poor view of plaintiffs' expert's report — Upon viewing letter, mistrial ordered — Defendants applied for costs on solicitor-and-client basis against plaintiffs' solicitor personally, on ground he was direct cause of mistrial — Application granted — Court had jurisdiction to award costs before new trial, and was in better position to award costs for mistrial than judge at new trial — Plaintiffs' counsel was in conflict of interest with clients, which had to be resolved by awarding costs prior to new trial.

Practice --- Costs — Costs of particular proceedings — Jury trial

Personal injury trial between parties was set down for jury trial upon successful application of defendants — Plaintiffs' counsel intended to call expert witness despite defendants' counsel's warning that he would take issue with qualifications of witness — At trial, plaintiffs' expert witness was deemed qualified in only one area, and plaintiffs' counsel informed court of intention to call 10 additional witnesses — Jury was dismissed on basis additional witnesses increased length of trial beyond time booked for jury — At trial, plaintiffs' counsel handed court letter containing defendants' offer to settle, under pretence it showed defendants' counsel's poor view of plaintiffs' expert's report — Upon viewing letter, mistrial ordered — Defendants applied for costs on solicitor-and-client basis against plaintiffs' solicitor personally, on ground he was direct cause of mistrial — Necessity of discharging jury was separate issue from mistrial — Plaintiffs' counsel had not acted unreasonably in proceeding on basis that his expert was qualified, and disqualification of expert was result of unpredictable disposition of court — Dismissal of jury was not directly caused by plaintiffs' counsel and jury costs were in cause.

Practice --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — General

Personal injury trial between parties was set down for jury trial upon successful application of defendants — Jury was dismissed on basis additional witnesses increased length of trial beyond time booked for jury — At trial, plaintiffs' counsel handed court letter containing defendants' offer to settle, under pretence it showed defendants' counsel's poor view of plaintiffs' expert's report — Upon viewing letter, mistrial ordered — Defendants applied for costs on solicitor-and-client basis against plaintiffs' solicitor personally, on ground he was direct cause of mistrial — Application granted — Court

had jurisdiction to award solicitor-and-client costs for cases of misconduct, default or negligence serious in nature — Plaintiffs' counsel was sole cause of mistrial, and solicitor and client costs remedied inequity of compelling innocent party to pay costs.

Practice --- Costs — Particular orders as to costs — Costs against solicitor personally — Negligence of solicitor

Personal injury trial between parties was set down for jury trial upon successful application of defendants — Jury was dismissed on basis additional witnesses increased length of trial beyond time booked for jury — At trial, plaintiffs' counsel handed court letter containing defendants' offer to settle, under pretence it showed defendants' counsel's poor view of plaintiffs' expert's report — Upon viewing letter, mistrial ordered — Defendants applied for costs on solicitor-and-client basis against plaintiffs' solicitor personally, on ground he was direct cause of mistrial — Application granted — Plaintiffs' counsel's conduct in passing offer of settlement to judge was breach of fundamental rule of ethics and procedure and met test for award of costs against solicitor personally — Costs were awarded against plaintiffs' counsel for causing mistrial — Court is able to award costs against party responsible for causing mistrial, including solicitor.

APPLICATION by defendants for solicitor-and-client costs against solicitor personally.

***Phillips J.*:**

I. Introduction

1 This decision is the result of an application made on April 28, 1999, for an award of solicitor-client costs against a lawyer personally where his actions alone were the direct cause of this Court having to declare a mistrial.

II. Facts

2 On March 4, 1999, on the fourth day of trial in a personal injury action, I declared myself disqualified after counsel for the Plaintiffs, Mr. Sutherland, handed me a copy of a letter purporting to be the Defendants' offer to settle. The trial had begun as a civil jury trial at the request of the Defendants. The decision of the Chief Justice to set the matter down for a civil jury trial was based in part on the representations of respective counsel as to how many witnesses they would be calling. Mr. Sutherland had stated that he would be relying upon a Dr. Donaldson as an expert witness in a number of areas. Counsel for the Defendants, Mr. Verjee, took issue with Dr. Donaldson's qualifications in those areas and informed Mr. Sutherland accordingly. Mr. Sutherland was, however, confident that Dr. Donaldson would be qualified and made no arrangements to give a Rule 218.1 notice of his intent to qualify back up expert witnesses in the event that Dr. Donaldson's qualifications were not fully accepted by this Court. On April 1, 1999, the matter proceeded to trial before a civil jury.

3 The first problem arose when Mr. Sutherland commenced his opening address to the jury. It lacked the requisite warnings to the jury that what counsel was saying was not in fact evidence but rather what he anticipated the evidence to be. In short, Mr. Sutherland was testifying and I cautioned him accordingly. I told him that if he continued on in that fashion and if it prejudiced the Defendants that it could give rise to a mistrial.

4 Shortly thereafter, Mr. Sutherland commenced the case for the Plaintiffs. He did so by calling the Defendant driver, Farhan Bajwa, as the first witness. It transpired that what he intended to do was read in part of the transcript from this Defendant's Examination for Discovery. I ruled that he could cross-examine the Defendant at the appropriate time and put the statements to him at that point and that if he was not called he could read in portions of the Defendant's Examination for Discovery he intended to rely on as part of the Plaintiffs' case. The following day, I later corrected this ruling and allowed Mr. Sutherland to read in from this Defendant's Examination for Discovery at that time.

