COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NO.:	1703 0195AC
TRIAL COURT FILE NO.:	1103 14112
REGISTRY OFFICE:	Edmonton
APPLICANTS	**MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS**
STATUS ON APPEAL	Appellant
STATUS ON APPLICATION	**Respondent**
RESPONSENTS (ORIGINAL APPLICANTS)	**ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE AND CLARA MIDBO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST (the "1985 Sawridge Trustees" or "Trustees")**
STATUS ON APPEAL	Respondent
STATUS ON APPLICATION	**Respondent**
INTERVENOR	**THE SAWRIDGE FIRST NATION (the "Band" or "SFN")**
STATUS ON APPEAL:	Respondent
STATUS ON APPLICATION:	**Respondent**
STATUS UNKNOWN	**PRISCILLA KENNEDY**
STATUS ON APPEAL	Proposed Appellant or Intervenor
STATUS ON APPLICATION	**Applicant**
RESPONDENT	**PUBLIC TRUSTEE OF ALBERTA ("OPTG")**
STATUS ON APPEAL	Not a party to the Appeal
STATUS ON APPLICATION	**Not a party to the Application**
DOCUMENT:	**MEMORANDUM OF ARGUMENT OF THE SAWRIDGE TRUSTEES IN THE APPLICATION BY PRISCILLA KENNEDY FOR PARTY OR INTERVENOR STATUS IN SAWRIDGE #6 AND FOR THE CONSOLIDATION OR JOINT HEARING OF THIS APPEAL WITH APPEALS NO 1703-0239AC AND 1703-0252AC** includes Authorities

Registrar's Stamp
REGISTRAR
FILED
NOV 24 2017
Court of Appeal of Alberta

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I. INTRODUCTION

1. On April 12, 2016, Maurice Stoney ("Stoney"), and purportedly his 10 brothers and sisters, applied to be added as parties or intervenors in Court of Queen's Bench Action No. 1103 14112, commenced by the trustees ("Trustees") of the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "1985 Trust"). On July 12, 2017, the Honourable Justice D.R.G Thomas, who is the case management judge, issued a Decision ("Sawridge #6"), denying the application and awarding costs on a solicitor and own client basis against Stoney[1]. This decision is appealed by Stoney.

2. Priscilla Kennedy was counsel for Stoney in Sawridge #6, #7 and #8. Sawridge #7[2] ordered the costs of Sawridge #6 jointly and severally against Ms. Kennedy personally. Sawridge #8[3] declared Stoney a vexatious litigant and issued a Court Access Control Order.[4] Ms. Kennedy appeals Sawridge #7 and a small portion of the reasons of Sawridge #8 unrelated to Stoney.

3. Ms. Kennedy now seeks to be added as a party or intervenor in the appeal by her former client of Sawridge #6, and consolidation or joinder of this Appeal with her appeals. The Trustees have filed an application to dismiss/strike her appeal in Sawridge #8, as she is not a proper party and she seeks to appeal reasons that do not form part of the Order, rendering her appeal moot.

4. Ms. Kennedy should not be a party or intervenor in Sawridge #6. This application is an attempt by her to completely assume carriage of Stoney's appeal and to do through the back door what she is not permitted to do through the front door. Stoney has not complied with any of the deadlines in his appeal to date and it will be struck if he fails to file a factum. She should not be able to argue on behalf of Stoney. In any event, the question of whether Stoney is a vexatious litigant is settled in #8 and was not appealed.

5. There is no efficiency to having these appeals joined. These Orders are all distinct. The subject of Sawridge #6 was Stoney. The subject of Sawridge #7 was Ms. Kennedy. Stoney has not appealed the findings in Sawridge #8; Ms. Kennedy is seeking to appeal some statements made about her in the underlying reasons, and none of the actual Order.

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1 *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 436 ("Sawridge #6") **[Tab 1]**

2 *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 ("Sawridge #7") **[Tab 2]**

3 *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 548 ("Sawridge #8") **[Tab 3]**

4 Orders of Sawridge #6, #7 and #8 **[Tab 4]**

6. There would, however, be efficiency in having these heard consecutively. Ms. Kennedy's appeal of the costs award in Sawridge #7 may be influenced by the outcome of Sawridge #6. If it is upheld, that may be a factor in the issues to be determined respecting the costs order against her. If it is overturned, in whole or in part, that may similarly impact the issues her appeal raises. The hearing of Sawridge #7 would benefit from the advance determination of Sawridge #6. However, this does not require Ms. Kennedy's arguments in Sawridge #6 as her right to make them in Sawridge #7 is preserved. Efficiency and fairness favour limiting her right to argue only once in her own appeal.

7. Similarly, the issues raised by Ms. Kennedy in her appeal in Sawridge #8, if capable of being appealed, would benefit from the determination of both Sawridge #6 and #7, as they may influence any decision regarding the comments regarding her conduct that she seeks to appeal.

II. LAW AND ARGUMENT

A. The Test for Adding a Party or Intervenor

8. The following conditions must be met for a party to be added to an appeal: 1) the Court must be satisfied that such an Order should be made; and 2) the addition of the party will not cause prejudice that could not be remedied by costs, an adjournment, or the imposition of terms. Rule 1.2, being a foundational Rule, requires that the Rules be used as a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.[5]

9. In *Amoco Canada Petroleum*, Justice Virtue adopted a two-part test for determining whether a court has jurisdiction to add a party: 1) the order sought by the Plaintiff must directly affect the intervenor, not in the latter's commercial interests, but in the enjoyment of their legal rights; and 2) the question to be settled cannot be effectually and completely settled unless he is a party. [6] It is not sufficient justification that they may have relevant evidence, an interest in the correct solution, or arguments to advance and fears that the existing parties may not advance them; the only reason necessitating their addition as a party is ensuring that they are bound by the result of the action, which cannot be settled unless they are a party. None of these factors apply in this case.

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5 *Alberta Rules of Court*, Alta. Reg. 124/2010 ("*Rules of Court*"), rules 1.2, 3.74, 14.57 **[Tab 5]**;
869120 Alberta Ltd. v. B & G Energy Ltd., 2011 ABQB 209, 2011 CarswellAlta 512 at para 22 **[Tab 6]**

6 *Amoco Canada Petroleum Co v Alberta & Southern Gas Co,* 1993 CarswellAlta 32 at paras 13-15 **[Tab 7]**

10. On application, an individual may be granted permission to intervene on an appeal.[7] In determining a proposed intervener's interest, a court will examine: (a) if the intervener will be directly and significantly affected by the appeal's outcome; and, (b) if the intervener will provide some expertise or fresh perspective on the subject matter that will be helpful in resolving the appeal. The power to allow interveners is discretionary and should be exercised sparingly.[8]

11. There is nothing in Ms. Kennedy's submissions to identify anything unique or substantive she would add to Stoney's appeal; she should not be permitted to argue his appeal. Stoney has not met the deadlines in his appeal. Permitting Ms. Kennedy party status essentially gives her the ability to save his appeal, thereby depriving the 1985 Trust a significant right to allow that appeal to be struck.

12. Ms. Kennedy has always held the reins in this litigation. While Ms. Kennedy states that she is not involved in Stoney's appeal, her firm's fax number is on the Notice of Appeal with a note from Stoney asking her to call him.[9] To permit her to step into Stoney's shoes and advance his appeal is inappropriate. Unnecessary proceedings are what the Case Management Justice was attempting to avoid and must continue to be discouraged by this Court. In response to paragraph 17, Ms. Kennedy should not be allowed to perfect the record on behalf of Stoney.

13. The Applicant states that she has a direct legal interest in Sawridge #6 and her interests are not fully protected. However, Sawridge #6 dismissed Stoney's application to be a party to the Trustees' Advice and Direction Application. Ms. Kennedy does not have a direct legal interest in whether Stoney should be a party in that Application. She does not have a direct legal interest in whether he should receive advance costs or pay costs. The only issue that affects the cost award against her is whether Stoney's application was vexatious, which was already determined by Sawridge #8 and which finding is not being appealed.

14. The case of *Walton Development*[10] is distinguishable in that Walton's interests in that case were found to not be represented by the other parties. In this case, Ms. Kennedy does not have a distinct legal interest in Sawridge #6.

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7 *Rules of Court*, rule 14.58 **[Tab 8]**

8 *Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238 at paras 8, 9, 11 ("*Orphan Well*") **[Tab 9]**

9 Civil Notice of Appeal of Maurice Stoney **[Tab 10]**

10 [Tab 2, Applicant's Memorandum]

B. Consolidation of Appeals is not efficient

15. An order to consolidate appeals may be made for such reason as the Court considers appropriate, particularly: (1) if there is a common question of fact or law; and (2) if they arise out of the same transaction or occurrence.[11] Even if appeals arise out of the same factual history in the sense that orders were issued in the same litigation, where they address different aspects of that litigation and have different parties, they are sufficiently different that consolidation will not be appropriate.[12]

16. In this case, there is no common question of fact or law. One appeals Stoney's request to be a party to the Trustees' Application; the second, the costs award against Ms. Kennedy as counsel; and the third, comments made in the underlying reasons about Ms. Kennedy. None of these raise the same issues of law, and there is scant factual overlap. The parties to the appeals are not the same, as Ms. Kennedy is not a party to the appeal in Sawridge #6 and Stoney is not a party to the appeals in Sawridge #7 or #8.

17. *Amalgamated Transit*[13] cited by Ms. Kennedy is distinguishable in that there were the same facts, issues and parties in the consolidated appeal such that joinder was required to avoid multiplicity of proceedings and inconsistent rulings. There is no such risk in respect of these appeals.

18. The issue of Ms. Kennedy's representation of Stoney in respect of his claim, and the relation of her conduct as counsel to her obligations to the court and thus to her liability for costs, is a distinct issue in Sawridge #7. Sawridge #6 does not raise that question, and merely queries whether a costs award against a lawyer is *potentially* warranted, but does not determine the issue and no such determination is in the resulting Order.[14] Thus, there is no need for Sawridge #6 and #7 to be heard together. The questions raised by each differ, and thus, the findings will not be inconsistent.

19. The Order in Sawridge #8 does not make reference to the matters appealed by Ms. Kennedy. There were no findings of misconduct; there was *obiter dicta* that the Court, *proprio motu*, sent the decision to the Law Society for review, which the Trustees understand has been done. This

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11 *Rules of Court*, rule 3.72(2) **[Tab 11]**; *Hill v. Hill*, 2010 ABCA 305 at paras 12 -14 **[Tab 12]**

12 *Ibid* at para 14 **[Tab 12]**

13 [Tab 4, paragraph 7, Applicant's Memorandum]

14 Sawridge #6, *Supra* note 1 at para 77 **[Tab 1]**

was done pursuant to the right of the Court to do so, and not by an Order. It cannot be undone, and it does not impact any aspect of the appeals in Sawridge #6 or #7.

20. Consolidation should also be denied as it would provide another avenue by which Ms. Kennedy could again advocate Stoney's position. In Sawridge #8, Justice Thomas raises the concern that Ms. Kennedy, despite the admonishment and concessions by her own counsel, attempts to re-litigate the same points for Stoney in her written submissions in Sawridge #8.[15] Whether Stoney was a vexatious litigant is an issue *he* must now argue, not Ms. Kennedy. Just as she should not be a party so that she can now take up the entirety of Stoney's appeal on his behalf, these appeals should not be consolidated such that she would have the opportunity to file materials in a combined appeal.

21. In contrast to there being no reason for consolidation, there is good reason for Sawridge #7 to follow the determination in Sawridge #6. If Sawridge #6 is upheld, it can assist in narrowing the possible arguments raised in that appeal. If it is overturned, in whole or in part, that will also affect the arguments made on the appeal of Ms. Kennedy's costs award. Knowing this outcome in advance will provide for efficiency and effectiveness in the administration of justice in that appeal, which raises questions this Court has indicated are ones it believes are of broader import.

22. The Trustees submit the best approach is to decide the appeal of Sawridge #6, followed by #7 and then #8 (if it is not struck for mootness). Consolidation is not efficient and will not enhance the administration of justice.

III. RELIEF REQUESTED

23. The Trustees request an order directing that Ms. Kennedy's applications to be added as a party or intervenor in Sawridge #6, and for consolidation or joinder of this Appeal with her appeals of Sawridge #7 and Sawridge #8, be dismissed; and request costs of this application to be payable forthwith and in any event of the cause on a solicitor and his own client basis, or in the alternative on a party and party basis.

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[15] Sawridge #8, *Supra* note 3 at paras 114-115 **[Tab 3]**

ALL OF WHICH IS RESPECTFULLY SUBMITTED AT EDMONTON ALBERTA THIS 24th DAY OF NOVEMBER, 2017.

DENTONS CANADA LLP

Per: _____

Doris C.E. Bonora/Anna Loparco
Solicitor for the Sawridge Trustees

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LIST OF ATTACHMENTS AND AUTHORITIES

TAB	AUTHORITIES
1.	*1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 436 ("Sawridge #6")
2.	*1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 ("Sawridge #7")
3.	*1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 548 ("Sawridge #8")
4.	Orders of Sawridge #6, #7 and #8
5.	*Alberta Rules of Court*, Alta. Reg. 124/2010 ("*Rules of Court*"), rules 1.2, 3.74, 14.57
6.	*869120 Alberta Ltd. v. B & G Energy Ltd.*, 2011 ABQB 209, 2011 CarswellAlta 512
7.	*Amoco Canada Petroleum Co v Alberta & Southern Gas Co,* (1993) 10 Alta LR (3d) 325, 1993 CarswellAlta 32
8.	*Rules of Court* , rule 14.58
9.	*Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238
10.	Civil Notice of Appeal of Maurice Stoney
11.	*Rules of Court*, rule 3.72(2)
12.	*Hill v. Hill*, 2010 ABCA 305

Tab 1

2017 ABQB 436
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

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

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

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

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

D.R.G. Thomas J.

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

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

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

Headnote

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

Chief of First Nation (FN) created particular trust in 1985 — Beneficiaries of trust were defined directly or indirectly by membership in FN — In 2011, trust commenced action against Public Trustee for advice and directions — Aboriginal man S was child of parents who had been members of FN but who had given up their family's Indian status and membership in FN in 1944 — S unsuccessfully applied to become member of FN, and rejection of his application was upheld on judicial review — S brought application on his own behalf and on behalf of 10 siblings for order adding them as beneficiaries of trust — FN brought cross-application for leave to intervene — Cross-application granted — FN's intervention was appropriate since S was making collateral attack on FN's decision-making on core subject of membership — FN was particularly prejudiced by potential implications of S's application — Indeed, it was hard to imagine more fundamental impact than where court considers litigation that potentially finds in law that individual who is currently outsider is, instead, part of established community group that holds title and property, and exercises rights, in sui generis and communal basis.

Aboriginal law --- Practice and procedure — Miscellaneous

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

and his siblings into matter in which they had no legal interest — Issue of S's potential membership in FN was closed, and there was no evidence indicating siblings had even taken steps to involve themselves in this litigation — Further, this application was collateral attack that attempted to subvert unappealed and crystallized judgment that had already addressed and rejected S's claims and arguments — As matter of court's inherent jurisdiction to control litigation abuse, S was given opportunity to provide written submissions as to whether his access to Alberta courts should be restricted and scope of any such restriction — Trustees and FN were given opportunity to make submissions on this issue and introduce additional relevant evidence.

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

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

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

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

APPLICATION by purported member of First Nation (FN), on his own behalf and on behalf of his siblings, for order adding them as beneficiaries of trust created in 1985 by Chief of FN; CROSS-APPLICATION by FN for leave to intervene.

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

I. Introduction

1 This is a case management decision on an application filed on August 12, 2016 (the "Stoney Application") by Maurice Felix Stoney "and his brothers and sisters" (Billy Stoney, Angeline Stoney, Linda Stoney, Bernie Stoney, Betty Jean Stoney, Gail Stoney, Alma Stoney, and Bryan Stoney) to be added "as beneficiaries to these Trusts". In his written brief of September 28, 2016, Maurice Stoney asks that his legal costs and those of his siblings be paid for by the 1985 Sawridge Trust.

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

3 The Stoney Application is denied. Maurice Stoney is a third party attempting to insert himself (and his siblings) into a matter in which he has no legal interest. Further, this Application is a collateral attack which attempts to subvert an unappealed and crystallized judgment of a Canadian court which has already addressed and rejected the Applicant's

claims and arguments. This is serious litigation misconduct, which will have costs implications for Maurice Stoney and also potentially for his lawyer Priscilla Kennedy.

II. Background

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

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

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

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

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

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

8 As is apparent from the style of cause in this Application, the manner in which the Applicants have been framed is unusual. They are named as "Maurice Felix Stoney and His Brothers and Sisters". The Application further states that the Applicants are "Maurice Stoney and his 10 living brothers and sisters" (para 1). Para 2 of the Application states the issue to be determined is:

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

9 There is no evidence before me or on the court file that indicates any of these named individuals other than Maurice Stoney has taken steps to involve themselves in this litigation. The "10 living brothers or sisters" are simply named. Maurice Stoney's filings do not include any documents such as affidavits prepared by these individuals, nor has there

been an *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"] application or appointment of a litigation representative, per *Rules* 2.11-2.21. In fact, aside from Maurice Stoney, the Applicant(s) materials provide no biographical information or records such as birth certificates for any of these additional proposed litigants, other than the year of their birth.

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

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

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

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

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

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

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

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

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

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

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

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

A. Maurice Stoney

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

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

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

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

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

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

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

B. Sawridge Band

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

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

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

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

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

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

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

C. 1985 Sawridge Trustees

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

VI. Analysis

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

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

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

(4) The Court may

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

. . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Vexatious Litigant Status

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. any appeal from this decision.

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

VIII. Costs

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

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

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

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

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

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

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

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

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

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

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

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

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

[*Jodoin*, para 29]

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

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

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

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

1. the nature of interests in question;

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

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

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

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

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

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

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

Cross-application granted; application dismissed.

End of Document

Tab 2

2017 ABQB 530
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

2017 CarswellAlta 1569, 2017 ABQB 530, [2017] A.W.L.D. 4934, [2017] A.W.L.D. 4935, [2017] A.W.L.D. 4937, [2017] A.W.L.D. 4938, 283 A.C.W.S. (3d) 40

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

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

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

D.R.G. Thomas J.

Heard: July 28, 2017
Judgment: August 31, 2017
Docket: Edmonton 1103-14112

Proceedings: additional reasons to *1985 Sawridge Trust v. Alberta (Public Trustee)* (2017), 2017 CarswellAlta 1236, 2017 ABQB 436, D.R.G. Thomas J. (Alta. Q.B.)

Counsel: Donald Wilson (written), for Priscilla Kennedy
D.C. Bonora (written), Erin M Lafuente (written), for 1985 Sawridge Trustees
Edward Molstad, Q.C. (written), Ellery Sopko (written), for Intervenor, Sawridge Band

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

Headnote

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

S claimed membership in First Nation but claim was rejected and affirmed by Federal Court — S brought unsuccessful application to be added to members of First Nation trust — Lawyer K was involved in protracted litigation on behalf of S — Solicitor and own client costs awarded against K personally — Unfounded, frivolous, dilatory or vexatious proceeding that denotes serious abuse of judicial system is new basis on which to order costs against lawyer — Professional discipline and court sanction for lawyer misconduct are distinct processes with separate purposes — Collateral attack on decision of Federal Court was very serious form of litigation misconduct — K conducted futile litigation that was collateral attack of prior unappealed decision — K conducted that litigation allegedly on behalf of persons who were not her clients on busybody basis — K and S liable for full costs on joint and several basis.

ADDITIONAL REASONS as to costs to a decision reported at *1985 Sawridge Trust v. Alberta (Public Trustee)* (2017), 2017 ABQB 436, 2017 CarswellAlta 1236 (Alta. Q.B.).

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

1 *The Court's Jurisdiction to Control Litigation and Lawyers* 11

I Introduction

1 On July 12, 2017 I issued *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 436 (Alta. Q.B.) ["*Sawridge #6*"] where I denied an application by Maurice Felix Stoney "and his 10 living brothers and sisters" to be added as interveners or parties to a proceeding intended to settle and distribute the assets of the 1985 Sawridge Trust, a trust set up by the Sawridge Band on behalf of its members.

2 In brief, Maurice Stoney had claimed he was in fact and law a member of the Sawridge Band, had been improperly denied that status, and therefore is a beneficiary of the Trust, and had standing to participate in this Action.

3 I denied that application on the basis (para 48) that:

> 1. Maurice Stoney is estopped from making this argument via his concession in *Huzar v. Canada*, [2000] F.C.J. No. 873 (Fed. C.A.) (QL), (2000), 258 N.R. 246 (Fed. C.A.) that this argument has no legal basis.
>
> 2. Maurice Stoney made this same argument in *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.), where it was rejected. Since Mr. Stoney did not choose to challenge that decision, that finding of fact and law has 'crystallized'.
>
> 3. In *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2015 ABQB 799 (Alta. Q.B.) at para 35, time extension denied 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.), I concluded the question of Band membership should be reviewed in the Federal Court, and not in the Advice and Direction Application by the 1985 Sawridge Trustees.
>
> 4. In any case I accept and adopt the reasoning of *Stoney v. Sawridge First Nation*, as correct, though I was not obligated to do so.

4 I made no findings in relation to Maurice Stoney's "10 living brothers and sisters" because I had no evidence they were actually voluntary participants in the application: *Sawridge #6* at paras 8-12.

5 At the conclusion of *Sawridge #6*, I ordered solicitor and own indemnity costs against Maurice Stoney (paras 67-68), and that he make written submissions on whether he should be subject to court access restrictions, and, if so, what those court access restrictions should be (paras 53-66). These steps were taken in response to what is clearly abusive litigation misconduct. Also at paras 71-81, I concluded that the activities of Maurice Stoney's lawyer, Ms. Priscilla Kennedy ["Kennedy"], required review.

6 I therefore ordered that Kennedy appear before me on July 28, 2017 and that the 1985 Sawridge Trust Trustees and the Sawridge Band could enter certain restricted evidence that is potentially relevant to whether she should be personally responsible for some or all of her client's costs penalty.

7 Prior to the July 28, 2017, hearing the Court received three affidavits relating to whether Maurice Stoney had obtained consent from his siblings to represent them in this litigation. At the hearing itself, Mr. Donald Wilson of DLA Piper represented Kennedy, who is also a lawyer with that firm. Mr. Wilson submitted that a costs award against Kennedy was unnecessary. Counsel for the Trust and the Sawridge Band argued costs were appropriate either vs Kennedy personally, or against Kennedy and Maurice Stoney on a joint and several basis.

8 At the July 28, 2017 hearing the issue arose of whether two siblings of Maurice Stoney who had provided affidavit evidence that they authorized Maurice Stoney to act on their behalf should also be subject to the solicitor and own client indemnity costs award which I had ordered in *Sawridge #6* at para 67. I rejected that possibility in light of the limited and after-the-fact evidence and the question of informed consent.

9 I reserved my decision at the end of that hearing concerning Kennedy's potentially paying costs, with reasons to follow. These are those reasons.

II Background

10 This Action was commenced by Originating Notice, filed on June 12, 2011 by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application". In brief, this litigation involves the Court providing directions on how the property held in an aboriginally-owned trust may be equitably distributed to its beneficiaries, members of the Sawridge Band.

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

12 Some of the terms used in this decision ("*Sawridge #7*") are also defined in the earlier *Sawridge Decisions*.

III Evidence and Submissions at the July 28 Hearing

13 *Sawridge #6* provides detailed reasons on why I denied Maurice Stoney's application (paras 32-54) and concluded that Maurice Stoney's siblings should not be captured by the potential consequences of that application (paras 8-12).

14 I also concluded that the Maurice Stoney application exhibited three of the characteristic indicia of abusive litigation, as reviewed in *Chutskoff Estate v. Bonora*, 2014 ABQB 389 (Alta. Q.B.) at para 92, (2014), 590 A.R. 288 (Alta. Q.B.), aff'd 2014 ABCA 444, 588 A.R. 303 (Alta. C.A.):

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

15 This is the litigation misconduct that may potentially attract court sanction for Kennedy as she was the lawyer who represented Maurice Stoney when he engaged in this abusive litigation.

A. Priscilla Kennedy

16 As noted above, Ms. Kennedy was represented at the July 28, 2017 hearing by Donald Wilson, a partner at the law firm where Kennedy is employed. He acknowledged that a lawyer's conduct is governed by *Rule* 1.2, and that the question of Maurice Stoney's status had been the subject of judicial determination prior to the August 12, 2016 application.

17 Nevertheless, Mr. Wilson argued that Kennedy should not be sanctioned because Kennedy " . . . litigates with her heart." She had been influenced by a perceived injustice against Maurice Stoney, and Maurice Stoney's intention to be a member of the Sawridge Band, which "... goes to the totality of his being." If Kennedy is guilty of anything, it is that she "... is seeing a wrong and persistently tried to right that wrong."

18 Nevertheless, Mr. Wilson did acknowledge that the August 12, 2016 application was "a bridge too far" and should not have occurred. He advised the Court that he had discussed the Sawridge Advice and Direction Application with

Kennedy, and concluded Maurice Stoney had exhausted his remedies. The August 12, 2016 application was not made with a bad motive or the intent to abuse court processes, but, nevertheless, " . . . it absolutely had that effect ...".

19 As for the "busybody" aspect of this litigation, Mr. Wilson argued that *Morin v. TransAlta Utilities Corporation*, 2017 ABQB 409 (Alta. Q.B.) involved a different scenario, since in that instance certain purported litigants were dead. The short timeline for this application had meant it was difficult to assemble evidence that Maurice Stoney was authorized to represent his siblings. These individuals were "a little older" and "[s]ome are not in the best of health."

20 The Court received three affidavits that relate to whether Maurice Stoney was authorized to represent his other siblings in the Sawridge Advice and Direction Application:

1. Shelley Stoney, dated July 20, 2017, saying she is the daughter of Bill Stoney and the niece of Maurice Stoney. She is responsible "for driving my father and uncles who are all suffering health problems and elderly." Shelley Stoney attests " . . . from discussions among my father and his brothers and sisters" that Maurice Stoney was authorized to bring the August 12, 2016 application on their behalf.

2. Bill Stoney, brother of Maurice Stoney, dated July 20, 2017, saying he authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.

3. Gail Stoney, sister of Maurice Stoney, dated July 20, 2017, saying she authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.

None of these affidavits attach any documentary evidence to support these statements. Kennedy has not provided any documentary evidence to support a relationship with these individuals or Maurice Stoney's other siblings.

21 Mr. Wilson acknowledged the limited value of this largely hearsay evidence.

22 Kennedy's counsel argued that in the end no costs award against Kennedy personally is necessary because she has already had the seriousness of her conduct "driven home" by the *Sawridge #6* decision and the presence of reporters in the courtroom. He said that is equally as effective as an order of contempt or a referral to the Law Society.

B. Sawridge Band

23 Mr. Molstad Q.C., counsel for the Sawridge Band, stressed that what had occurred was serious litigation misconduct. Kennedy had conducted a collateral attack with full knowledge of the prior unsuccessful litigation on this topic. She at the latest knew this claim was futile during the 2013 Federal Court judicial review that confirmed Maurice Stoney would not be admitted into the Sawridge Band. It is unknown whether Kennedy had any role in the subsequent unsuccessful 2014 Canadian Human Rights Commission challenge to the Sawridge Band's denying him membership, but she did know that application had occurred.

24 Kennedy had acted in an obstructionist manner during cross-examination of Maurice Stoney. She made false statements in her written submissions.

25 As in *Morin v. TransAlta Utilities Corporation*, Kennedy acted without instructions from the persons she purported to represent. Informed consent is a critical factor in proper legal representation. Where that informed consent is absent then a lawyer who acts without authority should solely be responsible for the subsequent litigation costs.

26 The affidavit evidence does not established Kennedy was authorized to act on behalf of Maurice Stoney's siblings. If these persons were participants in this litigation they could be subject to unfavourable costs awards.

27 The Sawridge Band again confirmed that the *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.) costs order against Maurice Stoney remained unpaid. The costs awarded against Maurice Stoney in *Stoney v. Twinn*, 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.) also remain unpaid. Kennedy in her written submissions indicated

that Maurice Stoney and his siblings have limited funds. Kennedy should be made personally liable for litigation costs so that the Sawridge Band and Trustees can recover the expenses that flowed from this meritless action.

C. Sawridge Trustees

28 The Sawridge Trustees adopted the submissions of the Sawridge Band. The question of Maurice Stoney's status had been decided prior to the August 12, 2016 application.

29 Counsel for the Trustees stressed that the Court should review the transcript of the cross-examination of Maurice Stoney's affidavit. During that process Kennedy objected to questions concerning whether Maurice Stoney had read certain court decisions, and Kennedy said Maurice Stoney did not understand what those decisions meant. That transcript also illustrated that Kennedy was " . . . the one holding the reins."

30 This meritless litigation was effectively conducted on the backs of the Sawridge Band community and dissipated the Trust. The only appropriate remedy is a full indemnity costs order vs Kennedy.

IV. Court Costs Awards vs Lawyers

31 *Sawridge #6* at paras 69-77 reviews the subject of when a court should make a lawyer personally liable for costs awarded against their client. *Rule* 10.50 of the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"] authorizes the Court to order a lawyer pay for their client's costs obligations where that lawyer has engaged in "serious misconduct":

> 10.50 If a lawyer for a party engages in serious misconduct, the Court may order the lawyer to pay a costs award with respect to a person named in the order.

