Clerk's stamp:

COURT FILE NUMBER:	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, C. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, CLARA MIDBO, and CATHERINE TWINN, as Trustees for the 1985 Sawridge Trust
DOCUMENT:	**WRITTEN SUBMISSIONS OF PRISCILLA KENNEDY RESPECTING THE SCOPE OF THE COSTS AWARD IN SAWRIDGE #6**
ADDRESS FOR SERVICES AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Field Law 2500, 10175 - 101 Street Edmonton, AB T5J 0H3 Attention: P. Jon Faulds, QC Telephone: (780) 423-7625 Fax: (780) 428-9329 Email: jfaulds@fieldlaw.com File No.: 65063-1 PJF

FACTS

1. In August, 2016, Maurice Stoney applied to be added as an intervenor to the Advice and Direction proceedings brought by the 1985 Sawridge Trust. This Court as case management judge (CMJ) directed his motion be heard in writing. The Sawridge First Nation sought and was granted intervenor status to oppose Mr. Stoney's application.

2. Both the Trust and the First Nation asked that Mr. Stoney's application be struck or dismissed and that he be ordered to pay solicitor and own client indemnity costs for his conduct in bringing the application.[1] The Sawridge First Nation specified the costs sought were of the Stoney application and of its application to intervene.[2] Neither Respondent sought costs personally against Mr. Stoney's counsel, Ms. Kennedy. Neither applied to have Mr. Stoney declared a vexatious litigant.

3. The CMJ dismissed Mr. Stoney's application with Reasons issued July 12, 2017 (***Sawridge #6***). With respect to costs the CMJ stated:

> [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.

4. The CMJ further stated his intention "to exercise this Court's inherent jurisdiction to control litigation abuse". He directed a hearing in writing to determine whether Mr. Stoney should be declared a vexatious litigant. The CMJ held the Respondents "may make submissions on Maurice Stoney's potential vexatious litigant status, and introduce additional evidence that is relevant to this question."[3]

5. Finally, the CMJ concluded a costs award against Ms. Kennedy was potentially warranted and directed she appear before the Court at a stated time "to make submissions on why she should not be personally responsible for some or all of the costs awarded against her client, Maurice Stoney."[4] The Court noted "the limited basis on which other litigants may participate in a hearing that evaluates a potential costs award against a lawyer" and allowed the Respondents to participate on such a basis.[5]

6. The show cause hearing concerning Ms. Kennedy was conducted on July 28, 2017. Counsel for both the First Nation and the Trust appeared and made submissions. Insofar as present counsel can ascertain, costs of the show cause hearing were not raised by any party. The CMJ issued his decision with Reasons on August 31, 2017 (***Sawridge #7***) and held:

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[1] Sawridge First Nation's briefs filed Sept 28, 2016, paras 74 to 79 and 81(d), and Oct 31, 2016, paras 42 and 43 **[Tab 1]**; 1985 Sawridge Trustees' brief filed Oct 31, 2016, paras 41, 42 and 44 **[Tab 2]**
[2] Sawridge First Nation's brief filed Nov 14, 2016, para 56 **[Tab 1]**
[3] ***Sawridge #6,*** paras 58 and 64
[4] *Ibid*, paras 77 and 79
[5] *Ibid*, para 81

> [153] ... I therefore conclude that Kennedy and Stoney are liable for the full costs of ***Sawridge #6***, on a joint and several basis.
>
> [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.

Those Reasons made no mention of the costs of the show cause hearing.

7. Written submissions for the vexatious litigant hearing were concluded on August 4, 2017. Again, insofar as present counsel can determine, costs of the vexatious litigant hearing were not raised by any party. The CMJ issued his decision with Reasons on September 12, 2017 and issued a limited Court Access Control Order. The Reasons made no mention of costs of the vexatious litigant hearing.

8. The Respondents have submitted draft Bills of Costs in the combined sum of approximately $209,000.00.[6] About $67,000 of this sum relates to costs of the proceedings in ***Sawridge #7*** and ***#8***.[7] The CMJ directed issues relating to the proposed Bills of Costs be addressed by an assessment officer. The parties have requested that before such an assessment occurs, the CMJ rule on the scope of the award of costs made in ***Sawridge #6***.

SUBMISSIONS

9. Ms. Kennedy understands that the Sawridge Trustees and the Sawridge First Nation take the position that the award of solicitor and client indemnity costs made in ***Sawridge #6*** also applies prospectively to costs subsequently incurred by them in relation to the hearings resulting in ***Sawridge #7*** and ***Sawridge #8***. On behalf of Ms. Kennedy we submit this is incorrect for the following reasons:

- There is nothing in the language of ***Sawridge #6*** to suggest the costs award was intended to have such a prospective effect, or was meant to apply to future hearings yet to be decided. It would be extraordinary that an exceptional award of indemnity costs would apply to future proceedings without express language to that effect.[8] There is also nothing in the substantial Reasons given in ***Sawridge #7*** and ***#8*** to suggest either Mr. Stoney or Ms. Kennedy would be liable for costs of those hearings on an indemnity basis.
- On the contrary, the Reasons in ***Sawridge #6*** indicate the award of exceptional costs applies to the application giving rise to that decision. The basis for the award is the circumstances and conduct of Mr. Stoney in bringing forward that application. The CMJ's decision to hold a show cause hearing with respect to Ms. Kennedy's liability for those costs is based upon her conduct and participation in that application. The show cause hearing was directed to the question of her liability for the costs already awarded against her client in that application. This is confirmed by the Reasons in ***Sawridge #7*** which state clearly that Ms. Kennedy and Mr. Stoney are jointly and severally liable for "the full costs of ***Sawridge #6***".

