COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1703-0195AC
TRIAL COURT FILE NUMBER:	1103-14112
REGISTRY OFFICE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	MAURICE STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL: STATUS ON APPLICATION:	Appellant Respondent
RESPONDENTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
STATUS ON APPEAL: STATUS ON APPLICATION:	Respondents Interested Party
RESPONDENT:	PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL: STATUS ON APPLICATION:	Not a Party to the Appeal Not a Party to the Application
INTERVENOR:	SAWRIDGE FIRST NATION ("Sawridge")
STATUS ON APPEAL: STATUS ON APPLICATION:	Respondent Applicant
DOCUMENT	**MEMORANDUM OF ARGUMENT OF SAWRIDGE FIRST NATION ON SECURITY FOR COSTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF	**Parlee McLaws LLP** 1700 Enbridge Centre

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I. INTRODUCTION AND FACTS

1. Sawridge First Nation ("Sawridge"), applies for an Order for security for costs as against the Appellant, Maurice Stoney ("Stoney"), pursuant to Rules 14.67, 4.22 and 4.23.[1]

2. The within Appeal arises from the July 12, 2017 case management decision of Justice Thomas known as *Sawridge #6*.[2] In *Sawridge* #6, Justice Thomas dismissed Stoney's application to be added as an intervenor or party to the underlying action, which is an application brought by the Trustees of the 1985 Sawridge Trust seeking advice and direction on the beneficiary definition of the trust. Justice Thomas found that Stoney's application was inappropriate, devoid of merit, and abusive in a manner exhibiting the hallmark characteristics of vexatious litigation and that it amounted to serious litigation misconduct.[3] Justice Thomas also granted Sawridge's application to intervene in Stoney's application, placed an interim court access restriction order on Stoney pending further consideration as to whether he is a vexatious litigant, and awarded Sawridge and the Trustees solicitor and own client full indemnity costs as against Stoney.

3. Subsequently Justice Thomas released two more case management decisions:

   (a) In *Sawridge #7*, he ordered that Stoney's lawyer, Priscilla Kennedy, was personally jointly and severally liable with Stoney for the costs of Sawridge and the Trustees ordered in *Sawridge #6*.[4] Ms. Kennedy was granted leave to appeal *Sawridge #7*.[5]

   (b) In *Sawridge #8*, he declared Stoney a vexatious litigant and restricted Stoney's access to the Court of Queen's Bench and the Provincial Court.[6] Stoney did not appeal *Sawridge #8*; however, Ms. Kennedy has a filed a notice of appeal in relation to *Sawridge #8*.

4. An Order for security for costs is just and reasonable because Sawridge is unlikely to be able to enforce an order or judgement against assets in Alberta, Stoney is unlikely to be able to pay a costs award, Stoney's appeal has no merit and is merely the latest in a series of failed attempts to assert membership in Sawridge, the order would not unduly prejudice Stoney's ability to continue the appeal, Sawridge has previous unpaid costs awards against Stoney, and Stoney has been declared a vexatious litigant and had his access to Alberta courts restricted as it relates to claims against Sawridge and the Trustees of the 1985 Sawridge Trust.

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[1] Alberta Rules of Court, Alta Reg 124/2010, Rules 4.22, 4.23 and 14.67 [*Alberta Rules of Court*] **[TAB 1]**
[2] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436 [*Sawridge #6*] **[TAB 2]**
[3] *Sawridge #6* at paras 47-51 **[TAB 2]**
[4] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530 [*Sawridge #7*] **[TAB 3]**
[5] *1985 Sawridge Trust v Kennedy*, 2017 ABCA 368 **[TAB 4]**
[6] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548 [*Sawridge #8*] **[TAB 5]** and Court Access Control Order for Maurice Felix Stoney **[Sawridge's Other Materials Tab A]**

II. ISSUE

5. Should Stoney be required to provide security for payment of a costs award?

III. ARGUMENT

6. Security for costs is "designed to protect a defendant from a plaintiff who wants to gamble if he wins, but not pay if he loses" as "such a plaintiff acts more unfairly than that, for by his groundless suit he inflicts serious expenses on the defendant."[7] It "is a discretionary order that balances the reasonable expectations and rights of the parties to come to a just and reasonable conclusion."[8] Rule 14.67 permits a single appeal judge to order a party to provide security for payment of a costs award.[9] Pursuant to Rule 4.22, the Court may order security for costs award if it considers it just and reasonable to do so, taking into account all of the following:

(a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;

(b) the ability of the respondent to the application to pay the costs award;

(c) the merits of the action in which the application is filed;

(d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;

(e) any other matter the Court considers appropriate.[10]

7. An order requiring Stoney to provide security for costs is just and reasonable as a consideration of the relevant factors favours the granting of such an order.

A. Sawridge is unlikely to be able to enforce judgment against assets in Alberta.

8. The only significant asset held by Stoney in Alberta, of which Sawridge is aware, is his primary residence located at 500 4th Street in Slave Lake. However, this residence is currently subject to foreclosure proceedings brought by Gabriel Nussbaum.[11] Evidence filed in support of an application for a Redemption Order in that action indicates that there are two mortgages registered against the property, that as of January 25, 2016, the first mortgagee, was owed $80,605.55, that as of October 27, 2015, Mr. Nussbaum, the second mortgagee claimed to be owed $29,858.02, and that as of October 29, 2015, the appraised value of the property was

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[7] *Crothers v Simpson Sears Ltd.; Attorney General of Alberta* (Intervener), 1988 ABCA 155 at para 43 **[TAB 6]**
[8] *Vaillancourt v Carter*, 2017 ABCA 282 at para 37 **[TAB 7]** and *Haymour v The Owners Condominium Plan No 802 2845*, 2016 ABCA 367 at para 8 **[TAB 8]**
[9] *Alberta Rules of Court*, R. 14.67 **[TAB 1]**
[10] *Alberta Rules of Court*, R 4.22 **[TAB 1]**
[11] Affidavit of Roland Twinn, November 15, 2017 at paras 2(c) and (d) and Exhibits B and C.

$145,000.00 to $150,000.00.[12] Having regard to the principal residence exemption from writ proceedings under the *Civil Enforcement Act* and the fact his residence is held jointly with his wife,[13] Sawridge is unlikely to be able to enforce judgment against any exigible assets in Alberta.

B. Stoney is unlikely to be able to pay a costs award if he is unsuccessful on appeal.

9. Currently, two costs awards made in favour of Sawridge remain unpaid by Stoney: $2,995.65 has been outstanding since October 22, 2014 from *Stoney v Sawridge First Nation*, 2013 FC 509; and $898.70 has been outstanding since June 14, 2016 from Justice J. Watson's dismissal of Stoney's application to extend the time to file an appeal of *Sawridge #3*.[14] Stoney has admitted he is unable to pay these prior costs awards due to his being elderly and having limited funds, as well as due to the foreclosure proceedings.[15] In *Sawridge #8*, Justice Thomas noted that Stoney "admitted he has outstanding unpaid cost awards" and he "says he is unable to pay the outstanding costs orders because he does not have the money for that."[16]

10. The presence of unpaid costs awards at lower levels of court is a factor in favour of granting security for costs.[17] Although the amount payable by Stoney in relation to *Sawridge #6* is yet to be finalized by an Assessment Officer, this Court should take notice that Sawridge claims $97,154.36.[18] Stoney's failure to pay prior costs awards, combined with his apparent impecuniosity, suggests he is unlikely to be able to pay a costs award if unsuccessful on appeal.

C. Stoney's appeal has no merit.

11. The Court may conduct a more in-depth analysis of the merits of Stoney's appeal as this this application is being brought far into the litigation.[19] The smaller the chance of success for Stoney on appeal, the slower the court should be to deny security when such security for costs would otherwise be appropriate.[20]

12. Stoney initially sought membership in Sawridge in 1995, but the Federal Court of Appeal in *Huzar v Canada* dismissed this action[21]. In 2011, he applied for membership in Sawridge and

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[12] Affidavit of Roland Twinn, November 15, 2017 at paras 2(c) and (d), and Exhibits B and C.
[13] *Civil Enforcement Act*, RSA 2000, c C-15, s 88 **[TAB 9]** and *Civil Enforcement Regulation*, Alta Reg 276/1995, s 37 **[TAB 10]**
[14] Affidavit of Roland Twinn, November 15, 2017 at paras 2(o) and (p); Affidavit of Roland Twinn, September 28, 2016 at paras 22, 28-29, Exhibits 4 and 6 **[Sawridge's Other Materials, Tab C]**
[15] Affidavit of Roland Twinn, November 15, 2017 at para 2(b) and (c), and Exhibits A and E.
[16] *Sawridge #8* at para 87 **[TAB 5]**
[17] *Zelman v Taler Resources Incorporated*, 2016 ABCA 318 **[TAB 11]**
[18] Affidavit of Roland Twinn, November 15, 2017 at para 2(g).
[19] *Bechir v Gowling Lafleur Henderson LLP*, 2017 ABQB 214 at para 13 **[TAB 12]**
[20] *1251165 Alberta Ltd v Wells Fargo Equipment Company Ltd*, 2013 ABQB 533 at para 43 **[TAB 13]**
[21] *Huzar v Canada*, 2000 CanLII 15589 (FCA) **[TAB 14]**

was denied. The denial was upheld by the Sawridge Appeal Committee and, later, by Justice Barnes in a Federal Court judicial review application.[22] In dismissing the application, Justice Barnes noted that the judicial review was an attempt by Stoney to re-litigate the matters that were in issue in *Huzar v Canada*, being his entitlement to membership as a result of Bill C-31. Justice Barnes accordingly concluded that the arguments related to Bill C-31 were barred under the doctrine of issue estoppel.[23] In 2015, Stoney filed a complaint with the Canadian Human Rights Commission, but the Commissioner refused to deal with the complaint on the basis that the Federal Courts had already decided the issue.[24] Subsequently, Stoney tried to insert himself into the underlying action by filing an application seeking an extension of time to file an appeal of Justice Thomas' decision in *Sawridge #3*, which application was denied by Justice Watson, who noted that Stoney does not have a participatory right in relation to the proceedings on the trust.[25]

13. In the face of these prior decisions, Stoney sought to be added as an intervener or party to the proceedings in the underlying action on the basis that he is a member of Sawridge pursuant to Bill C-31, and it is the denial of his application on the basis that it was an abuse of process that he now appeals. As noted by Justice Thomas in *Sawridge #6*, at the time that Justice Barnes issued his decision in the judicial review application and it was not appealed, Stoney's avenue for standing in the underlying action was closed and the question of his membership in Sawridge was *res judicata*.[26] During the July 28, 2017 hearing on personal costs against Ms. Kennedy, her counsel conceded that the Stoney Application had no merit.[27] Stoney's appeal has no merit and is merely the latest in a series of failed attempts to assert membership in Sawridge.

14. When viewed in the context of his numerous failed attempts at various levels of court and tribunal to assert membership, Stoney's appeal has no reasonable prospect of success.[28]

D. Security for costs will not unduly prejudice Stoney's ability to continue his appeal.

15. It is incumbent upon Stoney to adduce meaningful evidence of his financial status to avoid an adverse inference and to establish how such an order would affect his ability to pursue

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[22] *Stoney v Sawridge First Nation*, 2013 FC 509 **[TAB 15]**; Affidavit of Roland Twinn, September 28, 2016 at para 17 **[Sawridge's Other Materials, Tab C]**
[23] *Stoney v Sawridge First Nation*, 2013 FC 509 at para 17 **[TAB 15]**
[24] Affidavit of Roland Twinn, September 28, 2016 at para 25 **[Sawridge's Other Materials, Tab C]**
[25] *Stoney v 1985 Sawridge Trust*, 2016 ABCA 51 at para 20 **[TAB 16]**
[26] *Sawridge #6* at paras 47-51 **[TAB 2]**
[27] Transcript of July 28, 2017 hearing **[Sawridge's Other Materials, Tab B]**
[28] Affidavit of Roland Twinn, November 15, 2017 at para 2; Affidavit of Roland Twinn, September 28, 2016 at paras 4-26 **[Sawridge's Other Materials, Tab C]**

his appeal.[29] While he has admitted that he suffers from financial difficulties, an inability to post security for costs is only one factor to be considered and is not dispositive.[30] Further, "[a]ccess to justice principles do not entitle a person to engage in litigation without costs consequences…[a]s a matter of logic, the greater the chance that the appeal will be unsuccessful, the stronger the argument for the respondent seeking security for costs."[31] In the context of a security for costs application, "[w]hile the plaintiff deserves the right to proceed with a meritorious case, and that right merits protection on the facts in many cases, a defendant equally deserves at least some protection from the costs consequences of a case that is perhaps less than meritorious on its face."[32] Ordering Stoney to post security for costs would not unduly prejudice his ability to continue the action as all the other factors support such an order in the circumstances of this case.

E. Mr. Stoney has been declared a vexatious litigant and has not appealed that Order.

16. Finally, on an application for security for costs, it is "significant that the decision below was to the effect that the litigation below was an abuse of process,"[33] as here. Further, in Sawridge *#8*, Stoney was declared a vexatious litigant for engaging in a number of abusive litigation activities, including: re-litigating decided issues; bringing hopeless proceedings; conducting "busybody" litigation; failing to follow court orders, including the non-payment of costs awards; "forum shopping" in an attempt to prolong or renew abusive activities; bringing unproven allegations of fraud and corruption; and bringing an application with an improper purpose.[34] This Court should take note of these findings, which have not been appealed by Stoney, in finding security for costs is just and reasonable in the circumstances of this case.

III. RELIEF REQUESTED

17. Sawridge requests the following relief:

(a) An Order requiring Stoney to provide security for costs of $25,000.00, or such other amount as may be specified by this Court, within 2 months of the date of the Order, and staying the appeal of *Sawridge #6* and any applications until the security is provided;

(b) An Order stating that the appeal is dismissed without further order if Stoney fails to provide the security; and

(c) Cost of this Application.

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[29] *Stacey v Foy*, 2014 ABCA 420 **[TAB 17]**
[30] *Chalupa Estate v Chalupa*, 2014 ABCA 104 **[TAB 18]**
[31] *Wong v Giannacopoulos*, 2011 ABCA 156 at para 16 **[TAB 19]**
[32] *Hayden v Alberta Health Services (Foothills Medical Centre)*, 2017 ABQB 111 at para 30 **[TAB 20]**
[33] *Wong v Giannacopoulos*, 2011 ABCA 156 at para 17 **[TAB 19]**
[34] *Sawridge #8* at paras 80-100 **[TAB 5]**

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of November, 2017.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Counsel for Sawridge First Nation

LIST OF AUTHORITIES

Tab 1

Division 4
Security for Payment of Costs Award

Considerations for security for costs order

4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:

(a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;

(b) the ability of the respondent to the application to pay the costs award;

(c) the merits of the action in which the application is filed;

(d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;

(e) any other matter the Court considers appropriate.

Contents of security for costs order

4.23(1) An order to provide security for payment of a costs award must, unless the Court otherwise orders,

(a) specify the nature of the security to be provided, which may include payment into Court,

(b) require a party to whom the order is directed to provide the security no later than 2 months after the date of the order or any other time specified in the order,

(c) stay some or all applications and other proceedings in the action until the security is provided, and

(d) state that if the security is not provided in accordance with the order, as the case requires,

(i) all or part of an action is dismissed without further order, or

(ii) a claim or defence is struck out.

(2) If the security is given by bond, the bond must be given to the party requiring security unless the Court otherwise orders.

(3) If the security is given by money paid into Court, the money may, by agreement of the parties, be paid out and a bond substituted for it.

(4) As circumstances require, the Court may

(a) increase or reduce the security required to be provided, and

(b) vary the nature of the security to be provided.

(5) An order under this rule may amend a complex case litigation plan.

Division 5
Settlement Using Court Process

Formal offers to settle

4.24(1) At any time after a statement of claim, a claim under the *Family Law Act*, an application to vary a custody order under the *Extra-provincial Enforcement of Custody Orders Act* or an originating application to vary a corollary relief order granted by another court under the *Divorce Act* (Canada) is filed, but 10 days or more before

(a) an application for judgment by way of a summary trial is scheduled to be heard,

(b) a trial is scheduled to start, or

(c) an application is scheduled to be heard or considered,

one party may serve on the party to whom the offer is made a formal offer to settle the action or a claim in the action.

(2) To be valid a formal offer to settle must be made within the period described in subrule (1), be in Form 22 and include the following information:

(a) the name of the party making the offer;

(b) the name of the party or parties to whom the offer is made;

(c) what the offer is and any conditions attached to it;

(d) whether or not the amount of the offer is inclusive of interest and, if not, to what date and at what rate interest is payable under the terms of the offer;

(e) whether or not the amount of the offer is inclusive of costs and, if not, the amount or scale of the costs and the date to which they are payable under the terms of the offer;

Subdivision 7
Security for Costs

Security for costs

14.67(1) A single appeal judge may order a party to provide security for payment of a costs award pursuant to Part 4, Division 4.

(2) Where a party does not provide security as ordered, the appeal is deemed to have been abandoned and the other party is entitled to a costs award.

AR 41/2014 s4

Division 6
Deciding Appeals and Applications

Subdivision 1
Effect of Filing an Appeal

No stay of enforcement

14.68 Unless otherwise ordered under rule 14.48 or provided by law, the filing of an appeal or an application for permission to appeal does not operate as a stay of proceedings or enforcement of the decision under appeal.

AR 41/2014 s4

Intermediate acts valid

14.69 Unless otherwise ordered by the court appealed from, an appeal does not invalidate any intermediate act or proceeding taken.

AR 41/2014 s4

Subdivision 2
Basis on Which Appeals Are Decided

No new evidence without order

14.70 Unless an order is granted under rule 14.45 permitting the reliance on new evidence, appeals will be decided on the record before the court appealed from.

AR 41/2014 s4

Interlocutory decisions

14.71 An interlocutory order of the court appealed from does not restrict the ability of the Court of Appeal to decide an appeal, despite there having been no appeal from the interlocutory order.

AR 41/2014 s4

Tab 2

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 436

Date: 20170712
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Maurice Felix Stoney and His Brothers and Sisters

Applicants

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

Respondents (Original Applicants)

- and –

Public Trustee of Alberta ("OPTG")

Respondent

- and –

The Sawridge Band (the"Band" or "SFN")

Intervenor

Case Management Decision (Sawridge #6) of the Honourable Mr. Justice D.R.G. Thomas

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I. Introduction

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

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

[3] The Stoney Application is denied. Maurice Stoney is a third party attempting to insert himself (and his siblings) into a matter in which he has no legal interest. Further, this Application is a collateral attack which attempts to subvert an unappealed and crystallized judgment of a Canadian court which has already addressed and rejected the Applicant's claims and arguments. This is serious litigation misconduct, which will have costs implications for Maurice Stoney and also potentially for his lawyer Priscilla Kennedy.

II. Background

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

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

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

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

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

November 15, 2016	Further Written Response Argument of Maurice Stoney.

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

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

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

[9] There is no evidence before me or on the court file that indicates any of these named individuals other than Maurice Stoney has taken steps to involve themselves in this litigation. The "10 living brothers or sisters" are simply named. Maurice Stoney's filings do not include any documents such as affidavits prepared by these individuals, nor has there been an *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"] application or appointment of a litigation representative, per *Rules* 2.11-2.21. In fact, aside from Maurice Stoney, the Applicant(s) materials provide no biographical information or records such as birth certificates for any of these additional proposed litigants, other than the year of their birth.

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

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

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

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

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

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

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

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

[17] Two criteria are relevant when a court evaluates an application to intervene in litigation: whether the proposed intervenor is affected by the subject matter of the proceeding, and whether the proposed intervenors have expertise or perspective on that subject: ***Papaschase Indian Band v Canada (Attorney General)***, 2005 ABCA 320, 380 AR 301; ***Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)***, 2014 ABCA 340, 584 AR 255.

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

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

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

A. Maurice Stoney

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

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

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

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

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

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

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

B. Sawridge Band

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

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

[28] The Sawridge Band has entered evidence that Maurice Stoney has not paid the costs that were awarded against him in the ***Stoney v Sawridge First Nation*** action, and that Maurice Stoney has unpaid costs awards in relation to the unsuccessful appeal in ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2016 ABCA 51, 616 AR 176.

[29] On January 31, 2014, Maurice Stoney filed a Canadian Human Rights Commission complaint concerning the Sawridge Band's decision to refuse him membership. The Commission

refused the complaint, and concluded the issue had already been decided by ***Stoney v Sawridge First Nation***.

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

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

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

C. 1985 Sawridge Trustees

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

VI. Analysis

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

> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out;
>
> (b) that a commencement document or pleading be amended or set aside;
>
> (c) that judgment or an order be entered;
>
> (d) that an action, an application or a proceeding be stayed.
>
> (2) The conditions for the order are one or more of the following:
>
> ...
>
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
>
> (c) a commencement document or pleading is frivolous, irrelevant or improper;
>
> (d) a commencement document or pleading constitutes an abuse of process;
>
> ...
>
> (3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).
>
> (4) The Court may
>
> (a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;

...

[35] An action or defence may be struck under *Rule* 3.68 where it is plain and obvious, or beyond reasonable doubt, that the action cannot succeed: ***Hunt v Carey Canada Inc.***, [1990] 2 SCR 959, 74 DLR (4th) 321. Pleadings should be considered in a broad and liberal manner: ***Tottrup v Lund***, 2000 ABCA 121 at para 8, 186 DLR (4th) 226.

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

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

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

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

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

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

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

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

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

[43] Justice Barnes continues to observe at para 16 that this very same claim had been advanced in ***Huzar v Canada***, [2000] FCJ 873, 258 NR 246 (FCA), but that Maurice Stoney as a respondent in that hearing at para 4 had acknowledged this argument had no basis in law:

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

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

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

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

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

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

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

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

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

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

[50] McIntyre J in ***Wilson v The Queen***, [1983] 2 SCR 594 at 599, 4 DLR (4th) 577 explains how it is the intended effect that defines a collateral attack:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be

> described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. [Emphasis added.]

See also: ***R v Litchfield***, [1993] 4 SCR 333, 86 CCC (3d) 97; ***Quebec (Attorney General) v Laroche***, 2002 SCC 72, 219 DLR (4th) 723; ***R v Sarson***, [1996] 2 SCR 223, 135 DLR (4th) 402.

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

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

VII. Vexatious Litigant Status

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

[54] Maurice Stoney nevertheless persisted, appearing before the Alberta Court of Appeal in ***1985 Sawridge Trust (Trustee for) v Alberta (Public Trustee)***, 2016 ABCA 51, 616 AR 176, where Justice Watson concluded Mr. Stoney should not receive an extension of time to challenge ***Sawridge #3*** because he had no chance of success as he did not have standing and was "... in fact, a stranger to the proceedings insofar as an appeal from the decision of Mr. Justice Thomas to the Court of Appeal is concerned.": paras 20-21. Now Maurice Stoney has attempted to add himself (and his siblings) to this action as parties or intervenors, in a manner that defies *res judicata* and in an attempt to subvert the decision-making of the Sawridge Band and the Federal Court of Canada.

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

1. Collateral attacks that attempt to determine an issue that has already been determined by a court of competent jurisdiction, to circumvent the effect of a court or tribunal decision, using previously raised grounds and issues;

2. Bringing hopeless proceedings that cannot succeed, here in both the present application and the ***Sawridge #3*** appeal where Maurice Stoney was declared to be an uninvolved third party; and

3. Initiating "busybody" lawsuits to enforce the rights of third parties, here the recruited participation of Maurice Stoney's "10 living brothers and sisters."

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

[57] Any of the abusive litigation activities identified in ***Chutskoff v Bonora*** are a basis to declare a person a vexatious litigant and restrict access to Alberta courts. Maurice Stoney has exhibited three independent bases to take that step. The Alberta Court of Queen's Bench has adopted a two-step vexatious litigant application process to meet procedural justice requirements set in ***Lymer v Jonsson***, 2016 ABCA 32, 612 AR 122, see ***Hok v Alberta***, 2016 ABQB 651 at paras 10-11, leave denied 2017 ABCA 63; ***Ewanchuk v Canada (Attorney General)***, 2017 ABQB 137 at para 97.

[58] I therefore exercise this Court's inherent jurisdiction to control litigation abuse (***Hok v Alberta***, 2016 ABQB 651 at paras 14-25, ***Thompson v International Union of Operating Engineers Local No. 955***, 2017 ABQB 210 at para 56, affirmed 2017 ABCA 193; ***Ewanchuk v Canada (Attorney General)*** at paras 92-96; ***McCargar v Canada***, 2017 ABQB 416 at para 110) and to examine whether Maurice Stoney's future litigation activities should be restricted.

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

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

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

[62] I conclude the procedural fairness requirements indicated in ***Lymer v Jonsson*** are adequately met by a document-only approach, particularly given that the implications for a litigant of a criminal proceeding application, or for the striking out of a civil action or application, are far greater than the potential consequences of what is commonly called a vexatious litigant order. As Justice Verville observed in ***Hok v Alberta***, 2016 ABQB 651 at paras

30-34, the implications of a restriction of this kind should not be exaggerated, it instead "... is not a great hurdle."

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

1. his access to Alberta courts should be restricted, and
2. if so, what the scope of that restriction should be.

[64] The Sawridge Band and the Trustees may make submissions on Maurice Stoney's potential vexatious litigant status, and introduce additional evidence that is relevant to this question, see ***Chutskoff v Bonora*** at paras 87-90 and ***Ewanchuk v Canada (Attorney General)*** at paras 100-102. Any submissions by the Sawridge Band and the Trustees are due **by close of business on July 28, 2017**.

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

1. written submissions or affidavit evidence in relation to the Maurice Stoney's potential vexatious litigant status; and
2. any appeal from this decision.

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

VIII. Costs

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

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

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

> *Rule* 1.2 stresses this Court should encourage cost-efficient litigation and alternative non-court remedies. The Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7 at para 2, [2014] 1 SCR 87 has instructed it is time for trial courts to undergo a "culture shift" that recognizes that litigation procedure must reflect economic realities. In the subsequent ***R v Jordan***, 2016 SCC 27, [2016]

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

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

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

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

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

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

> The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them ... A court therefore has an inherent power to control abuse in this regard ... and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute" ...
>
> It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts ... It is therefore not reserved to superior courts but, rather, has its basis in the common law ...
>
> There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the

> courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice ... As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct ...
>
> The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. ...
>
> ... although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court ... the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt ...
>
> In most cases, of course, the implications for a lawyer of being ordered personally to pay costs are less serious than those of the other two alternatives. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. Moreover, as this appeal shows, an order to pay costs personally will normally involve relatively small amounts, given that the proceedings will inevitably be dismissed summarily on the basis that they are unfounded, frivolous, dilatory or vexatious.
>
> [Emphasis added, citations omitted.]

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

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

[***Jodoin***, para 29]

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

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

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

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

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

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

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

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

Heard and decided on the basis of written materials described in paragraph 7 hereof.
Dated at the City of Edmonton, Alberta this 12th day of July, 2017.

D.R.G. Thomas
J.C.Q.B.A.

Submissions in writing from:

Priscilla Kennedy
DLA Piper
for Maurice Felix Stoney (Applicant)

D.C. Bonora and
A. Loparco, Q.C.
Dentons LLP
for 1985 Sawridge Trustees (Respondents)

J.L. Hutchison
Hutchison Law LLP
for the OPTG (Respondent)

Edward Molstad, Q.C.
Parlee McLaws LLP
for the Sawridge Band (Intervenor)

Tab 3

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 530

Date: 20170831
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Maurice Felix Stoney and His Brothers and Sisters

Applicants

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

Respondents (Original Applicants)

- and –

Public Trustee of Alberta ("OPTG")

Respondent

- and –

The Sawridge Band

Intervenor

Case Management Costs Decision re Lawyer Priscilla Kennedy (Sawridge #7)
of the
Honourable Mr. Justice D.R.G. Thomas

I Introduction

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

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

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

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

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

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

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

[7] Prior to the July 28, 2017, hearing the Court received three affidavits relating to whether Maurice Stoney had obtained consent from his siblings to represent them in this litigation. At the hearing itself, Mr. Donald Wilson of DLA Piper represented Kennedy, who is also a lawyer with that firm. Mr. Wilson submitted that a costs award against Kennedy was unnecessary. Counsel

for the Trust and the Sawridge Band argued costs were appropriate either vs Kennedy personally, or against Kennedy and Maurice Stoney on a joint and several basis.

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

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

II Background

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

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

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

III Evidence and Submissions at the July 28 Hearing

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

[14] I also concluded that the Maurice Stoney application exhibited three of the characteristic indicia of abusive litigation, as reviewed in ***Chutskoff v Bonora***, 2014 ABQB 389 at para 92, 590 AR 288, aff'd 2014 ABCA 444, 588 AR 503:

1. Collateral attack that attempts to revisit an issue that has already been determined by a court of competent jurisdiction, to circumvent the effect of a court or tribunal decision, using previously raised grounds and issues.
2. Bringing hopeless proceedings that cannot succeed, here in both the present application and the ***Sawridge #3*** appeal where Maurice Stoney was an uninvolved third party.

3. Initiating "busybody" lawsuits to enforce the rights of third parties, here the recruited participation of Maurice Stoney's "10 living brothers and sisters."

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

A. Priscilla Kennedy

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

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

[18] Nevertheless, Mr. Wilson did acknowledge that the August 12, 2016 application was "a bridge too far" and should not have occurred. He advised the Court that he had discussed the Sawridge Advice and Direction Application with Kennedy, and concluded Maurice Stoney had exhausted his remedies. The August 12, 2016 application was not made with a bad motive or the intent to abuse court processes, but, nevertheless, "... it absolutely had that effect ...".