32 The Supreme Court of Canada in *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin*, 2017 SCC 26 (S.C.C.) at para 29, (2017), 408 D.L.R. (4th) 581 (S.C.C.) ["*Jodoin* "] has also very recently commented on costs awards against lawyers, and identified two scenarios where these kinds of awards are appropriate, either:

> 1. "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer", or
>
> 2. "dishonest or malicious misconduct on his or her part, that is deliberate".

33 Alberta trial courts have often referenced the judgment of *Robertson v. Edmonton (City) Police Service*, 2005 ABQB 499, 385 A.R. 325 (Alta. Q.B.) as providing the test for when a lawyer's activities have reached a threshold that warrants a personal award of costs. In that decision Slatter J (as he then was) surveyed contemporary jurisprudence and concluded at para 21:

> . . . The conduct of the barrister must demonstrate or approach bad faith, or deliberate misconduct, or patently unjustified actions, although a formal finding of contempt is not needed ...

34 I conclude this is no longer the entire test. *Jodoin* indicates a new two branch analysis. "[D]ishonest or malicious misconduct on his or her part, that is deliberate" is the category identified in *Robertson v. Edmonton (City) Police Service*. The second branch, "unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system", is a new basis on which to order costs against a lawyer.

35 I believe this is a useful point at which to look further into what is "serious abuse" that warrants a costs penalty vs a lawyer, following the first of the two branches of this analysis. I consider the language in *Rule* 10.50 ("serious misconduct") and *Jodion* ("serious abuse") to be equivalent. I use the Supreme Court of Canada's language in the analysis that follows.

36 In *Sawridge #6* at para 78 I indicated five elements that contributed to what I concluded was potentially "serious abuse":

> 1. the nature of interests in question;
>
> 2. this litigation was by a third party attempting to intrude into an aboriginal community which has *sui generis* characteristics;
>
> 3. that the applicant sought to indemnify himself via a costs claim that would dissipate the resources of aboriginal community trust property;
>
> 4. the application was obviously futile on multiple bases; and
>
> 5. the attempts to involve other third parties on a "busybody" basis, with potential serious implications to those persons' rights.

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

A. The Shifting Orientation of Litigation in Canada, Court Jurisdiction, and Control of Lawyers

38 Before proceeding to review the law on costs awards vs lawyers I believe it is helpful to step back and look more generally at how court processes in Canada are undergoing a fundamental shift away from blind adherence to procedure and formality, and towards a court apparatus that focuses on function and proportional response. This transformation of the operation of front-line trial courts has not simply been encouraged by the Supreme Court of Canada. Implementing this new reality is *an obligation* for the courts, but also for lawyers.

39 This has been called a "culture shift" (for example, *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para 2, [2014] 1 S.C.R. 87 (S.C.C.)), but this transformation is, in reality, more substantial than that. Court litigation, like any process, needs rules. The common law aims to develop rules that provide predictable results. That has several parts. One category of rules establishes functional principles of law, so that persons may structure their activities so that they conform with the law. A second category of rules aims to guarantee what is typically called "procedural fairness". Procedural fairness sets guidelines for how information is presented to the court and tested, how parties structure and order their arguments, that parties know and may respond to the case against them, and how decision-makers explain the reasoning and conclusions that were the basis to reach a decision. Much of these guidelines have been codified in legislation, such as the *Rules*. Other elements are captured as principles of fundamental justice, as developed in relation to *Charter*, s 7.

40 There is little dispute that litigation in Canada is now a very complex process, particularly in the superior courts such as the Alberta Court of Queen's Bench. Justice Karakatsanis in *Hryniak v. Mauldin* at para 1 observed that meaningful access to justice is now "the greatest challenge to the rule of law in Canada today." What is the obstacle? "Trials have become expensive and protracted." Canadians can no longer afford to sue or defend themselves. That strikes at the rule of law itself. Justice Karkatsanis continues to explain that historic over-emphasis on procedural rights and exhaustive formality has made civil litigation impractical and inaccessible (para 2):

> . . . The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

41 Thus, the "culture shift" is a movement away from rigid formality to procedures that are *proportionate* and lead to results that are "fair and just". The Supreme Court of Canada in *Hryniak v. Mauldin* called for better ways to control litigation to ensure court processes serve their actual function - resolving disputes between persons - and to reflect economic realities.

42 More recently the Supreme Court has in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 (S.C.C.) and *R. v. Cody*, 2017 SCC 31 (S.C.C.) stressed it is time for trial courts to develop and deploy effective and timely processes "to improve efficiency in the conduct of legitimate applications and motions" (*R. v. Cody*, at para 39). In *R. v. Cody* the Supreme Court at para 38 instructs that trial judges test criminal law applications on whether they have "a *reasonable* prospect of success" [emphasis added], and if not, they should be dismissed summarily. That is in the context of criminal litigation, with its elevated procedural safeguards that protect an accused's rights to make full answer and defence. Both *R. v. Jordan* and *R. v. Cody* stress *all* court participants in the criminal justice process - the Crown, defence counsel, and judges - have an obligation to make trial processes more efficient and timely. This too is part of the "culture shift", and a rejection of "a culture of complacency".

43 The increasingly frequent appearance of self-represented litigants in Canadian courts illustrates how the court's renewed responsibility to achieve "fair and just" but "proportionate and effective" results is not simply limited to 'streamlining' processes. Chief Justice McLachlin has instructed that the "culture shift" extends to all court proceedings, but "especially those involving self-represented parties": *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (S.C.C.) at para 110, [2014] 3 S.C.R. 31 (S.C.C.).

44 As I have illustrated, a key aspect of the "culture shift" means reconsidering how procedural formalities can be an obstacle to "fair and just" litigation. Very recently in *Pintea v. Johns*, 2017 SCC 23 (S.C.C.) the Supreme Court of Canada endorsed the Canadian Judicial Counsel *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) ["*Statement of Principles*"]. That document and its Principles are important as they illustrate how the traditional formal rules of procedure and evidence bend to the new reality faced by trial courts, and what is required to provide a "fair and just" result for self-represented litigants:

> Principle 2 on page 5:
>
> > Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.
>
> Principle 3 on page 8:
>
> > Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.
>
> I note these and other instructions to trial judges in the "*Statement of Principles*" are not permissive, but mandatory. See for example: ***Gray v Gray***, 2017 CanLII 55190 (Ont Sup Ct J); *Young v. Noble*, 2017 NLCA 48 (N.L. C.A.); *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383 (Ont. C.A.); *R. v. Tossounian*, 2017 ONCA 618 (Ont. C.A.).

45 Read plain, this is a substantial rejection by the Supreme Court of Canada of the traditional approach, that rules of procedure and evidence apply the same to everyone who appears before a Canadian court. The reason for that is obvious to anyone who has observed a self-represented person in court. They face a complex apparatus, whose workings are at times both arcane and unwritten.

46 These objectives are all relevant to how the gate of "access to justice" swings both open and closed. The *Statement of Principles* is not simply a licence for self-represented persons to engage the courts as an exception to the rules. They also have responsibilities: *Clark v. Pezzente*, 2017 ABCA 220 (Alta. C.A.) at para 13. What is particularly pertinent to the discussion that follows is how the *Statement of Principles* at p 10 indicate that self-represented litigants should also adhere to standards expected of legal professionals, such as politeness, and not abusing the courts personnel, processes, and resources:

> Self-represented persons are required to be respectful of the court process and the officials within it. Vexatious litigants will not be permitted to abuse the process.

47 Similarly, the *Statement of Principles* in its commentary at p 5 emphasizes that abusive litigation is not excused because someone is self-represented:

> Self-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures. In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it. The ability of judges to promote access may be affected by the actions of self-represented litigants themselves.

48 That objective of controlling litigation abuse is a critical facet of the "new reality". This is reflected in recent jurisprudence of this Court. One mechanism to achieve this "culture shift" is interdiction of abusive litigation, for example via vexatious litigant orders issued under this Court's inherent jurisdiction (surveyed in *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 14-25, (2016), 273 A.C.W.S. (3d) 533 (Alta. Q.B.), leave denied 2017 ABCA 63 (Alta. C.A.), leave to the SCC requested, 37624 (12 April 2017) [2017 CarswellAlta 1143 (Alta. Q.B.)]). Recent Alberta jurisprudence in this strategic direction has stressed how "fair and just" litigant control responses are ones that tackle both caused and anticipated injuries, for example:

> 1. identifying litigation abuse that warrants intervention in a prospective manner, by investigating what is the plausible future misconduct by an abusive litigant, rather than a rote and reflex response where the Court only restricts forms of abuse that have already occurred (*Hok v. Alberta*, at paras 35-37; *Thompson v. IUOE, Local 955*, 2017 ABQB 210 (Alta. Q.B.) at para 61, leave denied 2017 ABCA 193 (Alta. C.A.); *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237 (Alta. Q.B.) at para 160-164; *Chisan v. Fielding*, 2017 ABQB 233 (Alta. Q.B.) at paras 52-54);
>
> 2. recognition that certain kinds of litigation abuse warrant a stricter response given their disproportionate harm to court processes (*Ewanchuk v. Canada (Attorney General)* at paras 170-187); and
>
> 3. taking special additional steps where an abusive litigant defies simple control in his or her attacks on the Court, its personnel, and other persons (*Boisjoli, Re*, 2015 ABQB 629, 29 Alta. L.R. (6th) 334 (Alta. Q.B.); *Boisjoli, Re*, 2015 ABQB 690 (Alta. Q.B.)).

49 In many ways none of this should be new. The *Alberta Rules of Court*, *Rule* 1.2 statements of purpose and intention stress both the Court and parties who appear before it are expected to resolve disputes in a timely, cost-effective manner that respects the resources of the Court.

50 What is new are the *implications* that can be drawn from a lawyer's actions and inactions. They, too, must be part of the "culture shift". If their actions, directly or by implication, indicate that a lawyer is not a part of that process, then that is an indication of intent. The future operation of this and other trial courts will depend in no small way on the manner in which lawyers conduct themselves. If they elect to misuse court procedures then negative consequences may follow.

B. Costs Awards Against Lawyers

1. The Court's Jurisdiction to Control Litigation and Lawyers

51 Recent jurisprudence, and particularly *Jodoin*, has clarified the court's supervisory function in relation to lawyers. This is a facet of the inherent jurisdiction of a court to manage and control its own proceedings, which is reviewed in the often-cited paper by I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Leg Probs 23. The management and control power is a common law authority possessed by both statutory and inherent jurisdiction courts (*Jodoin* at para 17), that:

> . . . flows the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice ... [Citations omitted.]

(*Jodoin* at para 18.)

52 *Jodoin* at paras 21, 24 discusses two separate court-mediated lawyer discipline mechanisms, contempt of court vs awards of costs. While "the criteria . . . are comparable", these two processes are distinguished in a functional sense by the degree of proof, the possibility of detention, and the implications of a sanction on a lawyer's career:

> . . . Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt ...
>
> . . .
>
> In most cases . . . the implications for a lawyer of being ordered personally to pay costs are less serious than [a finding of contempt or law society discipline]. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. ...

53 Of course, lawyers are also potentially subject to professional discipline by their supervising Law Society. Gascon J in *Jodoin* at paras 20, 22, citing *Cunningham v. Lilles*, 2010 SCC 10 (S.C.C.) at para 35, [2010] 1 S.C.R. 331 (S.C.C.), is careful to distinguish how professional discipline and court sanction for lawyer misconduct are distinct processes with separate purposes:

> The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. . . .
>
> As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public . . . However, the judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:
>
> > The court's authority is preventative — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court.

54 The Canadian courts' inherent jurisdiction extends to review of lawyers' fees (*Mealey (Litigation Guardian of) v. Godin* (1999), 179 D.L.R. (4th) 231 (N.B. C.A.) at para 20, (1999), 221 N.B.R. (2d) 372 (N.B. C.A.)).

55 Inherent jurisdiction provides the authority for a court to scrutinize and restrict persons who attempt to act as a litigation representative. This usually emerges in relation to problematic layperson representatives. For example, in *R. v. Dick*, 2002 BCCA 27, 163 B.C.A.C. 62 (B.C. C.A.), the British Columbia Court of Appeal evaluated whether an agent with a history of abusive litigation activities should be permitted to act as a representative. The British Columbia Court of Appeal concluded courts have a responsibility to ensure persons who appear before the court are properly represented, and more generally to maintain the integrity of the court process: para 7. Permission to act as an agent is a privilege subject solely to the court's discretion: para 6. A person who is dishonest, shows lack of respect for the law, or who engaged in litigation abuse is not an appropriate agent. Similar results were ordered in *Gauthier v. Starr*, 2016 ABQB 213, 86 C.P.C. (7th) 348 (Alta. Q.B.); *Peddle v. Alberta Treasury Branches*, 2004 ABQB 608, 133 A.C.W.S. (3d) 253 (Alta. Q.B.); *R. v. Maleki*, 2007 ONCJ 430, 74 W.C.B. (2d) 816 (Ont. C.J.); *R. v. Reddick*, 2002 SKCA 89, 54 W.C.B. (2d) 646 (Sask. C.A.); *Law Society (British Columbia) v. Dempsey*, 2005 BCSC 1277, 142 A.C.W.S. (3d) 346 (B.C. S.C.), affirmed 2006 BCCA 161, 149 A.C.W.S. (3d) 735 (B.C. S.C.).

56 It seems to me that the same should be true for lawyers. Appellate jurisprudence is clear that courts possess an inherent jurisdiction to remove a lawyer from the record, though this usually occurs in the context of a conflict of interest, see for example *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.)at 1245, (1990), 77 D.L.R. (4th) 249 (S.C.C.). I see no reason why a Canadian court cannot intervene to remove a lawyer if that lawyer is not an appropriate court representative. While that is undoubtedly an unusual step, rogue lawyers are not unknown. For example, the Law Society of Upper Canada has recently on an interim basis restricted the access of a lawyer, Glenn Patrick Bogue, who was advancing abusive and vexatious Organized Pseudolegal Commercial Argument ["OPCA"] concepts (*Meads v. Meads*, 2012 ABQB 571, 543 A.R. 215 (Alta. Q.B.)) in a number of court proceedings across Canada: *Law Society of Upper Canada v. Bogue*, 2017 ONLSTH 119 (L.S. Tribunal). It is disturbing that this vexatious litigation had been going on for over a year.

57 In relation to control of problematic lawyers I note that the *Judicature Act*, s 23.1(5) indicates that what are commonly called "vexatious litigant orders" cannot be used to restrict court access by a lawyer or other authorized person, provided they are acting as the representative of an abusive and vexatious litigant:

> An order under subsection (1) or (4) may not be made against a member of The Law Society of Alberta or a person authorized under section 48 of the Legal Profession Act when acting as legal counsel for another person.

58 Arguably, section 23.1(5) is intended to extinguish this Court's inherent jurisdiction to impose some supervisory or preliminary review element to a lawyer's court filings. While I will not continue to investigate the operation of this provision, I question whether *Judicature Act*, s 23.1(5) is constitutionally valid, since it purports to extinguish an element of the Alberta superior court's inherent jurisdiction to control its own processes, but does not provide for an alternative agency or tribunal that can take steps of this kind. Any argument that the Legislature has delegated that task to the Law Society of Alberta fails to acknowledge the distinct and separate court-mediated lawyer-control functionality identified by the Supreme Court of Canada in *Jodoin* and its predecessor judgments.

2. The Nuremberg Defence - I Was Just Following Orders

59 Lawyers are subject to a number of different forms of legal duties and responsibilities. They are employees of their client, and are bound by the terms of that contract. But a lawyer's allegiance is not solely to whoever pays their bills.

60 When lawyers are admitted to the Alberta Bar a lawyer swears an oath of office that includes this statement:

> That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. I will not seek to destroy anyone's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favor or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta. [Emphasis added.]
>
> This is not some empty ceremony, but instead these words are directly relevant to a lawyer's duties, and the standard expected of him or her by the courts: *Osborne v. Pinno* (1997), 208 A.R. 363 (Alta. Q.B.) at para 22, (1997), 56 Alta. L.R. (3d) 404 (Alta. Q.B.); *C. (A.R.) v. C. (L.L.)*, 1999 ABQB 707 (Alta. Q.B.) at para 26, (1999), 180 D.L.R. (4th) 361 (Alta. Q.B.).

61 This duty is also reflected in the Law Society of Alberta *Code of Conduct*. Though that document largely focuses on lawyers' duty to their clients and interactions with the Law Society, the *Code of Conduct* also requires that a lawyer operate " . . . honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.": Chapter 5.1-1. The *Code of Conduct* then continues in Chapter 5.1-2 to identify prohibitions, including that a lawyer may not:

> • abuse a tribunal by proceedings that are motivated by malice and conducted to injure the other party (Chapter 5.1-2(a));

- "take any step . . . that is clearly without merit" (Chapter 5.1-2(b));
- "unreasonably delay the process of the tribunal" (Chapter 5.1-2(c));
- knowingly attempt to deceive the court by offering false evidence, misstating facts or law, or relying on false or deceptive affidavits (Chapter 5.1-2(g));
- knowingly misstate legislation (Chapter 5.1-2(h));
- advancing facts that cannot reasonably be true (Chapter 5.1-2(i)); and
- failure to disclose relevant adverse authorities (Chapter 5.1-2(n)).

62 The *Code of Conduct* chapter citations above are to the replacement *Code of Conduct* that came into force on November 1, 2011. Interestingly, I was only able to locate one reported post-2011 Law Society of Alberta Hearing Committee decision that references Chapter 5.1-1 or the 5.1-2 subsections, *Law Society of Alberta v Botan*, 2016 ABLS 8, where lawyer's abuse of court processes led to a one-day suspension.

63 Regardless, there is no question that lawyers have a separate, distinct, and direct obligation to the Court. As Justice Gascon recently stated in *Jodoin* at para 18:

> . . . As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct ...

64 Similarly *Law Society (British Columbia) v. Mangat*, 2001 SCC 67 (S.C.C.) at para 45, [2001] 3 S.C.R. 113 (S.C.C.), states that lawyer's status as officers of the court means:

> . . . they have the obligation of upholding the various attributes of the administration of justice such as judicial impartiality and independence, as well as professional honesty and loyalty.

65 Gavin MacKenzie in a paper titled "The Ethics of Advocacy" ((2008) The Advocates Society Journal 26) observed that a lawyers duty to his or her client vs the court " . . . are given equal prominence ...".

66 The Alberta Court of Appeal has repeatedly indicated that the lawyers who appear in Alberta courts have an independent and separate duty to those institutions. For example, in *R. v. Creasser*, 1996 ABCA 303 (Alta. C.A.) at para 13, (1996), 187 A.R. 279 (Alta. C.A.), the Court stressed:

> . . . the lawyer who would practise his profession of counsel before a Court owes duties to that Court quite apart from any duty he owes his client or his profession or, indeed, the public. That these duties are sometimes expressed as an ethical responsibility does not detract from the reality that the duties are owed to the Court, and the Court can demand performance of them. The expression "officer of the Court" is a common if flowery way to emphasize that special relationship. In Canada, unlike some other common law jurisdictions, the Courts do not license lawyers who practise before them, and do not suspend those licences when duties are breached. But that restraint does not contradict the fact that special duties exist. ... [Emphasis added.]

67 The professional standards expected of a lawyer as an officer of the court equally apply when a lawyer represents themselves. "[t]he lawyer as Plaintiff stands in a different position than a layman as Plaintiff.": *Botan v. St. Amand*, 2012 ABQB 260 (Alta. Q.B.) at paras 72-77, (2012), 538 A.R. 307 (Alta. Q.B.), aff'd 2013 ABCA 227, 553 A.R. 333 (Alta. Q.B.). As Rooke J (as he then was) explained in *Parkridge Homes Ltd. v. Anglin*, [1996] A.J. No. 768 (Alta. Q.B.) at para 33 (QL), 1996 CarswellAlta 1136 (Alta. Q.B.):

> . . . it is significant that he is a member of the Law Society of Alberta. If he were not, one could apply the standard of conduct of an ordinary citizen, and excuse some conduct for which an ordinary citizen might be ignorant or from

> which he or she would be otherwise excused. In my view such is not the case for an active practising member of the Law Society of Alberta, who has a standard to meet, regardless of his technical capacity of appearance, merely by virtue of that membership ...

68 Having countervailing obligations means that a lawyer's obligations to his or her client vs the Court may conflict, and judges have long recognized that fact. This is the reason why courts are cautious about applying potential sanctions again lawyers. As McLachlin J (as she then was) observed in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at 136, (1993), 108 D.L.R. (4th) 193 (S.C.C.), a court should be mindful that sanctions directed to a lawyer may interfere with that lawyer's execution of his or her duties:

> . . . courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

69 What this does not mean, however, is that a lawyer can simply point at a client and say abuse of the court is the client's fault, and I am just doing my job. In *C. (L.) v. Alberta*, 2015 ABQB 84 (Alta. Q.B.) at para 248, (2015), 605 A.R. 1 (Alta. Q.B.) my colleague Graesser J captured this principle in a colourful but accurate manner:

> "I was just following orders" does not work as a defence for lawyers any more than it worked for the Watergate burglars or at Nuremburg. Lawyers also owe a duty of candour to their opponents and have duties to the court regarding appropriate professional practices.

70 I agree. There are kinds of litigation misconduct where responsibility falls not just on the client, but also the lawyer who represents and advocates for that client. This judgment will explore that and chiefly investigate the award of costs against a lawyer on the basis of "unfounded, frivolous, dilatory or vexatious proceeding[s]", rather than the deliberate dishonest or malicious misconduct alternative branch, identified in *Jodoin* at para 29.

3. No Constitutional Right to Abusive Litigation

71 Though there should not have been any doubt on this point, McLachlin CJC has recently in *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)* at para 47 confirmed that:

> . . . There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice. [Emphasis added.]

72 I cannot see how this principle would apply differently for a self-represented litigant, or a person represented by a lawyer. A lawyer is a mechanism through which a client interacts with the Court and other court participants. However, a lawyer is not an automaton that does only what the client instructs. The preceding review explicitly indicates lawyers have duties to more than just their clients. They are not required to do whatever they are told.

73 I stress - there is *no right* to engage in this kind of litigation. Abusive litigation may be blocked, and actions may be taken to punish and control court participants who engage in this kind of litigation misconduct. Steps of that kind are appropriate to enhance access to justice and protect badly over-taxed court resources. Lawyers have a clear obligation not to promote abuse of court processes.

74 I therefore conclude any lawyer who acts on behalf of a client who engages in frivolous, vexatious, or abusive litigation is potentially personally subject to a costs award. A lawyer who is the mechanism to conduct frivolous, vexatious, or abusive litigation is not merely acting contrary of his or her obligations to the courts and other litigants. This is also a breach of a lawyer's obligations *to his or her own client*. By facilitating that misconduct the lawyer 'digs a grave for two.'

75 Restating this point:

1. clients have no right to engage in abusive litigation;

2. lawyers have obligations as professionals and as officers of the court to not misuse court resources and processes.

Combined, lawyers who advance litigation that is an abuse of court have no right to do so. Instead, that is a breach of the lawyer's obligations. Any lawyer who does so is an accessory to their client's misconduct.

4. An Exceptional Step

76 Appellate jurisprudence that discusses costs awards against lawyers sometimes describes that step as "exceptional", or "rare". For example, in *Jodoin*, at para 29, Gascon J writes:

> . . . an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. ...
>
> See also *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81 (S.C.C.) at para 85, [2001] 3 S.C.R. 575 (S.C.C.).

77 What these decisions are trying to capture is the fact that most of the time lawyers conduct themselves properly. Costs awards are presumptively awarded in civil litigation anytime a party is unsuccessful in an action or application (*Rule* 10.29(1)), but a lack of success does not necessarily mean actual bad litigation. An additional characteristic, abuse of the court and its processes, is what transforms a simple litigation failure into misconduct that may attract a costs award against a lawyer, personally. Fortunately, that 'added layer' is not a common occurrence. Most lawyers are responsible and responsive to their obligations.

78 In my opinion this language does not mean that lawyers are subject to a different and reduced standard from other persons who interact with the courts. Saying a costs award against a lawyer personally is "exceptional" does not mean that a lawyer can say that he or she is immune to a costs award because that lawyer may have abused court processes, but that abuse was not "exceptional". Abuse is abuse.

79 *Jodoin*, in fact, makes that clear. Paragraph 29 continues to make that point explicit:

> . . . This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer ... [Emphasis added.]

80 What constitutes "serious abuse" is a separate question. However Alberta courts have been developing guidelines and principles to test when court intervention is warranted to control litigant activities. This jurisprudence is also helpful to test when a lawyer has engaged in "serious abuse".

5. Abuse of the Court

81 Alberta decisions have collected and categorized types of litigation misconduct which are a basis on which to conclude that a litigant is "vexatious". These "indicia" are then each a potential basis to restrict a litigant's access to court. Put another way, these "indicia" are a basis to potentially conclude that a litigant is not a 'fair dealer', and so his or her activity needs to be monitored and controlled.

82 *Chutskoff Estate v. Bonora*, 2014 ABQB 389 (Alta. Q.B.) at para 92, (2014), 590 A.R. 288 (Alta. Q.B.), aff'd 2014 ABCA 444 (Alta. Q.B.) is the leading Alberta authority on the elements and activities that define abusive litigation. That decision identifies eleven categories of litigation misconduct which can trigger court intervention in litigation activities. These "indicia" are described in detail in *Chutskoff Estate v. Bonora*, however for this discussion it is useful to briefly outline those categories:

1. collateral attacks,

2. hopeless proceedings,

3. escalating proceedings,

4. bringing proceedings for improper purposes,

5. conducting "busybody" lawsuits to enforce alleged rights of third parties,

6. failure to honour court-ordered obligations,

7. persistently taking unsuccessful appeals from judicial decisions,

8. persistently engaging in inappropriate courtroom behaviour,

9. unsubstantiated allegations of conspiracy, fraud, and misconduct,

10. scandalous or inflammatory language in pleadings or before the court, and

11. advancing OPCA strategies.

83 Subsequent jurisprudence has identified two other categories of litigation misconduct that warrant court intervention to control court access:

1. using court processes to further a criminal scheme (*Boisjoli, Re*, 2015 ABQB 629 (Alta. Q.B.) at paras 98-103), and

2. attempts to replace or bypass the judge hearing or assigned to a matter, commonly called "judge shopping" (*McCargar v. Canada*, 2017 ABQB 416 (Alta. Q.B.) at para 112).

84 While each of these "indicia" is a basis to restrict court access, reported judgments that apply the *Chutskoff Estate v. Bonora* have instead reviewed the degree of misconduct in each category to assess its seriousness. For example, in *644036 Alberta Ltd. v. Morbank Financial Inc.*, 2014 ABQB 681 (Alta. Q.B.) at paras 71, 85, (2014), 26 Alta. L.R. (6th) 153 (Alta. Q.B.); *Ewanchuk v. Canada (Attorney General)* at para 136; *Boisjoli, Re*, 2015 ABQB 629 (Alta. Q.B.) at para 89 the presence of some "indicia" was not, alone, a basis to make a vexatious litigant order. These were, instead, "aggravating" factors.

85 Similarly, vexatious litigant judgments frequently conclude that the presence of multiple *Chutskoff Estate v. Bonora* "indicia" cumulatively strengthen the foundation on which to conclude court intervention is warranted in response to abusive litigation conduct: *Ewanchuk v. Canada (Attorney General)* at para 159; *Chutskoff Estate v. Bonora* at para 131; *Boisjoli, Re*, 2015 ABQB 629 (Alta. Q.B.) at para 104; *Hok v. Alberta* at para 39; *644036 Alberta Ltd. v. Morbank Financial Inc.* at para 91.

86 In *R. v. Eddy*, 2014 ABQB 391 (Alta. Q.B.) at para 48, (2014), 583 A.R. 268 (Alta. Q.B.), Marceau J awarded costs against a self-represented litigant in a criminal matter, and used the *Chutskoff Estate v. Bonora* "indicia" as a way to help test the seriousness of the litigation abuse. These were "aggravating" factors:

> I conclude that the characteristics of vexatious litigation, including those as identified in Judicature Act, s 23(2) and the common law authorities recently and comprehensively reviewed in Chutskoff v Bonora, 2014 ABQB 389 are 'aggravating' factors that favour a cost award against a criminal accused. These indicia form a matrix of traits that are shared by the kind of litigation misconduct that calls for court response and deterrence. [Emphasis added.]
>
> I note ***R v Eddy*** applies a costs award analysis developed in *Fearn v. Canada (Customs)*, 2014 ABQB 114, 586 A.R. 23 (Alta. Q.B.), which is cited with approval in *Jodoin* at paras 25, 27.

87 Similarly, Master Smart in *Lymer, Re*, 2014 ABQB 674 (Alta. Q.B.) at paras 34-35, (2014), 9 Alta. L.R. (6th) 57 (Alta. Q.B.) applied the *Chutskoff Estate v. Bonora* "indicia" as a way to evaluate whether a litigant had acted in contempt of court. In *Kavanagh v. Kavanagh*, 2016 ABQB 107 (Alta. Q.B.) at para 99, Shelley J concluded the presence of *Chutskoff Estate v. Bonora* "indicia" meant she should take additional steps to protect the interests of a potentially vulnerable third party to litigation.

88 I see the *Chutskoff Estate v. Bonora* "indicia" as a useful tool to test whether a lawyer's conduct is "serious abuse" warranting that costs be ordered against that lawyer. Each individual abusive conduct category is potentially relevant, and together these factors may operate in a cumulative manner.

