COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1703-0193AC
TRIAL COURT FILE NUMBER:	1103-14112
REGISTRY OFFICE:	Edmonton
PLAINTIFF/APPLICANT:	Patrick Twinn, on his behalf, Shelby Twinn and Deborah A. Serafinchon
STATUS ON APPEAL:	Appellant
DEFENDANT/RESPONDENT:	Roland Twinn, Catherine Twinn, Walter Felix Twin, Berta L'Hirondelle, and Clara Midbo, As Trustees For The 1985 Sawridge Trust (The "1985 Sawridge Trustees" Or "Trustees")
STATUS ON APPEAL:	Respondent
DEFENDANT/RESPONDENT:	Public Trustee Of Alberta ("OPGT")
STATUS ON APPEAL	Respondent
DEFENDANT/RESPONDENT:	Catherine Twinn
STATUS ON APPEAL	Respondent
DEFENDANT/RESPONDENT	Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley
STATUS ON APPEAL	Not a party to the Appeal
DOCUMENT:	**FACTUM**

Fast Track

Appeal from the Order of
The Honourable Mr. Justice D.R.G. Thomas
Dated the 5th day of July, 2017
Filed the 19th day of July, 2017

FACTUM OF THE RESPONDENTS, THE TRUSTEES

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Catherine Twinn

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TABLE OF CONTENTS

I. INTRODUCTION

1. This Factum is filed on behalf of the Trustees for the 1985 Sawridge Trust (the "Trustees") in response to the Appeal filed by Patrick Twinn ("Patrick"), Shelby Twinn ("Shelby"), and Deborah Serafinchon ("Deborah") (collectively, the "Appellants") of Justice D.R.G. Thomas' decision ("Case Management Judge" or "CM Judge") denying their application to be added as parties and denying their application for full indemnity advance costs. The Appellants also appeal the declaration that the Appellants are beneficiaries and the dismissal of the application for an accounting. Finally, the Appellants appeal the award of solicitor and own client costs against Patrick and Shelby.

2. The CM Judge was correct in law not to add any of the Appellants as parties to this litigation and correct as to the award costs against them. The Appellants' application to become parties in this litigation was filed more than five years past the deadline imposed by Court Order. They were also warned about the potentially duplicitous nature of their application, but they still chose to proceed.

3. The relief requested by the Appellants would cause serious prejudice to the Trust, setting this litigation back five years in time and depleting the Trust's value. The addition of the Appellants as parties is superfluous as their interests are already represented. They do not bring a unique perspective to the litigation. Granting party status to these Appellants would open up the floodgates to potentially hundreds of others seeking the same status.

II. BACKGROUND

4. The background facts relating to the 1985 Trust are not in dispute. They are set out in the affidavits of Paul Bujold sworn on August 30, 2011 ("First Bujold Affidavit") and September 12, 2011 ("Second Bujold Affidavit"). A detailed summary of the facts is labeled as Schedule "A", previously filed in these proceedings.

Schedule A, **[Extracts of Key Evidence ("EKE"), Tab 1]**.
Second Bujold Affidavit at paras 17-20 and 32 **[EKE, Tab 2]**.

5. The Trustees' *ex parte* application for setting the procedure to seek the opinion, advice and direction of the Court was heard on August 31, 2011 ("Advice and Direction Application") regarding the definition of "Beneficiary" in the 1985 Trust.

6. The Trustees obtained an *ex parte* Procedural Order on August 31, 2011 (the "Procedural Order"). The Procedural Order provided that notice of the Advice and Direction Application be given to the beneficiaries and potential beneficiaries of the 1985 Trust.

> Procedural Order of Justice D.R.G. Thomas dated August 31, 2011, filed September 6, 2011 ("**August 31 Order**") and 5 subsequent Procedural Orders [**EKE**, Tab 3]. It is found at Tab 2 of the Appeal Record.