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[6] This total includes fees claimed by both Respondents, but disbursements and taxes of the Sawridge Trustees only.
[7] This figure would be increased by any disbursements and taxes claimed by the Sawridge First Nation.
[8] The Alberta Court of Appeal recently referred to an award of full indemnity costs as "virtually unheard of except where provided by contract"; ***Twinn v. Twinn***, 2017 ABCA 419 at para. 25 **[Tab 3]**

- Moreover, absent a specific direction by the Court the application of the award in ***Sawridge #6*** to future undecided hearings is contrary to Rule 10.30 which states:[9]

  > Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made (a) in respect of an application or proceeding of which a party had notice, **after the application has been decided.** (emphasis added)

- Under Rule 10.31, with limited exceptions costs awards are for costs incurred, not future costs. The exceptions specified in the Rule at 10.31(2)(b) are the subsequent costs of assessing costs before the Court or an assessment officer which are not relevant here. While the Court under Rule 10.31(1)(b) may award "an indemnity to a party for that party's lawyer's charges" it is respectfully submitted it would take explicit language to extend such an award to costs not yet incurred relating to proceedings yet to be heard.[10]

- The subsequent hearings giving rise to the decisions in ***Sawridge #7*** and ***#8*** were taken on the CMJ's own motion as a result of the conduct which gave rise to the decision to award indemnity costs against Mr. Stoney in ***Sawridge #6.*** Those hearings do not concern relief sought by the Respondents. In directing Ms. Kennedy and Mr. Stoney appear before him for these further proceedings the CMJ made no suggestion or warning that that they were facing full indemnity costs for those hearings too, as required where such an award may be made.[11]

- The position of the Respondents that the costs award in ***Sawridge #6*** automatically extends to the subsequent proceedings in ***Sawridge #7*** and ***#8*** has the appearance of suggesting that the outcome of those hearings was predetermined. With respect, who (if anyone) was liable for the costs of those proceedings and on what scale could only be determined after those hearings had been conducted. No such determination has been made or requested.

- Moreover since Mr. Stoney and Ms. Kennedy are jointly liable for the costs awarded in ***Sawridge #6***, the effect of automatically extending those costs to the subsequent hearings would have the effect of making Mr. Stoney responsible for the costs of the show cause hearing against Ms. Kennedy over which he had no control and in which he did not participate.

10. For all of the foregoing reasons it is respectfully submitted that the special award of costs made in ***Sawridge #6*** bears its natural and ordinary meaning and effect and applies only to the application giving rise to that award and not to the subsequent proceedings and hearings directed by the Court. In the event the Respondents believe they are entitled to costs of their submissions relating to ***Sawridge #7*** and ***#8*** they may presumably seek an assessment pursuant to Rules 10.30 and 10.41.

11. As Ms. Kennedy is unaware of the basis on which the Respondents assert the costs award has prospective effect, they respectfully ask leave to file a brief reply (by January 16, 2018) to address any issue raised by the Respondent not anticipated in these submissions.

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[9] See extract from Alberta Rules of Court, Alta Reg 124/2010 **[Tab 4]**
[10] See also ***Ma v. Coyne***, 2013 ABQB 426 (aff'd 2016 ABCA 119) at paras 58-62 re costs "incurred" under Rule 10.41 **[Tab 5]**
[11] See ***Twinn v. Twinn,*** ibid, at para.27 **[Tab 3]**

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2018

FIELD LLP
Counsel for Priscilla Kennedy

Per: _____
P. Jon Faulds, QC

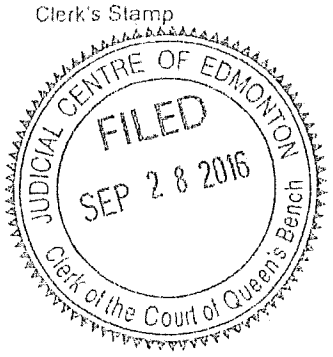
EXTRACTS and AUTHORITIES

1. Written Submissions of the Sawridge First Nation, filed September 28, 2016, October 31, 2016, and November 14, 2016 (extracts)
2. Written Submissions of the 1985 Sawridge Trustees, filed October 31, 2016 (extract)
3. *Twinn v. Twinn*, 2017 ABCA 419 (extract)
4. Alberta Rules of Court, Alta Reg 124/2010, Rules 10.28 through 10.43
5. *Ma v. Coyne*, 2013 ABQB 426 (extract)

Tab 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
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**WRITTEN SUBMISSIONS OF THE SAWRIDGE FIRST NATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1500 Manulife Place 10180 – 101 Street Edmonton, AB T5J 4K1 Attention: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 File Number: 64203-7/EHM

Clerk's Stamp



70. A review of the materials filed to date by the Applicants confirms that their attempt to become involved in this Action is a means of re-arguing the issue of their entitlement to membership. The Applicants are again relying on Bill C-31, the effect of their family's enfranchisement, and the Constitution as a basis for advancing arguments in relation to them having an automatic right to membership. The fact that these arguments are being made in the context of trust-related litigation does not detract from the fact that all of the arguments are connected to a cause of action that has been dealt with on three previous occasions.