89 In this discussion of the potential application of the *Chutskoff Estate v. Bonora* "indicia" I acknowledge that Gascon J in *Jodoin* is explicit that when a court examines whether a costs award should be made against a lawyer that the court's attention should focus on the specific conduct that has attracted court scrutiny. Justice Gascon stresses that an investigation of a particular instance of potential litigation misconduct should be restricted to the specific identified litigation misconduct and not put the lawyer's "career[,] on trial": para 33. A lawyer costs award analysis is not a review of the lawyer's "entire body of work", though external facts may be relevant in certain circumstances: paras 33-34.

90 This means for the purposes of a *Jodoin* lawyer costs analysis the *Chutskoff Estate v. Bonora* "indicia" will need to be adapted to the specific context. For example, a history of persistent through futile appeals is only relevant to a potential order of costs against a lawyer where the alleged abusive litigation is a persistent abusive appeal. Other *Chutskoff Estate v. Bonora* "indicia" have broader implications. An action where there is no prospect for success may not, in itself, illustrate a "serious abuse" of the court, but where the action also features scandalous or inflammatory language that may lead a judge to conclude the lawyer is deliberately acting in breach of his or her duties.

91 I will later discuss how certain kinds of litigation misconduct will, on their own, in most cases represent a basis to order costs against a lawyer. However, first, it is important to consider whether litigation misconduct is deliberate.

6. Knowledge and Persistence

92 Lawyers make mistakes. They sometimes get the law wrong, miss a key authority, overlook a critical fact, or simply become confused.

93 What *Jodoin* and other decisions indicate is that a misstep such as a "mere mistake or error of judgment" is not a basis, in itself, for an order of costs against a lawyer. Something higher is necessary, for example gross negligence (para 27) or deliberate misconduct (para 29). One way of satisfying a higher standard of proof, even to "beyond a reasonable doubt", is where a court concludes an actor is "willfully blind" to the fact their actions are wrong.

94 A mistake, in itself, is therefore not often likely to be a basis to order costs against a lawyer, though the presence of *Chutskoff Estate v. Bonora* "indicia" may lead to a conclusion that a purported mistake was not honest, but instead a stratagem. What is more damning, however, is when a lawyer advances frivolous, vexatious, or abusive litigation in the face of warnings of exactly that.

95 For example, a costs award would rarely be warranted against a lawyer if:

1. a lawyer had made an argument, application, or proceeding based on a false statement of law, an invalid authority, or other mistake;

2. that error was identified by another party or the court; and

3. the lawyer then acknowledged the error and abandoned the argument, application, or proceeding.

Of course, party and party costs would still be presumptively due against the litigant (*Rule* 10.29(1)), but at least the lawyer had taken steps to conduct 'damage control', and that should be encouraged and respected.

96 However, where a lawyer persists despite being warned or alerted, then a court may apply the often stated rule that a person may be presumed to intend the natural consequence of their actions: *Starr v. Ontario (Commissioner of Inquiry)*, [1990] 1 S.C.R. 1366, 68 D.L.R. (4th) 641 (S.C.C.). In that context a court may conclude that a lawyer who is breaking the rules knows what the rules are, but has proceeded and broken them anyway. That will create a strong presumption that a costs award is appropriate for a lawyer who engaged in what is, effectively, deliberate misconduct.

7. Examples of Lawyer Misconduct that Usually Warrant Costs

97 With that foundation in place, I believe it is useful to provide a non-exclusive set of scenarios where a lawyer will likely be a potential valid target for a personal costs award. Again, I stress that anytime a court considers whether to make a costs award of this kind the analysis should be contextual. Exceptional circumstances are no doubt possible. That said, there are some ground rules that any reasonable lawyer would be expected to know and follow. Some of these examples will overlap with the *Chutskoff Estate v. Bonora* "indicia" because, naturally, neither a lawyer nor litigant should expect a court to stand by and tolerate certain abusive behaviour.

a. Futile Actions and Applications

98 Conducting a futile action or application is a potential basis for an award of costs against a lawyer, particularly where the court concludes the lawyer has advanced this litigation knowing that it is hopeless, or being willfully blind as to that fact.

99 A key category of futile action that warrants court sanction is a collateral attack. This is where litigation seeks to undo or challenge the outcome of another court case. A collateral attack is a breach of a cornerstone of the English tradition common law - the principle of *res judicata* - that once a court has made a decision and the appeal period has ended, then that decision is final. This is a basic principle of law taught to every lawyer. Collateral attacks are serious litigation misconduct because they waste court and litigant resources. A collateral attack inevitably fails in the face of *res judicata*.

100 Similarly, litigation conducted in the face of a binding authority may render that action futile. A court literally cannot ignore *stare decisis*, and any lawyer should know that. Defying identified binding authority leads to the presumption that the lawyer is intending the natural consequence. That said, this does not mean that a lawyer should automatically be subject to a potential costs award if that lawyer has advanced a basis for why an established rule is incorrect, or should be modified, or how this case is somehow factually or legally different. However, simply telling the trial judge to ignore a court of appeal or Supreme Court of Canada decision indicates a bad litigation objective. Similarly, claims to distinguish binding jurisprudence on an arbitrary basis that is unrelated to the principle(s) in play implies an attempt to circumvent *stare decisis*.

101 Other examples of futile litigation are litigation in the wrong venue, premature appeals or judicial reviews, or actions that seek impossible or grossly disproportionate remedies. A lawyer who seeks general damages near the *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (S.C.C.) maximum for a modest injury raises the presumption that the lawyer intended this breach of an obvious and well-established legal rule; overstating the damages claimed was deliberate. That is doubly so if the maximum were exceeded. Courts are permitted to read between the lines and, in the context of the "culture shift", inquire what it means when a client and his or her lawyer advance a dubious, overstated claim.

102 An application made outside a limitations period and without any explanation is another example of a futile action which puts the lawyer's motivation in doubt.

103 All of these prior examples should be examined in context. Knowledge (obvious or implied) of the critical defect will often be an important factor. Again, a lawyer who makes a misstep but then corrects it will usually not be liable for litigation costs, personally. The *Chutskoff Estate v. Bonora* "indicia" may, however, tip the balance.

b. Breaches of Duty

104 Another category of litigation conduct which will usually attract a costs award against a lawyer is where a lawyer has breached a basic aspect of their responsibility to the courts and clients. As I have previously indicated, the Court's supervisory function includes scrutinizing whether an in-court representative is qualified for that task.

105 For example, *Morin v. TransAlta Utilities Corporation*, 2017 ABQB 409 (Alta. Q.B.) involved a lawyer who had conducted litigation on behalf of persons who were not his clients. He had no authority to represent them. Graesser J concluded, and I agree, that this kind of misconduct would almost always warrant costs paid personally by that lawyer. This is a form of "busybody" litigation, one of the *Chutskoff Estate v. Bonora* "indicia", but for a lawyer this action is in clear violation of both their professional duties and is a basic and profound abuse of how courts trust lawyers to speak in court on behalf of others.

106 Similarly, a lawyer who is aware of but does not disclose relevant unfavourable jurisprudence or legislation runs the risk of being subject to a personal costs penalty, particularly if the concealed item is a binding authority. This disclosure requirement is an obligation under the Law Society of Alberta *Code of Conduct*, but is even more critically an aspect of a lawyer's role and duties as an officer of the court. The simple fact is that judges rely on lawyers to assist in understanding the law. Intentionally omitting unfavourable case law has no excuse, and does nothing but cause unnecessary appeals, unjust results, and the waste of critical resources.

107 The same is true for a lawyer who does not discharge their duty to provide full disclosure during an *ex parte* proceeding. It is too easy for a monologue to lead to spurious and unfair results. A judge has no way to test evidence in that context. This scenario creates a special and elevated obligation on a lawyer as an officer of the court, see *Botan v. St. Amand.*

c. Special Forms of Litigation Abuse

108 Certain kinds of litigation abuse will attract special court scrutiny because of their character and implications.

109 For example, *habeas corpus* is an unusual civil application that has a priority 'fast track' in Alberta courts. As I explained in *Ewanchuk v. Canada (Attorney General)* at paras 170-187, abuse of this procedure has a cascading negative effect on court function. Further, the potential basis and remedy for *habeas corpus* is extremely specific and specialized. *Habeas corpus* may only be used to challenge a decision to restrict a person's liberty. The only remedy that may result is release. A lawyer who makes a *habeas corpus* application which does not meet those criteria can expect the possibility of a personal costs award. This kind of application is "serious abuse" because of how it damages the court's effective and efficient functioning.

110 OPCA strategies, a category of vexatious and abusive litigation that was reviewed by Rooke ACJ in *Meads v. Meads*, are another special form of litigation abuse that will almost certainly be a basis for a costs award against a lawyer. In brief, these are legal-sounding concepts that are intended to subvert the operation of courts and the rule of law. These ideas are so obviously false and discounted that simply employing these concepts is a basis to conclude a party who argues OPCA motifs intends to abuse the courts and other parties for an ulterior purpose: *Fiander v. Mills*, 2015 NLCA 31, 368 Nfld. & P.E.I.R. 80 (N.L. C.A.). The same is true for a lawyer who invokes OPCA concepts.

111 Another special category of litigation abuse that may attract a costs award against a lawyer personally is the practice of booking a hearing or an application in a time period that is obviously inadequate for the issues and materials involved. For example, a lawyer may appear in Chambers and attempt to jam in an application that obviously requires

a full or half day, rather than the 30 minute time slot allotted. The end result will either be an incomplete application, an application that goes overtime and disrupts the conduct of the Chambers session, or that the judge who received the application simply orders it re-scheduled to a future appearance with the appropriate duration.

112 In criticizing this practice I understand why it happens. The Alberta Court of Queen's Bench is no longer able to respond to litigants in a timely manner due to the now notorious failure of governments to maintain an adequate judicial complement, facilities, and supporting staff. In *Ewanchuk v. Canada (Attorney General)*, at para 178 I reported how long persons must wait to access this court, for example waiting over a year to conduct a one-day special chambers hearing. While preparing this judgment I checked to see if things have improved. They haven't.

113 When people attempt to 'game the system', and jump the que, that simply makes things worse. Again, in saying this, I am not denying that I understand the reason why this happens. It is just this ship is riding low in the water, if not sinking. Placing unanticipated pressures on this institution only makes things worse.

114 Lawyers have a special responsibility in the efficient management and allocation of limited court resources. They are the ones who are best positioned to accurately estimate the time needed for a court procedure, a hearing, or a trial. Lawyers cause great and cascading harm when they try to squeeze large pegs into small holes. The result is the surrounding wood shatters. A lawyer should not be surprised if this Court concludes the lawyer should personally face costs for this pernicious practice. It must stop. In one sense or another, we are all on the same (sinking) ship. Don't make it capsize.

d. Delay

115 Delay is an increasing issue in both civil and criminal proceedings in Canada. *R. v. Jordan* and *R. v. Cody* challenge the "culture of complacency" which has led to long and unacceptable pre-trial delays. These two decisions demand all court actors take steps to ensure 'justice delayed is not justice denied.'

116 *Jodoin* also makes explicit that when a lawyer represents a client, delays in a civil proceeding may be a basis to order costs are paid by the lawyer. In *Pacific Mobile Corp. v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842, 26 N.R. 453 (S.C.C.) unnecessary repeated adjournments were one of the bases that Pigeon J identified for the award of costs against lawyers, personally. In *Jodoin* at para 29 Gascon J identifies "dilatory" proceedings as a basis for targeting a lawyer for costs:

> . . . lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. ...

117 Avoiding delay is clearly a priority in the new post-"culture shift" civil litigation environment, but since this particular factor is not in play in the current costs proceeding I will not comment further on this basis for a potential costs award against a lawyer. This complex subject is better explored in the context of a fact scenario that involves potentially unnecessary or unexplained adjournments, and other questionable procedures that caused delay.

C. Conclusion

118 The Supreme Court of Canada has now provided clear guidance that Canada's legal apparatus can only operate, provide "access to justice", by refocussing the operation of courts to achieve "fair and just" results, but in a manner that is proportionate to the issues and interests involved. I have reviewed some of the aspects of this "culture shift".

119 This objective involves many actors. Parliament and the legislatures should design procedures and rules that better align with this objective. Some kinds of disputes, such as family law matters that involve children, are poor matches for the adversarial court context. Judges and courts should develop new approaches, both formal and informal, to better triage, investigate, and resolve disputes. Judicial review and appeal courts should be mindful to limit their intrusion into the operation of subordinate tribunals.

120 Litigants and their lawyers have a part in this. *Hryniak v. Mauldin*, *R. v. Jordan*, *R. v. Cody*, and now *Jodoin* indicate that in Canada being in court is a right that comes with responsibilities. Lawyers are a critical interface between the courts and the lay public. Their conduct will be scrutinized in this new reality. The door of "access to justice" swings open or drops like a portcullis depending on how the courts and their resources are used. Personal court costs awards against lawyers are simply a tool to help the court apparatus function, and ultimately that is to everyone's benefit.

V. Priscilla Kennedy's Litigation Misconduct

121 I reject that 'litigating from one's heart' is any defence to a potential costs award vs a lawyer, or for that matter from any other sanction potentially faced by a lawyer. Lawyers are not actors, orators, or musicians, whose task is to convey and elicit emotions. They are highly trained technicians within a domain called law. A perceived injustice is no basis to abuse the court, breach one's oath of office, or your duties as a court officer.

122 When a lawyer participates in abusive litigation that lawyer is not an empty vessel, but an accessory to that abuse. Persons are subject to sanctions including imprisonment where they engage in misconduct but are willfully blind to that wrongdoing. Lawyers have responsibilities and are held to a standard that flows from their education and training, and it is on that basis that Canadian courts give them a special trusted status. Abuse of that trust will have consequences.

123 Turning to Stoney's lawyer, Priscilla Kennedy, there are two main bases on which Ms. Kennedy may be liable for a court-ordered costs award against her, personally.

A. Futile Litigation

124 First, the August 12, 2016 application filed by Kennedy on behalf of Stoney was clearly an example of futile litigation. This is detailed in *Sawridge #6* at paras 38-52.

125 The August 12, 2016 application seeks to have Stoney added as a beneficiary of Sawridge 1985 Trust because he says he is in fact and law a member of the Sawridge Band. Stoney was refused membership in the Sawridge Band and challenged that result in Federal Court by judicial review, where his application was rejected: *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.). The Federal Court decision was not appealed. Kennedy was Stoney's lawyer in this proceeding. I concluded in *Sawridge #6* that the August 12, 2016 application was a collateral attack on the Federal Court's decision and authority. It is " . . . an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.": *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.) at 599, (1983), 4 D.L.R. (4th) 577 (S.C.C.).

126 I have previously commented on how a collateral attack is a very serious form of litigation misconduct that is a basis for court intervention and response. Kennedy was perfectly aware of the result in *Stoney v. Sawridge First Nation*. She was Stoney's lawyer in that proceeding. Further, the arguments made against Stoney by the Sawridge Band and the Sawridge 1985 Trust Trustees made clear that Kennedy was attempting to re-litigate on the same ultimate subject.

127 My review of Stoney's submissions in *Sawridge #6* and the reported *Stoney v. Sawridge First Nation* arguments illustrates that Kennedy's arguments in these two proceedings are effectively the same. Kennedy brought nothing novel to the *Sawridge #6* dispute.

128 It gets worse. Not only was *Stoney v. Sawridge First Nation* judicial review unsuccessful, but in that decision Justice Barnes at para 16 observed that Maurice Stoney had raised the same claim years earlier, in *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.), and in that action at para 4 had acknowledged that Stoney had abandoned that aspect of the appeal because that claim "discloses no reasonable cause of action". Justice Barnes therefore at para 17 concluded (and I agree) that the result in *Stoney v. Sawridge First Nation* was already barred by issue estoppel - Stoney was attempting to " . . . relitigate the same issue that was conclusively determined in an earlier proceeding."

129 Kennedy therefore did not merely engage in a hopeless proceeding before me. The *Stoney v. Sawridge First Nation* judicial review was also doomed from the start. Both actions were abuse of the courts. Neither Stoney nor Kennedy had any right to waste court and respondent resources in these actions.

130 Kennedy's counsel admitted this is true, that the August 12, 2016 application was hopeless from the start, and an abuse of court processes.

131 Acting to advance a futile action such as a collateral attack which proceeds in the face of objections on that ground is a clear basis to find a lawyer has engaged in serious abuse of judicial processes, and to then order costs against the lawyer, personally. The *Sawridge #6* application was an unfounded, frivolous, and vexatious proceeding. This was a serious abuse not only because of the character of the misconduct (a futile action), but that misconduct is aggravated because Kennedy had done the same thing with the same client before. There is a pattern here, and one that should be sharply discouraged.

132 This is the first basis on which I conclude that Priscilla Kennedy should be personally liable for litigation costs in the *Sawridge #6* application.

B. Representing Non-Clients

133 The three affidavits presented by Kennedy do not establish that Maurice Stoney was authorized to represent his siblings. Even at the most generous, these affidavits only indicate that Bill and Gail Stoney gave some kind of oral sanction for Maurice Stoney to act on their behalf. I put no weight on the affidavit of Shelley Stoney. It is hearsay, and presumptively inadmissible.

134 I note that none of these affidavits were supported by any form of documentation, either evidence or records of communications between Maurice Stoney and his siblings, or between Kennedy and her purported clients.

135 I make an adverse inference from the absence of any documentary evidence of the latter. The fact that no documentation to support that Kennedy and the Stoney siblings communicated in any manner, let alone gave Kennedy authority to act on their behalf, means none exists.

136 There is no documentation to establish that Maurice Stoney applied to become a litigation representative or was appointed a litigation representative, per *Rules* 2.11-2.21. This is not a class action scenario where Maurice Stoney is a representative applicant. While Kennedy has argued that Maurice Stoney's siblings are elderly and unable to conduct litigation, then that is not simply a basis to arbitrarily add their names to court filing. Instead, a person who lacks the capacity to represent themselves (*Rule* 2.11(c-d)) may have a self-appointed litigation representative (*Rule* 2.14), but only after filing appropriate documentation (*Rule* 2.14(4)). That did not occur.

137 I therefore conclude on a balance of probabilities that Kennedy did not have instructions or a legal basis to file the August 12, 2016 application on behalf of "Maurice Felix Stoney and his brothers and sisters".

138 I adopt the reasoning of Graesser J in *Morin v. TransAlta Utilities Corporation* that a costs award against a lawyer is appropriate where that lawyer engages in unauthorized "busybody litigation". This is a deep and fundamental breach of a lawyer's professional, contractual, and court-related obligations.

139 While at the July 28, 2017 hearing I concluded that no potential costs liability should be placed on Bill and Gail Stoney, I stress the potential deleterious consequences to these individuals for them being gathered into this Action in an uncertain and ill-defined manner. The Sawridge Band and Trustees stressed the importance of *informed* consent, and I have no confidence that sort of consent was obtained for either Bill or Gail Stoney, let alone the other siblings of Maurice Stoney.

140 In any case, I order costs against Kennedy on the basis of her "busybody litigation", but I believe that the submissions received in this costs application are a further aggravating factor given the potential of putting persons who are operationally non-clients at risk of court-imposed sanctions. This is a second independent basis that I find Kennedy should be liable to pay costs.

C. The Presence of* Chutskoff Estate v. Bonora *"Indicia" and other Aggravating Factors

141 As previously indicated, the presence of *Chutskoff Estate v. Bonora* "indicia" may assist the court in determining whether or not a lawyer has engaged in abusive litigation that is "serious abuse".

142 A point that was in dispute at the *Sawridge #6* application was whether or not Stoney had outstanding unpaid costs orders. This is a well-established indicium of vexatious litigation: *Chutskoff Estate v. Bonora* at para 92. This is a useful point to illustrate how, in my opinion, *Jodoin* instructs how a court 'quarantines' relevant vs extraneous evidence when the court evaluates a lawyer's potential liability due to litigation abuse. One of the allegations that emerged was that Stoney had not paid the costs awarded against him in *Stoney v. Sawridge First Nation*. If so, then that fact aggravates the fact Kennedy then conducted a collateral attack on the judicial review's outcome. Similarly, Maurice Stoney's failure to pay costs in relation to the *Stoney v. Twinn* appeal of *Sawridge #3* is related to the August 12, 2016 application by both subject matter and as it occurred in the same overall litigation. However, if Stoney had, hypothetically, not paid costs awarded in other actions where he was represented by Kennedy then that is of little relevance to this specific decision and the question of whether Kennedy should be liable for the *Sawridge #6* costs award.

143 I conclude that the fact that Kennedy proceeded with the August 12, 2016 application while there were outstanding costs orders in relation to *Stoney v. Sawridge First Nation* and *Stoney v. Twinn* is an aggravating factor but not, in itself, a basis to order costs against Kennedy.

144 The Trustees and Band indicated I should consider Kennedy's conduct during cross-examination of her client on his affidavit. While I have reviewed that material I do not think it is germane to my analysis because Kennedy's obstructionist conduct is distinct from the main bases for my award of costs against Kennedy. Similarly, the degree to which Kennedy was "holding the reins" of this litigation is not actually directly relevant to my analysis. What is critical is that the August 12, 2016 application had no merit. Kennedy's misconduct is essentially the same no matter whether she 'was just following orders', or 'the person behind the wheel'.

145 Another factor which I conclude is relevant and aggravating is that the Stoney August 12, 2016 application attempts to off-load litigation costs on the 1985 Sawridge Trust. Stoney's application seeks to have his entire litigation costs paid from the Trust. I would consider it a significant indication of good faith litigation intent if Stoney had acknowledged his litigation was 'a long shot', and acknowledged a willingness to cover the consequences to other involved parties. Instead Stoney resisted an application by the Sawridge Band that he pay security for costs.

146 The attempted 'offloading' of litigation costs in this instance is not in itself a basis to conclude that Kennedy should be liable to pay her client's court costs, but it favours that result. Stoney, whether he won or lost, sought to have the beneficiaries of an aboriginally owned trust pay for his (and his lawyer's) expenses.

147 Another aggravating factor is that in *Sawridge #2* I concluded at para 35 that this Court would not take jurisdiction to review the Sawridge Band membership process. That was the jurisdiction of the Federal Courts. Stoney and Kennedy ignored that instruction by advancing the *Sawridge #6* application.

148 Last, I note that Stoney's application has a special aggravating element. The intended relief was that Stoney be added as a member of an Indian Band. There is no need to review and detail the extensive jurisprudence on the special *sui generis* character of aboriginal title, how aboriginal property is held in a collective and community-based manner, and the unique fiduciary relationship between the Crown and Canada's aboriginal peoples. Suffice to say that membership in an Indian Band brings unusual consequences to both the member and that band member's community.

149 Put simply, a challenge to that status, and the internal decision-making, self-determination, and self-government of an aboriginal community is a serious matter. If I had been unclear on whether an illegal and futile attempt to conduct a collateral attack on the *Stoney v. Sawridge First Nation* decision qualified as "serious abuse" then I would have no difficulty concluding the *Sawridge #6* application was "serious abuse of the judicial system" in light of the interests involved, combined with the fact the Stoney application had no basis in law or fact.

D. Conclusion

150 I conclude that Priscilla Kennedy has conducted "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system" on two independent bases:

1. she conducted futile litigation that was a collateral attack of a prior unappealed decision of a Canadian court, and

2. she conducted that litigation allegedly on behalf of persons who were not her clients on a "busybody" basis.

151 Each of these are a basis for concluding that Kennedy should be liable for the *Sawridge #6* costs, personally. The aggravating factors I have identified simple emphasize that conclusion and result is correct.

E. Quantum of the Costs Award

152 In certain instances it might be possible to conclude that a lawyer's participation in an abusive application or action is really only related to a part of the problematic events, and on that basis a court might only make a lawyer responsible for a part of the court-ordered costs.

153 Here, however, Kennedy was involved fully throughout the *Sawridge #6* application. The abusive character of that litigation was established from the August 12, 2016 application date, onwards. I therefore conclude that Kennedy and Stoney are liable for the full costs of *Sawridge #6*, on a joint and several basis.

VI. Conclusion

154 I order that Kennedy is personally liable for the solicitor and own client indemnity costs that I ordered in *Sawridge #6* at paras 67-68, along with her client.

155 Stoney, Kennedy, the Trustees, and the Sawridge Band may return to the court within 30 days of this decision if they require assistance to determine those costs. Once determined, costs are payable immediately.

156 In light of my conclusion that Kennedy is responsible for conducting litigation that abused the Alberta Court of Queen's Bench's processes and the other Sawridge Advice and Direction Application participants, Kennedy admitting the same, and the nature and character of that abuse, I direct that a copy of this judgment shall be delivered to the Law Society of Alberta for its review.

Solicitor and own client costs awarded against applicant and counsel.

Tab 3

Paras 114-115
123-124

2017 ABQB 548
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

2017 CarswellAlta 1639, 2017 ABQB 548, [2017] A.W.L.D. 5010, 283 A.C.W.S. (3d) 55

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

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

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

D.R.G. Thomas J.

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

Counsel: Priscilla Kennedy, for Applicant, Maurice Felix Stoney
Edward H. Molstad, Q.C., for Sawridge Band
D.C. Bonora, for 1985 Sawridge Trustees

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

Headnote

Civil practice and procedure --- Actions — Suspension of right of action — Plaintiff persistently instituting vexatious proceedings

First Nations trust applied for directions as to distribution of trust — S whose family had formerly been members of First Nation was unsuccessful in attempts to be recognized as member — S continued to bring applications in various courts and before human rights tribunal in search for status — Case management judge put in place interim court order to restrict S from initiating or continuing litigation in Alberta courts, and sought submissions as to whether S should be subject to vexatious litigant order — Order made requiring S to seek leave prior to initiating or continuing litigation in Alberta Court of Queen's Bench and Alberta Provincial Court relating to persons and organizations involved with First Nation and S's disputes concerning membership in it — Payment of all outstanding costs awards prerequisite to leave — S's allegations of conspiracy against self and siblings raised concern that S might shift focus from First Nation and Trusts to individuals involved in the prior litigation and First Nation membership-related processes and decisions — S's refusal to accept dismissal of his claim was very strong predictor of future abusive litigation — Order flowed from court's inherent jurisdiction as strict persistence-driven approach in Judicature Act only targets misconduct that has already occurred — S had history of repeated collateral attacks in relation to subject and related parties — Attempts to re-litigate same issues also represented hopeless litigation — S engaged in busybody litigation exposing others to risk of costs consequences — S failed to pay costs and attempted to shift responsibility onto trust, which would have depleted communal property of First Nation — Forum shopping by S implied intent to evade legitimate litigation control processes and legal principles, including res judicata — Unproven allegations of fraud provided insight into S's litigation objectives.

CONSIDERATION by court of vexatious litigant order.

D.R.G. Thomas J.:

I Introduction

1 The Action to which this decision ultimately relates was commenced on June 12, 2011 by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application". The 1985 Sawridge Trust applied to this Court for directions on how to distribute the Trust property to its beneficiaries. Members of the Sawridge Band are the beneficiaries of that Trust. The initial application has led to many court case management hearings, applications, decisions, and appeals: *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365, 543 A.R. 90 (Alta. Q.B.) ("*Sawridge #1*"), aff'd 2013 ABCA 226, 553 A.R. 324 (Alta. C.A.) ("*Sawridge #2*"); *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2015 ABQB 799 (Alta. Q.B.) ("***Sawridge #3***"), time extension denied 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.); *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2017 ABQB 299 (Alta. Q.B.) ("***Sawridge #4***"); *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 377 (Alta. Q.B.) ("***Sawridge #5***"); *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 436 (Alta. Q.B.) ("***Sawridge #6***"); *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 (Alta. Q.B.) ("***Sawridge #7***").

2 On July 12, 2017 I rejected an August 12, 2016 application by Maurice Felix Stoney that he and "his brothers and sisters" should be added as beneficiaries to the 1985 Sawridge Trust: *Sawridge #6*. In that decision I concluded that Stoney's application was a collateral attack on previously decided issues, hopeless, without merit, and an abuse of court: paras 34-52. I also concluded that there was no evidence to support that Maurice Stoney's "10 living brothers or sisters" were, in fact, voluntary participants in this application: paras 8-12.

3 I therefore:

1. limited the scope of the August 12, 2016 application to Maurice Stoney;

2. struck out the August 12, 2016 application;

3. ordered solicitor and own client indemnity costs against Maurice Stoney;

4. ordered that Stoney's lawyer, Priscilla Kennedy, appear on July 28, 2017 to make submissions as to whether she should be personally liable for that litigation costs award;

5. concluded that Maurice Stoney's August 12, 2016 application exhibits indicia of abusive litigation, and, therefore, on my own motion and pursuant to the Court's inherent jurisdiction:

a) put in place an interim court order to restrict Maurice Stoney's initiating or continuing litigation in Alberta Courts, and

b) instructed that Maurice Stoney, the Sawridge 1985 Trustees, and the intervener Sawridge Band may file written submissions as to whether Maurice Stoney should have his court access restricted via what is commonly called a "vexatious litigant" order.

4 Written submissions were received from the Trustees on July 26, 2017, the Sawridge Band on July 27, 2017, and Maurice Stoney on August 3, 2017.

5 On August 31, 2017 I issued *Sawridge #7*, where I concluded that Priscilla Kennedy and Maurice Stoney were jointly and severally liable for the costs award ordered in *Sawridge #6*.

6 This judgment evaluates whether Maurice Stoney should be the subject of restrictions on his future litigation activity in Alberta courts.

