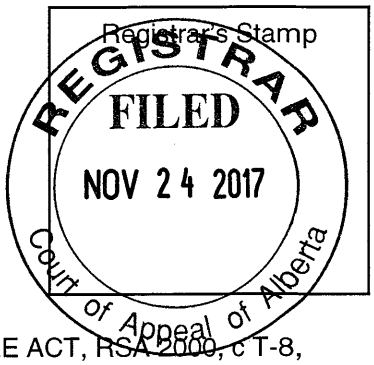
COURT OF APPEAL OF ALBERTA



COURT OF APPEAL FILE NUMBER:	1703 0252AC
TRIAL COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	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 FELIX STONEY and HIS BROTHERS AND SISTERS**
STATUS ON APPEAL	Not a party to the Appeal
RESPONDENTS (ORIGINAL APPLICANTS)	**ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")**
STATUS ON APPEAL	Respondents
STATUS ON APPLICATION	**Applicants**
INTERVENOR	**THE SAWRIDGE FIRST NATION**
STATUS ON APPEAL	Respondents
STATUS ON APPLICATION	**Interested Party**
RESPONDENT	**Public Trustee of Alberta ("OPTG")**
STATUS ON APPEAL	Not a party to the Appeal
STATUS UNKNOWN	**PRISCILLA KENNEDY**
STATUS ON APPEAL	Appellant
STATUS ON APPLICATION	**Respondent**
DOCUMENT:	**MEMORANDUM OF ARGUMENT OF THE SAWRIDGE TRUSTEES IN THE APPLICATION TO DISMISS OR STRIKE THE APPEAL** - includes Authorities

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CONTENTS OF AFFIDAVIT OF SUSAN HAGERMAN SWORN NOVEMBER 23, 2017 (FILED AS SEPARATE DOCUMENT):

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 the underlying Court of Queen's Bench Action No. 1103 14112 (the "Trial Court Action"), commenced by the trustees ("Trustees") of the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "1985 Trust" or "Trust"). On September 12, 2017, the Honourable Justice D.R.G Thomas ("Justice Thomas") issued a Case Management Decision (Sawridge #8), which included an Court Access Control Order for Stoney as a result of a finding of abusive and vexatious litigation[1].

2. Stoney has not appealed the Sawridge #8 decision. The Respondent, Priscilla Kennedy ("Ms. Kennedy") has appealed the Sawridge #8 decision on the basis that Justice Thomas commented in his reasons that her submissions on behalf of Stoney improper and that her conduct warranted his sending the judgment to the Law Society of Alberta for review.

3. The Trustees submit that the Respondent's Appeal should be dismissed. It is improper, as the issues purportedly appealed do not form part of the Order. The issue of the decision being sent to the Law Society is not open to review. Any member of the public, and of the legal system, is free to contact the Law Society. That is fundamental to the Law Society's mandate to operate in protecting the public. The Law Society has the jurisdiction to review any matter it chooses on its own initiative. This is especially true of a judgment, as it is a matter of public record. The act of sending the judgment to the Law Society of Alberta cannot be reversed, and thus nothing can be gained by this Appeal.

4. The Trustees alternatively seek an Order that the Appeal be struck pursuant to Rules 14.37 and 14.90(1)(b) on the basis that Ms. Kennedy is not a proper party to the proceeding.

II. LAW AND ARGUMENT

A. Ms. Kennedy's Appeal is Improper, Moot and the Court has no Jurisdiction

5. Pursuant to Rule 14.74 of the Alberta *Rules of Court*[2], a panel of the Court of Appeal may dismiss all or part of an appeal and make any order that the circumstances require if: a) the Court has no

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1 *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 548 (Sawridge #8) at paras 123-125 [**Tab 1**]

2 *Alberta Rules of Court* ("*Rules of Court*"), rule 14.74 **[Tab 2]**

jurisdiction; b) the appeal is moot; c) the appeal is frivolous, vexatious, without merit or improper; d) the appeal or any step in the appeal is an abuse of process.

(a) The Appeal is Improper, Meritless and an Abuse of Process

6. In *NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)*[3], this Court held that "[a]ppeals to this Court are brought from dispositions in the Court below, not from reasons". This point was reiterated in *R. v. Elliott*[4], and again more recently in *Chisholm v Lindsay*[5].

7. The provisions of the Sawridge #8 Order relate to the finding that Stoney is vexatious and set out the Court Access Control Order against him. Any discussion in the judgment relating to Ms. Kennedy's conduct is *obiter.* Justice Thomas' decision to send the judgment to the Law Society falls outside the scope of the Order and is not appealable.

8. If there was any doubt, the Court's intention is made crystal clear in the subsequent correspondence between Ms. Kennedy's counsel and Justice Thomas, wherein the attempt to make the provision that the judgment be sent to the Law Society a term of the Order was firmly denied.[6]

9. The Trustees submit that this appeal is untenable because it is brought from *reasons* given by Justice Thomas and not from the disposition of the matter. Thus, there is nothing to appeal; the Court has no jurisdiction to hear the matter and Ms. Kennedy's appeal is improper, lacks merit and is a clear abuse of process.

(b) The Appeal is Moot and therefore the Court Lacks Jurisdiction

10. Any review of the decision to send the judgment to the Law Society of Alberta is moot; the decision was sent and this act cannot be reversed. Further, the Court is in a unique position to observe and report any conduct it considers requires review to the Law Society. The Law Society is not a party and cannot be ordered to cease any investigation. It has the public interest mandate to review conduct and independently decide whether any sanction is warranted.

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3 *NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)*, 2005 ABCA 401, 2005 CarswellAlta 1726 at para 11 **[Tab 3]**

4 R. *v Elliott*, 2014 ABCA 431, 2014 CarswellAlta 2279 at para 4 **[Tab 4]**

5 *Chisholm v Lindsay*, 2017 ABCA 21, 2017 CarswellAlta 41 at para 8 **[Tab 5]**

6 Affidavit of Susan Hagerman sworn November 23, 2017, Exhibits "A" through "E" (filed in support of the Application as a separate document)

11. In *ATA v. Buffalo Trail Public Schools Regional Division No. 28*[7], the Court of Appeal summarized the law to bar an appeal for mootness. The approach involves a two-step analysis. First, has the required tangible and concrete dispute disappeared and the issues become academic? If so, should the Court exercise its discretion to hear the case? This discretion should be exercised on the basis of three basic rationalia for the enforcement of mootness doctrine: (i) whether there remains an adversarial context which 'helps guarantee that issues are well and fully argued by parties who have a stake in the outcome'; (ii) the need for judicial economy; and (iii) the court's proper adjudicative, not law making, function, to avoid intruding into legislative work.

12. Ms. Kennedy is not herself in an actual adversarial position to any party to the proceedings, being the Trustees, Stoney and the Sawridge First Nation. She is adversarial only in the sense that she disputes the reasons issued by the courts below. The exercise of discretion to hear a moot appeal is not justified where the parties are merely opposing debaters taking affirmative and negative positions on legal propositions and not litigants opposed in interest in an ongoing legal controversy.[8]

13. In *Edmonton (City) v. Grimble*[9], this Court held that the requirement of adversarial context is satisfied "if the adversarial relationships will prevail even though the issue is moot". The appellant is required to satisfy the Court that he/she "will suffer...collateral consequences if the merits are left unresolved", and that he/she "will continue to be engaged in an adversarial relationship". Ms. Kennedy will not suffer any consequence, collateral or otherwise, if the merit of her concern is left unresolved.

14. The factors to consider in respect of judicial economy include whether the Court's decision will have some practical effect on the rights of the parties, whether the case involves a recurring issue of brief duration, and the social cost of continued uncertainty in the law[10]

15. Justice Thomas' decision in Sawridge #8 will have no practical effect on the rights of Priscilla Kennedy. This appeal does not involve any recurring issues and there will be no social cost should the issue raised remain as resolved in the lower court. The circumstances of the case do not make it worthwhile to apply scarce judicial resources to resolve the issues at appeal.

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7 *ATA v. Buffalo Trail Public Schools Regional Division No. 28*, 2014 ABCA 432, 2014 CarswellAlta 2273 at paras 15-16, citing *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 **[Tab 6]**

8 *Runkle v. Alberta (Chief Firearms Officer)*, 2016 ABCA 56, 2016 CarswellAlta 252 at paras 3,10 [**Tab 7**]

9 *Edmonton (City) v. Grimble*, 1996 ABCA 45, 1996 CarswellAlta 159 at paras 11-12 **[Tab 8]**

10 *Ibid* at para 14 **[Tab 8]**

16. As the issue is moot, the Court lacks jurisdiction to deal with it.

(c) Any person can refer a matter of concern to the Law Society

17. The Law Society's mandate includes overseeing and sanctioning lawyer misconduct, derived from its responsibility to serve the public's interest by governing the professional conduct of its members. In *Jodoin*, the Supreme Court held:

> 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 [...] [Emphasis added][11]

18. As a body that serves the public, the Law Society is open to receiving communications and complaints from any member of the legal profession and the broader public. Anyone, including a judge, has the ability to contact them with a concern. Further, Rule 7.1-3 of the *Code of Conduct* imposes a duty on all lawyers to report to the Law Society any conduct that raises a substantial question as to another lawyer's competency as a lawyer[12]. If Justice Thomas did not send his reasons to the Law Society, every other lawyer on the matter may have had a duty to report Ms. Kennedy's conduct to the Law Society, and every lay person involved could also have reported her. There is no prejudice to Ms. Kennedy by reason of the Court sending the decision to the Law Society. There is prejudice to the administration of justice, and the protection of the public, if there is a determination that key members of the judicial system are prevented from contacting the regulatory body of the legal profession with a concern.

19. The Law Society controls its own processes. It will determine whether it will conduct an investigation, and if it does, it will determine what steps, if any, are subsequently taken. Ms. Kennedy's complaint assumes that there will be a negative consequence to her, which is by no means foregone. The Law Society has merely received notification of a concern. Ms. Kennedy, by attempting to appeal this notification, should not be permitted to prevent the Law Society from exercising their important mandate.

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[11] *Québec (Directeur des poursuites criminelles et pénales) v Jodoin*, 2017 SCC 26 ("*Jodoin*") at paras 20, 22, 23 **[Tab 9]**

[12] *Code of Conduct*, Law Society of Alberta, Rule 7.1-3 **[Tab 10]**

B. In the Alternative, the Appeal Should be Struck as Ms. Kennedy is not a Proper Party

20. Rule 14.37(2) permits a single appeal judge to hear and decide any application incidental to an appeal, including declaring an appeal to be struck for failure to comply with a mandatory rule. Rule 14.38 permits an Appeal Panel to decide any application. Rule 14.90(1)(b) grants the Appeal Court the power to strike a notice of appeal from the record for non-compliance with a rule.[13]

21. Rule 14.57 of the Alberta Rules of Court[14] directs that a party or person may be added as a party to an appeal in accordance with rule 3.74. Rule 3.74(2) provides that on application, the Court may order a person to be added as a party.

22. Ms. Kennedy has not applied to become a party to Sawridge #8 and has not been granted party status. Thus, she has no right to appeal. Ms. Kennedy's appeal should be struck for failure to comply with a mandatory rule, which requires an application for the Court's permission to be added as a party to the action. As it stands, Ms. Kennedy has no right to launch this appeal.

III. RELIEF REQUESTED

23. The Trustees request an order dismissing Ms. Kennedy's appeal on the grounds that the Court has no jurisdiction, as the appeal is improper, moot, lacks merit and is an abuse of process. In the alternative, the Trustees request an order that the appeal be struck as Ms. Kennedy is not a proper party. The Trustees seek 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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED AT EDMONTON ALBERTA THIS 23 DAY OF November, 2017.

DENTONS CANADA LLP

Per: _____

Doris C.E. Bonora
Solicitor for the Sawridge Trustees

Estimated Time for Argument: 20 minutes

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13 *Rules of Court*, rules 14.37, 14.38, 14.90(1)(b) **[Tab 11]**

14 *Rules of Court*, rules 14.57 and 3.74 **[Tab 12]**

LIST OF ATTACHMENTS AND AUTHORITIES

TAB **AUTHORITIES**

1. *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 CarswellAlta 1639, 2017 ABQB 548 (Sawridge #8)
2. *Alberta Rules of Court* ("*Rules of Court*"), rule 14.74
3. *NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)*, 2005 ABCA 401, 2005 CarswellAlta 1726
4. R. *v Elliott*, 2014 ABCA 431, 2014 CarswellAlta 2279
5. *Chisholm v Lindsay*, 2017 ABCA 21, 2017 CarswellAlta 41
6. *ATA v. Buffalo Trail Public Schools Regional Division No. 28*, 2014 ABCA 432, 2014 CarswellAlta 2273
7. *Runkle v. Alberta (Chief Firearms Officer),* 2016 ABCA 56, 2016 CarswellAlta 252
8. *Edmonton (City) v. Grimble*, 1996 ABCA 45, 1996 CarswellAlta 159
9. *Québec (Directeur des poursuites criminelles et pénales) v Jodoin*, 2017 SCC 26 ("*Jodoin*")
10. *Code of Conduct*, Law Society of Alberta, Rule 7.1-3
11. *Rules of Court,* rules 14.37, 14.38, 14.90(1)(b)
12. *Rules of Court*, rules 14.57 and 3.74

Tab 1

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.

End of Document

Tab 2

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 14 — Appeals
Division 6 — Deciding Appeals and Applications [Heading added Alta. Reg. 41/2014, s. 4.]
Subdivision 3 — Powers of the Court [Heading added Alta. Reg. 41/2014, s. 4.]

Alta. Reg. 124/2010, s. 14.74

s 14.74 Application to dismiss an appeal

Currency

14.74Application to dismiss an appeal

On application, a panel of the Court of Appeal may dismiss all or part of an appeal and may make any order that the circumstances require, including a costs award, if

(a) the Court of Appeal has no jurisdiction,

(b) the appeal is moot,

(c) the appeal is frivolous, vexatious, without merit or improper, or

(d) the appeal or any step in the appeal is an abuse of process.

Amendment History

Alta. Reg. 41/2014, s. 4

Currency

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

End of Document

Tab 3

Para 11

2005 ABCA 401
Alberta Court of Appeal

NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)

2005 CarswellAlta 1726, 2005 ABCA 401, [2005] A.J. No. 1581, [2006] A.W.L.D. 245, [2006] A.W.L.D. 247, [2006] A.W.L.D. 249, 10 B.L.R. (4th) 269, 144 A.C.W.S. (3d) 469, 363 W.A.C. 318, 380 A.R. 318, 49 C.L.R. (3d) 177

NAC Constructors Ltd. (Respondent / Appellant on Cross-Appeal / Respondent / Plaintiff) and Alberta Capital Region Wastewater Commission (Appellant / Respondent on Cross-Appeal / Applicant / Defendant)

Conrad, Berger, Ritter JJ.A.

Heard: November 2, 2005
Judgment: November 2, 2005
Written reasons: November 17, 2005
Docket: Edmonton Appeal 0503-0242-AC

Proceedings: affirming *NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)* (2005), 2005 CarswellAlta 1265, 46 C.L.R. (3d) 258 (Alta. Q.B.)

