COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1703-0239AC
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 SAWIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
STATUS ON APPLICATION:	Interested Party
RESPONDENTS (ORIGINAL APPLICANTS):	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, AND CLARA MIDBO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST (The "Trustees")
STATUS ON APPEAL:	Respondent
STATUS ON APPLICATION:	Respondent
RESPONDENT:	PUBLIC TRUSTEE OF ALBERTA
STATUS ON APPEAL:	Not a party to the Appeal
STATUS ON APPLICATION:	Not a party to the Application
INTERVENOR:	THE SAWRIDGE BAND
STATUS ON APPEAL:	As determined by the Court
STATUS ON APPLICATION:	As determined by the Court

INTERESTED PARTY	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers and Sisters
STATUS ON APPEAL:	Appellant
STATUS ON APPLICATION:	Applicant
DOCUMENT:	**MEMORANDUM OF ARGUMENT OF THE TRUSTEES TO THE APPLICATION BY PRISCILLA KENNEDY FOR ADVICE AND DIRECTION ON LEAVE TO APPEAL THE ISSUE OF SOLICITOR CLIENT COSTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora & Anna Loparco Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB
CONTACT INFORMATION OF ALL OTHER PARTIES:	Field LLP 2500, 10175 - 101 Street Edmonton, Alberta T5J OH3 Attention: P. Jonathan Faulds, QC Phone: 780-423-7625 Fax: 780-429-9329 File: 65063-1 Counsel for the Appellant, Priscilla Kennedy PARLEE MCLAWS LLP 1700 Enbridge Centre 10175-101 Street NW Edmonton, AB T5J OH3 Attention: Edward Molstad, QC & Ellery Sopko Phone: 780 423 8500 Fax: 780 423 2870 Counsel for The Sawridge Band Maurice Felix Stoney 500 4th Street NW Slave Lake, AB TOG 2A1

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I. INTRODUCTION

1. On April 12, 2016, Maurice Stoney ("Stoney") and his 10 brothers and sisters (the "Stoney Applicants") applied to be added as parties or intervenors in the within action, commenced by the trustees ("Trustees") of the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "1985 Trust" or "Trust"). The application also sought advance costs to be paid by the Trust to the Stoney Applicants (the "Stoney Application"). The Sawridge First Nation ("SFN") brought an application to be granted intervenor status, which was opposed by the Stoney Applicants.

2. On July 12, 2017, the Honourable Justice D.R.G Thomas ("CM Judge" or "Justice Thomas") issued a Case Management Decision (Sawridge #6), which included an Interim Court Filing Restriction Order for Maurice Felix Stoney as a result of a finding of abusive and vexatious litigation. Justice Thomas ordered Solicitor and Own Client Costs against Mr. Stoney and invited submissions from the parties as to whether his lawyer, Ms. Kennedy, should also be held responsible for some or all of the costs.[1]

3. In Case Management Decision, Sawridge #7, Justice Thomas ordered Solicitor and own Client costs be paid jointly and severally by Mr. Stoney and Ms. Kennedy to the Trustees and SFN.[2] Sawridge #6 and Sawridge #7 are separate decisions.

4. This brief addresses whether permission is required by Ms. Kennedy to appeal the costs ordered against her personally. The Trustees concur with the submissions made by SFN and submit that leave of the Court is required and should be denied.

II. LAW AND ARGUMENT

A. Whether Appeal of a Cost Award Requires Leave

5. Ms. Kennedy argues that leave is not required for the appeal of costs against her personally since the costs are a sanction. The Trustees submit that while the costs award may also have the effect of being a sanction arising from inappropriate behaviour, the purpose is to compensate the successful party. Rule 14.5(1)(e) is clear that there is no automatic right to appeal costs of any nature. Thus, leave must be granted in order to permit an appeal to go forward.

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

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

6. The leading case in respect of costs against a lawyer, which was relied on by the CM Judge, is *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*[3]. The Court held in *Jodion* 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...".[4]

7. Leave to appeal is required for any costs award, including one against a lawyer personally. In *Young v Young*[5], the BC Court of Appeal, held that Mr. How, a lawyer against whom costs had been awarded personally and Burnaby Unit, a third party against whom costs had been awarded, required leave to appeal. It stated: "[i]n my view the proper interpretation of s.6.2 leaves no doubt that in this jurisdiction a person seeking to appeal costs only, does require leave... I am reinforced in that view when I come to the application on behalf of the Burnaby Unit. ...There is no ambiguity about the provisions of s.6.2. Applying the usual Rules of Statutory Interpretation, in my view it is clear that leave is required."[6] Section 6.2 of the *Court of Appeal Act* and Rule 14.5 (1)(e) of the *Alberta Rules of Court* are similar.[7]

8. The above proposition supports the fact that although Rule 10.50 is listed under the heading entitled Sanctions, costs awarded under this Rule are not any different from any other costs award. Costs, regardless of the level of the award, and regardless of whether Ms. Kennedy is a non-party, require leave of the court to be appealed.

9. Although not raised by the Applicant, the Trustees acknowledge that since Mr. Stoney has also filed an appeal, it is possible for the Court to interpret Ms. Kennedy's appeal as an appeal that is not only as to costs (Rule 14.5(1)(e)). However, it is important to note that the Stoney appeal, which appeals Sawridge #6 is separate from this appeal and has been filed separately. Ms. Kennedy's appeal appeals Sawridge #7 and is strictly regarding costs against her personally. Further, Mr. Stoney's appeal is unlikely to proceed since he has not complied with the rules on appeal. SFN and the Trustees are bringing a security for costs application against Mr. Stoney. If successful, given that Mr. Stoney has not paid costs to date, it is unlikely he will be able to post security and his appeal will be struck.

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[3] *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 ("*Jodoin*") **[TAB 3]**

[4] *Jodoin* at para 18 [emphasis added] **[TAB 3]**

[5] *Young v Young*, 1990 CarswellBC 1465 ("*Young* 1990") **[TAB 4]**

[6] *Young* 1990 at paras 3-4 **[TAB 4]**

[7] Section 6.2 of the *Court of Appeal Act* and Rule 14.5 (1)(e) of the *Alberta Rules of Court*, Alta Reg 124/2010 ("*Rules of Court*") **[Tab 5]**

10. The Stoney appeal should not be interpreted as "a related substantive appeal". Moreover, if the Stoney Appeal is dismissed, only the Kennedy appeal as to costs remains, which would require leave.

B. The Test for Leave

11. The test for leave is set out in *Bun v Seng*[8] at para 4.

(a) Ms. Kennedy's Appeal of Costs is not a Good Arguable Case having Merit

12. The first portion of the test requires that the party seeking leave to appeal a costs award demonstrate a 'good arguable case having sufficient merit to warrant scrutiny by this court'.

13. The standard of review of a costs award against a lawyer is high. In *Jodoin,* the Court held that "[i]t 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". The Court further held: "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."[9]

14. The Court in *Bun* also held that "the case law is clear that permission to appeal costs orders should be granted sparingly, and a party seeking permission to appeal such an award must meet a high threshold. ...Discretionary orders of case management justices are similarly afforded deference, and absent an error of law, this Court will not interfere unless the decision was unreasonable."[10]

15. Recently, in *Brill v Brill*, the Alberta Court of Appeal summed up the law on costs: "Rule 14.5(1)(e) of the Alberta Rules of Court ... requires permission to appeal 'a decision as to costs only'. Permission should be granted sparingly. The purpose of the predecessor of this rule was 'to bring finality to cost orders and to conserve this Court's time by screening out hopeless appeals on the issue of costs alone.'"[11] The Supreme Court in *Jodoin* stated: "In *Young* [1993 CanLII 34 (SCC)], the Court held that such a sanction is justified if 'repetitive and irrelevant material, and excessive motions and

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[8] *Bun v Seng*, 2015 ABCA 165 ("*Bun*") **[Tab 6]**

[9] *Jodion* at paras 51, 52 [*Emphasis added*] **[TAB 3]**

[10] *Bun* at paras 4-5 [*Emphasis added*] **[Tab 6]**

[11] *Brill v Brill*, 2017 ABCA 235 [*Citations omitted*] [*Emphasis added*] **[TAB 7]**

applications, characterized' the conduct in question and if this was the result of a lawyer's acting 'in bad faith in encouraging this abuse and delay'".[12]

16. The Trustees submit that given the high threshold and high level of deference afforded to Justice Thomas, who was uniquely positioned to observe Ms. Kennedy's behaviour, leave should be denied.

i. Ms. Kennedy did not have Sufficient Grounds for a Representative Action

17. At no time in the application did Ms. Kennedy advise the Court that she was bringing a representative action pursuant to Rules 2.6, 13.11 of the *Rules of Court* and the *Class Proceeding Act*.[13]

18. Ms. Kennedy is a seasoned litigator and would be well aware of the requirements of advancing a representative action. Her pleading and the materials were wholly deficient in this regard (Rule 13.11). Justice Thomas' finding that she did not have instructions or legal basis to file the application was correct. Ms. Kennedy states that paragraph 31 of the Trustees' brief suggests an acknowledgement that her application was a 'representative action'. This is an incorrect reading of that paragraph in the Trustees' brief. It merely highlights the confusion in the materials that purport to be representative, but fail to meet any of the criteria required.

19. When questioned by the Court about the apparent representation of additional individuals listed in the Stoney Application, Ms. Kennedy referred to the Federal Court Rules and not the applicable Alberta *Rules of Court*.[14]

20. In the Stoney Application, each of the Stoney Applicants is named personally. It is only in this leave to appeal application at the Court of Appeal that Ms. Kennedy makes reference to the Alberta *Rules of Court* and a purported representative action. It is clear from her pleading that Ms. Kennedy intended to seek party status for each of the brothers and sisters individually and costs indemnification for each of them.

21. The CM Judge did not err in concluding that this was a muddled claim as Ms. Kennedy confused the Court and wasted its time with respect to whether this was a representative action, or whether she had the basis for a representative action. It was not clarified in materials filed by Ms. Kennedy, Mr.

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[12] *Jodion* at para 28 **[TAB 3]**

[13] Rules 2.6, 13.11, *Rules of Court* **[TAB 8]**

[14] Written Response Argument of Maurice Stoney on Vexatious Litigant Order at para 26 **[TAB 9]**

Stoney's affidavits or at Mr. Stoney's questioning. It is only now, in retrospect, that Ms. Kennedy is attempting to characterize the application as a representative action.

ii. Mr. Stoney's Application was a Clear Abuse of Process

22. In terms of whether the Stoney Application constituted a serious abuse of process, the Trustees submit that pages 4 through 6 of the brief filed in respect of this application is yet another attempt by Ms. Kennedy to re-litigate those arguments, which have been rejected by the court repeatedly.

23. Paragraphs 14-17 of Ms. Kennedy's brief should raise even more alarm bells. She attempts to advance "new" arguments, which she acknowledges were not before the previous courts that adjudicated her client's membership issues, but states that they should now be available for argument in this application. It has been made abundantly clear on many occasions that any further arguments by Mr. Stoney regarding membership are completely barred. They are barred not only because they are *res judicata* and bound by *stare decisis*, but they are barred because of a Court Order dated December 17, 2015[15], where it was clearly stated that membership was not an issue to be addressed in this action.

24. Ms. Kennedy failed to appreciate the nature of the Trustees' application, which is merely to seek advice and direction on the beneficiary definition of the Trust. She continued to try to fit a square peg into a round hole by arguing the right to band membership of an enfranchised person. She refused to accept the futility of her argument given that the Trust documents specifically state that enfranchised persons are not entitled to be beneficiaries under the Trust.[16]

25. This case is about the definition of beneficiaries and not about whether it is fair that enfranchised persons are not entitled to be members.

iii. The CM Judge Applied the Proper Test for an Award of Costs

26. The CM Judge relied on the Supreme Court of Canada's decision in *Jodoin* where the Supreme Court of Canada held that the courts have the power to manage and control the proceedings before them, including the inherent power to control any abuse and prevent the use of procedure.[17]

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[15] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ("Sawridge #3") **[TAB 10]**

[16] 1985 Trust Deed at pp. 3-4 **[TAB 11]**

[17] *Jodoin* at para 16 **[TAB 3]**

27. Ms. Kennedy knew that the arguments made by Mr. Stoney had been rejected repeatedly in the past. They had been rejected in five different tribunals and were again reiterated in this Court of Appeal when Ms. Kennedy applied for leave to extend the time for appealing Sawridge #3.[18]

28. It is clear that Ms. Kennedy knowingly used court resources for the purpose of obstructing the orderly and efficient conduct of a judicial process that was well underway. There is no other conclusion other than to say that her actions were abusive, frivolous and vexatious, given that final court decisions regarding Mr. Stoney were known to Ms. Kennedy prior to advancing the application. She persisted in submitting the same arguments to show that he was not a vexatious litigant when she filed briefs for Sawridge #8. She again persists in her submissions to this Court.

29. This Court must uphold the decision of the CM Judge, who had the discretion to control the process in his court after witnessing the multiple attempts to protract, expand and delay the court process without any regard for the waste of judicial and Trust resources. One wonders how many times the Trustees and SFN need to hear that Mr. Stoney has an automatic right to membership under section 35 of the Constitution.

30. As in *Young* (cited in *Jodoin* at para 28)[19] the filing of repetitive and irrelevant material, excessive motions and applications and acting in bad faith in encouraging abuse and delay rendered the compensatory order for costs against a lawyer justified, similarly the fact that Ms. Kennedy acted in bad faith in encouraging this abuse and delay warranted a personal cost award. Such costs award was within the CM Judge's discretion and it was appropriate in this case.

31. In *Balogun v Pandher,* the Court heard an appeal of a case management judge's decision denying an application to have a jury trial. The standard of review was stated as: the factual basis for an exercise of discretion was reviewed on a palpable and overriding error standard; the exercise of discretion was reviewed deferentially and appellate intervention was only merited if the case management justice had "clearly misdirected himself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice". The rationale for this standard of review was stated as: "case management would not be a very effective method for civil proceedings if rulings of case management judges could simply be re-visited as of right at the instance of an unsatisfied party to the action"[20]

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[18] See portions of the Memorandum of Argument of SFN, paras 7-12 **[TAB 12]**

[19] *Jodoin* at para 28 **[TAB 3]**

[20] *Balogun v Pandher*, 2010 ABCA 40, at p. 3 **[TAB 13]**

32. In *Beaconhill Service (2000) Ltd. v Esso Petroleum Canada*, the Appellants challenged the decision of a Chambers Judge with respect to the removal of counsel. The Court held that "discretionary rulings that affect the procedural course of legal proceedings should generally be disturbed on appeal only if clearly, unreasonable or legally erroneous, which in practical terms means "only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice". Exercises of judicial discretion should be reviewed on a deferential basis so as to facilitate the operation of the judicial system for all parties.[21]

33. The arguments on page 7 of the Appellant's brief again show that Ms. Kennedy fails to recognize that we are dealing with a Trust and the definition of the beneficiaries in that Trust. The arguments on page 7 clearly show that Mr. Stoney intends to re-litigate, in front of this Court, a federal matter that involves Mr. Stoney's membership in the SFN. These repetitive arguments were an aggravating factor before the CM Judge and should be an aggravating factor to the Court of Appeal such that leave should not be granted.

34. Despite the futile nature of the application, Ms. Kennedy further sought to dissipate the Trust property by seeking full indemnity costs for her own client.

35. Deference to the CM Judge is warranted and this decision should not be disturbed as costs awards are a significant tool that can be used by a Judge to control process.

iv. The Costs Award was Based on Relevant Considerations and Aggravating Factors

36. Ms. Kennedy's advancement of this application was unnecessary, vexatious, frivolous, *res judicata*, and an abuse of process.

37. Furthermore, the conduct of Ms. Kennedy at the cross-examination was obstructionist and aided and abetted her client's vexatious litigation.[22]

38. The objections, particularly those to factual questions that relate to the stated "right" to membership status were improper objections by Ms. Kennedy, which impeded the flow of the examination and prevented the examiner from being able to use the examination to test the truthfulness of the evidence. It is to be noted that, by pages 63 and 64, Mr. Stoney himself was objecting to questions,

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[21] *Beaconhill Service (2000) Ltd. v Esso Petroleum Canada*, 2012 ABCA 269 at paras 4-5 **[TAB 14]**

[22] Questioning on Affidavit Transcript of Maurice Stoney filed October 21, 2016 ("Stoney Questioning Transcript"), Index of Objections **[TAB 15]**

which his counsel condoned. This is improper and ought to have been followed by a direction by his counsel to answer the proper question. As a result of this behaviour, the Trustees abandoned their questioning determining it would serve no useful purpose.[23]

39. In paragraph 22 of her brief, Ms. Kennedy suggests that she was not warned that she should not bring this application as suggested by Justice Thomas because Sawridge #4 and #5 were rendered after she submitted her application and her brief. First, if she agrees that Sawridge #4 and #5 were warnings, once those decisions had been rendered, she should have withdrawn her application. Further, in the application at which Ms. Kennedy's associate attended on August 24, 2016, the court was clear that it was concerned about clogging this litigation up with unnecessary parties and frittering the Trust resources.[24]

40. Further, in Sawridge #3, which was rendered on December 17, 2015, well in advance of the Stoney application, it was made clear that membership is not to be argued in this action. A review of paras 32-35 of Sawridge #3, shows that the court considered the *Stoney v Sawridge First Nation* case as a factor in its decision to issue a warning. This is the exact case in which Ms. Kennedy argued for Mr. Stoney's membership rights.

41. Ms. Kennedy would have known that the court completely changed its position on membership following the Federal Court's decision in *Stoney v Sawridge First Nation*[25], since she was counsel. The Court in Sawridge #3 specifically stated that the Federal Court is the better forum and that there was no need, nor was it appropriate, for the Court to address the subject. A review of paragraphs 35, 49-52, 54-55, 69-70 of Sawridge #3[26] all show that membership was not an issue to be decided in Sawridge #3.

42. Ms. Kennedy appealed Sawridge #3 and sought leave to extend the time for filing an appeal. When she read Sawridge #3, she would have known that the Stoney FC Decision was compelling and influenced the decision of the court. Yet, she persisted to the Court of Appeal and was unsuccessful, partly because this Court found that there was no ability to succeed based on the grounds brought by Ms. Kennedy, which are similar to the arguments she is making now. Ms. Kennedy was warned by the Court of Appeal in the appeal of Sawridge #3 that her application was futile.

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[23] Stoney Questioning Transcript at pp. 63-64 **[TAB 16]**

[24] Transcript of hearing on August 24, 2016 at pp. 14-15 **[TAB 17]**

[25] *Stoney v Sawridge First Nation*, 2013 FC 509 (the "Stoney FC Decision") **[TAB 18]**

[26] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 **[TAB 10]**

43. Finally, the Trustees submit that the appeal by Ms. Kennedy is doomed to failure and leave should not be granted because of the concessions made by her counsel in respect of the application to decide whether costs should be awarded against her. The admissions of Ms. Kennedy's counsel, Mr. Wilson, clearly state that the application should not have been brought, was hopeless from the start and an abuse of court processes. Her own counsel's submissions suggest that there can now be no denial of the finding that the application advanced by Ms. Kennedy was ill-advised. Given these admissions, the appeal cannot succeed.[27]

44. Further, the Court should consider whether the application by Mr. Stoney is the deliberate action of Ms. Kennedy in light of the fact that at Mr. Stoney's Questioning, she admitted that her client doesn't read decisions and doesn't understand them.[28] Further, she knew that his lack of resources would make any costs award against him completely moot. Ms. Kennedy was the primary architect behind this application because Mr. Stoney clearly could not have made that judgement call on his own, nor could he have given the proper instructions in light of his lack of understanding of the proceedings.

45. Further, while Ms. Kennedy states that she is not involved in the appeal of Mr. Stoney's case, her firm's fax number is on the Notice of Appeal with a note to her from Mr. Stoney to have her call him.[29]

46. For all of the above reasons, there was an abundance of aggravating factors in this case to warrant solicitor and own client costs against Ms. Kennedy.

(b) The Issue is Not Important Enough to Warrant an Appeal

47. While it is not disputed that the issue is important to Ms. Kennedy personally, the Trustees' position is that Ms. Kennedy is a professional, seasoned lawyer who ought to have known that her actions could have serious consequences, particularly in light of the warnings she had received to not wade into membership issues, not to engage in any actions that would fritter away the Trust and to avoid applications that would needlessly prolong the litigation. This appeal further exacerbates the situation and risks a devaluation of the Trust, which was set up for the benefit of the members of the First Nation.

48. Further, it is clear from the record that the Trustees acted in good faith in accordance with their fiduciary duties to the beneficiaries by seeking an efficient and cost-effective solution to the issues.

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[27] Transcript of proceedings held July 28, 2017 at pp. 5,7 **[TAB 19]**; Sawridge#7 at para 18, 129-130 **[TAB 2]**

[28] Stoney Questioning Transcript at pp. 9, 26 **[TAB 20]**

[29] Civil Notice of Appeal filed by Maurice Stoney [**TAB 21**]

49. Ms. Kennedy suggests that the amount being claimed in costs is excessive. While the amount has not been established, it is important to note that amount of solicitor client costs involved five different applications and are an award of costs for two different parties. Thus, the costs are reasonable given the number of applications and the fact that this was a complex matter. Further, the briefs filed by Ms. Kennedy on behalf of Mr. Stoney were very extensive involving hundreds of pages. She cannot file extensive briefs including historic and constitutional arguments and expect that the replies will not be that extensive.

50. This case does not warrant an appeal because it is without question that an award against Ms. Kennedy was justified.

(c) The Cost Appeal has No Practical Utility

51. Ms. Kennedy suggests that the award of costs against her creates new precedent that ought to be reviewed by the Court of Appeal so that there is clarity on the issue. The Courts have awarded costs against solicitors on numerous occasions; it is specifically provided in Rule 10.50 of the *Alberta Rules of Court*.

52. Moreover, based on the cases cited above, costs are a discretionary matter to which a high level of deference should be granted. This deference is even heightened when a Case Management Judge with a long history with the parties has ordered costs.

III. CONCLUSION

53. For the above reasons, the Trustees pray to this Honourable Court that leave of the Court is required and should be denied with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th DAY OF OCTOBER, 2017.

Estimated Time of Argument: 30 minutes

DENTONS CANADA LLP

PER: _____
for: Doris Bohora
Solicitors for the Trustees

LIST OF ATTACHMENTS AND AUTHORITIES

Tab	Authorities
1.	*1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 436 ("Sawridge #6")
2.	*1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 ("Sawridge #7")
3.	*Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26
4.	*Young v. Young*, 1990 CarswellBC 1465
5.	Section 6.2 of the *Court of Appeal Act* R.S.B.C. 1979, c.7 (see *Court of Appeal Act* and the amendment adding section 6.2 into the Act pursuant to *Miscellaneous Statues Amendment Act (No. 2)*, 1988) and Rule 14.5 (1)(e) of the Alberta *Rules of Court*, Alta Reg 124/2010
6.	*Bun v. Seng*, 2015 ABCA 165, 2015 CarswellAlta 854
7.	*Brill v. Brill*, 2017 ABCA 235, 2017 CarswellAlta 1246
8.	Rules 2.6 and 13.11 of the Alberta *Rules of Court*, Alta Reg 124/2010
9.	Written Response Argument of Maurice Stoney on Vexatious Litigant Order (para 26)
10.	*1985 Sawridge Trust v. Alberta (Public Trustee)*, 2015 ABQB 799 ("Sawridge #3")
11.	1985 Trust Deed (pp. 3-4)
12.	Portions of the Memorandum of Argument of SFN (paras 7-12)
13.	*Balogun v Pandher*, 2010 ABCA 40
14.	*Beaconhill Service (2000) Ltd. v. Esso Petroleum Canada*, 2012 ABCA 269
15.	Questioning on Affidavit Transcript of Maurice Stoney filed October 21, 2016, Index of Objections
16.	Questioning on Affidavit Transcript of Maurice Stoney filed October 21, 2016, pp. 63-64
17.	Transcript of the hearing on August 24, 2016. pp. 14-15
18.	*Stoney v Sawridge First Nation*, 2013 FC 509
19.	Transcript of proceedings held July 28, 2017, pp. 5,7
20.	Questioning on Affidavit Transcript of Maurice Stoney filed October 21, 2016, pp. 9,26
21.	Civil Notice of Appeal filed by Maurice Stoney

TAB 1

2017 ABQB 436
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

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

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

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

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

D.R.G. Thomas J.

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

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

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

Headnote

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

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

Aboriginal law --- Practice and procedure — Miscellaneous

Abuse of process — Chief of First Nation (FN) created particular trust in 1985 — Beneficiaries of trust were defined directly or indirectly by membership in FN — In 2011, trust commenced action against Public Trustee for advice and directions — Aboriginal man S was child of parents who had been members of FN but who had given up their family's Indian status and membership in FN in 1944 — S unsuccessfully applied to become member of FN,

and rejection of his application was upheld on judicial review — S brought application on his own behalf and on behalf of 10 siblings for order adding them as beneficiaries of trust — Application dismissed — S was third party attempting to insert himself and his siblings into matter in which they had no legal interest — Issue of S's potential membership in FN was closed, and there was no evidence indicating siblings had even taken steps to involve themselves in this litigation — Further, this application was collateral attack that attempted to subvert unappealed and crystallized judgment that had already addressed and rejected S's claims and arguments — As matter of court's inherent jurisdiction to control litigation abuse, S was given opportunity to provide written submissions as to whether his access to Alberta courts should be restricted and scope of any such restriction — Trustees and FN were given opportunity to make submissions on this issue and introduce additional relevant evidence.

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

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

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

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

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

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

I. Introduction

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

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

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

II. Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 The Sawridge Band intervention is appropriate since that response was made in reply to a collateral attack on its decision-making on the core subject of membership. The common law approach is clear; here the Sawridge Band is particularly prejudiced by the potential implications of the Stoney Application. Indeed, it is hard to imagine a more

fundamental impact than where the Court considers litigation that potentially finds in law that an individual who is currently an outsider is, instead, a part of an established community group which holds title and property, and exercises rights, in a *sui generis* and communal basis: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 (S.C.C.); *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 (S.C.C.).

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

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

A. Maurice Stoney

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

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

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

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

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

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

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

B. Sawridge Band

26 The Sawridge Band points to the decision in *Stoney v. Sawridge First Nation* and says the Maurice Stoney Application is an attempt to revisit an issue that was decided and which is now subject to *res judicata* and issue estoppel. Maurice Stoney is wrong when he argues that he automatically became a Sawridge Band member when Bill C-31 was

enacted. His Affidavit contains factual errors. Maurice Stoney's claim to be a Sawridge Band member was rejected in court judgments that Maurice Stoney did not appeal.