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

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

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

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

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

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

B. Sawridge Band

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

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

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

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

[27] The Sawridge Band again confirmed that the ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253 costs order against Maurice Stoney remained unpaid. The costs awarded against Maurice Stoney in ***Stoney v 1985 Sawridge Trust***, 2016 ABCA 51, 616 AR 176 also remain unpaid. Kennedy in her written submissions indicated that Maurice Stoney and his siblings have limited funds. Kennedy should be made personally liable for litigation costs so that the Sawridge Band and Trustees can recover the expenses that flowed from this meritless action.

C. Sawridge Trustees

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

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

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

IV. Court Costs Awards vs Lawyers

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

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

[32] The Supreme Court of Canada in ***Quebec (Director of Criminal and Penal Prosecutions) v Jodoin***, 2017 SCC 26 at para 29, 408 DLR (4th) 581 ["***Jodoin***"] has also very recently commented on costs awards against lawyers, and identified two scenarios where these kinds of awards are appropriate, either:

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

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

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

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

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

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

1. the nature of interests in question;
2. this litigation was by a third party attempting to intrude into an aboriginal community which has *sui generis* characteristics;
3. that the applicant sought to indemnify himself via a costs claim that would dissipate the resources of aboriginal community trust property;
4. the application was obviously futile on multiple bases; and

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

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

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

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

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

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

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

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

[42] More recently the Supreme Court has in ***R v Jordan***, 2016 SCC 27, [2016] 1 SCR 631 and ***R v Cody***, 2017 SCC 31 stressed it is time for trial courts to develop and deploy effective and timely processes "to improve efficiency in the conduct of legitimate applications and motions"

(***R v Cody***, at para 39). In ***R v Cody*** the Supreme Court at para 38 instructs that trial judges test criminal law applications on whether they have "a reasonable prospect of success" [emphasis added], and if not, they should be dismissed summarily. That is in the context of criminal litigation, with its elevated procedural safeguards that protect an accused's rights to make full answer and defence. Both ***R v Jordan*** and ***R v Cody*** stress *all* court participants in the criminal justice process - the Crown, defence counsel, and judges - have an obligation to make trial processes more efficient and timely. This too is part of the "culture shift", and a rejection of "a culture of complacency".

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

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

> Principle 2 on page 5:
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> > Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.
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> Principle 3 on page 8:
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> > Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

I note these and other instructions to trial judges in the "*Statement of Principles*" are not permissive, but mandatory. See for example: ***Gray v Gray***, 2017 CanLII 55190 (Ont Sup Ct J); ***Young v Noble***, 2017 NLCA 48; ***Moore v Apollo Health & Beauty Care***, 2017 ONCA 383; ***R v Tossounian***, 2017 ONCA 618.

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

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

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

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

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

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

1. identifying litigation abuse that warrants intervention in a prospective manner, by investigating what is the plausible future misconduct by an abusive litigant, rather than a rote and reflex response where the Court only restricts forms of abuse that have already occurred (***Hok v Alberta***, at paras 35-37; ***Thompson v International Union of Operating Engineers Local No. 955***, 2017 ABQB 210 at para 61, leave denied 2017 ABCA 193; ***Ewanchuk v Canada (Attorney General)***, 2017 ABQB 237 at para 160-164; ***Chisan v Fielding***, 2017 ABQB 233 at paras 52-54);
2. recognition that certain kinds of litigation abuse warrant a stricter response given their disproportionate harm to court processes (***Ewanchuk v Canada (Attorney General)*** at paras 170-187); and
3. taking special additional steps where an abusive litigant defies simple control in his or her attacks on the Court, its personnel, and other persons (***Re Boisjoli***, 2015 ABQB 629, 29 Alta LR (6th) 334; ***Re Boisjoli***, 2015 ABQB 690).

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

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

B. Costs Awards Against Lawyers

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

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

> ... flows the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice ... [Citations omitted.]
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> (***Jodoin*** at para 18.)

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

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

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

> The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. ...
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> As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public ... However, the

judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:

> The court's authority is preventative — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court.

[54] The Canadian courts' inherent jurisdiction extends to review of lawyers' fees (***Mealey (Litigation guardian of) v Godin*** (1999), 179 DLR (4th) 231 at para 20, 221 NBR (2d) 372 (NBCA)).

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

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

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

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

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

2. The Nuremberg Defence - I Was Just Following Orders

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

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

> That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. I will not seek to destroy anyone's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favor or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta. [Emphasis added.]

This is not some empty ceremony, but instead these words are directly relevant to a lawyer's duties, and the standard expected of him or her by the courts: ***Osborne v Pinno*** (1997), 208 AR 363 at para 22, 56 Alta LR (3d) 404 (Alta QB); ***Collins v Collins***, 1999 ABQB 707 at para 26, 180 DLR (4th) 361.

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

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

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

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

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

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

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

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

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

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

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

> ... it is significant that he is a member of the Law Society of Alberta. If he were not, one could apply the standard of conduct of an ordinary citizen, and excuse some conduct for which an ordinary citizen might be ignorant or from which he or she would be otherwise excused. In my view such is not the case for an active practising member of the Law Society of Alberta, who has a standard to meet,

> regardless of his technical capacity of appearance, merely by virtue of that membership ...

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

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

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

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

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

3. No Constitutional Right to Abusive Litigation

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

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

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

[73] I stress - there is *no right* to engage in this kind of litigation. Abusive litigation may be blocked, and actions may be taken to punish and control court participants who engage in this kind of litigation misconduct. Steps of that kind are appropriate to enhance access to justice and

protect badly over-taxed court resources. Lawyers have a clear obligation not to promote abuse of court processes.

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

[75] Restating this point:

1. clients have no right to engage in abusive litigation;
2. lawyers have obligations as professionals and as officers of the court to not misuse court resources and processes.

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

4. An Exceptional Step

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

> ... an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. ...

See also ***R v 974649 Ontario Inc.***, 2001 SCC 81 at para 85, [2001] 3 SCR 575.

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

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

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

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

[80] What constitutes "serious abuse" is a separate question. However Alberta courts have been developing guidelines and principles to test when court intervention is warranted to control

litigant activities. This jurisprudence is also helpful to test when a lawyer has engaged in "serious abuse".

5. Abuse of the Court

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

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

1. collateral attacks,
2. hopeless proceedings,
3. escalating proceedings,
4. bringing proceedings for improper purposes,
5. conducting "busybody" lawsuits to enforce alleged rights of third parties,
6. failure to honour court-ordered obligations,
7. persistently taking unsuccessful appeals from judicial decisions,
8. persistently engaging in inappropriate courtroom behaviour,
9. unsubstantiated allegations of conspiracy, fraud, and misconduct,
10. scandalous or inflammatory language in pleadings or before the court, and
11. advancing OPCA strategies.

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

1. using court processes to further a criminal scheme (***Re Boisjoli***, 2015 ABQB 629 at paras 98-103), and
2. attempts to replace or bypass the judge hearing or assigned to a matter, commonly called "judge shopping" (***McCargar v Canada***, 2017 ABQB 416 at para 112).

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

[85] Similarly, vexatious litigant judgments frequently conclude that the presence of multiple ***Chutskoff v Bonora*** "indicia" cumulatively strengthen the foundation on which to conclude

court intervention is warranted in response to abusive litigation conduct: ***Ewanchuk v Canada (Attorney General)*** at para 159; ***Chutskoff v Bonora*** at para 131; ***Re Boisjoli***, 2015 ABQB 629 at para 104; ***Hok v Alberta*** at para 39; ***644036 Alberta Ltd v Morbank Financial Inc*** at para 91.

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

> I conclude that the characteristics of vexatious litigation, including those as identified in Judicature Act, s 23(2) and the common law authorities recently and comprehensively reviewed in Chutskoff v Bonora, 2014 ABQB 389 are 'aggravating' factors that favour a cost award against a criminal accused. These indicia form a matrix of traits that are shared by the kind of litigation misconduct that calls for court response and deterrence. [Emphasis added.]

I note ***R v Eddy*** applies a costs award analysis developed in ***Fearn v Canada Customs***, 2014 ABQB 114, 586 AR 23, which is cited with approval in ***Jodoin*** at paras 25, 27.

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

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

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

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

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

6. Knowledge and Persistence

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

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

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

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

1. a lawyer had made an argument, application, or proceeding based on a false statement of law, an invalid authority, or other mistake;
2. that error was identified by another party or the court; and
3. the lawyer then acknowledged the error and abandoned the argument, application, or proceeding.

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

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

7. Examples of Lawyer Misconduct that Usually Warrant Costs

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

a. Futile Actions and Applications

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

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

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

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

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

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

b. Breaches of Duty

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

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

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

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

c. Special Forms of Litigation Abuse

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

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

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

[111] Another special category of litigation abuse that may attract a costs award against a lawyer personally is the practice of booking a hearing or an application in a time period that is obviously inadequate for the issues and materials involved. For example, a lawyer may appear in Chambers and attempt to jam in an application that obviously requires a full or half day, rather than the 30 minute time slot allotted. The end result will either be an incomplete application, an application that goes overtime and disrupts the conduct of the Chambers session, or that the judge who received the application simply orders it re-scheduled to a future appearance with the appropriate duration.

[112] In criticizing this practice I understand why it happens. The Alberta Court of Queen's Bench is no longer able to respond to litigants in a timely manner due to the now notorious failure of governments to maintain an adequate judicial complement, facilities, and supporting staff. In ***Ewanchuk v Canada (Attorney General)***, at para 178 I reported how long persons must

wait to access this court, for example waiting over a year to conduct a one-day special chambers hearing. While preparing this judgment I checked to see if things have improved. They haven't.

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

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

d. Delay

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

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

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

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

C. Conclusion

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

[119] This objective involves many actors. Parliament and the legislatures should design procedures and rules that better align with this objective. Some kinds of disputes, such as family law matters that involve children, are poor matches for the adversarial court context. Judges and courts should develop new approaches, both formal and informal, to better triage, investigate,

and resolve disputes. Judicial review and appeal courts should be mindful to limit their intrusion into the operation of subordinate tribunals.

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

V. Priscilla Kennedy's Litigation Misconduct

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

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

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

A. Futile Litigation

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

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

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

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

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

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

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

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

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

B. Representing Non-Clients

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

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

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

[136] There is no documentation to establish that Maurice Stoney applied to become a litigation representative or was appointed a litigation representative, per *Rules* 2.11-2.21. This is not a class action scenario where Maurice Stoney is a representative applicant. While Kennedy has argued that Maurice Stoney's siblings are elderly and unable to conduct litigation, then that is not simply a basis to arbitrarily add their names to court filing. Instead, a person who lacks the

capacity to represent themselves (*Rule* 2.11(c-d)) may have a self-appointed litigation representative (*Rule* 2.14), but only after filing appropriate documentation (*Rule* 2.14(4)). That did not occur.

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

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

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

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

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

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

[142] A point that was in dispute at the ***Sawridge #6*** application was whether or not Stoney had outstanding unpaid costs orders. This is a well-established indicium of vexatious litigation: ***Chutskoff v Bonora*** at para 92. This is a useful point to illustrate how, in my opinion, ***Jodoin*** instructs how a court 'quarantines' relevant vs extraneous evidence when the court evaluates a lawyer's potential liability due to litigation abuse. One of the allegations that emerged was that Stoney had not paid the costs awarded against him in ***Stoney v Sawridge First Nation***. If so, then that fact aggravates the fact Kennedy then conducted a collateral attack on the judicial review's outcome. Similarly, Maurice Stoney's failure to pay costs in relation to the ***Stoney v 1985 Sawridge Trust*** appeal of ***Sawridge #3*** is related to the August 12, 2016 application by both subject matter and as it occurred in the same overall litigation. However, if Stoney had, hypothetically, not paid costs awarded in other actions where he was represented by Kennedy then that is of little relevance to this specific decision and the question of whether Kennedy should be liable for the ***Sawridge #6*** costs award.

[143] I conclude that the fact that Kennedy proceeded with the August 12, 2016 application while there were outstanding costs orders in relation to ***Stoney v Sawridge First Nation*** and ***Stoney v 1985 Sawridge Trust*** is an aggravating factor but not, in itself, a basis to order costs against Kennedy.

[144] The Trustees and Band indicated I should consider Kennedy's conduct during cross-examination of her client on his affidavit. While I have reviewed that material I do not think it is

germane to my analysis because Kennedy's obstructionist conduct is distinct from the main bases for my award of costs against Kennedy. Similarly, the degree to which Kennedy was "holding the reins" of this litigation is not actually directly relevant to my analysis. What is critical is that the August 12, 2016 application had no merit. Kennedy's misconduct is essentially the same no matter whether she 'was just following orders', or 'the person behind the wheel'.

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

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

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

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

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

D. Conclusion

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

1. she conducted futile litigation that was a collateral attack of a prior unappealed decision of a Canadian court, and
2. she conducted that litigation allegedly on behalf of persons who were not her clients on a "busybody" basis.

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

E. Quantum of the Costs Award

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

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

VI. Conclusion

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

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

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

Heard on the 28th day of July, 2017.
Dated at the City of Edmonton, Alberta this 31st day of August, 2017.

D.R.G. Thomas
J.C.Q.B.A.

Submissions in writing from:

Donald Wilson
DLA Piper
for Priscilla Kennedy

D.C. Bonora and
Erin M Lafuente
Dentons LLP
for 1985 Sawridge Trustees

Edward Molstad, Q.C.
Ellery Sopko
Parlee McLaws LLP
for the Sawridge Band (Intervenor)

Tab 4

In the Court of Appeal of Alberta

Citation: 1985 Sawridge Trust v Kennedy, 2017 ABCA 368

Date: 20171107
Docket: 1703-0239-AC
Registry: Edmonton

Between:

Maurice Felix Stoney and His Brothers and Sisters

Interested Parties
(Interested Parties)

- and -

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

Respondents
(Respondents)

- and -

Public Trustee of Alberta

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

- and -

The Sawridge First Nation

Intervenor
(Intervenor)

- and -

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

Applicant
(Appellant)

Reasons for Decision of
The Honourable Mr. Justice Frans Slatter

Application for Permission to Appeal

Reasons for Decision of
The Honourable Mr. Justice Frans Slatter

[1] The applicant, who was counsel for one of the parties in this litigation, seeks leave to appeal the decision reported as ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 530. That decision found the applicant personally liable for the costs of the proceedings on a solicitor and own client basis.

[2] The general rule in Alberta is that any party is entitled to one level of appeal as a matter of right. In some exceptional cases, an appeal is only allowed with permission, including an appeal of any decision "as to costs only": R. 14.5(1)(e). This rule is primarily intended to screen out potential appeals involving details of a costs award that do not justify a further level of review. It also reflects the fact that awards of costs are highly discretionary, and subject to a deferential standard of review.

[3] The test for permission to appeal a costs award includes whether the applicant can show: (1) a good arguable case having sufficient merit to warrant scrutiny by a full panel of this Court; (2) issues of importance to the parties and in general; (3) the costs appeal has practical utility; and (4) no delay in proceedings will be caused by the costs appeal: ***Bun v Seng***, 2015 ABCA 165 at para. 4 and ***Jackson v Canadian National Railway***, 2015 ABCA 89 at paras. 9-10, 599 AR 237.

[4] The *Rules of Court* contain a number of presumptions about costs awards. For example, R. 10.29 creates a presumption that the successful party is entitled to costs, and a presumption that costs are awarded on a "pay as you go" basis, not just at the end of the litigation. Schedule C creates a presumptive scale of costs. Costs that are consistent with the presumptions, guidelines and rules set out in the *Rules of Court* are resistant to appellate review, making appeals inappropriate. That is one reason that permission is required to appeal a decision as to costs only, and explains the outcome in cases like ***Brill v Brill***, 2017 ABCA 235, which is easily distinguishable from the present situation. Further, appeals on the details of costs awards (e.g., which Column applies, was second counsel required, etc.) are rarely appropriate.

[5] However, where a costs award raises more general issues, or issues of principle, or large sums are involved, a further appeal may well be justified. One example is ***Condominium Corp. No. 9813678 v Statesman Corp.***, 2011 ABQB 489, 52 Alta LR (5th) 252 which concerned whether a Bullock order could include double costs generated by an offer to settle. Another is ***Young v Young***, [1990] BCJ No 1051, [1990] BCWLD 1239, which considered the liability of non-parties for costs, and which eventually resulted in the leading decision ***Young v Young***, [1993] 4 SCR 3 at para. 253. A person subjected to an out-of-the-ordinary costs award will often have a legitimate basis for appealing, and where there is doubt permission to appeal should be granted.

[6] Costs awards against lawyers personally are recognized by R. 10.50 as being available as a form of sanction:

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

There is no direct appellate authority on this new rule, or the circumstances in which the rule should be engaged, although such awards are considered to be extraordinary: ***Quebec (Director of Criminal and Penal Prosecutions) v Jodoin***, 2017 SCC 26 at para. 25, 346 CCC (3d) 433. The interpretation of this rule, and its application in any particular situation, engages the tension between the lawyer's obligation to the client, and the lawyer's obligation to the system of justice.

[7] The case management judge raised this issue on his own motion, and suggested at para. 34 that there is a new "second branch" of the test, and at para. 37 that this is a "test example". The amounts involved here are large, and the issue is important both to the applicant and to the legal community. The applicant does not just challenge details or particulars about the costs award, but the underlying principles that should drive a costs award against a party's lawyer.

[8] The respondents emphasize the highly deferential standard of review citing, for example, the statements at paras. 51-2 of ***Jodoin***:

> 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. . . . 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 . . .

The respondents argue that no such error can be identified here, and that permission to appeal should not be granted because the decision below is "correct". This argument misapprehends the test for permission to appeal, as well as the role of individual appellate judges who hear applications for permission to appeal: ***CCS Corp. v Secure Energy Services Inc.***, 2017 ABCA 260 at paras. 6-7. The test for permission to appeal is whether there is a "good arguable case", not whether the appeal is likely to succeed. On an application for permission to appeal the point is not just whether the decision below is right or wrong, but whether the issue is important enough that a full panel of this Court should say whether it is right or wrong. Whether there is a "good arguable case" depends in part on the merits of the appeal, and the standard of review that will be applied, but it is not an invitation to pre-decide the appeal.

[9] The applicant has met the test, and permission to appeal is granted. In order to circumscribe the costs of this appeal, the Sawridge First Nation will (subject to any contrary agreement by counsel) be the lead respondent, and will be entitled to file a full factum as provided for in the *Rules of Court*. Other interested parties may file respondents' factums, but they will not be due

until 10 days after the Sawridge First Nation's factum is filed, they are not to be repetitive of arguments made in that factum, and unless permitted by the Case Management Officer they are to be limited to 8 pages.

Application heard on November 2, 2017

Reasons filed at Edmonton, Alberta
this 7th day of November, 2017

Slatter J.A.

Appearances:

D.C. Bonora and A. Loparco
for the Respondent 1985 Sawridge Trustees

Catherine Twinn, in person

E.H. Molstad, Q.C.
for the Intervenor The Sawridge First Nation

P.J. Faulds, Q.C.
for the Applicant

Tab 5

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 548

Date: 20170912
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Maurice Felix Stoney and His Brothers and Sisters

Applicants

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

Respondents (Original Applicants)

- and –

The Sawridge Band

Intervenor

Case Management Decision re Vexatious Litigant Status of Maurice Stoney (Sawridge #8) of the Honourable Mr. Justice D.R.G. Thomas

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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 v Alberta (Public Trustee)***, 2012 ABQB 365, 543 AR 90 ("***Sawridge #1***"), aff'd 2013 ABCA 226, 543 AR 90 ("***Sawridge #2***"); ***1985 Sawridge***

Trust v Alberta (Public Trustee), 2015 ABQB 799 ("***Sawridge #3***"), time extension denied 2016 ABCA 51, 616 AR 176; ***1985 Sawridge Trust (Trustee for) v Sawridge First Nation***, 2017 ABQB 299 ("***Sawridge #4***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 377 ("***Sawridge #5***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 436 ("***Sawridge #6***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 530 ("***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 at paras 14-25, 273 ACWS (3d) 533, leave denied 2017 ABCA 63, leave to the SCC requested, 37624 (12 April 2017); ***Thompson v International Union of***

Operating Engineers Local No. 955, 2017 ABQB 210 at para 56, affirmed 2017 ABCA 193; ***Ewanchuk v Canada (Attorney General)***, 2017 ABQB 137 at paras 92-96; ***McCargar v Canada***, 2017 ABQB 416 at para 110.

[8] An intervention of this kind is potentially warranted when a litigant exhibits one or more "indicia" of abusive litigation: ***Chutskoff v Bonora***, 2014 ABQB 389 at para 92, 590 AR 288, aff'd 2014 ABCA 444; ***Re Boisjoli***, 2015 ABQB 629 at paras 98-103, 29 Alta LR (6th) 334; ***McCargar v Canada***, 2017 ABQB 416 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 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 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***, 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 at para 9, 200 ACWS (3d) 1021, leave to SCC refused, 34271 (20 November 2011); ***Henry v El***, 2010 ABCA 312 at paras 2-3, 5, 193 ACWS (3d) 1099, leave to SCC refused, 34172 (14 July 2011). A litigant's entire court history is relevant, including litigation in other jurisdictions: ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456 at paras 83-127, 543 AR 132; ***Curle v Curle***, 2014 ONSC 1077 at para 24; ***Fearn v Canada Customs***, 2014 ABQB 114 at paras 102-105, 586 AR 23. 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 CanLII 15754 at para 23, 192 FTR 278 (FC); ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547 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 at para 6, 515 AR 58.

[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 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 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 & Ors (No 2)***, [2003] EWCA Civ 1113 (UK CA).

[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 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 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 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] FCJ 873, 258 NR 246 (FCA) and ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253 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 1985 Sawridge Trust***, 2016 ABCA 51

[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 at para 15, 609 AR 217.

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] FCJ 873, 258 NR 246 (FCA) and ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253 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, 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, 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 AR 392, 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, 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 Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59 at paras 40, 45-48, [2014] 3 SCR 31. 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 ***RO v DF***, 2016 ABCA 170, 36 Alta LR (6th) 282 at para 38 the Court stresses this requirement. Further, the ***RO v DF*** 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 ***RO v DF*** 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 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 & Anor***, [1999] EWCA Civ 3043 (UK CA) and ***Bhamjee v Forsdick & Ors (No 2)*** decisions.

[53] However, the strict "persistence"-driven approach in the *Judicature Act* and ***RO v DF*** 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 at para 44, 543 AR 11, 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 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,
3 retaining counsel, and
4. paying outstanding cost awards.

[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

[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 LR (4th) 50, appeal dismissed for want of prosecution 2004 ABCA 100, 61 WCB (2d) 306.

[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 AR 113, affirmed 2011 ABCA 289, 515 AR 392, leave to SCC refused, 34573 (26 April 2012) 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 at paras 4-5, 498 AR 109). Similarly, in ***Re FJR (Dependent Adult)***, 2015 ABQB 112, 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 AR 132, ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 625, 543 AR 11, ***Chutskoff v Bonora***, 2014 ABQB 389, 590 AR 288, ***Hok v Alberta***, 2016 ABQB 335, and ***Hok v Alberta***, 2016 ABQB 651 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 AR 215. 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:

- ***ANB v Alberta (Minister of Human Services)***, 2013 ABQB 97, 557 AR 364 - 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 - 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.
- ***Bursey v Canada***, 2015 FC 1126, aff'd 2015 FC 1307, aff'd ***Dove v Canada***, 2016 FCA 231, leave to the SCC refused, 37487 (1 June 2017) - 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.
- ***Claeys v Her Majesty***, 2013 MBQB 313, 300 Man R (2d) 257 - 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 (Ministry of Public Safety and Solicitor General)***, 2016 BCSC 1181 - 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 & PEIR 80 - 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 Canada***, 2013 FC 590, 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 LR (6th) 334; ***Boisjoil (Re)***, 2015 ABQB 690; ***Cormier v Nova Scotia***, 2015 NSSC 352, 367 NSR (2d) 295; ***Curle v Curle***, 2014 ONSC; ***Gauthier v Starr***, 2016 ABQB 213, 86 CPC (7th) 348; ***Holmes v Canada***, 2016 FC 918; ***R v Fearn***, 2014 ABQB 233, 586 AR 182; ***Yankson v Canada (Attorney General)***, 2013 BCSC 2332.

[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 (Re)***, 2015 ABQB 467 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 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 1985 Sawridge Trust***, 2016 ABCA 51 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 Houlden***, [1990] 1 SCR 1366, 68 DLR (4th) 641. 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; ***Callow v Board of School Trustees, School District No. 45***, 2008 BCSC 778, 168 ACWS (3d) 906.

[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 B.C. Court of Appeal Chief Justice Threfal*** (9 November 2011), Vancouver T-1386-11 (FC), aff'd (2 December 2011), Vancouver T-138611 (FC); ***Callow v Board of School Trustees (#45 West Vancouver)*** (2 February 2015), Vancouver T-2360-14 (FC). 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.

[95] The saga then continued, with Callow next having filings struck out in Quebec (***Callow v Board of School Trustees (S.D. #45 West Vancouver)***, 2015 QCCS 5002, affirmed 2016 QCCA 60, leave to the SCC refused, 36883 (9 June 2016) and Saskatchewan (***Callow v West Vancouver School District No. 45***, 2015 SKQB 308, affirmed 2016 SKCA 25, leave to the SCC refused, 36993 (6 October 2016). 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; ***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 CPC (7th) 348), and appearing before a court is a privilege solely subject to the court's discretion (***R v Dick***, 2002 BCCA 27, 163 BCAC 62). 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 respect to the Sawridges and 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 brought home the falling of continuing to prosecute the remedy 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 SCR 1235 at 1245, 77 DLR (4th) 249 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.

Appearances made by written submissions.
Dated at the City of Edmonton, Alberta this 12th day of September, 2017.

D.R.G. Thomas
J.C.Q.B.A.

Submissions in writing from:

Priscilla Kennedy
DLA Piper
for Maurice Felix Stoney (Applicant)

Edward H. Molstad, Q.C.
Parlee McLaws LLP
for the Sawridge Band

D.C. Bonora
Dentons LLP
for 1985 Sawridge Trustees

Tab 6

In the Court of Appeal of Alberta

Citation: Crothers v. Simpson Sears Ltd., 1988 ABCA 155

Date: 19880510
Docket: 8703-0456-AC
Registry: Edmonton

Between:

Dan Crothers

Plaintiff
(Appellant)

- and -

Simpson Sears Ltd.

Defendant
(Respondent)

- and -

The Attorney General of Alberta

Intervener
(Respondent)

The Court:

The Honourable Mr. Justice Bracco
The Honourable Mr. Justice Irving
The Honourable Mr. Justice Côté

Reasons for Judgment of The Honourable Mr. Justice Côté
Concurred in by The Honourable Mr. Justice Bracco
Concurred in by The Honourable Mr. Justice Irving

APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE BERGER
DATED THE 6TH DAY OF MAY, 1987 FILED THE 2ND DAY OF JUNE, 1987

COUNSEL:

P. G. Lister, Esq., for the Plaintiff

R. J. Normey, Esq., for the Intervener

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE COTE

I. Introduction

[1] The Plaintiff resides in Ontario and sues the Defendant for a leg twisted in a fall. The Court of Queen's Bench of Alberta on motion by the Defendant ordered the Plaintiff to post $1,300.00 security for costs. (The order appealed from is reported as *Singh v. Dura* [1987] 4 W.W.R. 549, 52 Alta. L.R.(2d) 62, 80 A.R. 347, 19 C.P.C.(2d) 295.)

[2] Whether R. 593(1)(a) requiring non-residents to post security for costs survives the Charter of Rights and Freedoms is the only issue. The Plaintiff questions only whether that subrule may validly require security for costs from poor residents of other provinces and territories of Canada. He concedes that the order for security appealed from is otherwise proper. The Defendant Simpson-Sears did not take part in the appeal, but the Attorney General of Alberta intervened and presented full argument.

[3] This judgment will show that costs are very hard to collect from a non-resident (Part II), and that a poor but meritorious plaintiff will not lose his suit for failure to post cash (Part III), and that resident plaintiffs have to post security too (Part V). It will conclude by discussing the Charter (in Parts VI to VIII).

[4] The discussion must start with how security for costs works and interlocking topics such as enforcement of judgments in other provinces, for two reasons. The first is to avoid sterile abstract theorizing. Constitutional challenges to costs Rules need factual underpinnings: *Re Danson* (1987) 60 O.R.(2d) 676 (C.A.). The second is because the Plaintiff criticizes features of the security for costs procedure which in my opinion do not exist.

II. A successful defendant will have more trouble collecting costs from a non-resident

A. The Defendant's Position

[5] The Plaintiff would concentrate on his own position as plaintiff. But almost everything else in civil procedure balances the interests of both parties, plaintiff and defendant. This cannot be accomplished, and grave injustice will result, if we look at the interests of only one party when ruling on security for costs. The issue here is not government vs. citizen, but citizen vs. citizen.

[6] Often a defendant is not wealthy and the taxable court costs which he will be awarded if he wins the lawsuit against him are only a small fraction of the legal bill that he will incur, not to mention the other expense and inconvenience he will sustain through being sued.

B. Execution of judgment if Plaintiff lives here

[7] If a resident plaintiff loses his suit, within two hours of pronouncement of a judgment for costs in his favour the successful defendant can levy execution, filing writs against land and chattels, and garnishing bank accounts or wages. Within a few more days he can examine the plaintiff under oath as to his assets. Indeed, the defendant may even be able to have the sheriff effect seizure within a few days. None of that requires leave, or consent, or any waiting period. The chance of the plaintiff's being able to hide or transfer his assets away is small. (Defendants sometimes see the inevitable coming and hide their assets, but few plaintiffs go to trial expecting to lose.)

[8] Now contrast that with a case where the defendant sues a non-resident plaintiff on his judgment for costs, or where he applies to register his judgment in the plaintiff's home province. Any legal régime to enforce judgments in other provinces involves inherent difficulties. Logistics dominate.