Counsel: J.D. Vallis, Q.C., P.L. Morrison for Respondent
R.R. Nelson, P.V. Stocco for Appellant

Subject: Contracts; Civil Practice and Procedure

Headnote

Construction law --- Contracts — Building contracts — Execution of formal contract — Tendering process — Process and procedure

Acceptance of late bid — Defendant Wastewater Commission issued tender call for upgrade of waste water treatment plant — On closing date for tenders, Commission received bids for upgrade project including one from plaintiff N Ltd. which submitted second lowest bid — Contract for project was awarded to lowest bidder M Inc. — N Ltd. protested, alleging that M Inc.'s winning bid was received by Commission after closing time for tender as set out in tender call documents — N Ltd. brought action against Commission, alleging that Commission was not able to accept M Inc.'s bid — Application by Commission for summary judgment dismissing action under R. 159(2) of Rules of Court was dismissed — Chambers judge held terms of Contract A, consisting of call for tenders and bid submitted by bidder, were insufficiently worded to allow Commission to accept bid after stated deadline had passed — Commission appealed — Appeal dismissed — Article of Contract A relied upon by Commission purported to allow Commission to accept bids which might be non-compliant by virtue of non-conformity with required tender form — Clause, in and of itself, did not permit Commission to accept late bid — Right to accept late tender was not specified in any article — Lack of specificity was crucial element of tendering process and essential to integrity of that process — Contract A did not expressly override duty of fairness — Chambers judge did not err in rejecting application for summary judgment.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — General principles

Defendant Wastewater Commission issued tender call for upgrade of waste water treatment plant — On closing date for tenders, Commission received bids for upgrade project including one from plaintiff N Ltd. which submitted second lowest bid — Contract for project was awarded to lowest bidder M Inc. — N Ltd. protested, alleging that M Inc.'s winning bid was received by Commission after closing time for tender as set out in tender call documents — N Ltd. brought action against Commission, alleging that Commission was not able to accept M Inc.'s bid — Application by Commission for summary judgment dismissing action under R. 159(2) of Rules of Court was dismissed — Chambers judge held terms of

Contract A, consisting of call for tenders and bid submitted by bidder, were insufficiently worded to allow Commission to accept bid after stated deadline had passed — Commission appealed, and N Ltd. cross-appealed — Appeal dismissed; cross-appeal dismissed — On cross-appeal, N Ltd. took issue with two observations made by chambers judge in course of her reasons for judgment, namely, that no inviolable rule existed that discretion clause could never affect formation of Contract A, and that no inviolable rule existed which prohibited parties to tendering process from agreeing that owner will be permitted to accept non-compliant bid — Appeals are brought from dispositions in court below, not from reasons — Cross-appeal confused reasoning with result — Cross-appeal was attempt to obtain opinion from Court with respect to matters which Court would decline to address.

APPEAL by defendant from judgment reported at *NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)* (2005), 2005 CarswellAlta 1265, 46 C.L.R. (3d) 258, 10 B.L.R. (4th) 252 (Alta. Q.B.), dismissing application for summary judgment dismissing action by plaintiff tender bidder for declaration that defendant was not permitted to accept winning bid for project; CROSS-APPEAL by plaintiff from certain observations made by chambers judge in course of reasons for judgment.

***Berger J.A.* (orally):**

1 The Alberta Capital Region Wastewater Commission issued a call for tenders for the upgrading of the wastewater treatment plant in Fort Saskatchewan. The call for tenders closed on January 21, 2003 at 2.00 p.m. The Respondent submitted a tender in the amount of $14.925 million. Maple Reindeers Inc. submitted a tender in the amount of $14.289 million. The Respondent objected to the Maple Reindeers' tender on the ground that the tender was submitted late. The Appellant, in any event, awarded the contract to Maple Reindeers.

2 The Appellant for the limited purpose of this appeal concedes the following:

> (a) That Contract A, consisting of the offer (the call for tenders) and the acceptance (the bid submitted by the bidder) was formed.
>
> (b) That the Maple Reindeers' tender was delivered late and, accordingly, as a matter of law is considered to be substantially non-compliant.

3 The Appellant maintains that Contract A, which includes both Article 2.1 and Article 30, allows the Appellant to accept a non-conforming or non-compliant tender. The Appellant submits that Article 30 enumerates a non-exhaustive list of the types of tenders that can be accepted or rejected by the Appellant in its sole and unfettered discretion.

4 The Appellant argues that the learned chambers judge, in dismissing the Appellant's motion for summary judgment, erred in finding that Article 30 of the Appellant's instructions to bidders did not permit the Appellant to accept the Maple Reindeers' tender. In a nutshell, the Appellant maintains that its instructions to bidders are sufficiently broad to include substantially non-conforming or non-compliant tenders, including those that are late.

5 Both the Appellant and the Respondent agree that an owner cannot use its privilege clause to award Contract B (being the ultimate contract awarded to the successful bidder), to a non-compliant bidder where the privilege clause does not permit the owner to do so.

6 In the result, the question to be decided is whether the privilege clause in the instant case permits the owner to award Contract B to the late bidder. The chambers judge held that the terms of Contract A were insufficiently worded to allow the Commission to accept the bid after the stated deadline had passed. We agree. In *Health Care Developers Inc. v. Newfoundland* (1996), 136 D.L.R. (4th) 609 (Nfld. C.A.), at 627-628, the Newfoundland Court of Appeal, mindful that accepting non-compliant bids is inherently unfair to tenderers submitting compliant bids, held that it was open to the parties to expressly override the duty of fairness if the owner's discretion clause was precise, specific, not antithetical to the entire purpose or intent of the remainder of the contract, and not unconscionable to public policy.

7 In *Double N Earthmovers Ltd. v. Edmonton (City)*, [2005] A.J. No. 221, 2005 ABCA 104 (Alta. C.A.), this Court stated at para. 20:

> 'The tender documents govern the terms, if any, of contract A': ***M.J.B.*** at para. 26. It follows that, if the terms so permit, a non-compliant bid may be acceptable, so long as there exists a clause explicitly allowing non-compliant bids. Such a clause would have to be very clear, and must be read restrictively when attempting to determine if non-compliant bids are permissible.

8 In the case at bar, Article 2.1, in our opinion, discusses non-conforming bids in the context of the tender form. It purports to allow the Commission to accept bids which may be non-compliant by virtue of non-conformity with the required tender form. This clause, in and of itself, does not permit the Commission to accept a late bid. The Appellant, however, also relies upon Article 30.1(b) which purports to reserve to the Commission the right to accept a non-compliant bid. The scope of "non-compliance" in sub-clause (b), however, is not defined nor elaborated upon. The remaining sub-clauses deal with irregularities or non-compliance relating primarily to the form and content of the bid, and its accompanying documents. The single reference to closing time of the tendering process speaks to the Commission's right to negotiate with the successful bidder after the closing time. The right to accept a late tender, however, is not specified. Mindful of the deadline for receipt of tenders, this lack of specificity, in our opinion, is a crucial element of the tendering process and essential to the integrity of that process. Mindful also that Contract A, in our opinion, does not expressly override the duty of fairness, we conclude that the chambers judge did not err in rejecting the application for summary judgment.

9 For these reasons, the appeal is dismissed.

10 As to the cross-appeal, NAC Constructors Ltd. takes issue with two observations made by the chambers judge in the course of her reasons for judgment:

> (a) That there is not an inviolable rule that a discretion clause can never affect the formation of Contract A.
>
> (b) That there is not an inviolable rule established through the case law which prohibits parties to a tendering process from agreeing that an owner will be permitted to accept a non-compliant bid.

11 Appeals to this Court are brought from dispositions in the Court below, not from reasons. The cross-appeal confuses reasoning with result. The cross-appeal is an attempt to obtain an opinion from this Court with respect to matters which we decline to address. They are not, in any event, properly within the purview of Part J. The cross-appeal must also be dismissed.

Appeal dismissed; cross-appeal dismissed.

Tab 4

2014 ABCA 431
Alberta Court of Appeal

R. v. Elliott

2014 CarswellAlta 2279, 2014 ABCA 431, [2014] A.J. No. 1393, [2015] 5 W.W.R. 213, [2015] A.W.L.D. 181, 118 W.C.B. (2d) 108, 13 Alta. L.R. (6th) 407

Her Majesty the Queen, Applicant/Respondent and Simon James Elliott, Respondent/Applicant

Barbara Lea Veldhuis, Thomas W. Wakeling, Russell Brown JJ.A.

Heard: December 11, 2014
Judgment: December 15, 2014
Docket: Edmonton Appeal 1403-0214-A

Proceedings: affirming *R. v. Elliott* (2014), 2014 ABQB 429, 2 Alta. L.R. (6th) 1, [2014] 10 W.W.R. 597, [2014] A.J. No. 779, 2014 CarswellAlta 1219, Robert A. Graesser J. (Alta. Q.B.)

Counsel: R.A. Drummond, for Respondent
Simon James Elliott, for himself

Subject: Criminal

Headnote

Criminal law --- Extraordinary remedies — Habeas corpus — Appeal — Powers of court

Prisoner successfully brought application for habeas corpus, directing his transfer from maximum security federal institution to medium security federal institution — Despite success, prisoner appealed and alleged that chambers judge erred by failing to make certain findings regarding conduct of employees of Correctional Service of Canada — Attorney General of Canada brought application to dismiss appeal — Application granted; appeal dismissed — Under R. 14.4(1) of Alberta Rules of Court, appeal was from disposition of matter, not from reasons given for such disposition — Prisoner was obviously content with disposition of his application for habeas corpus; he got what he wanted — There was nothing to appeal.

APPEAL by prisoner from judgment reported at *R. v. Elliott* (2014), 2014 ABQB 429, 2014 CarswellAlta 1219, [2014] A.J. No. 779, [2014] 10 W.W.R. 597, 2 Alta. L.R. (6th) 1 (Alta. Q.B.), granting prisoner's application for habeas corpus directing transfer but allegedly failing to make certain findings regarding conduct of correctional employees.

Russell Brown J.A. **(for the Court):**

1 The appellant Simon James Elliot is a federal prisoner. Earlier this year, he applied to the Court of Queen's Bench for an order of *habeas corpus* directing his transfer from a maximum security federal institution to a medium security federal institution. The chambers judge allowed the application (2014 ABQB 429 (Alta. Q.B.)).

2 Despite having been successful below, Mr. Elliot has appealed. He says the chambers judge erred by failing to make certain findings regarding the conduct of employees of the Correctional Service of Canada.

3 Although it is not clear from his materials what Mr. Elliot thinks this Court could or should do about this supposed error when his appeal is heard and determined, that is of no importance here. The Attorney General of Canada (acting in place of the improperly named respondents Her Majesty the Queen and the Department of Justice) applies to dismiss the appeal under rule 14.74 of the *Rules of Court* on the grounds that it is frivolous, vexatious, without merit and improper.

4 Section 3 of the *Judicature Act*, RSA 2000, c J-2 confers jurisdiction upon this Court, subject to the *Rules of Court*, to hear and determine all appeals respecting a *judgment*, *order* or *decision*. Rule 14.4(1) states a general rule that an appeal lies to this Court from a *decision* of a Court of Queen's Bench judge. The key point is that an appeal to this Court is from *the disposition* of a matter, not from *the reasons* given for such disposition: *NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)*, 2005 ABCA 401 (Alta. C.A.) at para 11, (2005), 380 A.R. 318 (Alta. C.A.). Mr. Elliot is obviously content with the disposition of his application for *habeas corpus*; he got what he wanted. The concerns he has raised before us today are not for us to decide. There is nothing to appeal. His appeal has no merit, and is improper.

5 We allow the Attorney General's application, and dismiss the appeal. The Attorney General shall recover costs of this application and of the appeal, calculated in accordance with rule 14.88(3).

6 Mr. Elliot also applied for a court-appointed lawyer for the ultimate hearing of his appeal. As we have just dismissed his appeal, this application is moot, and is dismissed with costs to the Attorney General.

7 In accordance with rule 9.4(2)(b), the court clerk may sign these orders without Mr. Elliot's approval of their form.

Appeal dismissed.

Tab 5

2017 ABCA 21
Alberta Court of Appeal

Chisholm v. Lindsay

2017 CarswellAlta 41, 2017 ABCA 21, [2017] A.W.L.D. 1000, 275 A.C.W.S. (3d) 389

Catherine Chisholm (Appellant / Plaintiff) and Noreen Lindsay (Respondent / Defendant)

Patricia Rowbotham J.A., Barbara Lea Veldhuis J.A., and Jo'Anne Strekaf J.A.

Heard: January 11, 2017
Judgment: January 18, 2017
Docket: Calgary Appeal 1601-0096-AC

Counsel: N.C. Mayer, M.B. Warren, for Appellant
D.S. Pagenkopf, for Respondent

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Judgments and orders — Nature and characteristics — Judgments

In plaintiff's cross-appeal from costs decision in her action with respect to motor vehicle accident, she raised grounds of appeal of which first ground related to claim for enhanced costs and remainder to five costs items that trial judge had specifically declined to award — Panel of Court of Appeal released judgment, stating in reasons for judgment that they found no basis upon which to intervene and that grounds relating to five costs items were prematurely referred to court, and directing parties to resolve matters before assessment officer — Assessment officer made provisional award of costs while referring question to Court of Queen's Bench as to whether he had jurisdiction to assess five costs items that were previously decided by trial judge — Chambers judge concluded that assessment officer lacked jurisdiction on basis that trial judge's costs order must be final and binding because Panel declined to intervene on those items that trial judge specifically chose not to award — Plaintiff appealed — Appeal allowed — Chambers judge erred in law by adopting interpretation focused on Panel's reasons and not on its judgment — There could have been some difficulty reconciling statements in reasons, including that Panel was declining to intervene and did not identify any overriding error by trial judge, with direction of parties to taxation but that ambiguity was resolved by formal judgment — Defendant's interpretation that judgment treated entire cross-appeal as having been dismissed would effectively render direction to proceed with taxation pointless — Plaintiff's interpretation recognized that, of six items raised on cross-appeal, only first ground was dismissed and remaining grounds were directed to taxation — This gave reasonable meaning to entirety of judgment.

APPEAL by plaintiff from judgment concluding that assessment officer lacked jurisdiction to assess costs items that trial judge declined to award.

Per curiam:

1 This appeal is from a decision by a chambers judge who addressed an alleged inconsistency in a previous decision by a panel of this court ("Panel") (reported as *Chisholm v. Lindsay*, 2015 ABCA 179 (Alta. C.A.) ("Reasons")).

I. Background

2 By way of brief background, parties involved in a motor vehicle accident each appealed a trial judge's costs decision (reported as *Chisholm v. Lindsay*, 2013 ABQB 589 (Alta. Q.B.)). The injured party cross-appealed claiming that the trial

judge had erroneously failed to award costs for six items. The Panel dismissed the first ground of the injured party's cross-appeal, being the trial judge's failure to award enhanced costs for additional expense caused by the defendant's refusal to admit some of the plaintiff's expert opinion. The Panel did so on the basis that rule 10.33(2)(b) of the *Alberta Rules of* Court, Alta Reg 124/2010 did not impose an obligation to award costs where a party failed to make an admission: Reasons at paras 48 — 51. The Panel stated that it saw "no basis to intervene on the cross-appeal" (para 48) and "declined to intervene" on the remaining five grounds of appeal which the trial judge had specifically declined to award because those grounds "in whole or in part are prematurely referred to this Court" (para 53). The Panel directed the parties to go before an assessment officer to have those matters resolved. Before the order finalizing the judgment was entered, the respondent sought clarification of paragraph 53 or, alternatively, a reconsideration of that aspect of the judgment.

3 The Panel directed the parties to make written submissions on the paragraph in dispute and, after reviewing the submissions, a judgment ("Judgment") was entered that stated in part:

> 3. The Plaintiff's cross-appeal in Appeal No. 1301-0286-AC for enhanced costs under Rule 10.33(2)(b) is dismissed; however, the following cost matters shall be resolved by way of Taxation by a Taxation Officer but if in the Taxations Officer's view a discrete question of law arises the Taxation Officer may refer that question of law onto a judge of the Court of Queen's Bench of Alberta:
>
> i. A fee(s) for the multiple submissions of Written Arguments after the initial Reasons;
>
> ii. Inflation on the Schedule C fees so awarded;
>
> iii. Full expert witness fee disbursement accounts of Mr. Stephen Mader, Certified Medical Illustrator (MSc. Bio-Mechanical Matters) and Dr. Hashman, Forensic Psychiatrist;
>
> iv. Rule 5.41 nominates fees of Dr. Hashman, Dr. Hoyer, Dr. Selland and Marni Tory; and
>
> v. The photocopy disbursement expense.

