Registrar's Office
TransCanada Pipelines Tower
2600, 450 – 1st ST SW
Calgary AB T2P 5H1

TEL: (403) 297-2206
FAX: (403) 297-5294

Registrar's Office
Law Courts Building
1A Sir Winston Churchill Square
Edmonton AB T5J 0R2

TEL: (780) 422-2416
FAX: (780) 422-4127

I. Moore
Deputy Registrar, Calgary and Edmonton

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December 8, 2017

Maurice Felix Stoney
500 4 Street
Slave Lake, AB T0G 2A1

D.C. Bonora
Dentons Canada LLP
Fax: 780-423-7276

E.H. Molstad, Q.C.
Parlee McLaws LLP
Fax: 780-423-2870

P.J. Faulds, Q.C./K. Precht
Field LLP
Fax: 780-428-9329

Re: ***Maurice Felix Stoney (A) v. Roland Twinn (R) and others Priscilla Kennedy (I)***
Appeal No. 1703-0195AC

This is to advise that the reserved judgment in the above named case will be released sometime today, **December 8, 2017**, 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,

for Deputy Registrar
Court of Appeal – Edmonton
/bt

☑ Date: DEC 0 8 2017

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

Thank you.

In the Court of Appeal of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABCA 418

Date: 20171208
Docket: 1703-0195-AC
Registry: Edmonton

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

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

Between:

Maurice Felix Stoney and His Brothers and Sisters

Respondent
(Appellant)

- and -

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

Respondents
(Respondents)

- and -

Public Trustee of Alberta

Not a Party to the Application
(Not a Party to the Appeal)

- and -

The Sawridge Band

Respondent
(Respondent)

- and -

Priscilla Kennedy, Counsel for Maurice Felix Stoney and His Brothers and Sisters

Applicant
(Proposed Appellant or Intervenor)

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

Application for Party or Intervenor Status

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

I Introduction

[1] The surrounding circumstances of the specific motion that I am presently dealing with in these reasons are rather out of the ordinary. This present motion was originally one of a group of motions by different parties related to what has been described as Decision No 6 (2017 ABQB 436), Decision No 7 (2017 ABQB 530) and Decision No 8 (2017 ABQB 548) by Thomas J, a case management judge of the Court of Queen's Bench on proceedings in that Court. Each of Decisions No 6, No 7 and No 8 were supported by detailed written reasons by the judge. Each of them is the platform for one of three proceedings in this Court under three different Court file numbers.

[2] The motions before me specifically arose out of Decisions No 6 and No 7, but Decision No 8 was also in the background. In these reasons, I will refer to the parties to the various appeals and motions by their names rather than venture linguistically to sort them out as appellants or respondents or applicants and so forth.

[3] As things developed when all the motions came on before me, I decided that some of the motions then booked before me should be deferred to a panel of this Court which was scheduled on December 14, 2017 to deal with another motion related to Decision No 8.

[4] Two of the motions originally before me were applications for security for costs made by each of the Sawridge First Nation (formerly referred to as a Band; "Sawridge") and the Sawridge Trustees ("the Trustees") on the appeal to this Court by Maurice Stoney ("Mr Stoney") from Decision No 6. I had jurisdiction as a single judge to deal with those motions: Rule 14.67(1) of the *Alberta Rules of Court*. Nonetheless, for practical reasons and in light of the possible finality of any such orders – which the parties also debated as having potential implications for the appeal from Decision No 7 – I decided to defer those motions to the panel on December 14, 2017, pursuant to Rule 14.37(2)(f) of the *Rules of Court*.

[5] Another motion before me was by Mr Stoney's former lawyer, Priscilla Kennedy, the appellant on decision No 7 ("Ms Kennedy"). Her underlying appeal on Decision No 7 was from an order made against her personally regarding costs in the Court of Queen's Bench proceedings which spawned all three decisions (and others). The principal motion of Ms Kennedy before me was for participation privileges on her own behalf in the appeal by Mr Stoney from Decision No 6.

[6] An ancillary motion of Ms Kennedy was for an order which would 'consolidate' the hearing of all three appeals on Decisions No 6, No 7 and No 8 as a single appeal proceeding. This motion to 'consolidate' -- or at least organize -- the hearings of all three appeals was premature.

That was so because the motion on December 14, 2017 related to the appeal on Decision No 8 and was to have that appeal quashed.

[7] Likewise, if the motions for security for costs on the appeal from Decision No 6 were successful, and if, furthermore, Mr Stoney could not post any security that might be required by such orders, that set of circumstances could lead to a practical extinction of Mr Stoney's appeal from Decision No 6 under Rule 14.67(2) of the *Rules of Court*.