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

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

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

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

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

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

C. 1985 Sawridge Trustees

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

VI. Analysis

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

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

. . .

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

(4) The Court may

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

. . .

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

1. He is estopped from making this argument via his concession in *Huzar v. Canada* that this argument has no legal basis.

2. He made this same argument in *Stoney v. Sawridge First Nation*, where it was rejected. Since Mr. Stoney did not choose to challenge that decision on appeal, that finding of fact and law has 'crystallized'.

3. In *Sawridge #3* at para 35 I concluded the question of Band membership should be reviewed in the Federal Court, and not in the Advice and Direction Application.

3. In any case I accept and adopt the reasoning of *Stoney v. Sawridge First Nation* as correct, though I am not obliged to do so.

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

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

[Emphasis added.]

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

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

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

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

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

VII. Vexatious Litigant Status

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. any appeal from this decision.

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

VIII. Costs

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

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

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

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

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

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

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

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

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

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

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

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

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

[*Jodoin*, para 29]

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

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

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

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

1. the nature of interests in question;

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

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

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

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

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

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

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

Cross-application granted; application dismissed.

End of Document

TAB 2

2017 ABQB 530
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

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

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

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

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

D.R.G. Thomas J.

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

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

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

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

Headnote

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

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

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

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

I Introduction

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

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

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

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

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

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

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

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

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

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

II Background

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

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

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

III Evidence and Submissions at the July 28 Hearing

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

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

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

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

A. Priscilla Kennedy

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

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

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

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

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

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

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

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

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

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

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

B. Sawridge Band

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

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

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

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

27 The Sawridge Band again confirmed that the *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.) costs order against Maurice Stoney remained unpaid. The costs awarded against Maurice Stoney in *Stoney v. Twinn*, 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.) also remain unpaid. Kennedy in her written submissions indicated that Maurice Stoney and his siblings have limited funds. Kennedy should be made personally liable for litigation costs so that the Sawridge Band and Trustees can recover the expenses that flowed from this meritless action.

C. Sawridge Trustees

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

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

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

IV. Court Costs Awards vs Lawyers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

adhere to standards expected of legal professionals, such as politeness, and not abusing the courts personnel, processes, and resources:

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

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

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

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

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

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

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

B. Costs Awards Against Lawyers

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

51 Recent jurisprudence, and particularly *Jodoin*, has clarified the court's supervisory function in relation to lawyers. This is a facet of the inherent jurisdiction of a court to manage and control its own proceedings, which is reviewed in the often-cited paper by I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Leg Probs 23. The

management and control power is a common law authority possessed by both statutory and inherent jurisdiction courts (*Jodoin* at para 17), that:

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

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

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

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

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

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

55 Inherent jurisdiction provides the authority for a court to scrutinize and restrict persons who attempt to act as a litigation representative. This usually emerges in relation to problematic layperson representatives. For example, in *R. v. Dick*, 2002 BCCA 27, 163 B.C.A.C. 62 (B.C. C.A.), the British Columbia Court of Appeal evaluated whether an agent with a history of abusive litigation activities should be permitted to act as a representative. The British Columbia Court of Appeal concluded courts have a responsibility to ensure persons who appear before the court are properly represented, and more generally to maintain the integrity of the court process: para 7. Permission to act as an agent is a privilege subject solely to the court's discretion: para 6. A person who is dishonest, shows lack of respect for the law,

or who engaged in litigation abuse is not an appropriate agent. Similar results were ordered in *Gauthier v. Starr*, 2016 ABQB 213, 86 C.P.C. (7th) 348 (Alta. Q.B.); *Peddle v. Alberta Treasury Branches*, 2004 ABQB 608, 133 A.C.W.S. (3d) 253 (Alta. Q.B.); *R. v. Maleki*, 2007 ONCJ 430, 74 W.C.B. (2d) 816 (Ont. C.J.); *R. v. Reddick*, 2002 SKCA 89, 54 W.C.B. (2d) 646 (Sask. C.A.); *Law Society (British Columbia) v. Dempsey*, 2005 BCSC 1277, 142 A.C.W.S. (3d) 346 (B.C. S.C.), affirmed 2006 BCCA 161, 149 A.C.W.S. (3d) 735 (B.C. S.C.).

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

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

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

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

2. The Nuremberg Defence - I Was Just Following Orders

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

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

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

61 This duty is also reflected in the Law Society of Alberta *Code of Conduct*. Though that document largely focuses on lawyers' duty to their clients and interactions with the Law Society, the *Code of Conduct* also requires that a lawyer operate " . . . honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and

respect.": Chapter 5.1-1. The *Code of Conduct* then continues in Chapter 5.1-2 to identify prohibitions, including that a lawyer may not:

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

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

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

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

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

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

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

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

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

67 The professional standards expected of a lawyer as an officer of the court equally apply when a lawyer represents themselves. "[t]he lawyer as Plaintiff stands in a different position than a layman as Plaintiff.": *Botan v. St. Amand*, 2012 ABQB 260 (Alta. Q.B.) at paras 72-77, (2012), 538 A.R. 307 (Alta. Q.B.), aff'd 2013 ABCA 227, 553 A.R. 333 (Alta.

Q.B.). As Rooke J (as he then was) explained in *Parkridge Homes Ltd. v. Anglin*, [1996] A.J. No. 768 (Alta. Q.B.) at para 33 (QL), 1996 CarswellAlta 1136 (Alta. Q.B.):

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

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

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

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

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

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

3. No Constitutional Right to Abusive Litigation

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

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

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

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

74 I therefore conclude any lawyer who acts on behalf of a client who engages in frivolous, vexatious, or abusive litigation is potentially personally subject to a costs award. A lawyer who is the mechanism to conduct frivolous,

vexatious, or abusive litigation is not merely acting contrary of his or her obligations to the courts and other litigants. This is also a breach of a lawyer's obligations *to his or her own client*. By facilitating that misconduct the lawyer 'digs a grave for two.'

75 Restating this point:

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

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

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

4. An Exceptional Step

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

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

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

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

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

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

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

5. Abuse of the Court

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

82 *Chutskoff Estate v. Bonora*, 2014 ABQB 389 (Alta. Q.B.) at para 92, (2014), 590 A.R. 288 (Alta. Q.B.), aff'd 2014 ABCA 444 (Alta. Q.B.) is the leading Alberta authority on the elements and activities that define abusive litigation. That decision identifies eleven categories of litigation misconduct which can trigger court intervention in litigation activities.

These "indicia" are described in detail in *Chutskoff Estate v. Bonora*, however for this discussion it is useful to briefly outline those categories:

1. collateral attacks,

2. hopeless proceedings,

3. escalating proceedings,

4. bringing proceedings for improper purposes,

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

6. failure to honour court-ordered obligations,

7. persistently taking unsuccessful appeals from judicial decisions,

8. persistently engaging in inappropriate courtroom behaviour,

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

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

11. advancing OPCA strategies.

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Knowledge and Persistence

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

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

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

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

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

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

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

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

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

7. Examples of Lawyer Misconduct that Usually Warrant Costs

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

a. Futile Actions and Applications

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

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

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

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

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

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

b. Breaches of Duty

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

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

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

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

c. Special Forms of Litigation Abuse

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

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

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

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

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

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

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

d. Delay

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

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

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

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

C. Conclusion

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

119 This objective involves many actors. Parliament and the legislatures should design procedures and rules that better align with this objective. Some kinds of disputes, such as family law matters that involve children, are poor matches for

the adversarial court context. Judges and courts should develop new approaches, both formal and informal, to better triage, investigate, and resolve disputes. Judicial review and appeal courts should be mindful to limit their intrusion into the operation of subordinate tribunals.

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

V. Priscilla Kennedy's Litigation Misconduct

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

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

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

A. Futile Litigation

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

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

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

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

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

concluded (and I agree) that the result in *Stoney v. Sawridge First Nation* was already barred by issue estoppel - Stoney was attempting to " . . . relitigate the same issue that was conclusively determined in an earlier proceeding."

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

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

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

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

B. Representing Non-Clients

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Conclusion

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

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

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

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

E. Quantum of the Costs Award

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

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

VI. Conclusion

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

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

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

Solicitor and own client costs awarded against applicant and counsel.

TAB 3

2017 SCC 26, 2017 CSC 26
Supreme Court of Canada

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

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

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

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

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

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

Counsel: Daniel Royer, Catherine Dumais, for the appellant
Catherine Cantin-Dussault, for the respondent
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Mathew P. Good, Ariane Bisaillon, for the intervener the Trial Lawyers Association of British Columbia
Frank Addario, Stephen Aylward, for the intervener the Canadian Civil Liberties Association

Subject: Constitutional; Criminal; Human Rights

Headnote

Criminal law --- Trial procedure — Costs — Miscellaneous

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

extraordinary remedies for purely dilatory purpose with sole objective of obstructing orderly conduct of judicial process in calculated manner — It was therefore reasonable for motion judge to conclude that lawyer had acted in bad faith and in way that amounted to abuse of process, thereby seriously interfering with administration of justice — Furthermore, procedural safeguards were observed in this case — Therefore, circumstances of instant case were exceptional and justified award of costs against lawyer personally.

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

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

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

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

The Court of Appeal acknowledged that the motions for writs of prohibition should be dismissed. However, it was of the view that the motion judge should not have exercised his inherent powers to sanction conduct that had occurred in another court that itself had the power to punish for contempt of court. It concluded that, on the facts, the situation did not have the exceptional and rare quality of an act that seriously undermines the authority of that

court or that seriously interferes with the administration of justice. Accordingly, the award of costs was set aside. The Crown appealed before the Supreme Court of Canada.

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

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

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

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

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

Le juge des requêtes a conclu que la condamnation personnelle de l'avocat aux dépens pouvait se justifier en présence d'une procédure frivole qui dénote un abus grave du système judiciaire commis de propos délibéré. Le juge

des requêtes a estimé que les gestes intentionnels de l'avocat révélaient un tel abus et constituaient une conduite exceptionnelle justifiant sa condamnation personnelle aux frais. Les requêtes demandant la délivrance de brefs de prohibition ont ainsi été rejetées et l'avocat a été condamné personnellement au paiement des dépens. L'avocat a interjeté appel.

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

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

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

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

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

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

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

Comment

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

In *Cunningham v. Lilles* (2010), 73 C.R. (6th) 1 (S.C.C.), for example, the Court provided courts with a limited discretion to refuse permission to a criminal defence lawyer to withdraw from a case. *Quebec v. Jodoin* is a continuation of this trend, although on this occasion in a more contentious context. Despite indicating that ordering costs against a defence lawyer will be rare, the majority found that this particular lawyer had crossed the line into territory where punishment was justified. The dissenting justices have agreed with the principles and framework laid out by the majority; they differ only in their assessment of whether the conduct in this case was of a sufficiently egregious nature to justify the order for personal costs. In both *Cunningham* and *Jodoin*, the Court has also held that, although law societies carry the responsibility and power to discipline lawyers, so, too, do the courts. After *Jodoin*, defence lawyers may continue to vigourously defend the interests of their clients but they also must be mindful of the possibility that they may be subject to penalties if that vigour crosses the line into seriously frustrating or impeding the criminal process.

Tim Quigley

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Commentaire

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

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

aussi, sanctionner ces inconduites. Au lendemain de l'arrêt *Jodoin*, les avocats de la défense pourront continuer d'assurer vigoureusement la défense de leurs clients, mais ils devront également garder en tête qu'ils s'exposent à des sanctions si, d'aventures, ils devaient se risquer à nuire, voire faire obstacle au processus de justice criminelle.

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

I. Overview

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

2 The respondent is an experienced criminal lawyer and a member of the Barreau du Québec. In several impaired driving cases joined for hearing on a single motion for disclosure of evidence, he filed two series of motions on the same day for writs of prohibition against two judges of the Court of Québec, each time on questionable grounds of bias, apparently in order to obtain a postponement of the scheduled hearing. A first judge had initially been assigned to preside over that hearing, but a second one replaced the first unexpectedly at the last minute. In response to that unprecedented strategy, which resulted in the postponement of the hearing in the Court of Québec, the appellant, the Crown, asked not only that the motions be dismissed, but also that the costs of the motions be awarded against the respondent personally.

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

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

II. Context

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

6 However, the same morning, before the motions were served, the parties learned that another judge would be presiding over the hearing instead. The motions were therefore put aside, and the hearing on the motion for disclosure of

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

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

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

III. Judicial History

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

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

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

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

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

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

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

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

IV. Issue

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

V. Analysis

A. Awarding of Costs Against a Lawyer Personally

(1) Power of the Courts

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

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

18 There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice: *Myers* , at p. 319; *Pacific Mobile Corp. v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842 (S.C.C.) , at p. 845; *Cronier* , at p. 448; *Pearl c. Gentra Canada Investments inc.*, [1998] R.L. 581 (C.A. Que.) , at p. 587. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct (M. Code, at p. 121).

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

20 The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. Punishment for contempt is thus based on the same power the courts have "to enforce their process and maintain their dignity and respect" (*U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.) , at p. 931). These sanctions are not mutually exclusive, however. If need be, they can even be imposed concurrently in relation to the same conduct.

21 This being said, although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court (*Cronier* , at p. 449), the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt (I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Current Leg. Probs.* 23, at pp. 46-48).

22 As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public (s. 23 of the *Professional Code*, CQLR, c. C-26). However, the judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:

> The court's authority is preventative — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court. [Emphasis deleted]
>
> (*Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 35)

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

24 In most cases, of course, the implications for a lawyer of being ordered personally to pay costs are less serious than those of the other two alternatives. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. Moreover, as this appeal shows, an order to pay costs personally will normally involve relatively small amounts, given that the proceedings will inevitably be dismissed summarily on the basis that they are unfounded, frivolous, dilatory or vexatious.

(2) Applicable Criteria

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

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

[*Young*, at p. 136]

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

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

28 There are in this Court's jurisprudence examples of conduct that has led to awards of costs being made against lawyers personally. In *Young* , the Court held that such a sanction is justified if "repetitive and irrelevant material, and excessive motions and applications, characterized" the conduct in question and if this was the result of a lawyer's acting "in bad faith in encouraging this abuse and delay" (pp. 135-36). In Pacific Mobile, the Court awarded costs against a company's solicitors personally in a bankruptcy case. The solicitors had been granted a number of adjournments and had instituted proceedings that were inconsistent with directions given by the trial judge. On the issue of costs, Pigeon J. stressed that he did "not consider it fair to make the debtor's creditors bear the cost of proceedings which were not instituted in their interest: quite the contrary". He added that such an award of costs, "far from appropriately discouraging unnecessary appeals occasioning costly delays, tends on the contrary to favour them" (p. 844). In the circumstances, he determined that "the Court should [therefore] make use of its power to order costs payable by solicitors personally" (p. 845).

29 In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate. Thus, a lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner.

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

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

32 As well, the role of a defence lawyer is not comparable in every respect to that of a lawyer in a civil case. For example, the latter has an ethical duty to encourage compromise and agreement as much as possible. In contrast, a defence lawyer has no obligation to help the Crown in the conduct of its case. It is the very essence of the role of a defence lawyer to challenge, sometimes forcefully, the decisions and arguments of other players in the judicial system in light of

the serious consequences they may have for the lawyer's client: *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.) , at paras. 64-66, citing *Histed v. Law Society (Manitoba)*, 2007 MBCA 150, 225 Man. R. (2d) 74 (Man. C.A.), at para. 71. Indeed, committed and zealous advocacy for clients' rights and interests and a strong and independent defence bar are essential in an adversarial system of justice: *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1 (Ont. C.A.), at para. 129; P. J. Monahan, "The Independence of the Bar as a Constitutional Principle in Canada", in Law Society of Upper Canada, ed., *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar* (2007), 117. If these conditions are not met, the reliability of the process and the fairness of the trial will suffer: *R. v. B. (G.D.)*, 2000 SCC 22, [2000] 1 S.C.R. 520 (S.C.C.) , at para. 25, quoting *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.) , at p. 57. In short, if costs are awarded against a lawyer personally in criminal proceedings, the purpose must not be to discourage the lawyer from defending his or her client's rights and interests, and in particular the client's right to make full answer and defence. From this point of view, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings.

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

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

(3) Process to be Followed

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

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

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

38 In closing, I note that the Crown's role on this specific issue must be limited in criminal proceedings. In such a situation, it is of course up to the parties as well as the court to raise a problem posed by a lawyer's conduct. However, the Crown's role is to objectively present the evidence and the relevant arguments on this point. It is the court that is

responsible for determining whether a sanction should be imposed, and that has the power to impose one, in its role as guardian of the integrity of the administration of justice. The Crown must confine itself to its role as prosecutor of the accused. It must not also become the prosecutor of the defence lawyer.

B. Application to the Facts of the Instant Case

(1) Judgment of the Superior Court

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

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

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

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

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

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

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

45 For this purpose, the judge focused primarily on evidence specific to the cases before him. He discussed the specific circumstances that led to the preparation of the motions for writs of prohibition. He reviewed in detail the transcript of

the hearing that had culminated in the postponement being granted by the Court of Québec judge. And he considered the respondent's conduct in the broader context of the motions for which he was ordered to pay costs personally.

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

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

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

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

(2) Judgment of the Court of Appeal

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

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

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

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

VI. Conclusion

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

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

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

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

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

***Abella and Côté JJ.*:**

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

> [TRANSLATION] The situation in the Quebec Superior Court ... as regards the conduct of the appellant ... *does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice.*

[Emphasis added; footnote omitted.]

(2015 QCCA 847, at para. 11 (CanLII))

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

> ... courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling. [p. 136]

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

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

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

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

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

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

64 It appears that Mr. Jodoin's conduct in this case was not unique in the district of Bedford, as reflected in the motions judge's comment that: [TRANSLATION] "In seeking a personal costs order against Mr. Jodoin, the prosecution wants to send a message to certain defence lawyers" (2013 QCCS 4661 (C.S. Que.), at para. 11). This suggests that Mr. Jodoin

was being punished as a warning to other lawyers engaged in similar tactics. The court ordered costs against Mr. Jodoin personally for a total of $3000.

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

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

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

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

69 This provision states that "a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial or within any other period fixed by the justice or judge, give notice to the other party or parties of his or her intention to do so". Crown counsel intending to call an expert witness also has to provide a copy of the expert witness's report or a summary of the opinion anticipated to be given by the expert witness to the other party within a reasonable period before trial (s. 657.3(3)(b)).

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

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

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

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

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

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

75 For these reasons, we would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

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

End of Document

TAB 4

1990 CarswellBC 1465
British Columbia Court of Appeal [In Chambers]

Young v. Young

1990 CarswellBC 1465, [1990] B.C.W.L.D. 1239, 21 A.C.W.S. (3d) 10

James Kam Chen Young, Respondent (Appellant) and Irene Helen Young, Petitioner (Respondent) and W. Glen How, Appellant and The Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses, Appellant

Hinkson J.A.

Judgment: April 12, 1990
Docket: CA011864, CA011865, CA011867

Counsel: *G. Turriff, Esq.*, for Appellants G. How and Burnaby Unit of the New Westminster Congregation of Jehovah's witnesses.
Miss J. Dassonville and *M. Patton, Esq.*, for Appellant, James Kam Chen Young.
L. MacLean, Esq. and *F. Lowther, Esq.*, for Respondents.

Subject: Civil Practice and Procedure

Headnote

Practice --- Costs — Particular orders as to costs — Costs against solicitor personally — General

Practice --- Costs — Appeals as to costs — Leave to appeal

***Hinkson, J.A.*:**

1 These are applications from decisions made at trial in these proceedings in which the trial judge awarded costs against the Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses personally, and against counsel for the plaintiff, Mr. How. Neither of these parties were litigants but in view of the proceedings before the trial judge and the conduct of these proceedings before trial and at trial, the trial judge exercised a discretion and exercised the inherent jurisdiction of the Supreme Court to make the awards of costs. Costs were to be paid by both the Burnaby Unit and Mr. How on a solicitor and client basis.

2 To begin with Mr. How seeks a declaration that he has an appeal as of right notwithstanding the provisions of s.6.2 of the *Court of Appeal Act*, R.S.B.C. 1979, c.7. That subsection provides notwithstanding 6.1 an appeal respecting costs only does not lie to the Court without leave of a justice.

3 Mr. Turriff urged on behalf of Mr. How that as a solicitor he was entitled to appeal the award of costs against him personally and did not require leave. In making that submission he relied on certain English authorities. In my view the proper interpretation of s.6.2 leaves no doubt that in this jurisdiction a person seeking to appeal costs only, does require leave. I indicated that I did not subscribe to that submission.

4 I am reinforced in that view when I come to the application on behalf of the Burnaby Unit. It too, sought a similar declaration and it was on the basis that by analogy if solicitors who are ordered to pay costs personally do not require leave to appeal, even though leave is otherwise required for an appeal respecting costs only, non-parties against whom

orders for costs are made should also have an appeal without the leave requirement. There is no ambiguity about the provisions of s.6.2. Applying the usual Rules of Statutory Interpretation, in my view it is clear that leave is required.

5 In those circumstances, Mr. Turriff proceeded then on an alternative basis to seek leave to appeal. He seeks leave to appeal upon the basis that this Court should pass on what principles should be applied when costs are to be awarded against a solicitor personally.

6 In the past this Court has had occasion to deal with the matter of costs awarded on a solicitor and client basis and has established that such costs should only be awarded where there has been misconduct in the course of the proceedings. But, the issues sought to be raised by Mr. Turriff has not been passed upon by this Court.

7 The costs at trial have been taxed by agreement, in the sum of $50,000. Mr. Turriff has been placed in funds in that amount and those funds are presently in his trust account. Pursuant to my request, he has determined that the money, namely the $50,000 has been loaned by the Jehovah's Witnesses Church to those liable to pay costs personally. Mr. Turriff has informed me that the appellant, Mr. Young, is not going to have to pay the costs awarded at trial, nor is the Burnaby Congregation, and that only Mr. How is at risk in respect of those costs.

8 Having regard to the decisions in this Court dealing with the basis in which leave ought to be granted, it seems to me that in this case there is an important principle raised on this application and there is merit to the arguments to be advanced. In those circumstances, with some reluctance that the respondent, Mrs. Young, is going to be embroiled in further litigation in this matter, I have concluded that this is an appropriate case in which to grant leave to Mr. How.

9 In my opinion, different considerations apply to the Burnaby Unit. Costs were awarded against it personally but as I have indicated Mr. Turriff has informed me that regardless of the outcome, the Burnaby Unit will not be personally liable to pay the costs. In that sense, in my opinion, the application for leave to appeal, and if it were granted, the appeal of the Burnaby Unit, has become academic.

10 It also seeks to raise the question of when a non-party can be held liable to pay the costs on a personal basis. This Court in the past has dealt with that issue, not just on the basis of where fraud has been shown to have been perpetrated by the party against whom costs are sought but in other situations as well. In my opinion, there are some overriding considerations with respect to granting leave to that party.

11 The trial judge has commented on the number of interlocutory applications that have taken place in these proceedings on behalf of the husband. The wife at times has been on welfare. She has no substantial funds with which to retain counsel. She has the responsibility of the upbringing of the three children who were the subject matter of these proceedings, and it seems to me that it is not in the interests of justice that she should become involved in a further appeal involving the Burnaby Unit. Those considerations outweigh, in my opinion, the consideration of granting leave to that applicant to have the issue it seeks to raise determined by this court.

12 Sitting as a judge in chambers I have a discretion in this matter and exercising that discretion upon the basis of the considerations I have mentioned, I would refuse leave to the Burnaby Unit to appeal the matter of costs against it.

13 By agreement of counsel this appeal is limited to grounds three, four, five, and seven as set out in the Amended Notice of Appeal.

14 There will be orders accordingly.

TAB 5

COURT OF APPEAL ACT

CHAPTER 74

Court of Appeal

1. (1) The Court of Appeal is continued and shall consist of a Chief Justice, who shall be styled "Chief Justice of British Columbia", and 10 Puisne Justices.

(2) The Court of Appeal shall also have for each office established under subsection (1) an additional office of supernumerary judge of the court.

(3) The judges appointed to the offices established under subsections (1) and (2) shall be called "Justices of Appeal".

RS1960-82-2; 1972-16-1; 1979-2-14.

Oath of office

2. The Chief Justice and every Puisne Justice of the Court of Appeal, previous to entering on the duties of his office, shall take the following oath:

I, , do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, exercise the powers and trusts reposed in me as Chief Justice [*or* of one of the Puisne Justices] of the Court of Appeal for British Columbia. So help me God.

1968-12-24.

Precedence

3. (1) The Chief Justice of British Columbia has rank and precedence over all other judges of the courts in British Columbia. The Chief Justice of the Supreme Court has rank and precedence next after the Chief Justice of British Columbia. The Justices of Appeal have rank and precedence next after the Chief Justice of the Supreme Court, and between themselves according to their seniority of appointment.

(2) The Chief Justice of British Columbia may require a Justice of Appeal to attend a meeting, conference or seminar to be held for a purpose relating to the administration of justice.

RS1960-82-4; 1979-2-15.

Seal

4. The Seal of the court shall be of a design approved by the Lieutenant Governor in Council.

RS1960-82-5.

Appellate jurisdiction

5. The Court of Appeal shall be a Superior Court of Record, and, to the full extent of the power of the Legislature of the Province to confer jurisdiction, there is transferred to and vested in the court all jurisdiction and powers, civil and criminal, of the Supreme Court, sitting as a Full Court, that were held and exercised prior to April 25, 1907, and all other appellate jurisdiction and appellate powers, statutory and otherwise, and however arising or conferred, that were on that date held or exercised by

the Supreme Court sitting as a Full Court. And without restricting the generality of the foregoing an appeal lies to the Court of Appeal

(a) from every judgment, order or decree made by the Supreme Court, and whether final or interlocutory, and whether for a matter specified in the Rules of Court or not;

(b) from judgments, orders or decrees of any County Court, whether final or interlocutory, for which an appeal will lie under the *County Court Act;*

(c) from the opinion of the Supreme Court on any matter referred to him by the Lieutenant Governor in Council under the *Constitutional Question Act;*

(d) from every decision of the Supreme Court or of any County Court, in any proceeding in connection with

(i) certiorari;

(ii) quo warranto;

(iii) mandamus;

(iv) prohibition;

(v) case stated under the *Offence Act;*

(vi) any point of law taken or raised on an appeal to the County Court under the *Offence Act;*

(vii) habeas corpus,

and in any matter arising under subparagraphs (i) to (vii), inclusive, in which the appellant is in custody, the Court of Appeal, if sitting, shall give the appeal precedence over every other appeal, and, if not sitting, shall promptly sit for the purpose of hearing the appeal; and in cases of habeas corpus in which the Crown is the successful appellant the Court of Appeal may make an order as it may see fit concerning the rearrest of the defendant;

(e) under any Act or ordinance;

(f) from every order, decision or finding of the registrar.