4 The parties appeared before the assessment officer who made the assessment directed by the Panel. He awarded additional costs of $68,441.94 (including $1,050 for the costs of the assessment) but noted that his assessment was provisional and referred a question to the Court of Queen's Bench with respect to his jurisdiction. The Chief Justice directed a chambers judge to determine the following issue:

> Does the Assessment Officer have the jurisdiction to assess the 5 costs items referred to in paragraph 3 of the judgment of the Court of Appeal filed August 13th, 2015, notwithstanding the same 5 items were previously decided by the trial judge?

5 The chambers judge concluded that the assessment officer lacked jurisdiction to assess the five costs items previously decided by the trial judge. He concluded that the trial judge's costs order must be final and binding because the Panel declined to intervene on those items. He concluded, "that the taxation assessment completed by the Assessment Officer is of no force or effect".

6 The appellant appeals on the basis that the Panel's Judgment meant that the issue of jurisdiction was *res judicata*.

II. Analysis

7 The issue on appeal is whether the chamber judge correctly interpreted paragraph 3 of the Judgment. Questions of jurisdiction are questions of law for which the standard of review is correctness. The same standard applies to whether a matter is *res judicata*: *David M. Gottlieb Professional Corp. v. Nahal*, 2012 ABCA 88, 522 A.R. 25 (Alta. C.A.) at para 9

8 A judgment or order of the court, not the reasons given, is the governing document. However, when the judgment contains an ambiguity it can be resolved by reviewing the reasons: *3464920 Canada Inc. v. Strother*, 2010 BCCA 328 (B.C. C.A.) at para 27, citing *Canadian Pacific Railway v. Blain* (1905), 36 S.C.R. 159 (S.C.C.) at 166-67:

> I cannot conceive that this formal judgment, transmitted to the court below, is at variance with the written memorandum read in open court as the judgment of the court. I cannot even say that it contradicts the very terms of the reasons. But suppose it is inconsistent with their tenor and meaning, which document is to govern and constitute the judgment of this court? Is it the judgment pronounced in court, which alone should be transmitted and certified to the court appealed from, or the reasons for judgment which were not read in court nor transmitted to the court below . . . The reasons of judgment are mere opinions which may be considered as part of the judgment in so far as they disclose the grounds upon which it is rendered, but they cannot vary the text or *dispositif* of the formal judgment.
>
> As noted by Chief Justice Taschereau in the same decision, the reasons cannot be entirely disregarded in the construction of the formal order. Where, for instance, the formal order contains an ambiguity, the ambiguity can be resolved by reviewing the reasons of the court: see *The Quebec, Jacques-Cartier Electric Company v. The King* (1915), 51 S.C.R. 594 at 601, 24 D.L.R. 424.
>
> See also *Badawy v Hassanein*, 2016 ABCA 42 at para 16; *1007374 Alberta Ltd. v Ruggieri*, 2015 ABCA 205, 602 AR 117 at para 11.

9 The interpretation adopted by the chambers judge focused on the Reasons not the Judgment. This was an error of law.

10 Admittedly, there may have been some difficulty reconciling the statements in the Reasons that the Panel found "no basis upon which to intervene" in the cross-appeal (para 48), was declining to intervene on the remaining grounds in the cross-appeal (para 53), and failed to identify any overriding error or improper exercise of discretion by the trial judge (which was acknowledged in paragraph 49 to be the test) with their direction in paragraph 53 that five of the matters which the trial judge had declined to award be resolved by taxation. However, that ambiguity was resolved by the Judgment.

11 As outlined above, it is the formal judgment not the reasons that govern. The respondent's interpretation of the Judgment treats the entire cross-appeal as having been dismissed, when paragraph 3 merely states that "the cross-appeal in Appeal No. 1301-0286-AC *for enhanced costs under Rule 10.33(2)(b) is dismissed*" (with emphasis). It effectively renders the direction to proceed with taxation a pointless exercise. By contrast the interpretation proposed by the appellant recognizes that, of the six items raised on the cross-appeal, only the first ground (based on Rule 10.33(2)(b)) was dismissed, and the remaining five grounds were directed to taxation. This latter interpretation is preferable as it gives reasonable meaning to the entirety of paragraph 3 of the Judgment.

III. Conclusion

12 As a result, the appeal is allowed. We adopt the provisional assessment of the assessment officer who awarded the appellant additional costs (in relation to the trial and the assessment) of $69,491.94.

13 The appellant sought solicitor-client costs for all steps taken after the Judgment issued, contending that those steps were unnecessary. Such costs are only awarded in exceptional circumstances and are not appropriate in this case. The costs of the assessment are already included in the above award. Costs are awarded to the appellant for the costs of this appeal only. The parties shall each bear their own costs for the remaining proceedings.

Appeal allowed.

Tab 6

Paras 15-16

2014 ABCA 432
Alberta Court of Appeal

ATA v. Buffalo Trail Public Schools Regional Division No. 28

2014 CarswellAlta 2273, 2014 ABCA 432, [2015] A.W.L.D. 533, [2015] A.W.L.D. 534, [2015] A.W.L.D. 597, [2015] A.W.L.D. 752, 247 A.C.W.S. (3d) 739, 588 A.R. 251, 626 W.A.C. 251, 94 Admin. L.R. (5th) 242

In the Matter of the Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25

In the Matter of Order F2010-037 Issued by the (Alberta) Information and Privacy Commissioner on August 30, 2011

The Alberta Teachers' Association, Respondent (Applicant) and Buffalo Trail Public Schools Regional Division No. 28, Respondent (Respondent) and Information and Privacy Commissioner, Appellant (Respondent)

Ronald Berger, Brian O'Ferrall JJ.A., Paul Jeffrey J. (ad hoc)

Heard: October 7, 2014
Judgment: December 15, 2014
Docket: Calgary Appeal 1401-0020-AC

Proceedings: appeal dismissed as moot *ATA v. Buffalo Trail Public Schools Regional Division No. 28* (2013), 2013 CarswellAlta 828, 2013 ABQB 283, (sub nom. Alberta Teachers' Association v. Buffalo Trail Public Schools) 562 A.R. 142, 228 A.C.W.S. (3d) 607, [2013] A.W.L.D. 2705, [2013] A.W.L.D. 2706, [2013] A.W.L.D. 2704 ((Alta. Q.B.))

Counsel: G. Solomon, Q.C, for Appellant
K.R. Nicholson, for Respondent, Alberta Teachers' Association
L.I. Randa, for Respondent, Buffalo Trail Public Schools Regional Division No. 28

Subject: Civil Practice and Procedure; Public; Labour; Municipal

Headnote

Labour and employment law --- Labour law — Collective bargaining — Miscellaneous

Teachers' association was involved in dispute with unincorporated body of school boards — Labour Relations Board made ruling that parties were required to bargain in good faith — School boards denied request of teachers' association for copy of its bylaws and constitution made pursuant to Freedom of Information and Protection of Privacy Act — Parties reached collective agreement — Privacy matter reffered to adjudication — School board body disbanded, and new collective agreement put in place — School boards' decision was upheld at adjudication — Teachers' association's application for judicial review was granted — Information and Privacy Commissioner appealed — Teacher's association brought application to strike appeal — Application granted — Appeal was moot — No labour dispute currently existed between parties — Reasons for production of records were now purely academic — Case should have ended years ago and judicial resources should not be used in continuing proceedings.

Privacy and freedom of information --- Provincial privacy legislation — Miscellaneous

Teachers' association was involved in dispute with unincorporated body of school boards — Labour Relations Board made ruling that parties were required to bargain in good faith — School boards denied request of teachers' association for copy of its bylaws and constitution made pursuant to Freedom of Information and Protection of Privacy Act — Parties reached collective agreement — Privacy matter reffered to adjudication — School board body disbanded, and new collective agreement put in place — School boards' decision was upheld at adjudication — Teachers' association's application for judicial review was granted — Information and Privacy Commissioner appealed — Teacher's association

brought application to strike appeal — Application granted — Appeal was moot — No labour dispute currently existed between parties — Reasons for production of records were now purely academic — Case should have ended years ago and judicial resources should not be used in continuing proceedings.

Civil practice and procedure --- Judgments and orders — Declaratory judgments or orders — Availability — Where question academic

Teachers' association was involved in dispute with unincorporated body of school boards — Labour Relations Board made ruling that parties were required to bargain in good faith — School boards denied request of teachers' association for copy of its bylaws and constitution made pursuant to Freedom of Information and Protection of Privacy Act — Parties reached collective agreement — Privacy matter reffered to adjudication — School board body disbanded, and new collective agreement put in place — School boards' decision was upheld at adjudication — Teachers' association's application for judicial review was granted — Information and Privacy Commissioner appealed — Teacher's association brought application to strike appeal — Application granted — Appeal was moot — No labour dispute currently existed between parties — Reasons for production of records were now purely academic — Case should have ended years ago and judicial resources should not be used in continuing proceedings.

Civil practice and procedure --- Parties — Standing

Teachers' association was involved in dispute with unincorporated body of school boards — Labour Relations Board made ruling that parties were required to bargain in good faith — School boards denied request of teachers' association for copy of its bylaws and constitution made pursuant to Freedom of Information and Protection of Privacy Act — Parties reached collective agreement — Privacy matter reffered to adjudication — School board body disbanded, and new collective agreement put in place — School boards' decision was upheld at adjudication — Teachers' association's application for judicial review was granted — Information and Privacy Commissioner appealed — Teacher's association brought application to strike appeal — Application granted — Appeal was moot — Commissioner did not have standing to bring appeal — In directing disclosure rather than remitting, chambers judge did not usurp commissioner's policy making role or become policy maker by default — Referring matter back to adjudicator would have been pointless — Chambers judge did not err or otherwise exceed jurisdiction in directing disclosure.

APPLICATION by teachers' association to dismiss appeal from judicial review regarding disclosure of bylaws and constitution of collection of school boards.

***The Court*:**

Introduction

1 We granted the application of the respondent, the Alberta Teachers' Association (ATA), to strike the appeal of the Information and Privacy Commissioner (IPC), with reasons to follow. These are those reasons and they are two-fold. First, the appeal was moot. Second, the IPC lacked standing to bring the appeal. Following a review of the background, we address each of those reasons in turn.

Background

2 In collective bargaining between the ATA and an unincorporated body of 12 school boards called the School Boards Employer Bargaining Authority (SBEBA), which included the Respondent Buffalo Trail Public Schools Regional Division No. 28 (Buffalo Trail), the ATA questioned whether it could be required to bargain with SBEBA, rather than with individual member school boards and divisions. On December 20, 2007, the Alberta Labour Relations Board declared that the ATA had a duty to bargain in good faith with SBEBA.

3 In May 2008 the ATA requested from Buffalo Trail the constitution and bylaws, and various transactional records of SBEBA (records in issue), pursuant to the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (the Act), explaining:

> In order to ensure that the Association is able to act fully on the new collective agreements and represent its teachers, it is necessary for Teacher Welfare staff to gain a full understanding of the operation of SBEBA with its member school boards. The SBEBA constitution and any related bylaws will greatly assist the Association in gaining this understanding — first in following correct procedures related to the SBEBA and second so the Association may avoid interfering with or being seen to interfere with the SBEBA.

4 In June 2008 the ATA and Buffalo Trail entered into a collective agreement for a term ending August 31, 2012.

5 In July 2008 Buffalo Trail refused to produce most of the information the ATA requested. The ATA then asked the IPC to review that refusal. The IPC authorized a portfolio officer to investigate and attempt settlement. That was done, but with limited success.

6 In April 2009 the ATA requested an inquiry by the IPC. On May 16, 2010, the IPC convened a written inquiry by one of its adjudicators.

7 In October 2010 SBEBA permanently disbanded. Buffalo Trail did not inform the IPC Adjudicator.

8 In August 2011 the IPC Adjudicator rendered his decision on the written inquiry, confirming Buffalo Trail's decision to refuse access to the remaining records. The ATA applied for judicial review of that decision in the Court of Queen's Bench.

9 On May 10, 2012, the ATA served notice on Buffalo Trail to commence negotiating a new collective agreement.

10 The chambers judge heard the judicial review application May 16, 2012, and reserved decision.

11 The collective agreement expired August 31, 2012. Without any involvement of SBEBA, but following the coming into force on May 27, 2013, of the *Assurance for Students Act*, SA 2013, c A-44.8, the ATA and Buffalo Trail entered into a new collective agreement, with a term from September 1, 2012 to August 31, 2016.

12 The chambers judge rendered her judicial review decision November 22, 2013: *ATA v. Buffalo Trail Public Schools Regional Division No. 28*, 2013 ABQB 283 (Alta. Q.B.). She found the standard of review to be reasonableness and the Adjudicator's decision reasonable in parts and unreasonable in others. She then directed release of SBEBA's records in issue to the ATA and remitted the matter to a different adjudicator "for a rehearing on the issue of nondisclosure" in respect of other records: para 71.

13 The IPC alone appealed from the judicial review decision; Buffalo Trail did not appeal or file a factum taking a position.

14 In her appeal, the IPC says that since the chambers judge was conducting a judicial review rather than an appeal, and since the Adjudicator had expressly not addressed other possible grounds for non-disclosure, then the chambers judge was required to remit back the issue of disclosure of the records. The IPC says that in failing to remit that issue back, but instead directing disclosure of the records in issue, the chambers judge exceeded her jurisdiction. This, the IPC argues, placed the IPC's jurisdiction in question. In substituting her own findings for those of the IPC, the IPC says, the chambers judge became the default policy maker on privacy matters. Further, the IPC argues, the chambers judge erred by failing to give reasons for so deciding, despite the IPC's post judgment request of the chambers judge.

The Appeal is Moot

15 Determining whether to bar an appeal for mootness follows a two-step process: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 92 N.R. 110 (S.C.C.) at paras 16, 17 and 42:

> ... First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case....
>
> The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons...
>
> In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

16 The three basic rationalia are: (i) whether there remains an adversarial context which "helps guarantee that issues are well and fully argued by parties who have a stake in the outcome" (para 31); (ii) the need for judicial economy (para 34); and (iii) the court's proper adjudicative, not law making, function, to avoid intruding into legislative work (para 40).

17 On the first question, there no longer remains a "tangible and concrete dispute" and the issues [between the ATA and Buffalo Trail] "have become academic". The labour relations dispute giving rise to the information request via the IPC's process resolved in 2008. Since then the parties have settled subsequent labour issues by a further collective agreement in place through to August 31, 2016. The uncontroverted evidence before us was that there is no current labour relations dispute between the ATA and Buffalo Trail.

18 The IPC acknowledges that the labour dispute had ended but said the IPC was not dealing with a labour dispute. The IPC says it was dealing with a privacy issue, which remains live. The IPC argues that the chambers judge's error (in directing disclosure of certain records, and not remitting the matter back for the Adjudicator to consider further whether to do that) affected the scope of the IPC's statutory delegated jurisdiction over privacy policy. It urges this court to reverse that error and says it remains a live issue.

19 We disagree. First, the IPC's appeal raises an issue of the scope of the chambers judge's jurisdiction on judicial review, not of privacy policy. The law on that is clear, repeated recently in *Telus Communications Inc. and TWU (Underwood), Re*, 2014 ABCA 199, 70 Admin. L.R. (5th) 100 (Alta. C.A.) at para 35:

> ... Once a reviewing court determines that an administrative body has rendered an unreasonable decision, the matter must, in theory, be sent back for a rehearing. However, the court may issue a decision on the merits if returning the case to the administrative tribunal would be pointless: *Giguère v Chambre des notaires du Québec*, 2004 SCC 1 at paras 65-66, [2004] 1 SCR 3.

20 Second, the dispute about whether certain records can remain private is of no further consequence or practical utility. The ATA wanted SBEBA's records for reasons that are, now, purely academic. There is no longer any need for the ATA "to gain a full understanding of the operation of SBEBA with its member school boards"; there is no longer any risk of the ATA not "following correct procedures related to the SBEBA" or "interfering with or being seen to interfere with the SBEBA". Further, the collective agreement entered into between the ATA and Buffalo Trail has long since expired, such that there is no longer any need "to act fully on" it. SBEBA was not revived for the most recent collective bargaining process and will not be the bargaining agent for, or otherwise negotiate on behalf of, Buffalo Trail in any future such process or dispute.