II. Abusive Litigation and Court Access Restrictions

7 The principles and procedure that govern court-ordered restrictions to access Alberta courts are developed in a number of recent decisions of this Court. This Court's inherent jurisdiction to control abuse of its processes includes

that the Alberta Court of Queen's Bench may order that a person requires leave to initiate or continue an action or application: *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 14-25, (2016), 273 A.C.W.S. (3d) 533 (Alta. Q.B.), leave denied 2017 ABCA 63 (Alta. C.A.), leave to the SCC requested, 37624 (12 April 2017) [2017 CarswellAlta 1143 (S.C.C.)]; *Thompson v. IUOE, Local 955*, 2017 ABQB 210 (Alta. Q.B.) at para 56, affirmed 2017 ABCA 193 (Alta. C.A.); *Ewanchuk v. Canada (Attorney General)*, 2017 ABQB 237 (Alta. Q.B.) at paras 92-96;*McCargar v. Canada*, 2017 ABQB 416 (Alta. Q.B.) at para 110.

8 An intervention of this kind is potentially warranted when a litigant exhibits one or more "indicia" of abusive litigation: *Chutskoff Estate v. Bonora*, 2014 ABQB 389 (Alta. Q.B.) at para 92, (2014), 590 A.R. 288 (Alta. Q.B.), aff'd 2014 ABCA 444 (Alta. C.A.); *Boisjoli, Re*, 2015 ABQB 629 (Alta. Q.B.) at paras 98-103, (2015), 29 Alta. L.R. (6th) 334 (Alta. Q.B.); *McCargar v. Canada*, 2017 ABQB 416 (Alta. Q.B.) at para 112. Where a judge concludes these "indicia" are present and control of abusive litigation may be appropriate then the Court usually follows a two-step process prior to imposing court access restrictions, if appropriate: *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 10-11; *Ewanchuk v. Canada (Attorney General)*, at para 97.

9 *Sawridge #6*, at para 55 identified three types of litigation abuse behaviour by Maurice Stoney that potentially warranted court access restrictions:

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

10 I therefore on an interim basis and pursuant to *Hok v. Alberta*, 2016 ABQB 335 (Alta. Q.B.) at para 105 restricted Maurice Stoney's litigation activities (*Sawridge #6*, at para 65-66), and invited submissions on whether Maurice Stoney's litigation activities should be restricted, and if so, in what manner (*Sawridge #6*, at paras 63-64).

11 Subsequently Associate Chief Justice Rooke on July 20, 2017 granted an exception to this interim order in relation to *Nussbaum v. Stoney* [(July 20, 2017), Doc. 1603-03761 (Alta. Q.B.)], Alberta Court of Queen's Bench docket 1603 03761 (the "Rooke Order").

12 The current decision completes the second step of the two-part *Hok v. Alberta* process.

13 Relevant evidence for this analysis includes activities both inside and outside of court:

> *Bishop v. Bishop*, 2011 ONCA 211 (Ont. C.A.) at para 9, (2011), 200 A.C.W.S. (3d) 1021 (Ont. C.A.), leave to SCC refused, 34271 (20 November 2011) [2011 CarswellOnt 10865 (S.C.C.)]; *Henry v. El*, 2010 ABCA 312 (Alta. C.A.) at paras 2-3, 5, (2010), 193 A.C.W.S. (3d) 1099 (Alta. C.A.), leave to SCC refused, 34172 (14 July 2011) [2011 CarswellAlta 1197 (S.C.C.)]. A litigant's entire court history is relevant, including litigation in other jurisdictions: *McMeekin v. Alberta (Attorney General)*, 2012 ABQB 456 (Alta. Q.B.) at paras 83-127, (2012), 543 A.R. 132 (Alta. Q.B.); *Curle v. Curle*, 2014 ONSC 1077 (Ont. S.C.J.) at para 24;*Fearn v. Canada (Customs)*, 2014 ABQB 114 (Alta. Q.B.) at paras 102-105, (2014), 586 A.R. 23 (Alta. Q.B.). That includes non-judicial proceedings, as those may establish a larger pattern of behaviour: *Bishop v. Bishop* at para 9; *Canada Post Corp. v. Varma* [2000 CarswellNat 1183 (Fed. T.D.)], 2000 CanLII 15754 at para 23, (2000), 192 F.T.R. 278 (Fed. T.D.); *West Vancouver School District No. 45 v. Callow*, 2014 ONSC 2547 (Ont. S.C.J.) at para 39. A court may take judicial notice of public records when it evaluates the degree and kind of misconduct caused by a candidate abusive litigant: *Wong v. Giannacopoulos*, 2011 ABCA 277 (Alta. C.A.) at para 6, (2011), 515 A.R. 58 (Alta. C.A.).

14 A court may order court access restrictions where future litigation abuse is *anticipated.* As Verville J observed in *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at para 37:

> . . . when a court makes a vexatious litigant order it should do so to respond to anticipated abuse of court processes. This is a prospective case management step, rather than punitive. [emphasis in original]

15 When a court considers limits to future court access by a person with a history of litigation misconduct the key questions for a court are:

1. Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?

2. What litigation subject or subjects are likely involved in that abuse of court processes?

3. In what forums will that abuse occur? (*Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at para 36).

16 Court access restriction orders should be measured versus and responsive to the anticipated potential for future abuse of court processes. Court access restrictions are designed in a functional manner and not restricted to formulaic approaches, but instead respond in a creative, but proportionate, manner to anticipated potential abuse: *Bhamjee v. Forsdick*, [2003] EWCA Civ 1113 (Eng. C.A.).

17 A vexatious litigant order that simply requires the abusive person obtain permission, "leave", from the court before filing documents to initiate or continue an action is a limited impediment to a person's ability to access court remedies: *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 32-33. Though this step is sometimes called "extraordinary", that dramatic language exaggerates the true and minimal effect of a leave application requirement: *Wong v. Giannacopoulos*, at para 8; *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 32-33.

18 Other more restrictive alternatives are possible, where appropriate, provided that more strict intervention is warranted by the litigant's anticipated future misconduct: *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at para 34; *Ewanchuk v. Canada (Attorney General)*, at paras 167-68.

III. Submissions and Evidence Concerning Appropriate Litigation Control Steps

A. The Sawridge Band

19 The Sawridge Band submits that this Court should exercise its inherent jurisdiction and *Judicature Act*, RSA 2000, c J-2 ss 23-23.1 to restrict Maurice Stoney's access to Alberta courts. The Sawridge Band relied on evidence concerning Maurice Stoney's activities that was submitted to the Court in relation to *Sawridge #6.*

20 The August 12, 2016 application was futile because Maurice Stoney had continued to repeat the same, already discounted argument. Maurice Stoney had not been granted automatic membership in the Sawridge Band by Bill C-31, and that fact had been either admitted or adjudicated in the *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.) and *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.) decisions.

21 Maurice Stoney was allowed to apply to become a member of the Sawridge Band, but that application was denied, as was the subsequent appeal. The lawfulness of those processes was confirmed in *Stoney v. Sawridge First Nation.*

22 A subsequent 2014 Canadian Human Rights Commission complaint concerning the membership application process again alleged the same previously rejected arguments. The same occurred before the Alberta Court of Appeal in *Stoney v. Twinn*, 2016 ABCA 51 (Alta. C.A.)

23 Maurice Stoney's persistent attempts to re-litigate the same issue represent collateral attacks and are hopeless proceedings. Stoney has failed to pay outstanding costs orders. His attempts to shift litigation costs to the 1985 Sawridge Trust are an aggravating factor. These factors imply that Maurice Stoney had brought these actions for an improper

purpose. The August 12, 2016 application was a "busybody" attempt to enforce (alleged) rights of uninvolved third parties.

24 Combined, these indicia of abusive litigation mean Maurice Stoney should be the subject of a vexatious litigant order that globally restricts his access to Alberta courts. In the alternative, a vexatious litigant order with a smaller scope should, at a minimum, restrict Maurice Stoney's potential litigation activities in relation to the Sawridge Band, its Chief and Council, the Sawridge 1985 and 1986 Trusts, and the Trustees of those trusts.

25 Given Stoney's history of not paying cost awards he should be required to pay outstanding costs orders prior to any application for leave to initiate or continue actions, as in *R. v. Grabowski*, 2015 ABCA 391 (Alta. C.A.) at para 15, (2015), 609 A.R. 217 (Alta. C.A.).

B. The Sawridge 1985 Trust Trustees

26 The Sawridge 1985 Trust Trustees adopted the arguments of the Sawridge Band, but also emphasized the importance of Maurice Stoney's answers and conduct during cross-examination on his May 16, 2016 affidavit. The Trustees stress this record shows that Maurice Stoney is uncooperative and refused to acknowledge the prior litigation results.

C. Maurice Stoney

27 Maurice Stoney's written submissions were signed by and filed by lawyer Priscilla Kennedy, identified as "Counsel for Maurice Stoney". The contents of the written submissions are, frankly, unexpected. Paragraphs 6 through 13 advance legal arguments concerning Maurice Stoney's status as a member of the Sawridge Band:

> 1. the *Huzar v. Canada* decision cannot be relied on as "evidence in this matter";
>
> 2. *Stoney v. Sawridge First Nation* is not a "thorough analysis" of Maurice Stoney's arguments;
>
> 3. Maurice Stoney has not attempted to re-litigate the membership issue but rather to set out the legal arguments that address the definition of a beneficiary of the 1985 Sawridge Trust; and
>
> 4. " . . . there have been a number of recent decisions on these constitutional issues that have and are in the process of completely altering the law related to these issues of the membership/citizenship of Indians, in order to have them comply with the *Constitution*." [Italics in original].

28 Paragraph 14 of the written brief, which follows these statements, reads:

> It is acknowledged that this court has dismissed these arguments and they are not referred to here, other than as the facts to set the context for the matters to be dealt
>
> with as directed on the issue of whether or not the application of Maurice Stoney was vexatious litigation.

29 I reject that a bald statement that these are "the facts" proves anything, or establishes these statements are, in fact, true or correct.

30 The brief then continues at paras 16-17, 24, 28 to state:

> As shown by the litigation in the Sawridge Band cases above, the on-going case in [Descheneaux c Canada (Procureur Général), 2015 QCCS 3555] and the decision of the Supreme Court of Canada in [Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 SCR 99], and the review of the Federal Court of Appeal decision in Huzar and the judicial review in Stoney, it is submitted that this is not a proceeding where the issue has been determined by a court of competent jurisdiction. Nor is this a matter where proceedings have been brought that cannot succeed or have no reasonable expectation of providing relief.

> It is submitted that litigation seeking to determine whether or not you qualify as a beneficiary under a trust established on April 15, 1985 is a matter where the issue of membership/citizenship has not been settled by the courts, and this application was not brought for an improper purpose . . .
>
> Contrary to the argument of Sawridge First Nation these matters have not been determined in the past Federal Court proceedings. Issues of citizenship and the constitutionality of these proceedings remains a legal question today as shown by the on-going litigation throughout Canada. Plainly, this Court has determined that these arguments are dismissed in this matter and that is acknowledged.
>
> . . . No conclusion was made in the 1995 Federal Court proceedings which were struck as showing no reasonable cause of action and the judicial review was concerned with the issue of the Sawridge First Nation Appeal Committee decision based on membership rules post September, 1985.

31 These are reasons why the August 12, 2016 application was not a collateral attack:

> No disrespect for the court process or intention to bring proceedings for an improper purpose, was intended to be raised by these arguments respecting this time period and the definitions of a beneficiary of this trust.
>
> (Written brief, para 23).

32 Prior to going any further I will at this point explain that I put no *legal* weight on these statements. If Maurice Stoney wishes to appeal *Sawridge #6* and my conclusions therein he may do so. In fact he did file an appeal of *Sawridge #6* as a self-represented litigant on August 11, 2017. If Maurice Stoney or his counsel wish to revisit *Sawridge #6* then they could have made an application under *Rule* 9.13 of the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"], however they did not elect to do so. I conclude these statements, no matter how they were allegedly framed in paragraphs 14 and 23 of Stoney's written arguments, are nothing more than an attempt to re-argue *Sawridge #6*. Again, I put no *legal* weight on these arguments, but conclude these statements are highly relevant as to whether Maurice Stoney is likely to in the future re-argue issues that have been determined conclusively by Canadian courts.

33 Other submissions by Maurice Stoney are more directly relevant to his potentially being the subject of court-ordered restrictions. He acknowledges that there are unpaid costs to the Sawridge First Nation, but says these will be paid " . . . as soon as it is possible ...". Stoney indicates he has been unable to pay these costs amounts because of a foreclosure action.

34 Affidavit evidence allegedly has established that Maurice Stoney was authorized to represent his brothers and sisters, and that Maurice Stoney was directed to act on their behalf. Counsel for Stoney unexpectedly cites *Federal Courts Rules*, SOR/98-106, s 114 as the authority for the process that Maurice Stoney followed when filing his August 12, 2016 application in the Alberta Court of Queen's Bench:

> . . . The Federal Court Rules, provide for Representative proceedings where the representative asserts common issues of law and fact, the representative is authorized to act on behalf of the represented persons, the representative can fairly and adequately represent the interests of the represented persons and the use of a representative proceeding is the just, more efficient and least costly manner of proceeding. This method of proceeding is frequently used for aboriginals and particularly for families who are aboriginal. It is submitted that this was the most efficient and least costly manner of proceeding in the circumstances where the claim of all of the living children possess the same precise issues respecting their citizenship.
>
> (Written Brief, para 24.)

Maurice Stoney therefore denies this was a "busybody" proceeding where he without authority attempted to represent third parties.

35 The written argument concludes that Maurice Stoney should not be the subject of court access restrictions, but if the Court concludes that step is necessary then that restriction should only apply to litigation vs the Sawridge Band and 1985 Sawridge Trust.

D. Evidence

36 The Trustees and the Sawridge Band entered as evidence a transcript of Maurice Stoney's cross-examination on his May 16, 2016 affidavit. This transcript illustrates a number of relevant points.

1. Maurice Stoney claims to be acting on behalf of himself and his brothers and sisters, and that he has their consent to do that: pp 9-10.

2. Maurice Stoney believes his father was forced out of Indian status by the federal government: p 12.

2. Maurice Stoney and his counsel Priscilla Kennedy do not accept that Maurice Stoney was refused automatic membership in the Sawridge Band by the *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.) and *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.) decisions: pp 23-27, 30-33.

3. Maurice Stoney claims he made an application for membership in the Sawridge Band in 1985 but that this application was "ignored": pp 37-39. Stoney however did not have a copy of that application: pp 39-40.

4. Maurice Stoney refused to answer a number of questions, including:

- whether he had read the *Stoney v. Sawridge First Nation* decision (pp 32-33),
- whether he had made a Canadian Human Rights Commission complaint against the Sawridge Band (p 54),
- whether he had ever read the Sawridge Trust's documentation (pp 60-61),
- the identity of other persons whose Sawridge Band applications were allegedly ignored (pp 63-64), and
- the health status of the siblings for whom Maurice Stoney was allegedly a representative (p 66).

5. Maurice Stoney claims that the Sawridge Band membership application process is biased: pp 41-42.

37 Maurice Stoney introduced three affidavits which he says indicate the August 12, 2016 application was not a "busybody" proceeding and instead Maurice Stoney was authorized to represent his other siblings in the Sawridge Advice and Direction Application:

1. Shelley Stoney, dated July 20, 2017, saying she is the daughter of Bill Stoney and the niece of Maurice Stoney. She is responsible "for driving my father and uncles who are all suffering health problems and elderly." Shelley Stoney attests " . . . from discussions among my father and his brothers and sisters" that Maurice Stoney was authorized to bring the August 12, 2016 application on their behalf.

2. Bill Stoney, brother of Maurice Stoney, dated July 20, 2017, saying he authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.

3. Gail Stoney, sister of Maurice Stoney, dated July 20, 2017, saying she authorized Maurice Stoney to make the August 12, 2016 application on his behalf in the spring of 2016.

38 In *Sawridge #7* at paras 133-37 I conclude these affidavits should receive little weight:

The three affidavits presented by Kennedy do not establish that Maurice Stoney was authorized to represent his siblings. Even at the most generous, these affidavits only indicate that Bill and Gail Stoney gave some kind of oral sanction for Maurice Stoney to act on their behalf. I put no weight on the affidavit of Shelley Stoney. It is hearsay, and presumptively inadmissible.

I note that none of these affidavits were supported by any form of documentation, either evidence or records of communications between Maurice Stoney and his siblings, or between Kennedy and her purported clients.

I make an adverse inference from the absence of any documentary evidence of the latter. The fact that no documentation to support that Kennedy and the Stoney siblings communicated in any manner, let alone gave Kennedy authority to act on their behalf, means none exists.

There is no documentation to establish that Maurice Stoney applied to become a litigation representative or was appointed a litigation representative, per *Rules* 2.11-2.21. This is not a class action scenario where Maurice Stoney is a

representative applicant. While Kennedy has argued that Maurice Stoney's siblings are elderly and unable to conduct litigation, then that is not simply a basis to arbitrarily add their names to court filing. Instead, a person who lacks the capacity to represent themselves (*Rule* 2.11(c-d)) may have a self-appointed litigation representative (*Rule* 2.14), but only after filing appropriate documentation (*Rule* 2.14(4)). That did not occur.

39 I come to the same conclusion here and also find as a fact that in this proceeding Maurice Stoney was not authorized to file the August 12, 2016 application on behalf of his siblings.

IV. Analysis

40 What remains are two steps:

1. to evaluate the form and seriousness of Maurice Stoney's litigation misconduct, and

2. determine whether court access restrictions are appropriate, and, if so, what those restrictions should be.

41 However, prior to that I believe it is helpful to briefly explore the inherent jurisdiction of this Court to limit litigant activities, vs the authority provided in *Judicature Act*, ss 23-23.1, since these two mechanisms were broached in the submissions of the parties.

A. Control of Abusive Litigation via Inherent Jurisdiction vs the Judicature Act

42 An argument can be made that that Alberta Court of Queen's Bench may only restrict prospective litigation via the procedure in *Judicature Act*, ss 23-23.1. I disagree with that position, though at present this question has not been explicitly and conclusively decided by the Alberta Court of Appeal, or the Supreme Court of Canada.

43 The most detailed investigation of this issue is found in *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.), where Verville J at paras 14-25 concluded that one element of this Court's inherent jurisdiction is an authority to restrict prospective and hypothetical litigation activities, both applications and entirely new actions.

44 In coming to that conclusion Justice Verville rejected a principle found in I H Jacobs often-cited paper, "The Inherent Jurisdiction of the Court" ((1970) 23:1 Current Legal Problems 23 at 43), that UK tradition courts do not have an inherent jurisdiction to block commencement of potentially abusive proceedings:

The court has no power, even under its inherent jurisdiction, to prevent a person from commencing proceedings which may turn out to be vexatious. It is possibly by virtue of this principle that many a litigant in person, perhaps confusing some substratum of grievance with an infringement of legal right, is lured into using the machinery of

> the court as a remedy for his ills only to find his proceedings summarily dismissed as being frivolous and vexatious and an abuse of the process of the court. The inherent jurisdiction of the court has, however, been supplemented by statutory power to restrain a vexatious litigant from instituting or continuing any legal proceedings without leave of the court.

45 Jacobs elsewhere in his paper explains that the inherent jurisdiction of the court flows from its historic operation, and stresses this is an adaptive tool that applies as necessary to address issues that would otherwise interfere with the administration of justice and the court's operations:

> . . . inherent jurisdiction of the court may be defined as the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. ...
>
> (Jacobs at 51)

46 However, Jacob's conclusion that courts have no inherent jurisdiction to limit future litigation was based on a historical error, as explained in *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.), at para 17:

> Two UK Court of Appeal decisions, Ebert v Birch & Anor, (also cited as Ebert v Venvil), [1999] EWCA Civ 3043 (UK CA) and Bhamjee v Forsdick & Ors (No 2), [2003] EWCA Civ 1113 (UK CA), set out the common law authority of UK courts to restrict litigant court access. Some Commonwealth authorities had concluded that UK and Commonwealth courts had no inherent jurisdiction to restrict a person from initiating new court proceedings, and instead that authority was first obtained when Parliament passed the Vexatious Actions Act, 1896.
>
> Ebert concludes that is false, as historical research determined that in the UK courts had exercised common law authority to restrict persons initiating new litigation prior to passage of the Vexatious Actions Act, 1896. That legislation and its successors do not codify the court's authority, but instead legislative and common-law inherent jurisdiction control processes co-exist.

47 Furthermore, the Alberta Court of Appeal has itself issued vexatious litigant orders which do not conform to *Judicature Act* processes. For example, in *Dykun v. Odishaw*, 2001 ABCA 204, 286 A.R. 392 (Alta. C.A.), that Court issued an "injunction" that restricted court access without either an originating notice or the consent of the Minister of Justice and Attorney General of Alberta (then required by *Judicature Act*, s 23.1). Justice Verville concludes (*Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.), at paras 19-20, 25), and I agree, that this means Alberta courts have an inherent jurisdiction to take steps of this kind. If the Court of Appeal had the inherent jurisdiction to make the order it issued in *Dykun v. Odishaw*, then so does the Alberta Court of Queen's Bench.

48 Beyond that, the efficient administration of justice simply requires that there must be an effective mechanism by which the courts may control abusive litigation and litigants. This must, of course, meet the constitutional requirement that any obstacle or expense requirement placed in front of a potential court participant does not " . . . effectively [deny] people the right to take their cases to court ..." or cause "undue hardship": *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (S.C.C.) at paras 40, 45-48, [2014] 3 S.C.R. 31 (S.C.C.). As I have previously observed, an obligation to make a document-based application for leave to file is a comparatively minor imposition and obviously does not cause "undue hardship".

49 The question, then, is whether the *Judicature Act*, ss 23-23.1 procedure is an adequate one, or does the Court need to draw on its "reserve" of "residual powers" to design an effective mechanism to control abusive litigants and litigation. I conclude that it must. A critical defect in this legislation is that section 23(2) defines proceedings that are conducted in a "vexatious manner" as requiring "persistent" misconduct, for example "persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction" [emphasis added]: *Judicature Act*, s 23(2)(a).

50 The Alberta Court of Appeal in certain decisions that apply *Judicature Act*, ss 23-23.1 appears to apply this rule in a strict manner, for example, in *O. (R.) v. F. (D.)*, 2016 ABCA 170, 36 Alta. L.R. (6th) 282 (Alta. C.A.) at para 38 the Court stresses this requirement. Further, the *O. (R.) v. F. (D.)* decision restricts the scope of a *Judicature Act*, ss 23-23.1 order on the basis that the vexatious litigant had no " . . . history of "persistently" ..." engaging in misconduct that involves outside parties. In other words, according to *O. (R.) v. F. (D.)* the *Judicature Act*, ss 23-23.1 process operates retrospectively. *Judicature Act*, ss 23-23.1 authorize court access restrictions only after "persistent" misconduct has occurred.

51 That said, it is clear that the Alberta Court of Appeal does not actually apply that requirement in other instances where it has made an order authorized per the *Judicature Act*. For example, in *Henry v. El* Slatter JA ordered a broad, multi-court ban on the plaintiff's court activities, though only one dispute is mentioned. There is no or little record of 'persistent history'. *Henry v. El* does not identify repeated or persistent litigation steps, nor are multiple actions noted. The misconduct that warranted the litigation restraint was bad arguments, and out- of-court misconduct: a need for the target of the misconduct to obtain police assistance, the plaintiff had foisted allegedly binding legal documents on the defendant, the abusive plaintiff was the target of a court ordered peace bond, and the abusive plaintiff posted a bounty for the defendant on the Internet.

52 In *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) at paras 36-37, Justice Verville concluded that an effective mechanism to limit court access should operate in a *prospective* manner - based on evidence that leads to a prediction of future abusive litigation activities. This is also the approach recommended in the UK Court of Appeal *Ebert v. Birch*, [1999] EWCA Civ 3043 (Eng. & Wales C.A. (Civil)) and *Bhamjee v. Forsdick* decisions.

53 However, the strict "persistence"-driven approach in the *Judicature Act* and *O. (R.) v. F. (D.)* only targets misconduct that has already occurred. It limits the court to play 'catch up' with historic patterns of abuse, only fully reining in worst-case problematic litigants after their litigation misconduct has metastasized into a cascade of abusive actions and applications.

54 That outcome can sometimes be avoided.

1. Statements of Intent

55 First, abusive litigants are sometimes quite open about their intentions. For example, in *McMeekin v. Alberta (Attorney General)*, 2012 ABQB 625 (Alta. Q.B.) at para 44, (2012), 543 A.R. 11 (Alta. Q.B.), a vexatious litigant said exactly what he planned to do in the future:

> I can write, I can write the judicature counsel, I can write the upper law society of Canada. I got Charter violations. I got administrative law violations. I've got civil contempt. I've got abuse of process. I've got abuse of qualified privilege. I can keep going, I haven't even got, I haven't even spent two days on this so far. And if you want to find out how good I am, then let's go at it. But you know, at the end of the day, I'm not walking away. And it's not going to get any better for them.

56 It seems strange that a court is prohibited from taking that kind of statement of intent into account when designing the scope of court access restrictions. This kind of stated intention obviously favours broad control of future litigation activities.

57 A modern twist on a statement of intentions is that some abusive litigants document their activities and intentions on Internet websites. For example, *West Vancouver School District No. 45 v. Callow*, 2014 ONSC 2547 (Ont. S.C.J.) at paras 31, 40 describes how an abusive court litigant had, rather conveniently, documented and recorded online his various activities and his perceptions of a corrupt court apparatus.

58 However, there is no reason why the opposite scenario would not be relevant. Where an abusive litigant chooses to take steps to indicate good faith conduct, then that action predicts future conduct, for example by taking tangible positive steps to demonstrate they are a 'fair dealer' by:

1. voluntarily terminating or limiting abusive litigation,

2. abandoning claims, restricting the scope of litigation, consenting to issues or facts previously in dispute,

59 These kinds of actions may warrant a problematic litigant receiving limited court access restrictions, or no court access restrictions at all. Rewarding positive self-regulation is consistent with the administration of justice, and a modern, functional approach to civil litigation.

2. *Demeanor and Conduct*

3. *Abuse Caused by Mental Health Issues*

4. *Litigation Abuse Motivated by Ideology*

5. *Persistent Abusive Conduct is Only One Predictor of Future Misconduct*

2. Demeanor and Conduct

60 Similarly, a trial court judge may rely on his or her perception of an abusive court participant's character, demeanor, and conduct. Obviously, there is a broad range of conduct that may be relevant, but it is helpful to look at one example. Maurice Prefontaine, a persistent and abusive litigant who has often appeared in Alberta and other Canadian courts, presents a predictable in-court pattern of conduct, which is reviewed in *R. v. Prefontaine*, 2002 ABQB 980, 12 Alta. L.R. (4th) 50 (Alta. Q.B.), appeal dismissed for want of prosecution 2004 ABCA 100, 61 W.C.B. (2d) 306 (Alta. C.A.).

61 Mr. Prefontaine presented himself in a generally ordered, polite manner in court. He was at one point a lawyer. He has for years pursued a dispute with the Canada Revenue Agency, and has appeared on many occasions in relation to that matter. Mr. Prefontaine's behaviour changed in a marked but predictable manner when his submissions were rejected. He explodes, making obscene insults and threats directed to the hearing judge and opposing parties. When a person responds to the court in this manner, that conduct is a significant basis to conclude that future problematic litigation is impending from that abusive court participant. Sure enough, that has been the case with Mr. Prefontaine.

62 Also perhaps unsurprising is that Mr. Prefontaine's conduct is probably linked to his being diagnosed with a persecutory delusional disorder, or a paranoid personality disorder: *R. v. Prefontaine*, at paras 8-17, 82, 94-98.

3. Abuse Caused by Mental Health Issues

63 There are many other examples of how litigation abuse has a mental health basis. For example, the plaintiff in *Koerner v. Capital Health Authority*, 2011 ABQB 191, 506 A.R. 113 (Alta. Q.B.), affirmed 2011 ABCA 289, 515 A.R. 392 (Alta. C.A.), leave to SCC refused, 34573 (26 April 2012) [2012 CarswellAlta 724 (S.C.C.)] engaged in vexatious litigation because her perceptions were distorted by somatoform disorder, a psychiatric condition where a person reports spurious physical disorders (*Koerner v. Capital Health Authority*, 2010 ABQB 590 (Alta. Q.B.) at paras 4-5, (2010), 498 A.R. 109 (Alta. Q.B.)). Similarly, in *R. (F.J.) v. R. (I.)*, 2015 ABQB 112 (Alta. Q.B.), court access restrictions were appropriate because the applicant was suffering from dementia that led to spurious, self-injuring litigation. In these cases future abuse of the courts can be predicted from a person's medical history.

64 Another and very troubling class of abusive litigants are persons who are affected by querulous paranoia, a form of persecutory delusional disorder that leads to an ever-expanding cascade of litigation and dispute processes, which only ends after the affected person has been exhausted and alienated by this self-destructive process. Querulous paranoiacs

attack everyone who becomes connected or involved with a dispute via a diverse range of processes including lawsuits, appeals, and professional complaints. Anyone who is not an ally is the enemy. This condition is reviewed in Gary M Caplan & Hy Bloom, "Litigants Behaving Badly: Querulousness in Law and Medicine" 2015 44:4 Advocates' Quarterly 411 and Paul E Mullen & Grant Lester, "Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour" (2006) 24 Behav Sci Law 333.