RS1960-82-7.

Original jurisdiction

6. The Court of Appeal shall exercise the original jurisdiction as may be necessary or incidental to the hearing and determination of any appeal.

RS1960-82-8.

Further powers

7. For the hearing and determination of any matter within its jurisdiction, and the amendment, execution and enforcement of any judgment or order, and for the purpose of every other authority expressly or impliedly given to the Court of Appeal by this Act, the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court.

RS1960-82-9.

Jurisdiction in divorce appeals

8. (1) The Court of Appeal has jurisdiction to hear and determine appeals from an order, judgment or decree of the court of the Province having jurisdiction in divorce and matrimonial causes.

MISCELLANEOUS STATUTES AMENDMENT ACT (No. 2), 1988

CHAPTER 46

Assented to June 29, 1988.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Assessment Act

1. The definition of "improvements" in section 1 of the *Assessment Act*, R.S.B.C. 1979, c. 21, is amended

(a) by repealing paragraph (g) and substituting the following:

(g) storage tanks, for the purposes of the 1988 and previous taxation years,

(g.1) tanks with a prescribed capacity, for the purposes of the 1989 and subsequent taxation years, , and

(b) in the words following paragraph (m) by striking out "and tanks with a capacity of more than 4 500 ℓ," and substituting ", storage tanks or tanks described in paragraph (g.1),".

2. Section 26.1 is amended

(a) in subsection (1) by striking out ' "cost" means' and substituting '"cost of industrial improvement" means', and

(b) by repealing subsection (4) and substituting the following:

(4) In this section

(a) the definition of "industrial improvement" and subsection (2) apply for the 1988 and subsequent taxation years, and

(b) the definition of "cost of industrial improvement" and subsection (3) apply for the 1989 and subsequent taxation years, but, where in the opinion of the Lieutenant Governor in Council the assessed value or the tax to be paid for a property or a class of property in 1989 is substantially greater than it was in 1988, he may order that the change in assessment or taxation resulting from the new method of valuation be phased in or adjusted in the manner he directs.

3. Section 80 (1) is amended by adding the following paragraph:

(a.1) prescribing capacity for the purposes of paragraph (g.1) in the definition of "improvements" in section 1, and different capacities may be prescribed for different categories or types of tank; .

4. Section 80 (1) (c.1) of the *Assessment Act*, as enacted by the *Assessment Amendment Act, 1987*, S.B.C. 1987, c. 53, s. 9, is amended by renumbering it as section 80 (1) (c.2).

Assessment Amendment Act, 1987

5. Section 10 of the *Assessment Amendment Act, 1987*, S.B.C. 1987, c. 53, is amended

International Commercial Arbitration Centre rules

22. (1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration.

(2) Where the rules referred to in subsection (1) are inconsistent with or contrary to the provisions in an enactment governing an arbitration to which this Act applies, the provisions of that enactment prevail.

(3) Where the rules referred to in subsection (1) are inconsistent with or contrary to this Act, this Act prevails.

16. The following section is added:

Extent of judicial intervention

31.1 No arbitral proceedings of an arbitrator and no order, ruling or arbitral award made by an arbitrator shall be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.

17. Section 34 is amended by striking out "hearing".

Community Care Facility Act

18. The *Community Care Facility Act*, R.S.B.C. 1979, c. 57, is amended by adding the following section:

Exemption

5.1 The board may exempt an applicant for a licence or a licensee from a requirement of this Act or the regulations where, in the opinion of the board, compliance with the requirement would result in undue hardship to the applicant or licensee and an exemption would result in no increased risk to the health or safety of a client in the facility.

Constitution Act

19. Schedule 1 of the *Constitution Act*, R.S.B.C. 1979, c. 62, is amended by striking out "thence westerly along the said parallel to the aforesaid westerly boundary of the watershed of Ashnola River, being the point of commencement, shall constitute one electoral district to be designated "Yale-Lillooet Electoral District"; and return one member." at the end of the legal description of the boundaries of the Yale-Lillooet Electoral District and substituting "thence easterly along the said parallel to the aforesaid westerly boundary of the watershed of Ashnola River, being the point of commencement, shall constitute one electoral district to be designated "Yale-Lillooet Electoral District"; and return one member."

Court of Appeal Act

20. The *Court of Appeal Act*, S.B.C. 1982, c. 7, is amended by adding the following section:

Appeals as to costs

6.2 Notwithstanding section 6 (1), an appeal respecting costs only does not lie to the court without leave of a justice.

Alta. Reg. 124/2010, s. 14.5

s 14.5 Appeals only with permission

Currency

14.5Appeals only with permission

14.5(1) Except as provided in this rule, no appeal is allowed to the Court of Appeal from the following types of decisions unless permission to appeal has been obtained:

(a) a decision of a single appeal judge;

(b) any pre-trial decision respecting adjournments, time periods or time limits;

(c) any ruling during trial, where the appeal is brought before the trial is concluded;

(d) a decision made on the consent of the parties;

(e) a decision as to costs only, but an appeal or cross appeal is not "as to costs only" if a related substantive decision is also being appealed;

(f) any decision where permission to appeal is required by an enactment;

(g) any decision in a matter where the controversy in the appeal can be estimated in money and does not exceed the sum of $25 000 exclusive of costs;

(h) any decision on security for costs;

(i) any decision of the Court of Queen's Bench sitting as an appeal court under rule 12.71;

(j) any appeal by a person who has been declared a vexatious litigant in the court appealed from.

14.5(2) Permission to appeal decisions of single appeal judges under subrule (1)(a) must be sought from the same judge who made the decision that is to be appealed.

14.5(3) No appeal is allowed under subrule (1)(a) from a decision of a single appeal judge granting or denying permission to appeal.

14.5(4) No appeal is allowed under subrule (1)(j) from an order denying the vexatious litigant permission to institute or continue proceedings.

Amendment History

Alta. Reg. 41/2014, s. 4; 85/2016, s. 1(7)

Currency

TAB 6

2015 ABCA 165
Alberta Court of Appeal

Bun v. Seng

2015 CarswellAlta 854, 2015 ABCA 165, [2015] A.W.L.D. 2588, 254 A.C.W.S. (3d) 537

Heang Bun, Applicant (Appellant) and Pheap Seng and The Cambodian Canadian Friendship Society of Edmonton and Areas, Respondent (Respondent)

Ellen Picard J.A.

Judgment: May 15, 2015
Docket: Edmonton Appeal 1503-0107-AC

Counsel: K.C. Ng, for Respondent, Respondent
Heang Bun, Applicant, Appellant, for himself

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Costs — Appeals as to costs — Leave to appeal

Applicant brought claim against organization and officer of organization alleging irregularities in financial records and requesting further information from organization — At case management meeting, organization brought cross-application to strike claim which was adjourned to later date — Applicant was ordered by case management justice to pay costs of appearance to organization — Applicant applied for permission to appeal — Application dismissed — Applicant failed to satisfy steps of test — On facts of case and given high degree of deference owed to costs awards on appeal, applicant had not demonstrated good arguable case of sufficient merit — While issue may be important to applicant, he had not demonstrated any general importance — Costs appeal would not have any practical utility because applicant had not raised any issues that would allow Court to provide direction on law with respect to costs.

APPLICATION for leave to appeal costs award.

***Ellen Picard J.A.*:**

1 The self-represented Mr. Bun seeks permission to appeal the March 26, 2015 costs order of Mr. Justice Verville.

2 Mr. Bun brought a claim against The Cambodian Canadian Friendship Society of Edmonton and Areas and Pheap Seng (an officer of the Society), alleging irregularities in the Society's financial records and requesting further information from the Society. Mr. Bun was not satisfied by the materials he received and sought assistance of the Court. Justice Verville was appointed case manager.

3 A case management meeting was scheduled for March 26, 2015 at Mr. Bun's request. At the case management meeting, the Society brought forward a cross-application to strike Mr. Bun's claim and prevent him from filing any further claims against the Society; that application was adjourned to a later date. Mr. Bun did not file an application or supporting affidavit in advance of the case management meeting, and the case management justice ordered him to pay the costs of the March 26 appearance to the Society. It is those costs that Mr. Bun seeks to appeal to this Court.

4 Rule 14.5(1)(e) requires a party to obtain permission to appeal a decision as to costs only. The case law is clear that permission to appeal costs orders should be granted sparingly, and a party seeking permission to appeal such an award

must meet a high threshold: *Lameman v. Alberta*, 2011 ABQB 724 (Alta. Q.B.) at para 9, (2011), 521 A.R. 121 (Alta. Q.B.); *Gutierrez v. Jeske*, 2005 ABQB 971 (Alta. Q.B.) at para 4, (2005), 396 A.R. 1 (Alta. Q.B.). This Court has held that it is appropriate to rely on the test for permission to appeal a costs award that was established under the former appellate Rules: *Jackson v. Canadian National Railway*, 2015 ABCA 89 (Alta. C.A.) at para 10. That test requires an applicant to demonstrate: (i) a good arguable case having sufficient merit to warrant scrutiny by this Court; (ii) issues of importance to the parties and in general; (iii) that the costs appeal has practical utility; and (iv) no delay in proceedings caused by the costs appeal.

5 The standard of appellate review of a costs award is important in assessing the first step of the test, the merits of the appeal. Costs decisions are highly discretionary and will not be interfered with lightly: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (S.C.C.) at para 42, [2003] 3 S.C.R. 371 (S.C.C.). Costs awards should not be set aside on appeal unless the judge below made an error in principle or the award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9 (S.C.C.) at para 27, (2003), [2004] 1 S.C.R. 303 (S.C.C.). Discretionary orders of case management justices are similarly afforded deference, and absent an error of law, this Court will not interfere unless the decision was unreasonable: *Decock v. Alberta*, 2000 ABCA 122 (Alta. C.A.) at para 13, (2000), 255 A.R. 234 (Alta. C.A.); *Attila Dogan Construction & Installation Co. v. AMEC Americas Ltd.*, 2014 ABCA 74 (Alta. C.A.) at para 17, (2014), 569 A.R. 308 (Alta. C.A.).

6 On the facts of this case and given the high degree of deference owed to costs awards on appeal, Mr. Bun has not demonstrated a good arguable case of sufficient merit and the first step of the test has not been satisfied. While the issue may be important to Mr. Bun, he has not demonstrated any general importance. Nor would this costs appeal have any practical utility because Mr. Bun has not raised any issues that would allow this Court to provide direction on the law with respect to costs. Although there are no concerns about delay in the proceedings below if this costs appeal were allowed to proceed, Mr. Bun has failed to satisfy the other steps of the test and permission to appeal is denied.

7 Both parties spoke to costs at the hearing before me. I award costs of $600 inclusive of disbursements to the respondent.

Application dismissed.

TAB 7

2017 ABCA 235
Alberta Court of Appeal

Brill v. Brill

2017 CarswellAlta 1246, 2017 ABCA 235, [2017] A.W.L.D. 4203, 281 A.C.W.S. (3d) 264

Reizel-Vered Brill (Applicant / Plaintiff) and Erez Brill (Respondent / Defendant)

Jo'Anne Strekaf J.A.

Heard: June 29, 2017
Judgment: July 18, 2017
Docket: Calgary Appeal 1701-0103-AC

Counsel: W. Aaron, Q.C., for Applicant
B. Minuk, for Respondent

Subject: Civil Practice and Procedure; Family

Headnote

Civil practice and procedure --- Costs — Appeals as to costs — Leave to appeal

Plaintiff brought application for leave to appeal costs of $2600 by chambers judge for full day hearing that resulted in accelerated trial on custody — Application dismissed — Chambers judge proceeded reasonably in applying usual rule of awarding costs of interlocutory application to successful party.

APPLICATION by plaintiff for leave to appeal costs award.

***Jo'Anne Strekaf J.A.*:**

1 The applicant seeks permission to appeal costs of $2,600 awarded by a chambers judge for a full day hearing that resulted in an accelerated trial on custody.

2 Rule 14.5(1)(e) of the *Alberta Rules of Court*, Alta Reg 124/2010 requires permission to appeal "a decision as to costs only". Permission should be granted sparingly: *Bun v. Seng*, 2015 ABCA 165 (Alta. C.A.) at para 4. The purpose of the predecessor of this rule was "to bring finality to cost orders and to conserve this Court's time by screening out hopeless appeals on the issue of costs alone": *Colborne Capital Corp. v. 542775 Alberta Ltd.*, 1996 ABCA 94 at para 10, (1996), 38 Alta. L.R. (3d) 127 (Alta. C.A.). The same rationale underlies the current rule.

3 The test for permission to appeal a costs award established under the former appellate *Rules* continues to apply: *Jackson v. Canadian National Railway*, 2015 ABCA 89 (Alta. C.A.) at para 10. The following applies on such an application:

(i) the applicant must identify a good, arguable case having enough merit to warrant scrutiny by the court;

(ii) the issues must be important, both to the parties and in general;

(iii) the appeal must have some practical utility; and

(iv) the court should consider the effect of delay in proceedings caused by the appeal.

4 The application that gave rise to the costs award arises out of a long standing high conflict family law dispute. As a result of a contested mobility application in 2010, it was determined that the parties' children would reside with the applicant in Israel and spend two months each summer with the respondent in Calgary. During the summer of 2016, questions arose regarding the treatment the children were receiving in Israel, which was hotly contested by the applicant. On July 29, 2016, a chambers judge heard a full day application and directed an accelerated trial which had been opposed by the applicant. The trial was conducted in August 2016. The trial judge directed that the children return to Israel with the applicant and granted ancillary orders, including an award of costs to the applicant for the trial.

5 The applicant sought to have the costs of the July 29, 2016 application treated as costs in the cause whereas the respondent sought costs as he had been successful on that application. The chambers judge stated:

> In my view, costs of the July 29 applications should follow the event, not the cause. Success by Ms. Brill at trial does not mean that she ought to have resisted the July 29 applications or that her resistance should be overlooked because she was ultimately successful in the cause. On the record before me, there was more than enough evidence to satisfy the threshold for ordering either counsel for the children or a voice of the child report and, frankly, for remitting the matter for the viva voce hearing.
>
> Ms. Brill's resistance caused additional costs to Mr. Brill unnecessarily. Ms. Brill chose to oppose the application, as was her right, but she did so in the hopes of avoiding the longer process entirely and the risks it entailed and the costs it would cause. She called oral evidence on July 29 to correct a perceived misstatement and to undermine the reliability of some suspect affidavit evidence asserted against her position, but she also did so more generally to mount that resistance to the larger change of custody hearing ever getting underway. She did so against the known risk that her strategy may not succeed. She did so knowing the lower threshold Mr. Brill faced at pushing the matter to a hearing. In my view, it is appropriate that she bear the costs downside of having taken those risks for which both sides bore additional costs.

6 A highly deferential standard is applied when reviewing a costs award: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (S.C.C.) at para 42, [2003] 3 S.C.R. 371 (S.C.C.).

7 The chambers judge proceeded reasonably in applying the usual rule of awarding the costs of an interlocutory application to the successful party. The applicant has not demonstrated that the proposed costs appeal has any arguable merit.

8 The application is dismissed.

Application dismissed.

TAB 8

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 2 — The Parties to Litigation
Division 1 — Facilitating Legal Actions

Alta. Reg. 124/2010, s. 2.6

s 2.6 Representative actions

Currency

2.6Representative actions
2.6(1) If numerous persons have a common interest in the subject of an intended claim, one or more of those persons may make or be the subject of a claim or may be authorized by the Court to defend on behalf of or for the benefit of all.

2.6(2) If a certification order is obtained under the *Class Proceedings Act*, an action referred to in subrule (1) may be continued under that Act.

Currency
Alberta Current to Gazette Vol. 113:18 (September 30, 2017)

End of Document

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 13 — Technical Rules
Division 3 — Pleadings

Alta. Reg. 124/2010, s. 13.11

s 13.11 Pleadings: specific requirements for class proceedings

Currency

13.11Pleadings: specific requirements for class proceedings
13.11(1) The title of a proceeding under the *Class Proceedings Act* must include the words "*Brought under the Class Proceedings Act*" immediately below the listed parties

(a) if it is intended, when the proceeding starts, that a certification order will be sought under the Act, or

(b) if a certification order is subsequently made in respect of the proceeding under the Act.

13.11(2) If a certification order is refused in respect of the proceeding or the proceeding is decertified, the words "*Brought under the Class Proceedings Act*" must not be included in the title in any subsequent pleadings and documents filed in the proceeding.

Currency
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TAB 9

Clerk's Stamp

COURT FILE NO.:	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, as am.

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19 ON APRIL 15, 1985 (the "1985 Sawridge Trust")

APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE AND CLARA MIDBO, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST
RESPONDENT:	MAURICE STONEY
INTERVENER:	SAWRIDGE FIRST NATION
DOCUMENT:	**WRITTEN RESPONSE ARGUMENT OF MAURICE STONEY ON VEXATIOUS LITIGANT ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

DLA Piper (Canada) LPP
1201 Scotia 2 Tower
10060 Jasper Avenue NW
Edmonton, AB, T5J 4E5
Attn: Priscilla Kennedy
Tel: 780.429.6830
Fax: 780.702.4383
Email: priscilla.kennedy@dlapiper.com
File: 84021-00001

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Authorities

1. Consent Order of Associate Chief Justice Rooke July 19, 2017.
2. *Huzar v. Canada,* 2000 CanLII 15589 (FCA).
3. *Powder v. H.M.T.Q.* August 16, 2016.
4. *Stoney v. Sawridge First Nation; Huzar and Kolosky v. Sawridge Frist Nation,* 2013 FC 509.
5. *Benner v. Canada,* [1997] 1 SCR 358 (headnote only).
6. *Re Manitoba Language Rights,* [1985] 1 SCR 721 (headnote only).
7. *McIvor v. Canada,* 2009 BCCA 153.
8. *Descheneaux v. Canada (A.G.),* 2015 QCCS 3555 [this is currently before the Quebec Court of Appeal as a result of Canada failing to comply with the 18 months' time period to resolve the issues of membership and status under the *Indian Act,* set to be heard on August 9, 2017].
9. *The Government of Canada's Response to the Descheneaux Decision.*
10. *Daniels v. Canada (Indian Affairs and Northern Development),* [2016] 1 SCR 99.
11. *Sawridge Band v. H.M.T.Q.* 2009 FCA 123.
12. And see *Twinn v. Sawridge Band,* 2017 ABQB 366.
13. *Poitras v. Twinn,* 2013 FC 910.
14. *Federal Court Rules,* Rule 114.

I. QUESTION SET BY THE COURT

1. Case Management Decision (Sawridge #6) orders in paragraph 63 that Maurice Stoney make written submissions prior to the close of the Law Courts on August 4, 2017 on the following two matters:

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

2. This Order further stipulates:

    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 proceedings is conducted, or his or her designate. ...

3. An exception to the Interim Court Filing Restriction Order was granted by Associate Chief Justice Rooke on July 19, 2017 filed on July 20, 2017 which permits completion of the direction of Master Schulz in Alberta QB Action 1603 03761 *Gabriel Nussbaum v. Maurice Felix Stoney and Eliza Marie Stoney.* The Associate Chief Justice did not require any notice to any other person nor any conditions or security for costs.

    Consent Order of Associate Chief Justice Rooke July 19, 2017. [Tab 1]

4. <u>This Consent Order was agreed to by Counsel for the Trustees and by Counsel for the Sawridge First Nation who both signed the Consent Order.</u>

II. FACTS

5. The 1985 Sawridge Trustees have adopted the arguments of the Sawridge First Nation. Paragraph 2 of the submissions of the 1985 Sawridge Trustees states:

    The trustees have reviewed the brief filed by the Sawridge First Nation and confirm that they agree with the contents. In the interests of saving costs to the 1985 Sawridge Trustee and in the interest of avoiding duplicative arguments, the Trustees wish to adopt the arguments of the Sawridge First Nation as filed in this action.

(A) Misstated Facts of Sawridge First Nation

6. The Federal Court of Appeal struck the Statement of Claim issued in Federal Court in 1995 on the ground that there was "no reasonable cause of action" and that the matter was properly a judicial review under section 18(3) of the *Federal Court Act*. On such a proceeding where the argument is that there is no reasonable cause of action, no evidence is admissible: *Canada (A.G.) v. Inuit Tapirisit of Canada,* [1980] SCJ No. 99 quoted at paragraph 24 in *Powder v. H.M.T.Q.* [Tab 3]. Accordingly, the striking of the Statement of Claim does not rely on any Affidavit evidence of Sawridge First Nation nor make any finding on it. It is improper to rely upon that evidence in this matter.

Huzar v. Canada, 2000 CanLII 15589 (FCA). [Tab 2]
Powder v. H.M.T.Q. August 16, 2016. [Tab 3]

7. The judicial review in 2013 did not include a "thorough analysis" of Maurice Stoney's arguments regarding his entitlement to membership since it was determined that no constitutional arguments could be made, see paragraph 22 as a result of not completing the Constitutional Question Notice required by section 57 of the *Federal Courts Act,* which provides in subsection 1 that it applies whenever "the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the ...Federal Court" must be served on each Attorney General in Canada.

Stoney v. Sawridge First Nation; Huzar and Kolosky v. Sawridge Frist Nation, 2013 FC 509, para. 22. [Tab 4]

8. Paragraphs 10 to 14 are in reference to the claims by Aline Huzar and June Kolosky to Sawridge First Nation membership as stated by Mr. Justice Barnes at paragraphs 10 to 14 and concluded by his statement "the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership". Only paragraph 15 refers to Maurice Stoney.

Stoney, supra, paras. 10-14, 15. [Tab 4]

9. As noted at paragraph 4, Mr. Justice Barnes did state that the Sawridge First Nation membership rules only applied from the point when the Minister of Indian and Northern Affairs gave notice under section 10(7) of the *Indian Act,* which occurred in September, 1985. This is contrary to the assertions throughout the facts stated by Sawridge First Nation. The date of issue in this matter of the beneficiaries of the 1985 Sawridge Trust is the date of the Trust which is dated April 15, 1985.

Stoney, supra., para. 4. [Tab 4]

(B) Other Facts

10. Following the cross-examination of Maurice Stoney on September 23, 2016, counsel for the Trustees did not make any applications to require further examination nor request any further cross-examination.

11. At no time did the Sawridge First Nation apply for clarification of whether or not they were a party entitled to attend cross-examination prior to the examination although they were well aware of the timing of the examination and the refusal of their participation much earlier in September, 2016 and had time to apply for such an Order.

12. Maurice Stoney has not attempted to re-litigate the membership issue but rather to set out the legal arguments to address the direct issue of the definition of a beneficiary under the 1985 Sawridge Trust made on April 15, 1985 at a time when the Sawridge First Nation was not legally able to limit its membership as noted by Mr. Justice Barnes in his decision at paragraph 4. The Supreme Court of Canada has held that citizenship is always an issue to be reviewed on constitutional rights see: *Benner v. Canada,* [1997] 1 SCR 358 (headnote only). Limitation periods, long periods where legislation have been treated as being constitutional, and prior decisions, even of the Supreme Court of Canada do not limit the ability to bring forward a question before the Courts: *Re Manitoba Language Rights,* [1985] 1 SCR 721. In this context, 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.*

Benner v. Canada, [1997] 1 SCR 358 (headnote only). [Tab 5]

Re Manitoba Language Rights, [1985] 1 SCR 721 (headnote only). [Tab 6]

McIvor v. Canada, 2009 BCCA 153. [Tab 7]

Descheneaux v. Canada (A.G.), 2015 QCCS 3555 [this is currently before the Quebec Court of Appeal as a result of Canada failing to comply with the 18 months' time period to resolve the issues of membership and status under the *Indian Act,* set to be heard on August 9, 2017]. [Tab 8]

The Government of Canada's Response to the Descheneaux Decision. [Tab 9]

Daniels v. Canada (Indian Affairs and Northern Development), [2016] 1 SCR 99. [Tab 10]

13. The Federal Court of Appeal determined on April 21, 2009, that the Sawridge Band's action seeking an order declaring that certain amendments to the *Indian Act* regarding membership, were unconstitutional. Sawridge Band had brought action against all of the amendments which "compelled the appellants [Sawridge Band], against their wishes, to add certain individuals to the list of band members. The appellants had argued that the legislation is an invalid attempt to deprive them of their right to determine the membership of their own bands." The first trial had commenced in 1993 and the history of the trial and re-trial is set out at paragraph 4. It is to be noted that the length of time this matter was before the Federal Court is indicative of the unsettled nature of the issues raised. The issue of membership/citizenship remains an unsettled matter as shown by the decisions of various courts including the Supreme Court of Canada, cited in paragraph 12 above.

Sawridge Band v. H.M.T.Q. 2009 FCA 123. [Tab 11]

And see *Twinn v. Sawridge Band,* 2017 ABQB 366. [Tab 12]; *Poitras v. Twinn,* 2013 FC 910. [Tab 13]

14. 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 as directed on the issue of whether or not the application of Maurice Stoney was vexatious litigation.

III. RESTRICTED ACCESS TO ALBERTA COURTS

(A) The *Judicature Act*, section 23(2)

15. Section 23(2) requires that the following matters be considered as a list of vexatious litigation:

> (2) For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:
>
> (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
>
> (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
>
> (c) persistently bringing proceedings for improper purposes;
>
> (d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;
>
> (e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
>
> (f) persistently taking unsuccessful appeals from judicial decisions;
>
> (g) persistently engaging in inappropriate courtroom behavior.

16. As shown by the litigation in the Sawridge Band cases above, the on-going case in *Descheneaux* and decision of the Supreme Court of Canada in *Daniels,* and by 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 already 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.

17. It is submitted that litigation seeking to determine whether or not you qualify as a beneficiary under a trust established on April 15, 1985 in 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. Nor have the matters raised in (d), (f) and (g) occurred.

18. Costs to the Sawridge First Nation have not been paid however the intention is to pay them as soon as it is possible for Maurice Stoney. Costs to the 1985 Sawridge Trust have been paid.