7. Notice of the Advice and Direction Application was provided pursuant to the Procedural Order. The Procedural Order became the constating Advice and Direction Application setting out the relief, the manner and form of the Application, how it was to be made known, and how it will proceed. All documents are posted to a public website; the Trustees were not required to file a separate pleading to commence the Application

8. In the six years that followed the Procedural Order, which included filing a Settlement Application and a Litigation Plan (see Tab 3 Procedural Orders), no application has been made to suggest the constating document is invalid; such an issue ought not to be permitted at this late stage. The Appellants desire to raise this issue at this stage demonstrates that adding them as parties would needlessly undo the years of progress in the litigation.

III. PART 1 - FACTS

9. Patrick Twinn is the son of Catherine Twinn, who is a Trustee and a party to this action. Patrick is a member of SFN and a beneficiary of the 1985 Trust and will continue to be a beneficiary regardless of the outcome of the litigation.

> Affidavit of Patrick Twinn, sworn on July 26, 2016 ("**Patrick Affidavit**") at paras 7 - 9 [**EKE**, Tab 4].

10. Shelby Twinn is the daughter of Paul Twinn. Paul Twinn is the half-brother of Patrick Twinn and a full brother to Roland Twinn, the latter being a Trustee and a party. Shelby is the niece of Catherine Twinn. Shelby is a beneficiary of the 1985 Trust but not a member of the SFN. Shelby's sister is already represented by the OPGT in this action and Shelby and her sister have identical interests.

> Affidavit of Shelby Twinn, sworn on July 26, 2016 ("**Shelby Affidavit**") at paras 4, 9, and 10 [**EKE**, Tab 5].

11. Deborah Serafinchon, who is neither a member of the SFN, a beneficiary of the 1985 Trust, nor a Status Indian. Deborah alleges that she is the illegitimate child of late Chief

Walter Patrick Twinn, but she has been unable to prove her paternity to the satisfaction of Indian Affairs, and thus, Deborah does not have Indian Status.

Affidavit of Deborah Serafinchon, sworn on July 26, 2016 ("**Deborah Affidavit**") at paras 11-21 **[EKE**, Tab 6].

12. According to the Procedural Order amended on November 8, 2011, any person interested in participating in the Advice and Direction Application was to file an affidavit no later than December 7, 2011.

Procedural Order and subsequent amending Procedural Order granted November 8, 2011 **[EKE**, Tab 3]

13. Patrick and Deborah were served with the Procedural Order by registered mail. They failed to heed the deadlines and chose to wait five years before bringing their application.

Affidavit of Paul Bujold, sworn on October 31, 2016 at paras 2 and 3 **[EKE**, Tab 7].

14. Shelby was served at the address that the First Nation had for her; there is no evidence that she was not aware of the Advice and Direction Application.

IV. PART 2 - GROUNDS OF APPEAL

15. The Appellants appeal the Order dated July 5, 2017 ("Sawridge #5") on the grounds that CM Judge erred in law or was wholly unreasonable in the exercise of his discretion in:

(a) Misinterpreting or misapplying the test for adding a party pursuant to Rule 3.75(3) of the *Rules of Court* and ignoring critical and determinative legal principles and the Judge's own previous decisions;

(b) Awarding solicitor and own client indemnity costs against Patrick and Shelby and denying advance costs of the Appellants; and

(c) Exceeding his jurisdiction in the absence of a constating application and in granting final relief as it relates to the Appellants on the issue of who is a current beneficiary.

V. PART 3 - STANDARD OF REVIEW

16. In *Ashraf v SNC Lavalin ATP Inc*, the Court of Appeal heard an appeal of several case management decisions and confirmed the following principles: (a) case management decisions are entitled to considerable deference; (b) absent an error of law, an appellate court will not interfere with a chambers judge's exercise of discretion unless the result was unreasonable, particularly when many competing factors must be balanced; (c)

questions of law are reviewed on the standard on correctness; (d) errors of mixed fact and law and fact alone are reviewed on a standard of palpable and overriding error, unless the error of mixed fact and law involves an error relating to an extricable principle of law, in which case the standard is one of correctness; and, (e) discretionary decisions will be reviewed only if the result was unreasonable.