71. Furthermore, even if the Applicants are advancing some new basis for arguing that they are members of Sawridge, there is no indication that said argument could not or should not have been argued as part of the earlier proceedings.

72. Finally, with regards to the other two parts of the test for finding cause of action estoppel, Sawridge submits that (much like its submissions regarding issue estoppel) there have been final decisions that involved parties with the requisite level of mutuality. As such, it is Sawridge's position that the doctrine of cause of action estoppel would be a bar to the Applicants' claim that they are beneficiaries under the 1985 Sawridge Trust, and would be grounds to dismiss their application.

c. *Abuse of process*

73. The law regarding the doctrine of abuse of process was summarized in the previous section of these written submissions. Sawridge submits that, for the reasons cited in that section, the doctrine could also be relied upon as a basis for defeating the Stoney Application if this Honourable Court is not prepared to strike the application pursuant to Rule 3.68.

D. Sawridge should be awarded enhanced costs

74. According to the *Rules of Court*, a Court has significant discretion concerning awards of costs. Rule 10.33 outlines a list of considerations that can be taken into account when assessing costs. That list includes the following considerations:

- The conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

- Whether any application, proceeding or step in an action was unnecessary, improper or a mistake; and
- Whether a party has engaged in misconduct.

Rules of Court, Alta Reg 124/2010, at 10.29, 10.31 and 10.33. [Tab 6]

75. Courts have recognized that solicitor-clients costs should be awarded against a losing party where that party's conduct was, "reprehensible, scandalous or outrageous."

Young v Young, [1993] 4 SCR 3, at paras 260 and 261. [Tab 18]

76. In *Jackson v Trimac Industries Ltd.*, the Court provided an overview of the various circumstances in which it is appropriate to award solicitor-client costs. Among other circumstances, it noted that solicitor-client costs were appropriate in the following instance:

> ...where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his;...

Jackson v Trimac Industries Ltd., (1993) 8 Alta LR (3d) 403 (QB), at paras 28 and 31. (Aff'd in 1994 ABCA 199, at para 29). [Tab 19]

77. The Applicants have unnecessarily delayed this Action by bringing the Stoney Application. This action has been ongoing since 2011. Rather than bringing an application at the early stages of this matter to be added as parties, the Applicants waited until essentially the final pre-trial moment in this Action to make their application. Their decision to wait until the last minute to make this application has resulted in the parties expending time and resources addressing which could have been utilized to advance this Action to trial.

78. The Applicants have also engaged in conduct which could clearly be considered unnecessary and improper. This Application represents the most recent step in a longstanding pattern of Maurice and his family using any and all judicial means to try and assert some entitlement to membership. Maurice has not brought anything new forward to the Stoney Application; rather, he is using the issue of the beneficiary definition under the 1985 Sawridge Trust to engage in a collateral attack of the issue of membership.

79. Taking into account all of Maurice's prior conduct, as well as the fact that he has consistently refused to pay any costs arising from proceedings, Maurice's attempt to involve himself in this Action falls into the type of conduct that the above-cited cases indicated was worthy of an award of solicitor and his own client costs, or, at the very least, of an award for enhanced costs.

V. RELIEF REQUESTED

80. For the above reasons, Sawridge prays that this Honourable Court order that Sawridge be granted the status to intervene in the Stoney Application, pursuant to Rule 2.10 of the *Rules of Court*, on terms which include the following:

(a) Sawridge shall have the right to question the Applicants on any Affidavits filed as part of the Stoney Application;

(b) Sawridge shall have the right to apply to strike the Stoney Application and/or to have the Stoney Application dismissed;

(c) Sawridge shall have the right to make submissions in response to the Stoney Application; and

(d) Sawridge shall have the right to seek costs as against Maurice with respect to the Stoney Application.

81. If Sawridge is granted the status to intervene in the Stoney Application, then Sawridge prays that this Honourable Court orders as follows:

(a) That the Stoney Application be struck pursuant to Rule 3.68 of the *Rules of Court*;

(b) In the alternative, that the Stoney Application be dismissed; and

(c) That costs be paid to Sawridge by the Applicants on a solicitor and his own client basis, or on an enhanced basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of September, 2016.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Solicitors for the Sawridge First Nation

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
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**WRITTEN SUBMISSIONS OF THE SAWRIDGE FIRST NATION IN RESPONSE TO THE APPLICATION BY THE STONEY APPLICANTS TO BE ADDED AS PARTIES OR INTERVENORS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1500 Manulife Place 10180 – 101 Street Edmonton, AB T5J 4K1 **Attention**: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 **File Number**: 64203-7/EHM

33. The Stoney Applicants are not members of Sawridge and are not beneficiaries of the 1985 Trust, such that they are not specially affected by any of the issues in the within Action. In any event, they have provided no evidence as to any special expertise or perspective concerning the issues in the within Action which would warrant them being granted intervenor status.

