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COURT OF APPEAL OF ALBERTA

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November 6, 2017

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Re: ***Priscilla Kennedy (A) v. Roland Twinn (R) and others***
Appeal No. 1703-0239AC

This is to advise that the reserved judgment in the above named case will be released the morning of **November 7, 2017**. On that day, **between 9:30 a.m. and 10:00 a.m.**, a copy of the judgment will be sent to you as set out above.

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

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

Thank you,

for Deputy Registrar
Court of Appeal – Edmonton
/bt

☑ Date: NOV-7, 2017

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

Thank you.

In the Court of Appeal of Alberta

Citation: 1985 Sawridge Trust v 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 . . .

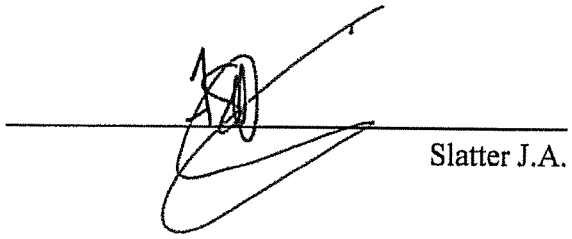
The respondents argue that no such error can be identified here, and that permission to appeal should not be granted because the decision below is "correct". This argument misapprehends the test for permission to appeal, as well as the role of individual appellate judges who hear applications for permission 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