Ashraf v SNC Lavalin ATP Inc, 2017 ABCA 95 at paras 4-5, 2017 CarswellAlta 462 [**Book of Authorities** ("**BOA**"), Tab 1].

17. In *Lameman v Alberta*, the Court stated that "deference is increased where the decision is made by case management judge as part of a series of decisions on an ongoing matter". In *Korte v Deloitte, Haskins & Sells*, the Court held that "case management judges in those complex matters must be given some 'elbow room' to resolve endless interlocutory matters and move these cases on to trial".

Lameman v Alberta, 2013 ABCA 148 at para 13, 2013 CarswellAlta 458 [**BOA**, Tab 2].
Korte v Deloitte, Haskins & Sells, 36 Alta LR (3d) 56, 1995 CarswellAlta 788 at para 3 [**BOA**, Tab 3].

18. In *Balogun v Pandher*, the Court heard an appeal of a case management judge's decision denying an application to have a jury trial and stated: "That high deference is not merely because of the policy resistance to fragmentation … but also <u>because the very essence of case management is judicial supervision of the litigation process in order to provide coherence, predictability and stability</u> to that process".

Balogun v Pandher, 2010 ABCA 40 at para 9, 2010 CarswellAlta 177 (emphasis added) [**BOA**, Tab 4].

19. The issue in this Appeal relating to the addition of parties is a question of mixed fact and law and is subject to the standard of palpable and overriding error.

20. The award of costs on a solicitor and his own client basis is an exercise of discretion and subject to the standard of reasonableness. If the Judge failed to consider or properly apply the applicable legal principle or test in exercising his discretion, it is a question of law and the standard of review is correctness.

Dreco Energy Services Ltd v Wenzel, 2008 ABCA 290 at paras 8-11, 2008 CarswellAlta 1145 [Dreco] [**BOA**, Tab 5]. Note that the Appellants' proposition at para 17 that "the exercise of discretion under the Rules of Court is reviewable on a reasonableness standard" is not supported by Castledowns Law Office Management Ltd v FastTrack Technologies Inc, 2012 ABCA 219, 2012 CarswellAlta 1203 [Castledowns].

21. Questions of jurisdiction and authority to make certain orders are matters of law and are subject to a standard of correctness.

Housen v Nikolaisen, 2002 SCC 33, [2002] 2 SCR 235 at para 8 **[BOA**, Tab 6].

22. All issues are subject to a high degree of deference as this litigation is under case management by a judge with intimate knowledge of the facts and control over the process.

VI. PART 4 - LAW AND ARGUMENT

A. Case Management Judge Correctly Denied Appellants' Application for Party Status

23. The Case Management Judge relied on Rules 1.2 and 3.75 of the *Alberta Rules of Court*, which set out the discretionary procedure for addition of parties. The Court held that the following conditions must be met: 1) the Court must be satisfied that such an Order should be made (pursuant to 3.75(2)(b)); and 2) the addition of the parties will not cause prejudice that could not be remedied by costs, an adjournment, or the imposition of terms (pursuant to 3.75(3)). Rule 1.2, being a foundational Rule, guides the interpretation of the other Rules, such that they are used to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

Alberta Rules of Court, Alta Reg 124/2010 (**"Rules of Court"**) at Rs 1.2 and 3.75 **[BOA**, Tab 7]
1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 377 **[Sawridge #5]** at para 26 **[Appeal Record** ("**AR**"), Tab 3].

24. As a question of mixed fact and law, the applicable standard of review for the above decision is palpable and overriding error, subject to a high degree of deference.

25. In *Amoco Canada Petroleum Co v Alberta & Southern Gas Co*, Justice Virtue adopted a two-part test for determining whether a court has jurisdiction within the Rule to add a party: 1) the order sought by the Plaintiff must directly affect the intervenor, not in the latter's commercial interests, but in the enjoyment of their legal rights; and 2) the question to be settled cannot be effectually and completely settled unless he is a party. What justifies the inclusion of a person as a party to an action is not that they have relevant evidence, an interest in the correct solution, or arguments to advance and fears that the existing parties may not advance them; the *only* reason which makes it necessary to make a person a party is to ensure that they are bound by the result of the action which cannot be settled unless they are a party. None of these factors apply in this case.