[8] In other words, there could conceivably be nothing to 'consolidate' if the appellate ground was reduced to a discussion of Ms Kennedy's appeal from Decision No 7. Accordingly, I also deferred that motion for 'consolidation' to be heard by the panel on December 14, 2017 under Rule 14.37(2)(f) of the *Rules of Court*.

[9] The present motion therefore remaining before me was Ms Kennedy's application for participation status on the appeal by Mr Stoney from Decision No 6. Her motion in this respect was originally for intervenor status. The written submissions filed before me largely focused on that proposed mode of entry, *viz* intervention. However, at the hearing, counsel for Ms Kennedy moved away from an intervention mode of participation to a motion for status as a full party in that appeal, essentially as a form of appellant in her own right. Ms Kennedy, as discussed below, submitted her own rationale and she asserted that she had a personal interest in participating in the appeal from Decision No 6 either way.

[10] Incidental side effects of permitting her participation in the appeal from Decision No 6 were apparent. First, such participation could conceivably mean that the appeal from Decision No 6 could persevere even if Mr Stoney failed to post security for costs (if so ordered) so as to continue it for himself. Second, in addition to Ms Kennedy contending – discussed below – that she anticipated arguing in a manner beneficial to the position of Mr Stoney on the appeal from Decision No 6, she risked liability for costs on that appeal. If so, and if their positions were covalent if not indeed overlapping, her potential liability for costs might make a security for costs order against Mr Stoney and for Sawridge and the Trustees somewhat close to superfluous.

[11] Having reflected on that remaining motion and with the benefit of full argument of counsel on it, I am persuaded that I should dispose of it and not pass the baton to the panel on December 14, 2017. Before turning to the merits of Ms Kennedy's application for party status in the appeal on Decision No 6, it is useful to encapsulate what all the appeals are about.

II Circumstances

[12] The decisions of Thomas J emerged out of an elongated history of events. The origins of the proceedings before Thomas J relate to an application launched on June 2, 2011, by the Trustees for the 1985 Sawridge Trust for directions on distribution of the trust property to eligible beneficiaries being members of the Sawridge First Nation. Mr Stoney, then represented by

Ms Kennedy, sought – putatively with others of his family – to be recognized as eligible Band members and beneficiaries. I call this the "Trust Action" hereafter for brevity.

[13] Without addressing all the intricacies of the Trust Action, it is pertinent to note that the matter has been before this Court at least twice. In ***1985 Sawridge Trust v. Alberta (Public Trustee)***, 2013 ABCA 226, 553 AR 324, this Court affirmed a decision of Thomas J to permit the Public Trustee of Alberta to have a role in those proceedings. This Court also dealt with ancillary issues. In ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2016 ABCA 51, 616 AR 176, I dealt with a motion by Mr Stoney, represented by Ms Kennedy, for an extension of time to appeal to this Court from a decision of Thomas J at 2015 ABQB 799. For the reasons I provided there, I dismissed that application. In those reasons I observed that, from what I was told, Mr Stoney had not yet made a formal motion to Thomas J to participate in those proceedings on the basis that he was an eligible member of the Band eligible to share in allocation of the Trust proceeds.

[14] Decision No 6 of Thomas J was released as ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 436. It dealt with a motion by Mr Stoney and his "10 living brothers and sisters" to be added as "parties or intervenors" in the Trust Action, and for costs, evidently with the ultimate aim of each being recognized as an eligible beneficiary of the trust. Thomas J dismissed the putative expansion of the motion to the "10 living brothers and sisters", and dismissed Mr Stoney's motion. He also awarded "solicitor and own client indemnity costs against Maurice Stoney". Crucial to the motion before me are the following statements from that decision.

[15] Thomas J firstly concluded on the motion to participate:

> 51 While I am not bound by the Federal Court judgments under the doctrine of *stare decisis*, I am constrained by *res judicata* and the prohibition against collateral attacks on valid court and tribunal decisions. Maurice Stoney's application to be a member of the Sawridge Band was rejected, and his court challenges to that result are over. He did not pursue all available appeals. He cannot now attempt to slip into the Sawridge Band and 1985 Sawridge Trust beneficiaries pool 'through the backdoor'.
>
> 52 I dismiss the Stoney Application to be named either as a party to this litigation, or to participate as an intervenor. Maurice Stoney has no interest in the subject of this litigation, and is nothing more than a third-party interloper. In light of this conclusion, it is unnecessary to address the Sawridge Band's application that Maurice Stoney pay security for costs.