B. Inherent Jurisdiction

19. The elements of vexatious litigation are set out in *Chutskoff v. Bonora,* at paragraph 92 quoted at pages 13-16 of the Written Submissions of the Sawridge First Nation.

20. It is submitted that this application by Maurice Stoney was not a collateral attack. The issue before the Court here is the definition of beneficiary in the 1985 Sawridge Trust when beneficiary is to be determined as of April 15, 1985. As Mr. Justice Barnes stated at paragraph 4 of the judicial review of the Sawridge First Nation membership application, that the Sawridge First Nation membership application does not apply to anything before the date that the Minister agreed to the Sawridge First Nation membership by-law in September, 1985, leaving a period from April 17, 1985 until September, 1985 which is not covered by the Sawridge First Nation membership process. The issue that was argued in the written submission during the fall of 2016, was the status of Maurice Stoney under the Sawridge Band on or about April, 1985 which was not *res judicata* from the previous matters in Federal Court. The issue of the status in the period from April 15, 1985 to September, 1985 was a completely new issue. Mr. Justice Barnes determined that the decision of the Appeal Committee of the Sawridge First Nation was reasonable on the question of membership in the Sawridge First Nation, based on the application made by Maurice Stoney to the Sawridge First Nation.

Stoney, supra. [Tab 4]

21. It is acknowledged that the costs owed from the Federal Court proceeding are owed by Maurice Stoney and because the judicial review was heard with the judicial review by Aline Huzar and June Kolosky, owed by all three of them and have not been paid along with the costs of the application before the Court of Appeal in Feb. 2016, although the costs of the 1985 Sawridge Trustees have been paid by Maurice Stoney in November, 2016. Maurice Stoney is 77 years of age and Aline Huzar and June Kolosky are all senior citizens of limited means.

22. There has been no 'escalating' of proceedings in this matter. The law related to status of Indians in Canada has changed over the years and Canada is still involved in proceedings to determine and satisfy these membership and status issues currently outstanding as a result of the *Descheneaux v. Canada (A.G.)* decision [Tabs 8 and 9] and the decision in the *Daniels* case [Tab 10]. These matters all include the issue of who, in law, is a member of a band and that will affect the issue of the Sawridge Band during the time period from April 17, 1985 until September, 1985.

23. 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 definition of beneficiary in this trust.

24. 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 provisions 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.

25. Throughout all of these proceedings and proceedings in the Federal Court, Maurice Stoney has honoured his Court obligations. The failure to pay the costs of Sawridge First Nation is the intervening result of foreclosure proceedings against Maurice Stoney and his wife in Q.B. Action No. 1603 03761 (originally started in Peace River in 2011 and transferred to Edmonton in 2016) in which the Associate Chief Justice Rooke has issued a Consent Order on July 19, 2017

directing that this Action is an exception to the Interim Order granted on July 12, 2017. This Order of the Associate Chief Justice has been consented to by the 1985 Sawridge Trustees and by the Sawridge First Nation [see Tab 1].

26. Affidavit evidence has been filed and provided to the Court on July 28, 2017, by Bill Stoney, brother to Maurice, by Gail Stoney, sister to Maurice and by Shelley Stoney, daughter of Bill Stoney, respecting the approval of the other brothers and sisters, to show that they commenced this application and directed that Maurice Stoney proceed on their behalf. 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, most 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.

Federal Court Rules, Rule 114. [Tab 14]

27. No collateral attack was intended nor was this brought as a "busy body" proceeding in presenting the arguments of Maurice Stoney and his brothers and sisters respecting the fact that they were born as members (citizens) of the Sawridge Band, they were removed by the provisions of the *Indian Act* during the 1940's and effective April 17, 1985 their removal from the *Indian Act,* was repealed.

28. It is also submitted that this application was not a hopeless proceeding without any reasonable expectation to provide relief. This is an area of the law that is changing rapidly as shown by *McIvor* [Tab 7], *Descheneaux* [Tab 8], *The Government of Canada's Response to the Descheneaux Decision* [Tab 9] and *Daniels* [Tab 10]. 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.

IV. SCOPE OF THE RESTRICTION

29. In *Hok v. Alberta,* para. 36 [Tab 2 of the Sawridge First Nation Authorities], three questions are set out to be answered on the question of how to structure the court order restricting access to the court for the litigant. These questions 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?

30. The Sawridge First Nation submits at paragraph 57 of their Written Submissions, that the claims of Maurice Stoney to membership in the Sawridge First Nation show the indicia of vexatious litigation. In paragraph 80, their submission is that Maurice Stoney's access to the Alberta Courts should be restricted for any litigation against:

(a) Sawridge First Nation

(b) any past, present, or future members of the Chief and Council of the Sawridge First Nation;

(c) the 1985 Sawridge Trust;

(d) the 1986 Sawridge Trust; and

(e) the Trustees of the 1985 and 1986 Sawridge Trusts.

31. It is submitted that the Interim Court Filing Restriction Order should not be made permanent on the grounds that the necessary conditions for such an Order are not met as set out in argument above.

32. In the alternative, it is submitted that such an Order should only restrict actions by Maurice Stoney against the Sawridge First Nation and the 1985 Sawridge Trust.

33. In paragraph 82 of the Sawridge First Nation Written Argument it appears that the Sawridge First Nation is also asking that all access to the Courts be restricted for Maurice Stoney although they have submitted in the previous paragraph that the restriction should only be with respect to the bodies set out in paragraph 30 above. It is submitted that there is no basis for restriction of Mr. Stoney's rights to access the Alberta Courts for matters unrelated to the Sawridge First Nation and the 1985 Sawridge Trust.

V. ORDER SOUGHT

34. It is respectfully submitted that Maurice Stoney should not be declared to be a vexatious litigant and that the Interim Order should not be made permanent.

35. In the alternative, it is submitted that, if Maurice Stoney is declared to be a vexatious litigant, it should be narrowed to restrict actions against the Sawridge First Nation and the 1985 Sawridge Trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd day of August, 2017.

DLA PIPER (CANADA) LLP.

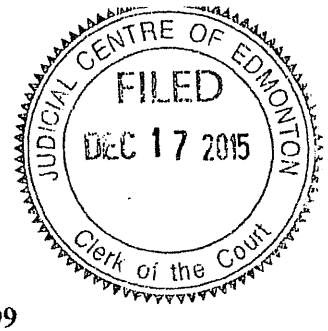
Per: _____

Priscilla Kennedy
Associate Counsel
Counsel for Maurice Stoney

LIST OF AUTHORITIES

1. Consent Order of Associate Chief Justice Rooke July 19, 2017.
2. *Huzar v. Canada*, 2000 CanLII 15589 (FCA).
3. *Powder v. H.M.T.Q.* August 16, 2016.
4. *Stoney v. Sawridge First Nation; Huzar and Kolosky v. Sawridge Frist Nation*, 2013 FC 509.
5. *Benner v. Canada*, [1997] 1 SCR 358 (headnote only).
6. *Re Manitoba Language Rights*, [1985] 1 SCR 721 (headnote only).
7. *McIvor v. Canada*, 2009 BCCA 153.
8. *Descheneaux v. Canada (A.G.)*, 2015 QCCS 3555 [this is currently before the Quebec Court of Appeal as a result of Canada failing to comply with the 18 months' time period to resolve the issues of membership and status under the *Indian Act*, set to be heard on August 9, 2017].
9. *The Government of Canada's Response to the Descheneaux Decision.*
10. *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99.
11. *Sawridge Band v. H.M.T.Q.* 2009 FCA 123.
12. And see *Twinn v. Sawridge Band*, 2017 ABQB 366.
13. *Poitras v. Twinn*, 2013 FC 910.
14. *Federal Court Rules*, Rule 114.

TAB 10



Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

In the Matter of the *Trustees 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 Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Between:

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

Respondents

- and -

Public Trustee of Alberta

Applicant

Reasons for Judgment
of the
Honourable Mr. Justice D.R.G. Thomas

Table of Contents

I Introduction

[1] This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365 ["***Sawridge #1***"], 543 AR 90 affirmed 2013 ABCA 226, 553 AR 324 ["***Sawridge #2***"]. The terms defined in ***Sawridge #1*** are used in this decision.

II. Background

[2] On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the "Band", "Sawridge Band", or "SFN"], set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the "*Charter*"].

[3] The 1985 Sawridge Trust is administered by the Trustees [the "Sawridge Trustees" or the "Trustees"]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust (the "Trust Amendments") and confirmation of the transfer of assets into that Trust.

[4] One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

[5] Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

> August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

February 14, 2012 - The Public Trustee applied:

1. to be appointed as the litigation representative of minors interested in this proceeding;
2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and
3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.

June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: ***Sawridge #1***, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (***Sawridge #1***, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (***Sawridge #1***, at para 55).

June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (***Sawridge #2***).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;
- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and
- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],
- the Trustees may withdraw their proposed settlement agreement and litigation plan, and

- some document and disclosure related items sought by the Public Trustee were adjourned *sine die*.
  ("September 2/3 Order")

October 5, 2015- I directed the Public Trustee to provide more detailed information in relation to its accounts totalling $205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

[6] Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

[7] This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

[8] ***Sawridge #1*** at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee's involvement in this matter:

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.
>
> [9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.
>
> [10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

[11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

[12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

[9] This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a *Rules* Part V affidavit of records within 60 days of the September 2/3 Order.

[10] The primary remaining issue relates to the disclosure of information in documentary form sought by the Public Trustee from the SFN and there are also a number of additional ancillary issues. The Public Trustee seeks information concerning:

1. membership in the SFN,
2. candidates who have or are seeking membership with the SFN,
3. the processes involved to determine whether individuals may become part of the SFN,
4. records of the application processes and certain associated litigation, and
5 how assets ended up in the 1985 Sawridge Trust.

[11] The SFN resists the application of the Public Trustee, arguing it is not a party to this proceeding and that the Public Trustee's application falls outside the *Rules*. Beyond that, the SFN questions the relevance of the information sought.

V. Submissions and Argument

A. The Public Trustee

[12] The Public Trustee takes the position that it has not been able to complete the responsibilities assigned to it by me in ***Sawridge #1*** because it has not received enough information on potential, incomplete and filed applications to join the SFN. It also needs information on the membership process, including historical membership litigation scenarios, as well as data concerning movement of assets into the 1985 Sawridge Trust.

[13] It also says that, without full information, the Public Trustee cannot discharge its role in representing affected minors.

[14] The Public Trustee's position is that the Sawridge Band is a party to this proceeding, or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information. It says that the Court can add the Sawridge Band as a party. In the alternative, the Public Trustee argues that *Rules* 5.13 and 9.19 provide a basis to order production of all relevant and material records.

B. The SFN

[15] The SFN takes the position that it is not a party to the Trustee's proceedings in this Court and it has been careful not to be added as a party. The SFN and the Sawridge Trustees are distinct and separate entities. It says that since the SFN has not been made a party to this proceeding, the *Rules* Part V procedures to compel documents do not apply to it. This is a stringent test: ***Trimay Wear Plate Ltd. v Way***, 2008 ABQB 601, 456 AR 371; ***Wasylyshen v Canadian Broadcasting Corp.***, [2006] AJ No 1169 (Alta QB).

[16] The only mechanism provided for in the *Rules* to compel a non-party such as the SFN to provide documents is *Rule* 5.13, and its function is to permit access to specific identified items held by the third party. That process is not intended to facilitate a 'fishing expedition' (***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*** (1988), 94 AR 17, 63 Alta LR (2d) 189 (Alta QB)) or compel disclosure (***Gainers Inc. v Pocklington Holdings Inc.*** (1995), 169 AR 288, 30 Alta LR (3d) 273 (Alta CA)). Items sought must be particularized, and this process is not a form of discovery: ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.*** (1989), 98 AR 374, 16 ACWS (3d) 286 (Alta CA).

[17] The SFN notes the information sought is voluminous, confidential and involves third parties. It says that the Public Trustee's application is document discovery camouflaged under a different name. In any case, a document is only producible if it is relevant and material to the arguments pled: *Rule* 5.2; ***Weatherill (Estate) v Weatherill***, 2003 ABQB 69, 337 AR 180.

[18] The SFN takes the position that ***Sawridge #1*** ordered the Public Trustee to investigate two points: 1) identifying the beneficiaries of the 1985 Sawridge Trust; and 2) scrutiny of transfer of assets into the 1985 Sawridge Trust. They say that what the decision in ***Sawridge #1*** did not do was authorize interference or duplication in the SFN's membership process and its results. Much of what the Public Trustee seeks is not relevant to either issue, and so falls outside the scope of what properly may be sought under *Rule* 5.13.

[19] Privacy interests and privacy legislation are also factors: ***Royal Bank of Canada v Trang***, 2014 ONCA 883 at paras 97, 123 OR (3d) 401; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information

unless the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: ***Juman v Doucette; Doucette (Litigation Guardian of) v Wee Watch Day Care Systems,*** 2008 SCC 8, [2008] 1 SCR 157. The cost to produce the materials is substantial.

[20] The SFN notes that even though it is a target of the relief sought by the Public Trustee that it was not served with the July 16, 2015 application, and states the Public Trustee should follow the procedure in *Rule* 6.3. The SFN expressed concern that the Public Trustee's application represents an unnecessary and prejudicial investigation which ultimately harms the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust. In ***Sawridge #2*** at para 29, the Court of Appeal had stressed that the order in ***Sawridge #1*** that the Public Trustee's costs be paid on a solicitor and own client basis is not a "blank cheque", but limited to activities that are "fair and reasonable". It asks that the Public Trustee's application be dismissed and that the Public Trustee pay the costs of the SFN in this application, without indemnification from the 1985 Sawridge Trust.

C. The Sawridge Trustees

[21] The Sawridge Trustees offered and I ordered in my September 2/3 Order that within 60 days the Trustees prepare and deliver a *Rule* 5.5-5.9 affidavit of records to assist in moving the process forward. This resolved the immediate question of the Public Trustee's access to documents held by the Trustees.

[22] The Trustees generally support the position taken by the SFN in response to the Public Trustee's application for Band documents. More broadly, the Trustees questioned whether the Public Trustee's developing line of inquiry was necessary. They argued that it appears to target the process by which the SFN evaluates membership applications. That is not the purpose of this proceeding, which is instead directed at re-organizing and distributing the 1985 Sawridge Trust in a manner that is fair and non-discriminatory to members of the SFN.

[23] They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253. Further, the membership criteria used by the SFN operate until they are found to be invalid: ***Huzar v Canada,*** [2000] FCJ No 873 at para 5, 258 NR 246. Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

[24] The 1985 Sawridge Trustees reviewed the evidence which the Public Trustee alleges discloses an unfair membership admission process, and submit that the evidence relating to Elizabeth Poitras and other applicants did not indicate a discriminatory process, and in any case was irrelevant to the critical question for the Public Trustee as identified in ***Sawridge #1***, namely that the Public Trustee's participation is to ensure minor children of Band members are treated fairly in the proposed distribution of the assets of the 1985 Sawridge Trust.

[25] Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and

that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

[26] The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

[27] I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: ***Trimay Wear Plate Ltd. v Way***, at para 17.

[28] If I were to compel document production by the Sawridge Band, it would be via *Rule* 5.13:

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.

[29] The modern *Rule* 5.13 uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule* 5.13 has referenced and used approaches developed in the application of that precursor provision: ***Toronto Dominion Bank v Sawchuk***, 2011 ABQB 757, 530 AR 172; ***H.Z. v Unger***, 2013 ABQB 639, 573 AR 391. I agree with this approach and conclude that the principles in the pre-*Rule* 5.13 jurisprudence identified by the SFN apply here: ***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co***; ***Gainers Inc. v Pocklington Holdings Inc.***; ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.***

[30] The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: ***Royal Bank of Canada v Kaddoura***, 2015 ABCA 154 at para 15, 15 Alta LR (6th) 37.

[31] I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

[32] It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee. A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

[33] In ***Sawridge #1*** I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since ***Sawridge #1*** the Federal Court has ruled in ***Stoney v Sawridge First Nation*** on the operation of the SFN's membership process.

[34] Further, in ***Sawridge #1*** I noted at paras 51-52 that in ***783783 Alberta Ltd. v Canada (Attorney General)***, 2010 ABCA 226, 322 DLR (4th) 56, the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in ***Strickland v Canada (Attorney General)***, 2015 SCC 37, the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

[35] The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in ***Stoney v Sawridge First Nation,*** there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

[36] It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

[37] Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;
2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and
3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

4. Supervising the distribution process itself.

[38] The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

[39] I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

[40] The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

[41] I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

[42] On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

[43] The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule* 5.13(1) application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

[44] If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule* 5.13(1) application by the Public Trustee. In the event no *Rule* 5.13(1) application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 – Examining potential irregularities related to the settlement of assets to the Trust

[45] There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

[46] The Public Trustee shall by January 29, 2016 prepare and serve a *Rule* 5.13(1) application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

[47] A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule* 5.13(1) application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

[48] The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of individuals who are minor beneficiaries and potential minor beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and
2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

[49] I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

[50] As Aalto, J. observed in ***Poitras v Twinn***, 2013 FC 910, 438 FTR 264, "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

[51] The Public Trustee has no relevant interest in the children of any parent who has an unresolved application for membership in the Sawridge Band. If that outstanding application results in the applicant being admitted to the SFN then that child will become another minor represented by the Public Trustee.

[52] While the Public Trustee has sought information relating to incomplete applications or other potential SFN candidates, I conclude that an open-ended 'fishing trip' for unidentified hypothetical future SFN members, who may also have children, is outside the scope of the Public Trustee's role in this proceeding. There needs to be minimum threshold proximity between the Public Trustee and any unknown and hypothetical minor beneficiary. As I will stress later, the Public Trustee's activities need to be reasonable and fair, and balance its objectives: cost-effective participation in this process (i.e., not unreasonably draining the Trust) and protecting the interests of minor children of SFN members. Every dollar spent in legal and research costs turning over stones and looking under bushes in an attempt to find an additional, hypothetical minor beneficiary reduces the funds held in trust for the known and existing minor children who are potential beneficiaries of the 1985 Sawridge Trust distribution and the clients of the Public Trustee. Therefore, I will only allow investigation and representation by the Public Trustee of

children of persons who have, at a minimum, completed a Sawridge Band membership application.

[53] The Public Trustee also has a potential interest in a child of a Sawridge Band candidate who has been rejected or is rejected after an unsuccessful application to join the SFN. In these instances the Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection or challenge the rejection through judicial review in the Federal Court. If so, then that child is also a potential candidate for representation by the Public Trustee.

[54] This Court's function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership. I mean by this that if the Public Trustee's inquiries determine that there are one or more outstanding applications for Band membership by a parent of a minor child then that is not a basis for the Public Trustee to intervene in or conduct a collateral attack on the manner in which that application is evaluated, or the result of that process.

[55] I direct that this shall be the full extent of the Public Trustee's participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

[56] In summary, what is pertinent at this point is to identify the potential recipients of a distribution of the 1985 Sawridge Trust, which include the following categories:

1. Adult members of the SFN;
2. Minors who are children of members of the SFN;
3. Adults who have unresolved applications to join the SFN;
4. Children of adults who have unresolved applications to join the SFN;
5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and
6. Children of persons in category 5 above.

[57] The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:
   a) made applications to join the SFN which are pending (category 3); and
   b) had applications to join the SFN rejected and are subject to challenge (category 5); and
2. The contact information for those individuals where available.

[58] As noted, the Public Trustee's function is limited *to representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and

2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

[59] This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);

b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and

c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

[60] These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

[61] My understanding from the affidavit evidence and submissions of the SFN and the 1985 Sawridge Trustees is that the Public Trustee has already received much information about persons on the SFN's membership roll and prospective and rejected candidates. I believe that this will provide all the data that the Public Trustee requires to complete Task 3. Nevertheless, the Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, then it is to file a *Rule* 5.13 application by January 29, 2016. The Sawridge Band and Trustees will then have until March 15, 2016 to make written submissions in response to that application. I will hear any disputed *Rule* 5.13 disclosure application at a case management hearing to be set before April 30, 2016.

Task 4 - General and residual distributions

[62] The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

[63] Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

a) a potential future successful SFN membership applicant and/or child of a successful applicant, or

b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

[64] As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or

2. on a pro rata basis:

a) be distributed to the members of Pool 1, and

b) be reserved in Pool 2 for future potential Pool 2 recipients.

[65] A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

[66] At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

[67] First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

[68] Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

[69] As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

[70] I believe that the instructions given here will refocus the process on Tasks 1 – 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in ***Sawridge #1*** I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in ***Stoney v Sawridge First Nation***. I repeat that

inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

[71] As the Court of Appeal observed in ***Sawridge #2*** at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule* 5.13 applications which may arise from completion of Tasks 1-3.

Heard on the 2nd and 3rd days of September, 2015.
Dated at the City of Edmonton, Alberta this 17th day of December, 2015.

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

Appearances:

Janet Hutchison
(Hutchison Law)
and
Eugene Meehan, QC
(Supreme Advocacy LLP)
for the Public Trustee of Alberta / Applicant

Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge First Nation / Respondent

Doris Bonora
(Dentons LLP)
and
Marco S. Poretti
(Reynolds Mirth Richards & Farmer)
for the 1985 Sawridge Trustees / Respondents

J.J. Kueber, Q.C.
(Bryan & Co.)
for Ronald Twinn, Walter Felix Twin,
Bertha L'Hoirondelle and Clara Midbo

Karen Platten, Q.C.
(McLennan Ross LLP)
For Catherine Twinn

TAB 11

SAWRIDGE BAND INTER VIVOS SETTLEMENT

DECLARATION OF TRUST

THIS DEED OF SETTLEMENT is made in duplicate the 15th day of April, 1985

B E T W E E N :

CHIEF WALTER PATRICK TWINN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter called the "Settlor"),

OF THE FIRST PART,

- and -

CHIEF WALTER PATRICK TWINN,
GEORGE V. TWIN and SAMUEL G. TWIN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter collectively called
the "Trustees"),

OF THE SECOND PART.

WHEREAS the Settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution of this Deed are members of the Sawridge Indian Band No. 19 within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, as such provisions existed on the 15th day of April, 1982, and the future members of such band within the meaning of the said provisions as such provisions existed on the 15th day

of April, 1952 and for that purpose has transferred to the Trustees the property described in the Schedule hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Settlement, the following terms shall be interpreted in accordance with the following rules:

(a) "Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time

would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band

No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement; and

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule hereto and any accumulated income thereon;

(B) any further, substituted or additional property and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Settlement; and

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be co[illegible]

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement.

4. The name of the Trust Fund shall be "The Sawridge Band Inter Vivos Settlement", and the meetings of the Trustees shall take place at the Sawridge Band Administration Office located on the Sawridge Band Reserve.

5. Any Trustee may at any time resign from the office of Trustee of this Settlement on giving not less than thirty (30) days notice addressed to the other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee shall be vested in the continuing Trustees or Trustee of this Settlement and such

power shall be exercised so that at all times (except for the period pending any such appointment, including the period pending the appointment of two (2) additional Trustees after the execution of this Deed) there shall be at least five (5) Trustees of this Settlement and so that no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there is more than one (1) Trustee who is not then a Beneficiary.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the end of twenty-one (21) years after the death of the last survivor of all persons who were alive on the 15th day of April, 1982 and who, being at that time registered Indians, were descendants of the original signators of Treaty Number 8, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under section 12(2) thereunder.

The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for Trustees' investments by the Trustees' Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Settlement for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner to any extent detracting from the generality of the foregoing, the power

(a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

(b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefor; and

(c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund,

including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries" under subparagraph 2(a) of this Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such

act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and subject to this clause.

13. Subject to paragraph 11 of this Deed, a majority of fifty percent (50%) of the Trustees shall be required for any decision or action taken on behalf of the Trust.

Each of the Trustees, by joining in the execution of this Deed, signifies his acceptance of the Trusts herein. Any other person who becomes a Trustee under paragraph 5 of this Settlement shall signify his acceptance of the Trust herein by executing this Deed or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Deed.

14. This Settlement shall be governed by, and shall be construed in accordance with the laws of the Province of

Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

NAME

ADDRESS

A. Settlor

B. Trustees:

NAME

ADDRESS

1.

NAME

ADDRESS

2.

NAME

ADDRESS

3.

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

TAB 12

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1603 0033AC
TRIAL COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, as amended IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19, now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985" Sawridge Trust")
INTERESTED PARTY/APPLICANT:	MAURICE STONEY
STATUS ON APPEAL:	APPELLANT
STATUS ON APPLICATION:	APPLICANT

DEFENDANT/RESPONDENT:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
STATUS ON APPEAL:	RESPONDENT
STATUS ON APPLICATION:	RESPONDENT
INTERESTED PARTY/RESPONDENT:	THE SAWRIDGE FIRST NATION
STATUS ON APPEAL:	RESPONDENT
STATUS ON APPLICATION:	RESPONDENT

DOCUMENT: **MEMORANDUM OF ARGUMENT OF THE SAWRIDGE FIRST NATION**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

Parlee McLaws LLP,
Barristers & Solicitors
Patent & Trade-Mark Agents
1500, 10180–101 Street
Edmonton, Alberta T5J 4K1
Attention: **Edward H. Molstad, Q.C.**
PH:(780).423-8506 FAX:(780) 423-2870
File No: 64203-7/EHM

and

CONTACT INFORMATION FOR ALL OTHER PARTIES:

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File No: 551860-1-DCEB

Hutchison Law
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130 Broadway Boulevard
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File No: 51433 JLH

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#600 West Chambers
12220 Stony Plain Road
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Attention: **Karen A. Platten, Q.C.**
PH: (780) 482-9200 FAX: (780) 481-9102
File No: 144194

Reynolds Mirth Richards & Farmer LLP
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Edmonton, AB T5J 3W8
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File No: 108511-001-MSP

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I. INTRODUCTION

1. The within application concerns Maurice Stoney's (the "Applicant") attempt to file an appeal of an Order granted by the Case Management Justice assigned to this Action, the Hon. Justice D. G. Thomas, on December 17, 2015 (the "Decision"). The Decision concerned a hearing that occurred on September 2 and 3, 2015 (the "Hearing").

2. The Hearing concerned, among other matters, a number of types of relief sought by the Office of the Public Trustee of Alberta ("Public Trustee") in relation to this Action. That relief was outlined in an Amended Notice of Application filed by the Public Trustee on July 16, 2015. While it is not a party to this Action, the Sawridge First Nation ("Sawridge") participated in the Hearing, because it was named as a Respondent in the Office of the Public Trustee's Amended Notice of Application.