C. Suit on Costs Judgment in Plaintiff's Province

[9] It is impossible to sue on an Alberta judgment for costs in Manitoba: *Koven v. Toole* (1954) 13 W.W.R. 444 (Man. C.A.); *Re Paslowski v. Paslowski* (1957) 22 W.W.R. 584 (Man.). I doubt that this is the law of Alberta: see *Cavanagh v. Lisogar* (1956) 19 W.W.R. 230 (Alta. D.C.); Gordon (1954) 32 Can. B. Rev. 1146; *Deutsche Nemectron v. Dolker* (1984) 51 B.C.L.R. 162. But the *Koven* doctrine is a complete barrier in Manitoba and maybe one or more other provinces.

[10] If it is possible to sue on a judgment for costs, what steps and time are involved? The successful defendant who sues the former plaintiff in the other province may be forced to put up security for costs: 1 Daniell's Chancery Practice 68 (8th ed.); *Crozat v. Brogden* [1894] 2 Q.B. 30; cf. *Lockett v. Solloway Mills & Co.* (1932) 41 O.W.N. 24. So security for costs in the initial suit involves less discrimination and more poetic justice than appears at first blush. The new defendant (former unsuccessful plaintiff) may well defend the new suit, thus delaying judgment for some months, even if the judgment creditor moved for summary judgment.

[11] How to sue elsewhere on an Alberta judgment is still relevant, for Alberta's reciprocal enforcement of judgments arrangements do not cover all the provinces of Canada. The question is one of different courts, not different countries. It is so even in a unitary state with different courts such as the United Kingdom, or pre-Confederation Canada: *McDonald v. Dicaire* (Ont. 1859) I Ch. Cham. 34. Before the Judicature Acts, English courts ordered security against those resident in Ireland or Scotland: 1 Daniell. *A fortiori* in Canada.

D. Reciprocal Enforcement Legislation

[12] Some cases say that reciprocal enforcement Acts should influence security for costs; see *Frank v. Commissioner* [1985] N.W.T.R. 149 (apparently misreading annotations to the Alberta Rules); cases cited in *McCormack v. Newman* (1983) 35 C.P.C. 298, 301-02 (Ont. M.). However, I do not consider such legislation at all important, because it still places or leaves barriers described below.

[13] Reciprocal registration of a costs judgment is also impossible in Manitoba: *Koven v. Toole, supra.* Another province may also follow that questionable decision. Once again, the winning Alberta defendant may have to give security for costs to the losing Ontario plaintiff: (English) Supreme Court Practice 71/4/1; *Kohn v. Rinson, supra*; Castel, 551 (1975). (It is otherwise in British Columbia: id. at 551-52).

[14] The reciprocal enforcement Acts of several provinces expressly allow the losing judgment debtor to retry the whole lawsuit on the merits. The losing plaintiff can there argue again that the Alberta judge was wrong, and make the winner prove his case all over: Castel, 471-78 (1975), 269 n. 191 (2d ed. 1986). And some mistaken cases elsewhere produce the same result: id. @ 269-70 n. 192 (2d ed.) and 489 ff., 523, 549 (1st ed.). That is not the law in Alberta or in most provinces, but it poses a great delay, expense, and risk in some provinces.

[15] It is instructive to look at the Reciprocal Enforcement of Judgments Act of Ontario (R.S.O. 1980 c. 432), which is where this Plaintiff lives. If a successful defendant in Alberta tries to use it, he will spend some days selecting an Ontario lawyer and learning the right forms. Ontario's Act requires an entered formal Alberta judgment, which can take weeks. Then he must get papers certified in Alberta and send them to Ontario for filing there. (On the formalities of proof, cf. Castel, 518 ff. (1975).) The Ontario statute (s. 3(e)) freezes all action during the Alberta appeal period plus the term of any appeal. The creditor must (by s. 5) find and personally serve the judgment debtor (former plaintiff) in Ontario; no address for service

suffices. During a further month the debtor (former plaintiff) may apply to the Ontario court to cancel the registration (s. 6). Even purely spurious objections which ultimately fail will occupy further weeks at least; if there are examinations on affidavits and so forth, it will take months. This process involves adjudication and disputes, even a trial; it is far from automatic: *Kohn v. Rinson & Stafford (Brod)* [1948] 1 K.B. 327. So the winning Alberta defendant cannot enforce his judgment in Ontario for months, maybe many months.

[16] One must distinguish reported English cases. Canadian reciprocal enforcement Acts are very different from the automatic incontestible registration of judgments between England, Scotland and Ireland: *Jorgenson v. Reid* [1932] 3 W.W.R. 250, 253-54 (Sask. C.A.); *Kohn v. Rinson, supra; Factory Tire & Rubber Co. v. Timac Sales* (1979) 9 Alta. L.R. (2d) 193, 195; 2 Dicey & Morris, Conflict of Laws 1101, 1196 (10th ed.) Cases relying on reciprocal enforcement arrangements for security for costs questions thus misread the English cases: Banfai (1980) 2 Adv. Q. 334.

[17] After all this delay, the execution debtor's assets may be hard to find. During these months a losing plaintiff could presumably hide his assets or make it very difficult to attach them. Furthermore, the judgment creditor (former defendant) must work across thousands of miles trying to instruct lawyers in a province he did not choose with no connection to the original lawsuit. The solicitor-and-client legal bills for this new process will normally exceed the original unpaid party-and-party costs judgment. So it may be completely uneconomical to register that judgment in Ontario.

[18] Reciprocal enforcement Acts do not give the Alberta party any substantive rights, and are of little relevance to security for costs: *Fraser v. Wainwright Dome Oil Co.* [1927] 1 W.W.R. 523 (Alta.); *Factory Tire v. Timac, supra; Jorgenson v. Reid, supra; Aeronave SPA v. Westland Charters* [1971] 1 W.L.R. 1445, 1449 (C.A.). See also Orkin, Law of Costs §503.3 (2d ed. 1987). Therefore I do not agree with the suggestion in *Kask v. Shimizu* [1986] 4 W.W.R. 154, 170 (Alta.) that the defendant's concern over recovering his costs is no more pressing and substantial when the plaintiff lives elsewhere than when he lives here.

III. A deserving non-resident will not lose by inability to post cash

A. Preliminary

[19] Now I will turn to the plaintiff's position. The Plaintiff alleges (citing *Kask v. Shimizu* at p. 156) that ordinarily a non-resident must give security without further debate. I disagree.

The Plaintiff also suggests that a poor non-resident will lose his suit just because he cannot post security. Nor do I accept that suggestion. Security or dismissal is unlikely to hinge on non-residence, because the courts and parties weed out most demands by a defendant for security for costs or dismissal for want of it. Each such case must survive the 10-step sorting process outlined in points B to K below.

B. Chosen forum

[20] Every non-resident plaintiff chooses Alberta as his forum. Canadian courts are now slow to strike out suits for choice of the wrong forum, so the forum is rarely imposed. The defendant Simpson Sears Ltd., could be sued in any province where they carry on business or are registered. In theory a plaintiff should sometimes sue where he can serve the defendant because service out of the jurisdiction will not found a judgment which can be enforced elsewhere. In fact, however, very few defendants have the courage or the lack of assets to ignore a suit against them in another province. So the plaintiff usually freely chooses the forum.

C. Plaintiff can afford to sue

[21] It is almost impossible for a non-resident to sue without a lawyer. That is because of the practicalities of life, not because of any law or Rules. A lawyer, court reporters, and experts all cost far more than security for costs would, so what is the practical impact of security? Security for costs never exceeds (and may be less than) estimated party-and-party costs, which are rarely more than a fraction of solicitor-and-client costs on one side: cf. (English) Supreme Court Practice 23/1-3/22. So the security, but a drop in the total bucket of litigation expenses, is highly unlikely to be the prohibitive expense. Indeed here someone told the judge that this plaintiff's

> "trial was adjourned due to the inability of the plaintiff to bear the cost of an expert witness attending at trial" (p. 552 W.W.R.).

It is ironic that the Plaintiff retains a lawyer to fight anew before the Court of Appeal this involved constitutional issue of legislative validity, all to avoid posting security worth $1300, and whose amount is admitted to be proper in this case.

D. Arguable defence

[22] The defendant now cannot get security unless he swears positively and shows that he has a defence to whole suit: R. 594. The plaintiff can cross-examine the defendant on that

affidavit. A host of authorities hold that the court then may go into the merits and conclude that the claim sounds well founded, or that the defence is weak or unlikely to succeed completely: see for example *Mackley v. Univ. of Alta.* [1933] 2 W.W.R. 330, 342, 345 (Alta. C.A.); *Mangold v. 330002 Ont.* (1986) 57 O.R.(2d) 716, 719, 721; 37 Halsbury's Laws 230-31 (para. 304) (4th ed.); *Mortimer v. Inuvialuit Reg. Corp.* [1987] N.W.T.R. 228, 231; *Simaan Gen. Contr. Co. v. Pilkington Glass* [1987] 1 W.L.R. 516, 520; Orkin, §§ 502, 503.1(2)(d); cf. *Gursky v. Rosedale etc.* [1917] 2 W.W.R. 441, 442 (Alta. C.A.) (appeal). Contrary cases probably rely on outdated decisions before R. 594: *Mackley* case, *supra,* at 332, 346; cf. Dicey & Morris 195 (11th ed.). In deciding whether to order security, the court looks at the nature of the defence: *Booth Constr. v. Estabrook Constr.* (1987) 55 Alta. L.R. (2d) 157, 165. The Alberta Business Corporations Act (R.S.A. 1980, c. B-15, ss. 184(11), 193, 223(3), 235(3)) also exempts certain classes of plaintiff from having to furnish security for costs.

E. No assets in Alberta

[23] Rule 595 and many decided cases deny security if the plaintiff has sufficient exigible assets in Alberta, or if he brings any to, or creates any in. Alberta. See 1 Seton's Judgments and Orders 28 (5th ed. 1891); 1 Chitty's Archbold 397 (14th ed. 1885).

F. General "discretion" of the court

[24] Courts should not automatically order security for costs. The history of the Rule is carefully reviewed in *Launer v. Sommerfeld,* (1964) 48 W.W.R. 224 (B.C.). Since the 1700's the courts have given or withheld security because of the justice of the individual case, and the modern Rule was worded to reverse a decision casting doubt on that principle: ibid. The word "may" in R. 593(1) is permissive not mandatory: Alberta Interpretation Act ss. 25(1)(e), 25 (2)(c); (English) Supreme Court Practice para. 2003; *A.-G. v. Emerson* (1889) 24 Q.B.D. 56, 58 (C.A.); *Parkinson v. Triplan,* [1973] 2 All E.R. 273, 285 (C.A.). Many authorities hold that security is "discretionary", i.e. that the court looks at the justice of the individual circumstances. See for example *Mackley v. U. of A., supra,* at 332, 341; *Vollenga v. Berry* (1962) 39 W.W.R. 319, 320 (Alta. C.A.); *Aukema v. Bernier Kitchen Cabinets* [1987] 5 W.W.R. 122, (Alta.); 1 Williston & Rolls, Law of Civil Procedure 577 (1970); 37 Halsbury's Laws 230-31 (para. 304) (4th ed.): *Aeronave v. Westland, supra;* 2 Holmested & Gale R. 373 §§ 3,4; Orkin at §502; (English) Supreme Court Practice 23/1-3/2A, 3.

[25] The Plaintiff does not quarrel with this view, and indeed asks this court to reaffirm it; he says he would be content with a rule of justice and "discretion".

G. A poor plaintiff

[26] Of course it is not enough for the Plaintiff to allege vaguely that he is poor; he must give evidence of it: *Milina v. Bartsch* (1985) 5 C.P.C. (2d) 124 (B.C.) (appeal); *Smith Bus Lines v. Bank of Mtl.* (1987) 61 O.R. (2d) 688. This Plaintiff made very little attempt in his affidavit to prove poverty (despite what he seems to have told the Chambers Judge about the cost of experts), and his counsel does not wish to argue that point.

[27] If a plaintiff shows that he cannot get any assets, and his action sounds well founded, a security for costs order is highly unlikely. Many authorities say this, among them *Vollenga v. Berry, supra; Proniuk v. Petryk* [1933] 1 W.W.R. 648 (Alta.), affirmed [1933] 3 W.W.R. 223 (Alta. C.A.); Williston & Rolls, *op. cit. supra,* at 577-78; *Holly Homes v. Euchner* [1986] N.W.T.R. 289, 292-93; *Mangold v. 330002 Ont., supra,* at 719-20; *Leathern v. Indelco Finan. Corp.* [1984] 4 W.W.R. 359 (Alta.); cf. *Gursky v. Rosedale, supra,* at 442. While two of the judges in the *Mackley* case, *supra,* questioned that proposition (at pp. 342, 343), they were a minority of the court (and only half of the majority); and their statements on the point were plainly obiter, for the court there refused to order security. Therefore, I do not agree with the suggestion (in *Kask v. Shimizu, supra,* at p. 164) that in Alberta it is unlikely that the court would ever refuse to order security from a non-resident.

[28] The Plaintiff's partial poverty is also a ground for greatly reducing the amount of the security: *Melbourne v. McQuesten,* [1942] 2 D.L.R. 483 (Ont. C.A.); *Sonntag v. Krause* (1975) 11 O.R. (2d) 500; *dicta* in *Eddie'n Me Productions Co. v. Toronto Star Newspapers* (1981) 34 O.R. (2d) 433, 24 C.P.C. 261.

H. Forms of acceptable security

[29] The court may accept anything reasonable as security, for the form and amount of security are in the "discretion" of the court: 1 Daniell 71, 2 id. 1621. The security might be a bond or payment into court: 2 id. @ 1621-3; 1 Chitty's Archbold 402; see (English) Supreme Court Practice 23/1-3/20 and 23/1-3/21. Alberta Rule 597 and 1 Seton 26 (5th ed. 1891) expressly contemplate a bond. A bond was allowed in *Booth v. Estabrook Constr.* (1987) 55 Alta. L.R. (2d) 157, 167-68. So suggestions that a non-resident plaintiff must pay cash into court are unfounded. If a plaintiff does not escape security because of poverty, then he can

offer some kind of security. He might offer a mortgage on his home or farm in Ontario; if any of his friends or relatives will act as sureties, then he can offer their bond.

I. How much time is allowed

[30] How much time the plaintiff gets to post the security is also in the "discretion" of the court: 1 Daniell 71, 2 id. 1621. Allowing him to pay it by instalments is apparently common in Ontario: *Mangold v. 330002 Ont., supra,* at 721-2. It was ordered in stages in *Booth Constr. v. Estabrook, supra.* See Orkin at §511.1. So the plaintiff can probably get enough time to post security and not lose his lawsuit.

J. The plaintiff need not lose his suit

[31] The court may choose not to dismiss or even stay the action if the plaintiff does not provide the security ordered: Rule 596; *Wray v. Can. No. Ry.* (1909) 12 W.L.R. 14 (Sask.); cf. 1 Daniell 72; 2 id. @ 1623-4; 1 Chitty's Archbold 402; cf. the cases cited in Part K below.

K. Reviving the suit

[32] The court can later extend time to give security, even reviving a suit dismissed for failure to give security: *Murray v. Delta Copper Co.* [1923] 2 W.W.R. 275 (Alta. C.A.); *Columbia Pictures of Can. v. Gurevitch* [1935] 2 W.W.R. 581, 582-3, 585-6 (Sask. C.A.). The reference in R. 596 to "special application" reinforces that: *Murray* case at 287-88; *Columbia* case at pp. 582, 585-86. So it is unnecessary to cite more general cases.

L. Specially tailored approach

[33] A defendant would thus have to surmount at least ten successive hurdles (points B-K above) to have the Plaintiff's suit dismissed. (Co-plaintiffs or multiple residences might add more hurdles.) The very poverty founding the Plaintiff's constitutional argument is a good ground for relaxing or dispensing entirely with security, let alone a stay or dismissal of the suit.

IV. A non-resident plaintiff who can put up security is not harmed

[34] A plaintiff who is ordered to post security and can do so, will suffer very little harm, especially as the security can take almost any form: see part III.J above. There is no injustice in requiring him to furnish security. Nor did the Plaintiff suggest any. Not many non-resident plaintiffs are destitute: see Part III.C above.

V. Residents give security for costs

[35] The Plaintiff suggests that residents of Alberta rarely need post security for costs. I disagree; here is a list of Alberta residents who must also give security:

a. Companies which may not be able to pay costs: Alta. Business Corporations Act, s. 245.1 (R.S.A. 1980, c. B-15).

b. Plaintiffs with repeated claims: R. 593(1)(c), (d).

c. Plaintiffs with nominal or representative claims: R. 593(1)(e), (f), (h). An insolvent Plaintiff suing for his creditors must (as a nominal Plaintiff) give security though resident here: (English) Supreme Court Practice 23/1-3/8; 2 Daniell's Chancery Practice 1620; 1 Chitty's Archbold 399 (14th ed. 1885); Harrison's Common Law Procedure Act 632n.

d. Infants: By Rule 58, they must sue by next friend, and his function is to answer for costs. He cannot retire without giving replacement security: 1 Daniell's Chancery Practice 106 (8th ed.). On security by a resident Plaintiff if infant or irresponsible, cf. Harrison's Common Law Procedure Act 630 n.; and see id. at 632 n. on (Imp.) 30 & 31 Vict. c. 142 s. 10 and cases under it.

e. Adult plaintiffs of unsound mind must similarly sue by next friend: R. 60.

f. Some Plaintiffs: R. 524.

g. Plaintiffs with frivolous or vexatious claims: R. 593(1)(g).

h. Parties getting things on terms. For example, defendants opening up default judgments; or plaintiffs avoiding summary judgment: R. 159(4). On payment into court of the amount in issue or other security as a condition of leave to defend, see (English) Supreme Court Practice 14/3-4/13, 13A.

i. Parties seeking a jury trial: Jury Act, s. 17 (R.S.A. 1980, c. J-2).

j. Parties seeking a special venue of a defamation trial away from the residence of the parties: Defamation Act, s. 14 (R.S.A. 1980, c. D-6).

k. Plaintiffs misstating or omitting their address: 2 Holmested & Gale R. 373 §21; (English) Supreme Court Practice 23/1-3/9; 2 Williams, Practice of the Supreme Court of Victoria 2462 (para. 65.6.14) (2d ed. 1973).

l. Spouses in matrimonial cases: Alta. Rr. 577.2, 578(4); (English) Supreme Court Practice 23/1-3/15; *White v. White* (196B) 2 D.L.R. (3d) 564 (B.C.C.A.); *dicta* in *Kerr v. Kerr*

(1980) 114 D.L.R. (3d) 159, 161 (B.C.). Cf. the Domestic Relations Act, R.S.A. 1980, c. D-37, s. 56(4).

m. Caveattors: Land Titles Act, R.S.A. 1980, c. L-5, s. 140 (even before they sue).

n. Creditors instructing seizure under distress warrant: Seizures Act, s. 22(2) (R.S.A. 1980, c. S-11). Or those instructing seizure of a growing crop: s. 13(1), (2). Or those instructing seizure of goods possessed by a third person who claims them: s. 38(1)(b). Or those instructing sale of perishable goods seized under writ of attachment: Rr. 492 and 493.

o. Those seeking replevin: Rr. 430-435.

p. Those seeking possession of property held by one claiming a lien: R. 469; Innkeepers Act, s. 4(1) (R.S.A. 1980, c. I-4).

q. Those claiming an injunction before trial (especially a debtor trying to restrain a creditor): *Prairie Hospitality Cons. v. Renard Hospitality Cons.* (1980) 118 D.L.R. (3d) 121, 125 (B.C.); *Nelson Burns & Co. v. Gratham Inds.* (1981) 34 O.R. (2d) 558, 564; Spry, Equitable Remedies 467-68 (3d ed. 1984); Kerr on Injunctions 28 (6th ed. 1927); cf. 32 C.J. 310-19.

r. Those suing or instructing seizure against an estate administered by the Public Trustee: Public Trustee Act, s. 18(2) (R.S.A. 1980, c. P-36).

s. Consumer organizations bringing actions against suppliers for unfair practices: Unfair Trade Practices Act, s. 15(4) (R.S.A. 1980, c. U-3).

t. Those appealing from Provincial Court or various specialized tribunals: a host of Alberta statutes so provide.

u. Certain witnesses, and plaintiffs in election, flooding, surrogate and trust company matters.

v. Residual category. Alberta courts have a general power in a just case to order security for costs by residents of Alberta even where no specific Rule authorizes it: *Bailey Cobalt Mines v. Benson* (1918) 43 D.L.R. 692, 694 (Ont.); *Lavaris v. MacMillan Bloedel* (1977) 3 B.C.L.R. 308, 309, 317, 318, 81 D.L.R. (3d) 197; *Grundy v. Grundy* (1982) 28 R.F.L. (2d) 51 (Sask.); *Shiell v. Coach House Hotel* (1982) 136 D.L.R. (3d) 470, 475, 478-79 (B.C.C.A.).

[36] Therefore I do not agree with the suggestion by the Plaintiff and by *Kask v. Shimizu, supra,* (at p. 170) that residents of Alberta have to give security for costs only if their action is found to be frivolous and vexatious.

VI. Equality Rights

[37] Section 15(1) of the Charter of Rights and Freedoms reads as follows:

> "15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[38] The Attorney General argues first that any alleged discrimination here is not similar to these enumerated grounds. Indeed, security for costs from a non-resident involves no discrimination on the basis of nationality: 2 Dicey & Morris, Conflict of Laws 1194, 1197 (10th ed.). In view of the other conclusions here, I need not pursue that argument.

[39] The authorities differ on what is the proper test for inequality or discrimination under s. 15 of the Charter of Rights and Freedoms. For example, *Andrews v. Law Society of B.C.* [1986] 4 W.W.R. 242 (B.C.C.A.) and *McKinney v. Guelph University* (1987) 24 O.A.C. 241 (C.A.) seem to conflict. The Plaintiff in oral argument asked this court not to rely on the subtleties of rival definitions of "discrimination", as they would all produce the same result in this case. I agree. It would suffice here, for the sake of argument only, to use the Plaintiff's suggested definition:

> "...discrimination is a distinction based on a personal characteristic that is automatically applied, but is irrelevant to the activity being regulated."

All the authorities cited to us agree that different legislative treatment of different people or classes is almost inevitable and does not itself contravene s. 15. Using any possible definition, however wide or lax, the maximum extent of forbidden discrimination must involve a less favourable legal position because of some insufficient criterion.

[40] Here the criterion, non-residence of a plaintiff, is both relevant and sufficient to justify security for costs (Part II above). The large number of exceptions and qualifications to security for costs against non-residents (Part III) and the large number of grounds for security against residents (Part V) show that their legal positions are not clearly different. "Equality before the law" does not demand the most carefully-tailored, finely-crafted legislation. The test is just a general examination of whether the statute is in pursuit of a valid [provincial]

legislative objective. Local administrative problems may allow different (federal) laws in different parts of Canada: *Cornell v. R.* (S.C.C. 24 Mar. 1988).

[41] This security for costs procedure in some ways just regulates the onus of proof. The interaction of Rules 593 and 595 means that where the plaintiff resides outside of Alberta, the onus merely shifts to him to show that he has assets within the jurisdiction which would be exigible, or to show that it would otherwise be unjust to order him to pay security for costs. The courts presume that those things are true of an Alberta resident. *R. v. Hamilton* (1986) 57 O.R.(2d) 412 (Ont. C.A.) found discrimination in federal criminal law which differed rigidly between provinces, but the court's remedy there was not to strike down the law. It was special individual consideration for those affected. That is what we already have in the (provincial) law on security for costs.

[42] The Plaintiff argues that R. 593(1)(a) is bad because in practice it is sometimes applied unevenly or even mechanically. No evidence was led to show that, the legal authorities cited rebut the argument, and should security ever be improperly ordered an appeal from a Master in Chambers is quick and inexpensive. A discretion which can be exercised in favour of plaintiffs offers them no ground to complain: cf. *Lyons v. R.* (S.C.C. 15 Oct. 1987) at pp. 36-37. The court will not assume bad administration of an impugned law which provides for individual exceptions: *R. v. Jones* [1986] 6 W.W.R. 577, 602-3 (S.C.C).

[43] Security for costs is designed to protect a defendant from a plaintiff who wants to gamble and collect if he wins, but not pay if he loses. Indeed, such a plaintiff acts more unfairly than that for by his groundless suit he inflicts serious expenses on the defendant.

> "The objective of the rule is to ensure equality between litigants. Where a plaintiff does not reside in the province and does not possess assets within the province sufficient to satisfy costs, that party is not at risk on an equal footing with a resident party. In order to re-establish a measure of equality between such parties the court may order that such security for costs be paid into court. Rule 58 does not violate s. 15(1) of the Charter."

The quotation is from *Isabelle v. Campbellton Regional Hospital and Arseneau* (1987) 80 N.B.R. (2d) 181 (N.B.), at pp. 182-83. Other cases agree that security for costs by non-residents does not violate the Charter: e.g. *Aukema v. Bernier Kitchen Cabinets* [1987] 5 W.W.R. 122, 19 C.P.C. (2d) 295 (Alta.); *Nissho Corp. v. Bank of B.C.* (1987) 39 D.L.R. (4th) 453 (Alta.); *Benoit v. Gestion Tex-Di* [1987] R.J.Q. 1401 (Que.).

[44] In *Mangold v. 390002 Ont.*, (1986) 57 O.R. (2d) 716, the court refused to strike down the Rule and merely suggested individual relief under the Charter to any plaintiff who could prove injustice in his particular case. For reasons given above, that should never occur.

[45] The corollary of Plaintiff's arguments based on *Kask v. Shimizu, supra,* (pp. 162 ff.) is that the Charter lets every plaintiff sue anyone without paying any money to anyone (e.g. court reporters, lawyers). But it is questionable that the Charter invalidates statutes of general application just because the wealthy find it easier to satisfy them than do the poor: *Gerald Shapiro v. Tessis* (1986) 13 C.P.C. (2d) 288, 295 (Ont. M.); *Benoit v. Gestion Tex-Di, supra,* at p. 1405. Indeed, the argument of the Plaintiff would logically bar any costs award against a plaintiff who fails. Yet a plaintiff may fail or pay costs without fault: e.g. a witness may not come, or may misunderstand questions, or the plaintiff may miss a short limitation period without fault. The defendant may pay money into court at an early stage and plaintiff recover less, so the defendant will recover heavy costs. Abolishing security for costs would largely postpone the evil day rather than eliminating it.

VII. Mobility Rights

[46] The Plaintiff argues that security for costs from non-residents also violates s. 6(2) of the Charter which reads as follows:

> "6.(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and
>
> (b) to pursue the gaining of a livelihood in any province."

But this suit is unconnected with employment. Rule 593 does not govern where one may live or work; it is about when one should make assets available to sue: *Shapiro v. Tessis* case, *supra,* at 296-7. Someone who works in Alberta would be resident in Alberta, maybe even for some time after he leaves that work. It is very difficult to conceive how someone could pursue the "gaining of a livelihood" in Alberta with neither residence nor assets in Alberta. Cf. 2 Holmested & Gale R. 373 §22. Therefore, I cannot accept that argument.

VIII. Section 1 of the Charter

[47] Even if ray conclusions above are wrong and Rule 593(1)(a) *prima facie* violates s. 15 of the Charter, it is saved by s. 1 of the Charter. To show that, one need only repeat the comments in the earlier parts of this judgment. Cf. *Shapiro v. Tessis, supra,* at 300-01

(C.P.C.) Clearly the end sought is important and proper. The means used are rational, proportional, and individually tailored to do as little harm as possible in each case.

[48] The Plaintiff suggests that something in *R. v. Oakes* [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 28-30 holds that the purposes protected by s. 1 of the Charter must be public purposes, so that protecting one litigant from another would not suffice. I cannot find any such statement in that judgment. As the *Oakes* case had to do with proving intent to traffic in narcotics in a criminal prosecution, one could hardly expect a discussion there of the rights and interests of one civil litigant against another. Again I emphasize that R. 593 regulates affairs between two citizens. Security for costs is held for defendants, not for the government. If the Charter could only be used to advance public or government objectives but never the objectives and interests of citizens, then the Charter would have the opposite effect to that for which it was enacted.

[49] Indeed, I repudiate the suggestion that a free and democratic society's objectives ignore civil lawsuits. Every citizen of a free and democratic society expects, and must get, justice in his dealings with his fellow citizens. A fair system of justice to settle private disputes among subjects has been a prime public objective of civilized societies whose traditions Canada follows. The Emperor Justinian's Institutes recite that

> "The imperial majesty should be armed with laws as well as glorified with arms, that there may be good government in times both of war and of peace, and that the ruler of Rome may not only be victorious over his enemies, but may show himself as scrupulously regardful of justice as triumphant over his conquered foes."

Book I Title I commences

> "Justice is the set and constant purpose which gives to every man his due."

The vast majority of his Institutes and of his Digest concern private civil law. In like manner, even Napoleon Bonaparte took great pride in his part in the 1804 enactment of the French Code Civil, which regulates private civil law. Queen Victoria formally opened The Royal Courts of Justice, housing the civil (non-criminal) courts. Handing the key to the Lord Chancellor, she said

> "I have all confidence that the independence and learning of the Judges, supported by the integrity and ability of the other members of the profession of the Law, will prove in the future, as they have in times past, a chief security for the rights of my Crown and the liberties of my people."

[50] Many other jurisdictions, all free and democratic, have a similar Rule on security for costs. Other Canadian Rules are listed in *Benoit v. Tex-Di, supra,* the English Rules are found in their Supreme Court Practice, and the Attorney-General has shown us some similar Australian Rules. We have a long tradition of security for costs which has been constantly applied for centuries: *Shapiro v. Tessis* at p. 301 (C.P.C.); the passages cited above in the Harrison, Daniell, and Chitty textbooks; *Launer v. Sommerfeld, supra.*

IX. The Result

[51] I would therefore dismiss this appeal. As the Defendant did not appear, I would not award any costs of this appeal to it. If the Intervener Attorney General wishes, he may speak to costs. If he does not do so within 21 days, then he or the Defendant may simply enter a formal judgment dismissing this appeal without costs.