E. The Stoney Applicants' submissions further justify Sawridge's claim to entitlement to solicitor and client or enhanced costs for this Application.

34. In its September 28, 2016 written submissions, Sawridge noted that the following may provide grounds for an award of solicitor and client costs:

(a) Conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) Any application, proceeding or step in an action that was unnecessary, improper or a mistake;

(c) A person has engaged in misconduct or conduct that is reprehensible, scandalous or outrageous; and

(d) A person has done something to hinder, delay, or confuse the litigation, where there was no serious issue of fact or law which required the lengthy, expensive proceedings.

35. It has become abundantly clear from a review of the Stoney Applicants' written submissions that the Stoney Application is, at base, the most recent attempt in a longstanding pattern of Maurice Stoney (and his family) using any and all judicial means to try to assert some entitlement to membership in Sawridge.

36. The Stoney Applicants' attempt to phrase the issue as one relating to the definition of "Beneficiaries" under the 1985 Trust, as opposed to one of membership, is disingenuous. A determination that Maurice Stoney and his siblings are beneficiaries of the 1985 Trust is conditional on a determination that they were members of Sawridge in 1982.

37. The Stoney Applicants are not members of Sawridge and have never been members of Sawridge at any time so as to make them beneficiaries of the 1985 Trust. This membership issue has been litigated in the 1995 Action with representation from counsel.

It was re-litigated in the 2012 Action (judicial review) by the very same counsel who now purports to make the same arguments in support of the Stoney Application.

38. Sawridge has yet again had to respond to the same arguments advanced by Maurice Stoney in the 1995 Action and the 2012 Action. Justice Barnes noted in the 2012 Action that the attempt to re-litigate Maurice Stoney's entitlement to automatic membership in Sawridge was barred by the doctrine of issue estoppel having regard to the decision of the Federal Court of Appeal in the 1995 Action. Maurice Stoney, who was represented by the very same counsel in the 2012 Action, did not appeal Justice Barnes' decision.

39. It is not open to the Stoney Applicants to now attempt to litigate the membership afresh in the within Action, when the membership issue is *res judicata* and barred by the doctrine of issue estoppel.

40. The Stoney Applicants' attempt to re-litigate the membership issue in this forum is, in the least, conduct that was unnecessary and that unnecessarily lengthened and delayed an already lengthy action. At worst, the Stoney Applicants' conduct is reprehensible and outrageous having regard to the history of litigation between Maurice Stoney and Sawridge concerning membership.

41. Furthermore, while purporting to bring an application which sought intervenor status as an alternative to party status, the Stoney Applicants failed to even address the merits of their application for intervenor status in their written submissions.

42. Sawridge submits that, for the foregoing reasons and those reasons set out in its submissions of September 28, 2016, the Stoney Applicants' conduct warrants an award of solicitor and his own client costs being made in Sawridge's favour in respect of the Stoney Application.

IV. RELIEF REQUESTED

43. If Sawridge is granted the status to intervene in the Stoney Application, then for the above reasons and those set out in its September 28, 2016 submissions, Sawridge prays that this Honourable Court orders as follows:

(a) That the Stoney Application be struck pursuant to Rule 3.68 of the *Rules of Court*;

(b) In the alternative, that the Stoney Application be dismissed; and

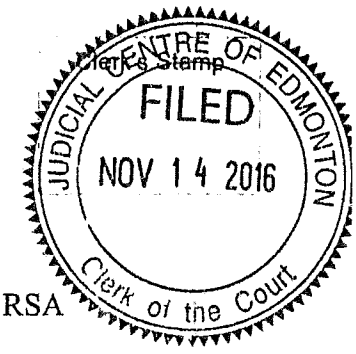
(c) That costs be paid to Sawridge by the Applicants on a solicitor and his own client basis, or on an enhanced basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2016.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Solicitors for the Sawridge First Nation

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

APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**REPLY OF THE SAWRIDGE FIRST NATION TO THE STONEY APPLICANTS' RESPONSE TO THE SAWRIDGE FIRST NATION'S APPLICATION TO INTERVENE IN THE STONEY APPLICATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1500 Manulife Place 10180 – 101 Street Edmonton, AB T5J 4K1 **Attention**: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 **File Number**: 64203-7/EHM

C. **The Stoney Applicants' repeated misstatement of facts and law relating to membership issues and previous litigation with Sawridge is egregious and demonstrates why the Sawridge Application for intervenor status should be granted with costs payable to Sawridge on a solicitor and client basis.**

42. At every opportunity, the Stoney Applicants are attempting to re-litigate and advance arguments that their very same counsel, Priscilla Kennedy, made before Justice Barnes in the judicial review application in Federal Court. These arguments were rejected by Justice Barnes.

43. Sawridge does not wish to belabour this point further, having exhaustively set out its position in this regard in its submissions of September 28, 2016 and October 31, 2016.

44. Sawridge should be granted intervenor status in the Stoney Application. Sawridge is uniquely situated to address the membership issues raised by the Stoney Applicants. This issue is at the centre of the Stoney Application, given that a finding that the Stoney Applicants are members in Sawridge is a pre-condition to finding they are beneficiaries of the 1985 Trust. Their alleged entitlement to membership has been at the centre of prior litigation between Sawridge and Maurice Stoney in Federal Court and has been subject to a complaint by Maurice Stoney against Sawridge to the Canadian Human Rights Commission.