5 The trial continued. Later on, in argument with respect to the qualifications of Dr. Donaldson, but not before the jury, Mr. Sutherland made reference to the presence of a rheumatologist who would be testifying for the Defendants and who worked for an insurance company assessment group. While the reference to "insurance" is no longer fatal to a trial given the almost universal knowledge of mandatory automobile liability insurance, it is historically a well known ground for the declaration of a mistrial because of its prejudicial effect on defendants.

59 A number of points are made in this one short passage. First, all settlement negotiations, formal or informal, are generally privileged and are not to be before the Court under any circumstances, even on a costs application, and certainly never when liability is still an issue. Second, the Rules of Court and the common law, as an exception to this general rule, allow a party to put the other on notice that they may put before the Court their own offer of settlement in a later costs application. There is neither statutory or common law authority for providing a Court with the other side's settlement offer during the course of a trial and before liability and quantum of damages have been decided.

60 In my view the distinction which counsel for Mr. Sutherland urges me to accept is without merit and I reject it accordingly. The consequences of Mr. Sutherland's conduct cannot be excused and overlooked simply because the Court had not specifically or expressly ordered him not to break an entrenched and fundamental principle of civil procedure.

61 In any event, Mr. Sutherland's conduct does not affect the underlying principle set out in all the cases which militates in favour of awarding costs against the party responsible for causing the mistrial. This is simply that the party who was in no way responsible for causing the mistrial and the throwing away of the related costs ought not to have to, in any way, bear the burden of the lost costs. This is the same policy factor which drives the awarding of costs against Mr. Sutherland personally, namely that his client, the Plaintiffs ought not pay for their counsel's unfortunate actions.

62 In short, Mr. Sutherland will bear the burden of costs occasioned by his causing of the mistrial.

VI. Conclusion

63 Since a realistic assessment of the costs of the proceedings to date requires a review of the conduct of the respective parties, it is appropriate and necessary for this matter to be dealt with at this point by myself and not by a different judge. In my view it is, conceptually at least, appropriate to distinguish between "jury discharge specific" costs and the "thrown away" costs occasioned by the mistrial. They arose from different causes. The discharge of the jury was not the result of a motion by either party so no one can be deemed the successful applicant. Further, it was not caused by either party acting unreasonably. Defendants' counsel had a right to oppose an application for the unlimited qualification of Plaintiffs' expert witness and Mr. Sutherland was reasonable in anticipating that his expert would be fully qualified. As such, to the extent that "jury specific costs", which were already off the table at the time of the mistrial, can be isolated, they should be awarded in the cause.

64 With respect to the mistrial itself, it was caused solely by the actions of Mr. Sutherland acting in breach of procedure and principle. The authorities and their underlying principles clearly tell this Court that precipitating a mistrial the way in which Mr. Sutherland did, and causing the attendant costs to be thrown away entirely, warrants costs on a solicitor-client basis approaching full indemnity. And since the cause of the mistrial was not the Plaintiffs but their lawyer, acting on his own judgment, it is unfair for the Plaintiffs to have to bear those costs. It is in keeping with the law and practice applied in our Courts for Mr. Sutherland to pay those thrown away costs personally.

65 For the sake of clarity it should also be specified what is meant by thrown away costs. It does not include costs for steps which may yet be profitably employed in a later trial or the ultimate resolution of the dispute. It includes only those costs which were made useless by the declaration of the mistrial. This is also in keeping with the line of cases reviewed above.

VII. Order

66 In light of the authorities, the Defendants will have their thrown away costs from the mistrial approaching a solicitor-client indemnity basis. Defendants' counsel calculates these to be $36,040.82. However, Ms. Shibley, on behalf of Mr. Sutherland, has reduced these to $19,761.24 to reflect her deduction of time and disbursements relating specifically to the jury or expended on inevitable steps in the litigation not directly related to the mistrial and hence not wasted.

67 After having reviewed and given careful consideration to the written briefs and the accounts submitted, I am satisfied that the Defendants will be adequately compensated for the thrown away costs from the mistrial by an award of costs of $25,000.00. This does not include what I will call "jury specific" costs, for instance the jury deposit and an application for a jury trial, and it does not include costs not specifically related to the mistrial, for instance (but not restricted to) interlocutory disputes over production of documents. To the extent that these costs have not already been the subject of a costs award, they will be awarded in the cause on a basis to be determined by the ultimate trial judge.

68 Therefore, I order Mr. Sutherland to personally pay to the Defendants costs for the mistrial caused by his actions in the sum of $25,000.00 (which amount includes the Schedule "C" costs for this application in which Mr. Sutherland appeared as a represented party found responsible for costs in the normal course).

Application granted.