Amoco Canada Petroleum Co v Alberta & Southern Gas Co, (1993) 10 Alta LR (3d) 325, 1993 CarswellAlta 32 at paras 13 and 15 [**BOA**, Tab 8].

26. In paras 31-39 of Sawridge #5, the CM judge set out his reasons for refusing the addition of Patrick and Shelby, namely that they are current beneficiaries whose status will not be eliminated. Further, the CM judge held that their participation would prejudice the Trust by dissipating the Trust's resources to the detriment of all current and future beneficiaries and make the lawsuit more adversarial.

27. At para 39 of Sawridge #5, the CM Judge stated that their ongoing involvement in the litigation would be better served by transparent and civil communications with the Trustees, legal counsel and through a positive dialogue with the Trustees.

28. The Case Management Judge must be given a high level of deference in dismissing the Appellants' application for party status as he observed that: 1) The Advice and Direction Application has been underway for almost six years; 2) there have been a number of complex applications resulting in numerous decisions; 3) the Appellants have not abided by the deadlines imposed by the Court; 4) the addition of parties will make this complex litigation more complicated, prolonging procedural steps and increasing costs that will be borne by the Trust; and 5) in his decisions to date, he has attempted to narrow and define the issues.

Sawridge #5, supra para 23 at paras 27-28 [**AR**, Tab 3].

29. In addition to the prejudice that would arise from permitting the Appellants to become parties, the CM Judge also observed that the Applicants would not be able to pay costs if they are unsuccessful, which would further dissipate the Trust. This approach aligns with the approach taken to Rule 3.74(3) in *Castledowns*.

Castledowns, *supra* para 0 at para 18 (cited to ABCA) [**BOA**, Tab 9].

30. The OPGT confirmed that it represents minors who have become adults, such as Shelby Twinn's sister. The Trustees represent all Beneficiaries' interests.

Sawridge #5, supra para 23 at paras 31-39 [**AR**, Tab 3].
Letter from CM Judge to OPGT [**EKE**, Tab 8].
Response from OPGT to CM Judge [**EKE**, Tab 9].

31. The statement at para 34 of Sawridge #5 that Patrick and Shelby are represented by the OPGT is technically incorrect. WhetherPatrick and Shelby were represented by the OPGT was not determinative in the decision; there were many additional reasons cited.

32. Patrick's status is stated above and thus, his interest is protected in this proceeding. Catherine Twinn assisted Patrick and Shelby in their representation by paying the retainer for their lawyers. Catherine and the other Trustees have already advanced the same arguments that Patrick is attempting to raise. Furthermore, Patrick is agreeable to having an expanded "Beneficiary" definition, which may dilute his interest.

> Transcript of Questioning on Affidavit of Patrick Twinn held September 22, 2016 ("Patrick Questioning") at 15 [**EKE**, Tab 10].
> Transcript of Questioning on Affidavit of Shelby Twinn held September 22, 2016 ("Shelby Questioning") at 8:4-12 [**EKE**, Tab 11].
> Reply Brief of Catherine Twinn for Special Chambers Case Management Meeting on June 30, 2015, filed on June 26, 2015 [**EKE**, Tab 12].

33. The Trustees, Catherine Twinn and the OPGT are all advocating for the beneficiaries in this action. Shelby has the same interests as her sister, Kaitlin, who is already represented by the OPGT. The Appellants have not distinguished themselves with a unique perspective.

34. Paragraphs 27-35 of the Appellants' factum refer to a conflict of interest between the interests of the Trustees and the beneficiaries. This was never addressed before the CM Judge and is a red herring now. The Trustees, acting in the best interests of the beneficiaries of the Trust, commenced an Advice and Direction application to deal with a potentially discriminatory provision. The interests of the beneficiaries are properly represented by the Trustees for the adult beneficiaries and by the OPGT for the minor beneficiaries and those minors who have become adults.