65 Persons afflicted by querulous paranoia exhibit a unique 'fingerprint' in the way they frame and conduct their litigation as a crusade for retribution against a perceived broad-based injustice, and via a highly unusual and distinctive document style. The vexatious litigants documented in *McMeekin v. Alberta (Attorney General)*, 2012 ABQB 456, 543 A.R. 132 (Alta. Q.B.), *McMeekin v. Alberta (Attorney General)*, 2012 ABQB 625, 543 A.R. 11 (Alta. Q.B.), *Chutskoff Estate v. Bonora*, 2014 ABQB 389, 590 A.R. 288 (Alta. Q.B.), *Hok v. Alberta*, 2016 ABQB 335 (Alta. Q.B.), and *Hok v. Alberta*, 2016 ABQB 651 (Alta. Q.B.) all exhibit the characteristic querulous paranoiac litigation and document fingerprint criteria.

66 Mullen and Grant observe these persons cannot be managed or treated: pp 347-48. Early intervention is the only possible way to interrupt the otherwise grimly predictable progression of this condition: Caplan & Bloom, pp 450-52; Mullen & Lester, pp 346-47. Disturbingly, these authors suggest that the formal and emotionally opaque character of litigation processes may, by its nature, transform generally normal people into this type of abusive litigant: Caplan & Bloom, pp 426-27, 438.

67 A "persistent misconduct" requirement means persons afflicted by querulous paranoia cannot be managed. They will always outrun any court restriction, until it is too late and the worst outcome has occurred.

4. Litigation Abuse Motivated by Ideology

68 Other abusive litigants are motivated by ideology. A particularly obnoxious example of this class are the Organized Pseudolegal Commercial Argument ["OPCA"] litigants described in *Meads v. Meads*, 2012 ABQB 571, 543 A.R. 215 (Alta. Q.B.). Many OPCA litigants are hostile to and reject conventional state authority, including court authority. They engage in group and organized actions that have a variety of motives, including greed, and extremist political objectives: *Meads v. Meads*, at paras 168-198. Justice Morissette ("Querulous or Vexatious Litigants, A Disorder of a Modern Legal System?" (Paper delivered at the Canadian Association of Counsel to Employers, Banff AB (26-28 September 2013)) at pp 11) has observed for this population that abuse of court processes is a political action, " . . . the vector of an ideology for a class of actors in the legal system."

69 Some OPCA litigants use pseudolegal concepts to launch baseless attacks on government actors, institutions, lawyers, and others. For example:

- *B. (A.N.) v. Hancock*, 2013 ABQB 97, 557 A.R. 364 (Alta. Q.B.) - after his children were seized by child services the Freeman-on-the-Land father sued child services personnel, lawyers, RCMP officers, and provincial court judges, demanding return of his property (the children) and $20 million in gold and silver bullion, all on the basis of OPCA paperwork.

- *Ali v. Ford*, 2014 ONSC 6665 (Ont. S.C.J.) - the plaintiff sued Toronto mayor Rob Ford and the City of Toronto for $60 million in retaliation for a police attendance on his residence. The plaintiff claimed he was a member of the Moorish National Republic, and as a consequence immune from Canadian law.

- *Dove v. R.*, 2015 FC 1126 (F.C.), aff'd 2015 FC 1307 (F.C.), aff'd *Dove v. R.*, 2016 FCA 231 (F.C.A.), leave to the SCC refused, 37487 (1 June 2017) [2017 CarswellNat 2531 (S.C.C.)] - the plaintiffs claimed international treaties and the *Charter* are a basis to demand access to a secret personal bank account worth around $1 billion that is associated with the plaintiffs' birth certificates; this is allegedly a source for payments owed to the plaintiffs so they can adopt the lifestyle they choose and not have to work.

• *R. v. Claeys*, 2013 MBQB 313, 300 Man. R. (2d) 257 (Man. Q.B.) - the plaintiff sued for half a million dollars and refund of all taxes collected from her, arguing she had waived her rights to be a person before the law, pursuant to the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Canada had no authority because Queen Elizabeth II was " . . . Crowned on a fraudulent Stone and ... violated her Coronation Oath by giving Royal Assent to laws that violate God's Law ...".

• *Doell v. British Columbia (Minister of Public Safety and Solicitor General)*, 2016 BCSC 1181 (B.C. S.C.) - an individual who received a traffic ticket for riding without a helmet sued British Columbia, demanding $150,000.00 in punitive damages, because he is a human being and not a person, and the RCMP had interfered with his right "to celebrate divine service".

• *Fiander v. Mills*, 2015 NLCA 31, 368 Nfld. & P.E.I.R. 80 (N.L. C.A.) - a person accused of fisheries offenses sued the Crown prosecutor, fisheries officer, and provincial court judge, arguing he was wrongfully prosecuted because he had opted out of "having" a "person" via the *Universal Declaration of Human Rights*.

• *Isis Nation Estates v. R.*, 2013 FC 590 (F.C.), the plaintiff, "Maitreya Isis Maryjane Blackshear, the Divine Holy Mother of all/in/of creation", sued Alberta and Canada for

$108 quadrillion and that they "cease and desist all blasphemy" against the plaintiff.

70 There is little need to explore why these claims are anything other than ridiculous.

71 OPCA litigants have been formally declared vexatious, for example: *Boisjoli, Re*, 2015 ABQB 629, 29 Alta. L.R. (6th) 334 (Alta. Q.B.); *Boisjoli, Re*, 2015 ABQB 690 (Alta. Q.B.); *Cormier v. Nova Scotia*, 2015 NSSC 352, 367 N.S.R. (2d) 295 (N.S. S.C.); *Curle v. Curle*, 2014 ONSC 1077 (Ont. S.C.J.); *Gauthier v. Starr*, 2016 ABQB 213, 86 C.P.C. (7th) 348 (Alta. Q.B.); *Holmes v. Canada (Attorney General)*, 2016 FC 918 (F.C.); *R. v. Fearn*, 2014 ABQB 233, 586 A.R. 182 (Alta. Q.B.); *Yankson v. Canada (Attorney General)*, 2013 BCSC 2332 (B.C. S.C.).

72 Judicial and legal academic authorities uniformly identify OPCA narratives and their associated pseudolegal concepts as resting on and building from a foundation of paranoid and conspiratorial anti-government and anti-institutional political and social belief. These individuals are sometimes called 'litigation terrorists' for this reason. They may act for personal benefit, but they also do so with the belief they are justified and act lawfully when they injure others and disrupt court processes. Persons who advance OPCA litigation to harm others have no place in Canada's courts. The court's inherent jurisdiction must be able to shield the innocent potential victims of these malcontents. Their next target can be anyone who crosses their path - government officials or organizations, peace officers, lawyers, judges, business employees - and who then offends the OPCA litigant's skewed perspectives.

73 These individuals believe they have a right to attack others via the courts, they like the idea of doing that, and they view their litigation targets as bad actors who deserve punishment. Waiting for these individuals to establish "persistent misconduct" simply means they just have more opportunities to cause harm.

74 The plaintiff in *Henry v. El* was obviously an OPCA litigant engaged in a vendetta. Slatter JA in that matter did not wait for the plaintiff to establish a pattern of "persistently" misusing the courts to attack others. I agree that is the correct approach. If a person uses pseudolaw to attack others as a 'litigation terrorist' then that should be a basis for immediate court intervention to prevent that from recurring. If the *Judicature Act* cannot provide an authority to do that, then this Court's inherent jurisdiction should provide the basis for that step.

5. Persistent Abusive Conduct is Only One Predictor of Future Misconduct

75 All this is not to say that "persistence" is irrelevant. In fact, it is extremely important. A history of persistent abuse of court processes implies the likelihood of other, future misconduct. Persistence is relevant, but must not be *the only*

prerequisite which potentially triggers court intervention. Persistence is a clear and effective basis for a court to predict actions when it cannot ascertain motivation or pathology, and from that derive what is likely and predictable.

However, that should not be the only evidence which is an appropriate basis on which to restrict court access.

76 The reason that I and other Alberta Court of Queen's Bench judges have concluded that this Court has an inherent jurisdiction to limit court access to persons outside the *Judicature Act*, ss 23-23.1 scheme is not simply because the UK appeal courts have concluded that this jurisdiction exists, *but also because that authority is necessary*. *Sawridge #7* at paras 38-49 reviews how the Supreme Court has instructed that trial courts conduct a "culture shift" in their operation towards processes that are fair and proportionate, without being trapped in artificial and formulaic rules and procedures. This is *an obligation* on the courts. The current *Judicature Act*, ss 23-23.1 process is an inadequate response to the growing issue of problematic and abusive litigation.

77 Even though the *Judicature Act* is not the sole basis for this Court's jurisdiction to control abusive litigation, that legislation could be amended to make it more effective. One helpful step would be to remove the requirement that "vexatious" litigation involves misconduct that occurs "persistently". Another would be to re-focus the basis for when intervention should occur.

Currently, section 23.1(1) permits intervention when " . . . a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner ...". This again is backwards-looking, punitive language. In my opinion a superior alternative is "... when a Court is satisfied that a person may abuse court processes ...".

78 The Legislature should also explicitly acknowledge that the *Judicature Act* procedure does not limit how courts of inherent jurisdiction may on their own motion and inherent authority restrict a person's right to initiate or continue litigation.

79 As Veit J observed in *Sikora Estate v. Sikora*, 2015 ABQB 467 (Alta. Q.B.) at paras 16-19, where a person seeks to have the court make an order that restricts court access then the appropriate procedure is *Judicature Act*, ss 23-23.1. That is a distinct process and authority from that possessed by judges of this Court. Given that the Masters of the Alberta Court of Queen's Bench derive their authority from legislation, another helpful step would be for the Legislature to extend *Judicature Act*, ss 23-23.1 to authorize Masters, on their own motion, to apply the *Judicature Act* procedure to control abusive litigants who appear in Chambers. This is not an uncommon phenomenon; the Masters are in many senses the 'front line' of the Court, and frequently encounter litigation abuse in that role.

B. Maurice Stoney's Abusive Activities

80 In reviewing Maurice Stoney's litigation activities I conclude on several independent bases that his future access to Alberta courts should be restricted. His misconduct matches a number *Chutskoff Estate v. Bonora* "indicia" categories and exhibits varying degrees of severity.

1. Collateral Attacks

81 First, Maurice Stoney has clearly attempted to re-litigate decided issues by conducting the *Stoney v. Sawridge First Nation* judicial review, the 2016 Canadian Human Rights Commission application, and his attempts to interfere in the Advice and Direction Application litigation via the *Stoney v. Twinn*, 2016 ABCA 51 (Alta. C.A.) appeal and his August 12, 2016 application. In each case he attempted to argue that he has automatically been made a member of the Sawridge Band by the passage of Bill C-31. He has also repeatedly attacked the processes of the Sawridge Band in administering its membership. My reasons for that conclusion are found in *Sawridge #6* at paras 41-52.

82 This is the first independent basis on which I conclude Maurice Stoney's litigation activity should be controlled. He has a history of repeated collateral attacks in relation to this subject and the related parties. This has squandered important court resources and incurred unnecessary litigation and dispute-related costs on other parties.

2. Hopeless Proceedings

83 Maurice Stoney's attempts to re-litigate the same issues also represent hopeless litigation. The principle of *res judicata* prohibits a different result. This is a second independent basis on which I conclude Maurice Stoney's litigation conduct needs to be controlled, though it largely overlaps with the issue of collateral attacks.

3. Busybody Litigation

84 Maurice Stoney appears to have alleged two bases for why I should conclude his purportedly acting in court as a representative of his "living brothers and sisters" is not "busybody" litigation:

1. he has provided affidavit evidence to establish he was an authorized representative, and

2. representation in this manner is authorized by the *Federal Court Rules*, s 114.

85 As I have previously indicated I reject that the affidavit evidence of Shelley, Bill, and Gail Stoney established on a balance of probabilities that Maurice Stoney was authorized to represent his siblings. As for the *Federal Court Rules*, that legislation has no legal relevance or application to a proceeding conducted in the Alberta Court of Queen's Bench.

86 "Busybody" litigation is a very serious form of litigation abuse, particularly since it runs the risk of injuring otherwise uninvolved persons. I am very concerned about how the weak affidavit evidence presented by Maurice Stoney represents an after-the-fact attempt to draw Maurice Stoney's relatives not only into this litigation, but potentially with the result these individuals face court sanction, including awards of solicitor and own client indemnity costs. While I have rejected that possibility (*Sawridge #7* at paras 8, 139), the fact that risk emerged is a deeply aggravating element to what is already a very serious form of litigation abuse. This is a third independent basis on which I conclude Maurice Stoney's court access should be restricted.

4. Failure to Follow Court Orders - Unpaid Costs Awards

87 Maurice Stoney admitted he has outstanding unpaid cost awards. Maurice Stoney says he is unable to pay the outstanding costs orders because he does not have the money for that. No evidence was tendered to substantiate that claim.

88 A costs order is a court order. A litigant who does not pay costs is disobeying a court order.

89 Outstanding costs orders on their own may not be a basis to conclude that a person's litigation activities require control. What amplifies the seriousness of these outstanding awards is that Maurice Stoney has attempted to shift all his litigation costs to a third party, the 1985 Sawridge Trust: *Sawridge #6* at para 78. Worse, the effect of that would be to deplete a trust that holds the communal property of an aboriginal community: *Sawridge #7* at paras 145-46, 148.

90 A court may presume that a person intends the natural consequences of their actions: *Starr v. Ontario (Commissioner of Inquiry)*, [1990] 1 S.C.R. 1366, 68 D.L.R. (4th) 641 (S.C.C.). Maurice Stoney appears to intend to cause harm to those he litigates against. He conducts hopeless litigation and then attempts to shift those costs to innocent third parties. If unsuccessful, he says he is unable to pay those costs. In this context Maurice Stoney's failure to pay outstanding costs orders to the Sawridge Band is in itself a basis to take steps to restrict his court access.

5. Escalating Proceedings - Forum Shopping

91 In *Sawridge #6* and *Sawridge #7* I noted that Maurice Stoney's dispute with the Sawridge Band has been spread over a range of venues. He acted in Federal Court, and when unsuccessful there he shifted to the Canadian Human Rights Commission. Again unsuccessful, he now renewed his abusive litigation, this time in the Alberta Court of Queen's Bench and the Alberta Court of Appeal.

92 I conclude this is a special kind of escalating proceedings, "forum shopping", where a litigant moves between courts, tribunals, and jurisdictions in an attempt to prolong or renew abusive dispute activities. Forum shopping is a particular issue in relation to vexatious litigants because court-ordered restrictions on litigation have a limited scope. For example, I have no authority to order steps that would affect a litigant's access to a court in a different province, or the federal courts.

93 Abusive litigants can exploit this gap in Canadian court jurisdictions to repeatedly harm other litigants and, in the process, multiple courts. The litigation activities of a British Columbia resident, Roger Callow, are a dramatic example of forum shopping: reviewed in *West Vancouver School District No. 45 v. Callow*, 2014 ONSC 2547 (Ont. S.C.J.); *Callow v. West Vancouver School District No. 45*, 2008 BCSC 778, 168 A.C.W.S. (3d) 906 (B.C. S.C.).

94 Callow's dispute began in 1985 as a labour arbitration proceeding in response to Callow's employment being terminated. That led to litigation and appeals in that jurisdiction. The Supreme Court refused leave. More British Columbia lawsuits followed, and by 2003 Callow was declared a "vexatious litigant" in British Columbia. Callow then persisted with multiple appeals and leave applications. That led to a further 2010 order to control his court access. Callow now shifted to the Federal Court, where his actions were struck out as an abuse of process: *Callow v. British Columbia (Court of Appeal Chief Justice)* (November 9, 2011), Doc. T-1386-11 (F.C.), aff'd (December 2, 2011), Doc. Vancouver T-138611 (F.C.); *Callow v. Board of School Trustees (#45 West Vancouver)* (February 2, 2015), Doc. Vancouver T-2360-14 (F.C.). In 2012 Callow then sued in Ontario, which led to him being subjected to broad court access restrictions in that jurisdiction as well: *West Vancouver School District No. 45 v. Callow*, 2014 ONSC 2547 (Ont. S.C.J.).

95 The saga then continued, with Callow next having filings struck out in Quebec (*Callow v. West Vancouver S.D. No. 45*, 2015 QCCS 5002 (C.S. Que.), affirmed 2016 QCCA 60 (C.A. Que.), leave to the SCC refused, 36883 (9 June 2016) [2016 CarswellQue 4744 (S.C.C.)] and Saskatchewan (*Callow v. West Vancouver S.D. No. 45*, 2015 SKQB 308 (C.S. Que.), affirmed 2016 SKCA 25 (Sask. C.A.), leave to the SCC refused, 36993 (6 October 2016) [2016 CarswellSask 624 (S.C.C.)]. I would be unsurprised if Alberta is not at some point added to this list.

96 Clearly, at least some persistent abusive court participants are willing to 'shop around', and Roger Callow's litigation is an extreme example of the waste that can result. Given the manner in which Canadian court and tribunal jurisdictions are structured there seems little way at present to escape scenarios like this. Academic commentary on the control of abusive litigation has recommended a national "vexatious litigant" registry: Caplan & Bloom at 457-58, Morissette at 22. I agree that would be a useful addition.

97 Forum shopping by its very nature implies an intent to evade legitimate litigation control processes and legal principles, including *res judicata*. In the case of Maurice Stoney his forum shopping largely overlaps his abusive collateral attack and futile litigation activities, and is a highly aggravating factor to that misconduct.

6. Unproven Allegations of Fraud and Corruption

98 The May 16, 2016 cross-examination transcript reveals that Maurice Stoney believes he and his relatives are the subjects of fraud and conspiracy that is intended to deny them their birthright. For example, he says Sawridge Band membership applications have been ignored, though he has no proof of that.

99 These allegations are not in themselves a basis to restrict Maurice Stoney's court access, however they provide some insight into his litigation objectives and how he views his now longstanding conflict with the Sawridge Band and its administration.

7. Improper Litigation Purposes

100 The Sawridge Band argues Maurice Stoney's August 12, 2016 application has an improper purpose, or no legitimate purpose. Maurice Stoney's exact objective is not obvious. It may be he intends to pursue his perceived objective no matter the consequences or justification, to disrupt the membership process of the Sawridge Band, to obtain monies from the 1985 Sawridge Trust, or a combination of those motives. However, as I have previously indicated, the combination of futile litigation, unpaid costs awards, costs shifting, forum shopping, and a claim that the abusive litigant lacks the means to pay costs leads to a logical inference. The August 12, 2016 application had no legitimate purpose. Its only effect was to waste court and litigant resources.

101 This is another independent basis on which I conclude court intervention is warranted to control Maurice Stoney's access to Alberta Courts.

C. Anticipated Litigation Abuse

102 This decision identifies five independent bases on which this Court should take steps to control future litigation abuse by Maurice Stoney in Alberta Courts. Collectively, that strongly favours court intervention. His litigation history predicts future litigation abuse.

103 But that is secondary to another fact - that the submissions received in the second stage of the procedure found in *Hok v. Alberta* shows that Maurice Stoney and his counsel still do not accept that prior decisions mean Maurice Stoney has no right to continue his interference with the Sawridge Band and its membership processes. Instead, Maurice Stoney and his counsel say his arguments are viable, if not correct. Those are "the facts". This is a very strong predictor of future abusive litigation activities. Maurice Stoney's objectives and beliefs remain unchanged.

104 What remains is to determine the scope of that court access restriction order. The combination of trial, appeal, judicial review, and tribunal activities strongly predicts that Maurice Stoney will not restrict his abusive litigation activities to a particular forum. Instead, his history of forum shopping suggests the opposite.

105 While I have agreed with many of the Sawridge Band and 1985 Sawridge Trust's arguments, I do not accept that Maurice Stoney's litigation history and apparent intentions means that his plausible future abusive litigation activities cannot be restricted to a particular target group or dispute. Instead, Maurice Stoney's complaint-related activities have a clear focus: his long-standing dispute with the Sawridge Band concerning band membership. I did not receive any evidence or statements that suggest that Stoney's abusive activities will expand outside that target set. I therefore only require Stoney obtain leave to initiate or continue litigation in Alberta courts where the litigation involves:

1. the Sawridge Band,

2. the 1985 Sawridge Trust,

3 the 1986 Sawridge Trust,

4 the current, former, and future Chief and Council of the Sawridge Band,

5. the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

6. the Public Trustee of Alberta,

7. legal representatives of categories 1-6,

8. members of the Sawridge Band,

9. corporate and individual employees of the Sawridge Band, and

10. the Canadian federal government.

106 I have defined this plausible target group broadly because Maurice Stoney's allegations of conspiracy against himself and his siblings raises a concern that Maurice Stoney may shift his focus from the Sawridge Band and the Trusts to the individuals who are involved in the prior litigation and Sawridge Band membership-related processes and decisions.

107 Maurice Stoney's litigation misconduct extends to appeals. Normally that would mean that I would restrict his access to all three levels of Alberta Courts, however in light of the inconsistent Alberta Court of Appeal jurisprudence on control of abusive and vexatious litigation in that forum I do not extend my order to that Court: *Hok v. Alberta*, 2016 ABQB 335 (Alta. Q.B.); *Ewanchuk v. Canada (Attorney General)*.

108 I agree that Maurice Stoney's future litigation activities should be made dependent on him first paying outstanding cost awards.

109 Maurice Stoney's "busybody" activities, and his attempts to justify his purportedly authorized representation activities in this hearing raise the troubling possibility that Stoney will again attempt to draw others into his disputes. Persons have no constitutional right to represent others (*Gauthier v. Starr*, 2016 ABQB 213, 86 C.P.C. (7th) 348 (Alta. Q.B.)), and appearing before a court is a privilege solely subject to the court's discretion (*R. v. Dick*, 2002 BCCA 27, 163 B.C.A.C. 62 (B.C. C.A.)). Maurice Stoney has badly abused that privilege and his arguments concerning his "busybody" activities are highly problematic. He has demonstrated he is an unfit litigation representative. I therefore order that Maurice Stoney is prohibited from representing any person in all Alberta Courts.

D. Court Access Control Order

110 I therefore order:

1. Maurice Felix Stoney is prohibited, under the inherent jurisdiction of the Alberta Court of Queen's Bench, from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, without an order of the Chief Justice or Associate Chief Justice, or Chief Judge, of the Court in which the proceeding is conducted, or his or her designate, where that litigation involves any one or more of:

(i) the Sawridge Band,

(ii) the 1985 Sawridge Trust,

(iii) the 1986 Sawridge Trust,

(iv) current, former, and future Chief and Council of the Sawridge Band,

(v) the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

(vi) Public Trustee of Alberta,

(vii) legal representatives of categories 1-6,

(viii) members of the Sawridge Band,

(ix) corporate and individual employees of the Sawridge Band, and

(x)) the Canadian federal government.

2. Maurice Felix Stoney is prohibited from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, until Maurice Felix Stoney pays in full all outstanding costs ordered by any Canadian court.

3. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may, at any time, direct that notice of an application to commence or continue an appeal, action, application, or proceeding be given to any other person.

4. Maurice Felix Stoney must describe himself, in the application or document to which this Order applies as "Maurice Felix Stoney", and not by using initials, an alternative name structure, or a pseudonym.

5. Any application to commence or continue any appeal, action, application, or proceeding must be accompanied by an affidavit:

(i) attaching a copy of the Order issued herein, restricting Maurice Felix Stoney's access to the Alberta Court of Queen's Bench and Provincial Court of Alberta;

(ii) attaching a copy of the appeal, pleading, application, or process that Maurice Felix Stoney proposes to issue or file or continue;

(iii) deposing fully and completely to the facts and circumstances surrounding the proposed claim or proceeding, so as to demonstrate that the proceeding is not an abuse of process, and that there are reasonable grounds for it;

(iv) indicating whether Maurice Felix Stoney has ever sued some or all of the defendants or respondents previously in any jurisdiction or Court, and if so providing full particulars;

(v) undertaking that, if leave is granted, the authorized appeal, pleading, application or process, the Order granting leave to proceed, and the affidavit in support of the Order will promptly be served on the defendants or respondents;

(vi) undertaking to diligently prosecute the proceeding; and

(vii) providing evidence of payment in full of all outstanding costs ordered by any Canadian court.

6. Any application referenced herein shall be made in writing.

7. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may:

(i) give notice of the proposed claim or proceeding and the opportunity to make submissions on the proposed claim or proceeding, if they so choose, to:

a) the involved potential parties;

b) other relevant persons identified by the Court; and

c) the Attorney Generals of Alberta and Canada.

(ii) respond to the leave application in writing; and

(iii) hold the application in open Court where it shall be recorded.

8. Leave to commence or continue proceedings may be given on conditions, including the posting of security for costs.

9. An application that is dismissed may not be made again.

10. An application to vary or set aside this Order must be made on notice to any person as directed by the Court.

111 This order will be prepared by the Court and filed at the same time, as this Case Management Decision and takes effect immediately. The exception granted in the Rooke Order shall apply to this court access control order.

112 The interim order made per *Sawridge #6* at para 65-66 is vacated.

V. Representation by Priscilla Kennedy in this Matter

113 I have deep concerns about the manner in which Maurice Stoney's lawyer, Priscilla Kennedy, has conducted herself in this matter. Certain of those issues are reviewed in *Sawridge #7*, a judgment where I determined that Kennedy should be personally responsible for her client's costs award because of her misconduct. She represented a client who made a hopeless application that was a serious abuse of the Court and other litigants, and involved other third parties without their authorization.

114 In *Sawridge #7* Ms. Kennedy was represented by Mr. Donald Wilson, a partner of the law firm DLA Piper, which is the law firm that employs Ms. Kennedy. I reproduce verbatim certain of Mr. Wilson's submissions to the Court in *Sawridge #7*:

> . . . in these circumstances, I will say that Ms. Kennedy has prosecuted this action on [Maurice Stoney's] behalf further than I would've, further than I think she should've. ...
>
> . . . the reason I go through this, Sir, is I think quite candidly I've conceded that Ms. Kennedy prosecuted this action further than I would've, further than I think she ought to have ...
>
> Now, if I'm [counsel for the Sawridge Band], I can tell you that the Band is the person that gets to determine their membership and that is entirely appropriate. And in Mr. Stoney's case they've done that. Appeals were made on two different
>
> levels. An additional attempt was made at the Human Rights tribunal. And Mr. Stoney has been told, and I know he's been told this because I told him this, he is at the end of his rope with respect to the Sawridge Band and the Court system.
>
> And the reason for that is background and history. It's one of Montgomery's campaigns in World War II, it's a bridge too far. He would've been fine if he'd stopped at bridges, by going for a third bridge the campaign itself stopped. In this instance, had -- if I'd been engaged or consulted, if I read Sawridge 5 . . . the fact that the Court is not, unlikely earlier trust litigation where often the trust ends up paying for part of the litigant's costs, the Court could not have been clearer that is not going forward. And the Court indicated interlope. That is, someone does not have a claim on the trust, presumably would make the trial more complicated, more time consuming, higher costs for everyone. ...
>
> Now, I can tell you that in the course of the last week . . . I had occasion to speak in depth with Ms. Kennedy. And Ms. Kennedy tried to convince me as to the merits of Mr. Stoney's case. And at a certain point in time, I had to tell her that he has exhausted his remedies in the legal realm with res pect to the Sawrid ges an d it's time to move on.
>
> . . .

> My submission would be the application that resulted in Sawridge 6 should not have been made. It was ill-advised. But was not done with bad motives, an attempt to abuse the process. It had that effect, I have to say in front of my friends it absolutely had that effect . . .
>
> . . . what the Court is trying to do, as you properly cite in your decision with respect to sanctions, is to change behaviour. It's the same rationale behind torts which is you're giving a tort award so that some other idiot isn't going to follow and do the same thing. And, with respect, I would submit to you that the seriousness of what Sawridge 6 is has been driven home to Ms. Kennedy. And, with respect, it' s been driven home as much as an order of contempt or a referral to the Law Society.
>
> The decision is out there, we have a courtroom full of reporters here to report on the matter.
>
> And I'm reminded of someone once asked Warren Buffett when he was testifying at the congress as to what was reasonable, and it was on the context of a company he owned and insider trading. And Mr. Buffett to the U.S. congress testified it meets a very easy standard. And the standard is, if they printed the story in your home town and your mother and your father had an opportunity to read it, would you be embarrassed? And, with respect, Ms. Kennedy and the Sawridge 6
>
> decision has brou ght ho me the falling o f continuing to prose cute the r eme d y she 's seeking for Mr. Stoney. Which, after meeting Mr. Stoney, I understand. But there's a certain point in time the legal remedies have been exhausted. . . .
>
> [Emphasis added.]

115 I believe I am fair when I indicate these submissions say that at the *Sawridge #7* hearing Mr. Wilson, on behalf of Ms. Kennedy, had acknowledged that there was no merit to the August 12, 2016 application, and that the legal issues involved in that application had been decided,

conclusively, in a series of earlier court proceedings. Yet, here in her written submissions, Ms. Kennedy on behalf of Maurice Stoney, re-argues the very same points. Her submissions are the law is unsettled, issues remain arguable, despite her counsel's admission on July 28, 2017 that

> the effect of the August 12, 2016 application was to abuse of the court's process: " . . . it absolutely had that effect ..." [emphasis added].

116 Mr. Wilson told me in open court that Ms. Kennedy had learned her lesson. When I read the written brief Kennedy prepared and submitted on behalf of Maurice Stoney, I questioned whether that was true.

117 In *Sawridge #7* at paras 98-99 I explained my conclusion why a lawyer who re-litigates or repeatedly raises settled issues has engaged in serious misconduct that is contrary to the standards expected of persons who hold the title "lawyer". I also observed on how advancing abusive litigation is a breach not merely of a lawyer's professional and court officer duties. It is a betrayal of the solicitor-client relationship, and 'digs a grave for two': para 74.