45. The Stoney Applicants are not members of Sawridge, and Sawridge is clearly specially affected by any suggestion to the contrary.

46. Upon a thorough review of the applicable case law, Bill C-31, and the evidence before this Court, it is clear that the Stoney Applicants are attempting to re-litigate their entitlement to membership in Sawridge under Bill C-31, which entitlement does not exist. This issue is *res judicata* and barred by the doctrine of issue estoppel.

47. The Stoney Applicants' conduct amounts to an abuse of process. It has unnecessarily delayed an already lengthy action by burdening this Honourable Court with a consideration of issues which have already been judicially determined in Federal Court.

48. Sawridge submits that, for the foregoing reasons and for those reasons set out in its submissions of September 28, 2016 and October 31, 2016, the Stoney Applicants' conduct warrants an award of solicitor and his own client costs being made in Sawridge's favour in respect of the Stoney Application and the Sawridge Application.

D. By failing to object to the Stoney Application despite the history of litigation involving Maurice Stoney and the determination that he (and his siblings) are not acquired rights members, the OPGT has failed to heed the direction of this Honourable to refocus its role in the within Action on the representation of potential minor beneficiaries and away from membership.

49. Sawridge submits that the OPGT's October 31, 2016 letter stating that is does not object to the Stoney Application is improper in light of this Honourable Court's decision in *Sawridge #3*, wherein Your Lordship's directed that the OPGT refocus its role in the within Action on the representation of minor and potential minor beneficiaries of the 1985 Trust and away from past and resolved membership issues:

> 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.
>
> ...
>
> 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.
>
> 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

54. Sawridge submits that the OPGT has failed to fulfill its duty to the minor beneficiaries by entertaining the Stoney Applicants' attempt to re-litigate past and resolved membership issues. Furthermore, the Stoney Applicants seek advance costs payable from the 1985 Trust, which ought to be of particular concern to the OPGT. Any such an award would reduce the funds held in trust for the minor and potential minor beneficiaries and thereby prejudice their interests.

IV. RELIEF REQUESTED

55. For the above reasons and those reasons set out in its submissions of September 28, 2016 and October 31, 2016, Sawridge prays that this Honourable Court order that Sawridge be granted the status to intervene in the Stoney Application, pursuant to Rule 2.10 of the *Rules of Court*, on terms which include the following:

(a) Sawridge shall have the right to question the Applicants on any Affidavits filed as part of the Stoney Application;

(b) Sawridge shall have the right to apply to strike the Stoney Application and/or to have the Stoney Application dismissed;

(c) Sawridge shall have the right to make submissions in response to the Stoney Application;

(d) Sawridge shall have the right to seek costs as against Maurice with respect to the Stoney Application.

56. If Sawridge is granted the status to intervene in the Stoney Application, then Sawridge prays that this Honourable Court orders as follows:

(a) That the Stoney Application be struck pursuant to Rule 3.68 of the *Rules of Court*;

(b) In the alternative, that the Stoney Application be dismissed; and

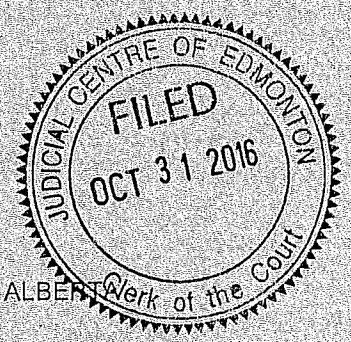
(c) That costs be paid to Sawridge by the Stoney Applicants on a solicitor and his own client basis, or on an enhanced basis, in respect of both the Stoney Application and the Sawridge Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November, 2016.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Solicitors for the Sawridge First Nation

Tab 2



Clerk's stamp:	
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	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

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 3

In the Court of Appeal of Alberta

Citation: Twinn v Twinn, 2017 ABCA 419

Date: 20171212
Docket: 1703-0193-AC
Registry: Edmonton

Between:

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)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Sheilah Martin

Memorandum of Judgment

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)

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 at para 8, 25 Alta LR (5th) 70; *Luft v Taylor, Zinkhofer & Conway*, 2017 ABCA 228 at para 77, 53 Alta LR (6th) 44.

[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 at para 25; *Brown v Silvera* at paras 29-35; aff'd 2011 ABCA 109. 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.

Appeal heard on November 1, 2017

Memorandum filed at Edmonton, Alberta
this 12th day of December, 2017

Paperny J.A.

Veldhuis J.A.

Martin J.A.

Appearances:

N.L. Golding, Q.C.
for the Appellants

D.C. Bonora and A. Loparco
for the Respondents Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Trust

J.L. Hutchison
for the Respondent The Office of the Public Guardian and Trustee

D.D. Risling
for the Respondent Catherine Twinn

Tab 4

(c) any further written argument.

(5) The respondent to the appeal must, within 10 days after service of the notice of appeal, file and serve on the appellant any written argument the respondent wishes to make.

Decision of judge

10.27(1) After hearing an appeal from a review officer's decision, the judge may, by order, do one or more of the following:

(a) confirm, vary or revoke the decision;

(b) revoke the decision and substitute a decision;

(c) revoke all or part of the decision and refer the matter back to the review officer or to another review officer;

(d) make any other order the judge considers appropriate.