DATED at EDMONTON, Alberta
this 10th day of May
A.D. 1988

Tab 7

In the Court of Appeal of Alberta

Citation: Vaillancourt v Carter, 2017 ABCA 282

Date: 20170905
Docket: 1601-0258-AC
Registry: Calgary

QB File: 0301-08965

Between:

Anne Marie Vaillancourt

Applicant
(Respondent)
(Plaintiff)

- and -

Kenneth R. Carter and Encott Enterprises Corporation

Respondents
(Appellants)
(Defendants)

- and -

Alpha Dog Enterprises Inc.

Not a Party to the Appeal
(Plaintiff)

- and -

SMIF Holdings Inc. and Ron St. Louis

Not a Party to the Appeal
(Defendants)

QB File: 0501-06088

Between:

Engine Block Holdings Inc.

Applicant
(Respondent)

(Plaintiff)

- and -

Kenneth R. Carter

Respondent
(Appellant)
(Defendant)

Reasons for Decision of
The Honourable Mr. Justice Brian O'Ferrall

Application for Security for Judgment
and for Security for Costs

Reasons for Decision of
The Honourable Mr. Justice Brian O'Ferrall

I. Introduction

[1] This is an application for security for judgment and security for anticipated appeal costs. Such security is sought as a condition of the appellants being permitted to prosecute their appeal.

II. Background

[2] The events predating this application began in 1999, when Anne Marie Vaillancourt entered into a business relationship with Kenneth R. Carter. Through a closely held corporation, Encott Enterprises Corp. (Encott), Mr. Carter owned and operated a number of Jenny Craig franchises. Mr. Carter was found to have hired Ms. Vaillancourt to help him operate the Jenny Craig franchises in exchange for 25% ownership in Encott.

[3] The parties' business relationship deteriorated and Ms. Vaillancourt ceased working with Encott on April 7, 2003. On June 5, 2003, Ms. Vaillancourt commenced an action against Mr. Carter in the Court of Queen's Bench. Ms. Vaillancourt sought the enforcement of her ownership interest in Encott and damages totalling $6,000,000. Mr. Carter filed a statement of defense and a counterclaim for $1,000,000 on July 11, 2003.

[4] Approximately 12 years passed before the matter reached trial, which commenced on May 11, 2015. During the interim, Mr. Carter took a number of steps in connection with Encott's business operations. In March 2007, Mr. Carter transferred ownership of the Jenny Craig franchises from Encott to Champion Weight Management Limited Partnership, an entity he indirectly owned and controlled. On September 27, 2012, Mr. Carter dissolved Encott and the defendant corporation ceased to exist.

[5] In October of 2016, Ms. Vaillancourt was awarded a judgment against both Mr. Carter and Encott (*Vaillancourt v Carter*, 2016 ABQB 492, 42 Alta LR (6th) 112). The principal amount of the judgment was $1,097,234, plus interest and costs. Mr. Carter filed a Notice of Appeal of the judgment on October 4, 2016. Five months later, on March 1, 2017, Ms. Vaillancourt filed an application for security for judgment and for security for costs of the appeal.

[6] After obtaining judgment in October of 2016, Ms. Vaillancourt made inquiries of the appellants with respect to payment of the judgment. Those inquiries fell on deaf ears. So, Ms. Vaillancourt commenced enforcement proceedings. She began by requiring that Mr. Carter provide her with a financial report verified by statutory declaration pursuant to section 35.10 of the *Civil Enforcement Regulation*, Alta Reg 276/1995. On February 16, 2017, Mr. Carter executed Form 13 – Financial Statement of Debtor (Form 13). In his Form 13, Mr. Carter swore he had no assets or financial holdings, save for $44,081.60 in a personal bank account. Two weeks later, on March 1, 2017, Ms. Vaillancourt applied to this court for an order for security for judgment and security for costs.

[7] In his March 21, 2017 affidavit opposing Ms. Vaillancourt's application for security, Mr. Carter swore that the information in his Form 13 was accurate and that his "financial position has not changed in any material respect for a number of years, since prior to the trial in 2015." Mr. Carter also claimed that if the application for security for judgment was granted, he would be unable to proceed with his appeal. For the reasons I outline below, I find that Mr. Carter's financial position is remarkably different than that disclosed in his Form 13 statutory declaration. Also, I am not satisfied that an order for security for judgment will cause Mr. Carter to be unable to prosecute his appeal.

III. The Statutory Framework

[8] Judgment creditors seeking to collect a trial judgment can enforce their judgments under the *Civil Enforcement Act*, RSA 2000, c C-15 and corresponding *Civil Enforcement Regulation*. Pursuant to section 35.10(1) of the *Civil Enforcement Regulation*, "[a]n enforcement creditor may, on written notice to an enforcement debtor, require the enforcement debtor to provide to the enforcement creditor a financial report of the enforcement debtor verified by statutory declaration." Prior to 2010, the ability to demand a judgment debtor's financial information was found under Rule 370 of the old *Alberta Rules of Court*, Alta Reg 390/68.

[9] The provision of a financial report under s. 35.10(1) of the *Civil Enforcement Regulation* is achieved by executing Form 13 – Financial Statement of Debtor. Form 13 is a written form of examination in aid of execution that requires an enforcement debtor to provide a comprehensive report of his or her financial position at the request of an enforcement creditor (*Michel v Lafrentz*, 1998 ABCA 231 at para 2, 219 AR 192). The report is verified by statutory declaration and the debtor must sign and swear that the information within the report is accurate (*Michel* at para 25).

[10] The financial information disclosed in Form 13 includes the judgment debtor's employment salary, business income, real and personal property, bank accounts, shares and securities, and any transfer of property occurring within the past year. The purpose of this disclosure is twofold: it can satisfy the judgment creditor that the judgment debtor is impecunious or it can help the judgment creditor find the judgment debtor's assets in circumstances where the judgment is not paid forthwith.

[11] The written format of Form 13, as opposed to personal attendance at an examination in aid of execution, does not lessen the obligation on the judgment debtor to truthfully disclose his or her financial position. As emphasized by Côté J.A. in *Michel*, "[t]hat indulgence can scarcely have been intended to make the process of answering more optional, or to make the court incapable of enforcing obedience to it" (at para 10). A person who fails to accurately disclose the information required by Form 13 risks prosecution for perjury (*Michel* at para 25).

IV. Evidence

[12] Before discussing the merits of the application, I must address the discrepancies between the financial information sworn by Mr. Carter in his Form 13 and subsequent evidence provided to the court. While the information sworn by Mr. Carter in Form 13 was misleading, incomplete, and

in places incomprehensible, the evidence he subsequently provided (some of it only after he was ordered to do so) nevertheless indicates that there are substantial assets in Mr. Carter's control.

[13] In his Form 13, Mr. Carter swore that his only source of income was $2,500 per month earned by working as a consultant at a massage studio called Massage Heights. Mr. Carter swore that his only asset was a single personal bank account which contained $44,081.60 and that his monthly expenses were "0". Though Mr. Carter swore that his interest in trust properties was "N/A" (whatever that acronym or abbreviation means), he subsequently acknowledged that a family trust paid his house and car expenses. Besides his personal bank account, Mr. Carter swore he had no other assets or income sources.

[14] I find that the information provided by Mr. Carter in his Form 13 statutory declaration, sworn to be accurate, is incomplete and misleading for the reasons which follow, which are by no means exhaustive:

- Mr. Carter swore in his Form 13 that his "shares and securities", defined as "holdings in a corporation", are "N/A" and that his business income, which includes the percentage ownership of any businesses and value of the businesses, is "N/A". On the evidence before the court, Mr. Carter is the 100% voting shareholder of Champion Weight Management Inc., Carter Management Co. Inc., and Shield Investments Inc. Shield Investments Inc. owns or owned all of Mr. Carter's vehicles, is the registered owner of his personal residence, and received $5.75 million in cash from the sale of Jenny Craig franchises. Champion Weight Management Inc. is the general partner in the entity that owned the Jenny Craig franchises prior to their sale;
- Mr. Carter swore in his Form 13 that his "monthly debt payments" are "0". This deposition is false on its face. Few people living a normal life have no debt at the end of the month. Regardless, on the evidence before the court, Mr. Carter has at least one monthly expense which is substantial and is payable to an ex-spouse until 2024.
- Mr. Carter swore in his Form 13 that properties or interests held by a trustee on his behalf are "N/A". On the evidence before the court, a family trust, KC Trust, was formed in 2005 and this trust pays Mr. Carter's home expenses, car expenses, legal expenses, vacation expenses, and obligations to his former spouse.

[15] Mr. Carter's frequent use of holding companies exacerbates the concern about his Form 13 statutory declaration. Strictly speaking, Mr. Carter may have been entitled to omit the assets owned by his holding companies, rather than Mr. Carter himself, in the information disclosed in Form 13, although that is debatable. However, many of these assets, which are valued at millions of dollars, were originally owned by Mr. Carter and transferred into Mr. Carter's holding companies within the last several years. Though the assets kept in holding companies may not be required to be disclosed on Form 13 (although, to repeat, that is debatable), they are evidence of a broader attempt to thwart the justice system. By way of example:

- Mr. Carter swore in his Form 13 that his shares and securities assets, defined as holdings in a corporation, are "N/A." On the evidence before the court, Shield Investments Inc., a corporation in which Mr. Carter is the 100% voting shareholder, is the majority shareholder of at least four closely held corporations. Champion Weight Management Inc., a corporation in which Mr. Carter is the 100% voting shareholder, is a partner in two other entities, one of which recently owned the Jenny Craig assets at issue in this litigation. Mr. Carter is also a director of eight closely held corporations, including the three corporations in which he holds 100% of the voting shares. The value of these corporations or of his shares therein was not disclosed on the within application for security;
- Mr. Carter swore in his Form 13 that his motor vehicle assets are "N/A". On the evidence before the court, Mr. Carter sold a 1989 Porsche, a 2003 Hummer H2, a 2003 Ferrari, and 1962 Corvette to Shield Investments Inc. for $265,000 in 2013. Mr. Carter also sold a Range Rover to Shield Investments Inc. for $42,000 in 2015. Shield Investments Inc. is a closely held corporation in which Mr. Carter is director and 100% voting shareholder;
- Mr. Carter swore in his Form 13 that his real estate assets are "N/A". On the evidence before the court, either Mr. Carter, or an entity controlled by or connected to Mr. Carter, owns four properties, including his personal residence estimated to be worth several million dollars, a property in downtown Calgary worth $1.4 million, and a recreational property in Vernon, British Columbia. Both Mr. Carter's personal residence and recreational property were transferred out of Mr. Carter's personal ownership in 2013;
- Mr. Carter swore in his Form 13 that he has not given away, sold, assigned or otherwise transferred any property in the past year. On the evidence before the court, an entity controlled by Mr. Carter, along with Mr. Carter himself, was party to the sale of a number of Jenny Craig franchises in 2016, resulting in a $5.75 million payment, a $1.0 million promissory note, and a $1.0 million contingency note. The sale of the Jenny Craig franchises occurred approximately nine months after the conclusion of Mr. Carter's trial and involved the same franchises previously owned by Encott in which Ms. Vaillancourt claimed a 25% interest;
- Mr. Carter swore in his Form 13 that his bank account contained $44,081.60. On the evidence before the court, Mr. Carter's bank account contained over $104,181.60 in the days prior to swearing his Form 13. On the day that Mr. Carter swore his Form 13, he transferred $60,000 out of his bank account. Whether or not those funds remained one of his assets was not disclosed. The bank account contained as much as $260,772.75 in January 2016;
- Mr. Carter swore in his affidavit that his financial situation had not changed in any material respect for a number of years, since prior to trial in 2015. At the very least, his only bank account decreased from $260,772.75 on January 4, 2016 to $4,140.49 on March 16 2017, five days before Mr. Carter swore his affidavit in these

> proceedings. But quite apart from his bank account, it would appear Mr. Carter's financial situation has changed substantially since prior to trial in 2015 and certainly since this litigation began.

[16] My assessment of Mr. Carter's sworn evidence is not unlike that of the trial judge, who held that Mr. Carter's sworn testimony at trial was "at times inconsistent, misleading, and far from forthright" (*Vaillancourt* at paras 4, 43, 82).

[17] A person who swears a statutory declaration does not do so as a formality, but as evidence of their legal obligation to verify the truthfulness of the financial report that person is required to provide to the judgment creditor. Yet, the number of inaccuracies and omissions in Mr. Carter's sworn evidence suggests that he considered this obligation to be optional. The financial information provided by Mr. Carter in Form 13 is in some respects incomprehensible and incapable of verification or scrutiny. Most of Mr. Carter's disclosure in Form 13, if he can be said to have provided any disclosure at all, consists of the pointless and arbitrary notation "N/A". This notation provides Ms. Vaillancourt with no information, other than confirming that Mr. Carter appears to have chosen to thwart the enforcement process.

[18] I note that Mr. Carter had access to legal advice when he swore his Form 13. Under s. 2(b) of the Schedule to the *Commissioners for Oaths Regulation*, Alta Reg 219/2014, a commissioner for oaths must not "participate in the preparation or delivery of any document that is false, incomplete, misleading, deceptive or fraudulent." It is incumbent on lawyers to ensure that their clients understand their obligations to truthfully disclose the information required to be sworn in a statutory declaration. A statutory declaration is not like an ordinary affidavit where the affiant attests to facts which support a narrative of his own choosing. A statutory declaration requires the affiant to attest to certain facts which are required by statute or regulation to be attested to.

[19] I must now consider Ms. Vaillancourt's application for security for judgment, bearing in mind the significant inaccuracies in Mr. Carter's sworn evidence.

V. Security for Judgment

[20] Security for judgment is an extraordinary remedy that can only be granted in exceptional circumstances (*Aetna Financial Services Ltd v Feigelman*, [1985] 1 SCR 2 at 10, 15 DLR (4th) 161; *CH v MH*, 1997 ABCA 263 at para 24, (*sub nom Hamza v Hamza*) 53 Alta LR (3d) 80. An order for security for judgment requires that the appellant post the required security before continuing with his or her appeal. In this way, security for judgment functions much like a *mareva injunction* and restrains the appellant from disposing of or dissipating a portion of his assets in order that they be available to satisfy the judgment should it be upheld (*Vaccaro v Twin Cities Power-Canada ULC*, 2013 ABCA 252 at para 14, 97 Alta LR (5th) 193). If security for judgment is ordered and not posted, the appeal is dismissed.

[21] Historically, courts have been reluctant to grant security for judgment, holding that such an exceptional remedy may preclude appellants with a lack of financial resources from pursuing their appeals (*Carr v Bower Cotton (A Firm)*, [2002] EWCA Civ 789 (BAILII) at para 33; *Creative*

Salmon Co v Staniford, 2007 BCCA 285 at para 12, 242 BCAC 299). That does not appear to be the case here. But, as well, courts have held that recovery of judgment is more appropriately dealt with through enforcement proceedings (*Barclay-Johnson v Yuill*, [1980] 1 WLR 1259 at 1262-63, [1980] 3 All ER 190; *Aikenhead v Jenkins*, 2002 BCCA 234 at para 31, 166 BCAC 293). Jurisprudence which favours enforcement proceedings over applications for security for judgments is of particular relevance, given that an appeal does not operate as a stay of enforcement in Alberta. Successful plaintiffs remain free to enforce their judgments (*Alberta Rules of Court*, Alta Reg 124/2010, s 14.68).

[22] Enforcement proceedings are the prescribed and preferred way that judgments are enforced. The *Civil Enforcement Act* not only provides for an exhaustive code of writs of enforcement (*Wagner v Wagner*, 2014 ABCA 428 at para 44, 588 AR 218), but it also provides protections for both creditors and debtors which cannot be easily replicated by courts in granting security for judgments (*Direct Norkus (Estate of) v Direct Rental Centre (West) Ltd*, 2001 ABCA 233 at para 25, 205 DLR (4th) 651). By way of example, I note that under s. 2(d) of the *Civil Enforcement Act*, enforcement proceedings taken by one execution creditor are taken on behalf of all execution creditors of the debtor. This protection precludes a single enforcement creditor receiving a preference over other creditors, which can happen if security for judgment orders become commonplace or are not made subject to conditions.

[23] The comprehensive scheme of enforcement provided by the *Civil Enforcement Act* suggests that the Court of Appeal should rarely make orders which interfere with statutorily-prescribed enforcement processes (*Guarantee RV Centre Inc v Schmidt*, 2007 ABCA 193 at para 7, 412 AR 21). Litigants cannot view this court as an agency for the collection of trial costs or as a way to circumvent the ordinary enforcement process (*Sorrel 1985 Ltd Partnership v Sorrel Resources Ltd*, 1998 ABCA 103 at para 13, 219 AR 2). To do so would be an abuse of process. An application for security for judgment is therefore warranted only in the most extreme cases and, as a general rule, will not be granted.

[24] However, in some circumstances, an order for security for judgment may be justified. There are a few notable exceptions to the general rule against granting security for judgment. From canvassing the case law, I find that an order preserving the assets of one party is available:

1. where there are no assets in the jurisdiction against which to enforce a judgment and the appeal has little merit (*Vaccaro* at para 11; *Creative Salmon* at para 12; *Richland Construction Inc v Manningwa Developments Inc*, 1996 CarswellBC 1767 (WL Can) at paras 12-13 (CA));
2. to preserve assets that would otherwise be destroyed, disposed of, or dissipated prior to the resolution of the dispute (*Hamza* at paras 26-30; *1400467 Alberta Ltd v Adderley*, 2014 ABQB 439 at para 52, 591 AR 40; *Vaccaro* at para 15; *Aetna Financial* at 12); and
3. to encourage respect for the judicial process and avoid abuse of process (*Hamza* at para 23, citing *Mooney v Orr* (1994), 100 BCLR (2d) 335 at 348 (BCSC) [*Mooney*

cited in this judgment to 1994 CarswellBC 26 (WL Can)]; *Vaccaro* at paras 12-14; *Aetna Financial* at 12).

[25] The exception that I am most concerned with in this application is encouraging respect for the judicial process and avoiding abuse of process and, to a lesser extent, avoiding the disposition of assets prior to ultimate resolution. As Huddart J. stated in *Mooney* at paragraphs 66-69:

> A litigant cannot be permitted to use the court to his advantage while effectively disavowing in advance any judgment against him .... (the ordering of the security is) not to enhance the claimant's rights, but to ensure that those reasonable people who pay for the administration of justice in this province are not affronted by the impotence of the court in the face of those who choose to order their affairs so as to keep all their options for themselves.

[26] It is apparent on the evidence before me that Mr. Carter has gone to elaborate lengths to shield his investments and arrange his affairs to appear as though he does not have the financial means to satisfy the judgment against him or to comply with a security for judgment order. A holding company, aptly named Shield Investments Inc., contains millions of dollars worth of Mr. Carter's personal assets, including his private residence and multiple luxury vehicles. While individuals are free to organize their affairs as they please, those who deliberately make themselves judgment-proof may be required to post security which others would not have to post.

[27] In this case, there is evidence to suggest that Mr. Carter has organized his assets for the specific purpose of defeating Ms. Vaillancourt's claim. In 2007, Mr. Carter transferred the Jenny Craig assets out of Encott and into a partnership that he alone controlled. Mr. Carter proceeded to dissolve Encott in 2012, ensuring that the corporation was unable to satisfy any judgment against it. Mr. Carter continued to profit off the Jenny Craig assets until 2016, when, unbeknownst to either Ms. Vaillancourt or the trial judge, he sold the assets to a third party. These actions could have rendered Ms. Vaillancourt's judgment against Encott unenforceable, save for the trial judge's holding that Mr. Carter is to be jointly and severally liable for the trial judgement against Encott (*Vaillancourt* at para 143). The trial judge also offered to assist Ms. Vaillancourt with tracing Encott's assets to their current location if that information was not forthcoming, given Mr. Carter's lack of disclosure (*Vaillancourt* at para 135).

[28] If Mr. Carter is successful on appeal, he retains the fruits of that victory. However, if Mr. Carter loses his appeal, "the choice of whether to pay the judgment remains effectively with the loser" (*Mooney* at para 68). I note here that Mr. Carter's appeal has some obstacles to overcome, given the numerous findings of fact that would need to be overturned on appeal and the high standard of review associated with such findings (*Housen v Nikolaisen*, 2002 SCC 33 at para 10, [2002] 2 SCR 235). Yet, without further order of this court, it is highly unlikely that Ms. Vaillancourt will ever collect the judgment that she is owed.

[29] I turn now to Mr. Carter's conduct before this court. As detailed above, Mr. Carter's statutory declaration, Form 13, is grossly inaccurate. By attempting to rely on the inaccuracies in Form 13 to defeat Ms. Vaillancourt's application for security for judgment, Mr. Carter has clearly

misled the court with regards to his financial position and shown a willingness to risk prosecution for perjury in order to do so. I note here that Mr. Carter is apparently facing criminal charges for perjury, though in an unrelated matter.

[30] As stated by Kerans J.A., "false statements made in statutory declarations ... with an intention to mislead must be taken very seriously" (*R v Predy*, 1983 ABCA 215 at para 14, 60 AR 338). The errors in Mr. Carter's Form 13 are not simple slips or omissions, but rise to a level of inaccuracy suggesting a complete disregard for the significance of the statutory declaration or his obligation to verify the accuracy of the financial report statutorily required to be provided. Such a blatant disregard for the legal process cannot go unsanctioned.

[31] Mr. Carter's reliance on Form 13 to oppose this application suggests an intention to deceive the court. In his affidavit, Mr. Carter swore that "[t]he information on Form 13 is accurate" and that if ordered to pay the amount sought, he would be unable to continue with the appeal. These statements, along with the corresponding statutory declaration that his only asset is $44,081.60 in a personal bank account, were put forward by Mr. Carter to support his position that granting security for judgment would not be in the interests of justice.

[32] Yet, as was the case in *Mooney*, the assets that Mr. Carter claims to own "are not sufficient to support the style of living and doing business revealed by the evidence" (*Mooney* at para 84). Mr. Carter lives in an expensive home in an exclusive inner-city neighbourhood. He has a recreational property in Vernon, British Columbia, drives luxury cars, and he recently sold a number of Jenny Craig franchises for upwards of $5.75 million. These assets are in addition to the half dozen closely held corporations that Mr. Carter is connected to and the fact that a family trust he setup pays all of his personal expenses.

[33] Mr. Carter cannot advance his appeal in this court while simultaneously abusing this court's processes and providing misleading evidence. Furthermore, I am not persuaded that an order of security for judgment will prevent Mr. Carter from continuing his appeal.

[34] Mr. Carter argued that Ms. Vaillancourt's application should be struck for delay. However, the delay in Ms. Vaillancourt's application for security for judgment appears to be attributable to her attempts to enforce her judgment under the *Civil Enforcement Act*. There were roughly five months between the Notice of Appeal filed on October 4, 2016 and the Application for Security for Judgment filed on March 1, 2017. However, during this time, Ms. Vaillancourt attempted to arrange for payment of the judgment and to determine the costs payable by Mr. Carter. The need for security for judgment did not arise until February 16, 2017, when Ms. Vaillancourt received Mr. Carter's Form 13 statutory declaration, in which Mr. Carter swore that he was impecunious. Ms. Vaillancourt filed her application for security for judgment within two weeks of receiving Mr. Carter's Form 13, a hasty response to the realization that enforcement proceedings appeared hopeless.

[35] I therefore order security for the judgment that has obtained against the appellants in the amount of $1.0 million as a condition of Mr. Carter prosecuting his appeal and that of Encott. As

the trial judgment included interest and costs, it is unnecessary to make a separate order for security for trial costs.

VI. Security for Costs of the Appeal

[36] In this case, Mr. Carter has agreed to pay $15,000 in security for costs and submits that $15,000 is the cost of a single appeal. Ms. Vaillancourt seeks security for costs in the amount of $43,342.50, arguing that two sets of costs should be awarded given that there are two actions being appealed. Ms. Vaillancourt also made oral submissions that the number of chambers applications made in this matter has substantially increased the costs of the appeal.

[37] Security for costs is a discretionary order that balances the reasonable expectations and rights of the parties to come to a just and reasonable conclusion (*Haymour v The Owners Condominium Plan No 802 2845*, 2016 ABCA 367 at para 8, 2016 CarswellAlta 2237). A single appeal judge may award security for costs in accordance with Rules 14.67(1) and 4.22 of the *Rules of Court*. Rule 4.22 states that the court may order a party to provide security for payment of a costs award if the court considers it just and reasonable to do so, taking into account all of the following:

a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
b) the ability of the respondent to the application to pay the costs award;
c) the merits of the action in which the application is filed;
d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
e) any other matter the Court considers appropriate.

[38] Mindful of the test articulated by Rule 4.22, I award a security for a single set of costs in the amount of $25,000. This amount accounts for the increase in costs resulting from the within application while recognizing that one set of costs may be sufficient where the appeals are heard together.

[39] As I previously stated, I do not believe that this order will prevent Mr. Carter's appeal given the substantial financial assets within Mr. Carter's reach. Though Mr. Carter has the financial ability to pay a costs award, Mr. Carter's actions in the course of this litigation cause me to doubt that Ms. Vaillancourt will be able to collect any costs awarded. An order for security for costs ensures that Ms. Vaillancourt does not expend further financial resources defending this appeal without any hope of cost recovery.

VII. Disposition

[40] For the forgoing reasons, I order that security be posted as follows:

1. security for judgment in the amount of $1,000,000; and
2. security for costs of the appeal in the amount of $25,000.

[41] The total security of $1,025,000 may be posted in the form of an irrevocable letter of credit payable on demand by the Registrar to the Registrar. Typically, permission to file an irrevocable letter of credit means that the party required to post security does not have to deposit the entire amount ordered. The security is to be posted within 60 days, failing which Mr. Carter's appeal is dismissed.

[42] In the event that the ordered security is posted in the form of an irrevocable letter of credit and a demand is made to pay the funds to the Registrar following a possible dismissal of the appellants' appeal, the funds may not be paid out without further order of this court. Mr. Carter may have other potential judgment creditors, including a former spouse. Had Ms. Vaillancourt commenced traditional enforcement proceedings, such creditors might have been entitled to share in any amounts realized by Ms. Vaillancourt (*Civil Enforcement Act*, s 2(d)). To avoid conferring upon Ms. Vaillancourt an improper priority over other creditors, the funds shall not be paid out without further order of this court.

[43] Mr. Carter has already filed his factum. Ms. Vaillancourt's factum in the appeal is due two weeks after the date that security is posted.

[44] Ms. Vaillancourt is awarded costs of this application if the ordered security is not posted. Otherwise, the costs of this application will be in the cause.

Application heard on June 21, 2017

Reasons filed at Calgary, Alberta
this 5th day of September, 2017

O'Ferrall J.A.

Appearances:

P.J. Major, Q.C.
M. Scott
for the Applicants

R. de Waal
for the Respondents

Tab 8

In the Court of Appeal of Alberta

Citation: Haymour v The Owners Condominium Plan No 802 2845, 2016 ABCA 367

Date: 20161123
Docket: 1603-0206-AC
Registry: Edmonton

Between:

Anis Haymour

Respondent
(Appellant)

- and -

**The Owners Condominium Plan No. 802 2845,
Jeff Gunther, Breezy Bay Holdings Inc., Consolidated Civil Enforcement Inc.,
Brian S. Sussman, Biamonte Cairo Shortreed LLP**

Applicants
(Respondents)

The Court:

**The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Thomas Wakeling**

**Memorandum of Judgment
Delivered from the Bench**

Applications to Dismiss Appeal and for Security for Costs

Memorandum of Judgment
Delivered from the Bench

Watson J.A. (for the Court):

[1] Each of four sets of applicants (defendants below) applies to have the plaintiff Anis Haymour's appeal from the decision released as 2016 ABQB 393 dismissed under r 14.74(c) and (d) as being frivolous, vexatious, without merit, improper and as a continued abuse of process.

[2] The appellant's claims against the applicants in those proceedings, in sum, were that they acted improperly in obtaining and enforcing judgment against him for arrears of condominium fees, causing him damages. The enforcement steps included selling the condominium owned by the appellant to the applicant (defendant) Breezy Bay Holdings Inc. (Breezy Bay). The other applicants are The Owners Condominium Plan 802 2845 (The Owners), Consolidated Civil Enforcement Inc. (CCEI) and Brian Sussman and his law firm Biamonte Cairo Shortreed LLP (The Lawyers), who acted for The Owners.

[3] Each applicant builds its motion to have the appellant's appeal dismissed on different elements of the reasons of Ross J in 2016 ABQB 393. A common theme, however, is that the appeal is facially flawed and without merit. The Lawyers argue that the appellant's suit against them was an abuse of process by re-litigation and, moreover, that the suit fundamentally lacked a basis in law as a cause of action. CCEI argues that they were simply agents for The Lawyers and, therefore, immune for the same reason. The Owners argue that the appellant's suit against them was also abuse of process by re-litigation. Finally, Breezy Bay also claimed abuse of process by re-litigation and, further, inordinate delay under r 4.31.

[4] The difficulty with the motions before us is that it does not automatically follow from a finding that a proceeding in the Court of Queen's Bench is an abuse of process as to several different defendants, that an appeal from that finding is an abuse of process as to every defendant or in the same way. Each of the applicants have a clear and detailed set of reasons to rely upon, but it cannot be said at this stage of the appeal whether the Court of Queen's Bench reasons would inevitably withstand probing analysis as to each applicant or whether abuse of the appellate process has been shown.

[5] Exercises of discretion under this rule which involve both interpretation (law context) *and* application (fact context) of the form of legislation that the rule is deemed to be under s 63(2) of the *Judicature Act*, RSA 2000 c J-2 are subject to the familiar axiom "context is everything": compare ***Thomas v. Edmonton (City)***, 2016 ABCA 57 at para 21, 396 DLR (4th) 317. So our disposition of this case does not dictate anything for other cases.