21 We note that the records inquiry of the ATA about SBEBA was moot as of October 2010, when SBEBA disbanded, whether the ATA knew it or not. It did not become moot upon the ATA's discovery that SBEBA would no longer represent Buffalo Trail in collective bargaining. A party's discovery of a fact does not make moot that which was already moot.

22 The second step of the process is to consider whether to exercise our discretion and nevertheless hear the appeal despite it being moot. There is no longer the platform for ensuring issues are well and fully argued by those having an interest in the outcome. The only party to the appeal with any interest in it, IPC, was not a party to the original adversarial labour dispute.

23 There is not a risk in this case of this court usurping the legislator's role by proceeding with the appeal, though we acknowledge the IPC asks us to fix what it perceives as the chambers judge's improper foray into that role.

24 As for economy of judicial (and quasi-judicial) resources, this case should have terminated years ago. Inexplicably, Buffalo Trail failed to inform the IPC's Adjudicator of the fate of the SBEBA, which rendered entirely unnecessary its further considerable effort. Buffalo Trail and the ATA (after it learned of the disbanding) both failed to inform the chambers judge of this development, rendering entirely unnecessary her further considerable effort. We are disinclined to expend still further scarce judicial resources to hear an appeal of a judicial review of an adjudicator's decision, both of which should have been saved the effort by the parties.

25 Therefore, we are not persuaded in this case to exercise our discretion to hear the appeal despite it being moot.

The IPC Lacks Standing

26 Even if we did not strike the appeal as moot, we nevertheless strike it because the appellant, the IPC, lacks standing to appeal. In *Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 160, 432 A.R. 188 (Alta. C.A.), this court addressed the extent to which a tribunal created by statute can appeal from a superior court's judicial review quashing that tribunal's decision. It held at paras 54 and 55:

> [54] There is binding precedent on this precise topic. Can the statutory tribunal whose own decision has been quashed by judicial review, appeal from that to the Court of Appeal? No, it cannot do so unless its own jurisdiction is in question or was questioned by Queen's Bench. The leading case is *Labour Relations Bd. v. Dom. Fire Brick etc.*, [1947] S.C.R. 335 [sic], [1947] 3 D.L.R. 1. See the decisions of the Chief Justice and Kerwin J. (p. 339 S.C.R.) and of Estey J. (p. 344). (The minority judgment, by Rand and Kellock J., is vague on this topic.)
>
> [55] The minority said much the same in *Labour Relations Bd. v. E. Bakeries*, [1961] S.C.R. 72, 78, 26 D.L.R. (2d) 332 (and the majority did not discuss the point). The topic came up again in *Can. Labour Relations Bd. v. Transair*, [1977] 1 S.C.R. 722, 727-28, 745-46, 756, 9 N.R. 181. All the Supreme Court judges there agreed that the impugned tribunal can appeal only to protect its jurisdiction, and that an appeal on the merits is bad. There are *dicta* to that effect in *Bibeault v. McCaffrey (Vassar v. Carrier)*, [1984] 1 S.C.R. 176, 190-91, 52 N.R. 241. (It went off on whether *audi alteram partem* was a question of jurisdiction.)

27 This aspect of *Brewer* was followed again earlier this year in a decision released after the IPC filed its appeal in this case: *Imperial Oil Ltd. v. Calgary (City)*, 2014 ABCA 231, 374 D.L.R. (4th) 489 (Alta. C.A.), at para 30; application for leave to appeal to the SCC filed September 29, 2014: [2014] S.C.C.A. No. 428 (S.C.C.).

28 The IPC says that the issue on this appeal deals with her jurisdiction. By failing to remit back to the Adjudicator the issue of disclosure of the records, the IPC says, the chambers judge usurped her jurisdiction. If left to stand this decision leaves the proper lines of division between the jurisdiction of the IPC and that of the chambers judge blurred, if not obliterated. The IPC maintains that the jurisdiction of the IPC is very much in issue.

29 We are of the view that the chambers judge did not err or otherwise exceed her jurisdiction in directing disclosure of the SBEBA documents. Remitting that matter back to the adjudicator would have been, in the words of this court in *Telus*, "pointless". The four subsections of the Act that the Adjudicator had not yet considered, and for which the IPC says were a reason the chambers judge was required to remit the matter so the IPC could still exercise its jurisdiction in respect of those statutory considerations, do not apply in this case. The four subsections of the Act address:

17(1) — disclosure harmful to personal privacy,

24(1)(d) — unimplemented personnel or administration management plans,

24(1)(f) — contents of agendas or meeting minutes, and

27(1) — privileged information.

30 Finally, the suggestion that directing disclosure instead of remitting the matter back rendered the chambers judge the default policy maker on privacy matters, misunderstands the nature of precedent in administrative law. That is, a delegate of legislative authority making decisions is bound to follow and apply interpretations of law made by courts. However, unless the statute expressly states otherwise, a decision maker bringing policy choices to bear in its decisions within its exclusive jurisdiction is not required to follow any previous policy decision, including its own earlier decisions. As explained in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 243 N.R. 22 (S.C.C.) at para 26, prior decisions of a delegated decision maker that create a legitimate expectation of future comparable decisions only militate in favour of greater procedural rights being accorded subsequently. They do not assure a party of any comparable substantive outcome, nor of any particular policy approach. These are the exclusive domain of the delegated decision maker in the context of the specific issue before them.

31 In directing disclosure rather than remitting, the chambers judge did not usurp the IPC's policy making role or become the policy maker by default.

Conclusion

32 For these reasons we struck the IPC's appeal of the judicial review decision.

33 In view of the ATA's assertion that the issues before this court on appeal were moot, which entailed it having no further interest in the requested information, which we have accepted in granting its application to strike the appeal, we stay the disclosure direction in the judicial review. No party ought to expend any further resources in this matter and the stay returns parties to their positions at the time the matter became moot, so far as now possible.

Application granted.

Tab 7

Paras 3, 10

2016 ABCA 56
Alberta Court of Appeal

Runkle v. Alberta (Chief Firearms Officer)

2016 CarswellAlta 252, 2016 ABCA 56, [2016] A.W.L.D. 1007, [2016] A.J. No. 200, 128 W.C.B. (2d) 535

Ian Daniel Runkle, Applicant (Respondent) and Attorney General of Canada (Representing the Chief Firearms Officer of Alberta), Respondent (Appellant)

Peter Costigan J.A., Jack Watson J.A., Thomas W. Wakeling J.A.

Heard: February 25, 2016
Judgment: March 1, 2016
Docket: Edmonton Appeal 1503-0111-AC

Counsel: Ian Daniel Runkle, Applicant, Respondent, for himself
C.G. Regehr, D.S. Poddar, for Respondent, Appellant

Subject: Civil Practice and Procedure; Criminal

Headnote

Judges and courts --- Jurisdiction — Superior courts — Appellate court — Where issue becoming academic or moot

R's long term authorization to transport firearms was amended in 2015 to impose conditions and delete purpose of transporting firearms to gunsmith or verifier — Queen's Bench judge held that this action was a refusal to issue and within jurisdiction of Provincial Court — Court granted Crown leave to appeal on questions whether response was a "refusal", whether Provincial Court had jurisdiction to review and direct terms and conditions on authorization to transport and whether application under Firearms Act may be made by letter — R applied to dismiss appeal as moot as Chief Firearms Officer (CFO) had issued requested authorization — CFO opposed application to dismiss — Application granted — Criteria in deciding whether to exercise discretion to hear moot appeal are whether adversarial relationship still exists, conservation of judicial resources and sensitivity to court's proper law-making function — Should Alberta judge in future adopt finding of Queen's Bench judge, open to CFO to appeal or seek leave to appeal on case where outcome makes a difference — Possibility that decision would be used as precedent in other jurisdictions was matter for those jurisdictions.

APPLICATION to dismiss appeal as moot.

The Court:

1 It is well established that this Court has jurisdiction to entertain a moot appeal under certain limited circumstances such as where an expenditure of judicial resources is warranted because the issue, although moot, is of a recurring nature but is evasive of review and an answer is needed: see *eg New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.) at para 45. There may also be other special reasons of a similar sort: see *eg J. (J.), Re*, 2005 SCC 12, [2005] 1 S.C.R. 177 (S.C.C.) . Neither situation is this case.

2 It is equally well established that the Court can decline to exercise jurisdiction to adjudicate where the "the required tangible and concrete dispute" has disappeared as between the specific parties even if the subject matter might come up again: see *eg Alberta (Attorney General) v. U.F.C.W., Local 401*, 2011 ABCA 93 (Alta. C.A.) at para 10, (2011), 502 A.R. 188 (Alta. C.A.). In that case it was noted that "the intervening legislative and jurisprudential context may well have a bearing on outcome". While the occurrence of legislative change and conclusion of the individual case did not persuade the Supreme Court not to hear the appeal in *Walsh v. Bona*, 2002 SCC 83, [2002] 4 S.C.R. 325 (S.C.C.) as the Crown still had a stake in the matter. That is not what we have here either.

3 The three criteria applied in deciding whether to exercise the discretion are whether there still exists an adversarial relationship, concern for conserving judicial resources and sensitivity to the court's proper law-making function. What we have here is what Doherty JA described in *Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (Ont. C.A.) at para 16 this way:

> The parties remain adversarial only in the sense that they take different positions on the legal issues raised before the courts below. They are aptly described as opposing debaters taking affirmative and negative positions on legal propositions and not as litigants opposed in interest in an ongoing legal controversy.

4 The circumstances here are that the respondent on the within appeal, Ian Runkle seeks an order dismissing the appeal of the Alberta Chief Firearms Officer (represented by the Attorney General of Canada) against a decision of the Court of Queen's Bench at 2015 ABQB 216 (Alta. Q.B.). Leave to appeal that Queen's Bench decision was granted at 2015 ABCA 233 (Alta. C.A.).

5 The respondent in 2009 was issued a Long-Term Authorization to Transport firearms which allowed him to transport firearms to a licensed gunsmith "for the purpose of maintenance, repair, modification or deactivation and return to the place of registration". This transportation authority is said to be linked to s 19 of the *Firearms Act*, SC 1995, c 39. On April 17, 2014, the respondent was issued a new authorization that added some conditions and did not allow the respondent to transport firearms to a gunsmith or verifier. Section 58 of the *Firearms Act* does permit the Chief Firearms Officer to "attach any reasonable condition" to an authorization to transport.

6 The respondent evidently spoke with and wrote to the Chief Firearms Officer on April 29, 2014, asking for relief from the additional conditions thus imposed and for approval to transport as before. The Chief Firearms Officer declined to give the respondent all of what he sought. The respondent treated that situation as being a "refusal" to issue a license under s 74 of the *Firearms Act* and thus as providing him with a basis to "refer" that "refusal" to a Provincial Court Judge under that *Act*. Under the *Act*, a decision of the Provincial Court Judge was thereafter subject to appeal to the Court of Queen's Bench and from there, by leave, to the Court of Appeal: see 2015 ABCA 233 (Alta. C.A.).

7 The Provincial Court judge found she did not have jurisdiction to deal with the matter as the response of the Chief Firearms Officer was not a "refusal". The Queen's Bench judge disagreed and found it was a "refusal" and therefore sent the matter back to the Provincial Court for determination on the merits. A member of this Court granted leave to appeal to this Court on three questions, relating first to whether the response was a "refusal", and secondly to whether the Provincial Court had jurisdiction to review and direct terms and conditions on an authorization to transport (which arose in part from para 32 of the Queen's Bench reasons), and thirdly whether an application under the *Firearms Act* may be made by letter.

8 Since the date of the leave grant, the respondent says that the authorization which he originally sought has been granted by license effective until January 25, 2020, which he exhibits before this Court. He says that there is no residual controversy to support the appeal and he undertakes to discontinue his reference to the Provincial Court. The Chief Firearms Officer seeks to maintain the appeal, however, asserting there is something left to talk about. We disagree. The only real question before us is whether we should proceed with the appeal despite its mootness as between these parties.

9 The Chief Firearms Officer contends that the appellant, being a lawyer interested in the subject of firearms, will deploy the decision of the Queen's Bench judge in future cases. This is close to an *in terrorem* argument. Should an Alberta judge in future adopt that argument, it will be open to the Chief Firearms Officer to appeal or seek leave to appeal, if so disposed, on a case where the outcome makes a difference. The issue is not evasive of review. That the Queen's Bench judge's decision here may be given endorsement or rejection in other jurisdictions of Canada is a matter for those jurisdictions.

10 While we endorse the observation of the leave judge that the law in this area might benefit from greater certainty, it can perhaps be said in most cases where the issue becomes moot on the facts that the law could still use clarification. The

adversary system, however, generally contemplates a real dispute existing in order to nourish the exercise of appellate jurisdiction.

11 The Chief Firearms Officer also contends that the recently elected Liberal Party administration of the Government of Canada has set its mind towards repeal of changes made by Bill C-42 which allowed restricted and prohibited weapons to be freely transported without a permit. Prime Minister Justin Trudeau's letter to the Minister of Public Safety and Emergency Preparedness, Ralph Goodale PC, stated in part that he expected the Ministry to repeal "some elements of Bill C-42." The letter is not entirely specific as to what amendments might be contemplated. We also note that we see no indication that Bill C-42 figured significantly in what the Queen's Bench judge decided.

12 The late Antonin Scalia of the United States Supreme Court was well known for his resistance to consideration of legislative debates as an interpretive tool in relation to legislation: see A. Scalia and B. Garner, *Reading Law: The Interpretation of Legal Texts*, pp 369-390 (2012). Canada's traditions are more hospitable to courts using legislative debates for such purpose, but we are unaware of authority for the idea that generalized political statements have the force of law *before* an enactment. Indeed, if the Chief Firearms Officer is right to speculate, it might equally be that the Government could enact to overcome any concerns as raised by any of the three questions for which leave was granted.

13 In the end, we are satisfied that the appeal has become moot and that there is no good reason to hear it anyway. The application is granted and the appeal is dismissed as moot.

Application granted.

Tab 8

Paras 11-12, 14

1996 CarswellAlta 159
Alberta Court of Appeal

Edmonton (City) v. Grimble

1996 CarswellAlta 159, [1996] A.W.L.D. 314, 116 W.A.C. 150, 133 D.L.R. (4th) 587, 181 A.R. 150, 37 Alta. L.R. (3d) 437, 45 C.P.C. (3d) 357, 61 A.C.W.S. (3d) 443

CITY OF EDMONTON (Appellant/Respondent) v. DONALD L. GRIMBLE (Respondent/Applicant) and EDMONTON REGIONAL AIRPORTS AUTHORITY (Respondent/Intervenor)

Belzil, Russell and Picard JJ.A.

Heard: February 16, 1996
Judgment: February 26, 1996
Docket: Doc. Edmonton Appeal 9403-0661-AC

Counsel: *W.H. Hurlburt, Q.C.*, and *A.H. Lefever*, for appellant/respondent.
D.G. Ingram, Q.C., and *B.C. Shoush*, for respondent/applicant.
K.D. Wakefield and *T.J. Williams*, for respondent/intervenor.

Subject: Civil Practice and Procedure; Public

Headnote

Judges and Courts --- Jurisdiction — Jurisdiction of superior courts — Jurisdiction of appellate court — Where issue becoming academic

Judges and courts — Jurisdiction of courts — Courts generally — Hypothetical or academic issues — Court declaring by-laws invalid for contravening third by-law — City appealing decision but repealing third by-law prior to appeal being heard — City's appeal being moot.

A chambers judge determined that two city by-laws contravened a third by-law. The city appealed that ruling, but before the court could address the merits of the appeal, the city, in response to a plebescite, enacted a by-law repealing the third by-law. The city conceded that its appeal was moot, but requested that the court direct that in the event the validity of the first two by-laws becomes an issue in any litigation between it and any other party, it not be precluded from arguing that the chambers decision was wrongly decided. The respondent requested that the court dismiss the appeal on the merits.