Amended Notice of Application of the Office of the Public Trustee of Alberta, filed July 16, 2015. **[Tab 1]**

3. On November 4, 2015, the Applicant's counsel filed an Affidavit sworn by the Applicant. That Affidavit was not served by the Applicant's counsel until January 21, 2016. Counsel served the Affidavit without stating its purpose.

4. Sawridge adopts the submissions prepared by the Trustees for the 1985 Sawridge Trust in opposition to this application. Additionally, it is Sawridge's position that this application should be denied, as the Applicant is attempting to use this appeal to re-litigate issues surrounding the Applicant's entitlement to membership that have previously been decided.

II. SUBMISSIONS

A. The Applicant's history of litigation

5. Sawridge, in accordance with the *Indian Act* and pursuant to its constitutional, aboriginal and treaty rights to self-government, enacted membership rules that govern its membership application process (the "Membership Rules").

6. The Applicant has commenced a number of proceedings against Sawridge wherein he has attempted to obtain membership with Sawridge, and wherein he has attacked the validity

of the Membership Rules. In short, the Applicant has argued that he was entitled to membership pursuant to certain provisions contained in Bill C-31 (a bill which amended the *Indian Act*), and pursuant to the cases interpreting that bill. He also argued that the Membership Rules were unconstitutional, and that they were being improperly applied by Sawridge.

Stoney v Sawridge First Nation, 2013 FC 509, at paras 8, 19 – 22. **[Tab 2]**

Huzar v Canada, 2000 CanLII 15589 (FCA), at paras 2, 4 – 5. **[Tab 3]**

7. In 1995, the Applicant and a number of other individuals filed a Statement of Claim, wherein they sought a declaration that the Membership Rules were discriminatory, and a declaration that the Membership Rules were being misapplied. The Applicant's Statement of Claim was struck by the Federal Court of Appeal in 2000, because the claim failed to show any cause of action. In coming to this decision, the Court affirmed that the Applicant had no automatic right to membership; rather, he had at best a right to apply for membership.

Huzar v Canada, 2000 CanLII 15589 (FCA), at paras 4 – 5. **[Tab 3]**

8. During the hearing before the Federal Court of Appeal, counsel for the respondents (which included the Applicant) conceded that the respondents did not have an acquired right to membership without the consent of Sawridge.

Huzar v Canada, 2000 CanLII 15589 (FCA), at para 4. **[Tab 3]**

9. The Applicant next attempted to apply for membership with Sawridge pursuant to the Membership Rules on August 30, 2011. The Applicant's application for membership was denied by Sawridge's Chief and Council. In its decision, Sawridge affirmed that the Applicant did not have a right to membership. It also noted that it did not wish to use its discretion to grant the Applicant membership.

Huzar v Canada, 2000 CanLII 15589 (FCA), at para 5. **[Tab 3]**

10. Pursuant to the Membership Rules, the Applicant appealed Chief and Council's decision to Sawridge's Appeal Committee. That appeal was heard on April 21, 2012. The

Applicant's appeal was dismissed, as there were, "no grounds to set aside the decision of the Chief and Council."

Decision in the matter of the appeal of the membership application of Maurice Felix Stoney. [Tab 4]

Stoney v Sawridge First Nation, 2013 FC 509, at paras 5 – 7. [Tab 2]

11. The Applicant and two other individuals (Aline Huzar and June Kolosky) filed a judicial review application with the Federal Court, wherein they attempted to overturn Sawridge's decision to deny their membership. The Applicant's application for judicial review was heard by Justice Barnes on March 5, 2013. In his written reasons, Justice Barnes affirmed that there was nothing in Bill C-31 that granted the Applicant automatic membership in Sawridge. Justice Barnes also noted that the judicial review application amounted to an attempt by the Applicant to re-litigate the issue of his entitlement to membership.

Stoney v Sawridge First Nation, 2013 FC 509, at paras 8, 15 – 17. [Tab 2]

12. Most recently, the Applicant lodged a complaint concerning Sawridge with the Canadian Human Rights Commission on January 31, 2014. The CHRC dismissed the Applicant's complaint on April 15, 2015. The commissioner who decided the matter found that since the validity of Sawridge's decision to deny the Applicant's membership had been decided in two previous proceedings before the Federal Court, and given that human rights allegations had been raised as part of those proceedings, the commissioner refused to deal with this complaint.

Record of Decision under Section 40/41, Canadian Human Rights Commission, dated April 15, 2015. [Tab 5]

B. *Issue Estoppel*

13. The doctrine of issue estoppel exists in order to protect finality in the litigation process. According to that doctrine, a party cannot re-litigate the substance of a matter in a proceeding if that matter has already been decided in a prior proceeding. In *Danyluk v Ainsworth Technologies Inc.* ("*Danyluk*"), Justice Binnie explained that there were two steps to determining whether a party was estopped from commencing proceedings based on this doctrine. The first step required that the following three preconditions be met:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Danyluk v Ainsworth Technologies Inc., [2001] 2 SCR 460, 2001 SCC 44, at para 25. **[Tab 6]**

14. If the above three preconditions exist, then the next step is for a Court to determine if the doctrine should be applied in the circumstances. That step requires that the Court consider certain factors related to the public's interest in ensuring finality in litigation, and its interest in ensuring that justice is done.

Danyluk v Ainsworth Technologies Inc., [2001] 2 SCR 460, 2001 SCC 44, at para 33. **[Tab 6]**

15. Sawridge submits that the Applicant's attempt to insert himself into these proceedings is in direct contravention of the doctrine of issue estoppel. With regards to the first step of the *Danyluk* test, the same issues being raised by the Applicant concerning membership in Sawridge have already been dealt with in the above-cited proceedings. In each of those proceedings, final decisions were made regarding the Applicant's entitlement to membership, and regarding the validity of the Membership Rules. Finally, all of these decisions involved both the Applicant and Sawridge.

16. Insofar as the second step of the *Danyluk* test, all of the relevant factors militate in favour of it applying in the circumstances. Allowing the Applicant to become involved in this Action and in the appeal before this Honourable Court is directly in opposition to the objective of ensuring finality in the litigation process. The interests of justice similarly weigh in favor of the application of issue estoppel; the Applicant has had a number of opportunities to advance the arguments he has raised during the aforementioned proceedings, and has in fact done so. As such, there is nothing that suggests that it would be unjust to apply the doctrine.

17. As noted in the submissions prepared by the Trustees for the 1985 Sawridge Trust, the merits of the Applicant's case are relevant to determining whether an extension of time to

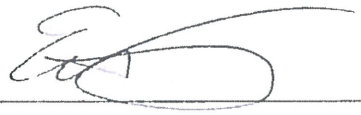
file an appeal should be granted. For the above-noted reasons, it is Sawridge's position that the Applicant's Notice of Appeal does not disclose any cause of action that would not be barred by the doctrine of issue estoppel. Accordingly, the Applicant's request to file his Notice of Appeal late should be dismissed.

III. CONCLUSION

18. Sawridge submits that the Applicant's request to file his notice of appeal should be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of February, 2016.

PARLEE McLAWS LLP



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

LIST OF AUTHORITIES

TAB	AUTHORITY NAME
1	Amended Notice of Application of the Office of the Public Trustee of Alberta, filed July 16, 2015.
2	*Stoney v Sawridge First Nation*, 2013 FC 509
3	*Huzar v Canada*, 2000 CanLII 15589 (FCA)
4	Decision in the matter of the appeal of the membership application of Maurice Felix Stoney
5	Record of Decision under Section 40/41, Canadian Human Rights Commission, dated April 15, 2015
6	*Danyluk v Ainsworth Technologies Inc.*, [2001] 2 SCR 460, 2001 SCC 44

TAB 13

2010 ABCA 40
Alberta Court of Appeal

Balogun v. Pandher

2010 CarswellAlta 177, 2010 ABCA 40, [2010] A.W.L.D. 867, [2010] A.W.L.D. 868, 184 A.C.W.S. (3d) 976, 474 A.R. 258, 479 W.A.C. 258

Alexander O. Balogun, Esther Elizabeth Balogun (by her Next Friend, Alexander O. Balogun), Pauline Jessica Balogun (by her Next Friend, Alexander O. Balogun), Daniel Richard Balogun (by his Next Friend, Alexander O. Balogun) and Alexander Otto Balogun Jr. (by his Next Friend, Alexander O. Balogun) (Appellants / Plaintiffs) and Harbhajan Singh Pandher (Respondent / Defendant)

Frans Slatter J.A., Jack Watson J.A., and Patricia Rowbotham J.A.

Heard: February 1, 2010
Judgment: February 5, 2010
Docket: Edmonton Appeal 0903-0144-AC

Counsel: Alexander O. Balogun for himself
B.E. Wallace for Respondent

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Trials — Jury trial — Power of court to determine mode of trial — Discretion

Case management judge issued order denying jury trial in motor vehicle personal injuries action — This was second ruling during case management process by same judge denying jury trial — Case management judge found that basis for earlier ruling had not changed and that there was no reason to decide differently — Plaintiff appealed — Appeal dismissed — There was no discernable basis for intervention either on (a) decision of case management judge to refrain from re-considering his earlier decision (if that is what he did), or (b) decision on merits if he did reconsider matter — As to point (a), case management would not be very effective method for civil proceedings if rulings of case management judges could simply be revisited as of right at instance of unsatisfied party, even if there might have been some adjustment of factual platform on which earlier decision was made — Appellate deference on exercise of discretion is particularly appropriate to case management decisions which decline to re-open procedural adjudication which settled issue for case management purposes — Very essence of case management is judicial supervision of litigation process in order to provide coherence, predictability and stability to that process — As to point (b), there was no error in substantive ruling on jury trial that was within reach of applicable standard of review — Decision was not arbitrary, erroneous in law or fact, or productive of injustice.

Civil practice and procedure --- Pre-trial procedures — Case management and status hearing — Case management — Appeals

Case management judge issued order denying jury trial in motor vehicle personal injuries action — This was second ruling during case management process by same judge denying jury trial — Case management judge found that basis for earlier ruling had not changed and that there was no reason to decide differently — Plaintiff appealed — Appeal dismissed — There was no discernable basis for intervention either on (a) decision of case management judge to refrain from re-considering his earlier decision (if that is what he did), or (b) decision on merits if he did reconsider matter — As to point (a), case management would not be very effective method for civil proceedings if

rulings of case management judges could simply be revisited as of right at instance of unsatisfied party, even if there might have been some adjustment of factual platform on which earlier decision was made — Appellate deference on exercise of discretion is particularly appropriate to case management decisions which decline to re-open procedural adjudication which settled issue for case management purposes — Very essence of case management is judicial supervision of litigation process in order to provide coherence, predictability and stability to that process — As to point (b), there was no error in substantive ruling on jury trial that was within reach of applicable standard of review — Decision was not arbitrary, erroneous in law or fact, or productive of injustice.

APPEAL by plaintiff from order of case management judge denying jury trial in motor vehicle personal injuries action.

Per curium:

The adult appellant challenges a Court of Queen's Bench case management judge's order denying a jury trial in a motor vehicle personal injuries lawsuit. The adult appellant is a plaintiff in his own right and proceeds without counsel. He purports to represent, as next friend, his four children also as appellants. His representation of two children is problematic as those two children are no longer minors and should be represented by their own solicitor: *Salamon v. Alberta (Minister of Education)*, 120 A.R. 298, [1991] A.J. No. 922 (Alta. C.A.), leave denied (1993), [1991] S.C.C.A. No. 535 (S.C.C.); see also *Holland (Guardian ad litem of) v. Marshall*, 96 B.C.L.R. (4th) 55, [2009] B.C.J. No. 1294, 2009 BCCA 311 (B.C. C.A. [In Chambers]), leave denied, [2008] S.C.C.A. No. 327 (S.C.C.) and affirmed as *Holland (Guardian ad litem of) v. Marshall*, [2009] B.C.J. No. 2535, 2009 BCCA 582 (B.C. C.A.); *Balogun v. Pandher*, [2009] A.J. No. 1339, 2009 ABCA 409 (Alta. C.A.). Under the circumstances of this case, however, we do not need to address this procedural concern.

The case management in the Court of Queen's Bench relates to an incident on May 14, 2003 where the respondent (defendant)'s vehicle collided with the back end of a vehicle containing the appellants. The appellants' claims include general damages, loss of income earning capacity, and cost of future care. The respondent disputes the damage claims. Issues at trial will include causation and quantum of damages.

The ruling under appeal dated April 22, 2009 is the second ruling during the case management process by the same judge denying a jury trial, the earlier ruling being at 430 A.R. 229, [2007] A.J. No. 1134, 2007 ABQB 615 (Alta. Q.B.). The case management judge in the ruling under appeal held that the basis for his 2007 ruling had not changed and that there was no reason to decide differently in 2009.

In his 2007 ruling, the case management judge referred to s. 17(1)(b) of the *Jury Act*, R.S.A. 2000, c. J-3, which allows for jury trials in lawsuits such as this where the amount claimed "exceeds an amount prescribed by regulation". The regulation in this instance provides that the "amount claimed" must exceed $75,000 for actions commenced after March 1, 2003: s. 4.1 of *Jury Act Regulation*, Alta. Reg. 68/83. The Statement of Claim in this instance claims an amount in excess of $75,000 for each plaintiff. By this and the other terms of s. 17 of the Act, the Legislature has set the criteria for eligibility for a civil jury trial in this province. There is no residual discretion of case management judges to order a civil jury trial on a basis not provided for by legislation: *Purba v. Ryan*, 397 A.R. 251, [2006] A.J. No. 963, 2006 ABCA 229 (Alta. C.A.).

A jury trial, however, can be refused where the trial involves matters that cannot "conveniently be made by a jury": s.17(2) of the *Act*. The case management judge looked at the criteria from case law for determining inconvenience under s. 17(2) of the *Act*. Those criteria include "(a) a prolonged examination of documents or accounts, or (b) a scientific or long investigation". To assess these criteria, a case management judge will consider such factors as the number of parties and factual issues, the number of experts, the need for interpretation, the legal issues, the potential for conflicts of expert opinion, questions of causation and other factors including, in our view, what the history of the litigation suggests about the approach the parties can be expected to take. He concluded in his 2007 ruling that "this is not a case that can be conveniently heard by a jury taking into account the number of issues involved with five Plaintiffs, the length of trial time required, the amount and complexity of the expert evidence, the number of medical reports and the history

of the litigation": at para. 43. No appeal was taken from that 2007 decision. As to the more recent 2009 ruling, the case management judge referred to his previous decision declining to order a jury trial and concluded that he saw "no reason to change [his] previous decision and order a jury trial."

In sum, the appellants argue that the trial of this action would not be so prolonged or complex that it could not be conveniently heard by a jury. The respondent submits that the case management judge properly considered the applicable criteria in determining that the case was inappropriate for a jury trial. The respondent also submits that the case management judge properly considered whether he should re-visit his earlier ruling.

The decision of the case management judge to decline to reverse his prior ruling, and his decision to find no basis to order a jury trial in this case, were both exercises of discretion. As such, the standard of review for the factual underpinnings of the exercise of discretion is deferential absent palpable and overriding error: *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24, 2005 SCC 25 (S.C.C.) at paras. 52 to 56. The standard of review for the exercise of discretion by a case management judge is also deferential and appellate intervention is warranted only if the case management judge has clearly misdirected himself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice: see e.g. *Chevron Canada Resources v. Canada (Executive Director of Indian Oil & Gas)*, 457 A.R. 132, [2009] A.J. No. 496, 2009 ABCA 180 (Alta. C.A.) at paras. 4 to 6; *Richard v. Lee-Knight*, [2009] A.J. No. 653, 2009 ABCA 224 (Alta. C.A.), leave denied, (2010), [2009] S.C.C.A. No. 429 (S.C.C.) at para. 9; *Balogun v. Pandher*, [2009] A.J. No. 1339, 2009 ABCA 409 (Alta. C.A.) at paras. 10 and 11.

Here we are unable to discern any basis for intervention either on (a) the decision of the case management judge to refrain from re-considering his earlier decision (if, indeed, that is what he did since he appears to have taken a renewed look at the matter substantively) or (b) the decision of the case management judge on the merits under s. 17 of the *Act* if indeed the case management judge did re-consider the matter.

As to point (a), case management would not be a very effective method for civil proceedings if rulings of case management judges could simply be re-visited as of right at the instance of an unsatisfied party to the action - even if there might have been some adjustment of the factual platform on which the earlier decision was made. Accordingly, appellate deference on the exercise of discretion is particularly appropriate as to case management decisions which decline to re-open a procedural adjudication which settled an issue for case management purposes. That high deference is not merely because of the policy resistance to fragmentation of proceedings and piecemeal appellate review, nor because it may be that a specific case management ruling may be subject to appeal at the end of the trial if its effects can be traced through to that stage, but also because the very essence of case management is judicial supervision of the litigation process in order to provide coherence, predictability and stability to that process. We detect no error in the case management judge's decision not to re-open his earlier ruling.

As to point (b), we find no error in the substantive ruling on a jury trial that is within reach of the applicable standard of review. The decision was not arbitrary, erroneous in law or fact, nor productive of injustice.

The appeal is dismissed.

Appeal dismissed.

TAB 14

2012 ABCA 269
Alberta Court of Appeal

Beacon Hill Service (2000) Ltd. v. Esso Petroleum Canada

2012 CarswellAlta 1563, 2012 ABCA 269, [2012] A.W.L.D. 4993, [2012] A.W.L.D. 5043, [2013] 1 W.W.R. 509, 536 A.R. 221, 559 W.A.C. 221, 70 Alta. L.R. (5th) 238

Beacon Hill Service (2000) Limited (Appellant / Plaintiff) and Esso Petroleum Canada, A Division of Imperial Oil Limited and McColl-Frontenac Petroleum Inc. (Respondents / Defendants)

Imperial Oil, a Partnership of Imperial Oil Limited and McColl-Frontenac Petroleum Inc. (Respondents / Plaintiffs by Counterclaim) and Beacon Hill Service (2000) Limited and E.F. Anthony Merchant (Appellants / Defendants by Counterclaim)

Peter Martin, Jack Watson, Frans Slatter JJ.A.

Heard: September 12, 2012
Judgment: September 21, 2012
Docket: Calgary Appeal 1201-0043-AC

Proceedings: affirming *Beacon Hill Service (2000) Ltd. v. Esso Petroleum Canada* (2011), [2011] 9 W.W.R. 200, 45 Alta. L.R. (5th) 92, 512 A.R. 212, 2011 ABQB 138, 2011 CarswellAlta 366 (Alta. Q.B.)

Counsel: S. Flannigan, for Appellants
R. Bastedo, for Respondents

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

Headnote

Professions and occupations --- Barristers and solicitors — Employment of lawyer — Representation by solicitor — Application for removal as solicitor of record

M was principal partner of law firm — M wanted firms' associate(s) to act for him and for plaintiff corporation in action — M was one of shareholders and directors of company (M Ltd.) which owned 97 per cent of shares in plaintiff — M was defendant by counterclaim — M was to be key witness — Defendant sought to remove firm as counsel for plaintiff and for defendants by counterclaim — Chambers judge ruled that M was prohibited from acting for plaintiff, firm was prohibited from acting for either M or plaintiff, but M was not prohibited from acting for himself — Plaintiff and M and appealed — Appeal dismissed — Chambers judge's conclusion was reasonable and not afflicted by error of law — Decision was exercise of discretion within innate jurisdiction of Court of Queen's Bench to control its processes, uphold integrity of administration of justice and to prevent abuse of those processes — Exercise of discretion did not terminate proceeding to disadvantage of any party — It was not error of law or palpable error of fact for chambers judge to have regard to indications that M would inevitably be called as witness in trial, nor was it unreasonable for him to conclude that M's personal credibility would be disputed by opposing parties on important and material matters directly in issue between parties — Chambers judge's further conclusion that M's law firm would be unable to approach litigation with any greater detachment than M was not unreasonable.

Business associations --- Nature of business associations — Nature of corporation — Distinct existence — From owner — General principles

M was principal partner of law firm — M wanted firms' associate(s) to act for him and for plaintiff corporation in action — M was one of shareholders and directors of company (M Ltd.) which owned 97 per cent of shares in plaintiff — M was defendant by counterclaim — M was to be key witness — Defendant sought to remove firm as counsel for plaintiff and for defendants by counterclaim — Chambers judge ruled that M was prohibited from acting for plaintiff, firm was prohibited from acting for either M or plaintiff, but M was not prohibited from acting for himself — Plaintiff and M and appealed — Appeal dismissed — Chambers judge's conclusion was reasonable and not afflicted by error of law — Decision was exercise of discretion within innate jurisdiction of Court of Queen's Bench to control its processes, uphold integrity of administration of justice and to prevent abuse of those processes — Exercise of discretion did not terminate proceeding to disadvantage of any party — It was not error of law or palpable error of fact for chambers judge to have regard to indications that M would inevitably be called as witness in trial, nor was it unreasonable for him to conclude that M's personal credibility would be disputed by opposing parties on important and material matters directly in issue between parties — Chambers judge's further conclusion that M's law firm would be unable to approach litigation with any greater detachment than M was not unreasonable.

APPEAL by plaintiff and M from judgment reported at *Beacon Hill Service (2000) Ltd. v. Esso Petroleum Canada* (2011), [2011] 9 W.W.R. 200, 45 Alta. L.R. (5th) 92, 512 A.R. 212, 2011 ABQB 138, 2011 CarswellAlta 366 (Alta. Q.B.) ruling that M was prohibited from acting for plaintiff, firm was prohibited from acting for either M or plaintiff, but M was not prohibited from acting for himself in action.

***Per curiam*:**

1 The appellants, being a lawyer (E.F.A. Merchant) and a company of which the lawyer is the "leading actor" (Beacon Hill Service (2000) Limited) challenge a ruling of a chambers judge that allowed the lawyer Merchant to represent himself in the proceedings but to prevent him from also representing Beacon Hill. The chambers judge also ruled that the lawyer's law firm, Merchant Law Group, could not represent Beacon Hill in the proceedings even before trial.

2 This decision was an exercise of discretion within the innate jurisdiction of the Court of Queen's Bench to control its processes, to uphold the integrity of the administration of justice and to prevent abuse and potential abuse of those processes. This jurisdiction extends to making orders that affect counsel, who are, after all, officers of the court: see *e.g. MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.) at paras 13 and paras 58 to 60; *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para 18; *R. c. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78 (S.C.C.) at para 24. This exercise of discretion did not terminate a proceeding to the disadvantage of any party.

3 Further, as pointed out in *MacDonald Estate* at paras 44 to 46 in the context of conflict of interest, a "probability of mischief" standard is "wanting" in terms of public confidence. Where the court is looking forward in the light of past events, the judgment of the Court as to the prospect of conflict or abuse is context-sensitive. This is not to substitute a "mere possibility" of mischief test: see *Forward v. Zurich Insurance Co.* (2002), 2002 ABCA 123, 303 A.R. 119 (Alta. C.A.) at para 7. But it is to recognize that the balancing of values involved is based on the realities of the situation.

4 Discretionary rulings that affect the procedural course of legal proceedings should generally be disturbed on appeal only if clearly unreasonable or legally erroneous, which in practical terms means "only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice": see *e.g. R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 (S.C.C.), at para 117 citing *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.), at paras 15 to 17 (p 1375); *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.), at para 87; *R. c. Bellusci*, 2012 SCC 44 (S.C.C.) at para 17. See also *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17, 343 D.L.R. (4th) 577 (S.C.C.) at para 112 ("The exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts...."); *Indian Residential Schools, Re* (2001), 2001 ABCA 216, 286 A.R. 307 (Alta. C.A.) at paras 16 to 23 citing *Decock v. Alberta*, 2000 ABCA 122, 255 A.R. 234 (Alta. C.A.) at para 13 (appeal to SCC No. 37980 abandoned).

5 As observed in *Van Breda* at para 70: "Judicial discretion has an honourable history, and the proper operation of our legal system often depends on its being exercised wisely." This does not mean that the exercise of discretion is unreviewable. But an appeal court should not simply substitute its own view on an interlocutory ruling merely because the appeal court takes a different view of the circumstances from that of the court where the matter is proceeding: see *Indian Residential Schools, Re*. See also *Boreta v. Primrose Drilling Ventures Ltd.*, 2010 ABCA 387, 499 A.R. 150 (Alta. C.A.) where it was pointed out at para 11 that "While the rules of court are intended to facilitate expeditious justice, they are intended to do so for all parties to the dispute, not for the convenience of one litigant only."

6 The appellant sought to persuade us that the chambers judge committed error of law by selecting what the appellant urges to be one of two distinct lines of authority as to interventions to require a party to change counsel. The appellant submits that the chambers judge in so doing took a rigid legal position. We doubt that there are two conflicting flows of reasoning in the cases provided to us. In any event we are not persuaded that the chambers judge adopted any bright line rule approach to the situation before him. In particular, we do not find the chambers judge made his decision purely based on any legal distinction between the business involvement of the appellant lawyer and his legal practice or conduct in the proceedings. Those aspects of the situations were just factors to be considered.

7 In our view, the chambers judge did not err in law in his assessment of the specific context of these slow moving proceedings and the events which had occurred therein as disclosed to him. It was not error of law or palpable error of fact for him to have regard to the indications that the appellant lawyer would inevitably be called as a witness in the trial. Nor was it unreasonable for the chambers judge to conclude that the appellant lawyer's personal credibility would be disputed by opposing parties on important and material matters directly in issue between the parties and not merely as to incidental or process topics. The chambers judge's further conclusion that the lawyer's law firm would be unable to approach the litigation with any greater detachment than the lawyer was also not unreasonable under the circumstances. The firm, like the lawyer, would arguably have a reputational if not also a financial stake in the outcome: see *e.g. Forward v. Zurich Insurance Co.* at para 8, citing with approval *Harvard Investments Ltd. v. Winnipeg (City)*, [1994] 6 W.W.R. 127 (Man. Q.B.), at 137. We also find no error of law in the chambers judge's conclusion that the corporate appellant had a distinct legal entity.

8 We do not find it necessary to be elaborate on the topic of what circumstances could give rise to requiring a party to obtain other counsel than the party would choose to have. We find this case to be one of particular circumstances. We find that the chambers judge's conclusion is reasonable and not afflicted by error of law and that it should be affirmed.

Appeal dismissed.

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TAB 15

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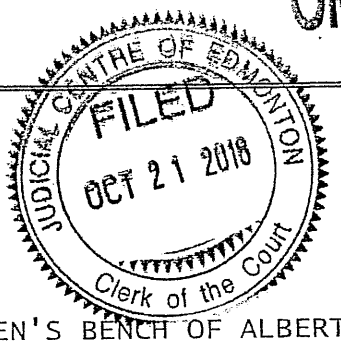

COURT FILE NUMBER: 1103 14112

COURT: COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, as am.