[6] On the other hand, it can be said that: (a) the submissions of the applicants; (b) the reasons of Ross J; (c) the record as to earlier proceedings in this Court at 2015 ABCA 234 and (d) the

record as to proceedings below indicate that the appellant's position is not strong and that his history of compliance with requirements imposed upon him below is not reassuring. In that light, CCEI and others suggests, as an alternative position to summary dismissal of the appeal, that an order for security for costs be made.

[7] The authority for security for costs in this Court is set out in r 14.67 "pursuant to Part 4, Division 4". A single judge of the Court may exercise this authority, but, of course, so may a panel. R 4.22 provides as follows:

> Considerations for security for costs order
>
> 4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate.

[8] The discretion involved in this rule does not require a demonstration that an appeal is doomed. It balances the reasonable expectations and rights of parties in search of a "just and reasonable" conclusion.

[9] We are persuaded that it has not been shown that the appeal should be dismissed summarily at this stage but that is without prejudice to the possibility of a renewed application by any of the applicants in the future if need be. Nonetheless, enough has been shown to require the appellant to do more to assure this Court and the opposing parties that he is genuinely committed to diligently pursue the appeal as to each of the applicants and is not furthering this appeal either as a forensic lottery or as continued harassment of the applicants.

[10] We have no evidence before us to indicate that the appellant would be unable to post security for costs sufficient to provide such assurance as we calculated. In this respect, I point out that the appellant has not attended Court today although counsel have advised that he was served

with each of the applicant's motions by way of delivery to the address he was required to provide by order of Ross J and that he used on his notice of appeal. We do not regard that form of notice as being inadequate in the circumstances of this case.

[11] Under those circumstances, we direct that the appellant shall, by January 30, 2017, post the following amounts as security for costs: 1) the sum of $6,000 in relation to the appeal as to each set of applicants and 2) the costs awarded in the Court of Queen's Bench in favour in each set of applicants. Proceedings on the appeal will be stayed until January 30, 2017. If the appellant has not posted the security amount required for any set of applicants by that date, the appeal against that set of applicants will stand dismissed with costs. The applicants get costs for today's motions.

Appeal heard on November 17, 2016

Memorandum filed at Edmonton, Alberta
this 23rd day of November, 2016

Watson J.A.

Appearances:

Respondent Anis Haymour in Person (no appearance)

S.K. Dhir, Q.C. and F.A. Virji
for the Applicant The Owners Condominium Plan No. 802 2845

K.M. Whittleton
for the Applicant Breezy Bay Holdings Inc.

M.D.J. Schulz
for the Applicant Consolidated Civil Enforcement Inc.

K. Handzic
for the Applicants Brian S. Sussman and Biamonte Cairo Shortreed LLP

Tab 9

Part 10
Exemptions

Exempted property

88 Subject to section 89, the interest of an enforcement debtor in the following is exempt from writ proceedings:

(a) the food required by the enforcement debtor and the enforcement debtor's dependants during the next 12 months;

(b) the necessary clothing of the enforcement debtor and the enforcement debtor's dependants up to the value prescribed by the regulations;

(c) household furnishings and appliances up to the value prescribed by the regulations;

(d) one motor vehicle up to the value prescribed by the regulations;

(e) medical and dental aids that are required by the enforcement debtor and the enforcement debtor's dependants;

(f) in the case of an enforcement debtor whose primary occupation is farming, up to 160 acres of land if the enforcement debtor's principal residence is located on that land and that land is part of that enforcement debtor's farm;

(g) the principal residence of an enforcement debtor, including a residence that is a mobile home, up to the value prescribed by the regulations for that residence but if the enforcement debtor is a co-owner of the residence, the amount of the exemption allowed under this provision is reduced to an amount that is proportionate to the enforcement debtor's ownership interest in the residence;

(h) in the case of an enforcement debtor whose primary occupation is not farming, personal property up to the value prescribed by the regulations that is used by the enforcement debtor to earn income from the enforcement debtor's occupation;

(i) in the case of an enforcement debtor whose primary occupation is farming, the personal property that is necessary for the proper and efficient conduct of the enforcement debtor's farming operations for the next 12 months;

(j) any property as prescribed by the regulations.

RSA 2000 cC-15 s88;2002 c17 s1(15)

Property exempt up to the prescribed value

89(1) This section applies to property in which the enforcement debtor's interest is exempt from writ proceedings up to a prescribed value, but it does not apply to property where other property of the same description has been selected for exemption under section 90.

(2) Property to which this section applies may be sold in writ proceedings only if the proceeds of the sale exceed the total of any amounts that would be payable out of the proceeds in respect of the following:

(a) money payable under section 96(4);

(b) money payable to the enforcement debtor or a subordinate secured creditor or encumbrancer under section 98(1).

(3) A bailiff may seize personal property to which this section applies except where the bailiff knows or should reasonably know that the property could not be sold for more than the total of the amounts referred to in subsection (2).

(4) Notwithstanding sections 7 and 47, an agency whose bailiff has seized personal property under subsection (3) must release the property from seizure without delay on acquiring knowledge that the property cannot be sold for more than the total of the amounts referred to in subsection (2).

(5) An agency that sells property to which this section applies must deal with the proceeds in accordance with Part 11.

RSA 2000 cC-15 s89;2002 c17 s1(16)

Selection of property

90(1) If

(a) an enforcement debtor owns more than one item of a type of property for which there is an exemption under section 88, and

(b) the total value of the items exceeds the maximum prescribed value of the exemption for that type of property,

the enforcement debtor may select the items, up to the maximum prescribed value of the exemption, that will be exempt.

Tab 10

Part 2
Exemptions

Definitions

36 For the purposes of Part 12 of the Act and this Part,

(a) "dependant" means one or more of the following:

(i) the spouse or adult interdependent partner of the enforcement debtor;

(ii) any child of an enforcement debtor who is under the age of 18 years and lives with the debtor;

(iii) any relative of an enforcement debtor or of the enforcement debtor's spouse or adult interdependent partner who, by reason of mental or physical infirmity, is financially dependent on the enforcement debtor;

(iv) any other person who the Court determines is financially dependent on the enforcement debtor;

(b) "relative" means

(i) a spouse or adult interdependent partner;

(ii) a parent or grandparent;

(iii) a child;

(iv) a brother or sister;

(v) a brother-in-law, sister-in-law, father-in-law or mother-in-law;

(vi) an aunt or uncle;

(vii) a first or second cousin.

(c) repealed AR 109/2003 s6.

AR 276/95 s36;109/2003

General exemptions

37(1) The following are the maximum amounts allowed for exempt property under section 88 of the Act:

(a) the maximum exemption for clothing referred to in section 88(b) of the Act is $4000;

(b) the maximum exemption for household furnishings and appliances referred to in section 88(c) of the Act is $4000;

(c) the maximum exemption for the motor vehicle referred to in section 88(d) of the Act is $5000;

(d) the maximum exemption for personal property referred to in section 88(h) of the Act is $10 000;

(e) the maximum exemption for a principal residence referred to in section 88(g) of the Act is $40 000.

(2) In addition to the property referred to in section 88 of the Act, the following property is exempt from writ proceedings:

(a) where an enforcement debtor sells

(i) exempt property, or

(ii) property that is exempt up to a prescribed value,

the proceeds from that sale, or the proceeds from that sale up to the stated value, as the case may be, are exempt for a period of 60 days from the day of the sale if those proceeds are not intermingled with any other funds of the enforcement debtor;

(b) any payment made to an enforcement debtor that is

(i) an income support payment paid under the *Income and Employment Supports Act*,

(ii) a handicap benefit paid under the *Assured Income for the Severely Handicapped Act*, or

(iii) a widow's pension paid under the *Widows' Pension Act*,

if the proceeds from the payment are not intermingled with any other funds of the enforcement debtor;

(c) any property that is exempt from writ proceedings under another enactment in force in Alberta.

AR 276/95 s37;203/2002;103/2005

Distress

38(1) For the purposes of Part 12 of the Act and this section, "household furnishings and appliances" means

(a) one washing machine and dryer,

Tab 11

In the Court of Appeal of Alberta

Citation: Zelman v. Taler Resources Incorporated, 2016 ABCA 318

Date: 20161018
Docket: 1503-0282-AC
Registry: Edmonton

Between:

Terence Zelman

Applicant

- and -

Taler Resources Incorporated Operating As Taler Resources Corporation, Darly Erwin Llyod, Erwin Singh Braich, and Yashminder Sidhu

Respondent

Memorandum of Decision of
The Honourable Mr. Justice Ronald Berger

Application for Security for Costs

Memorandum of Decision of
The Honourable Mr. Justice Ronald Berger

[1] This is an application for security for costs. The applicant relies upon the following factors:

1) Unpaid court costs incurred in the Court of Queen's Bench.

2) The contention that none of the appellants have exigible assets in Alberta or British Columbia.

3) Having been noted in default in the Court below, default judgment was granted, an appeal brought and dismissed on July 27, 2015 in the Court of Queen's Bench. A further appeal was dismissed on October 14, 2015.

4) No arguable merit to the appeal.

[2] As I see it, all of the foregoing contentions are made out. An argument was advanced that in proceedings before the Master, procedural fairness was denied because an agent retained to represent the appellants was denied an audience. That argument is also without merit having regard to section 106 of the ***Legal Profession Act*** as interpreted by this Court. See: ***908077 Alberta Ltd. v. 1313608 Alberta Ltd.***, 2015 ABCA 117, quoting with approval ***Lameman v. Alberta***, 2012 ABCA 59 at paras. 9, 35; ***Oommen v. Ramjohn***, 2015 ABCA 34 at paras. 3-4.

[3] For these reasons, the application is granted. It is ordered that the appellants post the sum of $13,000.00 as security for costs of appeal within two months of this Order, failing which the appeal stands dismissed without further Order of the Court.

[4] Counsel for the applicant will prepare the formal Order for my approval. It may be delivered to the Registrar and, in turn, submitted to me for signature.

Appeal heard on September 29, 2016

Memorandum filed at Edmonton, Alberta
this 18th day of October, 2016

Berger, J.A.

Appearances:

A.M. Simmonds
for the Applicant

No Appearance
for the Respondent

Tab 12

Court of Queen's Bench of Alberta

Citation: Bechir v Gowling Lafleur Henderson LLP, 2017 ABQB 214

Date: 20170327
Docket: 1501 00956
Registry: Calgary

Between:

Mahamoud Adam Bechir and Nouracham Bechir Niam

Applicants

- and -

Gowling Lafleur Henderson LLP, Kristine Robidoux, Glencore E&P (Canada) Inc., Glencore International AG

Defendants

Reasons for Decision
of the
Honourable Mr. Justice P.R. Jeffrey

Introduction

[1] The Plaintiffs appeal a Master's decision not to order the Defendants to answer various questions and produce further records (the "**Requested Information**"), in the context of a security for costs application brought by the Defendants.

[2] Master Laycock accurately summarized the complex factual background: *Bechir and Niam v Gowlings, Glencore et al* (December 10, 2015), Calgary 1501-00956 (Master's ABQB). It is not in dispute. For these purposes the following brief procedural background will suffice.

[3] The Plaintiffs served on the Defendants their claim for over $125 million. In it they allege, among other causes of action, reputational harm, breach of the *Vienna Convention on Diplomatic Relations*, negligent investigation, fraudulent withholding of shares in a corporation, misrepresentation, abuse of process, breach of contract and breach of trust.

[4] Very soon thereafter the Defendants each applied for security for costs, with supporting affidavits. During examinations the affiants refused the Requested Information.

[5] The Plaintiffs applied to a Master to compel the Requested Information. With a few exceptions, Master Laycock denied the application. That denial is the decision under appeal. For the reasons that follow, I dismiss the appeal.

Standard of Review

[6] The standard of review of this Master's appeal is correctness: *Bhachelli v Yorkton Securities Inc*, 2012 ABCA 166 at para 30.

Applicable Rules of Court

[7] Rules 4.22 and 6.7 of the *Alberta Rules of Court*, Alta Reg 124/2010, state:

> 4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> > (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
> >
> > (b) the ability of the respondent to the application to pay the costs award;
> >
> > (c) the merits of the action in which the application is filed;
> >
> > (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
> >
> > (e) any other matter the Court considers appropriate.
> >
> > ...
>
> 6.7 A person who makes an affidavit in support of an application or in response or reply to an application may be questioned, under oath, on the affidavit by a person adverse in interest on the application, and
>
> > (a) rules 6.16 to 6.20 apply for the purposes of this rule, and
> >
> > (b) the transcript of the questioning must be filed by the questioning party.

Issues

[8] The parties disagree on two issues:

a. Whether the Requested Information is relevant and material to the security for costs application; and

b. Whether the Requested Information is privileged.

Analysis

A. Relevance and Materiality to Security for Costs at the Early Stages of Litigation

[9] The scope of permissible examination is limited to what is relevant and material to the underlying application, not what is relevant and material to the main action: *Rozak (Estate)*, 2011 ABQB 239 at para 30.

[10] Rule 6.7 entitles the Plaintiffs to cross-examine the Defendants' affiants. They began to do so. Many of the questions were objected to as not relevant and material to the security for costs application and as constituting a discovery in the main action. The Defendants say that if required to respond with the Requested Information then the purpose of security for costs before significant litigation expense is incurred would be defeated.

[11] The Plaintiffs say they have been focussed with their questions. They say they are entitled to the Requested Information on either or both of two grounds: the "merits of the action" in Rule 4.22(c) and "any other matter the Court considers appropriate" in Rule 4.22(e). The "other matters" they say the Requested Information will inform are (i) issues of public policy (such as governmental agencies hiring independent investigators to avoid having to comply with international law while conducting investigations) and (ii) any connection between the Plaintiffs' current financial means and the impugned acts of the Defendants.

i. Merits of the Action under Rule 4.22(c)

[12] As a general rule, the principles governing the consideration of Rule 4.22(c) are:

> ...
>
> 2. The court must attempt to look at the merits of the action, as difficult as that may be on an interlocutory application;
>
> 3. The greater the likelihood of success for the plaintiff (if that can be reasonably assessed) the more the court should consider the potential unjustness of preventing a meritorious claim from proceeding;
>
> 4. The converse is true: the smaller the likelihood of success for the plaintiff (if that can be reasonably assessed) the slower the court should be in denying security when security would otherwise be appropriate
>
> (*1251165 Alberta Ltd v Wells Fargo Equipment Co*, 2013 ABQB 533 at para 44)

[13] For a security for cost application, the degree of rigour to the court's assessment of the merits under Rule 4.22(c) varies depending on how far into the litigation that the application for security for costs is brought: see *PM&C Specialist Contractors Inc v Horton CBI Limited*, 2015 ABQB 248 at para 15. The later in the proceedings the application for security for costs is brought, the more in-depth the merits of the case will be examined. Early in the proceedings, "it is difficult for any court ... to weigh the merits. It has heard no evidence and must attempt to rely on the submissions of counsel that arise from their pleadings and the questioning that has taken place to this point": *Provalcid Inc v Graff*, 2014 ABQB 453 at para 97. Therefore, if an application for security for costs is brought early in the proceedings, "it is neither possible, nor desirable, for the Court at this stage to determine which party's case is stronger": *Attila Dogan Construction v AMEC Americas Limited*, 2011 ABQB 175 at para 17.

[14] The consensus in the Alberta case law is that the merits of the case are relatively unimportant for applications brought early in the proceedings. In *Provalcid Inc*, at para 97, Justice Yamauchi quoted with approval the Nova Scotia Court of Appeal decision in *Wall v Horn Abbot Ltd* (1999), 176 NSR (2d) 96 at para 59:

> Second, while the merits of the plaintiff's case are relevant and may be considered, they should only be considered on the basis of undisputed facts, the pleadings, etc. and not on the basis of seriously disputed facts or assessments of credibility. Third, consideration of the merits should only be decisive where they are clear and obvious. In short, the law relating to consideration of the merits on interlocutory applications for security for costs is in harmony with the general reluctance to assess the merits of a claim or defence, other than in obvious cases, before trial. [emphasis added]

[15] Further, in *Xpress Lube & Car Wash Ltd v Gill*, 2011 ABQB 457 at para 11, Justice Hall stated that:

> In regard to Rule 4.22(c), the Court notes that neither action has proceeded through questioning. Each action makes allegations which, if proven, could ground a judgment; that is to say, valid causes of action are alleged. In these two cases it is simply too early for the Court to be persuaded that the actions do or do not have merit. Therefore, nothing turns on this subrule at present. Following the completion of questioning, this consideration may have greater weight. [emphasis added]

[16] In a recent decision, ***Alberta (Attorney General) v Alberta Power***, 2017 ABQB 195 at para 26, Chief Justice Wittmann summarized the general principles applicable to the scope of a cross-examination on affidavit in Alberta. The last of those is:

> 6. The principle of proportionality is a consideration and undertakings otherwise answerable had the deponent had the information available at oral questioning ought to be answered provided the provision of the information would not be "overly onerous" and would likely significantly help the Court in the determination of the application: ***Dow Chemical Canada Inc*** at para 5; ***Rozak Estate*** at para 41; ***PM&C Specialists Contractors*** at paras 9, 21.

[17] While the merits of the case must be considered by the Court in a security for costs application under Rule 4.22(c), the Court does not attempt to determine which case is stronger. Rather, if both parties establish a reasonably meritorious case on the pleadings and available evidence, Rule 4.22(c) should be a neutral consideration in the application.

[18] In this case the Defendants concede for the purposes of the security for costs application that the Plaintiffs' claim meets this threshold degree of merit. Therefore none of the Requested Information need be provided for the Plaintiffs to satisfy 4.22(c) in respect of their claims.

[19] I am also satisfied that there is already at least the same level of threshold merit to the defences raised. The Plaintiffs may overcome the defences on a balance of probabilities at trial, but that is not the test at this early stage. The defences are not frivolous. The defences have genuine gravitas, more than just an air of reality.

[20] Two examples suffice. First, the Defendants plead the *Limitations Act*. The Plaintiffs rely on the discoverability provisions therein. It will be an issue of fact as to when the Plaintiffs

knew, or in the circumstances ought to have known, information that would trigger the limitation period. Some of the Requested Information may inform the issue, but none of it could possibly reduce the degree of merit of this defence below the threshold level for this early stage security for costs application, let alone resolve it unequivocally in the Plaintiffs' favour. Information from the Plaintiffs may conceivably do that, but the Requested Information will not.

[21] Second, the Defendants plead absolute privilege. The conduct alleged to create liability for the Defendants to the Plaintiffs all arose, or virtually all arose, in the context of, or against the backdrop of, or concurrent with, the work of a lawyer and her law firm for their client. Ultimately the various privilege claims may or may not succeed, but at this early-on security for costs stage none of the Requested Information could possibly undermine the obvious threshold merit of that defence.

[22] I do not find any of the Requested Information material to rule 4.22(c). It is not sufficiently probative to the security for costs application to warrant ordering its production at this stage of the litigation. The prejudice to the security for costs applicants of requiring production of the Requested Information would be out of proportion to the possible benefit of the answers for rule 4.22(c).

ii. Any Other Factors under Rule 4.22(e)

[23] The Plaintiffs say that there are two other factors that this Court should consider, both in respect of Rule 4.22(e). First, the Plaintiffs want to raise a public policy argument with respect to delegating investigations to private firms who then breach international law. Specifically, the Plaintiffs allege that the Defendants breached international law when they were acting as an investigative proxy for government agencies bound by international law. According to the Plaintiff, this should engage a public policy consideration in whether or not to impose security for costs. Second, the Plaintiffs say that there is a connection between the Plaintiffs' financial position and the Defendants' conduct. The Plaintiffs argue that the Requested Information goes to these two factors, which it will ask be considered in the security for costs application.

a. Public Policy Argument

[24] On its face this public policy argument seems to be subsumed within the "merits of the case" consideration. The Plaintiffs allege that the Defendants were the means by which governmental investigative agencies indirectly did what international law prohibits directly, in breach of a legal duty the Defendants owed to the Plaintiffs. Therefore it is not an "other matter" warranting separate consideration, but a basis for alleging the Defendants are liable to the Plaintiffs. It goes to the merits of the lawsuit.

[25] The Plaintiffs seem to be arguing, however, that I should permit a broader scope of examination on this aspect of the claim because it goes not just to the merits of the underlying claim, but also to a separate policy consideration. The exact nature of this intended separate policy consideration was not made clear. Perhaps it is that the litigation proceeding unencumbered by a security for costs order will be more likely to deter such future conduct and thereby serve the public interest.

[26] At such an early stage of the litigation, I am not satisfied as to the materiality of the Requested Information to any possible public policy argument or that its production is proportional to its probative value on a security for costs application. I fail to see how any of the Requested Information will enable the Plaintiffs to make any policy argument any stronger than

they already can, that is not a function of strengthening the merits of the associated claim in the underlying litigation. In my view, the Defendants should not be put to the expense and delay associated with providing the Requested Information before being heard on their request for security prior to incurring such costs.

[27] The Plaintiffs say the cost to the Defendants would be minimal since the Requested Information is all readily available to the Defendants; much of it has been sent to various law enforcement agencies previously. I consider that unrealistic – naïve to the full costs of litigation and the sorts of things that drive up those costs. It may cost the Defendants less to produce some of the Requested Information, but that does not mean it will still not cost the Defendants an amount for which they should be able to ask for security first.

b. Connection between the Plaintiffs' Finances and the Defendants' Conduct

[28] With respect to the connection between the Plaintiffs' financial position and the Defendants' conduct in a security for costs application, in *1251165 Alberta Ltd* this Court said, at para 43:

> Any connection between the plaintiff's financial situation and the defendant's conduct is relevant, especially if the defendant's wrongful conduct is alleged to be the cause of the plaintiff's impecuniosity

[29] Further, some cases have recognized that a court may decline to order security for costs or may reduce the quantum when the actions of the applying defendant caused or contributed to the plaintiff's impecuniosity. Other cases indicate that security may be granted even when the impecuniosity allegedly results from the defendant's actions of which the plaintiff complains: *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 49 at para 48. Therefore, this consideration is relevant to a security for cost application.

[30] The Defendants concede that there is threshold merit, as I have called it, to the claim of Ms. Niam, including therefore her claim of having been denied the proceeds of sale of her shares. That value is in the millions of dollars. The Requested Information is not necessary to demonstrate the obvious, that not receiving such a large amount leaves her with less means to cover any court costs later, if she loses. The actual financial means of Ms. Niam is something that she has the ability to prove without any of the Requested Information from the Defendants. The additional Requested Information will not further inform any connection between her means and the impugned conduct of the Defendants, in so far as security for costs is concerned.

[31] As for any connection between the Plaintiffs' means and the other damages they claim to have suffered at the hands of the Defendants, some $125 million, the Requested Information would not inform it. The Requested Information relates to the cause of the alleged damages, not its effect on or connection to the Plaintiffs' means, for purposes of the security for costs application.

iii. Conclusion on Relevance and Materiality

[32] In my view, the Requested Information is not material to the security for costs application; requiring its production would be disproportionate to both what is appropriate for an early stage security for costs application like this one and to the very limited probative value the Requested Information could provide. The Applicants have not satisfied me that providing the Requested Information would not be overly onerous and, in any event, I am not persuaded that

any of the Requested Information would likely significantly help the Court in determining the security for costs application.

[33] Requiring the Defendants to provide the Requested Information accomplishes no useful purpose for the security for costs application. It only denies the Defendants the right to have their security for costs application heard early on, before further significant litigation costs are incurred.

B. Does Privilege Exist?

[34] Given the foregoing, I need not decide the second ground of resistance by the Defendants; namely, the various privileges they say apply: solicitor client, litigation privilege and settlement privilege.

[35] Nevertheless, I have reviewed again the decision and reasons of the learned Master on these points and find no error in them. They are consistent also with two Supreme Court of Canada cases that have been decided since his decision: *Lizotte v Aviva Cie d'assurance du Canada*, 2016 SCC 52, and *Alberta (Information Privacy Commissioner) v University of Calgary*, 2016 SCC 53. I might quibble with Master Laycock's use of the words "a waiver of privilege" on line 26 of p. 75 of the transcript of his reasons, but that is not material to his conclusion.

[36] The parties may speak to the quantum of costs if they cannot agree.

Heard on the 5th day of August, 2016 and the 16th day of March, 2017.
Dated at the City of Calgary, Alberta this 27th day of March, 2017.

P.R. Jeffrey
J.C.Q.B.A.

Appearances:

Terry Williams,
for the Plaintiffs

Ryan Phillips,
for the Defendants, Gowling Lafleur Henderson LLP and Kristine Robidoux

Gavin Matthews,
for the Defendant Glencore E&P (Canada) Inc.

Tab 13

Court of Queen's Bench of Alberta

Citation: 1251165 Alberta Ltd v Wells Fargo Equipment Company Ltd, 2013 ABQB 533

Date: 20130916
Docket: 1203 12762
Registry: Edmonton

Between:

1251165 Alberta Ltd. and Stuart Reginald Jobb

Appellants

- and -

Wells Fargo Equipment Finance Company Ltd.

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice Robert A. Graesser

Appeal from Order of
W. Breitkreuz, Master in Chambers
on March 20, 2013
Docket: 1203 12762

Introduction

[1] This is an appeal from the decision of Master W. Breitkreuz ordering payment of security for costs by the Plaintiffs as a precondition of their being able to pursue their claim in this matter.

Background

[2] 1251165 Alberta Ltd. and a related corporation Blackhorse Transportation Ltd. leased a specialized trailer from the Defendant, Wells Fargo Equipment Finance Company, on February 20, 2007. Stuart Reginald Jobb is a director of both 1251165 and Blackhorse, and personally guaranteed performance of the lease.

[3] As with other transactions of this nature, 1251165 and Blackhorse (the "Customer") located the trailer and arranged to have Wells Fargo purchase it and lease it to them. The purchase price of the trailer was approximately $200,000.00. The lease agreement essentially financed the purchase price and approximately $100,000.00 worth of refurbishment costs for the trailer.

[4] The Customer was obliged to make an initial payment of $30,143.63 to Wells Fargo and then 48 monthly payments of $4,312.98. Upon making the final payment of $250.00 the Customer was entitled to a transfer of the trailer.

[5] Because of the downturn in the economy, the Customer fell into arrears under the lease agreement, having by then made 37 of the required payments. Blackhorse went into bankruptcy. 1251165 did not go bankrupt but acknowledges that it has no assets other than this claim against Wells Fargo. All told, the Customer had paid all but about $50,000.00 of the payments under the lease agreement. Wells Fargo seized the trailer in May, 2010, as it was entitled to do under the agreement. It gave notice to sell to the Customer in June, 2010.

[6] The trailer was sold by Wells Fargo in late October or early November, 2010 for $15,000.00.

[7] 1251165 and Mr. Jobb (the "plaintiffs") allege that the trailer was worth far more than $15,000.00 and that Wells Fargo knew that the price it sold the trailer for was significantly under fair market value. Accordingly, Wells Fargo was not acting in good faith and in a commercially reasonable manner when it sold the trailer.

[8] Much of the evidence in Mr. Jobb's affidavits in support of this appeal relates to the merits of the claim against Wells Fargo. He swears that the value of the trailer when it was sold was at least $200,000.00.

[9] The trailer had been seized as well by another creditor, Alberta Treasury Branches, who held security on the trailer to secure business loans it had with the Customer. It appears from the materials that ATB released its seizure and claim against the trailer when it became satisfied that it was not likely that the trailer would sell for more than was owed to Wells Fargo (some $50,000.00 at the time of seizure).

[10] The affidavit of Wells Fargo's corporate representative sets out the details of the seizure and eventual sale. Mr. Cuthbert swears at para. 9 "In all of the circumstances, I believe the sale of the Trailer was commercially reasonable." He swears that after application of the sale proceeds, the debt owed to Wells Fargo is $34,818.71.

[11] The plaintiffs commenced this action on August 24, 2012 claiming damages against Wells Fargo totaling $500,000.00. Wells Fargo defended, and counterclaimed for the $34,818.71 shortfall.

[12] In January, 2013, Wells Fargo applied for security for costs, based on its representative's affidavit swearing to a good defence on the merits and pointing to the impecuniosity of the plaintiffs. Wells Fargo points specifically to a judgment against Mr. Jobb by ATB for approximately $260,000.00.

[13] The plaintiffs acknowledge that they are without funds to post security for costs in any amount, but argue that the trailer was worth more than $200,000 and they planned to use the proceeds of sale to pay off the ATB debt.

[14] It is clear from the conflicting affidavits that there is an issue over the value of the trailer and its condition at the time of the sale by Wells Fargo. The hearsay evidence put forward by Wells Fargo's representative indicates that the trailer may have been worth as much as $40,000.00 (subject to an inspection) but recovering even that amount would not have paid off Wells Fargo, let alone allowing the plaintiffs to deal with their other major creditor, ATB.

The application was heard by Master Breitkreuz on March 20, 2013. The essence of his oral decision is as follows:

> MR. MOORE: Now, the affidavit that discusses the value of the trailer is a separate affidavit, and, as I said, we're not party to that action. We weren't actually given that affidavit when we were served with notice of this application. So we weren't able to cross-examine the affiant on his evidence.
>
> We're asking, Sir, that that evidence not be relied on when determining to award security for costs.
>
> Decision
>
> MASTER BREITKREUZ: Well, it is available, and it seems to me to be reliable. I think what I should do – I think it is very harsh putting the end to a lawsuit that may have some merit to it. Obviously your client thinks it has some merit to it.
>
> MR. MOORE: Yes, Sir.

MASTER BREITKREUZ: Obviously your firm thinks it has some merit to it.

MR. MOORE: Yes.

MASTER BREITKREUZ: But I think where there is a question of good faith in proceeding there should be some security placed. I am going to start with just a little under half of what Mr. Rowan is requesting and with leave to apply to increase that when? Say after discovery stage. And then you will both be able to assess the merits of your clam better and the merits of the defence.