[16] Later in decision No 7 at para 4, he added that he "made no findings [in No 6] in relation to Maurice Stoney's '10 living brothers and sisters' because I had no evidence they were actually voluntary participants in the application." The next passage of importance to the motion before me from decision No 6 is as follows:

> 53 Maurice Stoney's conduct in relation to the Advice and Direction Application has been inappropriate. He arguably had a basis to be an interested party in 2011, because when the Trustees initiated the distribution process he had a live application to join the Sawridge Band. Therefore, at that time he had the potential to become a beneficiary. However, by 2013, that avenue for standing was closed when Justice Barnes issued the *Stoney v Sawridge First Nation* decision and Maurice Stoney did not appeal.
>
> 54 Maurice Stoney nevertheless persisted, appearing before the Alberta Court of Appeal in *1985 Sawridge Trust (Trustee for) v Alberta (Public Trustee)*, 2016 ABCA 51, 616 AR 176, where Justice Watson concluded Mr. Stoney should not receive an extension of time to challenge *Sawridge #3* because he had no chance of success as he did not have standing and was "... in fact, a stranger to the proceedings insofar as an appeal from the decision of Mr. Justice Thomas to the Court of Appeal is concerned.": paras 20-21. Now Maurice Stoney has attempted to add himself (and his siblings) to this action as parties or intervenors, in a manner that defies *res judicata* and in an attempt to subvert the decision-making of the Sawridge Band and the Federal Court of Canada.

[17] The quotation from my reasons in 2016 ABCA 51 is accurate. The passage in question was restricted to the points then in issue before me at that time. As I then wrote, Mr Stoney was in actuality a stranger to the Trust Action at that stage. Thomas J in his judgment being impugned at that stage, namely at 2015 ABQB 799, had not, as I wrote, made a ruling as to whether Mr Stoney should have standing as a participant in the Trust Action. I went on to add, at para 21, that on an appeal by an actual party to that ruling from that 2015 decision:

> "... no one is going to say anything about him, particularly when the appeal is heard. If incidentally the result of the appeal is that somehow his status or ability to apply as a beneficiary is improved, so be it. The mere existence of that judgment and of a potential decision of the Court of Appeal in relation to the judgment of Mr. Justice Thomas does not, it seems to me, create a condition that would give rise to a right of appeal on behalf of Mr. Stoney in this respect."

[18] In my ruling, I went on to add, at para 22, that there was "not, at this point in time, an arguable point by Mr. Stoney as against Justice Thomas' judgment, bearing in mind what the judgment is and what it says." Thomas J thereafter was, plainly, not operating under any belief that I had, in 2016 ABCA 51, shut the door on Mr Stoney. Rather, as his reasoning in Decision No 6 makes clear, he undertook to address the question of whether Mr Stoney should be able to participate in the Trust Action himself.

[19] The outcome of that consideration was not favourable to Mr Stoney for reasons adumbrated by Thomas J. Thomas J then made directions in No 6 for a hearing on whether Mr

Stoney should be found to be a vexatious litigant in light of 'serious litigation misconduct' on his part, and also directing that he be liable for costs, saying:

> 67 I have indicated Maurice Stoney's application had no merit, and was instead abusive in a manner that exhibits the hallmark characteristics of vexatious litigation. The Sawridge Band and Trustees seek solicitor and own client indemnity costs against Maurice Stoney. Those are amply warranted. In *Sawridge #5*, I awarded solicitor and own client indemnity costs against two of the applicants since their litigation conduct met the criteria identified by Moen J in *Brown v Silvera*, 2010 ABQB 224 at paras 29-35, 488 AR 22, affirmed 2011 ABCA 109, 505 AR 196, for the Court to exercise its Rule 10.33 jurisdiction to award costs beyond the presumptive Rule 10.29(1) party and party amounts indicated in Schedule C. The same principles apply here.
>
> 68 The costs award to the Sawridge Band is appropriate given its valid intervention and the important implications of Maurice Stoney's attempted litigation, as discussed above.