(2) If the amount of lawyer's charges payable pursuant to the decision of the review officer has been paid and, after payment, is reduced on appeal, the lawyer may be ordered to return the excess and, if the lawyer fails to do so, the lawyer, in addition to being liable for that amount, may be found guilty of a civil contempt.

AR 124/2010 s10.27;163/2010

Division 2
Recoverable Costs of Litigation

Subdivision 1
General Rule, Considerations and Court Authority

Definition of "party"

10.28 In this Division, "party" includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a costs award.

General rule for payment of litigation costs

10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

(a) the Court's general discretion under rule 10.31,

(b) the assessment officer's discretion under rule 10.41,

(c) particular rules governing who is to pay costs in particular circumstances,

(d) an enactment governing who is to pay costs in particular circumstances, and

(e) subrule (2).

(2) If an application or proceeding is heard without notice to a party, the Court may

(a) make a costs award with respect to the application or proceeding, or

(b) defer making a decision on who is liable to pay the costs of the application or proceeding until every party is served with notice of the date, time and place at which the Court will consider who is liable to pay the costs.

When costs award may be made

10.30(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made

(a) in respect of an application or proceeding of which a party had notice, after the application has been decided,

(b) in respect of a settlement of an action, application or proceeding, or any part of any of them, in which it is agreed that one party will pay costs without determining the amount, and

(c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

(2) If the Court does not make a costs award or an order for an assessment officer to assess the costs payable when an application or proceeding is decided or when judgment is pronounced or a final order is made, either party may request from an assessment officer an appointment date for an assessment of costs under rule 10.37.

Court-ordered costs award

10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or

(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,

(i) an indemnity to a party for that party's lawyer's charges, or

(ii) a lump sum instead of or in addition to assessed costs.

(2) Reasonable and proper costs under subrule (1)(a)

(a) include the reasonable and proper costs that a party incurred to bring an action;

(b) unless the Court otherwise orders, include costs incurred by a party

(i) in an assessment of costs before the Court, or

(ii) in an assessment of costs before an assessment officer;

(c) do not include costs related to a dispute resolution process described in rule 4.16 or a judicial dispute resolution process under an arrangement described in rule 4.18 unless a party engages in serious misconduct in the course of the dispute resolution process or judicial dispute resolution process;

(d) do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry or the fees and other charges of an expert for assisting in the conduct of a summary trial or a trial.

(3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:

(a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;

(b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;

(c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;

(d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.

(4) The Court may adjust the amount payable by way of deduction or set-off if the party that is liable to pay a costs award is also entitled to receive an amount under a costs award.

(5) In appropriate circumstances, the Court may order, in a costs award, payment to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C.

(6) The Court's discretion under this rule is subject to any specific requirement of these rules about who is to pay costs and what costs are to be paid.

Costs in class proceeding

10.32 In a proceeding under the *Class Proceedings Act* or in a representative action, the Court, in determining whether a costs award should be made against the unsuccessful representative party, may take into account one or more of the following factors, in addition to any other factors the Court considers appropriate:

(a) the public interest;

(b) whether the action involved a novel point of law;

(c) whether the proceeding or action was a test case;

(d) access to justice considerations.

Court considerations in making costs award

10.33(1) In making a costs award, the Court may consider all or any of the following:

(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

(c) the importance of the issues;

(d) the complexity of the action;

(e) the apportionment of liability;

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct.

Court-ordered assessment of costs

10.34(1) The Court may order an assessment of costs by an assessment officer and may give directions to the assessment officer about the assessment.

(2) The Court must keep a record on the court file of a direction

(a) given to an assessment officer,

(b) requested by a party and refused by the Court, or

(c) requested by a party that the Court declines to make but leaves to an assessment officer's discretion.

Subdivision 2
Assessment of Costs by Assessment Officer

Preparation of bill of costs

10.35(1) A party entitled to payment of costs must prepare a bill of costs in Form 44

(a) if that party wishes or is required to have the costs assessed by an assessment officer, or

(b) on request of a party who is required to pay the costs.

(2) The bill of costs must

(a) itemize all the costs sought to be recovered, distinguishing between fees, disbursements and other charges, and

(b) be signed by the person responsible for its preparation.

Assessment of bill of costs

10.36(1) After a judgment or order has been entered, an assessment officer, in accordance with any Court direction or order, may make an assessment of costs payable in accordance with rule 10.41 in any of the following circumstances:

(a) under rule 3.36(3);

(b) under rule 3.37;

(c) under rule 3.38;

(d) under rule 3.39.

(2) In cases other than those referred to in subrule (1), the amount assessed under rule 10.41 as payable by one party to another must be determined by way of an appointment with an assessment officer unless the Court or the assessment officer otherwise permits.

(3) Despite subrules (1) and (2), if one party approves a bill of costs prepared by another party adverse in interest, an assessment officer must certify the bill of costs under rule 10.43, without change.

Appointment for assessment

10.37(1) A party entitled to payment of costs may obtain from an assessment officer an appointment date for an assessment of costs.

(2) If a party entitled to payment of costs makes the appointment, that party must, 10 days or more before the appointment date,

(a) file a proposed bill of costs, and

(b) serve every party affected by the appointment with notice of the appointment date in Form 45 and the proposed bill of costs.

