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COURT OF APPEAL OF ALBERTA

<https://albertacourts.ca>

December 18, 2017

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Re: *Priscilla Kennedy (A) v. Roland Twinn (R) and others*
Appeal No. 1703-0252AC

This is to advise that the reserved judgment in the above named case will be released the morning of **December 19, 2017**. On that day, **between 9:30 a.m. and 10:00 a.m.**, a copy of the judgment will be sent to you as set out above.

That same day, the judgment will also be sent to the Canadian Legal Information Institute (CanLII) at 10:00 a.m. for publishing to its website, which may occur that same day. Any concerns with on-line judgments should be raised directly with CanLII.

If you have any concerns about the judgment being sent to you as set out above, please contact our office as soon as possible to make alternate delivery arrangements.

Thank you,


Deputy Registrar

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Court of Appeal – Edmonton
/rz

Date: Dec 19, 2017

As indicated above, attached is the judgment which was released today.

Thank you.

In the Court of Appeal of Alberta

Citation: Kennedy v Trustees for the 1985 Sawridge Trust, 2017 ABCA 439

Date: 20171219

Docket: 1703-0252-AC

Registry: Edmonton

Between:

Maurice Felix Stoney and His Brothers and Sisters

(Not Parties to the Appeal)

- and -

**Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara
Midbo, as Trustees for the 1985 Sawridge Trust**

Applicants
(Respondents)

- and -

Sawridge First Nation

Applicant
(Respondent)

- and -

Public Trustee of Alberta

(Not a party to the Appeal)

- and -

Priscilla Kennedy

Respondent
(Appellant)

The Court:

**The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Myra Bielby**

Memorandum of Judgment

Application to Dismiss the Appeal

Memorandum of Judgment

The Court:

[1] The appellant was counsel for one of the parties in this litigation. The case management judge was critical of her conduct, and in his reasons reported as *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548 at paras. 122, 125 (*Sawridge #8*) he stated: “. . . I will send a copy of this judgment to the Law Society of Alberta for review.” The appellant appealed this direction, and the applicants (respondents in the appeal) have now applied to strike the appeal.

[2] The applicants argue that the appeal is without merit, and should be struck under R. 14.74 for several reasons. First of all, the applicants argue that the reasons have already been sent to the Law Society, so the appeal is moot. The appellant advises that the Law Society has indicated that it is holding the matter in abeyance pending the outcome of these proceedings, and so argues that the appeal is not moot.

[3] Secondly, the applicants argue that a judge, like any concerned member of the public, can refer the conduct of a lawyer to the Law Society. The appellant responds that if this Court disagrees with the case management judge’s assessment of the appellant’s conduct, there would be no basis on which to refer the matter to the Law Society.

[4] Thirdly, the applicants argue that appeals are from the formal order of the court, not the reasons, and the challenged direction was not a part of the formal order. While the direction was included in early drafts of the formal order, the case management judge specifically declined to include it in the final version of the order. The appellant argues that the direction is still a pronouncement, and that she should not be deprived of an opportunity to have it reviewed by this Court just because the case management judge did not include it in the formal order.

[5] Fourthly, the applicants argue that the appellant was not a party to the proceedings and has not applied to be added as a party. The appellant replies that she is asserting the necessary status to launch her own appeal, not to be added as a party to an existing appeal. The appellant argues that the challenged direction directly engaged her interests, not just those of her client.

[6] These applications should be allowed. This appeal should be struck as being without merit, because a judge is entitled to refer the conduct of a lawyer to the Law Society: *Nazarewycz v Dool*, 2009 ABCA 70 at para. 75, 2 Alta LR (5th) 36, 448 AR 1; *R. & T. Thew Ltd. v Reeves (No.2)*, [1982] QB 1283 at p. 1286 (CA). The Law Society will undoubtedly be interested in any comments that this Court may have when it disposes of the substantive appeal, but that does not preclude the case management judge from raising the issue, nor does

it bind the Law Society. The matters that this Court will consider in disposing of the substantive appeal do not necessarily overlap completely with the matters that would be considered by the Law Society, as the two institutions discharge different functions: *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 at paras. 22-3, [2017] 1 SCR 478.

[7] Further, there is no basis to appeal the case management judge's direction since it was not included in the formal order which forms the basis of the appeal. Section 3 of the *Judicature Act*, RSA 2000, c. J-2 confers jurisdiction upon this Court, subject to the *Rules of Court*, to hear and determine appeals respecting only a "judgment, order or decision". Discussions in the reasons for decision that do not form part of the formal order or judgment are not "decisions" generating a right of appeal: *R. v R.E.M.*, 2008 SCC 51 at para. 9, [2008] 3 SCR 3; *Chisholm v Lindsay*, 2017 ABCA 21 at para. 8; *Law v Cheng*, 2016 BCCA 120 at paras. 17-8, 84 BCLR (5th) 238.

[8] Rule 14.8(1), which measures the time in which an appeal must be filed from the date of "pronouncement", does not expand the scope of a permissible appeal to cover everything "pronounced" in the reasons for decision. Appeals are only available from a "judgment, order or decision", not the reasons. Comments by the trial judge that do not form a part of his adjudication, and accordingly do not find their way into the formal order, cannot support an appeal.

[9] The appellant argues that it was an error of law for the case management judge not to include the direction in the formal order. The case management judge's advice that he was referring the matter to the Law Society was simply for the information of counsel and the parties, and did not constitute part of his "judgment, order or decision". He decided to refer his reasons to the Law Society as part of the court's inherent jurisdiction to control its proceedings and to regulate the conduct of its officers, not as a component of his adjudication of the merits of the action. It is open to a trial judge to determine that such a direction is not a part of the formal adjudication, and to exclude it from the order.

[10] The applications are accordingly allowed, and the appeal is dismissed.

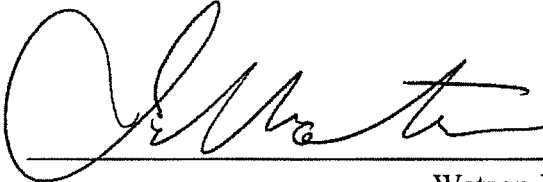
[11] The applicants claim costs of these applications on a "solicitor and own client" basis, but that is not an appropriate scale of party and party costs: *Luft v Taylor, Zinkhofer & Conway*, 2017 ABCA 228 at paras. 77-8, 53 Alta LR (6th) 44. There has been no litigation misconduct in this appeal, and the mere fact that the appeal was ultimately determined to be without merit is not a sufficient justification for indemnity costs: *Young v Young*, [1993] 4 SCR 3 at p. 134. The only assessable step taken by the applicants in this appeal would appear to be this contested application, and the applicants (respondents in the appeal) are each entitled

to one-half of the assessable costs of that step, on Column 2. Accordingly, each respondent is entitled to \$625 plus GST in costs for this appeal.

Application heard on December 14, 2017

Memorandum filed at Edmonton, Alberta
this 19th day of December, 2017

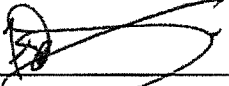




Watson J.A.



Slatter J.A.



Authorized to sign for: Bielby J.A.

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Appearances:

D.C. Bonora and A. Loparco

for the Applicants Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Sawridge Trust

E.H. Molstad, Q.C.

for the Applicant Sawridge First Nation

P.J. Faulds, Q.C. and K. Precht

for the Respondent/Appellant