[20] Thomas J went on in No 6 to add specifically in relation to Ms Kennedy as follows:

> 76 The lawyer who is potentially personally subject to a costs sanction must receive notice of that, along with the relevant facts: para 36. This normally would occur after the end of litigation, once "... the proceeding has been resolved on its merits.": para 36.
>
> 77 I conclude this is one such occasion where a costs award against a lawyer is potentially warranted. Maurice Stoney's attempted participation in the Advice and Direction Application has ended, so now is the point where this issue may be addressed. I consider the impending vexatious litigant analysis a separate matter, though also exercised under the Court's inherent jurisdiction. I do not think this is an appropriate point at which to make any comment on whether Ms. Kennedy should or should not be involved in that separate vexatious litigant analysis, given her litigation representative activities to this point.
>
> 78 I have concluded that Maurice Stoney's lawyer, Priscilla Kennedy, has advanced a futile application on behalf of her client. I have identified the abusive and vexatious nature of that application above. This step is potentially a "serious abuse of the judicial system" given:
>
> 1. the nature of interests in question;
>
> 2. this litigation was by a third party attempting to intrude into an aboriginal community which has *sui generis* characteristics;

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

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

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

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

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

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

[21] Counsel for Ms Kennedy interprets these observations by Thomas J as inexorably linked to comments later made by Thomas J in decision No 7 about Ms Kennedy. As discussed below, counsel argues that they were not merely linked, but were foundationally operative in Decision No 7 as the substratum of the exposure of Ms Kennedy to costs in the Trust Action. In this respect, I did not hear counsel for Ms Kennedy to contend in this respect that Thomas J already had his mind made up in Decision No 6 to hold Ms Kennedy jointly accountable for those costs based on fact findings already made in decision No 6 such that fact findings Thomas J made in Decision No 7 were redundant or window dressing. There was no suggestion of apprehension of bias made to me.

[22] The point of counsel for Ms Kennedy was, in effect, that whether or not a factual Rubicon was finally crossed on the characterization of the various steps in the Trust Action and actions related to it by Mr Stoney was concerned, a head of steam was built up such that Ms Kennedy would be unable to fully argue her position on appeal from decision No 7 without, in a sense, collaterally attacking a substantial part of Decision No 6. At the hearing before me, I noted that decision No 8 came *after* Decision No 7 and the findings made as to the characterization of the conduct of Mr Stoney were more conclusive there.

[23] Indeed, as per the reasons given in relation to decision No 8, some rulings contained in Decision No 6 were, in a sense, over-written. Decision No 8 of Thomas J was released as ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 548. At para 112, he wrote "[t]he interim order made per *Sawridge #6* at para 65-66 is vacated." Paragraphs 65 and 66 of No 6 specified terms of proceeding by Mr Stoney in response to the interim direction of Thomas J for Mr Stoney to respond to his direction of a vexatious litigant hearing.

[24] Returning to the key ruling under appeal by Ms Kennedy, namely Decision No 7, Thomas J found that Ms. Kennedy had engaged in serious misconduct and he concluded that she should be held jointly and severally liable together with Mr. Stoney for the costs awarded in Decision No 6. Decision No 7 was released as ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 530.

[25] In so deciding that Ms Kennedy should be held liable for the costs on the Trust Action to the extent that he did, Thomas J considered the position of then counsel for Ms Kennedy, Mr Wilson, who said that Ms Kennedy "litigates with her heart".

[26] In addition to that, Mr Wilson made certain statements that raised, at the hearing before me, the question whether or not Ms Kennedy was making admissions or concessions relevant to the costs question. I mention this now only to point out that am definitely not offering any opinion about whether those statements by Mr Wilson have any juridical effect. By the same token, I am not suggesting that Thomas J erred in considering what Ms Kennedy's counsel had to say. Analysis of the reasoning of Thomas J in Decision No 7 is not for me to state here.

[27] There was a reason that the question came up before me as to whether the comments of Mr Wilson should be taken as admissions or concessions for the purposes of the motion before me. According to counsel for the Trustees, those statements would arguably be an Achilles' Heel to the present submission on behalf of Ms Kennedy that if she could not have participation rights in the appeal as to Decision No 6, her position as to Decision No 7 would be impaired. Counsel for the Trustees suggested that any impairment of her ability to argue her appeal from Decision No 7 arising from any findings or conclusion in Decision No 6 would have to be considered diminished by those statements. Their content would, if taken as concessions or admissions, reduce any reason to allow Ms Kennedy to participate in the appeal from Decision No 6 to the vanishing point, or at least counsel for the Trustees suggested this. As indicated below, I do not think I need to grapple with this interesting contention.

[28] At any rate, it is appropriate here to quote significant paragraphs of Decision No 7 for present purposes. Those passages start with these comments:

> 36 In *Sawridge #6* at para 78 I indicated five elements that contributed to what I concluded was potentially "serious abuse":
>
> 1. the nature of interests in question;

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

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

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

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

37 Ms. Kennedy's litigation conduct is a useful test example to evaluate whether her actions represent "serious abuse", and then should result in her being liable, in whole or in part, for litigation costs ordered against her client."