Held:

Appeal dismissed.

The question of mootness depended on whether there was an extant controversy or concrete dispute between the parties. Since there was none, the issue was moot, and the respondent had failed to raise any concrete reason for the court to consider the case on the merits. There was no evidence that the respondent would suffer any collateral consequences if the merits were left unresolved, nor that he would continue to be engaged in an adversarial relationship with the city. There was no evidence of any potential future litigants, and none had applied for intervenor status. Nor was there any evidence of any further litigation arising, and therefore no adversarial context warranting the exercise of the court's discretion. The respondent also failed to establish that a determination of the issue, on the merits, would have any practical impact upon him. The case did not involve recurring issues, nor was there any suggestion of a social cost should the issue be left unresolved. The respondent had therefore failed to make out a test for the application of judicial economy. Furthermore, as the city's electorate had pronounced on the issue by way of a plebescite, an adjudication by the court could be construed as an unwarranted intrusion into the political arena. In the circumstances, a declaration on the merits would therefore be inappropriate.

Appeal of decision of chambers judge declaring by-laws invalid.

***Per curiam* (Written memorandum of judgment):**

1 We granted an application by the City of Edmonton to dismiss its own appeal for mootness, and promised these reasons.

2 The appeal concerns the validity of City of Edmonton Bylaw 10614, known as the Municipal Airport Passenger Service Limit Bylaw, and Bylaw 10629, known as the Slot Allocation Bylaw. A Chambers Judge held both those bylaws contravened Bylaw 10205, known as the Edmonton Municipal Airport Referendum Bylaw. That Bylaw required the City to take reasonable steps to maintain and promote the Edmonton Municipal Airport. The City appealed that ruling.

Arguments

3 Before the Court could address the merits of that appeal, the City, in response to a plebiscite, enacted a Bylaw to repeal Bylaw 10205. As a result the City now concedes that the issues raised in its appeal are moot, and there is no need for a decision concerning the correctness of the decision of the Chambers Judge. However, the City asks this Court to direct that in the event the validity of Bylaws 10614 or 10629 becomes an issue in litigation between it and any other person, that it not be precluded from arguing that the decision of the Chambers Judge was wrongly decided.

4 The respondent argues that this Court should dismiss the appeal on the merits, and should not dismiss or quash the appeal as moot. It says the City's position in seeking assurance that it will retain the right to argue the merits of the appeal, should the need arise, demonstrates that the issues are not moot. In support of that proposition, the respondent relies on *Forget c. Québec (Procureur Général)*, [1988] 2 S.C.R. 90.

5 In *Forget*, the respondent applied for a permit to practice her profession in Quebec. To obtain the permit, she was required to be knowledgeable in the French language, and to complete a written examination in French. Unable to meet those requirements, she obtained a declaration from the Quebec Court of Appeal that the provisions of the regulation requiring her to write the examination in French, and to have knowledge of the French language were invalid because it was contrary to the *Charter of Rights and Freedoms*. That declaration was appealed by the province of Quebec to the Supreme Court of Canada.

6 The regulation in question in *Forget*, was enacted under section 35 of the *Charter of the French Language*, R.S.Q. 1977 c. C-11. Between the time the Court of Appeal heard argument and issued its judgment, s. 35 of that statute was amended by incorporating a modified version of the requirement for knowledge of the French language. However, the impugned regulation was neither repealed or replaced. In view of the amendment, the Court was required to consider whether the issue had become moot. In that case, it was the respondent who took the position that the appeal was moot.

7 At page 97, Lamer J. (as he then was) held that the issue of mootness must be determined in light of the appellant's interest. The issue was held not to be moot because Quebec had an interest in a ruling by the Court on the validity of its actions from the time the regulation was adopted until the statute was amended.

8 Here, it is the appellant who wishes to have the appeal declared moot. Nonetheless, we are of the view that the issue of mootness must be considered in light of the appellant's interests. The appellant maintains that its interests can be met by quashing its appeal for mootness, with a direction that it is not precluded from arguing the merits at some later time. The effect would be that the matters in issue between the appellant and respondent would no longer be live, but the City could argue the merits in litigation with other persons if necessary.

9 The respondent argues that the City is seeking to place the issue concerning the validity of the Bylaws in legal limbo, because it neither seeks to uphold the validity, nor to have the validity finally determined.

Test for Mootness

(a) Are the Issues Academic?

10 We are all of the view that the application by the City meets the test established in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 [[1989] 3 W.W.R. 97], and should be granted. A case is moot if some event occurs after proceedings were commenced, which eliminates the controversy between the parties. The first part of the two step analysis in *Borowski* requires the Court to consider whether the dispute has disappeared and the issues have become academic. Here, the respondent denies that has occurred because it is possible that the City will become engaged in future litigation involving other parties in which the validity of the bylaws may be a central issue. However, as between these parties in these proceedings it is not disputed that the issue is academic. But since the merits of the appeal have been fully argued before us, the respondent argues on behalf of potential future litigants that it is in the interests of judicial economy that we proceed to decide the matter on its merits. In our view, the issue of judicial economy is more pertinent to the second step of the analysis. The question of mootness depends on whether there is an extant controversy or concrete dispute between these parties. Since there is none, the issue is moot.

(b) Is it Necessary to Hear the Case?

11 The second part of the analysis is whether it is nonetheless necessary for the Court to exercise its discretion to hear the case even though the issue between these parties is now academic. In our view, the respondent has not raised any concrete reasons which would warrant us doing so. The criteria for exercising the discretion was also addressed in *Borowski*. There, Sopinka J. recognized the undesirability of establishing an exhaustive list of guidelines which might fetter judicial discretion. However, he did propose some guidelines which may apply here.

(i) Adversarial Context

12 The first is that the issue must exist within an adversarial context. That requirement is satisfied if the adversarial relationships will prevail even though the issue is moot. Here, the respondent has not satisfied us that he will suffer any collateral consequences if the merits are left unresolved, nor that he will continue to be engaged in an adversarial relationship with the City. Potential future litigants are not identified, nor represented before us, and none have applied for intervenor status. There is no evidence before us of any further litigation arising. Thus, there is no identifiable adversarial context warranting the exercise of our discretion.

(ii) Judicial Economy

13 The second guideline to the exercise of the discretion discussed in *Borowski* is the issue of judicial economy. Sopinka J. said at p. 245 that:

> The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

14 The factors to consider include whether the Court's decision will have some practical effect on the rights of the parties, whether the case involves a recurring issue of brief duration, and the social cost of continued uncertainty in the law. We are unable to discern any practical impact on the rights of the respondent. He wants the issue determined, but has not provided any reason other than his investment of time and money in the proceedings to date, and the possible unidentified impact on unspecified third party interests which he purports to represent. The case does not involve recurring issues, and certainly not of the sort which Sopinka J. referred to in *Borowski*, that is those requiring resolution because of their short duration and the frequency with which they arise. There is also no evidence of any social cost should this issue be left unresolved. As such, the test for judicial economy has not been made out.

(iii) Role of the Legislative Branch

15 The third guideline to be considered in determining whether to exercise the discretion is whether in doing so the Court would be intruding into the role of the legislative branch, and indeed the democratic process. The electorate of the City of Edmonton have already given their pronouncement upon this issue. An adjudication by this Court upon the

issue, albeit only for the period prior to the repealing Bylaw, could nonetheless be construed as an unwarranted intrusion into the political arena.

16 Such a finding, while a departure from the Court's traditional adjudicative function, can be made if the situation so requires. There is no absolute prohibition against doing so. Some flexibility must be maintained if the Courts are to be able to properly evaluate the mootness of an appeal in relation to the overall judicial framework. It is a matter of discretion for the Court. However, in the circumstances of the case at bar, this Court finds such a declaration to be inappropriate.

Conclusion

17 In the result, we decline to exercise our discretion to decide the merits of the appeal.

18 Accordingly, we dismiss the City's appeal for mootness, on the ground that all of the issues raised no longer present a live controversy as between the appellant and the respondent, and should not be decided at this time. For the purpose of greater certainty, we further direct that in the event the validity of City of Edmonton Bylaw 10614 or Bylaw 10629 becomes an issue in litigation between the appellant and any other person, the appellant will not be precluded from arguing in this Court that the judgment appealed from in this appeal was wrongly decided.

19 We direct that there be no costs to either the appellant or the respondent in the appeal and cross-appeal in Appeal No. 9403-0661-AC.

Appeal dismissed.

Tab 9

2017 SCC 26, 2017 CSC 26
Supreme Court of Canada

Québec (Directeur des poursuites criminelles et pénales) c. Jodoin

2017 CarswellQue 3091, 2017 CarswellQue 3092, 2017 SCC 26, 2017 CSC 26, [2017] 1 S.C.R. 478, [2017] S.C.J. No. 26, 137 W.C.B. (2d) 542, 346 C.C.C. (3d) 433, 37 C.R. (7th) 1, 408 D.L.R. (4th) 581

Director of Criminal and Penal Prosecutions (Appellant) and Robert Jodoin (Respondent) and Director of Public Prosecutions, Criminal Lawyers' Association (Ontario), Association des avocats de la défense de Montréal, Trial Lawyers Association of British Columbia and Canadian Civil Liberties Association (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: December 5, 2016
Judgment: May 12, 2017
Docket: 36539

Proceedings: reversing *Jodoin c. Québec (Directeur des poursuites criminelles et pénales)* (2015), 2015 CarswellQue 4364, EYB 2015-251967, 2015 QCCA 847 (C.A. Que.) [Quebec]

Counsel: Daniel Royer, Catherine Dumais, for the appellant
Catherine Cantin-Dussault, for the respondent
Gilles Villeneuve, Mathieu Stanton, for the intervener the Director of Public Prosecutions
Maxime Hébrard, Marlys A. Edwardh, for the intervener the Criminal Lawyers' Association (Ontario)
Walid Hijazi, Lida Sara Nouraie, Nicholas St-Jacques, for the intervener Association des avocats de la défense de Montréal
Mathew P. Good, Ariane Bisaillon, for the intervener the Trial Lawyers Association of British Columbia
Frank Addario, Stephen Aylward, for the intervener the Canadian Civil Liberties Association

Subject: Constitutional; Criminal; Human Rights

Headnote

Criminal law --- Trial procedure — Costs — Miscellaneous

Personal costs orders — Lawyer filed two series of motions for writs of prohibition apparently in order to obtain postponement of scheduled hearing — In response to that unprecedented strategy, Crown asked not only that motions be dismissed, but also that costs of motions be awarded against lawyer personally — Motion judge held that lawyer's intentional acts constituted abuse of process that justified making award against him personally and lawyer appealed — Court of Appeal held that motion judge should not have exercised his inherent powers to sanction conduct that had occurred in another court that itself had power to punish for contempt of court — It concluded that situation did not have exceptional and rare quality of act that seriously undermines authority of that court or that seriously interferes with administration of justice — Accordingly, award of costs was set aside and Crown appealed before Supreme Court of Canada — Appeal allowed — While courts do have power to award costs against lawyer personally, threshold for exercising it is high one — This high threshold is met where court has before it unfounded, frivolous, dilatory or vexatious proceeding that denotes serious abuse of judicial system by lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate — Here, motion judge correctly identified applicable criteria and properly exercised discretion he has in such matters — Lawyer's conduct in cases in question was particularly reprehensible and its purpose was unrelated to motions he brought — Indeed, lawyer used extraordinary remedies for purely dilatory purpose with sole objective of obstructing orderly conduct of judicial process in calculated manner — It was therefore reasonable for

motion judge to conclude that lawyer had acted in bad faith and in way that amounted to abuse of process, thereby seriously interfering with administration of justice — Furthermore, procedural safeguards were observed in this case — Therefore, circumstances of instant case were exceptional and justified award of costs against lawyer personally.

Droit criminel --- Procédure lors du procès — Frais — Divers

Condamnations personnelles aux frais — Avocat a déposé deux séries de requêtes sollicitant la délivrance de brefs de prohibition vraisemblablement afin d'obtenir une remise de l'audience prévue — Devant cette démarche inédite, le ministère public a demandé non seulement le rejet des requêtes, mais aussi la condamnation personnelle de l'avocat au paiement des dépens en découlant — Juge des requêtes a conclu que les gestes intentionnels de l'avocat constituaient un abus de procédure justifiant sa condamnation personnelle aux frais, et l'avocat a interjeté appel — Cour d'appel a estimé que le juge des requêtes n'aurait pas dû exercer ses pouvoirs inhérents à l'endroit de comportements survenus devant une autre juridiction possédant elle-même le pouvoir de condamner l'outrage au tribunal — Elle a conclu que la situation ne révélait pas le caractère exceptionnel et rare que sont une atteinte sérieuse à l'autorité de ce tribunal ou une atteinte grave à l'administration de la justice — Ainsi, la condamnation aux frais a été annulée et le ministère public a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Si le pouvoir des tribunaux de condamner personnellement un avocat au paiement de dépens existe, son application est par contre circonscrite par des critères d'exercice élevés — Ce critère élevé est respecté lorsqu'un tribunal est en présence d'une procédure mal fondée, frivole, dilatoire ou vexatoire, qui dénote un abus grave du système judiciaire ou une inconduite malhonnête ou malveillante, commis de propos délibéré par l'avocat — En l'espèce, le juge des requêtes a bien dégagé les critères applicables et correctement exercé son pouvoir discrétionnaire en la matière — Conduite de l'avocat dans les dossiers en question était particulièrement répréhensible et visait un but étranger aux requêtes entreprises — De fait, l'avocat a utilisé les recours extraordinaires à une fin purement dilatoire dans le seul but d'entraver de manière calculée le bon déroulement du processus judiciaire — Devant cela, le juge des requêtes pouvait raisonnablement conclure que l'avocat a fait preuve de mauvaise foi et a abusé des procédures, portant ainsi sérieusement atteinte à l'administration de la justice — De plus, les garanties procédurales ont été respectées en l'espèce — Par conséquent, la situation en l'espèce était exceptionnelle et autorisait la condamnation personnelle de l'avocat au paiement des dépens.

A lawyer represented the accused in several impaired driving cases joined for hearing on a single motion for disclosure of evidence. A first judge was initially assigned to preside over that hearing, but a second one replaced the first unexpectedly at the last minute. The lawyer filed two series of motions on the same day for writs of prohibition against the two judges, each time on questionable grounds of bias, apparently in order to obtain a postponement of the scheduled hearing. In response to that unprecedented strategy, which resulted in the postponement of the hearing in the Court of Québec, the Crown asked not only that the motions be dismissed, but also that the costs of the motions be awarded against the lawyer personally. The motion judge thus heard the motions for writs of prohibition both on the merits and on the award of costs.

The motion judge held that awarding costs against a lawyer personally could be justified in the case of a frivolous proceeding that denotes a serious and deliberate abuse of the judicial system. The motion judge expressed the opinion that the lawyer's intentional acts were indicative of such abuse and constituted exceptional conduct that justified making an award against him personally. The motions for writs of prohibition were accordingly dismissed and costs were awarded against the lawyer personally. The lawyer appealed.

The Court of Appeal acknowledged that the motions for writs of prohibition should be dismissed. However, it was of the view that the motion judge should not have exercised his inherent powers to sanction conduct that had occurred in another court that itself had the power to punish for contempt of court. It concluded that, on the facts, the situation did not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice. Accordingly, the award of costs was set aside. The Crown appealed before the Supreme Court of Canada.

Held: The appeal was allowed and the award of costs restored.

Per Gascon J. (McLachlin, C.J.C., Moldaver, Karakatsanis, Wagner, Brown, Rowe JJ. concurring): While the courts do have the power to award costs against a lawyer personally, the threshold for exercising it is a high one. 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. 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, or dishonest or malicious misconduct on his or her part, that is deliberate. However, there are two important guideposts that apply to the exercise of this discretion in a situation like the one in this appeal. The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers. The second guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial. Also, a court obviously cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards. Thus, a lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against him or her and the possible consequences.