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19

QUESTIONING ON AFFIDAVIT

OF

MAURICE STONEY

P. E. Kennedy, Ms.	For Maurice Stoney
D. C. Bonora, Ms. E. M. Lafuente, Ms.	For the Trustees of the Sawridge Band Inter Vivos Settlement
C. C. Osualdini, Ms.	For Cathrine Twinn
Joanne Lawrence, CSR(A)	Court Reporter

Edmonton, Alberta
September 23, 2016

INDEX OF OBJECTIONS

(Objections are provided for your assistance. Counsel's records may differ. Please check to ensure that all objections have been listed according to your records.)

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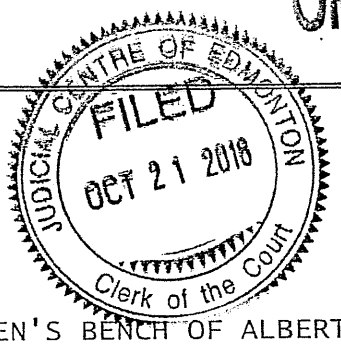
membership in Sawridge were ignored," and we were focussing on your application. Can you tell me whose applications you mean when you say "our applications," the word O-U-R?

TAB 16

ORIGINAL



COURT FILE NUMBER: 1103 14112

COURT: COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, as am.

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19

QUESTIONING ON AFFIDAVIT

OF

MAURICE STONEY

P. E. Kennedy, Ms.	For Maurice Stoney
D. C. Bonora, Ms. E. M. Lafuente, Ms.	For the Trustees of the Sawridge Band Inter Vivos Settlement
C. C. Osualdini, Ms.	For Cathrine Twinn
Joanne Lawrence, CSR(A)	Court Reporter

Edmonton, Alberta
September 23, 2016

MS. KENNEDY: In one particular portion, yes.

MS. LAFUENTE: Okay.

MS. KENNEDY: And what it says with respect to the rest of it is the wording in the trust deed which is what we're arguing about before the Court.

MS. LAFUENTE: And that's what you're attempting to bring before this Court by being added as a party.

MS. KENNEDY: That's what we're arguing in terms of our ability to be before the Court as a beneficiary.

Q MS. LAFUENTE: Okay. Sir, going back to paragraph 12 of your Affidavit, we talked about this first sentence here before, "All of our applications for membership in Sawridge were ignored," and we were focussing on your application. Can you tell me whose applications you mean when you say "our applications," the word O-U-R?

A I won't answer it.

Q Why won't you answer that, sir? It's your Affidavit, and I want to know what you mean when you say, "Our applications were ignored."

A Did you ask that question before?

Q No. I'm asking what you mean by the word, "Our" -- the words, "our applications." Whose applications?

A No, I won't answer that.
Q Sir, why aren't you answering that question?
A I'll leave it up to the courts.
Q You -- I'm going to point out that your counsel did not put an objection on the record but that you are refusing the answer the question because you want to leave it up to the courts.
MS. KENNEDY: That's what he said.
Q MS. LAFUENTE: Okay. So, sir --
MS. KENNEDY: You don't have to repeat it.
Q MS. LAFUENTE: -- how is the Court supposed to -- how is the Court supposed to understand what you mean by the word "our" if you won't tell us what you mean?
MS. KENNEDY: Okay. Now, let's not get into arguments with him, and that's what you're doing by characterizing the way he has made an answer. He has made an answer. You may not like it, but he has made an answer.
MS. LAFUENTE: Okay.

OBJECTION TO QUESTION:

Okay. Sir, going back to paragraph 12 of your Affidavit, we talked about this first sentence here before, "All of our applications for membership in Sawridge were ignored," and we were focussing on your application. Can you tell me whose

TAB 17

Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

August 24, 2016	Morning Session
The Honourable Mr. Justice Thomas	Court of Queen's Bench of Alberta
C.K.A. Platten, Q.C.	For Catherine Twinn
C. Osuladini	For Catherine Twinn
L. Maj	For the Minister of Aboriginal Affairs and Northern Development
J.L. Hutchison	For the Public Trustee of Alberta
D.C. Bonora	For Sawridge Trustees
A. Loparco	For Sawridge Trustees
N.L. Golding, Q.C.	For Patrick Twinn, et al
E.H. Molstad, Q.C.	For Sawridge First Nation
G. Joshee-Arnal	For Sawridge First Nation
S.A. Wanke	For Morris Stoney, et al
C. Wilde	Court Clerk

Discussions

THE COURT: Good morning.

Are you going to do the introductions?

MR. MOLSTAD: I have been assigned that task, Sir.

THE COURT: All right.

MR. MOLSTAD: We have, representing the Sawridge Trustees, Ms. Bonora and Ms. Loparco.

We have representing the Public Trustee, Ms. Hutchison. Mr. Meehan is not with us today.

We have representing Catherine Twinn, Ms. Platten, and Ms. Osualdini.

We have myself, Sir, and Mr. Joshee-Arnal representing the Sawridge First Nation.

We have representing Mr. Morris Stoney, et al, Ms. Wanke.

And we have representing Patrick Twinn, et al, Ms. Golding.

We also have in attendance from the Minister of Aboriginal Affairs and Northern Development, Ms. Maj from the Department of Justice.

We -- as you can see from the agenda that was sent to you yesterday, the first item on the agenda is the Rule 5.13 application --

THE COURT: Yes.

MR. MOLSTAD: -- on membership and costs. And I'd like to guess that the matters after that are not going to take too long, but that is a guess in terms of the other matters (INDISCERNIBLE).

THE COURT: Yeah, I saw that revised agenda this morning. Thanks for sending it in. But I think what I'm going to do is I'm going to reorder it, because it looks to me from the revised agenda, the only matter that may take some time is actually your application.

MR. MOLSTAD: That may be the case.

THE COURT: So let's see if we can move some of the counsel along here.

MR. MOLSTAD: Well, I'm -- we're all in your hands, Sir, so. . .

THE COURT: All right.

MR. MOLSTAD: What order are you proposing in.

THE COURT: Oh, I'm proposing just normal chambers process; that is the consent order first, get it resolved and dealt with. That would be --

MR. MOLSTAD: Number 4?

THE COURT: Number 4, the consent order. And then we'll deal with these adjournment requests and --

MR. MOLSTAD: All right. Before I sit down, before we start the

Rule 5.13 application, I've had some discussion with my friend and I have a few preliminary comments before we start that.

THE COURT: All right.

MR. MOLSTAD: Okay? Thank you, Sir.

THE COURT: Certainly. And I think I will -- that's useful, because I think I've reviewed that material and I can narrow it down fairly quickly.

MR. MOLSTAD: Thank you.

THE COURT CLERK: Sorry, Sir, what was your name?

THE COURT: Mr. Molstad, Q.C.

MR. MOLSTAD: Sorry.

Submissions by Ms. Bonora

MS. BONORA: Sir, you'll recall that in this application, there were basically two issues. One was the beneficiary designation and the second was to confirm that the transfer of assets from the 1982 Trust to the 1985 Trust were -- was appropriate, and that we've put that issue behind us. And through the work of counsel, we've been able to reach agreement on the issue of the transfer of assets.

I believe, Sir, you received a brief from us and a copy of the consent order.

THE COURT: I did. And thank you very much for the brief, because it makes it pretty clear --

MS. BONORA: Yeah. So --

THE COURT: -- well, what the basis for it is, and I'm certainly satisfied that the consent order is appropriate and properly based in law.

MS. BONORA: Sir, I will not take any more time then. If you've read the brief, I really have nothing else to add to the submissions that we've made. And so, therefore, I think my friends would like to make a few comments, and I'll just respond to those if there's anything else, unless you have any questions for me.

THE COURT: All right. I wonder if, counsel, if you wouldn't mind just mentioning your name before you speak just so the clerk can keep track of who's speaking?

MS. BONORA: Doris Bonora of Dentons just spoke. Thank you, Sir.

THE COURT: Thanks, Ms. Bonora.

Submissions by Ms. Hutchison

MS. HUTCHISON: Good morning, My Lord. Janet Hutchison for the Public Trustee of Alberta.

Very brief comments, My Lord, simply to give the Court some idea of why the OPTT, and I believe Ms. Platten will speak to trustee Twinn, why we weren't able to arrive at a joint brief, as well as a consent order. And it was simply a matter, My Lord, of some of the wording around the facts and the evidence and what evidence was actually available, as well as the final paragraph of the brief. Counsel just really weren't able to quite agree how to characterize some of the issues around accounting.

The -- the Public Trustee would just like it noted on record that its position on the consent order is that when it -- there is this reference to accounting in the preamble in paragraph 2, that includes an individual accounting, as well as a passing of accounts. And, of course, My Lord, for future reference, the passing of accounts for the five trusts would occur logically within this proceeding, after beneficiary identification is dealt with.

But that's all we have to say, My Lord.

THE COURT: All right. Thank you. Ms. Platten?

Submissions by Ms. Platten

MS. PLATTEN: Sir, I think those are also our submissions, and so we don't really anything further to say.

THE COURT CLERK: Sorry, your name, for the record?

MS. PLATTEN: Sorry, Karen Platten for Catherine Twinn.

Submissions by Ms. Golding

MS. GOLDING: Sir, Nancy Golding from Borden Ladner Gervais in Calgary, and I am new to these -- this matter, acting on behalf of several of the individual beneficiaries.

I just wanted to comment that my client wasn't involved in this order, and so we don't intend to make any comment on it. However, we do want it noted that our understanding is the order is without prejudice to the rights of our client to request an accounting as it relates to the 1982 and 1985 Trusts, and for any relief that might come from that.

Thank you, Sir.

THE COURT: Thank you. Ms. Bonora, any --

MS. BONORA: Just one --

THE COURT: Look, I --

MS. BONORA: -- comment, Sir.

MS. MAJ: Sorry, sorry.

MS. BONORA: Oh, my -- my apologies.

THE COURT: You -- you can say something, but if --

MS. MAJ: That's all right. It's hard -- it's hard to see me in the back.

THE COURT: Quite frankly, you are not a party at --

Submissions by Ms. Maj

MS. MAJ: I was simply going to actually echo Ms. Platten's comments, My Lord.

THE COURT: Yeah. Well, okay. Well, just echo it and let's get on with it.

Ms. Bonora?

Submissions by Ms. Bonora

MS. BONORA: Just one comment. Ms. Hutchison said that the consent order was based on the accounting naturally occurring in this proceeding, and that was not discussed until yesterday morning. So I don't think it is the basis for the consent order, and that is a very live issue in terms of how the accounting will proceed. So I -- we just need to -- I'm not sure that you will be hearing that accounting. That is an issue that you'll hear about later in terms of how that's going to happen, so. . .

THE COURT: All right. Mr. Molstad, you don't have anything to say?

MR. MOLSTAD: I don't have anything to say. My name is Mr. Molstad.

Order (Consent Order)

THE COURT: All right. The consent order being sent to me with the brief, as I -- just so it's clear on the record, I did review that brief and it was very helpful to me in terms of providing a legal basis for the consent order. Plus, the Summary of Facts helped put me in the picture again.

So the consent order is granted, and there it is.

MS. BONORA: Thank you, Sir.

THE COURT: Madam Clerk, if you wouldn't mind handing that to Ms. Bonora.

Submissions by Ms. Bonora (Distribution Proposal Adjournment)

MS. BONORA: Sir, perhaps I'll speak to the adjournment in respect of the distribution proposal next.

THE COURT: All right. Sure.

MS. BONORA: Sir, the -- you'll recall in your December 17th, 2015, decision, you asked the Trustees to present a distribution proposal and to have it approved by the Court, and so we, in fact, submitted the distribution proposal to the Court. We then filed a brief in respect of approving that distribution proposal, and briefs have been filed by the Office of the Public Guardian and Trustee, and by Catherine

Twinn.

Subsequent to the filing of those briefs, we received applications by Morris Stoney and his brothers and sisters, and from Patrick Twinn, and his family Shelby Twinn and Debra Sarafinchin.

In respect of the standing of those parties and whether they are beneficiaries, we believe that until those applications are heard, that, as beneficiaries, they probably have a right to speak. If they, in fact, are beneficiaries and are going to be treated as parties, that they have a right to speak to distribution, and so we think it appropriate to postpone that issue. It's ready to go once we've determined the standing of the various other parties and -- and it would be our submission that especially with respect to the clients Ms. Golding represents.

So those are my submissions in respect of the adjournment, and I think all counsel are on board with that adjournment request.

THE COURT: So both the distribution plan, I'll call it, plus the issue of -- the outstanding issue of who the beneficiaries are?

MS. BONORA: Yes. So the beneficiary definition is also postponed. Counsel have advised that they believe it would be perhaps a two-day application to deal with that particular issue, and so we still have to determine exactly how we're going to come to bring that issue before the Court. We're still in discussions among counsel on that issue.

THE COURT: Well, thank you for that, but I'll give you my thinking on that issue. I'm inclined to send that issue to trial, and it won't be me hearing it. It will be some other judge. I'm finding that the estimates of counsel in this matter aren't too accurate, and given the nature of this litigation, I'm thinking -- my thinking is, I'm not making an order, but I'm thinking this is not going to be determined on the basis of affidavit evidence. It's going to go to a trial and get this thing resolved once and for all. So --

MS. BONORA: Thank you, Sir.

THE COURT: -- just so you know my thinking on it.

MS. BONORA: And it --

THE COURT: And that you might want to start preparing a

contingency plan around that approach.

MS. BONORA: M-hm. That's very helpful to all counsel, because there was some discussion about whether you would, in fact, hear that application, and there was a discussion about whether we needed to make an application about whether you would hear that application. So if, in fact, you are saying perhaps you won't and that it should move to a trial, that gives us some direction in our next discussions about scheduling and moving towards that.

THE COURT: Okay.

MS. BONORA: So thank you for those comments.

THE COURT: Yeah. No, I -- the reason I'm saying it is I really came on to this before we had all sorts of rules around case management in -- generally, and specifically in commercial matters. I mean, case managers are meant to deal with process issues, and not substantive disputes. I mean, we deal with a lot of disputes over the appropriate process, but this one is going off in the direction of a more general dispute. So that's why I'm thinking about it, and I -- and clearly if it went to a trial, I would not be the case manager in this case.

MS. BONORA: Yes, Sir.

THE COURT: All right?

MS. BONORA: So perhaps if you could leave the issue of the actual process and whether it would be a trial or whether counsel may be able to agree that it could proceed by affidavit evidence, and whether we could maybe discuss that before you made a decision about that and we could make some -- even if we just did it by way of written submissions to you, that would be helpful to all of us, I think, to have us consider that and consult with our clients.

THE COURT: That would be satisfactory to me.

MS. BONORA: Thank you. Mr. Molstad just asked me if you were talking about trials of other issues on the agenda, but I think you're just talking about --

THE COURT: No, I'm --

MS. BONORA: -- the definition of beneficiary, which was the

original issue in our action.

Order (Distribution Proposal Adjournment)

THE COURT: That's -- well, I think it -- my goal here has been to try and get this litigation focussed, or refocussed in some cases, and it does seem that the issues are narrowing, which is sort of the function of a case manager. We're down to the -- well, the distribution plan, I'll call it, appears to be generally acceptable, subject to some latecomers having a look at it. Whether they'll have anything to say is yet to be decided, but my thinking is that the distribution plan looks like it's -- I mean, I've read it. It seems quite reasonable. It looks like that issue is going to get swept off the table. The -- so the one outstanding issue is the -- the scope of the beneficiary group.

MS. BONORA: Thank you, Sir.

THE COURT: So your request for an adjournment on the distribution proposal application and -- is adjourned *sine die*.

Submissions by Ms. Bonora (Standing)

MS. BONORA: Thank you, Sir.

Perhaps, Sir, we could deal with number 3 on the list, because I don't believe Ms. Wanke has any other matters that she would be attending to. I don't know that for sure, but the -- so the application with respect to Mr. Stoney is an application for standing, an application to be determined as a beneficiary. We're asking that matter to be adjourned. We just got served with it. Obviously, there needs to be some discussion around exactly what's going to happen with that, and questioning. And I don't think there's any opposition to that request to adjourn, but I will leave it for Ms. Wanke to speak, and Mr. Molstad would like to address it, as well.

THE COURT: All right. Well, Ms. Wanke, you're the applicant -- representing the applicant, so if you'd like to speak first?

Submissions by Ms. Wanke (Standing)

MS. WANKE: I am, My Lord. We have no issue with Ms. Bonora's request to adjourn the matter. She had proposed that counsel have a conference and come to you with a proposal in terms of timelines and how the matter will be heard, and we think that's reasonable. And we think counsel can certainly do that by consent.

We have some concerns that matters will be decided in this proceeding before the issue of our application is determined if our application doesn't move forward in a timely manner, and we're wondering if it would be appropriate to suggest that our application would be determined first, before any more matters of -- that effect Mr. Stoney and his brothers and sisters are heard and determined, or, in the alternative, at the very least if we could be added to the service list while their application is pending so we receive notice of what's going on in this proceeding.

Sir, I'd --

THE COURT: Okay.

MS. WANKE: I'd also like to speak briefly to Mr. Molstad speaking. I understand that Mr. Molstad wants to speak today. I appreciate that there's likely hardly anything of substance that's going to be said or determined on the adjournment application, since nothing of -- no merit decision is being made, but as a matter of precedent we think it's important to note that the Sawridge First Nation was, in your decision in 2015, expressly noted not to be a party to these proceedings, and rights and benefit flow and obligations flow from being a party. Since they're not a party or a respondent to our application, our position is they would first need to seek standing to make any submissions. And, again, nothing of merit or substance is being determined today, but for precedent, I think it's important that prior to Sawridge First Nation having a say on anything to do with our application, they first satisfy the Court they have standing to speak.

THE COURT: Mr. Molstad, as an active participant?

Submissions by Mr. Molstad (Standing)

MR. MOLSTAD: Well, we haven't been named as a respondent. However, my friend's application sets out as one of the grounds that Mr. Stoney and his siblings are members of the Sawridge First Nation. So it is a matter that directly affects the Sawridge First Nation.

We can tell you that we will be making an application to intervene in this matter and participate because of this allegation. And also you may or may not be aware that this issue has been litigated before a number of courts previously, including the Federal of Court of Appeal, the Federal Court and the Canadian Human Rights Commission.

THE COURT: Thank you.

MS. WANKE: But the issue that's been litigated is a different issue.

THE COURT: Well --

MS. WANKE: The issue of being a beneficiary of the Trust --

THE COURT: Okay. Well, look --

MS. WANKE: -- versus being a present day member.

THE COURT: -- I'm not going to get into it.

MS. WANKE: And it -- it simply -- you're right. It simply isn't a matter for --

THE COURT: Well, let me --

MS. WANKE: -- to be determined.

Order (Standing)

THE COURT: Let me -- I'll give you some direction right now.

You can make your application in writing, with a written brief, serve it on all of the participants who are here today. They can respond, or not, and you can include in that the Sawridge First Nation application for intervenor status. This matter will be dealt with in writing. It will not be the subject of court appearance. You can stand in line for a decision, because it may take some time to get dealt with, but that's the way it will proceed. Okay?

MR. MOLSTAD: In terms of timing, Sir. We would just ask for a reasonable period of time to prepare and file.

THE COURT: Well, certainly. Well, let's just pick dates. So pick end dates.

MR. MOLSTAD: Pardon me?

THE COURT: The -- the applicant Stoney will have a -- well, they've got an application, or -- all I've got is a Notice of Motion or --

MR. MOLSTAD: Right.

THE COURT: So, but the -- no affidavit ever made it to me, my desk. So all materials, including a written brief in respect of this application to be joined as a party by Maurice Stoney shall be completed, filed and served by September 30th, 2016, and the respondents, including a proposed intervenor, the Sawridge First Nation, by October 31st.

MR. MOLSTAD: But we'll be making an application to intervene. Should -- is that October 31st for us?

THE COURT: Well, you can put it in right -- yeah, just be -- you're a without-prejudice respondent, all right? Sawridge First Nation, you're to be served with this application.

MR. MOLSTAD: Okay.

THE COURT: So double up on the response to the application, and put in your intervenor response.

MR. MOLSTAD: So --

THE COURT: Or position.

MR. MOLSTAD: -- I just want to make sure I understand, Sir. When do we file our application to intervene? September 30th --

THE COURT: You can do it --

MR. MOLSTAD: -- or October --

THE COURT: Well, do it by September 30th.

MR. MOLSTAD: All right. Thank you.

THE COURT: Okay?

MR. MOLSTAD: Yeah.

THE COURT: And then we'll give you until mid-November, November 15th, for the Maurice Stoney applicant to respond in turn in writing to those, and in particular the intervention application.

MS. WANKE: My Lord, my only concern with the proposed schedule is that Ms. Bonora had requested to question on the affidavit last week, and we provided her -- admittedly, it was right before this application -- we provided her with three dates before today, and those weren't acceptable. So if questioning is to take place, I wonder if we could have a commitment? I know that Mr. Stoney will make himself available. Can we have a commitment from Ms. Bonora that any questioning that will take place will take place before September 10th?

THE COURT: Well, why don't you work that out with counsel?

MS. WANKE: Well, my fear is that it will happen after.

THE COURT: Well, I'm not going to get into it. Work it out with counsel. We're not going to stand this litigation still while, you know, the latecomers get their act together. You can deal with her.

MS. WANKE: Thank you, My Lord.

THE COURT: I'm not going to intervene in it.

Now, we've got another matter, another similar latecomer.

Submissions by Ms. Golding (Scheduling)

MS. GOLDING: That is correct, Sir. And, Sir, I had actually prepared an order that I had provided to counsel and have comments on, and it is (INDISCERNIBLE) in accordance with those comments.

Sir, my application and my order in terms of the scheduling just indicated that our application would be adjourned to allow counsel to schedule a hearing of the matter. And, in fact, Ms. Bonora and I may be able to come to an agreement in terms of the standing part of that, although perhaps not the costs part. And then we had put into this order that until the hearing date, and without prejudice to the actual decision that gets made, that we would be considered to be parties and would have standing to make submission, and that any documents that are to be served on our clients could be served

on our office, Sir. And as I've indicated, counsel have all approved the order.

THE COURT CLERK: Sorry, can you state your name for the record?

MS. GOLDING: Sorry, I apologize. Nancy Golding.

THE COURT: I take it when you say all counsel, it includes the Sawridge First Nation and Mr. Molstad?

MS. GOLDING: I did talk with Mr. Molstad about it --

MR. MOLSTAD: We're not --

MS. GOLDING: But he'd indicated --

MR. MOLSTAD: -- a party to this.

MS. GOLDING: -- he's not a party to this.

THE COURT: Yeah, I know you're not party, but have you seen this?

MR. MOLSTAD: Well, I haven't seen it, no. Sorry.

MS. GOLDING: I -- I tried to show it to him, but he didn't want to look at it.

MR. MOLSTAD: It appears that this is simply an adjournment and deems them to be parties until it's decided, and that seems reasonable, Sir.

THE COURT: I'm just wondering about -- again, I keep clogging this litigation up with additional parties who really don't -- I mean, on the face of it I'm not seeing what Mr. Patrick Twinn and -- who is already a beneficiary. . .

MS. GOLDING: That's correct, Sir.

Order (Standing)

THE COURT: I'm just concerned about clogging this litigation up with unnecessary parties. I'm not saying Mr. Twinn and his relations are unnecessary parties, but the more lawyers and the more people that get added into this litigation

simply make it more difficult to bring to a conclusion, and I'm not sure at this stage that there aren't enough people involved in this to raise all the issues that should be raised.

I'm not prepared to grant this order. I'm prepared to -- you -- I'm not prepared to grant it, and I'm just going to -- Patrick Twinn and company, I'm going to -- you can proceed in the same way as Mr. Stoney.

MS. GOLDING: Thank you, Sir.

THE COURT: In terms of we'll deal with their application in writing. All right? Same timelines?

MS. GOLDING: That -- that's fine, Sir. Thank you, Sir.

THE COURT: In include Sawridge First Nation in terms of the receipt of the materials, and you can decide whether or not you want the band -- pardon me, the Sawridge First Nation can decide whether they want to take a position on intervention.

MS. GOLDING: Thank you, Sir.

THE COURT: All right? So otherwise that is -- you're adjourned *sine die*. Your matter's adjourned *sine die* as of --

MS. GOLDING: Thank you, Sir.

THE COURT: Madam Clerk, I'm just going to pass that proposed consent order back.

Okay. Madam Clerk, I've moved along fairly quickly. Would you like to -- are you okay with -- everything's adjourned? You've got notes?

All right. We're -- you're the only application outstanding.

Submissions by Mr. Molstad (Application)

MR. MOLSTAD: Just I have a couple of preliminary comments before my friend makes her submissions in relation to this matter, and we're really in your hands in terms of the procedure, but the comments are very brief.

When we referred in our brief to the decision of *Francis Kutee (phonetic)* as a decision of

TAB 18

Original
2013 FC 509, 2013 CF 509
Federal Court

Stoney v. Sawridge First Nation

2013 CarswellNat 1434, 2013 CarswellNat 2006, 2013 FC 509,
2013 CF 509, 228 A.C.W.S. (3d) 605, 432 F.T.R. 253 (Eng.)

Maurice Felix Stoney, Applicant and Sawridge First Nation, Respondent

Aline Elizabeth (McGillivray) Huzar and June Martha (McGillivray)
Kolosky, Applicants and Sawridge First Nation, Respondent

R.L. Barnes J.

Heard: March 05, 2013
Judgment: May 15, 2013
Docket: T-923-12, T-922-12

Counsel: Priscilla Kennedy, for Applicants
Edward H. Molstad, for Respondent

Subject: Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Aboriginal law --- Government of Aboriginal people — Membership

Applicants were descendants of individuals who were at one time members of First Nation group, but who, either voluntarily or by operation of law, lost their band memberships — Applicants were excluded from membership in First Nation by chief and council — Appeal committee upheld chief and council's decision — Applicants brought application for judicial review — Application dismissed — Applicants did not qualify for automatic band membership — Applicants' only option was to apply for membership in accordance with membership rules promulgated by First Nation — Further, applicants were named as plaintiffs in previous action seeking mandatory relief requiring that their names be added to First Nation's membership list, and that action was struck out — Attempt by applicants to reargue question of their automatic right of membership in First Nation was barred by principle of issue estoppel — There was no evidence to make finding of institutional bias — There was no evidence to support finding of breach of s. 15 of Canadian Charter of Rights and Freedoms.