[29] Perhaps at the ultimate appeal from Decision No 7, those paragraphs could be taken as both being prefatory to what followed in Decision No 7, and being explicative of the tentative nature of the findings in Decision No 6. Thomas J then provided an overview of the evolving law of the modern operation of the administration of justice and of the modernized obligations of barristers and solicitors in that operation. One key observation he made at para 75 that "lawyers who advance litigation that is an abuse of court have no right to do so. Instead, that is a breach of the lawyer's obligations. Any lawyer who does so is an accessory to their client's misconduct."

[30] Thomas J went on to opine in No 7 at para 94 that, inasmuch as lawyers make mistakes, "a 'mere mistake or error of judgment' is not a basis, in itself, for an order of costs against a lawyer". He provided examples. As a potential exception from 'mistake', he described at para 98 a situation where "[c]onducting a futile action or application is a potential basis for an award of costs against a lawyer, particularly where the court concludes the lawyer has advanced this litigation knowing that it is hopeless, or being willfully blind as to that fact."

[31] This is merely a selection from these passages of Decision No 7, and is mentioned here because it reveals that Thomas J was, in these passages, distinguishing between the lawyer and the client. Adverse findings about the conduct of a client would not, at least in his view, necessarily lead to adverse findings about the lawyer. This is a factor to consider about whether the outcome of the appeal of Decision No 6 is crucial to the appeal of Decision No 7. Thomas J went on to distinguish the liability of the client and the lawyer from the other perspective in his further descriptions of situation where it is actually counsel who does the misconduct in relation to matters of disclosure, delay or forthrightness.

[32] Thomas J made further findings adverse to Ms Kennedy, a crucial one being a finding that she pressed "Futile Litigation", a topic arguably shared with Mr Stoney. He found that she engaged in "Representing Non-Clients". It is not apparent that such conduct was determined in Decision

No 6. He listed some other items which he suggested would not have been misconduct justifying costs, or would not have been misconduct of Mr Stoney but only of Ms Kennedy.

[33] It is important for me to make clear that I express no opinion about any findings adverse to Ms. Kennedy. The foregoing paragraphs of my decision is my attempt to describe what might be called the 'architecture' of Decision No 7. In the end, Thomas J said as follows:

> 150 I conclude that Priscilla Kennedy has conducted "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system" on two independent bases:
>
> 1. she conducted futile litigation that was a collateral attack of a prior unappealed decision of a Canadian court, and
>
> 2. she conducted that litigation allegedly on behalf of persons who were not her clients on a "busybody" basis.
>
> 151 Each of these are a basis for concluding that Kennedy should be liable for the *Sawridge #6* costs, personally. The aggravating factors I have identified simple [sic] emphasize that conclusion and result is correct.

[34] Ms Kennedy was granted permission to appeal Decision No 7 by my colleague Slatter JA in ***Stoney v. 1985 Sawridge Trust***, 2017 ABCA 368, Slatter JA did not confine the scope of permission, or state specific questions to be covered. He wrote:

> 8 ... The test for permission to appeal is whether there is a "good arguable case", not whether the appeal is likely to succeed. On an application for permission to appeal the point is not just whether the decision below is right or wrong, but whether the issue is important enough that a full panel of this Court should say whether it is right or wrong. Whether there is a "good arguable case" depends in part on the merits of the appeal, and the standard of review that will be applied, but it is not an invitation to pre-decide the appeal.

[35] He then concluded that "[t]he applicant has met the test, and permission to appeal is granted." Slatter JA's reasons canvass the arguments inveighed against permission to appeal, but they do not provide any reason to think that he was of the view that Ms Kennedy would not be entitled to raise any arguments available to her to challenge the outcome against her. For that matter it is not obvious that counsel opposing the motion suggested any restriction. I turn therefore to resolve the motion before me.

III Discussion

[36] As noted above, Ms Kennedy's position is that it is necessary for her to participate fully in the appeal of Decision No 6 because her ability to challenge the underpinnings of Decision No 6 is essential to her ability to challenge Decision No 7. Imbricated in this submission is the premise that Ms Kennedy fears that if the appeal of Decision No 6 fails for any procedural reason, as it might, she would be faced with a sort of 'fait accompli' as to some topic vital to her appeal. A single judge has jurisdiction to permit an intervention: see Rule 14.37(2)(e) of the *Rules of Court*.

[37] In her initial motion for intervenor status, there was the suggestion that Ms Kennedy would also be able to protect the interests of Mr Stoney, her former client, in a manner he could not do if he was representing himself. While I had no reason to doubt the sincerity of this as a form of altruism, I raised with counsel for Ms Kennedy the question whether or not, in light of the circumstances, Ms Kennedy might be in a conflict of interest. It seems unnecessary to venture too far into the topic of the granting of intervenor status since that was not pursued.