Here, the motion judge correctly identified the applicable criteria and properly exercised the discretion he has in such matters. The lawyer's conduct in the cases in question was particularly reprehensible and its purpose was unrelated to the motions he brought. Indeed, the lawyer used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the motion judge to conclude that the lawyer had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice. Furthermore, the above-mentioned procedural safeguards were observed in this case. Therefore, the circumstances of the instant case were exceptional and justified an award of costs against the lawyer personally.

Per Abella, Côté JJ. (dissenting): Although superior courts have, in theory, the power to award costs personally against counsel in the criminal context in exceptional circumstances, the exercise of such power in this case was unjustified. Personal costs orders should only be awarded under exceptional circumstances. It appeared, from the record, that the lawyer's behavior was not unique in the district in question. Hence, it could not be said that this was an exceptional circumstance which justified awarding costs personally against him. Therefore, while the filing of motions for writs of prohibition for the purpose of suspending the proceedings could easily be seen as an error of judgment, it can hardly justify a personal costs order.

Un avocat représentait des accusés dans plusieurs dossiers de conduite avec les facultés affaiblies réunis pour une même audience sur une même requête en communication de la preuve. Un premier juge a initialement été nommé pour présider cette audience, mais un second l'a remplacé à la dernière minute, contre toute attente. L'avocat a déposé le même jour deux séries de requêtes sollicitant la délivrance de brefs de prohibition contre les deux juges, chaque fois pour des motifs de partialité douteux, vraisemblablement afin d'obtenir une remise de l'audience prévue. Devant cette démarche inédite qui a entraîné le report de l'audience devant la Cour du Québec, le ministère public a demandé non seulement le rejet des requêtes, mais aussi la condamnation personnelle de l'avocat au paiement des dépens en découlant. Les requêtes sollicitant la délivrance de brefs de prohibition ont donc été entendues par le juge des requêtes tant sur le fond que sur le volet de la condamnation aux dépens recherchée personnellement contre l'avocat.

Le juge des requêtes a conclu que la condamnation personnelle de l'avocat aux dépens pouvait se justifier en présence d'une procédure frivole qui dénote un abus grave du système judiciaire commis de propos délibéré. Le juge des requêtes a estimé que les gestes intentionnels de l'avocat révélaient un tel abus et constituaient une conduite exceptionnelle justifiant sa condamnation personnelle aux frais. Les requêtes demandant la délivrance de brefs de prohibition ont ainsi été rejetées et l'avocat a été condamné personnellement au paiement des dépens. L'avocat a interjeté appel.

La Cour d'appel a reconnu qu'il y avait lieu de rejeter les requêtes sollicitant la délivrance de brefs de prohibition. Toutefois, elle était d'avis que le juge des requêtes n'aurait pas dû exercer ses pouvoirs inhérents à l'endroit de comportements survenus devant une autre juridiction possédant elle-même le pouvoir de condamner l'outrage au tribunal. Elle a conclu que, dans les faits, la situation ne révélait pas le caractère exceptionnel et rare que sont une atteinte sérieuse à l'autorité de ce tribunal ou une atteinte grave à l'administration de la justice. Ainsi, la condamnation aux frais a été annulée. Le ministère public a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli et la condamnation aux dépens a été rétablie.

Gascon, J. (McLachlin, J.C.C., Moldaver, Karakatsanis, Wagner, Brown, Rowe, JJ., souscrivant à son opinion) : Si le pouvoir des tribunaux de condamner personnellement un avocat au paiement de dépens existe, son application est par contre circonscrite par des critères d'exercice élevés. Une condamnation personnelle de l'avocat aux dépens ne peut se justifier que de manière exceptionnelle, en présence d'une atteinte sérieuse à l'autorité des tribunaux ou d'une entrave

grave à l'administration de la justice. Ce critère élevé est respecté lorsqu'un tribunal est en présence d'une procédure mal fondée, frivole, dilatoire ou vexatoire, qui dénote un abus grave du système judiciaire ou une inconduite malhonnête ou malveillante, commis de propos délibéré par l'avocat. Toutefois, il existe deux balises importantes encadrant l'exercice de ce pouvoir discrétionnaire dans une situation analogue à celle du présent pourvoi. La première balise découle du contexte particulier des procédures en matière criminelle, lequel requiert une certaine souplesse de la part des tribunaux à l'égard des actions entreprises par les avocats de la défense. La seconde balise exige que les tribunaux s'en tiennent aux faits propres à l'affaire dont ils sont saisis et qu'ils s'abstiennent de faire indirectement le procès du dossier disciplinaire de l'avocat, voire de sa carrière. Par ailleurs, il va de soi qu'un tribunal ne peut condamner personnellement un avocat aux dépens sans respecter un certain processus et certaines garanties procédurales. Ainsi, l'avocat passible d'une telle sanction devrait recevoir un avis préalable l'informant des allégations formulées à son endroit et des conséquences qui pourraient en découler.

En l'espèce, le juge des requêtes a bien dégagé les critères applicables et correctement exercé son pouvoir discrétionnaire en la matière. La conduite de l'avocat dans les dossiers en question était particulièrement répréhensible et visait un but étranger aux requêtes entreprises. De fait, l'avocat a utilisé les recours extraordinaires à une fin purement dilatoire dans le seul but d'entraver de manière calculée le bon déroulement du processus judiciaire. Devant cela, le juge des requêtes pouvait raisonnablement conclure que l'avocat a fait preuve de mauvaise foi et a abusé des procédures, portant ainsi sérieusement atteinte à l'administration de la justice. De plus, les garanties procédurales mentionnées plus haut ont été respectées en l'espèce. Par conséquent, la situation en l'espèce était exceptionnelle et autorisait la condamnation personnelle de l'avocat au paiement des dépens.

Abella, Côté, JJ. (dissidentes) : Bien que les cours supérieures possèdent, en théorie, le pouvoir de condamner personnellement un avocat aux dépens dans des circonstances exceptionnelles lors de procédures criminelles, l'exercice d'un tel pouvoir en l'espèce n'était pas justifié. Les condamnations personnelles aux frais ne devraient être prononcées que dans des circonstances exceptionnelles. Il semblait, à la lecture du dossier, que la conduite de l'avocat ne présentait pas un caractère exceptionnel dans le district en question. Ainsi, on ne pouvait pas affirmer qu'il s'agissait d'une circonstance exceptionnelle qui justifiait qu'il soit condamné personnellement aux frais. Par conséquent, bien que le dépôt des brefs de prohibition en vue d'obtenir la suspension des procédures pouvait aisément être considéré comme une erreur de jugement, il ne pouvait pas justifier une condamnation personnelle aux frais.

APPEAL by Crown from judgment reported at *Jodoin c. Québec (Directeur des poursuites criminelles et pénales)* (2015), 2015 QCCA 847, EYB 2015-251967, 2015 CarswellQue 4364 (C.A. Que.), setting aside decision ordering that costs be awarded against lawyer personally because of his frivolous and dishonest conduct.

POURVOI formé par le ministère public à l'encontre d'un jugement publié à *Jodoin c. Québec (Directeur des poursuites criminelles et pénales)* (2015), 2015 QCCA 847, EYB 2015-251967, 2015 CarswellQue 4364 (C.A. Que.), ayant annulé une décision condamnant personnellement un avocat aux frais en raison de sa conduite frivole et malhonnête.

Comment

In recent years, the Supreme Court has increasingly indicated that courts at all levels are empowered to control their processes and that this applies to criminal proceedings as well — and to both the Crown and the defence. The Court has, in several cases, determined that prosecutorial behaviour, while largely the discretionary province of the executive branch of government, may nevertheless be reviewed under the admittedly narrow doctrine of abuse of process. See, e.g.: *R. v. O'Connor* (1995), 44 C.R. (4th) 1 (S.C.C.) ; *R. v. Regan* (2002), 49 C.R. (5th) 1 (S.C.C.); *R. v. Nixon* (2011), 85 C.R. (6th) 1 (S.C.C.).

In *Cunningham v. Lilles* (2010), 73 C.R. (6th) 1 (S.C.C.), for example, the Court provided courts with a limited discretion to refuse permission to a criminal defence lawyer to withdraw from a case. *Quebec v. Jodoin* is a continuation of this trend, although on this occasion in a more contentious context. Despite indicating that ordering costs against a defence lawyer will be rare, the majority found that this particular lawyer had crossed the line into territory where punishment was justified. The dissenting justices have agreed with the principles and framework laid out by the majority; they differ only in their assessment of whether the conduct in this case was of a sufficiently egregious nature to justify the order for personal

costs. In both *Cunningham* and *Jodoin*, the Court has also held that, although law societies carry the responsibility and power to discipline lawyers, so, too, do the courts. After *Jodoin*, defence lawyers may continue to vigourously defend the interests of their clients but they also must be mindful of the possibility that they may be subject to penalties if that vigour crosses the line into seriously frustrating or impeding the criminal process.

Tim Quigley

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Commentaire

Au cours des dernières années, la Cour suprême a insisté de plus en plus fermement pour affirmer que les tribunaux, à tous les niveaux, sont investis du pouvoir de contrôler les procédures dont ils sont saisis, et que ceci s'applique aux instances criminelles et autant au ministère public qu'à la partie défenderesse. Dans plusieurs affaires, la Cour a conclu que la conduite de la partie poursuivante, bien que découlant en grande partie du pouvoir discrétionnaire de l'autorité exécutive du gouvernement, peut néanmoins être examinée en vertu de la doctrine stricte de l'abus de procédure. Voir, par exemple, *R. c. O'Connor* (1995), 44 C.R. (4e) 1 (C.S.C.); *R. c. Regan* (2002), 49 C.R. (5e) 1 (C.S.C.); et *R. c. Nixon* (2011), 85 C.R. (6e) 1 (C.S.C.)

Dans *Cunningham c. Lilles* (2010), 73 C.R. (6e) 1 (C.S.C.), à titre d'exemple, la Cour a conféré aux tribunaux le pouvoir discrétionnaire limité de refuser d'autoriser à un avocat de la défense dans une cause criminelle à se désister d'un dossier. La décision rendue dans l'affaire *Jodoin* s'inscrit dans cette tendance, bien qu'alors dans un contexte plus litigieux. Bien qu'ayant souligné que la condamnation d'un avocat de la défense aux dépens constitue une rareté, les juges majoritaires ont conclu que l'avocat de la défense dans ce dossier en particulier avait dépassé les bornes en agissant d'une manière qui était passible de sanctions. Les juges dissidentes étaient d'accord avec les principes et le cadre d'application énoncés par les juges majoritaires, mais ne partageaient pas leur avis que la conduite en question était répréhensible au point de justifier une condamnation personnelle aux dépens. Dans les arrêts *Cunningham* et *Jodoin*, la Cour a également conclu que si les barreaux ont la responsabilité et le pouvoir de sanctionner l'inconduite des avocats, les tribunaux peuvent, eux aussi, sanctionner ces inconduites. Au lendemain de l'arrêt *Jodoin*, les avocats de la défense pourront continuer d'assurer vigoureusement la défense de leurs clients, mais ils devront également garder en tête qu'ils s'exposent à des sanctions si, d'aventures, ils devaient se risquer à nuire, voire faire obstacle au processus de justice criminelle.

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***Gascon J.* (McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Brown and Rowe JJ. concurring):**

I. Overview

1 This appeal concerns the scope of the courts' power to award costs [1] against a lawyer personally in a criminal proceeding. Although the courts have the power to maintain respect for their authority and to preserve the integrity of the administration of justice, the appropriateness of imposing such a sanction in a criminal proceeding must be assessed in light of the special role played by defence lawyers and the rights of the accused persons they represent. In such cases, the courts must be cautious in exercising this discretion.

2 The respondent is an experienced criminal lawyer and a member of the Barreau du Québec. In several impaired driving cases joined for hearing on a single motion for disclosure of evidence, he filed two series of motions on the same day for writs of prohibition against two judges of the Court of Québec, each time on questionable grounds of bias, apparently in order to obtain a postponement of the scheduled hearing. A first judge had initially been assigned to preside over that hearing, but a second one replaced the first unexpectedly at the last minute. In response to that unprecedented

strategy, which resulted in the postponement of the hearing in the Court of Québec, the appellant, the Crown, asked not only that the motions be dismissed, but also that the costs of the motions be awarded against the respondent personally.

3 The Superior Court held that awarding costs against a lawyer personally can be justified in the case of a frivolous proceeding that denotes a serious and deliberate abuse of the judicial system. The judge expressed the opinion that the respondent's intentional acts were indicative of such abuse and constituted exceptional conduct that justified making an award against him personally. The Court of Appeal acknowledged that the motions for writs of prohibition should be dismissed, but nonetheless set aside the award of costs against the respondent personally, finding that his conduct did not satisfy the strict criteria developed by the courts in this regard.

4 In my opinion, the appeal should be allowed. The Superior Court correctly identified the applicable criteria and properly exercised the discretion it has in such matters. The Court of Appeal should not have intervened in the absence of an error of law, a palpable and overriding error of fact or an unreasonable exercise of his discretion by the motion judge. Although the exercise of this discretion will be warranted only in rare cases, the circumstances of the instant case were exceptional and justified an award of costs against the respondent personally.

II. Context

5 The relevant context of this case can be summarized briefly. In April 2013, the respondent was representing 10 clients charged with driving while impaired by alcohol or while their blood alcohol level exceeded the legal limit. There were 12 cases, and they were joined for a hearing scheduled in the Court of Québec on a motion for disclosure of evidence, because the accused were all represented by the respondent. On the morning of the hearing, before it even began, the respondent had the office of the Superior Court stamp a series of motions for writs of prohibition in which he challenged the jurisdiction of the Court of Québec judge who was to preside over the hearing, alleging bias on the judge's part. As an experienced criminal lawyer, the respondent was well aware that the filing of such motions results in the immediate postponement of the hearing then under way until the Superior Court has ruled on them.

6 However, the same morning, before the motions were served, the parties learned that another judge would be presiding over the hearing instead. The motions were therefore put aside, and the hearing on the motion for disclosure of evidence began. At the hearing, the Crown stated that it wished to call its expert witness. The respondent objected on the ground that he had not received the notice required by s. 657.3(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, and that he had been unable to consult the expert's resumé. He requested a postponement. The judge heard the parties on this subject and decided to authorize the examination in chief of the expert after the lunch break. In his view, the respondent would have an opportunity to examine the expert's resumé before the hearing resumed.

7 During the break, the respondent chose instead to draw up a new series of motions for writs of prohibition, this time challenging the second judge's jurisdiction and alleging, once again, bias on the judge's part. After the break, he informed the judge of this. As a result of s. 25 of the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002*, SI/2002-46, which provides that the service of such motions suspends proceedings, the judge had no choice but to adjourn the hearing.

8 The appellant, believing that the sole purpose of these successive extraordinary remedies was to obtain a postponement for an ulterior motive, objected to the respondent's tactic. He told the respondent that he intended to seek an award of costs against the respondent personally because of the latter's dilatory motions and abuse of process. The Superior Court thus heard the motions for writs of prohibition both on the merits and on the award of costs being sought against the respondent personally.

III. Judicial History

A. Quebec Superior Court (2013 QCCS 4661 (C.S. Que.))

9 The Superior Court judge began by rejecting the arguments on the merits of the motions for writs of prohibition against the Court of Québec judge. He found that the motions were unfounded and frivolous and that they were of questionable legal value for an experienced lawyer such as the respondent.

10 The judge then dealt with the costs award being sought against the respondent. Indeed, he devoted the bulk of his reasons to that issue, as it was clear, to say the least, that the proceeding was frivolous, given that there was nothing in the words of the Court of Québec judge to indicate an excess of jurisdiction.