Table of Authorities

Cases considered by *R.L. Barnes J.*:

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — referred to

Huzar v. Canada (2000), 2000 CarswellNat 5603, 258 N.R. 246, 2000 CarswellNat 1132 (Fed. C.A.) — referred to

Lavallee v. Louison (1999), 1999 CarswellNat 1771, 1999 CarswellNat 5553 (Fed. T.D.) — referred to

Sawridge Band v. R. (2003), 2003 FCT 347, 2003 CarswellNat 1212, 2003 CFPI 347, 2003 CarswellNat 2857, [2003] 3 C.N.L.R. 344, (sub nom. *Sawridge Indian Band v. Canada)* 232 F.T.R. 54, (sub nom. *Sawridge Band v. Canada)* [2003] 4 F.C. 748 (Fed. T.D.) — considered

Sawridge Band v. R. (2004), 2004 FCA 16, 2004 CarswellNat 130, (sub nom. *Sawridge Indian Band v. Canada)* 316 N.R. 332, 2004 CAF 16, 2004 CarswellNat 966, (sub nom. *Sawridge Indian Band v. Canada)* 247 F.T.R. 160 (note), [2004] 2 C.N.L.R. 316, (sub nom. *Sawridge Indian Band v. Canada)* [2004] 3 F.C.R. 274 (F.C.A.) — considered

Sweetgrass First Nation v. Favel (2007), 63 Admin. L.R. (4th) 207, 2007 CarswellNat 5180, 2007 CF 271, 2007 FC 271, 2007 CarswellNat 567 (F.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 15 — referred to

Federal Courts Act, R.S.C. 1985, c. F-7

s. 18.1 [en. 1990, c. 8, s. 5] — pursuant to

Gender Equity in Indian Registration Act, S.C. 2010, c. 18

Generally — referred to

Indian Act, R.S.C. 1927, c. 98

Generally — referred to

s. 6 — considered

s. 10(7) — considered

s. 114 — referred to

Indian Act, Act to amend the, S.C. 1985, c. 27

Generally — referred to

APPLICATION for judicial review of appeal committee's decision upholding chief and council's decision to exclude applicants from membership in First Nation.

***R.L. Barnes J.*:**

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 Band v. R.*, 2004 FCA 16 (F.C.A.) at para 26, [2004] F.C.J. No. 77 (F.C.A.).

10 Ms. Huzar and Ms. Kolosky rely on the decisions in *Sawridge Band v. R.*, 2003 FCT 347, [2003] 4 F.C. 748 (Fed. T.D.), and *Sawridge Band v. R.*, 2004 FCA 16, [2004] F.C.J. No. 77 (F.C.A.) 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 Band v. R.*, 2003 FCT 347 (Fed. T.D.) at paras 27 to 30, [2003] 4 F.C. 748 (Fed. T.D.):

> 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 Band v. R.*, 2004 FCA 16, [2004] F.C.J. No. 77 (F.C.A.).

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] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.).

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 S.C.R. 460 (S.C.C.) .

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 (F.C.) at para 19, [2007] F.C.J. No. 347 (F.C.), and *Lavallee v. Louison*, [1999] F.C.J. No. 1350 (Fed. T.D.) at paras 34-35, (1999), 91 A.C.W.S. (3d) 337 (Fed. T.D.).

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.

Application dismissed.

End of Document

TAB 19

Action No.: 1103 14112
E-File No.: EVQ17SAWRIDGEBAND
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

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

ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust

Applicants

P R O C E E D I N G S

Edmonton, Alberta
July 28, 2017

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E.Sopko	For the Sawridge Band
D.C.E. Bonora	For the Sawridge Trustees
E.M.L. Lafuente	For the Sawridge Trustees
D.J. Wilson	For P. Kennedy
E. Holmstrom	Court Clerk

Discussion

THE COURT CLERK: Order in chambers, all rise.

THE COURT: Good afternoon.

MR. WILSON: Are you ready, Sir?

THE COURT: Actually, I just have a few questions of a case management nature before we get going on your matter. The first question is, I issued that decision, Sawridge number 6 as I call it, and I haven't seen a formal order. And it may be I haven't seen it because I didn't assign responsibility for preparing a formal order on that decision.

MS. BONORA: Sir, I think, for me at least, we thought we'd wait until today and then perhaps have final decision about the costs and put it all together. But I will certainly undertake responsibility for putting that together.

THE COURT: All right. If you wouldn't mind. I just don't want to lose track.

MS. BONORA: Yes.

THE COURT: All right. Well we are here today to deal with the question of whether Ms. Kennedy should be made personally liable for solicitor-client costs in respect to the now dismissed application in my case management decision, which

I described as Sawridge 6 2017 ABQB 436. What I'd like to do is just begin by having counsel identify themselves for the record and whether or not their clients are present.

MR. WILSON: My Lord, my name's Don Wilson. I'm a partner at DLA Piper. I'm here speaking on behalf of Ms. Kennedy. I can tell you that Mr. Maurice Stoney is in the courtroom. I met Mr. Stoney for the first time today.

THE COURT: Okay.

MR. WILSON: Mr. Molstad, of course you know very well.

THE COURT: Mr. Molstad.

MR. WILSON: Ellery Sopko is also here. Erin Lafuente, and Ms. Bonora are here as well.

MS. BONORA: Sir, I can tell you that our client, Brian (INDISCERNIBLE) as the chair of the trustees is here and Erin Lafuente's going to speak for us this afternoon. My husband's been in hospital so I've been a bit distracted this week. So, I'm here, but Erin Lafuente is going to speak for us this afternoon.

THE COURT: Okay. All right.

Let's talk about what we're going -- how we're going to go at this today. I see big piles of books in front of the trustees' counsel. Is that your material?

MS. BONORA: No. These are all the briefs that had been filed so we just brought them in --

THE COURT: Oh, just in --

MS. BONORA: Yes.

THE COURT: -- in -- okay. All right. Well let's go with you, Mr. Wilson, and then I guess Mr. Molstad can reply and trustees can reply.

MR. WILSON: I commented to Mr. Molstad as I stepped in, whatever I need I'm sure enough that your office (INDISCERNIBLE) and I'll refer to that in a minute. I should've used Ms. Bonora's approach to bring everything.

Submissions by Mr. Wilson

MR. WILSON: Sir, I can tell you that today's application is very serious. It is exceedingly unfortunate that we're here. I can say that the gravity of this application that's been brought to Ms. Kennedy, to Mr. Stoney, and I will say to myself and my partners, I can say that I spent -- I knew nothing about this litigation until sometime last week. Just going to point out you were referring to Sawridge 6, there's a whole bunch of Sawridge that don't have numbers so I've read lots of those as well. By no means am I conversant in the litigation like my friends are. And I can say that more than anything, the Sawridge 5 represents what I consider to be a very clear foreshadowing of how the Court is approaching this and how since the change in our *Alberta Rules of Court* 2010, section 1.2, the Parnell and Modelin (phonetic) case, it has truly brought forward the difference with respect to how litigation is to be conducted. It isn't the litigation myself, yourself, Mr. Molstad or Ms. Bonora started with. And the Supreme Court has given us very clear guidance that things have to change.

When I say foreshadowing, I think of Sawridge 5 where it points out where parties think they're going to get into a trust, and if they're unsuccessful, that the trust is going to pay for the litigation. That is not something that's going to happen moving forward.

And I can say that reality is also recognized by Ms. Kennedy, myself, and our law firm. And we've had some discussions with Mr. Stoney with respect to that. And we obviously have the vexatious litigation next week that we'll -- or, pardon me, August 4 which will have to be addressed.

But, with respect, what we're dealing with, Sir, is Ms. Kennedy from our office prosecuting litigation that the Court found to be improper. And I can say, like some of the other lawyers I know, Ms. Kennedy litigates with her heart. I indicated to the Court earlier that I met Mr. Stoney for the first time. I don't do Aboriginal litigation at all. And Mr. Stoney's comment to me was I was born a member of the Sawridge Band, I'm 75 years old, and I want to die a member of the Sawridge Band.

As I told Mr. Stoney, Courts have been heard, subject to whatever appeal you may try to prosecute in this matter, but the Courts have been heard. And I can say that Mr. Molstad in the vexatious litigation, I don't know if you've had a chance to look at his materials, in the recitation of the facts has set out five separate attempts by Mr. Stoney to become a member of the Sawridge Band. We have the long ago 1995 litigation. I have to say I don't have the file, my colleague, Ms. Kennedy, doesn't have the file. And there was an attempt then to get some regress.

We then have the application that --

THE COURT: Sorry, can I just stop you? I think I know that body of litigation as the Hazar or Hajar.

MR. WILSON: No, the '95 --

MR. MOLSTAD: *Huzar.*

MR. WILSON: Mr. Stoney made an application to be added as a member of the bar after C-31. I will say I think it was 12 years before determination of that application was to be made, an appeal was made to the appeal panel that set up for that exact purpose and then a judicial review was made.

I do know the Court's familiarity with judicial reviews and it isn't an independent look at the determination. It's to determine whether the body is expert qualified and to apply the appropriate rigor and deference. And in that instance, the federal court made a decision and that decision was not appealed.

I'd love to say that's the end of the matter, but unfortunately it isn't. Mr. Stoney attempted to utilize a Canadian Human Rights tribunal to effect other remedies. And, again, that was unsuccessful.

An application was made by my colleague, Ms. Kennedy, to be added to an appeal that went before Mr. Justice Watson. Mr. Watson -- Mr. Justice Watson carefully reviewed the matter and determined that there was no way he was going to add them to that appeal. So, that's four.

We then have Sawridge 6 and Sawridge 6 is, and I said it's unfortunate, it is unfortunate that we got to the point where the Court said enough. And I have all of the sympathy and empathy for my friends who were attempting to prosecute the complex piece of litigation to determine who is members of the trust, and I have no doubt they have prosecuted that litigation with the appropriate standard as officers of the court.

I can say, I said earlier, Ms. Kennedy litigates with her heart. She listens to her client. She takes their causes of action to her heart and I suspect many instances, one of which is this instance, takes steps to prosecute their rights sometimes when she ought not to. I can say where we're dealing with someone who -- I will say Mr. Stoney's very powerful comments to me, and that were very brief, being a member of the band goes to the totality of his being. And in these circumstances, I will say that Ms. Kennedy has prosecuted this action on his behalf further than I would've, further than I think she should've. But I can understand as an officer of the court when one is dealing with justice, not just the administration of justice, you attempt to get a remedy for your client.

I will say that one of the cases that you cited was the *Morin* decision of Mr. Justice Graesser. And I do note that I think all counsel here are commercial litigators. In that instance, and I will say Justice Graesser case managed a very large piece of litigation that is on a long time and I know how careful he is a jurist, Justice Graesser had in front of him a claim that was advanced for dead people. That is people who were not in existence. He had assertions that certain people held title or ought to concede to certain lands and they did not. In that litigation, a notice to admit was served upon the parties. The lawyer involved didn't even respond to the notice to admit and I will say throughout the entirety of my legal career not dealing with a notice to admit has fairly significant consequences. And when the evidence, the only evidence before the Court, these people were dead when they started the action and they didn't control the title to which he was served a claim, the lawyer then filed an appeal. And I will say --

THE COURT: This is the lawyer Willier?

MR. WILSON: Willier, yes. And 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, but we are not dealing with the circumstance like Willier where there are immutable facts on the record in the action. And in the face of those facts that he participated in creating by not filing a reply to the notice to admit, he filed an appeal. And in that instance, and the reason I go to the Graesser decision, why considered to be the leading member of this bench. He awarded -- he had a payment to the court, not to the parties, of $1,000. And then he indicated payments, and I apologize, one was AltaLink and I don't remember the other entity's name.

THE COURT: TransAlta wasn't it?

MR. WILSON: Yeah. And I believe it was about $4,800 each. And the reason I use that juxtaposition, Sir, is in that instance the record is absolutely without any foundation. I will say I know very well two of my colleagues on the other table they'll say that's what we're dealing with here. And the difference is, Mr. Stoney is not dead. Mr. Stoney started as a member of the Sawridge Band. By an act of Mr. Stoney's father, he took steps to cease being a member of the Band and has tried repeatedly, sometimes inappropriately, to turn back time and to become a member again.

I say this recognizing how serious this is, but also one of the lines in Stoney 5 was the administration of justice. And what Ms. Kennedy is guilty of, if she's guilty of something, is seeing a wrong and has persistently tried to right that wrong.

Now, if I'm Mr. Molstad, 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, had I read Sawridge 5, saw the foreshadowing, that is setting out section 1.2, Pernell and Modelin, the fact that the Court is not, unlike 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 is coming forward and not only wants to challenge, wants to be a member of the trial, presumably would make the trial more complicated, more time consuming, higher costs for everyone. And it's not that Mr. Stoney's counsel wouldn't be paid, it's that the trust and the trust property would be depleted by however long that is, however the trial is prolonged by the addition of Mr. Stoney.

Now, I can tell you that in the course of the last week, other than reading way too many Sawridge decisions, 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.

The reason I referred to the Graesser case is, when I read it, my immediate reaction was --

THE COURT: I'm just going to -- Graesser case being the TransAlta v. Morin --

MR. WILSON: Yeah. *Morin,* sorry. My apologies.

THE COURT: Yeah. It's okay. I just -- because I'll end up getting a transcript of this, it's just easier for me to connect the dots. So, thank you.

MR. WILSON: I keep forgetting Mr. Justice Graesser writes a few more than one.

THE COURT: Yes, he's pretty prolific.

MR. WILSON: I know.

As a seasoned litigator, I read the *Morin v. TransAlta and AltaLink case,* and I see a lawyer who has no instructions from his client. The client has no entitlement to tie up the land, participates in a legal process that results, that is not filing the notice to admit, so that the record crystalizes and could not be any clearer, and then files an appeal. And I go back to your decision talking about abuse of process, vexatious, et cetera, and that is -- that is the Court regulating its process. I think it's Gascon in *Jodoin* said even in the context of a criminal case where we're going to go the extra mile to see that the criminal defendant gets every opportunity to put forward its face, even then the Court will look where there's an abuse of process and sanction it.

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, but it is an advocate putting forward a position she believes in, believes in the remedy that her client is trying to seek. And I can say, having regard to what one of the items you indicated in your decision, was we don't even know if the other Stoneys ever provided instructions. The Stoneys are a little older. Some of them are not in the best of health. And we attempted on numerous occasions to assemble affidavits confirming at the time that they instructed Ms. Kennedy -- or, pardon me, Mr. Maurice Stoney to advance the litigation on their behalf. I can say, Sir, I am aware of the law that says hearsay evidence is no evidence, I also am aware of the decision by Mr. Justice McMahon who says using a hearsay affidavit is some evidence of bad counsel.

We assembled the best affidavits we could in a short period of time with people who weren't the easiest to get a hold of. And one brother and one sister of Mr. Stoney confirmed under oath that Ms. Kennedy had the instructions to act on their behalf in advancing this action. And we got a niece who indicated that she was aware of that. I am aware that's a hearsay affidavit, it is -- I will say in the federal courts hearsay affidavits are allowed. I'm not suggesting for a moment they're allowed in this court. I, in fact, use evidence -- I use case law that points out that's not allowed to counsel when they provide me with hearsay affidavits. In this instance, it was the best affidavit we could get having regard to your direction that we come forward on today's date.

I put that evidence before the Court in part so that you didn't think we were doing what was done in the *Morin* case that was addressed in the Graesser decision, that is, the people who, at least on the face of the action, saying they were seeking (INDISCERNIBLE) were actually seeking summary (INDISCERNIBLE).

And, again, I apologize for not having affidavits from all of them but we did the best we could in the time we had.

Now, Sir, you actually canvassed the various remedies with respect to counsel and you highlight contempt of court, which is the most serious instance; you highlight Law Society and the sanctions there. And then you raise the Court's own ability, and as Mr. Molstad has raised, the *Judicature Act* - ability to sanction counsel. And my only comment would be, with respect to each of those, is 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 reports 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. And, with respect, it'd be my submission to this Court that solicitor-client costs awarded against Ms. Kennedy are unnecessary, although clearly within the purview of this Court's inherent jurisdictions, the *Rules* and the *Judicature Act.* Those are my submissions, Sir.

THE COURT: Thank you, Mr. Wilson.

Mr. Molstad?

Submissions by Mr. Molstad

MR. MOLSTAD: Sir, first of all, we submit that the facts (INDISCERNIBLE) are contained in the findings that you have already made in Sawridge 6. And they're also find, we submit, in the affidavit of Chief Walter Twinn, and in the three written submissions that were filed on behalf of the Sawridge First Nation.

We also suggest and submit, Sir, that you should have reference to the transcript of the questioning of Mr. Maurice Stoney which has been filed.

THE COURT: Now, sorry, this is in the material that I saw a frontend loader brought a stack of materials into my office. I didn't bring it into court because I thought it was part of the response of Mr. Stoney, if he chooses to make one, to the vexatious litigant issue.

MR. MOLSTAD: Yeah. I believe our friends on behalf of the trustees in filing a written submission in relation to the vexatious litigant submissions, including a copy of the transcript.

THE COURT: Okay.

MR. MOLSTAD: It had been filed in the material.

THE COURT: Oh, yes, it was in the original one.

MR. MOLSTAD: It was in the original application that had been filed.

THE COURT: Okay. Got it.

MR. MOLSTAD: And, Sir, we submit that Ms. Kennedy participated in a course of conduct advancing an argument with respect to Mr. Stoney that was devoid of merit, vexatious and an abuse of process. We submit, Sir, that this conduct constitutes serious misconduct in accordance with *Rule* 10.50 of the *Rules of Court.* This conduct includes preparing and filing an application of a third party who was attempting to insert himself and his siblings into a matter in which he has no legal interest; it includes preparing and filing an application which was a collateral attack attempting to subvert an appealed and crystalized judgment of the federal court which has already addressed and rejected her client's claims and arguments.

You, Sir, have already found that the application of Maurice Stoney is serious litigation misconduct. It is our submission that Ms. Kennedy participated in this serious litigation misconduct with full knowledge of the history and the previous decisions. Ms. Kennedy's application purported to be an application on behalf of ten persons all to be named as beneficiaries of the Sawridge Trust.

My friend has referred you to the *Morin* decision. I am intimately familiar with that decision. And that was a case where there were nine plaintiffs that were named, five of

whom were deceased, and it appeared obvious that Mr. Willier, counsel who had assumed conduct on behalf of these individuals named, did not have instructions from of course the deceased and all of those others except for the one that continued. And that was the application on behalf of Peter Morin. And the Court recently heard -- Master Smart heard a motion that the claim being advanced by Peter Morin be struck on the basis of a number of arguments including that he had settled with (INDISCERNIBLE), he had agreed in that settlement not to take any legal action as against TransAlta and AltaLink and he was paid compensation for that. But, in any event, it was not a situation where all of the plaintiffs were deceased.

THE COURT: Had they all been -- I mean, I recognize quite a few of the names because I used to act for the Enoch First Nation, are they mostly -- they were counsel -- they had been councillors. I saw some of the names there had been councillors or --

MR. MOLSTAD: What happened in the case, Sir, is Mr. Willier represented the Enoch Cree Nation as in-house counsel. And he commenced an action naming a number of parties including TransAlta and AltaLink. And he named the chief and councillors of the day as representative of the Nation and he also named person who he felt I assume were owners of a certificate of possession.

THE COURT: Okay.

MR. MOLSTAD: That had been issued many, many years earlier. And, as a result, some of them had passed away and some of them had passed on their certificate of possession. But the bottom line was that at the end of the day, without excepting Peter Morin, it was clear that he had no instructions to represent those people.

THE COURT: Okay.

MR. MOLSTAD: And in that decision, in the *Morin* decision, we submit that Justice Graesser stated the obvious. And you've referred to that in paragraph 80 of your decision. When he said essentially, counsel cannot commence a lawsuit on behalf of a party without that party's consent. He also stated that instructions must come from the individual themselves. And that's found in paragraph 34 of Justice Graesser's decision in *Morin.*

He went on to state that the jurisprudence is clear that a solicitor who commences proceedings without proper authority may be liable for costs. And we submit, Sir, that is the natural consequences that should flow when a lawyer commences proceedings in the name of the party, or a party, without instructions and without that party's consent.

We also submit that consent must be an informed consent. Informed about a potential of a cost award if not successful in the application. We submit, Sir, it would be unjust to hold anyone but the lawyer to be responsible for costs when there is no authority given to commence or continue a proceeding.

We submit, Sir, that my friend must advise this Court that Ms. Kennedy had instructions directly from each of these nine persons to make this application. It's not enough, in our submission, for Ms. Kennedy to file an affidavit, and I think my friend will agree, of the niece of Mr. Stoney that she heard him talking to his brothers and sisters.

It's also our submission it's not enough for two affidavits, those of Ms. Gail Stoney and Mr. Bill Stoney, where they say they authorized Maurice Stoney to bring an action. That's not instructing Ms. Kennedy.

One of the interesting questions that comes up when I look at this, is has anyone given Bill Stoney and Gail Stoney and the brothers and sisters legal advice about the jeopardy that they put themselves in, in coming forward in saying we told our brother to advance this application? Which is the potential to have a cost award. A significant cost award as against them. Or, alternatively, we say is this a situation where they are of limited funds? And Ms. Kennedy in her written submissions in paragraph 6 of the November 15th, 2016 submissions, stated that Mr. Stoney and his siblings were of limited funds. So does that mean that a judgment of costs doesn't mean anything?

The history of this proceeding is not complicated, and my friend touched upon some of the matters in terms of what information Ms. Kennedy had. But we know that in 1995, Maurice Stoney and others commenced an action in federal court where Maurice Stoney sought membership in the Sawridge First Nation. And I refer to that as the 1995 action. Maurice Stoney, in that 1995 action, through his legal counsel, conceded to the Federal Court of Appeal in 2000 that he did not have entitlement to membership in the Sawridge First Nation without the consent of the Sawridge First Nation.

Ms. Kennedy was not counsel for Mr. Stoney before the Federal Court of Appeal in 2000. However, she was aware of this decision no later than the application for judicial review before Justice Barnes of the federal court which was heard on March 5th, 2013. Because, of course, it was referred to in (INDISCERNIBLE).

In August of 2011, Mr. Stoney applied for membership in Sawridge. The decision of the chief and council was to deny his application and that decision included the reason that he did not have a specific right to be a member of the Sawridge First Nation. Mr. Stoney appealed the decision of the chief and council to the appeal committee which was the

electors of the Sawridge First Nation.

Ms. Kennedy represented Mr. Stoney at this appeal. Ms. Kennedy made written submissions and appeared and made oral submissions before the appeal committee. And in the written submissions of Ms. Kennedy, which are part of the record, on behalf of Mr. Stoney to this appeal committee which would've been in April of 2012, it was argued that Maurice Stoney was entitled to a membership in Sawridge First Nation pursuant to the *Indian Act.* In other words, an acquired right member. And I refer you to her written argument which is found in the Roland Twinn affidavit, Exhibit 2, tab W, paragraphs 9 and 13.

The appeal committee was unanimous in upholding the decision of Chief and council and dismissed the appeal. Ms. Kennedy, on behalf of Mr. Stoney, applied for judicial review of the appeal committee's decision which denied Mr. Stoney's membership in the Sawridge First Nation. And I refer to that judicial review application as the 2012 action.

In the 2012 action, Ms. Kennedy advanced a number of grounds. They included, however, that Maurice Stoney was entitled to automatic membership. That is, he was an acquired right individual. Mr. Stoney swore an affidavit as part of the 2012 action and in that affidavit, he alleged that he was entitled to automatic membership in the Sawridge First Nation as a result of Bill C-31. As you know, Sir, Justice Barnes of the federal court dismissed the application for judicial review and confirmed again that Maurice Stoney had no right to automatic membership. He also found that Maurice Stoney was attempting to relitigate matters in issue in the 1995 action and that these arguments were barred under the doctrine of issue estoppel. Costs were awarded to the Sawridge First Nation in the sum of $2,995.65 and these costs were not paid by Mr. Stoney.

So if I summarize briefly, the knowledge of Ms. Kennedy in May of 2013 includes the following: she knew in 2000 that counsel for Maurice Stoney conceded to the Federal Court of Appeal that Maurice Stoney did not have entitlement to membership in Sawridge First Nation without their consent; she knew on December 7th, 2011, Mr. Stoney's application for membership was denied by Chief and council on grounds including he did not have a specific right to be a member; she knew the Sawridge appeal committee was unanimous in upholding the decision of Chief and council; and, of course, she knew the federal court on May 15th, of 2013, confirmed again that Maurice Stoney had no right to automatic membership and his argument was barred by virtue of the principle of issue estoppel. This was her knowledge in May of 2013.

As my friend has stated on her behalf, on January 31st, 2014, Mr. Stoney filed a complaint with the Canadian Human Rights Commission regarding Sawridge's decision to deny him membership. We don't know if Ms. Kennedy assisted Mr. Stoney in relation to

that matter. However, she was clearly made aware of the complaint and the decision in this motion as it was included in the Roland Twinn affidavit.

The CHRC decision is another decision, we submit, that confirms that this issue was dealt with in the 1995 action and in the 2012 action.

In 2015, Ms. Kennedy applied on behalf of Mr. Stoney to extend time for him to file an appeal of one of your case management decisions - I believe it was Sawridge 3. And in that application, it was asserted that Mr. Maurice Stoney was a member of the Sawridge First Nation. Mr. Justice Watson dismissed the application and awarded costs to the Sawridge First Nation. Costs were assessed at $898.70 and they have not been paid to the Sawridge First Nation.

And, of course, Ms. Kennedy represented Mr. Stoney in this matter in the August 12th, 2016 motion which I refer to as the Stoney application, which resulted in Sawridge 6. In this matter, Ms. Kennedy refused to allow Sawridge First Nation's legal counsel to question Mr. Stoney on his affidavit. The legal counsel for the Sawridge Trustees did attend and question Mr. Stoney on his affidavit. And we submit, Sir, that Ms. Kennedy, during that questioning, interrupted, obstructed and refused to permit questions addressing the substance of the application and affidavit. And we respectfully request, Sir, that it is important for this Court to read this transcript again in order to observe the questioning of Maurice Stoney and the conduct of Ms. Kennedy during that questioning. We submit, Sir, that conduct should be taken into consideration in relation to your decision as it relates to costs.