[38] Counsel moved instead to a motion for full participation so the issue of intervenor status became a moot point. Arguably there are significant distinctions between the two forms of participation (although some different Court's Rules seem to blend the forms of participation): see *eg* ***Reference re: Amendments to the Election Act, R.S.B.C. 1996, c. 106***, 2012 BCCA 301 at paras 1 to 5, 324 BCAC 189. Our Rule 14.1(1)(k) provides:

> "party" means a party to an appeal or an application under this Part and includes an intervenor where the context requires;

[39] Our Rules distinguish cases of application for status as parties and as intervenors under Rules 14.57 and 14.58 of the *Rules of Court*. As a matter of statutory construction on the tautology principle, doing so was not to create a pointless ornament in the Rules: see eg ***Alberta (Education) v Canadian Copyright Licensing Agency***, 2012 SCC 37 at para 47, [2012] 2 SCR 345, cited in ***321665 Alberta Ltd. v. Husky Oil Operations Ltd***, 2013 ABCA 221 at para 24, 82 Alta LR 5th 124, leave denied [2013] SCCA No 341 (QL) (SCC No 35529). Fortunately, it is not necessary for me to embroider any of the differences here.

[40] It might be mentioned that the various elements of the test for intervenor status, as discussed in ***Grant Thornton Limited v Alberta Energy Regulator***, 2016 ABCA 238, 40 Alta LR (6th) 11, ***Piikani Nation v. Kostic***, 2017 ABCA 259 and ***Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)***, 2017 ABCA 280 are not all met here. Sincerity is insufficient by itself to make for intervener status. As in ***Canadian Centre***, it is of concern as to intervention that the outside party's participation might widen the specific dispute beyond the specific case in question. Also, Ms Kennedy's interests might (arguably) diverge from a complete tracking of Mr Stoney's interests, particularly in light of findings of Thomas J in Decision No 7 as noted above. ***Kostic*** adds that the proposed intervener would have to show how failure to permit the intervention would prejudice him.

[41] In my view, Ms Kennedy does not meet the criteria for a helpful role and fairness necessity to justify intervention. As for full participation rights on the *appeal* from Decision No 6, that submission depends essentially on whether anything in Decision No 6 would have an operative legal effect to cabin or crimp the ability of Ms Kennedy to argue her own appeal. As pointed out in ***Alberta (Attorney General) v Malin***, 2016 ABCA 396 at para 18, 406 DLR (4th) 368, the proposed addition of a new *appellant* raises questions of standing to appeal:

> 18 The courts have historically recognized that limitations on who can sue about an issue are required: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 22, [2012] 2 SCR 524 [*Downtown Eastside*]. Legal standing is the vehicle courts have used to determine who is entitled to bring a case for a decision: *Downtown Eastside, supra* at para 1. *This includes who can appeal a decision.* Generally speaking, legal standing is grounded on either (a) a personal basis where one(s [sic] legal rights have been or are likely to be affected; or (b) on a public interest basis where the person claiming standing can be seen as a genuine representative of a larger class of individuals intent on bringing matters of public interest and importance before the courts: *Downtown Eastside*, supra at para 22. The Judge does not satisfy the test for either. [Emphasis added]

[42] Ms Kennedy's argument falls into the category of her alleging "a personal basis where one's legal rights have been or are likely to be affected". Put another way, her position appears to be that her interests are not going to be adequately represented in the appeal from Decision No 6: see ***Hayes v Mayhood*** (1958), 24 WWR 332 (Alta CA), affirmed [1959] SCR 568, cited in ***Saskatchewan Power Corporation v NaturEner USA LLC***, 2014 ABCA 318 at para 10, 584 A.R. 107:

> 10 This Court has the inherent power to add parties to an appeal, especially if an applicant's interests are not represented: *Hayes v Mayhood* (1958), 24 WWR 332 (Alta CA), aff'd [1959] SCR 568. The parties here all agree that the test for adding a party in this context was set out in *Carbon Development Partnership v Alberta (Energy Utilities Board)*, 2007 ABCA 231 at para 9: the applicant must first show that it has a legal interest in the outcome of the proceedings. If so, there are two sub-tests: whether it is just and convenient to add the applicant, and whether the applicant's interest can be adequately protected only if it is granted party status.

[43] It is unnecessary to try to compare the tests in ***Downtown Eastside*** and ***Saskatchewan Power***, because the material aspect is shared, namely legal interest in the sense of legal rights being affected and whether it is 'just and convenient'.