(3) If any other party obtains an appointment date, that party must

(a) 20 days or more before the appointment date, serve notice of the appointment date in Form 45 on every party affected, and

(b) serve on the party entitled to payment of costs a request that the entitled party prepare a proposed bill of costs.

(4) The recipient of the request to prepare a proposed bill of costs must do so as soon as practicable and file it and serve it on every other party 10 days or more before the appointment date.

(5) An assessment officer may vary a time period referred to in this rule whether or not the period has passed.

Assessment officer's authority

10.38(1) For the purpose of assessing costs payable, an assessment officer may do all or any of the following:

(a) take evidence either by affidavit or orally under oath, or both;

(b) direct the production of records;

(c) require notice of the appointment for the assessment to be served on persons who may be affected by the assessment or who have an interest in the trust, estate, fund or property from which the costs are or may be paid or charged;

(d) give directions about how a notice of the appointment for the assessment is to be served;

(e) allow a party to be independently represented by a lawyer;

(f) require details of the services provided and disbursements or other charges claimed or require information about any other matter necessary to understand the reason for an item in the bill of costs and to decide whether the item and charge is reasonable and proper;

(g) validate service of the notice of the appointment or, if service is impractical or impossible, dispense with service.

(2) An assessment officer may not conduct an assessment of costs that have previously been assessed by an assessment officer unless the Court so orders or the parties agree.

Reference to Court

10.39(1) An assessment officer may direct any question arising about the assessment of costs payable to be referred to the Court for a decision or direction.

(2) The assessment officer may do all or any of the following:

(a) require one party to serve another party or other interested person with notice of the reference;

(b) specify how a reference to the Court is to be prepared and by whom;

(c) prescribe time limits;

(d) specify any other matter for the effective and efficient disposition of the reference.

(3) On considering a question referred to it, the Court may make any order it considers appropriate in the circumstances, including an order to enforce a direction given under rule 10.38.

Absence of person served with notice of appointment for assessment

10.40 An assessment officer may, on proof of service of the notice of appointment and proposed bill of costs, proceed with the assessment of costs payable despite the absence of the person served.

Assessment officer's decision

10.41(1) Subject to an order, if any, an assessment officer may, with respect to an assessment of costs payable, determine whether the costs that a party incurred to

(a) file an application,

(b) take proceedings,

(c) carry on an action, or

(d) participate in an action, application or proceeding,

are reasonable and proper costs.

(2) Reasonable and proper costs of a party under subrule (1)

(a) include the reasonable and proper costs that a party incurred to bring an action,

(b) unless the Court otherwise orders, include costs that a party incurred in an assessment of costs before the Court,

(c) unless the Court or an assessment officer otherwise directs, include costs that a party incurred in an assessment of costs before an assessment officer,

(d) do not include costs related to a dispute resolution process described in rule 4.16 or a judicial dispute resolution process under an arrangement described in rule 4.18 unless a party engages in serious misconduct in the course of the dispute resolution process or the judicial dispute resolution process, and

(e) do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry, or the fees and other charges of an expert for assisting in the conduct of a summary trial or a trial.

(3) In making an assessment under subrule (1) and taking into account the conduct of the parties, the assessment officer

(a) may decide whether an item in the bill of costs is reasonably and properly incurred,

(b) may disallow an item in a bill of costs that is improper, unnecessary, excessive or a mistake,

(c) may fix the amount recoverable for services performed by a lawyer that are not specified or described in Schedule C,

(d) may not allow lawyer's fees at more than the amounts specified in Schedule C except when these rules, including the Schedule, explicitly permit or a written agreement expressly provides for a different basis for recovery,

(e) may not reduce an amount provided for in Schedule C

(i) unless Schedule C so permits, or

(ii) except in exceptional circumstances,

and

(f) may, in exceptional circumstances, reduce an amount, or allow a fraction of an amount, if the services were incomplete or limited.

(4) If the assessment officer disallows or reduces a fee specified in Schedule C, the assessment officer must give reasons for doing so.

(5) If a party that is liable to pay costs is also entitled to payment of costs, the assessment officer may

(a) adjust the amount payable by way of deduction or set-off, or

(b) delay ordering the payment of costs to a party until that party has paid any costs for which that party is liable.

Actions within Provincial Court jurisdiction

10.42(1) This rule applies only to actions the subject-matter of which is within the jurisdiction of the Provincial Court.

(2) Despite anything in this Division or Schedule C, unless the Court otherwise orders,

(a) in the case of an action brought in the Court of Queen's Bench for which the amount sued for or the amount of the judgment or order does not exceed the amount for which the Provincial Court has jurisdiction under section 9.6 of the *Provincial Court Act*, the costs to and including judgment or order must be assessed, if at all, at not more than 75% of the amount specified in Column 1 of the tariff in Division 2 of Schedule C;

(b) in the case of an action described in clause (a), post-judgment matters are to be assessed, if at all, at not more than 100% of the amount specified in Column 1 of the tariff in Division 2 of Schedule C.