118 I am also troubled by Ms. Kennedy relying on a procedure found in the *Federal Court Rules* to explain why Maurice Stoney's August 12, 2016 application was not a "busybody" proceeding. Stating what should be obvious, civil proceedings in front of this Court are governed by the *Alberta Rules of Court*, not the *Federal Court Rules*. I question the competence of a lawyer who does not understand what court rules apply in a specific jurisdiction.

119 In *Sawridge #7* at paras 51-58 I reviewed case law concerning the inherent jurisdiction of a Canadian court to control lawyers and their activities. At para 56 I cited *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.) at 1245, (1990), 77 D.L.R. (4th) 249 (S.C.C.) for the rule that courts as part of their supervisory function may remove lawyers

from litigation, where appropriate. In that decision representation by lawyers was challenged on the basis of an alleged conflict of interest.

However, the inherent jurisdiction of the court is not expressly restricted to simply that:

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

120 In my opinion Ms. Kennedy's conduct raises the question of whether she is a suitable representative for Maurice Stoney, and whether the proper administration of justice requires that Ms. Kennedy should be removed from this litigation.

121 This judgment represents what I believe should be Ms. Kennedy's final opportunity to participate in the Advice and Direction Application in the Alberta Court of Queen's Bench as a representative of Maurice Stoney. If that were not the case then I would have proceeded to invite submissions from Ms. Kennedy why she and her law firm, DLA Piper, should not be removed as representatives of Maurice Stoney, and prohibited from any future representation of Maurice Stoney in the Advice and Direction Application.

122 Instead I will send a copy of this judgment to the Law Society of Alberta for review.

VI. Conclusion

123 I conclude that Maurice Felix Stoney has engaged in abusive litigation activities resulting in him being required to seek leave prior to initiating or continuing litigation in the Alberta Court of Queen's Bench and Alberta Provincial Court that relates to persons and organizations involved with the Sawridge Band and Maurice Stoney's disputes concerning membership in that Band. Maurice Stoney may only seek leave after he has paid all outstanding costs awards.

124 Maurice Stoney is also prohibited from representing others in any litigation before the Alberta Provincial Court, Alberta Court of Queen's Bench, and Alberta Court of Appeal.

125 I confirm that I will send a copy of this judgment to the Law Society of Alberta for review in respect to Ms. Kennedy.

Order made.

Tab 4

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

Clerk's Stamp
FILED
OCT 06 2017

DATE ON WHICH ORDER WAS PRONOUNCED: July 12, 2017

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Honourable Justice D.R.G. Thomas

UPON THE APPLICATION of Maurice Stoney and his brothers and sisters to be added as parties or intervenors in the within action as beneficiaries of the 1985 Sawridge Trust and for the legal costs of Maurice Stoney and his brothers and sisters to be paid by the 1985 Sawridge Trust;

AND UPON THE APPLICATION of the Sawridge First Nation to be added as an intervenor in the application of Maurice Stoney and his brothers and sisters and for an Order striking and/or dismissing the application of Maurice Stoney and his brothers and sisters;

AND UPON THE APPLICATION of the Sawridge Trustees that Security for Costs be posted by Maurice Stoney and his brothers and sisters in the event they are added as parties or intervenors in the within action;

AND UPON THE DIRECTION of the Case Management Justice that the applications herein be dealt with in writing; AND UPON HAVING READ the written submissions herein from counsels for Maurice Stoney and his brothers and sisters, the Office of the Public Trustee and Guardian, the Sawridge First Nation, and the Sawridge Trustees; AND UPON THE DELIVERY of written reasons for the decision of the Honourable Mr. Justice D.R.G. Thomas dated July 12, 2017;

IT IS HEREBY ORDERED THAT:

1. Sawridge First Nation is granted intervenor status herein with respect to the Application by Maurice Stoney and his brothers and sisters only;

2. The Application by Maurice Stoney and his brothers and sisters is limited to Maurice Stoney alone and will not involve his "10 living brothers and sisters";

3. The application by Maurice Stoney is dismissed;

4. The application by the Sawridge Trustees for security for costs need not be addressed;

5. The Sawridge First Nation and the Sawridge Trustees are awarded solicitor and own client indemnity costs against Maurice Stoney;

6. Counsel for Maurice Stoney, Priscilla Kennedy, has advanced a futile application which has been identified by the Court as abusive and vexatious and as a result, Priscilla Kennedy shall appear before this Court at 2:00 p.m. 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 Maurice Stoney. The Sawridge First Nation and the Sawridge Trustees should appear on July 28, 2017 to comment on this issue and may introduce evidence as indicated in ***Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin***, 2017 SCC 26 (CanLII), paragraphs 33 and 34.

7. Maurice Stoney is subject to an Interim Court Filing Restriction on terms set out in the Order filed herein on July 12, 2017;

8. Maurice Stoney shall, if he chooses to do so, make written submissions by close of business on August 4, 2017 on whether his access to the Alberta courts should be restricted, and if so, what the scope of such restrictions should be;

9. The Sawridge First Nation and the Sawridge Trustees may make submissions on Maurice Stoney's potential vexatious litigant status and introduce additional evidence that is relevant to this question by the close of business on July 28, 2017.

Honourable Justice D.R.G. Thomas

Thomas J

Entered this _____ day of October, A.D. 2017

CLERK OF THE COURT

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

DATE ON WHICH ORDER WAS PRONOUNCED: August 31, 2017 (Sawridge #7)

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Honourable Justice D.R.G. Thomas

UPON THIS COURT'S DIRECTION that Priscilla Kennedy appear before me at 2 p.m. on Friday, July 28, 2017, to make submissions on why she should not be personally responsible for some or all of the costs awarded against her client, Maurice Stoney; in Case Management Decision (Sawridge #6) herein;

AND UPON THIS COURT'S FURTHER DIRECTION that counsels for the Sawridge First Nation and the Trustees of the 1985 Sawridge Trust should appear to comment on this issue and may introduce evidence as further described at paragraph 81 of Case Management Decision (Sawridge #6);

AND UPON HAVING READ THE AFFIDAVITS filed on behalf of Priscilla Kennedy only;

AND UPON HAVING HEARD what was said by the counsels for Priscilla Kennedy, the Sawridge First Nation and the Trustees of the 1985 Sawridge Trust;

AND UPON THE DELIVERY OF WRITTEN REASONS FOR DECISION of Honourable Mr. Justice Thomas dated August 31, 2017, entitled Case Management Decision (Sawridge #7);

IT IS HEREBY ORDERED THAT:

1. Priscilla Kennedy has conducted an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system on two independent bases:

   (a) Priscilla Kennedy conducted futile litigation that was a collateral attack of a prior unappealed decision of a Canadian court; and

   (b) Priscilla Kennedy conducted that litigation allegedly on behalf of persons who were not her clients on a "busybody" basis (150).

2. Priscilla Kennedy and Maurice Stoney are liable jointly and severally for solicitor and client indemnity costs of the Sawridge Trustees and the Sawridge First Nation. (150, 152, 153 and 154).

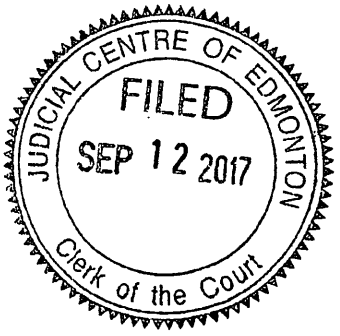
3. Maurice Stoney, Priscilla Kennedy, the Sawridge Trustees and Sawridge First Nation may return to the Court if they require assistance to determine the costs payable. Costs are payable immediately. (155)

4. A copy of Case Management Decision (Sawridge #7) shall be delivered to the Law Society of Alberta for its review.

Honourable Justice D.R.G. Thomas

Entered this _____ day of October, A.D. 2017

CLERK OF THE COURT



COURT FILE NUMBER	1103 114112
COURT	Court of Queen's Bench of Alberta
JUDICIAL CENTRE	Edmonton
APPLICANT	Maurice Felix Stoney
RESPONDENTS	Roland Twinn, Catherine Twinn, Walter Felix Twin, Martha L'Hirondelle and Clara Midho, as Trustees for the 1985 Sawridge Trust, the Public Trustee of Alberta, and the Sawridge Band
DOCUMENT	**COURT ACCESS CONTROL ORDER FOR MAURICE FELIX STONEY**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF THE PARTY FILING THIS DOCUMENT	Justice D.R.G. Thomas, Alberta Court of Queen's Bench Judicial District of Edmonton 3rd Floor – Law Courts Building 1A Sir Winston Churchill Square Edmonton, Alberta T5J 0R2

DATE ON WHICH ORDER WAS PRONOUNCED: September 12, 2017

NAME OF THE JUDGE WHO MADE THIS ORDER: Honourable D.R.G. Thomas

WHEREAS on July 12, 2017 this Court dismissed the Application of Maurice Felix Stoney and "His Brothers and Sisters" to be added to Docket 11103 14112 action, that decision reported as ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 436;

AND WHEREAS on concluding that the Application of Maurice Felix Stoney disclosed indicators of vexatious and abusive litigation;

AND UPON the Court receiving and reviewing written submissions filed on behalf of Maurice Felix Stoney and others concerning whether his access to Alberta courts should be restricted, and if so, the scope of those restrictions;

AND UPON THE COURT'S OWN MOTION;

IT IS HEREBY ORDERED THAT:

1. The Interim Court Filing Restriction Order for Maurice Felix Stoney made and filed July 12, 2017 is vacated.

2. Maurice Felix Stoney is prohibited, under the inherent jurisdiction of the Alberta Court of Queen's Bench, from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, without an order of the Chief Justice or Associate Chief Justice, or Chief Judge, of the Court in which the proceeding is conducted, or his or her designate, where that litigation involves any one or more of:

   (i) the Sawridge Band,

   (ii) the 1985 Sawridge Trust,

   (iii) the 1986 Sawridge Trust,

   (iv) the current, former, and future Chief and Council of the Sawridge Band,

   (v) the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

   (vi) the Public Trustee of Alberta,

   (vii) legal representatives of categories 1-6,

   (viii) members of the Sawridge Band,

   (ix) corporate and individual employees of the Sawridge Band, and

   (x) the Canadian federal government.

3. Maurice Felix Stoney is prohibited from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, until Maurice Felix Stoney pays in full all outstanding costs ordered by any Canadian court.

4. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may, at any time, direct that notice of an application to commence or continue an appeal, action, application, or proceeding be given to any other person.

5. Maurice Felix Stoney must describe himself, in the application or document to which this Order applies as "Maurice Felix Stoney", and not by using initials, an alternative name structure, or a pseudonym.

6. Any application to commence or continue any appeal, action, application, or proceeding must be accompanied by an affidavit:

   (i) attaching a copy of the Order issued herein, restricting Maurice Felix Stoney's access to the Alberta Court of Queen's Bench and Provincial Court of Alberta;

   (ii) attaching a copy of the appeal, pleading, application, or process that Maurice Felix Stoney proposes to issue or file or continue;

   (iii) deposing fully and completely to the facts and circumstances surrounding the proposed claim or proceeding, so as to demonstrate that the proceeding is not an abuse of process, and that there are reasonable grounds for it;

   (iv) indicating whether Maurice Felix Stoney has ever sued some or all of the defendants or respondents previously in any jurisdiction or Court, and if so providing full particulars;

   (v) undertaking that, if leave is granted, the authorized appeal, pleading, application or process, the Order granting leave to proceed, and the affidavit in support of the Order will promptly be served on the defendants or respondents;

   (vi) undertaking to diligently prosecute the proceeding; and

   (vii) providing evidence of payment in full of all outstanding costs ordered by any Canadian court.

7. Any application referenced herein shall be made in writing.

8. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may:

   (i) give notice of the proposed claim or proceeding and the opportunity to make submissions on the proposed claim or proceeding, if they so choose, to:

      a) the involved potential parties;

      b) other relevant persons identified by the Court; and

      c) the Attorney Generals of Alberta and Canada.

   (ii) respond to the leave application in writing; and

   (iii) hold the application in open Court where it shall be recorded.

9. Leave to commence or continue proceedings may be given on conditions, including the posting of security for costs.

10. An application that is dismissed may not be made again.

11. An application to vary or set aside this Order must be made on notice to any person as directed by the Court.

12. The exception granted in the Order made by Associate Chief Justice Rooke on July 20, 2017 in the matter of ***Nussbaum v*** Stoney, Alberta Court of Queen's Bench docket 1603 03761 shall apply to this Court Access Control Order.

D.R.G. Thomas
JUSTICE OF QUEEN'S BENCH OF ALBERTA

ENTERED this 12 day of Sept, A.D. 2017

CLERK OF THE COURT

SINGLE SOURCE SERVICES LTD.
(the "**Corporation**")

RESOLUTION IN WRITING OF THE SHAREHOLDERS OF THE CORPORATION DATED FOR REFERENCE APRIL 1, 2016

WHEREAS the Corporation has acknowledged receipt of the resignation of Derrick Larson as a director of the Corporation.

WHEREAS it is desired to elect Tanya McCrary-Singh as the sole director of the Corporation.

IT IS RESOLVED:

1. The receipt of the resignation of Derrick Larson as a director of the Corporation is hereby confirmed.

2. Tanya McCrary-Singh is elected as the sole director of the Corporation.

By their signatures, the shareholders confirm their intention that the foregoing resolution be as valid as if passed at a meeting of shareholders as of the date noted above. This resolution may be executed in one or more counterparts and may be delivered by fax or electronically, each of which shall be deemed an original and all of which shall be deemed to constitute one and the same instrument.

TANYA McCRARY-SINGH

DERRICK LARSON

RESIGNATION OF DIRECTOR

TO: Single Source Services Ltd. (the "**Corporation**")

I hereby tender my resignation as a director of the Corporation effective February ___, 2017,

Dated for reference April 1, 2016.

DERRICK LARSON

Tab 5

PARAGRAPHS
1.2(1)-(4)
14.57
3.74(1)-(2)-(3)

Alta. Reg. 124/2010, s. 1.2

s 1.2 Purpose and intention of these rules

Currency

1.2Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

1.2(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

1.2(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

1.2(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Currency
Alberta Current to Gazette Vol. 113:20 (October 31, 2017)

Alta. Reg. 124/2010, s. 14.57

s 14.57 Adding, removing or substituting parties to an appeal

Currency

14.57Adding, removing or substituting parties to an appeal
A party or person may be added, removed or substituted as a party to an appeal in accordance with rule 3.74.

Amendment History
Alta. Reg. 41/2014, s. 4

Currency
Alberta Current to Gazette Vol. 113:20 (October 31, 2017)

Alta. Reg. 124/2010, s. 3.74

s 3.74 Adding, removing or substituting parties after close of pleadings

Currency

3.74Adding, removing or substituting parties after close of pleadings

3.74(1) After close of pleadings, no person may be added, removed or substituted as a party to an action started by statement of claim except in accordance with this rule.

3.74(2) On application, the Court may order that a person be added, removed or substituted as a party to an action if

(a) in the case of a person to be added or substituted as plaintiff, plaintiff-by-counterclaim or third party plaintiff, the application is made by a person or party and the consent of the person proposed to be added or substituted as a party is filed with the application;

(b) in the case of an application to add or substitute any other party, or to remove or to correct the name of a party, the application is made by a party and the Court is satisfied the order should be made.

3.74(3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

Currency

Alberta Current to Gazette Vol. 113:20 (October 31, 2017)

Tab 6

2011 ABQB 209
Alberta Court of Queen's Bench

869120 Alberta Ltd. v. B & G Energy Ltd.

2011 CarswellAlta 512, 2011 ABQB 209, [2011] A.W.L.D. 3203, [2011] A.J. No. 366, 200 A.C.W.S. (3d) 62

869120 Alberta Ltd., Plaintiff and B & G Energy Ltd., Defendant

K.M. Eidsvik J.

Heard: November 10, 2010
Judgment: March 28, 2011
Docket: Calgary 0901-10713

Counsel: Mr. Jeffrey Thom, Q.C., for Plaintiff
Mr. David Tupper, Mr. Chris Petrucci, for Defendant

Subject: Corporate and Commercial; Civil Practice and Procedure; Torts; Contracts

Headnote

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Pleadings — Amendment

Plaintiff was company that was joint venture partner along with companies owned by BH and GG — Defendant was company that operated joint venture while acting as trustee for joint venture partners — BH and GG were directors of defendant — Plaintiff agreed to sell its interest in joint venture to BH's and GG's companies — Defendant subsequently sold interests of BH's and GG's companies to non-party — Plaintiff alleged defendant, BH, and GG had failed to disclose significant information before buying plaintiff's interest — Plaintiff commenced action against defendant and BH's and GG's companies for damages for negligence — Plaintiff discontinued action against BH's and GG's companies — Plaintiff brought application for leave to amend statement of claim to add and expand upon claims and damages, and to add BH and GG and their companies as defendants — Application granted in part — Amendments to claims and damages were allowed except for tracing remedies — BH and GG were added as defendants but their companies were not added — BH and GG had been not only directors and controlling minds of defendant but also principals of companies that purchased plaintiff's interest — Since BH and GG wore dual hats, it was arguable they had separate interest from defendant with respect to tortious claims that plaintiff wanted to add — Amended claims appeared to be within limitation period since plaintiff allegedly did not become aware of withheld information until recently — Plaintiff satisfied requirements for seeking oppression remedy — Tracing remedies were not appropriate at this stage since plaintiff first had to establish trust property that could be traced — Availability of tracing remedies in this case was far from clear.

APPLICATION by plaintiff for leave to amend statement of claim to add and expand upon claims and damages and to add new defendants.

K.M. Eidsvik J.:

1 An application was made by the Plaintiff before me as case managing judge to allow new parties to be added as Defendants and substantial amendments to the Statement of Claim. The claim involves an oil and gas joint venture property sale dispute.

2 The new parties initially requested to be added in the Notice of Motion were Mr. Brian Hiebert and Mr. Guy Grierson, directors of the Defendant B & G and the principals of the joint venture partner corporations who purchased the Plaintiff's interest in B & G. By the time the application was heard, the Plaintiff also asked to have Messrs. Hiebert and Grierson's corporations added (B. Hiebert Hydrocarbons Ltd. "BHH" and G. Grierson Hydrocarbons Ltd. "GGH"),

and the corporation they were amalgamated into (Amerone Energy Inc. and/or Ltd., under its new name Amerone Oil & GasLtd., "Amerone").

3 The substantial amendments requested related to further particulars, particularising the failure to disclose allegation to claims of negligent and intentional misrepresentation, an increase of damages, tracing remedies and an oppression claim under the *Business Corporations Act of Alberta* R.S.A. c. B-9 ("ABCA").

4 The application was vigorously opposed on the basis, in short, that there was no cause of action against the individuals, BHH and GGH had already been discontinued against earlier, and it was too late to add them back in along with the new company within which they were amalgamated. Further, that tracing and oppression claims should not be allowed at this stage.

Decision

5 For the reasons that follow, I am prepared to allow the proposed individual Defendants Mr. Brian Hiebert and Mr. Guy Grierson to be added to the Statement of Claim as Defendants for some but not all of the allegations requested, as I will detail. I am also prepared to allow various amendments to the particulars, the increase of damages claim, and the oppression claim.

6 I am not prepared to add any of the corporations at this stage. Further, I am not prepared to allow any of the tracing remedies to be added to this claim at this time.

Background

7 The Plaintiff was a party to a series of joint venture agreements with, amongst other corporations, the Defendant B & G, and proposed Defendants BHH and GGH.

8 A series of trust agreements were entered into in June 2005 and November 2006 amongst the Defendant B & G, the Plaintiff, BHH and GGH and other corporations, for the joint operating agreements #4 and #5. These trust agreements appointed the Defendant B & G as trustee. Generally speaking, B & G was to hold legal title to all of the beneficiaries' assets and operate them on behalf of the beneficiaries in accordance with the joint operating agreements.

9 In March 2007, the Plaintiff and the proposed Defendants BHH and GGH came to an understanding that the Plaintiff would sell its interest in the joint operating agreements # 4 and # 5 to a number of the B & G trust beneficiaries as purchasers. This agreement closed on May 1, 2007.

10 The Plaintiff's principal officer, Mr. Lloyd Arnason, states in his affidavit of February 1, 2010 that the "Defendants" (which at the time was only B & G since all the other Defendants had been discontinued against) was possessed of "significant proprietary information" in April 2007 that was not made available to the Plaintiff.

11 In particular, in the same affidavit, Mr. Arnason swore that he had not seen correspondence from B & G dated April 26, 2007 giving notice of an intention to drill the Waterlet well and the well test analysis of the Pine Creek well sent by email on April 23, 2007.

12 In Mr. Arnason's affidavit of November 5, 2010, he alleges that the proposed individual Defendants were possessed of knowledge prior to the May 1, 2007 closing date that was "hidden from him". He realised this near the end of May 2009 after reviewing information relating to the purchase and sale of the Waterlet Well.

13 Some of the procedural background to this action is important to review.

14 A Statement of Claim was filed by the Plaintiff on July 16, 2009 against 14 corporate Defendants, including B & G, BHH and GGH, alleging a breach of contract and negligence arising from the failure to comply with the duty of disclosure and honesty that the Plaintiff was owed. The Statement of Claim claimed $3 million in damages.

15 A detailed Statement of Defence was filed on behalf of B & G and other Hydrocarbon Defendants (not including BHH and GGH) on September 21, 2009 generally denying the allegations, claiming that the Plaintiff was not denied any information, that no damages could have been suffered had the Plaintiff had any further information at the time in any event, and claiming a limitation period defence on the basis that the Plaintiff could have known about the success of the well in question before July 16, 2007 since it was public information.

16 An application for security for costs was brought by the Defendants B & G and a number of other Defendants (not including BHH and GGH) on November 13, 2009 with an affidavit in support filed by Mr. Guy Grierson dated November 13, 2009. A Consent Order was reached and obtained on December 9 th, 2009 where the Plaintiff agreed to post $25,000 costs.

17 Partial Discontinuances of Action were filed in favour of all the Defendants except B & G on January 20 and 26, 2010 and, the application to add the individual Defendants was filed February 2, 2010 along with an Affidavit of Mr. Arnason dated February 1, 2010 which attached a proposed Amended Statement of Claim. Further Affidavits attaching different proposed amended Statement of Claims were then filed by Mr. Arnason on October, 2010 and November 5, 2010. These changes requested the addition of BHH or GGH and the Amarone Defendants. The application proceeded on the basis that the November 5, 2010 proposed Amended Statement of Claim was the one the Plaintiff wanted to have allowed.

The proposed amendments

18 It is to be noted that all but four of the 34 proposed paragraphs in the Amended Statement of Claim are underlined in red. They outline the proposed claims against the present Defendant and against the six (or seven) proposed new Defendants.

19 In order to try and achieve some order of review of the requested changes, I have broken down the substance of what has been requested into the following:

> 1) the addition of the individuals behind BHH and GGH who are also directors of B & G Energy Ltd. (Brian Hiebert and Guy Grierson) for the claims that the individual Defendants, along with B & G, had fiduciary and contractual duties and obligations to disclose information to the Plaintiff and that they breached these duties by negligently and intentionally misrepresenting and failing to disclose proprietary information.
>
> 2) the addition of the original joint venture partners of the Plaintiff, BHH and GGH, (now Amerone) for a tracing claim of the proceeds of a sale of joint venture assets in June 2008 which were paid out to the proposed individual defendants and BBH and GGH and for fraudulent preference and *Statute of Elizabeth* Fraudulent Conveyance claims as against all of the proposed Defendants.
>
> 3) further factual particulars which allegedly better clarify the claims made in the original Statement of Claim including an increase in the claim for damages from $3 million to the amount of $5.5 million.
>
> 4) s. 242 ABCA oppression claims against B & G and the proposed individual Defendants as directors of B & G.

Issues

20 There was no strong opposition to the amendments which proposed certain additional particulars of facts, nor to the proposed increase in damages. The remaining proposed amendments were opposed, so the issues that I must determine are as follows:

> 1. Do the proposed amendments disclose or sufficiently plead a triable issue as against the proposed and present defendants, and is there sufficient evidence to support such amendments? In order to decide this I must consider:

a) whether it is appropriate in these circumstances to pierce the corporate veil with respect to the alleged claims against the proposed the individual defendants?

b) whether a tracing remedy claim as against the any of the proposed Defendants is appropriate in this action at this time?

c) whether fraudulent preference claims are appropriate as against the proposed Defendants in this action?

d) whether oppression remedies are appropriate as against the individual proposed Defendants and present Defendant?

Analysis

The Law

21 I will begin this analysis by briefly reviewing the law that is important to this decision on the amendments being claimed. Firstly, I turn to the *Rules of Court* on this issue. The new *Rules* on point are 3.62 through to 3.76. The ones most applicable here are 3.65, which gives the Court the general right to give the applicant the permission to amend a pleading, and 3.74 which applies when the applicant wants to add parties to an action.

22 The test found in 3.74 (2) (b) states that the Court may order that a person be added if it is "satisfied that the order should be made". Subsection 3 goes on to add however that "The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms."

23 The former *Rules*, rules 132 and 133, although somewhat differently worded, were similarly broad. The parties agreed that these new rules do not materially alter the legal test and accordingly reliance can be made on the case law on point to date. Indeed, subsection 3 basically codifies the "classic rule" that "an amendment should be allowed no matter how careless or late, unless there is prejudice" as outlined by Justice Côté in *Balm v. 3512061 Canada Ltd.*, 2003 ABCA 98 (Alta. C.A.) at para. 43 and *Milfive Investments Ltd. v. Sefel* (1998), 216 A.R. 196 (Alta. C.A.).

24 The other criteria that is generally accepted is that the amendment must raise a triable issue, or otherwise said, not be "hopeless" (*Stolk v. 382779 Alberta Inc.*, 2005 ABQB 440 (Alta. Q.B.), *M. (T.) v. R. (O.)*, 2000 ABQB 931 (Alta. Q.B.)), there must be a "modest degree of evidence" if the amendment is beyond trivial or of a clarifying nature, unless the claim to be added is fraud, and there a "stiffer test" is to be used (*Balm* at paras. 29 and 63). Finally, if the claim against a person to be added, or the cause of action is outside of the limitation period then reference is to be made to section 6 of the *Limitation Act* R.S.A. 2000 c. L- 12 to determine if it should be allowed.

1. Claims against the proposed individual Defendants re duties to disclose

25 Paragraphs 19 - 21 of the original Statement of Claim claimed that B & G was possessed with proprietary information that it failed to disclose to the Plaintiff in breach of its duties of honesty, good faith and in its position as joint venture partner and trustee. Paragraphs 17 - 22 of the proposed Amended Statement of Claim expand the details of the proprietary information and add that the individual proposed Defendants also owed the duties alleged as against B & G in the original claim, and seek to add the breaches of fiduciary or contractual duties, and negligent and intentional misrepresentations.

26 The Plaintiff argued that these allegations are based in the evidence of Mr. Arnason sworn on November 5, 2010, that they allege causes of action recognised in law, are based on claims within the limitation period, and therefore should be allowed.

27 The proposed Defendants argue that these proposed amendments fail to disclose a cause of action since the transactions put at issue occurred entirely in a corporate context and therefore the individuals should not be added, they

lack particulars, and in any event there is a lack of evidence in their support. In the alternative, if they do disclose a cause of action, they are beyond the limitation period and should not be allowed.

Piercing the corporate veil

28 I agree with the Defendants that courts are wary where individuals in a corporate context are sought to be added in a corporate lawsuit. The *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, [1996] O.J. No. 1568 (Ont. Gen. Div.) and the *Condominium Corp. No. 022 5840 v. Executive Loft Inc.*, 2010 ABQB 232 (Alta. Master) cases are both good examples of where the courts did not allow individual defendants to be added into claims involving corporate disputes.

29 However, both cases also discuss exceptions where individuals may be added. In *Transamerica Life* Justice Sharpe said at paras. 21 and 22:

> There are undoubtedly situations where justice requires that the corporate veil be lifted...
>
> ...the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct.

30 Master Breitkreuz stated at para. 37 of the *Condominium* case:

> The actions of a shareholder, officer, director or employee of a corporation may give rise to a personal liability in tort where those actions are themselves tortious or exhibit a separate identity or interest from that of the corporation (cases cited)...

31 Here the proposed individual Defendants were not only the directors and controlling minds of B & G but were also the owners, directors and controlling minds of the purchasing joint venture partner corporations, BHH and GGH. Accordingly, in the sale process, and up to the closing date, these individuals wore dual hats - as directors of B & G, acknowledged trustee for the Plaintiff as a joint venture partner - and as buyers. Therefore it is arguable that they were 'exhibiting a separate interest' from B & G with respect to the tortious claims that the Plaintiff wants to add.

32 In this regard I bear in mind the warning in *Balm* at para. 12:"...the court must allow an amendment even though it raises a doubtful plea, if it is arguable".

33 With respect to the evidence, in my view, the evidence of Mr. Arnason is sufficient to clear the hurdle for the amendment of pleadings.

34 Finally, with respect to the limitation period issue, I find that on a *prima facie* basis, the Plaintiff's requested amended claims are within the limitation period. The sworn evidence of Mr. Arnason, which may or may not be accepted ultimately, is that he was not aware of the withholding of information to him until May 2009 - since the amendment to add the individual parties was sought by February 2010, this is well within the two years from discovery of the injury as required under the *Limitation Act*.