35. The Appellants' reference in para 31 of their factum to the CM Judge's concern about the importance of representation for the potentially excluded and affected children is overstated. He found "structural conflict" which is inherent in First Nations as they are essentially all part of family groups. The Court ordered the OPGT to act for the entire class of minors partially because of the structural conflict.

36. Finally, the Judge correctly held at para 40-42 of Sawridge #5 that Deborah Serafinchon should not be added as a party as she is not a beneficiary, she is not an Indian under the Indian Act and is not a member of the SFN, nor has she applied or shown any intention to apply to be a member.

37. This Court is not a proper forum to address Deborah's membership issues. Given that the operations of First Nations are generally regulated by the Federal Court, it is appropriate

for determinations regarding membership or Indian Status to be heard in the Federal Court. The issue of membership was addressed by Justice Thomas in *Sawridge #3*.

1985 Sawridge Trust (Trustees of) v Alberta (Public Trustee), 2015 ABQB 799 at para 35, 2015 CarswellAlta 2373 [**BOA**, Tab 10].

38. There is no evidence that the Appellants have any special insight into the litigation. They did not know the intentions of the Settlor nor do they provide a unique perspective.

39. If every person who thought they were a potential beneficiary is made a party with full indemnity costs awarded, this litigation would be gridlocked and the Trust would be in serious financial trouble.

40. The Appellants argue at paras 21-25 of their Factum that justice requires that they be added as parties as the *Trustee Act* requires their informed consent to the variation of the Trust. However, the *Trustee Act* does not apply in this situation.

Trustee Act, RSA 2000, c T-8 [***Trustee Act***] [**BOA**, Tab 11].

41. The Trustees seek a determination from the Court on whether the definition of 'beneficiary' in the 1985 Trust is discriminatory and if it is discriminatory, then the Trustees seek a solution such as striking sufficient words to correct the discrimination.

42. The Trustees are not seeking a variation of the Trust under the Trustee Act. The Trust deed has its own variation clause and prohibits amendment of the beneficiary definition. Thus, no variation is sought. This is an application to determine if the definition should be changed based on public policy reasons given that it is discriminatory. The Appellants fail to recognize that the women who are the subjects of Bill C-31 and are being discriminated against are not current beneficiaries; thus their consent would not be required under the *Trustee Act*. The suggestion that consent is required would again result in these women be excluded and discriminated against.

Trustee Act, *supra* para 40 [**BOA**, Tab 11].
Sawridge Band Inter Vivos Settlement Declaration of Trust at para 11, [**EKE**, Tab 13].

43. Court intervention without beneficiary consent is well-established in law when dealing with discriminatory trusts. In the *Leonard Foundation Trust* case, the Ontario Court of Appeal deleted discriminatory provisions of the trust relating to race, religion, nationality and gender on the basis that they violated the common law doctrine of public policy.

Canada Trust Co v Ontario Human Rights Commission, 69 DLR (4th) 321, 1990 CarswellOnt 486 ("*Leonard Foundation Trust*") at paras 48, 49, and 53 [**BOA**, Tab 12].
Bruce Ziff, "Welcome the Newest Unworthy Heir", (2014) 1 ETR (4th) 76 at 80 and 81 [**BOA**, Tab 13].

44. By its very nature, a discriminatory trust leaves out individuals from its beneficiary ranks. Only Courts can remedy this situation by amending the trust by striking words to ensure that trusts are no longer discriminatory. Hence, the Trustees' Application was advanced.

45. The application for party status is subject to the standard of review of palpable and overriding error. The application of Rules 1.2 and 3.75 to the facts of this case make it clear that the application should be denied as it causes irreparable prejudice.

46. This action is in its advanced stages. The Appellants chose not to abide by a court-ordered imposed deadline. Moreover, they have not advanced any novel arguments.

47. Permitting further parties to be added at this stage causes clear prejudice to the Trustees and all the beneficiaries of the Trust. The Court has already narrowed the focus and made several key decisions with the goal of setting the matter down in the near future for a hearing. The Trustees believe they are very close to a resolution of this matter. To start fresh with three new litigants will jeopardize the significant progress made.