[44] There is no dispute that Ms Kennedy's legal rights and factual situation are seriously affected by Decision No 7 and that they would be in relation to the appeal from Decision No 7. The

real question is whether anything that happens as to Decision No 6 could change anything as to the appeal of Decision No 7.

[45] To be fair, it has been held that a lawyer might be given status to participate in an appeal where the lawyer's reputation was directly involved and he was, in effect, the voice of his deceased client whose Will was under attack inasmuch as he had testified at trial: ***Elton v Elton Estate***, 2009 NLCA 34, 72 CPC (6th) 33. That is not this case. Further, I have reservations about the accuracy of para 14 in that single judge decision.

[46] This is also not a situation where an existing party is attempting to dragoon a non-party into the appeal as in ***MB v SC***, 2008 ABCA 298, 448 AR 263 or ***Banuelos v Cassels Brock & Blackwell LLP***, 2010 FCA 94, 402 NR 71. Ms Kennedy is volunteering to take the shilling herself with the costs exposure that might involve in her being a party to the appeal on Decision No 6: see *eg* Rules 14.55(1) and Rule 14.88(1) of the *Rules of Court*. Be that as it may, Ms Kennedy was not a party below and in my view she still must make a threshold showing of a reasonable prospect of being directly affected adversely in a significant personal manner by what happens as to Decision No 6. It would not be good enough that she has an interest in how the law works out in the appeal from Decision No 6 because she can air the law in her own appeal in Decision No 7.

[47] In my view, Ms Kennedy does not face any real predicament for the appeal from Decision No 7. She was not a party to Decision No 6. Although she is worried about it, I am not persuaded that she would be impeded by any fact findings in Decision No 6 on her appeal in Decision No 7 by the rules of *res judicata* or issue estoppel howsoever "carefully engrossed on parchment" Decision No 6 might be: see ***Wemyss v Hopkins*** (1875), LR 10 QB 378. In this respect, one should not overlook the triune test of same issue, finality and mutuality set out in ***Toronto (City) v. C.U.P.E., Local 79***, 2003 SCC 63 at para 23, [2003] 3 SCR 77:

> 23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, per Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, " *Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality*" (1990), 69 Can. Bar Rev. 623, at pp. 648-51.) In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.' [underlining in original]

[48] There was no submission that Ms Kennedy was a "privy" of her client in the Trust Action. Whether privy status might arise for a lawyer to client in another context, there is no obvious reason to find such here. Merely because it might have been Ms Kennedy's submissions that failed before Thomas J did not mean Ms Kennedy personally was bound by them in fact as well as in law (although of course the law binds everybody equally).

[49] Indeed, the fact that Thomas J took pains to provide Ms Kennedy with a hearing on her potential personal liability for costs illuminates the reality that even he did not think that she was disqualified from arguing to 'relitigate' the characterization of the court proceedings in a manner she saw fit in relation to addressing her personal professional risk.

[50] Furthermore, as noted above, not all the topics in her situation in Decision No 7 were the same as in Decision No 6. ***R v Punko***, 2012 SCC 39 at para 62, [2012] 2 SCR 396 noted ***R v Mahalingan***, 2008 SCC 63, [2008] 3 SCR 316 where Charron J at para 122 stated:

> 122 Determining whether a question was distinctly put in issue and clearly determined in a prior proceeding can prove difficult at times, even in the context of a civil action with its precise system of pleadings and, in the vast majority of cases, with the assistance of a reasoned judgment delivered by a judge sitting alone.

[51] Significantly, it would appear to be the characterization *in law* by Thomas J of the *factual* history of legal proceedings leading up to the conclusions in Decision No 6 which is of greatest concern to Ms Kennedy in her appeal from Decision No 7. A characterization in law is the application of a legal test. If there is no dispute about the foundational facts for that application of the legal test, then a question of law is involved: see ***Canada (Director of Investigation and Research) v Southam Inc.***, [1997] 1 SCR 748 at para 39; ***R v Shepherd***, 2009 SCC 35 at para 20, [2009] 2 SCR 527. There is no 'issue estoppel' or for that matter 'abuse of process' arising within a dispute on a point of law. A party is not entitled to their own law different from the general law, but that is not a bar of argument, but of outcome.

[52] Furthermore, I am unaware of any 'finality' principle on any issues which Thomas J disposed of conclusively for his Court in Decision No 6 that would prevent this Court from parting ways with that decision of the Court of Queen's Bench on an issue of fact (or law for that matter) in Decision No 7. For what it is worth, my reasons here do not bind a panel of the Court either: see Rule 14.71 of the *Rules of Court*.