35 The Defendant argues that the Plaintiff could have known about the alleged withheld information as early as the data about the well in question became public before July 2007, or when there was a sale of assets to third parties in 2008. These may be good arguments, but will depend on the evidence before the court to determine ultimately. Presently, the different unchallenged sworn evidence of the Plaintiff on this point is enough to meet the limitation hurdle for an amendment in my view.

36 Accordingly, with respect to this argument, I will allow the amendments requested in paras. 17 - 22, and the addition of Mr. Guy Grierson and Mr. Brian Hiebert with this caveat. I agree with the Defendants that there needs to be a claim of reliance that should also be added to make this misrepresentation allegation clear and complete. Those particulars to the claim need to be added at the same time that the amended pleading is filed.

2. Tracing and other remedies

37 The Plaintiff seeks to add further particulars in paragraphs 24 to 26 about finding out where B & G had distributed the funds from the ultimate sale of the remaining joint venture parties interests to third parties. Then in paragraphs 27 through to 31 the Plaintiff seeks various tracing remedies.

38 In my view, it is not appropriate to allow these tracing remedies at this stage of the proceedings. In order to pursue a tracing remedy the Plaintiff needs first to succeed in showing that there is trust property to trace. Based on the pleadings and amendments requested, along with the various affidavits filed to date, it is far from clear that the Plaintiff will have this remedy available to it. The Plaintiff's claim is made out in several alternative forms - breach of contract, negligence and/or breach of fiduciary duties. Further, the amount of the so-called alleged trust money is not determined - indeed the Plaintiff in this same application wants to amend the damages from $3 million to $ 5.5 million with no particular breakdown of how it arrives at these numbers.

39 Further, some of the tracing remedies are premature in that the basic condition precedents have not been met. For instance, in paragraphs 28, 29 and 30, the Plaintiff claims that the *Fraudulent Preferences Act* R.S.A. 200 c. F-24 should be invoked to set aside the distribution of funds. However, there is no pleading, and no evidence that B & G is insolvent, and the Plaintiff is not yet a "creditor" as defined under the Act.

40 The same problem plagues proposed paragraph 32 that seeks to plead the invocation of the *Statute of Elizabeth Act 1571*, 13 Eliz I Cap 5. The pre-conditions of such an action are set out in para. 31 of *Palechuk v. Fahrlander*, 2006 ABCA 242 (Alta. C.A.). The Plaintiff must plead that there has been a conveyance of property for no, or nominal, consideration with intent to defraud, delay or hinder creditors. The challenger must be a creditor or someone with a legal or equitable right to claim.

41 The Plaintiff has not attempted to plead these pre-conditions, and in any event, even if it is arguable that the Plaintiff may have a legal or equitable claim - that is not enough to allow an amendment at this stage here.

42 Further, in my view, the addition of the tracing remedies at this stage would unduly complicate and delay this action. Accordingly I am not prepared to allow them.

3. Oppression remedy

43 The Plaintiff seeks to add oppression remedies in paragraphs 32 and 33 with respect to B & G and the individuals as directors of B & G. He seeks status to bring these claims as a "shareholder, joint venture partner, and creditor". The Defendant argued that the Plaintiff does not fit this criteria as complainant.

44 The term "complainant" is defined under section 239 of the ABCA. In short, it states that it means a holder or owner of a security of the corporation, a director or officer, a creditor, or "any other person who, in the discretion of the Court, is a proper person to make an application under this part."

45 Here, the Plaintiff is a joint venture holding partner of B & G and as such, in my view fits the definition of complainant to bring this action. The evidence of withholding information in the context plead is enough to allow this amendment in my view as against both B & G and the individual proposed Defendants.

4. Miscellaneous amendments

46 There are a number of paragraphs that request minor changes with wording and further and better particulars. Those are all allowed (see details below). There is also paragraph 23 which seeks an increase in damages claimed - this is also allowed.

Summary and conclusion

47 In sum, for the reasons stated above, I will allow the following amendments as noted in the Amended Statement of Claim attached to Mr Arnason's Affidavit of November 5, 2010:

- the style of cause will have Brian Hiebert and Guy Grierson added as Defendants
- the proposed changes in paragraphs 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23, 26, 32, 33, and 34
- paragraphs 21 and 22 are allowed with the addition of a claim about reliance - either in these paragraphs or in separate paragraphs
- the proposed changes in the prayer claim, (a) (d) (e) (f) and (g)

48 The remaining paragraphs and requested changes are disallowed. For clarity sake these are as follows:

- B. Hiebert Hydrocarbons Ltd., G. Grierson Hydrocarbons Ltd., Amerone Energy Inc. (or Ltd.), Amerone Oil & Gas Ltd. as Defendants
- paragraphs 4, 25, 27, 28, 29, 30, 31
- in the prayer claim - (b) and (c)

49 The Amended Statement of Claim shall be filed by April 29, 2011.

50 The action as against the new Defendants will be deemed to have started on February 2, 2010, the date the Notice of Motion to add them was filed.

Costs

51 Subject to the comments I may hear on this subject, pursuant to Rule 3.66 the party filing the pleading is subject to costs. Here, the result has been mixed, however, in my view the Plaintiff should bear the costs. This application was unduly complicated by several revisions of the claims requested and affidavits being filed on the eve of applications. The parties are at liberty to make further submissions on this if necessary at a case management meeting.

Application granted in part.

End of Document

Tab 7

1993 CarswellAlta 32
Alberta Court of Queen's Bench

Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.

1993 CarswellAlta 32, [1993] A.W.L.D. 473, [1993] A.J. No. 317, 10 Alta. L.R. (3d) 325, 140 A.R. 244, 18 C.P.C. (3d) 275, 40 A.C.W.S. (3d) 232

AMOCO CANADA PETROLEUM COMPANY LIMITED and AMOCO CANADA RESOURCES LTD. v. ALBERTA AND SOUTHERN GAS CO. LTD. and PACIFIC GAS AND ELECTRIC COMPANY; TCPL RESOURCES LTD. and ENCOR ENERGY CORPORATION INC. (Applicants)

Virtue J.

Judgment: May 6, 1993
Docket: Doc. Calgary 9101-15026

Counsel: *Kent R. Anderson*, for applicants TCPL Resources Ltd. and Encor Energy Corporation Inc.
Murray A. Putnam, Q.C., for respondent Alberta and Southern Gas Co. Ltd.
Alan D. Hunter, Q.C., for respondent Pacific Gas and Electric Company.

Subject: Civil Practice and Procedure

Headnote

Practice --- Parties — Adding or substituting parties — Adding plaintiff — General

Civil procedure — Parties — Adding or substituting parties — Court outlining test for adding parties — Plaintiff must be seeking remedy which will affect intervenor's legal rights as opposed to intervenor's commercial interests — Party only being added where issues not being effectually and completely settled unless that person is party.

The plaintiff brought action for breach of contract against the first defendant, alleging that the first defendant failed to purchase the agreed minimum amount of natural gas in each contract year. The plaintiff further alleged that the first defendant induced the second defendant to breach its contracts with the plaintiff. The applicants alleged that they had each acquired an interest in the plaintiff's contracts to sell natural gas to the first defendant. They alleged that they owned an interest in the reserves and reservoirs dedicated to the performance of the plaintiff's contracts with the first defendant. The applicants applied to be added as party plaintiffs and appealed the decision of the master dismissing the application.

Held:

Appeal dismissed.

The test for adding parties in an existing cause is whether the remedy sought by the plaintiff will directly affect the intervenor, not in its commercial interests, but in the enjoyment of its legal rights. The only reason to add a party is that the question to be settled cannot be effectually and completely settled unless that person is a party.

The question in issue was whether there had been a breach of the contract between the plaintiff and the defendants. There was no contractual relationship between the applicants and the defendants, and the applicants had nothing to bring to the resolution of the issue that could not be adduced by way of their evidence, if required.

The legal rights of the applicants existed against the plaintiff, not the defendants, and would not be altered by the outcome of the litigation. Their commercial interests were only potentially affected. The applicants had no claim which they could advance against the defendants; accordingly, the need to prevent multiplicity of actions did not arise.

Appeal of decision of Master Floyd dismissing application to be added as party plaintiffs.

Virtue J.:

1 TCPL Resources Ltd. ("TCPL") and Encor Energy Corporation Inc. ("Encor") seek to be added as party plaintiffs in an action which Amoco Canada Petroleum Company Limited and Amoco Canada Resources Ltd. ("Amoco") have brought against Alberta and Southern Gas Co. Ltd. ("A&S") and Pacific Gas and Electric Company ("PG&E"). The Plaintiff, Amoco, takes no position on the application.

2 The application was heard by Master Floyd on January 7th, 1993, and dismissed without written reasons. The Applicants, TCPL and Encor, appeal the decision of the Master to this Court.

3 The Applicants claim to be interested parties "under the Plaintiff Amoco", and submit that their presence as party Plaintiffs is necessary in order for the Court to effectually and completely adjudicate upon the matters raised in the Statement of Claim. They submit further that the interests of the Applicants may be materially prejudiced if they are not added as parties.

4 They also seek leave to amend the Statement of Claim so as to disclose the nature of their interest.

5 The applicants TCPL and Encor allege that each acquired a 12.5% interest in Amoco's contracts to sell natural gas to the Defendant A&S and that Encor has the right to receive 25% of the proceeds of the sale of natural gas to the Defendant A&S and that Encor has sustained 25% of the loss claimed to have been sustained by the Plaintiff Amoco due to the alleged breaches of contract by A&S. The Applicants also claim that at all material times TCPL and Encor have owned a 25% interest in the reserves and reservoirs dedicated to the performance of Amoco's contracts to supply A&S and that if the injunction sought by Amoco is not granted their interests in the reservoirs and reserves will be adversely affected.

6 In their Statement of Claim the Amoco Corporations claim that Amoco contracted with A&S, by way of a number of contracts under which the Plaintiff Amoco agreed to sell and deliver natural gas to A&S. Under these contracts A&S was obliged to purchase in each contract year, certain minimum quantities of natural gas. Amoco alleges that A&S failed to purchase these minimum amounts and that, as a result, Amoco has suffered loss and damage amounting to several millions of dollars. The Plaintiffs allege further that as a result of the fact that the fields and reservoirs which had been dedicated by Amoco to these supply contracts were not being drained to the full extent required to supply the contracts, further losses have been sustained by Amoco due to the depletion and drainage of the reserves from various causes. These additional losses, the Plaintiffs say, run into the millions of dollars.

7 Amoco further alleges that A&S has evinced an intention to continue to fail to meet the minimum purchase requirements in the future which will result in continued losses to Amoco and continuing depletion and drainage of the reserves and reservoirs.

8 With respect to the Defendant PG&E, Amoco alleges that PG&E induced A&S to breach its contracts with Amoco, or in the alternative, that the contractual obligations of A&S are those of the Defendant PG&E, who, it says, directs the purchase of natural gas by Amoco.

9 The Amoco Plaintiffs seek damages totalling $84,700,000 and an injunction requiring A&S to meet the minimum purchase requirements in the future.

10 The Defendants say that their gas purchases have been subject to the control of various regulatory agencies both in Canada and the United States which have modified the minimum purchase obligation. In the alternative the Defendants say that certain regulatory decisions, which prevented A&S from purchasing natural gas, constitute a force majeure within the meaning of that term in its contracts with the Plaintiffs. The Defendants also allege certain failure on the part of the Plaintiffs, which they say caused or contributed to the Defendants' inability to purchase natural gas from the Plaintiffs. The Defendants raise a variety of additional defences to the Plaintiffs' claims.

11 Against that background I return to the relief sought by the Applicants TCPL and Encor. In essence, they claim to be the beneficial owner of 25% of the causes of action alleged in the Statement of Claim and to own beneficially, a 25%

interest in the sale and purchase contracts and the related gas and oil properties which are dedicated to the supply of those contracts. The Applicants say that they have been excluded from any participation in settlement negotiations between Amoco and A&S because of the confidential nature of those negotiations. The Applicants say further that Amoco has different commercial interests in dealing with the Defendants than do the Applicants and that the Applicants could be prejudiced unless they are made party to these proceedings and permitted to participate in the settlement negotiations.

12 The matter of adding parties in an existing cause is dealt with in the *Alberta Rules of Court*. Rule 38(3) provides in part:

> (3) The Court may ... order that the name of ... any person be added ... whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, or in order to protect the rights or interests of any person ... interested under the plaintiff ...

13 The addition of parties to actions by order of the Court is a subject which has been dealt with more extensively in the Courts of England than Canada. Some controversy still exists as to whether the proper test is a narrow or a broad one. The narrow test is best exemplified in *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357. In that case Devlin J., with painstaking thoroughness, traces the cases dealing with the English rule, and concludes that what he describes as the narrow test, is the correct interpretation of the rule. My understanding of the test enunciated by Devlin J., which, for the reasons set out below, I respectfully adopt, is this: Would the order for which the Plaintiff was asking directly affect the intervenor, not in his commercial interests, but in the enjoyment of his legal rights? And secondly, the only reason which makes it necessary that a party be added is that the question to be settled cannot be effectually and completely settled unless he is a party. Unless these tests are met the Court has no jurisdiction to add a party within the rule.

14 For those who are interested in tracing the history of English legal analysis and application of the rule the whole of Devlin J.'s reasons are commended, but I refer in particular to the expression adopted by him at pp. 378-79:

> ... that is the key to the whole section: if the court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the court.

15 At p. 380 he elaborates on this further:

> The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ... The only reason which makes it *necessary* to make a person a *party* to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party. [Emphasis in original.]

With respect to the other aspect of the test: commercial interest versus legal interests, Lord Devlin says, at p. 381:

> On the wider construction of the rule, I do not understand where the line is to be drawn — it is conceded that it must be drawn somewhere — between a commercial interest in the question involved in the case and a legal one. It is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally — that is by curtailing his legal rights.

16 And finally at p. 386:

> ... the test is: "May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?"

17 In reaching the conclusion I have as to the proper test to be used in the application of R. 38(3) (which is based not only on Lord Devlin's analysis, but upon my own interpretation of the Alberta Rule), I hasten to point out that in *Gurtner v. Circuit*, [1968] 1 All E.R. 328, a case decided some 13 years after *Amon*, Lord Denning, in one of the Reasons for Judgment of the English Court of Appeal, specifically did not agree with Devlin J., and preferred to give the Rule a wider interpretation. Lord Denning's views appear at p. 332 as follows:

> That was done by DEVLIN, L., in *Amon v. Raphael Tuck & Sons, Ltd.* He thought that the rule should be given a narrow construction, and his views were followed by JOHN STEPHENSON, J., in *Fire, Auto and Marine Insurance Co. Ltd. v. Greene*. I am afraid that I do not agree with them. I prefer to give a wide interpretation to the rule, as LORD ESHER, M.R., did in *Byrne v. Brown*. It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute "to be effectually and completely determined and adjudicated upon" between all those directly concerned in the outcome. [Footnotes omitted.]

18 *Gurtner* was a case where the Motor Insurer's Bureau would be bound to pay a judgment for an uninsured defendant who had disappeared, if the plaintiff established negligence. The Court of Appeal joined the Bureau as a defendant although, in a technical sense, the Bureau was not a necessary party to the action. The rights between the plaintiff and the missing defendant could have been determined without the addition of the Bureau as a party. I have set out above Lord Denning's reasons for allowing the joinder. Lord Diplock reached his conclusion, at p. 336, on the basis that:

> ... the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained.

It is difficult to disagree with Lord Diplock's conclusion on the particular facts of that case.

19 Subsequently the interpretation of the Rule was considered by the House of Lords in *Re Vandervell's Trusts; White v. Vandervell Trustees Ltd.*, [1970] 3 All E.R. 16. Viscount Dilhorne did not accept Lord Denning's interpretation and at p. 24 said:

> My difficulty about accepting Lord Denning's wide interpretation is that it appears to me wholly unrelated to the wording of the rule. I cannot construe the language of the rule as meaning that a party can be added whenever it is just or convenient to do so. That could have been simply stated if the rule was intended to mean that. However wide an interpretation is given, it must be an interpretation of the language used. The rule does not give power to add a party whenever it is just or convenient to do so. It gives power to do so only if he ought to have been joined as a party or if his presence is necessary for the effectual and complete determination and adjudication on all matters in dispute in the cause or matter.

20 (It will be remembered that Lord Devlin's interpretation in *Amon* was based upon a careful interpretation of the wording of the rule itself, to determine its true intent and meaning.)

21 Subsequently, Lord Denning had occasion to revisit the Rule in *White v. London Transport*, [1971] 3 All E.R. 1 (C.A.). His reasons in that case (where he upheld the trial judge's rejection of the application of the Motor Insurer's Bureau to be joined as a party) seem to indicate a drawing back from the position he had adopted earlier in *Gurtner*. At p. 4 Lord Denning deals with the application in this way:

> It seems to me that if the bureau were allowed to come into the action, it would be open to their counsel on the one hand to cross-examine Mrs White about contributory negligence and damages; and then, on the other hand, to cross-examine London Transport Executive's witnesses to show that they were wholly or in part to blame. Such

> an exceptional course might be permissible if it were *necessary* to ensure that all the matters in dispute could be effectually determined. But I do not see that it is necessary in the least. In my judgment, seeing that Mrs White is bringing the action on the discretion of the bureau, she will be bound to pursue the action with vigilance and skill against London Transport Executive, doing all she can to make them liable in part or whole. So far as London Transport Executive is concerned they will do their best to defend the action by disputing negligence, by alleging contributory negligence, and questioning the damages. So all the matters will be properly and fully investigated without the necessity of joining the bureau. Accordingly I doubt whether this joinder is "necessary" within the opening words of RSC Ord 15, r 6(2)(*b*).

22 In *Fullwood v. Master Excavators Ltd.* (1981), 34 A.R. 541, Funduk M.C. conducts an extensive review of the history of the Rule and the cases dealing with both the Alberta Rule and its English equivalent. In reaching his conclusions, the learned Master, as I have done, relies upon Devlin J.'s interpretation of the rule in *Amon* (supra), as setting out the correct tests. See especially paras. 17-21, at pp. 549-51, where Master Funduk concludes that [p. 551]:

> The rejection of a "commercial interest" as a foundation for a person becoming a party was re-affirmed by the Court of Appeal in *In re I.G. Farbenindustrie*, [1944] 1 Ch. 41.

23 Having reviewed the cases referred to me by the parties I conclude that the tests to be applied in this case are these:

24 (a) Can the question to be settled between the Plaintiff Amoco and the Defendants A&S and PG&E be effectually and completely settled without TCPL and Encor being added as Plaintiffs?

25 (b) Will the order which the Plaintiff Amoco seeks, directly affect TCPL and Encor, not in their commercial interests but in the enjoyment of their legal rights?

26 I am satisfied that the answer to the first question is that the question can be settled without the addition of those parties. The issue is whether there has been a breach of the contract between Amoco and the Defendants. Neither TCPL nor Encor have anything to bring to the resolution of that issue that cannot be adduced by way of their evidence, if required. There is no contractual relationship between those parties and the Defendants. The existence of proposed novation agreements, which are still in draft form, do not, in my view, alter this non-relationship.

27 The answer on cross-examination of Randall Findlay, vice-president of both the Applicant corporations, upon his affidavit in support of the application, is revealing. He was asked:

> Q. In terms of the litigation between Amoco and A&S and PG&E, I take it Encor has no unique or different evidence to offer the Court in respect of whether or not A&S has been in breach of its obligations under these three contracts? In other words, Amoco has whatever evidence there is in respect of A&S purchases and takes under these contracts?
>
> A. No, I don't believe we have anything unique to offer.

28 This question and answer add weight to my conclusion that the issue between Amoco and the Defendants can be effectually and completely settled without the intervention of the Applicants as parties. The issue is one between Amoco and the Defendants.

29 Insofar as the second part of the test is concerned, I am satisfied that while the Applicants' commercial interests may be affected by the outcome of the litigation, their legal rights will not be altered. Those rights exist against Amoco, not the Defendants.

30 A factor considered in some of the cases in which the rule is applied is the prevention of multiplicity of actions. That is not a factor in this case. The Applicants have no claim which they can advance against the Defendants A&S and PG&E. As they are not in a position to commence action, multiplicity is not a factor to be considered.

31 In my view the lawsuit between Amoco and the Defendants would be unnecessarily cluttered and made more difficult and expensive by the addition of the Applicants as parties. Their presence is not necessary for the determination of the issues between the Plaintiffs and the Defendants nor is their presence as parties required in order to protect their rights or interests.

32 I agree with the conclusion of the Master who dismissed the applications and I would dismiss the appeal, with costs to the Respondents, which may be spoken to in thirty days if required.

Appeal dismissed.

End of Document

Tab 8

PARAGRAPHS 14.58(1)-(3)

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 14 — Appeals
Division 5 — Managing the Appeal Process [Heading added Alta. Reg. 41/2014, s. 4.]
Subdivision 2 — Parties to an Appeal [Heading added Alta. Reg. 41/2014, s. 4.]

Alta. Reg. 124/2010, s. 14.58

s 14.58 Intervenor status on appeal

Currency

14.58Intervenor status on appeal

14.58(1) In addition to persons having a right to intervene in law, a single appeal judge may grant status to a person to intervene in an appeal, subject to any terms and conditions and with the rights and privileges specified by the judge.

14.58(2) A person granted intervenor status in the court appealed from must apply again to obtain intervenor status on an appeal.

14.58(3) Unless otherwise ordered, an intervenor may not raise or argue issues not raised by the other parties to the appeal.

Amendment History

Alta. Reg. 41/2014, s. 4

Currency

Alberta Current to Gazette Vol. 113:20 (October 31, 2017)

Tab 9

Paras 8, 9, 11

2016 ABCA 238
Alberta Court of Appeal

Orphan Well Assn. v. Grant Thornton Ltd.

2016 CarswellAlta 1466, 2016 ABCA 238, [2016] A.W.L.D. 3666, 270 A.C.W.S. (3d) 55, 39 C.B.R. (6th) 1, 40 Alta. L.R. (6th) 11, 89 C.P.C. (7th) 14

IN THE MATTER OF REDWATER ENERGY CORP.

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT. R.S.C. 1985. c. B-3, as amended

Orphan Well Association (Respondent / Status on Appeal: Appellant) and Grant Thornton Limited and Alberta Treasury Branches (Respondents / Status on Appeal: Respondents) and Canadian Association of Petroleum Producers, Canadian Association of Insolvency and Restructuring Professionals, Attorney General for Saskatchewan, and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and British Columbia Oil and Gas Commission (Applicants for Intervener Status on Appeal / Status on Appeal: Not Parties to the Appeal)

Alberta Energy Regulator (Respondent / Status on Appeal: Appellant) and Grant Thornton Limited and Alberta Treasury Branches (Respondents / Status on Appeal: Respondents) and Canadian Association of Petroleum Producers, Canadian Association of Insolvency and Restructuring Professionals

Attorney General for Saskatchewan, and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and British Columbia Oil and Gas Commission (Applicants for Intervener Status on Appeal / Status on Appeal: Not Parties to the Appeal)

Sheilah Martin J.A.

Heard: August 9, 2016
Judgment: August 11, 2016
Docket: Calgary Appeal 1601-0129-AC, 1601-0130-AC

Counsel: M.W. Selnes, for Respondent, Orphan Well Association
K. Cameron, for Respondent, Alberta Energy Regulator
T.S. Cumming, J.L. Oliver, for Respondent, Grant Thornton Limited
C. Nyberg, R. Zahara, for Respondent, Alberta Treasury Branches
T.J. Coates, for Applicant, Canadian Association of Petroleum Producers
C.E. Hanert, A.C. Macrov, for Applicant, Canadian Association of Insolvency and Restructuring Professionals
R.J. Fyfe, for Applicant, Attorney General, for Saskatchewan
C. Nicholson, for Applicants, Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and the British Columbia Oil and Gas Commission
C. King, for Minister of Justice and Solicitor General of Alberta and the Attorney General of Alberta

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — General principles
Trustee in bankruptcy and receiver for bankrupt energy company disclaimed certain non-producing wells — Alberta Energy Regulator (AER) and Orphan Well Association brought unsuccessful application for declaration that disclaimer was void due to necessary environmental work arising from abandonment — Court found that doctrine of federal paramountcy was triggered; that compliance with both provincial regulatory regime and federal insolvency regime

was not possible; that abandonment orders were inoperative; and that trustee was entitled to disclaim assets — AER appealed to Court of Appeal — Leave to appeal was granted — Canadian Association of Petroleum Producers, Canadian Association of Insolvency and Restructuring Professionals, Attorney General for Saskatchewan, and Queen in Right of British Columbia as represented by Ministry of Natural Gas Development and British Columbia Oil and Gas Commission (applicants) applied for leave to intervene on appeal — Application granted on conditions — Applicants had interest and would be directly and significantly affected by outcome of appeals — Applicants met criteria for permission for leave to intervene.

APPLICATION for leave to intervene on appeal to Court of Appeal.

***Sheilah Martin J.A.*:**

Introduction

1 Four different entities seek leave to intervene in a constitutional appeal that concerns the interpretation of federal and provincial legislation, the division of legislative powers and the doctrine of paramountcy.

2 The applicants are the Canadian Association of Petroleum Producers; Canadian Association of Insolvency and Restructuring Professionals; Attorney General for Saskatchewan and a joint application from Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and the British Columbia Oil and Gas Commission.

3 I granted permission to intervene (with terms and conditions) to each of the applicants with reasons to follow. These are those reasons.

Background

4 At issue is Wittmann CJ's decision *Grant Thornton Ltd. v. Alberta Energy Regulator*, 2016 ABQB 278 (Alta. Q.B.), which thoroughly reviews the factual and legal background. In brief, the trustee in bankruptcy and receiver for Redwater Energy Corporation sought a determination of the applicable law and issues related to oil and gas assets of the bankrupt company. The trustee disclaimed and renounced certain non-producing wells. The Alberta Energy Regulator (AER) and the Orphan Well Association (OWA) jointly applied for a declaration that the disclaimer was void and unenforceable due to the necessary environmental work arising from abandonment. They additionally sought an order compelling the receiver to fulfill its statutory obligations as licensee in relation to abandonment, reclamation and remediation of all Redwater licensed properties.

5 Chief Justice Wittmann found the purpose of section 14.06 of the *Bankruptcy and Insolvency Act* (BIA), was to permit receivers and trustees to make rational economic assessments of the costs of remedying environmental conditions, with discretion to determine whether to comply with orders to remediate property affected by these conditions. He found an operational conflict arose between section 14.06(a) of the BIA and the definition of a licensee under the *Oil and Gas Conservation Act* (OGCA), and the *Pipeline Act* (PA). Under section 14.06 of the BIA, the trustee could renounce assets without responsibility for environmental abandonment and remediation work. Under the OGCA and the PA, a licensee (including a trustee) could not renounce licensed assets in such a manner. Wittmann CJ found dual compliance with the provincial regime and the BIA was not possible, thereby triggering the doctrine of federal paramountcy. He found there was a conflict between the trustee's power to renounce and continuing liability under provincial legislation. The definitions of licensee in the OGCA and PA were declared inoperative to the extent they frustrated the purpose of the BIA by requiring the trustee to comply with abandonment orders, provide security deposits, or create priorities to any claims against Redwater. Other provisions that frustrated the purpose of the BIA, by preventing renouncement of licensed assets without economic benefit to creditors, were also declared inoperative. The remedies sought by the AER and the OWA were accordingly denied and they appealed.

Issues on Appeal

6 On June 29, 2016, the parties were granted leave to appeal on the following questions:

a) Did the court err in the interpretation and application of section 14.06 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the BIA)?

b) Did the court err in finding that the doctrine of federal paramountcy was triggered by the AER requiring Grant Thornton Limited as Trustee and Receiver to comply with abandonment orders issued pursuant to the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (OGCA), and the *Pipeline Act*, RSA 2000, c P-15, in relation to certain assets that Grant Thornton renounced and declined to take possession of?

c) Did the court err in finding that there is an operational conflict between section 14.06(4) of the BIA and the definition of "licensee" under the OGCA and *Pipeline Act*, and that dual compliance with both the Alberta provincial regulatory regime under the OGCA and the *Pipeline Act* and the federal insolvency regime under section 14.06(4) of the BIA is not possible?

d) Did the court err in finding that certain abandonment orders issued by the AER were inoperative and that the Respondent, Grant Thornton Limited, was entitled to disclaim certain AER licensed assets?

e) Did the court err in the interpretation and application of the decision of the Supreme Court of Canada in *AbitibiBowater Inc., Re*, 2012 SCC 67 (S.C.C.)?

f) Did the court err in the interpretation and application of the decision of the former Chief Justice Laycraft in *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181 (Alta. C.A.)?

Tests for Permission to Intervene

7 Rules 14.37(2) and 14.58 of the Alberta *Rules of Court*, AR 124/2010, authorize a single appeal judge to grant permission to a party to intervene in an appeal and impose conditions on the intervention. The intervener cannot raise or argue novel issues on appeal unless otherwise permitted: Rule 14.58(3).

8 Granting intervener status is a two-step process. The court first considers the subject matter of the appeal and then determines the proposed intervener's interest in it: *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2005 ABCA 320 (Alta. C.A.) at para 5, (2005), 380 A.R. 301 (Alta. C.A.). In determining a proposed intervener's interest, a court should examine (a) if the intervener will be directly and significantly affected by the appeal's outcome, and (b) if the intervener will provide some expertise or fresh perspective on the subject matter that will be helpful in resolving the appeal.