Issues

[15] The Plaintiffs identify the following issues:

1. standard of review from the Master's decision;

2. whether the existence of a counterclaim affects the ability of a Defendant to obtain security for costs;

3. if the Defendant is partly or wholly responsible for the impecuniosity of the Plaintiff, should security for costs be ordered? and

4. did the Master err by failing to give reasons?

Standard of Review

[16] It is common ground that the standard of review has been determined by the Court of Appeal to be correctness, following ***Bahcheli v. Yorkton Securities Inc.***, 2012 ABCA 166.

Impact of counterclaim

[17] The plaintiffs argue that the existence of a counterclaim that deals with the same issues as the claim is a factor which should weigh against the granting of security for costs. They cite ***Attila Dogan Construction v. AMEC Americas Ltd.***, 2011 ABQB 175 and ***Caskey v. Guardian Insurance Co. of Canada,*** (1994), 148 A.R. 251 (Q.B. (Master)).

Connection Between Defendant and Plaintiffs' Impecuniosity

[18] The plaintiffs argue that the actions of Wells Fargo prevented them from being able to deal with the ATB and as a result, they lost not only the trailer but ended up with a large

judgment against them. The judgement would have been considerably less if Wells Fargo had acted in a commercially reasonable manner and realized the market value of the trailer.

[19] The plaintiffs cite ***John Wink Ltd. v. Sico Inc.***, (1987), 15 C.P.C. (2d) 187 (Ont. H.C.). In that case, Reid J. stated at paras. 7 – 9:

> 7 The defendant having shown a prima facie case, the ball returned to plaintiff's court. Plaintiff chose to rely on its poverty rather than deny it, and rested on the gross injustice that would be the result if poverty caused by the defendant secured the defendant against a trial.
>
> 8 There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of a plaintiff. If the consequence of an order for costs would be to destroy such a claim no order should be made. Injustice would be even more manifest if the impoverishment of plaintiff were caused by the very acts of which plaintiff complains in the action.
>
> 9 It is thus necessary to consider, where impoverishment has been shown or admitted, whether a claim should be allowed to proceed to trial, notwithstanding the risk to defendant of not being able to collect costs even if successful. Trainor J. says that special circumstances must be shown. Yet to do justice to both parties at this stage is a particularly difficult problem. Some have expressed or espoused the view that the question is to be answered by assessing the merits of plaintiff's claim, i.e., the likelihood of success. The merits, however, are merely a consideration in making "such order for security for costs as is just" and are by no means determinative. I agree with Master Sandler, who observed in Hawaiian Airlines, Inc. v. Chartermasters, Inc. et al. (1985), 50 O.R. (2d) 575, 50 C.P.C. 224, that in most cases, coming to a conclusion on the merits of a claim upon a motion for security for costs is likely to be impossible. This was also recognized by Trainor J. in Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd. Although he regarded the merits of plaintiff's case and its prospects of success as relevant considerations in deciding whether to grant relief from posting security for costs, he did not treat them as determinative.

Reasons

[20] The plaintiffs agree that it would be of no benefit for the matter to be returned to masters' chambers for a rehearing. The court on appeal has the same jurisdiction as did the master, and can make its own decision in the event it concludes the master was in error. This ground of appeal was not pursued.

Analysis

[21] The starting place is Rule 4.22 regarding applications for security for costs The rule provides:

> 4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate.

[22] There is little or no substantive change between the current rule and old rule, although the new rule expressly invites the court to consider the merits of the action. There is no basis to conclude that the old case law should not generally continue to apply. While the new rules are intended to improve access to justice, they were not intended to accomplish that purpose by favouring or disadvantaging either party. The quest for efficiency, economy and speed do not absolve an impecunious party from having to put up security for costs in appropriate cases. Defendants should be at no greater risk under the new rules of obtaining an uncollectable cost award in the event they successfully defeat the claims against them than they were before November, 2010. Plaintiffs should have no greater or lesser obligations regarding security for costs.

[23] Here, the defendant has satisfied general requirements of an application like this by swearing to a good defence on the merits and specifying the nature of it (that it acted in a commercially reasonable manner). The evidence indicates that the plaintiffs are individually and collectively unable to put up any security for costs, confirming the defendant's fears that if it succeeds in defending the claim, it will be unable to collect its costs.

[24] The rule is discretionary, and notwithstanding that the defendant may have a reasonable prospect of successfully defending the claim, and that it will not likely be able to recover any costs in the event of its success, the court still has a discretion as to the amount and terms of any security ordered, or indeed as to whether security should be ordered at all.

[25] The plaintiffs argue two factors which they say favour refusal of security in this case. Firstly, they point out that Wells Fargo has a counterclaim against them on the lease agreement based on the shortfall resulting from the sale it effected. The same issues will have to be tried on the counterclaim as in the plaintiffs' claim: the details of the sale, the value and condition of the trailer, and the commercial reasonableness of Wells Fargo's actions.

[26] In ***Attila Dogan***, AMEC pursued security for costs based on Attila Dogan's lack of connection with Alberta. Attilia Dogan argued that security should be denied because AMEC had a counterclaim against it and litigation was going to proceed. Wittmann A.C.

[27] Wittmann J. (as he then was) pointed out that the mere existence of a counterclaim does not automatically exclude the availability of security for costs on the main claim, following ***Tracer Industries Inc. v. Shell Canada Ltd.***, 2004 ABQB 484.

[28] He continued at para 20:

> Where the counterclaim is so intimately interwoven with the issues in the statement of claim that those issues would still have to be addressed in the counterclaim, it may be appropriate to refuse security for costs...Where the counterclaim adds significant complexity to the action, with the potential to prolong discoveries and trial, this may be a relevant factor in refusing security or in determining the amount."

[29] In ***Atilla Dogan***, Wittman A.C.J. granted AMEC's application and ordered Atilla Dogan to post security for costs. In doing so, he considered the fact that AMEC's counterclaim did not raise the same issues as in Atilla Dogan's claim against it, and that the counterclaim would not unduly complicate the action.

[30] The ***Caskey*** case was cited by Wittmann A.C.J. with approval. In that case, Master Funduk held that where the issues in the counterclaim were the same as in the main claim, that is a "relevant fact" and "plays a part in the exercise of the Court's discretion to award or not award security to be given."

[31] In ***Caskey***, the Master declined to order security for costs.

[32] Wells Fargo referenced ***Ritter v. Hoag***, 2003 ABQB 229. In that case, Burrows J was faced with a similar argument as is raised here: a defendant with a counterclaim cannot obtain security for costs from the plaintiff.

[33] Burrows J held at para 29:

> [29] Before moving on to the plaintiffs' application for security for costs in the counterclaim, it is necessary to note that the plaintiffs cited Specialty Steels v. Suncor [1997] A.J. No. 276 in opposing the defendants'

application for security for costs. In that case Fraser J. dismissed a defendant's application for security for costs because the defendant had also counterclaimed. He said ". . . Suncor has counterclaimed and is therefore not in any event entitled to security for costs". In my view there is no general legal proposition that a defendant who counterclaims cannot obtain security for costs from the plaintiff. My reasons in that regard appear below (para. 40).

[34] At paras. 40 and 41 he stated:

> [40] Before considering whether security for costs should be ordered against the defendants in the counterclaim, I wish to return to the Specialty Steels case mentioned above (para. [29]). In that case a defendant who had counterclaimed applied for security for costs against the plaintiff. The application was denied. Fraser J. referred to the authorities cited above, in particular Athabasca Realty and Neck v. Taylor. He said: (para. 12)
>
> The Athabasca Realty case dealt with the application of a defendant by counterclaim for costs in respect of a counterclaim by a non-resident plaintiff by counterclaim (defendant). Nevertheless as was evidenced by the decision in Neck, the principle involved in respect of any application by a defendant who has advanced a counterclaim for security for costs in respect of the plaintiff's claim is the same. Assuming that the counterclaim arises out of the transaction which gives rise to the plaintiff's claim, a requirement that the plaintiff give security for the costs of the defendant in defending the plaintiff's claim would be to indirectly require the plaintiff to give security for the costs of the plaintiff by counterclaim (defendant) of prosecuting its counterclaim. As stated by Master Funduk, it would require the plaintiff to give security for costs as a condition of it being allowed to defend the action by the plaintiff by counterclaim (defendant) and of having all the issues between those parties arising from the same transaction dealt with together.
>
> [41] The second sentence of that quotation is in error. The Neck case did not involve the application by a defendant who had advanced a counterclaim for security for costs in respect of the plaintiff's claim. It, like Athabasca Realty, was an application by a plaintiff for security for costs from a defendant who had counterclaimed. It is not authority for denying a defendant who has counterclaimed security for costs against a plaintiff. In my view, if the fact that a defendant has counterclaimed has any

> significance to the question of whether the plaintiff should post security for costs, it is but one circumstances to be considered with all the others. In the case before me it has no significance to my decisions, previously explained (paras. [14] and [28]), holding that both plaintiffs should post security for costs.

[35] I agree with Burrow J and his analysis. There is no bar against a defendant with a counterclaim obtaining security for costs against the plaintiff; similarly, there is no bar on the plaintiff getting security for costs against the defendants on its counterclaim. Defendants do not have to put up security to defend, but they may if they are advancing a counterclaim.

[36] In ***John Wink Ltd. v. Sico Inc.***, Reid J was faced with a situation where the plaintiff relied on its poverty and argued that it would be a gross injustice if its poverty, caused by the defendant, protected the defendant from going to trial.

[37] He held at para. 11:

> In my respectful opinion, unless a claim is plainly devoid of merit, it should be allowed to proceed. That is the only "special circumstance" that I would require. While the adoption of this standard might allow some cases to go to trial that the trial will prove should not have proceeded, nevertheless, the danger of injustice resulting from wrongly destroying claims that should have been permitted to go to trial is to my mind a greater injustice. In my experience, there are very few claims that are entirely without merit that go to and through a trial. The onus on plaintiff is therefore not to show that the claim is likely to succeed. It is merely to show that it is not almost certain to fail.

[38] With respect, the approach taken by Reid J has the potential to gut the provisions for security for costs. The basis for an order for security for costs is that the defendant has an arguable defence, and if the defendant is successful at trial, it is unlikely to recover its proper costs because of the plaintiff's poverty.

[39] If the plaintiff's poverty is proven, which is often the case in these applications, requiring the defendant to prove that the plaintiff's claim is groundless or frivolous, that test sounds remarkably like the test for summary dismissal of an action.

[40] If all the plaintiff has to do is show that the claim is not almost certain to fail, defendants will rarely get security for costs. One might ask if the test is essentially the same as the test for summary dismissal, why bother with security for costs?

[41] In any event, I think what the ***John Wink*** shows is the nature of the discretion a judge has with respect to ordering security for costs. There are no absolutes. It is an area for the exercise of discretion based on what the court considers to be just and reasonable.

[42] The court is required to consider the potential for enforcement of a bill of costs, the ability of the respondent to pay and the merits of the action.

[43] Some basic principles can be drawn from the cases, and I do not profess that the following is exhaustive. Rather, the following are some principles applicable to the facts and circumstances of this case.

The plaintiff's ability to pay a future cost award is always relevant;

1. The existence of a counterclaim is a factor to be weighed based on the extent to which the counterclaim is tied to the claim, or whether it involves mainly different issues from the claim;

2. The court must attempt to look at the merits of the action, as difficult as that may be on an interlocutory application;

3. The greater the likelihood of success for the plaintiff (if that can be reasonably assessed) the more the court should consider the potential unjustness of preventing a meritorious claim from proceeding;

4. The converse is true: the smaller the likelihood of success for the plaintiff (if that can be reasonably assessed) the slower the court should be in denying security when security would otherwise be appropriate; and

5. Any connection between the plaintiff's financial situation and the defendant's conduct is relevant, especially if the defendant's wrongful conduct is alleged to be the cause of the plaintiff's impecuniosity

[44] As with many applications, this analysis involves a balancing act: balancing the right of a plaintiff to pursue a claim and the right of a defendant to protection from false claims.

[45] Alberta is a "costs" jurisdiction, meaning that the loser pays. There is no free ride in litigation. Plaintiffs who win can expect to recover some of their costs in pursuing their successful claim; defendants who win and defeat the plaintiff's claim can expect to recover some of their defence costs.

[46] Security for costs has developed as a means of protecting defendants from frivolous claims, or claims by plaintiffs who have "nothing to lose" by making the claim in that if they lose, they don't have the wherewithal to pay the defendant's costs.

[47] As best as the court can do on an interlocutory application, the court must determine if it can get to the stage of assessing "likelihoods": is the plaintiff likely to succeed at least to some degree; or is the defendant more likely to defeat all of the claims?

[48] Here, the plaintiffs' claim boils down to whether or not the defendant acted in a commercially reasonable manner and determining the fair value of the trailer. That will require some expert evidence on both sides. The mere fact that a machine purchased for some $200,000 and refurbished for a further $100,000 some three years before a forced sale for $15,000 is not conclusive one way or another. The extent to which a creditor may be required to hold off on sale for more favourable economic conditions, or expend further funds marketing the trailer or improving the trailer for sale are all issues for trial.

[49] I cannot say that the plaintiff is more likely to succeed than the defendant. There are certainly arguments both ways, and even the defendant suggests that the trailer may have been worth as much as $40,000 at the time. That, however, does not necessarily mean that it was not commercially reasonable for a creditor to take the only offer available at the time.

[50] The plaintiffs argue that it was placed in the impecunious position it finds itself in because the trailer was sold out from under them at a time when they could have used the value of the trailer to pay off its main creditor, the Alberta Treasury Branch.

[51] The evidence before me shows that ATB seized the trailer first, and that it backed off attempting to manage the sale process in the face of Wells Fargo's claim for some $50,000.

[52] That suggests ATB doubted that after paying selling costs and Wells Fargo's prior encumbrance, it would not recover much if anything towards its debt. This suggests that another creditor doubted that the trailer was worth much more than $40,000.

[53] Correspondence attached to Mr. Jobb's affidavit shows that an offer was made to him to purchase the trailer plus a gooseneck for $200,000. The offer was made on September 13, 2011. On February 21, 2012 Wells Fargo's solicitor Mr. Pawlyk wrote to 1251165's solicitor Mr. Payne stating: "if a real offer is presented in writing, Wells Fargo will not stand in the way of any due diligence required by the purchaser."

[54] Mr. Payne wrote Mr. Pawlyk and ATB's lawyer on February 15, 2012 referencing an expected offer for $225,000 and asking "if the offer is presented, what is each of your client's position". No more details of that are provided.

[55] However, it appears by the time of that series of correspondence, the trailer had already been sold by Wells Fargo. And this was known to 1251165 based on a letter dated December 1, 2011 from Mr. Payne to Samax Industries, the purchaser of the trailer from Wells Fargo.

[56] There seems to have been a disconnect between Wells Fargo and its counsel, as its lawyer appeared to believe the trailer was still unsold in February, 2012.

[57] No details are provided as to what occurred during the period from the sale of the trailer in October 2010 to the making of the offer in September, 2011. Wells Fargo invoiced the purchaser on October 20, 2010 although the offer from the purchaser is dated October 26, 2010.

The purchaser provided a cheque for the purchase price on November 3, 2010. Wells Fargo advised ATB that it sold the trailer on November 5, 2010.

[58] The essence of 1251165's claim is that Wells Fargo disposed of their security unreasonably and that it acted without good faith, relying on the provisions of the *Personal Property Security Act*, RSA 2000 c P-7. As evidence of Wells Fargo's unreasonableness, the plaintiffs say they had a sale negotiated for $200,000 and this was thwarted by Wells Fargo selling the trailer. There is a conflict in the evidence as Wells Fargo says the plaintiffs' proposed sale included accessories and the "gooseneck" which the plaintiffs had retained.

[59] Presumably, the plaintiffs argue that Wells Fargo should have held onto the trailer until the fall of September, 2011 rather than sell it.

[60] It is curious that no one outside Wells Fargo and ATB, including Wells Fargo's solicitor acting on enforcement of the security, appears to have known that the trailer had been sold in October 2010. Correspondence from Wells Fargo to ATB dated November 10, 2010 advises that the trailer was sold for $15,000. On November 15, 2010, Wells Fargo sent ATB confirmation of the sale and describes the sale date as November 5, 2010. I do not know if anything turns on these various dates.

[61] ATB did not obtain a judgment against Mr. Jobb until June 1, 2012 when it was awarded some $261,000.00.

[62] From the facts before me, I cannot and do not conclude that the plaintiffs' position is hopeless and bound to fail, and that Wells Fargo is certain to win. I have no idea why the plaintiffs were trying to sell the trailer in September, 2011 when it had already been sold by Wells Fargo in October, 2010. ATB had in November, 2010 abandoned any claim it had to the trailer and knew of the sale.

[63] I presume that Wells Fargo complied with the notice requirements for private sale under the *PPSA*. It is curious that the *Act* does not require notification to the debtor following a sale so it is conceivable that the plaintiffs were unaware that the trailer had been sold until sometime after September, 2011 when it received an offer, and early December, 2011 when it wrote to the purchaser from Wells Fargo. They may have still been counting on their estimate of the value of the trailer to deal with ATB, even though ATB knew that the trailer had been sold.

[64] I also cannot conclude that the plaintiffs' woes were caused by Wells Fargo's allegedly unreasonable sale. They had already defaulted in their obligations to Wells Fargo and ATB. A related company was in bankruptcy.

[65] It is open to speculation as to how far $150,000 may have gone to satisfy ATB, when ATB's registered judgment is $261,000. The plaintiffs suggest that a significant part of that amount is made up of ATB's costs, which would have been much smaller had they been able to

deal with the lawsuit earlier. There is no indication that Wells Fargo could have received $200,000 for the trailer any earlier than the fall of 2011 and it is unclear whether with that amount the plaintiffs could have settled with ATB and avoided judgment against Mr. Jobb.

[66] It is clear that if the matter goes to trial, expert evidence will be required concerning the value of the trailer at the time it was sold by Wells Fargo, as well as what constitutes commercial reasonableness in the context of realization on chattel security.

Conclusion

[67] The admitted poverty of the plaintiffs strongly favours an award of security for costs. There is nothing compelling to suggest that it would be unfair to require the plaintiffs to put up security. Wells Fargo was entitled to seize the trailer and did so, gave notice of its intent to sell in June, 2010 (according to their statement of defence) and sold the trailer in late October, 2010 to the only bidder.

[68] The plaintiffs had at least five months following the seizure and four months after the notice to deal with the trailer and find a buyer. By abandoning its interest in the trailer in November, 2010, ATB appears to have concluded that the trailer was not going to fetch more than $50,000 at the time. Evidence of value comes from the same expert for both sides, and much of the assessment hinges on what components were with the trailer when Wells Fargo sold it, as well as the overall condition of the trailer at the time.

[69] There is a temporal disconnect between Wells Fargo's sale, and the activities of a year later when the plaintiffs received an offer on the trailer at least nine months after they learned that it had already been sold.

[70] This is not a situation where the plaintiffs' woes are clearly tied to the actions of the defendant. Here, the plaintiffs must prove that Wells Fargo sold the trailer in bad faith, and not in a commercially reasonable manner. They must show that the trailer, if properly disposed of, would have realized more than was owed to Wells Fargo. To get much by way of damages, they must then show that the surplus (which would have gone to ATB because of its security) would have materially affected their dealings with ATB.

[71] The plaintiffs might prove that Wells Fargo acted unreasonably. But that will get them nowhere unless they prove the value of the trailer (presumably without the gooseneck) was more than $50,000 in October, 2010. If they prove both of those facts, they will get damages of significance only if they can establish that the surplus would have been large enough to materially affect the course of their dispute with ATB.

[72] This is a far cry from a case alleging wrongful seizure, the consequences of which puts the plaintiff out of business. There, the plaintiff could, by proving a wrongful seizure, show a direct connection between going out of business and the seizure. Here, the plaintiffs were already

in default to two creditors, a related company was bankrupt, and the seizure was lawful. The argument is that Wells Fargo should have done more to market the trailer and held out for more, and that if it had done so, it would have got much more on the sale than was owed to it.

[73] I considered hardship issues in ***Cormode & Dickson Construction (1983) Ltd. v. 394300 Alberta Ltd.***, 2008 ABQB 607. There, ordering security for costs would have prevented the defendant (plaintiff by counterclaim) from being able to defend itself on the claim, as its defence was largely set off as a result of the counterclaim. The plaintiff by counterclaim did have assets (although not exigible) – approximately a million dollars tied up in court in the litigation itself. There would have been funds available for the defendant by counterclaim's costs unless it was entirely successful as plaintiff.

[74] That case is more applicable to the situation of the plaintiff being able to get security for costs on the defendant's counterclaim than it is to a case where the defendant seeking security has a counterclaim itself.

[75] Wells Fargo has offered to discontinue its counterclaim in the event the plaintiffs do not put up the necessary security for costs, in an attempt to answer the argument that a defendant with a counterclaim should not be able to get security for costs against the plaintiff as the proceedings will carry on whether or not the plaintiff provides security.

[76] Here, the claim and the counterclaim are inextricably connected. Wells Fargo can likely put the evidence forward on its counterclaim easily. The defence to it is the same as the plaintiffs' claim: Wells Fargo failed to act in good faith in a commercially reasonable manner. The same experts will be required on the value of the trailer and commercial reasonableness. The only difference would be that without having to face the plaintiffs' claim if they cannot come up with ordered security, Wells Fargo would only be facing a dismissal of its claim if it was found in bad faith or being unreasonable.

[77] The same issues will be tried one way or the other and the claim and counterclaim are closely connected, so the existence of the counterclaim is relevant. It is still there, and is only offered up conditionally on security being ordered and not placed. That offer is a significant factor to consider on this application.

Decision

[78] I have a broad discretion with respect to this matter. While being mindful of Reid J.'s concerns in ***John Wink*** about preventing meritorious claims from proceeding, defendants should only be at risk for their costs in exceptional circumstances when it is clear that absent success in the litigation, the plaintiff will have no ability to satisfy a cost award against it.

[79] Here, there are no compelling reasons to conclude that the Master erred in ordering security for costs. The plaintiffs have no ability to pay a future cost award if they are not

successful. While the counterclaim is relevant, the defendant offers to discontinue it if the plaintiffs fail to put up the necessary security so the action will be wholly disposed of in those circumstances.

[80] I can draw no likelihoods from the evidence before me. I cannot conclude one way or the other at this stage who has the stronger case. Further, while there may be a connection between the plaintiffs' impecuniosity and the defendant's actions, that is speculative and does not automatically flow from a finding that the defendant failed to act in a commercially reasonable manner.

[81] Thus I find that the Master's order that security be provided was correct.

[82] I do take some issue with his quantification of the costs, however.

[83] It is clear from case authority that security can be ordered progressively, and at various stages of the litigation. Here, the parties have not yet produced their records or had questioning. Records and questioning will go a long way to filling in the present gaps in information and evidence. Security is generally not ordered for past costs.

[84] Wells Fargo put forward a draft bill of costs on column 3, which is the appropriate column.

[85] On the basis of two days of questioning and three days of trial, Wells Fargo's bill of costs totals $20,600 in fees and $20,000 for disbursements.

[86] For steps from now until the completion of discovery, fees are estimated at $6,000.00. Before the matter can be set for trial, the parties will have to obtain expert reports. This is not a hugely complicated matter. Experienced counsel has projected $10,000 for experts including their attendance at trial (one from Germany). Curiously, both parties appear to be relying on the same expert regarding the value of the trailer. Travel and travel time are likely to be a significant part of the overall estimate.

[87] Once the parties have exchanged records, had questioning and have exchanged expert reports, it will be much more practical to assess the parties' positions and the reasonable range of outcomes at trial.

[88] At this stage, I direct that the plaintiffs provide security for costs in the amount of $10,000.00, with leave to the defendant to reapply for further security following questioning and before the matter is set for trial.

[89] If the plaintiffs are unable to post security in the time and manner specified in Rule 4.23, both the claim and the counterclaim will be dismissed.

Comments

[90] I would suggest as a threshold step, before the parties incur the cost of producing records and conducting questioning, that they engage the German expert as a joint expert and provide him with several sets of assumptions relating to condition, accessories and the presence or absence of the gooseneck. That information would allow both parties to better assess their risks in the litigation and that would likely be a fraction of the cost of proceeding through questioning before engaging experts. With information as to value, from a mutually-agreed expert, the parties will then be able to focus on the real issues to be tried and put themselves in a better position for settlement, alternative dispute resolution or ultimately trial.

Heard on the 10th day of July, 2013.
Dated at the City of Edmonton, Alberta, this 16th day of September, 2013.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

Roderick C. Payne
Hustwick Payne
for the Appellants

Kentigern A. Rowan, Q.C.
Ogilvie LLP
for the Respondent

Tab 14

2000 CarswellNat 1132
Federal Court of Canada — Appeal Division

Huzar v. Canada

2000 CarswellNat 1132, 2000 CarswellNat 5603, [2000] F.C.J. No. 873, 258 N.R. 246

Her Majesty the Queen, in Right of Canada, Department of Indian and Northern Affairs Canada and Walter Patrick Twinn, as Chief of the Sawridge Indian Band and the Sawridge Indian Band, Defendants (Appellants) and Aline Elizabeth Huzar, June Martha Kolosky, William Bartholomew McGillivray, Margaret Hazel Anne Blair, Clara Hebert, John Edward Joseph McGillivray, Maurice Stoney, Allen Austin McDonald, Lorna Jean Elizabeth McRee, Frances Mary Tees, Barbara Violet Miller (nee McDonald), Plaintiffs (Respondents)

Décary J.A., Evans J.A., Sexton J.A.

Judgment: June 13, 2000
Docket: A-326-98

Counsel: *Mr. Philip P. Healey*, for Defendants/Appellants.
Mr. Peter V. Abrametz, for Plaintiffs/Respondents.

Subject: Public; Civil Practice and Procedure

Headnote

Native law --- Bands and band government — Miscellaneous issues

Practice --- Pleadings — Amendment — Application to amend — Practice and procedure

Administrative law --- Action for declaration

APPEAL from order granting plaintiffs' motion to amend statement of claim and dismissing defendants' motion to strike the claim.

Evans J.A.:

1 This is an appeal against an order of the Trial Division, dated May 6th, 1998, in which the learned Motions Judge granted the respondents' motion to amend their statement of claim by adding paragraphs 38 and 39, and dismissed the motion of the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, to strike the statement of claim as disclosing no reasonable cause of action.

2 In our respectful opinion, the Motions Judge erred in law in permitting the respondents to amend and in not striking out the unamended statement of claim. The paragraphs amending the statement of claim allege that the Sawridge Indian Band rejected the respondents' membership applications by misapplying the Band membership rules (paragraph 38), and claim a declaration that the Band rules are discriminatory and exclusionary, and hence invalid (paragraph 39).

3 These paragraphs amount to a claim for declaratory or prerogative relief against the Band, which is a federal board, commission or other tribunal within the definition provided by section 2 of the *Federal Court Act*. By virtue of subsection 18(3) of that Act, declaratory or prerogative relief may only be sought against a federal board, commission or other

tribunal on an application for judicial review under section 18.1. The claims contained in paragraphs 38 and 39 cannot therefore be included in a statement of claim.

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

5 It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

6 For these reasons, the appeal will be allowed with costs in this Court and in the Trial Division.

Appeal allowed.

Tab 15

Federal Court  Cour fédérale

Date: 20130515

Docket: T-923-12
Docket: T-922-12

Citation: 2013 FC 509

Ottawa, Ontario, May 15, 2013

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-923-12

BETWEEN:

MAURICE FELIX STONEY

Applicant

and

SAWRIDGE FIRST NATION

Respondent

Docket: T-922-12

BETWEEN:

ALINE ELIZABETH (MCGILLIVRAY) HUZAR AND JUNE MARTHA (MCGILLIVRAY) KOLOSKY

Applicants

and

SAWRIDGE FIRST NATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The Applicants are all descendants of individuals who were at one time members of the Sawridge First Nation, but who, either voluntarily or by operation of the law at the time, lost their band memberships. As a result the Applicants were excluded from membership in the Sawridge First Nation. They now ask this Court to review the Sawridge First Nation Appeal Committee's decision to uphold the Sawridge Chief and Council's decision which denied their applications for membership.

[2] The father of the Applicant Maurice Stoney was William J. Stoney. William Stoney was a member of the Sawridge First Nation but in April 1944 he applied to the Superintendent General of Indian Affairs to be enfranchised under section 114 of the *Indian Act*, c 98, RSC 1927. In consideration of payments totalling $871.35, William Stoney surrendered his Indian status and his membership in the Sawridge First Nation. By operation of the legislation, William Stoney's wife, Margaret Stoney, and their two children, Alvin Stoney and Maurice Stoney, were similarly enfranchised thereby losing their Indian status and their membership in the Sawridge First Nation.

[3] The Applicants Aline Huzar and June Kolosky are sisters and, like Mr. Stoney, they are the grandchildren of Johnny Stoney. The mother of Ms. Huzar and Ms. Kolosky was Johnny Stoney's daughter, Mary Stoney. Mary Stoney married Simon McGillivray in 1921. Because of her marriage Mary Stoney lost both her Indian status and her membership in Sawridge by operation of law. When Ms. Huzar and Ms. Kolosky were born in 1941 and 1937 respectively Mary Stoney was

not a member of the Sawridge Band First Nation and she did not reacquire membership before her death in 1979.

[4] In 1985, with the passing of Bill C-31, *An Act to amend the Indian Act*, 33 – 34 Eliz II c 27, and pursuant to section 10 of the *Indian Act*, the Sawridge First Nation delivered its membership rules, supporting documentation and bylaws to the Deputy Minister of Indian and Northern Affairs, who accepted them on behalf of the Minister. The Minister subsequently informed Sawridge that notice would be given pursuant to subsection 10(7) of the *Indian Act* that the Sawridge First Nation had control of its membership. From that point on, membership in the Sawridge First Nation was determined based on the Sawridge Membership Rules.