48. The addition of parties at this late juncture would unnecessarily expand the scope of the Trustees' Application and increase legal expenses, which, given the Applicants' inability to contribute to pay costs, would result in prejudice to the Trustees and the beneficiaries of the Trust. This protracted litigation and opening up the floodgates to hundreds of potential parties will risk bankrupting the Trust.

B. Judge Had Discretion to Award Application Costs on Solicitor and own Client Basis

49. The decision to award costs of the application on a solicitor and its own client basis is an exercise of discretion. However, whether the Chambers Judge failed to consider or properly apply the applicable legal principle or test in exercising his discretion is a question of law, and the standard of review is correctness.

Half Moon Lake Resort Ltd v Strathcona (County), 2001 ABCA 50 at para 47, 2001 CarswellAlta 245 [**BOA**, Tab 14].
Dreco, *supra* para 20 at paras 8-11 [**BOA**, Tab 5].

50. Costs are a wholly discretionary matter for the Court pursuant to Rule 10.33 and in accordance with the basic principle set out in the foundational Rule 1.2.

51. The Case Management Judge held that Patrick and Shelby Twinn offer nothing and instead propose to fritter away Trust resources to no benefit.

Sawridge #5, supra para 23 at para 47 [**AR**, Tab 3].

52. The CM Judge cited *Babchuk v Kutz* for the proposition that the Court must investigate the role of the unsuccessful litigant when awarding costs. He concluded that Patrick and Shelby had no basis to participate and would end up harming the pool of beneficiaries. In this new reality of litigation in Canada, the purpose of cost awards is to "shape improved litigation practices by creating consequences for bad litigation practices".

Babchuk v Kutz, 2007 ABQB 88, 411 AR 181, aff'd in toto 2009 ABCA 144, 457 AR 44 [**BOA**, Tab 15].
Sawridge #5, supra para 23 at paras 49, 51 [**AR**, Tab 3].

53. Justice Thomas found that elevated solicitor and own client indemnity costs were appropriate to deter dissipation of trust property as this application involved meritless activities by trust beneficiaries Patrick and Shelby Twinn. In addition, Justice Thomas warned Patrick and Shelby Twinn that their involvement appeared duplicitous on August 24, 2016.

Case Management August 24, 2016 Transcript at 14:31-41 and 15:1-6 [**AR**, Tab 6].

54. In *Serdahely (Estate of)*, Johnstone J held that at some point during the disclosure of information, they should have withdrawn their claim, which was meritless. Justice Graesser in *Foote Estate (Re)* reaffirmed this principle that the 'modern' approach to costs in estate litigation requires careful scrutiny of the litigation to restrict unwarranted litigation and protect estates from being depleted.

Serdahely (Estate of), 2005 ABQB 861 at paras 55-60, 2005 CarswellAlta 1751 [**BOA**, Tab 16].
Foote Estate (Re), 2010 ABQB 861 at para 16, 2010 CarswellAlta 513 [**BOA**, Tab 17].

55. More recently, in *McDonald Estate*, a matter under Case Management by Justice Gates, it was held that the Respondent was ordered to pay costs personally on a solicitor and own client basis due to what was determined to be unnecessary litigation.

McDonald Estate, 2012 ABQB 704 at paras 113-14, 2012 CarswellAlta 2235 [**BOA**, Tab 18].

56. In *Brill v Brill*, the Alberta Court of Appeal summarized the law on costs by stating that Rule 14.5(1)(e) of the *Rules of Court* requires permission to appeal "a decision as to costs

only" and that permission should be granted sparingly. The predecessor to this rule was meant "to bring finality to cost orders and to conserve this Court's time by screening out hopeless appeals on the issues of costs alone."

Brill v Brill, 2017 ABCA 235 at paras 2 and 6, 2017 CarswellAlta 1246 [**BOA**, Tab 19].