9 *Papaschase* stated parties could be granted intervener status if they met either criterion. However, subsequent decisions have set out that simply establishing an affected interested is not enough to grant leave. A proposed intervener must also provide fresh information or a fresh perspective: *Pedersen v. Van Thournout*, 2008 ABCA 192 (Alta. C.A.) at para 10, (2008), 432 A.R. 219 (Alta. C.A.). If parties can intervene simply because they have affected interests, the number of potential interveners would greatly increase and unduly delay the appeal process without a corresponding benefit.

10 In *Pedersen*, this court stated (at para 3) that the following questions are relevant factors to consider when determining whether to grant intervener status:

1. Will the intervener be directly affected by the appeal;

2. Is the presence of the intervener necessary for the court to properly decide the matter;

3. Might the intervener's interest in the proceedings not be fully protected by the parties;

4. Will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal;

5. Will the intervention unduly delay the proceedings;

6. Will there possibly be prejudice to the parties if intervention is granted;

7. Will intervention widen the *lis* between the parties; and

8. Will the intervention transform the court into a political arena?

11 The power to allow interveners is discretionary and should be exercised sparingly: *R. v. N. (L.C.)*, 1996 ABCA 242 (Alta. C.A.) at para 16, (1996), 184 A.R. 359 (Alta. C.A.). However, interveners have been allowed when they add significantly to complex constitutional issues, especially those, like the case at bar, with serious and wide ranging policy implications.

12 As explained in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.) at para 1, "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."

13 The court's ability to assess whether an intervener has something useful and different to add is tied to how clearly the intervener articulates the submissions they seek to advance. A bare assertion that one has a unique perspective is far less helpful than an overview of the arguments the intervener seeks to advance. The Supreme Court requires applicants to identify the position of the intervener intends to take, set out the submissions to be advanced, the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties. See rule 57(2) of the *Rules of the Supreme Court of Canada*, SOR/83-74. This level of specificity is to be encouraged in this court as well.

Have these Intervener Applicants met the Pedersen Test?

Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and the British Columbia Oil and Gas Commission

14 Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Natural Gas Development and the British Columbia Oil and Gas Commission, (collectively the British Columbia applicants) seek to intervene in support of the appellants. While British Columbia legislation differs from Alberta legislation, the British Columbia applicants seek permission to intervene because Alberta receivership orders directly affect the British Columbia regulator when an Alberta insolvent has assets or carries on operations in British Columbia. As well, the interpretation of section 14.06 of the BIA could affect the interpretation and application of the legislative provisions in British Columbia, and directly impact the regulation and management of the oil and gas industry in British Columbia, the British Columbia orphan fund, and the British Columbia taxpayers.

15 While British Columbia played no role the court below, they submit they can bring a perspective on the extra-provincial implications of the interpretation of section 14.06 of the BIA, and address Alberta legislative provisions similar to British Columbian's regarding the liability management rating system and provisions permitting the regulator's imposition of conditions on transfers of licenses, as well as the practical effect of a trustee or receiver being able to disclaim or renounce oil and gas licenses. They submit this will assist the court in understanding how its decision will potentially affect the oil and gas industry in British Columbia, including potential unanticipated consequences.

16 They expect to advance arguments on the interpretation of section 14.06 of the BIA, which are different from those of the parties. In particular, they would address the interpretation of section 14.06(7) of the BIA regarding ownership rights and the definition of "contiguous". They would also make submissions on the interpretation of section 20 of the

BIA as it informs renouncement rights, which they claim did not receive a lot of focus in the decision under appeal. As well, they submit they would advance a different argument on the errors in the interpretation of the decisions in *AbitibiBowater Inc.* and *Northern Badger Oil & Gas Ltd.*

17 They submit they would not widen the *lis* nor prejudice the parties or cause any delay.

18 I find that British Columbia has an interest, and would be directly and significantly affected by the outcome of these appeals. The British Columbia applicants would bring an extra-provincial perspective, but are not to widen the *lis* by explaining the differences and similarities in the British Columbia and Alberta legislation. They would make submissions on the interpretation of the BIA and the case authorities different from the other parties that would be helpful to the panel hearing the appeals. Subject to the conditions imposed below, they meet the criteria for permission to intervene.

Canadian Association of Petroleum Producers

19 CAPP represents over 85 percent of the companies that explore for, develop and produce natural gas and crude oil throughout Canada. CAPP's mission, on behalf of the Canadian upstream oil and gas industry, is to advocate for and enable economic competitiveness and safe, environmentally, and socially responsible performance. It made submissions in the court below.

20 CAPP's members are key players in both the oil and gas industry and the regulatory regime. Through the levies charged to licensees by the AER, CAPP's members are the primary source of funding for both the orphan fund and the AER, and as a result, the appeals directly affect the members of CAPP. As well, the appeals affect the reputation of license holders and the industry.

21 CAPP seeks to intervene in support of the appellants and made submissions on appeal. It submits it has special expertise and is uniquely positioned to provide insight from the oil and gas industry as a whole into the effect of the possible outcomes in the appeals. It is able to provide industry perspective on the public interest considerations the industry believes are at play in requiring oil and gas companies to meet their obligations to properly reclaim and abandon their wells and facilities in accordance with the obligations under the AER licensing regime. As well, it can provide its perspective on which parties are best able and suited to manage the risks of licensees failing to live up to their obligations. Using the "broad voice of industry", it seeks to provide a different and broader perspective regarding the issues that differ from and are unavailable to the appellants, or which the appellants may be restrained in making.

22 It does not propose to expand the issues and it submits it will not repeat any of the arguments or issues raised by any of the appellants.

23 I find that CAPP has an interest and would be directly and significantly affected by the outcome of these appeals. It possesses expertise in the oil and gas industry that can bring a broader policy perspective to the issues and that would be helpful to the panel hearing the appeals. Subject to the conditions set out below, CAPP meets the criteria for permission to intervene.

Attorney General for Saskatchewan

24 Attorney General for Saskatchewan did not intervene in the court below. The Attorney General seeks permission now because Saskatchewan has legislative provisions very similar to the legislative provisions at issue in these appeals. If the decision below is upheld on appeal, and followed in Saskatchewan, it would negatively impact Saskatchewan's orphan well program, the oil and gas industry in Saskatchewan, and Saskatchewan taxpayers. I accept the characterization of Saskatchewan, that the case at bar involves resource based issues arising throughout Western Canada that are first being addressed in Alberta.

25 The Attorney General seeks to intervene in support of the appellants. It submits it will focus on common law bankruptcy principles such as the principle that bankruptcy proceedings should not place creditors in a better

position than they would be absent the bankruptcy. It also submits such principles must be applied together with guiding constitutional principles such as co-operative federalism, which mandate that federal paramountcy should be narrowly construed and applied in order to allow the continued operability of valid provincial legislation. It submits such broader principles appear not to have been applied in the court below. As well, it would make specific analysis of Chief Justice Wittmann's reasons on the cost of compliance to argue conflict can be avoided as the issue is not an either/or situation. Saskatchewan would also address its concern that the application of the paramountcy doctrine to bankruptcy is taking on the characteristic of immunity to provincial legislation and would make submissions regarding interjurisdictional immunity.

26 It submits it will avoid causing any delay in the proceedings.

27 I find that Saskatchewan has an interest and would be directly and significantly affected by the outcome of these appeals. The Attorney General would be helpful to the panel hearing the appeals by bringing a fresh perspective with argument on common law bankruptcy principles not applied in the court below, and by addressing broader issues of constitutional interpretation, including co-operative federalism. Subject to the conditions imposed below, the Attorney General for Saskatchewan meets the criteria for permission to intervene.

Canadian Association of Insolvency and Restructuring Professionals

28 CAIRP is a national professional association representing receivers, trustees, agents, monitors and consultants working in the insolvency field, and designed to advance the practice of insolvency administration in Canada as well as the public interest in connection with insolvency matters. Its mission is to advocate for a fair, transparent and effective system of insolvency and restructuring administration throughout Canada. It made submissions in the court below.

29 CAIRP submits it has particular experience and insight into the practice and procedures in insolvency and restructuring, including questions of priorities; and has expertise on the interplay of provincial regulatory legislation and federal insolvency legislation.

30 It submits it is able to inform the court on the practical outcomes of the policy decisions the court will be called upon to consider. It can speak to the impact of a change to the legislation currently governing the administration of insolvency proceedings.

31 CAIRP submits its perspective is both unique and broader than the parties to the appeal. Its position differs from the position of Grant Thornton Limited who, as court-appointed receiver and trustee, is an officer of the court and therefore unable to advocate freely for the interests of insolvency professionals generally. CAIRP would support the decision under appeal, and address the implications and impacts of the decision to receivers and trustees. Specifically, CAIRP would stress the need for certainty in the practical, day-to-day workings of their members.

32 It submits it will not widen the *lis* between the parties.

33 I find that CAIRP has an interest and would be directly and significantly affected by the outcome of these appeals. Its expertise in insolvency administration would bring a broader policy perspective to the appeal that will be helpful to the panel hearing the appeals. Subject to the conditions imposed below, CAIRP meets the criteria for permission to intervene.

Conclusion

34 In granting permission to intervene, terms and conditions were imposed to balance the benefit of the interveners' submissions with a timely and fair hearing by preserving the appeal scheduled for October 11, 2016, and avoiding any prejudice to the parties. Therefore, permission was granted as follows:

- Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and the British Columbia Oil and Gas Commission may file a joint factum of no more than 15 pages;

- CAPP may file a factum of no more than 15 pages;
- The Attorney General for Saskatchewan may file a factum of no more than 15 pages; and
- CAIRP may file a factum of no more than 15 pages.

35 The Minister of Justice and Solicitor General of Alberta is entitled to be heard as of right under the *Judicature Act*, RSA 2000, c J-2, and may file a factum of no more than 25 pages.

36 All interveners and Alberta may make oral submissions to a maximum of 10 minutes, subject, as always, to the appeal panel's determination of its own needs.

37 All intervener factums and materials must be filed no later than 3:00 pm on Monday, August 22, 2016.

38 The two respondents' written submissions are to be filed no later than 3:00 pm on Monday, August 29, 2016. They are each granted an additional 10 pages to address the interveners' submissions.

39 The two appellants may file, but are not required to file, a reply to CAIRP's intervener factum of no more than five pages, no later than 3:00 pm on Monday, August 29, 2016.

40 None of the interveners may supplement the record nor add new issues to those identified in Rowbotham JA's order of June 29, 2016.

41 All the interveners and the respondents may file one factum for the two appeal numbers.

42 No general costs, either in favour or against the interveners, shall be payable in respect of these applications or the appeal.

Application granted.

Tab 10

COURT OF APPEAL OF ALBERTA

Form AP-1
[Rule 14.8 and 14.12]

Registrar's Stamp

COURT OF APPEAL FILE NUMBER:	
TRIAL COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	Edmonton
PLAINTIFF/APPLICANT:	Maurice Stoney
STATUS ON APPEAL:	Appellant
DEFENDANT/RESPONDENT:	Roland Twinn and Others as Trustees for the 1985 Sawridge Trust
STATUS ON APPEAL:	Respondent
DEFENDANT/RESPONDENT:	Sawridge First Nation
STATUS ON APPEAL:	Other Intervenor
DOCUMENT:	**CIVIL NOTICE OF APPEAL**
APPELLANT'S ADDRESS FOR SERVICE AND CONTACT INFORMATION:	[redacted] MAURICE STONEY 500 4 STREET SLAVE LAKE, AB, T0G-2A1 TEL: 780-516-1143.

WARNING

To the Respondent: If you do not respond to this appeal as provided for in the Alberta Rules of Court, the appeal will be decided in your absence and without your input.

1. **Particulars of Judgment, Order or Decision Appealed From:**

Fax 780 423 7276
a/c
Doris Banora

Date pronounced: July 12, 2017

Date entered: July 12, 2017

Date served: July 12, 2017

Official neutral citation of reasons for decision, if any:
(do not attach copy) 2017 ABQB 436

[redacted]

(Attach a copy of order or judgment: Rule 14.12(3). If a copy is not attached, indicate under item 14 and file a copy as soon as possible: Rule 14.16(2).)

2. **Indicate where the matter originated:**

☑ Court of Queen's Bench

Judicial Centre: Edmonton

Justice: Mr. Justice Thomas

On appeal from a Queen's Bench Master or Provincial Court Judge?: ☐ Yes ☑ No

Official neutral citation of reasons for decision, if any, of the Master or Provincial Court Judge:
(do not attach copy) _____

(If originating from an order of a Queen's Bench Master or Provincial Court Judge, a copy of that order is also required: Rule 14.16(1)(c).)

☐ **Board, Tribunal or Professional Discipline Body**

Specify Body: _____

3. **Details of Permission to Appeal, if required** (Rules 14.5 and 14.12(3)(a)):

☑ Permission not required, or ☐ Granted

Date: _____

Justice: _____

(Attach a copy of order, but not reasons for decision.)

4. **Portion being appealed** (Rules 14.12(2)(c)):

☑ Whole, or

☐ Only specific parts (if specific part, indicate which part):

5. **Provide a brief description of the issues:**

6. **Provide a brief description of the relief claimed:**

Application by Maurice Stoney and his 10 brothers and sisters to be within the definition of beneficiary in the 1985 Sawridge Trust.

7. **Is this appeal required to be dealt with as a fast track appeal?** (Rule 14.14)

☐ Yes ☑ No

8. **Does this appeal involve the custody, access, parenting or support of a child?** (Rule 14.14(2)(b))

☐ Yes ☑ No

9. **Will an application be made to expedite this appeal?**

☐ Yes ☑ No

10. **Is Judicial Dispute Resolution with a view to settlement or crystallization of issues appropriate?** (Rule 14.60)

☐ Yes ☑ No

11. **Could this matter be decided without oral argument?** (Rule 14.32(2))

☐ Yes ☑ No

12. **Are there any restricted access orders or statutory provisions that affect the privacy of this file?** (Rule 6.29, 14.12(2)(e), 14.83)

☐ Yes ☑ No

If yes, provide details: _____

(Attach a copy of any order.)

13. **List respondent(s) or counsel for the respondent(s), with contact information:**

Roland Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, - D.C. Bonoro and A. Loparco, Q.C. at Dentons LLP 2900 Manulife Place, 10180 - 101 Street, Edmonton, AB, T5J 3V5

Catherine Twinn represented by Karen Platten, Q.C. at McLennan Ross LLP, 600 12220 Stony Plain Road, Edmonton T5N 3Y4

Sawridge First Nation represented by Edward Molstad, Q.C. at Parlee Mclaws, 1700 Enbridge Centre, 10175 0 101 Street, Edmonton, T5J 0H3

If specified constitutional issues are raised, service on the Attorney General is required under s. 24 of the Judicature Act: Rule 14.18(1)(c)(viii).

14. **Attachments (as applicable):**

☐ Order of judgment under appeal if available (not reasons for decision) (Rule 14.12(3))

☐ Earlier order of Master, etc. (Rule 14.18(1)(c))

☐ Order granting permission to appeal (Rule 14.12(3)(a))

☐ Copy of any restricted access order (Rule 14.12(2)(e))

If any document is not available, it should be appended to the factum, or included elsewhere in the appeal record.

Call me @
516 1143
Maurice Storey

Tab 11

 PARAGRAPHS 3.72 (1)-(2)

Alta. Reg. 124/2010, s. 3.72

s 3.72 Consolidation or separation of claims and actions

Currency

3.72Consolidation or separation of claims and actions

3.72(1) The Court may order one or more of the following:

(a) that 2 or more claims or actions be consolidated;

(b) that 2 or more claims or actions be tried at the same time or one after the other;

(c) that one or more claims or actions be stayed until another claim or action is determined;

(d) that a claim be asserted as a counterclaim in another action.

3.72(2) An order under subrule (1) may be made for any reason the Court considers appropriate, including, without limitation, that 2 or more claims or actions

(a) have a common question of law or fact, or

(b) arise out of the same transaction or occurrence or series of transactions or occurrences.

Currency

Alberta Current to Gazette Vol. 113:20 (October 31, 2017)

Tab 12

2010 ABCA 305
Alberta Court of Appeal

Hill v. Hill

2010 CarswellAlta 2035, 2010 ABCA 305, [2010] A.W.L.D. 4924, [2010] A.W.L.D. 4926, 193 A.C.W.S. (3d) 1084

Daniel Walter Hill (Appellant / Applicant) and Paul James Hill, Fred Hill, The Trustees of The Frederick W. Hill Family Trust, Richard P. Rendek, Rand Flynn, Famhill Investments Limited and Harvard Developments Inc. (Respondents / Respondents)

Daniel Walter Hill (Respondent / Appellant / Respondent by Cross Appeal / Plaintiff) and Paul James Hill, Fred Hill, The Trustees of The Frederick W. Hill Family Trust, Richard P. Rendek, Rand Flynn, Famhill Investments Limited and Harvard Developments Inc. (Applicants / Respondent / Appellants by Cross Appeal / Defendants)

Myra Bielby J.A.

Heard: October 5, 2010
Judgment: October 5, 2010
Docket: Calgary Appeal 1001-0119-AC, 1001-0238-AC

Counsel: J.L. McCready, E.W. Halt, M. Vernon for Appellant / Cross-Respondent
M.O. Laprairie, Q.C., S.L. Polsky for Respondent / Cross-Applicant, Paul James Hill, Richard P. Rendek, Rand Flynn
J.P. Flanagan for Executors of the Estate of Frederick W. Hill (in Appeal 1001-0238-AC only)
F.R. Foran, Q.C., J.G. Hopkins for Respondent / Cross-Applicant, Famhill Investments Ltd., Harvard Developments Inc.

Subject: Civil Practice and Procedure; Estates and Trusts

Headnote

Civil practice and procedure --- Pre-trial procedures — Consolidation or hearing together — General principles

F established trust to hold shares of F Ltd. — Plaintiff, one of F's sons, brought action against F and other defendants in 2005 alleging he had been improperly deprived of 25 percent of shares in F Ltd. — F died in 2008 — Case management judge allowed plaintiff to amend statement of claim in 2009 to, inter alia, remove F from action — Executors of F's estate resided in Saskatchewan and declined to attorn to jurisdiction of court in Alberta — Case management judge granted further application to amend in January 2010 but refused to allow amendments to include things she had ruled could not be added in 2009 amendment application — Plaintiff appealed from January 2010 order (first appeal) — Plaintiff also appealed from August 2010 order dismissing plaintiff's action to add executors of F's estate as defendants (second appeal) — Plaintiff brought application to join appeals — Defendants applied for order declaring that second appeal was not proper appeal under provisions of Part J of Consolidated Practice Directions of Alberta Court of Appeal — Plaintiff's application dismissed; defendants' application granted on other grounds — Plaintiff had control of choice of parties to action and choice of jurisdiction at time it was launched — It was difficult to follow how plaintiff could be prejudiced now as result of those choices, simply because case management judge was not prepared to allow him to reconsider those early decisions, relatively late in day — There was no risk of inconsistent verdicts if appeals proceeded separately, little if any expense would be saved by ordering consolidation at such late date and some preparation costs would be lost — Those considerations outweighed attraction of dealing with matter in one proceeding rather than multiple appeals.

Civil practice and procedure --- Practice on appeal Interlocutory or final orders Final orders

Trust was established by F to hold shares of F Ltd. Plaintiff, one of F's sons, brought action against defendants in 2005 alleging he had been improperly deprived of 25 percent of shares in F Ltd. F died in 2008 Case management judge allowed amendments to statement of claim in 2009 to, inter alia, remove F from action Executors of F's estate

resided in Saskatchewan and declined to attorn to jurisdiction of court in Alberta — Case management judge granted further application to amend in January 2010 — Plaintiff appealed from January 2010 order (first appeal) — Plaintiff also appealed from August 2010 order dismissing plaintiff's action to add executors of F's estate as defendants (second appeal) — Plaintiff brought application to join appeals — Defendants applied for order declaring that second appeal was not proper appeal under provisions of Part J of Consolidated Practice Directions of Alberta Court of Appeal — Plaintiff's application dismissed on other grounds; defendants' application granted — Second appeal did not fall within provisions of Part J, s. 2(a)(i) of Consolidated Practice Directions because it was order that finally determined all plaintiff's substantive rights against estate of F in Alberta — Application to add party to action is akin to order striking out statement of claim against party which s. 2(b)(i) expressly states is not type of proceeding to which Part J applies.

APPLICATION by plaintiff to join two appeals; APPLICATION by defendants for order declaring second appeal improper.

***Myra Bielby J.A.*:**

1 In the Court of Appeal of Alberta. There are 2 applications before me today. Daniel Hill, who I will call the Plaintiff, applies for an order joining two appeals or directing that they be heard at the same time. Each is from a separate decision of the case management judge for this lawsuit.

2 The other parties, who I will call the Defendants, oppose that application and have applied for an order declaring that the second of these two appeals, initiated by way of Notice of Appeal filed on September 14, 2010 is not a proper Part J appeal. The executors of the estate of Fred Hill, are named respondents only in relation to the second appeal and have to this point maintained that they do not attorn to this jurisdiction. They nonetheless have now filed a brief opposing the application to join the two appeals.

3 This litigation involves a trust established by Fred Hill in 1976 to hold the shares of a company called Famhill. In 2005 one of his sons, the Plaintiff, started this lawsuit against the Defendants alleging he had been improperly done out of 25% of the shares in Famhill. Nation J. was appointed case manager of this litigation shortly thereafter and has continued to case manage it to date.

4 Fred Hill died in 2008. The Style of Cause in this action was amended by order on June 15, 2009 to remove his name. The executors of his estate reside in Saskatchewan and have, to date, stated that they decline to attorn to the jurisdiction of the court in Alberta. In that June 15, 2009 order the case management judge also allowed some but not all of certain amendments to the statement of claim sought by the Plaintiff.

5 In January 2010 the case management judge also allowed a further application to amend the Statement of Claim. She refused to allow it to be amended, however, to include things she had ruled could not be added in the prior amendment application of June 2009. She also ordered that there be no further examinations for discovery or document production notwithstanding that the pleadings were to be amended because those amendments "are not new to the proceedings or based on new information, they arise out of the discoveries and documents produced" to date. She held that request for further affidavits on production and discovery was an attempt by the plaintiffs to relitigate issues decided earlier; she was not willing to allow it on that basis, because of the context of the lawsuit over the prior 4 years and because of the provisions of her June 2009 order.

6 The Plaintiff launched an appeal from the January 2010 order. That appeal is set to be heard on October 14, 2010. Nothing more needs to be done to ready it to be heard. The executors of the estate of Fred Hill are not parties to it.

7 Few materials have been filed in relation to the second appeal. The terms of the order which is the subject of that appeal have not yet been settled or entered. The Notice of Appeal was filed September 14, 2010. That appeal is from an order made by the case management judge on August 18, 2010 in which she dismissed the Plaintiff's action to add the executors of the estate of Fred Hill as defendants to this action. I was provided with her reasons for that decision

yesterday and have read them. The executors of the estate of Fred Hill have filed a brief in opposition to the application to join the two appeals for hearing while maintaining the position that they continue to not attorn to the jurisdiction.

8 The defendants argue that the second appeal is not a proper Part J appeal because it is from an order "which finally determines all the substantive rights against a potential party in the action" and as such falls outside of the description of Part J appeals found in the Rules.

9 Nonetheless the case manager of the Court of Appeal has decided to treat this as a Part J appeal. The Defendants seek a direction to the effect that this is not correct, and the matter should not be dealt with under Part J in the future.

Issues

Should these two appeals be argued at the same time?

10 The Consolidated Practice Directions of the Alberta Court of Appeal, Part J, s. 2(e) direct that one justice of appeal may declare whether a given appeal is a proper "Part J" appeal and may consolidate appeals. Neither party has provided any case authority addressing when it is proper to do the latter.

11 I interpret the word consolidate as used in Part J to mean actual consolidation into one appeal, but also to include an order directing two appeals to be heard at the same time, or immediately sequentially. If the application to consolidate were successful, I would order that the two appeals be heard immediately sequentially as the estate of Fred Hill, now not a party to either appeal, would nonetheless have standing to appear and argue jurisdiction in relation to the second appeal but would have no standing in relation to the first. Arguing the appeals sequentially would therefore be mechanically easier that otherwise, to allow the estate of Fred Hill to make the representations it is entitled to make in the second but not the first.

12 It is helpful to consider the provisions of Rule 229 addressing consolidation of proceedings prior to trial, in determining when appeals should properly be consolidated. That rule provides that proceedings may be consolidated or tried at the same time or immediately sequentially or one may be stayed until the other is heard where two or more actions or proceedings have a common question or law or fact or arise out of the same transaction or series of transactions.

13 Stevenson and Côté in their *Alberta Civil Procedure Handbook* comment, at page 295, that the principle behind this rule is the avoidance of multiplicity of legal proceedings, and possibly inconsistent verdicts, while countervailing considerations such as delay and expense arise. And this issue was thoroughly canvassed in the decision of *B & S Publications Inc. v. Gaulin*, 2002 ABCA 238 (Alta. C.A.).

14 Applying this rule and principle by analogy to consolidation of appeals, I note:

> a. the two appeals do not give rise to a common question of fact or law; the first deals with whether certain amendments not concerning the estate of Fred Hill should have been allowed, with resulting document production and discoveries while the second deals with whether the estate should have been added as a party to the action.
>
> b. while the two appeals arise from the same factual history in the sense that both arise from orders made in the same litigation:
>
> > i. they each address different factual aspects of that litigation;
> >
> > ii. while the two appeals have the same parties at the moment, if the second is successful it will add a new party, the executors of the estate of Fred Hill; those executors may wish to appear for the limited purpose of challenging the jurisdiction of the Alberta court to add them as a party but this would be only in relation to the second appeal; they would have no right to be heard in relation to the first as they would not yet be parties at the time that it was argued, if the two appeals were consolidated;

iii. granting a consolidation order would delay the first appeal for a considerable period of time; it is otherwise ready to be argued in a few days. If this order is granted it will not be argued until sometime next year when the second appeal is ready to be heard. The plaintiff argues this will not delay the litigation overall because it cannot proceed until the second appeal is resolved, in that if the executors of the estate of Fred Hill become parties they may wish to defend and conduct examinations all of which would have to occur before the matter could be set for trial. On the other hand, if the estate maintains its position that it does not attorn to the jurisdiction none of this will happen even if it is added as a party on the second appeal being argued. Delaying the first appeal will also increase the cost of arguing it. No doubt counsel have done some preparation for October 14 by this date. Much or all of that would have to be repeated if the appeal is adjourned at this point.

iv. reconsideration - the suggestion has been made that a special application will have to be made to a 3 judge panel precedent to the second appeal being argued, for leave to reconsider previously decided law. If this is and remains a law in Alberta, the second appeal may have no hope of success. I note that the law has already been re-considered by the Court of Appeal as recently as 1990 and remain unchanged at that time. On the other hand, I note that Nation J. made extensive observations in her most recent Reasons for Decision to the effect that but for the current state of this law, she would have added the executors as parties given their personal involvement to date in other capacities in relation to this litigation. If all of this is correct, Nation J. was correct in her result of her August 2010 decision. Further delay would result to the resolution of the first appeal as essentially two steps would have to happen before it was resolved, the application for reconsideration first with the appeal being argued later. If this application is successful the second appeal may become moot yet would remain part of the consolidated appeal.

v. if the second appeal is declared not to be a proper Part J appeal different procedural rules would apply to it that to the first appeal; this is not a grave concern because as a condition of making any order for consolidation I could direct that the appeals both be dealt with in the same fashion, either as Part J appeals or as regular appeals.

vi. the plaintiff argues that there is a serious risk of prejudice to it if the two appeals are not heard together and it would be unfair to it to require one to proceed in the absence of the other. No particulars are given of this alleged prejudice or unfairness.

15 The Plaintiff was the one who had control of the choice of parties to this action and the choice of jurisdiction at the time it was launched. It sued Fred Hill and then successfully applied to remove him from the action. It now wants to reverse that decision by adding his estate as a party. It is difficult to follow how the Plaintiff could be prejudiced now as a result of those choices, simply because the case management judge was not prepared to allow him to reconsider those early decisions, relatively late in the day.

16 Taking all of these factors into account I conclude that the principles to be considered in consolidating appeals would be best reflected in an order dismissing the application. There is no risk of inconsistent verdicts if the appeals proceed separately, little if any expense would be saved by ordering consolidation at this late date and some preparation costs would be lost. These considerations outweigh the obvious attraction of dealing with this all in one proceeding rather than multiple appeals.

Is the second appeal the type of proceeding which must be dealt with under Part J?

17 No. I agree that it does not fall within the provisions of Part J, s. 2(a)(i) of the Consolidated Practice Directions because it is an order that finally determines all of the Plaintiff's substantive rights against the estate of Fred Hill in

Alberta. An application to add a party to an action is akin to an order striking out a statement of claim against a party which s. 2(b)(i) expressly states is not the type of proceeding to which Part J applies.

18 Now counsel for the defendants this morning alerted me to an 88-year old decision, *Roeske v. Senerius*, [1922] 2 W.W.R. 977 (Alta. C.A.) which does not appear to support the conclusion that dismissing an action against a party or refusing to add a party to any action, it concludes that it is an interlocutory decision. However, it obviously didn't address Part J which was not in force 88 years ago, and Part J does not expressly use the word "interlocutory", so I am not at all convinced that today our Court would apply that decision rather than a more recent contrary appellate authority from other provinces in Canada.

[Discussion on Fred Hill estate documents]

19 Counsel for the estate will be allowed to file documents as if they were a party to the action.

Plaintiff's application dismissed; defendants' application granted.