[53] Accordingly, if anything contained in Decision No 6 should, when the matter is bruited downstream, be claimed by Sawridge or the Trustees to be itself operative to block Ms Kennedy from taking full effect of the 'at large' permission order made by Slatter JA on her own appeal from Decision No 7, it would presumably arise in the backstop zone of abuse of process. This is not to say Sawridge or the Trustees would be disentitled to contend that Thomas J was correct in Decision No 6 or Decision No 8, or, in any event, that this Court should find Mr Stoney's conduct was deserving of costs sanction based on Decision No 6.

[54] But that is not the same thing as attempting to extract any findings of fact (or law) made by Thomas J in Decision No 6 and seeking to inject them into Decision No 7 such as to say it would be abuse of process for Ms Kennedy to dispute them in this Court. (It must be made clear that I am not talking about any inoculation that might be argued by Sawridge or the Trustees to arise from what Mr Wilson said on her behalf in the hearing of Decision No 7 and whether those circumstances might make anything she argues in her own appeal there demurrable.) Before any of Ms Kennedy's submissions on appeal from Decision No 7 could be blown out of the saddle by that abuse of process doctrine, the terms of that doctrine would have to be met.

[55] It is noteworthy that in ***Mahalingan***, albeit in the context of discussing why the 'abuse of process' limitation on re-litigation would not be sufficient to overcome a need for issue estoppel against the Crown in criminal cases, McLachlin CJC wrote:

> 42 ... To date, the doctrine has not been much used to protect against relitigation, and indeed there is authority for the proposition that relitigation, without more, simply does not reach the threshold required for a finding of abuse of process: *Bradford & Bingley Building Society v. Seddon*, [1999] 1 W.L.R. 1482 (C.A.), at pp. 1492-93. To protect parties from relitigation, abuse of process would need to be cast in a less discretionary form than it now takes. Therefore, considering the high threshold for proof and the unpredictability of its operation, it is unlikely that the doctrine of abuse of process adequately achieves the fairness goal that underlies the doctrine of issue estoppel.

[56] So for present purposes, to create a real interest on Ms Kennedy's part in any decision this Court might make as to an appeal from Decision No 6, so as to support participation right in the appeal on Decision No 6, Ms Kennedy would have to show a real prospect that she would face an effective abuse of process bar to any submission she might make in challenging the entire superstructure of the basis of her liability for costs in Decision No 7 if she is not able to challenge the entire superstructure of the basis of liability on Mr Stoney in Decision No 6.

[57] In my view, Ms Kennedy has not showed she faces any such jeopardy. (I again set to one side the question of Mr Wilson's statements and whether they make her position demurrable.) Neither the reasons for Decision No 6 or for that matter Decision No 8 would be binding on this Court in relation to Decision No 7 if neither of them was debated here on their own. There is, after all, a hierarchy in the Alberta Courts and the conclusions of Thomas J even if not under appeal would not bind this Court.

[58] If there is more than one appeal outstanding this Court would presumably attempt to be coherent in the assessment of the issues of law, but it would not be required to be consistent on facts if the records for each appeal were different. It is not uncommon for co-accused persons to achieve different results even on the same record, let alone different ones. Here the ground is simply not identical for Mr Stoney and Ms Kennedy.

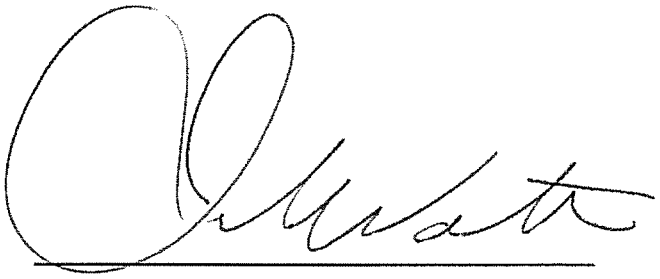
[59] In the end, I am not persuaded that Ms Kennedy has any personal interest in how the appeal on Decision No 6 proceeds or results. I am also not persuaded that justice would be impaired or denied for either Mr Stoney or Ms Kennedy if Ms Kennedy were not a party to Mr Stoney's appeal.

IV Conclusion

[60] The motion for participation status is dismissed.

Application heard on November 29, 2017

Reasons filed at Edmonton, Alberta
this 8th day of December, 2017



Watson J.A.

Appearances:

Respondent Maurice Felix Stoney in Person

D.C. Bonora
for the Respondents Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle, and Clara Midbo (Sawridge Trustees)

E.H. Molstad, Q.C.
for the Respondent the Sawridge Band

P.J. Faulds, Q.C./K. Precht
for the Applicant