57. In *British Columbia (Minister of Forests) v Okanagan Indian Band*, the Supreme Court held that "the discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to any applicable rules of court." The trial judge's decision was "based on his judicial experience, his view of what justice required, and his assessment of the evidence; it is not to be interfered with lightly."

British Columbia (Minister of Forests) v Okanagan Indian Band, 2003 SCC 71, [2003] 3 SCR 371 at para 42 [**BOA**, Tab 20].

58. In *Bun v Seng*, the Court of Appeal confirmed the above principle and stated 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."

Bun v Seng, 2015 ABCA 165 at paras 4-5, 2015 CarswellAlta 854 [**BOA**, Tab 21].

59. Given the warnings, the Appellants ought to have carefully considered their position. Rather than ensure they had a proper basis to be added to the litigation so late in the game, the Appellants merely repeated their entitlement and proffered no evidence to distinguish their interests from those already represented.

60. Courts do not require egregious conduct in order to award solicitor-client costs. The modern trend in trust litigation favours a discretionary award of solicitor and own client costs in this case given the lengthy delay, the lack of necessity to the Appellants' application and the prejudice caused to the Trust.

61. At paras 44 and 47 of the Appellants' factum, they argue that solicitor and client costs are to be awarded only where egregious conduct is present in a case. However, one case they cite, *Meads v Meads*, 2012 ABQB 571, demonstrates that there are many other factors to be considered.

C. Within Jurisdiction of Court to Declare Patrick and Shelby Twinn Beneficiaries

62. The history of the Advice and Direction Application was set out in previous decisions known as *Sawridge #1-4*, and multiple Court Orders, all of which are now *res judicata*.

Sawridge #5, supra para 23 at paras 2-3 [**AR**, Tab 3].

63. The Appellants state that the Trustees have not filed an application on the issue of the definition of beneficiaries and that the CM Judge has exceeded his jurisdiction in determining matters related to the Trust in the absence of a constating application.

64. In para 57 of their factum, the Appellants complain that the determination of beneficiary status is *ultra vires*. This argument demonstrates Patrick and Shelby's litigious nature given that this ruling is in their best interest.

65. Both the Appellants and the Respondent Trustees agreed that Patrick and Shelby are beneficiaries and thus, there was a desirable narrowing of issues made by the CM Judge. His role is to identify, simplify and clarify the issues in dispute and make orders to promote the fair and efficient resolution of the action (Rule 4.14).

Case Management August 24, 2016 Transcript at 14:35 [**AR**, Tab 6].
Patrick Affidavit at paras 7 and 9 [**EKE**, Tab 4].
Shelby Affidavit at paras 4, 9, and 10 [**EKE**, Tab 5].
Rules of Court, supra para 23 at R 4.14 [**BOA**, Tab 7].

66. The Procedural Orders operated as the *de facto* constating application regarding the determination of the beneficiary definition in the Trust. In *Chisholm v Lindsay*, the Court held: "A judgment or Order of the Court…is the governing document".

Chisholm v Lindsay, 2017 ABCA 21 at para 8, 2017 CarswellAlta 41 [**BOA**, Tab 22].

67. In para 58, the Appellants state that dismissing the claim for an accounting was not proper. It was dismissed on a without prejudice basis as no submissions were made. The Appellants have the ability to bring this application again. This is another example of needless complication. An accounting application is not related to Advice and Direction.

VII. PART 5 – RELIEF SOUGHT

68. The Trustees pray that the appeal be dismissed in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of October, 2017.

Estimated Time of Argument: 45 minutes

Dentons Canada LLP

Doris Bonora and Anna Loparco
Solicitors for the Trustees

LIST OF AUTHORITIES

Tab	Authority
1.	*Ashraf v SNC Lavalin ATP Inc.*, 2017 ABCA 95, 2017 CarswellAlta 462
2.	*Lameman v Alberta*, 2013 ABCA 148, 2013 CarswellAlta 458
3.	*Korte v Deloitte, Haskins & Sells*, 36 Alta LR (3d) 56, 1995 CarswellAlta 788
4.	*Balogun v Pandher*, 2010 ABCA 40, 2010 CarswellAlta 177
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