Ms. Kennedy, in her written submissions, asserted on behalf of Mr. Stoney that the federal court issued an order of mandamus in *Sawridge v. Canada* [2003] 4 FCR 748, compelling Sawridge to restore Stoney applicants as members on the basis that they were acquired rights members. This is both incorrect and, we submit, improper.

Ms. Kennedy, in her written submissions, misstated the status of the Poitras litigation and misapplied decisions arising from that litigation in an attempt to suggest that the Sawridge First Nation has repeatedly failed to comply with Justice Hugessen's order. She also asserted that Sawridge continued to deny Ms. Poitras membership and that Sawridge continues to deny membership to Ms. Poitras today. These submissions, with the greatest of respect, Sir, are false. And I refer you to tab 8 of the November 14th, 2016 Sawridge submissions.

This Court has awarded to the Sawridge First Nation solicitor and own client indemnity costs in relation to this application. We submit that the Court has not yet decided who should pay those costs. In paragraph 6 of Ms. Kennedy's November 15th, 2016 written

response on behalf of Mr. Stoney, it is stated that Maurice Stoney and his brothers and sisters are all elderly and have limited funds. Based upon Mr. Stoney's conduct to date in not paying Sawridge First Nation's costs, and this admission that he and his brothers and sisters have limited funds, we submit that it is unlikely that the Sawridge First Nation and the Sawridge Trustees will recover their costs unless they are paid by Ms. Kennedy.

This Court has found that Ms. Kennedy has advanced a futile application on behalf of her client and that the application was abusive and vexatious. We submit, Sir, that based on *Jodoin,* Ms. Kennedy has triggered cost award against her by advancing what is described in that decision as an:

> Unfounded, frivolous, dilatory and vexatious proceeding that denotes a serious abuse of the judicial system.

Sir, if costs are not awarded as against Ms. Kennedy in this proceeding, there will be no consequences. And this is a case where, based upon the history and the conduct that has occurred here, there should be consequences, in our submission.

We also say, Sir, that if costs are not ordered to be paid by Ms. Kennedy personally, that the award of costs is against Mr. Stoney and Ms. Kennedy on a joint and several basis.

I'm really not sure how you deal with those siblings who have come forward and put to you and put to this Court the two affidavits as it deals with costs. But one of the question, as I raised it earlier, that comes up is if they're coming forward and saying we're part of this application, should they also be subjected to any cost award that you make should be joint and severally?

THE COURT: I thought I'd already let them off the hook --

MR. MOLSTAD: Well, I think what you --

THE COURT: -- on costs.

MR. MOLSTAD: -- said, Sir, is that you're treating this as an application on behalf of Maurice Stoney.

THE COURT: Yes. I think --

MR. MOLSTAD: It may be that --

THE COURT: Yes.

MR. MOLSTAD: -- you decided that you're not looking at them.

THE COURT: I've written so much about this, I don't know what I've said anymore.

MR. MOLSTAD: Well, yeah. And I'd encourage you - - and I stand to be corrected in that regard. In any event, Sir, our submission is that if you're going to look at attaching costs as it relates to Maurice Stoney that you make it joint and several --

THE COURT: M-hm. Okay.

MR. MOLSTAD: -- with Ms. Kennedy. Those are our submissions, Sir.

THE COURT: Okay. Just a sec. I just want to make a note about the other brothers and sisters. You're still saying that to the extent they've now come forward and say --

MR. MOLSTAD: I don't have an answer to that, Sir.

THE COURT: You're going to leave it --

MR. MOLSTAD: But you're going to have to --

THE COURT: You're going to leave it to me.

MR. MOLSTAD: You're going to have to deal with it.

THE COURT: Okay.

MR. MOLSTAD: And I don't -- I'm not making a submission one way or another. But it's a very difficult issue to deal with.

And, based upon Justice Graesser's decision in *Morin,* clearly, if you're coming to court and purporting to represent someone, you must respond that you have instructions to represent that person. And if you can't do that, you know, you put yourself in a situation where you can have costs awarded against you personally.

THE COURT: Yes. We sort of assume that when people put

things into statements of claim that --

MR. MOLSTAD: Pardon me?

THE COURT: Once names go into a statement of claim as a claimant --

MR. MOLSTAD: Well --

THE COURT: -- you sort of assume that --

MR. MOLSTAD: I was involved in that *Morin* matter, Sir, and I can't always make that assumption anymore.

THE COURT: Okay.

MR. MOLSTAD: Thank you, Sir.

THE COURT: All right. Thanks, Mr. Molstad.

MR. MOLSTAD: Thank you.

Submissions by Ms. Lafuente

MS. LAFUENTE: Good afternoon, My Lord. As I was introduced earlier, but I will repeat my name for you as I'm the least familiar face at the table, my name is Lafuente, initial E., and I'm with Dentons. And I'm here today on behalf of the Trustees.

My Lord, we are in agreement with our friend Mr. Molstad's submission and we will keep our additional submissions brief and try to limit any repetition.

My Lord, in presenting this to you today, we believe it's very important that we consider that there is a significant difference between being a zealous advocate and zealously advancing frivolous litigation. And it's important to understand that in the relationship between Ms. Kennedy and her client, it's quite clear who had the abundance of knowledge and understanding of the consequences of the decisions that had been made to that point. And that was brought home in the cross-examination on Mr. Stoney's affidavit. I was counsel at that examination, My Lord, and there were questions asked about court decisions, specifically about pleadings, and the answer that Ms. Kennedy gave on behalf of her client was, "He won't understand that," or, "He didn't read those." And when I

tried to pursue that a little further to find out if in fact he had read certain decisions, Ms. Kennedy objected to the questions in their entirety.

My friend, Mr. Molstad, has asked today that you go back and look at the transcript and I'm going to repeat that request because I think that it is very important. But I believe that when that transcript is read, it is clear that Ms. Kennedy was the one holding the reins. She was the one who was pursuing this because, as she indicated when giving answers to the questions, he didn't understand what was going on. Ms. Kennedy certainly did and should have understood.

My friend has indicated today, unfortunately, that even in preparing for this, Ms. Kennedy is still trying to indicate why -- indicate why it should proceed. And that is a concern as it relates to is the decision that you've issued, is Sawridge 6, enough? And we would submit, My Lord, that it is not enough. And it is not enough primarily because the consequence to the community which this trust is supposed to benefit is significant. The costs have been borne by a community and Ms. Kennedy has put forward a position which said right out the shoot, he's of limited means. What I asked -- we sought questions about costs -- previous cost awards that had been unpaid, those were objected to. You can't ignore the risk of costs. You can't try to prevent this Court from knowing that there is unpaid costs in previous litigation, and that is what was done.

Now, My Lord, this application, as you know it, has been described as another attempt in a long history to try to assert an entitlement to membership. That has been done. It should not have been brought again. But that is even more important in the context of this litigation because, My Lord, as you'll be aware, you issued an order on December 17th, of 2015, where you stated clearly that membership was not an issue to be addressed in this litigation. That was not to be addressed. And yet, when you go back, My Lord, and you look at the transcript you will see numerous references to an entitlement to membership. And there are even parts where we have to redirect both Mr. Stoney and his counsel to that this is not about membership.

My Lord, we've prepared for you, for your review, a summary of some of the most important places that we would like you to review the transcript. And I'm not going to go through them now today but I will just highlight the different headings. Firstly, pages 4 to 6 of the transcript are all of the objections listed in one place and it's a good place to look just to see the number of them. But there was -- there are numerous examples to show that Ms. Kennedy was really directing this litigation. And those are -- there's an inference that the Court decisions were only interpreted by Ms. Kennedy for Mr. Stoney and he was not given the decisions to read, that Mr. Stoney did not understand his own pleadings and could not be asked questions about what claims he had previously made, that Ms. Kennedy would not allow him to answer basic questions, that she refused to allow

questions regarding his outstanding costs, that she directed him not to answer questions before they were asked. And there's a reference there, Sir, and I would invite you to look at it, where it was put on the record that no question had yet been asked but an objection had been entered.

Mr. Stoney asked his counsel at one point if he'd ever seen the statement of claim that he filed and Ms. Kennedy intervened to try to prevent questions on that claim.

In addition, there was the refusal to answer questions by Mr. Stoney himself. And you will note, Sir, when you read the transcript that by the end of the examination, Mr. Stoney was giving the answers that he wouldn't answer the question and he was not directed by Ms. Kennedy to provide an answer to those questions. And there are further examples, My Lord, of Ms. Kennedy, herself, answering questions.

My Lord, the most important aspect of this is that this is and has been found to be frivolous litigations -- litigation, sorry. And Ms. Kennedy sought to dissipate the trust property by seeking full indemnity costs for Mr. Stoney in that litigation. So she started out looking for full indemnity costs and now we're looking for our costs back from Ms. Kennedy.

I want to make sure I'm not repeating what Mr. Molstad has already covered.

My friend, Mr. Wilson, has indicated that -- has brought up the administration of justice and how strongly that Mr. Stoney feels about the litigation and how strongly that Ms. Kennedy feels about it. And he'd indicated that she was guilty of seeing a wrong and trying to right it. But I would -- I would add to that, that she was also guilty of trying to thwart counsel's ability to show that was a frivolous exercise by refusing to let us ask questions and refusing to have her client answer questions about these immutable facts that this had already been decided time and time again. That this matter, I mean, that there was issue estoppel, it was res judicata, it was an abuse of process.

I would submit, My Lord, that while I fully understand and I appreciate that Ms. Kennedy is remorseful and I have no doubt about that, that my friend's submission that somehow that's enough of a consequence, it is not enough. Her client was of limited means, there was -- appeared to be limited risk that he would actually have to pay a costs award, but there has been serious harm to the community that this trust was created to benefit. This litigation has had a significant impact on the benefits that can be provided to the beneficiaries. The costs, My Lord, we submit should be borne by Ms. Kennedy personally. And we would agree with my friend Mr. Molstad's suggestion that if any costs are to be borne by Mr. Stoney, that those costs should be jointly and severally owed by Mr. Stoney and Ms. Kennedy. We are seeking full indemnity for our solicitor-client costs.

THE COURT: Do you have anything to say about the brothers and sisters of Mr. Stoney and whether they should be captured in this should I decide that these costs are to be jointly and severally? Or --

MS. LAFUENTE: My Lord, I would say I have concern, as Mr. Molstad had indicated earlier, that there is -- whether there is informed consent demonstrated in those affidavits. I don't think the affidavits actually do prove the point that they had instructions -- sorry, given instructions to Ms. Kennedy. But to the extent that you find, My Lord, that they do, I believe there's no option but to include them jointly and severally with Ms. Kennedy.

MR. MOLSTAD: If I could just add to that, My Lord?

THE COURT: M-hm.

MR. MOLSTAD: The problem that we see, with the greatest of respect, is that they have not filed sufficient evidence to show that these two additional people instructed Ms. Kennedy. So, in light of that, I think that you should proceed cautiously as it relates to those two individuals. Until such time as my friend stands up and says we were instructed directly by this person to represent them in relation to this application, it would be unjust to award costs as against them.

THE COURT: Okay. Thanks.

Okay. Mr. Wilson, any response?

Submissions by Mr. Wilson

MR. WILSON: I'm not sure how I'm supposed to assure the Court that I received those instructions. Because, with respect, we received your judgment, we had a tight timeline to turn it around. And, with respect, we got the only two people available at the time. It's my understanding that the cost consequence of their affidavit was explained to them. That is, there is going to be a large cost consequence, and they swore the affidavit. That is my understanding, Sir.

THE COURT: Okay. I'm going to clean that issue up right now. I'm not going to award --

MR. WILSON: Yeah. Well I just --

THE COURT: Okay.

MR. WILSON: -- part of the --

THE COURT: Yeah.

MR. WILSON: -- part of the problem, Sir, is it's summertime, Albertans like to go away during summertime, and we didn't have a large window. And I apologize, it's just actually the reality.

Now --

THE COURT: Okay. Well, look, I want to finish it off. I mean, we'll do it right here, now. No costs award, solicitor-client or party-party or anything else will be made against the brothers and sister. Period. That takes care of that.

MR. WILSON: All right. Sir, I apologize for my lack of comprehensive knowledge of the files. I just do not -- I don't have a copy of any of the '95 pleadings. I have the decision by the Band in '12, the applications made 11 and 12 years earlier. Wasn't even 2011 or '12, it was made in 2000. And I have the appeal decision, I have the Court of Appeal's decision, I now have access to the Canada Human Rights decision. My friend says -- my friend, Mr. Molstad, says in paragraph 34 there's a reference to limited funds. That is my understanding and it's my understanding if that was an issue at the time there is provision to apply for security for costs and that application wasn't made.

MS. BONORA: It was made.

MR. WILSON: Was made?

MS. BONORA: Yeah. There was an --

MR. WILSON: Good thing I started with I don't have a comprehensive knowledge of the file. And was security ordered, Ms. Bonora?

MS. BONORA: It's referenced in Sawridge 6. It wasn't ordered because there was no -- they weren't added as parties.

MR. WILSON: Right.

THE COURT: Yeah.

MR. WILSON: With respect to the cross-examination on affidavit, I invite you to read it. It is -- it should be something that you should review with respect to your decision. I will say when Ms. Lafuente handed me for the first time the series of concerns about the cross-examination, I was going to ask her if she ever relitigated with Mr. Redmond (phonetic) because I suspect you could have similar comments.

Sir --

THE COURT: You should've been his partner.

MR. WILSON: Well, I will say discoveries were always interesting and everybody has different styles. I've sat in discovery rooms with Mr. Molstad, sat in discovery rooms with a variety of people. My approach, typically, is not to interfere. Typically. There's a wide range. With respect, we're not dealing with a sophisticated person. During the course of my meeting with Mr. Stoney and my discussion with him, he had no problem following what we were discussing, but when he was talking about the legal process he does not understand the process. He doesn't understand that we have a master, Court of Queen's Bench, Court of Appeal and the Supreme Court, doesn't understand leave. So, with respect, to a series of questions about that, I am not surprised that Mr. Stoney did not have the best -- the best answers or the best understanding.

With respect to Ms. Lafuente, she indicated that the application that was before the Court was for indemnity. It was for indemnity for Mr. Stoney. It was not for indemnity -- so what my friends are now doing is what they want to do is remove Mr. Stoney who has limited funds, reinsert Ms. Kennedy, and to the extent that costs are out there, they want full indemnity for everything from her personally. With respect, I would suggest that's a stretch. And, with respect, and again, I'm not getting into the merits because I've already told my friend we're not, it's my understanding that what we were dealing -- what was being dealt with by you was whether or not Mr. Stoney would be a beneficiary under the trust. And the trust had a specific date, Sir. I will say, often even in courtrooms, people intermittently use different words. There is no question that Mr. Stoney was not attempting to become a member of the Sawridge Band with respect to the application. He was attempting to become a beneficiary under the trust. In law, there is a difference, Sir. Particularly where the trust is set up in 1985.

I've made my submissions with respect to costs and have nothing further to add.

THE COURT: Thank you, Mr. Wilson.

Okay. That's -- don't have anymore questions coming back to the Trustees or the Sawridge First Nation. I'm going to reserve a decision on this issue - the question of whether or not Ms. Kennedy should be personally liable for solicitor-client costs in favour of the Sawridge First Nation and the Sawridge Trustees.

As you counsel all know, there is also this other matter of whether the (INDISCERNIBLE) in respect to my declaration that Mr. Stoney is a vexatious litigant, that awaits a response. He has until I think next Friday to respond to that. I see there are already some materials have arrived from the Trustees and from the Sawridge First Nation. So that material is incoming I assume. And while it's somewhat of a separate matter, it's still there's going to be some crossover.

So I'll reserve on the specific question that's here today. I'll be issuing a written decision on it. It will probably not happen until sometime in mid-September just because of resource allocation issues. I will remind myself that what I will do, I will issue a written decision, but I think I will call you all back to deliver a summary of it. In part, because I see there's some interest from the media. Not quite sure who they are but there's some interest. And it's become my practice when that happens that the media gets the decision on a thumb drive so they've got it electronically right away. And I'll make the same, assuming I can talk the Court of Queen's Bench into buying me some thumb drives, I'll make them available to the counsel involved as well.

MR. WILSON: Sir, I have one question, and it's just a practical question on vexation litigant, is that a total -- I do know that designation like a dangerous sexual offender has very broad definitions, is there the possibility that it can be a vexation litigation, that is, I've already made my comments to the Court with Mr. Stoney and the Sawridge Band and the Trust, that is that it's at an end. My concern is a lease dispute, a personal injury. That's my only -- and I don't know because I've not yet looked at the law.

THE COURT: Well, I don't know if either the Trustees or Mr. Molstad have taken a position on the scope of the vexatious litigant matter. I just haven't had a chance to read the material.

MR. MOLSTAD: And I think your direction is that you would deal with this in terms of written submissions.

MR. WILSON: Yeah.

THE COURT: Yes.

MR. MOLSTAD: We've made ours and served our friend, and obviously there are going to be a reply that will be circulated.

THE COURT: Yes. I mean, I think you make your pitch for narrowing it.

MR. WILSON: Yeah. I -- because I've never done it, my only concern is I understand my friends wanting protection and I have to say I understand that. I just wouldn't want someone to have to go to court to get permission to do something that might come up in the ordinary course.

THE COURT: Yes. Well I, you know, should wait until I see all the material --

MR. WILSON: Absolutely, Sir.

THE COURT: -- but certainly there's nothing I've seen that Mr. Stoney is a frequent flier in the Court of Queen's Bench.

MR. WILSON: I don't think he's a frequent --

THE COURT: Other than his involvement in this particular matter. Off the top --

MR. MOLSTAD: We've actually addressed --

THE COURT: -- of my head it's -- oh, sorry.

MR. MOLSTAD: We have addressed this issue in our written submissions so I encourage my friend --

THE COURT: Okay. Maybe I'll just leave it at that then. But, you know, I think it's pretty narrow.

MR. WILSON: Yeah. No, and knowing Mr. Molstad as I do, I have no doubt that it's appropriate in all of the circumstances.

THE COURT: Yes. As I say, that one will probably be dealt with -- I'll just -- it may just be nothing more than a short memorandum on that one. This one raises -- the solicitor-client cost issue raises far bigger legal and policy issues.

Anyway, on this particular application heard today, so it's just adjourned sine die. Judgment reserved.

MR. WILSON: Thank you, Sir.

THE COURT: All right.

MR. MOLSTAD: Thank you.

THE COURT: Thanks, Counsel. Thanks for your help.

THE COURT CLERK: Order in chambers, all rise.

THE COURT: Go ahead. I'm organizing things up here.

PROCEEDINGS ADJOURNED

Certificate of Record

I, Erik Holmstrom, certify that this recording is the record made of the evidence in the proceedings in the Court of Queen's Bench, held in courtroom 311, on -- at Edmonton, Alberta, on the 28th day of July, 2017, and that I, Erik Holmstrom, was the court official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Nicole Carpendale, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

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ToC Pages:	1
Transcript Pages:	26
Total Pages:	28
Line Statistics	
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ToC Lines:	8
Transcript Lines:	1087
Total Lines:	1148
Visible Character Count Statistics	
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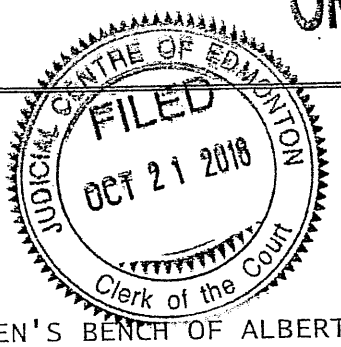
TAB 20

ORIGINAL



COURT FILE NUMBER: 1103 14112

COURT: COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, as am.

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19

QUESTIONING ON AFFIDAVIT

OF

MAURICE STONEY

P. E. Kennedy, Ms.	For Maurice Stoney
D. C. Bonora, Ms. E. M. Lafuente, Ms.	For the Trustees of the Sawridge Band Inter Vivos Settlement
C. C. Osualdini, Ms.	For Cathrine Twinn
Joanne Lawrence, CSR(A)	Court Reporter

Edmonton, Alberta
September 23, 2016

Q Okay. Can you -- do you understand where it says, "Application to be Added as a Party or Intervener by Maurice Felix Stoney and his Brothers and Sisters"?
A Yes.
Q So do you understand, then, sir, that you are applying to be added as a party to Court of Queen's Bench Action Number 1103 14112?
A Yes.
Q Okay.
MS. KENNEDY: That's the court number.
A Okay.
Q MS. LAFUENTE: And, alternatively, you're seeking to be added as an intervener in that party; is that correct?
A Intervener?
MS. KENNEDY: He is not going to understand that at all.
Q MS. LAFUENTE: Okay. Okay. Fair enough, sir. Okay. Can I just draw your attention, then, to where it says, under -- beside "document," "By Maurice Felix Stoney and his brothers and sisters"?
A Application... Yeah.
Q Okay. You're bringing this application on behalf of your brothers and sisters?
A Yes.
Q Okay. And do you have their consent to do that?

Mr. Stoney was, had he ever been told by the Federal Court that he did not have an automatic right to membership, to which --

MS. KENNEDY: And --

MS. LAFUENTE: Just a second, Ms. Kennedy. To which he indicated he had not been told that.

MS. KENNEDY: No, and he had not. This is a judgment. He doesn't read --

MS. LAFUENTE: Of the Federal Court.

MS. KENNEDY: -- judgments of the Federal Court. His lawyer may very well. What his lawyer says to him is a question of solicitor-client privilege, and I am telling you that, as his lawyer, I will be making legal arguments.

MS. LAFUENTE: Okay.

MS. KENNEDY: That's the end of the questions on that.

MS. LAFUENTE: Well, I have a couple more questions.

Q MS. LAFUENTE: Sir --

MS. KENNEDY: Fine, but we're not going to be answering them.

Q MS. LAFUENTE: Sir, did you read the Federal Court of Appeal decision?

MS. KENNEDY: Don't answer that.

MS. LAFUENTE: You're objecting to the question of whether he read it?

TAB 21

COURT OF APPEAL OF ALBERTA

Form AP-1
[Rule 14.8 and 14.12]

Registrar's Stamp

COURT OF APPEAL FILE NUMBER:	
TRIAL COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	Edmonton
PLAINTIFF/APPLICANT:	Maurice Stoney
STATUS ON APPEAL:	Appellant
DEFENDANT/RESPONDENT:	Roland Twinn and Others as Trustees for the 1985 Sawridge Trust
STATUS ON APPEAL:	Respondent
DEFENDANT/RESPONDENT:	Sawridge First Nation
STATUS ON APPEAL:	Other Intervenor
DOCUMENT:	**CIVIL NOTICE OF APPEAL**
APPELLANT'S ADDRESS FOR SERVICE AND CONTACT INFORMATION:	[redacted] MAURICE STONEY 500 4 STREET SLAVE LAKE, AB, T0G 2A1 TEL: 780-516-1143.

WARNING

To the Respondent: If you do not respond to this appeal as provided for in the Alberta Rules of Court, the appeal will be decided in your absence and without your input.

1. **Particulars of Judgment, Order or Decision Appealed From:**

Date pronounced: July 12, 2017

Date entered: July 12, 2017

Date served: July 12, 2017

Official neutral citation of reasons for decision, if any:
(do not attach copy) 2017 ABQB 436

Fax 780 423 7276

a c
Doris Banora

[redacted]

(Attach a copy of order or judgment; Rule 14.12(3). If a copy is not attached, indicate under item 14 and file a copy as soon as possible: Rule 14.18(2).)

2. Indicate where the matter originated:

☑ **Court of Queen's Bench**

Judicial Centre: Edmonton

Justice: Mr. Justice Thomas

On appeal from a Queen's Bench Master or Provincial Court Judge?: ☐ Yes ☑ No

Official neutral citation of reasons for decision, if any, of the Master or Provincial Court Judge:
(do not attach copy) _____

(If originating from an order of a Queen's Bench Master or Provincial Court Judge, a copy of that order is also required: Rule 14.18(1)(c).)

☐ **Board, Tribunal or Professional Discipline Body**

Specify Body: _____

3. Details of Permission to Appeal, if required (Rules 14.5 and 14.12(3)(a)):

☑ Permission not required, or ☐ Granted

Date: _____

Justice: _____

(Attach a copy of order, but not reasons for decision.)

4. Portion being appealed (Rules 14.12(2)(c)):

☑ Whole, or

☐ Only specific parts (if specific part, indicate which part):

5. Provide a brief description of the issues:

6. Provide a brief description of the relief claimed:

Application by Maurice Stoney and his 10 brothers and sisters to be within the definition of beneficiary in the 1985 Sawridge Trust.

7. Is this appeal required to be dealt with as a fast track appeal? (Rule 14.14)

☐ Yes ☑ No

8. **Does this appeal involve the custody, access, parenting or support of a child?** (Rule 14.14(2)(b))

☐ Yes ☑ No

9. **Will an application be made to expedite this appeal?**

☐ Yes ☑ No

10. **Is Judicial Dispute Resolution with a view to settlement or crystallization of issues appropriate?** (Rule 14.60)

☐ Yes ☑ No

11. **Could this matter be decided without oral argument?** (Rule 14.32(2))

☐ Yes ☑ No

12. **Are there any restricted access orders or statutory provisions that affect the privacy of this file?** (Rule 6.29, 14.12(2)(e), 14.83)

☐ Yes ☑ No

If yes, provide details: _____

(Attach a copy of any order.)

13. **List respondent(s) or counsel for the respondent(s), with contact information:**

Roland Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, - D.C. Bonoro and A. Loparco, Q.C. at Dentons LLP 2900 Manulife Place, 10180 - 101 Street, Edmonton, AB, T5J 3V5

Catherine Twinn represented by Karen Platten, Q.C. at McLennan Ross LLP, 600 12220 Stony Plain Road, Edmonton T5N 3Y4

Sawridge First Nation represented by Edward Molstad, Q.C. at Parlee Mclaws, 1700 Enbridge Centre, 10175 0 101 Street, Edmonton, T5J 0H3

If specified constitutional issues are raised, service on the Attorney General is required under s. 24 of the Judicature Act: Rule 14.18(1)(c)(viii).

14. **Attachments (as applicable):**

☐ Order of judgment under appeal if available (not reasons for decision) (Rule 14.12(3))

☐ Earlier order of Master, etc. (Rule 14.18(1)(c))

☐ Order granting permission to appeal (Rule 14.12(3)(a))

☐ Copy of any restricted access order (Rule 14.12(2)(e))

If any document is not available, it should be appended to the factum, or included elsewhere in the appeal record.

Call me @
516 1143
Maurice Storey