11 On the law applicable to the issue of costs in criminal proceedings, the Superior Court judge cited *Québec (Procureur général) c. Cronier* (1981), 63 C.C.C. (2d) 437 (C.A. Que.) . He noted that L'Heureux-Dubé J.A., as she then was, had emphasized [TRANSLATION] "the inherent power of the Superior Court to manage cases within its jurisdiction and to award costs not provided for by statute" (para. 115). On the basis of the principles enunciated in *Cronier* , the judge found that the issue was whether what was before him was "a frivolous proceeding that denotes a serious abuse of the judicial system", an abuse that was "deliberate" (para. 117).

12 On the facts of the case before him, the judge found that the [TRANSLATION] "preparation, at lunchtime on April 23, 2013, of a series of motions for writs of prohibition in a legal situation that did not call for such a proceeding, and the continued presentation of those proceedings," constituted abuse of "section 25 of the *Rules of Practice* and the suspension order it entails" (para. 118). In his analysis, the judge took the respondent's conduct in other cases into account in determining whether he had had culpable intent to file, as a calculated act, proceedings that he knew to be frivolous and abusive.

13 The judge concluded that the respondent's conduct satisfied the applicable criteria and that it had [TRANSLATION] "led, in a manner that well-informed Canadians would not approve of, to paralysis of the legitimate work of the Court of Québec sitting in a criminal proceeding and to disruption of its local judges' case management work" (para. 119). He dismissed the motions for writs of prohibition and awarded costs against the respondent personally, setting them at $3,000 for all the cases combined, or $250 per case.

B. Quebec Court of Appeal (2015 QCCA 847 (C.A. Que.))

14 The Court of Appeal affirmed the Superior Court's judgment on the disposition of the motions for writs of prohibition, but allowed the appeal solely to set aside the award of costs against the respondent personally. It noted that, in criminal cases, [TRANSLATION] "costs have no longer been systematically awarded since the 1954 reform of the criminal justice system" (para. 5). However, it acknowledged that, "in circumstances that are quite rare and exceptional", the Superior Court can, "in the exercise of its inherent superintending and reforming powers, award costs" (para. 6). In the case at bar, the Court of Appeal was of the view that the Superior Court should not have exercised those inherent powers to sanction conduct that had occurred in another court that itself had the power to punish for contempt of court. It concluded that, on the facts, the situation [TRANSLATION] "does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice" (para. 11).

IV. Issue

15 The only issue in this appeal is whether the Superior Court was justified in awarding costs against the respondent personally. What must be done to resolve it is, first, to determine the scope of the courts' power to impose such a sanction, the applicable criteria and the process to be followed, next, to ascertain whether the criteria were properly applied by the Superior Court judge and, finally, to determine whether the intervention of the Court of Appeal was necessary.

V. Analysis

A. Awarding of Costs Against a Lawyer Personally

(1) Power of the Courts

16 The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167 (S.C.C.) , at para. 58). A court therefore has an inherent power to control abuse in this regard (*Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) , at p. 136) 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": *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.) , at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63, [2002] 3 S.C.R. 307 (S.C.C.). This is a discretion that must, of course, be exercised in a deferential manner (*Anderson* , at para. 59), but it allows a court to "ensure the integrity of the justice system" (*Morel v. R.*, 2008 FCA 53, [2009] 1 F.C.R. 629 (F.C.A.) , at para. 35).

17 It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts (*Anderson* , at para. 58). It is therefore not reserved to superior courts but, rather, has its basis in the common law: *Myers v. Elman* (1939), [1940] A.C. 282 (U.K. H.L.) , at p. 319; M. Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 126.

18 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: *Myers* , at p. 319; *Pacific Mobile Corp. v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842 (S.C.C.) , at p. 845; *Cronier* , at p. 448; *Pearl c. Gentra Canada Investments inc.*, [1998] R.L. 581 (C.A. Que.) , at p. 587. 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 (M. Code, at p. 121).

19 This power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases (*Cronier*). This means that it may sometimes be exercised against defence lawyers in criminal proceedings, although such situations are rare: *R. v. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69 (N.S. C.A. [In Chambers]); *R. v. S. (K.D.)* (1999), 133 Man. R. (2d) 89 (Man. Q.B.) , at para. 43; *Canada (Procureur général) c. Bisson*, [1995] R.J.Q. 2409 (C.S. Que.) ; M. Code, at p. 122.

20 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. Punishment for contempt is thus based on the same power the courts have "to enforce their process and maintain their dignity and respect" (*U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.) , at p. 931). These sanctions are not mutually exclusive, however. If need be, they can even be imposed concurrently in relation to the same conduct.

21 This being said, although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court (*Cronier* , at p. 449), 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 (I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Current Leg. Probs.* 23, at pp. 46-48).

22 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 (s. 23 of the *Professional Code*, CQLR, c. C-26). 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. [Emphasis deleted]
>
> (*Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 35)

23 The courts therefore do not have to rely on law societies to oversee and sanction any conduct they may witness. It is up to the courts to determine whether, in a given case, to exercise the power they have to award costs against a lawyer personally in response to the lawyer's conduct before them. However, there is nothing to prevent the law society from exercising in parallel its power to assess its members' conduct and impose appropriate sanctions.

24 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.

(2) Applicable Criteria

25 While the courts do have the power to award costs against a lawyer personally, the threshold for exercising it is a high one. It is in fact rarely exercised, and the question whether it should be arises only infrequently: *Cronier* ; *Young* ; *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (S.C.C.) , at para. 85; *R. v. Trang*, 2002 ABQB 744, 323 A.R. 297 (Alta. Q.B.) , at para. 481; *Fearn v. Canada (Customs)*, 2014 ABQB 114, 586 A.R. 23 (Alta. Q.B.) , at para. 121; *Smith* , at para. 43. Only serious misconduct can justify such a sanction against a lawyer. Moreover, the courts must be cautious in imposing it in light of the duties owed by lawyers to their clients:

> Moreover, 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.
>
> [*Young*, at p. 136]

26 The type of conduct that can be sanctioned in this way was analyzed in depth in *Cronier* . L'Heureux-Dubé J.A. concluded after reviewing the case law that the courts are justified in exercising such a discretion in cases involving abuse of process, frivolous proceedings, misconduct or dishonesty, or actions taken for ulterior motives, where the effect is to seriously undermine the authority of the courts or to seriously interfere with the administration of justice. She noted, however, that this power must not be exercised in an arbitrary and unlimited manner, but rather with restraint and caution. The motion judge in the case at bar properly relied on *Cronier* , and the Court of Appeal also endorsed the principles stated in it.

27 Several courts across the country have adopted the requirement of conduct that represents a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system: *Bisson* ; *R. v. Ciarniello* (2006), 81 O.R. (3d) 561 (Ont. C.A.) , at para. 31; *R. v. Leyshon-Hughes*, 2009 ONCA 16, 240 C.C.C. (3d) 181 (Ont. C.A.), at para. 62; *Fearn* , at para. 119; *Smith* , at para. 58. Also, as the House of Lords stated in a case that has been cited by Canadian courts, including in *Cronier* , a mere mistake or error of judgment will not be sufficient to justify awarding costs against a lawyer personally; there must at the very least be gross neglect or inaccuracy (*Myers* , at p. 319).

28 There are in this Court's jurisprudence examples of conduct that has led to awards of costs being made against lawyers personally. In *Young* , the Court held that such a sanction is justified if "repetitive and irrelevant material, and excessive motions and applications, characterized" the conduct in question and if this was the result of a lawyer's acting

"in bad faith in encouraging this abuse and delay" (pp. 135-36). In Pacific Mobile, the Court awarded costs against a company's solicitors personally in a bankruptcy case. The solicitors had been granted a number of adjournments and had instituted proceedings that were inconsistent with directions given by the trial judge. On the issue of costs, Pigeon J. stressed that he did "not consider it fair to make the debtor's creditors bear the cost of proceedings which were not instituted in their interest: quite the contrary". He added that such an award of costs, "far from appropriately discouraging unnecessary appeals occasioning costly delays, tends on the contrary to favour them" (p. 844). In the circumstances, he determined that "the Court should [therefore] make use of its power to order costs payable by solicitors personally" (p. 845).

29 In my opinion, therefore, 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. 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, or dishonest or malicious misconduct on his or her part, that is deliberate. Thus, a 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.

30 This being said, however, it should be noted that there are two important guideposts that apply to the exercise of this discretion in a situation like the one in this appeal.

31 The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers. In considering the circumstances, the courts must bear in mind that the context of criminal proceedings differs from that of civil proceedings. In criminal cases, the rule is that costs are not awarded; no provision is made, for example, for awards of costs where extraordinary remedies are sought (*Cronier* , at p. 447). Awards of costs made against lawyers personally are therefore purely punitive and do not include the compensatory aspect costs have in civil cases.

32 As well, the role of a defence lawyer is not comparable in every respect to that of a lawyer in a civil case. For example, the latter has an ethical duty to encourage compromise and agreement as much as possible. In contrast, a defence lawyer has no obligation to help the Crown in the conduct of its case. It is the very essence of the role of a defence lawyer to challenge, sometimes forcefully, the decisions and arguments of other players in the judicial system in light of the serious consequences they may have for the lawyer's client: *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.) , at paras. 64-66, citing *Histed v. Law Society (Manitoba)*, 2007 MBCA 150, 225 Man. R. (2d) 74 (Man. C.A.), at para. 71. Indeed, committed and zealous advocacy for clients' rights and interests and a strong and independent defence bar are essential in an adversarial system of justice: *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1 (Ont. C.A.), at para. 129; P. J. Monahan, "The Independence of the Bar as a Constitutional Principle in Canada", in Law Society of Upper Canada, ed., *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar* (2007), 117. If these conditions are not met, the reliability of the process and the fairness of the trial will suffer: *R. v. B. (G.D.)*, 2000 SCC 22, [2000] 1 S.C.R. 520 (S.C.C.) , at para. 25, quoting *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.) , at p. 57. In short, if costs are awarded against a lawyer personally in criminal proceedings, the purpose must not be to discourage the lawyer from defending his or her client's rights and interests, and in particular the client's right to make full answer and defence. From this point of view, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings.

33 The second guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial. The facts that can be considered in awarding costs against a lawyer personally must generally be limited to those of the case before the court. In its analysis, the court must not conduct an ethics investigation or seek to assess the whole of the lawyer's practice. It is not a matter of punishing the lawyer "for his or her entire body of work". To consider facts external to the case before the court can be justified only for the limited purpose of determining, first, the intention behind the lawyer's actions and whether he or she was

acting in bad faith, and, second, whether the lawyer knew, on bringing the impugned proceeding, that the courts do not approve of such proceedings and that this one was unfounded.

34 In this regard, certain evidence that is external to the case before the court may sometimes be considered, because it is of high probative value and has a strong similarity to the alleged facts, in order to establish, for example, wilful intent and knowledge on the lawyer's part. However, it must be limited to the specific issue before the court, that is, the lawyer's conduct. It may not serve more broadly as proof of a general propensity or bad character (*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908 (S.C.C.) , at paras. 71, 72 and 82).

(3) Process to be Followed

35 This being said, a court obviously cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards (Y.-M. Morissette, "L'initiative judiciaire vouée à l'échec et la responsabilité de l'avocat ou de son mandant" (1984), *R. du B.* 397, at p. 425). However, it is important that this process be flexible and that it enable the courts to adapt to the circumstances of each case.

36 Thus, a lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts. The notice should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should, of course, have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. Ideally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits.

37 However, these protections differ from the ones conferred by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*. Where an award of costs is sought against a lawyer personally, the lawyer is not a "person charged with an offence" and the proceeding is not a criminal one *per se*. Although the applicable criteria are strict, the standard of proof is the balance of probabilities.

38 In closing, I note that the Crown's role on this specific issue must be limited in criminal proceedings. In such a situation, it is of course up to the parties as well as the court to raise a problem posed by a lawyer's conduct. However, the Crown's role is to objectively present the evidence and the relevant arguments on this point. It is the court that is responsible for determining whether a sanction should be imposed, and that has the power to impose one, in its role as guardian of the integrity of the administration of justice. The Crown must confine itself to its role as prosecutor of the accused. It must not also become the prosecutor of the defence lawyer.

B. Application to the Facts of the Instant Case

(1) Judgment of the Superior Court

39 In light of the foregoing, I am of the view that the motion judge properly exercised his discretion in awarding costs against the respondent personally.

40 The motion judge first correctly identified the standard of conduct on which such an award is based and correctly summed up the law in requiring that there be a [TRANSLATION] "frivolous proceeding that denotes a serious abuse of the judicial system" and a "deliberate strategy" (para. 117).

41 Next, he properly analyzed the facts to find that the respondent's acts constituted abusive conduct that was designed to indirectly obtain a postponement and had led to [TRANSLATION] "paralysis of the legitimate work of the Court of Québec" and "disruption of its local judges' case management work" (para. 119). He correctly distinguished an [TRANSLATION] "unintended result" from a "deliberate strategy" (para. 117). The judge cannot be faulted for choosing to exercise his discretion in respect of a defence lawyer here.

42 As the judge noted, the respondent's conduct in the cases in question was particularly reprehensible. Its purpose was unrelated to the motions he brought. The respondent was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. His subsequent conduct was consistent with this finding. It is quite odd, if not unprecedented, for a lawyer to file, on the same day and in the same cases, two series of motions for writs of prohibition against two different judges on the same ground of bias. The respondent thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the judge to conclude that the respondent had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice.

43 Finally, the procedural safeguards were observed in this case. The Crown sent the respondent two prior notices of its intention to seek an award of costs against him personally. The respondent had more than three months to prepare. The prosecution's role was limited to notifying the respondent of its intention to seek an award of costs against him personally and presenting the relevant evidence to the judge. The respondent had an opportunity to make submissions to the judge in this regard. Moreover, he raised no objection to the process or to the evidence adduced on the issue of costs. Nor did he insist on being represented by counsel or ask that the issue of costs be dealt with separately from the merits of the motions.

44 That being the case, I do not accept the respondent's criticisms to the effect that the judge improperly relied on inadmissible similar fact evidence. On the contrary, I note that the judge's findings were based on admissible evidence that supported his analysis on the respondent's intention and knowledge:

> [TRANSLATION] His preparation, at lunchtime on April 23, 2013, of a series of motions for writs of prohibition in a legal situation that did not call for such a proceeding, and the continued presentation of those proceedings, were two calculated acts that did not result from ignorance of the law on the part of Mr. Jodoin, an able tactician who defends his clients forcefully when he is before the Court.
>
> [Emphasis added; para. 118]

45 For this purpose, the judge focused primarily on evidence specific to the cases before him. He discussed the specific circumstances that led to the preparation of the motions for writs of prohibition. He reviewed in detail the transcript of the hearing that had culminated in the postponement being granted by the Court of Québec judge. And he considered the respondent's conduct in the broader context of the motions for which he was ordered to pay costs personally.

46 It is true that the judge took note of certain facts from other cases in which the respondent had been involved, as the Crown had invited him to do with no objection from the respondent. However, the judge considered those facts to be [TRANSLATION] "relevant to the determination of whether [the respondent's] motions are frivolous and dilatory and whether an award of costs must be made against him personally, and in what amount" (para. 109). He found that this evidence was relevant to his analysis on whether the respondent had had culpable intent to file and present a proceeding that he knew to be frivolous and abusive. The judge referred to it in determining, among other things, that the impugned conduct was a deliberate strategy on the respondent's part and not an unintended result.

47 In this regard, the judge was justified in referring to motions for writs of prohibition that had been filed in 2011 against one of the two Court of Québec judges concerned in the 2013 motions (paras. 22-27). The motions from 2011 were all dismissed in a judgment that was subsequently affirmed by the Court of Appeal (*R. c. Carrier*, 2012 QCCA 594 (C.A. Que.)). In that case, the respondent had sought writs of prohibition in relation to a refusal by the judge in question to allow the withdrawal of a motion for the disclosure of evidence. In its judgment, the Court of Appeal mentioned that a court can review a party's decision to withdraw a proceeding, especially where the goal is to obtain a postponement. It concluded that the alleged apprehension of bias on the judge's part was without merit, because [TRANSLATION] "although the judge was overly interventionist, the fact remains that there is no reason to doubt his impartiality" (para. 4).