[5] Ms. Kolosky submitted her application for membership with the Sawridge First Nation on February 26, 2010. Ms. Huzar submitted her application on June 21, 2010. Mr. Stoney submitted his application on August 30, 2011. In letters dated December 7, 2011, the Applicants were informed that their membership applications had been reviewed by the First Nation Council, and it had been determined that they did not have any specific "right" to have their names entered in the Sawridge Membership List. The Council further stated that it was not compelled to exercise its discretion to add the Applicants' names to the Membership list, as it did not feel that their admission would be in the best interests and welfare of Sawridge.

[6] After this determination, "Membership Processing Forms" were prepared that set out a "Summary of First Nation Councils Judgement". These forms were provided to the Applicants and outlined their connection and commitment to Sawridge, their knowledge of the First Nation, their

character and lifestyle, and other considerations. In particular, the forms noted that the Applicants had not had any family in the Sawridge First Nation for generations and did not have any current relationship with the Band. Reference was also made to their involvement in a legal action commenced against the Sawridge First Nation in 1995 in which they sought damages for lost benefits, economic losses, and the "arrogant and high-handed manner in which Walter Patrick Twinn and the Sawridge Band of Indians has deliberately, and without cause, denied the Plaintiffs reinstatement as Band Members...". The 1995 action was ultimately unsuccessful. Although the Applicants were ordered to pay costs to the First Nation, those costs remained unpaid.

[7] In accordance with section 12 of the Sawridge Membership Rules, the Applicants appealed the Council's decision arguing that they had an automatic right to membership as a result of the enactment of Bill C-31. On April 21, 2012 their appeals were heard before 21 Electors of the Sawridge First Nation, who made up the Appeal Committee. Following written and oral submissions by the Applicants and questions and comments from members of the Appeal Committee, it was unanimously decided that there were no grounds to set aside the decision of the Chief and Council. It is from the Appeal Committee's decision that this application for judicial review stems.

[8] The Applicants maintain that they each have an automatic right of membership in the Sawridge First Nation. Mr. Stoney states at para 8 of his affidavit of May 22, 2012 that this right arises from the provisions of Bill C-31. Ms. Huzar and Ms. Kolosky also argue that they "were persons with the right to have their names entered in the [Sawridge] Band List" by virtue of section 6 of the *Indian Act*.

[9] I accept that, if the Applicants had such an acquired right of membership by virtue of their ancestry, Sawridge had no right to refuse their membership applications: see *Sawridge v Canada*, 2004 FCA 16 at para 26, [2004] FCJ no 77.

[10] Ms. Huzar and Ms. Kolosky rely on the decisions in *Sawridge v Canada*, 2003 FCT 347, [2003] 4 FC 748, and *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77 in support of their claims to automatic Sawridge membership. Those decisions, however, apply to women who had lost their Indian status and their band membership by virtue of marriages to non-Indian men and whose rights to reinstatement were clearly expressed in the amendments to the *Indian Act*, including Bill C-31. The question that remains is whether the descendants of Indian women who were also deprived of their right to band membership because of the inter-marriage of their mothers were intended to be protected by those same legislative amendments.

[11] A plain reading of sections 6 and 7 of Bill C-31 indicates that Parliament intended only that persons who had their Indian status and band memberships directly removed by operation of law ought to have those memberships unconditionally restored. The only means by which the descendants of such persons could gain band membership (as distinct from regaining their Indian status) was to apply for it in accordance with a First Nation's approved membership rules. This distinction was, in fact, recognized by Justice James Hugessen in *Sawridge v Canada*, 2003 FCT 347 at paras 27 to 30, 4 FC 748, [2003] 4 FC 748:

> 27 Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic

entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."

28 The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):

> ... today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.

29 A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates*, idem, at page 2645):

> This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. [page766] While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.

30 Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates*, idem, at page 2646):

> ... I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals...
>
> [Emphasis added]

This decision was upheld on appeal in *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77.

[12] The legislative balance referred to by Justice Hugessen is also reflected in the 2010 Legislative Summary of Bill C-3 titled the *Gender Equity in Indian Registration Act*, SC 2010, c 18. There the intent of Bill C-31 is described as follows:

> Bill C-31 severed status and band membership for the first time and authorized bands to control their own membership and enact their own membership codes (section 10). For those not exercising that option, the Department of Indian Affairs would maintain "Band Lists" (section 11). Under the legislation's complex scheme some registrants were granted automatic band membership, while others obtained only conditional membership. The former group included women who had lost status by marrying out and were reinstated under paragraph 6(1)(c). The latter group included their children, who acquired status under subsection 6(2).
>
> [Emphasis added]

[13] While Mary Stoney would have an acquired right to Sawridge membership had she been alive when Bill C-31 was enacted, the same right did not accrue to her children. Simply put neither Ms. Huzar or Ms. Kolosky qualified under section 11 of Bill C-31 for automatic band membership. Their only option was to apply for membership in accordance with the membership rules promulgated by Sawridge.

[14] This second generation cut-off rule has continued to attract criticism as is reflected in the Legislative Summary at p 13, para 34:

> 34. The divisiveness has been exacerbated by the Act's provisions related to band membership, under which not all new or reinstated registrants have been entitled to automatic membership. As previously mentioned, under provisions in Bill C-31, women who had "married out" and were reinstated did automatically become band members, but their children registered under subsection 6(2) have been eligible for conditional membership only. In light of the high volume of new or returning "Bill C-31 Indians" and the scarcity of reserve land, automatic membership did not necessarily translate into a right to reside on-reserve, creating another source of internal conflict.

Notwithstanding the above-noted criticism, the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership.

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

[16] Even if I am wrong in my interpretation of these legislative provisions, this application cannot be sustained at least in terms of the Applicants' claims to automatic band membership. All of the Applicants in this proceeding, among others, were named as Plaintiffs in an action filed in this Court on May 6, 1998 seeking mandatory relief requiring that their names be added to the Sawridge membership list. That action was struck out by the Federal Court of Appeal in a decision issued on June 13, 2000 for the following reasons:

> [4] It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.
>
> [5] It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

See *Huzar v Canada*, [2000] FCJ no 873, 258 NR 246.

[17] It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel: see *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460.

[18] The Applicants are, nevertheless, fully entitled to challenge the lawfulness of the appeal decision rejecting their membership applications.

[19] The Applicants did not challenge the reasonableness of the appeal decision but only the fairness of the process that was followed. Their argument is one of institutional bias and it is set out with considerable brevity at para 35 of the Huzar and Kolosky Memorandum of Fact and Law:

> 35. It is submitted that the total membership of Sawridge First Nation is small being in the range of 50 members. Only three applicants have been admitted to membership since 1985 and these three are (were) the sisters of deceased Chief, Walter Twinn. The Appeal Committee consisted of 21 of the members of Sawridge and three of these 21 were the Chief, Roland Twinn and Councillors, Justin Twinn and Winona Twin, who made the original decision appealed from.

[20] In the absence of any other relevant evidence, no inference can be drawn from the limited number of new memberships that have been granted by Sawridge since 1985. While the apparent involvement of the Chief and two members of the Band Council in the work of the Appeal Committee might give rise to an appearance of bias, there is no evidence in the record that would permit the Court to make a finding one way or the other or to ascertain whether this issue was waived by the Applicants' failure to raise a concern at the time.

[21] Indeed, it is surprising that this issue was not fully briefed by the Applicants in their affidavits or in their written and oral arguments. It is of equal concern that no cross-examinations were carried out to provide an evidentiary foundation for this allegation of institutional bias. The issue of institutional bias in the context of small First Nations with numerous family connections is nuanced and the issue cannot be resolved on the record before me: see *Sweetgrass First Nation v Favel*, 2007 FC 271 at para 19, [2007] FCJ no 347, and *Lavalee v Louison*, [1999] FCJ no 1350 at paras 34-35, 91 ACWS (3d) 337.

[22] The same concern arises in connection with the allegation of a section 15 Charter breach. There is nothing in the evidence to support such a finding and it was not advanced in any serious way in the written or oral submissions. The record is completely inadequate to support such a claim to relief. There is also nothing in the record to establish that the Crown was provided with any notice of what constitutes a constitutional challenge to the *Indian Act*. Accordingly, this claim to relief cannot be sustained.

[23] For the foregoing reasons these applications are dismissed with costs payable to the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications are dismissed with costs payable to the Respondent.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-923-12 T-922-12
STYLE OF CAUSE:	STONEY v SAWRIDGE FIRST NATION and HUZAR ET AL v SAWRIDGE FIRST NATION
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 5, 2013
REASONS FOR JUDGMENT:	BARNES J.
DATED:	May 15, 2013

APPEARANCES:

Priscilla Kennedy	FOR THE APPLICANTS
Edward H. Molstad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davis LLP Edmonton, Alberta	FOR THE APPLICANTS
Parlee McLaws LLP Edmonton, Alberta	FOR THE RESPONDENT

Tab 16

In the Court of Appeal of Alberta

Citation: Stoney v 1985 Sawridge Trust, 2016 ABCA 51

Date: 20160226
Docket: 1603-0033-AC
Registry: Edmonton

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

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

Between:

Maurice Stoney

Applicant (Putative)

- and -

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

Respondents

- and -

Public Trustee of Alberta

Respondent

Oral Reasons for Decision of
The Honourable Mr. Justice Jack Watson

Application to Extend Time to File Appeal

Oral Reasons for Decision of
The Honourable Mr. Justice Jack Watson

[1] This is Court of Appeal file number 1603-0033-AC, In the Matter of the *Trustee Act*, RSA 2000, c T-8 as amended; and In the Matter of The Sawridge Band *Inter Vivos* Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust").

[2] The application before me now is by a gentleman named Maurice Stoney. Mr. Stoney claims, with some vigour, that he is a member of the First Nation in question and that he has been for a long time, and that as a member of the First Nation, certain legal rights of his follow from this.

[3] The matter that is under appeal by two parties now – and for which the subject matter before me is a motion for an extension of time for a further appeal – is a decision by Mr. Justice Thomas that was given at 2015 ABQB 799. His decision was in the course of a proceeding which dealt with The Sawridge Band *Inter Vivos* Settlement created back on April 15, 1985, which is referred to in the various proceedings as the Sawridge Band Trust. As mentioned, Mr. Stoney's position is that he is a member of the Sawridge First Nation and that as a consequence of that he presumably has a right to some share in the distribution of the trust when that is eventually carried out.

[4] The application that is specifically is before me at this time is by Mr. Stoney for an extension of time to appeal the judgment of Mr. Justice Thomas. The part of the reasons of Mr. Justice Thomas which are objected to in the proposed appeal by Mr. Stoney arise from his role as a case manager in connection with the ongoing proceeding dealing with the trust. His position is that both inappropriately and unfairly, Mr. Justice Thomas in his role as case manager has made final determinations which seriously and adversely affect his situation *vis-à-vis* his rights to participate in the trust. It is interesting to note that in the course of so arguing, his supporting affidavit which was sworn on October 27, 2015 in para 13 contains the broader assertion that:

> For thirty years, I have been seeking to have my membership in Sawridge be recognized.

In that respect, therefore, Mr. Stoney has the concern that his membership is also an issue in the judgment of Mr. Justice Thomas, either directly or indirectly, by virtue of these case management determinations which Mr. Justice Thomas made.

[5] During the course of argument with counsel, I referred counsel to para 56 of the judgment of Mr. Justice Thomas in which he purported to designate what he described as: "the potential recipients of a distribution of the 1985 Sawridge Trust...". I say purported because the existing two appeals from his decision dispute what he has said and done. He identified six categories.

[6] The other appeals by the other parties in relation to that turn very much on that paragraph. I will, therefore, not offer any extensive discussion about what the implications are of that paragraph nor whether it is the product of fair process, nor whether it is accurate or anything of that sort. I merely observe that that paragraph would appear to be a key triggering paragraph in particular for Mr. Stoney's request that he also be part of the process before the Court of Appeal, in relation to the challenges to the judgment of Mr. Justice Thomas.

[7] Indeed, Mr. Stoney's arguments to a large extent replicate points put forward by the appellants that have existing appeals against the judgment of Mr. Justice Thomas on the question of fair process. Certainly, Ms. Kennedy in her eloquent submissions on behalf of Mr. Stoney made considerable remarks in connection with the manner in which the issue of para 56 and, indeed, paras 32 and following in Mr. Justice Thomas' judgment arose. She takes the position that, in effect, Mr. Justice Thomas has seriously side-swiped the interest of Mr. Stoney and, although they are not appellants, the interest of the other two ladies whose names have been mentioned in the course of these proceedings.

[8] The position that has been taken in answer to the application for an extension of time is to invoke firstly, the Reasons for Judgment of Mr. Justice Slatter in ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Ltd***, 2015 ABCA 206, 602 AR 135. The position taken on behalf of the First Nation, although the First Nation has not been, strictly speaking, a party to the proceedings before Mr. Justice Thomas, is that the objections and complaints made by Mr. Stoney (and, although they are not here, made by the two ladies presumably) are long since settled by the Federal Court and by other proceedings and other courts. The First Nation contends that the claims of Mr. Stoney, therefore, are not live questions here, whether or not they were implicitly raised in Mr. Justice Thomas' decision. They are certainly not the subject matter of the current appeals from Mr. Justice Thomas' decision, at least in the opinion of the First Nation.

[9] The response in answer to the extension of time application given by the Trustees of the trust – albeit not for this purpose including a dissenting Trustee – are that Mr. Stoney's position does not meet any of the criteria contained in para 4 of the judgment of ***Attila Dogan*** to which I have just made reference. The position taken on that aspect should be addressed, therefore, first.

[10] The position taken by the Trustees is that having regard to the way in which the record unfolded in this matter, there is not really adequate evidence before this Court to make a determination as to whether the principles in ***Cairns v Cairns***, [1931] 4 DLR 819 (Alta SC (AD)), which are quoted by Mr. Justice Slatter in ***Attila Dogan,*** are met. The situation is that they are suggesting that the affidavit evidence does not provide a reasonable explanation for the failure to file on time and it further does not provide an indication of a *bona fide* intention to appeal while the right of appeal existed.

[11] I am prepared to infer that, in fact, there would have been intention to appeal while the right of appeal existed had Ms. Kennedy been aware of the judgment of Mr. Justice Thomas. Further, while there are certainly some strengths to the argument against Ms. Kennedy's position relative to

the explanation for failure to file the appeal on time, I am satisfied that that would not be of itself a basis upon which to apply the ***Attila Dogan*** and ***Cairns*** test against the application being made on behalf of Mr. Stoney.

[12] It seems to me that the real issue that comes to the forefront of this matter is whether under para 4(e) of ***Attila Dogan*** there is a reasonable chance of success on the appeal, which Justice Slatter goes on to describe as a reasonably arguable appeal. This brings back into focus the objection made by the First Nation relative to whether or not the position of Mr. Stoney, at this stage, is merely that of an intermeddler seeking to intrude the issue of membership into an appeal to the Court of Appeal from Mr. Justice Thomas when Mr. Justice Thomas did not deal with membership.

[13] Indeed, it is quite clear from the reasoning of Mr. Justice Thomas that he attempted to avoid the question of membership. That was because he was taking on, in his view, the strict issue of the administration of the trust. From the reasons that he provided, the Federal Court was the proper location in which to determine whether a person is or is not a member of that particular First Nation. Whether or not that is correct and whether or not that issue would be resolved later by this Court on the existing two appeals is an interesting point which I do not need to come to grips with here. But the point of the matter is that Mr. Justice Thomas, at least, did not consider himself to be dealing with the question of membership.

[14] Mr. Justice Thomas' decision, in this respect, was attempting to regulate the processes for dealing with the trust. Insofar as doing so is concerned, it is clear that the administration of the trust would have a considerable effect on people who are entitled to be beneficiaries. The argument placed before me for Mr. Stoney is that a person who has a legitimate status as a member, and who has been foreclosed in the opportunity to put that position forward so far, may still very well be a person who should at some point by a competent authority be determined to be a beneficiary under the trust.

[15] The difficulty with the argument in that respect, however, from the point of view of the viability of an appeal under the ***Attila Dogan*** case, is that once the appeal gets to the Court of Appeal from Mr. Justice Thomas' decision, the impact of the decision upon Mr. Stoney's situation is yet to be understood.

[16] It seems to me that if the arguments that are put forward by the existing appellants from Mr. Justice Thomas' reasons hold sway in some way or another – and I would have to speculate what might happen there – that could very well address entirely the position of Ms. Kennedy's client. At least it would arguably do so insofar as her concern that Mr. Justice Thomas' judgment somehow stands in the path of Mr. Stoney in terms of getting some rights as a beneficiary.

[17] It has already been pointed out in the argument before me that there has not been, up to now, an application made by Ms. Kennedy's client, Mr. Stoney, to be a participant in the proceedings before Mr. Justice Thomas, in any formal way at least. He is certainly not named as a

party there, but with admirable fairness, Ms. Bonora, counsel for the Trustees, appreciates that there is no specific time running on this point before Mr. Justice Thomas. That is because the issue of who is a beneficiary for the purposes of division of this trust has not actually been made yet.

[18] In fact, one of the reasons why Mr. Justice Thomas got to making his decision under appeal in the first place was because he was attempting to make determinations for the process to determine who gets to decide who is beneficiary and so forth.

[19] That being the case, Ms. Bonora quite fairly points out that Mr. Stoney's position as to whether or not he should be considered to be entitled to be a beneficiary in the trust has not arisen yet before Justice Thomas. That is going to have to be decided at some future date whether or not the appeal goes ahead from Mr. Justice Thomas and whether or not Mr. Justice Thomas' judgment, in this particular regard, is upheld or changed or in some way dealt with by the Court of Appeal.

[20] It therefore follows that in terms of determining reasonable chance of success in the appeal, the embargo against the participation of Mr. Stoney that is or has been created by the various proceedings that have occurred in various courts including the Federal Court as raised by the First Nation, has an enhanced status for the purposes of determining the extension of time here. That is because, on the face of things, Mr. Stoney does not have a participatory right in relation to the proceedings on the trust, does not have standing to appeal within the meaning of the case of ***Dreco Energy Services Ltd et al v Wenzel Downhole Tools Ltd***, 2008 ABCA 36, 429 AR 51 at paras 5 to 8, and is, in fact, a stranger to the proceedings insofar as an appeal from the decision of Mr. Justice Thomas to the Court of Appeal is concerned.

[21] Since Mr. Stoney is interested in matters which were not entirely addressed by Mr. Justice Thomas, and which may or may not be addressed by the Court in the medium of other arguments by other parties before the Court of Appeal, I am left with the situation where it seems to be quite clear that there is no reasonable chance of success on an appeal by Mr. Stoney. That is because no one is going to say anything about him, particularly when the appeal is heard. If incidentally the result of the appeal is that somehow his status or ability to apply as a beneficiary is improved, so be it. The mere existence of that judgment and of a potential decision of the Court of Appeal in relation to the judgment of Mr. Justice Thomas does not, it seems to me, create a condition that would give rise to a right of appeal on behalf of Mr. Stoney in this respect.

[22] Having said all that, then, I am not satisfied that an extension of time should be granted to Mr. Stoney to appeal the decision of Mr. Justice Thomas, even if I could discern precisely what it is about the decision of Mr. Justice Thomas that is directly under attack, or would be under attack, on an appeal by Mr. Stoney. I can make inferences about what Mr. Stoney might hope might unfold on appeal, but there is not, at this point in time, an arguable point by Mr. Stoney as against Justice Thomas' judgment, bearing in mind what the judgment is and what it says.

[23] The application is dismissed.

[Discussion with counsel re costs]

Watson J.A.:

[24] Costs will follow for the parties that participated on the motion itself. And any parties who did not, do not get anything.

Application heard on February 17, 2016

Reasons filed at Edmonton, Alberta
this 26th day of February, 2016

Watson J.A.

Appearances:

P.E. Kennedy
for the Applicant (Putative)

M.S. Poretti/D.C.E. Bonara
for the Respondents Roland Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo (Sawridge Trustees)

E.H. Molstad, Q.C.
for the Respondent Sawridge First Nation

C. Osualdini
for the Respondent Catherine Twinn

E. Meehan, Q.C./J.L. Hutchinson
for the Respondent Public Trustee of Alberta

Tab 17

In the Court of Appeal of Alberta

Citation: Stacey v. Foy, 2014 ABCA 420

Date: 20141210
Docket: 1403-0253-AC
1403-0268-AC
Registry: Edmonton

Between:

1403-0253-AC

Terry Stacey and TS Maintenance Ltd. and TSM Complete Heating Ltd

Respondents

- and -

Kimberley Foy

Applicant

And Between:

1403-0268-AC

Terry Stacey and TS Maintenance Ltd. and TSM Complete Heating Ltd.

Respondents

- and -

Kimberley Foy

Applicant

Supplementary Reasons for Decision of The Honourable Mr. Justice Ronald Berger

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Application for Security for Costs

Supplementary Reasons for Decision of
The Honourable Mr. Justice Ronald Berger

[1] The factual matrix giving rise to the present application for security for costs is set out in the Reasons for Decision of November 24, 2014. In the light of the Court's ruling that an extension of time to appeal the order of Sullivan J. pronounced on July 22, 2014 be denied, the Respondents have now advised the Court that they intend to proceed in any event with the appeal of the order of Jeffrey J. pronounced on September 26, 2014 and entered on October 6, 2014. An order for security for costs is discretionary informed by Rules 14.67, 4.22 and 4.23 of the *Alberta Rules of Court*. I have considered each of the five factors set out in Rule 4.22 and in the light of the competing submissions I have determined whether it is just and reasonable in all of the circumstances to grant the order prayed for.

[2] I have taken account of the factors set out in para. 22 of the Respondent Stacey's Memorandum of Argument in reply filed on October 10, 2014, and, in particular, I am alive to the contention that the Respondents have assets in Alberta and the ability to pay the costs award already imposed. The fact is, however, that the costs award of $139,875.85 is but a small portion of the total award in the Court below before interest of $675,024.15. The Respondent acknowledges that the property in Fort McMurray purchased for $1.2 million had already been encumbered by a $450,000 mortgage; foreclosure proceedings have been initiated. The Respondent Stacey concedes that "[h]e may be experiencing some financial difficulties ..." (para. 24 of the Respondent's Memorandum of Argument in reply).

[3] I appreciate full well that a stay has been granted by the trial judge relative to the judgment of September 26, 2014. Even assuming that the appeal has arguable merit, mindful that the Respondent has failed to pay the costs awards totalling $10,500 in respect of proceedings prior to trial, I draw an adverse inference from the failure of the Respondent to adduce meaningful evidence of his financial status and that of the corporate entities. The Respondent's contention that if an order for security for costs is made, his ability to pursue his claims will be thwarted, is simply not made out on this record: ***Autoweld Systems Ltd. v. CRC–Evans Pipeline International, Inc.***, 2011 ABCA 243 at para. 14:

> "The applicant says the chambers judge erred in finding that it did not meet its evidentiary burden to show that a security for costs order would unduly prejudice its ability to continue the action. I reject that argument. The applicant filed no evidence whatsoever as to the impact of a security for costs order on its ability to continue the suit. The learned chambers judge commented on this absence: 'I have no sworn evidence from Autoweld that it cannot raise any security in or near the amount demanded': para 23."

[4] In the result, I have come to the conclusion that it is just and reasonable that security for costs be posted on or before December 19, 2014 with the Registry of the Court of Appeal in the total sum of $175,000, failing which the appeals will be struck without more.

Application heard on October 14, 2014

Reasons filed at Edmonton, Alberta
this 10th day of December, 2014

Berger J.A.

Appearances:

B.R. Corbin and R. Yoo
for the Applicant

P.J. Holubitsky and E. Alves (Agents for C.L. Flett)
for the Respondent

Tab 18

In the Court of Appeal of Alberta

Citation: Chalupa Estate v. Chalupa, 2014 ABCA 104

Date: 20140314
Docket: 1403-0003-AC
Registry: Edmonton

Between:

Estate of Marian Chalupa, Deceased, by his personal representative, Darleen Paszkiewicz, Chalupa & Son Trucking Co. Ltd., Richard Chalupa, Lilliana Chalupa and Donna Prodorutti

Respondent
(Respondent)

- and -

Anna Chalupa aka Anna Goch

Applicant
(Appellant)

Reasons for Decision of
The Honourable Mr. Justice Ronald Berger

Application for Leave to Appeal

Reasons for Decision of
The Honourable Mr. Justice Ronald Berger

[1] The Applicant seeks leave to appeal an order for security for costs made by a Queen's Bench judge. The Applicant, who resides in Poland, was married to the deceased testator for approximately ten years when they resided in Alberta.

[2] Three extant matters were before the Court of Queen's Bench which were earlier the subject of a consolidation order by Manderscheid J.

[3] The three matters before the Court are the following:

1. An application by Ms. Goch under the ***Dower Act***, RSA 2000, c. D-15 for a declaration of a dower interest. She claims a life estate in land forming part of the deceased's estate.

2. No provision was made for Ms. Goch in the testator's will. An application was brought by her under the ***Wills and Succession Act***, SA 2010, c. W-12.2.

3. The estate, the corporate entity, and the children of the deceased, have brought an action in fraud alleging that Ms. Goch has "systematically taken money from the company" and taken CPP and other personal cheques payable to the deceased and cashed them, thereby systematically defrauding the family of over $200,000 (the "Fraud Action").

[4] The only viable asset of the estate is said to be the matrimonial home of a value of $220,000 which in 2004 the deceased transferred to himself and his four children. The Applicant maintains that the dower affidavit sworn by the deceased is false in that he deposed that neither he nor the Applicant ever resided on the land at any time since they married. They married in 1998.

[5] There is no question that leave to appeal is required having regard to Rule 505(3) and (4) of the *Alberta Rules of Court*. The application for security for costs was brought pursuant to Rule 4.22 which reads as follows:

> "4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;

> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate."

[6] The test for leave to appeal "requires that the appeal raise an important question of law and have a reasonable chance of success." (***Zulu Publications Inc. v. Westjet Airlines Ltd.***, 2007 ABCA 154). An order for security for costs is a discretionary matter and considerable deference is owed to the adjudicator of first instance absent an error of law, an unreasonable exercise of discretion apparent on the record, or a misapprehension of an important fact.

[7] There was affidavit evidence before the Court deposed to by the Applicant (counsel for the Respondent conceded at the hearing of this application that the "swearing of the affidavit by Skype" was no longer contested) that she has no assets other than a one-bedroom condominium in Poland in which she resides with her mother who supports her because of her health problems. Her monthly expenses are nominal.

[8] The chambers judge took account of a number of factors set out in Rule 4.22, including "whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta" (a reference to the fraud action); "the ability of the respondent to the application to pay the costs award"; "the merits of the action in which the application is filed"; "whether an order to give security for payment of costs will unduly prejudice the respondent's ability to continue the action." As to the third factor, the chambers judge also took account of the "Fraud Action" and noted the following (Proceedings, p. 10/23-25):

> "Counsel have indicated that there is, in the application or the action commenced by the Executor and by the Estate that there is significant detail of the allegations of theft and fraud against Ms. Goch."

[9] The foregoing is a reference to the representations by Mr. Belzil on behalf of the estate of the deceased and his adult children, and the trucking company, to the following effect:

> "If you review the statement of claim you will see that they're pled with very – with great particularity. This is not a broad-based or broad-stroke action. Great particularity about a number of incidents going back over 15 years which were endorsed fraudulently and disappeared and did not – from these

> various plaintiffs, primarily from the trucking company and from the deceased, including his pension cheques, CPP cheques.
>
> So we believe that this was a very calculated marriage. My clients believe that this was a marriage of opportunity for Anna Goch, that she systematically defrauded the family of over $200,000 that they know of.
>
> The, as my friend has alluded to, there is a handwriting expert's report, which I've provided to my friend, Mr. Speidel." (Proceedings, p. 5/5-16)

[10] Ms. Van Wachem, counsel for the personal representative of the estate, added at Proceedings, p. 9/5-6:

> "There's – there's a reason why the bank is here. They endorsed and accepted these cheques on her [Ms. Goch's] behalf."

[11] The order that followed specified that in the event that security for costs was not posted within 60 days, a motion to strike Ms. Goch's pleadings would follow.

[12] In considering each of the factors under Rule 4.22 of the *Alberta Rules of Court*, and in so ordering, the chambers judge made the following findings:

1. Ms. Goch resides in Poland and there is no indication she has assets in Alberta.
2. Ms. Goch is impecunious but for the condominium she owns in Poland.
3. There is significant detail of the allegations of theft and fraud against Ms. Goch.
4. There is no evidence to suggest her ability to continue with the action would be prejudiced by an award for security for costs.
5. Delays in the action attributable to the Applicant were thwarting the orderly administration of the estate.

[13] The contention of the Applicant was that payment of costs would be a financial hardship and granting an order for security for costs against an impecunious litigant was inappropriate. I am somewhat concerned that the chambers judge in respect of finding no. 4 above may not have given appropriate weight to the inevitable prejudice to the Applicant to pursue her action given her lack of funds. Nonetheless, the Applicant's ability to pay the award of security for costs is but one factor and not dispositive. Moreover, the Applicant relies upon the judgment of this Court in

Vollenga v. Berry, [1962] 39 W.W.R. 319. The case, however, is easily distinguished on the following bases:

1. In ***Vollenga*** the Court considered it an error of law for the judge in the Court below to have stated that "the fact that [the Appellant] is a needy litigant has no relevancy." (at para. 6) No such statement was made by the chambers judge in the case at bar. Quite the contrary, the transcript of proceedings makes clear that the chambers judge was alive to the impecuniosity of Ms. Goch.

2. In ***Vollenga*** the Appellant was "compelled to leave the province by forces beyond his control, at the same time evincing an intention to return to the province." (at para. 7) There is no such evidence in the case at bar applicable to Ms. Goch.

3. I note also that in ***Vollenga*** the Court stated, "A discretionary order such as the present order is not one that will be lightly interfered with by this court." (at para. 7)

[14] The appeal must raise an important question of law and have a reasonable chance of success. In determining whether to grant leave to appeal, this Court should consider the amount of the security awarded, the ramifications of the potential delay caused by an appeal, and the disparity between the cost of an appeal and the security for costs awarded.