Certification of costs payable

10.43(1) An assessment officer's decision must be given by an interim or final certificate, which may be endorsed on a bill of costs, and which must

(a) certify the amount to be paid by each party or person,

(b) certify any special circumstance and the amount to be paid by each party or person with respect to the special circumstance, and

(c) be dated and signed by the assessment officer.

(2) A certificate that meets the requirements stated in subrule (1) is conclusive proof of the amount that a party or person who had notice of the assessment must pay.

Tab 5

Court of Queen's Bench of Alberta

Citation: Ma v Coyne, 2013 ABQB 426

Date: 20130809
Docket: 0901 18916, 0901 10602
Registry: Calgary

Between:

Action No.: 0901 18916

Jian Guang Ma, Guo Chi Ma and Mei Fang Ma

Plaintiffs/Respondents

- and -

Delainey Lauren Coyne

Defendant/Appellant

And Between:

Action No.: 0901 10602

Maggie YanYan Wen

Plaintiff/Respondent

- and -

Karen L. Bader

Defendant/Appellant

Reasons for Judgment
of the
Honourable Madam Justice S.M. Bensler

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[51] However, the current issue does not concern the Section B benefit itself. Rather, the issue is whether interpreter fees for the completion of forms to obtain accident benefit claims and property claims are an appropriate disbursement.

[52] Concerning the set off argument, interpreter fees in completing forms for obtaining benefits from Section B are separate from the Section B benefits. These interpreters fees may qualify as a separate head of damages, however, they are not an eligible disbursement in this action.

[53] Furthermore, with respect to the accident benefit claims, the party responsible for payment is addressed by legislation. The *Automobile Accident Insurance Benefits Regulations*, Alta Reg 352/1972 under Special Provisions, Definitions, and Exclusions of Section B at section 3.2 states the following:

> Responsibility for Expenses Related to Completion of Claim Form - The Insurer shall pay all expenses incurred by or on behalf of the insured person in completing the medical report portion of the prescribed claim form.

[54] The legislation is specific in stating that the Section B insurer is required to incur expenses for completing the medical report portion of the claim form, not the entire claim form.

[55] The legislation does not appear to address the non-medical report portion of the accident benefit claim form. Therefore, the responsibility in completing the remainder of the accident benefit claim form and the property claim form appears to lie with the individual plaintiffs.

[56] Again, the interpreter fees for the completion of accident benefit claim and property claim forms are not directly related to the current action, although it is closely connected. Where the need for an interpreter arises, this may give rise to a separate head of special damages against the third party insurer. However, these were not pleaded and now cannot be characterized as a disbursement to this action.

[57] The interpreter fees to assist in completing forms not directly related to the current action were inappropriately categorized as a disbursement and therefore these costs are not within the authority of the assessment officer. Consequently, the assessment officer made a palpable error in awarding interpreter costs for the completion of forms that relate to the accident benefit claim and property claim. These expenses are not permitted and this portion of the assessment officer's ruling is overturned on this appeal.

C. Anticipated Costs

[58] The Appellant submits that allowing costs for anticipated interpreter services was a palpable error. Their position is that disbursements normally indicate that the expense has been

incurred. The Appellant also advances a secondary argument which raises the issue of their ability to verify whether the anticipated services were actually performed or not.

[59] At the assessment hearing, the Respondents stated that a bill was provided for taxation purposes. The issue of the interpreter fees had prevented the Respondents from concluding the matters and consequently another meeting between the Respondents' firm and their clients was anticipated. This final meeting, which would take place after the issue of interpreter fees is concluded would require additional interpreter services which resulted in the invoice for anticipated costs.

[60] The assessment officer allowed anticipated costs in this case with the caveat that they seemed reasonable. The costs were set at a relatively reasonable rate and time. The justification for this decision was that it would be more practical than obtaining supplemental or updated bills. For example, the assessment officer stated that an hour to conclude a settlement process did not appear to be out of line.

[61] I agree that it would be practical to allow anticipated costs for interpreters, so long as the anticipated costs were reasonable in the circumstances. Where reasonable and necessary, this would seem to be a more efficient and practical process than obtaining and submitting an updated Bill of Costs.

[62] However, Rule 10.41(1) states that "[...] an assessment officer may, with respect to an assessment of costs payable, determine whether the costs that a party *incurred* [...] are reasonable and proper." [emphasis added] The operative word in the new *Rules of Court* is the word "incurred". At the time of the assessment hearing, the anticipated interpreter costs had not yet been incurred although they were likely to be incurred. Consequently, although the approach taken by the assessment officer was practical, I find the assessment officer made a palpable error in allowing anticipated costs given my reading of Rule 10.41(1). The appeal is successful in this regard, the costs for anticipated interpreter services are not allowed.

D. Interpreter Costs Generally

[63] The Appellant submits that even if pre-commencement interpreter's fees can be allowed, the fees charged in these actions were excessive. The Appellant relies on the Court of Queen's Bench Costs Manual, available on the Court of Queen's Bench website, which states that an interpreter's fees are set at $45.00 per hour in the manual and that the rates set by the assessment officer at $80 per hour is excessive.

[64] The Respondents submit that the interpreter's fees set by the assessment officer at $80 per hour is not excessive. It may seem excessive but the interpreter retained billed for as little as a tenth of an hour while other translators had minimum time requirements. Furthermore, the translator used was available on an *ad hoc* basis, 24-hours a day.