48 As the motion judge observed, there is a strong similarity between those motions from 2011 and the 2013 motions in terms of the facts, the decisions being challenged, the procedures that were chosen and the nature of the exchanges between the respondent and the judge in question. This could support findings that the respondent's actions were calculated and intentional and that he had knowledge of the applicable legal rules and had deliberately ignored them. It could be concluded from this relevant evidence that the respondent was well aware of the invalidity of the extraordinary remedy he had chosen to seek and of the foreseeable consequences of his actions, the *modus operandi* of which was similar to that of 2011. This was not improper evidence of a general propensity or bad character, but admissible evidence of the respondent's state of mind when he filed the proceedings.

49 As regards the respondent's argument that the judge wanted to make an example of his case in the district in question, I am of the view that there is not really any support for it. That is certainly not what the judge said at para. 11 of his reasons. Moreover, it is clear from his reasons as a whole that he did not rely either on that factor or on the specific context of the district to support his conclusions. As can be seen from his analysis, he objectively had enough evidence to justify awarding costs against the respondent personally on the basis of the specific facts of the case before him.

(2) Judgment of the Court of Appeal

50 In this context, the Court of Appeal was in my view wrong to choose to substitute its own opinion for that of the Superior Court on this issue. In fact, the Court of Appeal reassessed the facts before concluding that the situation before the Superior Court did not have the exceptional character required in the case law. And it did so despite having acknowledged that the motion judge had, after thoroughly analyzing the facts, been right to dismiss the motions for writs of prohibition he had found to be frivolous, unfounded and abusive.

51 It was not open to the Court of Appeal to intervene without first identifying an error of law, a palpable and overriding error in the motion judge's analysis of the facts, or an unreasonable or clearly wrong exercise of his discretion. It did not identify such an error. This Court, too, is subject to this standard for intervention (*St-Jean c. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491 (S.C.C.) , at para. 46). Furthermore, given its position at the second level of appeal, this Court's role is not to reassess the findings of fact of a judge at the trial level that an appellate court has not questioned: "... the principle of non-intervention 'is all the stronger in the face of concurrent findings of both courts below' ..." (*ibid.*, at para. 45, quoting *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 (S.C.C.) , at p. 574 (emphasis deleted)).

52 It is well established that costs are awarded on a discretionary basis: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.) , at para. 27; *Galganov v. Russell (Township)*, 2012 ONCA 410, 294 O.A.C. 13 (Ont. C.A.) , at paras. 23-25. In a case involving an exercise of discretion, an appellate court must show great deference and must be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable or non-judicial manner: *Trackcom Systems inc. v. Trackcom Systems international inc.*, 2014 QCCA 1136 (C.A. Que.) , at para. 36; *Québec (Procureur général) c. Bélanger*, 2012 QCCA 1669, 4 M.P.L.R. (5th) 21 (C.A. Que.). In its brief judgment, the Court of Appeal did not specify an error of any kind whatsoever in the motion judge's reasons that would justify its intervention.

53 As for the comment that the Superior Court should not have exercised its jurisdiction in relation to facts or conduct that had occurred in a court that itself had the power to punish the respondent for contempt of court, I believe that it reflects a misunderstanding of the situation. Costs are in order in this case because of the frivolous and abusive nature of the motions for writs of prohibition that were heard and dismissed by the Superior Court. It was the Superior Court that had the discretion to determine whether the costs of those motions should be awarded against the respondent.

VI. Conclusion

54 In the final analysis, the Superior Court judge addressed the valid concerns voiced by the Crown, which he summarized as follows:

> [TRANSLATION] Take a more rigorous approach to the criminal law, fight tooth and nail for your clients, be demanding of the prosecution so that it makes its entire case competently, but face the music so that, in an overburdened judicial system in which each person's time must be used sparingly and efficiently, cases move forward.
>
> [Emphasis deleted, para. 11.]

55 The judge sent a clear message to the players in the judicial system, in terms that were once again unequivocal, by denouncing actions and decisions that had led to an unjustified paralysis of the legitimate work of courts sitting in criminal proceedings and to the disruption of the management of cases by their judges, and by sanctioning an abuse of process whose sole purpose had been to obtain a postponement and delay cases.

56 The judge's comments were consistent with the principles recently enunciated by this Court in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 (S.C.C.) , in which the majority denounced, among other things, the culture of complacency toward delay that impairs the efficiency of the criminal justice system. In *Jordan* , the Court emphasized the importance of timely justice and noted that all participants in the criminal justice system must co-operate in achieving reasonably prompt justice. From this perspective, it is essential to allow the courts to play their role as guardians of the integrity of the administration of justice by controlling proceedings and eliminating unnecessary delay. That is what the Superior Court did here.

57 I would therefore allow the appeal and restore the award of costs against the respondent.

Abella and Côté JJ.:

58 We agree that superior courts have, in theory, the power to award costs personally against counsel in the criminal context in exceptional circumstances. Justice Gascon, drawing on caselaw from both the civil and criminal context, has set out an excellent summary of the relevant principles. In our respectful view, however, the test was not met in this case. As noted by the Quebec Court of Appeal:

> [TRANSLATION] The situation in the Quebec Superior Court ... as regards the conduct of the appellant ... *does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice.*
>
> [Emphasis added; footnote omitted.]
>
> (2015 QCCA 847, at para. 11 (CanLII))

59 The exceptional nature of personal costs orders was emphasized by this Court in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) :

> ... 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. [p. 136]

60 These concerns are magnified in the criminal context. In *R. v. Gunn*, 2003 ABQB 314, 335 A.R. 137 (Alta. Q.B.) , the Court of Queen's Bench of Alberta highlighted the chilling effect that personal costs orders could have on criminal defence counsel, where Langston J. observed:

> ... to sanction defence counsel in the course of their duties of protecting the criminally accused could have a chilling effect on counsel's ability to properly and zealously defend their client against all the powers that a state has to wield against them. [para. 50]

61 The more appropriate response, if any, is to seek a remedy from the law society in question. As Michael Code observed, disciplinary processes present advantages over awards of costs:

> A useful intermediate remedy, when repeated injunctions and reprimands have failed to put an end to counsel's "incivility," is for the trial judge to report the offending counsel to the Law Society. This is the remedy that was adopted by the B.C. Court of Appeal in *R. v. Dunbar et al.* and it was only exercised at the end of the hearing, when the Court delivered its Judgment. *The great value of this remedy, before resorting to more punitive sanctions such as costs orders and contempt citations, is that it does not disrupt the trial and it does not cause prejudice to the client of the offending counsel.* When the misconduct escalates to the point that costs and contempt remedies are under consideration, the lawyer is entitled to a hearing and the trial will inevitably be disrupted. By simply reporting the lawyer's misconduct to the Law Society, the court is able to escalate the available remedies without the need to conduct its own hearing into the alleged "incivility." Furthermore, the client may not be complicit in the lawyer's "incivility" and should not bear the cost or the prejudice of a hearing to consider sanctions against the lawyer. [Footnote omitted; emphasis added.]
>
> (Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 119)

62 This forms the policy basis for why the threshold is so high before ordering costs against criminal defence counsel. Only in the most exceptional of circumstances should they be ordered. Given the policy concerns and the exceptional nature of costs orders against defence counsel, it is worth emphasizing that the Crown should be very hesitant about pursuing them.

63 We do not challenge the motion judge's finding that the writs of prohibition were requested for the purpose of postponing the proceedings and that the motions seeking the writs may not have had a solid legal foundation. Like the Court of Appeal, however, we are of the view that Mr. Jodoin's behaviour did not warrant the exceptional remedy of a personal costs order.

64 It appears that Mr. Jodoin's conduct in this case was not unique in the district of Bedford, as reflected in the motions judge's comment that: [TRANSLATION] "In seeking a personal costs order against Mr. Jodoin, the prosecution wants to send a message to certain defence lawyers" (2013 QCCS 4661 (C.S. Que.), at para. 11). This suggests that Mr. Jodoin was being punished as a warning to other lawyers engaged in similar tactics. The court ordered costs against Mr. Jodoin personally for a total of $3000.

65 The desire to make an "example" of Mr. Jodoin's behaviour does not justify straying from the legal requirement that his conduct be "rare and exceptional" before costs are ordered personally against him.

66 Logically, the idea that costs should only be ordered against a lawyer personally in rare and exceptional circumstances cannot be reconciled with the fact that other defence counsel appear to have engaged in similar conduct.

67 Mr. Jodoin has certainly not engaged in conduct we would commend. But to the extent that his behaviour was not unique in the district of Bedford, it is hard to see how it would amount to "dishonest or malicious misconduct" that would justify awarding costs personally against him (reasons of Gascon J., at para. 29).

68 Moreover, we are not persuaded that Mr. Jodoin's motions for writs of prohibition were unfounded to a sufficient degree to attract a personal costs order. The Superior Court concluded that Mr. Jodoin had filed those motions only for the purpose of obtaining an adjournment. This, however, does not take full account of the context of the proceedings, where one of the grounds raised involved the application of s. 657.3(3) of the *Criminal Code*, R.S.C. 1985, c. C-46.

69 This provision states that "a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial or within any other period fixed by the justice or judge, give notice to the other party or

parties of his or her intention to do so". Crown counsel intending to call an expert witness also has to provide a copy of the expert witness's report or a summary of the opinion anticipated to be given by the expert witness to the other party within a reasonable period before trial (s. 657.3(3)(b)).

70 If notice is not given, s. 657.3(4) states that

> **(4)** ... the court shall, at the request of any other party,
>
> (a) grant an adjournment of the proceedings to the party who requests it to allow him or her to prepare for cross-examination of the expert witness;
>
> (b) order the party who called the expert witness to provide that other party and any other party with the material referred to in paragraph (3)(b); and
>
> (c) order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness's testimony, unless the court considers it inappropriate to do so.

71 The Crown had not provided Mr. Jodoin with the required notice. When Mr. Jodoin sought the adjournment to which he was entitled under s. 657.3(4), the judge presiding in the Court of Québec granted him a brief one over the lunch break. And, in refusing the requested adjournment, the judge mistakenly said that Mr. Jodoin had already cross-examined the Crown's expert witness in other matters.

72 This is the context in which Mr. Jodoin filed his motions for writs of prohibition after the lunch hour.

73 Mr. Jodoin now concedes, based on other decisions rendered subsequently in similar matters, that he ought not to have used motions for writs of prohibition in response to the court's refusal to grant the requested adjournment. But it is also undisputed that the Crown did not in fact give proper notice and that Mr. Jodoin was, as a result, entitled to an adjournment.

74 In the circumstances, Mr. Jodoin's filing of motions for writs of prohibition for the purpose of suspending the proceedings can easily be seen as an error of judgment, but hardly one justifying a personal costs order.

75 For these reasons, we would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 The Superior Court and the Court of Appeal used the French term "*dépens*" in their reasons and in their conclusions. The appellant and the respondent have referred sometimes to the concept of "*dépens*" and sometimes to that of "*frais*". For consistency, I will use the term used by the courts below in the French version of these reasons.

Tab 10

Chapter 7 – Relationship to the Society and Other Lawyers

7.1 Responsibility to The Society and The Profession Generally

Communications from the Society

7.1-1 A lawyer must reply promptly and completely to any communication from the Society.

Meeting Financial Obligations

7.1-2 A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.

Commentary

[1] In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients, unless, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one.

[2] When a lawyer retains a consultant, expert or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

[3] If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise him or her about the change and provide the name, address, telephone number, fax number and email address of the new lawyer.

Duty to Report

7.1-3 Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

(a) the misappropriation or misapplication of trust money;

(b) the abandonment of a law practice;

(c) participation in criminal activity related to a lawyer's practice;

(d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer;

(e) conduct that raises a substantial question about a lawyer's capacity to provide professional services; and

(f) any situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary

[1] Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (for example, through another lawyer). In all cases, the report must be made without malice or ulterior motive.

[2] Nothing in this rule is meant to interfere with the lawyer-client relationship.

[3] Instances of conduct described in this rule can arise from a variety of causes, including addictions or physical, mental or emotional conditions or disorders. Lawyers who face such challenges should be encouraged by other lawyers to seek assistance as early as possible.

[4] The Society supports the ASSIST Program in Alberta and similar agencies in their commitment to the provision of counselling on a confidential basis. Therefore, a lawyer who is making a bona fide effort to have another lawyer seek help for such problems is not required to report to the Society non-criminal conduct of that lawyer that would otherwise have to be reported under the rule. However, the lawyer must advise the Society if there are reasonable grounds to believe that the other lawyer is encouraging or will engage in conduct that is criminal or is likely to harm any person or of any other conduct under the rule if the lawyer refuses or fails to seek help.

Tab 11

Alta. Reg. 124/2010, s. 14.37

s 14.37 Single appeal judges

Currency

14.37Single appeal judges

14.37(1) Unless an enactment or these rules otherwise require, a single appeal judge may hear and decide any application incidental to an appeal, including those that could have been decided by a case management officer.

14.37(2) For greater certainty, a single appeal judge may

(a) grant permission to appeal, unless an enactment requires that an application for permission to appeal must be heard by a panel of the Court of Appeal,

(b) declare an appeal to be struck, dismissed or abandoned for failure to comply with a mandatory rule, prior order or direction of the Court of Appeal,

(c) when a notice of appeal or an application for permission to appeal is not filed within the time limit, strike the appeal or application or extend the time to appeal or to seek permission to appeal,

(d) dismiss an appeal if it has not been significantly advanced in over 6 months and significant prejudice has resulted to a party,

(e) grant permission to intervene, and

(f) refer any application to a panel of the Court of Appeal.

Amendment History

Alta. Reg. 41/2014, s. 4; 85/2016, s. 1(10)

Currency

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Alta. Reg. 124/2010, s. 14.38

s 14.38 Court of Appeal panels

Currency

14.38Court of Appeal panels

14.38(1) A panel of the Court of Appeal may decide any application, including those that could have been decided by a single appeal judge.

14.38(2) The following applications must be heard by a panel of the Court of Appeal:

(a) an application to allow or dismiss an appeal on the merits;

(b) an application for new evidence, unless a panel of the Court of Appeal directs that the application be heard by a single appeal judge;

(c) an application to reargue or reopen an appeal;

(d) an application for directions required to give effect to any decision of the Court of Appeal, unless a panel of the Court of Appeal directs that the application be heard by a single appeal judge;

(e) an application to reconsider a prior precedential decision of the Court.

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

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Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 14 — Appeals
Division 7 — General Rules for Appeals [Heading added Alta. Reg. 41/2014, s. 4.]
Subdivision 6 — Sanctions [Heading added Alta. Reg. 41/2014, s. 4.]

Alta. Reg. 124/2010, s. 14.90

s 14.90 Sanctions

Currency

14.90Sanctions

14.90(1) In addition to the sanctions set out in Part 10, Division 4,

(a) unless otherwise ordered, a party is not entitled to assess costs or recover disbursements in respect of a procedural step in which the party has

(i) failed to comply with a deadline set out in this Part,

(ii) filed a document that fails to comply in a substantial respect with the requirements of these rules, or

(iii) filed a document that is carelessly or inadequately prepared or that contains illegible material or text;

(b) in the case of any non-compliance with a rule or a direction or order, a single appeal judge or a panel of the Court of Appeal may strike from the record any document, including a notice of appeal or cross appeal, or provide directions for the management of the appeal.

14.90(2) Where an appeal has been struck by operation of these rules or the provisions of any order or because of the failure of any party to appear when required, or has been deemed to have been struck or abandoned, the respondent is entitled to a costs award for having responded to the appeal.

14.90(3) A single appeal judge may order the interim release of the appellant pending the appeal of any order for the imprisonment or other restraint of the liberty of the appellant arising from a civil sanction imposed by the court appealed from.

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

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Tab 12

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

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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.

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