[15] No error of law warranting appellate intervention has been identified by the Applicant and the Queen's Bench justice applied Rule 4.22 correctly.

[16] The application for leave to appeal is denied.

Application heard on March 6, 2014

Reasons filed at Edmonton, Alberta
this 14th day of March, 2014

Berger J.A.

Appearances:

Y.V. Wachem
for the Respondent – Executor of the Estate of Marian Chalupa

M.A. Pruski
for the Respondents – Darleen Paszkiewicz, Chalupa & Son Trucking Co. Ltd., Richard Chalupa, Lilliana Chalupa and Donna Prodorutti

R.A. Speidel
for the Applicant – Anna Chalupa

M. Sesitito
for the CIBC - Third Party

Tab 19

In the Court of Appeal of Alberta

Citation: Wong v. Giannacopoulos, 2011 ABCA 156

Date: 20110525
Docket: 1103-0031-AC
Registry: Edmonton

Between:

V.W. Wong, Monica Leung and
A. Leung, Guardian and Trustee for Y.W. Leung

Respondents
(Appellants)

- and -

Vicki Giannacopoulos, Rebecca Cormack, Christina Lynne Tchir, McLennan Ross LLP, Chris Dundas, Dominion of Canada General Insurance Company, Ian Darrell Awid, Jane Doe #1-8 and John Doe #1-8

Applicants
(Respondents)

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

Application for Security for Costs

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

[1] The respondents on this appeal, who were the successful defendants in the court below, sought security for costs on an appeal by V.W. Wong from dismissal of the action against them. There were two sets of respondents applying for security for costs, each set represented by counsel. According to the record, V.W. Wong's action in the court below was dismissed as being an abuse of process within the meaning of Rule 3.68 of the *Alberta Rules of Court*, AR 124/2010. V.W. Wong appeared in person in response to the respondents' motions, without counsel.

[2] The respondents provided material that explained the rationale for the dismissal. They also provided evidence about their costs from the proceedings below, and about various writs of execution against the active appellant, who has chosen to self-identify in the Notice of Appeal as "V.W. Wong". In sum, the respondents suggested that V.W. Wong is not likely to pay costs.

[3] "V.W. Wong" had filed a Notice of Appeal in this court with what is putatively and only her own signature. But in that Notice of Appeal there are other putative appellants referred to, namely "Monica Leung", whom in the material before me from V.W. Wong on this motion is referred to as her sister and "now deceased". The Notice of Appeal also was framed as if it were an appeal by "A. Leung" described as Guardian and Trustee for "Y.W. Leung". In her materials, V.W. Wong described Y.W. Leung as a "dependent adult" and as her common law spouse.

[4] There was no clear indication on the court file evidencing her authority to bring an appeal in any capacity for anyone else. There was no clear indication by which it could be said that those other names were properly before the Court as appellants.

[5] At the outset of the application by the respondents, this ambiguity about the parties was converted into a serious contest. The contest appeared by reason of the attendance of a person who identified herself as the "A. Leung" in the Notice of Appeal. She advised that she was the daughter of Monica Leung, who had passed away in 2009. She also said she was the daughter of Y.W. Leung. She asserted as well that she was the actual guardian and trustee for the estate of Y.W. Leung, whom she said was a dependent adult.

[6] A. Leung presented as being very upset about the fact that she and her father had been dragooned without their authority into these proceedings – not only those in this Court, but in the Court of Queen's Bench. She asserted that she wanted herself and her father taken out of the entire matter. She said she had been identified in writs of execution for costs as a result of proceedings in which neither she nor her father had any role, or even any proper notice.

[7] After hearing from her and counsel for the respondents, I concluded that the best option was to recommend to A. Leung that she make an application to the Court for rectification of the Court record on notice to everyone interested. Inasmuch as it was not obvious to me that removal of putative parties to an appeal would be a matter incidental to an appeal under Rule 516, I suggested

to A. Leung that she make an application returnable before the motions panel on the June sittings for the rectification that she was seeking.

[8] In so doing, I explained to her that she would need a proper notice of motion, and additionally, a detailed affidavit explaining her position. She advised that she had an affidavit drafted. I also informed her that, in my view, counsel for the respondents would have a right to interview her in connection with her affidavit. She expressed willingness to be interviewed, and indeed appeared to be anxious to co-operate in order to clear up the situation. A. Leung then departed the court room to commence her preparatory steps.

[9] After A. Leung left, V.W. Wong was heard from. During her commentary, she stated that she had only launched the appeal in her own name, and that she did not purport to appeal directly on behalf of Monica Leung or A. Leung or Y.W. Leung or his estate. Nevertheless, she also asserted that the claim related back to proceedings involving a motor vehicle collision which involved Y.W. Leung. As she elaborated her position, it emerged that she appeared to be claiming standing to the appeal based upon her interest in seeing justice done for Y.W. Leung, and not that she had anything to do personally with the subject matter.

[10] It appears that there were proceedings in the Court of Queen's Bench concerning a motor vehicle accident in February, 2001 which concluded in 2006. What came before Ouellette J. was a motion to stop, as an abuse of process, further proceedings that were a form of re-visiting the outcome of the earlier Court of Queen's Bench proceedings. Apart from a passionate presentation about what she said were the rights of people against insurance companies and lawyers, V.W. Wong did not identify herself as a person involved in the motor vehicle accident.

[11] In light of what V.W. Wong said in response to the appearance of A. Leung, the standing of V.W. Wong to appeal at all was now put into question. It is not necessary for me to determine any such point and it would not be appropriate for me to do so as (a) no affidavit was provided to the Court by the person who identified herself as A. Leung, and (b) any motion for rectification of the appeal record will be heard later by a panel. What the respondents choose to do as a result of these events is up to them.

[12] As to the merits of their applications for costs, the respondents submitted that there would be no recourse for either of the sets of respondents for any costs in relation to the appeal that the respondents may suffer. They contended that the special circumstances contemplated by the relevant rules of court was made out.

[13] The test for security for costs on appeal is discussed in: ***Glenbow Alberta Institute and Telus Corporation v. Megatrend Holdings Inc.*** (2008), 425 A.R. 72, 2008 ABCA 26; ***Pivotal Capital Advisory Group Ltd. v. NorAmera BioEnergy Corp.***, [2008] A.J. No. 844 (QL), 2008 ABCA 279 and ***H. (V.A.) v. Lynch***, [2009] A.J. No. 280 (QL), 2009 ABCA 104, leave denied [2009] S.C.C.A. No. 375 (QL). In sum, the test arises from current Rules 524 and 593(1.1), which has two basic

components: namely, that it must be just and reasonable to order security for costs and that the respondent to the appeal must demonstrate special circumstances for the Court to do so. Another significant factor is that once the respondent proves that special circumstances exist, the onus then shifts to the appellant to establish that the appeal has some reasonable prospect of success.

[14] V.W. Wong had filed a brief document in reply to this motion that provided no real answer to the respondent's submissions. It did not identify with clarity any basis upon which she could expose the other named appellants to the risks of the appeal. V.W. Wong had not provided any reliable evidence as to her financial state. She did claim orally that she had posted as much as $10,000.00 in security for costs on some past occasion. During the hearing, V.W. Wong also suggested that she wanted the opportunity to cross examine on the affidavits filed by the respondents in support of the application for security for costs. That request was denied as it was clear that such request was simply a frivolous attempt to delay matters.

[15] As the impact of a security for costs order on appeal can, depending on its terms, have a near injunctive effect against an appeal, a judge must make such a determination carefully and with circumspection: ***1159465 Alberta Ltd. v. Adwood Manufacturing Ltd.***, 2010 ABCA 273 at para. 6. As mentioned, a Court considering a case where security might debar an appeal should, in my view, give some consideration to the prospective merits of the appeal. See also ***Verth v. Howrie*** (1995), 169 A.R. 398, [1995] A.J. No. 712 (QL) at paras. 4 to 5; ***Arcuri v. Adamson*** (2006), 401 A.R. 218, 2006 ABCA 360 at paras. 6 to 8, leave denied [2006] S.C.C.A. No. 128 (QL); ***De Shazo v. Nations Energy Co.***, [2006] A.J. No. 51 (QL), 2006 ABCA 11 at paras. 3 to 6.

[16] Access to justice principles do not entitle a person to engage in litigation without costs consequences: ***DataNet Information Systems, Inc. v. Belzil***, 2011 ABCA 40 at para. 4 (currently on motion to the Supreme Court on Court File No. 34196). *A fortiori*, a person of doubtful standing who wishes to pursue a matter as a claimant in support of an eccentric or idiosyncratic or purely subjective theory of right should be prepared to put up security for costs for such litigation: see *e.g.* ***Arcuri***; ***Opal v. Boyd***, [2008] A.J. No. 57 (QL), 2008 ABCA 25 at paras. 3 to 6. As a matter of logic, the greater the chance that the appeal will be unsuccessful, the stronger the argument for the respondent seeking security for costs.

[17] From the material provided to me, and setting aside entirely the allegations of A. Leung and giving them no weight in this respect, there seems to me to be no clear prospect of success on the appeal. Therefore, the mitigating effect of a 'good argument' as against the imposition of an order for security for costs is absent. It is also significant that the decision below was to the effect that the litigation below was an abuse of process. Under the applicable schedule, the costs to which the respondents would be entitled on the dismissal of the appeal would be substantial.

[18] Under the circumstances, I direct that the appellant V.W. Wong shall post the sum of $5,000.00 as security for costs for her appeal for each of the two sets of respondents who have appealed. This means that she shall post $5,000.00 (cash) in security for costs in an account with this

Court to the credit of Chris Dundas, Dominion of Canada General Insurance Company and Ian Darrell Awid, and an additional (further) $5,000.00 (cash) in security for costs in an account with this Court to the credit of Vicki Giannacopoulos, Rebecca Cormack, Christina Lynne Tchir and McLennan Ross LLP, for a total of $10,000.00.

[19] The appellant V.W. Wong is given until the end of the business day on Friday, July 15, 2011 to post each security amount. Proceedings on the appeal are stayed until the appellant V.W. Wong posts that security for costs, except that V.W. Wong shall file her appeal digest by the date required by the rules. That filing will not trigger any time lines for the respondents. In the event that the appellant fails to post the full applicable security for costs amount by the end of the business day on Friday, July 15, 2011, then, pursuant to Rule 524(2), the appeal will be deemed abandoned. If the appellant posts the full applicable security as against only one set of the two sets of defendants, the appeal will be deemed abandoned as against the other set of defendants.

Application heard on May 19, 2011

Reasons filed at Edmonton, Alberta
this 25th day of May, 2011

Watson J.A.

Appearances:

D.G. Woodske
for the Applicants, Vicki Giannacopoulos, Rebecca Cormack, Christina Lynne Tchir and McLennan Ross LLP

S.E. Hart
for the Applicants, Chris Dundas, Dominion of Canada Insurance Company and Ian Darrell Awid

Respondent V.W. Wong in person

Tab 20

Court of Queen's Bench of Alberta

Citation: Hayden v Alberta Health Services (Foothills Medical Centre), 2017 ABQB 111

Date: 20170215
Docket: 1601 02565
Registry: Calgary

Between:

Ingrid Hayden

Plaintiff

- and -

Alberta Health Services, operating business at the Foothills Medical Centre in Calgary, Alberta, Ms. Vickie Kaminski, President and CEO of Alberta Health Service, Ms. Tina Giesbrecht, Ms. Laurie Blahitka, Ms. Jo Ann Beckie, Ms. Sara J. Pereira, Dr. Chris Spanswick, Mr. Mark Kent, Mr. Marty Sholtz, Ms. Linda Norton, Ms. Connie Lorraine Burkart. Ms. Suzanne Basiuk, Mr. Dr. W. Becker, Dr. A. Eloff, Dr. Lori Montgomery S, Mr. Rob Caswell, Ms. Cynthia Cook, Mr. Larry Walter, Mr. Christopher Dunn, Ms. Jaylene MacDonald, Mr. Ryan Dimitriou, Ms. Sara Gallow, Ms. Glenda Thompson, Ms. Stacey Roach, Ms. Brenda Ward, Ms. Katherine McCauley, Mr. Ryan Roche, Ms. Ingrid Martinez, Ms. Jenna Steen, Ms. Laura Nicholson, Mr. Dennis Holliday, Mr. David Silverstone, Ms. Johanne Edwards, Ms. Cathy Edmonds, Ms. Irene O'Callaghan, Ms. Ruth Sutherland, Ms. Dale Gyonor, Ms. Allison Kinney, Ms. Dawn Lake, Ms. Jann Lynn-George, Mr. Steven R. Jewell, Mr. Michael Tolfree, Mr. Derek Wojtas, Mr. Waqar Mughal, Ms. Linda Teskey, Mr. Matthew Murphy, Alberta Union of Provincial Employees, operating business in Edmonton, Alberta, Mr. Guy Smith, President of Alberta Union of Provincial Employee, Mr. Greg Maruca, Mr. Reynold Morgan, Mr. David Lardner, Ms. Stacey McKenna, Mr. Michael Hughes, Nugent Law Office, operating business in Edmonton. Mr. Patrick Nugent, Erin Ludwig (Ludwig) and Norton Rose Fulbright LLP

Defendants

Memorandum of Decision
of
J. Farrington, Master in Chambers

The Application

This is an application for security for costs. For the reasons that follow, I direct that security for costs be posted, but not in the amount sought by the applicant.

Background

[1] As is usually the case, context is important.

[2] The Plaintiff Ingrid Hayden was a long time employee of Alberta Health Services. She experienced some issues in the workplace, which led to disputes, which led to disciplinary action and termination by the employer, which led to grievances. The centrepiece of the action is a grievance hearing which took place in May, 2014. Ms. Hayden was assisted with the grievance and at the hearing by her union, the Alberta Union of Provincial Employees ("AUPE"). Alberta Health Services was represented by counsel Erin Ludwig of the Norton Rose Fulbright LLP (as that entity is named in the Statement of Claim) firm.

[3] Ms. Hayden was unsuccessful in pursuit of the grievance. She says that it was because the AUPE and AHS Counsel Ms. Ludwig colluded to suppress medical evidence that was of the utmost importance in pursuit of the grievance.

[4] No appeal or judicial review of the workplace arbitration was sought. Ms. Hayden says that was the fault of the AUPE. Ms. Hayden filed an Alberta Labour Relations Board complaint against her union alleging that it did not fairly represent her at the hearing. That complaint was dismissed by the Alberta Labor Relations Board, although Ms. Hayden has requested a reconsideration of that decision and a decision on the reconsideration motion is apparently still pending. Ms. Hayden did file an application in this Court for judicial review of the Alberta Labour Relations Board dismissal of her unfair representation complaint and that is an active and ongoing action.

[5] Ms. Hayden sues many individuals in this action. A large number of them were from Alberta Health Services, and some of them were from AUPE, including AUPE's counsel. She did not originally name the Alberta Health Services entity itself, and the AUPE entity itself, but on a different application, I allowed Ms. Hayden's application to file an Amended Statement of Claim naming those entities as parties.

[6] Ms. Hayden also sues Ms. Ludwig and Norton Rose Fulbright LLP, who were not her counsel, but counsel for Alberta Health Services, alleging among other things that they were part of a conspiracy to suppress her medical evidence, and that they had a duty to arrange for and call Ms. Hayden's medical evidence at the workplace arbitration.

[7] In the fall of 2016 a group of applications came to be scheduled before me. They included applications to strike the action by the AHS and AUPE entities and those individuals

involved with them. They also included an application by Ms. Hayden to file her Amended Statement of Claim and an application by Ms. Hayden to compel answers to questions and responses to undertakings that had been requested by Ms. Hayden from Ms. Ludwig in a questioning on a summary dismissal application brought by Ms. Ludwig and Norton Rose Fulbright LLP. That summary dismissal application is not, and has not been, before me. The remaining application that formed part of the group of applications that came before me was this application for security for costs.

[8] Inevitably, the time of argument for all of the applications before me exceeded the available and allotted time, and the Court made special accommodations for the parties to find available times to hear and continue the various applications.

[9] The time eventually allotted for hearing the security for costs application was January 20, 2017. On that day, the time for submissions again exceeded the available half-day special time allotted and the Court made a special accommodation to hear continuation of the matter on January 25, 2017, notwithstanding that the date was not a regularly scheduled Court sitting date.

[10] I have now heard all of the applications which originally came before me in the fall of 2016. On January 12, 2017 I delivered oral reasons dealing with the Alberta Health Services and AUPE applications to strike. I granted those applications for various reasons, including on the basis that issues pertaining to those entities were already determined in the labour relations setting, and the Amended Statement of Claim in this action was a collateral attack upon those proceedings and on issues which had already been decided. As indicated previously, judicial review proceedings remain extant on the AUPE matter and my oral reasons made it clear that they did not affect those proceedings.

[11] The action as framed against Ms. Ludwig and Norton Rose Fulbright LLP stands on a different foundation. It is not an attempt to argue issues that have already been decided. The allegations are tort allegations against them regarding conduct of the workplace arbitration. For that reason, they stand on a different footing.

The Law on Security for Costs Generally

[12] The approach of Chief Justice Wittmann in ***Attila Dogan Construction v. AMEC Americas Limited***, 2011 ABQB 175 on security for costs is often cited in security for costs applications. I intend to follow that approach, although in many respects this matter is largely fact driven. Ultimately, the factors enumerated in 4.22 of the Alberta Rules of Court play a critical role.

[13] Rule 4.22 provides:

> 4.22 The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;

(e) any other matter the Court considers appropriate.

[14] The Court considers the matter having regard to all of those factors, and any others that may be appropriate, in order to determine what is "just and reasonable", to use the wording of the rule.

Analysis of the Factors

Assets in Alberta

[15] Ms. Hayden has a home. There is mortgage security registered on the home and any equity in the home would likely be exempt from execution. There does not appear to be evidence of any other significant assets. This factor weighs in favour of the security for costs application.

Ability to Pay a Costs Award

[16] Ms. Hayden does not argue that she has an ability to pay a significant cost award. She submitted material, albeit very late in the proceedings, detailing her income and current cash flow and it demonstrates a likely inability to pay a significant cost award. Ms. Hayden does not argue otherwise. For that reason, and out of respect for Ms. Hayden's privacy on an issue that is not contested, I do not intend to discuss the specific details of her assets or financial position. This factor weighs in favour of the security for costs application.

Merits of the Action

[17] The vast majority of time during argument was spent on this point. Ms. Ludwig and Norton Rose Fulbright LLP argue strenuously that there is no duty of care owed from opposing counsel to the opposing litigant in a contested litigation manner (see ***Ma v. Quinn***, 2011 ABQB 103, ***Big Bear Hills Inc. v. Bennett Jones Alberta Limited Liability Partnership***, 2010 ABQB 764, ***Hanson v. Hanson***, 2009 ABCA 222, ***ESA Holdings Ltd. v. Shea Nerland Calnan LLP***, 2007 ABQB 78 and ***German v. Major***, 1985 ABCA 176 among other cases).

[18] Ms. Hayden took the Court through her analysis in great detail arguing that as Ms. Ludwig had taken some steps during the course of the litigation to obtain subpoenas in relation to medical records, she had undertaken obligations towards her in relation to those records. She argues that Ms. Ludwig having requested them, she was somehow obliged to ensure their use at trial. Ms. Ludwig replies that she was requesting them only so that she had access to them if needed in the event that Ms. Hayden elected to call medical evidence and raise medical issues at the arbitration. In other words, she wanted to be prepared. In the end, the AUPE called no medical evidence on behalf of Ms. Hayden. Ms. Hayden and the AUPE disagree as to why that happened, and that formed the basis for the unfair representation complaint to the Alberta Labour Relations Board.

[19] At times during argument Ms. Hayden seemed to acknowledge that in the ordinary course one would expect that a decision as to whether or not to call medical evidence at the arbitration on her behalf would fall solely to herself and her union. At other times, her argument was that somehow there was an obligation upon AHS counsel to make certain that the medical evidence was called if her union did not do so.

[20] Ms. Hayden raises many other arguments. She took the Court in great detail through what she says are inconsistencies in Ms. Ludwig's evidence. For example, she complains that Ms. Ludwig was sending arbitration related materials to AHS personnel in places in Alberta where Ms. Hayden thought they ought not to be sent. Of course, Ms. Ludwig can send materials to

persons at her client's organization that she chooses to send them to as she deems necessary. That is her call, not Ms. Hayden's. AHS was her client and she was at liberty to deal with her client as she thought necessary.

[21] Similarly, Ms. Hayden made much of identifying the finer details as to exactly when Ms. Ludwig was retained. She did this in advancing her theory that there was an ongoing conspiracy to remove her from her position. While there may be some minor inconsistencies and lost recollections on dates, the terms of the retainer are between Ms. Ludwig and AHS, and the terms of what was expected from Ms. Ludwig by AHS at any given time were between Ms. Ludwig and AHS. Ms. Ludwig was actively involved at the workplace arbitration hearing and that is the crux of the action. There is no material that on its face would appear to be indicative of a conspiracy as alleged.

[22] As to the merits of the action aspect, Ms. Ludwig and Norton Rose Fulbright LLP have met their onus us to show an arguable defence. This factor tends to support these defendants' application for security for costs.

Would an order unduly prejudice the plaintiff's ability to continue the action?

[23] Ms. Hayden emphasized this point during her submissions and she provided authorities. She cited ***Parkland Industries Ltd. v. 897728 Alberta Ltd***, 2015 ABQB 10, ***Crothers v. Simpsons Sears Ltd.***, 1988 ABCA 155, ***Trosin v. Sikora*** 2002 ABQB 195, ***Estate Associates Inc. v. 1645112 Ontario Ltd.*** 2016 ONSC 150, ***Reset Electronics Inc. v. Hydro One Networks Inc.***, 2016 ONSC 921, ***Thomas Fuller Construction Co. v. Bisson***, 2016 ONSC 2684, ***Triple A Farms v. State Agriculture Development Inc.***, 2014 SKQB 369 and ***Hornbrook v. Hornbrook***, 199 ABQB 52.

[24] Ms. Hayden urged the Court to do what she referred to as "justice" in this case, and not require the posting of security because posting the requirement to post security could well have a significant impact on her ability to carry on the action. There is no doubt that such an order may well have that impact.

[25] "Justice" is an often referred to concept, but in this context, what does that term really mean? And who is "justice" meant to serve?

[26] In ***Hryniak v. Mauldin***, [2014] 1 SCR 87 Karakatsanis, J. held at paragraph 23:

> This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

[27] In ***Liu v. Tangirala***, 2005 ABQB 246, Lefsrud, J. held at paragraph 31 (paraphrasing from Watson, J. in ***Crocker-McEwing v. Drake***, 2001 ABQB 13):

> Justice Watson considered the effect of a security for costs application on an impecunious plaintiff, stating that it is not desirable to impose a security for costs requirement that simply ends a meritorious action. Justice Watson went on, however, to state that harm to the defendants cannot simply be dismissed if the action is doubtful. He advocated an approach whereby the Court should look first at the realities of potential losses to the parties to determine if there could be a serious impairment of justice, and then consider the relative strength of the positions of the parties (para. 62). Justice

Watson concluded that while a high level of security for costs would effectively end the action, a more modest order would not necessarily do so. Furthermore, the plaintiff's action was "weak" while the defendant's position was, on its face, sound enough to invoke the Rule. Security for costs was ordered.

[28] Lefsrud, J. further held at paragraph 35:

> Based on the foregoing, whether an impecunious plaintiff can be required to put up security for costs will be largely fact driven and will require the Court to undertake a careful balancing of the competing considerations in the individual circumstances of each application.

[29] In ***Crocker-McEwing v. Drake***, which was cited by Lefsrud, J., Watson J, held:

> The fundamental policy balance is between the desire not to unnecessarily or unfairly impede access to the Courts by legitimate and bona fide Plaintiffs and the desire to ensure that the administration of justice is not perverted by encouraging risk-free and doubtful litigation claims by Plaintiffs to the harassment of, and to the imposition of practically unrecoverable cost upon, Defendants who are possessed of facially meritorious answers to such claims.
>
> Both policy considerations deserve great respect. Access to the Courts is a matter going to the very heart of the viability and credibility of the administration of justice. Limitations on that access should be driven by strong grounds of policy: see e.g. B.C.G.E.U.[11]. On the other hand, the uses of recoverable and case-related costs has long been accepted as a means of regularizing the processes of Courts and ensuring fairness therein. Moreover, the use of costs is to serve the further aim of discouraging the phenomenon of legal proceedings which become the tool of the recreational litigant or, worse, the litigation terrorist. Judicial notice can, arguably, be taken about the litigation atmosphere of our great southern neighbour. There, costs do not have the same function or characteristics as they do in Canada.

[30] In my view, justice in the circumstances of this application necessarily entails an objective consideration of the fact situation and the law, in a way that is fair to all of the parties to the litigation. Justice is not viewed solely from the subjective perspective of one of the litigants. While the plaintiff deserves the right to proceed with a meritorious case, and that right merits protection on the facts in many cases, a defendant equally deserves at least some protection from the costs consequences of a case that is perhaps less than meritorious on its face.

[31] The dividing line in the cases appears to be a consideration of the merits of the matter generally. The cases support the proposition that no security should be ordered when the claim has been demonstrated to have arguable merit. On the other hand, the case for the non-posting of security is weaker if a case has demonstrable frailties.

[32] There is no doubt that Ms. Hayden genuinely feels strongly about her position. She has every right to commence an action and she has done so. Once she has done so, however, that also engages rights for those persons against whom an action has been commenced. Serious allegations have been made by Ms. Hayden. In fact, it is hard to envision a more serious allegation against a litigation lawyer than being accused of being part of an alleged conspiracy to suppress evidence.

[33] A person of who makes those allegations is subject to significant and potentially aggravated cost awards if the allegations are not proven. The law is problematical if allegations of that nature can be made with impunity by someone who is not in a position to honour a costs award unless the allegations appear to have reasonably strong preliminary merit. Defendants are entitled to the benefits (and subject to the burdens) of the Rules of Court in the same way as are plaintiffs. The potential of a costs award is a check and balance in the system.

[34] While I am mindful of Ms. Hayden's strong argument that the effects of a security for costs award may impact her ability to conduct this litigation, I must consider the application based upon the law, and based upon the facts. The facts of this matter are that the claim as against Ms. Ludwig and Norton Rose Fulbright LLP is an extremely novel one, because the cases consistently hold that a duty such as that argued by Ms. Hayden does not exist. To find such a duty would place opposing counsel in the untenable position of owing duties to both sides in an adversarial system. Short of evidence of a fact situation that created a duty here, the road appears to be a difficult one for Ms. Hayden.

[35] Ms. Hayden will have every opportunity to prove issues of merit for trial at the defendants' summary judgment application when it is heard, and moving forward with this matter generally. Based upon the evidence at this stage, however, her task appears to be a daunting one.

[36] This is not the type of meritorious case that cries out for an exception to the normal security for costs considerations. The exception that has been traditionally carved out is for cases that have demonstrable merit. Unfortunately for Ms. Hayden, this one case does not fall into that category in light of the applicable law and the facts.

Other factors

[37] Ms. Ludwig and and Norton Rose Fulbright LLP argued that there are previous unpaid costs awards. Ms. Hayden submitted evidence that most of those have been paid and she acknowledges that the costs awards totaling $11,000.00 that I made in my oral decision of January 12, 2017 dismissing her claims against AHS and AUPE have not been paid. Those are very recent and I have not regarded those as a significant factor in my decision.

[38] I further note that the litigation itself has been contentious. There have been numerous Court applications and inevitably the Court applications have exceeded the typical time available for a half day special. In particular, there were applications dealing with the issue of who should pay the examining reporter cost when Ms. Hayden was questioning, and a lengthy hearing regarding an attempt to compel answers by Ms. Hayden. Ms. Hayden was unsuccessful on both of those applications. I have regarded these applications as a factor, although a small one, simply to recognize that the current litigation has the potential to be more expensive than many other actions as a result of the fact that there have been a number of motions that ought to have been unnecessary.

Result

[39] Considering all of the above, I order that security for costs be posted by Ms. Hayden. Ms. Ludwig and Norton Rose Fulbright LLP sought approximately $50,000.00 through to trial. I decline to order that amount at this time for several reasons. One reason is that if the defence case is as strong as the defendants contend, the case may not need to go to trial. The primary

reason is that the Court may order the phased posting of security for costs in its discretion. I find that a phased approach would be appropriate in this case.

[40] I direct that the amount of $18,000 be posted with the Clerk as security for the costs of Erin Ludwig and Norton Rose Fulbright LLP within 120 days of the date of these reasons.

[41] I have selected that time frame in order to provide Ms. Hayden with a reasonable period of time for raising the required security, and for her to consider all of the interrelated parts of her actions generally and decide where to best allocate her resources. The action is stayed as against Ms. Ludwig and Norton Rose Fulbright LLP pending the posting of the security. If the security is not posted within the required time frame, the action is dismissed without further order. These defendants shall have leave to reapply for further security after both their summary judgment application has been heard (or withdrawn) and their Affidavit of Records has been served.

[42] Because the issue was raised previously, and assuming posting of the security such that the stay is lifted, I confirm for clarity that I make no direction as to whether these defendants' affidavit of records need be provided prior to the summary judgement application being heard or not. If the parties cannot agree, that issue will need to be resolved by application having regard to ***P. Burns Resources Limited v Honourable Patrick Burns Memorial Trust***, 2015 ABCA 390 principles.

Heard on the 20th and 25th days of January, 2017.

Dated at the City of Calgary, Alberta this 15th day of February, 2017.

J. Farrington
M.C.C.Q.B.A.

Appearances:

Ingrid Hayden
Plaintiff
Self Represented Litigant

Caron & Partners LLP
R.J. Daniel Gilborn
for the Defendants Erin Ludwig and Norton Rose Fulbright LLP