End of Document

TAB 5

大成 DENTONS

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大成 Salans FMC SNR Denton McKenna Long
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September 14, 2017

File No.: 551860-1

VIA EMAIL: PRISCILLA.KENNEDY@DLAPIPER.COM

DLA Piper (Canada) LLP
Suite 1201, Scotia Tower 2
10060 Jasper Avenue
Edmonton AB T5J 4E5

Attention: Priscilla Kennedy

Dear Madam:

RE: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust)
Action: 1103 14112
Your File No.: 84021-00001

We enclose our Bill of Costs with respect to the application in relation to Maurice Felix Stoney which are payable jointly by Ms. Kennedy and Maurice Stoney. Please review and advise if you have any problems with the Bill of Cost. Otherwise, we expect that the Bill of Costs will be paid forthwith.

Please be advised that we must return to court by September 29, 2017 to have the court settle any issues.

Yours very truly,
Dentons Canada LLP

Doris C.E. Bonora

DCEB

Enclosure

Form 44
[Rule 10.35(1)]

COURT FILE NUMBER	1103 14112
COURT	Court of Queen's Bench of Alberta
JUDICIAL CENTRE	Edmonton
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, as amended IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19, now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
PROCEDURE	An Application for an Order with Respect to Costs
DOCUMENT	**BILL OF COSTS FOR THE RESPONDENTS ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust**
APPLICANT (S)	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
RESPONDENT(S)	MAURICE STONEY
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Doris Bonora** **Dentons Canada LLP** **2900 Manulife Place** **Edmonton, AB T5J 3V5** **Ph: 780-423-7188 Fx: 780-423-7276** **Email: Doris.Bonora@Dentons.com** **File: 551326-1-DCEB**

Clerk's Stamp

BILL OF COSTS OF THE APPLICANTS, ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust WITH RESPECT TO THE MAURICE STONEY APPLICATION:

Fees Claimed:

To all fees billed on a solicitor and his own client full indemnity basis for the time period August 15, 2016 to and including July 31, 2017 as follows:

- Draft Agenda for Court Application;
- Attend Court Application;
- Draft Order for dealing with application; Receive comments; Amend Order and submit to Court;
- All emails and correspondence to and from counsel;
- All emails and correspondence to and from clients;
- Review all correspondence from P. Kennedy on opposition to SFN;
- All phone calls to and from clients;
- All phone calls to and from counsel;
- Review of pleadings filed by Maurice Stoney and his brothers and sisters (collectively "Maurice Stoney");
- Review Affidavit filed by Maurice Stoney;
- Review P. Kennedy's position in respect of SFN;
- Prepare and attend questioning of Maurice Stoney;
- Review Affiidavit of Roland Twinn;
- Review Brief of Maurice Stoney;
- Draft application for security for costs;
- Draft affidavit for security for costs;
- Review Brief of SFN;
- Draft Brief in response to SFN and Maurice Stoney and in relation to security for costs;
- Review reply Briefs;
- Instruct and review research on all issues including advance costs, adding parties, security for costs, vexatious proceedings, intervenor status;
- Review of decision of Justice Thomas – Sawridge #7;
- Prepare for and attend at July 28, 2017 application;

- Review decision in respect of Justice Thomas – Sawridge #8;
- Draft Orders arising out of Sawridge #7 and Sawridge #8;

TOTAL HOURS		207.7
Doris Bonora – 75.6 Hrs @$ 590/hr = $44,604.00		44,604.00
Erin Lafuente – 60.4 Hrs @ $460/hr = $27,784.00		27,784.00
Anna Loparco – 12.8 Hrs @ $425/hr = $5,440.00		5,440.00
Omolara Oladipo – 16.9 Hrs @ $350/hr = $5,915.00		5,915.00
Mandy England – 1.0 Hrs @ $350/hr = $350.00		350.00
Kent Gislason – 0.2 Hrs @ $275/hr = $55.00		55.00
Harkirat Teja – 3.7 Hrs @ $210/hr = $777.00		777.00
Brett Lojczyz – 7.4 Hrs @ $210/hr = $1,554.00		1,554.00
Jaclin Cassios – 0.5 Hrs @ $210/hr = $105.00		105.00
Taylor Watts – 20.5 Hrs @ $210/hr = $4,305.00		4,305.00
Peggy Harker – 0.5 Hrs @ $165/hr = $82.5		82.50
Susan Hagerman – 8.2 Hrs @ $165/hr = $1,353.00		1,353.00
TOTAL FEES		92,324.50

Disbursements:

DESCRIPTION	**AMOUNT**
August Disbursements	$377.14
September Disbursements	$2,599.14
October and November Disbursements	$1,683.76
December Disbursements	$20.21
July Disbursements	$7,477.35
Total	$12,157.60

GST:

(a)	Amount claimed on fees:	$4,616.23
(b)	Amount claimed on disbursements:	$ 607.88
(c)	Amount claimed on other charges:	$ 0.00

TOTAL GST: $5,224.11

Total amount claimed:

Fees:	$ 92,324.50
Disbursements:	$ 12,157.60
Other Charges:	$ 0.00
GST:	$ 5,224.11
TOTAL:	$109,706.21

Person responsible for preparation of this Bill of Costs:

Signature

Doris Bonora, Dentons Canada LLP

Print Name